

FAMILY AND DOMESTIC VIOLENCE AND EMPLOYMENT LAW



DISCLAIMER

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon

Family and domestic violence can happen to anyone, however it is most commonly committed by men against women. This information sheet is primarily designed for women experiencing family and domestic violence in order to highlight its interaction with particular employment law rights. We suggest that you read this information sheet in conjunction with JobWatch's other infosheets that are referred to throughout.

Who can use this infosheet?

This infosheet is designed for **Victorian** and national system employees in **Tasmania** and **Queensland** only.

If you are a **Victorian** employee, you can use this infosheet unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this infosheet unless you were a State public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this infosheet unless you were a State public sector or local government employee not covered by a nationally registered collective agreement.

Requests for flexible working arrangements

Flexible working arrangements can include taking time off work to do something to deal with domestic and family violence including, for example, going to court, the doctor or moving house. Flexible working arrangements may also include working from home, working part-time, flexible start and finish times or job sharing. It may occur as a one-off, occasionally, for a fixed period of time or indefinitely.

Making your request

If you are a national system employee, you can request flexible working arrangements under the National Employment Standards in the *Fair Work Act 2009* if you are:

- a permanent employee with at least 12 months of continuous service; or
- a long term casual with a reasonable expectation of continuing employment on a regular and systematic basis

AND

You would like to change your working arrangements because you are;

- experiencing violence from a member of your family; or
- providing care or support to a member of your immediate family or household who requires care or support because they are experiencing violence from a family member.

Requests need to be in writing and set out details of the change sought and the reasons for the change.

From 1 December 2018, employers have additional obligations under Modern Awards when dealing with requests for flexible working arrangements including that they must discuss the request and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate your circumstances, having regard to:

- your needs arising from your circumstances;
- the consequences for you if changes in your working arrangements are not made; and
- any reasonable business grounds for refusing the request.

Employer's refusal of your request

Your employer must give you a written response to your request within 21 days, stating whether it grants or refuses your request. Your employer can refuse your request only on reasonable business grounds. If your employer refuses your request, your employer's written response must include details of the reasons for the refusal. Some examples of reasonable business grounds include:

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

From 1 December 2018, Modern Awards require that your employer's reasons for refusal include:

- the business ground or other grounds relied upon by the employer for the refusal;
- how the ground or grounds apply;
- if you and your employer could not agree on a change in working arrangements, whether or not there are any changes in working arrangements that your employer can offer you so as to better accommodate your circumstances; and
- if your employer can offer you such changes in working arrangements, details of those changes in working arrangements.

Under Modern Awards, if you and the employer reach an agreement on a change in working arrangements that differs from that initially requested by you, the employer must provide you with a written response to your request setting out the agreed change(s) in working arrangements.

Unfortunately, it is not possible to legally challenge any refusal by your employer to agree to your request for flexible working arrangements. Nevertheless, if your employer fails to give you written reasons for refusing your request or otherwise breaches the Modern Award, your employer may incur a financial penalty. Additionally, if your employer dismisses you or takes other adverse action against you because you made the request, you may have a number of legal options (see below).

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Things to consider about your request

- If you are dismissed by your employer, call JobWatch straight away as you only have **21 days** from the date your dismissal takes effect to file a General Protections Dispute – Termination claim or, if eligible, an unfair dismissal claim.
- If you are treated adversely by your employer as a result of making your request but you are not dismissed:
 - You may be able to file a General Protections Dispute – Non -Termination Claim within 6 years because making your request may constitute a ‘workplace right’. See JobWatch’s ‘General Protections Dispute - Non - Termination claim’ information sheet.
 - Also consider making a complaint to the Fair Work Ombudsman.
- Discrimination complaint
 - You may be able to make a discrimination complaint, on the basis of ‘employment activity’ or ‘carer status’ or ‘unreasonable refusal to provide flexible working arrangements due to family responsibilities’ within 12 months of the discriminatory conduct. For more information, contact the Victorian Equal Opportunity and Human Rights Commission, Equal Opportunity Tasmania or Anti-Discrimination Commission Queensland and the Australian Human Rights Commission.
- If you are dismissed because of making your request, you may be able to:
 - If eligible, file an Unfair Dismissal claim within 21 days of the date your dismissal takes effect at the Fair Work Commission. See JobWatch’s ‘Unfair Dismissal’ Infosheet.
 - File a ‘General Protections Dispute’ – Termination claim within 21 days of the date your dismissal takes effect at the Fair Work Commission. See JobWatch’s ‘General Protections Dispute - Termination claim’ infosheet.
 - Also consider making a complaint to the Fair Work Ombudsman.

