

Chamber of Commerce & Industry | Workplace Relations

Paid Family and Domestic Violence Leave Fact Sheet

Version: January 2023

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) ('Amendment Act') has amended the *Fair Work Act 2009* (Cth) (the 'FW Act') to provide all employees with a new entitlement to 10 days of paid family and domestic violence leave ('FDV leave') every 12 months.

This new entitlement will replace the existing entitlement to 5 days of unpaid family and domestic violence leave contained in the National Employment Standards in the Act.

Who can access paid FDV leave?

The 10 days of paid FDV leave will be available to all full-time, part-time and casual employees. This also includes employees on fixed-term contracts.

Paid FDV leave will not be applied on a pro-rata basis for part-time and casual employees¹. This means all employees will be entitled to be absent from work with pay for 10 days in a 12-month period.

When will employees be able to access paid FDV leave?

Paid FDV leave will be available to all employees on the following dates:

- 1 February 2023 for non-small businesses with 15 or more employees².
- 1 August 2023 for small businesses with 14 or fewer employees (as of 1 February 2023)³.

These are the relevant commencement dates for employers.

Do employees accrue paid FDV leave?

Paid FDV leave does not need to be accrued before it can be accessed like annual leave and personal/carer's leave. Employees who will be employed on the relevant start dates listed above will have access to the full 10 days of paid FDV leave right away.⁴ Paid FDV leave does not need to be accrued before it can be accessed like annual leave and personal/carer's leave.

Employees who are employed on the relevant commencement date listed above will have access to the full 10 days of paid FDV leave immediately from the commencement date⁵. All new employees who are employed after the relevant commencement date will have access to the full 10 days of paid FDV leave from their first date of employment.⁶

¹ *Fair Work Act 2009* (Cth) s106E.

² *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) s 2(1).

³ *Ibid* sch 1 s 22 (Inserting new sch 1 s 51(into *Fair Work Act 2009* (Cth)).

⁴ *Fair Work Act 2009* (Cth) 106A(1)-(3), *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 8-10.

⁵ *Fair Work Act 2009* (Cth) 106A(1)-(3), *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 8-10.

⁶ *Fair Work Act 2009* (Cth) s 106A(1)-(3), *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 8-10.

An employee's paid FDV leave balance will reset to 10 days on their employment anniversary date each year.⁷

As paid FDV leave does not accrue, an employee's balance will reset on an employee's employment anniversary date and any unused paid FDV leave will not roll-over⁸.

Example: *Jess commenced with her employer on 9 November 2019. As at 1 February 2023, her employer has more than 15 employees. Jess is entitled to 10 days of paid FDV leave from 1 February 2023. Jess' FDV leave balance will reset to 10 days on her work anniversary of 9 November each year. Jess' balance does not reset on 1 February each year.*

Example: *Helen commenced work with a small business on 18 October 2023. From this date, Helen can access 10 days of paid FDV leave. Helen's paid FDV leave balance will reset to 10 days on 18 October each year. Helen will not accumulate and roll-over her unused FDV leave balance.*

When can employees take paid FDV leave?

The Amendment Act provides that all employees can use paid FDV leave if:

- they are experiencing family and domestic violence, and
- need to do something to deal with the impact of family and domestic violence, and
- it is not practical for them to do so while they are working.

Some examples of when FDV leave can be taken include when an employee has to:⁹

- make arrangements for their safety or the safety of a close relative (including relocation),
- attend a court hearing,
- access police services,
- attend counselling, or
- attend appointments with medical, financial or legal professionals.

An employee does not need to be the victim of family and domestic violence to take paid FDV leave under specific situations.

What is family and domestic violence?

From 1 February 2023, the FW Act will provide an expanded definition of family and domestic violence.

⁷ Fair Work Act 2009 (Cth) s 106A(1)-(3), Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth) sch 1 s 8-10.

⁸ Fair Work Act 2009 (Cth) s 106A(1)-(3), Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth) sch 1 s 8-10.

