



L5 – Maternity, adoption, surrogacy, parental and out-of-home care leave



General information

This information is for teachers in the Education Teaching Service (teachers in schools, including promotions positions, and non-school-based teaching service positions). The conditions covered in this leaflet will apply to individual teachers from the time their workplace rolls over to the new SAP HR Payroll system in 2018. Until that time the previous conditions will continue to apply.

This leaflet is not intended to be exhaustive, and members should consult the *Teachers Handbook*, Chapter 4, Section 2, “Adoption, Maternity and Parental Leave” or contact Federation’s Professional Support section (1300 654 367) if they have further questions.

Members should note that their principal may access their leave records, but must notify the member in writing first.

This leaflet is divided into sections that contain information specific to the different types of leave — maternity, adoption and parental — followed by a section containing information about conditions that are common to all of them.

Maternity leave

L5.1 Eligibility

Unpaid maternity leave is available to all teachers who become pregnant, regardless of their length of service. For further information on the length of unpaid maternity leave see section L5.21 below. Temporary and casual teachers should note that unpaid maternity leave of up to 12 months is only available during a temporary or casual engagement.

Eligibility for paid maternity leave depends on the length of the teacher’s continuous service. For the definition of “continuous service” see section L5.20 below.

- a) Permanent teachers are eligible for paid maternity leave if they have completed 40 weeks’ continuous service. The 40 weeks’ service is a once-only requirement.
- b) Temporary teachers are eligible for paid maternity leave if they have completed 40 weeks’ continuous service during the preceding two years and only if the anticipated date of birth (ADB) falls within a temporary engagement. Note that Federation has dealt with a number of cases where the ADB fell just outside an engagement in one school year, where the teacher would normally have been offered a subsequent engagement in the following year. A school cannot deny a temporary teacher an engagement, if she would otherwise have had one, on the grounds that she will not be available for work due to having a baby. Failure to offer a temporary engagement due to pregnancy constitutes discrimination. Any temporary teacher experiencing difficulties securing an engagement after becoming pregnant should contact Federation’s Professional Support on 1300 654 367.

Any maternity leave taken in the lead up to the ADB can be included in the 40 weeks.

Members who are not eligible for paid maternity leave should still apply for unpaid maternity leave rather than ending a temporary engagement early, as it counts as service for salary progression and allows them, should they wish, to access the “right to request” provisions in the future (see L5.30 below).

- c) Casual teachers may be eligible for a maternity payment in lieu of leave if they have completed 40 weeks’ continuous service immediately before the ADB. A casual teacher not employed for up to four weeks before the ADB will have this period deemed as continuous service for the purposes of eligibility for maternity leave.

L5.3 Paid maternity leave entitlement

- a) Eligible permanent teachers are entitled to 14 weeks’ paid maternity leave, which can be taken on full pay, half pay, a combination of both, or as a lump sum.
- b) Eligible temporary teachers are entitled to 14 weeks’ paid maternity leave, which can be taken on full pay, half pay, a combination of both, or as a lump sum. If the temporary engagement ends during the period of paid maternity leave, then the remaining entitlement will be paid as a gratuity.

c) Eligible casual teachers are entitled to be paid a lump sum equivalent to 14 weeks' pay, at the same rate as the final week of service prior to ceasing duty for maternity purposes.

L5.4 Ceasing work

There is no requirement to cease work a certain number of weeks before the anticipated date of birth (ADB). The earliest paid maternity leave can commence is nine weeks prior to the ADB. Maternity leave can commence no later than the ADB, or the actual date of birth, whichever is sooner.

L5.5 Leave to attend pre-natal classes

Generally, teachers are expected to attend pre-natal classes outside of school hours. In exceptional circumstances, where classes are not available out of hours, FACS leave may be granted.

