

Long Service Leave changes will apply 1 November 2018

Victoria's **Long Service Leave Act 2018** applies from 1 November 2018.

This will mean new rights and responsibilities for employers and employees.

The State Government of Victoria has an obligation to keep businesses informed of critical changes which present regulatory compliance obligations.



Long Service Leave changes coming 1 November 2018

The Long Service Leave Act 2018 will come into effect on 1 November 2018 and supersede the 1992 Act.

These changes include:

- greater flexibility for women, families and people transitioning to retirement
- access to long service leave after seven years, not ten
- allowing employees to take long service leave in smaller increments (i.e. for any period of one day or more)
- most absences from work do not break continuous employment
- unpaid leave, including parental leave, counts towards long service leave
- increased penalties for employers who do not keep records or do not produce them when requested.

This website, including the Long Service Leave calculator, will be updated to reflect those changes on 1 November.

Frequently Asked Questions

Why do we have a new Long Service Leave Act?

Long service leave is a long-standing entitlement for Australian employees. The *Long Service Leave Act 2018 (Vic)* (LSL Act) sets out arrangements for long service leave in Victoria. The Act replaces the *Long Service Leave Act 1992 (Vic)* (1992 Act).

A review of the 1992 Act found that it had not kept pace with community standards, (for example, in the way that it treated parental leave), and was not easy to understand. The new LSL Act has been written so that it is easier to understand, is fairer to people whose working circumstances change, and is more flexible.

What are the key changes?

- The new laws will provide greater flexibility to women, families and those transitioning to retirement.
- Employees will be able to apply for leave after seven years of work, rather than ten years.
- Employees can now take long service leave in smaller increments, i.e. a minimum of one day per occasion.
- Absences from work including unpaid parental leave will generally not break continuous employment.
- 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.

Who does the Long Service Leave Act apply to?

Most Victorian employees are entitled to long service leave in accordance with the LSL Act. However, some employees may have a different arrangement under a federal employment instrument (such as an enterprise agreement) or under other Victorian legislation (for example, the *Construction Industry Long Service Leave Act 1997*). The LSL Act 2018 applies as a default or base standard in both the public or private sectors in Victoria.

Are casual, seasonal, and fixed term employees covered by the Act?

Yes, the LSL Act explicitly entitles these employees to long service leave. A casual or seasonal employee's employment must be 'continuous' (as defined by the LSL Act).

This means that:

- there must not be an absence of more than 12 weeks between any two instances of employment, unless 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 on a regular and systematic basis and has a reasonable expectation of being re-engaged.

Under the new Act, a casual or seasonal employee is also entitled to take up to 104 weeks paid or unpaid parental leave before their continuous employment may be deemed interrupted.

Has the long service leave entitlement changed under the new Act?

The basic entitlement has not changed; it is just expressed differently. Employees are entitled to leave after seven years continuous employment. This is calculated by dividing the period of employment by 60.

For example, if the employee has worked for 7 years, dividing this by 60 equates to approximately 6.1 weeks.

What has changed is that under the 1992 Act, employees were not able to take leave until they had worked a minimum of 10 years. If employment ended after 7 years, they would be entitled to be paid in lieu of leave. Under the LSL Act 2018, the entitlement to take leave arises at 7 years, and employees are entitled to apply for leave from that day.

How does an employee get to take long service leave?

An employee can request to take long service leave at any time after 7 years continuous employment. One of the major changes in the LSL Act is that 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 LSL Act defines what 'reasonable business grounds' means.

Can an employee take long service leave at half pay?

Yes. An employee can request to take a period of long service leave for twice as long as the period to which they are entitled, at half their ordinary pay.

If an employee makes a request to take their long service leave in this way, the employer must grant the request unless the employer has 'reasonable business grounds' for refusing the request.

On the other hand, an employee cannot take half of their leave entitlement at double the rate of pay.

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](#) [External link \(opens in same window\)](#) to resolve the dispute.

Can long service leave be 'cashed out' rather than taken as a break from work?

No. Under both the new and the old Acts, long service leave cannot be cashed out. The only time it is paid out is at the end of employment, if accrued and not yet taken.

What is meant by 'one employer'?

The 1992 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.

For example, if a business is sold and the new owner continues the employment of an employee at that business, the new employer must recognise the employee's period of employment with the old employer. If an employee performs work in relation to assets used in the carrying on of a business, and those assets are transferred, employment will be continuous if the new owner of the assets continues the employee's employment.

The LSL Act retains this rule. What has changed is that the 1992 Act defines 'assets' narrowly, as it only included physical assets such as land and equipment. The new LSL Act defines 'assets' to include intangible assets.

Another new 'one employer' situation under the LSL Act relates to insourcing and outsourcing of work, such as through a labour-hire arrangement. The period of an employee's employment carried out when performing the work must be recognised as continuous by both the service provider and host employer as many times as the employee's employment relationship moves between the host-employer and service-provider in relation to the performance of that work.

What measures are in place to prevent double-dipping?

Where a business is sold, and the new owner decides to employ an employee who worked for the previous owner, the LSL Act 2018 requires the new employer to recognise the employee's prior continuous employment. The LSL 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 entitlement when employed by the old employer.

Is there a change to the way absences from work are treated?

