EMPLOYMENT NEW ZEALAND

Holidays Act 2003

Guidance on annual holidays, family violence leave, bereavement leave, alternative holidays, public holidays and sick leave

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government

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Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful

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Some provisions in the Act which currently allow more than one interpretation have not had the matter tested and decided by the Courts. Where MBIE has a view on the interpretation of a particular provision, it will express how it interprets that provision, but this should not be considered a substitute for legal advice.

Summary of changes made to Holidays Act 2003: Guidance on Annual Holidays and Related Provisions:

Date of change: July 2017

- Correction to typographical error on page 50, bullet point three to state the scheduled amount of hours as 10, and not 16.

Date of changes: September 2017

- Change in title of document to Holidays Act 2003: Guidance on annual holidays, bereavement leave, alternative holidays, public holidays and sick leave.
- Changes to the following sections to reflect inclusion of additional BAPS content (pages 5 – 52): Providing guidance on the Holidays Act 2003 – an overview; Key messages; Key terms; Detailed definitions; and Annual Holidays and Annual closedown periods.
- Stylistic and other minor changes (pages 5 – 52) to ensure consistency between annual holidays and BAPS sections.
- Transfer of gross earnings table and annual holidays – detailed scenarios sections to Annex 1 and Annex 2 respectively.

Date of changes: November 2017

- Correction to typographical error on page 56, 'With regard to (b)' amended to 'With regard to (a)'.

Date of changes: April 2019

- Change in title of document to include "family violence leave" to reflect addition of new section on family violence leave.
- Changes to the contents to reflect the new section on family violence leave; and change in heading from sick leave, bereavement leave entitlements on termination to sick leave, bereavement leave and family violence leave entitlements on termination (pages 2).
- Changes to the following sections to reflect inclusion of additional family violence content (pages 5 – 88): Key messages; Key terms; Otherwise working day ('OWD'); Gross earnings ('GE'); Relevant daily pay ('RDP'); Average daily pay ('ADP'); Annual holidays; Annual closedown periods; Public holidays; Sick leave; Entitlements on finishing employment; and Annex 1: Gross earnings.

Date of changes: July 2021

- Changes to minimum sick leave entitlements: from 5 to 10 days and change of wording 'domestic violence' to 'family violence'.

Date of changes: 10 October 2023

- Change wording about available information/guidance to clarify this related to the time the guide was originally published (page 5).
- Changes made to account for findings in two court decisions (Tourism Holdings and Metropolitan Glass) (pages 19-21 and 90).
- Changes to public holidays content: from "11" to "12" public holidays, "Queen's" to "King's" Birthday; and addition of Matariki holiday (page 55).
- Change to the hourly rates (and the subsequent calculations) in examples so they are more than the current minimum wage rates (pages 22, 25, 45 and 60).
- Correct references to "five" days of sick leave to "ten" days (pages 67-68).
- Inserted missing words in the last sentence of the pink box relating to 'casual' employees (page 69).
- Replace diagram relating to "Carrying over sick leave" with a table (page 71).
- Change reference to section 3 of the Domestic Violence Act to section 9 of the Family Violence Act (page 80).
- Correction of mathematical errors in "Scenario 2 – Jeanie (moderate variation around contracted hours)" (pages 95-96).

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Providing guidance on the *Holidays Act 2003*

The Ministry of Business, Innovation and Employment (MBIE) is responsible for administering and enforcing the Holidays Act 2003 (the 'Act'). This guidance has been produced because it has become apparent that non-compliance with the Act is a significant issue. This is, in part, due to the challenges of applying the legislation in certain situations, and because at the time this guidance was originally published (June 2017) the available information and guidance did not address these situations in detail.

This guidance is intended to assist parties to an employment relationship to better understand their rights and obligations regarding the holidays, leave and related provisions in the Act and how these should be applied across the range of working arrangements in today's labour market.

The Act sets out the minimum entitlements to holidays and leave, and payment for them, that employers are obliged to provide to their employees. This document provides guidance about the holidays and leave provisions to help:

- employers understand and meet their obligations
- employees understand their entitlements and make sure they are receiving them
- professional service providers, including payroll system providers, support employers to meet employer obligations under the Act.

In general, applying the provisions of the Act for employees whose work and pay arrangements are consistent will be reasonably straightforward, but for employees with more complex or variable work and/or pay arrangements, applying the Act can be more challenging and time-consuming.

In particular, there are a number of key decision points in the Act that relate to the provision of holidays and leave and the payment for them. These decisions require a judgement based on the specific facts of an employee's working arrangements, and, in some cases, an explicit agreement between the employer and employee reached in good faith.

Because the application of the Act often requires decisions that are fact-specific, guidance cannot provide definitive answers in all situations. Instead, this guidance is intended to assist employers to make these decisions and support employees in their discussions with their employer through, for example, clearly stating the key principles that underpin the legislation, providing guidance on the application of specific provisions, and listing questions/factors for consideration.

There are a number of things to bear in mind when considering this guidance:

- there will often be more than one way to achieve compliance in any one situation
- it is not possible to provide examples to cover every situation
- this guidance is no substitute for legal advice
- employers and employees are free to negotiate entitlements above the minima in the Act.

Key messages for employers

- It is the employer's legal duty to make sure their employees' holiday and leave entitlements that are set out in the Act – along with the payment for these entitlements – are correct and meet minimum employment standards. Employers cannot contract out of their responsibilities under the Act, even if employees agree.

- Employers are free to choose the work arrangements that best suit their business objectives, consistent with the law, but should also recognise that complicated pay and/or variable or unpredictable work arrangements are likely to increase the time and cost of complying with the Act.

- To ensure compliance with minimum standards and other legal obligations requires the employer to engage with their employees and their payroll staff or provider on an ongoing basis – taking a 'set and forget' or a 'one size fits all' approach to payroll carries a high risk of non-compliance.

- In many situations, correctly implementing the Act requires a judgement to be made based on the specific facts of an employee's working arrangements and pay. Certain situations also require explicit agreement with the employee, though employers are strongly advised to be open and transparent with their employees about all aspects of the provision of these entitlements. Agreements should follow a good faith discussion (see Key terms section on Page 11) with the employee. The key points in the Act relating to holidays and leave which require these kind of judgements are:
    - agreeing what genuinely constitutes a working week for each employee
    - agreeing what portion of the annual holiday is taken when annual holidays are requested
    - determining what is, and is not, 'regular' for the purpose of calculating an employee's ordinary weekly pay
    - determining when it is not possible to identify an employee's ordinary weekly pay and so using the four-week average formula
    - determining what is an otherwise working day for the purpose of establishing entitlement to bereavement leave, alternative holidays, public holidays, sick leave and family violence leave
    - determining relevant daily pay, or average daily pay where applicable, for an employee who takes bereavement leave, alternative holidays, public holidays, sick leave and family violence leave.

- Payroll software or third-party providers can make managing employees' holiday and leave provisions easier, but it is still the duty of the employer to make sure the pay is correct. There are also limits to what payroll software can achieve – it cannot make the kind of judgement calls referred to above. These must be made by the employer and inputted into the system. This may be required each time holidays and leave are taken.

- Missing data, inaccurate entries, changes in an employee's working arrangements, not keeping updated with the law, and wrongly configured payroll systems can all contribute to not giving an employee the correct holidays entitlements and pay. The Act sets out the legislative minimum entitlements and payments. This does not prevent employers and employees agreeing to enhanced holiday and leave entitlements and payments over and above the minima.

Key steps for reducing the risk of non-compliance

MBIE considers that the following steps will significantly reduce the risk of non-compliance with the Act:

- ***Employers should engage with their employees in good faith (see Key terms section on page 11) on the issue of provision of the minimum entitlements (and the relevant payment for them)*** – this is especially important when it is not clear and a judgement needs to be made. Some holiday and leave provisions require specific agreement with employees. Employers educating their employees about their minimum entitlements will also support compliance and assist identification of issues relating to holidays and leave.

- ***Employers must respond to changes in employees' work patterns*** – employers (and their payroll staff or providers) need to be aware of any permanent or temporary changes to an employee's agreed work pattern. Sometimes these changes might not be immediately obvious. They must discuss these changes, and their implications for the provision of the Act's entitlements – particularly the annual holiday entitlement – in good faith and in a timely manner.

- ***Employers must keep accurate records for each of their employees that are compliant with the requirements in both the Employment Relations Act 2000 and the Holidays Act 2003*** – this includes having a record of the hours worked each day in a pay period by each employee and the pay received for those hours.

- ***Employers need to ensure that their payroll systems and processes (whether internal or third-party) are fit-for-purpose*** – it is the employer's responsibility to provide their employees with their holiday and leave entitlements in accordance with the Act. It is therefore, the employer's responsibility to ensure that the payroll system they use calculates entitlements and pay in accordance with the Act.

- ***Employers need to ensure that payroll has all the relevant information from across the business to correctly calculate their employees' entitlements and pay*** – it is the employer's responsibility to provide their employees with the minimum entitlements in accordance with the Act. It is therefore the employer's responsibility to ensure that payroll receives, on an ongoing basis, all the relevant information from across the business (for example, from HR, line managers, the employees themselves). This is especially important for employees whose hours/days and pay vary.

- ***Employers may want to err on the side of caution*** – in many cases there is no single 'correct' answer as to what the minimum entitlement or pay is. If there is more than one choice for calculating entitlements, choosing the ones that are more favourable to the employee may significantly reduce risk and, potentially, the compliance costs associated with trying to determine the minimum.

Key messages for employees

- You have a minimum entitlement to four weeks' paid annual holidays off work for rest and recreation after 12 months' continuous employment with your employer (though your employer can agree to give you more). The intent is that, if you took all of your entitlement in one year, you would have had a total of (at least) four calendar weeks off work.

- You may take annual holidays in advance (before you have become entitled to them) if both you and your employer agree.

- For employees who work the same hours each day and the same days each week, and receive the same pay for those hours, working out the annual holiday entitlement and payment will be relatively straightforward.

