



Holidays and leave

A GUIDE FOR EMPLOYERS



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Introduction

The Holidays Act 2003 is designed to create productive and mutually rewarding workplace relationships.

The Holidays Act 2003 provides minimum legal entitlements to:

- annual holidays
- public holidays
- sick leave
- bereavement leave.

In this handbook, we discuss holiday and leave entitlements, and how to calculate payments correctly. If you need more information about any matter, please contact the Department of Labour freephone on 0800 20 90 20 or visit our website www.dol.govt.nz

Principles underpinning the Holidays Act 2003

New Zealand law on holidays and leave has been based on three key concepts:

- For the purposes of rest and recreation, all employees should enjoy four weeks' paid annual holidays (sometimes called "annual leave") each year.
- Public holidays are for the observance of days of national, religious, or cultural significance, which, where possible, all employees should be entitled to take as leave. Where it is necessary for an employee to work on a public holiday, that work needs to be specially rewarded.
- The employment relationship is both financial and human. Therefore, after a period of employment, it is reasonable to expect that employers will support employees with sick leave and bereavement leave when required.

The Holidays Act 2003 reinforces these principles by balancing fairness between employers and employees, and recognising that, in some areas, existing arrangements, whilst framed differently from the Act, meet these principles.

Annual holidays entitlements

All employees are entitled to at least four weeks' paid holidays a year.

Employees get their annual holiday entitlements on their first and subsequent anniversaries after starting work.

From 1 April 2007, the minimum entitlement increased from three to four weeks' holidays. Employees with three weeks' holidays get their extra week's holiday entitlement on their anniversary date. This means that an employee who started work on 3 April gets their extra week's holidays on 3 April 2007, and an employee who started on 20 March gets their extra week on 20 March 2008.

The change to four weeks' annual holidays does not necessarily mean that employees who already have four or more weeks' holidays in their employment agreements qualify for an extra week's holidays. This depends on the specific wording of their employment agreements. If the employment agreement specifies a number of weeks' holidays, then the change to four weeks does not create an entitlement to an additional week's holidays. Some agreements may provide for one or more "additional" weeks' holidays to the statutory entitlement, and employers who have such agreements should seek independent advice about interpretation. Employers who provide above-minimum entitlements may choose to negotiate additional holiday arrangements with their employees in light of the change to four weeks.

Annual holidays can be taken at any time agreed between the employer and the employee. Employees must be given the opportunity to take at least two of the four weeks' holidays continuously, if they wish to do so.

Under two circumstances, the date on which the employee's entitlement accrues is adjusted:

- **When the business has an annual closedown period and an employee is not yet entitled to annual holidays:** This is covered on page 16 under "Regular annual closedowns".
- **When an employee takes unpaid leave of more than a week during the year:** This is covered on page 17 under "The effect of unpaid leave on annual holidays".

An employer and employee may agree on what four weeks' annual holiday means in their circumstances. Any agreement should ideally be recorded at the start of the employment relationship, even where it is clear what "four weeks" means. The agreement must be a genuine reflection of the employee's working week.

Where agreement cannot be reached, either party can seek the assistance of a Labour Inspector.

Where employees are permanently employed on a constant work pattern, establishing their entitlement is easy.

Where an employee is employed on a work pattern that changes during the year, for example going from part-time to full-time work, the employer and the employee should agree how the entitlement to four weeks' holiday is provided. Such an agreement may affect the annual holiday entitlements that the employee was earning under their previous work pattern. For example, the employee's entitlement could be provided as if the employee was a full-time employee for the whole period. Alternatively, the entitlement could be proportionate to the time in each form of work. Where a new agreement is reached, it is strongly advisable to record it in writing.

Where an employee is employed on a genuine fixed-term agreement of less than 12 months, the employee may be paid annual holiday pay with their salary – that is, separately identified in the employee's employment agreement and shown as a separate item on the pay slip (i.e. on a pay-as-you-go basis). This reflects the fact that these employees are not expected to reach the date on which they qualify for annual holidays.

More details of this approach are set out under "Employees on genuine fixed-term agreements (pay-as-you-go provisions)".

Many types of employees are described as "casual employees". The range of uses of this term means it is not possible to include a single definition of casual employee in the Act. However, where an employee's employment pattern is so intermittent or irregular that it is not meaningful or practicable to attempt to provide four weeks' paid annual holidays, the employee may be paid annual holiday pay with their regular pay (i.e. on a pay-as-you-go-basis).

Details of this approach are set out under “Employees with intermittent or irregular work patterns (genuine casual work)” on page 15. Employees paid on a pay-as-you-go basis do not become entitled to time off for annual holidays.

Where an employee has an irregular or changing work pattern over the entire 12-month period, either because of moving between full-time and part-time work or because of variable work patterns, the principle of four weeks’ annual holidays continues to apply. The method currently used in most payroll systems is to express the accruing entitlement in hours, with a holiday entitlement of 4/52 of an hour accruing for each hour worked.

If you keep records manually, make sure you:

- have an accurate wage and time record
- correctly complete your employees’ holiday and leave records.

You can then accurately calculate the average weekly earnings for the purposes of annual holiday pay by dividing the gross earnings for the year prior to the holiday by 52.

Examples of wages and time records, and of holiday and leave records, can be downloaded from the Department of Labour’s website www.dol.govt.nz or obtained by phoning the Department of Labour’s freephone on 0800 20 90 20.

Payment for annual holidays

Payment for annual holidays is at the greater of the ordinary weekly pay at the time the holiday is taken, or the employee’s average weekly earnings over the 12-month period before the annual holiday is taken.

Definitions:

“Ordinary weekly pay” and “average weekly earnings”

“Ordinary weekly pay” represents everything an employee is normally paid weekly, including:

- regular allowances, such as a shift allowance
- regular productivity or incentive-based payments (including commission or piece rates)
- the cash value of board or lodgings
- regular overtime.

Intermittent or one-off discretionary payments are not included in ordinary weekly pay.

1. For many people, ordinary weekly pay is quite clear because they are paid the same amount each week.
2. Where ordinary weekly pay is unclear for any reason, the Act provides a formula for working it out. Ordinary weekly pay is established by:
 - going to the end of the last pay period
 - from that date, going back
 - four weeks, or
 - if the pay period is longer than four weeks, the length of the pay period
 - taking the gross earnings for that period
 - deducting from the gross earnings any payments that are irregular or that are discretionary
 - dividing the answer by four.
3. Sometimes an employment agreement will include a specified ordinary weekly pay. If this is the case, the figure in the employment agreement should be compared with the actual ordinary weekly pay (as calculated

under 1 or 2 above), and the greater of the two should be used as “ordinary weekly pay”.

