

WE KNOW

# HUMAN RESOURCES

## DOMESTIC VIOLENCE – VICTIMS PROTECTION ACT

QUICK GUIDE

This Quick Guide provides summarised information on amendments to the Holidays, Employment Relations and Human Rights Acts which will come into force from 1 April 2019. It also provides a suggested Guide for Employees and a sample Policy.

### INTRODUCTION

The Domestic Violence – Victims' Protection Act comes into force on **1 April 2019** and amends the Employment Relations, Holidays and Human Rights Acts, setting out ways employers can provide help to employees currently affected by domestic violence or who have experienced domestic violence in the past. The new provisions allow affected employees to apply for flexible short-term (not more than 2 months) variations in their working arrangements - a change of duties, hours, days and place of work, or any other variation in their terms of employment they think would help them deal with the effects of domestic violence, including the extent of the contact details they must provide to their employer.

Affected employees are also entitled to domestic violence leave of up to 10 days a year and to be free from adverse treatment in their employment. The provisions apply equally if the violence is being or has been inflicted on a child under the age of 17 who usually lives with the employee (unless the child is married or lives in a de facto relationship). Employees can be asked to provide proof of domestic violence.

This Guide also includes a Guide for Employees and example of a Domestic Violence Policy which members may wish to adopt or adapt for their own use.

### Domestic Violence Leave – 10 days each year

The Holidays Act is amended by including a new category of leave separate from annual holidays and sick leave. Up to 10 days paid *Domestic Violence Leave* (DVL) each year will be available to all employees after six months continuous employment (or if, over a period of 6 months, the employee has worked for the employer for an average of 10 and no less than 1 hour a week or no less than 40 hours a month (as with parental leave)).

A person affected by domestic violence is a person or a child under the age of 17 living with that person (or both) against whom someone else is inflicting or has inflicted domestic violence.

Employees affected by domestic violence can take leave regardless of when the domestic violence occurred – which could be before the affected person became an employee

Leave does not accrue from year to year.

Employees are not required to provide proof of being affected by domestic violence when making an application, but an employer may request proof before granting leave. If the employee fails to provide proof without a reasonable explanation, the employer is not required to make payment until the employee complies.

Payment for DVL is calculated on the employee's relevant or average daily pay for each leave day taken on what would otherwise be a working day for the employee. Payment is not needed if an employee is on accident compensation and employees cannot be required to take DVL if they are receiving first week or weekly accident compensation for a work-related injury. If both agree, an employer who pays the difference between first week or weekly compensation and ordinary weekly pay may deduct from the employee's domestic violence leave entitlement 1 day for every 5 whole days the payment is made

Employers must allow an employee that would otherwise be taking annual holidays to take domestic violence leave if affected by domestic violence while on holiday.

The definition of '[domestic violence](#)' is broad and is as defined by the Domestic Violence Act 1995 and covers:

- physical, sexual and psychological abuse, in the latter case abuse such as intimidation, harassment, damage to property threats of abuse, financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)
- psychological abuse of a child by causing or allowing the child to see or hear the physical, sexual, or psychological abuse of someone with whom the child has a domestic relationship or putting the child at real risk of seeing or hearing that abuse occurring
- A single act could constitute abuse or a number of acts taken together, even if apparently trivial by themselves, might be considered to form a pattern of abuse.

### Ability to request flexible working arrangements extended

In addition to the existing types of flexible working arrangements which may be made by employees generally under the Employment Relations Act, those affected by domestic violence will be able to request short term variations (up to 2 months). Requests must be dealt with not later than 10 working days after the employer receives them and can be refused only if proof of domestic violence has been asked for and hasn't been produced, or if the request cannot be reasonably accommodated on non-accommodation grounds set out in the Act. Those grounds are the same as those that currently exist with the exception that an employer will not be able to rely on inconsistency with the terms of a collective agreement (where applicable) as a reason for refusal.

It allows additional forms of variation to those currently available – specifically –

- The location of their workplace,
- Their work duties,
- The extent of the contact details to be provided to the employer, and
- Any other term of employment requiring variation that the employee believes to be necessary to deal with the effects of domestic violence.

