

The Victorian Long Service Leave Act 2018

Fact Sheet No. 1 The basics

The new *Long Service Leave Act 2018* (LSL Act 2018) commences operation on 1 November 2018. It replaces the *Long Service Leave Act 1992*, following a legislative review and broad industry and community consultation. The LSL Act 2018 brings long service leave into line with community standards, is easier to understand, and is fairer and more flexible.

The LSL Act 2018 covers most Victorian employees. However, the LSL Act 2018 will not apply to certain employees who are covered by federal enterprise agreements or pre-reform awards, or by other Victorian legislation that includes long service leave entitlements, e.g. the *Construction Industry Long Service Leave Act 1997* administered by CoINVEST for workers in the construction industry.

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Provision	Application
The <i>Long Service Leave Act 2018</i> applies to	Most Victorian employees (excluding employees under some Commonwealth enterprise agreements and pre-reform awards, and certain other Victorian laws)
Categories/types of employ generally covered include	Full time Part time Casual Seasonal Fixed term
Entitlement	After completing a minimum of 7 years 'continuous employment' with 'one employer', an employee is entitled to an amount of long service leave on ordinary pay equal to 1/60 th of the period of employment (approx. 6.1 weeks after 7 years), less any period taken during that period, which continues to accrue at the same rate thereafter.
Entitlement on termination	Same as the entitlement to take leave, except that the employee with a minimum of 7 years continuous employment with 'one employer' is instead entitled to payment for an amount of long service leave. The payment must be made to the employee on the day employment ends.
Calculation of payment	LSL paid at 'ordinary pay'. If hours changed or no fixed hours or if no ordinary time rate of pay, averaging is required.
Taking long service leave	Requests to take leave any time after 7 years to be granted as soon as practicable. Employer can direct an employee to take leave via 12 weeks written notice

Method of taking leave	Taken in any period of not less than 1 day, can be taken at half pay
Work during long service leave	Prohibited
Cashing out	Prohibited
Contracting out	Prohibited
Leave and absences break service	See Fact Sheet No. 6 – Accrual of long service leave – impact of leave, absences and interruptions
Leave and absences that count for employment	See Fact Sheet No. 6 – Accrual of long service leave – impact of leave, absences and interruptions
Record keeping	Employer must keep records during employment and retain for 7 years following termination
Authorised officers	Powers to require records
Employees	Right to request a long service leave record
Penalties	Apply to individuals and body corporates

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From 1 November 2018 the 2018 Comprehensive Guide is available to download at: business.vic.gov.au/longserviceleave or call 1800 287 287 for a copy.

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 Email longserviceleave@ecodev.vic.gov.au
 Phone 1800 287 287
 Facsimile 9651 9703

Wage Inspectorate Victoria
 Department of Economic Development, Jobs Transport and Resources
 GPO Box 2392
 Melbourne VICTORIA 3001

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Fact Sheet No. 2 Taking Long Service Leave

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Entitlement to take leave after 7 years

Employees are entitled to take long service leave after a minimum of 7 years continuous employment.

The amount of leave an employee is entitled to take is calculated on one-sixtieth of the period of employment, i.e. number of weeks employment divided by 60 equals the number of weeks entitlement. For example, if an employee has worked for 7 years, convert this to weeks, divide by 60, and this equals approximately 6.1 weeks. 6.1 weeks is the long service leave entitlement at that time. (The leave amount has not changed under the new LSL Act 2018.)

Taking Leave

At the employee's request

An employee can request to take long service leave at any time after 7 years continuous employment. The employer must grant the leave as soon as practicable following the employee's request unless the employer has 'reasonable business grounds' for refusing the request. The LSL Act 2018 defines what 'reasonable business grounds' may include. Previously an employee had to work a minimum of 10 years to be entitled to take leave. Disputes over the timing of the taking of leave can be referred to the Industrial Division of the Magistrates' Court, either by the employer or the employee.

At an employer's direction

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.

Period of leave

Long service leave can be taken for any period of one day or more. It could be taken all at once or for any period of not less than one day at a time.

Long service leave at half pay

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.

Working elsewhere while on long service leave prohibited

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

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.

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Wage Inspectorate Victoria
Department of Economic Development, Jobs Transport and Resources
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Melbourne VICTORIA 3001

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Fact Sheet No. 4 Long Service Leave Casual and Seasonal Employees

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Casual, seasonal and fixed term employees accrue long service leave

The LSL Act entitles full time, part time, casual, seasonal and fixed term employees to long service leave where their employment has been 'continuous'. Under the 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.

Long service leave accrual for casual or seasonal employees and parental leave

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

Calculation of entitlement (also see 'Ordinary Pay' Fact Sheet No. 7)

Casual and seasonal employees accrue long service leave in the same way as part-time and full-time employees, accruing one week of long service leave for every 60 weeks continuous employment. The calculation of the amount paid will take account of the varying hours of work. An employee is entitled to be paid their long service leave based on their 'ordinary pay'. Under the LSL Act 2018, the ordinary

pay is the actual pay received by an employee for working 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 on termination.