“Average weekly earnings” are determined by calculating gross earnings over the 12 months prior to the end of the last payroll period before the annual holiday is taken, and dividing that figure by 52. The following payments make up gross earnings and should be included in the calculation:

1. Salary and wages.
2. Allowances (but not reimbursing allowances).
3. All overtime.
4. Piece work.
5. At-risk, productivity or performance payments.
6. Commission.
7. Payment for annual holidays and public holidays.
8. Payment for sick and bereavement leave.
9. The cash value of board and lodgings supplied.
10. Amounts compulsorily paid by the employer under ACC (i.e. the first week of compensation).
11. Any other payments that are required to be made under the terms of the employment agreement.

Unless the employment agreement says otherwise, reimbursement payments and discretionary or ex gratia payments (for example, genuinely discretionary bonuses) are not included in these calculations; nor are payments made by ACC or when an employee is on voluntary military service.

Remember: When you have calculated both “ordinary weekly pay” and “average weekly earnings”, the greater figure is used for the employee’s annual holiday pay.

When an employee is to take annual holidays, the first step is to determine what portion of the entitlement is being taken, taking into account what a week means for that employee. This portion may be a period of weeks, or a period of less than a week.

For example, if an employee who works three days per week has agreed with their employer that their four week holiday entitlement will be 12 days, then takes a day off work, this will be one-third of a week of annual holidays.

In this case, payment would be a proportion of ordinary weekly pay or average weekly earnings based on the period of leave taken, namely, one-third of the greater of those weekly earnings.

The Act describes how you should calculate annual holiday payments in a variety of circumstances. These calculations are outlined in the following subsections of this booklet:

- Employees after completion of 12 months' service.
- Employees during their first year of service.
- Employees who take annual holidays in advance of entitlement.
- On an employee's resignation or termination.
- Employees on genuine fixed-term agreements.
- Employees with intermittent or irregular work patterns.

Employees after completion of 12 months' service

For an employee after completion of 12 months' service, the calculation of annual holiday pay requires the comparison between ordinary weekly pay and average weekly earnings. The greater amount should be paid to the employee. This calculation needs to occur at the time the employee takes the holiday.

These calculations apply to all employees, including those whose pay has varied over the year or whose work pattern has changed during the year.

If this is being done for an employee who has worked the same hours for the same rate of pay throughout the year, and hasn't received any bonus or additional payments, the answer is likely to be their ordinary weekly pay. It is important to check that the employee hasn't had a period of overtime earlier in the year that could affect the average.

Employees during their first year of service

During the first year of employment, three circumstances can arise that require the calculation of the payment due for annual holidays:

- The employee may seek, and the employer may approve, the taking of annual holidays in advance. Payment for holidays taken in advance is covered below.
- The employer may have a regular annual closedown of the workplace. Entitlements in these circumstances are covered on page 16, under “Regular annual closedowns”.
- The employee may resign or the employer may terminate the employment. Entitlements on resignation or termination are covered in Chapter 7 of this booklet.

Employees who take annual holidays in advance of entitlement

Employees can ask to take paid annual holidays in advance where they do not have an entitlement – either because they have not completed 12 months of service, or because they have used all of their entitlement. In these circumstances, approval is at the discretion of the employer, unless a right to take annual holidays in advance is included in the relevant employment agreement.

The payment for holidays taken in advance is still based on the greater of the employee’s ordinary weekly pay or average weekly earnings. To calculate average weekly earnings where the employee has less than 12 months’ service, the gross earnings from starting work until the last pay period before the holiday are divided by the number of weeks worked.

To calculate average weekly earnings where the employee has been employed for more than 12 months but is taking annual holidays in advance of entitlement, the calculation covers the 12 months prior to the end of the last pay period before the holiday.

There is no longer a requirement for an annual check whether the employee has received the greater of ordinary or average pay for annual holidays in advance of entitlement, commonly known as a “top-up” or “wash-up”.

When an employer approves annual holidays in advance, the employee should be asked to agree in writing that the employer is able to reduce any final pay to recover from the employee the amount of any overpayment of holiday pay that results from taking annual holidays in advance.

On an employee's resignation or termination

The Act provides two ways to calculate payment for annual holidays on resignation or termination. These are:

- where the employment ends within 12 months (that is, before the employee is entitled to annual holidays)
- where the employment ends after 12 months (that is, where an entitlement to take annual holidays has arisen for the first and any subsequent years' employment).

Where an employee resigns or employment ends in the first 12 months of service, they are entitled to a payment for annual holidays of 8% of gross earnings during the employment. This entitlement is reduced by any payment for annual holidays taken in advance during the employment or by any payment for annual holidays on a pay-as-you-go basis.

Where an employee resigns or employment ends after becoming entitled to annual holidays, the first amount to be calculated is the greater of ordinary weekly pay or average weekly earnings for the annual holidays to which the employee is entitled under the Act, as if the holidays were being taken at the end of the employment.

If the employee's rate of ordinary weekly pay at the time is not clear, the calculation in the "Definitions" box on page 8 is used to establish the correct figure. The 12 months prior to leaving are used to establish average weekly earnings.

The second amount to be calculated is annual holiday pay for the period since the employee last became entitled to holidays, which is calculated at 8% of gross earnings since the entitlement last arose.

The payment for any annual holidays taken in advance is deducted from the final amount, as is any amount paid on a pay-as-you-go basis.

Example:

Calculation of final payment for annual holidays

Ted leaves his employment on 12 May 2009, and the last date he became entitled to annual holidays was 12 April 2009. Ted is entitled to:

- payment for any holidays remaining of his four week entitlement on 12 April 2009 (and payment for any outstanding holidays from earlier entitlements, if any) at the greater of average or ordinary weekly earnings
- payment at 8% of gross earnings for the one month period between 12 April and 12 May.

Employees on genuine fixed-term agreements (pay-as-you-go provisions)

The entitlement to four weeks' paid holiday after 12 months' service is sometimes not the best way to deal with holidays when the employment relationship is short-term.