- If it is not immediately clear from your work pattern what your entitlement should look like, your employer should discuss this with you in good faith – including talking through the implications of different choices – so that you can reach an agreement. Your employer cannot simply impose an approach to annual holidays on you without discussion.

- If it is not clear whether a day you have requested for holidays or leave would otherwise be a working day for you (because your days of work vary), then your employer should discuss this with you (and the Act prescribes certain factors that must be considered) so that you can reach agreement. If you cannot reach an agreement a Labour Inspector may make a determination.

- If you are off work because it is a public holiday or alternative holiday, or because you are entitled to sick leave, bereavement leave or family violence leave, you must be paid for the days off work, if they fall on an otherwise working day for you. You must be paid not less than your relevant daily pay, or average daily pay where applicable.

- If your work pattern changes, either as a result of an explicit agreement with your employer or as a result of a gradual change, and your employer has not yet discussed this with you, it is important that you discuss the implications of this change for your annual holiday and leave entitlements with your employer. Any permanent or long-term change to your work pattern should be recorded in writing.

- Discussion in good faith (see Key terms section on Page 11) means being open and communicative with each other and not doing anything likely to mislead or deceive the other person. Essentially, you and your employer (and your union if involved) need to be upfront and honest when discussing these issues.

- Your employer is required by law to keep a holiday and leave record and wages and time record in relation to your employment. You can ask to see this at any time. Among other things, this record must contain details of your current holiday and leave entitlements, the dates of any annual holidays and leave you have taken and the payment you have received for these.

- If you think that you are not receiving your minimum entitlements, or your employer has not kept an accurate holidays and leave record, you should discuss this with your employer. You can seek advice and representation for this conversation if you need it (for example, a lawyer or union representative). If you are unhappy with the results of these discussions you have a legal right to challenge your employer's decision in some instances. If you just need information, you can contact Employment New Zealand on 0800 20 90 20.

Key messages for professional service providers

- The responsibility for providing the holiday and leave entitlements in the Act rests with the employer and it is their responsibility to ensure that payroll has all the necessary information required to calculate the correct pay for employees.

- It is the responsibility of professional service providers, including payroll systems providers, to ensure that the products, services and advice they offer are consistent with the Act, and capable of being configured and used in a fully compliant manner.

- Third parties, including payroll system providers, can be found liable under the legislation if they are found to be knowingly and intentionally involved in a breach of employment standards (which include the holiday and leave provisions in the Act).

- Key provisions in the Act cannot be systematised for all circumstances and may require judgements to be made by the employer (and, in certain cases, agreed with the employee) based on the specific facts of an employee's work pattern and pay.

- If it is not clear how a particular provision should be applied in the case of a particular employee, you should raise this with the employer, who then needs to discuss this with the employee and let payroll know what has been agreed.

This guidance should assist professional service providers, including payroll system providers, to have discussions with employers about how best to implement the provisions of the Act in the payroll system.

Key terms

The following key terms are intended to add context to the terms defined in the Act. They should not be used as a substitute for, or expansion of, the legal definition in the Act. If you cannot find a definition you are looking for, check the Act, particularly the 'Interpretation' provisions.

Six key terms that are central to calculating payment for family violence leave, bereavement leave, alternative holidays, public holidays and sick leave (FBAPS) are dealt with in greater detail in Detailed definitions section on Page 14

Annual holiday entitlement
Also known as annual leave, this is an employee's legal right to not less than four weeks of annual holidays each year after working for an employer for 12 months.

Average daily pay ('ADP')
See Detailed definitions section on Page 26.

Average weekly earnings ('AWE')
AWE is 1/52 of the employee's gross earnings for the 12 months before the end of the last pay period before the annual holiday.

FBAPS leave
A collective term for family violence leave, bereavement leave, alternative holidays, public holidays and sick leave.

Casual employee
Employment legislation does not define what 'casual' employee means (it is set out in case law). It is generally taken to mean an employee who works as and when required, can turn down work and has no expectation of ongoing employment. All employees have the same entitlements under the legislation. See Page 13 for a note of caution about casual employees and the Act.

Closedown period
Employers can have a customary closedown of all or part of their operations once a year and require employees to take annual holidays during the closedown, even if an employee has to take unpaid leave. Christmas is the most common time for a closedown.

Continuous employment
Employees become entitled to annual holidays when they have completed 12 months' 'continuous' employment. While many types of leave (for example, paid leave, parental leave and unpaid sick leave) count towards the 12 months' continuous employment, other leave without pay in excess of one week does not count towards the 12 month total unless this is agreed between the employer and employee.

Eligibility to bereavement leave, sick leave and family violence leave is dependent on six months' 'current continuous' employment. However, employees may also be entitled to this if, over a six-month period, they worked for an average of at least 10 hours per week, and no less than: at least one hour every week, or 40 hours every month.

Employee records: wages and time and holiday and leave
The information employers must hold about employees, as required by the *Employment Relations Act 2000* (s130(1)) and the *Holidays Act 2003* (s81(2)).

Fixed-term agreement
Employment relationships with a set start and end day or event, along with a genuine reason for such an arrangement. This arrangement must be clearly specified in writing in the employment agreement and must comply with the requirements set out in s66 of the *Employment Relations Act* to be valid.

Good faith
The law requires parties in an employment relationship (including employers, employees and unions) to act towards each other in good faith, which includes being responsive, communicative, and active and constructive in maintaining the employment relationship. It also requires that the parties refrain from taking any actions likely to mislead or deceive. All these obligations directly apply to the parties' obligations under the Act when discussing and agreeing on holiday and leave entitlements.

Gross earnings ('GE')
See Detailed definitions section on Page 16.

Leave without pay ('LWOP')
An employee's unpaid absence, taken while staying employed.

Normal pay cycle
The period of work that an employee is paid for on a regular basis, for example, weekly, fortnightly, monthly.

Ordinary weekly pay ('OWP')
See Detailed definitions section on Page 17.

Otherwise working day ('OWD')
See Detailed definitions section on Page 14.

Pay-as-you-go ('PAYG') annual holiday pay
Employees who meet either of two specific sets of criteria (set out in s28 of the Act) can agree with their employer to be paid annual holiday pay on top of their gross earnings for each pay period, instead of receiving paid time off work.

Paying out some of the annual holiday entitlement
This is commonly referred to as 'cashing up' some annual holidays. Employees can ask their employer to pay out up to a maximum of one week of their minimum four-week annual holiday entitlement each entitlement year (instead of taking the time off as annual holidays). The employee must make the request for this pay out and the request must be in writing. Employers may have a policy against paying out (including in an applicable collective agreement), but even if they do not have such a policy they do not have to agree to a pay-out.

Pay period
The dates an employee is paid for, such as Monday 12 February to Sunday 18 February. Even if the payment is made before or after 18 February, the pay period covers days the wages or salary relates to.

Permanent employee
A person employed on an ongoing indefinite basis.

Relevant daily pay ('RDP')
See Detailed definitions section on Page 21.

Regular payments

Regular payments are included in calculations of ordinary weekly pay. See Detailed definitions section on Page 17 for more information on the meaning of 'regular' in relation to OWP.

'Casual' employees – a note of caution

The Act does not distinguish between employees on the basis of employment status other than in s28, under which certain employees can agree with their employer to receive their annual holiday pay as part of their regular pay package (PAYG holiday pay). The term 'casual' does not appear anywhere in the employment legislation. All employees, regardless of employment status, are entitled to receive the minimum levels of holiday and leave if they meet the required criteria.

Just because an employee is called 'casual' by the employer or is employed under a casual employment agreement, does not mean that they can automatically be paid PAYG holiday pay, (though some employees termed 'casual' will meet the s28 test). This is a common cause of non-compliance with the Act.

Detailed definitions

This section goes into greater detail about five key terms in the Act:

- Otherwise working day ('OWD')
- Gross earnings ('GE')
- Ordinary weekly pay ('OWP')
- Relevant daily pay ('RDP')
- Average daily pay ('ADP').

Otherwise working day ('OWD')

The Act provides employees with entitlement to paid family violence leave, bereavement leave, alternative holidays, public holidays and sick leave where such days fall on an otherwise working day.

While the Act only makes explicit reference to OWD in the context of FBAPS leave, the concept also applies to annual holidays when taking less than a week off, for example if a day's annual holiday is requested. The same factors should be considered when determining if a day is an OWD for the purpose of providing the annual holidays' entitlement.

The principle behind determining an OWD is whether an employee would have worked, had they not taken holidays or leave on the day in question. In most cases whether a day is an OWD – and how many hours they would have worked on that day – is clear because the employee's work pattern or roster is constant and predictable. However, some employees may have a pattern of work that is inherently unpredictable – perhaps because their hours and days are highly variable from week to week – and whether a day is an OWD (and, if so, how many hours they would have worked) may be hard to determine.

If it is unclear whether a day is an OWD, the Act requires that the employer and employee must take into account the factors listed below with a view to reaching agreement on the matter:

- the employee's employment agreement
- the employee's work patterns
- any other relevant factors, including:
    - whether the employee works for the employer only when work is available
    - the employer's rosters or other similar systems
    - the reasonable expectations of the employer and the employee that the employee would work on the day concerned
- whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave, bereavement leave or family violence leave, the employee would have worked on the day concerned.

As the Courts have made clear, determining whether a day is an OWD is an intensely practical exercise. There are no hard and fast rules to follow and each case needs to be determined with reference to the particular nature of the employee's work pattern.

When it is not clear, employers and employees must engage with each other in good faith to reach an agreement, taking account of all the relevant factors, as listed above[1].

[1] The listed factors are not the only ones that can be taken into account. As observed by the Court of Appeal in *NZ Fire Service Commission v NZ Professional Firefighters Union* [2007] 2 NZLR 356 those factors "are very open-ended and flexible".

It would not, for example, be sufficient to take account of only rosters without considering these other factors. There may be situations where an employee might not be rostered to work on a public holiday because of a suspended or reduced service on the day in question (for example, postal workers or bus drivers) but who would otherwise have an expectation to work on the day.

