

## Coronavirus (COVID-19) pandemic: School closures and the meaning of an ‘unexpected emergency’ for personal/carer’s leave purposes

### SUMMARY

The school closures announced as a result of the COVID-19 pandemic have led to questions being asked about the meaning of an ‘unexpected emergency’ in the personal/carer’s leave provisions of the *Fair Work Act 2009 (FW Act)*.

### Personal/carer’s leave to care for another due to an ‘unexpected emergency’

Due to the COVID-19 pandemic, some Ai Group Members have queried the meaning of the expression ‘*unexpected emergency*’ in section 97 of the FW Act and whether it applies to an employee who cannot attend work due to a school closure and their need to care for children.

Section 97 of the FW Act includes an entitlement for an employee to take any of their accrued paid personal/carer’s leave to provide care or support to a member of the employee’s immediate family or household who requires care or support because of ‘*an unexpected emergency affecting the member*’.

Notice and evidence requirements apply.

### The background to the wording in section 97 of the FW Act

The history of the provision in the FW Act regarding an ‘unexpected emergency’ can be traced back to the *Family Provisions Case* which was heard by the Australian Industrial Relations Commission (now the Fair Work Commission) between 2003 and 2005. As an outcome of this case a model award clause was inserted into numerous awards giving employees an entitlement to take any of their accrued paid

personal/carer’s leave to provide care or support to a member of the employee’s immediate family or household who required care or support because of ‘*an unexpected emergency*’.

In 2006, the *Workplace Relations Act 1996* was varied to create a legislative minimum standard for personal/carer’s leave. The relevant entitlement was in similar terms to the model award clause, i.e. to provide care or support to a member of the employee’s immediate family or household who needs care or support due to ‘*an unexpected emergency affecting the member*’.

The Explanatory Memorandum for the amendments to the *Workplace Relations Act 1996* stated:

*Carer’s leave is paid or unpaid leave taken by an employee to provide care or support for a member of the employee’s immediate family or household. Carer’s leave is available where a member of the employee’s immediate family or household is ill or injured, or there is an unexpected emergency affecting a family or household member. For example, an unexpected emergency could include the employee being asked to meet with a school teacher to discuss the employee’s child’s learning requirements or to take a household member to a medical practitioner.*

In 2009, the FW Act replaced the *Workplace Relations Act 1996*. Section 97 of the FW Act contains a similar entitlement to the former model award provisions and the equivalent provision in the *Workplace Relations Act 1996*.

### Relevant Federal Circuit Court decision

In a 2013 decision of the Federal Circuit Court (*Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056), Justice Whelan held that an 'unexpected emergency' included circumstances where a mother of a primary school aged child was unable to make alternative arrangements and left work early to collect her son from school, giving her employer one day's notice.

### The meaning of an 'unexpected emergency'

An 'unexpected emergency' is not defined in the FW Act. The Macquarie Dictionary defines 'unexpected' as: '*unforeseen; surprising*'. The Macquarie Dictionary defines an 'emergency' as '*an unforeseen occurrence; a sudden and urgent occasion for action*'.

There would be little doubt that if a school closed in the middle of a particular day and a parent had to leave work to pick up a child to care for them, this would be an '*unexpected emergency*'.

It might also be the case that if a school closed suddenly and the school closure lasted for two days while the school was thoroughly cleaned that this would be an '*unexpected emergency*'.

**However, the idea that an ongoing school closure is an '*unexpected emergency*', in Ai Group's view, is not correct.** If there was only, say, one day's notice of an ongoing school closure then the first day and perhaps even the second day may be regarded as an 'unexpected emergency' but then the event ceases to be 'unexpected' (see Macquarie Dictionary definitions above).

The view of the Fair Work Ombudsman on this issue is set out on its website. The following extract is relevant:

*Paid carer's leave is available to full-time or part-time employees where the employee needs to look after a family member or a member of their household who requires care or support because of a personal illness or unexpected emergency affecting the member. A school closing on short notice and for a short period due to concerns about coronavirus (for example, because someone at the school has tested positive) is an unexpected emergency for this purpose.*

### Do you require further advice?

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic.

For further information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.

For detailed advice about COVID-19 workplace relations issues, the team of lawyers and advisers at [Ai Group](#) and [Ai Group Workplace Lawyers](#) is available to assist you.



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