Employers must respond to short-term requests not later than 10 working days after receiving them and must provide information about domestic violence support services either in the response or sooner. If a request is refused, the employer must notify the employee of the ground(s) for refusal and explain why it applies.

Employers may ask for proof of domestic violence, either from or on behalf of the employee, to be provided as soon as practicable but within 10 working days of the employer receiving the employee's request. Proof can be required only if the employee is advised within 3 working days of receiving the employee's request that it is required.

Requests may be refused because the required proof was not produced within 10 working days of the employer receiving a leave request or on 'non-accommodation' grounds – inability to reorganise work among exiting staff or recruit extra staff, detrimental impact on quality/performance, insufficient work when the employee wants to work, planned structural changes, burden of additional costs, detrimental effect on ability to meet customer demand. Requests must not be refused because the employee is covered by a collective agreement, the request relates to working arrangements covered by the collective and the employee's working arrangement would be inconsistent with the collective if the request were approved.

Employers can be challenged only on the ground of failure to comply with the notification provisions and as provided in relation to references to a Labour Inspector, mediation, the Authority or because of failure to pay any penalty imposed (see below)

Employees who consider their employer has failed to comply with the notification requirements have 6 months in which to refer the matter to a Labour Inspector, mediation, or the Authority. Referrals can be made from the time the employee is notified of a refusal (if notified within 10 working days) or in any other case, 5 working days after the employer receives the employee's request

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Employees dissatisfied with a Labour Inspector's decision can seek mediation with the matter to be treated as an employment relationship problem. Referrals must be made within 6 months of learning of the Labour Inspector's decision

Employees dissatisfied with the result of an initial or a later mediation reference can apply to the Authority. Applications must be made within 6 months of learning the result of mediation

The Authority can impose a penalty (maximum, in the case of a company or other corporation, of \$20,000) on an employer who has failed to comply with the notification requirements. The penalty is to be paid to the employee concerned and an action to recover it must be commenced within 6 months of the date when the cause of action for recovery first became known to the employee or should reasonably have become known.

### **Adverse treatment because of domestic violence**

Domestic violence can be the basis for a personal grievance under the Employment Relations Act if an employee is treated adversely because the employee *'is or is suspected or assumed or believed to be a person affected by domestic violence'*. The Human Rights Act is similarly amended to prohibit adverse treatment, implied or overt, of a person affected by domestic violence.

### **Proof of being affected by domestic violence**

Note that although employers can ask for proof that someone is affected by domestic violence, the Act provides no indication of what form that proof should take. However, in Australia, with legislation along similar lines, it has been suggested one or other of the following might be appropriate: a document issued by the police, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service, a lawyer or a statutory declaration.

### **Advice for Employers**

#### **Provide a written policy**

Policy development should involve all relevant members of the workplace (human resources, unions and so on, depending on workplace size) but particularly senior management and supervisors. All in the workforce should understand why a policy is needed and the policy itself should include a statement from the Chief Executive stating the organisation's support for employees affected by domestic violence and emphasising the workplace's concern for their wellbeing. It should also point out how important it is for employees affected by domestic violence to stay in their employment. Their domestic situation should not force them to leave.

#### **Appoint a suitable employee or employees for someone affected by domestic violence to speak to in confidence**

The policy should tell employees who they can go to if they have a domestic violence problem. And it should assure them their problem, and any request they make, will be dealt with in complete confidence.

#### **Promote the domestic violence policy**

All employees affected by domestic violence need to know their workplace can help them while others not so affected need to recognise that sometimes there will be colleagues requiring special support.

Clearly set out what the workplace can do for employees affected by domestic violence and the process they should follow

The policy should inform employees affected by domestic violence what their entitlements are and how to access them.

