A-Z Guide

FAMILY VIOLENCE

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Introduction

The Domestic Violence – Victims' Protection Act 2018 ("the Act") came into force on 1 April 2019. Its core purpose is to provide specific legal protections for victims of family violence, and importantly, to support them to stay in paid employment.

In order to achieve this, the Act amends the Employment Relations Act 2000, the Holidays Act 2003, and the Human Rights Act 1993. The Act provides employees who are affected by family violence the right to:

- Request short term flexible working arrangements;
- Paid family violence leave; and
- Protection from adverse treatment in the context of employment.

Note: The Family Violence Act 2018 repealed the Domestic Violence Act 1995 from 1 July 2019. All references to 'domestic violence' in the Act are now replaced by 'family violence'.

Key Definitions

'A person who is affected by family violence'

This is defined in the Act to mean:

- A person against whom any other person inflicts, or has inflicted, family violence; and/or
- A person with whom there ordinarily or periodically resides a child against whom any other person inflicts, or has inflicted, family violence.

Family violence may affect an individual for a long time, even after it ends. When the family violence took place does not matter for the purposes of the Act. An employee still has rights under the Act, even if they experienced family violence before being employed by their current employer, or before the Act came into effect.

The rights under the Act do not apply to individuals who inflict family violence, as they are not covered by the definition above.

'Family violence'

This is defined in Section 9 of the Family Violence Act 2018. It means **violence** against any person by another person with whom that person is, or has been, in a **family relationship.**

The following are examples of a **family relationship:**

- Spouse or partner;
- Family member;
- Ordinarily shares a household;
- Close personal relationship.

What would constitute a close personal relationship would depend on the nature and intensity, and the duration of the relationship. A sexual relationship is not a necessary requirement for a close personal relationship.

Violence against a person includes physical abuse, sexual abuse or psychological abuse.

Psychological abuse includes, but is not limited to:

- Threats of physical abuse, sexual abuse, or psychological abuse;
- Intimidation or harassment;
    - Watching, loitering near, or hindering access to a person's place of residence, business, employment, education, or any other place the person visits often.
    - Following the person about or stopping or accosting a person in any place.
    - If a person is present on or in any land or building, entering or remaining on or in that land or building in circumstances that constitute a trespass.
- Damage to property;
- Ill-treatment of household pets, or other animals whose welfare affects significantly, or is likely to affect significantly, a person's well-being;
- Threats of physical abuse, sexual abuse, or psychological abuse;
- Financial or economic abuse;
    - Unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education.
- In relation to a child – if that person:
    - causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a family relationship; or
    - puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.

In respect of the above definition, a single act may amount to abuse. A number of acts that form part of a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial. Psychological abuse may be, or may include behaviour that does not involve actual or threatened physical or sexual abuse.

'Proof of family violence'

If an employee requests a short-term variation to their working arrangements, or takes family violence leave, an employer can require proof under s 72G of the Holidays Act 2003. This proof should show the employee is a person affected by family violence. The Act does not specify, or limit, what kind of proof an employer may accept.

The following are some examples of what may be accepted as proof:

- Correspondence from a family violence support service;
- Report from a health practitioner;
- Report from a school;
- A declaration – a letter of evidence witnessed by an authorised person under the Oaths and Declarations Act 1957;
- Any court or police documents about the family violence.

Requests for proof should be reasonable, and take into consideration the employee's particular circumstances. The Act does not define or set a threshold for what may constitute sufficient proof. We advise employers to be cautious about applying too high a standard to this. If the information is legitimate and clearly refers to the employee as being affected by family violence, that is all that is needed and no additional detail should be requested.

Flexible Working Arrangements

The Act amends the Employment Relations Act 2000 to allow employees affected by family violence to request a short term variation to their working arrangements. These arrangements can last for up to two months.

An employee (or a person on the employee's behalf) may make a written request at any time for the purpose of assisting the employee to deal with the effects on the employee of being a person affected by family violence. It is irrelevant how long ago the family violence occurred, and the entitlement to request a variation exists even if the family violence occurred before the person became an employee of the employer, or before the Act came into effect.

The Act does not limit the number of requests that can be made by an employee.

What can an employee request?

An employee can request a 'variation of the working arrangements'. This means one or more of the following:

- Hours and days of work;
- Place of work;
- Any additional term that need variation.
- Changes in start and/or finish times;
- Changes in total number of hours worked. For example, requesting to move from full-time to part-time work;
- Work from home;
- Work from another company office;
- Changes in duties at work;
- Changes to contact details given to the employer.

How is a request made?

