



Holidays and leave



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→ Introduction

The Holidays Act 2003 helps to promote balance between work and other aspects of employees' lives. It was amended by the Holidays (Transfer of Public Holidays) Amendment Act 2008 and the Holidays Amendment Act 2010. This guide includes those changes.

The Holidays Act 2003 provides minimum legal entitlements to:

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

In this guide, 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 by visiting our website www.dol.govt.nz or calling us free on 0800 20 90 20.

More information about the changes to the laws on employment relations and holidays from the 2010 Amendment Acts can be found in another Department of Labour document: www.dol.govt.nz/er/actchanges.

■ Principles underpinning the Holidays Act

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

- › For the purposes of rest and recreation, all employees are entitled to enjoy four weeks' paid annual holidays (or "annual leave") each year.
- › Public holidays are for the observance of days of national, religious, or cultural significance, which all employees should be entitled to take as leave, where possible. Where it is necessary for an employee to work on a public holiday that work should 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 may meet these principles.



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→ 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.

Some agreements may provide for one or more "additional" weeks of holidays on top of the statutory entitlement.

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.

■ Establishing entitlements

Employees get their annual holiday entitlements on their anniversary of starting work. There are two circumstances where 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 later under "Regular annual closedowns".
- › **When an employee takes unpaid leave of more than a week during the year:** This is covered 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. Such an agreement will be in relation to the time away from work that "four weeks" represents and does not affect the payment that will be due for those weeks when they are taken. 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. On each anniversary of the date of commencing employment, the employee is entitled to four weeks of paid annual holidays.

Where an employee is employed on a work pattern that changes during the year, the employer and the employee should reach a new agreement on what "four weeks" will be in terms of time away from work. Ideally this agreement should be made when the work pattern changes and recorded 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, annual holiday pay is separately identified in the employee's employment agreement and wage and time records and shown as a separate item on any 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 possible 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). As noted above, this should be set out in the employment agreement and shown as a separate calculation on any pay slips.

Details of this approach are set out under "Employees with intermittent or irregular work patterns (genuine casual work)". 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.



Employers who keep records manually should ensure they:

- › have an accurate wage and time record
- › correctly complete their employees' holiday and leave records.

They 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 free on 0800 20 90 20.

■ Payment for annual holidays

Payment for annual holidays is at the greater of either 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. Payment calculations for other types of leave are covered separately in this document.

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 payments as well as 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 the employer is not bound to pay
 - › 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:

- › Salary and wages.
- › Allowances (but not reimbursing allowances).
- › All overtime.
- › Piece work.
- › At-risk, productivity or performance payments.
- › Commission.
- › Payment for annual holidays and public holidays.
- › Payment for sick and bereavement leave.
- › The cash value of board and lodgings supplied.
- › Amounts compulsorily paid by the employer under ACC (i.e. the first week of compensation).
- › 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, or payments for cashed-up holidays.

Remember: When calculating 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 to calculate annual holiday payments in a variety of circumstances. These calculations are outlined in the following subsections of this guide:

- › 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.
- › Moving from fixed-term to permanent employment with the same employer.
- › Where the fixed-term agreement is not genuine or exceeds 12 Months.
- › 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 under "Regular annual closedowns".
- › The employee may resign or the employer may terminate the employment. Entitlements on resignation or termination are covered later in this guide.

■ 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.

When an employer approves annual holidays in advance, the employee should be asked to agree in

writing that the employer is able to deduct any final pay to recover from the employee the amount of any overpayment of holiday pay that results from taking annual holidays in advance. If this does not happen, the employer will not be able to lawfully deduct money to compensate for granting leave in advance.

■ Employees taking parental leave

An employee's time on parental leave is included as continuous service and taking parental leave does not affect entitlement to annual leave; the employee will still be entitled to a minimum of four weeks of annual holidays. However, the payments for the annual holidays will be affected by the parental leave.

If the employee becomes entitled to annual holidays during parental leave or in the following year, that holiday pay is paid at the rate of their average weekly earnings over the year before the annual holidays. (Note that if the employee has previous entitlements they hadn't used, then the normal pay provisions still apply to that leave.)

■ 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 year's employment).

Where an employee resigns or employment ends before they have completed their 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 earlier 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. Refer also to the Entitlements on Resignation section on page 25.

