

**COMPREHENSIVE GUIDE
TO THE VICTORIAN
LONG SERVICE LEAVE
ACT 2018**



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INTRODUCTION TO THIS GUIDE

This guide sets out in detail how the Long Service Leave Act 2018 (Vic) (Act) applies. This guide and accompanying resources are also available on the Business Victoria website at: business.vic.gov.au/longserviceleave.

This guide is for information purposes only. The Wage Inspectorate Victoria (Inspectorate) can be contacted for further information.

The guide does not constitute legal advice and should not be relied upon as legal advice. Should you have any concerns regarding the application of the material to your individual circumstances, you should seek your own independent legal advice.

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Do not delay in seeking advice or help if your long service leave has not been paid. Some time limits apply, including time limits for regulatory action by the department if your employment ceased prior to 1 November 2018.



LONG SERVICE LEAVE CALCULATOR

The long service leave calculator is an easy to use on-line tool. The calculator can be accessed on the Business Victoria website at: business.vic.gov.au/calculatelongserviceleave.

The calculator estimates the number of weeks' accrued long service leave on termination, the number of weeks of long service leave accrued at any point in time, and when long service leave can be taken.

HOW DO I FIND OUT MORE?

The Inspectorate administers the Act on behalf of the Victorian Government for the benefit of Victorian employees and employers. The Inspectorate operates a telephone information service, provides information and education services, investigates alleged breaches of the Act, and is empowered to enforce the provisions of the Act.

Information on long service leave can be obtained by visiting business.vic.gov.au/longserviceleave or calling the Inspectorate on 1800 287 287.

A copy of the Act can also be found at: legislation.vic.gov.au.

To determine if an employee is entitled to long service leave under federal law, contact the Fair Work Infoline by calling 13 13 94 or check the Fair Work Ombudsman's website at: fairwork.gov.au.

Employers may also contact their employer organisation for help.

Employees may also contact their union or JobWatch for assistance with any employment-related issues (metro callers: (03) 9662 1933, or regional callers: 1800 331 617).

THE VICTORIAN LONG SERVICE LEAVE ACT 2018

Long service leave is a long-standing entitlement for Australian employees. The Act sets out arrangements for long service leave in Victoria. This guide explains the entitlements and obligations of employees and employers under the Act.

The Act applies from 1 November 2018 and replaces the Long Service Leave Act 1992 (Vic) (1992 Act), following a legislative review to ensure that our long service leave laws continue to meet community expectations, are easy to understand and apply, and are consistent, where appropriate, with other workplace laws, such as the Commonwealth Fair Work Act 2009 (FW Act).

Continuing effect of certain leave or absences taken under the 1992 Act

While the Act applies from 1 November 2018, long service leave accrued under the 1992 Act continues. In some instances, the Act has rules (called 'transitional provisions') that preserve the operation of some provisions of the 1992 Act in relation to continuous employment, and what does and does not count towards the period of employment for long service leave purposes. These transitional provisions mean that certain types of leave, or absences, from work taken prior to 1 November 2018 continue to affect the continuity of employment and accrual of long service leave in the same way they did when the 1992 Act applied. Reference to transitional provisions occurs throughout this guide, where relevant.

WHAT ARE THE KEY CHANGES?

1. The new laws will provide greater flexibility for women, families and those transitioning to retirement.
2. Employees will be able to apply for leave after seven years of work, rather than ten years.
3. Employees can now take long service leave in smaller increments, i.e. a minimum of one day per occasion.
4. Absences from work including unpaid parental leave will generally not break continuous employment.
5. Certain breaks will now count towards accrual of long service leave, e.g. unpaid parental leave of up to 52 weeks, or longer in certain circumstances.
6. New penalties apply for failing to keep and/or produce records when requested.

Under the 1992 Act, employees were not eligible to take leave until they had worked a minimum of 10 years, although, if employment ended after 7 years, an employee was entitled to be paid for any unused long service leave entitlement. Under the Act, the entitlement to take leave now arises at 7 years, and workers are entitled to apply for leave from that day.

The change to when long service leave can be taken does not alter the rate at which long service leave accrues. It is just expressed differently. Long service leave is calculated by simply dividing the period of employment by 60. For example, if the employee has worked for 7 years, convert the years into total weeks and divide this by 60 which equates to approximately 6.1 weeks long service leave.

WHO IS COVERED BY THE LONG SERVICE LEAVE ACT?

Most Victorian employees will be covered by and entitled to long service leave in accordance with the Act, unless they have a long service leave entitlement from another source. In short, almost all Victorian workers will have a right to long service leave, but that right may be under the Act, an enterprise agreement, a pre-reform award (explained later) or under some other workplace law (known collectively as 'industrial instruments').

Definitions of employee and employer for the purposes of this Act are covered later in this Guide.

The Act does not apply to employees who are entitled to long service leave under another Victorian Act to the extent of any inconsistency.

The Act does not apply to workers covered by the Construction Industry Long Service Leave Act 1997 (Vic). There are also specific arrangements for portable long service for some industries under the Long Service Benefits Portability Act 2018 (Vic) that commence in 2019. Progressive updates on this scheme are available at: economicdevelopment.vic.gov.au/what-we-do/industrial-relations.

INTERACTION BETWEEN STATE AND FEDERAL LONG SERVICE LEAVE LAWS: WHICH LAW APPLIES?

It is important for employees and employers to check if an employee's employment is covered by another Act, or a pre-reform award or enterprise agreement, and whether that award or agreement contains its own long service leave provisions. Help with this enquiry can be obtained by calling the Fairwork Infoline on **13 13 94** or fairwork.gov.au.

Modern awards (governed by the FW Act) made from 1 January 2010 cannot include long service leave terms.

In some instances, a collective enterprise agreement ('employment agreement') may contain long service leave entitlements that refer to and/or align with the Act, or may be different from the entitlements under the Act. Importantly though, long service leave terms in an employment agreement made under the FW Act from 1 January 2010 will be invalid to the extent that they are inferior to those under the Act in any respect – in such circumstances the Act applies instead.

It is important to know which industrial instrument provides the entitlement to long service leave, as this may affect the timing of when the leave becomes available, the rate of accrual, and whether a state or federal agency is responsible for ensuring compliance with that long service leave law.

The Long Service Leave Act and pre-reform awards

The FW Act has retained some old awards, called pre-reform awards, which may apply instead of the Act for long service leave purposes. A pre-reform award is an old award that applied before 1 January 2010. An employee may have an entitlement to long service leave under a pre-reform award if the employer is bound to the award, and it covers the work of the employee and entitles the employee to long service leave. Pre-reform awards continue to apply in this manner (subject to certain rules) in a range of industries, including in the automotive, horticultural and pastoral industries.

If the relevant award or employment agreement is silent on long service leave, the Victorian Act applies in default.

HOW MUCH LONG SERVICE LEAVE DO EMPLOYEES GET?

Under the Act, long service leave accrues at a rate of one week for every 60 weeks of continuous employment with one employer, that is, at approximately 0.866 weeks per year.

WHEN DO EMPLOYEES BECOME ENTITLED TO LONG SERVICE LEAVE?

After at least seven years' continuous employment with one employer, an employee is entitled to:

1. take their long service leave, or
2. be paid any unused long service leave entitlement if employment ends.

Refer to our online long service leave calculator to check when leave is due or how many weeks' long service leave has accrued at business.vic.gov.au.

Refer later in this Guide for the definition of continuous employment.

EXAMPLE

Jenny has worked at a chemist for 8 years and 6 weeks.

Jenny wants to renovate her house but doesn't have the time. A friend of Jenny's tells her she might be entitled to take long service leave because she has more than 7 years' employment at the chemist.

Jenny asks her employer if she is entitled to take long service leave. Jenny's employer calculates the amount of long service leave she can take as follows:

8 years multiplied by 52 weeks = 416 weeks.

416 weeks + 6 weeks = 422 weeks.

