

Parental Leave and Employment Protection Act 1987

INTRODUCTION

The Parental Leave and Employment Protection Act provides paid and unpaid leave, and employment protection, for qualifying employees who are having a baby, or adopting a child under the age of six.

The following information is taken from the Employment New Zealand website. For more detailed information refer to the website -

<http://employment.govt.nz/er/holidaysandleave/parentalleave/index.asp>

ELGIBILITY

Leave may be available to:

- female employees having a baby, and to their spouses or partners (includes a married, civil union or de facto relationship with a different or same-sex partner), and
- employees, and their spouses or partners (includes a married, civil union or de facto relationship with a different or same-sex partner), who begin permanently caring for a child under 6 years who is not their natural child (this includes permanent care such as adoption and home for life, but not foster care).

Employees can take parental leave multiple times as long as 6 months elapse between the date they returned to work and the arrival date (due date of birth or date of permanent care) of the subsequent child. An employee must also meet the test criteria each time.

Parental leave is unpaid leave but any employee may be able to get government-funded parental leave payments while they are on leave, sometimes referred to as paid parental leave.

Employees on fixed-term employment agreements get the same entitlements to parental leave and parental leave payments as permanent employees as long as they meet the test criteria.

To take parental leave an employee must meet either the 6 month or 12 month test criteria.

Six month test criteria

An employee must have worked for the same employer for an average of at least 10 hours a week for the 6 months just before their baby's due date (or the date they assume responsibility for the care of a child under 6 years on a permanent basis).

Twelve month test criteria

An employee must have worked for the same employer for an average of at least 10 hours a week for the 12 months just before their baby's due date (or the date they assume responsibility for the care of a child under 6 years on a permanent basis).

TYPES OF PARENTAL LEAVE

There are five types of parental leave. These are:

(a) Primary Carer Leave

- female employees who are having a baby, or
- her spouse or partner if he or she has all or part of the birth mother's parental leave payments transferred to them, and
- employees who are going to have the primary responsibility for the care, development and upbringing of a child under 6 years on a permanent basis; this may be through adoption, or home for life, or whangai (but it doesn't include foster care or other temporary care basis). If the employee has a spouse or partner, they need to choose who will be the primary carer.

Primary carer leave can be taken for up to 18 weeks and must be taken in one continuous period. Primary care leave can't be taken if the employee has already taken any period of parental leave or similar leave in relation to that child. Primary carer leave begins on the date of confinement if the child is born to the employee, or in any other case the date that the employee becomes the primary carer in respect of the child. The employee can start their primary carer leave up to 6 weeks (or earlier with the employer's consent) before the baby's due date or the date on which the employee will become the primary carer of the child).

Pregnant women can start their primary carer leave earlier if:

- the baby is born before her scheduled leave, or
- directed by a doctor or midwife, or
- the employer considers that the pregnant employee's work is unsafe, or her performance is inadequate, due to her pregnancy; and the employer can't temporarily transfer her to another suitable job.

If the primary carer leave starts early (by medical or employer direction as above), the female employee giving birth may still take at least 8 weeks primary care leave after the expected date of delivery birth (even if this means that she will have taken more than 18 weeks primary carer leave). In this situation the additional weeks of primary carer leave is not included in the calculation of the amount of extended leave available.

(b) Special leave

In addition to any parental leave taken, females who are pregnant can also take up to 10 days unpaid special leave for pregnancy-related reasons such as antenatal classes, scans or midwife appointments.

(c) Partner's leave

If the employee is a spouse or partner who meets the:

- 6 month time criteria they may take 1 week's unpaid partner's leave
- 12 month time criteria they may take 2 weeks' unpaid partner's leave.

An employee can take partner's leave within the time frame:

- starting 21 days before the due date of the baby, or the date their partner or spouse becomes the primary carer for a child under 6 years, and
- ending 21 days after the baby is born (unless the baby is discharged from a hospital more than 21 days after the birth, in which case the partner's leave time frame ends on the day the child is discharged) or the date their partner or spouse becomes the primary carer for the child.

If the employer and the employee agree, they can start their partner's leave at any time.

