

NES – October 1 2012 Amendments

Sections 77A, 78(1A), 79A, 79B and 84A have been inserted to the NES, please see the relevant section below:

77A Pregnancy ends (other than by birth of a living child) or child born alive dies

Application of this section

- (1) This section applies to unpaid parental leave, if:
 - (a) the leave is birth-related leave; and
 - (b) either:
 - (i) the pregnancy ends other than by the child being born alive; or
 - (ii) the child dies after being born.

Cancellation of leave

- (2) Before the leave starts:
 - (a) the employee may give the employer written notice cancelling the leave; or
 - (b) the employer may give the employee written notice cancelling the leave.

Example: Subsections (2) and (3) do not apply if:

- (a) the child dies after being born; and
- (b) the employee is the female employee who gave birth to the child.

This is because in this case the leave must not start later than the date of birth of the child (see subsection 71(3)).

- (3) If the employee or employer does so, the employee is not entitled to unpaid parental leave in relation to the child.

Note: If the employee is the female employee who was pregnant with the child and the employee is not fit for work, she may be entitled to:

- (a) paid personal leave under Subdivision A of Division 7; or
- (b) unpaid special maternity leave under section 80.

Return to work

- (4) The employee may give the employer written notice that the employee wishes to return to work:
 - (a) after the start of the period of leave, but before its end; and
 - (b) within 4 weeks after the employer receives the notice.
- (5) The employer:
 - (a) may give the employee written notice requiring the employee to return to work on a specified day; and
 - (b) must do so if the employee gives the employer written notice under subsection (4); unless the leave has not started and the employer cancels it under subsection (2).

- (6) The specified day must be after the start of the period of leave, and:
 - (a) if subsection (4) applies—within 4 weeks after the employer receives the notice under that subsection; or
 - (b) otherwise—at least 6 weeks after the notice is given to the employee under subsection (5).
- (7) The employee’s entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

Interaction with section 77

- (8) This section does not limit section 77 (which deals with the employee ending the period of unpaid parental leave with the agreement of the employer).

78 Employee who ceases to have responsibility for care of child

- (1A) However, this section does not apply if section 77A applies to the unpaid parental leave (because the unpaid parental leave is birth-related leave and either the pregnancy ends other than by the child being born alive or the child dies after being born).

79A Keeping in touch days

- (1) This Subdivision does not prevent an employee from performing work for his or her employer on a keeping in touch day while he or she is taking unpaid parental leave. If the employee does so, the performance of that work does not break the continuity of the period of unpaid parental leave.
- (2) A day on which the employee performs work for the employer during the period of leave is a **keeping in touch day** if:
 - (a) the purpose of performing the work is to enable the employee to keep in touch with his or her employment in order to facilitate a return to that employment after the end of the period of leave; and
 - (b) both the employee and the employer consent to the employee performing work for the employer on that day; and
 - (c) the day is not within:
 - (i) if the employee suggested or requested that he or she perform work for the employer on that day—14 days after the date of birth, or day of placement, of the child to which the period of leave relates; or
 - (ii) otherwise—42 days after the date of birth, or day of placement, of the child; and
 - (d) the employee has not already performed work for the employer or another entity on 10 days during the period of leave that were keeping in touch days.

The duration of the work the employee performs on that day is not relevant for the purposes of this subsection.

Note: The employer will be obliged, under the relevant contract of employment or industrial instrument, to pay the employee for performing work on a keeping in touch day.

- (3) The employee’s decision whether to give the consent mentioned in paragraph (2)(b) is taken, for the purposes of section 344 (which deals with undue influence or pressure), to be a decision to make, or not make, an arrangement under the National Employment Standards.
- (4) For the purposes of paragraph (2)(d), treat as 2 separate periods of unpaid parental leave:
 - (a) a period of unpaid parental leave taken during the employee’s available parental leave period; and

- (b) a period of unpaid parental leave taken as an extension of the leave referred to in paragraph (a) for a further period immediately following the end of the available parental leave period.

Note: Performance of work on keeping in touch days is also dealt with, for the purposes of parental leave pay, in sections 49 and 50 of the *Paid Parental Leave Act 2010*.

79B Unpaid parental leave not extended by paid leave or keeping in touch days

If, during a period of unpaid parental leave, an employee:

- (a) takes paid leave; or
- (b) performs work for his or her employer on a keeping in touch day;

taking that leave or performing that work does not have the effect of extending the period of unpaid parental leave.

84A Replacement employees

Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:

- (a) that the engagement to perform that work is temporary; and
- (b) of the rights:
 - (i) the employer; and
 - (ii) the employee taking unpaid personal leave;have under subsections 77A(2) and (3) (which provide a right to cancel the leave if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
- (c) of the rights the employee taking unpaid parental leave has under:
 - (i) subsections 77A(4) to (6) (which provide a right to end the leave early if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
 - (ii) section 84 (which deals with the return to work guarantee); and
- (d) of the effect of section 78 (which provides the employer with a right to require the employee taking unpaid parental leave to return to work if the employee ceases to have any responsibility for the care of the child).

For more information regarding Parental Leave under the National Employment Standards (NES) please refer to the [NES – Parental Leave](#) guide.

For further assistance in customising and implementing employment practices in your workplace, please contact VECCI's Workplace Relations Helpline on (03) 8662 5222.

Disclaimer

The information contained in this document has been prepared by VECCI in this format for the convenience and benefit of its members and is provided as a source of information only. VECCI does not accept responsibility for the accuracy of the information or its relevance or applicability in particular circumstances. The information does not constitute, and should not be relied on, as legal or other professional advice about the content and does not reflect the opinion of VECCI, its employees or agents. VECCI and its employees, officers, authors or agents expressly disclaim all and any liability to any person, whether a member of VECCI or not, in respect of any action or decision to act or not act which is taken in reliance, whether partially or wholly, on the information in this communication. Without limiting the generality of this disclaimer, no responsibility or liability is accepted for any losses incurred in contract, tort, negligence, or any other cause of action, or for any consequential or other forms of loss. If you are uncertain about the application of this information in your own circumstances you should obtain specific advice.