⁹ Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth) sch 1 s 17 (inserting new 'Note 1' for section 106B(1) in Fair Work Act 2009 (Cth)).

From this date, family and domestic violence will mean, “Violent, threatening or other abusive behaviour by an employee’s”:¹⁰

- close relative,
- member of their household, or
- current or former intimate partner,

that:

- seeks to coerce or control the employee, and
- causes them harm or to be fearful.

A close relative is defined in the FW Act to include any of the following:

- an employee's immediate family, including:
 - spouse/former spouse,
 - de facto partner/former de facto partner,
 - child,
 - parent,
 - grandparent,
 - grandchild, or
 - sibling.
- a child, parent, grandparent, grandchild or sibling of an employee’s current or former spouse or de facto partner, or
- a person who is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

How is paid FDV leave paid to employees?

Full-time and part-time employees are entitled to be paid their full remuneration for the hours they would have worked had they not been on paid FDV leave.¹¹

Casual employees are entitled to be paid at their applicable rate of pay for the hours they were rostered had they not been on paid FDV leave.¹²

What this means is when an employee takes paid FDV leave, they will be entitled to be paid as though they worked their rostered hours for that day.

Payment is at the employee’s base rate of pay, plus the following entitlements that would have also been paid had the employee worked their rostered shift, including:

- bonus payments,
- incentive payments,
- loadings (e.g. casual loading, late/early shift loadings),
- monetary allowances (e.g. travel allowance, laundry allowance),
- overtime rates,
- penalty rates.

¹⁰ *Fair Work Act 2009* (Cth) s 106B(2)-(3), *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) Schedule 1 s 18 (updating 106B(2) in *Fair Work Act 2009* (Cth)).

¹¹ *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 19 (inserting new section 106BA(1)(a) into the *Fair Work Act 2009* (Cth)).

¹² *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 19 (inserting new section 106BA(1)(b) into the *Fair Work Act 2009* (Cth)).

Where an employee is paid an all-inclusive salary, they will be entitled to continue being paid their applicable salary when taking paid FDV leave.

When an employee has exhausted their 10-day balance of paid FDV leave, they will not be entitled to be paid for time not worked, unless they take another form of authorised paid leave (e.g. annual leave or personal/carer's leave).

Example for casual Employee:

Emily is a casual employee and needs to take three days of leave from Thursday to Saturday to relocate her belongings, attend meetings with her lawyers and attend court due to family and domestic violence from her former intimate partner. For the three days Emily needs to take leave, she was rostered to work 5 hours each day.

Emily does not get paid any other amounts (e.g. allowance, bonus, incentive payments)

Emily's employer is required to pay her:

- *her hourly casual rate for the 10 hours she was rostered on to work Thursday and Friday, and*
- *her hourly weekend casual penalty rate for the 5 hours she was rostered on for the Saturday.*

Emily's balance of paid FDV leave is reduced by three days to 7 days (assuming this is the first time Emily has accessed paid FDV leave), until it resets to 10 days.

Example for full-time employee:

Jane is a full-time employee working Monday to Friday and needs to take 2 days of leave from Thursday to Friday one week to assist her daughter to relocate after experiencing domestic violence. During the 2 days Jane took leave, she was rostered to work 8 ordinary hours and 2 overtime hours each day.

Jane is also paid a daily travel allowance for each shift.

Jane's employer needs to pay her:

- *her base hourly rate for the 8 ordinary hours she was rostered on to work Thursday and Friday, and*
- *the relevant overtime hourly rate for the 2 overtime hours she was rostered on to work Thursday and Friday, and*
- *her daily travel allowance for both days.*

Jane's balance of paid FDV leave is reduced by 2 days (assuming this is the first time Jane has accessed paid FDV leave). Jane will have a balance of 8 days until it resets to 10 days.

Pay slip requirements

From 1 February 2023, certain information is prohibited from being included on an employee's pay slip relating to paid FDV leave.¹³ The explanatory memorandum to the Amendment Act states that following information must not be recorded on a pay slip:

- an employee's paid FDV leave balance, and
- a payment identifying that paid FDV leave has been taken.

