

WORKERS' RIGHTS PARENTAL LEAVE



Employees who have completed at least 12 months continuous service with their employer on a permanent full-time or part-time basis are entitled to parental leave.

What is parental leave?

Parental leave is an entitlement under the Fair Work Act 2009 for employees who have or will have responsibility for the care of a child. Under the National Employment Standards (NES), parental leave is taken on the birth of a child or the adoption of a child under 16 (the child may be your child or your partner's child). Note that 'partner' includes a spouse, a former spouse, a de facto partner and a same sex partner. Parental leave covers maternity leave for women and paternity leave for men although the terms 'maternity leave' and 'paternity leave' are no longer used in the federal legislation.

Who is entitled to parental leave?

Employees who have completed at least 12 months continuous service with their employer on a permanent full-time or part-time basis are entitled to parental leave. Casual employees are not entitled to parental leave unless they have worked regularly and systematically with at least 12 months continuous service and have a reasonable expectation of ongoing work. Each parent can take a maximum of 52 weeks of unpaid leave, unless one parent requests an extension.

I just found out I'm pregnant, do I have to tell my boss?

Many women don't wish to tell anyone about their pregnancy until after the first trimester, or even later. You are not obliged to tell your employer that you are pregnant until 10 weeks before your expected due date.

My pregnancy means I can't keep doing my job, what will happen to me?

Employers have a legal responsibility under occupational health and safety laws to provide all employees with a safe and healthy workplace. They also have a responsibility under anti-discrimination legislation and the Fair Work Act 2009 not to disadvantage or mistreat an employee because of pregnancy.

Your employer should perform a risk assessment to ensure that the work you do and the way you do it is safe for you while you are pregnant.

They may need to make alternative equipment available to you, or temporarily adjust the duties you perform. SafeWork SA can assist with information regarding undertaking a risk assessment. Your doctor can assist with information about what work is safe and appropriate for you to perform while pregnant.

If you are pregnant and your job poses a risk to your health or the health of your baby, you have the right to be transferred to a safe job with the same pay and conditions. You need to provide a medical certificate stating that you are fit to work but are unable to continue in your present position. If a transfer is not reasonably practical (for example, because appropriate and safe work is not available), you are entitled to take paid leave for the period you can't continue in your position (as stated in the medical certificate). This paid leave is in addition to your normal leave entitlements, such as personal leave and annual leave. This leave does not reduce your 12 months parental leave entitlement. Note that you can only be transferred to a safe job if you are entitled to parental leave (see below) and you have notified your employer that you will be taking parental leave.

What if I need time off while I am pregnant and still working?

Generally, you should be able to access your paid personal leave (often called sick leave) to attend antenatal appointments or if you are unwell during your pregnancy. If you are too unwell to work and have no paid personal leave available, or don't want to take your paid personal leave, you are able to apply for unpaid 'special maternity leave'. Special maternity leave can be taken by a female employee for a pregnancy related illness, or to recover from a miscarriage that occurs up to 28 weeks before the expected date of birth, or in the event of a stillbirth. You can take as much special maternity leave as your doctor recommends in a medical certificate. You must be eligible for parental leave to be able to take special maternity leave. Note that the amount of 'special maternity leave' that you take is deducted from the period of parental leave available once your baby is born.

When can I start parental leave?

If you are pregnant, your leave may start up to six weeks before your expected due date, but no later than the date of birth. For adoption leave, the leave must start on the day of placement of the child.

If you want to stay at work within six weeks before the expected date of birth, your employer may request a medical certificate to state that you are fit to work.

What if I am not eligible for parental leave?

If you have not been employed by your current employer for at least 12 months at the time you will commence parental leave, then you are not eligible for parental leave under the Fair Work Act 2009. However, you are protected by the Sex Discrimination Act 1984(Cth), the Equal Opportunity Act 1984 (SA) and the Fair Work Act 2009 (Cth), all of which prohibit employers from discriminating against an employee due to their pregnancy. These protections effectively mean that while you may not be eligible for parental leave, your employer has a responsibility to try and accommodate your needs arising from pregnancy and parenthood. For example, your employer may negotiate a reasonable alternative to you taking parental leave under the Fair Work Act 2009, such as allowing you to use any accrued annual or long service leave and/or offering you leave without pay.

Can my partner and I take parental leave at the same time?

Under the NES, if you are both employed you can take three weeks unpaid parental leave at the same time, either immediately after the birth or placement of a child or by agreement with the employer, at any time during an extended period starting before the birth and ending no later than six weeks after the birth or placement. These three weeks count towards the total 12 month entitlement.

Reducing or extending parental leave

You may find that you are not ready or able to return to your old position when it is time to go back to work after parental leave. If you have arranged to take less than 12 months parental leave, then you are entitled to extend your return date once by giving written notice to your employer at least four weeks before your original return date, as long as your new return date will still fall within the 12 months immediately after the birth or adoption.

If you wish to extend your leave again (within the 12 months), or if you wish to return to work earlier than arranged, your employer can agree but has the right to refuse your request.

