



Changes to state employment laws in WA

Amendments to the *Long Service Leave Act*

The *Long Service Leave Act 1958* (LSL Act) applies to many state and national system employers and employees in Western Australia. Amendments are being introduced to the LSL Act by the *Industrial Relations Legislation Amendment Act 2021* and the new provisions will commence early in 2022.

The amount of long service leave an employee is entitled to under the LSL Act will remain unchanged. The long service leave entitlement for full time, part time and casual employees is:

- after 10 years of continuous employment with the same employer – $8^{2/3}$ (8.667) weeks of leave on ordinary pay;
- for every 5 years of continuous employment with the same employer after the initial 10 years – $4^{1/3}$ (4.333) weeks of leave on ordinary pay.

In most cases, when employment ends after at least 7 years of continuous employment, the employee is entitled to pro rata long service leave.

This fact sheet provides an overview of key changes to the LSL Act, but does not discuss all issues concerning long service leave. Extensive information on the LSL Act is available on the Wageline long service leave page at www.dmirs.wa.gov.au/longserviceleave.

State employment laws are changing

This fact sheet is part of a suite of information on the changes to state employment laws that will commence early in 2022. For details on the changes visit www.dmirs.wa.gov.au/new-employment-laws.

The new provisions in the LSL Act:

- clarify that casual and seasonal employees are entitled to long service leave;
- clarify the absences that do not break an employee's continuous employment;
- clarify the absences that do and do not count towards the length of an employee's continuous employment, including specific provisions relating to casual and seasonal employees, and apprentices;
- provide for increased flexibilities regarding the taking of long service leave;
- clarify existing provisions relating to the cashing out of long service leave;
- clarify how ordinary pay is calculated for the purposes of long service leave, including for casual employees, employees whose hours of work have varied during their period of employment, and for employees who are paid by piece rates, commission or other systems of payment by results;
- amend record keeping requirements; and
- replace the transmission of business provisions with transfer of business provisions.

The maximum penalties for non-compliance with the LSL Act will be the same as the increased penalties for contraventions of other state employment laws.

Definition of 'employee' clarified

The definition of 'employee' will be amended to specifically refer to casual and seasonal employees. Casual and seasonal employees are currently employees for the purposes of the LSL Act, however the term 'employee' will be updated to include a specific reference to these employee types. As with all employees, whether a particular casual or seasonal employee is entitled to long service leave depends on whether they have completed the necessary continuous employment.

Continuous employment

Provisions in the LSL Act regarding continuous employment will be modernised and clarified, including provisions dealing with:

- the types of paid and unpaid absences that count towards an employee's period of employment for long service leave purposes; and
- the types of paid and unpaid absences that do not break an employee's continuous employment but do not count towards the length of an employee's period of employment.

Casual and seasonal employees' continuous employment

The LSL Act will be amended to provide that a casual or seasonal employee has continuous employment with an employer despite an absence from work for any of the following reasons, irrespective of duration:

- an absence under the terms of employment;
- an absence caused by seasonal factors;
- any other absence after which the employee has, due to the regular and systematic nature of the employment, a reasonable expectation of returning to work for the employer.

The LSL Act additionally will provide that a casual or seasonal employee has continuous employment with an employer despite the fact that:

- the employee is employed by the employer under two or more contracts of employment; or
- the employee is also employed by another person during the period of employment with the employer.

Casual and seasonal employees' ordinary pay

A casual or seasonal employee who has completed the required period of continuous employment is entitled to long service leave on ordinary pay. Where the employee's normal weekly number of hours have varied during their period of employment (which is common for casual and seasonal employment), their normal weekly number of hours is the average weekly hours worked during the qualifying period. Periods where no hours were worked will therefore be taken into account when calculating the employee's ordinary pay for long service leave purposes.

Example

On 1 January 2013, Jennifer is employed to work casually at an amusement park. As the amusement park is only open for part of the year, Jennifer does not work every week of the year. For those weeks of the year that Jennifer is not required to work (because the park is closed) her weekly hours are recorded as 'zero'.

