

TANDA

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Australia

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Committee Secretary
Senate Standing Committees on Education and Employment
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary
**Submission into Fair Work Amendment (Paid Family and Domestic Violence Leave)
Bill 2022**

Enclosed is our submission for the Committee's consideration.

Please contact me if you would like to discuss it further.

Sincerely

Andrew Stirling
Head of Product Compliance

Introduction

Thank you for the opportunity to make a submission into the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* (Cth) (the **Bill**).

Tanda welcomes the Federal Government's plan to legislate for ten days' Paid Family and Domestic Violence Leave (**PFDVL**). Tanda believes access to PFDVL will save lives and help vulnerable employees escape dangerous situations. The purpose of our submission is to outline our view on how to ensure the technical elements of the Bill are free of ambiguity and conducive to a simple implementation across Australian workplaces. In particular, all employers and employees should clearly understand how an employee's PFDVL should be on-costed and deducted.

Taking PFDVL and associated deductions

Under the Bill, employees will have an entitlement to 10 days' PFDVL per year. This entitlement will reset in full on the employee's work anniversary, and does not accrue from year to year. That much appears clear.

The Bill does not explain how the annual 10 day entitlement to PFDVL should be reduced when the employee takes PFDVL leave. Uncertainty arises because the entitlement to take PFDVL is expressed in days, but the entitlement to payment for PFDVL is expressed in hours.

There are five questions that should be resolved before the Bill becomes law:

- Are the 10 days of PFDVL per year that an employee is entitled to 10 "notional days" (i.e. actually an entitlement in hours, the same as personal/carer's leave)?
- Are deductions from the 10 days of PFDVL made in days or hours?
- If deductions from the 10 days of PFDVL are to be made in days, how is a "day" defined (e.g. A calendar day? A working day?)?
- If deductions from the 10 days of PFDVL are to be made in days, what deduction should be made if an employee takes a part day of PFDVL (i.e. the employee works some of the day, but takes part of the day as PFDVL as anticipated by s106A(4)(c) of the Act)?
- If deductions from the 10 days of PFDVL are to be made in days, what deduction is to be made for days that are unpaid (e.g. the unpaid day of PFDVL on the Friday, as described in the illustrative example in paragraph 52 of the explanatory memorandum)?

A similar disconnect in the language between the entitlement and the payment of personal/carer's leave resulted in 11 years of significant uncertainty for employers and employees, which was resolved only by the *Mondelez* High Court decision. It would be a pity if employers and employees had similar uncertainty regarding this entitlement, especially since the opportunity to resolve that uncertainty is available now.

On-costing PFDVL

The Bill provides that PFDVL will be paid at the employee's full rate of pay. The amount of any payment is to be worked out:

- for permanent employees - as if the employee had not taken the period of leave; and
- for casual employees - as if the employee had worked the hours in the period for which the employee was rostered.

So far as we can identify, this is the first time that the *Fair Work Act 2009* (Cth) (the **Act**) will include an entitlement to take leave at an employee's "full rate of pay" and on hours other than ordinary hours. Employers will need to be able to calculate on-costs associated with the payment of the PFDVL. At this point, we anticipate confusion about how an employer should account for PFDVL when it is calculating its liabilities for:

- superannuation guarantee;
- payroll tax;
- workers' compensation premiums.

Given the significance of the proposed change, employers would benefit from clarification in the Bill or supplementary materials regarding how on-costs should be calculated. Absent any clarification, Tanda would seek to on-cost the payment according to the nature of the working hours underlying the "full rate of pay".

Privacy and safety

Employers remain concerned about protecting their employees' right to privacy and health and safety, while at the same time complying with their obligations under s536 of the Act and regulation 3.46. Showing taken PFDVL on a payslip might compromise an employee's health and safety if it were seen by a perpetrator.

It is ambiguous whether the existing law requires employers to show PFDVL, and other leave types for that matter, as a separate item on an employee's pay slip. Employers would benefit from having this ambiguity resolved as part of the Bill.

About Tanda and the author

Tanda is a Brisbane headquartered technology company, founded in 2012. Among other things, Tanda's cloud-based workforce management platform offers our customers rostering, leave management, time and attendance, and payroll calculation solutions.

Tanda's primary mission in business is to ensure that employees are paid fairly and lawfully every time they go to work. This is to protect both employers and employees.

Andrew Stirling is Tanda's Head of Product Compliance. Andrew worked as an employment lawyer at the top-tier law firm Allens for twelve years, including four years leading its Brisbane employment practice, before joining Tanda three years ago. During his time at Allens and Tanda, Andrew has established his reputation as a thought leader in industrial relations compliance, regulation and policy. His monthly webinar, [Tanda PaySure](#), covers the pressing industrial relations issues affecting corporate Australia – helping viewers get across important regulatory changes in less time.