The Employment Relations Act allows for fixed-term employment agreements if, on appointment, there is a genuine reason for the fixed term. Examples of genuine reasons:

- "The job is to prune trees in the west block, and your job will cease when all of the trees are pruned. I estimate that this pruning job will take you and your co-workers two months from the start date."
- "This appointment is for a fixed term to cover for an employee who is taking four months' leave. The employee will return on [dd/mm/yyyy], and there will be a hand-over period of one week. As a consequence, your employment will cease on [dd/mm/yyyy]."

Where such a fixed-term agreement is for less than 12 months, an employee may agree to the employer adding 8% to their gross weekly earnings in lieu of annual holidays or in lieu of getting an aggregated 8% at the end of the fixed term.

Any such arrangement should be included in the employment agreement, and the 8% should appear as a separate and identifiable amount on the employee's pay slip. On the completion of the fixed term, the employee will have received all pay for annual holidays. No further payment will be outstanding and no holidays are available.

If the employee is later employed on one or more further fixed-term agreements of less than 12 months with the same employer, the same arrangement can be made, even when there is no break in employment, provided the two parties agree and document the arrangement.

Moving from fixed-term to permanent employment with the same employer

If an employee enters into a permanent working arrangement, the payment of the additional 8% annual holiday pay in the employee's regular pay must cease.

The employee will then become entitled to four weeks' annual holidays one year after the final fixed-term period started. Because the employer has already paid the additional 8% annual holiday pay during the fixed-term period, the pay for annual holidays is reduced by the amount of holiday pay already paid at 8% during the final period of fixed-term employment.

Where the fixed-term agreement is not genuine or exceeds 12 months

If an employer has incorrectly paid annual holiday pay on a pay-as-you-go basis, after 12 months' continuous employment, the employee will become entitled to paid annual holidays, and any amount paid on a pay-as-you-go basis may not be deducted from the employee's annual holiday pay.

Examples of circumstances where this occurs are:

- where a fixed-term agreement was not genuine
- where a fixed-term agreement was for a period of greater than 12 months.

Issues to consider with pay-as-you-go arrangements

Fixed-term agreements are, in some cases, linked to the completion of projects. In these circumstances, there is a risk to the employer that the fixed

term will exceed 12 months, at which time the employee becomes entitled to paid annual holidays, despite having already been paid on a pay-as-you-go basis.

Therefore, pay-as-you-go arrangements are not recommended where it is possible that the employment will last longer than 12 months.

You should seek to clarify entitlements and renegotiate the relevant employment agreement as soon as it appears likely that a fixed-term arrangement will unexpectedly last more than 12 months.

Employees with intermittent or irregular work patterns (genuine casual work)

Many employees who are described as “casual” are part-time employees whose future employment is actually clear – for example, supermarket or hospitality employees whose work pattern is established on a fortnightly roster. These employees are entitled to four weeks’ holiday calculated as described in the “Definitions” box on page 8.

For a minority of employees, however, this is not the case.

Generally, these are employees whose employment is triggered by an event that cannot be accurately anticipated, or whose work pattern can be described as so irregular or intermittent that the concept of four weeks away from work is difficult to apply. In such cases, an arrangement can be agreed to add 8% of the employee’s gross earnings as annual holiday pay to their pay.

For these employees, the arrangement must be by genuine agreement and be included in the employment agreement, and the 8% annual holiday pay should appear as a separate and identifiable amount on the employee’s pay slip.

On the termination of the employment relationship, no additional pay for annual holidays is due.

If an employee agrees to enter into such an arrangement, the employer would be wise to keep it under review to see whether a regular cycle of work has developed. If this occurs, the employer and employee should enter into a new employment agreement that provides for annual holidays to accrue, and that removes the 8% payment.

Examples:

Genuinely irregular or intermittent employment

The Holidays Act 2003 contains no reference to “casual work” because the term is applied to so many types of employment arrangements. Instead, it refers to intermittent or irregular employment. Here are two examples of intermittent or irregular employment for the purposes of the Holidays Act:

- A retired employee who is called back in emergencies to cover for sickness.
- A specialist tradesperson who is employed only when a particular process (such as repairing a broken machine) is required.

When should annual holiday pay be paid?

Employees are entitled to receive their pay for annual holidays before the holiday commences, unless the employer and employee agree that the normal pay cycle will continue undisturbed by the time off work.

This provision is designed to ensure that employees have money available to them to pay for the travel and accommodation expenses involved in a holiday, which often are required either at the start of a holiday or in advance.

If an agreement is reached to pay the employee any annual holiday pay in their normal pay cycle, it is advisable to record it either as part of the employment agreement or in writing on a case-by-case basis.

Regular annual closedowns

The method of calculating the annual holiday entitlement is different where the employer chooses to have a regular annual closedown. This closedown can occur either:

- across the entire workplace (for example, where a company closes over the Christmas/New Year period), or
- for part of an enterprise (for example, where the factory closes for maintenance while the office, dispatch and sales departments remain open).

The employer may implement such a closure once a year and require employees to take annual holidays during the period of the closedown, even where this requires employees to take time off for which they are not fully reimbursed. The employer is required to provide employees with at least 14 days' advance notice of the closedown.

For employees in their first year of employment, the level of annual holiday pay for the period of the closedown can be established by:

- the employer paying the employee 8% of gross earnings to date, or
- the employer and employee agreeing to the employee taking annual holidays in advance and being paid, even though the leave has not yet accrued.

If you are in doubt, the Department of Labour can assist with guidance on 0800 20 90 20.

For all employees whose work is subject to a regular annual closedown, the employer can nominate a date that will be treated as the date that the closedown begins, and on which the employees become entitled to annual holidays. This date must be reasonably connected to the timing of the regular annual closedown. For example, where there is a Christmas closedown, the date could be set at 15 December to ensure that it always comes before the annual closedown commences.

Aside from this, an employer cannot nominate a particular date for annual holiday calculations.

An employer who wants to implement more than one closedown in any year can do so with the agreement of their employee or employees, but cannot direct them to take annual holidays using the above provisions, nor is the date of entitlement to annual holiday adjusted by a second closedown.

The effect of unpaid leave on annual holidays

When an employee takes unpaid leave of more than a week during the year, this can be managed in one of three ways:

- The employer can choose to extend the time required before the employee becomes entitled to annual holidays by the period of unpaid leave in excess

of one week. That is, if an employee takes two weeks' unpaid leave, they become entitled to annual holidays one week after the anniversary of the starting date of employment.

