Does time spent on leave count toward continuous employment for the purpose of accruing long service leave?

Does time spent on sick leave or WorkCover count toward continuous employment for the purpose of accruing long service leave?

How is payment for long service leave calculated?

How is ordinary pay calculated?

How is long service leave calculated if the employee’s hours vary from week to week?

How is long service leave calculated if the employee’s ordinary hours of employment have changed during the course of employment – for example, the employee has moved from full to part time employment?

How is long service leave calculated if there is no fixed ordinary time rate of pay?

Does ordinary pay include the value of items such as mobile phones and cars?

How is ordinary pay calculated when an employee is, or has been, on WorkCover?

How do public holidays affect long service leave?

Can a person who is on long service leave be employed during the period of long service leave?

Can an employee claim long service leave entitlements if the company is liquidated?

Penalties for failure to keep records under the Act

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

Can an employer or employee be penalised for breaching the Act?

Can directors, or people involved in the management of a corporation, be personally liable for a corporation’s breach of the Act?

Can a corporation be liable for a breach of the Act by a director, employee or agent of the corporation?

What is a penalty unit?

Preservation of long service leave entitlements due to the impact of federal workplace laws

How does the Victorian legislation address these problems?

Other features of the Act

Long service leave calculator

How do I find out more?
Long service leave laws in Victoria

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

This brochure explains the entitlements and obligations of employees and employers under the Act.

02 Who does the Long Service Leave Act apply to?

Long service leave is one of the National Employment Standards (NES) which apply to all employees in the national workplace relations system. Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES.

Under the NES an employee is entitled to long service leave in accordance with their applicable pre-modern award, or enterprise agreement which expressly deals with long service leave. Modern Awards (from 1 January 2010) cannot include terms dealing with long service leave.

It is important for employees and employers to check if their employment is covered by a pre-modern federal award, or workplace agreement, and if that award or agreement contains its own long service leave provisions. This can be done by calling the Fairwork Infoline on 13 13 94.

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

Most Victorian employees are covered by the Act. 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 to be taught an occupation.

Full time, part time, casual and seasonal employees all accrue long service leave.
The Act does not apply to employees who have their long service entitlement provided by another act or regulation, such as workers in building and construction, where it is provided by the CoINVEST scheme.

An employee may have a more generous entitlement than the Act provides under an oral or written common law employment contract or agreement. However, a contract cannot legally contain a long service leave entitlement that is inferior to the entitlement provided in the Act. If you are not sure what a common law employment contract or agreement is, please contact the Employment Information and Compliance Unit on 1800 287 287.

Independent contractors and business owners are usually not regarded as employees and would not be eligible for long service leave provided by the Act. However, outworkers in the clothing industry are deemed (by the Outworkers (Improved Protection) Act (2003) (Vic)) to be employees for the purposes of the Act.

### Are casual or seasonal employees covered by the Act?

The Act explicitly includes casual and seasonal employees provided that:
- the employee has had continuous employment with one employer; and
- there has been no more than a three month absence between two periods of employment.

The Act also specifies that even if there is an absence of more than three months between two periods of employment, the employment may still be regarded as continuous if such an absence is in accordance with the terms of the employment.

The casual hourly rate does not include an amount to cover long service leave. A casual hourly rate cannot be loaded to include the obligation of the employer to pay long service leave. Indeed, it is illegal to pay an employee in lieu of long service leave (section 74 of the Act).

#### Example One

Valda works on a seasonal basis in the agricultural industry at Russell’s Plant Nursery. Valda 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 many years of working at Russell’s. However, Valda’s regular work always recommences after the winter shut down, although that gap might be variable according to the severity of a winter.

Valda will be eligible for long service in accordance with the terms of her employment.

#### Example Two

Matthew is a casual zoology tutor at a Victorian university.

He has been employed by the same university for 13 years. Matthew and the university have an agreement that Matthew does not teach between November and March, due to the university non-teaching period.

Matthew therefore has a four month break from work each year. However, this is in accordance with his contract of employment and his employment is to be regarded as continuous.

Matthew will be eligible for long service leave in accordance with the terms of his employment.
What happens if employment is terminated, or an employee resigns, before all leave is taken?