Nor should rosters be used for the sole purpose of avoiding having to pay employees on public holidays. This practice would not be considered compliant with the Act. Similarly, the parties should not rely just on formulas (such as a certain percentage of Fridays worked over recent months) to determine an OWD. While these can be helpful, the Act requires the parties to take into account all the relevant factors.

Employees classified as 'casual' will often have sufficiently regular work hours to entitle them to receive all types of leave under the Act. It is a mistake to conclude that an employee cannot have an OWD if they are classified as 'casual'. In one case, an employee was on a casual employment agreement, but the Employment Court ruled that he was entitled to be paid for public holidays because (i) his working pattern around the public holidays was regular and (ii) the employee would have had a reasonable expectation of working on those days[2].

Examples:

- If a part-time employee normally works Tuesday, Wednesday and Friday, the employee will be entitled to receive payment for Good Friday as an OWD but will not be entitled to pay for Easter Monday.

- Where an employee's roster requires 3 x 10-hour days on Monday to Wednesday one week (week 1) and the same hours on Thursday to Saturday the following week (week 2), and if week 1 coincides with the week in which Good Friday falls, this employee will not be entitled to receive payment for Good Friday or Easter Monday (that will fall in week 2) because they would not have been scheduled to work on that Friday or Monday. If, however, week 2 coincides with Good Friday, the employee will be entitled to a holiday pay for both Good Friday and Easter Monday.

- If an employee is required to work only certain times of a year, such as seasonal workers where employment only occurs during the picking or tourist seasons, or there are regular times of the year when the employee is not paid – for example an employee who only works during term time – then a public holiday which falls during a period when the employee is not required to work, would not be considered to be an OWD.

If an employee is on a 'casual' employment agreement and is called in (even at short notice of less than a day or two) and agrees to work on a particular day, this can raise the question as to whether this becomes an OWD should, for example, the employee subsequently fall sick and be unable to work on the day. While the employee may have had a reasonable expectation to work on the day, this factor cannot be considered in isolation when establishing whether this would be an OWD. Other relevant factors in this situation include whether the employee works only as and when required and whether there was a pattern of the employee working on the day concerned.

[2] *BW Murdoch Ltd v Horn, Labour Inspector* (2008) ERNZ 38

The Act provides that if a public holiday falls during a closedown period[3], employees are entitled to be paid for it if it would be an OWD, taking the same relevant factors into account as described above.

The Employment New Zealand website has a tool to assist with determining an OWD.

Gross earnings ('GE')

Gross earnings feature in a number of calculations in the Act. They are used to determine, among other things:

- the four-week average ordinary weekly pay ('OWP') when needed for calculating annual holiday pay
- average weekly earnings ('AWE') in the calculation of annual holiday pay
- average daily pay ('ADP') when needed for calculating pay for FBAPS leave
- eight percent PAYG
- termination pay.

The key question when calculating gross earnings is 'what payments are included?' Section 14 of the Act states that gross earnings "in relation to an employee for the period during which the earnings are being assessed, means all payments that the employer is required to pay to the employee under the employee's employment agreement…". The section then proceeds to list a number of examples of inclusions and exclusions.

Three important points to recognise are:

- Gross earnings exclude any payments that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee. These payments will be relatively rare.
- 'Employment agreement' should be read broadly to include all documents and other agreements that form part of the contractual agreement between the employee and employer. Agreements need not be written down; they may also be verbal or created by the conduct of the parties. An employment agreement includes (but is not limited to) an offer of employment, an individual employment agreement, a collective agreement and additional agreed terms and conditions not inconsistent with the collective agreement.
- Listed in the exclusions are 'discretionary payments'. It is important to understand that 'discretionary payments' have a special meaning under the Act. If an employer is bound by the terms of the employment agreement or some other agreement such as the rules of a commission scheme, to make a payment to the employee – even if the amount is discretionary (and could be zero) and/or certain conditions must be met before it is paid – it is not a discretionary payment.

A table of many common payment types listing whether they should be included or excluded from GE is set out in Annex 1.

[3] The meaning of closedown in this context is that as is defined in s29 of the Holidays Act.

There is one further, more subtle, point with the GE calculation that can lead to different results. This is that there are two ways of interpreting s14 that both appear to be consistent with the legislation:

- GE requires an assessment of *all relevant payments that are made (or due) to an employee during the period concerned*, regardless of when the work that is being remunerated was done ('money paid').
- GE requires an assessment of all relevant payments made *for the work done during the period concerned* ('money earned').

Note: By 'due' we are simply referring to the contractual obligation to make a payment on a certain date. In many cases money paid = money due, ie the payment is made when it is due. If payment is made after it is due, it is the due date that is important[4].

MBIE generally takes a 'money paid' approach, but it is likely that both approaches will be compliant in most situations as they will lead to a similar result. Employers should take a consistent and principled approach to this issue and be open and transparent with their employees about it. In situations in which they result in quite different outcomes (as can sometimes happen in the OWP calculation), employers are advised to err on the side of caution.

One example that highlights the difference is when counting back 12 months for the AWE calculation lands you in the middle of a pay period, for which the pay is received at the end of the period (ie within the 12-month assessment period):

- under a 'money paid' approach, the full amount paid for that pay period is included in the GE calculation (even though some of the period falls outside the 12 months). It is not split on the grounds that some of the pay period falls outside of the 12-month period
- under a 'money earned' approach, only the portion of that first pay that relates to the portion of the pay period that falls within the 12 months would be considered.

Both of these approaches are likely to be compliant and different configurations of payroll systems may mean that one is easier than the other. However, it will be important to apply a consistent approach to any individual employee.

In most cases there is unlikely to be a significant difference between these two approaches when assessing GE over either 12 months (for AWE) or 52 weeks (for ADP). (The situation when calculating the four-week average OWP is slightly different and is discussed below.)

Ordinary weekly pay ('OWP')

Ordinary weekly pay ('OWP') is used in the calculation of payment for annual holidays. It is compared to the employee's average weekly earnings ('AWE').

OWP is the amount an employee is normally/usually paid each week. It includes:

- regular allowances, such as a shift allowance
- regular productivity or incentive-based payments (including commission or piece rates)

[4] *Howell v MSG Investments Ltd* [2014] NZEmpC 68

- the cash value of board or lodgings provided by the employer
- regular overtime payments.

OWP excludes:

- productivity, incentive-based and overtime payments if these are not a regular part of the employee's pay
- any one-off or exceptional payments
- any discretionary payments that the employer is not bound, under the terms of the employment agreement, to pay the employee (noting the special meaning of 'discretionary payments' under the Act)
- any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

For many people, OWP is quite clear because they are paid the same amount each week. However, when it is not possible to determine OWP, the Act gives a formula to work it out. That formula is:

- go to the end of the last pay period before the holiday is taken (ie do not count the date of a one-off, irregular payment)
- from that date, going back four weeks, or the length of the pay period (if longer than four weeks) – for example, if the last pay period is a month, go back a month
- determine the gross earnings for that period
- deduct any payments that are excluded from the determination of OWP (ie the exclusions listed above)
- divide the answer by four.

Section 8 of the Act refers to the four-week period "before the calculation is made". This should be read in the context of s21 which refers to the OWP "at the beginning of the holiday". The four-week period is, therefore, the four-week period before the end of the last pay period before the holiday is taken.

Some payroll software recalculates pay for holidays if an employee's pay rate increases during the time on holiday. As the legislation only requires holiday pay to be calculated based on pay just before the holidays are taken, this recalculation will be compliant but only if it results in an employee being paid above their entitlement for the holiday.

Some employment agreements include a special rate of OWP. If so, the special rate in the employment agreement must be compared with the actual OWP. Employers must use the greater of the two for OWP.

The key questions when calculating OWP are:

- what does 'regular' mean? (ie when should productivity/incentive/overtime payments be included in the OWP assessment?)
- when is it 'not possible' to determine an employee's OWP? (ie when should the four- week average formula be used instead?)
- how should the four-week average be calculated?

These questions are considered in the following box.

What does 'regular' mean?

Productivity or incentive-based payments are only included in OWP if the payments are "a regular part of the employee's pay". The Act does not define the term "regular".

The meaning of 'regular' in this context was considered by the Supreme Court in *Tourism Holdings Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment**. In its decision the Court noted that the purpose of the Act is to 'put an employee who takes a holiday in broadly the same position as if they had been working', and to avoid artificial inflation of annual holiday pay entitlements.

Following the decision in *Tourism Holdings*, whether a productivity or an incentive-based payment (including commission) should be treated as regular depends on whether OWP as defined by s8(1) or s8(2) (using the four-week formula) applies.

When s8(1) applies, whether a payment is regular is assessed against the employee's ordinary working week. Section 8(1) is focused on the assessment of "the amount of pay" the employee receives for an ordinary working week. For this purpose, productivity/incentive/overtime payments are only included 'if they have sufficient connection with, or regularity in relation to, an ordinary working week to enable such an assessment to be made'.

When s8(2) applies, whether a payment is regular is assessed against a four-week period. This means that productivity/incentive/overtime payments that are made weekly, fortnightly or monthly should be included when calculating the four-week average in s8(2), even when the amount of the payment varies. As a result, payments of this type made on average monthly, are sufficiently regular to be included in the calculation under s8(2), despite not being "regular" in terms of an ordinary working week.

Each situation will need to be considered on its merits. Employers should exercise their judgement and discuss in good faith with their employees so that the employees have a clear understanding of how the calculation has been performed. It is suggested that employers err on the side of caution and include the payment if they wish to minimise the risk of non-compliance.

* [2021] NZSC 157

When is it 'not possible' to calculate OWP or when should the four-week average be used?

The question can be rephrased as: *Is there a normal/usual amount that the employee receives each week or most weeks?*

- If there are some occasional variations, but it still makes sense to talk of a 'normal/usual' amount, then that amount should still be considered as s8(1) OWP.
- If the employee works different, but predictable weeks, (as, for example occurs in a four day on/four day off shift pattern) then OWP should relate to the week they take as annual holidays.
- The 'normal/usual' amount should include regular overtime/incentive etc. payments, but only if it makes sense to consider these as part of the employee's OWP.

