



## NEWSLETTER

## WORKPLACE RELATIONS AND SAFETY

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## KIDS, CARERS AND CAREERS

### Parental leave, rights and responsibilities

Balancing operational requirements with the rights and responsibilities of employees and the push to adapt workplaces to the increasing need for flexibility present challenges to every employer. This article provides a guide to minimum compliance requirements in relation to parental leave and looks at what lies ahead when the Federal Government's National Employment Standards (**NES**) commence on 1 January 2010.

An employee's entitlement to parental leave, like many employment entitlements, is governed by a range of instruments, including legislation, industrial agreements, individual contracts and employer policies. The minimum legislative entitlement, for employees of "constitutional corporations" (meaning trading or financial corporations), is found in the *Workplace Relations Act 1996* (Cth) (**WR Act**).

Managers at all levels should ensure they have an understanding of these legislative provisions, as penalties for breach of an employer's obligations can be costly and potentially damage a business's public image as well as staff morale.

### The entitlement

Subject to certain conditions, an employee is entitled to up to 52 weeks' unpaid parental

- *Employees have statutory conditional entitlement to a full year of unpaid parental leave*
- *Employers face significant penalties for breaches of the Workplace Relations Act*
- *Employers should ensure they consult with employees on parental leave when redefining their role*

leave for each child. To be eligible, the employee must:

- comply with the documentation requirements in the WR Act;
- immediately before the expected birth, have completed at least 12 months' continuous service with the employer; or
- immediately before the expected birth, be an "eligible casual employee", that is,

engaged on a regular and systematic basis for at least 12 months with a reasonable expectation of continuing to be engaged except for the expected birth.

The maximum total parental leave to which an employee is entitled in respect of a child's birth is 52 weeks. This entitlement is reduced by an amount equal to any "related authorised leave" taken by the employee *or their spouse*, including any paid leave such as annual leave or long

service leave. As a result, the total combined parental leave (paid and unpaid) entitlement for an employee and their spouse is 52 weeks.

## Types of leave

There are seven kinds of parental leave provided in the WR Act. These are ordinary and special maternity leave, short and long paternity leave, short and long adoption leave and pre-adoption leave. They all have different requirements and entitlements.

## Return to work

The WR Act guarantees an employee's right to return to their former position after a period of parental leave. Generally, if the employee was promoted or voluntarily transferred to a new position, they are entitled to return to that position. If a female employee commenced part-time work because of the pregnancy before taking leave, she is entitled to return to the position she held immediately before commencing the period of part-time work.

If the employee's former position no longer exists, they are entitled to return to another position for which they are qualified and able to fill or, if two or more such positions are available, the position nearest in status and remuneration to their former position.

## Variations to the period of leave and replacement employees

An employee may extend her ordinary maternity leave once by giving 14 days' written notice to her employer, provided that the extension will not result in the employee exceeding her maximum leave entitlement. She may subsequently extend the period of

leave only with the agreement of her employer.

Conversely, the period of maternity leave may be shortened by written agreement, so long as the employer receives at least four weeks' notice of the intended return date.

The WR Act provides that anyone taking the position of an employee on parental leave must be informed that the employee is entitled to return to the position.

## Civil remedies

A number of avenues for redress are open to employees who believe they have been denied their parental leave entitlements.

## Proceedings for breach of the WR Act

Where it is alleged that an employer has breached a provision of the WR Act, the employee, a union on their behalf or a workplace inspector, may commence proceedings against the employer in the Federal Court or Federal Magistrates Court. The Court may make an order for compensation, or any other orders to stop or rectify the employer's breach. This can include fines of up to \$33,000 for corporations and \$6,600 for individuals.

The Court will, in appropriate cases, impose significant monetary penalties on employers, as *Sterling Commerce (Australia) Pty Ltd v Iliff* [2007] FMCA 1960 demonstrates.

On 10 December 2004, Ms Iliff went on maternity leave. She intended to return to work on a part-time basis in April 2005, working one to two days per week, and increasing to full-time work by December 2005. While Ms Iliff was on leave, Ms Matthews was engaged as a contractor to act in her role. Sterling was very

impressed with Ms Matthews' performance and decided to retain her in Ms Iliff's position. While Ms Iliff was on maternity leave, Ms Matthews began undertaking a broader range of activities, as the business of Sterling expanded.

Upon returning to work, Ms Iliff was told her position was to be made redundant. At first instance, Burchardt FM held that Sterling was required to return Ms Iliff to the position she held before going on maternity leave. His Honour also found that Ms Iliff was capable of performing the expanded role of performing the expanded role that Ms Matthews was undertaking so that, if Ms Iliff's former role had been made redundant, she should have been returned to the expanded role.

His Honour also found that Sterling had discriminated against Ms Iliff when it told her that she could only be paid a redundancy payment if she signed a deed of release, stating that if Ms Iliff "had not been a woman she would not have been on maternity leave and if she had not been on maternity leave [Sterling] would not have required a release from her".