Employers should develop an internal policy that has a default approach to pay slip information when taking paid FDV leave, such as:

- calling it 'leave: other', or
- payments reflective of what an employee would have been paid as per their roster had they not been on leave.

Employers are also encouraged to:

- consult with an employee taking paid FDV leave to discuss what they are comfortable with being displayed on their pay slip,
- talk with their payroll provider to understand how they may be noting FDV leave in the payroll program,
- develop a system for recording internal payroll notes to identify when paid FDV leave has been taken so that an accurate record of paid FDV leave balances is kept.

Notice and evidence requirements

The FW Act provides the following with regard to notice and evidence:

Employees seeking to take FDV leave are required to notify their employer as soon as possible that they will be absent from work, how long they will be absent, and that they are requesting to take paid FDV leave.

The FW Act provides that an employer can require an employee to provide evidence to show that the employee is in genuine need of taking paid FDV leave.

Further, the evidence an employee provides must satisfy a reasonable person that the employee is:

1. experiencing family and domestic violence,
2. taking leave to deal with the impact of family and domestic violence, and
3. it is not practical to do so during work hours.¹⁴

Types of evidence an employee can provide can include, but not limited to the following:

- documents issued police,
- documents issued by a court,
- family violence support service provider documents,
- capacity/certificate of fitness from health professional or counsellor,

¹³ *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 2, sch 2 s 9 (inserting new section 757BA into the *Fair Work Act 2009* (Cth)).

¹⁴ *Ibid* s107(3)(d).

- medical certificate/report of injury or illness sustained from violence,
- letter of confirmation of legal services, or
- a statutory declaration.

Employers must take practicable steps to keep any evidence and information about an employee's circumstance confidential when they receive it as part of an application for paid FDV leave.

Where an employer mishandles information relating to an employee's situation, there could be adverse impacts on the employee's safety and well-being.

Employers can only request evidence for the purpose of confirming an employee's entitlement to take paid FDV leave. Where evidence is requested, an employee must provide the evidence before the absence can be recognised (and paid) as FDV leave.

What if an employee is currently on paid leave and they apply for paid FDV leave?

Where an employee is away from work on a period of annual leave and personal/carer's leave, they can apply to switch that leave to paid FDV leave if required.

When this happens, the employee is no longer on that other form of leave, but on paid FDV leave.¹⁵

The same rules in relation to notice and evidence apply when an employee requests to change leave types. An employee will be entitled to be paid what they would have been paid had they come in and worked their rostered shifts and not been on paid leave.

Casual employees are not entitled to paid annual leave or personal/carer's leave, meaning the above will not apply to them.

Can employees cash out paid FDV leave?

No. There are no provisions to allow employees to cash out paid FDV leave.

Likewise, there is no requirement for an employer to pay out an employee's unused paid FDV leave balance upon termination of employment.

Who pays for paid FDV leave?

Employers are responsible for paying employees when they take paid FDV leave.

Government funding and subsidies will not be provided to employers to cover the costs of employees taking paid FDV leave.

The amendments to the FW Act providing employees with the entitlement to paid FDV leave will be independently reviewed in early 2024. The review will consider the impacts of paid FDV leave on small businesses, sole traders and people experiencing family and domestic violence.

¹⁵ *Fair Work Act 2009* (Cth) s 89(2), *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) sch 1 s 6 (inserting new section 98(2) into the *Fair Work Act 2009* (Cth)).

What should employers be doing?

CCIQ suggests the following for employers to consider in managing paid FDV leave:

- identify the relevant date that their employees will be entitled to access paid FDV leave,
- seek to understand the obligations and duties that apply with the introduction of paid FDV leave,
- develop and implement a detailed FDV leave policy, and ensure all employees are aware of it,
- consider and establish the necessary protocols for;
 - a) keeping records of employees taking paid FDV leave, and
 - b) how evidence and sensitive employee information will be managed.
- establish the necessary protocols for keeping accurate and up to date records for rebalancing of paid FDV leave balances,
- look to relevant accounting requirements for budgets and forecasts.

