



NEW LAW GRANTS MISCARRIAGE LEAVE TO PARENTS

An historic change has been made to the *Fair Work Act 2009* (Cth) (**Act**) as a result of the passage of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (**Respect at Work Act**). Employers in Australia are now required to provide up to two days of compassionate leave for each occasion, to employees who experience a miscarriage within the first 20 weeks of their pregnancy.

Law Prior to Respect at Work Act

Previously, there was no provision under the Act for special leave for parents who suffered the loss of a child prior to 12 weeks' gestation. The existing provision under section 80 of the Act allowing female employees to access unpaid "special maternity leave" in the event of an early termination of pregnancy only applies after a gestation period of at least 12 weeks. This is despite the fact that the vast majority of miscarriages occur in the first 12 weeks of pregnancy. Special maternity leave is also only available to female employees (that is, expecting mothers).

The Respect at Work Bill

The "Respect at Work" Bill was put to Federal Parliament on 24 June 2021 and was passed on 2 September 2021. On 10 September 2021, the Act was updated to include miscarriage occurring within 20 weeks as a reason to access compassionate leave and amends sections 12, 104 and 105 of the Act to give effect to this.

Amount of Compassionate Leave for Miscarriage

Parents who have suffered a miscarriage are entitled to two days' compassionate leave. Crucially, the new provisions allow for both expectant mothers and their current spouse or de facto partner (though not former partners) to access compassionate leave.

An employee does not accumulate compassionate leave and it does not come out of their personal/carer's leave or annual leave balance. It can be taken any time an employee needs it. If an employee is already on another type of leave (e.g. annual leave) and needs to take compassionate leave, the employee can use compassionate leave instead of the other leave.

This compassionate leave can be taken as:

- A single continuous 2 day period;
- 2 separate periods of 1 day each; or
- Any separate periods the employee and the employer agree.

Payment For Compassionate Leave

Full-time and part-time employees receive paid compassionate leave and casual employees receive unpaid compassionate leave.

Full-time and part time employees are paid at their base pay rate for the ordinary hours they would have worked during the period of leave. This does not include separate entitlements such as incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates

Compassionate leave cannot be cashed out.

Notice and Evidence

Employees taking compassionate leave must give their employer notice as soon as they can (this may be after the leave has started). The employee must tell the employer of the period, or expected period, of the leave.

An employer may request evidence that the proposed compassionate leave is to be taken for one of the grounds set out in section 104 of the Act. The request for evidence must be reasonable. If the employee does not provide the requested notice or evidence, they may not be entitled to access compassionate leave.

How We Can Assist

The new provisions impose additional obligations on employers that they must be aware of when an employee experiences a miscarriage. We can assist employers to navigate these obligations and ensure they provide their employees with the leave to which they are entitled. We can also help employees by clarifying the scope of their rights during what is an emotional and extremely difficult time in their lives.



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For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

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