- The employer and employee can agree that an employee's average weekly earnings calculation will be modified to reflect the number of whole or part weeks greater than one week that the employee was on unpaid leave. For example, if an employee takes two weeks' unpaid leave during the year, it can be agreed that the annual holiday pay is calculated on the basis of a 51 week year, not on the basis of 52 weeks.
- The employer and employee can agree that the unpaid leave will have no effect on the employee's annual holiday entitlement. Time while an employee is on ACC, parental leave or leave for voluntary military service does not affect the anniversary date for annual holiday purposes.

Employment agreements

The annual holiday provisions in the Holidays Act 2003 apply even if the employment agreement is silent on the subject of holidays.

Many employment agreements developed before April 2004 contained provisions that varied the provisions of the Holidays Act 1981. Such variations were often to the benefit of the employee – for example, by providing additional annual holidays, establishing a higher rate for annual holiday pay, or providing consultative arrangements about closedowns.

The Holidays Act 2003 does not prevent the employer providing the employee with enhanced entitlements. However, employers and employees should have reviewed such arrangements to ensure they were not affected by the changes made by the Holidays Act 2003.

Particularly under the 1981 legislation, the concept of "overall advantage" was sometimes used to establish whether variations in employment agreements were legal. This concept no longer applies. The Holidays Act 2003 makes clear that each component of holiday arrangements must be at least as favourable to the employee as the entitlements specified in the Act.

This means, for example, that an employer cannot provide an employee with an extra week of annual holidays in exchange for the employee giving up their public holiday entitlements.

Public Holidays

Entitlements

Employees are entitled to a paid day off on a public holiday if it would otherwise be a working day. These public holidays are separate from and additional to annual holidays.

The public holidays

There are two groups of holidays, with slightly differing entitlements applying to each:

- Christmas and New Year: Christmas Day (25 December), Boxing Day (26 December), New Year's Day and the day after (1 and 2 January).
- All other holidays: Waitangi Day (6 February), Good Friday and Easter Monday (dates variable), ANZAC Day (25 April), Queen's Birthday (first Monday in June), Labour Day (fourth Monday in October) and Provincial Anniversary Day (date determined locally).

The public holidays over the Christmas and New Year period have special arrangements:

- If the holiday falls on a weekend, and the employee doesn't normally work on the weekend, the holiday is transferred to the following Monday or Tuesday so that the employee still gets a paid day off if the employee would usually work on these days.
- If the holiday falls on a Saturday or Sunday and the employee normally works on that day, the holiday remains at the traditional day and the employee is entitled to that day off on pay. An employee cannot be entitled to more than four public holidays over the Christmas and New Year period, regardless of their work pattern.

All other public holidays are celebrated on the day on which they fall. In years where Waitangi Day (6 February) or ANZAC Day (25 April) fall at the weekend, employees who do not normally work on the weekend have no entitlement to payment for the day.

In light of a recent Supreme Court decision, an employer and employee cannot agree to transfer a public holiday from the day listed in the Holidays Act 2003 to another day.

However, as an exception to the above, the Holidays Act 2003, as amended by the Holidays (Transfer of Public Holidays) Amendment Act 2008 allows employees working shifts that start and end on different days to transfer the public holiday, by agreement with their employer, so that the public holiday covers one whole shift. It is important to note that the transfer can only take place if certain requirements are met, such as that the employee is due to work a shift in the period to which the public holiday is transferred.

For further information see the fact sheet – Transferring public holidays – entitlements for employees working shifts that cross midnight.

Taking a public holiday

Thinking about whether a day would “otherwise be a working day” is key to determining an employee’s entitlement regarding public holidays.

In most cases, whether a day would “otherwise be a working day” is clear because the working week or roster is constant and both the employer and employee can understand and agree about whether the employee would otherwise work on the day.

Where the employer and the employee cannot agree whether a day would “otherwise be a working day”, they should consider the following issues:

- What the employment agreement says.
- The employee’s usual work patterns.
- The employer’s rosters or other similar systems.
- The reasonable expectations of the employer and employee as to whether the employee would work on the day concerned.
- Whether the employee works for the employer only when work is available.
- Any other relevant factors.

If the employer and employee are unable to reach agreement, a Labour Inspector has the power to determine the matter, taking into consideration the same issues.

If an employee has a day off on a public holiday, the employee is paid for that day if it would “otherwise be a working day”.

The Department of Labour’s Holidays Online Tool can help show whether a day would “otherwise be a working day” for an employee. See www.dol.govt.nz/onlinetools

Examples:

“Would otherwise be a working day”

- If a part-time employee normally works four hours each day on Tuesday and Wednesday and normally works eight hours on Friday, the employee will be given Good Friday off with eight hours’ pay, but will not be entitled to pay for Easter Monday.
- Where an employee’s roster requires three 10-hour days on Monday to Wednesday one week (week one) and the same hours on Thursday to Saturday the following week (week two), and if week one coincides with the week in which Good Friday falls, this employee will not get paid for Good Friday or Easter Monday (that will fall in week two) because they would not have been scheduled to work on that Friday or Monday. If, however, week two coincides with Good Friday, the employee will be entitled to a holiday on pay for both Good Friday and Easter Monday.

Payment when the employee does not work on a public holiday

The employee is paid as if they had worked as normal on the day and is entitled to be paid their “relevant daily pay” (see page 25). For employees working a regular pattern of hours, the pay cycle continues unchanged.

An employee who does not normally work on the day in question and who does not work is not entitled to a payment for the day.

For example, a part-time employee who never works on Friday has no entitlement to payment for Good Friday.

Payment for working on public holidays

The basis for payment for working on a public holiday is “relevant daily pay” (see page 25). If an employee works on any public holiday, that work attracts a minimum payment of time and a half for the time they actually work on the day. To ensure this minimum time and a half payment, the Holidays Act provides that an employee is entitled to the greater of:

- “relevant daily pay” less any “penal rates” plus half that amount again (time and a half), or
- “relevant daily pay” including any “penal rates”.

Where the employee is working a shift that includes some time on the public holiday, only the time actually worked on the public holiday attracts the minimum time-and-a-half payment; the balance may be paid at the normal rate of pay.