422 weeks divided by 60 = 7 weeks.

Jenny is entitled to take up to 7 weeks' long service leave to renovate her house.



WHO IS AN EMPLOYEE?

The Act provides entitlements for employees to long service leave. An employee is defined by the Act as a person employed by an employer to do any work for hire or reward. It includes an apprentice and any person, such as a trainee, whose oral or written contract of employment requires him or her to learn or be taught an occupation.

Full time, part time, casual and seasonal employees, and employees under certain fixed term arrangements, all accrue long service leave.

An employee may have a more generous entitlement than the Act under a common law employment contract. However, a contract cannot legally contain long service leave entitlements inferior to the Act. In addition, an employer cannot lawfully use a contract, agreement or deed of any kind to avoid their obligation to pay the full amount of long service leave owed to an employee. For further information, please contact the Inspectorate on **1800 287 287**.

Genuine independent contractors are not employees and are generally ineligible for long service leave under the Act. However, whether a person is truly an independent contractor or employee needs to be assessed on a case by case basis. For an assessment of whether a person is more likely to be a genuine independent contractor or an employee in a given situation, visit business.gov.au and type 'Independent Contractors Decision Tool' into the search bar – completing the Tool will provide an indication of a person's status. The Fairwork Infoline also provides further guidance on this issue – for more information call **13 13 94** or visit fairwork.gov.au/find-help-for/independent-contractors.

Outworkers in the clothing industry are deemed - by the Outworkers (Improved Protection) Act 2003 (Vic) - to be employees for the purposes of the Act and entitled to long service leave in accordance with the Act.

EXAMPLE ONE

Janika is offered and accepts a job as a retail salesperson. On the day Janika starts at the business, she signs a contract of employment which has a clause stating she won't be entitled to long service leave if employment ends before 10 years.

Janika resigns from her employment after 8 years and asks her employer to pay her 7 weeks' long service leave. However, her employer points out that she signed a contract which stated she was not entitled to long service leave if employment ends before 10 years.

Despite the wording of her contract of employment, she is entitled to payment for 7 weeks' long service leave on the day her employment ends. This is because long service leave terms in a contract that are lesser entitlements (i.e. less favourable) than under the Act are invalid, and the Act will still apply, even if an employee signed the contract. In this example, Janika's employer is obliged to pay Janika her long service leave entitlement and Janika can still enforce her legal right to recover non-payment.

EXAMPLE TWO

Esther's employment ends after 10 years, and she is entitled to 8.7 weeks of long service leave.

Esther and her employer become involved in a dispute over her long service leave entitlement, and Esther is offered a settlement by her employer equivalent to 6 weeks.

Despite any settlement agreement, based on a 10-year employment period, she will be entitled to payment for 8.7 weeks of long service leave in accordance with the Act, and she retains the right to recover the underpayment even if she has signed the settlement agreement.

ARE CASUAL, SEASONAL AND SPECIFIED (FIXED) TERM EMPLOYEES ENTITLED TO LONG SERVICE LEAVE?

Yes, the Act explicitly entitles casual, seasonal and fixed term employees to long service leave. A casual or seasonal employee's employment must still be 'continuous' under the Act.

The rules for casual and seasonal employees mean that employment will be deemed continuous if there is not an absence of more than 12 weeks between any two instances of employment. However, a casual or seasonal employee's employment will also remain continuous for long service leave purposes, despite a longer absence from work exceeding 12 weeks, if:

- the employee and the employer so agree before the start of the absence; or
- the absence is in accordance with the terms of the engagement; or
- the absence is caused by seasonal factors; or
- the employee has been employed by the employer on a regular and systematic basis and has a reasonable expectation of being re-engaged by the employer; or
- the absence is due to the casual or seasonal employee taking up to 104 weeks' paid or unpaid parental leave.

Paid or unpaid absences of any duration because of illness or injury will also not break continuous employment. There is more detailed information about the impact of other leave/interruptions or absences on long service leave under the Act on page 31 of this guide.

The casual hourly rate does not include an amount to cover long service leave. A casual hourly rate cannot be loaded to compensate for non-payment of long service leave. It is illegal to cash out an employee's long service leave entitlement instead of allowing the employee to access the leave as a break from work (see section 34 of the Act) – except where employment has ended.

FIXED TERM EMPLOYEES

The Act provides that where employment terminates because the fixed period of employment has expired, but the employee is re-engaged within 12 weeks, employment will be deemed continuous for the purposes of long service leave.

EXAMPLE ONE – CASUAL OR SEASONAL EMPLOYEE AND EMPLOYER AGREE:

Paul is a casual zoology tutor at a Victorian university. He has been employed by the same university for 13 years.

Paul and the university have an agreement that Paul does not teach between November and March, due to the university non-teaching period. Paul therefore has a four-month break from work each year. However, this is in accordance with his employment agreement and his employment is to be regarded as continuous.

Paul will be eligible for long service leave despite the absences of more than 12 weeks between instances of employment every year. This is because Paul and his employer have agreed that his employment continues despite the regular, lengthy absences.

EXAMPLE TWO – SEASONAL EMPLOYMENT

Russell works on a seasonal basis at Ruth's Plant Nursery. Russell has worked at the nursery for 8 years.

Russell does not work in the coldest winter months when there is a dormant period for the plants. The non-working period ranges from five weeks to a few months over the years of working at Ruth's. On at least 3 occasions, the winter spell has lasted for more than 3 months. However, Russell's regular work always recommences after the winter shut down although the gap varies according to the severity of a winter.

Russell is eligible for long service because his absences are caused by seasonal factors.

EXAMPLE THREE – REGULAR AND SYSTEMATIC CASUAL EMPLOYMENT

Leo works as a casual employee at his local supermarket. He is regularly rostered to work Mondays and has done so for the last 2 years.

Leo's mother unfortunately falls ill, and Leo must take 4 months off work. He tells his employer this, and his employer assures him they will make shifts available to him again once he is able to return. Leo then returns to work 4 months later when his mother is feeling better.

Although there is no explicit agreement that his employment will not be broken for the purposes of long service leave, his service will be deemed continuous under the Act. This is because Leo's work is regular and systematic, and he has a reasonable expectation of being re-engaged following the absence.

EXAMPLE FOUR – CASUAL OR SEASONAL EMPLOYEE TAKES UNPAID PARENTAL LEAVE

Ashanti works as a casual ski instructor during each Victorian ski season. Ashanti has worked every ski season for the past 6 years.

Ashanti takes an initial period of 52 weeks' parental leave. Before the end of the initial 52 weeks' unpaid parental leave, Ashanti applies to extend it by a further 52 weeks – making a combined total of 104 weeks' unpaid parental leave. Ashanti returns to work at the start of the next ski season after her 104 weeks' unpaid parental leave.

In this example, Ashanti's period of unpaid parental leave does not interrupt her continuous employment for long service leave purposes under the Act. Additionally, any further period beyond 104 weeks' unpaid parental leave that elapsed before Ashanti could return to work also won't break her continuous employment if the further absence was due to seasonal factors related to the ski season.

EXAMPLE FIVE – FIXED TERM EMPLOYMENT

Karina works at an accountant's business in the city. Karina has been employed at her job for 8 years. Karina is currently employed on an ongoing basis, but for the first 3 years she was employed on a series of 12-month fixed term contracts. Karina was re-employed at the end of each fixed term contract. On the first two occasions, the new employment contract commenced immediately after the expiration of the previous fixed term. On the last occasion, however, there was a gap of 4 weeks between the expiration of Karina's third and last fixed term contract and the commencement of her ongoing employment.

Despite Karina being employed under a total of 4 separate employment contracts, the first three being fixed term engagements, her entire period of employment under each successive period of employment, and any gap between them, is deemed continuous under the Act. This is because there was never a gap of more than 12 weeks after the expiration of Karina's fixed term contracts on each occasion.



