

# Modern Award Update: Compulsory family & domestic violence leave

30 August 2018

7 min. read

Worthwhile read for: HR Professional, Business Owner, Employer

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## Key issues

- From 1 August, all national system employees covered by most modern awards are entitled to family and domestic violence leave
- This applies to all employees suffering family and domestic violence who need time off work to deal with the impact
- Employers need to be aware of the requirements to ensure they are complying with modern awards

As part of the four yearly modern award review process, the Fair Work Commission (**Commission**) determined that most modern industry awards should be updated to include a clause providing leave entitlements to employees in circumstances of family and domestic violence<sup>1</sup>.

As a result, from 1 August 2018, all employees covered by most modern awards<sup>2</sup> are now entitled to Family and Domestic Violence Leave (**FDV Leave**) which provides five days' unpaid leave in circumstances of family and domestic violence.

Family and domestic violence is defined (by the new modern award clause) to mean violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

## What are the entitlements?

The inclusion of FDV Leave in most modern awards provides all employees covered by those modern awards **five days' unpaid leave** in circumstances where an employee is:

- experiencing family and domestic violence; and
- needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

This may include a situation where an employee is required to make arrangements for his or her safety or the safety of a family member (including relocation), attending court hearings or accessing police assistance.

It is critical for employers to note that, for employees covered by an applicable modern award:

- the full entitlement to FDV Leave is available to all employees, including full-time, part-time and casual (not pro-rated);
- FDV Leave is available in full at the commencement of each 12 month period of the employee's employment (and does not accrue progressively);
- the leave entitlement does not accumulate from year to year; and
- an employee is not required to utilise his or her paid leave entitlements prior to accessing FDV Leave.

## **Notice and evidence requirements**

Where an employee seeks to access FDV Leave, they must notify their employer as soon as practicable (which in some circumstances may be after the commencement of the leave) and advise the employer of the period of leave or the expected period needed.

When an employee has provided notice of his or her requirement to take FDV Leave, the employer is entitled to request evidence for the entitlement to take the leave. The evidence must be such that would satisfy a reasonable person. It may include, as examples, a document issued by the police service, a court, a doctor (including a medical certificate), maternal and child healthcare nurse, a family violence support service, a lawyer or a statutory declaration.

The modern award clause imposes specific obligations on employers relating to confidentiality. Due to the sensitive nature of this type of request and the evidence relied upon for the entitlement to take the leave, it is essential that the employee's information is kept confidential. An employer must ensure that such information is not, without the employee's consent, disclosed in any manner unless required by law or where necessary to prevent a serious threat to the life, health and safety of any individual.

## **Who has access?**

The entitlement to FDV Leave applies to all employees (including casuals) who are covered by a relevant modern award.<sup>3</sup> Currently, FDV Leave is not, by default, available to employees who are:

- covered by enterprise awards;
- covered by state referenced public sector awards;
- covered by enterprise and other registered agreements; or
- award and agreement free.

While the above group of employees do not have access to FDV Leave entitlements under the modern award model, there has been a noticeable shift by employers to introduce FDV Leave entitlements, typically more generous than the modern award model. In 2015, Telstra introduced a policy providing an entitlement for its employees to 10 days' paid FDV Leave. Similarly in 2018, the Western Australian Water Corporation negotiated into its Enterprise Agreement, an entitlement of 10 days' paid FDV Leave.

## **State systems**

### **Western Australia**

The Premier's Circular 2017/07 Family and Domestic Violence – Paid Leave and Workplace Support issued on 18 August 2018 entitles all Western Australian public sector employees to:

- 10 days' paid non-cumulative FDV Leave;
- reinforced flexible work arrangements;
- safety plan arrangements; and
- continued access to employer-sponsored confidential counselling services.

Where public sector employees have exhausted their respective paid FDV Leave entitlements, they are entitled to an additional two days' unpaid leave per permissible occasion. A model clause has been prepared and will be incorporated into public sector industrial instruments as they are replaced.

These entitlements apply only to Western Australian employees who are public sector employees.

A ministerial review of the State Industrial Relations System was completed in June 2018 with an initial report detailing the recommendation that there should be a consistent set of statutory minimum conditions for all public and private sector employees in Western Australian, known collectively as the State Employment Standards (**SES**), therefore replacing the *Industrial Relations Act 1979* (WA) and the *Minimum Conditions of Employment Act 1993* (WA). Whether the recommended SES will include entitlements for FDV Leave is yet to be determined.

## Queensland

Public sector employees in Queensland, unless employed casually, have an entitlement to 10 days paid 'domestic and family violence leave' in any year. Casual employees have an entitlement to take unpaid leave. Otherwise, the entitlement is similar to the modern award model.

## National Employment Standards (NES)

The *Fair Work Amendment (Improving National Employment Standards) Bill 2018* (**Bill**) seeks to amend the current NES so that an employee who is experiencing FDV is entitled to up to 10 days' paid FDV Leave per year or, if that entitlement has been exhausted; two days of unpaid FDV Leave for each permissible occasion.

If passed, the Bill will extend an FDV Leave entitlement to all national system employees - not just those workers to whom relevant modern awards apply - as part of the national safety net of terms and conditions of employment.

## Compliance and policies

As with other award entitlements and obligations, failure to comply with them can result in prosecution for civil penalties.

To assist your business in managing and supporting a worker affected by family and domestic violence and with compliance generally, you may wish to introduce a specific workplace policy detailing:

- a description of what constitutes family and domestic violence;
- confidentiality considerations and obligations;
- evidence requirements;
- responsibilities of managers; and
- the intersection of other paid leave and flexible work arrangements.

If you would like to discuss these recent award changes in detail or require any assistance with your business' workplace policies, please do not hesitate to contact any member of our [workplace and employment](#) team.

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1. During this process the Commission accepted evidence that violence against women costs \$21.7 billion annually, which includes the cost of health services, loss of productivity and increased demand on the criminal justice system. In their considerations, the Commission ruled that current workplace entitlements were not sufficient to cover the special case of domestic violence.

2. Except those employees covered by the Australian Government Industry Award 2016, the Road Transport and Distribution Award 2010 and the Road Transport (Long Distance Operations) Award 2010.

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