If there is not a normal/usual weekly amount once all 'regular' payments are considered, then the four-week average should be used. For example:

- If the employee's hours vary from week to week (and these are more than just minor/occasional variations) such that there is no 'normal/usual' amount the employee receives for a working week, then the four-week average (s8(2) of the Act) should be used.
- An Employment Relations Authority case found that an employee's overtime payments were regular (they occurred every week) but as the amount varied unpredictably from week to week, the four-week average should be used[5].
- If commission is earned from activity each week (regardless of when it is actually paid), but the amount varies unpredictably from week to week, then the four-week average should be used.

The main point is that an employee should not be disadvantaged financially for taking annual holidays as opposed to being at work.

Calculating the four-week average

The four-week average is based on an employee's gross earnings, but productivity/incentive/overtime payments that are not regular are excluded. Any payments of this nature that are regular should be included here. However, over a four-week period, the 'money earned v money paid' issue (discussed above in the Gross Earnings section) can give rise to some significant differences in the calculation.

In *Tourism Holdings* the Supreme Court considered as a secondary issue which week commission payments should be allocated to when calculating the four-week average. On that issue, the Court endorsed the view that the periods the payments in question are allocated to, should be based on when the payments became payable (or were "earned") rather than when the employee was paid the commission.

(continued on the next page)

[5] *Kriskneel Singh v Tyres 2 Go Limited* [2016] NZERA Christchurch 94

Calculating the four-week average (continued)

Consider a situation in which an employee receives a base salary with commission payments made quarterly. These commission payments relate to weekly sales, and so should be considered as 'regular'.

Under a 'money paid' approach, if the quarterly payment fell within the four-week assessment period, the annual holiday pay calculation could be inflated, though if it fell outside the four-week assessment period, the holiday pay calculation would only be based on the employee's base pay.

Under a 'money earned' approach, only the portion of the commission that arose from sales during the four-week assessment period would be considered for the calculation.

A sensible approach, particularly following the Court's comments in *Tourism Holdings*, in this kind of situation is to take a "money earned" approach, and it is important that this approach is taken in a principled and consistent manner and that the employer is open and transparent with the employee.

Relevant daily pay ('RDP')

The principle behind relevant daily pay ('RDP') is that an employee should be paid what they would have received had they worked on the day that the employee takes as family violence leave, bereavement leave, alternative holidays, public holidays or sick leave ('FBAPS').

RDP includes:

- productivity or incentive payments, including commission or piece rates, if those payments would have been received had the employee worked on the day
- overtime, if the employee would have received it for the day
- the cash value of board or lodgings if this has been provided by the employer.

RDP does not include:

- payment of any employer contribution payment into an employee superannuation fund
- reimbursements payable to the employee for the day.

Determining RDP

In most cases, determining RDP will be straightforward, as it will be clear what the employee would have received on the day in question.

Just because RDP is not immediately apparent, does not necessarily mean it cannot be applied. If an employee works variable hours it may still be possible to determine RDP, for example by looking at the reasons for the variation within the context of the employee's work patterns.

Employers need to take a pragmatic approach and use their judgement, taking account of the employee's work pattern and relevant circumstances.

However, where it is genuinely not practicable or possible to determine an employee's RDP, an employer should use average daily pay ('ADP'), the formula for which is set out under the detailed definition of Average daily pay on Page 26.

Example:

Kate works four days a week but her hours fluctuate depending on demand each day. Her hours vary unpredictably between six and nine per day. Kate takes a day's sick leave, so is entitled to sick leave for that day. Kate's variable hours are such that the employer cannot possibly determine her RDP – what she would have received had she worked that day.

Kate earns $26 an hour. Her ADP (Kate's gross earnings for 52 weeks [$40,560] divided by the number of whole or part days [208]) in the 52-week period – is calculated at $195.

Had Kate's employer guessed, for example, that she would have worked six hours on the day, this would have led to her pay being incorrectly determined at $156.

The question as to whether to apply RDP or ADP may need to be assessed on a case-by-case basis and require a judgement call on the part of the employer. For some groups of employees, such as certain salaried employees that are not paid for overtime, an assessment may not be required.

Employers should be wary of having a 'set and forget' approach and are advised to have systems in place to alert them to situations that may require an assessment. This will be dependent on having good quality information that is regularly updated. In larger organisations managers should have a clear overview of their employees' working patterns and may have to make regular decisions on approving overtime. They should provide this information to the payroll function with a view to ensuring compliance.

The impact of overtime

If it is clear that an employee would have worked overtime on a day, these payments must be included in RDP. For example, if an employee regularly works a set of amount overtime on the day in question, then payment for this must be included in their RDP. Similarly, if an employee is rostered on to work overtime on the day concerned, then the overtime payment must be included in RDP.

If it turns out that on the day concerned the employee would have worked a period of unrostered overtime (maybe because there was a surprise order that urgently needed to be filled), this overtime must also be included in their RDP. It must be clear that the employee would have received the extra payment. An exception to this is where all other employees do overtime on a day because one employee is away (for example, off sick), then the employee who is sick would not be eligible to have that overtime included in their RDP.

Where it is not possible to establish whether or how much overtime would have been worked on a particular day[6] then an employer may use ADP. However, it would also be compliant for employers to apply RDP based on say a maximum amount of overtime that an employee could conceivably have worked on a particular day.

The impact of commission, bonuses and incentive payments

If an employee earns commission or an incentive payment, then this must be included in RDP if it is clear that the payment would have been received had the employee worked on the otherwise working day they took as FBAPS leave. However, where it is either not possible or practicable to determine the extent to which a commission or incentive payment is attributable to a particular day, an employer should use ADP.

Examples:

- David works in a manufacturing company and works a regular eight-hour day from Monday to Friday. He earns $30 an hour ($240 a day). In addition, he earns a daily incentive payment of $40 as he consistently meets production targets. He takes a day's sick leave on Thursday. Because it is possible to determine his RDP and because his daily pay in the pay period has not varied, the employer must pay RDP, inclusive of the incentive payment, amounting to $280.

- Wiri works for a telecommunications company and takes a day of bereavement leave. In addition to his base salary, he receives a bonus based on the number of customers who he has persuaded to switch to the company's network. The number of new customers he signs up varies significantly from day to day, and it is therefore not possible or practicable to determine his RDP. The employer should therefore pay ADP for his bereavement leave.

[6] *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481

The impact of allowances

Where an employee receives an enduring[7] allowance, for example a taxable vehicle allowance or higher duties allowance, this allowance need not be included in RDP if this allowance is paid in full regularly (for example fortnightly) and listed as a separate line item on the employee's pay sheet. The examples of payslip extracts below show how the payments for an enduring allowance can be shown to have been paid on either a weekly or daily basis.

Where the circumstances permit the employer to pay ADP, then all regular allowances must be included in the gross earnings calculation. While there may be a perception of 'double dipping' because the employee already receives the regular allowance in full every pay period, the Act is clear about this requirement.

Higher duties allowance included as daily amount

	Thu 29/6	Fri 30/6	Sat 1/07	Sun 2/7	Mon 3/7	Tue 4/7	Wed 5/7	**Total (hours)**	Rate per hour ($)	Received ($)
Time (Hours)	8.00				8.00			16.00	20.00	320.00
Sick Leave		8.00						8.00	20.00	160.00
Higher Duties	8.00	8.00			8.00			24.00	5.00	120.00
									Total Taxable	**600.00**

Higher duties allowance included as weekly amount

	Thu 29/6	Fri 30/6	Sat 1/07	Sun 2/7	Mon 3/7	Tue 4/7	Wed 5/7	**Total (hours)**	Rate per hour ($)	Received ($)
Time (Hours)	8.00				8.00			16.00	20.00	320.00
Sick Leave		8.00						8.00	20.00	160.00
Higher Duties								24.00	5.00	120.00
									Total Taxable	**600.00**

Where an employee receives an on-call allowance that is payable only on days when an employee is on call, rather than as an enduring allowance, there may be some uncertainty as to whether the on-call payment should be included in RDP on days when the employee would normally expect to be on call after-hours but is not required to be on call because the day is a public holiday.

In this situation, the allowance must be included in RDP if the public holiday falls on an otherwise working day. This is because the Act is clear that RDP is what the employee would have received were it not for the fact that the day was a public holiday.

[7] As opposed, for example to an allowance paid in specific circumstances, such as a 'rain allowance' paid to some postal workers.

What to do when both RDP and ADP can be applied?

The Act allows the use of ADP where it is not possible or practicable to determine an employee's RDP, or where an employee's daily pay varies within the pay period in which the holiday or leave falls.

There will be situations where it is both possible and practicable to determine RDP, and an employee's daily pay varies within the pay period in which the holiday or leave falls. This might be the case, for example, where variation in daily pay forms part of a regular, predictable pattern and it is therefore straightforward to determine RDP.

In such situations either RDP or ADP may be applied. Generally, it is preferable to apply RDP whenever this can be determined. This is because RDP is consistent with what the employee would expect to receive (and with the principles of good faith and transparency). This is illustrated in the example below.