TAKING LONG SERVICE LEAVE – WHEN AND HOW?

An employee can request to take long service leave at any time after becoming entitled to take the leave. Leave can be taken for any period of not less than 1 day at a time.

If an employee makes a request to take long service leave, the employer must grant the leave as soon as practicable unless the employer has reasonable business grounds for refusing the request. The 'Definitions' in section 3 of the Act provide guidance on what is included in the meaning of 'reasonable business grounds'. For further guidance, contact the Inspectorate on **1800 287 287**.

EXAMPLE

Rui is nearing retirement and has never taken long service leave. As a result, he has 26 weeks' accrued long service leave owing to him.

Rui could wait until he retires and receive a payment for the accrued long service leave, but he would like to ease into retirement by working a four-day week for 12 months. His employer likes this idea, as it will reduce the long service leave payment to Rui when he reaches retirement. They agree to make this arrangement.

The Act allows leave to be taken in one-day periods. In this example, Rui can work a four-day week for the last year of his employment, without loss of pay or reduction in superannuation. The balance of his leave will then be paid out on retirement.

CAN LONG SERVICE LEAVE BE TAKEN IN ADVANCE?

Yes. An employer may agree to leave being taken before an entitlement is due. If the employment then ends before the long service leave is accrued, the employer may deduct from monies owed to the employee on termination, an amount equivalent to the long service leave taken in advance. However, there is no requirement for an employer to agree to this.

CAN AN EMPLOYER DIRECT AN EMPLOYEE TO TAKE LONG SERVICE LEAVE?

Yes. An employer may direct an employee to take leave by giving at least 12 weeks' written notice. If the employee does not want to take their leave at the time nominated by the employer, they can apply to the Industrial Division of the Magistrates' Court for a decision about this dispute.

CAN THE PERIOD OF LEAVE BE EXTENDED?

Yes. An employer may agree to an employee taking a period of leave at half pay. For example, an employee with 13 weeks' accrued long service leave could take a 26 weeks' break at half pay. Again, there is no requirement for an employer to agree to this.

Note that taking half the leave at double pay is not permitted, as this is in breach of the Act's prohibition on 'cashing out' long service leave.

The online calculator can assist to check when long service leave is due and how many weeks' long service leave has accrued at:
business.vic.gov.au/calculatelongserviceleave.

WHAT HAPPENS IF EMPLOYMENT ENDS BEFORE ALL LEAVE IS TAKEN?

RESIGNATION, REDUNDANCY, TERMINATION, DEATH

There is no entitlement to a payment of accrued long service leave unless there is at least seven years' continuous employment immediately before employment ends.

On the day that employment ends, an employee with at least seven years' continuous employment with one employer is entitled to receive payment for any untaken long service leave. This will apply whether the employee has resigned, has had their employment terminated by the employer, has been made redundant, or has died. If an employee has accrued long service leave but dies before it is taken, a payment must be made to the employee's personal representative.

It is an offence for an employer not to pay an employee the full amount of the employee's long service leave entitlement on the day the employment ends. The penalty for this offence is 12 penalty units for a natural person and 60 penalty units for a body corporate (see *What is the value of a penalty unit?* on page 54 of this guide for an explanation of 'penalty units'). These penalties apply for each day that the offence continues. If an employer is found guilty of this offence, a criminal conviction may also be recorded.

Where an employee has already taken some long service leave, the employer must pay any remaining accrued leave when employment ends. When calculating long service leave, weeks of long service leave already taken or paid for in accordance with the Act must be deducted.

It is important to note that payments in lieu of long service leave are prohibited (where employment is still continuing), as this is in breach of the Act's prohibition on 'cashing out' of long service leave.

EXAMPLE ONE

Jacqui resigns from her employment, and, following completion of her notice period, her employment ends after seven years and six months' continuous employment. Jacqui's long service leave entitlement is calculated as follows:

Seven years multiplied by 52 weeks = 364 weeks.

Six months = 26 weeks.

364 weeks plus 26 weeks = 390 weeks in total.

We then divide the total weeks by 60, as Jacqui will receive one week of long service leave for each 60 weeks' continuous employment. 390 weeks divided by 60 equals 6.5 weeks.

Jacqui is therefore entitled to payment for 6.5 weeks of long service leave on the day her employment ends.

EXAMPLE TWO

Marcus resigns from his employment, offering one month's notice, but his employer elects to pay him in lieu of notice so that his employment ends on the day on which he resigns. Marcus' employment ends after six years and eleven months. As Marcus has not reached seven years' continuous employment by the last day of his employment, there is no entitlement to a payment of accrued long service leave. If, however, Marcus had worked out his period of notice, he would have accrued seven years' service, and would then be entitled to a payment in lieu of long service leave.

EXAMPLE THREE

Jayne is retiring after 22 years. After 8 years of employment, Jayne took 6 weeks of long service leave to visit her daughter in Canada. Jayne's long service leave is calculated as follows:

22 years multiplied by 52 weeks = 1,144 weeks in total.

We then divide 1,144 weeks by 60. 1,144 divided by 60 = 19.1 weeks.

We then deduct the 6 weeks' long service leave already taken to calculate Jayne's final entitlement. 19.1 minus 6 = 13.1 weeks.

Jayne is entitled to a payment for 13.1 weeks of long service leave on the day her employment ends.

CAN LONG SERVICE LEAVE BE 'CASHED OUT' ?

No. It is an offence under the Act to give or receive payment for long service leave instead of the employee taking the break from work. An employee can only receive payment for any unused long service leave if their employment ends before the leave is taken (the only time long service leave can be paid out is when employment ends.) Both an employee and an employer can be liable for this offence. If an employer or employee is found guilty of this offence, a criminal conviction may also be recorded.

WHAT IS MEANT BY 'ONE EMPLOYER'?

The Act requires an employee to have continuous employment with one employer to become entitled to long service leave (a more detailed explanation of the special meaning of 'continuous employment' is contained elsewhere in this guide).

The Act sets out several situations where an employee is regarded as having been employed by one employer, even though in the strict legal sense they have worked for more than one employer, as follows:



WHEN A BUSINESS CHANGES HANDS

Where a business is sold, transferred or assigned and an employee remains with the business, the new employer becomes responsible for the employee's long service leave entitlement. The period of employment with the old employer transfers to the new employer, who becomes liable for the long service leave accrued across the entire period of employment. It is common for the sale of business documents to reflect this liability, but such documents cannot validly exclude an employee's entitlement. Even if the contract for the sale of business does not include contingencies to cover a transferring employee's long service leave, the employee still has an entitlement with the new owner under the Act.

Where an employee will continue with the new owner of the business, the old employer generally should not pay out accrued long service leave to the employee, as this may amount to an unlawful cashing out of the entitlement. There are sale-of-business situations in which it may be unknown to an employer whether an employee may become re-employed by a new owner of their business (discussed below).

It is common for the parties to a sale of business to factor long service leave liabilities into the purchase price, or for an amount of money to be put into trust for the employee's benefit to cover the amount of long service leave the employee accrued during their employment with the old employer. Whatever the seller and purchaser agreed during their negotiation has no bearing on their continuing obligations to the employee under the Act, and any arrangement must ensure strict compliance with the Act.

SALE OF BUSINESS

If an employee is dismissed by the old business owner but is employed by the new business owner within 12 weeks after their dismissal to do work which is the same (or substantially the same) as the work the employee did for the old owner, employment is deemed continuous for the purposes of long service leave accrual under the Act.

NO DOUBLE-DIPPING

Where a business is sold, and the new owner decides to employ an employee who worked for the previous owner, the Act requires the new employer to recognise the employee's prior continuous employment. This is the case even where the old employer paid the employee their accrued long service entitlement with respect to the employee's same period of employment.

However, the Act does not require the new employer to grant leave or make payment with respect to the same period of employment for which the employee has previously received long service leave entitlements when employed by the old employer. It is advisable that the new employer seek documents from the old employer verifying that the long service leave entitlement was in fact taken or paid.

