

## 10 Days Paid Family and Domestic Leave – New NES Entitlement

14 February 2023, *BN8*

### Introduction

#### What is paid FDV leave?

Family and domestic violence leave (**FDV leave**) is leave taken by victim-survivors in connection with family and domestic violence. FDV leave is unique amongst other forms of leave in terms of the range of absences from work that it can potentially cover – from medical and other appointments to court dates, to time off associated with making arrangements for safety, including relocation.

FDV leave can be provided for under legislation, modern awards or enterprise agreements.

#### Current NES entitlement and new NES entitlement

Since 2018, the National Employment Standards (**NES**) in the *Fair Work Act 2009 (Cth)* (**FW Act**) have provided for up to 5 days *unpaid* FDV Leave in a 12 month period.<sup>1</sup> The recently passed *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (**FDV Leave Act**) amends the NES to provide for up to 10 days of *paid* FDV Leave every 12 months. Those engaged by employers with more than 15 employees will have access to the new NES entitlement from 1 February 2023, and those with employers with less than 15 employees will have access from 1 August 2023.

The entitlement to 10 days paid FDV leave will replace the existing entitlement to 5 days unpaid FDV leave in the NES. Employees can still access 5 days of unpaid FDV leave until the new paid leave entitlement becomes available to them, or any entitlement to FDV leave in an award, enterprise agreement, other legislation or policy applies to them.

#### Commencement of new NES entitlement

The FDV Leave Act received Royal Assent on 9 November 2022.<sup>2</sup> The FDV Leave Act amends the FW Act to provide for paid FDV leave in the NES.

Under the new provisions, paid FDV leave will be available under the NES:

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<sup>1</sup> FW Act Part 2-2 Div 7 Sub-div CA

<sup>2</sup> Australian Parliament House, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022, <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6882](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6882)>

- From 1 February 2023 for non-small business employers and employees ;<sup>3</sup>
- From 1 August 2023 for small business employers and employees.<sup>4</sup>

Section 23 of the FW Act defines a small business employer as one with fewer than 15 employees.

#### *Example*

Austin is one of 50 employees at their workplace. Because their employer is not a small business, paid FDV leave is available to them under the NES from 1 February 2023.

### **How is FDV leave different to other leave entitlements?**

Significantly, the full ten-day entitlement to paid FDV leave will be available upfront to full time, part-time and casual workers, and is paid at an employee's full rate of pay. This distinguishes it from most other forms of paid leave, which are usually not available to casuals, available on a pro rata basis to part-time employees, and paid at an employee's base rate of pay. Employers are also prohibited from including information regarding paid FDV leave in a payslip, to ensure the safety and privacy of employees needing to take the leave.<sup>5</sup>

Further, if *International Labour Organization Convention concerning the elimination of violence and harassment in the world of work (No. 190)* (Geneva, 21 June 2019) (**C.190**) is ratified, Schedule 2 of the FDV Leave Act will extend the NES entitlement to paid FDV leave to non-national system employees, making the entitlement a truly universal one.<sup>6</sup>

### **In what circumstances will Paid FDV leave be available under the NES?**

#### **Definition of family and domestic violence**

The new provisions define family and domestic violence as:<sup>7</sup>

- Violent, threatening or other abusive behaviour;
- By:
  - a member of the employee's immediate family (as defined in the FW Act s 12); or
  - someone related to the employee according to Aboriginal and Torres Strait Islander kinship rules; or
  - a member of an employee's household; or,
  - a current or former intimate partner of an employee

<sup>3</sup> FDV Leave Act, new FW Act Sch 1 Part 12 sub-cl 52(1)

<sup>4</sup> FDV Leave Act, new FW Act Sch 1 Part 12 sub-cl 52(3)

<sup>5</sup> New FW Act s 757BA as inserted by FDV Leave Act Sch 2 cl 9; Schedule 1, Part 1, Division 2 of the *Fair Work Legislation Amendment Regulations 2022*, made on 8 December 2022 (accessible at <https://www.legislation.gov.au/Details/F2022L01640>)

<sup>6</sup>The Govt has tabled C190 in parliament and referred it to JSCOT – assuming JSCOT recommends ratification then the Govt will lodge the ratification instrument with the ILO. The Convention will come into force a year after Govt lodges the ratification instrument. There is no date for ratification at the time of the making of this note as it remains in Committee processes.