An employee must put their request in writing and state:

- Their name;
- The date the request is made;
- That the request is made under Part 6AB of the Employment Relations Act 2000;
- The details of the variation of the working arrangement being requested;
- How long they want these variations to be in place – up to two months;
- The dates these variations will start and finish;
- How, in their view, these variations will assist them to deal with the effects of family violence; and
- What changes, in their view, the employer may need to make to its arrangements if the employee's request is approved.

What does the employer have to do?

The employer must provide a written response to the request within 10 working days of receiving it.

The employer may require proof that the employee is affected by family violence, to assist in its decision to approve the request. If proof is required, the employer must ask for it within three working days of receiving the request. This provides enough time within the 10-working day period for both the employee to provide proof, and for the employer to respond.

Approving or refusing a request

Whether the employer approves or refuses the request, it must provide the employee with information about suitable support services that can help with family violence. This can be done when the employer provides a written response to the request, or

before.

If the employer approves a request, the employee must be advised in writing. This would be a legally binding variation to the terms and conditions of employment, and should be clearly documented.

The employer can refuse a request if the proof required was not produced and/or the request cannot be reasonably accommodated on one or more of the following grounds:

- Inability to reorganise work among existing staff;
- Inability to recruit additional staff;
- Detrimental impact on quality;
- Detrimental impact on performance;
- Insufficiency of work during the periods the employee proposes to work;
- Planned structural changes;
- Burden of additional costs;
- Detrimental effect on ability to meet customer demand.

If a request is refused, the employee must be advised in writing and the employer must state that the request is refused because of a ground specified in the legislation. The employer must state the ground(s) for refusal and explain the reasons for that ground.

It is extremely important that when a ground is to be relied on, this can be explained clearly and be reasonably justified. As with any other employment law matter, employers must be prepared to set out the justification of their decision in detail, if the employee decided to challenge the decision.

An employee can challenge an employer's refusal of a request on the following grounds only:

- If the employer did not follow the law, for example, if it did not respond to the request within 10 working days;
- If the employer was wrong in deciding that the request could not be reasonably accommodated, for example, if it said that work could not be reorganised but the employee believes that it could.

The employee can refer the matter to a Labour Inspector, to mediation, or to the Authority.

Family Violence Leave

The Act amends the Holidays Act 2003 by creating a new category of paid leave. Employees affected by family violence are entitled to take up to 10 days' family violence leave. The purpose of this leave is to help employees deal with the effects of family violence, for example, to get help from a family violence support service, move house, or support their children.

An employee may take family violence leave if the employee is a person affected by family violence, regardless of how long ago the family violence occurred, even if the family violence occurred before the person became an employee, or before the law came into effect.

Who is eligible?

Family Violence

An employee is entitled to family violence leave after they have completed six months' current continuous employment with the employer (this applies regardless of how many hours an employee worked during those six months.)

An employee may also be entitled to family violence leave where the service is not continuous (e.g. casual work) if they have, over a period of 6 months, worked for the employer for:

- At least an average of 10 hours a week during that period; and
- No less than 1 hour in every week during that period or no less than 40 hours in every month during that period.

An employer and employee may agree that the employee may take family violence leave in advance of their entitlement. This leave is then to be deducted from the employee's next entitlement. This should be explained to any employee requesting leave in advance, and the arrangement should be recorded in writing.

Should the employment end before the employee is next entitled to family violence leave, the employer may recover the payment of leave in advance if they have the employee's written consent to this – either obtained at the time, or in their employment agreement (by way of a deductions clause). If there is no consent, the employer will not be able to recover the payment.

Number of days' entitlement

When an employee becomes eligible for family violence leave, they are entitled to 10 days. This applies to all employees, including part-time employees.

After the initial entitlement arises on reaching 6 months' continuous employment, a further 10 days' family violence leave entitlement will arise for each subsequent 12-month period of continuous employment.

For employees who do not have continuous service, a further entitlement will arise for each subsequent 12- month period during which the employee meets the hours worked test above.

An employee cannot carry over forward any family violence leave not taken in the relevant 12-month period.

An employer can offer additional or enhanced family violence leave entitlements and agree to different rules that may apply in relation to the additional entitlements.

Taking family violence leave

When an employee becomes entitled to 10 days' family violence leave, the employee may take those days together or separately.

An employee who intends to take family violence leave must notify their employer of that intention as early as possible before the employee is due to start work on the day that is intended to be taken as family violence leave. If that is not practicable, the employee must notify their employer as soon as possible after the time they are due to start work.