EXAMPLE ONE

Consuela has been continuously employed by Robert's Tyres for nine years. The owner of Robert's Tyres, Robert, sells Robert's Tyres to James. When the business is taken over, James continues to employ Consuela.

In this situation, Consuela's employment is continuous. James becomes liable for Consuela's accrued long service leave over the past nine years, and for any long service leave that accrues in future.

EXAMPLE TWO

Shirley works at the Happy Valley Coffee Shop. Her employer sells the coffee shop and terminates her employment. The new owner takes over the running of the coffee shop. Four weeks after Shirley was terminated by the old owner, Shirley is re-employed by the new owner to do the work she was doing for the old owner.

As Shirley is re-employed within 12 weeks by the new owner to do the work she was doing for the old owner, her employment is continuous for the purposes of long service leave.

EXAMPLE THREE

Matt – who loves the sound of leather on willow – has been continuously employed by Howzat Cricket Supplies Pty Ltd for 7.5 years. Matt’s boss, Big Merv, reluctantly informs Matt that he needs to make him redundant, as he has decided to reduce business trading hours and train towards his dream of joining the Australian Cricket Team.

Big Merv pays out Matt’s accrued, unused long service leave on the last day of Matt’s employment. Six weeks after the day Matt’s dismissal takes effect, Cricket Australia tells Big Merv he doesn’t have what it takes to make it in test cricket. However, Cricket Australia offers to purchase Howzat Cricket Pty Ltd from Big Merv to supply its team with the best cricket equipment.

The new owner of Howzat Cricket Supplies Pty Ltd reemploys Matt within 12 weeks from the day Big Merv dismissed him.

In this example, Howzat Cricket Supplies Pty Ltd is required to recognise Matt’s continuous employment for long service leave purposes from the day he was first employed by the old owner (Big Merv). However, because in this example Big Merv was required to pay Matt’s accrued long service leave in lieu on termination, Howzat is NOT required to pay or grant the period of leave with respect to the same period of service again, and it can be deducted when calculating the value of the entitlement the next time Matt wishes to take long service leave.

WHEN ASSETS ARE TRANSFERRED

If an employee performs work in relation to assets used in the carrying on of a business, and those assets are transferred, employment will remain continuous if the new owner of the assets continues the employee's employment.

Employment will also be deemed to remain continuous in relation to the transfer of assets where an employee's employment ends with the old owner of the assets but commences with the new owner of the assets within 12 weeks of the transfer.

Assets are defined in the Act to include tangible and intangible assets.

EXAMPLE ONE

Michael works as a graphic designer.

The company he works for has no physical office, and he works from home. The company becomes insolvent and is liquidated. The liquidated company's online domain name (which has positive online branding recognition), is sold to another business. The new business employs Michael, and he commences work on the day following the transfer of the domain name.

The Act defines assets to include intangible assets, and in this example, the positive branding recognition associated with the online domain name satisfies this definition.

Michael will be entitled to have his prior period of employment recognised, and his employment will remain continuous for the purposes of long service leave accrual under the Act.

EXAMPLE TWO

Lativa has been continuously employed by Nadia of Nadia's Vegan Confectionery Factory for nine years. She works with the chocolate making equipment.

Nadia's Vegan Confectionery Factory closes down, but the chocolate making equipment is sold to Jackie. Jackie runs her business as Jackie's Chocolate Factory. Lativa obtains a job working with Jackie's Chocolate Factory, working with the same chocolate making equipment she used when working for Nadia's Vegan Confectionery Factory.

In this situation, Lativa's employment is continuous. Jackie becomes liable for Lativa's accrued long service leave.

WHEN WORK IS PERFORMED FOR A RELATED EMPLOYER

Where an employee has worked first with one employer and subsequently works with a related corporation, or a corporation with substantially the same directors and/or management, then employment will be continuous. In such circumstances, the related corporation will assume liability for the employee's long service leave entitlement from the time when the employee first commenced with the previous employer(s).

INSOURCING AND OUTSOURCING

If an employer outsources work to another employer, like an agency or contractor, and as a result an employee moves from the host employer to the contracted employer, the contracted employer must recognise the employee's continuous employment with the host employer.

This rule also applies if work is insourced. In this circumstance a host employer must recognise continuous employment with the previously contracted employer.

Where work is contracted in and out over a period the same rule applies. In these circumstances an employee will be taken to have worked for one employer while carrying out the work for the purposes of accruing long service leave.

EXAMPLE

Leanne is employed in IT for an accounting company, Accounting Co Ltd.

Accounting Co Ltd decides to outsource its IT work to IT Contractors Pty Ltd. As a result, Leanne continues to work at Accounting Co Ltd, but is now employed by IT Contractors Pty Ltd.

After a year, Accounting Co Ltd decides that it no longer wants to use IT Contractors Pty Ltd, and takes its IT operations back in-house. As a result, Leanne once again becomes employed by Accounting Co Ltd.

Even though Leanne has worked for two different employers during these changes, she will be entitled to long service leave as if she were employed by only one employer.

WHAT IF THE EMPLOYEE HAS BEEN AN APPRENTICE?

If an employer re-employs a person who was formerly the employer's apprentice within 52 weeks after completion of the employee's apprenticeship, then the period of their apprenticeship counts towards the period of employment with that employer.

Some apprentices are employed by a Group Training Company, which places the apprentice with a host employer. The apprentice may later become employed by the host employer directly. In this circumstance the rules that apply to insourcing and outsourcing will apply. That is, the continuous employment with the Group Training Company must be recognised by the host employer.



CONTINUOUS EMPLOYMENT AND WHAT COUNTS TOWARDS THE PERIOD OF EMPLOYMENT

Certain leave and/or absences occur in employment that impact both the continuity of employment on the one hand, and what counts towards the accrual of long service leave on the other. Certain absences do not break continuous employment under the Act, while others do. Similarly, certain absences count towards the period of employment for long service leave purposes, while others do not.

There are therefore two key questions that can usefully guide an assessment of a person's entitlement to long service leave under the Act, as follows:

1. Has an employee taken any leave or absences of a type that break continuous employment?
2. Do the types of leave or absences an employee takes during employment count towards the period of employment for the purposes of the accrual of long service leave?

ABSENCES THAT WILL NOT BREAK CONTINUOUS EMPLOYMENT

For an employee to become entitled to long service leave, their employment with the employer must be continuous. This does not prevent the employee taking certain paid or unpaid breaks from work. Also, some other specified leave and absences will be deemed to not interrupt or break continuous employment for long service leave purposes.

Note the effect of transitional provisions referred to on page 8 of this guide.

ILLNESS OR INJURY

Any paid or unpaid absence from work for any duration because of illness or injury (including WorkCover absences), will not break continuous employment.

PAID OR UNPAID LEAVE

Annual leave, paid or unpaid parental leave for full time or part time employees (or up to 104 weeks' paid or unpaid parental leave for seasonal or casual employees), or long service leave itself, will not break continuous employment. Any other form of leave provided for under an oral or written employment agreement will also not break continuous employment.

INTERRUPTIONS - TERMINATION AND RE-EMPLOYMENT

If there is a gap in employment caused by either the employee or employer terminating employment, but the employee is re-employed within 12 weeks, then employment will remain unbroken for the purposes of long service leave. This rule will also apply where an employee's employment ends because their contract has expired, but they are re-employed within 12 weeks of the expiration of the fixed period/s of employment.

OTHER INTERRUPTIONS – CASUALS

For casual employees, continuous employment remains unbroken in a comprehensive range of circumstances. This topic is discussed in detail elsewhere in this guide. For more information about casual and seasonal employees and continuous employment under the Act, contact the Inspectorate on **1800 287 287**.

Note the effect of transitional provisions referred to on page 8 of this guide.