Family and domestic violence leave under modern awards

On 26 March 2018, the Fair Work Commission decided to provide 5 days’ *unpaid* leave per year to almost all modern award covered employees (including casuals) experiencing domestic and family violence. The leave will be available in the event an employee needs to do something to deal with the impact of the domestic and family violence and it is impractical for them to do it outside their ordinary hours of work.

It is proposed that the unpaid leave entitlement:

- will be available in full at the commencement of each 12 month period (rather than accruing progressively during a year of service);
- will not accumulate from year to year; and
- will be available in full to part-time and casual employees (i.e. not pro-rated).

The **commencement date** of the unpaid domestic and family violence leave is **1 August 2018**. The three modern awards that will not have the unpaid domestic and family violence leave clause inserted, being the Australian Government Industry Award 2016, the Road Transport and Distribution Award 2010 and the Road Transport (Long Distance Operations) Award 2010, will be the subject of a separate decision.

What is family and domestic violence under modern awards?

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Family and domestic violence means violent, threatening or other abusive behaviour by an employee's family member that:

- seeks to coerce or control the employee
- causes them harm or fear.

A family member includes:

- an employee's:
 - spouse or former spouse
 - de facto partner or former de facto partner
 - child
 - parent
 - grandparent
 - grandchild
 - sibling
- an employee's current or former spouse or de facto partner's child, parent, grandparent, grandchild or sibling, or
- a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

General Protections Dispute – Non-Termination Claim

Adverse action by an employer is unlawful if it is taken because of one or more protected grounds including 'workplace rights' and 'family responsibilities'. See JobWatch's 'General Protections Dispute - Non-Termination Claim' infosheet for more information. The following are examples of adverse action taken by employers that may be the subject of this claim:

Example 1. Jane's employer hears that she is considering making a request for flexible working arrangements. As a result, he overlooks her for a promotion. This is an example of adverse action taken by an employer because the employee proposed to exercise a workplace right.

Example 2. Kim's Enterprise Agreement provides her with a right to take domestic violence leave, which she takes. Upon Kim's return, her working hours are permanently reduced. This is an example of adverse action taken by an employer because the employee exercised a workplace right.

Occupational Health and Safety

The effects of family and domestic violence could have implications for Occupational Health and Safety. Generally speaking, employers have an obligation to, 'so far as is reasonably practicable, provide and maintain for employees... a working environment that is safe and without risks to health'. In certain circumstances involving family and domestic violence, your employer may need to take appropriate action to provide you with a healthy and safe workplace. If you have any concerns, contact WorkSafe

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Victoria, WorkSafe Queensland, WorkSafe Tasmania or SafeWork Australia. See ‘Where to get help’ on page 6.

An example of a potential Occupational Health and Safety issue could be the following:

Example 1. Kathleen’s domestic partner stalks her and makes abusive phone calls to her whilst she is at work.

Workplace Bullying

Under the *Fair Work Act 2009* workplace bullying occurs when *‘an individual or group of individuals repeatedly behaves unreasonably towards a worker or group of workers and the behaviour creates a risk to health and safety’*.

However, reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

Situations of workplace bullying could arise where you work in the same workplace as your domestic partner or are bullied by a fellow employee as a result of your experience of family and domestic violence.

In such circumstances, you may be able to apply for a ‘stop bullying order’. For more information, please refer to JobWatch’s ‘Workplace Bullying’ infosheet.

Termination of Employment

Unfair Dismissal

For a dismissal to be ‘unfair’, it must be considered either ‘harsh, unjust or unreasonable’ and not a case of genuine redundancy. A number of factors are taken into account in deciding this including whether there was a valid reason for your dismissal, whether there was procedural fairness and any other relevant matters. Family and domestic violence could be taken into account, weighing towards the dismissal being seen as ‘harsh’, particularly if the employer is aware that you are experiencing family and domestic violence. Additionally, family and domestic violence and related issues may not be a valid reason for dismissal in relation to your capacity or conduct at work.

Example 1. Hoda obtained an intervention order against her husband who also worked in the same workplace. As a result, the employer decided to dismiss Hoda because of her personal situation. This is an example of an unfair dismissal because the reason for Hoda’s dismissal did not relate to her capacity or conduct at work.

