A close-up photograph of a woman with dark hair and glasses, smiling and holding a baby. The baby is wearing a blue knit sweater and looking towards the camera. The background is a soft-focus green, suggesting an outdoor setting. A vertical green line is positioned to the left of the text.

PARENTAL LEAVE GUIDE

**CARROLL
& O'DEA**
LAWYERS

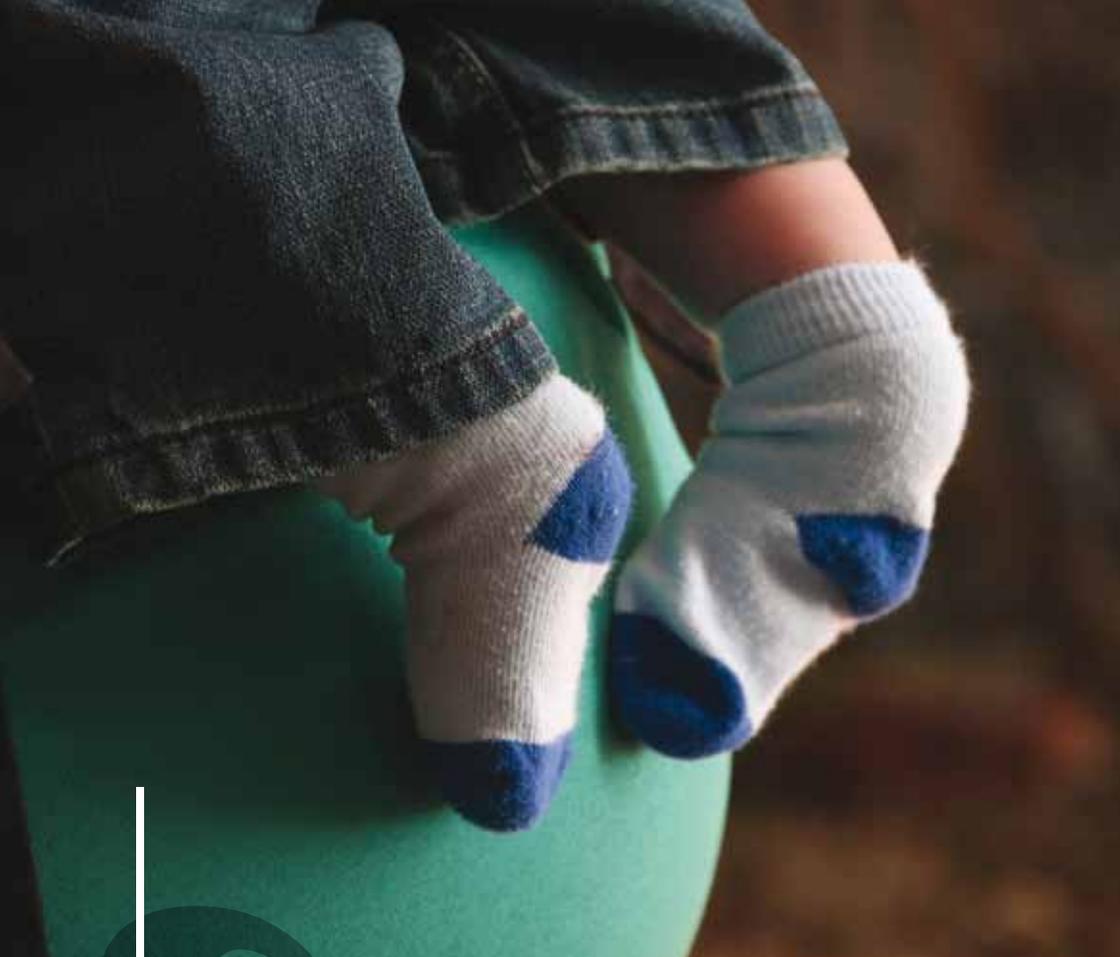


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INTRODUCTION

On 1 January 2011, Australia's first national paid parental leave scheme (funded by the Federal Government) will commence. Paid parental leave will be available to eligible employees in addition to unpaid leave from their employers (which is presently available to most employees under the "National Employment Standards"), as well as any additional paid parental leave offered by employers.



In recent times there have been many changes to the law regarding parental leave, both paid and unpaid, and in some respects this area of law is quite complex.

This Guide is intended to provide a general overview of the law regarding the minimum standards for parental leave (and related matters), essentially for the private sector workforce. Employers are encouraged to be aware of their obligations to their employees, both to ensure compliance with the law and avoid costly disputes and legal proceedings.

I acknowledge and thank Claire Bateman and Michelle Wright, lawyers with Carroll & O'Dea, for their contributions in preparing this Guide.

I hope that you find this guide helpful, and my team and I would be happy to assist you if required.