His Honour imposed the maximum penalty of \$33,000 on Sterling, and ordered that it pay Ms Iliff compensation in excess of \$22,000 in respect of notice and severance.

In imposing the maximum penalty, Burchardt FM expressly adopted the observation of Merkel J in *Finance Sector Union v Commonwealth Bank of Australia* [2005] 224 ALR 467 that "any light-handed approach that might have been taken in the past to serious wilful and ongoing breaches of the industrial laws should no longer be appropriate". His Honour noted that Sterling had acted deliberately, despite taking legal advice regarding Ms Iliff's

entitlements, and had shown little to no contrition for the impact of its conduct on Ms Iliff.

Sterling was also ordered to pay 80 per cent of Ms Iliff's costs of the proceedings. An appeal by Sterling was dismissed.

### Unlawful termination proceedings under the WR Act

Where, for example, an employer does not permit an employee to return to work after a period of parental leave, and the employee's employment is terminated, the employee may invoke the unlawful termination provisions of the WR Act, which provide that employment may not be terminated on a number of specified grounds. Relevantly, those grounds include family responsibility or pregnancy.<sup>1</sup>

A defence exists where the employment is terminated because the employee is unable to comply with the inherent requirements of the position concerned. In such cases it will be necessary for the employer to demonstrate attempts to place the employee in other suitable employment.

If a termination is found to have been unlawful, the Court can issue a range of orders, including a penalty of up to \$10,000, reinstatement of the employee, compensation and any other orders necessary to remedy the effect of the termination.

### Unlawful discrimination

An employee may bring discrimination proceedings under state or federal legislation, on the grounds of family or carer's responsibilities, pregnancy or gender.

Complaints of discrimination in the parental leave space often arise in relation to the arrangements made for an employee's return to work, as was the case in *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294.

## Case study - Tleyji case

Ms Tleyji was a senior full-time travel consultant. After three years service in TravelSpirit's Eastwood branch she commenced 12 months' maternity leave. Upon her return to work, she requested that she be allowed to work three days per week. TravelSpirit said that this was not feasible because the Eastwood branch already had two part-time employees. They offered Ms Tleyji a part time position in the city office that did not include direct contact with clients and was not as well paid. Ms Tleyji refused and made a discrimination complaint.

The NSW Administrative Decisions Tribunal (ADT) found that TravelSpirit had discriminated against Ms Tleyji on the basis of her carer's responsibilities. It was accepted that, because of those responsibilities, she would find it difficult to work full-time.

The issue was whether it was reasonable for TravelSpirit to refuse the request to work part-time. Although the ADT recognised TravelSpirit's business concerns in not taking on another part-time employee, it also found that TravelSpirit had not fully and properly considered whether it was possible to accommodate Ms Tleyji's request. In particular, they did not consider whether:

- the part-time employees would be willing to work full-time for a period;

- a job-sharing arrangement could be implemented; or
- Ms Tleyji could return to her old job after working in an alternative position for a period.

The complaint was substantiated. TravelSpirit was ordered to pay Ms Tleyji damages in the amount of \$5,000.

### National Employment Standards (NES)

The ten NESs form part of the Federal Government's Fair Work Bill 2008 which was passed by Parliament on 20 March 2009. In large part, the existing entitlements of employees taking parental leave will remain, as will the requirements for taking that leave. In a welcome change of structure, much of the current overlap between provisions dealing with maternity and paternity leave has been removed.

Employers will be required to provide information to employees on unpaid parental leave regarding changes the employer intends to make to the employee's pre-leave position, where the change will have a significant effect on the status, pay or location of the position. Employees must also be given an opportunity to discuss the intended changes to the position with the employer.

There is little guidance at this stage as to what will constitute a "significant effect" or, more importantly, the extent to which an employer must consider matters raised by an employee. Employers should therefore implement procedures to ensure they adequately consult when redefining the role of an employee on parental leave, and that they properly consider employee concerns.



HENRY DAVIS YORK

LAWYERS

One other significant change entitles certain employees who are parents or carers of a child under school age to request flexible working arrangements to assist with the care of the child. The employer will be required to respond to the request within 21 days, and will only be permitted to refuse the request on "reasonable business grounds". That term is not defined in the reform legislation.<sup>2</sup>

### **Paid parental leave**

The Productivity Commission was due to provide its final report into paid parental leave to the Federal Government before the end of February 2009. As at the time of writing, the final report has not yet been released. In its draft report released in September 2008, the Commission proposed the introduction of taxpayer-funded paid parental leave for a total of 18 weeks (shared between eligible parents), with an additional two weeks of paternity leave reserved for the father or same-sex partner. Under the proposal, leave would be paid at the rate of the adult minimum wage, currently \$543.78 per week. The government has not yet commented on the proposal.

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<sup>2</sup> For further detail on the National Employment Standards, see Tumpsey P, 2008, "Government releases new National Employment Standards", *Keeping good companies*, Vol 60 No 7, pp 424-427