<sup>7</sup> FW Act s 106B as amended by FDV Leave Act Sch 1 cls 14-18

- That:
  - Seeks to coerce or control the employee; and
  - Causes the employee harm or to be fearful.<sup>8</sup>

### When an employee can take leave?

Under the new provisions, an employee will be able to take paid FDV leave:<sup>9</sup>

- If they are experiencing family and domestic violence; and
- Need to do something to deal with the impact of that family and domestic violence; and
- It is impractical for them to do that thing outside of their hours of work.

This will mean that workers will be able to take paid FDV leave in a range of circumstances. Family and domestic violence is defined broadly to encompass a wide span of behaviours by perpetrators. The paid FDV leave provisions are designed to empower victim-survivors in responding to family and domestic violence in way that meets their needs. Examples of actions victim-survivors may need to take include:

- Making arrangements for their safety, or the safety of a close relative (including developing a plan to leave, finding and moving to safe accommodation, putting safety plans in place in their children's school, changing locks and telephone numbers)
- Attending court hearings
- Accessing police services and providing evidence to the police
- Seeking medical treatment and attending medical appointments
- Attending counselling
- Attending appointments with financial or legal professionals and updating financial arrangements
- Accessing Centrelink and other support and services.

A person will not be taken to be on paid FDV leave during a public holiday or a period of paid personal/carer's leave.<sup>10</sup>

### Will casual employees be able to take paid FDV leave?

Yes. Paid FDV leave will be extended to casual employees as well as permanent employees.

See also [Payment of FDV Leave](#).

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<sup>8</sup> The Govt has tabled C190 in parliament and referred it to JSCOT which is a sign of their intention to ratify – assuming JSCOT recommends ratification then the Govt will lodge the ratification instrument with the ILO. The Convention will come into force a year after it lodges the ratification instrument. At this stage there is no date for ratification as yet because it is still going through the Committee process

<sup>9</sup> See FW Act s 106B as amended by FDV Leave Act Sch 1 cls 14-18

<sup>10</sup> FW Act s 98 as amended by FDV Leave Act Sch 1 cl 6

## Payment of FDV Leave

Permanent employees who take paid FDV leave must be paid at their “full rate of pay”, as if they had not taken the leave.<sup>11</sup> “Full rate of pay” is defined in s 18 of the FW Act to include:

- incentive based payments and bonuses;
- loadings;
- monetary allowances;
- overtime or penalty rates; and
- any other separately identifiable amounts.

Casual employees who take paid FDV leave must be paid at their full rate of pay (which includes any applicable casual loading), as if they had worked the hours in the period for which they were rostered.<sup>12</sup> Rostered hours include any hours that have been offered by the employer and accepted by the employee.<sup>13</sup> A casual employee may take paid FDV leave in relation to a period that they haven’t been rostered to work, but no payment is required in this situation.<sup>14</sup>

## How much paid FDV leave is available to workers?

Paid FDV leave is available in full 1 February 2023 for all employees except small business employees; and from 1 August 2023 for small business employees. New employees who meet the criteria for taking leave (see [In what circumstances will Paid FDV Leave be available under the NES?](#)) will have the full 10 days’ of FDV Leave available to them on commencing their employment.<sup>15</sup> The leave that is available resets to 10 days on each 12 month anniversary of their employment and does not carry over from year to year.<sup>16</sup>

### *Example*

Jesse starts a new job on 1 October 2023. Their employer is a small business. Because their commencement date is after 1 August 2023, they will have 10 days paid FDV Leave available to them on commencement, which can be taken over the following 12 months. After 12 months (and every 12 months after that), the amount of leave available to Jesse will reset to 10 days.

There are transitional arrangements for existing employees. Workers employed prior to 1 February 2023 (or 1 August 2023 in the case of small businesses and their employees) will have 10 days of paid FDV leave available to them on that date.<sup>17</sup> This will then reset on their next 12-month employment anniversary, and every 12 months thereafter.<sup>18</sup>

### *Example*

Because Austin is an existing employee that doesn’t work for a small business, they will have 10 days paid FDV Leave made available to them from 1 February 2023.

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<sup>11</sup> FDV Leave Act Sch 1, new s 106BA(1)(a) FW Act

<sup>12</sup> FDV Leave Act Sch 1, new s 106BA(1)(b) FW Act

<sup>13</sup> FDV Leave Act Sch 1, new s 106BA(2) FW Act

<sup>14</sup> FDV Leave Act Sch 1, new s 106BA(3) FW Act

<sup>15</sup> FW Act s 106A(2)

<sup>16</sup> FW Act s 106A(2)

<sup>17</sup> FDV Leave Act, new FW Act Sch 1 Part 12 sub-cl 52

<sup>18</sup> FDV Leave Act, new FW Act Sch 1 Part 12 sub-cl 52

Austin started working for the company on 2 January 2011. This means that the leave available to Austin will reset to 10 days on 2 January 2024, and then every 12 months after that.

