

WORKPLACE ALERT

IMPORTANT CHANGE TO PERSONAL LEAVE ENTITLEMENTS

The Full Bench of the Federal Court has handed down a decision which will significantly impact the manner in which personal (sick/carer's) leave is accrued and taken.

The Full Bench in *Mondelez v AMWU & Ors* [2019] FCAFC 138 has found that the personal leave entitlement for both full-time and part-time employees is 10 days per year and not a maximum of 76 hours as was previously thought to be the case by many employers, with part-time employees being entitled to a pro-rata amount.

This Decision will temporarily (or permanently if it is not successfully appealed or the legislation is amended) change the way that personal leave applies to part-time employees or full-time employees that work compressed working weeks like a four-day week.

How will the Leave Accrue

It seems from the Decision that an employee will now accrue personal leave at the rate of one day for each 5.2 weeks worked resulting in an accrued entitlement to 10 days per year. When an employee takes a day off due to personal leave, they will be paid for the number of ordinary hours they would have worked on that day. This may vary from day off to day off depending on the roster that is worked but one day is taken from their personal leave entitlements no matter how many hours are worked.



Example 1- Part-time Employees

If a part time employee works 2 days per week at 9 ordinary hours a day, they will be entitled to 10 days personal leave per year at 9 hours per day being a total of 90 hours of personal leave per year. Under the previously held assumptions, they would only have accrued 36 hours of personal leave.

Example 2- Compressed Work Week

If an employee works 4 days per week at 9.5 hours per day, they will be entitled to 10 days personal leave at 9.5 hours per day being a total of 95 hours of personal leave per year. Under the previously held assumptions, they would only have accrued 76 hours of personal leave.

Example 3- Varied Roster

If an employee works 4 days per week with the number of hours worked on each day being 5, 7, 8 and 9, and they have a day off, the amount of personal leave they are paid for will depend on the number of hours they would have worked on that day. It could mean they are paid for as little as 5 hours or as many as 9 hours depending on the roster and when the leave falls. Leave will no longer be accrued by the hour, rather it will be accrued and taken by the day.

Other Permutations

There are endless other permutations and combinations that might arise. Each employee's situation will need to be assessed to determine the entitlement.



Impact of Overtime

A further issue that was looked at in this Decision was the impact of overtime hours on personal leave accruals. The Court has confirmed that personal leave only accrues on ordinary hours of work and not overtime hours.

Whilst this outcome is good and maintains the current status quo, each Award differs in relation to how many ordinary hours can be worked in any day. Some Award limit this to 8 hours whilst others have upper limits of 10-12 hours. In the Mondelez Decision, the employees were working 3 shifts of 12 hours per shift in an Award that allowed for 12-hour shifts and as a result have an entitlement to 120 hours of personal leave per year.

What Do Employers Have to Do

Each employer will need to review the Awards that cover their staff to determine how this decision will impact the way personal leave accrues. There is a real possibility that the way it impacts will vary between staff and it is bizarrely possible that some part time employees may well have greater entitlement as far as payment for the leave than full time employees.

If this Decision were to stand the effect of the Decision would be backdated to the commencement of the Fair Work Act 2009, subject to some limited statute of limitation issues. The associated issues could be enormous, and there may be a significant liability for some employers.

The Decision will also impact on the cost of some family friendly rostering practices because it will potentially increase the cost of these practices by creating a greater entitlement to personal leave.

What Might Happen Next

There are three possibilities that might now occur.

1. The Decision is not appealed, and this outcome remains in effect.
2. The Decision is appealed to the High Court. Whether the High Court will even hear this matter is not immediately clear, and even if they do, it may take some time to progress to an outcome.
3. The government may seek to amend the Fair Work Act 2009 to address the drafting issue with the legislation that has resulted in this outcome.

In the short term at least, the new rules will be in effect and you are obligated to comply with those rules. There are significant penalties of up to \$63,000.00 per breach for non-compliance with statutory obligations.

If you need assistance in determining your organisations obligations as a result of this Decision, please contact our office ACWA ESSA HELPLINE .

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