

SURROGACY LEAVE

Contents

Authority and Application	1
Overview	2
Relevant provisions of the VPS Agreement.....	2
Supplementary Guidance Information	2
1. Definitions.....	2
2. Interaction with the Assisted Reproductive Treatment Act 2008 (Vic).....	3
3. Privacy and confidentiality.....	3
4. Overview of leave entitlements	3
5. Pre-Natal Leave	4
6. Planning and commencement of Surrogacy Leave	5
7. Evidence requirements for Surrogacy Leave.....	5
8. Employee continuing to work while pregnant.....	5
9. Special Surrogacy Leave	6
10. Calculating the rate of pay for paid Surrogacy Leave	6
11. Effect of Surrogacy Leave on Long Service Leave accruals	7
12. Superannuation	7
13. Keeping in touch days.....	7
Making decisions under this policy	7
Dispute resolution.....	7
Further Information.....	7
Related policies or documents.....	7

Authority and Application

Clause 56 of the *Victorian Public Service Enterprise Agreement 2020* (the Agreement) applies to Victorian Public Service Departments and Agencies (Employers) and their Employees covered by the Agreement.

Overview

As part of the formal surrogacy arrangement, which complies with Part 4 of the *Assisted Reproductive Treatment Act 2008 (Vic)*, an Employee may be either the Surrogate or Surrogacy Parent party to the formal surrogacy arrangement.

For the avoidance of doubt, Clause 56 (Surrogacy Leave) of the Agreement sets out the leave available to an eligible Employee, who is the Surrogate, and enters into a formal surrogacy arrangement on or after 1 July 2020, which complies with Part 4 of the *Assisted Reproductive Treatment Act 2008 (Vic)*.

An eligible Employee, who is the Surrogate, is entitled to six weeks paid Surrogacy Leave under clause 56 of the Agreement, if they have completed at least three months paid continuous service. The Employee is also entitled to Pre-Natal Leave to attend medical appointments totalling up to 38 hours.

Casual Employees are not entitled to paid Surrogacy leave entitlements.

Clause 55 (Parental Leave) of the Agreement outlines the provisions for an eligible Employee, who is a Surrogacy Parent, whose child is born through a formal surrogacy arrangement, which complies with Part 4 of the *Assisted Reproductive Treatment Act 2008 (Vic)*. Please refer to the Towards Common Practice Parental Leave Policy for further detailed guidance on the parental leave entitlements for an Employee who will be a Surrogacy Parent.

Relevant provisions of the VPS Agreement

Clause 56. Surrogacy Leave

Supplementary Guidance Information

1. Definitions

For the purpose of this Policy:

- 1.1 **Continuous Service** has the same definition as under clause 55.2(b) (Parental Leave) in the Agreement and is work for the Employer on a regular and systematic basis (including any period of authorised leave) and any period of Recognised Prior Service (as defined in clause 55.2(g) of the Agreement).
- 1.2 **Surrogacy Parent** is a person who has entered into a formal surrogacy arrangement and will take primary parenting responsibility of the Child after the Child is born either as primary or secondary caregiver.
- 1.3 **Surrogate**, who may also be called a gestational parent in some instances, and is a person who carries the Child through pregnancy with the intention that the Child born as a result of the formal surrogacy arrangement is to be treated as the Child of another person/s.
- 1.4 **Recognised Prior Service** has the same definition as under clause 55.2(g) (Parental Leave) in the Agreement and means any service immediately prior to the Employee's employment with the Employer, where the Employee was employed:
 - 1.4.1 by a public entity under the *Public Administration Act 2004 (Vic)* (PAA);
 - 1.4.2 under Part 6 of the PAA; or
 - 1.4.3 as a parliamentary officer or electorate officer under the *Parliamentary Administration Act 2005 (Vic)*.