Long service leave accrues at a standard rate of one week for each 60 weeks of employment with one employer, that is, at approximately 0.866 weeks per year.

On the day that employment ends an employee with at least seven years of continuous service with one employer is entitled to receive, in full, 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.

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 20 penalty units for the employer. If an employer is found guilty of this offence, a criminal conviction may also be recorded.

Note that phasing in does not apply on termination.

An employee ceasing employment after at least seven years of continuous employment with one employer is entitled to be paid long service leave at the standard accrual rate of one week for each 60 weeks of continuous employment, regardless of the reason for the termination of the employment.

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

Where an employee has already taken long service leave, the employer must pay any remaining accrued leave at termination.

Note that before 1 January 2006, there was no entitlement to a payment of accrued long service leave unless the employee had reached at least 10 years of continuous employment.

What if the employee dies before leave is taken?

If an employee has accrued long service leave but dies before it is taken, a payment must be paid to the employee’s personal representative.

Please contact Employment Information and Compliance on 1800 287 287 for further information.

Example One

Marina resigns from her employment after seven years and six months’ employment.

Marina’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 need to divide the total weeks by 60, as Marina will receive one week’s long service leave for each 60 weeks of service. 390 weeks divided by 60 equals 6.5 weeks.

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

Example Two

Rosa resigns from her employment after six years and nine months.

As Rosa has not reached seven years of continuous employment, there is no entitlement to a payment of accrued long service leave.
Example Three

Jenny is retrenched from her employment after 16 years and three months’ employment. She has not taken any long service leave during the course of her employment.

At 15 years, Jenny is entitled to 13 weeks’ long service leave.

> Jenny is entitled to an additional amount of long service leave for the one year and three months worked since 15 years
> One year and three months = 65 weeks
> 1/60th of 65 weeks = 1.083 weeks
> Jenny is therefore entitled to payment of 14.083 weeks’ long service leave on the day her employment ends.

Example Four

Jayne is retiring after 33 years’ employment with one employer. Jayne has had two long service leave holidays, the first of 13 weeks at 15 years and then a second 13 weeks at 30 years.

There is, therefore, no long service leave entitlement remaining for the first 30 years of employment.

However, Jayne is entitled to an additional amount of long service leave for the three years worked since she last took long service leave, based on the one week per 60 weeks of service formula.

Jayne’s long service leave entitlement is calculated as follows:
> Three years multiplied by 52 weeks = 156 weeks.
> As the long service leave entitlement is one week per 60 weeks of service, we then need to divide the total additional weeks worked that is 156 weeks by 60. The outcome is 2.6 weeks.
> Jayne is therefore entitled to a payment of 2.6 weeks’ long service leave on the day her employment ends.

Refer to our online calculator to check when long service leave is due and how many week’s long service leave you will be entitled to at business.vic.gov.au/longserviceleavecalculator

05
What is the entitlement to take long service leave?

Long service leave accrues at the rate of one week for each 60 weeks of employment with one employer, that is, at approximately 0.866 weeks per year.

For employees with 15 years or more of continuous employment with one employer

An employee with continuous employment with one employer is entitled to 13 weeks’ paid long service leave, taken as a break from work without loss of pay, at 15 years.

For every five years of continuous employment after this initial 15 years, the employee is entitled to an additional 4.333 weeks of leave.

For employees with between 10 and 15 years of continuous employment with one employer

An employee will be entitled to take long service leave after ten years of continuous employment with one employer. The entitlement is calculated on a pro-rata basis. Based on the formula of one week per 60 weeks of employment, an employee will be entitled to take approximately 8.66 weeks’ long service leave after ten years of continuous employment.

It is important to note that since 1 January 2006 the entitlement to take long service leave after ten years’ service has been progressively phased in.

To calculate when an employee is eligible to take leave:
> two thirds of an employee’s period of service before 1 January 2006; and
> all of an employee’s period of service from 1 January 2006 is taken into account.

When this amounts to a total of ten years, the long service leave entitlement is due to be taken.