An employee can't take partner's leave if their partner or spouse is the child's biological mother who has transferred her parental leave payment to the employee (who will have primary responsibility for the day-to-day care of the child and therefore be on primary carer leave during this time). An employee can't take partner's leave if she is the biological mother and she has transferred her parental leave payment entitlements to her spouse or partner.

(d) Extended leave

The amount of extended leave that an employee may take depends on whether each parent meets either the 6 month or 12 month time criteria. Extended leave may be shared by two parents who both meet the criteria, and they can take it at the same time or one after the other:

- Employees who meet the 12 month criteria may take up to 52 weeks extended leave (less the number of weeks primary carer leave taken, up to 18 weeks); if 2 parents are sharing the leave and they both meet the 12 month criteria then they share this amount, or
- employees who meet the 6 month criteria may take up to 26 weeks in total (less the number of weeks primary carer leave taken, up to 18 weeks); if 2 parents are sharing the leave and they both meet the 6 month criteria then they share this amount.

- If one parent meets the 12 months criteria and the other parent the 6 months criteria then the person who has only worked for 6 months cannot take more than 26 weeks of the total 52 weeks (less the number of weeks primary carer leave taken up to 18 weeks) available to the couple.

The 1 or 2 weeks partner's leave is not included in the 26-week or 52-week extended leave period.

Starting extended leave

An employee can start extended leave:

- at any time after they end their primary carer leave, or
- at any time after they end their partner's leave, or
- on any date agreed with their employer, or
- if they can take primary carer or partner's leave but choose not to, then they can start extended leave either when they finish work to have the baby (known as the date of confinement) if the child is born to an employee or their spouse or partner, or the date they or their spouse or partner becomes the primary carer in respect of the child in all other cases.

An employee can finish their primary carer or partner's leave, go back to work, and then take extended leave later.

Ending extended leave

For an employee who has (and/or their spouse or partner has) worked for 12 months, extended leave must end by the:

- date the child turns 1 year if the child is born to the employee or their spouse or partner, or
- the 12 months anniversary of the employee or their spouse or partner becoming the primary carer in respect of the child.

For an employee who has only worked for 6 months (and whose spouse or partner has not worked for 12 months), extended leave must end by the:

- date the child turns 6 months if the child is born to the employee or their spouse or partner, or
- 6 months from the date the employee or their spouse or partner became the primary carer of the child.

(e) *Negotiated carer leave*

If an employee will be the primary carer of the child and would meet the work time and hours criteria to receive a parental leave payment, but they can't take primary carer leave (because they don't meet the criteria for parental leave), they can ask the employer to give them negotiated carer leave. Negotiated carer leave lets employees who don't qualify for primary carer leave to take leave to care for their child and receive a parental leave payment.

Negotiated carer leave is a period of unpaid leave from work which an employee can ask for:

- at least 3 months before the baby's due date, if the employee or their spouse or partner is pregnant, or
- 14 days before an employee becomes the primary carer of a child.

If an employee asks for negotiated carer leave and they give the employer the correct information, the employer must let the employee know if they, as the employer, agree as soon as possible and not more than one month after they asked.

As an employer can say no if:

- they can't reorganise their work by giving it to colleagues or by recruiting extra staff, or
- their absence reduces quality, performance or ability to meet customer demand, or
- the employer is planning to make changes to their area, or
- there will be too many extra costs.

KEEPING IN TOUCH DAYS

If an employee is on parental leave but they choose (and the employer agrees) to perform work from time to time, for example, to attend a team day or change announcement, it won't be counted as them having stopped their parental leave by being back at work as long as:

- they only do a total of 40 hours or less of paid work for their employer during their leave, and
- this work is not within the 28 days after their child was born.

If they do more than 40 hours or work within the 28 days after the birth of their child, then they are considered to be back at work; this also means that they won't be able to get any more parental leave payments, and any payments they got for time after they are considered back at work are treated as an overpayment.

(These keeping in touch days don't apply to paid work they perform during a period when they are getting or are able to get a preterm baby payment, instead the paragraph below applies to this time).