Paid Family & Domestic Violence Leave – FAQ

1. When does the new paid family and domestic violence (FDV) leave entitlement come into effect?

Currently, under s106A of the *Fair Work Act 2009* (Cth) (the 'FW Act'), employees are entitled to 5 days of unpaid FDV leave in a 12-month period.

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) (the 'Amendment Act') has amended this entitlement to 10 days paid FDV leave per each 12-month period.

For business with 15 or more employees, the new paid leave entitlement commences on 1 February 2023.

The new paid leave entitlement will commence on 1 August 2023 for businesses with 14 or less employees (headcount as at 1 February 2023). This means small businesses will have an additional six months to prepare for the new paid leave entitlement.

2. What is the definition of FDV?

The FW Act section 106B(2) defines FDV as violent, threatening or other abusive behaviour by a close relative of an employee that seeks to coerce or control the employee and causes the employee harm or to be fearful.

The Amendment Act has expanded the definition of FDV by including a member of the employee's household and a current or former partner as people who can be violent, threatening or abusive to the employee.

With the expansion of the definition under the Amendment Act, the definition of FDV is:

Violent, threatening or other abusive behaviour by a close relative, a member of the employee's household and a current or former partner of an employee that seeks to coerce or control the employee and causes the employee harm or to be fearful.

3. When can an employee access the paid FDV leave entitlement?

Under section 106B(1)* of the FW Act, an employee can access their 10-day paid FDV leave entitlement if the employee is experiencing FDV and the employee needs to do something to deal with the impact of the FDV, and it is impractical for the employee do so outside of their work hours.

**Please note, section 106B(1) of the FW Act refers to 'unpaid' FDV leave, however, the Amendment Act Sch 1 s14 replaces 'unpaid' with 'paid' in the Act, meaning s106B(1) should be read according to this amendment.*

4. What does the new paid leave entitlement mean for the existing unpaid FDV leave entitlement in the FW Act?

The Amendment Act has deleted the existing unpaid FDV leave entitlement and replaced with the new 10 day paid FDV leave entitlement from the operative dates referred to earlier in this FAQ.

Therefore, the 5-day unpaid FDV leave entitlement will cease to exist on the respective commencement date* of the new paid leave entitlement.

**Please refer to the commencement dates provided in FAQ Question 1.*

5. Is the paid FDV leave entitlement paid at the same rate as other leave entitlements such as personal/carer's and annual leave?

Yes, it is paid at the same because employers must pay the FDV paid leave entitlement at the same rate the employee would have been paid had the employee worked that day and not taken FDV leave.

6. How should I refer to the FDV leave entitlement in employment contracts?

Paid FDV leave is a new entitlement effective from the relevant commencement date*. As this new entitlement is enshrined in the FW Act, it will apply to all employees regardless of whether an employment contract specifically refers to the entitlement.

CCIQ recommends all employment contracts refer to entitlements that apply to an employee, and suggests the following wording can be used for this purpose:

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Family and Domestic Violence Leave is provided in accordance with the National Employment Standards in the Fair Work Act 2009 (Cth).

**Please refer to the commencement dates provided in FAQ Question 1.*

7. Is paid FDV leave available to all employees?

Yes, it is, as all full time, part time and casual employees are entitled to 10 days paid FDV leave for each 12-month period.

Please note that the entitlement is provided on a daily, not an hourly basis. For example, if employee finishes work 4 hours early to do something to deal with the effects of family and domestic violence, a whole day will need to be deducted from their paid FDV leave entitlement.

8. Can employers request for documentary evidence before approving FDV leave?

Yes, employers are encouraged to request documentary evidence to prove that the employee:

- is experiencing family and domestic violence,
- needs to do something to deal with the impact of family and domestic violence, and
- it is not practical for them to do so while they are working.

Employers should check the validity of the evidence to ensure it is acceptable before approving and paying the leave entitlement.