Example: Calculation of final payment for annual holidays

Ted has been employed for one year and one month. He leaves his employment on 12 May, and the last date he became entitled to annual holidays was 12 April. Ted has already used one week of annual holiday so has three weeks remaining at the end of his employment. Ted also has two alternative holidays from working on public holidays that are left untaken at the end of his employment. Ted is entitled to:

- › Payment for the two alternative holidays
- › Payment for the three weeks of annual holiday remaining of his four week entitlement from 12 April at the greater of average weekly earnings or ordinary weekly pay
- › Payment at 8% of gross earnings for the one month period between 12 April and 12 May. The gross earnings for the 8% calculation also include the holiday pay paid to Ted for his three weeks of unused holiday and the value of the two alternative holidays.

■ **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 annual 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 final fixed-term period of employment, the pay for annual holidays is reduced by the amount of holiday pay already paid at 8%.



The Employment Agreement should be updated as required.

The Employment Agreement Builder (which is at www.dol.govt.nz/agreementbuilder) can help put together a draft employment agreement.

■ Where the fixed-term agreement is not genuine or exceeds one year

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 earlier.

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 with no expectation of ongoing employment beyond the event, 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 or customary 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 only 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.

The Holidays Amendment Act 2010 clarifies how to determine whether a day that falls during a closedown period would be an otherwise working day in regard to entitlements to public holidays, alternative holidays, sick leave and bereavement leave. See the section below on "Public holidays during a closedown period".

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 employee is not yet entitled to annual holidays.

If you are in doubt, the Department of Labour can assist with guidance by calling us free 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.



■ Cashing-up annual holidays

As of 1 April 2011, employees are able to ask their employer to pay out in cash up to one week of their entitlement to annual holidays per year.

The Amendment Act introducing cashing up annual holidays provides that a request may be made only in relation to an entitlement year that begins on or after 1 April 2011. Employees cannot cash up annual holiday entitlements that arose before 1 April 2011.

An entitlement year is defined as beginning on the anniversary of the employee's employment. An employee who becomes entitled to annual holidays on their anniversary date on or after 1 April 2011 is able to request cash up of up to one week of their annual holidays during the 12 month period of their entitlement year that runs from that point.

For example, an employee with an anniversary date of 1 June is able to request that up to one week is cashed up of their four week entitlement that they receive on 1 June 2011. Their request can be made at any point in the entitlement year that runs from 1 June 2011 to 1 June 2012.

Cashing up annual holidays can only be at the employee's request and the request must be made in writing. Employees may request to cash up less than a week at a time. More than one request may be made until a maximum of one week of the employee's annual holidays is paid out in each entitlement year (the period of 12 months' continuous employment from the anniversary of the employee's starting date).

Any request must be considered within a reasonable time and may be declined – unless the employer has a policy that does not allow cashing up. The employee must be advised of the decision in writing and the employer is not required to provide a reason for their decision.

If an employer agrees to pay out a portion of the employee's annual holidays, the payment should be made as soon as practicable, which will usually be the next pay day. The value of the payment must be at least the same as if the employee had taken the holidays.

An employer cannot pressure an employee into cashing up holidays. Cashing up cannot be raised in wage or salary negotiations or be a condition of employment. Requests to cash up cannot be included in an employment agreement. However, an employment agreement may outline the process for making such a request. The process must meet the minimum requirements set out in the legislation.

Employers may have a workplace policy that they will not consider any requests to cash up annual holidays. This can apply to the whole or only some parts of the business. The policy can only be on whether the employer will consider any requests. It cannot be about the amount of annual holidays an employee can cash up or the number of requests an employee may make. An employer should consult with employees on the development of such a policy, and advise new employees of the policy when they make an offer of employment, as part of their good faith obligations.

If an employer does not have a workplace policy on cashing up that applies to the employee, they must consider any request to cash up annual holidays in good faith.

If an employer is found to have incorrectly paid out a portion of the employee's annual holidays where the employee did not request it, the employee is still entitled to take the portion of annual holidays concerned and to keep the money. The employer may also face a penalty.

If an employer has agreed to pay out a portion of the employee's annual holidays, but the employer and employee cannot agree on the proportion or payment amount, a Labour Inspector may determine the proportion or amount for them.

There are other details that employers and employees considering cashing up holidays will need to know, for example how it affects superannuation payments, Working for Families, child support and income tax and what happens when there is parental leave. The Department of Labour can assist with information about parental leave and you can call us free on **0800 20 90 20**. For tax related matters please contact Inland Revenue on **0800 227 774** or go to www.ird.govt.nz

■ Employment agreements

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

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. However, the law does not prevent the employer providing the employee with entitlements over and above those provided by the Act.