The employer can require proof that an employee is a person affected by family violence. The employer does not need to pay the employee until this proof is provided, unless the employee has a 'reasonable excuse'. The Act does not define or set a threshold for what would constitute a 'reasonable excuse'. As with assessing what is 'proof', similarly here, we recommend employers to be cautious about applying too high a standard to this.

Again, if the information is legitimate and clearly indicates a reasonable excuse, that is all that is needed and no additional details should be requested.

An employer must pay an employee their Relevant Daily Pay or Average Daily Pay for each day taken as family violence leave that would otherwise be a working day for the employee. The payment must occur in the pay that relates to the pay period in which the leave is taken, unless proof of family violence is required but has not been provided.

Refer to the **A-Z Guide** on **Leave Forms** for a sample family violence leave form.

Other Issues

Family violence leave and annual holidays

An employee who is taking annual holidays who then becomes entitled to take family violence leave, must be allowed to take family violence leave for the relevant period. Similarly, an employee who is scheduled to take annual holidays, but has not yet taken them when they become entitled to take family violence leave, must be allowed to take family violence leave for the relevant period. An employer may allow an employee to take annual leave to deal with the effects of family violence, if they are not yet entitled to, or have exhausted their family violence leave.

Family violence leave on a public holiday

If an employee is required, or has agreed, to work on a public holiday, but does not work on the day because they are taking family violence leave, then the day must be treated as a public holiday and not as family violence leave. The employee's entitlements for the day should be calculated based on the day being a public holiday not worked.

End of employment

An employee is not entitled to be paid for any family violence leave that has not been taken before their final day of employment.

Record keeping

The Holidays Act 2003 requires an employer to keep a holiday and leave record for each employee for at least 6 years after the date which the information is entered. As with other types of leave such as sick leave and bereavement leave, the same record keeping requirements apply in respect of family violence leave.

Refer to the **A-Z Guide** on **Records** for further information.

Protections against adverse treatment in employment

The Act further amends the Human Rights Act 1993 and the Employment Relations Act 2000 by creating an additional ground on which complaints of discrimination can be made. It is unlawful for an employer in the context of employment (including an

application for employment), to treat adversely, or to make an implied or overt threat to treat adversely a person, on the ground that the person is, or is suspected or assumed or believed to be, a person affected by family violence.

Examples of 'adverse treatment' by an employer include:

- Dismissal of that employee, in circumstances in which other employees employed by that employer on work of that description are not, or would not be dismissed; or
- Refusal or omission to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially the same qualifications, experience, or skills employed in the same or substantially similar circumstances; or
- Subjecting that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be subjected to such detriment; or
- Retiring that employee or requiring or causing that employee to retire or resign.

Claims in this context may be pursued in accordance with the personal grievance provisions of the Employment Relations Act 2000 or the Human Rights Act 1993.

Frequently Asked Questions

What constitutes a family/close personal relationship, e.g. do you have to actually live together and would this need to be permanently or could it be temporarily?

The term "family relationship/close personal relationship" is defined in the Family Violence Act 2018, section 14. Such relationship can exist if the person:

- Is a spouse or partner of the other person; or
- Is a family member of the other person; or
- Ordinarily shares a household with the other person; or
- Has a close personal relationship with the other person.

Whether or not these criteria are satisfied depends on the assessment of the particular circumstances. For example, it may involve an assessment of the nature and intensity of the relationship, the amount of time spent together, the place or places where that time is ordinarily spent (for example shared household), and the duration of the relationship. It is not necessary for there to be a sexual relationship between the persons. Two people who do not actually live together may still be in a "family relationship" for the purposes of the Act. It is not a requirement that the victim and the perpetrator live or have lived together at the time of the actual family violence.

Is a person entitled to family violence leave and/or flexible working arrangements who resides with a couple that abuses each other and/or their children?

Generally, a person who is not directly being abused would not be entitled to family violence leave and/or flexible working arrangements, in that such person would ordinarily not be "affected by family violence" for the purposes of the Act. However, if, for example, a grandparent (who is in employment) resides with the father and mother of a child, and the grandparent ordinarily cares for the child, and the child is subjected to family violence, then the grandparent would likely be entitled to family violence leave and/or flexible working arrangements.

Does it matter when the family violence occurred, i.e. can an employee request family violence leave and/or short-term flexible working arrangements if the family violence occurred before the victim commenced their employment?

For the purposes of the entitlements to family violence leave and/or flexible working arrangements it is irrelevant when the family violence has occurred. The family violence may even have occurred a long time before the employee commenced employment with the employer.

An employee may make a short-term flexible working arrangement request at any time from the commencement of their employment. There is no 'qualifying period' in respect of this entitlement.

