

## Holidays Act 2003

### Information and Entitlements

The Holidays Act 2003 came into force 1 April 2004 and sets out minimum leave and holiday entitlements available to all employees. It replaced the Holidays Act 1981.

Employment agreements can provide entitlements better than those provided in the Act. If you are currently providing more favourable entitlements, then you are required to continue to provide these entitlements. The Act makes it clear that each separate component of holiday and leave arrangements must be at least as favourable to the employee as the entitlements specified in the Act.

This document looks at the four types of holidays and leave the Act requires employers to provide to employees. The definitions and examples of the different pay calculations are provided in [Appendix A](#) at the end of this document. These pay calculations are ordinary weekly pay, average weekly earnings and relevant daily pay.

The Holidays Act 2003 requires that all employers inform their staff about their entitlements under the Act. You must also inform employees that they can obtain further information about the Act from their union if they are a member of one, or from the Department of Labour. [Appendix B](#) is a sample notice that employers can give to employees with information about their entitlements under the new Act.

Sample individual employment agreement clauses covering the Holidays Act 2003 are provided in [Appendix C](#). This can be changed to suit your employee's current terms and conditions and attached as a variation document to the employee's individual employment agreement.

### **ANNUAL HOLIDAYS**

#### **General Entitlements**

Employees become entitled to four weeks' annual leave per year after twelve months continuous employment. Employees are entitled to take two weeks of their annual leave entitlement in an uninterrupted block if they choose too, and that leave must be allowed within 12 months of the employee becoming entitled to the leave in question.

Employers have the ability to either opt in (or opt out of) the ability for the employee to request the cashing out of up to one week of their annual leave. If an employer does not want to give the employees the ability to cash up their annual leave s/he needs to issue a policy informing employees of the employer's position.

Employers can manage an employee's annual leave by making them take their leave. If the employer and employee cannot agree on a suitable time (after consultation and with no

unreasonable withholding of agreement on the part of the employer), the employer can give the employee 14 days written notice of the date on which their holiday is to begin and end.

The employer is able to direct an employee to take an alternative holiday on 14 days notice.

### **Pay As You Go Arrangements**

Pay as you go holiday pay arrangements (8% in addition to wages) can only be used in the following two circumstances:

- Employees who are on genuine fixed term agreements of less than 12 months. This reflects the fact that these employees are not expected to reach the date on which they would normally qualify for annual holidays
- Employees with a work pattern that is intermittent or irregular (genuine casual work). This reflects the fact that the employee's employment pattern means it is not meaningful or practicable to attempt to provide them with three weeks paid annual holidays.

If you are found to be using pay as you go holiday pay arrangements for non-genuine reasons, or for permanent employees, then the employee could be entitled to four weeks annual leave on full pay at the end of 12 months' continuous service, regardless of any holiday pay payments already made.

### **The Effect of Sickness or Bereavement on Annual Holidays**

If an employee falls sick immediately before a period of annual leave, the employee is entitled to take any scheduled annual holidays as sick leave, for the period of sickness.

If an employee falls sick during a period of annual leave, the employer and employee may agree that the employee take the period of sickness as sick leave rather than annual holidays. However, this is not a legal requirement.

If the employee suffers bereavement before or during any period of annual leave, the employee is entitled to take bereavement leave. The period of bereavement leave will depend on the nature of the bereavement.

### **Calculating Holiday Pay**

Payment for annual holidays is at the greater of the ordinary weekly pay at the time the holiday is taken or the employee's average weekly earnings over the 12-month period before the annual leave is taken. Ordinary weekly pay and average weekly earnings calculations are provided in [Appendix A](#).

## **PUBLIC HOLIDAYS**

### **General Entitlements**

All employees are entitled to 11 public holidays per year. If the public holiday falls on a day that is otherwise a working day for the employee, then the employee must be paid for the day. You do not have to pay an employee on a public holiday if they do not work and if it is not a day that the employee would normally work.

There are slightly different entitlements to different public holidays:

- Christmas Day, Boxing Day, New Year's Day, the day after New Year's Day, Waitangi Day and Anzac Day
  - If the holiday falls on a Saturday or Sunday and that day would not otherwise be a working day for the employee, 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 that day would otherwise be a working day for the employee, the holiday remains at the traditional day and the employee is entitled to that day off on pay.
- Good Friday, Easter Monday, Queens Birthday, Labour Day and the Provincial Anniversary Day
  - These days never fall on a Saturday or Sunday so they are celebrated on the day on which they fall.

If an employee is required to work on a public holiday, they must be paid a minimum payment of time-and-a-half of relevant daily pay (which can be wider than simply ordinary pay) for the time they actually worked. This is regardless of whether they are employed on a salary or wages. Employment agreements must not state that the relevant daily pay of an employee already includes payment for time-and-a-half on public holidays.

