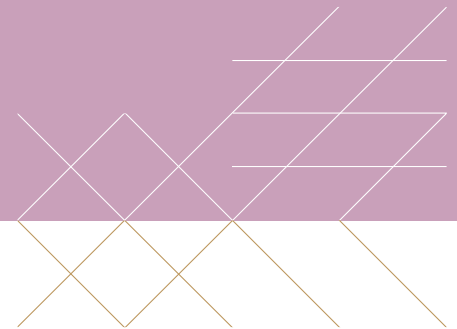


LawNews

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EMPLOYMENT LAW

Paid domestic violence leave about to become law

By Catherine Stewart & William Fussey

Ground-breaking legislation due to become law on Monday will give employees impacted by domestic violence an extra 10 days' paid leave a year and the right to request short-term flexible working arrangements.

The Domestic Violence – Victims' Protection Act 2018, which comes into force on 1 April 2019, aims to limit the effects of domestic violence by supporting those affected to remain in paid employment. The legislation will help to de-stigmatise domestic violence and empower employees to feel comfortable about raising the issue with their employer.

New Zealand has one of the highest rates of domestic violence in the developed world.

Green Party MP and sponsor of the private member's bill, Jan Logie, has described it as "a win for victims, a win for employers and a win for society".

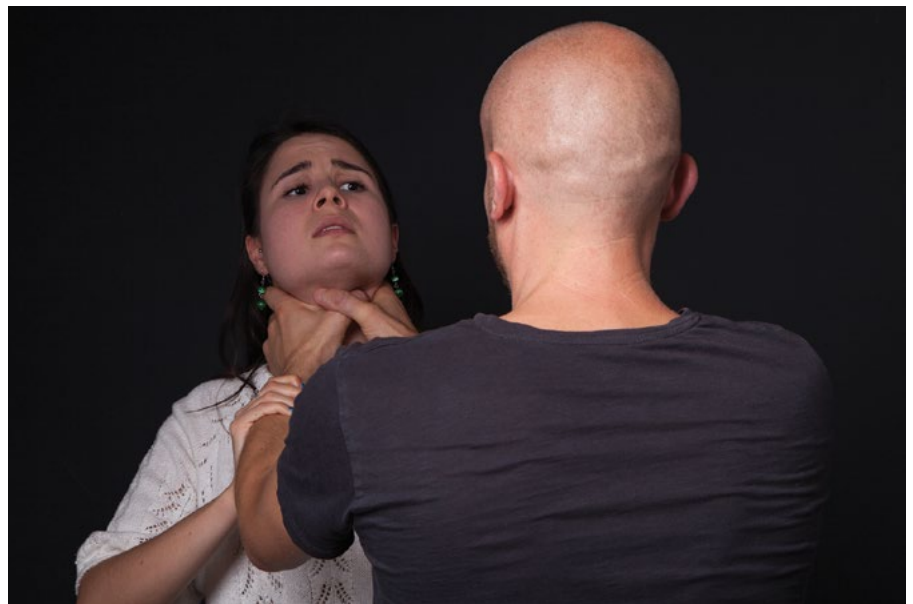
The win for victims and for society is probably self-evident, but for employers there would appear to be both benefits and costs as they will be paying for the leave and providing the requisite flexibility. But by supporting employees impacted by domestic violence, it is hoped employers can maintain a fulfilled and productive workplace with lower staff turnover.

How it works

For an employee to be affected by domestic violence, he or she must have suffered from domestic violence or be living with a child who has suffered from domestic violence.

Domestic violence means physical, sexual or psychological abuse, including intimidation, harassment, property damage, threats of abuse and financial abuse.

Affected employees will be eligible for paid



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leave regardless of when the domestic violence occurred, even if it was before they began their employment. It will be paid on the same basis as bereavement leave, public holidays, alternative holidays and sick leave. But it will not be paid out upon termination and cannot be carried over to subsequent years.

Employees affected by domestic violence can also make flexible working requests for a two-month (or shorter) variation of their working arrangements. This can include hours, days or place of work. The flexible working request can also be for a temporary alteration of the employee's duties or any other term of the employment agreement.

The employer may refuse the request only on specific grounds, such as an inability to reorganise work among existing staff, a detrimental impact on

quality or performance, or the burden of additional costs.

The employer is required to deal with the request as soon as possible, but no later than 10 working days after receiving it. Enabling employees to work flexibly should give them the opportunity to access the support they need and to maintain economic stability as they seek a pathway out of violence.

The Act also introduces a new ground for a personal grievance by amending the Employment Relations Act 2000: namely, that the employee has been treated adversely on the basis that he or she is a person affected by domestic violence. This extends also to situations where the treatment has occurred because the employee is suspected, assumed or believed to be such a person.

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The Act also provides detail around what constitutes adverse treatment.

This can include dismissal, refusing to offer particular opportunities, and any other employment-related detriment. A prohibition against adverse treatment of employees under these circumstances will also be inserted into the Human Rights Act 1993, meaning employees can complain to the Human Rights Commission and seek remedies in the Human Rights Review Tribunal.

Practical implications

Although the new legislation is likely to impact positively on employers and employees alike, some practical difficulties are likely.

An employer may require proof of domestic violence where an employee makes a flexible working request or seeks domestic violence leave.

However, proof is not defined in the Act so it is unclear as to what will be considered acceptable. An earlier version of the legislation would have required a "domestic violence document", such as a report from a medical practitioner or a domestic violence support organisation.

But the select committee said listing a range of acceptable documents would risk confusing employers who should be able to accept any proof that an employee is a person affected by domestic violence.

It remains to be seen whether employers can specify in their employment agreements exactly what proof they require (such as a domestic violence report) or whether that will be considered too prescriptive and contravene parliamentary intention.

Ultimately, proof is likely to be determined on a reasonableness basis, but a lack of clarity about what is reasonable runs the risk of employment disputes. For example, employers and employees are likely to have different views on whether a self-declaration is sufficient proof that the employee is affected by domestic violence.

In general, interpreting proof leniently risks the possibility of employees being untruthful to obtain extra leave or flexible work arrangements. But making proof requirements too onerous runs the risk that those genuinely affected by domestic



Catherine Stewart



William Fussey

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violence cannot get the assistance they need.

An appropriate balance needs to be struck. Case law may need to develop to give guidance on where that balance lies.

Another practical implication is that the Act is silent on protecting the privacy of employees

affected by domestic violence.

Although the Privacy Act 1993 already protects employees' personal information, domestic violence may be considered particularly sensitive information for those impacted by it.

So, while payroll employees may be bound by confidentiality, employees affected by domestic violence may feel uncomfortable with payroll being told to enter domestic violence leave into the system. It may be useful for an employer to follow a privacy policy that ensures the protection of this personal information is paramount.

There is hope the new legislation will make a real difference in the lives of employees affected by domestic violence. While it will not prevent domestic violence, it gives employees more support and flexibility to deal with its effects.

Catherine Stewart is a barrister and William Fussey is a staff barrister ✕

Correction

On page 5 of last week's *LawNews* we misspelt the surname of Scott Thompson, a senior associate at MinterEllisonRuddWatts.

We regret the error.

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