Parental Leave – Common Questions Answered

It is the busiest time of the year for the business and an employee has requested to take an extended period of time off because they are about to become a parent for the first time. What do you do? Do you have to allow the employee to take time off? How long can the employee request to be off for? Can the employee extend their time off? Do you have to pay the employee?

The answer to this common question is contained in the *Fair Work Act 2009* (Cth) (***Fair Work Act***) and this article intends to explore some of the common questions, and myths, around parental leave in Australia.

When is an employee entitled to Parental Leave?

Under the *Fair Work Act* an employee will have access to unpaid parental leave if the employee has completed 12 months of continuous service with the employer. Parental leave allows an employee to take up to 12 months' unpaid leave with a guaranteed return to the role they were in prior to going on leave (or if that role no longer exists, a position of similar pay and status).

Parental leave must be taken in one continuous period and cannot be broken into multiple periods of leave. Parents can take a combined 12 months of Parental Leave however, only 8 weeks of parental leave can be taken by the parents at the same time.

An employee on parental leave has a return to work guarantee. This means that the employee has the right, immediately following a period of parental leave, to return to their pre-parental leave position, or if that position no longer exists, an available position nearest in status and pay.

It is important for employers to remember that they also have obligations under the *Fair Work Act* when engaging replacement employees. In particular, before engaging a replacement an employee the employer must notify the replacement employee that their engagement is temporary, that the employee on parental leave has a return to work guarantee, and notify the replacement of the rights of the employee on parental leave in the case of a stillbirth, death or where they cease to have responsibility for the care of the child. These requirements come from section 84A of the *Fair Work Act.*

How much notice can an Employer expect to receive?

There are notice and evidence requirements that employees must provide to employers, should they wish to take a period of parental leave under the *Fair Work Act* including that:

- an employee must provide at least 10 weeks' notice of their intention to take parental leave; and
- 4 weeks prior to the commencement of parental leave, the employee must confirm the anticipated start and end dates of the period of leave.

An employee can make a request to extend their period of parental leave for up to an additional 12 months, however, the employer is able to refuse the request on reasonable business grounds, including, but not limited to, if the employer:

- would experience a significant loss in profit or revenue;

- could not find a replacement for the role; or
- would experience significant operational difficulties.

Is there a requirement to pay for Parental Leave?

Employees who take parental leave under the *Fair Work Act* will typically be paid by the Government during the period of leave under the Department of Human Services Paid Parental Leave Scheme.

There are a number of myths about the Paid Parental Leave Scheme, including that it is employer funded, that it does not apply to small business, and that the employer must determine eligibility for payment.

The Paid Parental Leave Scheme applies to all employers, regardless of the size of the business or number of employees. The Paid Parental Leave is funded by the Australian Government, however in most cases the employer will provide the payment once the employer has received the funds from the Government.

The employer is not responsible for determining an employee's eligibility under the Paid Parental Leave Scheme, the employee is responsible for lodging their claim with the Australian Government who then determines eligibility.

Where an employee is eligible for Paid Parental Leave, they will be entitled to up to 18 weeks leave paid at the national minimum wage (currently set at $719.20). In addition, the employees' partner may be eligible for Dad and Partner Pay for up to 2 weeks.

What records must be kept?

Businesses need to ensure they keep accurate records, in addition to the ordinary pay slip and record keeping obligations. In particular the following parental leave records must be kept:

- the amount of Parental Leave Pay received from the government for each employee;
- the date each parental leave payment was due to the employee;
- the period each payment covers;
- the amount of each payment including the tax withheld;
- identify each payment as Parental Leave Pay under the Australian Government Paid Parental Leave Scheme; and
- the amount of any deductions, if any, from each payment.

Becoming an Employer of Choice

Whilst employees may access unpaid parental leave upon satisfaction of the relevant provisions of the *Fair Work Act*, and paid leave from the Government, businesses may position themselves as an employer of choice by implementing a Company Paid Parental Leave Policy, which provides employees with paid leave separate to the government's paid leave scheme. Whilst this is optional it is an effective tool to retain staff or incentivise staff to return after their time parental leave period ends.

Businesses should also consider implementing a flexible work policy which allows those employees with parenting responsibilities to have greater flexibility in the workplace, particularly in relation to when and how an employee works their ordinary hours.

If you have any questions in relation to Parental Leave or becoming an employer of choice, please contact the VANA Employment Relations team on (02) 9083 0091.

How to Manage an Unauthorised Absence from Work.

An unauthorised absence is when an employee fails to come to work without either the absence being authorised, or without the absence being due to genuine sickness or carer responsibilities. This includes an absence from work contrary to the lawful direction of the employer.

What does not count as an unauthorised absence?

