

Parental Leave

This Fact Sheet explains your entitlement to unpaid parental leave and how to make sure you are eligible to return to the same position you held before your unpaid parental leave began.

It is also designed to help employees understand the interaction between parental leave and redundancy. It provides options for employees to consider to reduce the risk of their job being made redundant while they are on parental leave, as well as outlining potential legal action if their job is made redundant while they are on parental leave.

Parental leave under the National Employment Standards

If you are a permanent full-time or part-time employee, you may be eligible to take up to **12 months** unpaid parental leave under the *National Employment Standards* if:

- you, your spouse or de facto partner are giving birth to a child or adopting a child under 16 years of age; and
- you have responsibility for the care of your child; and
- you have or would have completed **12 months** of *continuous service* with your employer by the expected date of birth or date of placement of your child or, the starting date of the leave if the leave is taken after another person takes unpaid parental leave.

If you are a casual employee, you may be eligible to take up to **12 months** unpaid parental leave under the National Employment Standards if:

- you have been working for your employer on a regular and systematic basis for at least **12 months** before the expected birth of your child; and
- you have a reasonable expectation of continuing work with the employer on a regular and systematic basis, if not for the birth or adoption of your child.

Applying for unpaid parental leave

It is very important to formally apply for unpaid parental leave under the National Employment Standards to make sure you become eligible for the 'return to work guarantee' (see below).

- You may formally apply for unpaid parental leave by providing your employer with **written notice** letting them know the intended start and end dates of your leave. You must give this notice to your employer at least **10 weeks** before starting your unpaid parental leave or else as soon as you can. It is important to keep a copy of your written notice for your records. You must also give your employer relevant medical evidence if required; for example, a medical certificate.
- At least **4 weeks** before the intended start date of your unpaid parental leave, you must confirm the intended start and end dates of your parental leave with your employer. You must also advise your employer of any changes. It is a good idea to also keep a copy of your confirmation for your records.

National Employment Standards (NES): A set of 10 minimum entitlements that all employers need to comply with.

Continuous Service: A period of time that an employee works for the employer. Any period of leave that the employer has not approved and any unpaid leave do not count towards an employee's service.

Disclaimer

This Fact Sheet 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 Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

Applying for unpaid parental leave (cont.)

- If you cannot give the usual period of notice; for example, if your baby is born prematurely, you can still take unpaid parental leave as long as you provide notice as soon as practicable.
- If you have taken less than **12 months** unpaid parental leave, you may extend your leave by giving your employer written notice of the extension at least **4 weeks** before the end date of the original leave period. The notice must tell your employer the new end date for the leave.
- You can request in writing that your employer extend your unpaid parental leave for longer than **12 months**. The employer must provide a written response to this request. The employer may refuse the request only on reasonable business grounds.

Your employer's options

If you take parental leave under the NES, your employer has a number of options for dealing with your absence. For example, it may:

- Do without your role and duties while you are absent on parental leave; or
- Distribute your duties amongst existing employees while you are on parental leave; or
- Fill your position by hiring a 'replacement employee' pursuant to section 84A of the *Fair Work Act 2009*.

A 'replacement employee' is employed on a temporary basis to perform the role of an employee who is on parental leave and is aware that the person on parental leave has a right to return to their pre-parental leave position when their parental leave has ended.

It may be a reasonable course of action for you to suggest to your employer that it should hire a 'replacement employee' to perform your role while you are on parental leave because, at least then, your role will still be performed by someone rather than be made redundant (see below).

Your employer's obligations

Obligation to Consult with Employees on Unpaid Parental Leave

If you have applied formally for unpaid parental leave under the NES, your employer must consult with you about any decision that is made while you are on parental leave that will have a significant effect on the status, pay or location of your pre-parental leave position. So, if your employer decides to make your position redundant, it is obliged to consult with you. This means your employer must take all reasonable steps to give you information about, and an opportunity to discuss, the effect of its decision to make your position redundant.

Additionally, if your employment is covered by a Modern Award or Enterprise Agreement, your employer also has obligations to consult with you regarding major workplace change as required under the relevant Award or Agreement (if any).

Obligation to Consult with Employees on Unpaid Parental Leave (cont.)

For example, if your employer has made a definite decision to make your position redundant and you are covered by a Modern Award, your employer must notify and discuss the matter with you. Measures to avoid or mitigate the adverse effects of the proposed redundancy should be discussed and your employer must give prompt consideration to any matters you raise in relation to the redundancy. These discussions must start as soon as practicable after your employer has made its decision and for the purposes of such discussions, your employer must provide to you, in writing, all relevant information about the proposed redundancy.

During consultation with your employer, a few issues and options that you may consider discussing to attempt to avoid being dismissed due to redundancy may include the 'return to work guarantee', redeployment to another job within your employer's business, returning to work on a part-time basis or with flexible working arrangements or potentially extending your parental leave to a time when economic conditions may have improved. You may even consider telling your employer that you believe you have legal options and that you are going to obtain legal advice.

If your employer fails to consult with you as required, your employer may have acted unlawfully by breaching the NES and/or the Modern Award/ Enterprise Agreement (if any) and a court may order your employer (including the persons involved in the breach) to pay a financial penalty which could, in certain circumstances, be ordered to be paid to you. You have **6 years** to file in the relevant court from the date of the alleged breach. Any failure to consult with you as required under a Modern Award or Enterprise Agreement (if any) may also make your dismissal due to redundancy an unfair dismissal.

If you are still employed by your employer, you may also seek to activate the dispute resolution procedure under the relevant Modern Award or Enterprise Agreement (if any) regarding your employer's failure to consult as required. If your dispute cannot be resolved at the workplace level, you can refer your dispute to the Fair Work Commission which may conciliate, mediate or arbitrate in relation to your dispute. You should act quickly because this option is only available while you are still an employee of your employer.