***Included with this Quick Guide for Members we have set out below a suggested Domestic Violence Policy and Information for Employees which members are free to adopt or adapt for their own use....***

Members seeking assistance or further information should contact our Employment Relations Advisors – telephone: 03 366 5096; email: [info@cecc.org.nz](mailto:info@cecc.org.nz)

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### **Sample Domestic Violence Policy & Information for Employees**

..... (Employer's, company's name) is concerned about the level of domestic violence in New Zealand and is committed to offering support both to employees currently affected and to employees affected by domestic violence in the past. We emphasise that all our employees need to recognise the importance of providing proper assistance to anyone in such circumstances, so the experience of domestic violence does not force them to leave their job.

We will ensure all employees understand why those affected by domestic violence may need to avail themselves of the entitlements provided by the Domestic Violence – Victims' Protection – Act 2018 and acknowledge the reasons for providing support.

Domestic violence is recognised as physical, sexual and psychological abuse, in the latter case abuse such as intimidation, harassment, damage to property threats of abuse, financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education).

Domestic violence is also the psychological abuse of a child by causing or allowing the child to see or hear the physical, sexual, or psychological abuse of someone with whom the child has a domestic relationship or putting the child at real risk of seeing or hearing that abuse.

The employer/company understands the work performance of an employee affected by domestic violence may be temporarily affected by the experience and the employee may have difficulty in fulfilling job responsibilities. Employees who feel their work is affected by domestic violence should contact ..... (support person) to learn what options are available to help them with their difficulties. They can be assured all such inquiries will be treated in the strictest confidence as, subsequently, will the fact that they are receiving support.

..... (employer or company) respects the right of employees affected by domestic violence to privacy and any information they might provide will remain strictly confidential unless a court of competent jurisdiction requires disclosure or disclosure is necessary to protect the safety of the employee affected by domestic violence or that of other individuals in the workplace. In the latter case, disclosure will be limited to such disclosure as is reasonably necessary to safeguard both the affected employee and others in the workplace and to comply with the law.

An employer who considers information provided on a confidential basis must, to maintain workplace safety, be shared with another person or other persons will, if it is reasonably practicable to do so, provide advance notice to the employee affected by domestic violence, explaining the reason why the information has to be disclosed. If it is necessary to disclose the employee's information, the employer will tell the employee the name or names of the person or persons to whom the employer intends to share the information.

Employees will not be discriminated against or treated adversely because they are affected by domestic violence and are entitled to take a personal grievance, or a complaint to the Human Rights Commission should adverse treatment be experienced.

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Set out below are employees' entitlements under the Domestic Violence – Victims' Protection – Act 2018.

**Guide for employees affected by domestic violence or who have a child under the age of 17 living with them who is affected by domestic violence**

*If you are affected by domestic violence, or usually have a child under the age of 17 living with you who is affected by domestic violence, you can:*

- make a written request for a flexible short-term variation or variations (not more than 2 months) in your working arrangements
- take up to 10 days domestic violence leave in any one year

All requests should be taken to your manager or supervisor (or to named person) and will be treated confidentially.

*Requests for flexible short-term variations in working arrangements (not more than 2 months)*

- You, or someone on your behalf, can make a written request at any time even if the domestic violence occurred before we employed you. You may ask for a change of duties, hours, days and place of work, or any other variation in your terms of employment that would help you deal with the effects of domestic violence, including the extent of the contact details you have to give us
- To support your application you, or someone on your behalf, may be asked to provide proof you are a person affected by domestic violence
- Your request must be made in writing and state:
  - your name
  - the date the request was made
  - that the request is made under Part 1 of the Domestic Violence – Victims' Protection Act
  - how you want your working arrangements varied and for how long (less than 2 months)
  - the date you want any variation to apply from and when you want it to end
  - how you think varying your work arrangements will help you deal with the domestic violence
  - the changes (if any) you think we will have to make if we approve your request

*Our response*

- We will let you know in writing as soon as possible, but not later than 10 working days of receiving your request, whether or not it has been approved. We will also provide you with information about specialist domestic violence support services
- If we refuse your request, we will tell you why it was refused

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- If we want you to provide proof you are someone affected by domestic violence we will let you know within 3 days of receiving your request. You will need to provide the proof as soon as practicable but not later than 10 working days from the time we received your request