This phasing-in method does not reduce the amount of long service leave to which an employee is entitled once the ten year service is calculated. At this time, an employee is entitled to one week of leave for every 60 weeks of employment, taking into account the employee’s full period of employment with no reductions.
Sarah has been employed in a flower shop since 1 July 1996. A friend told her about an entitlement to long service leave at ten years. On 1 July 2008 she asked her employer about the entitlement.

Sarah’s employer explained that her entitlement to take long service leave is calculated as follows:

- Sarah worked a total of nine years and six months in the period before 1 January 2006. Two thirds of this period is taken into account. Nine years and six months less one third is six years and four months.

- Sarah worked a total of two years and six months from 1 January 2006 to 1 July 2008. All of this period is taken into account.

- Sarah’s relevant period of service using the phasing-in formula is therefore six years and four months plus two years and six months. This equals eight years and ten months.

- Because this is less than ten years, she is not yet eligible to take long service leave.

- When Sarah has worked another one year and two months, on 1 September 2009, she will have completed ten years service using the phasing-in formula and will be entitled to take long service leave.

- At that time, the amount of long service leave Sarah will be entitled to is 1/60th of her full period of service since 1 July 1996, being thirteen years and two months, which will be approximately 11.4 weeks of leave.

Although the Act provides that the employee has an entitlement to take leave, the actual date the leave commences should be agreed between the employer and the employee.

The long service leave must be taken in one period, except where an employer and employee agree to separate periods. The first 13 weeks of long service leave may be taken in up to three separate periods, and subsequent long service leave may be taken in two separate periods.

Can long service leave be taken in advance?
Yes. The employee and employer may agree on the leave being taken before an entitlement is actually due. If the employment is then terminated before the long service leave is accrued, the employer may recover the amount of any advance payment.

Can the taking of long service leave be deferred?
Yes. An employee can request deferral of their long service leave. The rate of pay when the employee then takes the long service leave will be the rate agreed in writing between the employer and employee. The rate cannot be less than the employee’s ordinary rate of pay at the time the leave was due.

Can an employee be directed to take long service leave by the employer?
Yes. If agreement cannot be reached about when long service leave is to be taken, an employer may direct an employee to take leave at a particular time by giving at least three months’ written notice. This notice can however be appealed in the Magistrates’ Court.

Can the period of leave be extended?
An employee and employer may make an agreement which allows the employee to take a period of leave at half pay. For example, an employee with 13 weeks’ accrued leave could take a 26 week break at half pay. However, taking half the leave at double pay is not permitted.

Refer to our online calculator to check when your leave is due and how many weeks’ long service leave you will be entitled to at business.vic.gov.au/longserviceleavecalculator.
Can long service leave be ‘cashed out’ rather than taken as a break from work?

No. An employee cannot ‘cash out’ their long service leave. It is an offence under the Act to give or receive payment instead of the employee actually taking the break from work. An employee can only receive payment in lieu of taking long service leave if their employment ends before the leave is actually taken.

The penalty for this offence is 20 penalty units each for the employee and the employer. 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 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.

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 could not validly deny an employee’s entitlement. Even if there are no documents setting out this liability, the employee still has an entitlement.
It is important to note that, where an employee will continue with the new owner of the business, the old employer should not pay out accrued long service leave to the employee. At the time of a sale of a business their employment is terminated with the old owner, however this does not break continuing employment for long service leave according to the Act.

**Example One**

Robyn has been continuously employed by John’s Tyres for nine years. The owner of John’s Tyres, John, sells John’s Tyres to Terry. When the business is taken over, Terry continues to employ Robyn and there is no break in service.

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

Employment may be considered continuous when the assets (for example, equipment), or part of a business, rather than the entire business itself, are transferred to another employer and the employee works for the new owner of the assets or part of a business.

**Example Two**

Jonathan has been continuously employed by Melissa of Melissa’s Sweet Factory for seven years. He works with the chocolate making equipment. Melissa’s Sweet Factory closes down, but all the chocolate making equipment is sold to Isabelle of Isabelle’s Chocolate Factory. Jonathan obtains a job working with Isabelle’s Chocolate Factory, working with the same chocolate making equipment that he used when working for Melissa’s Sweet Factory.