Payment for other holidays and leave

For public holidays, alternative holidays, sick leave and bereavement leave an employee is entitled to be paid either their relevant daily pay or average daily pay.

■ Definitions of 'Relevant Daily Pay', 'Average Daily Pay' and 'Penal rates'

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.

However, it excludes payment of any employer contribution to a superannuation scheme for the benefit of the employee.

An employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave, as long as the rate is equal to, or greater than, the rate that would otherwise be calculated using the method above.

Definition: 'Average daily pay'

The Holidays Amendment Act 2010 introduced a new calculation, 'average daily pay' that may be used where it is not possible or practicable to determine relevant daily pay, or if the employee's daily pay varies within the pay period when the holiday or leave falls. This replaces

the four-week averaging calculation that was formerly applied when it was not possible to determine relevant daily pay.

Average daily pay is a daily average of the employee's gross earnings over the past 52 weeks. That is, the employee's gross earnings divided by the number of whole or part days the employee either worked or was on paid leave or holiday during that period.

If an employer and employee cannot agree on the amount of the employee's ordinary weekly pay, relevant daily pay or average daily pay, a Labour Inspector may determine the amount.

Relevant daily pay or average daily pay?

It is advisable for the employer to attempt to calculate an employee's relevant daily pay in the first instance. An employer has the discretion to use either relevant daily pay or average daily pay if their employee's pay varies within the pay period in question. This discretion may be better exercised if the employer knows the results of both calculations.

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.

A penal rate may be specified in an employment agreement.



→ 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.

Following the Holidays Amendment Act 2010 an employer and employee can now agree to transfer a public holiday from the day listed in the Holidays Act 2003 to another day. See further details below over 'Transferring a public holiday'.

■ Transferring a public holiday

As of 1 April 2011, employers and employees are able to agree to transfer the observance of public holidays to another working day to meet the needs of the business or the individual needs of the employee. An employer and employee should make the agreement in writing.

The public holiday to be observed by the employee must be on another identified or identifiable calendar day or 24-hour period and otherwise be a working day for the employee. A request can be made by either employee or employer and must be considered in good faith by the other party and any agreement must meet the minimum requirements set out in law. The agreement can't reduce the number of public holidays which an employee is entitled to. The purpose of a transfer cannot be to avoid paying the employee time and a half for working on a public holiday or providing them with an alternative holiday (although this may be the effect of the transfer).

An employee is entitled to a paid day off on the day the public holiday is transferred to. The employee should be paid their relevant daily pay or average daily pay for the day (see the "Definitions" box).

If the employee works on the day the public holiday is transferred to, then they are entitled to be paid time and a half for the hours worked and to receive a whole day's alternative holiday (see "Alternative holidays for working on public holidays" in a later section of this guide). An employer and employee must both agree that the employee will work on the day the public holiday is transferred to.

Where the employee would have been working on a day that a public holiday is transferred to but cannot work due to sickness, the payment for the day is as if they had a paid, unworked public holiday.

If a day that a public holiday is transferred to falls within a period that an employee is taking as annual holidays, then that day must be treated as a public holiday and not as part of the employee's annual holidays.

Transferring part of a public holiday

Employees working shifts that start and end on different days can 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.

The purpose of the transfer cannot be to avoid paying the employee time and a half for working on a public holiday or providing them with an alternative holiday (although this may be the effect of the transfer).

Example: Transferring part of a public holiday

An employee is to work from 10 pm on 24 April to 6 am on Anzac Day and from 10 pm on Anzac Day to 6 am on 26 April.

The employer and employee can agree to treat 10 pm to midnight on Anzac Day as not part of a public holiday in exchange for treating a period of 24 hours that finishes on Anzac Day as a public holiday. Just when the 24-hour period starts before or finishes after a work period is a matter for the parties to agree on. For instance, they could agree that it runs from midday on 24 April to midday on Anzac Day.

Employers may have a workplace policy that they will not transfer public holidays. This may refer to the transfer of part or the whole of a public holiday, and can relate to the whole of a business or some parts of the business. If employees agree, this policy could be included in an employment agreement.

The Department of Labour can help employers and employees if any disputes arise around transferring public holidays.

■ 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, alternative holidays, sick leave and bereavement leave.

