

Fair Work Amendment Act 2013 (Cth) - Overview

The Fair Work Act Amendment Bill 2013 received royal ascent on 28 June 2013. This guide outlines the amendments to the *Fair Work Act 2009* (Cth) ("Act"). Please note that some amendments are effective from **1 July 2013** and other amendments will be effect from **1 January 2014**.

Division 4 – Right to Request Flexible Working Arrangements

The amendments to the Act, effective from **1 July 2013** have expanded the groups of employees entitled to request flexible work arrangements and include the following circumstances:

- the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
- the employee has a disability;
- the employee is 55 or older;
- the employee is experiencing violence from a member of the employee's family; or
- the employee provides 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 the member is experiencing violence from the member's family.

Additionally, the Act has further clarified that parents who have the responsibility for the care of a child may request part time hours to assist in the care of the child upon return from parental leave.

The term 'family' includes persons related by blood, marriage, adoption, step or fostering and those who usually reside in the household of the employee. The Australian Government publication *'Domestic Violence in Australia – an overview of the issues'* has concluded that 'violence' includes violent or threatening behavior that coerces, controls or causes that family member to become fearful. This may include physical violence, sexual assault, sexually abusive behavior, economic abuse, emotional abuse, or psychological abuse.

The term 'carer' will encompass all people who provide personal care, support and assistance to individuals who need support due to a disability, medical condition, including a terminal or chronic illness, mental illness or fragility due to age.

The definition of 'school age' will be amended to mean the age at which a child is required to attend school in the relevant State or Territory.

Prior to the recent amendments, an employee was **only** eligible to make requests for flexible working arrangements in circumstances where the employee is a parent, or has responsibility for the care of a child, if the child is under school age or the child is under the age of 18 and has a disability.

Reasonable business grounds

Prior to the 1 July 2013 amendments, section 65(5) of the Act provides that an employer may refuse a request for flexible working arrangements only on reasonable business grounds. The amendments to the Act, clarify the meaning of 'reasonable business grounds' to include the following:

- that the new working arrangements requested by the employee would be too costly for the employer;
- that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

This list is not exhaustive and the grounds of reasonable refusal need to have regard for the particular circumstances of each workplace and the nature of the request made. This amendment is effective from **1 July 2013**.

Division 5 – Parental leave and related entitlements

Concurrent Unpaid Parental Leave

Prior to 1 July 2013, section 72(5)(a) of the Act entitled eligible employees to a period of three (3) weeks concurrent leave for employee couples who are taking birth-related or adoption-related leave.

Under the new amendments introduced from **1 July 2013**, the entitlement to concurrent leave has extended from three (3) to eight (8) weeks. Additionally, the leave may be taken in separate periods of at least two (2) weeks (or a shorter period agreed by the employer) at any time within the first twelve (12) months of the birth or adoption. Employees are required to notify employers at least ten (10) weeks prior to going on leave or, in cases where the leave is to be taken in separate periods, four (4) weeks prior to going on leave.

Special Maternity Leave

Under section 80 of the Act, employees may be entitled to a period of special maternity leave where they are not fit for work, because:

- she pregnancy-related illness; or
- she has been pregnant, and the pregnancy ends with 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

Prior to the 1 July 2013 amendments, section 80(7) of the Act reduced a female's entitlement to unpaid parental leave by the amount of special maternity leave taken. Under the new amendments, this section will be repealed so that a female's unpaid parental leave **will not** be affected by the taking of special maternity leave.

Additionally, an employee may choose to take personal/carer's leave before taking unpaid special maternity leave. This amendment is effective from **1 July 2013**.

Transfer to a Safe Job

Prior to the 1 July 2013, the Act, gave employees who had completed 12 months of continuous service the right to transfer to a safe job. This entitlement was accommodated in circumstances where the employee provides evidence to her employer stating she is fit for work, but that it is inadvisable for her to continue in her present position during a risk period because of:

- illness, or risks, arising out of the pregnancy; or
- hazards connected with the position.

Where these requirements are satisfied, the employee **must be transferred** to an appropriate job with no other changes to the terms and conditions of employment during the employee's risk period.

The amendments effective from **1 July 2013** extend the existing safe job entitlements to a pregnant employee **regardless of the employee's length of service**. While any pregnant employee may be entitled to transfer to a safe job (upon meeting the requirements), if no there is no appropriate safe job available, the employee may be entitled to **no safe job leave**.