Peter Punch

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OVERVIEW

Whilst the introduction of Government funded paid parental leave across Australia is a major development, the entitlement to unpaid parental leave is not new. Since 1979 most employees in Australia have had access to some form of leave after the birth of a baby, although the focus has always been on the mother and her traditional role within the 'normal' family unit.

The Government has now recognised that there is no such thing as a 'normal' family unit. Accordingly, care arrangements for a newly born or adopted child may vary greatly. A range of possible arrangements could exist, such as: the mother may return to work after childbirth whilst the father is the primary carer for the child; a child could be cared for by one partner of a same-sex couple; or the child may be cared for by an adoptive parent. The provisions in the *Fair Work Act 2009* (Cth) dealing with parental leave reflect such changes in modern society.

The "National Employment Standards" contained in the *Fair Work Act* commenced on 1 January 2010, and form the basis of most employees' entitlements to unpaid parental leave. This legislation provides a father with many of the same leave rights as a mother, and adoptive parents with largely the same leave rights as biological parents.

From 1 January 2011, many employees across Australia will also be entitled to seek paid parental leave from the Federal Government, in addition to unpaid parental leave and any such leave paid by their employer. The new paid parental leave scheme significantly enhances the parental leave entitlements of Australian workers.

[NB: Public Sector employees often have different entitlements, but that subject is not within the scope of this Guide.]

WHO IS ENTITLED TO PARENTAL LEAVE?

An employee is entitled to be provided with unpaid parental leave if they satisfy the following:

- They are a permanent employee; and
- They have had at least 12 months continuous service with an employer immediately before the date, or expected date of birth of the child, or date or expected date of placement of an adopted child.

OR

- They are an eligible casual employee, being a casual employee who has been employed by their employer on a regular and systematic basis for a sequence of periods of employment during a period of 12 months, and who would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis, but for the birth or placement of a child, or the taking of a period of unpaid parental leave.

Significantly, the definition of "de-facto partner" includes members of a same sex couple, which means that gay and lesbian couples now have access to most parental leave entitlements.

However, if an employee wishes to take unpaid parental leave that is to start within 12 months after the birth or placement of a child, the above requirements will apply immediately before the date on which the leave is to commence.

An employee will not be entitled to unpaid parental leave in connection with the adoption of a child unless the child is or will be under 16 years of age at the date, or expected date, of placement, and has not lived continuously with the employee for 6 months or more as at the date, or expected date, of placement. The child being adopted also cannot be a child of the employee or the employee's spouse or de facto partner.

"Spouse" is defined quite narrowly under the *Fair Work Act*, and only extends to a former spouse. However, "de-facto partner" is broadly defined and includes: a person who lives with the employee in a relationship as a couple on a genuine domestic basis; and a former de-facto partner of the employee. This is a significant development in the law, and reflects changes in modern society.

HOW MUCH PARENTAL LEAVE CAN BE TAKEN?

Parental leave:

- can start for female employees any time within 6 weeks before the expected date of birth of the child;
- can be for a period of up to 12 months (with extension to up to 2 years by agreement with the employer);
- may be unilaterally extended by the employee on one occasion if they have commenced a period of unpaid parental leave that is shorter than their available parental leave period (i.e. less than 12 months). The employee needs to provide their employer with at least four weeks notice of an extension; and
- may be reduced or further extended by agreement between the employee and employer.

The *Fair Work Act* also provides female employees with an entitlement to unpaid special maternity leave in circumstances where the employee is not fit for work because: she has a pregnancy-related illness; or the pregnancy has ended within 28 weeks of the expected date of birth.

Special provisions also apply where the child dies or the employee ceases to be the primary care-giver for the child, which enable the employer to cancel the remaining parental leave period after providing notice to the employee.

A female employee's entitlement to unpaid parental leave may be unilaterally extended by the employee once, up to a total period of 12 months, if they have commenced a period of unpaid parental leave that is shorter than their available parental leave (i.e. less than 12 months).

WHAT IS THE PROCESS FOR CLAIMING PARENTAL LEAVE?



To be eligible for parental leave, an employee must give their employer the following:

- A written notice stating the intended start and end dates of the period of leave. This must be given at least 10 weeks before the first day of intended leave.
- A written notice confirming or advising changes to the period of leave. This notice must be provided at least 4 weeks prior to the intended start date unless it is not practicable for the employee to do so.

The employer may also require the employee to provide evidence that would satisfy a reasonable person of the date, or expected date, of birth or placement of the child. Such evidence may include a medical certificate or a statutory declaration.

HOW CAN AN EMPLOYEE TAKE UP TO TWO YEARS LEAVE?

An employee who takes their total entitlement to unpaid parental leave (i.e. 12 months) may request to extend their unpaid parental leave period by a further period of up to 12 months (i.e. so that their parental leave may be up to 2 years). Such a request must be made in writing and provided to their employer at least 4 weeks before the end of their first period of parental leave (i.e. the first 12 month period).