APPRENTICES/TRAINEES

For apprentices, if employment ends because of the completion of the apprenticeship, but the apprentice is re-employed within 52 weeks, the employment remains unbroken for the purposes of long service leave.

TRANSFER OF ASSETS

If an employee is absent from work solely because assets have been transferred from one employer to another, and the employee usually performs duties in connection with those assets, then continuous employment will not be broken for the purposes of long service leave.

In certain circumstances, if an employee is stood down because of a lack of work, machinery breakdown, or during industrial action, their employment will remain unbroken for long service leave purposes.

EXAMPLE ONE

Alex works in a factory that manufactures building products.

The factory purchases new equipment. As a result, Alex and 2 other workers are made redundant. However, there are problems with the new equipment and so the factory reinstates its previous work practices. Because of the problems with the new equipment, 10 weeks after being made redundant, Alex is offered his old job back. Alex accepts the job offer and returns to work the following week.

Because the gap in employment was less than 12 weeks, Alex's employment is deemed continuous for the purposes of long service leave.

EXAMPLE TWO

Naj works as a bartender at his local pub.

Naj resigns from his employment to take up a job at a café nearby. Unfortunately, after 8 weeks the café owner decides to close her business. Naj approaches the local pub to see if he can have his old job back. The publican agrees and Naj re-commences work the following day.

Because the break in employment was less than 12 weeks, Naj's employment is deemed continuous for the purposes of long service leave.

PAID ABSENCE FROM WORK

All periods of paid leave count towards the period of continuous employment for long service leave purposes. Examples include: annual leave, carer's leave, and long service leave itself.

Note the effect of transitional provisions referred to on page 8 of this guide.

PERIODS OF UNPAID ABSENCE FROM WORK

The first period of up to 52 weeks' unpaid leave - including unpaid parental leave - (or a longer period under an oral or written employment agreement/contract) counts towards the period of employment and does not break continuous employment.

Note the effect of transitional provisions referred to on page 8 of this guide.

PARENTAL LEAVE, ACCRUAL AND CONTINUOUS EMPLOYMENT

Unpaid parental leave up to 52 weeks will count towards continuous employment for accrual of long service leave, and no amount of paid or unpaid parental leave will break continuous employment for long service leave purposes.

Unpaid parental leave exceeding 52 weeks will not count towards the accrual of long service leave, unless:

- the (longer) period of absence is taken to be a period of employment in accordance with the relevant written or oral employment agreement; or
- the employee and employer agree in writing before the (longer) leave is taken that the leave is to be regarded as a period of employment; or
- the (longer) period of unpaid leave is any other form of leave provided for in the relevant written or oral employment agreement (note: section 3 of the Act contains a broad, non-exhaustive definition of what is meant by the term 'employment agreement').

The Act's transitional provisions mean that certain types of absence from work that occurred before 1 November 2018 will continue to not count towards the period of employment for accrual of long service leave purposes.

If the Act commences during an employee's absence on unpaid parental leave, only that part of the period of unpaid absence occurring on and from 1 November 2018 counts towards the employee's period of employment for the purposes of accruing long service leave.

PERIODS OF ABSENCE AND ACCRUAL OF LONG SERVICE LEAVE ENTITLEMENT

All forms of paid leave count towards the period of continuous employment for long service leave accrual. Examples include: annual leave, carer's leave, and long service leave.

Periods of up to the first 52 weeks of unpaid leave will count towards the period of employment. However, unpaid leave exceeding 52 weeks will not count, unless:

- the (longer) period of absence is taken to be a period of employment in accordance with the relevant written or oral employment agreement; or
- the employee and employer agree in writing before the (longer) leave occurs that it is regarded as a period of employment; or
- it is taken because of illness or injury or is any other form of leave provided for in the relevant written or oral employment agreement.

Note the effect of transitional provisions referred to on page 8 of this guide.

EXAMPLE

Lola commences 52 weeks of unpaid parental leave 26 weeks before the commencement of the Act on 1 November 2018.

When calculating her entitlement to long service leave, the last 26 weeks of Lola's unpaid parental leave will count towards the period of continuous employment because the leave occurred under the Act, but the first 26 weeks will not count because it occurred under the previous, 1992 Act.

ABSENCE ON SICK LEAVE OR WORKCOVER AND ACCRUAL OF LONG SERVICE LEAVE ENTITLEMENT

Yes. Under the Act, any paid or unpaid absence from work because of illness or injury occurring on and from the commencement of the Act on 1 November 2018 counts towards the period of employment for long service leave purposes. Unpaid leave due to illness or injury includes a WorkCover absence.

Note the effect of transitional provisions referred to on page 8 of this guide. Where the unpaid absence because of illness or injury occurred before the commencement of the Act, only 48 weeks' unpaid absence for that reason in any year counts towards the period of employment, as it occurred under the previous, 1992 Act.

The tables below identify common absences from work or interruptions to employment and state their effect on continuous employment and what counts towards the period of employment for long service leave purposes. The absences identified are not an exhaustive list of all circumstances that may affect the accrual of long service leave.

The tables separately address what the rule is for the absence/s or interruption/s identified, depending on whether these have occurred under the Act (from 1 November 2018), or the 1992 Act (as it previously applied).



TABLES: EFFECT OF ABSENCES/LEAVE ON LONG SERVICE LEAVE

COMMON ABSENCES AND HOW THEY AFFECT CONTINUOUS EMPLOYMENT IF THEY OCCUR ON AND FROM 1 NOVEMBER 2018

Does not break continuous employment	Does break continuous employment
Annual leave	In the case of a casual or seasonal employee, paid or unpaid parental leave exceeding 104 weeks (note: a longer absence may not break a casual or seasonal employee's continuous employment in certain circumstances – see page 16 of this guide for guidance and examples)
Long service leave	
Absence from work because of illness or injury	
Carer's leave	
Paid or unpaid parental leave for permanent employees	Termination of employment at the initiative of the employer or the employee if the employee is not re-employed within 12 weeks
In the case of a casual or seasonal employee, paid or unpaid parental leave up to 104 weeks (note: a longer absence may not break the continuous employment of a casual or seasonal employee in certain circumstances – see page 16 of this guide for guidance and examples)	
Termination of employment at the initiative of the employer or the employee if the employee is re-employed within 12 weeks	
Any other form of paid or unpaid leave provided for under the relevant employment agreement	

COMMON ABSENCES AND HOW THEY AFFECT CONTINUOUS EMPLOYMENT IF THEY OCCURRED UNDER THE 1992 ACT (BEFORE 1 NOVEMBER 2018)

Does not break continuous employment	Does break continuous employment
Annual leave	Termination of employment at the initiative of the employee
Long service leave	The dismissal of an employee where the employee is not re-employed within 3 months
Absence from work because of illness or injury	Parental leave exceeding 12 months unless otherwise specified in the relevant employment agreement or provided for under the National Employment Standards
Carer’s leave	
Any other leave approved by the employer, excluding parental leave	
Parental leave up to 12 months or any other period specified in the relevant employment agreement or provided for under the National Employment Standards	
The dismissal of an employee if the employee is re-employed within 3 months of the dismissal	

COMMON ABSENCES FROM WORK THAT COUNT OR DO NOT COUNT TOWARDS THE PERIOD OF CONTINUOUS EMPLOYMENT IF THEY OCCUR ON AND FROM 1 NOVEMBER 2018

Does count towards the period of employment

Paid leave

Unpaid leave (including unpaid parental leave) up to 52 weeks, or longer if the leave is provided for under the relevant employment agreement

Leave on account of illness or injury

Does not count towards the period of employment

Unpaid leave exceeding 52 weeks unless the leave is provided for under the relevant employment agreement

Where an employee's employment ends, and the employee is re-employed within 12 weeks, the period during which the employee was not employed

COMMON ABSENCES FROM WORK THAT COUNT OR DO NOT COUNT TOWARDS THE PERIOD OF CONTINUOUS EMPLOYMENT IF THEY OCCURRED BEFORE 1 NOVEMBER 2018

Does count towards the period of employment

The taking of any annual leave or long service leave

Any other paid or unpaid absence from work approved by the employer, including carer's leave but not including adoption, maternity or paternity leave

Any absence from work of not more than 48 weeks in any year on account of illness or injury

Does not count towards the period of employment

Unpaid parental leave

Where an employee is dismissed at the employer's initiative and the employee is re-employed within 3 months, the intervening period

Any absence from work exceeding 48 weeks in any year on account of illness or injury

TRANSITIONAL RULES AND CONTINUOUS EMPLOYMENT

Under the 1992 Act, there were different rules for which unpaid absences from work would break continuous employment, and which unpaid absences would count towards the period of employment. The Act retains these rules (called 'transitional provisions') where the absence in question occurred before 1 November 2018.