Where the person is specifically employed only to work on public holidays (for example, an employee who is only employed to work at the racetrack for the Waitangi Day meeting), there is no entitlement to an alternative day's holiday, but the employee must still be paid at least time and a half.

Some employment agreements specify a salary rate with unspecified hours or patterns of work, or set specific wage rates for public holidays. Employees on such agreements must be paid at least time and a half if they work on a public holiday.

Employment agreements can also include specified penal rates for particular days worked – for example, double time for working on a Sunday. Where a public holiday falls on such a day, the employee is entitled to relevant daily pay including any penal rate in the employment agreement, or time and a half of relevant daily pay excluding any penal rate, whichever is the greater. They are not entitled to time and a half on top of the penal rate in the employment agreement.

Therefore, an employee who works on an ANZAC Day that falls on a Sunday, and who is entitled under their employment agreement to double time rates on Sunday, receives double time, as the double time rate is more than the time and a half provided for in the Holidays Act.

The Department of Labour’s Holidays Online Tool calculates “relevant daily pay” and payment for working on public holidays. See www.dol.govt.nz/onlinetools

Payment where an employee is sick or bereaved on a public holiday

Where the employee would have been working on a public holiday but is sick or bereaved, the day would be treated as a paid unworked public holiday. Therefore:

- the employee would be paid their relevant daily pay but would not be entitled to time and a half or an alternative holiday
- no sick or bereavement leave would be deducted.

Alternative holidays for working public holidays

If an employee is required to work on a public holiday, and it is a day that would “otherwise be a working day” for the employee, they are entitled to a whole day’s alternative holiday at a later stage.

Unlike earlier legislation, the entitlement to an alternative holiday now applies consistently to all public holidays, including ANZAC Day and Waitangi Day.

This provision includes employees working shifts and some employees on call. Both types of employees get the full day off, even if they only work for a small part of the day.

Definition:**“Penal rate”**

A penal rate is an identifiable additional amount that is payable to compensate the employee for working on a particular day or type of day.

Examples include:

- a Saturday payment
- a Sunday payment
- a public holiday payment.

Allowances such as wet weather money are not penal rates, nor are overtime rates or special rates for working a sixth or seventh day in a week.

Definition:

“Relevant daily pay”

Relevant daily pay is used to calculate payment for public holidays, alternative holidays, sick leave and bereavement leave. Relevant daily pay is the amount the employee would otherwise have earned on the day if they had worked, and includes:

- productivity or incentive payments, including commission or piece rates, if those payments would have been received had the employee worked
- overtime payments
- the cash value of board and lodgings provided.

In cases where the amount is not clear, the payment is calculated by dividing the employee's gross earnings for either:

- the four weeks before the end of the pay period immediately before the holiday or leave, or
- where the pay period is longer than four weeks, the pay period before the calculation by the number of whole or part days the employee either worked or was on paid leave or holiday during that period.

Employment agreements may specify a rate of relevant daily pay, but only if that rate is greater than or equal to the rate determined according to the above.

The Department of Labour's Holidays Online Tool calculates “relevant daily pay” and payment for working on public holidays. See www.dol.govt.nz/onlinetools

Where an alternative holiday does not apply

Where an employee:

- works on a public holiday and that day would not otherwise be a working day, or
- is on call on a public holiday but is not required to restrict activities, or
- is only employed to work on public holidays there is no entitlement to an alternative holiday.

Taking alternative holidays

The alternative holiday can be taken at any time mutually agreeable to the employer and employee, and is paid at the employee's relevant daily pay for the day taken off.

If the employer and employee cannot agree, the alternative holiday may be taken at a time determined by the employee, having regard to the employer's view of what is convenient. The employee must give 14 days' notice of when they are taking an alternative holiday.

If the alternative holiday is not taken within 12 months of it accruing, the employer can direct the employee to take the alternative holiday.

Alternatively, at that time, the employee may ask the employer to make a payment instead of having the holiday off. If the employer agrees to make a payment, the level of payment is a matter of agreement between the employer and employee.

Where an employee wishes to take an alternative holiday, and has accrued several alternative holiday entitlements, an employer can't make the employee use up the holidays in the order they were earned (i.e. oldest first).

If any alternative holidays are outstanding at the time of resignation or termination, these are paid out at the rate of pay for the employee's last day of work, i.e. the relevant daily pay.

The requirement to work on a public holiday

An employer may require an employee to work on a public holiday when:

- the public holiday falls on a day the employee would otherwise have worked, and
- the employee's employment agreement specifies that the employee will be required to work on the holiday.

Employment agreements

Most employment agreements required amendment or clarification as a result of the changes in the Holidays Act 2003 so that they specifically provided that an employee would receive at least time and a half for working on a public holiday.

This applied to all employees, including salaried employees.

All existing agreements had to be amended by 1 April 2007 to provide for at least time and a half.

New employment agreements need to specifically provide that an employee will receive at least time and a half for working on a public holiday.

Any such provision must be consistent with the Holidays Act 2003.

For help in preparing an employment agreement, visit the Department of Labour's Employment Agreement Builder, see www.dol.govt.nz/onlinetools

The builder includes a range of frequently used clauses that can be customised for your needs. These include clauses that are required by legislation, including clauses that reflect the provisions of the Holidays Act 2003.

An employment agreement cannot in future specify that the rate of pay already includes a component for time and a half.

In most cases, what time and a half means will be easy to identify. For example, if the employee is paid an hourly rate and no additional payments, then they are entitled to one and a half times that rate for the time worked on a public holiday, as in the following clause:

“The pay rate for this position is \$15 per hour. For time worked on a public holiday, the pay rate is \$22.50 per hour (time and a half).”

In other cases, there are a number of ways this can be done appropriately, depending on the wishes of the employer and employee. This may be a day rate, part-day rate or hourly rate. The basis on which pay for work on a public holiday is calculated should ideally be included in the employee's employment agreement, if the person is likely to work on a public holiday.

For example, if a salaried employee has regular hours of work, the relevant daily pay can be calculated by dividing the annual salary by 52, and then by the number of days worked. The amount of the time-and-a-half payment should then be based on the portion of the normal day that the employee actually works.

For example, for an employee whose salary is \$40,000 per annum and who normally works five eight-hour days per week:

- weekly pay is \$769.23
- the relevant daily pay is \$153.85 (weekly pay divided by five)
- time and a half the relevant daily pay is \$230.78.