2. Interaction with the Assisted Reproductive Treatment Act 2008 (Vic)

- 2.1. Part 4 of the *Assisted Reproductive Treatment Act 2008* (Vic) outlines the requirements for entering a formal surrogacy arrangement and ensuring that all parties to the formal surrogacy arrangement are aware and understand the personal and legal consequences of the arrangement.
- 2.2. Part 4 of the *Assisted Reproductive Treatment Act 2008* (Vic) specifies that before a formal surrogacy arrangement is entered into the Surrogate and their partner (where the Surrogate has a partner) and the Surrogacy Parent/s, must attend a range of surrogacy related appointments, including with the Patient Review Panel (PRP) who determine suitability and final approval of the formal surrogacy arrangement.
- 2.3. Where the Employee, who will be the Surrogate, is required to attend surrogacy related appointments, which may include medical appointments prior to approval of the formal surrogacy arrangement, the Employee may request leave for the purpose of attending these appointments in accordance with clause 51 (Personal/Carer's Leave) of the Agreement.
- 2.4. Attendance at routine medical appointments may, by agreement with the Employer, also be facilitated through flexible working arrangements (such as agreement to make up the time taken to attend medical appointments) as an alternative to using accrued Personal/Carer's Leave.

3. Privacy and confidentiality

- 3.1. The privacy and confidentiality of the Employee must be maintained at all times. The Employee has the right to discuss their formal surrogacy arrangement openly, or to keep information private. It is the decision of the Employee, when, with whom and how much they share about their private information throughout the formal surrogacy arrangement.
- 3.2. Information disclosure must be managed in line with the Employer's record keeping practices and in accordance with the provisions of the *Privacy and Data Protection Act 2014*.

4. Overview of leave entitlements

- 4.1. An Employee is eligible for paid Surrogacy Leave (eligible Employee) if they:
 - 4.1.1. are employed on an ongoing or fixed term basis,
 - 4.1.2. have completed at least three months paid Continuous Service; and
 - 4.1.3. have entered a formal surrogacy arrangement on or after 1 July 2020 to act as the Surrogate, and the arrangement complies with Part 4 of the *Assisted Reproductive Treatment Act 2008* (Vic).
- 4.2. An eligible Employee, who is pregnant under a surrogacy arrangement is entitled to six weeks paid Surrogacy Leave. The notice and evidence requirements in clause 56.9 of the Agreement apply and these are explained in detail below.
- 4.3. A Surrogacy Parent/s may also have an entitlement to parental leave under clause 55 subject to the meeting the eligibility, notice and evidence requirements in that clause.
- 4.4. The table below summarises the entitlements for Surrogate, Surrogacy Parents and their spouse/partner.

LEAVE ENTITLEMENTS TABLE (effective from 1 July 2020)			
CATEGORY	PAID LEAVE	UNPAID LEAVE	TOTAL
SURROGATE (An Employee who enters a formal surrogacy arrangement and is the Surrogate will be entitled to Surrogacy Leave in accordance with clause 56 of the Agreement)			
More than 3 months continuous service	6 weeks		

LEAVE ENTITLEMENTS TABLE (effective from 1 July 2020)			
CATEGORY	PAID LEAVE	UNPAID LEAVE	TOTAL
Less than 3 months continuous service	0		
Long-term casual Employee	0		
SURROGATE PRE-NATAL			
Surrogate	38 hours		
Partner or spouse	7.6		
Casual	0		
SURROGACY PARENT PRIMARY CAREGIVER (An Employee who enters into a formal surrogacy arrangement and who will become the Primary Caregiver of the child will be entitled to Parental Leave in accordance with Clause 55 of the Agreement).			
More than 3 months continuous service	16 weeks	Up to 36 weeks	52 weeks
Less than 3 months continuous service	0	Up to 52 weeks	52 weeks
Long-term casual Employee	0	Up to 52 weeks	52 weeks
SURROGACY PARENT SECONDARY CAREGIVER			
More than 3 months continuous service	4 weeks	Up to 48 weeks	52 weeks
More than 3 months continuous service and takes over the primary responsibility for the care of the child within first 78 weeks	An additional 12 weeks	Up to 36 weeks	52 weeks
Less than 3 months continuous service	0	Up to 52 weeks	52 weeks
Long-term casual Employee	0	Up to 52 weeks	52 weeks
SURROGACY PARENT PRE-NATAL			
More than 3 months continuous service	7.6 hours		
Spouse or partner	7.6 hours		
Casual	0		

*Please refer to the Parental Leave Policy for further guidance on the parental leave entitlements for an Employee who will be a Surrogacy Parent.