Seek further information and advice in these circumstances.

Different interpretations may apply for certain prosecution time limits under the 1992 Act and the Act (from 1 November 2018). If a dispute exists regarding an alleged unpaid entitlement where employment ceased before 1 November 2018, seek advice without delay.

Information on long service leave can be obtained by visiting business.vic.gov.au/longserviceleave or by calling the Inspectorate on 1800 287 287.

HOW IS PAYMENT FOR LONG SERVICE LEAVE CALCULATED?

The calculation is the total number of weeks of employment divided by 60 and multiplied by the ordinary weekly rate of pay for the employee's normal weekly hours at the time the leave is taken, or employment ends.

EXAMPLE

Lissa has worked continuously for 11 years; she wants some work-life balance and decides to resign from her employment. Lissa's long service leave entitlement is calculated as follows:

11 years multiplied by 52 weeks = 572 weeks.

We then need to divide the total weeks by 60, as Lissa will receive one week of long service leave for each 60 weeks of service. 572 weeks divided by 60 = 9.53 weeks.

At the time of resignation, Lissa's ordinary pay is \$1,100.00 per week gross.

9.53 weeks multiplied by \$1,100.00 per week is \$10,483.00 gross.

Lissa is therefore entitled to a payment of \$10,483.00 (gross and subject to statutory taxation) on the day her employment ends.

HOW IS ORDINARY PAY CALCULATED?

Ordinary pay is the actual pay received by an employee for working his or her normal weekly hours at the time the employee takes long service leave or ceases employment and has long service leave paid out.

Ordinary pay has a special meaning under the Act and depends on how an employee's wages or salary are earned. It does not include most allowances, penalty or occasional overtime rates but is the actual ordinary time rate received. A casual employee's ordinary rate includes the casual loading. Ordinary pay includes the cash value of any board or lodging that the employee receives from his or her employer.

HOW IS LONG SERVICE LEAVE CALCULATED IF THE EMPLOYEE'S HOURS VARY FROM WEEK TO WEEK?

An employee's long service leave entitlement is based on his or her normal weekly hours at the time the leave is taken, or on the day employment ends. However, in some cases, an employee's hours may vary from week to week. This occurs particularly for casual employees.

Where an employee's hours vary from week to week, the employee's normal hours for calculating long service leave entitlement are taken to be the greatest of the average weekly hours (occurring immediately before the long service leave commences) over either the preceding 52 weeks, 260 weeks, or the entire period of continuous employment. When calculating the average weekly hours, unpaid leave is excluded. The Act contains formulas to calculate ordinary pay where averaging is required.

The following process flowchart explains the steps to follow when applying the averaging rules under the Act. You can use this flowchart to work out the average weekly number of hours and then ordinary pay for workers who do not have fixed hours of work. The formulas are set out in a table located below the flowchart.

ORDINARY PAY: AVERAGE WEEKLY HOURS - CALCULATING THE GREATEST AVERAGE

52 WEEKS

260 WEEKS

ENTIRE PERIOD OF EMPLOYMENT

STEP 1

Add the number of hours worked in the last 52 weeks to the number of hours of paid leave in the last 52 weeks

STEP 1

Add the number of hours worked in the last 260 weeks to the number of hours of paid leave in the last 260 weeks

STEP 1

Add the number of hours worked over the entire period of continuous employment, to the number of hours of paid leave in that time

STEP 2

Subtract the number of weeks of unpaid leave taken in the last 52 weeks (if any) from 52.

STEP 2

Subtract the number of weeks of unpaid leave taken in the last 260 weeks (if any) from 260.

STEP 2

Subtract the number of weeks of unpaid leave taken over the entire period of continuous employment (if any) from the number of weeks worked in that period.

STEP 3

Divide the answer you got at step 1 by the answer you got at step 2.

STEP 3

Divide the answer you got at step 1 by the answer you got at step 2.

STEP 3

Divide the answer you got at step 1 by the answer you got at step 2.

The average weekly hours is the greatest of these three calculations

TABLE OF FORMULAS FOR CALCULATING ORDINARY PAY WHERE HOURS VARY OR CHANGE

PERIOD OF CONTINUOUS EMPLOYMENT	52 WEEKS	260 WEEKS	ENTIRE PERIOD OF CONTINUOUS EMPLOYMENT
FORMULA	$A = \frac{(B + C)}{(52 - D)}$	$A = \frac{(B + C)}{(260 - D)}$	$A = \frac{(B + C)}{(D - E)}$
KEY TO FORMULA	<p>A is the employee's average weekly number of hours;</p> <p>B is the number of hours the employee worked during the 52 weeks;</p> <p>C is the number of hours in respect of which the employee took paid leave during the 52 weeks;</p> <p>D is the number of weeks the employee took unpaid leave during the 52 weeks;</p>	<p>A is the employee's average weekly number of hours;</p> <p>B is the number of hours the employee worked during the 260 weeks;</p> <p>C is the number of hours in respect of which the employee took paid leave during the 260 weeks;</p> <p>D is the number of weeks the Employee took unpaid leave during the 260 weeks;</p>	<p>A is the employee's average weekly number of hours;</p> <p>B is the number of hours the employee worked during the entire period of continuous employment;</p> <p>C is the number of hours in respect of which the employee took paid leave during the entire period of continuous employment;</p> <p>D is the number of weeks of the employee's entire period of continuous employment;</p> <p>E is the number of weeks the employee took unpaid leave during the entire period of continuous employment.</p>

EXAMPLE

Dani has worked at a dance studio as a casual instructor for the past 10 years. She works according to a roster but depending on lesson schedules, her hours can change from one week to the next. Dani took 52 weeks of unpaid parental leave from February 2016 to February 2017. Dani has not taken any long service leave before but would like to do so now.

Dani's hours over the past 10 years have been as follows:

Year	Hours worked
2008	600
2009	550
2010	620
2011	640
2012	638
2013	580
2014	655
2015	635
2016	100
2017	550
2018	635
Total hours in the last 52 weeks	635
Total hours in the last 260 weeks	2,575
Total hours worked for the period of continuous employment	6,203
Total weeks worked for the period of continuous employment	520

In the last 52 weeks

635 hours worked plus no hours of paid leave = 635

52 weeks minus no weeks of unpaid leave

635 divided by 52 = 12.2 normal weekly hours for the purposes of long service leave

In the last 260 weeks

2,575 hours worked plus no hours of paid leave = 2,575

260 minus 52 weeks unpaid parental leave = 208

2,575 divided by 208 = 12.4 normal weekly hours for the purposes of long service leave

For the entire period of continuous employment

6,203 hours worked plus no hours of paid leave = 6,203

520 weeks worked minus 52 weeks of unpaid leave = 468

6,203 divided by 468 = 13.3 normal weekly hours for the purposes of long service leave

Because Dani's average weekly hours of work over the entire period of continuous employment is greater than the average weekly hours over either the last 52 or 260 weeks, her normal weekly hours for the purposes of long service leave will be 13.3 hours per week (because it is the greatest of the three averages).

