

Article Information

Authors: Chris Hartigan, John Evans

Service: Employment & Labour

Changes to Victoria's long service laws are coming

The Victorian Government has recently announced that it will introduce reforms to Victoria's long service leave legislation.

The changes are aimed at allowing increased flexibility for employees to take their accrued long service leave and introducing increased protections to ensure continuity of service is not disrupted.

Background

The Victorian Government has recently introduced into the Parliament a bill to repeal and replace the *Long Service Leave Act 1992* (Vic) (**LSL Act**). If passed by the Victorian Upper House, the *Long Service Leave Bill 2017* (**LSL Bill**) will introduce a number of significant changes to long service leave arrangements in Victoria. Importantly, however, it will not change the rate at which an employee accrues long service leave.

What are the changes?

Taking long service leave after 7 years

Under the current regime, after 7 years of continuous service, an employee is entitled to have their long service leave paid out on a pro rata basis if their employment ends. However, it is only after 10 years of continuous service that the right to take long service leave accrues.

The LSL Bill will allow employees to take their accrued long service leave after 7 years on a pro rata basis, rather than having to wait until they have attained 10 years of continuous service.

Changes to continuity of service and accrual of long service leave

In the LSL Act, parental leave (whether paid or unpaid) for up to 12 months does not break continuity of service. But unpaid parental leave does not count towards an employee's period of continuous employment.

In the LSL Bill, on the other hand, continuity of service will not be broken by parental leave even if it is in excess of 12 months. Moreover, any period of paid leave will count as service, and any period of unpaid parental leave of up to 12 months will also count as service.

Casual and seasonal employees have more rights

In general, under the LSL Act, casual and seasonal employees must not have more than 12 weeks break between their engagements with their employer or their continuity of service will be broken. This approach is retained under the LSL Bill. However, an exception is made whereby continuity of service will not be broken where a casual or seasonal employee:

- takes up to two years parental leave (whether paid or unpaid);
- the employer and employee so agree in advance of employee's absence;
- where the break is due to seasonal factors; or
- where the employee had a reasonable expectation of re-employment.

Increased flexibility in taking long service leave

The LSL Act currently mandates that leave must be taken in one period, unless it is agreed between the employer and employee that the employee may take the first 13 weeks of long service leave in 2 or 3 separate periods, and any

subsequent leave in 2 separate periods. In contrast, under the new scheme, employees with accrued long service leave will be able to take leave in minimum 1 day periods.

Under the new scheme, an employer may refuse an employee's request for leave of one day or more if the employer has reasonable business grounds to do so. However the onus of establishing the reasonable ground is placed squarely on the employer.

Employers keen to reduce long service leave balances may find this a useful change.

New calculation method in regard to employees on variable hours

The LSL Act currently provides that if an employee's hours have changed in the 12 months prior to taking long service leave, the weekly hours are calculated using the average over the previous 12 months, or five years (whichever is the greater). Under the LSL Bill a third option is added, which is the average hours worked over the entire period of continuous service (where that is longer than 5 years), with the employee being entitled to the greater of the 3 averages.

Transmission of leave entitlements upon sale of business

Under the LSL Act, if an employee performs duties in connection with assets, and those assets are transferred to another employer who continues to employ the employee, the new employer will become responsible for the employee's long service leave entitlements.

Under the LSL Act, however, "assets" was defined to include land, plant and equipment. In contrast, under the LSL Bill, the term has been expanded to include "tangible and intangible assets". The broader definition will likely expand the circumstances where an incoming employer will be held liable for existing long service leave entitlements.

Termination and re-engagement

Under the current LSL Act, an employee terminated at the initiative of the employer and re-employed with the same employer within 12 weeks is considered to have continuous employment.

The LSL Bill expands the operation of this rule to include not only termination at the initiative of the employer, but also termination at the initiative of the employee, the expiration of a specified term in an employment contract, or because the employee's apprenticeship is complete. This means, for example, if an employee resigns and is re-hired within a 12 week period, their service will be taken to be continuous for the purposes of long service leave.

Extension of criminal liability under the new legislation

Finally, under the LSL Bill, two former civil penalties have been converted into criminal penalties. These relate to an employer failing to disclose that an employment agreement would modify or remove the employee's long service leave entitlements, and an employer taking adverse action against an employee because the employee is entitled to long service leave.

Moreover, under the LSL Act, all penalties range from 5 penalty units to 20 penalty units. In contrast, under the new legislation, all penalties are 12 penalty units for an individual or 60 penalty units for a body corporate. As at 1 July 2017, 60 penalty units is worth \$9,514.20.

Conclusion

If the LSL Bill passes Victoria's Upper House, the legislation is proposed to come into effect on 1 June 2018, unless an earlier date is proclaimed. Employers should keep an eye on this Bill and should it pass the Upper House, seek advice in regard to the changes and any relevant policies they have in place in order to ensure that long service leave entitlements are correctly calculated and requests for long service leave are appropriately responded to.

Should you have any questions concerning how the proposed Bill may affect your business, please contact a member of Piper Alderman's Employment Relations team.