- 4.5. Where a public holiday occurs during a period of paid Surrogacy Leave, the public holiday is not regarded as part of the paid Surrogacy Leave. The Employer will grant the Employee a day off in lieu, to be taken by the Employee immediately following the period of paid Surrogacy Leave.
- 4.6. An Employee with less than three months paid Continuous Service or who is engaged on a casual basis is not entitled to Surrogacy Leave but may be able to access leave without pay with the approval from their manager under clause 70 of the Agreement (Other Leave). In such cases the notice and evidence requirements in clause 56.9 of the Agreement apply.
- 4.7. An Employee may access any other paid or unpaid leave entitlements in conjunction with Surrogacy Leave with the approval of their manager.

5. Pre-Natal Leave

- 5.1. Pre-Natal Leave enables an Employee to attend routine medical appointments associated with the pregnancy. An eligible Employee, who is the Surrogate, is entitled to up to 38 hours paid Pre-Natal Leave per pregnancy consistent with clause 55.7 of the Agreement.
- 5.2. It is recognised that the Surrogacy Parent/s often attends the pre-natal appointments with the Surrogate. If the Surrogacy Parent's partner/spouse attends pre-natal appointments, they will be entitled to up to 7.6 hours per pregnancy of paid Pre-Natal Leave.
- 5.3. An Employee seeking to access Pre-Natal Leave must provide a medical certificate confirming that they are pregnant as the Surrogate or evidence that they will be a Surrogacy Parent. Each absence on Pre-Natal Leave must be covered by a medical certificate or in the case of Surrogacy Parent other evidence that would satisfy a reasonable person.
- 5.4. An Employee with less than three months paid Continuous Service or who is engaged on a casual basis may access unpaid leave to attend routine medical appointments associated with the pregnancy with approval from the Employer. They may also request leave for the purpose of attending these appointments in accordance with clause 51 (Personal/Carer's Leave) of the Agreement.

6. Planning and commencement of Surrogacy Leave

- 6.1. As part of the planning and preparation for a period of leave related to the birth of the Child, the Employee must provide 10 weeks' written notice to the Employer of their intention to take Surrogacy Leave. The Employee must confirm these details at least 4 weeks prior to the commencement of the proposed period of paid Surrogacy Leave.
- 6.2. An Employee may commence paid Surrogacy Leave up to six weeks prior to the expected date of the birth of the Child but the leave must commence no later than the date of the birth of the Child (unless otherwise agreed with the Employer).
- 6.3. The Employee and Employer must discuss, plan and agree on the leave arrangements, including the taking of any other paid or unpaid leave entitlements in conjunction with the paid Surrogacy Leave. Consideration should be given to ensure the Employee is provided adequate time to recover after the birth of the Child before returning to work.
- 6.4. Where the Employee plans for an immediate return after the expected birth date of the Child, and there is genuine concern about the Employee resuming their normal duties, the Employer may require the Employee to provide a medical certificate stating whether the Employee is fit to undertake their normal duties by the planned return to work date.

7. Evidence requirements for Surrogacy Leave

- 7.1. An Employee who is pregnant must provide 10 weeks' written notice to the Employer of their intention to take Surrogacy Leave. The notification should include a Statutory Declaration which specifies:
 - 7.1.1. the intended start and end dates of the leave,
 - 7.1.2. if known, any other paid or unpaid leave the Employee is seeking approval of to take in conjunction with their Surrogacy Leave, and
 - 7.1.3. for the period of the Surrogacy Leave the Employee will not engage in any conduct inconsistent with their contract of employment.
- 7.2. The Employee may also be required to provide documentary evidence to confirm the expected birth date of the Child and the formal surrogacy arrangement, which complies with Part 4 of the *Assisted Reproductive Treatment Act 2008* (Vic).
- 7.3. The Employee must confirm in writing, the intended start and end dates of their paid and unpaid leave, or advise of any changes to the proposed arrangements, no later than four weeks before the intended commencement of the Surrogacy Leave.