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.
- › Whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.
- › Whether it is during a customary closedown period
- › 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” for them.



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.

Public holidays during a close-down period

The Holidays Amendment Act 2010 clarifies entitlements to public holidays, alternative holidays, sick leave and bereavement leave that fall during a close-down period.

If a business has a closedown period that includes public holidays (as can happen over the Christmas and New Year period) then the employee is entitled to paid public holidays if they would be otherwise working days for them, taking the factors in section 12 of the Act into account as if the closedown were not in effect. Just as if a public holiday falls during a period of annual holidays, the employee is entitled to a paid public holiday if it is otherwise a working day for them.

Payment when the employee does not work on a public holiday

The employee is paid for the public holiday as if they had worked as normal on the day and is entitled to be paid their ‘relevant daily pay’ or ‘average daily pay’ (see the “Definitions” box). For most 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 starting point for payment for working on a public holiday is the employee’s relevant daily pay or average daily pay (see the “Definitions” box). If an employee works on any public holiday, that work is paid a minimum payment of time and a half for

the time they actually work on the day. From 1 April 2011, an employee is entitled to the greater of either:

- › the portion of the employee’s relevant daily pay or average daily pay (if applicable) that relates to the time actually worked on the day, less any penal rates, plus half that amount again (time and a half), or
- › the portion of the employee’s relevant daily pay that relates to the time actually worked on the day including any penal rates.

The only time an employer may choose to use average daily pay, to calculate an employee’s pay for working on a public holiday, will be when that employee’s daily pay varies in the pay period in question. This is because the trigger for using average daily pay for the reason that it is ‘not possible or practicable’ to determine relevant daily pay will never be met when the employee actually works on the public holiday.

If the average daily pay varies in the pay period and the employer chooses to use average daily pay to determine the employee’s pay for working on a public holiday, the employer must work out the portion of the employee’s average daily pay that relates to the time actually worked on the day (minus any penal rates) and then multiply by 1.5. This figure must be compared to the employees’ relevant daily pay (including any penal rates) and the employer must pay the greater amount.

Refer to the “Examples” box to see how time and a half of relevant daily pay or time and a half of average daily pay may be calculated.

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. That is unless the employee and employer agree to transfer the public holiday so that it covers one whole shift (see the section on “Transferring a public holiday”).

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 for the time actually worked 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 the portion of their relevant daily pay that relates to the time actually worked on the day, including any penal rate in the employment agreement, or time and a half of the portion of relevant daily pay or average daily pay that relates to the time actually worked on the day 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.

Example: using relevant daily pay to calculate payment for working on a public holiday:

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.

Example: using average daily pay to calculate payment for working on a public holiday:

If an employee’s pay varies within a payment period, the average daily pay calculation may be used.

For example, a part-time employee earns \$23,000 annually by working 16.5 hours per week across three shifts. If the employee’s normal Monday shift is 6 hours and Monday is a public holiday, the employer may choose to use the average daily pay. The employer must determine the portion of employee’s average daily pay that relates to the time actually worked on the day (minus any penal rates) and then multiply by 1.5. One way of doing this would be as follows:

- › total gross earnings = \$23,000
- › hours per week = 16.5 hours; total number of hours worked in 52 weeks = 52 weeks × 16.5 shift hours per week = 858 hours
- › average hourly rate = \$23,000 divided by 858 hours = \$26.80 per hour.
- › pay for the public holiday worked = \$26.80 × 6 hours for the public holiday shift × 1.5 for time and a half = \$241

If there is any dispute, a Labour Inspector can determine the matter for the parties.



■ **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 or average 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 works on a public holiday they are entitled to be paid time and a half for the hours they work and if it is an otherwise working day for the employee they are also entitled to another day off on pay. This alternative holiday recognises that the employee has missed out on having a day off work on a day of national significance and enables them to take a day off at another time.

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.

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 or average daily pay (where applicable) for the day taken off.

As of 1 April 2011, if an employer and employee cannot agree when an alternative holiday is to be taken, the employer may determine the date, on a reasonable basis. The employer must give the employee at least 14 days' notice of the requirement to take the alternative holiday.

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

■ **Alternative holiday may be exchanged for payment**

If an employee does not take their alternative holiday within 12 months of becoming entitled to the alternative holiday, the employee and employer can agree for the alternative holiday to be exchanged for payment. In this instance, the

payment for the alternative holiday is to be agreed between the employer and employee and must be paid as soon as practicable once the agreement has been made.