However, unless agreed otherwise, an employee may only take paid family violence leave after:

- Six months of continuous employment with the employer; or
- If the employee, over a period of six months, has worked for the employer for at least an average of ten hours per week but no less than one hour every week and no less than 40 hours in every month during that six-month period.

When does the entitlement to paid family violence leave arise in respect of employees who have already been continuously employed for six months as at 1 April 2019?

Those employees are entitled to paid family violence leave immediately since 1 April 2019, which also constitutes their anniversary date for the calculation of the 12-months entitlement period.

Unless agreed otherwise between the employer and the employee, the entitlement to paid family violence leave generally arises after six months continuous employment with the employer. Does the continuous period of employment need to be with the same employer?

Yes. An exemption, however, may occur in the event that the employee's employment transfers to a new employer as a result of the business being sold, etc., and the new employer agrees to recognise (or is legally required to recognise) the employee's previous service with the old employer for service-related entitlements.

Is there any restriction on how often an employee could take paid family violence leave for the same incident of family violence?

No. Once the employee is eligible to take paid family violence leave, he/she can utilize their paid family violence leave entitlement multiple times in relation to the same incident of family violence. The only 'cap' that exists is that the entitlement is limited to ten days per 12-month entitlement period, regardless of the number of family violence incidents. Hence, an employee cannot take ten days paid family violence leave in relation to violence from person A, and ten days paid family violence leave in relation to violence from person B, within the same 12-month entitlement period.

Can/should I ask applicants for employment whether they have previously been affected by family violence and/or have taken time off from work in order to deal with the effects of family violence?

No. Whilst such information may be of genuine interest for the employer in informing the decision to offer employment to an applicant, any enquires by an employer in this respect expose the employer to a risk of a claim for unlawful discrimination under the Human Rights Act 1993. This is particularly so, if you decide not to offer employment to that applicant. We recommend that employers avoid such questions, including any indirect questions regarding family violence.

Can I ask applicants for employment whether they have previously been perpetrators of family violence?

We do not recommend asking such question. Instead, we recommend to conduct a Ministry of Justice check for applicants for employment which reveals past convictions (subject to past convictions being affected by the Clean Slate Act 2004). Limited categories of employers ("approved agencies", i.e. organisations that are involved in the care for vulnerable people, for example, children, disabled and/or elderly people) may or even must conduct vetting of applicants (and current employees) by New Zealand Police. Police vetting is not limited to criminal convictions but covers any information regarding a person's criminal history and/or any other concerning information held by New Zealand Police. The information disclosed by way of such checks may inform the employer's decision to offer employment to an applicant.

Is a perpetrator of family violence entitled to family violence leave, i.e. can the perpetrator also be an "affected person"?

Generally not. Whilst the Acts are silent on this, MBIE advises that the entitlements are victim-centered and do not apply to perpetrators of family violence. However, it may be possible that a perpetrator is a victim at the same time (for example, if and when a couple abuses each other), and in such circumstances they could be entitled to family violence leave and/or flexible working arrangements. If both people in the family relationship are employees and meet the eligibility criteria in the Act, then both will be entitled to take paid family violence leave and/or request flexible working arrangements.

If flexible working arrangements result in reduced hours/days of work and therefore reduced payments to an employee affected by family violence, can this be topped up by way of using paid Family Violence Leave?

Yes, while the legislation is silent on this issue we consider that the employer can "top up" an employee's pay by using paid family violence leave, if the employee requested this. We recommend that any such arrangement be documented in writing with the employee (for example, via an email trail).

What happens if the employee becomes affected by family violence and eligible for family violence leave before or during a period of annual leave?

An employer must allow an employee taking annual holidays to take family violence leave if that period relates to the effects of family violence under section 37A of the Holidays Act 2003. For example, an employee takes five days annual leave and then requests the employer to treat that period as family violence leave; the employer must reinstate the employee's relevant annual leave entitlement.

An employer must also allow an employee to take family violence leave before scheduled annual holidays if that period relates to the effects of family violence under section 38 of the Holidays Act 2003. For example, an employee applies for five days annual leave and prior to taking the annual leave requests that the employer treats that period as family violence leave; the employer must treat that period as family violence leave.

How does Payroll calculate payment for family violence leave?

Payment for family violence leave must be in accordance with section 72I of the Holidays Act 2003, whereby "an employer must pay an employee an amount that is equivalent to the employee's relevant daily pay or average daily pay for each day of family violence leave taken by the employee that would otherwise be a working day". See section 9 and 9A of the Holidays Act 2003 for definitions.