L5.6 Use of sick leave and transfer to a safe work site

If a teacher's work is, specifically because of pregnancy or breastfeeding, a risk to her health and safety or that of her unborn or newborn child:

- the teacher's working conditions or hours of work are to be temporarily adjusted; or
- where an adjustment is not possible or reasonable, the teacher is to be temporarily transferred to other appropriate work; or
- where a transfer is not possible or reasonable, the teacher shall be granted unpaid maternity leave or, if an entitlement exists, paid sick leave.

A medical certificate, specifying the nature of the risk and suitable adjustments, is required to access these entitlements.

L5.7 Notification of birth

As soon as feasible after the birth, the teacher should provide a copy of the birth certificate, or extract indicating the details of the mother and child only, to the Department.

The Department has started requiring proof of actual birth before it will pay any lump sum or gratuity in lieu of outstanding maternity leave. This has been a problem for teachers where the ADB is very close to the end of the engagement. Proof does not need to be a birth certificate, but can be a letter from the hospital or copy of the wrist/ankle hospital band. In these circumstances, the teacher would still be required to provide the birth certificate later.

L5.8 Miscarriage or stillbirth

In the case of miscarriage, the teacher will be granted sick leave or unpaid maternity leave for as long as a medical practitioner certifies this to be necessary. In the case of stillbirth, if an entitlement exists, a teacher can access paid or unpaid maternity leave or sick leave. The amount of available maternity leave is the same as for a live birth (14 weeks paid, 12 months unpaid), but the teacher will not be able to make applications to extend under the right-to-request provisions (described in L5.30).

Adoption leave

L5.9 Eligibility

Unpaid adoption leave is available to all teachers who adopt a child and are to be the primary caregiver of the child, regardless of their length of service. For further information about unpaid adoption leave see section L5.21 below, but casual teachers should note that only up to one week of unpaid adoption leave is available to them at the time of taking adoptive custody of the child.

Permanent and temporary teachers who have completed at least 40 weeks' continuous service are eligible for paid adoption leave. For the definition of "continuous service" see section L5.20 below. Temporary teachers must have completed the 40 weeks in the two years immediately prior to the date of taking custody of the child. The date of taking adoptive custody must fall within the period of a temporary engagement.

Paid adoption leave cannot be accessed early where the teacher takes custody of the child before the adoption is finalised. Federation and other public sector unions are continuing to push for paid leave to be available where a period of out-of-home care precedes the adoption.

L5.10 Paid adoption leave entitlement

Eligible permanent and temporary teachers are entitled to 14 weeks' paid adoption leave, which can be taken on full pay, half pay, a combination of both, or as a lump sum.

Leave for altruistic surrogacy

L5.11 Eligibility

Altruistic surrogacy leave is available to a permanent or temporary teacher becoming the primary care giver of an infant through a surrogacy arrangement under the Surrogacy Act 2010. Teachers who have completed 40 weeks' continuous service are eligible for paid surrogacy leave. For the definition of "continuous service" see section L5.20 below. Temporary teachers must have completed the 40 weeks in the two years immediately prior to the date of taking custody of the child. This date must fall within a temporary engagement. Parental leave (see below) is available to the secondary care giver.

This leave will commence on the date of assuming the role of primary (or secondary) carer of the child.

L5.12 Paid surrogacy leave entitlement

Eligible permanent and temporary teachers are entitled to 14 weeks' paid surrogacy leave, which can be taken on full pay, half pay, a combination of both, or as a lump sum.

L5.13 Documentary requirements

Teachers will need to apply for the leave four months before the anticipated date of birth of the child. To be eligible to access the leave, a teacher must provide to the Department:

- a copy of the pre-conception surrogacy agreement, as provided for under the Surrogacy Act 2010 (redacted as necessary to protect the privacy of non-employees)
- at the time they assume the role of primary (or secondary in the case of parental leave) carer, a statutory declaration advising that they are now the primary (or secondary) carer of the child and intend to make application for a parentage order
- a copy of the parentage order application (redacted as necessary) as soon as practicable after it is lodged
- a copy of the parentage order (redacted as necessary) as soon as practicable after it is granted.