9. Do employers need to inform employees of the upcoming FDV leave change?

CCIQ recommends employers communicate with their employees about the new entitlement of 10 days paid FDV leave per each 12-month period. Employers should ensure that employees are aware that the entitlement is changing from 5 days unpaid leave to 10 days paid leave on the respective commencement date.

Employers will need to ensure their current Leave Policy and/or Family and Domestic Violence Policy is updated to reflect the new entitlement of 10 days paid FDV leave and associated administration obligations and arrangements.

Communicating policy updates is a positive way of ensuring employees are aware of the new paid leave entitlement.

10. If employment contracts reference the unpaid FDV leave entitlement, do employers need to issue new employment contracts to all staff referencing the new paid Domestic Violence Paid Leave entitlements?

Employers should ensure that employees understand the new paid entitlement. To do so, employers should first review what their current employment contracts state, given they may generically refer to FDV as an entitlement.

Where an employment contract is silent on FDV leave, employers may:

- a) issue employees with a new employment contract that refers to the new entitlement in detail; or
- b) issue employees with a memo explaining the new FDV leave entitlement and confirming that this entitlement is to be read into an employee's employment contract.

Employers are encouraged to review employment contract templates to ensure future employment contracts do not reference out of date FDV leave entitlements.

CCIQ's Workplace Relations team can assist employers seeking to update employment contract templates or develop a template memo for use at their workplace.

11. What is reasonable evidence to request prior to approving/paying FDV leave?

An employer can request the following evidence to support an employee's request for paid FDV leave:

- documents issued by the police service,
- documents issued by a court,
- family violence support service documents, or
- statutory declaration.

The standard of evidence requirement outlined at section 107(3)(d) of the FW Act states that the evidence provided by the employee to their employer must satisfy a reasonable person that they are experiencing FDV and need to do something to deal with the impacts of FDV that cannot be done during their work hours.

12. What support can employers provide to employees who are experiencing FDV?

It is best practice to ensure that paid FDV leave requests are responded to promptly with care and confidentiality. FDV is a personal issue for an individual, however a positive workplace response will assist an employee to manage the impact of the FDV.

Employers should ensure employees are aware of the new paid leave entitlement and be provided with a copy, or know where to access a copy, of a FDV policy that explains how employees can request access to their paid FDV leave entitlement.

CCIQ recommends that employers consider the following measures to increase support for employees experiencing FDV:

- offering flexible work arrangements* to help the employee deal with the impacts of FDV; and
- providing an Employee Assistance Program for all employees so any employee who is experiencing FDV can receive free and confidential counselling support; and
- monitoring the employee's workload while they deal with the impacts of FDV and reducing their workload where necessary to help relieve workplace pressure.

** Flexible work arrangements are provided for in the FW Act for eligible employees. Arrangements above and beyond this should be documented in a workplace policy.*

13. Is the paid FDV leave entitlement paid out of an employee's accrued annual leave balance, or is this a separate leave entitlement that the business must provide?

Paid FDV leave is a new paid leave entitlement that is additional and separate to other leave entitlements such as annual leave and personal/carer's leave entitlements.

There is no government funding or subsidies available to assist businesses fund paid FDV leave.

14. What is the best way provide employees with information about the new FDV leave entitlement while being mindful of sensitivity around this issue?

FDV is a sensitive topic, therefore, the way businesses communicate the new paid leave entitlement and implement policies and procedures will differ depending on the needs of the business and its employees.

CCIQ recommends that all employers update their Family and Domestic Violence Leave Policy to reflect the changes to paid FDV leave.

CCIQ has developed a detailed policy template available that covers the necessary considerations for a Family and Domestic Violence Leave Policy. Employers wanting to purchase a copy of CCIQ's template are encouraged to contact the Workplace Relations team on telephone 1300 135 822 or via email advice@cciq.com.au.

Members can purchase the policy template for \$140 (excl GST).

Non-members can purchase the policy template for \$250 (excl GST).

