

Article Information

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News flash: Federal Government proposes a paid family and domestic violence leave entitlement

Paid family and domestic violence (FDV) leave will likely be included in the National Employment Standards (NES) after the new Federal Labor Government announced it will propose the inclusion of a paid leave entitlement for all employees, over and above the Fair Work Commission's (FWC) recent decision to recommend the inclusion of a paid entitlement in Modern Awards.

Since 2018, Modern Awards have provided employees an entitlement to 5 unpaid FDV leave days. In the decision that confirmed that unpaid entitlement, the FWC foreshadowed that it would consider whether modern awards should also include a paid FDV entitlement.

On 16 May 2022, a Full Bench of the FWC handed down its decision confirming that its provisional view was that modern awards should be amended to include an entitlement to 10 paid FDV days per 12 months. The paid leave would only be available to permanent full time and part time employees. While the ACTU in its submissions sought to have a paid FDV entitlement extended to casual employees, and despite the FWC finding that those experiencing FDV are more likely to be casuals and part time employees, the FWC held that the operational difficulties in providing such an entitlement to casuals, in part because casuals do not have rostered shifts, outweighed the merits of doing so, particularly for small and medium sized businesses.

While the ACTU filed extensive evidence, ACCI, Ai Group and the Master Grocers Australia opposed the ACTU's claim generally but did not file any evidence for the FWC to consider. That was the subject of comment from the FWC which held that a party asserting particular facts (or in this case, consequences) has the evidentiary burden of adducing and pointing to evidence in support. In the absence of any evidence, the FWC is only in a position to accept contested assertions if the assertions are "logically persuasive".

In identifying the important role of the workplace and effects that FDV can have on employees in the workplace, the FWC findings are demonstrative of its view that FDV is an issue to be addressed, at least in part, in the workplace:

"[75] we find that FDV is ubiquitous, disproportionately affects women, has increased during the COVID-19 pandemic, and has a significant adverse effect on those who experience it as well as their families and the general community. We also find that FDV has a real and tangible impact in the workplace, and that women who experience FDV have a more disrupted work history, lower personal incomes, more frequent changes of jobs, and are more likely to be employed in casual and part-time work than women with no experience of violence. We find that FDV is both a cause and consequence of gender inequality, and we affirm the finding made in the March 2018 FDVL Decision that employees who experience FDV often face financial difficulties as a result, such as relocation costs, or becoming a sole parent, and may suffer economic harm as a result of disruption to workplace participation."

That finding is important because the FWC can only decide to vary a modern award if it satisfied that a modern award is not achieving the modern awards objective and requires variation. The modern awards objective is to provide a fair and relevant minimum safety net of terms and conditions, taking into account various indicia such as social inclusion and living standards. Indeed, the FWC noted that many employers have started to implement policies supporting employees experiencing FDV, and the number of enterprise agreements with FDV leave provisions is increasing, indicating employers

generally accept their role in addressing FDV.

In response to the FWC's decision, the Labor Government has written to the FWC committing to introduce legislation to provide for 10 days paid FDV leave into the NES as soon as possible. The legislation is not yet available and it remains unclear whether the Government intends to extend a paid FDV leave entitlement to casual employees, which would be a step further than the FWC has been willing to go in relation to the Modern Awards.

Conclusion

Employers should continue to keep an eye out for when FDV paid leave is introduced into the NES and any Modern Awards, with particular attention to when the changes will take effect. In order to ensure that requests for such leave are treated in accordance with the NES or Modern Award, some employer's may wish to review their internal policies. If you have any questions please do not hesitate to contact a member of the Employment Relations team.