

31 May 2018

NAT 011/18

New Long Service Leave legislation in Victoria – changes to employer obligations

SUMMARY

The **Long Service Leave Act 2018** has been passed by the Victorian Parliament. The Act replaces the *Long Service Leave Act 1992* (Vic) and introduces changes to the long service leave entitlements of employees and the obligations of employers.

The legislation operates from a date to be proclaimed. We have been advised by the Victorian Government that the legislation will be proclaimed to operate from **1 October 2018**.

Long Service Leave Act 2018 (Vic) – Summary of changes

The *Long Service Leave Act 2018* (Vic) has been passed by Parliament and will implement the following changes:

- There will be flexibility for employees to take long service leave in any number of periods with the agreement of the employer, including single days of leave.
- An employee will be able to take long service leave after seven years of continuous employment. (Currently pro rata long service leave is payable on termination of employment after seven years of service but leave can only be taken after 10 years of service).
- New averaging arrangements will apply when calculating entitlements for employees who have worked different ordinary hours during their employment with a company.
- Unpaid parental leave that is taken after the date when the legislation comes into operation will count as continuous employment. (In most circumstances, only the first 52 weeks of leave is included).
- Where employment ends and the employee is re-employed within 12 weeks, continuous employment will not be broken.

- New continuity of employment arrangements will apply for casual and seasonal workers.
- New transfer of business / employment arrangements will apply.
- Penalties for breaches of the long service leave legislation will be increased.
- Departmental officers will have new inspection and enforcement powers.

What is the operative date?

The legislation operates from a date to be proclaimed. We have been advised by the Victorian Government that the legislation will be proclaimed to operate from **1 October 2018**.

At what rate does long service leave accrue?

An employee is entitled to long service leave equal to **1/60th of the employee's total period of "continuous employment"** less any period of long service leave taken during that period.

This equates to 6.067 weeks of long service leave for 7 years of continuous employment, 8.667 weeks of long service leave for 10 years of continuous employment and 13 weeks of long service leave for 15 years of continuous employment.

The accrual rate under the new legislation is the same as the accrual rate under the current legislation, but a more generous definition of “**continuous employment**” applies (see **Attachment A**).

What is the meaning of “**continuous employment**” and what absences from work are included when calculating the period of “**continuous employment**”?

See **Attachment A**.

When is an employee entitled to take long service leave?

An employee will be entitled to take long service leave after **seven years** of continuous employment with one employer.

Does long service leave include public holidays and/or annual leave?

Long service leave does not include any public holidays that occur or any annual leave that is taken, during the period when long service leave is taken.

Is an employer required to grant an employee’s request to take long service leave?

An employer must grant any employee’s request to take long service leave as soon as practicable after receiving the request, unless the employer has reasonable business grounds for refusing the request.

Reasonable business grounds are defined in the Act and include where:

- There is no capacity to change the working arrangements of other employees to accommodate the long service leave;
- It is impractical to change the working arrangements of other employees, or recruit new employees to accommodate the long service leave;
- The long service leave requested is likely to result in a significant loss in efficiency or productivity;
- The long service leave requested is likely to have a significant negative impact on customer service.

Can an employer direct an employee to take long service leave?

An employer may direct an employee to take long service leave at a specified time and for a specified period by giving the employee at least 12 weeks’ written notice.

Long service leave flexibility

An employee can request to take long service leave in any number of periods, including single days of leave. Employees may also request a period of long service leave to be taken at half pay. An employer must grant such requests, unless the employer has reasonable business grounds for refusing the request.

An employer may agree to an employee taking long service in advance and may make the relevant deduction from any payment payable to the employee if the employment ends before the employee becomes entitled to the leave.

At what rate is long service leave paid?

Long service leave is calculated on an employee’s “**ordinary pay**”, which means:

- “the pay that an employee is entitled to receive on the day on which the employee starts long service leave, calculated on the employee’s “**normal weekly hours**” at the employee’s “**ordinary time rate of pay**”; and
- “includes the cash value of any board or lodging that an employee receives from the employee’s employer”.

If an “**ordinary time rate of pay**” is not fixed under the relevant employment agreement, the employee’s “**ordinary time rate of pay**” must be calculated in accordance with a formula in s.15(2) of the Act.

If “**normal weekly hours**” are not fixed under the relevant employment agreement, or have varied one or more times in the 104 weeks before the employee starts long service leave, the “**normal weekly hours**” must be calculated in accordance with a formula in s.16 of the Act.

What maximum penalties apply for breaches of the Act?

Hefty maximum financial penalties apply for breaches of the Act which can accumulate for every day that the offence continues.

If a body corporate has committed an offence under the Act, directors and senior managers of the body corporate also commit an offence, and are criminally liable, if they authorised, permitted or were knowingly concerned in any way in the commission of the offence.

The legislation gives officers of the Victorian Department of Economic Development, Jobs, Transport and Resources the power to investigate breaches of the Act and to pursue prosecutions.