HOW IS LONG SERVICE LEAVE CALCULATED IF THE EMPLOYEE'S ORDINARY HOURS OF EMPLOYMENT HAVE CHANGED?

An employee's long service leave entitlement is based on his or her normal weekly hours at the time the leave is taken, or at the time employment ends and the employee receives payment for any unused long service leave. However, in some cases, an employee's ordinary hours of employment may change. For example, an employee may move from full time to part time employment, or vice versa.

Where an employee's ordinary hours have changed in the 104 weeks immediately before the employee takes long service leave, the employee's hours for calculating long service leave will be averaged over the preceding 52 weeks, 260 weeks, or the entire period of continuous employment, whichever average is greatest. Refer to the flowchart and table on pages 42 and 43 of this guide to see how these averages should be calculated.

EXAMPLE

Sonia has been continuously employed as a manager at a restaurant for 8 years. For the first 7 and a half years she worked full time (38 hours per week) but for the last 26 weeks she has worked part time for 24 hours per week. Sonia takes 152 hours of annual leave every year.

Sonia's hours for the last 8 years have been as follows:

Year	Hours worked
2011	1,824
2012	1,824
2013	1,824
2014	1,824
2015	1,824
2016	1,824
2017	1,824
2018	1,460

Total hours worked in the last 52 weeks	1,460
Total hours worked in the last 260 weeks	8,756
Total hours worked for the entire period of continuous employment	14,228
Total weeks worked for the entire period of continuous employment	416
Hours of paid leave in the last 260 weeks	760
Hours of paid leave for the entire period of continuous employment	1,216

In the last 52 weeks

1,460 hours worked plus 152 hours of paid leave = 1,612

52 weeks minus no weeks of unpaid leave = 52 weeks

1,612 divided by 52 = 31 normal weekly (averaged) hours for the purposes of long service leave

In the last 260 weeks

8,756 hours worked plus 760 hours of paid leave = 9,516

260 minus no weeks' unpaid leave = 260 weeks

9,516 divided by 260 = 36.6 normal weekly (averaged) hours for the purposes of long service leave

For the entire period of continuous employment

14,228 hours worked plus 1,216 hours of paid leave = 15,444

416 weeks worked minus no weeks of unpaid leave = 416

15,444 divided by 416 = 37.1 normal weekly (averaged) hours for the purposes of long service leave

Because Sonia's average weekly hours of work over the entire period of continuous employment is greater than the average over either the last 52 or 260 weeks, her normal weekly hours for the purposes of long service leave will be 37.1 hours per week.

HOW IS LONG SERVICE LEAVE CALCULATED IF THERE IS NO ORDINARY TIME RATE OF PAY?

An employee's long service leave entitlement is based on his or her ordinary time rate of pay at the time the leave is taken or is to be paid out. However, in some cases, where permitted by the relevant award or agreement, an employee may not have a fixed ordinary time rate of pay. And in other cases, an employee's wages or salary may include an hourly rate of pay and/or other regularly provided benefits which increase or vary total salary over time. Examples which affect the calculation of ordinary pay under the Act include where the employee is paid per piece of work, per delivery, or on commission and retainer or base rate.

Non-discretionary commissions and regular bonuses (for example, those based on sales targets) may be counted as part of ordinary pay if they are included in the employee's oral or written contract of employment.

Where an employee's ordinary time rate of pay is not fixed for an employee's work under the relevant employment agreement, the employee's ordinary time rate of pay is to be averaged over the preceding 52 weeks, 260 weeks, or over the entire period of continuous employment, with the greatest of the three having application.

EXAMPLE

Dragan is a real estate agent who has worked for the same agency for 8 years. Dragan has resigned from his employment. He did not take any long service leave during his employment.

Dragan's contract of employment specifies he is paid a retainer of \$25,000 per annum, plus commission for sales he has written for the company. In the last five years, Dragan's retainer did not alter but commission was variable.

Dragan's ordinary pay over the past five years is as follows:

Year	Commission \$	Retainer \$	Total p.a. \$
2011	25,000	50,000	75,000
2012	40,000	50,000	90,000
2013	30,000	50,000	80,000
2014	20,000	50,000	70,000
2015	45,000	50,000	95,000
2016	40,000	50,000	90,000
2017	35,000	50,000	85,000
2018	40,000	50,000	90,000
Total hours in the last 52 weeks		635	
Total hours in the last 260 weeks		2,575	
Total hours worked for the period of continuous employment		6,203	
Total weeks worked for the period of continuous employment		520	

In the last 52 weeks

\$90,00 earned divided by 52 weeks = \$1,730.76

In the last 260 weeks

\$430,000 earned divided by 260 weeks = \$1,661.53

For the entire period of continuous employment

\$675,000 earned divided by 416 weeks = \$1,622.59

Because Dragan's average weekly rate earned over the last 52 weeks is greater than the average over either the last 260 weeks, or the entire period of continuous employment, his ordinary time rate of pay for the purposes of long service leave will be \$1,730.76 per week.

DOES ORDINARY PAY INCLUDE THE VALUE OF ITEMS SUCH AS MOBILE PHONES AND CARS?

Yes, if the value of the item forms part of salary and is included in the contract of employment (oral or written).

EXAMPLE

Shae works in sales for a company that sells stock feed. His contract of employment states that his total salary is \$80,000.00 per year, packaged to include part cash payment, part the value of private use of an employer-provided mobile phone and part the value of private use of an employer-provided vehicle.

As the value of the vehicle and mobile phone form part of Shae's salary and are included in his contract of employment, the value of the items would form part of his ordinary pay for long service leave purposes

HOW IS ORDINARY PAY CALCULATED WHEN AN EMPLOYEE IS, OR HAS BEEN, ON WORKCOVER?

If an employee is receiving WorkCover benefits or is on a return to work plan, the employee's long service leave entitlement will be calculated on either their pre-injury normal weekly hours and ordinary time rate of pay, or their normal weekly hours and ordinary time rate of pay immediately before the employee starts long service leave, whichever is greater.

HOW DO PUBLIC HOLIDAYS AFFECT LONG SERVICE LEAVE?

A public holiday falling within the period of leave is added to the period of long service leave, just as it would if the public holiday occurred during a period of annual leave.

This ensures that the employee will still have the benefit of a public holiday should it fall during a period of long service leave.

CAN A EMPLOYEE ON LONG SERVICE LEAVE BE EMPLOYED DURING THE PERIOD OF LONG SERVICE LEAVE?

It is an offence to work while on long service leave or to employ someone who is on long service leave.

However, where an employee has more than one job (for example, two part-time jobs), the situation may differ. If an employee takes long service leave from one of their part-time jobs (Job A), they may continue to work in the other part time job (Job B). However, while they are on long service leave from Job A, they must not work at Job B during the hours they would otherwise work at Job A.

EXAMPLE

Cam has two part-time jobs, one at a local newsagent with Local Newsagent Pty Ltd, and one as a bar attendant with Local Hotel Pty Ltd. He works with Local Newsagent Pty Ltd on Mondays, Tuesdays and Wednesdays, and with Local Hotel Pty Ltd on Fridays and Saturdays.

Cam is presently taking long service leave from his work with Local Newsagent Pty Ltd.

While on long service leave from his work with Local Newsagent Pty Ltd, Cam can continue working for Local Hotel Pty Ltd on Fridays and Saturdays.

However, Cam cannot work for Local Hotel Pty Ltd on Mondays, Tuesdays or Wednesdays. This is because that is when he would normally work for Local Newsagent Pty Ltd, which is currently paying him long service leave so that he can take a break from work in relation to those hours.

CAN AN EMPLOYEE CLAIM LONG SERVICE LEAVE ENTITLEMENTS IF THE COMPANY IS LIQUIDATED?

If a company is liquidated, it is essential to contact the liquidator urgently to make an application to the liquidator to be paid from the available assets as a creditor of the business. If the assets are insufficient to meet an employee's long service leave entitlement, the Fair Entitlements Guarantee scheme may be available.