Casuals or employees who do not have normal weekly hours

If an employee changes their weekly hours in the last 2 years or does not have fixed hours of work, as is the case for casual employees, the employee's hours of work are averaged for the purposes of calculating long service leave.

The Act sets out a detailed formula to assist in the averaging calculation. See 'Ordinary Pay' fact sheet no.7.

Averaging ordinary time rate of pay

Once the average weekly hours are calculated, these are paid at the employee's ordinary time rate of pay. If the employee does not have an 'ordinary rate', perhaps due to being paid partially on commission or paid piece work rates (see Calculation of entitlement fact sheet for more detailed information) then averaging requirements apply. A casual employee's ordinary rate includes the casual loading. The rate will be the greatest of the average earned over either the last 52 weeks, 260 weeks or entire period of employment.

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Fact Sheet No. 6 Accrual of Long Service Leave – Impact of Leave, Absences and Interruptions

The new *Long Service Leave Act 2018* (LSL Act 2018) commences operation on 1 November 2018. It replaces the *Long Service Leave Act 1992* (1992 Act), following a legislative review and broad industry and community consultation. The LSL Act 2018 brings long service leave into line with community standards, is easier to understand, and is fairer and more flexible.

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Impact of leave, absences and interruptions on long service leave entitlements

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

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

1. Has an employee taken any leave or absences of a type that might break continuous employment?
2. Do the types of leave, or absence, taken by an employee during their employment count towards the period of employment for the purposes of accruing long service leave?

Under the 1992 Act, there were different rules for which absences from work would break continuous employment, and which absences would count towards the period of employment. These rules are retained by transitional provisions in the LSL 2018 Act where the absence in question occurred whilst the 1992 Act was in operation. In short, this means that certain absences and events that occurred, and were treated a certain way, under the 1992 Act, will continue to be treated that way even after the new LSL Act 2018 commences. For more information about the impact of transitional provisions in the LSL Act 2018 on continuous employment, and what counts as service, contact the inspectorate on 1800 287 287.

For an employee to become entitled to long service leave, their employment with the employer must be continuous. This does not prevent the employee taking certain paid or unpaid breaks from work.

Also, some other, specified interruptions will also be deemed to not break continuous employment for long service leave purposes.

Continuous employment is interrupted when....

For long service leave purposes, continuous employment will be broken where an employee's employment ends. (There is an exception where the employee is subsequently re-employed within 12 weeks of that date, and in this instance continuous employment is not broken.)

Continuous employment will also generally be broken where a casual employee takes paid or unpaid parental leave exceeding 104 weeks (unless any longer period of leave is provided for under an oral or written employment agreement, or if the longer absence is in accordance with other exceptions applying to casual and seasonal employees under the Act).

Other forms of paid or unpaid leave including paid or unpaid illness or injury leave (which includes a WorkCover absence), annual leave, paid or unpaid parental leave for full time or part time employees (or up to 104 weeks paid or unpaid parental leave for seasonal or casual employees), or long service leave itself, will not break continuity of employment.

What counts towards the period of employment?

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

However, unpaid leave exceeding 52 weeks will not count unless:

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

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Fact Sheet No. 7

Entitlement to take leave and 'Ordinary Pay'

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Employees are entitled to take long service leave after a minimum of 7 years continuous employment. Previously an employee had to work a minimum of 10 years to be entitled to take leave.

The amount of leave an employee is entitled to take is calculated on one-sixtieth of the period of employment, i.e. number of weeks employment divided by 60 equals the number of weeks entitlement. For example, if an employee has worked for 7 years, convert this to weeks, divide by 60, and this equals approximately 6.1 weeks. 6.1 weeks is the long service leave entitlement at that time. The actual entitlement has not changed.

Definition of 'ordinary pay'

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

The components that make up ordinary pay will depend on the 'employment agreement' of the employee. 'Employment agreement' is defined in the LSL Act to include the contract of employment (whether or not it is in writing) and statutory entitlements (such as awards or enterprise agreements). Generally, amounts not included in 'ordinary pay' are overtime and penalty rates (such as shift allowance or weekend penalties). Amounts that may be included are various components of a salary package, including commissions and amounts relating to personal use of a motor vehicle. Casual loading is also included when calculating a casual employee's ordinary pay.

For information on rates of pay, please contact the Commonwealth Fair Work Ombudsman on 13 13 94.

Calculation where there has been a change in weekly hours or no fixed hours

If an employee changes their weekly hours in the last 104 weeks or does not have fixed hours of work, as is the case for casual employees, the employee's hours of work are averaged for the purposes of calculating long service leave. The employee is entitled to the greater of the following:

- the average weekly hours worked in the 52 weeks immediately before the employee starts long service leave; or
- the average weekly rate earned in the 260 weeks immediately before the employee starts long service leave.
- the average weekly hours worked during the employee's total period of continuous employment with the employer.

