

Planning for long service entitlements - avoiding nasty surprises

Overview – Australian long service leave

Long service leave is a standard employment benefit in Australia. It is provided to Australian based employees who have completed a qualifying period of continuous service.

In some cases employees who have spent a relatively short time in Australia will qualify for long service leave that takes into account service overseas. This can give rise to problems for employers who are not aware of the reach of local long service leave laws.

When unexpected entitlements arise

Employers need to ensure they understand their Australian long service obligations to avoid unexpected 'surprise' entitlements arising, particularly if they:

- second, transfer or repatriate employees to or from Australia;
- hire employees from related companies; or
- buy a business.

Problems can occur for example, where the employer is unaware that an employee's prior service overseas or with related companies 'counts' as service with the employer, in determining long service entitlements. Because long service obligations will be unique to each employee, employers should consider each situation on a case by case basis to determine what entitlement (if any) exists. Expert advice should be sought where necessary.

Long service entitlements

Long service leave is intended as a reward for long serving employees, providing an additional opportunity for rest and recreation. In most cases the entitlement cannot be 'cashed out'. The timing for the taking of leave, how the leave may be taken and how payment is calculated, is determined by the relevant legislation, award, agreement or contract.

Accrued and untaken long service leave must be paid out at termination of employment. In some cases employees qualify for a pro rata payment on death or termination of employment, where a prescribed period of service has been completed before a long service entitlement has fully accrued. The pro rata entitlement generally will be lost if the employee is dismissed for serious and wilful misconduct. Specific advice should be sought where an employee is dismissed to determine what (if any) payment is due.

A long service entitlement may arise under a state or territory statute, an award, an Australian Workplace Agreement, collective workplace agreement, a state industrial agreement or employment contract. State and Territory based legislation provides for long service entitlements ranging from 8 to 13 weeks, after 7 to 15 years' continuous service. Entitlements from such legislation will generally be overridden by other instruments containing long service entitlements, provided they are no less favourable to the employee than those provided in the legislation itself.

Qualifying service - what counts?

Generally, an employee's prior service in any location will count for the purposes of determining a long service entitlement. An exception to this is where continuity of service has genuinely been broken.

Prior service with related companies to the employer may also count as service with the employer. The term 'related company' means 'holding company', 'subsidiary company' or a 'subsidiary of a subsidiary of a holding company'. A vertical relationship of control will mean companies are related.

Breaks in continuity of service

Generally, if there has been a break of employment of longer than 2 to 3 months, prior service with the same or related employer will not count for the purposes of calculating long service entitlements.

Continuity of service will not be broken if an employer terminates an employee's employment and then redeploys the employee to avoid long service obligations.

Long service leave in practice

The following examples illustrate how long service rules can operate in practice:

Service with a related company overseas

Alex was employed by XYZ Limited in January 1998, based at its London office. Alex moved to Australia in 2006 to take up a role with XYZ's subsidiary, XYZ (Australia) Pty Limited. Alex's long service entitlements are determined by the Long Service Leave Act 1955 (NSW) ("NSW Act").

While Alex had only been employed by XYZ (Australia) Pty Limited for 2 years, in January 2008 he became entitled to 2 months' long service leave. XYZ (Australia) Pty Limited has not planned for this entitlement, and does not want Alex to take the holiday because of an important project that is underway. Unfortunately, under the NSW Act, 'cashing out' Alex's long service entitlement is prohibited.

If XYZ (Australia) Pty Limited had anticipated long service entitlements would arise when employing Alex, it may have:

- obtained advice about its obligations and the options available to it when engaging Alex;
- negotiated a payment from its parent company representing a 'deemed value' for Alex's accrued long service entitlements; and
- planned for the possibility that Alex would want to take long service leave in 2008.

Break in continuity of service and applicable policies

Jane worked for L Group in New York between December 1996 and December 2003. In March 2004 Jane relocated to Australia and was employed by L Group's Australian subsidiary, L (Australia) Pty Limited at its Sydney office.

The NSW Act is applicable to Jane. While Jane has been a long serving employee of L Group, under the NSW Act she is not entitled to long service leave because of the 3 month break between working for L Group, and L (Australia) Pty Limited. For long service leave purposes, Jane's employment with L (Australia) Pty Limited is treated as having commenced in March 2004.

However, L Group has a long service policy applying to all employees of group companies. This provides that any prior service within the group will 'count' as service with the employer for the purposes of determining long service entitlements. Because of the policy, Jane's 7 years' prior service with L Group is recognised, and she became entitled to long service leave in March 2007.

Recommended actions

Potential long service obligations should be considered whenever employers propose to hire, second, transfer or repatriate employees within or to Australia, particularly long serving employees. Understanding potential long service obligations at the outset allows employers the flexibility to determine how best to deal with the issue before the relationship is formalised, rather than being taken by surprise later. When in doubt, seek expert advice.