



Paid Family and Domestic Violence Leave – New National Employment Standards Entitlement and Record Keeping Obligations

The National Employment Standards contained in the *Fair Work Act 2009* (Cth) have been amended to give all employees an entitlement to up to 10 days of paid family and domestic violence leave each year.

The definition of ‘*family and domestic violence*’ has also been extended to include conduct of a current or former intimate partner of an employee or of a member of their household.

The new provisions are operative from 1 February 2023, although small business employers will have until 1 August 2023 to provide the new paid entitlement to eligible employees.

There are also new pay slip requirements which have been introduced to ensure that a pay slip does not identify that an employee has accessed paid family and domestic violence leave

Background

On 27 October 2022, the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Amendment Act)* passed through Parliament.

The Amendment Act varies the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) (**FW Act**) to give all employees (including casual employees) up to 10 days of paid family and domestic violence leave each year (**Paid FDVL**).

This replaces the previous entitlement in the NES to 5 days of unpaid family and domestic violence leave.

Which types of employees are entitled to Paid FDVL?

All types of employees will be able to potentially access Paid FDVL. This includes casual employees, as well as full-time and part-time employees.

How much Paid FDVL is an employee entitled to?

An employee is entitled to up to 10 days of Paid FDVL each year. The entitlement does not accumulate from year to year.

The full 10-day entitlement may be accessed by part-time and casual employees. Unlike most other types of leave under the NES, it is not calculated on a pro-rata basis relative to an employee’s ordinary hours of work.

For what purposes can Paid FDVL be taken?

An employee may take Paid FDVL if the following (**Eligibility Requirements**) are met:

- (a) the employee is experiencing family and domestic violence; and
- (b) the employee needs to do something to deal with the impact of the family and domestic violence; and
- (c) it is impractical for the employee to do that thing outside the employee's 'work hours'.

The entitlement permits employees to take Paid FDVL when they need to do something to deal with family and domestic violence during their 'work hours'. This represents a change to the previous unpaid NES entitlement which only arose when an employee needs leave to attend to a relevant matter during their 'ordinary hours of work'.

A consequence, an employee may be able to access the leave during overtime hours and receive payment calculated by reference to such hours.

A note in the NES identifies the following as examples of activities for which an employee may be able to access Paid FDVL:

- attending counselling or appointments with medical, financial or legal professionals;
- arranging for the safety of the employee or a close relative (including relocation); and
- attending court hearings or accessing police services.

What is the new definition of 'family and domestic violence'?

The definition of '*family and domestic violence*' has been extended to include conduct of a '*current or former intimate partner of an employee*' and '*a member of an employee's household*'.

The new definition is as follows:

Family and domestic violence is defined in the FW Act as violent, threatening or other abusive behaviour by a close relative of an employee, a member of an employee's household, or a current or former intimate partner of an employee, that:

- (a) seeks to coerce or control the employee; and
- (b) causes the employee harm or to be fearful.

The definition of a '*close relative*' in the FW Act has not changed:

A **close relative** of an employee is defined in the Act as a person who:

- (a) is a member of the employee's immediate family; or
- (b) is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

What rate of pay do employees receive during a period of Paid FDVL?

The manner in which payment for Paid FDVL is to be calculated differs slightly between permanent and casual employees.

For an employee other than a casual employee - payment must be at the employee's 'full rate of pay', worked out as if the employee had not taken the period of leave.

For a casual employee - payment must be at the employee's 'full rate of pay', worked out as if the employee had worked the hours in the period for which the employee was rostered. This will include circumstances where a casual employee has accepted an offer by the employer to work certain hours.

The Explanatory Memorandum to the Amending Act provides that, for a casual employee, this would include situations where:

- The employer makes available to the casual employee (by any means) a list of shifts to be undertaken by the casual employee in advance.
- An offer and acceptance of work that been agreed orally. There is no need to for it to be confirmed in writing.

A casual employee may take a period of Paid FDV Leave that does not include hours for which the employee is 'rostered' to work. However, in this circumstance, the employer would not be required to pay the employee for the un-rostered hours.

This ensures that a casual employee who is not able to make themselves available for a shift that they are asked to perform, even though it has not been rostered, cannot be adversely treated because they need to instead do something to deal with family and domestic violence during that period.

What amounts must be included in the employee's 'full rate of pay'?

An employee's 'full rate of pay' is defined in the FW Act as the rate that is payable to an employee, including all the following: incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and other separately identified amounts.

The 'full rate of pay' is different to the 'base rate of pay' which applies when an employee accesses most forms of paid leave under the NES.