During the first 10 years of employment, Jennifer does not have any absences that would be excluded from continuous employment (e.g. a period of unpaid parental leave or leave without pay). Jennifer therefore becomes entitled to $8^{2/3}$ weeks of long service leave on 1 January 2023, after completing 10 years of continuous employment. As Jennifer's hours of duty have varied over the accrual period, her employer needs to calculate the average number of hours she has worked each week over the entire period.

Jennifer's employer calculates that over the 10 year qualifying period (520 weeks), Jennifer has worked a total of 7,750 hours. Jennifer's average weekly hours are therefore **14.9038** (7,750 hours ÷ 520 weeks).

Jennifer is therefore entitled to $8^{2/3}$ weeks of long service leave, paid at 14.9038 hours per week.

Apprentices

New provisions in the LSL Act will specify that if an employee enters into a contract of employment with an employer within 52 weeks of completing an apprenticeship with that employer, the period of the apprenticeship is taken to be part of the employee's continuous employment. However, any gap between the completion of the employee's apprenticeship and the employment of the employee on a new contract of employment does not count towards the length of the employee's period of continuous employment.

Example

Carlos completes a mechanical apprenticeship with a vehicle repair business. When Carlos completes his apprenticeship he ceases working for the employer, as the business cannot afford to keep him on. However, 6 months later, the business has recovered financially, and it hires Carlos as a qualified mechanic.

As Carlos has entered into a contract of employment with his employer within 52 weeks of completing an apprenticeship with it, the period of the apprenticeship is taken to be part of his continuous employment. However, the 6 month period where he was not working for the vehicle repair business does not count when calculating the length of his period of continuous employment.

Flexibility in taking long service leave

There will be increased flexibility in the way that long service leave can be taken.

Employers and employees will be able to agree on leave being taken for any period – i.e. in single days.

An employee will also be able to request that an employer grant them:

- a period of long service leave on half pay. For example, an employee who is entitled to 8 weeks' long service leave may request that they take 16 weeks of leave at half pay; or
- a period of long service leave on double pay. For example, an employee who is entitled to 8 weeks' long service leave may request that they be granted 4 weeks of leave at double pay.

An employer will not be obligated to agree to a request to take long service leave in a flexible manner.

Cashing out long service leave

The LSL Act currently provides that an employer and employee may agree that the employee forgo an entitlement to long service leave, if the employee is given an adequate benefit in lieu and the agreement is in writing.

Amendments will be made to the LSL Act to:

- specify that part of an entitlement can be cashed out;
- clarify that a benefit is not adequate unless the employee is paid at least the amount they would have received had they taken the leave. This is to ensure that an employee who cashes out accrued long service leave is not financially worse off for cashing out their leave than taking the leave;
- clarify that employers and employees cannot reach agreement to cash out long service leave **before** the employee's entitlement to long service leave has accrued. That is, an employer and employee may only agree to cash out long service leave once an employee has completed the required continuous employment and accrued a full entitlement;
- require the written agreement to cash out leave be signed by the employer and employee; and
- require an employer to keep a copy of the written agreement, including details of the benefit for, and the amount of, long service leave that was foregone, and when the benefit was paid.

Payment of long service leave for employees paid by results

Under the LSL Act, ordinary pay for a period of long service leave for an employee who is paid by results (such as commission or piece rates) is the average weekly rate of pay the employee earned over the previous 12 months. The LSL Act will be amended to:

- change the reference from a period of 12 months to a period totalling 365 days;
- exclude periods of unpaid leave and stand down from the 365 day period. This ensures that employees are not disadvantaged if, for example, they have taken a period of unpaid leave, such as unpaid parental leave;
- clarify that the requirement to average an employee's rate of pay over a period totalling 365 days applies to all employees paid by results, whether they are paid wholly or partly by results. For example, an employee who is paid a retainer plus commission would be deemed to be paid by results and their ordinary pay is therefore their average weekly rate of pay earned over a period totalling 365 days; and
- specify that, where an employee cashes out their leave, the period totalling 365 days ends on the day immediately before the day on which the written agreement to cash out the leave is reached.