Parental leave

L5.14 Eligibility

Parental leave is available to teachers who become parents but for whom maternity or adoption leave does not apply. Any member becoming a primary carer of an infant who does not meet the eligibility criteria for maternity or adoption leave (e.g. via surrogacy) should contact Federation for advice. All teachers who become parents are entitled to unpaid parental leave, which is not taken simultaneously with a partner's leave relating to the birth or adoption of the child, regardless of their length of service. For further information about unpaid parental leave see section L5.21 below, but casual teachers should note that only up to one week of unpaid parental leave is available to them at the time of birth or taking adoptive custody of the child.

Permanent and temporary teachers who have completed 40 weeks' continuous service are eligible for paid parental leave. Temporary teachers must complete the 40 weeks in the two years immediately prior to the ADB or date of taking custody of the child.

L5.15 Paid parental leave entitlement

- a) Eligible permanent and temporary teachers are entitled to one week of paid parental leave at full pay or two weeks at half pay.
- b) Casual teachers are not entitled to paid parental leave.

L5.16 Simultaneous leave

Parental leave can be taken simultaneously with the partner's maternity, adoption or parental leave on the following basis:

- for the period of paid parental leave
- where both partners are sharing child care duties and are taking part-time leave on separate days
- under the right-to-request provisions (see L5.30 below), a teacher may request an extension of simultaneous leave up to eight weeks.

Leave for permanent out-of-home care

L5.17 Eligibility

Permanent and temporary teachers providing permanent out-of-home care under a guardianship or permanent placement order are eligible for 12 months' unpaid leave.

L5.18 Entitlement

There is currently no provision for paid leave for teachers becoming parents (taking on parental responsibility) via a permanent out-of-home care arrangement. This includes those where there is a view to adopt the child from the date of taking custody. Adoption leave is available at the time of the adoption being finalised.

The NSW Government has agreed to review the provision after 12 months. Federation will continue to strongly advocate for paid leave as part of that review.

Commonwealth Paid Parental Leave

L5.19 Eligibility

Paid parental leave of up to 18 weeks at the minimum wage is available from the Commonwealth on different eligibility criteria from the Department's leave. Members becoming parents are advised to contact the Department of Human Services to determine their eligibility.

Conditions common to all five types of leave

L5.20 Continuous service

To access any form of paid leave covered by this leaflet, a teacher must have completed 40 weeks' continuous service. This includes:

- full-time and part-time temporary teaching and full-time casual service
- all paid leave, all unpaid maternity, adoption or parental leave, sick leave without pay, school vacations, public holidays and up to five days leave without pay
- previous service with the Department, TAFE or other government agency that merges with employment as a teacher.

It also includes:

- unpaid school vacations that occur during a temporary engagement or between two temporary engagements
- the four-week period prior to the ADB regardless of whether a temporary or casual engagement exists during this period or not.

While not included in the 40 weeks, the following will not break continuity of service:

a) temporary teachers:

- an absence of 21 calendar days at the beginning of the school year, provided the teacher was working at the end of the previous year and is available for work
- if a temporary engagement is ended early, the period from that time until the original end date of the engagement.

b) casual teachers:

- any absence from duty for a period or periods of leave without pay which exceeds a total accumulated period of five days
- an absence from full-time service at the beginning of the school year, for a period of not longer than 21 calendar days where service is otherwise continuous.

L5.21 How much leave is available?

For permanent and temporary teachers, maternity, adoption, surrogacy, parental and out-of-home care leave are available on the following basis:

- on a full-time basis for 12 months from the ADB or date of taking adoptive custody of the child. Any paid entitlement (outlined above) does not extend the time available
- on a part-time basis for a period of 24 months, provided the total amount of leave taken is equivalent to the maximum 12 months full-time leave.