The Fair Entitlements Guarantee (FEG) is a federal government scheme which provides for the payment of certain entitlements of eligible employees whose employment has been terminated because of their employer's liquidation or bankruptcy. The FEG provides for payments to employees of certain unpaid wages, annual leave, long service leave, payment in lieu of notice and up to 16 weeks' redundancy pay if applicable.

Contact the FEG Hotline for full details of the scheme on **1300 135 040** or visit the FEG website at jobs.gov.au/fair-entitlements-guarantee-feg.

AUTHORISED OFFICERS

Authorised officers are appointed to carry out certain functions under the Act. They are employed by the department.

Authorised officers can require a person to provide information or documents for monitoring and enforcing compliance with the Act. Where an authorised officer exercises this power in person, the officer must produce their identity card for inspection. An authorised officer must also produce their identity card for inspection at any time during the exercise of a power under the Act, if asked to do so.

Subject to certain rules, it is a criminal offence not to provide information or documents sought by an authorised officer in accordance with the Act. It is also a criminal offence to produce a false document.

CAN AN EMPLOYER OR EMPLOYEE BE PENALISED FOR BREACHING THE LONG SERVICE LEAVE ACT?

Yes, there are penalties for breaching the Act.

PENALTIES MAY APPLY WHERE AN EMPLOYER:

- fails to pay an employee while the employee is taking long service leave;
- fails to pass on a pay increase that occurred while the employee was on long service leave;
- fails to pay an accrued entitlement on termination of employment;
- fails to pay an accrued entitlement on the employee's death;
- pays an employee in lieu of allowing the employee to take long service leave as a paid break from work;
- knowingly employs a person while that employee is on long service leave from employment with that employer or another employer;
- fails to maintain correct records;
- makes a false or misleading statement in a record;
- fails to provide information or documents to an authorised officer;
- provides a false or misleading document to an authorised officer;
- refuses an employee's request to be provided with a copy of a long service leave record relating to the employee;
- takes adverse action against an employee because they have or exercise a right or entitlement under the Act.

PENALTIES MAY APPLY WHERE AN EMPLOYEE:

- accepts payment in lieu of taking long service leave as a paid break from work;
- works elsewhere while on long service leave from another employer (see *Can long service leave be 'cashed out' rather than taken as a break from work?* page 24 of this guide for information on the rules that apply when an employee has more than one job).

Most offences under the Act attract a penalty of 12 penalty units for natural persons and 60 penalty units for a body corporate.

PROSECUTION TIME LIMITS

Different interpretations may apply for certain prosecution time limits under the 1992 Act and the Act (from 1 November 2018). If a dispute exists regarding an alleged unpaid entitlement where employment ceased before 1 November 2018, seek advice without delay.

Information on long service leave can be obtained from the Inspectorate on **1800 287 287**.

WHAT IS THE VALUE OF A PENALTY UNIT?

Most modern Victorian legislation sets out fines in terms of penalty units instead of a dollar amount.

The value of a penalty unit varies from time to time – as updated on 1 July each year. From 1 July 2018, one penalty unit is \$161.19 – meaning a fine of 12 penalty units is \$1,934.28, and 60 penalty units is \$9,671.40.

To find out more about penalty units, go to www.ocpc.vic.gov.au and click on FAQ, then go to the question “What is the value of a penalty unit?”.

CAN DIRECTORS, OR COMPANY OFFICERS, BE PERSONALLY LIABLE FOR A CORPORATION’S BREACH OF THE ACT?

Yes. Under the Act, an officer of a body corporate may be liable for the conduct of the body corporate where the officer knew about the conduct or was reckless as to whether the conduct engaged in was in breach of certain sections of the Act.

If found guilty, the officer would then be liable for penalties and/or criminal conviction, in the same way as the body corporate.

It is NOT required that the body corporate first be found guilty of an offence, or for it to even still exist at the time of prosecution, for a natural person, such as a director, to be held personally liable for a breach of the Act.

CAN A CORPORATION BE LIABLE FOR A BREACH OF THE ACT BY A DIRECTOR, EMPLOYEE OR AGENT OF THE CORPORATION?

Yes. Conduct of a director, employee or agent acting with apparent authority, or of a person authorised by a director, employee or agent, is also taken to be conduct by corporation itself.

PENALTIES FOR FAILURE TO KEEP RECORDS UNDER THE ACT

An employer must keep accurate records of the employee's long service leave during the entire period of employment and retain these for at least seven years after the employment ceases.

Records must be kept in the form (if any) approved under the Act by the Secretary of the department, and include any details required to be kept. Any approved form and specified long service leave details will be available on the Business Victoria website at: www.business.vic.gov.au/longserviceleave. The FW Act, which applies to all Victorian businesses, also requires that employment records be kept, and that pay slips be provided to employees.

It is an offence to fail to keep records in the manner prescribed by the Act. The penalty for this offence is 12 penalty units for a natural person, and 60 penalty units for a body corporate. If an employer is found guilty of this offence, a criminal conviction may also be recorded.

An employer must not refuse a request from an employee (or their personal representative) or an authorised officer of the Inspectorate to produce the employee's long service leave records. The penalty for this offence is 12 penalty units for a natural person, and 60 penalty units for a body corporate.

WHAT HAPPENS IF AN EMPLOYEE IS OWED LONG SERVICE LEAVE AND THE EMPLOYER FAILS TO PAY?

TAKING LEGAL ACTION TO RECOVER LONG SERVICE LEAVE - CIVIL REMEDIES

An employee can seek recovery of money owed for long service leave entitlements under the Act via a civil claim in the Industrial Division of the Magistrates' Court. An order made by the Court in the employee's favour may include a requirement that payment of the long service leave be made to the employee, with interest. The civil claim must commence within six years of the employee's entitlement arising – usually being the date employment ends. In this type of application, the employee would be alleging that the employer failed to pay the long service leave entitlement on termination.

Employees may ask an organisation registered under the FW Act (for example, a union) to act to recover money on their behalf. They may make such a request if they are a member of the organisation or eligible to be a member. If an employee is deceased, their estate may make a claim on their behalf.

CRIMINAL ENFORCEMENT

If an employer fails to pay an employee's long service leave entitlement, the employer may be prosecuted in the Magistrates' Court for a criminal offence. Only an authorised departmental officer may initiate a prosecution. Unions and other groups cannot prosecute.

If an employer is found guilty of failing to pay a long service leave entitlement, the employer may be fined an appropriate penalty and may also have a criminal conviction recorded against them. Additionally, there is the possibility of an order being made for the employer to pay for the legal costs of the department.

If the employer is found guilty, the Court may also order that the employer pay the outstanding long service leave entitlement to the employee and may also order that interest be paid.

The penalty for this offence is 12 penalty units for a natural person and 60 penalty units for a body corporate. These penalties apply to every day during which the offence continues, which may result in a significant fine (see page 54 of this guide for the meaning and value of a penalty unit).

ADVERSE ACTION AGAINST EMPLOYEES PROHIBITED

WHAT IS ADVERSE ACTION?

Adverse action is defined in the Act to include dismissing an employee, altering the position of an employee to their prejudice, or discriminating against the employee.

It is an offence under the Act for an employer to take adverse action against an employee because:

- the employee has an entitlement under the Act; or
- the employee seeks to exercise an entitlement under the Act; or
- the employee enquires about their entitlements under the Act; or
- the employee challenges a direction to take long service leave in the Magistrates' Court.

It is also an offence to make false or misleading representations about an employee's long service leave entitlements.

FURTHER INFORMATION OR ASSISTANCE

For further assistance about the information contained in this guide, please visit our website at: business.vic.gov.au/longserviceleave or contact the Inspectorate on 1800 287 287. You will also find further resources at this web address, including the long service leave calculator for calculating long service leave entitlements, and an electronic version of this guide.