Example:

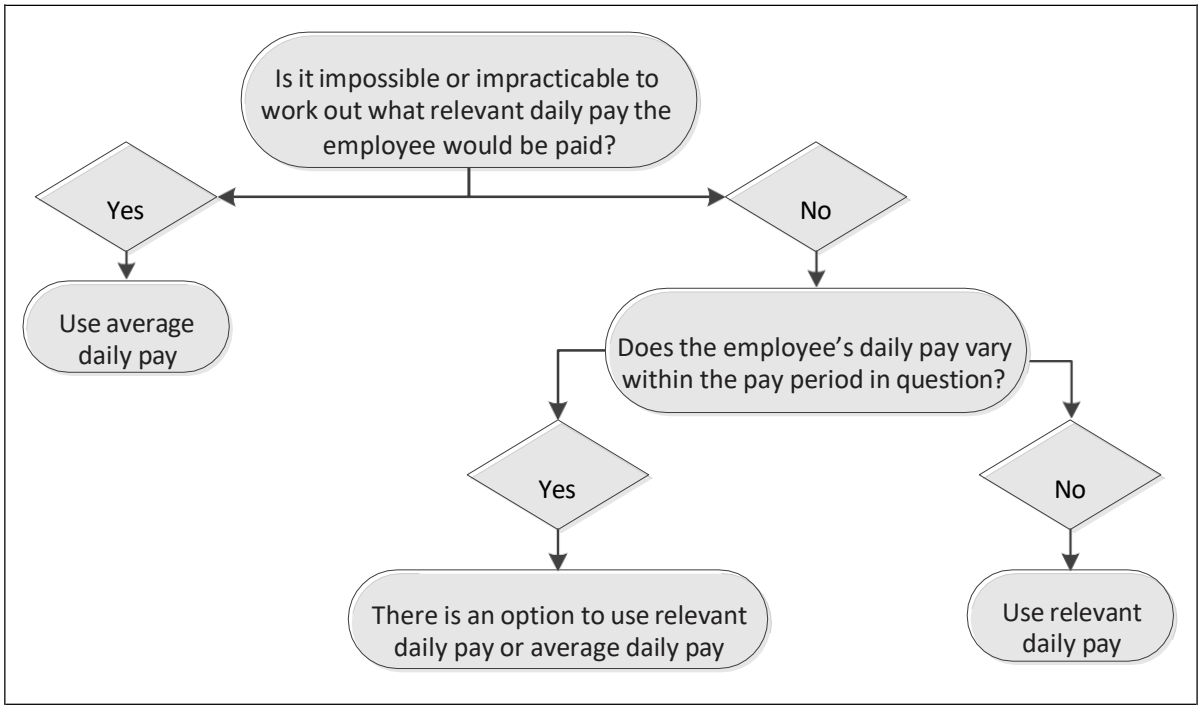
Marcia works at a supermarket after school and on weekends and earns $24 an hour. She has three set shifts; Mondays 4pm-10pm (five and a half hours), Thursdays 4pm-6pm (two hours), and Saturdays 8am-4.30pm (eight hours). She has a sick day on Monday.

Because Marcia's daily pay varies during the pay period the employer can choose to pay her ADP. However, because the employer can clearly determine RDP – the distribution of her hours during the pay period follows a clear and regular pattern – the employer decides to pay Marcia her RDP of $132.00.

In this example, the employer will also have the option to use the formula for ADP, which works out at $124.00. In this case, Marcia would receive less than her RDP for Monday ($132.00). However, using ADP would also mean that Marcia would receive $76.00 more than RDP if she was sick on a Thursday.

If employers choose to apply ADP in these situations, they should not do so simply with a view to paying less than RDP. In accordance with the statutory requirement for the parties to an employment relationship to deal with each other in good faith, employers should take a principled, consistent and transparent approach. In the example described above, this might involve explaining to Marcia how her pay will be determined and advising her that it would be calculated on the same basis was she to be sick on a Thursday or Saturday.

When to use RDP or ADP



Average daily pay ('ADP')

The calculation of average daily pay ('ADP') is an alternative formula to relevant daily pay ('RDP') that can be used for calculating payment for family violence leave, bereavement leave, alternative holidays, public holidays and sick leave ('FBAPS') in specific circumstances.

The Act allows employers to use ADP for determining payment of FBAPS leave where:

- it is not possible or practicable to determine an employee's RDP; or
- an employee's daily pay varies within the pay period in which the holiday or leave falls.

ADP is determined by dividing the employee's gross earnings for the last 52 weeks by the number of whole or part days that the employee has worked over that period, including any paid holiday or leave but excluding any other day the employee did not work.

Calculation
$$\frac{\textit{Gross earnings}}{\textit{Number of whole or part days}} = \textit{Average daily pay}$$
Gross earnings: the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made. *Number of whole or part days*: the number of whole or part days on which the employee earned those gross earnings, including any paid holiday or leave but excluding any other day the employee did not work.

For the purposes of the denominator in the formula above, a part day has the same value as a whole day. Assuming, for example, an employee worked 160 whole days and 40 part days during the period over which their gross earnings were calculated, the divisor will amount to 200.

Sometimes employers may decide to use a lower value that reflects the portion of the day worked. So in the example above, if the employer decided to count the part days as half days (0.5) for the purpose of the formula, this would reduce the divisor to 180 and have the effect of increasing the ADP made to the employee. This approach benefits the employee and would therefore also be compliant.

By contrast, a single whole or part day should never be allocated a value of more than one to reflect a situation where an employee works, for example, a 10-hour rather than their usual seven-hour day. This would have the effect of increasing the divisor, thereby incorrectly lowering the level of ADP.

More advice on when to use ADP or RDP is set out under the section for Relevant daily pay in the detailed definitions section on Page 21.

Annual holidays

Key messages in this section

Most important message for employers
While provision of, and payment for, the annual holidays entitlement will be straightforward in many cases, there will be some situations in which it is not immediately clear. For example, determination of what genuinely constitutes a working week and/or whether a day is an otherwise working day, is often not clear for employees with variable hours and days from week to week. It is essential that employers engage with their employees in good faith when these situations arise to reach agreement on what a four-week entitlement looks like in practice and what portion of the annual holidays entitlement is being requested. Simply deciding on these matters without agreement increases the risk of non-compliance.

For employers	For employees	For professional service providers
After each 12 months of continuous employment with you, an employee is entitled to not less than four weeks' annual holidays as paid time off work. (Certain employees may agree to be paid at least eight percent of gross earnings in addition to their usual pay instead, but only if they meet certain criteria). You may offer your employees more than the minimum. An employee's annual holidays entitlement remains in force until the employee has taken the holidays or it has been paid out under s28B of the Act.	After each 12 months of continuous employment with the employer, you are entitled to not less than four weeks' annual holidays, as paid time off work. You may take annual holidays in advance of becoming entitled to them, if both you and your employer agree. Certain employees can agree to be paid at least eight percent of gross earnings in addition to your usual pay instead, but only if you meet certain criteria. Your annual holidays entitlement remains in force until you have taken the holidays or it has been paid out ('cashed up') under s28B of the Act.	The responsibility for providing the annual holidays entitlements in the Act rests with the employer and it is their responsibility to ensure that you have all the necessary information required. It is the responsibility of professional service providers, including payroll system providers, to ensure that the products, services and advice they offer are consistent with the legislation, and that any computerised payroll systems provided are capable of being configured and used in a fully compliant manner.
Annual holidays are based on weeks, and an employee's entitlement should be determined according to their work pattern at the time the holiday is requested. It is essential that you monitor changes in your employees' work patterns and adjust annual holidays balances accordingly.	While you may think of your annual holiday balance in hours or days, weeks are the fundamental unit of the annual holidays' entitlement. What this actually means in terms of time off depends on your working pattern when you take annual holidays (as opposed to when you earned it).	Many key provisions in the Act cannot be systematised and require judgements to be made based on the specific facts of an employee's work pattern and pay.

Pay annual holidays at the greater of the employee's average weekly earnings or ordinary weekly pay for the agreed portion. Decisions on entitlements must be made in accordance with good faith obligations.	If you consider your work pattern has changed from what you originally agreed with your employer (eg you are regularly working more hours, or have moved from casual to permanent), you should discuss the implications of this for your annual holiday with your employer.	If it is not clear how a particular provision should be applied in the case of a particular employee – ask the employer to discuss this with the employee and let you know what they agree. Good faith applies to any such judgement call.
While determining the portion of entitlement used is easy for most employees with regular hours and pay, it can be complex in many situations, eg when employees have highly variable work patterns. No guidance can cover all possible situations and so engaging with your employees in good faith is important in these situations.	The date(s) on which you take your annual holiday entitlement is/are to be agreed between you and your employer. You only need to apply for paid annual holidays for days on which you would otherwise be working. Your employer cannot unreasonably withhold their consent to your request to take your annual holiday entitlement.	This guidance should assist you to have discussions with the employer about how best to implement the provisions of the Act in the payroll system.
You must also ensure that your end-to-end payroll system is fit-for-purpose, including ensuring that your business processes (eg record keeping, ensuring payroll have accurate information from across the business) are sufficiently robust to support compliance with these provisions.	Discussions and agreements you reach with your employer may have significant consequences for your annual holidays balance and payments – if in doubt, seek advice and (if necessary) representation.	

Annual holidays – the basics

There are three key steps to providing an employee's entitlement to, and payment for, annual holidays:

Step 1: Provision of the entitlement

Under s16 of the Act, all employees must get not less than four weeks' paid annual holidays after each 12 months of continuous employment. Under s17 of the Act, an employer and employee may agree on how the employee's entitlement to four weeks annual holidays is to be met based on what genuinely constitutes a working week for the employee.

Step 2: Agreeing the portion of entitlement used when annual holidays are taken

Under s21 of the Act, to determine payment for annual holidays, first the portion of the annual holidays entitlement taken must be agreed. This must be determined in relation to the employee's work pattern at the time the holiday is taken.

Step 3: Payment for annual holidays taken

The agreed portion of the annual holidays entitlement taken is paid at the greater of an employee's ordinary weekly pay ('OWP') and average weekly earnings ('AWE').

When employees work regular hours and days each week for regular pay, following these steps is usually straightforward.

Example:

Wiremu works a standard five-day, 40-hour week (eight hours a day), as set out in his employment agreement. After 12 months' continuous employment, he receives four weeks' annual holidays entitlement (Step 1). When Wiremu takes a day off work, he has clearly used 1/5 of a week of his entitlement (Step 2), and should be paid at 1/5 x (greater of OWP and AWE) (Step 3). His balance will reduce by 1/5 of a week.

However, there are some situations in which following these steps is not straightforward – for example, when employees have highly variable hours/days each week or work according to a roster pattern that does not fit neatly into a week. The next three sections provide detailed guidance on each of these steps in turn to assist employers to meet their annual holidays obligations – and employees to understand their entitlements – across a range of working patterns.

Additional important information about annual holidays

An employee's annual holidays entitlement remains in force until the employee has taken the holidays or it has been paid out under s28B of the Act.

Employers can provide their employees with more than the minimum.