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

If an employee is dismissed by the old or new business owner but is re-hired by the new business owner within three months, employment is not broken for purposes of the Act.

If an employee does not remain with a business that has changed hands, the employer who sold the business is responsible for calculating and paying out any long service leave entitlements to which the employee has become entitled.

**When work is performed for a related employer**

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

**What if the employee has been an apprentice?**

If an employer has an apprentice who is employed by the same employer within 12 months after completion of that apprenticeship, then the time of their apprenticeship is counted for 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 situation, the employment is likely to be with two employers (first the Group Training company, later the business) who are not related. The time the apprentice has spent employed with the Group Training Company will only be considered continuous employment where the Group Training Company and the host employer are related in a way prescribed in the Act.

**What if an employee has worked for one employer, but in a variety of states and/or countries?**

Some employees may work in a variety of locations over a period of years. As long service leave entitlements vary between states, the question then arises as to which long service leave legislation applies to the continuous employment. The answer will always turn on the particular circumstances of the case. You should seek advice about your particular circumstances in this situation.

Overseas service is likely to be included for the purposes of accruing long service leave if it is part of continuous employment with one employer.
Which absences from work 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 breaks from work, paid or unpaid.

Any form of paid or unpaid parental leave (maternity, paternity or adoption leave), up to 52 weeks at a time or longer as per legal entitlement, will not break continuous employment. Similarly, an absence of any length from work on account of illness or injury (which includes a WorkCover absence), annual leave, or long service leave itself will not break employment. Any other form of paid or unpaid leave, for example study leave, will also not break employment.

If an employee is stood down by their employer because of a lack of work, their employment will remain unbroken.

If an employee is dismissed by their employer but subsequently re-employed before three months have elapsed, then employment will be unbroken for purposes of long service leave.

Example
Silvie is employed as a dishwasher at the Happy Valley Coffee House. Her employment is terminated as the employer decides he no longer needs a dishwasher because the kitchen-hand should be able to do those duties as well as his own. After one and a half months, the employer realises that it just isn’t working and that in fact Silvie did a whole lot more than just dishwashing, and asks her to come back.

As Silvie is re-employed within three months, this break in the employment period will not break her continuity of employment.

Which absences from work will break continuous employment?

Continuous employment will be broken where an employee resigns from employment, even if the employee is subsequently re-employed.

Continuous employment will be broken where an employee is dismissed by their employer and is subsequently re-employed after three months have elapsed.

Example
Koby has been a mechanic at S.B.A. Auto Repairs for six and a half years. He gets offered a job by a new repair shop which opens for business down the road. He accepts the offer and resigns from S.B.A. However, after just one month, Koby realises that he has made a mistake. He is required to work really long hours with minimum wages. He asks for his old job back at S.B.A. Auto Repairs and they welcome him back.

In this case, although Koby was only gone for one month, the fact that he resigned means his continuous service is broken.

Does time spent on leave count toward continuous employment for the purpose of accruing long service leave?

Most forms of paid and unpaid leave, except unpaid parental leave, will count toward the period of employment. Although unpaid parental leave will not count, any paid parental leave will count towards employment.
12 Does time spent on sick leave or WorkCover count toward continuous employment for the purpose of accruing long service leave?

Any absence from work of not more than 48 weeks in any year on account of illness or injury is to be counted as part of the period of employment. Any absence for that reason in excess of 48 weeks is not to be counted.

Illness or injury leave includes a WorkCover absence.

Example

Emma worked at a pony stud for 11 years, during which time she slipped and sustained a back injury while at work. She commenced receiving WorkCover payments and was unable to attend work for three years following the injury. Emma then resigned from her employment after 14 years (11 years while working and three years while on WorkCover). Emma has never taken long service leave during her employment.

Emma’s long service leave entitlement is calculated as follows:

> 11 years multiplied by 52 weeks = 572 weeks.
> Three years multiplied by 48 weeks (remember that only 48 weeks in each of the years that Emma has been absent on the basis of illness or injury will count toward her long service leave entitlement) = 144 weeks.
> 572 weeks plus 144 weeks = 716 weeks in total.
> We then need to divide the total weeks by 60, as Emma will receive one week’s long service leave for each 60 weeks of service. 716 divided by 60 = 11.93.

