

**Ensuring Compliance with the
Australian Fair Pay and Conditions Standard
by Reviewing Leave Provisions**

Reducing compliance costs for employers with different work sites in several states or territories

- Employees in several different states or territories may be employed under different awards with different leave provisions.
- This would increase the administration costs compared with a situation where leave provisions were uniform for employees in all states.
- This means there are benefits to be gained from standardising terms of employment through a workplace agreement under the new *WorkChoices* legislation.
- A number of collective workplace agreements could be negotiated for different work sites and/or sectors of a business, with uniform leave provisions across the agreements.
- This would need to be weighed against the cost and convenience of implementing the new agreement.

Rights and obligations of employers and employees currently on parental leave

- Where an employee ceases to be the child's primary care giver, the employer must give the employee 4 weeks' notice of the cancellation of the employee's parental leave.
- An employee may extend or shorten a period of parental leave by agreement with their employer.
- An employer may terminate an employee's employment during parental leave, subject to any notice requirements.
- An employee is guaranteed an entitlement to return to work in the same position – or a similar position if the old position does not exist – at the end of the parental leave period.
- If the child dies, entitlement to parental leave is unaffected, however, the employer may give the employee 4 weeks' notice (or in the case of maternity leave, notice up to 6 weeks after the date of birth, if this is later) of the cancellation of the remaining period of parental leave.

Understanding recreation leave and whether an employer can direct staff to take it if it was accrued before WorkChoices

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- Under the *Annual Holidays Act 1944* (NSW), an employer could direct an employee to take annual leave, upon the giving of one month's notice.
- Under *WorkChoices*, the circumstances in which an employer can direct staff to take annual leave are:
 - When the employer shuts the business down over a period and the amount of leave directed to be taken is already credited to an employee.
 - When an employee has accrued more leave than they ordinarily would over the previous 2 years. For full-time employees this means that if they have accrued more than 8 weeks' leave over the previous 2 years, the employer can direct an employee to take 2 weeks' leave.
- Further, there is now no specified notice required to be provided to an employee before directing that they take leave.
- However, amendments to the Regulations in September 2006, clarified that the Standard only applies to annual leave after *WorkChoices* came into effect on 27 March 2006.
- This means that an employer can direct an employee to take annual leave that accrued prior to 27 March 2006.

When to grant and what evidence to require when granting compassionate leave

- Compassionate leave is available after the death of an immediate family member or household member of an employee.
- It is also available for an employee to spend time with an immediate family member or household member if they have a life-threatening illness or injury.
- Members of the "immediate family" of an employee include a spouse of an employee and a child, parent, grandparent, grandchild or sibling of an employee or an employee's spouse.
- Up to 2 days paid leave is available for each occasion, including 2 periods of 1 day each.
- The evidence that an employer may require is unspecified under the Act, except for saying that the requirement must be "reasonable".
- A statutory declaration would be the preferred option – it is cheaper, quicker and probably more considerate than asking for a death certificate.
- Other, less formal evidence that the employer may deem acceptable in the case of a death is a copy of the death or funeral notice from the paper or a funeral booklet.

Ensuring efficient use of carer's and personal leave through documentary requirements

- It is worth considering the actual definitions of personal/carer's leave:
 - (a) paid leave (*sick leave*) taken by an employee because of [emphasis added] a personal illness, or injury, of the employee; or
 - (b) paid or unpaid leave (*carer's leave*) taken by an employee to provide [emphasis added] care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or injury, of the member; or
 - (ii) an unexpected emergency affecting the member.
- For sick leave, an employee must produce a medical certificate from a registered health practitioner, if it is reasonably practicable to do so. If not, a statutory declaration made by an employee is acceptable.
- For carer's leave, there is the option of either a medical certificate or a statutory declaration.
- The obvious reason for these requirements is to ensure that personal leave is taken for genuine reasons.
- These requirements can be made at the employer's discretion. It is common for employers to require evidence where an employee is absent for more than one day, or on a day preceding or following a holiday. To avoid uncertainty, employers are urged to reduce requirements to a policy.
- "Health practitioner" includes nurses, pharmacists, podiatrists, Chinese medicine practitioners and other non-traditional fields.
- The health practitioner must be registered with their relevant body, e.g. the Nurses and Midwives Board of NSW.
- The certificate must be issued in respect of the area of practice in which the practitioner is registered or licensed.
- Since paid sick leave is only granted when an employee is ill or injured, an employer can require an employee to attend a medical examination to verify that an employee is sick, if there are grounds for doubt. If it appears after the medical examination that the employee was not ill or injured on the date of taking leave, it is possible for the employer to withhold payment for that period.

Cashing out of paid personal/carer's leave

- Employees may now cash out their accrued personal leave, so long as they maintain an amount of 15 days. Cashing out is only available via a registered workplace agreement.
- This protected amount would be pro-rata for part time employees, since the formula is 3/52 of nominal hours worked over the preceding 12 months of service.
- The employer and employee may insert a provision in an employee's workplace agreement allowing for cashing out of personal/carer's leave.
- An employee must give the employer a written election to forego the leave.
- The workplace agreement must provide for time in lieu to be paid at no less than an employee's basic periodic rate of pay.
- "Basic periodic rate of pay" is defined as a rate of pay for a period worked, and excludes all additional payments such as incentive payments and bonuses, loadings, allowances, penalty rates or other similarly separately identifiable entitlements.
- The employer's authorisation is required, which entitles the employer to withhold authorisation, however an employer must not exert undue influence or pressure.

Setting the rate of pay for personal/carer's leave, compassionate leave and maternity leave

- An employee on personal leave or compassionate leave must be paid at the amount an employee would reasonably expect to be paid if an employee had worked during the period. This could include bonuses, allowances and other additional payments, including annual leave loading and public holiday rates.
- An employee on annual leave must be paid at a rate no less than an employee's "basic periodic rate of pay". This is defined as a rate of pay for a period worked, and excludes all additional payments such as incentive payments and bonuses, loadings, allowances, penalty rates or other similarly separately identifiable entitlements.
- Parental leave is unpaid. If an employer chooses to provide paid leave, it can be provided at a rate specified by the employer. Ideally, such paid parental leave and the rate at which it is to be paid, should be clearly set out in a policy.

Implementing additional annual leave for shift workers

- Shift workers are entitled to an extra week of annual leave after each 12 months of continuous service.

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- This is available on a pro-rata basis for part time employees, since the formula is 1/52 of nominal hours worked.
- Annual leave normally accrues monthly, this extra week accrues at the end of the year.

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