Employers must give employees the chance to take annual holidays within 12 months after becoming entitled to the holidays. Employees can take annual holidays at any time agreed between the employer and the employee. Employers must let employees take at least two of the four weeks' annual holidays continuously, if the employee wants to.

Employers can encourage employees to take annual holidays. If the employer and employee cannot agree on when an employee will take annual holidays, the employer can make the employee take the holidays with not less than 14 days' notice.

Employers cannot unreasonably refuse to let an employee take some of their annual holiday entitlement. Not wanting the employee to take their annual holiday is not enough of a reason to decline the request. If the holiday is declined, employers should give a reason.

Employees have an entitlement to not less than four weeks' annual holidays after they have completed 12 months' continuous employment with an employer. A continuous year of employment includes, amongst other things, any period during which the employee is on paid holidays or leave under this Act and periods during which the employee is receiving weekly compensation under ACC.

Leave without pay (LWOP) can affect the annual holidays entitlement. Further information is provided in the Leave without pay (LWOP) section.

An employee's time on parental leave is included as part of the employee's continuous employment and time on parental leave still counts towards the 12 months' continuous

service for annual holidays entitlements; the employee will still be entitled to not less than four weeks of annual holidays. However, under s42 of the *Parental Leave and Employment Protection Act 1987*, annual holidays entitlement during and in the 12 months after parental leave is only paid according to AWE (unless otherwise agreed). This will affect payment for annual holidays taken after parental leave, particularly in the first 12 months after the date on which the employee returns to work following a period of parental leave.

If an employee (or their spouse or dependent) becomes sick or injured while the employee is on annual holidays, the employer and employee may agree that this time is taken as sick leave as opposed to annual holidays.

If an employee (or a child living with them, including periodically) becomes affected by family violence while the employee is on annual holidays, the employer and employee may agree that this time is taken as family violence leave as opposed to annual holidays.

If the employee has booked a period of annual holidays and becomes sick and remains sick when the annual holidays are due to be taken, the period of those annual holidays during which the employee continues to be sick must be treated as sick leave.

If the employee has booked a period of annual holidays and becomes affected by family violence and remains affected when the annual holidays are due to be taken, the period of those annual holidays during which the employee continues to be affected must be treated as family violence leave.

If an employee suffers a bereavement while on annual holidays, the employer must allow the employee to take bereavement leave instead of annual holidays.

If an employee has used all their sick leave entitlement, family violence leave entitlement or requires more leave than the bereavement leave entitlement permits, then the employer may agree that the employee can take annual holidays instead.

Annual holidays in advance

Employees can take annual holidays in advance (before they have become entitled to those holidays), if the employer and employee both agree. Employers are not obliged to grant employees annual holidays in advance. As with annual holidays taken once the employee has become entitled to them, the amount of annual holidays taken in advance should relate to what genuinely constitutes a working week at the time it is taken. Annual holidays taken in advance will then be deducted from the four-week entitlement when it becomes due on the anniversary date. The example of Keiko in the box below is a straightforward application of annual holidays taken in advance.

'Accruing' annual holidays

Many payroll systems run an 'accrual' balance, either on its own or in tandem with the entitlement balance. However, there is no concept of 'accrued holidays' in the Act, and care should be taken with 'accrual' balances. While they may be useful as an estimate of an employee's entitlement (and an employer's liability), they can often lead to non-compliance (especially if the accrual balance is in units other than weeks). Problems that can arise with annual holidays accrual include:

- Not reconciling the accrued balance with the *actual* entitlement. If the accrued balance is kept in units other than weeks, it will not necessarily be the same as the entitlement balance after 12 months.
- Likewise, if annual holidays taken in advance have been deducted from the accrual balance, the accrual balance at the end of the year may not be the same as the

entitlement balance. The example of Susan in the following box illustrates this point.

- Calculating termination payments based on accrued annual holidays balances is non-compliant and may result in underpayment. Annual holiday pay for any part year worked since the last anniversary date is paid at eight percent of gross earnings (less any amount paid for holidays taken in advance). See Entitlements on finishing employment section on Page 86 of this document for more information on termination payments.

Examples:

After working for Rivets Inc. for eight months, Keiko and her manager agree that she can take a paid week off as annual holidays in advance. After 12 months (at her anniversary date) of working for Rivets Inc., Keiko will be due three weeks of annual holidays (four weeks' entitlement less the one week taken in advance).

Susan works three days a week in her first year of employment, but then moves to five days a week in her second year. In her first year, she took a total of five days annual holidays in advance. If an accrual balance is kept, this could lead to the conclusion that her annual holidays balance after 12 months will be equivalent to seven days. This would be incorrect and emphasises the importance of working in weeks (and the risk associated with using an accrual balance as anything other than an estimation).

Five days annual holidays taken in advance is equivalent to one and 2/3 weeks (according to her work pattern at the time the annual holidays are taken) and so her annual holidays balance on her anniversary date will be two and 1/3 weeks. Under her new work pattern of five days a week, this will be equivalent to 11 and 2/3 days.

Pay-as-you-go ('PAYG') holiday pay

Two specific groups of employees can choose to agree with their employer to receive holiday pay with their regular pay, instead of receiving four weeks' paid annual holidays. These are employees on a fixed-term agreement of less than 12 months and employees whose work is so intermittent or irregular that it is impracticable to provide four weeks' paid annual holidays. These employees receive at least eight percent of their gross earnings on top of their regular pay as holiday pay. More information is provided on PAYG holiday pay in the section Pay-as-you-go (PAYG) holiday pay on Page 48.

Annual holidays – provision of the entitlement (Step 1)

Under s16 of the Act, an employee receives at least four weeks' annual holidays after 12 months' continuous employment. In many cases it will be obvious what this four weeks looks like, as in the example of Wiremu on Page 30. For situations in which this is not clear, s17 of the Act provides that an employer and employee may agree on how the entitlement is to be met, based on what genuinely constitutes a working week for the employee. This will usually be done by reference to either a number of days or hours that a week is equivalent to.

Defining a week in terms of days or hours

The basic unit of the annual holidays entitlement is the 'week'. This aligns with the purpose of the Act which is to provide a minimum entitlement to annual holidays to provide the opportunity for rest and recreation. The intent is that an employee who uses all of their entitlement will have had (at least) four paid weeks off work in total.

The Act does not explicitly provide for the entitlement to be considered in units other than a week. However, the Act recognises (in s17) that there will be situations in which what four weeks looks like is not obvious and so provides that employers and employees can agree on this. This agreement will generally involve defining a week in terms of days or hours.

Generally, defining a week in either days or hours is likely to be compliant if the method is applied consistently, the parties are aware of the implications of the choice and have agreed to this. This applies both to how the entitlement is to be provided (Step 1) and the agreement on the portion of the entitlement taken (Step 2).

When the number of hours is pretty similar each day, there will be little difference between the working in hours or days. However, when the number of hours each day is quite different, the outcomes can be quite different. The example of Bob on Page 35 illustrates this scenario.

In the absence of a specific agreement, and in particular when the hours each day are quite different, considering a week in terms of days rather than hours is more likely to be consistent with the purpose of providing four weeks for rest and recreation, and so more likely to be compliant.

An employee's annual holidays balance should be kept in weeks

Whatever units are used to assist either the provision of the entitlement (**Step 1**) or the calculation of the agreed portion of entitlement taken (**Step 2**), it is strongly advised that annual holidays balances are kept in weeks. This will reduce the risk of non-compliance. Keeping balances in units other than weeks can lead to non-compliance if work patterns change.

Example:

Ben works 20 hours a week for the first year of his employment and receives his four-week entitlement at the end of that year. He changes to a 40-hour week at the beginning of his second year. His four-week entitlement is equivalent to 160 hours (not 80) as this reflects what now genuinely constitutes a working week for Ben.

Annual holidays balances in payroll systems that work in hours (or any units other than weeks) need recalculating whenever an employee's hours increase otherwise there is a high risk of non-compliance (as the example of Ben shows). If the employee's hours decrease, recalculating will be compliant with the Act, but could give rise to other issues, such as a claim for breach of contract, if the employer has not been recalculating previously. In this situation, it is recommended that legal advice is sought.

Employers and employees are strongly advised to discuss the issue of how the entitlement is to be provided in good faith at the start of employment (or when work patterns change) and agree up front as much detail as possible. Ideally, this should be recorded in the employment agreement. The issue of how changing work patterns impacts the provision of the annual holidays entitlement is addressed in more detail in the section Changing work patterns on Page 44.

Agreeing how the four weeks is to be provided should be possible when work patterns are predictable up front. It is not necessarily the case that both days and hours need to be predictable – as long as at least one of these is, then this could form the basis of the annual holidays entitlement. The work pattern that forms the basis of how the four weeks' entitlement is to be provided shall be referred to as the employee's 'scheduled', 'contracted' or 'agreed' days/hours.

However, it may not be possible to agree how the four weeks is to be provided if work patterns are not predictable up front (eg casual employees, or employees who work varying days/hours each week according to a roster). For this second group of employees, what genuinely constitutes a working week must be agreed at the time the annual holidays are taken (as part of **Step 2**).

For those employees whose work pattern is predictable up front, this pattern will either fit into a seven-day cycle, or it will not. Each of these will be dealt with in turn, followed by a discussion on how to approach **Step 1** for employees whose work pattern is not predictable up front.

Work pattern is predictable and fits into a seven-day cycle

For this group of employees, their expected weekly work pattern is (usually) agreed up front and this pattern can form the basis of determining how the entitlement to four weeks' annual holidays is to be met. This group includes:

- most salaried employees (other than those on rosters that do not fit a weekly cycle, or those who work highly variable and significant additional overtime)
- waged employees who work the same number of hours and/or days each week
- piece rate employees who work the same number of hours and/or days each week.

Note that, if the days and/or hours the employee is expected to work each week are agreed up front, these are required to be recorded in the employment agreement.

Number of hours and days each week are the same

If the number of hours worked each day is the same, then the provision of the entitlement is straightforward. The example of Wiremu (Page 30) falls into this category. However, if the number of hours worked each day is different (but still predictable), choosing hours or days to define the entitlement can have different consequences, as the example of Bob shows.