Extra keeping in touch days for primary carers of preterm babies

In addition to the above, if the employee is a primary carer getting a preterm baby payment, they may work on keeping in touch days, during the preterm baby payment period, for up to a total of 3 hours multiplied by the number of weeks that they receive the preterm baby payment and it won't be counted as them having stopped their parental leave. If they work more than this, they are treated as having returned to work on the day after they did too many hours and any preterm baby payments they got for time after this day are treated as an overpayment (but they can still get a normal parental leave payment).

EMPLOYEE'S PROTECTION OF THEIR JOB DURING PREGNANCY OR PARENTAL LEAVE

An employee can't lose their job just because they are pregnant or applying for parental leave. (They can still lose their job for a good legal reason not connected to their parental situation for example, serious misconduct, and following a fair and legal process.)

As long as they give the right notice, the employer must keep their job open for them until they come back to work after their parental leave if they are taking only up to 4 weeks parental leave (and it's the first period of parental leave for that child). If they are taking more than 4 weeks parental leave, the employer must keep their job open for them unless their job is defined as a key position or there is a redundancy situation.

If the employer decides that the job is a key position, or there is a redundancy situation and the job won't be kept open for the employee, they'll go into a 26 week 'period of preference' at the end of their parental leave. This means that at any time during this 26 week period, if the employer has a job that is really similar to the employee's job, the employer must offer it to the employee first before offering it to anyone else.

An employee doesn't keep any job protection or preference rights once their parental leave or period of preference has ended.

Key positions

To decide if the employee's job is a key position, the employer will consider in relation to the particular job:

- the size of their business or organisation, and
- the training period or skills required in the job.

A job may be a key position because it needs special skills, and there are not enough people with those skills, or it would take too long to train someone for an employer to be able to find someone on a temporary basis to do the job. An employee can disagree with their employer's decision that the job is a key position.

Impact of an employee's job not being kept open on parental leave payment

If an employee's job is not being kept open because it's a key position or there is a redundancy situation, this doesn't affect whether an employee is able to get a parental leave payment. Even if they have started their parental leave and are receiving a parental leave payment and the employee is made redundant, they'll still get up to the full (up to 18 weeks) parental leave payment (that they would otherwise have got).

APPLYING FOR PARENTAL LEAVE

Letting the employer know the employee will be taking parental leave

An employee must write to their employer about their leave and not just rely on a conversation. Putting their leave details in writing makes things clear for both parties and reduces the chance of misunderstandings or problems later.

An employee should think carefully about how much parental leave they want to take before they apply for leave. If they want to take extended leave in 2 or more periods, each period will have to have dates agreed to by the employer.

Notice that employees must give their employer

- If the employee (or their spouse or partner) is having a baby and wants to take parental leave (or negotiated carer leave) they must write to the employer at least 3 months before the baby's expected due date.
- If neither the employee or their spouse or partner are having a baby but they're going to start being the permanent primary carer of a child under 6 years, they may not know far in advance when they will take responsibility for the child. As part of their good faith obligations as an employee, they should tell their employer it is likely to happen and must write to their employer as soon as they can, but they need to write to their employer at least 14 days before they want to take parental leave.

The letter must say:

- what type of leave they want
- the date that they want the leave to start
- how long the period of leave will be.

If the employee is sharing any part of their leave with their spouse or partner, the letter must also say:

- the dates on which the employee and their spouse or partner plan to start and finish each period of leave
- their spouse or partner's name and, if they are an employee, the name and address of their employer
- that they and their spouse or partner are both eligible for the leave they are applying for
- that the total amount of leave they and their spouse or partner are taking will not be more than 52 weeks (not counting any partner's leave taken).

What the employee must attach if they or their spouse/partner are giving birth to the child

If the employee or their spouse or partner are giving birth to the child, they must attach a copy of a certificate from their doctor or midwife naming who is pregnant and the baby's due date. If it is their spouse or partner who is pregnant, they need to include a written letter from her saying that they are their spouse or partner and that the employee is going to assume the care for the child she is going to have.