Transitional arrangements also apply to non-national system employees (see [Extension to non-national system employees who aren't covered by the NES](#)).

## **Extension to non-national system employees who aren't covered by the NES**

The FDV Leave Bill Schedule 2 extends the application of the NES provisions to employers and employees outside of the national system. This will take effect upon Australia's ratification of the ILO's Violence and Harassment Convention, 2019 (No. 190) (**C.190**) for other employers and employees.<sup>19</sup>

The reasons for this are complex. In short, this arises because the constitutional powers which underpin the FW Act do not allow for the making of laws with respect to all workers. Through reference to C190, the legislature can rely on a different constitutional power (external affairs) and extend coverage to more workers.

## **Notice and evidence requirements**

The evidence requirements applying to the taking of paid FDV Leave are carried over from those which currently apply in relation to the taking of unpaid FDV leave.<sup>20</sup>

This means that a person taking paid FDV leave will have to:

- Notify their employer as soon as practicable (this can be after the period of leave commences), advising the period or expected period of the leave;
- If required by the employer, provide evidence that would satisfy a reasonable person that the employee
  - Is experiencing family and domestic violence; and
  - Needs to do something to deal with the impact of that family and domestic violence; and
  - It is impractical for them to do that thing outside of their hours of work.

## **Privacy requirements**

Employers are required to take reasonably practicable steps to ensure that any notice or evidence given by an employee in relation to taking FDV Leave is treated confidentially.<sup>21</sup>

Employers also cannot (without the employee's permission) use such information for reasons other than satisfying themselves in relation to a person's entitlement to take paid FDV leave (unless doing so is required by law or for the purpose protecting someone's life, health or safety). In particular an employer must not use such information to take adverse action against an employee.<sup>22</sup> Certain information may also be considered personal information and be regulated by *the Privacy Act 1988 (Cth)*.

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<sup>19</sup> FDV Leave Act cl 2, Sch 2

<sup>20</sup> See FW Act s 107

<sup>21</sup> FW Act s 106C(1)

<sup>22</sup> FW Act s 106C(2) as amended by FDV Leave Act Sch 1 cl 19A

From 1 February 2023, the *Fair Work Regulations (FW Regulations)* in relation to paid FDV leave includes new rules (**first set of changes**).<sup>23</sup> These rules were changed when further amendments to the FW Regulations were made, effective from 4 February 2023 (**second set of changes**).<sup>24</sup> This is to reduce the risk to an employee's safety when accessing paid family and domestic violence leave.

Employers will be prohibited from including information on pay slips that shows:

- that an amount paid to an employee is a payment for paid family and domestic violence leave
- a period of leave taken by an employee has been taken as paid family and domestic violence leave
- an employee's paid family and domestic violence leave balance.

Under the first set of changes to the FW Regulations, employers were able to report paid FDV leave on payslips as another type of leave, for example as special leave, miscellaneous leave or other leave.

Under the second set of changes to the FW Regulations, when an employee takes paid family and domestic violence leave, employers must report it on the pay slip as the performance of ordinary hours of work, or as another kind of payment made in relation to the performance of work, such as overtime, allowances or a bonus. Employers will not be able to report paid FDV leave as another type of leave such as 'miscellaneous leave' or 'other leave', **unless an employee has requested that it be recorded as a period of leave.**

Because the rules relating to payslips have been changed so recently, and to allow employers time to update their payroll systems, there will be a grace period of 4 months during which employers will not be penalised if they report a period of paid FDV leave on a payslip as another type of leave. After 4 months, employers may only record paid FDV leave as hours worked or another kind of payment for the performance of work, unless the employee requests it be recorded as a period of leave. Employers may be liable to pay a civil penalty if they don't comply.

## Where employees already have existing rights to paid FDV leave

FDV leave can be provided for under legislation, modern awards or enterprise agreements. When advising members, it's important to identify:

1. The source of the FDV leave entitlement;
2. How family and domestic violence is defined in that instrument; and
3. The circumstances in which family and domestic violence leave may be taken.