Employers have the ability to either opt in (or opt out of) the ability for the employee to the transfer of a public holiday to another 24 hour period. If an employer does not want to give the employees the ability to transfer a public holiday s/he needs to issue a policy informing employees of the employer's position. Where an employer organisation agrees to transfer a public holiday, the holiday must be transferred to a day that would otherwise be a working day and that day cannot be taken on another public holiday.

### **Alternative Holidays**

An employee is entitled to an 'alternative holiday' (previously called a day in lieu) if they work on a public holiday that would otherwise be a normal working day for them. An alternative holiday is a full day's holiday, not dependant on the number of hours the employee worked on the public holiday.

If the employer and employee cannot agree on a suitable time (after consultation and with no unreasonable withholding of agreement on the part of the employer), the employer can give the employee 14 days written notice of the date on which their alternative holiday is to begin and end.

The employer is able to direct an employee to take an alternative holiday on 14 days notice.

Employees on-call on a public holiday will receive an alternative holiday if, because of the restrictions imposed on them by the on-call conditions, the employee was significantly impaired from enjoying the public holiday. This is regardless of whether the employee is called in for work or not.

**Sickness or Bereavement on a Public Holiday**

If an employee who is supposed to work on a public holiday but does not due to sickness or bereavement, the day must be treated as a public holiday and not as sick or bereavement leave. Payment will therefore be paid at not less than the employee's relevant pay, but without the penal rate payable if the employee had worked.

**Calculating Pay on Public Holidays and Alternative Holidays**

Relevant daily pay is used for calculating pay on public holidays and alternative holidays. The relevant daily pay calculation is outlined in [Appendix A](#).

**SICK LEAVE**

Under the old Holidays Act, sick leave was incorporated with bereavement leave and called 'special leave'. These entitlements have now been separated.

**General Entitlements**

Employees become entitled to five days' sick leave per year after six months continuous employment. Sick leave cannot be pro-rated for part-time employees. This means that part-time employees also receive five days' sick leave per year.

Sick leave may be used in the event of sickness or injury of:

- The employee
- The employee's spouse
- Any other person who depends on the employee for care.

Employees can carry up to 15 days' sick leave into the next 12-month period of entitlement. This means they may accrue a maximum entitlement of 20 days sick leave.

Employers can ask for a medical certificate or proof of sickness for any day off work. There is no need for the employer to have formed a reasonable suspicion regarding misuse of sick leave for this request to be made. For absences of 3 or more days, you can simply request a medical certificate which the employee must provide at their own expense. For absences of less than 3 days, you must inform your employee that proof is required as early as possible and the employer must meet the employee's reasonable expenses in obtaining proof.

Employers may allow employees to use their annual leave for a period of sickness if the employee's sick leave entitlement has been used up. The employee has to agree to this. If they don't, you can provide them with leave without pay if their sick leave is exhausted.

**ACC and Sick Leave**

If an employee is injured and their injury is accepted by ACC they will receive weekly compensation from ACC while they are off work. There is a one week stand down period before ACC compensation starts. If the injury is a work related injury, the employer is required to pay the employee (at 80% of what they would have normally earned) for the first week off work, without deduction of sick leave. If the injury is not work related, the employee can choose to pay the employee for the first week as sick leave. However, there is no legal obligation for you to do this.

ACC will only pay a maximum of 80% of the employee's earnings in weekly compensation. There is no obligation on you to top-up the remaining 20%, even if it is a work related injury. However many employers are happy to agree to top up the additional 20% by using the employees sick leave. This would mean that a full time employee would be paid one day of sick leave per week (20% per day).

More information can be found on ACC's website: <http://www.acc.co.nz/for-business/small-medium-and-large-business/managing-employee-injuries>

### **Calculating Sick Leave**

Relevant daily pay is used for calculating pay during periods of sick leave. The relevant daily pay calculation is outlined in [Appendix A](#).

## **BEREAVEMENT LEAVE**

### **General Entitlements**

After six months' continuous employment an employee is entitled to three days' paid bereavement leave on the death of the employee's:

- Spouse
- Parent or parent-in-law
- Child
- Sibling
- Grandparent
- Grandchild.

In addition to that entitlement, after six months' continuous employment an employee is entitled to one day paid bereavement leave on any other occasion where the employer accepts that the employee has suffered a bereavement. The employer should take into account:

- Closeness of the association
- Responsibility for ceremonies
- Cultural responsibilities

These entitlements are available for every bereavement the employee suffers – there is no maximum limit.

