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An Easy Guide to the Holidays Act 2003

Purpose

The purpose of the Holidays Act 2003 is to promote a balance between work and life, at the same time as balancing the needs of employers and employees.

It is to ensure that all employees receive their minimum entitlements to:

- Annual holidays for rest and recreation;
- Public holidays for the observance of days of national, religious or cultural significance;
- Sick leave to assist employees who are unable to attend work because they or their dependents are sick or injured; and
- Bereavement Leave to assist employees who are unable to attend work because they have suffered a loss.

Annual Leave

Key Provisions

- All employees are entitled to four weeks' paid annual holidays after one year of employment.
- Fixed term employees with an employment agreement of less than 12 months and <u>may either be</u> paid an additional 8%, which is added to their regular pay (with conditions) instead of receiving annual holidays, or alternatively <u>may have</u> their holiday pay paid out at the end of the fixed term.
- Casual employees will never be entitled to physical annual leave because the true nature of their employment relationsip is that it is so intermittent or irregular that it is impracticable for the employer to provide the employer with leave. Although casual employees are not entitled to the physical leave they are entitled to holiday pay. Casual

employees may either be paid an additional 8% which is added to their regular pay or may have their holiday pay paid out at the end of the casual engagement.

- Fixed term employees with an employment agreement of less than 12 months will have no entitlement to physical leave as their employment will never reach the requirement to be employed for 12 months.
- Any unused annual holidays are paid out at termination.
- An employee can request to cash up one week of annual holidays in any entitlement year and the employer can agree to this request.
- Employers must give employees 14 days' notice of any annual holidays the employee is entitled to, that they require the employee to take.
- An employer may have one closedown per year where they require their employees to take annual holidays, or unpaid leave if the employee has no annual holidays available to them.
- The employer must allow the employee to take their annual leave within the 12 months after the date they became entitled to it and must not unreasonably withhold consent to an employee taking holidays.
- The employer and the employee may agree for an employee to take annual holidays in advance of entitlement.

Application

- The employee will apply for annual leave.
- The employer and employee will agree.
- The employer will determine what portion of the entitlement is being taken, taking into account what a work week means for that employee. For example: If an employee works 3 days per week, their physical annual leave entitlement is 12 days (4 weeks x 3 days per week).
- The employer will calculate the employee's average weekly earnings and compare it to the employee's ordinary weekly pay. The employee will then be paid a rate based on the greater, for the portion of the annual holiday being taken.
- The employer will record the days of annual leave, and the holiday pay that is paid to the employee, in the wage, time and holiday records.

Public Holidays

Key Provisions

- All employees are entitled to 11 public holidays each year which are paid days off for the employee if the public holidays falls on a day they would have otherwise have worked.
- The Christmas and New Year public holidays, Waitangi Day and ANZAC Day are transferable public holidays. This is based on a work week of the employee and means that if a public holiday falls on a Saturday, the Saturday would be considered the public holiday for those that usually work that day, but for those employees who work Monday to Friday the public holiday will be treated as falling on the next Monday.

Application

There are four different examples of employees who work or don't work on a public holiday:

1. If an employee works on a public holiday, that is an otherwise working day (meaning a normal working day for them), they are entitled to be paid time and a half for the time they worked and receive an alternative holiday.
2. If an employee works on a public holiday, but that day is not an otherwise working day, they are entitled to be paid time and a half for the time they worked but will not receive an alternative holiday.
3. If an employee does not work on a public holiday, that would be an otherwise working day, they will be paid their relevant daily pay, which means the amount they would have received if the day had not been a public holiday and they worked it, and no alternative holiday.
4. If an employee does not work on a public holiday and this is not an otherwise working day, they are not paid and receive no alternative holiday.

Sick Leave

Key Provisions

- After six months of employment with an employer, a permanent or fixed term employee is entitled to five days' paid sick leave over the next and each ensuing 12 months.
- After six months of employment with an employer a casual employee is entitled to five days' paid sick leave over the next 12 months if they have worked at least an average of 10 hours a week and no less than one hour every week or 40 hours in every month.
- Sick leave can be accumulated to a maximum of 20 days.
- If an employee goes on holiday and falls sick the employer may allow the employee, on agreement, to use sick leave instead of annual holidays. There is no automatic right to the exchange.
- The employer can request proof of the entitlement to sick leave in two ways:
  1. If the employee has been absent for three or more consecutive calendar days.
  2. If the employer informs the employee, within three consecutive calendar days, that they require the employee to provide proof. In this instance, the employer must bear any reasonable costs.