■ **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.

■ **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**

As of 1 July 2011, employers must retain a signed copy of the employment agreement or the current signed terms and conditions of employment. The employer must retain the "intended agreement" even if the employee has not signed it. The employer must also provide a copy of the current terms and conditions if requested by the employee.

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.

An employment agreement cannot 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 has regular hours each week and is paid an hourly rate and no additional payments, then under relevant daily pay 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.

Where an employee's pay varies within the pay period, an employer may use the employee's average daily pay to calculate the payment for working on a public holiday.

■ 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 are 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 (or average daily pay if applicable) 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.

Examples:

1. An employee starts at 10pm on Christmas Day and ceases work at 6am 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 10pm on Christmas Eve until 6am 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, and 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 10pm 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 or average daily pay, where applicable. 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.



→ 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" below.

Sick leave can be used when an employee is sick or injured, or when the employee's spouse or partner

or a person who depends on the employee for care (such as a child or elderly parent) is sick or injured.

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 is receiving "first week compensation" for a work-related accident, an employer and employee can agree that the employer will top up the "first week compensation" payment from 80% to 100% by reducing the employee's sick leave entitlement by one day for each five days' leave taken.
- › 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.

For information about ACC entitlements see www.acc.co.nz.

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 should be at the rate the employee would ordinarily be paid on the day leave is taken (relevant daily pay) or their average daily pay where applicable. For example, an employee who normally works eight hours Tuesday to Friday is sick on Tuesday, a payment of eight hours would be due under relevant daily pay.

Where relevant daily pay is used as the basis of calculation (see the 'Definitions' box on pg 14) 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.

If the employee normally works eight hours Tuesday to Friday and four hours on Saturday and is sick on Saturday, the employer may choose to pay the employee their relevant daily pay or average daily pay for the sick day.

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 or average 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 sick leave would be paid at the employee's relevant daily pay or average 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.

Employers are able to ask for proof of sickness or injury at any time once an employee takes sick leave.

Special rules apply if the employer requests proof within three consecutive calendar days of the employee taking sick leave. The employer must inform the employee as early as possible that the proof is required, and pay the reasonable expenses in getting proof. Employers are not required to have reasonable grounds to suspect that the sick leave is not genuine before requesting proof within these first three consecutive calendar days.

The three consecutive days can't be interrupted by a scheduled break. For example, if an employee takes a day's sick leave on a Tuesday, then has a one-day scheduled break on the Wednesday and another day's sick leave on Thursday, the employee can be asked to provide proof of the sickness or injury even though the Thursday is only the second day of sick leave.

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. If the employer hasn't requested proof of illness or injury at the time, they are not precluded from using the normal processes for dealing with problems of employee performance, and the mediation services of the Department of Labour can be asked to help resolve any dispute.

■ The effect of various work patterns

Most employees 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 or average daily pay (if it is not practicable or possible to work out what an employee would have earned on the day, or if the employee's pay varies within the pay period). 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.



→ 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 more than one 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 bereavement, up to one day's paid leave may be taken if the employer accepts that the employee has suffered 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 of paid leave to talk to the lawyer about settling the details of her sister's will.

The Department of Labour can be contacted by calling us free 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, their relevant daily pay, or their average daily pay (where applicable). Payment for bereavement leave is made in the normal pay cycle.

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

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



■ 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 daily pay or average daily pay (where applicable).

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

When renegotiating employment agreements, any reference to each form of leave in the agreement (such as domestic leave, special leave or family leave) should maintain the minimum bereavement leave entitlement while also reflecting any special arrangements.

Be sure that any negotiated changes are in writing, as "custom and practice" may not be sufficient if there is a dispute. The Employment Agreement Builder (which is found at www.dol.govt.nz/er/agreementbuilder) can help put together a draft employment agreement.



→ 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” in the “Annual Holidays Entitlements” section.

■ 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 their relevant daily pay or average daily pay (if applicable) 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.

■ Alternative holidays

If an employee has alternative holidays that have not yet been taken or paid out, the days are paid on resignation at the same rate as their relevant daily pay or average 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.

Example: “Calculation on termination”

Jason resigns and finishes work on Friday, 16 October. 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.