The employee would be paid for the time actually worked on the basis of this amount. For example, if the above employee worked half a day, they would need to be paid \$115.39 (half of \$230.78). Where it is difficult to tell what an employee's pay for a public holiday would be, a Labour Inspector can help determine the employee's entitlement on a public holiday.

If there is a dispute over whether the rate does or does not include a provision for time and a half for working on a public holiday, a Labour Inspector can determine the matter for the parties.

The effect of various work patterns

The Holidays Act 2003 addresses the public holiday entitlements for employees in a number of work patterns where entitlements were previously unclear, including:

- employees working shifts
- employees on call
- where the parties dispute whether a day would “otherwise be a working day”.

Employees working shifts are entitled to no less than:

- their relevant daily pay for their normal rostered shift when they take a public holiday as a day off work
- the greater of time and a half or relevant daily pay including penal rates in their employment agreement for hours worked on the public holiday plus, if the day would otherwise be a working day, an alternative holiday for each public holiday or part of a public holiday the shift covers. For example:
 1. An employee starts at 10 pm on Christmas Day and ceases work at 6 am on Boxing Day. The employee is entitled to eight hours pay of at least time and a half and two alternative holidays (one each for Christmas and Boxing Day).
 2. An employee works from 10 pm on Christmas Eve until 6 am on Christmas morning. The employee works the same shift beginning on Christmas night, finishing on the morning of Boxing Day. The employee is entitled to two hours’ pay at ordinary time and six hours’ pay of at least time and a half for the first shift, to eight hours’ pay of at least time and a half for the second shift, and to two alternative holidays (one each for Christmas Day and Boxing Day).
 3. An employee working an eight hour shift starting on ANZAC Day at 10 pm is entitled to two hours’ pay of at least time and a half, six hours’ pay at the normal hourly rate, plus a full day’s alternative holiday.

Employees on call on public holidays have different entitlements depending on the nature of the call-out arrangement:

- If the employee is called out, they are entitled to at least time and a half for the time worked, plus a full day's paid alternative holiday if the day would otherwise be a working day for them.
- If the employee is required to restrict activities on the day to the extent that they have not enjoyed a full holiday – for example, if the employee is required to stay at home all day, but is not called out – the employee is entitled to a full day's paid alternative holiday if the day would otherwise be a working day for them.
- If the employee is on call, but is not required to restrict activities – for example, if the employee can choose not to accept the call-out – entitlement to an alternative holiday would arise only if the employee accepts a call-out and the day would otherwise have been a working day for the employee.

If the employee is not called out but the day would otherwise be a working day, they would be entitled to their relevant daily pay. Any payment for being on call would be as included in the employee's employment agreement or as negotiated by the parties.

Entitlements to an alternative holiday do not apply where the person called out has an employment relationship with the employer only on the public holiday.

Transitional arrangements for “days in lieu”

On 1 April 2004, any “days in lieu” owed to the employee for working on earlier public holidays became “alternative holiday” entitlements under the Holidays Act 2003. All of the rules about alternative holidays apply to these “days in lieu”.

Sick Leave

Entitlements

For most employees, there is a minimum provision of five days' paid sick leave a year after the first six months of continuous employment and an additional five days' sick leave after each subsequent 12-month period. Exceptions are covered under "The effect of various work patterns".

Sick leave can be used when an employee is sick or injured, or when the employee's spouse or a dependent person (such as a child or elderly parent) is sick or injured and needs care.

At any time when the employee does not have a sick leave entitlement (including during the first six months of employment), the employer and employee can agree to the employee anticipating the sick leave entitlement. In this case, any sick leave taken can be deducted from the next entitlement that arises.

Relationship to ACC entitlements

The following rules apply in relation to the ACC scheme:

- When the employee is taking leave for the first week of a non-work accident, sick leave may be used.
- If an employee has a work-related accident, the employer has to pay "first week compensation" and cannot require the employee to take that time off as sick leave.
- If an employee has a work-related or non-work related accident and remains on weekly compensation, the employer cannot require the employee to take time off as sick leave.
- If an employee is receiving weekly compensation from ACC, the employer has no obligation to pay the employee.
- Where the period of leave on ACC is in excess of five days (for either workplace or non-work accidents), the employer and employee can agree that the employer will top up the ACC payment from 80% to 100% by reducing the employee's sick leave entitlement by one day for each five days' leave taken.

Unused sick leave under the Holidays Act 2003 is automatically carried over. For example, if someone uses only one day's sick leave from the five-day entitlement in a 12-month period, they may carry over the other four days, so in the next 12-month period, the total entitlement is nine days' sick leave. The maximum accumulation under the Act is 20 days' leave, although employment agreements can provide more generous sick leave and/or accumulation.

Accumulated sick leave cannot normally be exchanged for cash, or form part of any final payment to the employee on resignation or termination, unless the employment agreement requires this.

Sick leave entitlements are not pro-rated in any way. For example, even if a part-time employee works three days a week, they become entitled to five days' sick leave a year after being in employment for six months. Sick leave also accumulates to up to 20 days for part-time employees.

Payment for sick leave

Payment for sick leave taken should be the amount the employee would ordinarily be paid if they had been at work on the day leave is taken (that is, their relevant daily pay). For example, where an employee who normally works eight hours Tuesday to Friday and four hours Saturday is sick on Saturday, a payment of four hours is due.

The payment can include overtime when overtime would have been worked on the day. For example, if the employment agreement specifies an hour for lunch but the employee, at the employer's request, usually takes only half an hour for lunch, the employee's sick leave payment would include the extra half hour normally paid for.

The Department of Labour's Holidays Online Tool calculates "relevant daily pay" for sick leave. See www.dol.govt.nz/onlinetools

Where the employee would have been working on a public holiday but is sick, the day would be treated as a paid, unworked public holiday. Therefore:

- the employee would be entitled to their relevant daily pay but would not be entitled to time and a half or an alternative holiday, and
- no sick leave would be deducted.

Where the employee works continuously but to an irregular pattern, sick leave would be payable if the employee was rostered to work on the particular day leave is taken, or could have expected to be rostered. The amount of pay is what the employee would otherwise have earned – that is, the relevant daily pay. Payment for sick leave is made in the normal pay cycle.