There are certain circumstances that are not to be included as an unauthorised absence:

1. When an employee has been approved of annual leave in advance;
2. When the absence has been authorised as compassionate leave or granted as special leave;
3. When the absence is a genuine sickness and in compliance with any requirements for reporting and evidence under a sickness absence policy.
4. When an employee is absent from work due to maternity or paternity leave; and
5. When an employee is absent from work due to a statutory right, such as time off for appointments i.e. antenatal care, or leave to search for work when an employee has been made redundant.

In the circumstances that an employee fails to attend work without an authorised absence, it must be for a reason that is sufficient to justify the immediate absence. Instances such as the sudden death of a family member or the employee being involved in a serious accident are examples that may be seen as justifiable reasons. On the other hand, confusion about shifts or working days may not be seen as justifiable reasons and is an unauthorised unpaid absence.

Employers can only inform employees of a situation of unauthorised unpaid absence when no reasons have been given at all by the employee, if the employer requests a medical certificate but the employee does not provide one this could be a valid unauthorised absence and the employee will not need to be paid.

However, in circumstances where an employee alleged there were unwell but has not provided a medical certificate straight away, caution should be exercised as the employee may have a genuine reason for not being able to meet the requirement to provide a certificate as soon as possible after the request, such as the lack of available appointments.

What is good practice of absence management?

In the first instance reasonable attempts should be made to contact the employee who has failed to attend work without prior authorisation and without reporting any sickness absence.

Periodic attempts to contact the employee should be made throughout the day including telephone calls to their contact numbers, emails and/or text messages. In some circumstances this may include contacting the emergency contact of the employee to request that the employee make contact.

It is prudent to make a detailed record of the attempts made to contact the employee including times of the calls and any voice messages left.

Employers should have a sickness absence policy in place that covers the procedures in reporting a sickness. This should include the following:

- who the employee is required to contact to report their sickness;

- when they need to inform the business;
- when their return date to work will be; and
- that they are required to provide a medical certificate.

Can an unauthorised absence be a disciplinary offence?

When the employee returns to work or makes contact to explain their absence it would be reasonable to invite the employee to a disciplinary meeting (with sufficient notice) to answer the allegation of unauthorised absence.

With the proper undertaking of absence management, and with strong policies in place, an employer can be protected from the detrimental aspects of unauthorised absence. This will reduce business disruption, prevent negative sentiment and low morale in the other staff, and reduce the costs that are associated with unauthorised absence.

For any further enquiries regarding an unauthorised absence from work please contact the VANA Employment Relations team on (02) 9083 0091.

Police checks – Use them but don't abuse them

Employers have a right to request police checks from employees. Indeed, certain forms of criminal history will legally bar individuals from achieving employment in certain occupations. Yet, while employers want to employ the most suitable candidate for a role, using police checks to achieve this should be done carefully.

In 2012, the AHRC found Railcorp discriminated against a candidate based on criminal record. The candidate applied for a Market Analyst role but was subsequently denied the position due to previous middle-range drink driving offences. The Commission found the candidate's criminal record was irrelevant to the position, thereby recommending Railcorp pay $7,500 in compensation.

It is evidently important that criminal records are used appropriately in justifying any adverse action against employees or candidates. The rationale: if they've done the time, forget the crime.

Criminal record is a ground of discrimination under the *Australian Human Rights Commission Regulations 1989* (Cth) (AHRC Regulations), which gives effect to Australia's obligations under the *International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation* ('ILO 111'). This includes discrimination based on police checks, as well as circumstances surrounding convictions. The AHRC Regulations apply to all employers and employees across Australia. While discrimination based on criminal record is not classified as 'unlawful discrimination', meaning remedies cannot be sought from the Federal Court or Federal Circuit Court of Australia, the Commission may seek to affect a settlement for any appropriate inquiries. The Commission may also make recommendations upon situations they deem discrimination has occurred, including for payment of compensation. These, however, are not enforceable.

However, the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) does provide an "inherent requirements" exception to discrimination in employment. The AHRC Act section 3(1) states,

> "It is not discrimination if the person's criminal record means that he or she is unable to perform the inherent requirements of the particular job."

As such, the Australian Human Right Commission suggests it is best practice to only request criminal records where the employer has identified that certain criminal convictions or offences are relevant to the inherent requirements of the position.

Whilst at a federal leave, criminal history may not be 'unlawful discrimination', employers in Tasmania and the Northern Territory should be acutely aware of respective state and territory legislation which deem it unlawful to discriminate based on an irrelevant criminal record.

Criminal records will be deemed irrelevant if, for example, charges were withdrawn or the conviction is not relevant to the action taken, e.g. they were denied an employment opportunity based on a conviction, but it did not affect their ability to perform the role competently. If found to have breached such legislation courts may enforce remedies, including compensation.

For more information police checks and criminal records please contact the VANA Employment Relations team on (02) 9083 0091.