What the employee must attach if they are taking permanent primary responsibility for the care, development and upbringing of a child under 6 years

If the employee or their spouse or partner are not giving birth to the child under 6 years who they'll be permanently caring for, they will need to attach to the statement that they will be the primary carer for the child:

- a certified copy of a court order placing the child in their day-to-day care or custody, or
- a copy of a letter from the chief executive of the Ministry or organisation who has custody of the child confirming that the employee is or will be the primary carer in respect of the child, or
- a copy of the application for a parenting order or adoption order (if one has been made) and a statutory declaration or
- if none of the above can be provided, a statutory declaration

Employer's confirmation of leave

Within 21 days of the employee going on leave, the employer must write to the employee confirming the arrangements. The letter must include:

- the date the employee's parental leave will end, and
- either the date they return to work (if their job is being kept open) or the date the period of preference starts, and
- a reminder that if their job is being kept open, the employee needs to write and tell their employer what they are going to do at least 21 days before they are due to return from parental leave, and
- the circumstances in which the employee can return to work early.

Replacing employees on parental leave

While an employee goes on parental leave, employers have some choices as to how to get their work done. They can:

- redistribute the work among existing staff (being aware of health and safety implications and not overloading other workers)
- hire a contractor
- hire an agency temp
- hire a temporary employee on a fixed-term agreement to replace employees while they are on parental leave. The replacement employee's employment agreement must state that they are employed on a temporary basis to replace someone on parental leave, and that the person on leave may return from leave early.

Employee's letter about their return to work

An employee who is on parental leave and whose job is being kept open, must write to their employer at least 21 days before their return to work and tell their employer whether or not they are coming back to work.

Employee's letter about returning early to work

An employee who wants to return to work, or begin their [period of preference early](#), must write to the employer at least 21 days before they want to return.

Other matters employees and employers should think about:

- additional provisions regarding parental leave or parental leave payments in the employee's employment agreement, or in the workplace's policy
- obligations under the health and safety in employment legislation.

GOVERNMENT-FUNDED PARENTAL LEAVE PAYMENT (PAID PARENTAL LEAVE)

Employees may be able to get a parental leave payment while they are not working so they can care for a new child.

Parental leave payments are generally attached to the birth mother, or the chosen primary carer if they are becoming the permanent primary carer of a child under 6 years such as through adoption, whāngai or Home for Life. The birth mother or primary carer can transfer some or all of the payment to their spouse/partner if

- they have been employed (but this doesn't have to be for the same employer) or self-employed for at least an average of 10 hours per week over any 26 of the 52 weeks just before either:
 - the due date of the employee or self-employed person transferring her payment or
 - the date on which the employee or self-employed person became the primary carer of the child.

If the employee wants to transfer parental leave payments to their spouse or partner, their spouse or partner must stop working (including by taking parental leave) for the time for which the payments are transferred and for this time their spouse or partner must have the primary responsibility for the day-to-day care of the child. If they transfer some or all of their parental leave payment, their spouse/partner must take the amount transferred in one continuous period.

If only one person is going to be the permanent carer, for instance, if only one spouse is adopting the child, only that person can apply for the parental leave payment.

As an employee in some cases they may become able to receive a parental leave payment if their spouse or partner dies or if they become permanently responsible for the care, development and upbringing of the child.

The employee and their spouse cannot receive parental leave payments at the same time and if they become the primary carer, they cannot receive parental leave payments for a child they have already received parental leave payments for.

If their baby comes before the due date, this would generally not affect their parental leave payments.

WHO CAN GET THE PARENTAL LEAVE PAYMENT?

Employees

The employee must:

- be becoming the primary carer of a child under 6 years (through giving birth or otherwise taking permanent primary responsibility for the care, development and upbringing of the child eg through adoption, whangai, Home for Life or similar permanent arrangement), and
- have been employed as an employee (this doesn't have to be for the same employer) for at least an average of 10 hours per week over any 26 of the 52 weeks just before:
 - the baby's due date (if the child is being born to them or their spouse or partner) or
 - in any other case of a child under 6 years, the date when they or their spouse or partner becomes the primary carer of the child.