Example:

Bob works three days, 20 hours a week, part-time. He works 10 hours on a Monday, and five hours each on Tuesday and Wednesday. He is paid $30 an hour. Either days or hours could be used as the basis for Bob's annual holidays calculations as long as the choice is applied consistently. If days are used, then one week is considered as three days, and if hours are used, then one week is considered as 20 hours (Step 1). However, as a week is defined, this will then form the basis of determining the portion of entitlement used when annual holidays are taken (**Step 2**). Bob and his employer have discussed the implications of each choice and then reached an agreement. In this situation, they lead to quite different outcomes for Bob's annual holidays calculations as the table below demonstrates. (**Note:** For the purpose of this example, it is assumed that OWP=AWE=$600.)

		Mon	**Tue**	**Wed**
Hours worked per day		10	5	5
Calculation based on 1 week = 3 days	Amount of entitlement used (in weeks) if day taken as annual holiday	1/3	1/3	1/3
	Pay when working	$300	$150	$150
	Pay if annual holiday taken	$200	$200	$200
Calculation based on 1 week = 20 hours	Amount of entitlement used (in weeks) if day taken as annual holiday	1/2	1/4	1/4
	Pay when working	$300	$150	$150
	Pay if annual holiday taken	$300	$150	$150

Essentially the issue is:

- if days are chosen to define a week, the total number of days off will be consistent, but there will be 'overs and unders' in relation to daily pay
- if hours are chosen to define a week, the daily pay will be the same as if he worked, but there will be variation in the total number of days off the annual holidays actually equates to.

If days are used:

- Bob will have used 1/3 of a week of his entitlement regardless of which day off he has taken;
- he will be paid the same for the day taken off regardless of which day he has taken (though AWE calculations could be affected by previous annual holidays taken and the pay won't be the same as what he would have been paid if he worked); and
- his total entitlement will amount to 12 days (though the total hours will be different depending on which days he has taken off).

If hours are used, he will have used 1/2 of a week if he takes Monday off, and 1/4 of a week if takes either Tuesday or Wednesday off; he will be paid what he would have been paid had he worked; and his total entitlement will amount to 80 hours (though this could amount to anywhere between eight and 16 days off depending on which days he has taken off).

This illustrates the importance of employers and employees discussing the implications of different choices for the annual holidays entitlement and reaching agreement in good faith.

Number of days each week is the same, but total number of hours may differ

An example of an employee in this category is someone who works five days each week, but alternates each week between 40 hours and 20 hours to accommodate childcare responsibilities. In this kind of situation, to the extent that it is necessary, choosing days to define a week is the recommended option given that these are consistent from week to week. Though if, in either week, the number of hours worked on each day varies, the employer and employee need to discuss the implications of this along the same lines as Bob in the example above.

Number of hours each week is the same, but total number of days may differ

An employee in this category might be required to work 20 hours a week (say) but is given the flexibility as to when to work these hours. For example, they might work four five-hour days one week and then two ten-hour days another week. As it is the number of hours each week that is constant, it is recommended that, to the extent that it is necessary, hours are chosen to define a week. Again, it will be important for the employer and employee to consider how the choice will affect an actual holidays calculation when annual holidays are taken. A potential issue in this situation is that it might not be obvious if a day's holiday requested falls on an otherwise working day for the employee, in which case this will need to be determined as provided for in the Act. See the Detailed definitions section on Page 14 for more details on determining an otherwise working day.

Work pattern is predictable but does not fit into a seven-day cycle

The most obvious example of employees that fall into this group is employees who work on a shift pattern that, though predictable up front, does not fit into a weekly cycle. These employees will work a different number of days and hours each week, but to a predictable pattern. Another example might be an employee who works a nine-day fortnight (ie five days one week, four days the next).

Example:

Simon works a regular four-day on/four-day off, 12-hour shift pattern. This means that he works four days a (calendar) week for a block of four weeks and then three days a week for a block of four weeks and then the eight-week pattern repeats.

Step 1 requires determining how the four weeks' annual holidays entitlement will be provided. Options for the kind of arrangement described above include:

- defining a week according to the longest week in the cycle
- defining a week as an average across the cycle
- not defining a week up front.

There may be other options. It is essential that employers and employees in this situation agree an approach upfront in good faith.

Defining a week (by agreement) according to the longest week in the cycle will guarantee compliance with ss 16 and 17. In the example above, the longest week is four days, and so the annual holidays entitlement would be equivalent to 16 days. (There would be no difference working in hours in this particular situation as the number of hours worked each day is the same). Compliance is guaranteed because, even if (in **Step 2**) all the annual holidays are taken in four-day weeks, the employee has a sufficient annual holidays balance to receive at least four weeks off during the year. (If the employee takes some/all of their annual holidays in three-day weeks, they will end up having more than four calendar weeks off, even though the total number of days off remains the same).

Defining a week as an average across the cycle means totalling up the number of days or hours in a full cycle and then dividing by the number of weeks in the cycle. In our example above, the employee works (4 x 4 days) + (4 x 3 days) = 28 days across the eight-week cycle, so an average week is 28/8 = 3½ days (or 42 hours). The entitlement is, therefore, equivalent to 14 days (or 168 hours)[8]. A consequence of this choice is that an employee does not necessarily have sufficient annual holidays balance to guarantee four weeks off during the year if all annual holidays are taken in four-day weeks. This approach will not be compliant unless agreed between the employer and employee.

Not defining a week up front – ie leaving the initial annual holidays balance as four weeks without defining that in terms of days or hours – will also guarantee that the employee receives four weeks' annual holidays during the year. However, this will equate to anywhere between 12 and 16 days in total depending on whether annual holidays are taken in three day or four-day weeks, and this could lead to uncertainty for both parties.

[8] This approach has been found acceptable in the Employment Relations Authority decision *Electrical Union 2001 Ltd v Mighty River Power Ltd* [2012] NZERA Auckland 446.

Work pattern is unpredictable upfront

For some employees, it simply may not be possible to define a week upfront as their pattern of work is not predictable upfront. Employees in this group might include causal employees (who are not receiving PAYG holiday pay) and employees who work to a roster that is only determined a certain time before the work period and where hours and days may vary from week to week. For these employees, what genuinely constitutes a working week may only be able to be determined at the time the annual holidays are taken, ie in **Step 2**.

However, consideration should, nonetheless, be given to determining whether there is a pattern of work that could be identified upfront that could form the basis of the annual holidays entitlement.

For example, an employment agreement might specify a certain number of guaranteed hours, with the possibility of additional hours on top determined according to a roster[9]. If it is known upfront that these additional hours are not going to be too significant, then the guaranteed hours could still form the basis of the annual holidays entitlement. The section 'When actual days/hours vary around an agreed work pattern' on Page 42 looks at the issue of variability in hours around an established work pattern in more detail.

If it is not possible to define a week upfront, the consequences of this, and how the annual holidays calculations of **Step 2** will be approached, should be discussed up front with the employee. While this will be discussed in more detail in the next section, what this essentially will entail will be that what genuinely constitutes a working week for the employee will have to be determined when the annual holidays are taken with reference to the employee's recent work pattern.

Annual holidays – determining the portion of entitlement taken (Step 2)

Step 2 involves establishing (under s21) the agreed portion of the annual holidays entitlement that is being used when annual holidays are taken.

This means identifying the following fraction:

Proportion of entitlement taken =
number of days/hours taken (the 'numerator')/ number of days/hours that genuinely constitutes a week (the 'denominator')

Proportion of entitlement taken =

$$\frac{\textit{number of days/hours taken (the 'numerator')}}{\textit{number of days/hours that genuinely constitutes a week (the 'denominator')}}$$

[9] Note that, if the employee is required to be available for additional hours, it is a legislative requirement that the employment agreement provide for a minimum number of guaranteed hours.

Key principle

When calculating the portion of entitlement taken, what genuinely constitutes a working week (ie the denominator) must be determined in relation to the employee's work pattern at the time the annual holidays are taken.

For employees whose work pattern is predictable upfront, what genuinely constitutes a working week at the time annual holidays are taken will generally (but not necessarily) be the same as that determined under **Step 1**, assuming there has been no change to the employee's work pattern since then. (Note the example of Simon below which illustrates that a 'week' under **Step 1** and a 'week' under **Step 2** need not necessarily be the same).

For employees whose work pattern is not predictable upfront, what genuinely constitutes a working week at the time annual holidays are taken will need to be determined by agreement with reference to the employee's recent work pattern.

For employees whose work pattern was predictable upfront and has not changed since it was determined under **Step 1**, calculating the portion of entitlement taken will be straightforward in most cases. For employees whose work pattern was not predictable upfront or who have had a change in work pattern, careful consideration needs to be given to the work pattern at the time the annual holidays are taken in order to determine the portion of entitlement taken. Below, the same three groups will be examined in turn that were considered under **Step 1**.

Work pattern is predictable and fits into a seven-day cycle

Calculating the portion of entitlement taken will be straightforward in most cases. This is because (i) what genuinely constitutes a working week (the denominator) has already been established, and (ii) the predictability of the work pattern means that (in most cases) it will be clear how much annual holiday has been requested/taken (the numerator). The examples of both Wiremu (Page 30) and Bob (Page 35) above demonstrate **Step 2** calculations (including how, in Bob's case, these calculations can be dependent on what agreement is reached as to how the four weeks' entitlement is to be provided).

There may be instances in which the numerator is not immediately clear – for example if the pattern of days worked is varying despite a set number of hours – in which case it may be necessary to apply the OWD principles to determine whether a day requested is an OWD (and, if it is, how many hours would have been worked). See the Detailed definitions section on Page 14 for more information on determining an otherwise working day.

The key things to watch out for that could affect the **Step 2** calculation for this group are:

- is there significant enough variation around the work pattern established in **Step 1** that that work pattern no longer can be said to genuinely constitute a working week for the employee when the annual holidays are taken? The section 'When actual days/hours vary around an agreed work pattern' on Page 42 looks at this issue in more detail
- has the employee's work pattern changed – either through explicit agreement, or gradual change? If an employee's work pattern has changed since the original agreement as to how the four weeks' entitlement was to be provided, then what genuinely constitutes a working week for the employee needs to be reconsidered. The section 'Changing work patterns' on Page 44 looks at this issue in more detail.