If the employee has completed 12 months continuous service and is eligible for no safe job leave, the leave will be paid. However, if the employee has not completed 12 months continuous service, they will be on unpaid no safe job leave.

Please note: An employer may require the employee to provide a **medical certificate** as evidence.

Illustrative example

Sarah is a pregnant employee and has been working full-time with her employer for five years. Given Sarah has completed twelve (12) months continuous service; she is eligible to take unpaid parental leave under the *Fair Work Act 2009* (Cth). Sarah has applied for unpaid parental leave and given at least ten (10) weeks written notice and a medical certificate in accordance with the notice and evidence requirements in section 74 of the *Fair Work Act 2009* (Cth).

Ten (10) weeks before the expected date of birth, Sarah provides her employer with a medical certificate stating she is fit to continue working, however, it is inadvisable for her to do so in her present position, because of hazards connected with the role. If Sarah's employer is unable to transfer her to a safe job because there is no appropriate safe job available, then Sarah is entitled to take paid '**no safe job**' leave for the risk period, which may extend until the birth of the child.

Leanne is a pregnant employee who has been working full-time with her employer Luke for eight months and is not entitled to unpaid parental leave. Leanne provides Luke with a medical certificate stating that she is fit to continue working, but that it is inadvisable for her to continue working for the next couple of weeks in her present position because of risks arising out of her pregnancy.

If Luke is not able to transfer Leanne to a safe job because there is no appropriate safe job available, then Leanne can take unpaid no safe job leave for the risk period. At the end of the risk period, Leanne is entitled to return to her position.

Please see the VECCI fact sheet [NES – Parental Leave](#) for further details.

Right of Entry

Amendments to right of entry under the Act will be effective from **1 January 2014**. The amendments provides for interviews/discussions to be held in rooms or areas agreed to by the occupier and permit holder. Previously, employers could direct meetings to be conducted in a location that was deemed 'reasonable'. However, under the new amendments, in the absence of agreement as to where such a reasonable location may be, the union may do so in the workplace lunchroom. That is, any room or area:

- whereby one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
- that is provided by the occupier for the purpose of taking meal or other breaks.

Please see the VECCI fact sheet [Union Right of Entry](#) for further details.

Anti-Bullying Measures

Anti-bullying amendments form part of the Government's response to reduce cases of bullying in Australian workplaces. From **1 January 2014**, employees who believe they are being bullied in the workplace may apply to the Fair Work Commission ("FWC") for an order to stop the bullying. Bullying occurs where an individual(s) repeatedly behaves unreasonably towards a worker or a group of workers and that behavior creates a risk to their health and safety. Under this provision, the FWC must process the application within 14 days of receiving the application if they are satisfied that bullying has occurred. Importantly, while the FWC will have authority to issue orders for the bullying to stop, no order for payment or pecuniary amount can be issued under this provision.

Changes to Rosters or Working Hours

New content requirements will be inserted in modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work before making any decision to change those rosters or hours. These additional requirements will require employers to **genuinely consult** with affected employees about the impact of the changes on their family and caring responsibilities.

Regardless of an employee being permanent or casual, where an employee is hired on a 'regular and systematic*' basis, any change to those arrangements would require the employer to consult in accordance with the consultation clause in the modern award. The consultation process to change a regular roster or ordinary hours of work requires:

- The employer informing potentially affected employees of the proposed changes;
- Allowing employees to respond to the proposal and any impact the changes may have in relation to family and caring responsibilities; and
- Considering the views of employees

Illustrative example

Amy is employed on a part-time basis, working four (4) days a week with Tuesdays off to assist with the care of her elderly mother on that day.

Her employer has decided to change the arrangements under which Amy works. This proposed change will result in her no longer being able to take Tuesdays off. Before changing Amy's regular rostered hours of work, in accordance with the consultation term included in the applicable modern award, her employer will be required to consult and provide information to her about the proposed change, give her an opportunity to raise with her employer the impact of the proposed change on her (including in the context of her family and caring responsibilities) and require the employer to consider Amy's views on that impact before making any changes.

This amendment will be effective from **1 January 2014**.

Award Penalty Rate Protections

Changes to the Act effective from **1 January 2014**, will amend the modern award objective and require the Fair Work Commission to take into account the need to provide additional remuneration for employees working:

- overtime;
- unsocial, irregular/unpredictable hours;
- weekends and public holidays; or
- shifts

For further assistance in customising and implementing employment practices in your workplace, please contact VECCI's team of consultants for a quote on 03 8662 5222.

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