An employee is counted as being employed as an employee for an hour, even if they are not at work for an hour that they would normally have been at work if they are

- absent on leave with pay for that hour; or
- on leave without pay (other than parental leave) with the employer's agreement for that hour; or
- entitled to a payment of weekly compensation under the Accident Compensation Act 2001 for that hour; or
- on volunteers leave (within the meaning of the Volunteers Employment Protection Act 1973) for that hour; or
- a pregnant employee who is on primary carer leave before the expected date of delivery of the child for that hour (excluding any primary carer leave taken for a different child in the past 6 months); or
- absent because of any other circumstances that are considered by a Labour Inspector not to disrupt the normal pattern of the employee's employment.

Employees should request parental leave or negotiated carer leave before they apply for a parental leave payment. Employees might do a small amount of work while they are on leave if they are using a keeping in touch day but this must be within the limitations of keeping in touch days.

Subsequent children

An employee can get parental leave payments for their next children, but there must be at least 6 months between the date they received a parental leave payment for their last child and the date they want a parental leave payment from their next child. They must also meet all the criteria for a parental leave payment each time.

Multiple births (e.g. twins)

If a parent has more than one child at the same time eg twins, they get the same amount of parental leave and parental leave payments as if they only had one child. Depending on their level of family income, they may be able to get a parental tax credit, this might be better for some families than a

parental leave payment. An employee can't get the parental tax credit and a parental leave payment for the same child or children, so they should check out each option first so they know which one to apply for.

Duration of parental leave payments (paid parental leave)

Parental leave payments are payable for one continuous period of up to 18 weeks. (If the employee transfers some or all of their parental leave payment, their spouse or partner must also take the amount transferred in one continuous period). The payment period starts on:

- the earliest of the date the employee starts parental leave or confinement if they are a birth mother, or
- in any other case on the date they become the primary carer of the child.

An employee will get their parental leave payment up to the end of 18 weeks, but it will stop before the end of 18 weeks if they:

- transfer the payment, or part of the payment, to their spouse or partner, or
- return to work, or
- stop being the primary carer of the child (unless they are the birth mother and they stop being the primary carer of the child eg the child is adopted by another family; or they miscarry; or the child dies, in which case, they can still receive the parental leave payment for up to 18 weeks).

If the employee returns to work early (not including keeping in touch days) while still receiving parental leave payments they must contact Inland Revenue and advise them of their return date. Their entitlement to payment ends then.

To get the parental leave payment the employee needs to apply to Inland Revenue by completing the form that is right for their situation. (The employee needs to first apply to their employer for parental leave or negotiated carer leave.)

Employee's parental leave payments equal the greater of:

- an applicant's ordinary weekly pay, or
- an applicant's average weekly income

up to the maximum amount of \$516.85 gross

Employee not going back to work

If an employee decides not to go back to work when their parental leave ends, they must write and tell their employer at least 21 days before the end of their parental leave. If the employee is on leave and getting a parental leave payment and they decide not to go back to work, they will still get their parental leave payment.

If the employee doesn't go back to work at the end of their parental leave, their job ends on the day they started the parental leave, not the day they resign or at the end of any notice period. This means that any holiday pay they receive in their final pay will be based on their last day of work being the day they started parental leave.

Notice of return

If the employee intends to go back to work after their parental leave, and their job was kept open, they must write to their employer at least 21 days before their leave ends and advise the employer that they intend to return to work.

If the employer was unable to keep their job open while the employee was on parental leave, they need to tell their employer at least 21 days beforehand of the date they'll be available for work. This date becomes the start of their 6-month period of preference.

Early return to work

Usually an employee can only go back to work early, or start their preference period early, if the employer agrees. If they are on primary carer leave in relation to a child they gave birth to, the employer may ask for a medical certificate showing that they are fit to return to work before agreeing to them coming back early.

An employee may go back to work early without their employer's agreement if:

- they or their spouse or partner are no longer the primary carer of the child, or
- the child is miscarried, stillborn or dies.

An employee needs to write to their employer at least 21 days before the date they want to return to work early.