If you, or your partner, has taken 12 months parental leave and wishes to extend, one of you can request an extension of leave to a maximum of 24 months, reduced by the amount of any leave taken by your partner. So, if you or your partner have used your full 12 months entitlement, then you or your partner have the right to request a further period of up to 12 months unpaid parental leave. You must make the request in writing at least four weeks before the end of the initial period of leave.

Your employer must respond in writing within 21 days stating whether they grant or refuse the request. Employers may refuse the request only on reasonable business grounds and must include the reasons for the refusal in the written response. While reasonable business grounds are not defined in the NES, they may include the effect on the workplace (e.g. the impact on finances, efficiency, productivity or customer service), the inability to manage the workload among existing staff or the inability to recruit a replacement employee.

Can I take other types of leave as well as parental leave?

You can also take other forms of leave, such as annual leave or long service leave, at this time. However, your entitlement to 12 months of unpaid parental leave will be reduced by the amount of any other form of leave you take. For example, if you take a month of annual leave, you will have 11 months of unpaid parental leave remaining.

What notice do I have to give?

You must give your employer at least 10 weeks written notice before starting your leave, unless this is not possible. The notice must specify the intended start and end dates of the leave, and you must confirm the intended start and end dates of the leave (or advise of any changes) at least four weeks before the intended start date, unless this is not possible. An employer may require evidence of the due date or adoption placement date.

Pre-Adoption leave

Adopting parents can take up to two days of unpaid pre-adoption leave for adoption interviews or exams (unless their employer requires them to take other paid leave they have available, such as annual leave). You do not need to meet service requirements to access this leave. You must give notice of the intention to take pre-adoption leave and your employer can require reasonable evidence.

Paid parental leave

Many organisations provide paid parental leave as a way of valuing, supporting and retaining their staff. You should check your award, agreement, contract or letter of offer to see if you may be eligible for paid parental leave.

The Australian Government also provides paid parental leave through its funded Paid Parental Leave scheme.

What is the Paid Parental Leave scheme?

The Paid Parental Leave scheme is an Australian Government funded entitlement for working parents who become the primary carer of a newborn or newly adopted child.

Who is entitled to Parental Leave Pay?

- Working parents, including full-time, part-time, casual, contract and self-employed workers may be eligible for Parental Leave Pay if they meet the eligibility criteria.

- Your child must have been born or adopted on or after 1 January 2011 to be eligible for Parental Leave Pay.
- The birth mother or the initial primary carer of an adopted child must make the claim for Parental Leave Pay, unless there are exceptional circumstances.
- To be eligible for the full 18 weeks of Parental Leave Pay, you should nominate a start date for your pay that is within 34 weeks of the birth or adoption of your child.
- Lodge your claim with the Family Assistance Office early.

How will I be paid under the Paid Parental Leave Scheme?

From 1 July 2011, your employer is responsible for providing your Parental Leave Pay if:

- your child is born on or after 1 July 2011,
- you have worked for your employer for at least 12 months prior to the expected date of birth or adoption of your child,
- you are receiving at least eight weeks of Parental Leave Pay, and
- you will continue to be employed by them during your Paid Parental Leave period



If this does not apply to your situation, you and your employer can still agree that your employer will provide your Parental Leave Pay after 1 July 2011, provided you are eligible.

How much will I be paid under the Paid Parental Leave Scheme?

Eligible working parents will receive Parental Leave Pay at the minimum wage (\$589.30 as at 1 July 2011) per week for a maximum period of 18 weeks. This pay is taxable.

If your employer is providing your Parental Leave Pay, you will be able to access other paid leave such as maternity leave, however this may mean you will be taxed at a higher rate.

You may arrange for other deductions to be made from your Parental Leave Pay. You may salary sacrifice some or all of your Parental Leave Pay. For example, you may make voluntary contributions to superannuation. You must agree to these arrangements with your employer as you do with wages. Your employer will not be required to make superannuation contributions on your Parental Leave Pay.

The leave can be taken in conjunction with, or in addition to, employer-provided paid parental leave, and other employer-provided leave entitlements such as annual leave. If you meet the eligibility criteria, you can choose between the scheme or the Baby Bonus and other family assistance.

Employers who currently provide paid parental leave through an agreement cannot withdraw that entitlement for the life of the agreement. However, existing leave schemes could be modified in the bargaining process for a new agreement.

What if I get the sack while I am pregnant or on parental leave?

It is unlawful for your employer to dismiss you because you are pregnant or on parental leave. Your employer should not downgrade your work or refuse you a job solely because you are pregnant, have been on parental leave or because you have a young child.

Check the section below on Discrimination, and the Termination of Employment Factsheet for more information.

Returning to work

Under the Fair Work Act 2009, if your employer makes a decision about your job while you are on parental leave, and that decision will have a significant effect on the pay, status or location of your position, then they must take all reasonable steps to give you information about the changes and an opportunity to discuss them.