His final payment is made up of:

- › payment for his work since the last pay period – that is, eight days’ pay for Wednesday, 10 October through to Friday 16 October
- › payment for his three accrued alternative holidays at the relevant daily pay rate for working on Friday 16 October or at his average daily pay rate (if applicable)
- › 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 or average daily pay (if applicable), as it falls during the four weeks’ notional annual holidays added to the end of his employment
- › an additional 8% of his gross earnings since 25 June.

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 Employment Relations Act 2000 requires the employer to keep wages and time records for each employee. The Holidays Act 2003 has 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.

The requirements for employers to keep accurate records of an employee's holiday and leave entitlements and payments were updated by the Holidays Amendment Act 2010 to reflect the new ability to cash-up annual holidays and transfer public holidays.

The following information must be 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 (even for employees receiving a salary it is useful to keep calculations of holiday and leave entitlements)
- › 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).
- › The portion of any annual holidays that have been paid out in each entitlement year.
- › The date and amount of payment in each entitlement year for any annual holidays paid out.
- › The day or part of any public holiday agreed to be transferred and the calendar or period of 24 hours to which it has been transferred.

Employers should also keep copies of any agreements to transfer holidays or any requests regarding alternative holidays or requests to cash-up annual holidays even if they were not agreed to.

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 templates for 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 calling us free 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 to leave in general terms, the entitlements under the Holidays Act 2003, as amended by the Holidays Amendment Act 2010, apply 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 an on-line 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 the Employment Agreement Builder, see the Department of Labour's website www.dol.govt.nz or call us free on 0800 20 90 20.

→ Parental leave

Under the Parental Leave and Employment Protection Act 1987, if an employee and their partner are having a baby or are going to adopt a child under six, and the employee has worked for the current employer for at least six months, she or he may be eligible for paid parental leave of 14 weeks. They may also be entitled to unpaid parental leave before and after the birth or adoption.

If the employee becomes entitled to annual holidays during parental leave or in the following year, that holiday pay is paid at the rate of their average weekly earnings over the year before the annual holidays. (Note that if the employee has previous entitlements they hadn't used, then the normal pay provisions still apply to that leave.)

Following the Holidays Amendment Act 2010, from 1 April 2011 the employee may either take the holidays or cash-up a maximum of one week of the annual holidays they become entitled to while on parental leave.

The Department of Labour can provide further information and assistance on parental leave and payments – visit www.dol.govt.nz or call us free on 0800 20 90 20.



→ Employment relations education leave

Under the Employment Relations Act 2000, if an employee is a union member, their union may nominate them to take employment relations education leave. This is leave to do training on employment relationship issues.

Following the Holidays Amendment Act 2010, the employee attending employment relations leave may be paid either their relevant daily pay or average daily pay (if applicable).

→ Defence force volunteers

Under the Volunteers Employment Protection Act, if an employee does full-time or part-time voluntary training in any of the armed forces the employer has to allow the employee to take unpaid leave for training.

The employer also has to allow the employee to take leave and hold their job open if the employee takes unpaid leave to go on active service, either when they are called up or when they volunteer in a "situation of national interest". There are some eligibility criteria that need to be satisfied before the employee can take this leave and, if the employee volunteers in a situation of national interest, they may only take up to 12 months' leave.

The Department of Labour can give you further information, visit www.dol.govt.nz or call us free on 0800 20 90 20.



→ Resolving problems

If employment relationship problems arise as a result of holiday and leave issues, both sides should attempt to solve the problems in good faith.

It is advisable to:

- › be clear about the facts.
- › talk to the other party.
- › deal with issues promptly but allow sufficient time for both parties to seek advice and think through the issues.
- › ensure everyone follows the process for issue resolution outlined in the employee's employment agreement.
- › call the Department of Labour to clarify your obligations (0800 20 90 20).
- › ask a labour inspector to help resolve the matter.

If you can't resolve the problem yourself, you can participate in mediation, either through the Department of Labour's mediation services or through independent mediators.

If this does not resolve the problem, you can go to the Employment Relations Authority (which is found at www.era.govt.nz) for a determination.

If either you or the other party are dissatisfied with the determination of the Employment Relations Authority, the issue can be taken to the Employment Court.

If a problem is a personal grievance, the employee must raise it with the employer within 90 days of the action complained of, or after they became aware of it, unless the employer consents to the personal grievance being raised after the expiration of that period (if consent is not given, the employee can apply to the Employment Relations Authority).

For more detailed information about problem resolution check: www.dol.govt.nz/er/problem.







⇒ More information

www.dol.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.dol.govt.nz or by calling us free on 0800 20 90 20.

