

[Personal/carer's leave](#)

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Minimum personal/carer's leave entitlements for national system employees can be found under the [National Employment Standards \(NES\)](#), as contained in [Pt 2-2](#) of the Fair Work Act 2009 (Cth) (FW Act).

Modern awards and enterprise agreements may include provisions that are ancillary or incidental to the personal/carer's leave entitlements under the NES, or which supplement those entitlements.

Employees who are not covered by the NES are generally entitled to personal/carer's leave under state legislation.

What is the entitlement to personal/carer's leave under the national system?

Entitlement to paid personal/carer's leave

The NES provide that employees (other than casuals) are entitled to 10 days of paid personal/carer's leave for each year of service with their employer.

References: [s 95, Fair Work Act 2009 \(Cth\)](#)
[s 96\(1\), Fair Work Act 2009 \(Cth\)](#)

An employee may take paid personal/carer's leave:

- when the employee is unfit for work due to personal illness or injury; or
- to provide care or support to a member of the employee's immediate family or household who is affected by illness, injury or unexpected emergency ('immediate family' includes de facto partners and grandparents/grandchildren).

References: [s 12, Fair Work Act 2009 \(Cth\)](#)
[s 97, Fair Work Act 2009 \(Cth\)](#)

An employee does not receive their full entitlement to paid personal/carer's leave on commencement of employment, the entitlement accrues progressively throughout the year. Unused leave rolls over to the next year.

Personal/carer's leave is calculated on the basis of "working days" not "ordinary hours" and is not pro-rated for part-time employees. However, a part-time employee is only entitled to paid personal/carer's leave on the days which the part-time employee would normally work. See *Mondelez v AMWU*. This approach is currently subject to an appeal to the High Court of Australia.

References: [s 96\(2\), Fair Work Act 2009 \(Cth\)](#)
Mondelez v AMWU [\[2019\] FCAFC 138](#)

Unlike annual leave, unused personal/carer's leave is not usually paid out on the termination of an employee's employment (unless this is provided for in an applicable award or agreement, or the employment contract).

Employees on personal/carer's leave are entitled to be paid at their base rate of pay for ordinary hours of work normally worked on that day. See *Mondelez v AMWU*. An employee's base rate of pay excludes other payments

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that they may receive as part of their remuneration, such as incentive-based payments, loadings, monetary allowances, overtime or penalty rates, and other separately identifiable amounts. See [Calculating pay for certain purposes — Base rate of pay](#).

References: [s 99, Fair Work Act 2009 \(Cth\)](#)

[s 16\(1\), Fair Work Act 2009 \(Cth\)](#)

[Mondelez v AMWU \[2019\] FCAFC 138](#)

The base rate of pay for pieceworkers (ie employees who are paid for each piece of work produced regardless of time) is that specified in a modern award or enterprise agreement ([s 16\(2\)\(a\)–\(b\)](#)); or the rate set out in regulations, for award/agreement-free employees ([s 16\(2\)\(c\)](#), and [reg 1.09](#) of the Fair Work Regulations 2009 (Cth)).

Personal/carer's leave is paid based on the actual number of hours that the employee would have worked on the day and not on the average number of hours of work per day across the work cycle. The practical effect of this is that shiftworkers may be entitled to more hours of personal/carer's leave (and pay) than employees who work regular 8-hour shifts: *AWU v AstraZeneca Pty Ltd* and *Mondelez Australia Pty Ltd*. In the case of a part-time employee, if the employee is ill on a non-working day, no personal/carer's leave is paid: *Mondelez v AMWU*.

References: [AWU v AstraZeneca Pty Ltd \[2018\] FWC 4660](#) 

[Mondelez Australia Pty Ltd \[2018\] FWC 2140](#) 

[Mondelez v AMWU \[2019\] FCAFC 138](#)

Practice Tip: Employers should establish systems to ensure that employees accrue based on “days” rather than “hours” and are paid at the correct rate when they take paid personal/carer's leave.

Entitlement to unpaid carer's leave

Employees (including casuals) are entitled to two days' unpaid leave, for each occasion when the employee needs to provide care or support to a member of the employee's immediate family or household affected by illness, injury or unexpected emergency. Unpaid carer's leave may be taken as two consecutive days, or over separate days as agreed between employer and employee: [s 103\(2\)](#). If the employee has accrued, but untaken, paid personal/carer's leave, they must take this first: [s 103\(3\)](#).

References: [ss 102](#).