Informing the employer and proof of illness

Employees are required to inform the employer, at the earliest opportunity, of the intention to take sick leave – preferably before they are due to start work, but otherwise as early as possible after falling sick.

The employer has the right, after the employee has been sick or injured for three calendar days, to require the employee to provide proof, such as a medical certificate, of the injury or illness.

The three calendar days are not interrupted by a scheduled break.

Therefore, an employee taking a day's sick leave on a Friday, then a two-day scheduled weekend break, can be asked to provide proof of the illness or injury if they take another day of sick leave on the Monday, even if that day is only the second day of sick leave.

Where the employer has reasonable grounds to suspect that the sick leave being taken is not genuine, the employer may require the employee to provide proof of illness or injury within the three calendar days if they:

- inform the employee that proof is required as soon as possible after forming the suspicion, and
- agree to meet the employee's reasonable expenses in obtaining the proof.

Where the employee is using sick leave to care for another person, such as a spouse or child, the employer can similarly require proof of illness or injury for that person.

The employer cannot require the employee to visit a particular doctor, i.e. the employee has the right to choose their own doctor.

If an employee fails, without reasonable excuse, to provide proof of illness or injury when required by the employer to do so, the employer does not have to pay the employee for the leave until proof is provided.

In any circumstance where the employer comes to believe that the employee has misused a sick leave entitlement, this issue can be dealt with as an employment relationship problem under the Employment Relations Act. Failure to request proof of illness or injury at the time will not preclude the employer from using the normal processes for raising, progressing and determining problems of employee performance, and the mediation services of the Department of Labour can be asked to help resolve the dispute.

The effect of various work patterns

Most people are entitled to sick leave whether they are full- or part-time, permanent or fixed-term employees, providing that they have completed six months' continuous service.

The Act also provides sick leave entitlements after six months to employees whose employment is not continuous if, during those six months, they have worked for the employer for:

- an average of at least 10 hours per week, including
- at least one hour per week or 40 hours per month.

People on a series of fixed-term agreements, or employees sometimes described as "casual", would become entitled to sick leave if they met this test.

The payment for sick leave would be made where it is a day that the employee would otherwise have worked and would be made at the employee's relevant daily pay for the day. The entitlement to sick leave is subject to the same test each 12 months.

If in any year the work pattern does not meet the above test, then no new sick leave entitlement arises. However, the employee may requalify for sick leave on the basis of six months' service.

Transitional arrangements

Any special leave to which an employee was entitled under the Holidays Act 1981 automatically became sick leave on 1 April 2004. For example, if an employee had three days' special leave left on 1 April 2004, this became three days' sick leave.

Employment agreements

Prior to 1 April 2004, the Holidays Act 1981 provided a joint sick leave and bereavement leave entitlement called "special leave". Many employment agreements used the language of that Act to express employees' conditions for leave.

If an agreement is framed in this way, even if its provisions in some way exceed the minimum established on 1 April 2004, the employer, employee and union should consider renegotiating the employment agreement to reflect the provisions and language of the Holidays Act 2003.

Failure to make needed changes may create additional leave entitlements that were not intended.

When employers, employees and unions are renegotiating employment agreements, any reference to each form of leave in the agreement (such as domestic leave, special leave or family leave) must maintain the minimum sick leave entitlement of five days a year while also reflecting any special arrangements between the employer and their employees.

If the existing agreement has sick leave, accumulation or other provisions that are more favourable than the Holidays Act 2003, the relationship between the Act and those provisions should be clearly expressed.

Be sure that any renegotiated changes are in writing, as "custom and practice" may not be sufficient if there is a dispute.

Bereavement Leave

Entitlement

There are two separate entitlements to bereavement leave after six months' employment:

- On the death of an immediate family member, the Act provides for up to three days paid leave. This can be taken at any time and for any purpose genuinely relating to the death. "Immediate family members" are the employee's spouse or partner, parent, child, sibling, grandparent, grandchild or the spouse's parent. Where there is a multiple bereavement, the employee is entitled to three days' bereavement leave in respect of each death.
- In the event of a death outside the immediate family that causes a person to suffer a bereavement, up to one day's paid leave may be taken if the employer accepts that the employee has suffered a bereavement. In considering whether a bereavement has occurred, the employer should take into consideration:
 - how close the association was between the employee and the other person
 - whether the employee is responsible for any aspects of the ceremonies around the death
 - whether the employee has any cultural responsibilities they need to fulfil in respect of the death.

Using bereavement leave

Employees do not have to use bereavement leave immediately, or on consecutive days. Following are examples of bereavement leave allowable under the Holidays Act 2003:

- Bob is entitled to three days' paid bereavement leave when his brother Jack is killed in an accident while living overseas. The funeral is in Sydney. Bob uses two days of paid bereavement leave to attend the funeral. Six months later, Bob takes off another day of bereavement leave to attend a local memorial service.

- Rangi is entitled to three days' paid bereavement leave when his grandmother dies. He takes two days immediately to attend her tangi. A year later, he takes the third day's paid leave to attend the unveiling of his grandmother's headstone.
- Joyce takes two days' paid bereavement leave when her sister dies after a long illness. Over the next several weeks, she takes two more half days' paid leave to talk to the lawyer about settling the details of her sister's will.

The Department of Labour can be contacted on 0800 20 90 20 to provide information on managing bereavement leave.

Payment for bereavement leave

Payment for bereavement leave should be at the rate the employee would ordinarily be paid on the day leave is taken – that is, the relevant daily pay. Payment for bereavement leave is made in the normal pay cycle.

Where the employee would have been working on a public holiday but suffers a bereavement, the day would be treated as a paid, unworked public holiday. Therefore:

- the employee would be paid relevant daily pay but would not be entitled to time and a half or an alternative holiday, and
- no bereavement leave would be deducted.

The Department of Labour's Holidays Online Tool calculates "relevant daily pay" for bereavement leave. See www.dol.govt.nz/onlinetools

The effect of various work patterns

Most people are entitled to bereavement leave whether they are full- or part-time, permanent or fixed-term employees, providing that they have completed six months' continuous service.

The Act also provides bereavement leave entitlements after six months to employees whose employment is not continuous if they have worked for the employer for:

- an average of at least 10 hours per week, including

- at least one hour per week or 40 hours per month.

Employees on a series of fixed-term agreements, or employees sometimes described as “casual”, would become entitled to bereavement leave if they met this test.