Note that unpaid leave for temporary teachers is available on the same basis as for permanent teachers, but only within a temporary engagement.

A teacher may apply to have this extended by a further 12 months under the right-to-request provisions (see L5.30 below).

A teacher wishing to continue leave after exhausting all maternity, adoption, surrogacy, parental or out-of-home care leave entitlements may apply for leave without pay for personal reasons or part-time leave without pay.

For casual teachers, unpaid maternity leave of up to 12 months, and unpaid adoption, surrogacy and parental leave of up to one week, is available only within a casual engagement.

L5.22 Applying for leave

Applications for leave should be submitted at least one month before the first day of leave and must be accompanied by a medical certificate indicating the ADB or documentation from the adoption authority indicating the date of taking custody (except for surrogacy leave described at L5.13 above).

The application can be varied any number of times before the leave commences. Once leave has commenced, the application can be varied once without approval and any number of times with approval. If this happens, resumption of duty must then be at the start of a school term.

L5.23 Effect of vacations

In the past, paid maternity, adoption and parental leave was debited during a vacation period. So, if there was a two-week vacation period that fell during the period of paid maternity, adoption or parental leave, that two-week period was included in the period of paid leave. From the point at which a teacher's school rolls over to the new HR/Payroll SAP system in 2018, paid maternity, adoption, surrogacy and parental leave will no longer be debited during a vacation period. This means that if, as in the example above, there is a two-week vacation period falling during the period of paid leave, the teacher will be paid vacation pay for those two weeks and the remainder of the paid maternity, adoption, surrogacy or parental leave once the vacation period is over, thus extending the period of paid leave by two weeks.

L5.24 Does leave count as service?

Paid and unpaid maternity, adoption, surrogacy, parental and out-of-home care leave count as service for salary progression. Only the paid leave portion counts for accrual of vacation pay, annual leave loading and all types of leave. However, if a teacher has more than 10 years' paid service, then up to six months of unpaid leave would accrue extended leave/long service leave.

Any accrued vacation pay or annual leave loading will be paid at the same time as other teachers.

L5.25 Working casually while on unpaid leave

A teacher who wishes to work casually while on unpaid leave can apply for a casual approval to do so. Approval will not be granted while a teacher is on paid leave.

Service as a casual teacher during unpaid leave will count as service for extended leave/long service leave, except where the teacher is eligible for service credits for the unpaid leave (see L5.24 above).

A teacher eligible for extended leave/long service leave can use it to top up leave on half or no pay.

L5.26 Subsequent leave

A teacher does not need to resume duty to access subsequent maternity, adoption, surrogacy, or parental leave entitlements. Subsequent leave will be paid at the teacher's substantive full-time equivalent rate provided he/she is on maternity, adoption, surrogacy, or parental leave.

If the teacher is on a period of leave without pay, the subsequent leave will be paid at the substantive full-time rate if the leave without pay has been for less than 40 weeks.

When a teacher has been on leave without pay for more than 40 weeks, he/she will need to resume duty in their substantive position to access further paid maternity, adoption, surrogacy or parental leave entitlements. However, if the teacher has a temporary engagement covering the ADB, and meets the eligibility requirements for temporary teachers, they may make an application for paid leave based on their temporary service.

Teachers who have been working part-time under the right-to-request provisions will be paid subsequent maternity, adoption, surrogacy or parental leave at their substantive full-time equivalent rate.

Subsequent maternity, adoption, surrogacy or parental leave begins according to the ADB or date of taking custody of the subsequent child. Any remaining entitlement relating to the earlier leave is cancelled.

L5.27 NSW Teachers Federation membership fees

Members can apply for an exemption from membership fees while on unpaid leave or a reduction in fees while on half-pay or part-time leave. Applications should be submitted in advance, in writing, to Federation's Membership section and should include evidence of the leave approval from the Department of Education.

Members teaching casually while on unpaid leave will need to pay the appropriate membership rate to maintain the full benefits of membership.