Emma is therefore entitled to a payment of 11.93 weeks’ long service leave on the day her employment ends.
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How is payment for long service leave calculated?

The calculation is the total number of weeks’ employment divided by 60 and multiplied by the ordinary weekly rate of pay at the time the leave is taken, or the employee ceases employment.

Example One
My Linh has worked continuously for 11 years and decides to resign from employment.

My Linh’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 My Linh will receive one week of long service leave for each 60 weeks of service. 572 weeks divided by 60 = 9.33 weeks.
> At the time of resignation, My Linh’s ordinary pay is $500.00 per week gross.
> 9.33 weeks multiplied by $500.00 per week is $4,665.00 gross.

My Linh is therefore entitled to a payment of $4,665.00 (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 their long service leave paid out. It does not include most allowances, penalty or overtime rates but is the actual ordinary time rate received, even if the employee is a casual employee (note that 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 falls due or is to be paid out. However, in some cases, an employee’s hours may vary from week to week. This may occur, in particular, for casual employees.

Where an employee’s hours vary from week to week, the employee’s hours for calculating long service leave will be averaged over the preceding 12 months, or the preceding five years, whichever average hours are the greater.

Example Two
Melinda has worked at a shoe shop as a casual for the past 22 years. She works according to a roster but depending on how busy the shop is, she works a different amount of hours week to week. Melinda has not taken any long service leave before, but would like to do so now.

Melinda’s hours over the past five years have been as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Hours worked</th>
<th>Average number of hours worked per week (number of hours divided by 52)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>220</td>
<td>4.23</td>
</tr>
<tr>
<td>2002</td>
<td>200</td>
<td>3.8</td>
</tr>
<tr>
<td>2003</td>
<td>240</td>
<td>4.6</td>
</tr>
<tr>
<td>2004</td>
<td>210</td>
<td>4.0</td>
</tr>
<tr>
<td>2005</td>
<td>230</td>
<td>4.4</td>
</tr>
<tr>
<td>Average over five years</td>
<td>(total hours worked over five years divided by five)</td>
<td>(total average hours divided by five)</td>
</tr>
<tr>
<td></td>
<td>220</td>
<td>4.2</td>
</tr>
</tbody>
</table>

If Melinda’s hours are averaged over the last 12 months of employment, her long service leave would be calculated at 4.4 hours per week. However, if her hours are averaged over the previous five years, her entitlement would be to long service leave based on 4.2 hours per week.
How is long service leave calculated if the employee’s ordinary hours of employment have changed during the course of employment – for example, the employee has moved from full to part time employment?

An employee’s long service leave entitlement is based on his or her normal weekly hours 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. 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 12 months immediately before the employee takes long service leave, the employee’s hours for calculating long service leave will be averaged over the preceding 12 months or five years, whichever average hours are the greater.

Example Three

Danielle has been continuously employed for 16 years. However, she worked full time (38 hours) for the first 15 years of employment, and then part time for 20 hours per week in the 16th year.

Danielle’s ordinary hours over the past five years have been as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Hours worked per week</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>38</td>
</tr>
<tr>
<td>2002</td>
<td>38</td>
</tr>
<tr>
<td>2003</td>
<td>38</td>
</tr>
<tr>
<td>2004</td>
<td>38</td>
</tr>
<tr>
<td>2005</td>
<td>20</td>
</tr>
<tr>
<td>Average over five years</td>
<td>34.4 (calculated by adding up the hours worked each week for the past five years and dividing by five)</td>
</tr>
</tbody>
</table>

If Danielle’s hours are averaged over the last 12 months of employment, her long service leave would be calculated at 20 hours per week. However, if her hours are averaged over the previous five years, her entitlement would be to long service leave based on 34.4 hours per week.

Danielle’s long service leave should therefore be calculated based on the average weekly rate over the past five years and she will be entitled to long service leave based on 34.4 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 this is permitted by the relevant award or agreement) an employee may not have a fixed ordinary time rate of pay. For example, the employee may be 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 rate of pay varies from week to week, the employee’s rate of pay for calculating long service leave will be averaged over the preceding 12 months or five years, whichever average rate is the greater.

