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industrial relations : human resources : employment matters : training

CIRCULAR: GEN/ 061/NAT/061/18
DATE: 16 April 2018
SUBJECT: Fair Work Commission Decision – Family and Domestic Violence Leave
ATTENTION: Chief Executive Officer

Further to our circular on 6 July 2017 (055.NAT.005.17) regarding the Fair Work Commission preliminary view on Family and Domestic Violence Leave, the Fair Work Commission Full Bench (the Commission) decision was published on 26 March 2018 confirming the decision to introduce unpaid Family and Domestic Violence Leave into all modern awards. The amendment takes effect as part of the FWC 4 yearly review of modern awards.

Background

In 2017, a Full Bench rejected a claim put forth by the ACTU for paid family and domestic violence leave. However, the Majority Decision went on to express the preliminary view that to achieve modern award objectives it may be necessary to make amendment to all modern awards and insert the following provisions:

- a period of unpaid domestic and family violence leave; and
- access to personal/carer's leave for the purpose of taking family and domestic violence leave.

The Findings

Following further submissions, a Full Bench has made the following findings:

- family and domestic violence has a significant adverse impact on those who experience such violence;
- while men can, and do, experience family and domestic violence, such violence is a gendered phenomenon that disproportionately affects women;
- the effects of family and domestic violence are far reaching and extend beyond the individual directly affected to their families and the general community;
- family and domestic violence has a real and tangible impact on employees and employers in the workplace;
- employees who experience family violence 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.

The Commission accepted and adopted the conclusion that the circumstances faced by employees who experience family and domestic violence require a special response.

The Commission was not satisfied that the employer-response to family and domestic violence was a matter that was better left to enterprise-level negotiation. Rather, family and domestic violence is a serious social issue that impacts on employees and employer in the workplace, and the Commission's view was that modern awards ought to provide a minimum safety net standard on the matter.

Unpaid Domestic and Family Violence Leave

The Commission has determined that all award covered employees should have access to unpaid family and domestic violence leave and has decided to provide five days unpaid leave per annum to all employees, including casual, experiencing family and domestic violence.

A number of matters relating to access to the entitlement were considered, the Commission decided that the unpaid entitlement will apply as follows:

- all employees, including casuals, will have access;
- the entitlement will be available in full at the commencement of each 12 month period rather than accruing progressively during a year of service;
- the entitlement will not accumulate from year to year; and
- the entitlement will not be pro-rated and will be available in full to part-time and casual employees.

The Commission was satisfied that the variation of modern awards to include a model unpaid family and domestic violence leave term is necessary to ensure that such awards achieve the modern awards objective.

The Commission rejected the contention that unpaid family and domestic family violence leave should not be available to the employee where they can access paid personal/carer's leave. Whilst award reliant employees are more likely to access available paid leave entitlements in the first instance, the Commission was of the view that it is not preferable to mandate the approach.

Access to personal/carer's leave?

The Commission decided to defer its consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.

All of the submissions before the Full Bench contended that the Commission does not have jurisdiction to provide for paid personal/carer's leave under the NES to be taken for reasons relating to family and domestic violence, given the unanimous position, the Commission has not expressed a position.

Next Steps

It is anticipated that the drafting of the model term to give effect to the decisions to introduce unpaid family and domestic violence leave will be finalised in the coming weeks.

Interested parties will be given the opportunity to comment on the final form of the model term.

The Commission will revisit the issue in June 2021 after the model term has been in operation for three years. At that time it will be considered whether any changes are required to the unpaid level model term, and whether to allow access to personal/carer's leave.

While unlikely to impact you, three awards, namely, the *Australian Government Industry Award, Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010* were exempted from the decision. Further proceedings in relation to these three awards will be subject to a mention to be held Tuesday 1 May 2018.

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447.



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