The Act contains formulas to calculate ordinary pay where averaging is required.

The following process flowchart has been developed to explain the steps to follow to use the formulas when applying the averaging rules under the Act. You can use this flowchart to work out the ordinary pay for workers who do not have fixed hours of work. The formulas are also set out in a separate table located below the flowchart.

CALCULATING THE GREATEST AVERAGE:

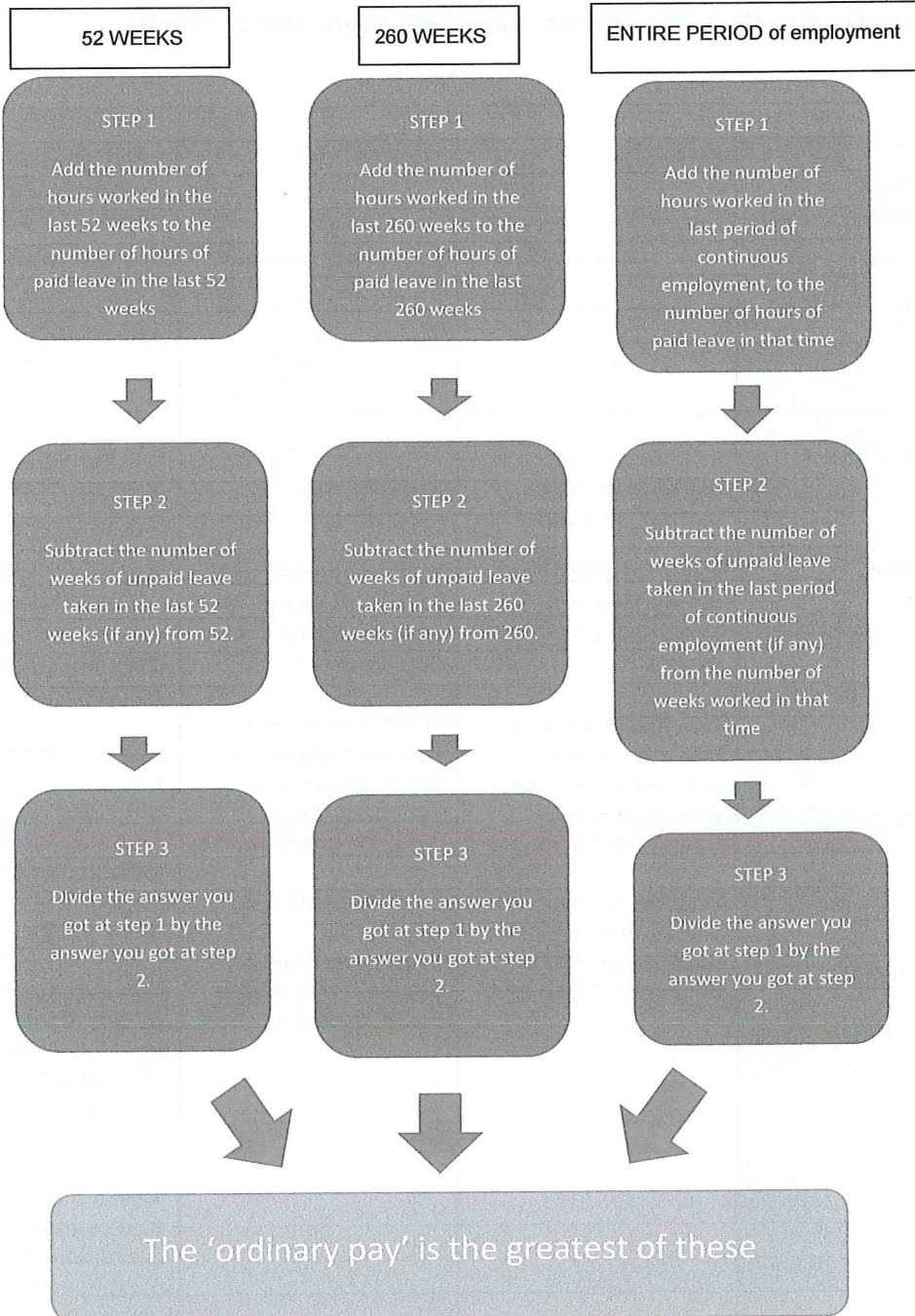


Table of formulas for calculating ordinary pay where hours vary or change

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

Once the average weekly hours are calculated, these are paid at the employee's ordinary time rate of pay.

Averaging ordinary time rate of pay

If the employee does not have an 'ordinary time rate', perhaps due to being paid by commission or piece work rates, then averaging requirements apply. A casual employee's ordinary rate includes the casual loading. The ordinary time rate will 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.

See *Comprehensive Guide to Long Service Leave Act 2018* (available from 1 November 2018) for more detailed explanations and case studies.

Cashing out prohibited

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.

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