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<sup>23</sup> See Schedule 1, Part 1, Division 2 of the *Fair Work Legislation Amendment Regulations 2022*, made on 8 December 2022, and which commence on 1 February 2023 (accessible at <https://www.legislation.gov.au/Details/F2022L01640>)

<sup>24</sup> See Schedule 1 of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023*, made on 3 February 2023, and which commence on 4 February 2023 (accessible at [Fair Work Amendment \(Paid Family and Domestic Violence Leave\) Regulations 2023 \(legislation.gov.au\)](https://www.legislation.gov.au/Details/F2023L00001)). See also [Explanatory Statement \(accessible at 034A1900.PDF\)](#).

### Existing Enterprise Agreements providing for paid FDV leave

An enterprise agreement cannot exclude any of the provisions of the NES (including FDV leave).<sup>25</sup> Terms which are ancillary or supplement the NES are allowed, but only to the extent that they are not detrimental.<sup>26</sup> Before approving an agreement, FWC must be satisfied that the agreement does not include terms which exclude the NES.<sup>27</sup> Any terms which do are of no effect.<sup>28</sup>

If taking paid FDV leave is provided for under an existing agreement in a way that is detrimental when compared to the new NES entitlements, applications can be made by an employer, employee or employee organisation covered by the agreement, and the FWC will be able to make orders varying the agreement to make it consistent with the NES entitlement (including notice and evidence requirements).<sup>29</sup>

### Existing state laws providing for paid FDV leave

State laws which provide for FDV leave in relation to non-national system employees and are more beneficial than the provisions of the FW Act are not excluded by its operation.<sup>30</sup>

## Review of legislation

The paid FDV leave entitlement will be independently reviewed after 12 months to consider the impacts on small businesses, sole traders and people experiencing family and domestic violence. The review must consider both quantitative and qualitative research and must start as soon as practicable after 1 February 2024. A written report must be provided to the Minister within 3 months, and the Minister must cause a copy of the report to be tabled in both Houses of Parliament within 15 sitting days after the report is given to the Minister.<sup>31</sup>

## Considerations when assisting members and dealing with employers

### Unique nature of paid FDV leave entitlements

Given that paid FDV leave operates significantly differently from other forms of leave in several ways, it is imperative that unions are in a position to educate and support their members, and to educate and hold employers to account. In particular, unions should ensure that both members and employers know that:

- the entitlement is available to casual employees, and how payment for casuals is determined;
- the entitlement is available in full to part time and casual employees - i.e. everyone receives the full 10 days, it is not calculated pro rata;

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<sup>25</sup> FW Act s 55

<sup>26</sup> FW Act s 55

<sup>27</sup> FW Act s 186

<sup>28</sup> FW Act s 56

<sup>29</sup> FDV Leave Act Sch 1 which inserts FW Act Sch 1 Part 12 cl 53

<sup>30</sup> FDV Leave Act Sch 2 cl 9 which inserts FW Act s 757E

<sup>31</sup> FDV Leave Act s 4

- the entitlement is paid at an employee’s full rate of pay rather than the base rate of pay, and all of the components this includes;
- an employee’s right to privacy and confidentiality;
- employers are prohibited from including information regarding paid FDV leave in a payslip, to ensure to ensure the safety and privacy of employees needing to take the leave.

### Need for trauma informed/responsive approaches

Employees who need to access paid FDV leave may be distressed and suffering from trauma. It is important that unions are able to use trauma responsive and informed approaches. Unions may also need to impress this fact upon employers. There are resources and training being developed, please contact the ACTU for more information about accessing this assistance.

### Interpretation of new NES entitlement

Some of the key questions of interpretation that will be tested in early cases include:

- When a casual employee will be ‘rostered to work hours’ for the purpose of s106BA (1) (b) and how this will be evidenced. Presumably, a formal roster will not be required, and text messages, group chats and/or specific apps where hours are offered and employees accept those hours will be sufficient. Verbal arrangements would presumably also count, although will be harder to prove.

### Strategic considerations

Unions should start thinking about how best to contribute to the review of the legislation due to commence on 1 February 2024 and how to gather and collate the insights from members and employers. It may be useful to identify employers supportive of the entitlement who are willing to contribute their experiences to the review. Given the short timeframe for the review - the report needs to be given to the Minister within 3 months of the review commencing – decisions about how unions will contribute to the review, and how data will be gathered, should be decided well before then.

There will be some employees who have not previously been eligible for or had access to paid FDV leave because of narrower definitions of family and domestic violence in industrial instruments, or who had access to a lesser entitlement (for example, fewer days, lower rates of pay, and so on). It is important that these employees are aware of the new entitlement. Unions may wish to consider making applications to the FWC to seek orders varying enterprise agreements with terms that are less beneficial than the new NES entitlement to make them consistent with the NES entitlement.<sup>i</sup>

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<sup>i</sup> The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.