

National Disability Services Portable Long Service Leave

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Introduction

Portable Long Service Leave Scheme in Victoria

Two common overall queries being raised by employers as a result of the Scheme:

- Which employees are covered by the Social, Community, Home Care and Disability Services Industry Award 2010?
- What entitlement do employees have to long service leave and what do employers need to accrue?

Award Coverage

- The 2020 Regulations provide that an individual will not be considered a community services employee unless they are engaged under:
 - Social, Community, Home Care and Disability Services Award 2010;
 - Children's Services Award 2010;
 - Education Services (Teachers) Award 2010;
 - Labour Market Assistance Industry Award 2020;
 - Supported Employment Services Award 2020.

SCHADS Award Coverage

- SCHADS Award covers employers and employees in the social and community services sector, as follows:
 - **social and community services sector** means the provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services.
- Issues arising:
 - Are office based administration employees covered?
 - Are senior employees, including Chief Executive Officers covered?

Case law

Cubillo v North Australian Aboriginal Family Violence Legal Service [2011] FWA 6818

- Fair Work Australia decided that the CEO was covered under the level 8 classifications of the SCHADS Award.

Stockton v EPIS Inc [2020] FWC 3829

- Commission indicated that a CEO may not be covered under the level 8 classification of the SCHADS Award.

Hobart District Nursing Service Inc [2018] FWC 4818

- Commented that specialised and complex managerial or specialist functions, potentially including General Manager or Chief Executive Officer may be covered by the SCHADS Award:

I find that the employees who will be covered by the Agreement's Administration and Clerical Stream in classification levels 6 to 8 and who are not also "health professionals" within coverage of the Health Award are in a class of employees that the SCHADS Award is expressed to cover. Those employees are covered by the SCHADS Award in relation to their particular employment with TDN.

What does all this mean?

Who is covered by the SCHADS Award?

- Senior administrative and clerical staff are likely to be covered by the Award;
- The Award does contemplate coverage of senior and executive employees;
- Assessment requires an examination of any relevant documents and what the employee does on a day to day basis in the particular organisation;
- Review your decision regarding Award coverage again and on an ongoing basis.

What if your employees are covered by an enterprise agreement?

- For the purpose of the Scheme, an individual is taken to be employed under an Award even if an enterprise agreement or an agreement based transitional instrument applies.

Entitlement to Long Service Leave

- The Scheme is not an entitlement scheme, but a scheme to provide a portable long service leave benefit, ultimately funded by the employer's contributions.
- Employees are entitled to LSL under the NES as follows:
 - If there is an applicable award derived long service leave term, that applies to the employee;
 - An applicable long service leave term is an entitlement set out in a pre-reform award which would have applied to the employee as at 30 December, 2009; unless
 - An enterprise agreement or other registered IR agreement came into operation before 1 January 2010 which expressly dealt with long service leave.
- Otherwise the *Long Service Leave Act 2018* and/or an enterprise agreement applies.

LSL entitlement contd.

- This allows for a number of different scenarios regarding an employee's entitlement to long service leave:
 - 13 weeks pay after 15 years continuous services, payable after 7 years on pro-rata basis;
 - 26 weeks pay after 15 years continuous service, payable after 10 years on a pro-rata basis;
 - A combination of both – ie a pro-rata entitlement based on 13 weeks pay between 7-10 years continuous service and then based on 26 weeks pay after 10 years of service.

Pre-reform Awards

- By way of example, the following pre-reform Awards could have applied:
 - Social and Community Services Victoria – Victoria – Award 2000;
 - Attendant Care – Victoria Award 2004;
 - Home and Community Care Award 2001;
 - Residential and Support Services (Victoria) Award 1999;
 - Disability Services Award (Victoria) 1999;
 - Children’s Services (Victoria) Award 2005.
- Undertake an assessment and check: *Fair Work Act 2009*, any pre-reform Award, any IR agreements which applied prior to and after 30 December 2009, the contract of employment and the *Long Service Leave Act 2018* in order to ensure long service leave entitlements are being accrued correctly.

Accrual

- Employers must continue to accrue long service correctly and account for any entitlement before the commencement of the Scheme, including any increase in the rate of pay;
- The entitlement to long service leave may be different between employees;
- Employers should anticipate that they may need to pay out the full amount of long service accrued with their organisation, prior to and after the commencement of the Scheme, prior to being reimbursed by the Authority.

Conclusion

- Employers need to undertake another assessment if they have not done so recently to check the following:
 - who is covered by the relevant Awards named in the Portable Long Service Leave Scheme, in particular any employees who may be covered by the SCHADS Award;
 - employees are accruing the correct entitlement to long service leave, which may differ between employees within the same organisation;
 - the correct amount of long service leave is being accrued in the accounts noting that the accrual will change once the employer commences to pay into the Scheme, but the employer may have to pay the full amount until they are reimbursed from the Scheme.

Q&A – Your Russell Kennedy Contact



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