CCIQ members seeking to discuss their specific business circumstances around communicating the new paid FDV leave entitlement, are encouraged to contact CCIQ using the contact details provided above.

Non-members can also seek advice on a fee for service basis.

15. What FDV leave entitlements are available to ad-hoc casual employees?

All casual employees are entitled to 10 days of paid FDV leave per 12-month period regardless of their usual hours of work.

Casual employees can take paid FDV leave to be absent from work with pay based on rostered shifts. If a casual employee does not have any rostered shifts, they will not be able to access paid FDV leave.

16. Will small business employers need to provide paid FDV leave to their employees?

Small business, like all businesses, are required to provide 10 days of paid FDV leave to all full time, part time and casual employees. As noted in question 1 of this FAQ document, small businesses have a further six-month period before the paid leave entitlement takes effect.

All businesses will need to consider the potential cost of the new entitlement and ensure that appropriate budgetary measures are taken in preparation for the entitlement having effect.

It is important to keep in mind the likely reality that not all employees will use the full 10-day paid leave entitlement in each 12-month period.

17. Can FDV leave be referred to for the purposes of internal reporting?

Employers are required by law keep a record of employee leave entitlements, including paid FDV leave. For the purpose of paid FDV leave, records may take the form of a separate FDV leave register.

A FDV leave register should contain the following information:

- employee's name or employee ID number,
- their service anniversary date,
- how many days of approved paid FDV leave that has been taken, and when it was taken,
- an accurate paid FDV leave balance,
- if evidence was provided and what type (e.g. police report, statutory declaration).

CCIQ recommends that all employers maintain a paid FDV leave register with employee paid FDV leave balances.

18. Who should be responsible for maintaining FDV leave records?

CCIQ recommends employers nominate a suitable person in their business who maintains and accesses the record to ensure its confidentiality. A suitable person can be a senior HR employee, payroll employee, or the business owner.

19. How can an employer refer to paid FDV leave on a payslip while retaining confidentiality?

To maintain confidentiality, and ensure sensitivity and the safety of an employee who needs to access paid FDV leave, CCIQ recommends:

- talking to the business's payroll provider to confirm any arrangement they have put in place for recording a period of paid FDV leave in their payroll system and resulting payslips; and
- discussing this with the employee. Employers will need to know who can access the employee's payslip and if it's safe to name paid FDV leave as something else on the payslip (e.g. 'leave other').

20. Can the paid leave entitlements be used by a person other than a victim of FDV?

An employee can access paid FDV leave if they need to:

- make arrangements for their safety or the safety of a close relative (including relocation),
- attend court hearings,
- access police services,
- attend counselling,
- attend appointments with medical, financial or legal professionals.

An employee can take paid FDV leave to support a close relative who is experiencing FDV who needs to relocate for their safety, even though the employee may not be the victim of FDV.

A close relative is defined in the FW Act to be a:

- parent or grandparent,
- child or grandchild,
- sibling,
- spouse or former spouse,
- de facto partner or former de facto partner, or
- a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

21. How can businesses link paid FDV leave to a payroll system without labelling the leave as FDV leave and how can a business manage the leave balance in the payroll system?

For payroll system related questions, CCIQ recommends employers contact their payroll provider to discuss specifics around how the payroll system will manage paid FDV leave.

22. Is there an amount of notice that the employee is required to give to the employer prior to taking FDV leave?

There isn't a specific timeframe for employees to give notice of taking paid FDV leave.

However, the FW Act section 107(2)(a)-(b) states that employees must:

- provide notice to their employer as soon as practicable, which may be a time after the leave has started, and
- advise their employer of the period (or extended period) of the FDV leave they need to take to deal with the impact of FDV.

Further Advice

Members who have any unanswered questions, require advice on a particular circumstance or to want to ensure compliance, are encouraged to contact the Workplace Relations team on 1300 135 822 or at advice@cciq.com.au

We are here to help you!

For membership enquiries, please contact our membership team on 1300 731 988, or go to the CCIQ website <https://www.cciq.com.au/membership/>

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