Upon receiving an employee's written request, an employer must provide the employee with a written response as soon as possible, and not later than 21 days after the request. The employer may only refuse a request for an extension on "reasonable business grounds", and a refusal of the request must state the reasons for the refusal.

An employee can take any other kind of paid leave (except personal / carer's leave) at the same time that they are taking unpaid parental leave.



WHAT ABOUT DAD?

Male employees now have largely the same parental leave entitlements as female employees where they have responsibility for the care of a child.

Parental leave taken by a male employee must not overlap with his partner's parental leave or other authorised leave taken because of the birth or placement of a child. However, where each partner is an employee (i.e. an "employee couple") both may take a period of up to 3 weeks concurrently, but this is only permissible in the 3 week period starting from the date of birth or placement of a child (unless otherwise agreed by the employer and employee).



ARE EMPLOYEES ENTITLED TO PAID PARENTAL LEAVE?

Australia's first national paid parental leave scheme, to be funded by the Federal Government, will commence on 1 January 2011. Paid parental leave will be available, subject to eligibility requirements, in the first year after the birth or adoption of a child.

Paid parental leave will be provided:

- to the primary carer of a child for a period of up to 18 weeks;
- at the national minimum wage in instalments; this is likely to be approximately \$570.00 per week initially, but will change from time to time.

Whilst the Federal Government will fund this scheme, the payments will generally be made by the employer (using funds provided by the Government) or, if a person is not employed, by the Family Assistance Office.

To assist employers with the transition to this scheme, the involvement of employers will be phased in over 6 months, which means that employers will not be required to make payments until 1 July 2011. However, employers can choose to take on this responsibility early, with their employee's agreement.

Paid parental leave will be provided concurrently with existing parental leave entitlements discussed above. Employees who are entitled to receive paid parental leave from their employers (i.e. employer funded parental leave) may also be entitled to the Federal Government funded paid parental leave.

ARE THERE SPECIAL REQUIREMENTS WHEN HIRING REPLACEMENT STAFF?



Prior to the *Fair Work Act* it was a legislative requirement that an employee hired to replace an employee on maternity leave be advised of the temporary nature of their employment. This is no longer legislated, but nevertheless employers would be wise to ensure that a replacement employee clearly understands that his or her employment will not or may not necessarily continue when the employee returns from parental leave.



WHAT HAPPENS WHEN AN EMPLOYEE RETURNS TO WORK?



An employee who has taken unpaid parental leave is entitled to return to work in the position they held immediately prior to the start of their parental leave, or for female employees the position they held immediately prior to any transfer or alteration in their duties made due to pregnancy.

The *Fair Work Act* also provides employees, who have responsibility for the care of a child, with the right to request changes to their working arrangements to assist the employee to care for the child. However, the child must be under school age, or under 18 and have a disability.

The types of requests that could be made include: different hours of work; different patterns of work; and changes in location of work.

An employee is not entitled to make a request unless the employee has completed at least 12 months of continuous service with the employer before making the request, or the employee is a long term casual employee immediately before the request and has a reasonable expectation of continuing employment on a regular and systematic basis.

Requests for flexible working arrangements must be made in writing, and set out the details of the changes sought along with the reasons for the requested change. An employer must respond in writing within 21 days of receiving the request, and the response must state whether or not the request will be granted. Employers may only refuse a request on “reasonable business grounds”, and if a request is refused the written response provided to the employee must include the reasons for the refusal.

WHAT IF THERE IS A DISPUTE?



Employees who believe that they have been discriminated against by their employers in connection with parental leave or requests for flexible working arrangements may be able to seek legal redress through relevant anti-discrimination legislation. A complaint may be made to the Fair Work Ombudsman, or the employee could commence court proceedings in relation to the discrimination suffered using the ‘adverse action’ provisions under the *Fair Work Act*.

Employers are prohibited from discriminating against employees for reasons which include: sex; marital status; family or carer’s responsibilities; and pregnancy. Discriminatory action taken against an employee may include: dismissing the employee; injuring the employee in his or her employment; altering the position of the employee to the employee’s prejudice; or discriminating between the employee and other employees.

Employers should exercise caution when handling applications for parental leave and requests for flexible working arrangements to ensure that they do not unlawfully discriminate against their employees.

WHERE CAN I GET MORE INFORMATION?



Further information can be obtained from a number of different sources including:

- the Fair Work Ombudsman – www.fwo.gov.au
- the Department of Employment and Workplace Relations – www.deewr.gov.au

Carroll and O’Dea’s Employment and Industrial Relations team can also assist. We have published numerous articles on workplace issues, of which the following are recent examples:

- “Modern Awards – Mission accomplished? ... Not yet!”, by Michelle Wright, June 2010;
- “‘Workplace rights’ and ‘adverse action’ – Fear of the unknown or simply not yet known?”, by Claire Bateman, May 2010;

These articles and more are all available from our website: www.codea.com.au

We also invite you to contact our team for any specific advice on any aspect of the *Fair Work Act* or other employment-related issues.

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