#### *Reasons for refusing a request*

- We can refuse your request if we asked for proof you are someone affected by domestic violence and you didn't provide it within 10 working days
- We can also refuse your request if we can't accommodate it because:
  - we can't re-organise the work among existing staff
  - we can't recruit additional staff
  - granting it would have a detrimental impact on quality or performance
  - there wouldn't be enough work during the periods you are proposing to work
  - we are planning structural changes
  - the additional costs would be a burden
  - granting the request would have a detrimental effect on customer demand

#### *What you can do if you don't get a proper response or if you are not treated well because you are affected, or assumed to be affected, by domestic violence*

- If we haven't responded to your request within 10 working days or have failed to tell you why your request was refused, you can refer the matter to a Labour Inspector or to mediation or ask the Employment Relations Authority to decide whether or not we responded as required. You will need to apply within the 6-month period beginning 10 days after you received our refusal notice, if we provide the notice within 10 working days of your request. If we don't reply within 10 working days, the time for making an application starts 10 working days after we received your request, again running for a 6-month period
- You can also take a personal grievance if you are treated adversely because you are affected, or assumed to be affected, by domestic violence (or were in the past). Adverse treatment means:
  - being dismissed when other employees doing the same work were not or wouldn't be dismissed
  - not being offered the same terms of employment work conditions, fringe benefits or opportunities for training, promotion or transfer as other similarly qualified, experienced or skilled employees, working in the same or substantially similar circumstances
  - being treated in some way that disadvantages the employee when other employees are not
  - being required or caused to retire or resign

#### **Domestic violence leave**

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### *Entitlement to domestic violence leave*

- If you are affected by domestic violence you can take domestic violence leave if you have completed 6 months current continuous service OR in a period of 6 months you have worked for at least an average of 10 hours a week with no less than 1 hour a week or 40 each month. After 6 months there is a yearly entitlement of up to 10 days leave. The leave doesn't accumulate, can't be carried forward and if has not been taken when employment ends is not paid out
- While the leave entitlement accrues only after 6 months' employment, in some circumstances we may agree to your taking leave before becoming entitled to it
- If you intend to take leave you must let us (your manager or supervisor or nominated person) know as soon as possible before you are due to start work on the day in question, or if that is not practicable, as early as possible after that time. You might be asked to provide proof that you are someone affected by domestic violence
- Payment for domestic violence leave is relevant or average daily pay for any day when you would otherwise have worked. You will be paid in the pay for the pay period when you take the leave. You won't be paid a domestic violence leave payment if you are receiving weekly accident compensation and a first week's absence on accident compensation cannot be taken as domestic violence leave
- If we agree to pay the difference between first week or weekly accident compensation and your ordinary weekly pay, we can deduct 1 day for every 5 whole days the additional payment is made from your domestic violence leave entitlement
- Domestic violence leave will substitute for your annual holiday leave if you are affected by domestic violence while on annual holiday leave or before taking an annual holiday which has already been agreed
- If in any year, you use up all your domestic violence leave and require more leave, we may agree to your using your annual holiday entitlement instead

### **Freedom from adverse treatment in employment (Human Rights Act)**

#### *Persons affected by domestic violence*

- Persons affected by domestic violence are those subject to physical, sexual and psychological abuse. Psychological abuse is abuse such as intimidation, harassment, damage to property threats of abuse, financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)

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- Persons affected by domestic violence are also those who usually live with a child under the age of 17 where the child is considered psychologically abused by seeing or hearing the domestic violence suffered by that person, or is a real risk of being psychologically abused

A single act might constitute abuse or a number of acts, even if apparently trivial, might form a pattern of abuse when taken together.

#### *Adverse treatment*

- Adverse treatment is being:
  - dismissed when other employees doing the same work are not dismissed
  - refused or not offered the same terms of employment, work conditions, fringe benefits or opportunities for training, promotion or transfer as other employees with the same or substantially similar qualifications, experience or skills who are similarly employed
  - subjected to some detrimental action when others similarly employed are not
  - required to retire or resign.

No-one, either in paid or unpaid employment, or applying for work, must be treated badly, or threatened with bad or adverse treatment because they are affected by domestic violence