Do you require further advice?

For more information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77, Monday to Friday between 8.30am and 8.30pm EST.

Should you require detailed advice relating to long service leave provisions in contracts of employment, company policies or enterprise agreements, our team of professional workplace relations advisers and lawyers at [Ai Group](#) and [Ai Group Workplace Lawyers](#) are available to assist you.



Stephen Smith
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ATTACHMENT A

CONTINUITY OF EMPLOYMENT AND ABSENCES THAT ARE INCLUDED WHEN CALCULATING THE LENGTH OF A PERIOD OF “CONTINUOUS EMPLOYMENT”

What absences do not break the continuity of an employee’s employment?

Under the *Long Service Leave Act 2018* (Vic), the following absences do not break the continuity of an employee’s employment:

- An absence caused by the employee taking:
 - annual leave;
 - long service leave;
 - paid parental leave, other than in the case of a casual or seasonal employee;
 - in the case of a casual or seasonal employee, paid parental leave that is not longer than 104 weeks;
 - unpaid parental leave, other than in the case of a casual or seasonal employee. (See below for the amount of unpaid leave that is counted as continuous employment);
 - in the case of a casual or seasonal employee, unpaid parental leave that is not longer than 104 weeks. (See below for the amount of unpaid leave that is counted as continuous employment);
 - carer's leave;
 - leave on account of illness or injury;
 - any other form of leave that is provided for under the relevant employment agreement.
- An absence caused by the termination of the employee's employment:
 - at the initiative of the employer or the employee, if the employee is re-employed by the employer within 12 weeks after the termination;
 - because of the expiration of a specified term of an employment contract, if the employee is re-employed by the employer within 12 weeks after the expiration; or
 - because the employee's apprenticeship is completed, if the employee is re-employed by the employer within 52 weeks after the end of the apprenticeship.
- An absence caused by the employer terminating or interrupting the employment with the intention of avoiding an obligation in relation to long service leave;
- An absence arising solely from the transfer of assets from one employer to another, if the employee usually performs duties which are connected with those assets;
- A stand down in circumstances where the employee cannot be usefully employed because of industrial action, a breakdown of machinery or equipment or a stoppage of work for which the employer cannot reasonably be held responsible, and where there is no employment agreement applying to the employer and employee providing for the employer to stand down the employee in such circumstances.

A casual or seasonal employee's employment is taken to be continuous despite an absence from work that is longer than 12 weeks if:

- the casual or seasonal employee and the employer so agree before the start of the absence;
- the absence is due to the terms of engagement of the casual or seasonal employee;
- the absence is caused by seasonal factors; or
- the employee has been employed by the employer on a regular and systematic basis and the employee has a reasonable expectation of being re-engaged by the employer.

What absences are taken to be periods of employment when calculating the length of a period of continuous employment?

The following periods of absence from work are taken to be periods of employment when calculating the length of an employee's period of continuous employment:

- a period of paid leave;
- if a period of unpaid leave is less than or is 52 weeks, that period;
- if a period of unpaid leave is more than 52 weeks, the initial 52 weeks;
- if a period of unpaid leave is more than 52 weeks, the entire period of unpaid leave if:
 - the period of absence is taken to be a period of employment in accordance with the relevant employment agreement; or
 - the employer and the employee agreed in writing before the leave was taken that the period is taken to be a period of employment; or
 - the leave is taken on account of illness or injury or is any other form of leave provided for under the relevant employment agreement;
- a period of absence arising from:
 - an interruption to, or termination of, employment caused by the employer with the intention of avoiding an obligation in relation to long service leave; or
 - the transfer of assets from one employer to another if the employee usually performs duties which are connected with those assets.
- If an employee enters into a contract of employment with an employer within 52 weeks after completing an apprenticeship with the employer, the period of apprenticeship is taken to be a period of employment when calculating the length of the employee's period of continuous employment.

The following periods of absence from work are not taken to be periods of employment when calculating the length of an employee's period of "continuous employment":

- a period of unpaid leave in excess of 52 weeks (other than the initial 52 weeks) unless:
 - the period of absence is taken to be a period of employment in accordance with the relevant employment agreement; or
 - the employer and the employee agreed in writing before the leave was taken that the period is taken to be a period of employment; or

- the unpaid leave is taken on account of illness or injury or is any other form of leave provided for under the relevant employment agreement;
- an absence following the ending of the employee's employment:
 - if the employee is re-employed by the employer within 12 weeks after the termination;
 - because of the expiration of a specified term of an employment contract, if the employee is re-employed by the employer within 12 weeks after the expiration;
- an absence caused by an employer standing down the employee where the employee cannot be usefully employed because of industrial action, a breakdown of machinery or equipment or a stoppage of work for which the employer cannot reasonably be held responsible, and where there is no employment agreement applying to the employer and employee providing for the employer to stand down the employee in such circumstances.