The identification of what is required to calculate an employee's full rate of pay may be difficult in some circumstances, particularly where amounts that may be earned had the employee worked are not readily identifiable where they do not actually undertake such work.

The Explanatory Memorandum to the Amending Act provides the following guidance on the calculation of payment for the new form of leave:

"...The intention is that employees taking paid family and domestic violence leave will receive the same remuneration they would have received had they not taken the leave, as far as possible. Employers would be required to pay employees in relation to a period of paid family and domestic violence leave amounts the employee would otherwise have earned, provided those amounts can be identified and calculated with a reasonable degree of certainty. Conversely, for irregular payments or amounts contingent upon certain events that may or may not have happened during the employee's rostered hours, an employer may not be liable to pay an employee those amounts."

It also provides the following illustrative example:

"... an employee would be entitled to be paid overtime rates where they were rostered in advance to work overtime on a day they take paid family and domestic violence leave. However, an employee may not be entitled to be paid a travel allowance in relation to a period of paid family and domestic violence leave if the calculation of the allowance was based on the distance travelled, where the distance that would have been travelled during the period the employee took the leave cannot be ascertained."

What notice does an employee seeking to access Paid FDVL need to give to the employer?

An employee must:

- give the employer notice of the taking of leave, as soon as practicable (which may be a time after the leave has started); and
- advise the employer of the period, or expected period, of the leave.

What evidence does an employee need to give to a grower?

An employee must, if required by a Grower, provide evidence that would satisfy a reasonable person that they have met the Eligibility Requirements (as outlined above) for the taking of Paid FDVL.

Examples of evidence could include:

- a statutory declaration;
- documents issued by the police service;
- documents issued by a court, or
- family violence support service documents.

What are the confidentiality requirements?

Growers must take steps to ensure that information concerning any notice or evidence an employee has given for the purposes of taking Paid FDVL is treated confidentially, as far as it is reasonably practicable to do so.

In addition, an Grower must not, other than with the consent of the employee, use such information for a purpose other than satisfying itself in relation to the employee's entitlement to the leave.

An employer is not prevented from dealing with information provided by an employee if doing so is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

How does the new entitlement interact with entitlements to paid personal/carer's leave?

There may be occasions when an employee will be entitled to both personal/carer's leave and Paid FDVL.

If the period during which an employee takes paid personal/carer's leave includes a period of Paid FDVL, the employee is taken not to be on paid personal/carer's leave for the period of that Paid FDVL.

When did the Paid FDVL entitlement commence operation?

The new Paid FDVL entitlement commenced on 1 February 2023

Employees (other than small business employees) that are employed on or before 1 February 2023 will be entitled to the full 10-day Paid FDVL entitlement from that date. The employee's 10-day entitlement will then be reset on the anniversary of the date they started employment with their employer.

Employees (other than small business employees) engaged after 1 February 2023 will obtain the full 10-day entitlement at the start of their employment and the entitlement will then reset on the anniversary of their start date.

Small business employers/growers have been afforded an additional 6 months to prepare for the implementation of the new Paid FDVL entitlement. The new entitlement will not apply to a 'small business employee' until 1 August 2023.

A small business employee employed on or before 1 August 2023 will be entitled to the full 10-day Paid FDVL entitlement from that date.

The employee's 10-day entitlement will then be reset on the anniversary of the date they started employment with their employer. A small business employee, engaged after 1 August 2023, will obtain the full 10-day entitlement at the start of their employment and the entitlement will then reset on the anniversary of their start date.

Do the provisions in the FW Act apply to award-covered employees?

The new Paid FDVL provisions will be incorporated as terms of the NES. As such, the new Paid FDVL entitlement will apply to award-covered employees.

Do the provisions in the FW Act apply to employees covered by enterprise agreements?

The new Paid FDVL provisions will be incorporated as terms of the NES. As such, the new provisions apply to enterprise agreement-covered employees.

If an enterprise agreement contains a more generous paid family and domestic leave entitlement, those provisions will typically apply instead of the new Paid FDVL entitlement.

Where an enterprise agreement contains a paid family and domestic leave entitlement, such provisions cannot be detrimental to an employee when compared to the new Paid FDVL entitlement. To the extent that they are, the new Paid FDVL entitlement in the NES will apply instead.

If an enterprise agreement contains an unpaid family and domestic violence leave provision, this may continue to apply in addition to the Paid FDVL entitlement under the NES, unless the provision in the enterprise agreement provides otherwise.