Example Four

Dragan is a real estate agent who has worked for the same agency for 11 years.

Dragan has resigned from his employment. He did not take any long service leave during the course of 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 has varied as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Commission</th>
<th>Retainer</th>
<th>Total p.a.</th>
<th>Average weekly rate per year (total income divided by 52)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>12,000</td>
<td>25,000</td>
<td>37,000</td>
<td>$711.54</td>
</tr>
<tr>
<td>2002</td>
<td>10,000</td>
<td>25,000</td>
<td>35,000</td>
<td>$673.08</td>
</tr>
<tr>
<td>2003</td>
<td>15,000</td>
<td>25,000</td>
<td>40,000</td>
<td>$769.23</td>
</tr>
<tr>
<td>2004</td>
<td>8,000</td>
<td>25,000</td>
<td>33,000</td>
<td>$634.62</td>
</tr>
<tr>
<td>2005</td>
<td>6,000</td>
<td>25,000</td>
<td>31,000</td>
<td>$596.15</td>
</tr>
<tr>
<td>Total average yearly pay for last five years</td>
<td></td>
<td></td>
<td></td>
<td>$676.92</td>
</tr>
</tbody>
</table>

(Commissions are calculated by first adding together the average weekly rate for the past 5 years (which totals $3,384.62), and then dividing that number by five.

If Dragan’s ordinary weekly rate of pay is averaged over the last 12 months of employment, his long service leave would be calculated on the basis of his ordinary weekly pay being $596.15. However, if his ordinary weekly rate of pay is averaged over the previous five years, his entitlement would be to long service leave based on an ordinary weekly rate of pay of $676.92.

Dragan’s long service leave should therefore be calculated based on the average weekly rate over the past five years, and he will be entitled to long service leave based on an ordinary weekly rate of $676.92.

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 Five

Frank is a nurse working in a rural town. His contract of employment states that his total salary is $40,000.00 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 Frank’s salary and are included in his contract of employment, the value of the items would form part of 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 returns to work on a return to work plan, the employee’s long service leave entitlement will be calculated on either their pre-injury pay rate or their ordinary time pay rate at the time leave is taken, whichever is the greater.
14. How do public holidays affect long service leave?

A public holiday falling within the period of leave is added to the period of leave. This is the same way that public holidays during a period of annual leave are treated. Employees will have the benefit of a public holiday should it fall during a period of long service leave.

15. Can a person who is 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 such 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 for Job B during the hours for which they would otherwise work for Job A and for which they are being paid long service leave by Job A.
Can an employee claim long service leave entitlements if the company is liquidated?

If a business 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 these are insufficient to meet an employee’s long service leave entitlement, the Fair Entitlements Guarantee may be available.

The Fair Entitlements Guarantee is a federal government scheme which provides for the payment of certain entitlements of employees whose employment has been terminated as a result of their employer’s insolvency. The guarantee 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 Fair Entitlements Guarantee Hotline for full details of the scheme on 1300 135 040 or visit the Fair Entitlements Guarantee website at deewr.gov.au/feg

Penalties for failure to keep records under the Act

An employer must keep accurate records of the employee’s long service leave for at least seven years after the employment ceases.

Records must be kept in the form prescribed by the Department of Economic Development, Jobs, Transport and Resources. The approved format is available on the Business Victoria website, business.vic.gov.au

The penalty for this offence is 20 penalty units for the employer. If an employer is found guilty of this offence, a criminal conviction may also be recorded.
18
What happens if an employee is owed long service leave and the employer fails to pay?

An employee is able to seek recovery of money owed under the Act as an application for arrears in pay. The application is heard in the Magistrates’ Court and, if an order is made in the employee’s favour, it may include an order that the payment be made with interest. The proceeding must commence within six years of the employee’s entitlement arising.