ANNUAL LEAVE PROVISIONS WHILE ON PARENTAL LEAVE

An employee's time on parental leave is included as continuous service and taking parental leave does not affect entitlement to annual leave; the employee will still be entitled to a minimum of four weeks of annual holidays. However, the payments for the annual holidays will be affected by the parental leave.

If the employee becomes entitled to annual holidays during parental leave or in the following year, that holiday pay is paid at the rate of their average weekly earnings over the year before the annual holidays. However, if the employee has previous entitlements they hadn't used, then the normal pay provisions still apply to that leave – i.e. it should be calculated at the higher of average weekly earnings or ordinary weekly pay.

The Parental Leave Act provision only applies to holidays that the employee becomes entitled to either during parental leave or within 12 months of returning from parental leave. This leave is paid at average weekly earnings only. Average weekly earnings are determined by calculating gross earnings over the last 12 months and dividing that figure by 52. So for example, after being on parental leave for a full year, the employee would have accrued up to four weeks' annual leave during that period of their parental leave; payment for those four weeks is calculated on average weekly earnings. If the employee takes any or all of that leave within the first year of returning from leave, they will not get paid as much as they would have if they worked a full year before taking the leave because of the average weekly earnings calculation. Some examples are as follows:

Kate commences parental leave in June 2012. In December 2012, she becomes entitled to four weeks' annual leave. The period of parental leave ends in June 2013. In December 2013, Kate again becomes

entitled to four weeks' annual leave.

When Kate takes the annual leave that she became entitled to in December 2012 and December 2013, she must be paid her average weekly earnings for the 12 months prior to the end of the last pay period before she takes the annual leave. Her average weekly earnings will therefore vary depending on the length of time since she returned from unpaid parental leave.

The annual leave which she becomes entitled to in December 2014 is paid at the greater of her average weekly earnings and her ordinary weekly pay at the time of taking the leave.

The following examples demonstrate how much the payment can vary.

Example One

Kate used all her outstanding entitlement to annual leave (from December 2011) in the weeks before she went on parental leave. Her pay was \$1000 per week.

Kate returns to work in June 2013, having become entitled to 4 weeks' annual leave in December 2012. If she takes annual leave immediately (i.e. before she actually starts working again), her holiday pay would be \$0 per week. This is because it is based on her average weekly earnings for the 12 months before the leave is taken, and she was on unpaid leave during that period.

Example Two

If Kate takes the annual leave in October 2013, having worked for 12 weeks since her return at \$1000 per week, her average weekly earnings would be:

$$\$12,000 \div 52 \text{ weeks} = \$230.77.$$

In December 2013, Kate becomes entitled to another four weeks' annual leave. Because this is within 12 months of her return to work from parental leave, holiday pay for this leave must also be calculated based on her average weekly earnings (not ordinary weekly pay).

The sooner she takes the leave, the less her holiday pay will be.

Example Three

If Kate took the leave in January 2014, having been back at work for 28 weeks (since June 2013) at \$1000 per week, her average weekly earnings would be:

$$\$28,000 \div 52 \text{ weeks} = \$538.46.$$

Example Four

If Kate waited until June 2014 to take the annual leave she became entitled to in December 2013, her average weekly earnings would be much higher because she would have worked for 52 weeks at \$1000 per week.

$$\$52,000 \div 52 \text{ weeks} = \$1000.$$

PARENTAL LEAVE FORMS AND LETTERS

A selection of leave forms and letters for both employers and employees can be found on the Employment New Zealand website -

<http://employment.govt.nz/er/holidaysandleave/parentalleave/forms/index.asp> including:

- Declaration as to assumption of responsibility for care of child by primary carer
- Notice about entitlement to parental leave
- Declaration relating to parental leave payment threshold test
- Employee whose job is being kept open
- Employee whose job is not being kept open
- Sample Letter for employer replying to request for negotiated carer leave
- Example letters for birth mothers taking leave
- Example letters for partners or spouses (of birth mothers) taking leave
- Example letters for adoptive or other primary carers taking leave
- Example letters for partners or spouses (of adoptive or other primary carers) taking leave
- Sample Letter from employee requesting negotiated carer leave

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Need more help?

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