If an enterprise agreement includes terms providing for paid family and domestic violence leave, the Fair Work Commission can, on application by an employer, employee or union, consider whether the effect of the terms is detrimental when compared with the new Paid FDVL entitlement in the NES. If the Fair Work Commission considers that the effect of those terms is detrimental as compared to the NES, it may vary the terms of the enterprise agreement to make it consistent with the NES.

Pay slip requirements for employers granting family and domestic violence leave

Requirements relating to pay slips and information about family and domestic violence leave

On 8 December 2022 the Minister made the *Fair Work Legislation Amendment Regulations 2022*, which introduced a number of new requirements into the Fair Work Regulations 2009 (**FW Regulations**) preventing employers from disclosing certain information about an employee's Paid FDV Leave entitlements on a pay slip (Initial Pay Slip Requirements).

From 1 February 2023, Growers are required under the Initial Pay Slip Requirements to not disclose the following information on an employee's pay slip (Regulation 3.47):

- (a) a statement that an amount paid to an employee is a payment in respect of the employee's entitlement to paid family and domestic violence leave; or
- (b) a statement that a period of leave taken by the employee has been taken as a period of paid family and domestic violence leave; or
- (c) the balance of an employee's entitlement to paid family and domestic violence leave.

The FW Regulations were initially amended to also include the following note suggesting that employers could describe payments in relation to family and domestic violence leave:

Note: An example of the way in which a statement could be included in a pay slip that an amount is a payment in respect of a particular kind of leave is to state that the amount is paid as special leave, miscellaneous leave or leave—other

In response to concerns that describing a payment as relating to leave could create difficulties or risks for an employee accessing the relevant entitlements, on 3 February 2023 the Government made the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023*.

This further regulation deleted the above note and introduced additional obligations relating to the content of pay slips (Additional Pay Slip Requirements). These Additional Pay Slip Requirements specify (Regulation 3.48):

- (a) must not report on a pay slip as an amount paid to the employee for taking a period of paid family and domestic violence leave; and
- (b) must instead report an amount paid to the employee for taking a period of paid family and domestic violence leave as:
 - I. payment for the performance of an employee's ordinary hours of work;
 - II. as another kind of payment made in relation to the performance of the employee's work, including (but not limited to) an allowance, bonus or a payment of overtime.

The Additional Pay Slip Requirements came into effect on 4 February 2023.

The new requirements will typically mean that a payment made to an employee in respect of a period of paid family and domestic violence leave will need to be recorded on a pay slip as the various amounts making up the full rate of pay for the period, as though the employee had worked instead of accessing the entitlement.

The Explanatory Memorandum accompanying the regulation introducing the additional requirements indicates that the intention underpinning the changes is that:

“...employers will issue employees with pay slips which reflect as closely as possible the pay slip that would have been issued had the employee not taken a period of paid family and domestic violence leave.”

What if an employee would like the payments they receive in relation to family and domestic violence leave described in a particular way?

If an employee requests it, an employer may report a payment relating to family and domestic violence leave on a pay slip as an amount paid for taking some other kind of leave that is not paid family and domestic violence leave.

For example, an employee who has told an abusive partner that they have taken carer’s leave or annual leave, when in fact the employee has taken paid family and domestic violence leave in order to do something to deal with the impact of the family and domestic violence, may request that the employer report that the relevant payment was made for ‘carer’s leave’ or ‘annual leave’ on the employee’s pay slip.

A Grower is not required to comply with an employee request to describe a payment for family and domestic violence leave as a payment for some other kind of leave. It may be difficult for some employers to accommodate such requests, particularly at short notice, due to the nature of their payroll systems.

Will employers be afforded time to implement the recent changes regarding pay slips?

The Regulation affords employers a ‘grace period’ ending on 4 June 2023.

During this period, Growers may identify an amount paid to an employee for taking a period of paid family and domestic violence leave on a pay slip as an amount paid to the employee for taking a period of leave (other than a period of paid family and domestic violence leave). Accordingly, an employer will be temporarily permitted to describe paid family and domestic violence leave entitlements on a pay slip as, for example, ‘miscellaneous leave’ in accordance with the explanatory note that was included in the Initial Pay Slip Requirements but has since been repealed.

After the grace period ends, Growers may be liable to pay a financial penalty if they contravene the new pay slip reporting requirements that commenced on 4 February 2023.

Will meeting the new requirements mean that an employer is including false and misleading information on pay slips?

The FW Act prohibits a Grower from providing an employee with a pay slip that the employer knows is false or misleading. The FW Act has, however, been amended to provide that a pay slip is not false or misleading merely because it complies with the pay slip reporting requirements set out in the FW Regulations.