8. Employee continuing to work while pregnant

- 8.1. A Surrogate who has advised their Employer that they would like to work during the six weeks before the birth of the Child may be asked by their Employer to provide a medical certificate stating they are fit for work and whether there are any risks in connection to their duties.
- 8.2. An Employee who fails to provide a requested medical certificate within seven days of the request by the Employer or provides a certificate that states they are unfit for work may be required to commence Surrogacy Leave.
- 8.3. If a registered medical practitioner provides a medical certificate stating that it is inadvisable for the Employee to continue in their present job due to illness or the risks associated with pregnancy, the Employee is entitled to be transferred to an appropriate safe job until the Employee's leave commences. The safe job will have the same, or other agreed ordinary hours of work with no other changes to the Employee's terms and conditions.
- 8.4. An Employee who has provided a medical certificate stating that they are fit for work, but it is inadvisable for the Employee to continue in their present job due to illness or the risks associated with pregnancy, and there is no safe job available for the Employee to be transferred to, is entitled to take paid or unpaid if not entitled to paid leave per clause 56.1 of the Agreement) 'No Safe Job Leave'.

9. Special Surrogacy Leave

- 9.1. Where the pregnancy of a Surrogate Employee not then on Surrogacy Leave terminates other than by the birth of a living child, the Surrogate is entitled to access paid special surrogacy leave in accordance with clause 56.7 of the Agreement.
- 9.2. The National Employment Standards provide that where a pregnant employee's pregnancy ends after a period of gestation of at least 12 weeks otherwise than by the birth of a living child and the child is not stillborn the Employee may access unpaid special maternity leave for the period they are unfit for work.
- 9.3. Clause 56.7 currently only provides access to special parental leave where the pregnancy terminates after the completion of 20 weeks. To ensure clause 56.7 of the Agreement is compliant with this requirement the following entitlements will apply, in lieu of clause 56.7:
 - 9.3.1. Where the pregnancy of an Employee not then on parental leave terminates other than by the birth of a living Child, the Employee may take leave for such periods as a registered medical practitioner certifies as necessary, as follows:
 - a) where the pregnancy terminates during the first 11 weeks, during the certified period/s the Employee is entitled to access any paid and/or unpaid personal/carer's leave entitlements in accordance with clause 51 of the Agreement;
 - b) where the pregnancy terminates after a gestation of at least 12 week but before the completion of 20 weeks, during the certified period/s the Employee is entitled to unpaid special maternity leave and/or to access any paid personal/carer's leave entitlements in accordance with clause 51 of the Agreement;
 - c) where the pregnancy terminates after the completion of 20 weeks, during the certified period/s the Employee is entitled to paid special maternity leave not exceeding the amount of paid parental leave available under clause 56.1 and thereafter, to unpaid special maternity leave.
- 9.4. Surrogates with less than 3 months continuous service or casual employees may access paid or unpaid leave for the period certified by a medical practitioner, with the agreement of the Employer.

10. Calculating the rate of pay for paid Surrogacy Leave

- 10.1. Surrogacy Leave is paid at the Employee's ordinary rate of pay and on their ordinary hours of work.

11. Effect of Surrogacy Leave on Long Service Leave accruals

- 11.1. The Employee's paid Surrogacy Leave counts as service for Long Service Leave purposes, consistent with clause 62.5(a) of the Agreement.
- 11.2. A period of unpaid leave associated with a surrogacy arrangement will be processed as leave without pay and will not count as service for long service leave purposes unless the Employer expressly authorises long service leave to accrue in accordance with clause 62.5(e) of the Agreement.

12. Superannuation

- 12.1. The Employee's paid Surrogacy Leave counts as service for superannuation purposes.

13. Keeping in touch days

- 13.1. During a period of Surrogacy Leave an Employee and their Employer may agree to perform work for the purpose of keeping in touch in order to facilitate a return to employment at the end of the period of leave.
- 13.2. Keeping in touch days may be used by the Employee to participate in work related training or team meetings.
- 13.3. Prior to commencing Surrogacy Leave, the Employee and their Employer should discuss appropriate arrangements for keeping in touch, including the use of keeping in touch days to assist with achieving any training identified in the Employee's Performance Development Plan.

Making decisions under this policy

Under section 20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

Dispute resolution

An Employee who is directly affected by a decision made or action taken pursuant to clause 56 may apply for a review of actions under the Employer's Review of Actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

Related policies or documents

VPS Enterprise Agreement Common Policies

- Parental Leave
- Annual Leave
- Flexible Working Arrangements

- Other Leave
- Review of Action

All policies in the VPS Enterprise Agreement common policies collection can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>

Authorised by Industrial Relations Victoria:

Key Details	Date
Version	Final as approved
Date	August 2022

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