### **Relationship with Other Types of Leave**

If the employee suffers a bereavement while on annual holidays or sick leave, the period will be treated as bereavement leave (up to the statutory maximum).

The employee can use annual leave when they have run out of bereavement leave, however the employer cannot insist they do this. Another option is to allow the employee to take additional bereavement leave without pay.

### Calculating Bereavement Leave

Relevant daily pay is used for calculating pay during periods of bereavement leave. The relevant daily pay calculation is outlined in [Appendix A](#).

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### Need more help?

Contact the NZMA:

**Phone** | 0800 65 61 61

**Email** | Robyn Fell: [robyn@nzma.org.nz](mailto:robyn@nzma.org.nz)

## **APPENDIX A**

### **CALCULATING PAYMENTS UNDER THE HOLIDAYS ACT 2003**

#### **Ordinary Weekly Pay**

Ordinary weekly pay represents everything an employee is normally paid weekly. This includes:

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

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

Where ordinary weekly pay is unclear for any reason, the Act provides an averaging formula for working it out.

$$\text{Ordinary Pay} = \frac{a - b}{c}$$

*a* = gross earnings over the last four weeks

*b* = excluded payments

*c* = 4

To calculate gross earnings over the last four weeks, you go back to the end of the employee's last pay period, and work back four weeks. If the employee is paid on a monthly salary, '*a*' would be equal to the value of the employee's last salary payment.

If an employment agreement includes a specified ordinary weekly pay, this is the figure you use.

#### **Average Weekly Earnings**

##### **Annual Gross Earnings**

52

Average weekly earnings are determined by calculating gross earnings over the 12 months prior to the end of the employee's last pay 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 (not reimbursing allowances)
- all overtime payments
- piece work payments
- at risk, productivity or performance payments
- commissions
- 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 (ie 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.

### **Relevant Daily Pay**

Relevant daily pay reflects what the employee would have been paid if they had worked on the day in question.

Relevant daily pay must include:

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

Relevant daily pay does not include discretionary payments. Bonus clauses that state that the employee will receive a bonus but the amount of the bonus is to be determined by the employer are classified as discretionary payments and therefore do not form part of the definition of relevant daily pay. As a result such payments will be included in the calculation of gross earnings and will increase leave payments for some employees.

Relevant daily pay for calculating payment for public holidays will not include any penal rate otherwise payable. The term 'penal rate' refers to an identifiable additional amount payable for working on a public holiday or on a particular day of the week. It does not include any payment such as a payment for a sixth or seventh day.

Where relevant daily pay is unclear for any reason, the Act provides a formula called average daily pay for working it out.

$$\text{Average daily pay} = \frac{a}{b}$$

**a** = gross earnings over the last fifty two weeks

**b** = the number of full or part-time days worked by the employee over that period.

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

Employers can also choose to use the average daily pay formula where an employees' daily pay varies during the pay period in which the holiday is taken. So for example, where an employee works 9-12 3 days a week and 9 – 5 the other 2 days, the employer could choose to use the average daily pay formula instead of paying the employee's actual relevant daily pay.



## **APPENDIX B**

### **HOLIDAYS ACT 2003 – NOTICE FOR EMPLOYEES**

The purpose of this notice is to inform all current, and intending, employees of their general entitlements under the Holidays Act 2003.

#### **Permanent Full or Part-Time Employees**

Subject to the terms set out in your Employment Agreement, you are entitled to:

- ❑ four weeks' paid annual holidays after the end of each completed 12 months of continuous employment.
- ❑ 11 public holidays, which will be paid days off if they fall on days you would normally work and are not required to work. If you are required, and do work on a public holiday you must be paid at least time-and-a-half of your relevant daily pay for the hours you actually worked on the day concerned;
- ❑ after six months' continuous employment, five days' sick leave for each 12 months thereafter. Unused sick leave may accumulate to a maximum of 20 days' leave;
- ❑ after six months continuous employment, bereavement leave of:
  - 3 days on the death of a spouse, parent or parent-in-law, child, sibling, grandparent or grandchild; and
  - 1 day for the death of any other person if we accept that you have suffered a bereavement.

#### **Casual Employees**

Your entitlements will depend on the length of your employment with us, and the number of hours you work. Please contact [insert name] to check which of the new entitlements you will be eligible for.

As a general rule you will be entitled to penal rates for work on public holidays. Therefore, if you are required, and do work on a public holiday you must be paid at least time-and-a-half of your relevant daily pay for the hours you actually worked on the day concerned.

#### **Fixed Term Employees**

Your entitlements under the Holidays Act 2003 will depend on the length of your fixed term agreement with us. Please contact [insert name] to check which of the new entitlements you will be eligible for.