Any failure to consult with you by your employer while you were on parental leave could also amount to unlawful discrimination.

Keeping in touch days

The purpose of performing work for your employer on a 'keeping in touch day' is to enable you to keep in touch with your employment in order to facilitate your return to that employment at the end of your parental leave. It seems reasonable to suggest that if you perform your job for your employer on 'keeping in touch days' during your parental leave, then it is more difficult for your employer to say that your position has been made redundant while you were on parental leave when you exercise your right to return to work under the 'return to work guarantee'.

For further assistance, contact JobWatch, your union, or a lawyer.

Fair Work Commission

Phone: 1300 799 675

Website:
fwc.gov.au

Keeping in touch days (cont.)

If you take unpaid parental leave under the NES, you may, with your employer's consent, perform work for your employer for up to **10 days** during your available period of parental leave, i.e. up to **12 months**, and a further **10 days** during any extension of your parental leave, i.e. up to a further **12 months**, by agreement with your employer. These are known as 'keeping in touch days'.

You are entitled to be paid for work performed on a 'keeping in touch day' and performance of that work does not break the continuity of your unpaid parental leave. You can request to work a 'keeping in touch day' from **14 days** after the date of birth of your child and your employer may request you to work a 'keeping in touch day' from **42 days** after the date of birth of your child.

Return to work guarantee

If you have formally applied for unpaid parental leave under the National Employment Standards, then you are eligible for the 'return to work guarantee.'

The 'return to work guarantee' is where you have the right to return to the same position you held before your unpaid parental leave began. If that position is no longer there, you then have the right to an available position for which you are qualified, which is nearest in status and pay to your old job.

Redundancy

A redundancy occurs when the job you were employed to do is no longer required to be performed by anyone due to changes in your employer's operational structure. The changes may be caused by economic reasons, for example a downturn in sales or production, or because your employer makes a decision to structure its business differently. An employee whose position is made redundant and who is not redeployed within the employer's business or within an associated entity of the employer, has been 'retrenched', which means they have been dismissed due to redundancy.

How can I reduce the risk of my job being made redundant while I am on parental leave?

Ultimately, your employer has the right to structure its business any way it thinks fit subject to compliance with relevant laws including unfair dismissal, General Protections and anti-discrimination. Nevertheless, there are some simple steps that you can take which may reduce the risk of your position being made redundant while you are on parental leave including:

- applying formally for unpaid parental leave under the NES thereby activating the 'return to work guarantee';
- suggesting that your employer fill your position with a temporary 'replacement employee' (possibly someone you know) rather than distribute your duties amongst existing employees;
- reminding your employer that it is obliged to consult with you while you are on parental leave regarding any decision that will have a significant effect on your job; and
- using your 'keeping in touch days' strategically to create evidence that your job has not been made redundant.

Note!

Positions that are overseas or within an associated entity of your employer, e.g. a position with a subsidiary company, may be an 'available position.'

Please see JobWatch's 'Redundancy' Fact Sheet for more information about redundancy and redeployment, redundancy pay and other entitlements that may be due on termination of employment.

How can I reduce the risk of my job being made redundant while I am on parental leave? (cont.)

Also, remember that if your employer fails to consult with you as required while you are on parental leave, you must still be employed by your employer to activate the dispute resolution procedure under the relevant Modern Award or Enterprise Agreement (if any), so act quickly if you wish to challenge your employer's lack of consultation.

What rights do I have if my job is made redundant while I am on parental leave?

If, while you are on parental leave, your employer distributes your duties among existing staff members or does without your job entirely and when you attempt to come back to work after your parental leave, you are told that your position has been made redundant, you may be able to make a legal claim regarding the termination of your employment.

Whether or not you have a good legal case and which claim you should choose to make will depend upon the facts of your particular situation.

You should obtain independent legal advice as soon as possible regarding these issues because you only have **21 days** from the date your dismissal takes effect to file an unfair dismissal or General Protections Dispute – Termination claim at the Fair Work Commission, **24 months** to file a discrimination complaint at the Australian Human Rights Commission (AHRC), or **12 months** to file a discrimination complaint at your state's anti-discrimination commission or tribunal.

As you can only make one claim regarding the termination of your employment, you will have to choose the claim and the jurisdiction that best suits your particular situation.

These legal options are in addition to any claim for your entitlements on termination such as unpaid pay instead of notice and redundancy pay. You have **6 years** from the date your entitlements fell due to file a claim in an eligible court. For further assistance, contact JobWatch, your union, or a lawyer.

Flexible working arrangements

If you are parent of a child who is of school age or younger (or have responsibility for the care of such a child) you may request a change in working arrangements to accommodate this. For example, you may request to work part-time to assist you to care for the child.

The employer should provide a written response to the request. The employer may refuse the request only on reasonable business grounds. You are not able to seek review of or appeal the refusal of the request.

Please see the following JobWatch Fact Sheets for relevant information:

- Unfair Dismissal
- General Protections Dispute – Termination claim
- General Protections Dispute – Non-Termination claim
- Pregnancy and Breastfeeding Discrimination
- Carer, Parent and Family Discrimination
- Getting Paid and Underpayments

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Australian Human Rights Commission	1300 656 419
Victorian Equal Opportunity and Human Rights Commission	1300 292 153
Victorian Civil and Administrative Tribunal	1300 018 228
Queensland Human Rights Commission	1300 130 670
Queensland Industrial Relations Commission	1300 592 987
Equal Opportunity Tasmania	1300 305 062
Tasmanian Civil and Administrative Tribunal	1800 657 500
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.