Employees may ask an organisation registered under the Commonwealth Fair Work Act (for example, a union) to take an action 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 employer fails to pay an employee his or her long service leave entitlement, the employer may also be prosecuted in the Magistrates’ Court. Employment Information and Compliance is able to investigate claims of unpaid or underpaid long service leave entitlements, and with the authorisation of the Minister for Industrial Relations, to pursue a prosecution in the Magistrates’ Court for an offence under the Act.

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

If the employer is found guilty, the Court may also order that the employer pay his or her employee the money due to the employee, possibly with interest.

The penalty for this offence is 20 penalty units for the employer.

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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 on 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

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 page 16 for information on how this is handled when an employee has more than one job)

Offences under the Act attract a penalty of 20 penalty units.

The sole exception to this is the penalty for an offence relating to an employee working while on long service leave. This offence attracts a penalty of five penalty units for breach by an employee and/or an employer.
Where an employer or employee is found guilty of an offence, a criminal conviction may also be recorded.

Can directors, or people involved in the management of a corporation, be personally liable for a corporation’s breach of the Act?

Yes. Under the Act, a director of a corporation, or a person who takes part in the management of a corporation, may be liable for the conduct of the corporation where the director knew about the conduct, or was reckless as to whether the conduct engaged in was in breach of the Act.

If found guilty, the director or manager would then be liable for penalties and/or criminal conviction, in the same way as the corporation.

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 conduct engaged by the corporation itself.

What is a penalty unit?

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

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Preservation of long service leave entitlements due to the impact of federal workplace laws

How does the Victorian legislation address these problems?

In 2006, changes to federal workplace laws meant that employee’s accrued long service leave entitlements were no longer guaranteed, particularly when they enter a new workplace agreement. Some Victorian employees had more beneficial long service leave entitlements under a federal award. The Act was amended in 2006 to ensure that those accrued or more beneficial entitlements were preserved for those employees.

The federal legislation also allowed agreements to modify or remove long service leave entitlements. The Act now requires employers to notify their employees in writing if the agreement they are making had this effect.

Prohibition on dismissals (or other prejudicial action) to avoid under the Act obligations

The Act now prohibits an employer from sacking or demoting an employee in order to avoid their obligations under the Act. As it is difficult for an employee to prove that the employer’s reason for the dismissal was to avoid their long service leave obligations, the Act provides a reverse onus of proof. So, where the employee can provide evidence that they were dismissed after they applied for leave or the dismissal took place whilst they were on leave, the employer must prove that the sacking was for some other lawful reason.

It will not be a criminal offence to terminate employment to avoid Act obligations. Instead a civil penalty of up to $10,000 will apply.

The Court will be able to award the penalty to the individual, to the Consolidated Fund, or to an organisation (usually only so ordered where the organisation has incurred the costs of the proceeding). The Court can also order reinstatement and reimbursement of lost wages. Where reinstatement is not appropriate, the Court may order compensation.
21 Long service leave calculator

You can access the long service leave calculator at business.vic.gov.au/longserviceleavecalculator. It is also available on the Business Victoria website, business.vic.gov.au. It can calculate the number of weeks’ long service leave for a termination payout and calculate when long service leave is due to be taken. The calculator is also available on a CD if you are unable to access the internet. Contact Employment Information and Compliance on 1800 287 287.

22 How do I find out more?

The Employment Information and Compliance Unit, which is part of the Department of Economic Development, Jobs, Transport and Resources, administers the Long Service Leave Act. The unit operates a telephone inquiry service, provides information and education services and investigates alleged breaches of the Act.

Information on long service leave can be obtained from the Employment Information and Compliance Unit on 1800 287 287 or by visiting business.vic.gov.au

The Act can also be found at business.vic.gov.au

To check if an employee is covered by a federal award or agreement which contains long service leave clauses, call Fairwork Infoline on 13 13 94 or check the Fairwork Ombudsman website, fairwork.gov.au

Employers may contact their employer organisation for help.

Employees may contact their union or Job Watch (metro callers: 9662 1933, regional callers: 1800 331 617) for help.
Here’s a quick way to calculate long service leave

Visit our easy-to-use online calculator at 

If you’re covered by the State Long Service Leave Act, it only takes a few steps on the Victorian Government’s online calculator to calculate an entitlement.