Application

- Receive notification from the employee that they will be taking sick leave.
- Where appropriate, advise the employee of the requirement of proof of sickness.
- Ensure all sick days are recorded in the wage, time and holiday record.
- The employee is paid relevant daily pay (RDP) or average daily pay (ADP) for the sick day.
- Any sick day taken during a period of annual leave MAY be changed to sick pay by agreement of the employer. If this occurs, the employer will then:
  - Alter wage, time and holiday records to reflect sick leave taken;
  - Credit the annual leave day to employee's records;
  - Adjust payment for the day accordingly i.e. payment at RDP or ADP.

Bereavement Leave

Key Provisions

- After six months of employment with an employer, a permanent or fixed term employee is entitled to paid bereavement leave.
- After six months of employment with an employer, a casual employee is entitled to paid bereavement leave if they have worked at least an average of 10 hours a week and no less than one hour every week or 40 hours in every month.
- An employee is entitled to up to three days on the death of a close relative and one day on the death of any other person if the employer accepts that the employee has suffered a bereavement, taking into account the closeness of association and cultural factors. A close relative is:
    - Spouse (husband, wife or de factor partner)
    - Parent
    - Child
    - Sibling
    - Grandparent
    - Grandchild
    - Spouse's parent

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 person.
- Whether the employee is responsible for any aspects of the ceremonies around the death.
- Whether the employee has any cultural responsblities they need to fulfil in repect of the death.

- If an employee suffers a bereavement while they are on annual holiday the employer <u>must</u> exchange annual holidays for bereavement leave and that period should not be treated as annual holidays.
- Proof of bereavement cannot be a condition of taking bereavement leave but it is important to stress the concept of good faith which includes parties communicating and not misleading or deceiving each other.

Application

- Receive notification from an employee that they have suffered a bereavement.
- Confirm the number of days the employee will be absent from work and where appropriate take into account the closeness of association and cultural factors.
- Ensure days are recorded in wage, time and holiday record.
- The employee is paid relevant daily pay (RDP) or average daily pay (AVP) for the bereavement day(s).
- Any bereavement day taken during a period of annual leave:
    - Alter wage, time and holiday records to reflect bereavement leave taken;
    - Credit the annual leave day to the employee's records;
    - Adjust payment for the day(s) accordingly i.e. payment at RDP or ADP.

Alternative Leave

Purpose

- An alternative holiday is a public holiday taken at another time.
- If an employee works on a public holiday and the day would be an otherwise working day then they are entitled to an alternative holiday.
- If an employee only works on a public holiday they are not entitled to the alternative holiday.
- After 12 months from the public holiday, an employee and the employer can agree that the alternative holiday be exchanged for payment.
- An alternative holiday stays in force until it is taken, cashed up or the employment ends.

Application

- An alternative holiday is a whole day away from work (regardless of the time actually worked on the public holiday).
- Ensure a balance of alternative holidays is recorded in the wage, time and holiday record.
- Ensure that when the alternative holiday is taken it is recorded in the wage, time and holiday record.
- The employee is paid relevant daily pay (RDP) or average daily pay (ADP) for the alternative holiday day.

When Employment Terminates

Purpose

- When an employee’s employment is terminated, they must be paid their outstanding annual holiday pay and alternative holiday pay.
- If an employee has taken annual holidays in advance these are taken into account for the purpose of the final calculation.
- If the employee has outstanding unused annual leave, as at their last anniversary, these days are added on to their last day of work and any public holidays that fall within this period must also be paid.
- An employee is not entitled to be paid for any sick leave balance owing to them at termination.

Application

- The employer will calculate the physical annual leave not taken since the employee’s last anniversary date.
- The employer will also calculate the employee’s total gross earnings from the last anniversary day to the employee’s last day (including any notice period).
- The employer will calculate the employee’s average weekly earnings and compare it to the employee’s ordinary weekly pay.
- The employer will use the higher rate to pay the employee for the portion of the annual holiday entitlement being taken.
- The employer will record the days of annual leave and the holiday pay paid to the employee in the wage, time and holiday records.

- The calculation:

1. Days of physical annual leave owing as at last anniversary	Number of days x higher of average daily earnings or ordinary daily pay	Total $xxxxx – this is Total A
2. Gross earnings from last anniversary to last day of employment	$xxxx gross plus Total A x 8%	Total $xxxxx – this is Total B
3. **Less** any annual leave paid and taken in advance	Total amount paid in advance $xxxx	Total $xxxxx – this is Total C
4. Public holidays captured – the number of days of unused annual leave entitlement (referred to in 1. of this table) will be added on to the last day of employment and if a public holiday falls within this period it must be paid if it was a normal working day for the employee	Public holiday X RDP	Total $xxxxx – this is Total D
5. Any Alternative holidays owing	Alternative day X RDP	Total $xxxxx – this is Total E
Total to be paid to employee at termination		Calculation is: Total A Plus Total B Plus Total D Plus Total E Minus Total C

Definitions

An Employee

An employee is any person who has agreed and has commenced working, under a contract of service, to work for some form of payment. For the purposes of the Holidays Act 2003, an employee is not a person intending to work.