An employer can request proof from the employee that she/he is affected by family violence. When should proof be requested and what is satisfactory proof? What if the employer requested proof but the employee did not provide such proof?

In respect of short-time flexible working arrangements, the employer is free to require proof that the employee is affected by

family violence within three working days after receiving the employee's request. Where the employer requires proof, the employee must provide proof within ten working days of making their initial request for flexible working arrangements. If the employee fails to provide proof, the employer can decline the employee's request for that reason. In respect of paid family violence leave, the employer may require proof and may withhold payment until proof is produced. There are no rules in terms of timeframes to request or provide proof in respect of paid family violence leave.

Whether or not the employer may request proof in respect of either entitlement, is in the employer's sole discretion. Some circumstances may warrant a request for proof, whereas others may not. We are of the view that caution should be exercised in this respect and a request for leave and/or short-term flexible working arrangements should initially be taken at face value. This is because employees will likely feel very self-conscious and vulnerable if they front up and confide in the employer that they are affected by family violence and wish to make a mere request for leave and/or short-term flexible working arrangements. This should be taken into account. Requests for proof may be more appropriate if and when the employer has reasonable grounds to suspect that the requesting employee may be attempting to misuse the entitlements, i.e. for reasons unrelated to family violence and/or its effects. Requests for proof may also be appropriate if the family violence relied upon has occurred a very long time ago.

With regard to what kind of proof employers may ask for, the statutory provisions offer no guidance whatsoever. Hence, proof can be anything that can reasonably satisfy an employer that the employee is affected by family violence and needs to deal or is dealing with the effects of such violence. Examples of proof that we would consider to be acceptable are, without any limitation, documentation from a Counsellor, Health Practitioner, Government Department, or NZ Police.

Should I advise employees of their employment-related entitlements regarding family violence?

Yes. In fact, you are required to do so. A clause you can adopt for your employment agreements could read like this:

FAMILY VIOLENCE LEAVE AND FLEXIBLE (SHORT-TERM) WORKING ARRANGEMENTS

The Employee will be entitled to family violence leave in accordance with the Holidays Act 2003, subject to the Employee's eligibility under this Act.

The Employee will also be entitled to request flexible work arrangements for a period of up to two months in accordance with the Employment Relations Act 2000, subject to the Employee's eligibility under this Act.

The Employee can obtain further information regarding these entitlements via the Ministry of Business, Innovation and Employment. [Optional addition: The Employer's Family Violence Leave policy applies in relation to the aforementioned entitlements.]

Privacy

The issues surrounding family violence in the work environment are complicated and difficult to for anyone involved to navigate. It is important for employers to have policies and processes that make the workplace supportive for employees affected by family violence, and employers should think practically about how to manage and promote the entitlements under the Act.

One of the key issues employers should consider is privacy. The Act is silent on the issue, which means it will operate within existing privacy law by default. The Privacy Act 2020 therefore applies to the new Act. Employers should be mindful about protecting and preserving the privacy, trust and confidence of their employee. When considering privacy matters in this context,

employers should consider:

- How requests under the Act are made;
- How such requests can be made privately;
- What information will be recorded or shared, and with whom – including within management, payroll and on payslips.

There are no formal training requirements in the Act. However, we recommend employers to take a proactive approach to recognise and train specific employees within their organisation to manage applications delicately and privately.

Employers may want to consider providing wider organisational training in order to minimise embarrassment and stigma perception, and increase support by raising awareness to encourage victims and others to speak up and access support.

Some of the mechanisms in the Act could in fact be discouraging to employees wanting to access the support available, for example, the forms that must be used, and in particular the requirement to provide proof. To address this, it would be prudent for employers to consider how it can minimise these negative effects. Options may include:

- Making template forms available to employees;
- Having employees specifically available to help persons affected, to make requests under the Act and to direct them towards other support, in the community or workplace;
- Additional paid or unpaid leave to persons affected, or employees who are helping others through family violence;

The following is a general summary of best practice suggestions for employers:

- Get on the front foot – be proactive and educate staff and yourself as to what the new obligations are; and
- Consider how you might address the changes. Ideally this would involve some training and a specific policy which sets out what the relevant laws are, how your organisation intends to address these, how privacy will be managed, and a general statement which will act as encouragement and support to employees who may want to access support;
- Review your current privacy policy and check that your privacy officer understands the relevant privacy principles and how to manage any complaints.

Remember

- **Always call AdviceLine on 0800 300 362 to check you have the latest guide.**
  Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- **Use our AdviceLine employment advisors as a sounding board to test your views.**
- **Get one of our consultants to draft an agreement template that's tailor-made for your business.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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