New penalties

Amendments to the *Industrial Relations Act 1979* (IR Act) will enable a long service leave entitlement to be enforced under the provisions of the IR Act. This will ensure that contraventions of the LSL Act attract the same maximum penalties as contraventions of other minimum employment entitlements.

Employers will face a penalty of up to \$13,000 (or up to \$130,000 in the case of a serious contravention) for individuals or a penalty of up to \$65,000 (or up to \$650,000 in the case of a serious contravention) for bodies corporate for contraventions of the LSL Act.

New accessorial liability provisions will also be introduced into the IR Act for contraventions of the minimum employment entitlements, including the LSL Act. The *Increased penalties and accessorial liability* fact sheet, available at www.dmirs.wa.gov.au/new-employment-laws has more details on new penalties and accessorial liability provisions.

Employment records relating to long service leave

Employers will need to keep the following additional long service leave records for an employee:

- the employer's name and Australian Business Number (if any);
- the date of any transfer of business during the employment of the employee;
- the weekly hours worked by the employee; and
- details of the any leave foregone under an agreement to cash out long service leave, including the amount of leave cashed out, the benefit that was paid, and the date this occurred.

Employers will face a penalty of up to \$13,000 (or \$130,000 in the case of a serious contravention) for individuals or up to \$65,000 (or \$650,000 in the case of a serious contravention) for bodies corporate for:

- not keeping employment records;
- keeping an employment record that the employer knows, or could reasonably be expected to know, is false or misleading;
- failing to transfer copies of transferring employees' employment records to the new employer, where there is a transfer of business.

Transfer of business provisions

New transfer of business provisions will replace the transmission of business provisions in the LSL Act, and establish new parameters regarding when a transfer of business occurs. A transfer of business commonly occurs via the sale of a business and an employee of the old owner/employer becomes an employee of the new owner/employer.

Under the new provisions, there is a transfer of business from an old employer to a new employer if the following requirements are satisfied:

- the employment of an employee of the old employer has ended (e.g. by resignation or termination by the employer);
- within three months after the employment ends, the employee becomes employed by the new employer;
- the work (the 'transferring work') the employee performs is the same or substantially the same as the work the employee performed for the old employer; and
- there is a connection between the old employer and the new employer.

Connections between an old and new employer

The LSL Act will set out the circumstances in which there is a connection between an old employer and a new employer. In broad terms, there will be a connection between the old employer and the new employer if the new employer owns or has the beneficial use of some or all of the assets (whether tangible or intangible) that the old employer owned or had the beneficial use of, and that relate to, or are used in connection with, the transferring work.

Regardless of whether there is a transfer of assets, there will also be a connection between the old employer and the new employer if:

- the old employer has outsourced work to the new employer, and that work is performed by one or more transferring employees engaged by the new employer; or
- the new employer previously outsourced work to the old employer, but decides to in-source that work and engages employees of the old employer to continue performing that work; or
- the new employer is a related body corporate of the old employer when the transferring employee becomes employed by the new employer.

Effect of a transfer of business on an employee's long service leave entitlement

The new provisions establish that, for the purposes of the LSL Act, on a transfer of business:

- a transferring employee's employment before and after the transfer is taken to be a single period of continuous employment; and
- the new employer is taken to have been the transferring employee's sole employer for the entire period.

The intention is that a transfer of business will not disadvantage an employee. Therefore, when a business is transferred, an employee's period of continuous employment with the old employer transfers to the new employer and an employee's accrued leave (if any) is also transferred.

Transfer of employment records

The new provisions provide that, on the transfer of a business, the old employer must transfer copies of all transferring employees' employment records to the new employer. This will enable the new employer to accurately determine an employee's long service leave entitlement.

The transfer of business provisions will only apply for transfers that occur on or after the commencement of the amendments to the LSL Act in early 2022. The existing transmission of business provisions will apply to any change of business ownership that occurred prior to this date.

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