Gross Earnings

Gross earnings are used for the purposes of calculating average weekly earnings for annual holiday entitlements.

The gross earnings figure includes all payments that the employer is required to pay to the employee under the employee's employment agreement. With the exception of the cash value of the provision of board and lodgings, an employee's gross earnings are made up only of payments. It does not matter whether the payments were regular or not. For example, ordinary weekly pay does not include irregular payments for overtime, whereas gross earnings include all overtime payments, whether regular or not.

The first week of compensation under ACC is included in gross earnings because it is paid by the employer rather than ACC

Ordinary Weekly Pay

Ordinary weekly pay is the amount the employee would normally receive in an ordinary working week. Ordinary weekly pay is only used to calculate an employee's pay when they take annual holidays.

Included in ordinary weekly pay is payment for the hours the employee would normally have worked. It also includes all payments that an employee would receive on a usual or regular basis such as:

- regular allowances,
- shift allowance;
- regular productivity or incentive-based payments, including commission or piece rates;
- regular overtime payments;
- the cash value of board or lodgings.

Not included in ordinary weekly pay are payments that are paid solely at the discretion of the employer or irregular overtime, productivity and irregular incentive-based payments

Average Weekly Earnings (AWE)

Average weekly earnings are calculated using the gross earnings (GE) for the 12 months immediately before the end of the last pay period before the holiday is taken and divided by 52. Or, written as a formula:

AWE = GE/52

Relevant Daily Pay

Relevant daily pay is the amount to be paid where the employee takes public holidays, alternative holidays, sick leave or bereavement leave.

The principle is that an employee should be paid what they would have received had they worked on the particular day that the public holiday falls or the employee takes as a public holiday, sick leave, alternative holiday or bereavement leave.

Another example is if the employment agreement provided for overtime rates of double time for example after working for 40 hours, then at the time of the public holiday falling (which was an otherwise working day for the employee who had the holiday) the relevant daily pay would be based on the overtime rate (of double time) that was payable for that particular day. This, of course, would apply to sick leave, bereavement leave and alternative days.

Relevant daily pay is different from ordinary weekly pay in that it includes payments that the employee would not "ordinarily" receive, but would have received had they worked on the particular day. However relevant daily pay does not include any reimbursements payable to the worker for the day; generally speaking, non-taxable allowances won't be included.

Average Daily Pay

This calculation is an alternative formula that can be used for calculating payment for public holidays, alternative holidays, sick leave and bereavement leave.

This is calculated by dividing the employee's gross earnings for the last 52 weeks (or part thereof) and dividing those earnings by the number of whole or part days that the employee has worked over that period. (Note that the divisor is a whole number, therefore a part day would count as one full day for the purposes of the formula.)

The employer is allowed to use the average daily pay formula when:

a. it is not possible or practicable to determine an employee's relevant daily pay, or
b. where an employee's daily pay varies within the pay period in which the holiday or leave falls.

Board and Lodgings

The cash value of board and lodgings is included in ordinary weekly pay and relevant daily pay. It will not be included in ordinary weekly pay or relevant daily pay where the work requires the employee to sleep elsewhere than in their genuine place of residence. It is also included in gross earnings when calculating average weekly earnings for annual holiday entitlements.

There is no set amount for board and lodgings so this is a matter for agreement between the employer and employee.

This will apply where board and/or lodgings are a defined component of the wage. A situation where an employee pays rent to the employer after wages are calculated and tax deducted, would not fit the board and lodgings criteria, and calculations would simply be made on the full gross amount.

On Call and Rostered Employees

Identifying an "otherwise working day" and annual leave entitlement for employees who are on call and employees who work a roster can be complicated. If this is unclear you may need to seek advice from Three60 Consult.

When there is a situation where employees work a roster. For example: 4 days on and 4 days off, the parties should attempt to agree on what constitutes a week but if they cannot a Labour Inspector will determine it.

A Labour Inspector uses a simple formula that takes into account the factors in section 12(3) of the Act.

The factors are—

(a) the employee's employment agreement:

(b) the employee's work patterns:

(c) any other relevant factors, including—

(i) whether the employee works for the employer only when work is available:

(ii) the employer's rosters or other similar systems:

(iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.