The payment for bereavement leave would be made where it is a day the employee would otherwise have worked and would be made at the employee’s relevant rate of pay for the day.

The entitlement to bereavement leave is subject to the same test each 12 months. If in any year the work pattern does not meet the above test, bereavement leave entitlement ceases. However, the employee may requalify on the basis of six months’ service.

Employment agreements

Prior to 1 April 2004, the Holidays Act 1981 provided a joint sick leave and bereavement leave entitlement called “special leave”. Many employment agreements use the language of that Act to express employees’ conditions for leave.

If an agreement is framed in this way, even if its provisions in some way exceed the minimum established on 1 April 2004, the employer, employee and union should consider renegotiating the employment agreement to reflect the provisions and language of the Holidays Act 2003.

Failure to make needed changes may create leave entitlements that were not intended.

When you are renegotiating employment agreements, make sure that any reference to each form of leave in your agreement (such as domestic leave, special leave or family leave) maintains the minimum bereavement leave entitlement while also reflecting any special arrangements between you and your employees.

Be sure that any negotiated changes are in writing, as “custom and practice” may not be sufficient if there is a dispute.

Entitlements on Resignation

On resignation, the employee becomes entitled to accrued payments that can both affect and be affected by public holidays, accrued alternative holidays, sick leave and bereavement leave.

Annual holidays

Any accrued annual holidays that the employee has not taken must be paid out on termination. Full details are provided above under the heading “On an employee’s resignation or termination” beginning on page 12 in Chapter 3 of this booklet.

Public holidays

On resignation or termination, the employee’s final date of work is notionally extended by any annual holiday entitlements not taken, and any public holidays falling during that period must be dealt with in accordance with the Holidays Act 2003.

For example, if an employee is to finish work four days before a public holiday and accrued annual holidays represent more than four days, the employee is entitled to a day’s payment at the relevant daily pay for the public holiday if it is a day on which they would normally have worked.

Public holidays falling during the notice period are dealt with in terms of the general provisions of the Act.

If the public holiday is a day on which the employee would have worked, they are to be paid as if they had worked. If the departing employee is required to work on the public holiday, then both time and a half and alternative holiday provisions apply.

Alternative holidays

If an employee has alternative holidays that accrued from working on a public holiday and that have not yet been taken or paid out, the days are paid on resignation at the same rate as the relevant daily pay for the last day of the employee’s work, regardless of the rate of pay at the time they accrued.

Accrued alternative holidays do not extend the period of employment for the calculation of annual holiday pay.

Sick leave and bereavement leave

Employees continue to be entitled to sick leave and bereavement leave during the period they are working out their notice. There is no entitlement to receive payment for unused sick leave on resignation.

The Holidays Act 2003 does not continue previous arrangements that, in some circumstances, pro-rated pay for public holidays by one-tenth for each day within the 10 days preceding the holiday that the terminating employee worked. However, if such provisions remain in the employment agreement, they continue to apply in addition to the provisions above.

Example:

“Calculation on termination”

Jason resigns and finishes work on Friday, 16 October 2009. Jason has been paid up to the preceding Tuesday 9 October. He has three days’ accrued alternative holidays and is entitled to four weeks’ paid annual holidays. He last became entitled to annual holidays on 25 June 2009.

His final payment is made up of:

- payment for his work since the last pay period – that is, three days’ pay for Wednesday, Thursday and Friday
- payment for his three accrued alternative holidays at the relevant daily pay rate for working on Friday 16 October
- payment of four weeks’ annual holiday pay calculated as per the definitions of “ordinary weekly pay” and “average weekly earnings”
- an additional day’s payment for Labour Day (at relevant daily pay), as it falls during the four weeks’ notional annual holiday added to the end of his employment
- an additional 8% of his gross earnings since 25 June 2009.

These gross earnings include:

- the four weeks’ annual holidays paid out
- payment for the alternative holidays.
- payment for the public holiday.

Recording Requirements

Good record keeping protects the employer in the case of a dispute and ensures that an employee's entitlements are correctly met.

The Holidays Act 2003 keeps the requirement to maintain a holiday and leave record in addition to the requirement to maintain a wages and time record. This record may be written or electronic.

You must ensure that the following information is recorded in a manner that enables the employee to verify entitlements:

- The name of the employee.
- The date employment commenced.
- The days on which the employee works, if the information is relevant to entitlement or payment under the Holidays Act.
- The date the employee last became entitled to annual holidays.
- The employee's current entitlement to annual holidays.
- The employee's current entitlement to sick leave.
- The dates any annual holiday, sick or bereavement leave was taken.
- The amount of payment for any annual holidays, sick leave and bereavement leave taken.
- The dates of and payment for any public holiday worked.
- The number of hours worked on any public holiday.
- The date on which the employee became entitled to any alternative holiday for any public holiday worked.
- The dates and payment of any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to payment.
- The cash value of board and lodgings provided.
- The cash value of any alternative holidays that the employee has surrendered for payment.

- The date of their employment ended (if applicable).
- The amount of pay for holidays when their employment ended (if applicable).

It would also be useful for employers to record the date on which employees become entitled to sick and bereavement leave, to avoid any dispute over whether the employee is entitled to this leave.

Examples of wage and time records, and holiday and leave records, can be downloaded from the Department of Labour's website www.dol.govt.nz or by phoning the Department of Labour on 0800 20 90 20

Managing Changes to Employment Agreements

Under the Employment Relations Act, every employee has a written employment agreement, which can be individual or collective. Where current employment agreements do not specifically outline holiday and leave provisions, or if they refer in general terms to the Holidays Act 1981, **the entitlements under the Holidays Act 2003 have applied from 1 April 2004 unless a new agreement with better provisions has been negotiated and agreed.**

To assist employers, employees and unions in reviewing employment agreements, the Department of Labour has developed an individual employment agreement tool containing the minimum conditions required and other entitlements that are frequently included in agreements. This can be customised for the needs of each workplace.

For access to this tool and for further information about the transition from the Holidays Act 1981 to the Holidays Act 2003, see the Department of Labour's website www.dol.govt.nz

The staff at the Department of Labour's freephone 0800 20 90 20 can also help.

↳ Notes



FOR MORE INFORMATION ON EMPLOYMENT RELATIONS
VISIT WWW.DOL.GOVT.NZ



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