Practice Tip: Employers should establish systems to ensure that employee requests to take unpaid carer's leave are not approved, when an employee has unused paid personal/carer's leave.

Notice and evidence requirements

An employee must notify the employer as soon as is practicable of the need to take personal leave and how much leave is required ([s 107\(1\)–\(2\)](#)). This may be done after the leave has commenced, if it is not practicable to do so in advance of the leave being taken.

Regardless of the duration of the paid or unpaid personal/carer's leave, an employee must provide evidence verifying the reason for the leave if requested to do so by the employer: [s 107\(3\)](#). The evidence must be of a type that would satisfy a reasonable person. This might include a medical certificate confirming the nature of an employee's illness or injury, or that of a family or household member. Evidence requirements for the taking of personal/carer's leave may be set out in award or agreement provisions: [s 107\(5\)](#).

An employee is not entitled to take personal/carer's leave if they have not complied with the above notification and evidence requirements: [s 107\(4\)](#).

Practice Tip: If an employer requires medical certificates or other evidence to verify an employee's personal illness or the need to care for a family/household member, these requirements should be included in the employee's

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contract of employment or the employer's workplace policies. Check whether any such requirements are specified in an applicable award or enterprise agreement.

Taking personal/carer's leave on public holiday

If a period during which an employee takes paid personal/carer's leave includes a public holiday, the employee is taken not to be on paid personal/carer's leave on that public holiday: [s 98](#). In other words, that day (or part-day) is not subtracted from the employee's paid personal/carer's leave balance.

Taking personal/carer's leave while on annual leave

If a period of annual leave includes any other type of leave including paid or unpaid personal/carer's leave, the employee is taken not to be on annual leave for that period of that other leave: [s 89\(2\)](#). For example, an employee who falls sick while on annual leave may be entitled to paid personal/carer's leave (subject to meeting the normal notification and evidentiary requirements — see above). In that instance, the employee's annual leave balance would be re-credited for the period of sickness and their paid personal/carer's balance would be reduced by an equivalent amount.

Cashing out of paid personal/carer's leave

Paid personal/carer's leave can only be "cashed out" if permitted under the terms of a modern award or enterprise agreement. Such terms must require that:

References: [s 100, Fair Work Act 2009 \(Cth\)](#)
[s 101, Fair Work Act 2009 \(Cth\)](#)

- cashing out cannot occur if the effect would be to leave an employee with an accrual of less than 15 days' paid personal/carer's leave;
- each cashing out must be by separate written agreement between the employer and the employee; and
- the employee must be paid at least the amount that the employee would have been paid had the personal/carer's leave been taken.

Employees who are not covered by an award or agreement cannot cash out paid personal/carer's leave.

Practice Tip: Where employees accrue large balances of personal/carer's leave, employers might wish to enter into cashing out arrangements. However, when doing so, employers must be careful to ensure compliance with the above requirements.

What are the entitlements to personal/carer's leave under other industrial instruments?

Modern awards and enterprise agreements may not exclude NES entitlements — this includes the provisions relating to personal/carer's leave: [s 55\(1\)](#). See also: [The National Employment Standards \(NES\)](#).

However, awards and agreements may include provisions that are ancillary or incidental to the personal/carer's leave entitlements under the NES, or which supplement those entitlements: [s 55\(4\)](#). So, for example, an award or agreement could include a provision which provided an employee with greater than 10 days' paid personal/carer's leave per year.

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Any ancillary, incidental or supplementary award/agreement provision relating to personal/carer's leave must not be detrimental to an employee in any respect, when compared to the NES: [s 55\(4\)](#).


References: [s 55, Fair Work Act 2009 \(Cth\)](#)

Awards and agreements may also:

- include terms that are expressly permitted by the NES provisions relating to paid personal/carer's leave and unpaid carer's leave ([s 55\(2\)](#)), such as terms imposing evidentiary requirements for the taking of leave and 'cashing out' provisions (see above); and
- replicate the NES entitlements to personal/carer's leave: [s 55\(6\)](#).


There is nothing to prevent an award or agreement from expressing an entitlement to personal/carer's leave in hours per annum, rather than days as provided for under the NES, however, employees must not be left with an inferior entitlement to the NES minimum standard.

In *Mondelez v AMWU*, the Fair Work Commission held that the quantum of an employee's statutory entitlement will depend on the actual number of hours that would have been worked on the day taken as personal/carer's leave. This means by way of example, that an employee working 3 x 12-hour shifts per week (36 ordinary hours in total) is entitled to be paid for 12 hours per day of personal leave taken (rather than as Mondelez submitted, 7.2 hours, being the average daily working hours on an assumed 5-day working week).