You must file this claim at the Fair Work Commission within **21 days** of your dismissal taking effect however there are a number of eligibility criteria which must first be met. For more information, see JobWatch’s ‘unfair dismissal’ infosheet.

General Protections Dispute – Termination Claim

It is also unlawful to terminate your employment because of a protected ground. Examples may include the following:

Example 1. Jane’s employer hears that she is considering making a request for flexible working arrangements. As a result, the employer terminated her employment. This may be an example of adverse action for proposing to exercise a workplace right.

Example 2. Kim’s Enterprise Agreement provides her with a right to take domestic violence leave. Upon Kim’s return from this leave, her employment is terminated. This may be an example of adverse action for exercising a workplace right.

You must file this claim at the Fair Work Commission within **21 days** of the date your dismissal took effect. For more information, see JobWatch’s ‘General Protections Dispute – Termination Claim’ infosheet.

TEMPORARY ABSENCE FROM WORK DUE TO ILLNESS OR INJURY

Termination on the basis of a temporary absence from work due to illness or injury, may also be the subject of a General Protections Dispute – Termination claim.

A temporary absence is an absence of not more than 3 months, either in a single block or in separate periods, within 12 months, unless you were on paid sick leave for the duration of the absence.

You must file this claim at the Fair Work Commission within **21 days** of the date your dismissal took effect. For more information refer to JobWatch’s ‘General Protections Dispute - Termination Claim’ Infosheet.

Where to get help

General/Federal

Australian Human Rights Commission

(Complaints Infoline)

1300 656 419

(General Enquiries)

1300 369 711

<https://www.humanrights.gov.au/>

Fair Work Commission Helpline

1300 799 675

<https://www.fwc.gov.au/>

National Association of Community Legal Centres (*for your local CLC*)

(02) 9264 9595

<http://www.naclc.org.au/>

Job Watch Inc.

Metro: (03) 9662 1933

(Telephone interpreters available for non-English speakers.)

Rural: 1800 331 617

<http://www.jobwatch.org.au>

ACTU Member Connect	(03) 9664 7333 1300 362 223 http://www.actu.org.au/
Victoria	
Law Institute of Victoria Legal Referral Service	(03) 9607 9311 https://www.liv.asn.au/
Workcover Assist	(03) 9941 0537 http://www.workcoverassist.vic.gov.au/
WorkSafe Victoria Advisory Service	(03) 9641 1444 1800 136 089 http://www.worksafe.vic.gov.au/
Victoria Police (Switchboard)	(03) 9247 6666 http://www.police.vic.gov.au/content.asp?
Victoria Trades Hall Council	(03) 9639 6144 http://www.vthc.org.au/
Victorian Civil & Administrative Tribunal	(03) 9628 9900 https://www.vcat.vic.gov.au/
Victorian Equal Opportunity & Human Rights Commission (interpreter)	1300 292 153 1300 152 494 http://www.humanrightscommission.vic.gov.au/
Victoria Legal Aid	1300 792 387 https://www.legalaid.vic.gov.au/
Tasmania	
Law Society of Tasmania	(03) 6234 4133 http://lst.org.au/
Legal Aid Commission Tasmania	1300 366 611 www.legalaid.tas.gov.au/

WorkSafe Tasmania	1300 366 322 http://www.worksafe.tas.gov.au/
Tasmanian Police	(03) 6230 2111 http://www.police.tas.gov.au/
Equal Opportunity Tasmania	1300 305 062 http://equalopportunity.tas.gov.au/
Anti-discrimination Tribunal (Tas)	1300 135 513 http://www.justice.tas.gov.au/tribunals/tri-Discrimination_Tribunal
Unions Tasmania	(03) 6234 9553 http://unionstas.com.au
Queensland	
Anti-discrimination Commission Queensland	1300 130 670 https://www.adcq.qld.gov.au/
Queensland Civil and Administrative Tribunal	1300 753 228 http://www.qcat.qld.gov.au/
Queensland Police	131 444 https://www.police.qld.gov.au/
Legal Aid Queensland	1300 65 11 88 www.legalaid.qld.gov.au/
Law Society of Queensland	1300 367 757 https://www.qls.com.au/Home
WorkSafe Queensland	1300 362 128 https://www.worksafe.qld.gov.au
Queensland Council of Unions	(07) 3010 2555 http://queenslandunions.org/

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Jobwatch Inc | Metro (03) 9662 1933 | Regional 1800 331 617 | www.jobwatch.org.au

Monday to Friday from 9:00am until 5:00pm and until 8:30pm every Wednesday (AEDT)