There are two ways absences from work can affect an employee's long service leave entitlement.

While some absences from work do not break the continuity of employment, the entire period of absence may not always count towards the period of employment. Under the LSL Act, any period of unpaid leave (including unpaid parental leave) will not break continuity of employment. However, only the first 52 weeks of that leave automatically counts towards long service leave.

A longer period of unpaid leave may also count towards long service leave accrual where:

- the employer and employee agree that a longer unpaid absence will also count towards the period of employment
- the longer unpaid absence/leave is provided for in an enterprise agreement

- it is unpaid leave due to illness or injury for any reason
- it is any other form of leave provided for in an oral or written employment agreement.

This is a change from the 1992 Act, where a period of unpaid parental leave exceeding 12 months may have broken continuity of employment in certain circumstances. In addition, while the 1992 Act did not count unpaid parental leave towards the period of employment for long service leave purposes, the LSL Act has rectified this unfairness as outlined above.

What happens if I leave my job, but then go back to the same business?

If employment ends at the initiative of either the employer or the employee, but the employee returns to work for the same employer within 12 weeks, the employee's employment is deemed continuous. However, in this situation, the period the employee was off work is not counted as a period of employment for the purposes of calculating the long service leave entitlement.

Has the definition of 'ordinary pay' changed?

Generally, 'ordinary pay' is the actual pay received by an employee for working his or her normal weekly hours at his or her ordinary time rate of pay, at the time the employee takes long service leave, or ceases employment and has long service leave paid out in lieu on termination. Other components of salary may be included in the definition of ordinary pay in certain circumstances.

While the definition of 'ordinary pay' has not changed in this respect, there are some changes in the way hours and pay may be averaged in certain circumstances, as outlined below.

How is payment for accrued long service leave calculated if the employee does not have fixed hours of work, or the employee's hours of employment have changed, and/or the employee's ordinary time rate of pay is not fixed?

The value of an employee's long service leave entitlement is based on both his or her normal weekly hours and ordinary time rate of pay at the time the leave is taken or is to be paid out.

However, in some cases, an employee's ordinary hours of employment may alter, or rate of pay may vary or include a range of non-standard components (for example, commission), making it variable or subject to change.

How do I work out 'ordinary hours' if these have changed during employment?

For ordinary hours, an employee may move from full time to part time employment, or vice versa. Other employees do not have fixed hours of work, for example, casual employees.

Under the 1992 Act, where an employee's hours of work were not fixed, or their hours of work changed at least once in the 12 months before leave was taken, the employee's hours of work were averaged for the purposes of calculating long service leave.

The employee was entitled to the greater of the following:

- the average weekly rate earned in the 52 weeks immediately before the employee starts long service leave
- the average weekly rate earned in the 260 weeks immediately before the employee starts long service leave.

Under the LSL Act, the averaging arrangements are retained, but a third calculation will now apply:

- the average weekly hours worked during the employee's entire period of continuous employment with the employer.

The employee will be entitled to the greatest of the three averages, and any periods of unpaid leave are to be excluded from the averaging exercise.

The averaging arrangement will apply if the hours of work are changed at least once in the 104 weeks prior to the leave being taken, rather than during the last 12 months under the 1992 Act.

How do I calculate 'ordinary time rate of pay' where it is not fixed?

To calculate the 'ordinary time rate of pay', a similar, third averaging period has been added to the averaging requirements when it comes to calculating the monetary value of an employee's long service leave entitlement under the new Act.

The rate will now be the greatest of:

- the average weekly rate earned by the employee in the 52 weeks immediately before the employee starts long service leave
- the average weekly rate earned by the employee in the 260 weeks immediately before the employee starts long service leave
- the average weekly rate earned by the employee during the employee's entire period of continuous employment with the employer immediately before the employee starts long service leave.

Can a person who is on long service leave work in another job?

It is an offence to work while on long service leave or to employ someone who is on long service leave. This is unchanged from the 1992 Act. However, where an employee has more than one job (for example, two part-time jobs), the employee may continue to work at one job whilst they are on long service leave from their other job, providing they do not work during the part time hours from which they are on long service leave.

Are there new enforcement arrangements under the new Act?

Yes. Under the 1992 Act, authorised departmental officers could ask to see employment records, but if the request was refused, they had no power to require production. Under the new Act, a requirement or request to produce records must be complied with.

It is a criminal offence to:

- not keep records for the entire employment period, and for 7 years after employment ends
- refuse to produce the records if required by an authorised officer
- refuse a request by an employee or their personal representative to provide the employee (or the personal representative) with a copy of a long service leave record relating to the employee
- produce a false record.

What happens if an employee is owed long service leave and the employer fails to pay?

The LSL Act retains the same rules as under the 1992 Act. Only an authorised departmental officer may prosecute for a criminal breach of the Act. An employee or their personal representative may otherwise seek to recover unpaid entitlements through a civil claim in the Industrial Division of the Magistrates' Court.

Have penalties increased?

The penalties for breaching the LSL Act have increased. They now range from 12 penalty units for an individual to 60 penalty units for a body corporate (as at 1 July 2018, a penalty unit is \$161.19).

New penalties apply for failing to produce records when requested.

For More Information refer to:

<https://www.business.vic.gov.au/hiring-and-managing-staff/long-service-leave-victoria/>