The calculation the Labour Inspector will use to determine what constitutes a week for an employee who works a roster of 4 days on and 4 days off is as follows:

28 days = 4 weeks
÷ 8 days in cycle (4 days on 4 days off) = 3.5 days
x 4 weeks
= 14 days annual leave entitlement

3.5 days constitutes a "week"

Otherwise Working Day

An "otherwise working day" is a day that, but for the intervening day away from work (on a public holiday, alternative holiday, sick leave or bereavement leave) the employee would have worked and therefore should be paid for it.

A simple test to identify an "otherwise working day" is to ask: "but for" the day being a public holiday (or other day) would the employee have worked?

Leave Without Pay (LWOP)

If the employee has a period of LWOP, you may need to seek advice from Three60 Consult. LWOP does impact on calculations and may be complex.

Home and Support Settlement Act 2016

This section has its genesis in 2013 when proceedings were lodged with the Employment Relations Authority in relation to payment for care workers when they travelled between client homes.

Employees are covered by this Settlement Act if they provide home and community-based support services to clients listed in the schedule of the Settlement Act. This does not include services performed for the purpose of preparing an intellectually disabled client to live independently in the community or where the services were purchased using Ministry of Health funding.

The payments for time spent in travel are included in holiday calculations. However, the contribution towards costs relating to travel between clients is not included.

Effect of Parental Leave on the Calculation of Annual Holidays

The Parental Leave and Employment Protection Act 1987 provides for a particular entitlement and calculation for employees commencing or returning from a period of parental leave. You should seek advice from Three60 Consult if this occurs.

Wage, Time and Holiday Records

Employees (whether current or ex-employees), or their representative (authorised under section 236 ER Act 2000), may access the wage, time and holiday records pertaining to their employment. Labour Inspectors may also access records.

It is the employer's duty to provide access to the records.

Closedown Periods

Closedowns (also known as “shutdowns”) is a term used to define a period of time when the employer customarily closes their business annually for a period of time.

A closedown can occur either:

- Across the entire workplace; or
- For part of an enterprise (e.g. the factory closes for maintenance while the office and sales department remain open).

The employer:

- must give an employee 14 days’ notice of the closedown.

The employees:

- must take their annual leave or leave without pay;

- who do not yet have an annual holiday entitlement are paid 8% of their gross earning and must take the period of the closedown as unpaid.

Days that are Public Holidays

The following days are public holidays:

1. Christmas Day
2. Boxing Day
3. New Year's Day
4. 2 January
5. Waitangi Day
6. Good Friday
7. Easter Monday
8. ANZAC Day:
9. the birthday of the reigning Sovereign (observed on the first Monday in June)
10. Labour Day (being the fourth Monday in October)
11. the day of the anniversary of a province or the day locally observed as that day.

If two or more of the public holidays specified above fall on the same day, the public holidays must, for the purposes of this subpart in the Holidays Act 2003, be treated as one day.

Transferring Public Holidays

Shift workers whose work shift crosses midnight can transfer part of a public holiday.

An employer and an employee can agree in writing to the transfer of one of the public holidays to another calendar day or 24 hour period which is an otherwise working day.

This has some complexity and the employer should take advice from Three60 Consult.

Labour Inspector

Labour Inspectors are officers of Ministry of Business, Innovation and Employment (MBIE) who are able to enforce the minimum provisions of the Holidays Act.

Penalties for Non-Compliance

Penalties associated with breaches of the Holidays Act are at $10,000.00 for individuals and $20,000.00 for companies.

These penalties also include a person involved (i.e. any person occupying a position in the company that exercises significant influence over the management or administration) and does not necessarily mean owners, directors or shareholders of the company.

Other penalities:

- Pecuniary damages
- Employers prevented from employing employees on a working visa
- Employers prevented from employing employees

For Advice and Assistance

This is a simple guide to apply the standards required in the Holidays Act 2003.

This piece of legislation is continuously changing.

Where an employee works fluctuating patterns or unusual hours, the employee should take advice from Three60 Consult.

Minimum Standards Review

Three60 Consult can provide you with confidence that you are meeting your obligations as an employer.

Our Minimum Employment Standards Review service is designed to decrease the risk of receiving a penalty action when you are audited by a Labour Inspector from the Ministry of Business, Innovation and Employment.

We are not accountants or auditors. We are minimum entitlements specialists.

Our team will physically review your records and employment agreements to ensure that your business is meeting legislative requirements. We will make recommendations where there are areas of non-compliance and can offer remedial and educative services as required.

Please contact us:

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