When returning to work from parental leave you have the right to return to your old position or to a new position if you have been promoted or agreed to accept a new position. If you had been performing light duties or reduced hours as a result of your pregnancy prior to commencing parental leave, you are entitled to have your original position back. If your old job no longer exists (meaning no other employee is performing your old job either) and you are qualified and able to work in another position, then you are entitled to work in another position. When there is more than one appropriate position, you are entitled to the position nearest in status and pay to your former position.

Some women will find that for many reasons they are not able to, or do not wish to, return to their original position at the end of their parental leave. If this happens to you and you wish to maintain your employment relationship, you will need to negotiate with your employer to find an alternative that works for everyone. Part-time work may be available upon your return. You should let your employer know early of your interest in working part-time and commence negotiations as soon as possible.

If you do not return to your position at the end of your period of parental leave, you will lose your entitlement under the Fair Work Act 2009 to have your old position back when you are ready to return.

However, depending on the circumstances, you may have protection under the General Protections and Unlawful Termination provisions of the Fair Work Act 2009, which make it against the law to dismiss you because of your family responsibilities, as well as protection under anti-discrimination legislation, which require your employer to attempt to accommodate your responsibilities and needs as a parent.

See the section on Discrimination and the Termination of Employment Factsheet for more information.

Right to request flexible working arrangements

There are many ways that your workplace can help you in balancing your work and family commitments including but not limited to allowing you to work part-time. They could also include allowing you to perform some work from home or bringing children to work, providing a breastfeeding friendly workplace, providing assistance with child care, allowing you to access leave over school holidays or at half pay, and salary banking to provide for extra leave. These flexible arrangements may be informal agreements between you and your employer (although it is always best to get such things in writing), part of your workplace policies, or could be part of your award or negotiated and formally written in to your agreement.

Under the Fair Work Act 2009, if you are a parent or have responsibility for the care of a child under school age (or a child with a disability under 18), you can request a change in working arrangements to assist with the care of your child.

To make this request, you must have 12 months continuous service with the employer, and if you are a casual, you must also have an expectation of ongoing employment on a regular and systematic basis. You must make the request in writing and include what change you are wanting and why. Your employer must give you a written response within 21 days, stating whether the request is granted or refused, and if refused, detailed reasons why. You should be able to clearly understand why your request is rejected. They cannot just give a refusal without reason. A request can only be refused on reasonable business grounds. While these are not defined in the Fair Work Act 2009, they may include the effect on the workplace, including the financial impact and the impact on efficiency, productivity and customer service; the inability to organise work among existing staff; and the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the request.

If your request for flexible working arrangements is rejected and you are not satisfied with your employer's stated reason, then you can go to the Fair Work Ombudsman for assistance in resolving the disagreement.

Check the Negotiating with your Employer and Balancing Work and Family Factsheets for more information.

What if I am discriminated against or unfairly treated?

It is illegal to discriminate against pregnant and breastfeeding women in the workplace. It is also illegal to discriminate against women on the ground of 'potential pregnancy' (i.e. women of child bearing age, who may be likely or perceived to be likely, to become pregnant). So, if you are pregnant, potentially pregnant, or breastfeeding, this cannot be used as a reason to refuse to employ you, transfer you (without a valid medical or safety reason), demote you, change your hours or status, deny you access to training and other opportunities, or dismiss you. It is unlawful for employers or potential employers to question you about current or future pregnancies including when they are interviewing you for a job.

It is also unlawful to be discriminated against or dismissed because of family responsibilities. This includes if your employer does not allow you to use your personal leave to care for your children when they are sick, injured, or affected by an unexpected emergency. If you need to use your personal leave to care for a sick child or other family member, it is known as carer's leave and this right is protected by law.

If you are dismissed or pressured to resign while on parental leave or when you return from leave, or if your job is changed while you are on parental leave, this may be an adverse action and/or an unlawful dismissal.

Check the Adverse Action and Termination of Employment Factsheets for more information.

Does taking parental leave affect my continuity of service?

Taking parental leave will not break your continuity of service, however unpaid parental leave is not counted when calculating your period of service for the purposes of long service leave and other entitlements. You will only accrue personal leave and annual leave on paid parental leave, not unpaid parental leave.



Where can I get more help?

Your union

SA Unions
Ph: (08) 8279 2222
www.saunions.org.au

Working Women's Centre

Ph: 1800 652 697
www.wwc.org.au

1st Floor, Station Arcade
52 Hindley Street
Adelaide, SA, 5000

Legal Services Commission

Ph: 1300 366 424
www.lsc.sa.gov.au

82-98 Wakefield Street
Adelaide SA 5000

Young Workers Legal Service

Ph: (08) 8279 2233
www.ywls.org.au

Family Assistance Office

Ph: 13 61 50
www.familyassist.gov.au

Equal Opportunity Commission

Ph: 8207 1977

Australian Human Rights Commission

Ph: (02) 9284 9600
Complaints Infoline: 1300 656 419

Fair Work Ombudsman

Ph: 13 13 94
www.fairwork.gov.au

Telephone Interpreter Service

Ph: 13 14 50

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