

A-Z Guide

DE FACTO



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Use This Guide to Understand

- How the term “de facto” relates to employment
- What relationships are considered to be “de facto” under various legislation

“De Facto” and Employment

“De facto” has a range of meanings. The meaning in any given situation will depend on the law relating to the circumstances. An employee’s status can impact on employment in relation to discrimination and certain leave entitlements.

Discrimination in Employment

You should be careful not to treat an employee differently because they are in a de facto relationship. Refer to the information below which illustrates how discrimination in employment could arise.

Marital status

Under both the Human Rights Act 1993, and the Employment Relations Act 2000, it is unlawful to discriminate in employment on the grounds of a person’s marital status, family status, or sexual orientation. In the Human Rights Act 1993, marital status includes married, in a civil union or in a de facto relationship. Neither of these Acts defines “de facto”.

The Property Relationships Act 1976 defines de facto, and although the Human Rights Act does not refer to it, the definition may be helpful in determining whether an employee is in a de facto relationship:

Property Relationships Act 1976, section 2D

(1) For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman):

- a. who are both aged 18 years or older; and
- b. who live together as a couple; and
- c. who are not married to, or in a civil union with, one another.

Continued

Property Relationships Act 1976, section 2D (continued)

(2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- a. the duration of the relationship
- b. the nature and extent of common residence
- c. whether or not a sexual relationship exists
- d. the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties
- e. the ownership, use, and acquisition of property
- f. the degree of mutual commitment to a shared life
- g. the care and support of children
- h. the performance of household duties
- i. the reputation and public aspects of the relationship.

(3) In determining whether two persons live together as a couple:

- a. no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
- b. a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.

(4) For the purposes of this Act, a de facto relationship ends if:

- a. the de facto partners cease to live together as a couple; or
- b. one of the de facto partners dies.

Family status

Family status under section 21(1) of the Human Rights Act 1993 includes:

- I. Having the responsibility for part-time care or full-time care of children or other dependents; or
- II. Having no responsibility for the care of children or other dependents; or
- III. Being married to, or being in a civil union or de facto relationship with, a particular person; or
- IV. Being a relative of a particular person: "being married to or being in a relationship in the nature of marriage with, a particular person".

De Facto

There are however exceptions to the above. You may impose restrictions on an employee who is married to or living in a relationship in the nature of a marriage with another employee if:

- there is a reporting relationship between them; or
- there is a risk that they will collude to the employer's detriment.

The exception also applies to a situation where an employee is married to or is living in a relationship in the nature of a marriage with an employee of another employer and there is the risk of collusion to the employer's detriment. These exceptions should not be invoked arbitrarily and without ensuring that they apply to the situation at hand. We recommend you obtain advice before using these exceptions.

Sexual orientation

Under the Human Rights Act 1993 sexual orientation means a heterosexual, homosexual, lesbian, or bisexual orientation. This provision does not deal with any types of relationship; however, the Holidays Act 2003 clearly defines a "partner" to include a de facto partner irrespective of the partner's sex. Therefore, your employees can apply for sick, or bereavement leave to care for a spouse who is of the same sex. The same entitlement applies where leave is sought to care for a sick dependent or bereavement leave is needed for a child with same sex parents.

Parental leave

The Parental Leave and Employment Protection Act 1987 defines "partner" to include married couples and relationships covered by section 2D of the Property Relationships Act 1976, Meaning of de facto relationship.

Married parents who are separated are entitled to parental leave, whereas employees in a de facto relationship must be living together. Therefore, employees living in a de facto relationship, including same, are entitled to parental leave if they meet the eligibility requirements as for all employees. See the A-Z guide on Parental Leave for eligibility requirements.

Holidays Act

As already noted, the Holidays Act 2003 defines "partner" to include a de facto partner. Therefore, your employees would be entitled to sick or bereavement leave to care for a de facto partner.

Conclusion

The commonsense approach should be to discriminate-in rather than to discriminate-out so that more people are included than excluded.

By being inclusive you can be reassured that you are not only complying with your obligation under the Human Rights Act 1993, but that you are creating and preserving good employment relationships because your approach is reasonable and fair.



Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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