L5.28 Superannuation

During any paid leave, with the exception of the Commonwealth Paid Parental Leave, superannuation payments will continue to be made as normal. Teachers in accumulation schemes, such as First State Super, are not required to make any superannuation payments while on unpaid leave. Teachers in defined benefits schemes (State Superannuation Scheme or State Authorities Superannuation Scheme) should contact their superannuation provider for advice.

Returning to work

L5.29 Right of return

Permanent teachers will retain right of return to their substantive position for the duration of full-time leave for up to 24 months (including an extension of that leave to the end of the next school vacation). A teacher granted full-time leave without pay after that 24 months' leave will also retain right of return. Teachers taking part-time maternity, adoption or parental leave under the right-to-request provisions (see L5.30 below) retain right of return to their substantive position for the entire duration of the part-time leave.

Temporary teachers will retain right of return during the period of the temporary engagement from which they take leave.

Except in the case of making a request for part-time leave (see L5.30), teachers must confirm their intention to resume duty in writing no less than one month prior to the date of return.

L5.30 Right to request

A teacher who has taken maternity, adoption, surrogacy, parental or out-of-home care leave may request:

- to extend the period of simultaneous leave (with their partner) up to a maximum of eight weeks
- to extend the period of unpaid leave for a further continuous period of 12 months
- to return to work on a part-time basis until the child reaches school age.

A teacher who has returned to full-time duty after leave, may still access these provisions, upon negotiation with the principal.

An application made under the right to request must be negotiated with the principal. The Department may only refuse the request on reasonable grounds related to the effect on the workplace, such as cost or lack of replacement staff.

Teachers wishing to make such a request should begin negotiations with the principal as early as possible. An application is required in writing seven weeks in advance. However, teachers should apply in writing (including preferred days of the week worked for part-time applications) as soon as possible, in the context of availability and administrative arrangements for childcare.

Any member experiencing difficulties in negotiating a request, including getting it confirmed in writing, should contact Federation immediately for advice.

L5.31 Allocation of duties and classes

A principal has responsibility for the allocation of duties and classes across the school to meet the learning needs of the students. At the same time, all teachers (including those working part time) have a right to be supported in their professional learning, and the principal has a responsibility to facilitate this learning. A teacher's caring responsibilities, including working part time to meet those responsibilities, should not be used to deny access to opportunities in a way that would stifle the teacher's professional growth. Any teacher experiencing difficulties negotiating classes, roles or access to other opportunities can contact Federation for advice.

L5.32 Lactation breaks

All permanent and temporary teachers who are breastfeeding are entitled to lactation breaks for the purpose of breastfeeding, expressing milk or other related activity.

A teacher working more than four hours per day is entitled to a maximum of two paid lactation breaks of up to 30 minutes each per day. A teacher working less than four hours per day is entitled to one break of up to 30 minutes.

The timing of these breaks is to be determined by the lactating teacher's needs.

The school should make every effort to provide access to suitable facilities, including:

- a private, lockable, hygienic space with a power point and comfortable seating
- facilities for washing hands and equipment
- refrigeration and storage space.

Lactation breaks need to be negotiated with the principal. The school's operational needs will need to be balanced with the needs of the teacher. Any member experiencing difficulties in negotiations should contact Federation for advice.

References

Teachers Handbook, Chapter 4.2 — Adoption, Maternity and Parental Leave.

Determination 5 of 2006 — Casual school teachers Adoption, Bereavement, Maternity, Parental and Personal Carers Entitlements

Determination 1 of 2007 — Maternity Leave

Determination 2 of 2007 — Parental Leave

Determination 3 of 2007 — Adoption Leave

Determination 4 of 2009 — Maternity Leave, Parental Leave and Adoption Leave

Determination 3 of 2011 — Breastfeeding and Lactation Breaks in Schools: Guidelines for Principals and School Staff