References: [AWU v AstraZeneca Pty Ltd \[2018\] FWC 4660](#) 

[Mondelez Australia Pty Ltd \[2018\] FWC 2140 \(Mondelez\)](#) 

Mondelez appealed the decision and sought a declaration that accrual of paid personal/carer's leave was to be calculated in hours according to the "notional day" construction of [s 96\(1\)](#) of the FW Act. Mondelez argued that an entitlement to "10 days of paid personal/carer's leave" under [s 96\(1\)](#) must be construed according to "industrial meaning" of word "day". The Full Federal Court (FCAFC) denied the application. The FCAFC found that personal leave is to be accrued and taken by reference to "days" rather than a notional number of average hours. Mondelez has sought special leave to appeal to the High Court.

References: [Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union \(AMWU\) \[2019\] FCAFC 138](#) 

[s 96, Fair Work Act 2009 \(Cth\)](#)

Practice Tip: To avoid contravening the NES, where an instrument expresses an entitlement to personal/carer's leave in terms of hours, the employer should provide an undertaking to make up any shortfall under the instrument as compared to the NES.

What are the entitlements to personal/carer's leave under State legislation?

Employees who are not covered by the FW Act may be entitled to personal/carer's leave entitlements under the following state legislation:

- New South Wales — minimum sick leave entitlements under state awards: [ss 26–27, Industrial Relations Act 1996](#) (NSW);
- Queensland — sick leave: [Ch 2, Pt 3, Div 6–1](#); carer's leave: [Ch 2, Pt 3, Div 6–2, Industrial Relations Act 2016](#) (Qld)
- South Australia — sick/carer's leave: [s 70, Fair Work Act 1994](#) (SA);

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- Tasmania — personal leave: [s 47AF, Industrial Relations Act 1984](#) (Tas); and
- Western Australia — leave for illness, injury or family care: [ss 19–22, Minimum Conditions of Employment Act 1993](#) (WA).

Practice Tip: As legislation relating to personal/carer's leave differs across jurisdictions, employers and employees should check the applicable legislation carefully to determine the entitlements of employees not covered by the FW Act.

What happens in the case of long term illness or injury?

An employee who is sick or injured but has exhausted their paid personal/carer's leave entitlements, may also be able to access other forms of leave (including annual leave), provided the relevant rules applicable to those forms of leave permit such use. Alternatively they may take unpaid leave. See [Unpaid leave](#).

An employer cannot dismiss an employee because they are *temporarily* absent from work due to a prescribed kind of illness or injury: [s 352](#). A prescribed kind of illness or injury exists if the employee meets at least one of the following evidentiary requirements:

References: [reg 3.01, Fair Work Regulations 2009 \(Cth\)](#)

- the employee provides a medical certificate or statutory declaration about the illness or injury within 24 hours of the commencement of the absence or 'such longer period as is reasonable in the circumstances';
- the employee complies with the terms of an award or enterprise agreement which requires them to notify the employer of their absence from work and to 'substantiate the reason for the absence'; or
- the employee has provided the employer with evidence and notice of taking paid personal/carer's leave under [s 97](#).

An illness or injury is not a prescribed kind of illness or injury if:

References: [reg 3.01\(5\), Fair Work Regulations 2009 \(Cth\)](#)

- the employee is absent for more than three months in a row, or more than three months over a 12 month period (whether based on a single illness or injury or separate injuries or injuries); and
- the employee is not on paid personal/carer's leave for the duration of the absence.

Practice Tip: Care should be taken before dismissing an employee suffering from an illness or injury which is not a prescribed kind of injury, as the employer may be exposed to an unfair dismissal application on the basis that their dismissal was harsh, unjust or unreasonable, or a general protections claim if the employee was dismissed because of their disability. See: [Unfair dismissal — Valid reason for dismissal](#) and [Adverse action](#).

See also: [What are the legal risks involved in managing employee injury/ illness?](#)

Precedents

[Personal/carer's leave clause](#) [B. Pendlebury, Australian Encyclopaedia of Forms and Precedents]

[Personal leave policy](#) [B. Pendlebury, Australian Encyclopaedia of Forms and Precedents]

[Personal leave policy \(SMART\)](#) [B. Pendlebury, Australian Encyclopaedia of Forms and Precedents]