As a general rule you will be entitled to penal rates for work on public holidays. Therefore, if you are required, and do work on a public holiday you must be paid at least time-and-a-half of your relevant daily pay for the hours you actually worked on the day concerned.

A copy of the Holidays Act 2003 is available for you to view on request. For further information about your entitlements you may wish to contact the Department of Labour on 0800 800 863 or contact your Union.

## APPENDIX C

### SAMPLE INDIVIDUAL EMPLOYMENT AGREEMENT CLAUSES

#### Leave Provisions

Further information about entitlements under the Holidays Act 2003 can be obtained by the employee from the Department of Labour or from the employee's Union.

##### **a) Annual Leave**

Upon completion of each of each continuous twelve-month period of employment, the employee is entitled to four weeks' paid annual holiday, in addition to all statutory holidays and inclusive of the provisions of the Holidays Act 2003. Annual holidays will be paid in accordance with the Holidays Act 2003 and will be paid in the normal pay cycle unless otherwise agreed between parties.

The times at which leave is taken will be determined by mutual agreement, or failing that at the employer's discretion after consultation and provided that no less than fourteen days' notice is given.

The employee [**may/may not**] cash up x proportion of their holidays entitlement.

##### **b) Sick Leave**

Sick leave is allowed for in accordance with the Holidays Act 2003. Where the employee has worked for six months with the employer they shall be entitled in each ensuing period of 12 months, to five days' sick leave on full pay. Sick leave may accumulate to a maximum of 20 days' entitlement in any year.

Sick leave may be taken in the following circumstances:

- The employee's sickness or injury,
- Sickness of the employee's spouse,
- Sickness of a person who depends on the employee for care.

Where the employee needs to take sick leave, the employee will notify the employer as soon as practicable and before the commencement time on the first day of absence where practicable.

The employee will, subject to section 68 of the Holidays Act 2003, provide evidence to support an application for sick leave if required by the employer. Where the employee is requested to provide a medical certificate, the medical certificate must state that the employee/dependant has been examined by a doctor and is, in the doctor's opinion, unfit for work.

Sick leave will be paid in accordance with the Holidays Act 2003 and will be paid in the normal pay cycle.

If there is reason to suppose that the employee is suffering from any sickness, illness, physical and/or mental disability impacting on the employee's ability to perform the duties to a satisfactory level, the employer may request the employee to undergo an independent medical assessment by a medical practitioner nominated and paid for by the employer. The employee agrees to authorise the nominated medical practitioner to release any reports to

the employer to assist in its assessment of the situation. If the employee should refuse to undergo a medical assessment or release such report the employer will be at a liberty to assess the situation based on such information and belief as the employer has at the time of refusal.

**c) Bereavement Leave**

Bereavement leave will be allowed for in accordance with the Holidays Act 2003. After six months current continuous service, the employer will allow the employee to take:

- ❑ Three days' bereavement leave on the death of one or more of the employee's spouse, parent, child, brother or sister, grandparent, grandchild or spouse's parent; and
- ❑ One day's bereavement leave for the death of any other person if the employer accepts that the employee has suffered a bereavement as a result of the death.

Bereavement leave will be paid in accordance with the Holidays Act 2003 and will be paid in the normal pay cycle.

**d) Public Holidays**

Public holidays are allowed for in accordance with the Holidays Act 2003. Each employee shall be entitled to 11 whole holidays which shall, where they fall on days that would otherwise be working days for the worker, be paid holidays in addition to annual holidays.

Such public holidays are: Christmas Day, Boxing Day, New Year's Day, 2 January, Good Friday, Easter Monday, ANZAC Day, Labour Day, the Sovereign's birthday, Waitangi Day and the appropriate provincial anniversary.

Due to the nature of the employer's business, the employee may be required to work on any of these public holidays. Where the employer requires an employee to work on any of the said public holidays, the employer may on notice of at least 5 working days require the employee to work on the public holiday.

Where a public holiday falls on a day that would otherwise be a working day for the employee, and the employee is directed to, and does work on that day, the employee will be paid the portion of the employee's relevant daily pay that relates to the time actually worked on the day plus half that amount again (time-and-a-half).

If the employee works on a public holiday that is a normal working day for the employee, then the employee will also be granted an alternative day's holiday, at their relevant daily pay, for the day chosen. Any alternative holiday will be taken at a time mutually agreed between the employer and employee. An employee will not be entitled to an alternative holiday if they work on a public holiday that is not a normal working day for the employee. The employer has the discretion to direct an employee to take an alternative holiday on 14 days notice.

At the discretion of the employer the employee may choose the public holiday to another working day, provided that the working day is not another public holiday.