Work pattern is predictable but does not fit into a seven-day cycle

As with the previous group, calculating the portion of entitlement taken will be straightforward in most cases. This is because (i) what genuinely constitutes a working week (the denominator) has already been established, and (ii) the predictability of the work pattern means that (in most cases) it will be clear how much annual holidays has been requested/taken (the numerator).

However, in this instance, what genuinely constitutes a working week at the time the annual holidays are taken is changing according to the shift pattern.

Referring back to the 'four days on/four days off' example of Simon (Page 37), as with the provision of the entitlement in **Step 1**, there is more than one way to approach determining the agreed portion of the annual holiday entitlement taken. The important thing will be to agree the approach with the employee and apply it consistently. This should be done upfront (at the same time as **Step 1**) if possible.

One approach (for Simon) is that when a day's annual holiday is taken in a three-day week, then 1/3 of a week has been taken as annual holidays and when a day's annual holiday is taken in a four-day week, then 1/4 of a week has been taken as annual holidays. In either case, his annual holidays balance will reduce by one day.

In the *Electrical Union 2001 Ltd v Mighty River Power Ltd* case referred to above, an alternative approach was taken in which a week was defined as eight days (so as to cover a full 'four days on/four days off' cycle) for the purpose of calculating payment for annual holidays, meaning that a day's holiday always equated to ¼ of a week. (**Note** that in this example, the 'week' defined for the purpose of providing the entitlement and the 'week' defined for the purpose of calculating the payment for annual holidays are different).

Pay calculations can be complicated if employers adopt some kind of 'pay smoothing' across different weeks, and if a period of annual holidays crosses between different weeks. Employers and employees should discuss the implications of different options before agreeing how to approach **Step 2**.

As with the preceding group, it is important that employers continue to watch out for variations around the employee's usual work pattern and/or changes to that work pattern. The section 'Changing work patterns' on Page 44 looks at this issue in more detail.

Work pattern is unpredictable up front

If it is not possible to determine upfront how the four weeks' entitlement to annual holidays is to be provided (**Step 1**) because the work pattern is unpredictable, then what genuinely constitutes a working week for the employee must be determined at the time the annual holidays are taken.

In most cases, it is likely to be possible to identify a work pattern on which to base the annual holidays calculations from the days and hours the employee has been working leading up to when the annual holidays are taken.

Useful factors for the employer and employee to consider when seeking to reach agreement on the above include:

- the historical roster pattern – particularly in the weeks leading up to when the annual holidays are taken
- the agreed hours in the employment agreement and the extent of the variation around these – do these hours still form a fair and reasonable reflection of the employee's working week for the purpose of calculating the portion of entitlement taken?
- the extent of the variation in days and/or hours from week to week – if at least one of these is reasonably consistent, then it may form a suitable basis for calculating the portion of entitlement taken if there are no (or only minimum) agreed hours
- employee expectations – how does the employee view their working week? How much annual holiday does the employee consider that they are requesting?

It is worth noting that there is clearly less scope for days to vary considerably from week to week (as compared to the potential variation in hours), and so patterns are likely to be more identifiable in terms of days.

If it is genuinely not possible to identify a work pattern, then one approach is to base the calculation on an average number of hours determined from some appropriate period. As with all other situations in which it is not immediately apparent how the calculation should be performed, this must be agreed between the employer and employee. Averaging over a shorter (recent) period (eg four weeks) is likely to be a good reflection of current work patterns – and should therefore be preferred – but is susceptible to one-off 'peaks or troughs'. Averaging over a longer period (eg 52 weeks) would smooth out peaks and troughs, but may not be a good reflection of current work patterns (ie it would not take into account any significant changes in working arrangements during the year). The example of Joseph (discussed in detail in Scenario 3, Page 97) is a useful one to refer to better understand when averaging might be appropriate.

The important thing is that, when calculating the portion of the entitlement taken, the same pattern is used for both the numerator and denominator. For example, if agreed hours are used to define the week (the denominator) then the annual holidays taken should be defined with reference to the agreed hours too.

How should payroll systems deal with annual holidays requested in advance?

One issue with these employees is how payroll systems should deal with annual holidays requested some time in advance or when they will be taken, as the portion of entitlement taken can only be calculated once the work pattern of the weeks prior to the annual holidays being taken is known.

One option might be to base the calculations on the working pattern in the weeks worked prior to the request. If the annual holidays are not so far in the future, this is likely to be a reasonable reflection of the situation at the time the annual holidays are taken. Alternatively, payroll systems and employees may simply have to deal with not having an accurate assessment of the annual holidays until they are actually taken.

A note of caution

Employers need to give careful consideration before concluding that there is no pattern to an employee's working hours and days. Defaulting to an 'average' approach in this situation without consideration of whether there is, in fact, a pattern to the employee's working days/hours poses a risk of non-compliance. Defaulting to an average approach in this situation without the explicit agreement of the employee will be non-compliant.

Another common issue that labour inspectors see is employers who default to the eight percent 'PAYG' approach for variable hours workers, often because they simply consider it too hard to work out how to approach annual holidays in this situation. This will be non-compliant unless the employee fits one of the two categories set out in s28 of the Act. It could also result in the employer paying effectively double for annual holidays if enforcement action is taken as any amount already paid at eight percent cannot be offset against what is actually owed for any holidays the employee is entitled to.

Further information on PAYG employees (those that fit the criteria of s28 of the Act), including the differences between this group and employees with variable and/or unpredictable hours, can be found in the section Pay-as-you-go (PAYG) holiday pay on Page 48.

When actual days/hours vary around an agreed work pattern

Many employees' actual days/hours sometimes vary around the days/hours that have been agreed as the basis for the annual holidays entitlement (whether these are the scheduled or contracted hours, the hours agreed in the employment agreement or any other work pattern agreed between the employer and employee). This may be in the form of formal overtime, or just be part of the expectations of the employment relationship (as is often the case for salaried workers). The example of Sam (discussed in detail in Scenario 1 on Page 94 is a useful one to refer to when considering the varying hours many salaried employees probably work.

If the days/hours are varying around the agreed work pattern, the question to consider is: despite this variation, are the scheduled/contracted/agreed days or hours still a fair and reasonable reflection of the employee's work pattern?

When considering this, it is useful to note that the calculation of the portion of entitlement taken is unlikely to be too affected by even a moderate amount of variation. This is because if the variation around both terms – ie the numerator and denominator – is equal, then the *portion of entitlement* taken will remain the same. The example of Jeanie (discussed in detail in Scenario 2 on Page 95) is a useful one to refer to better understand this.

The question could therefore be reframed as – has the variation become so significant that, essentially, a new work pattern has emerged (or there is no longer any identifiable pattern)?

This is a judgement that employers and employees need to reach by agreement and that must be made based on consideration of the specific facts relating to an individual employee's work pattern, such as:

- the extent of the week-by-week variation in days worked
- the extent of the week-by-week variation in hours worked
- the employee's scheduled/contracted/agreed days and hours
- the difference between the scheduled weekly hours and average weekly hours (over an appropriate period).

If there is little variation in the days the employee works each week, even if the employee is working quite a few more hours than scheduled, the scheduled days/hours might still be a fair representation of an employee's working week. (The greater the variation in hours, though, especially if the variation is uneven across the days worked, the more unreliable hours will become as a basis for the annual holidays calculations.)

If the days vary each week, but there is little difference in the hours worked each week, those scheduled hours could still form the basis of a working week for the employee, but determining an otherwise working day may not be so straightforward.

However, if there is considerable variability in both hours and days each week compared to the scheduled hours/days, then it may be difficult to discern any particular pattern and the scheduled hours/days may no longer form an appropriate basis for the employee's annual holidays calculations.

A significant difference between scheduled weekly hours and average weekly hours may also be an indicator that the current pattern of scheduled hours may not be an appropriate basis for the calculations. The employer should consider if a different pattern has emerged in this instance.

Note that, as discussed in the section 'Changing work patterns', employers and employees need to remain vigilant to changes in work patterns, particularly those that happen gradually, rather than by specific agreement. Changes to work patterns should be reflected in a change to the employment agreement, the consequences of this for the provisions of the annual holidays entitlement discussed and a new agreement reached.

Annex 2 on Page 94 details three scenarios that will help consideration of the issue of calculating the portion of entitlement taken when hours are varying. They cover, respectively, minor, moderate and significant variation in hours and or days.

- Sam, who works a 40-hour week, is paid a salary and is expected to work reasonable additional hours to meet work demands. His actual hours vary most days, but this variation is rarely significant.
- Jeanie whose contracted hours started at 10 a week, but then changed permanently to 16 (though the employment agreement wasn't changed). However, in each two-week pay period, she has actually worked anywhere between about 32 and 60 hours, over between 10 and 12 days (since she changed to a 16-hour week). Though the variation is more significant compared to Sam, her new agreed hours (ie 16 a week) still form a fair and reasonable reflection of her actual hours at the time she takes her annual holidays and are a good basis for her annual holidays calculation.
- Joseph, who has a minimum 10 hours agreed in his employment agreement, but works anywhere between 10 and 50 hours, over between one and six days a week. His contracted hours certainly do not form a good basis for calculation of his annual holidays, and the variation in hours is so significant that there is no discernible pattern. Some form of averaging may present a reasonable alternative approach in this case.

Changing work patterns

When an employee's work pattern changes, there will be consequences for the provision of the annual holidays' entitlement. This is because what genuinely constitutes a working week for the employee has probably changed. These changes either come about through an explicit agreement to change made between the employer and employee, or through a gradual shift that may not be immediately obvious. Employers need to be aware of when this second kind of change results in the emergence of a new work pattern. If this new work pattern is likely to be ongoing, it should be reflected in a change in the employment agreement and a reconsideration of how the annual holidays entitlement is to be provided.

Changing work patterns and units of annual holidays

Consistent with the principles that a 'week' is the fundamental unit of the annual holidays entitlement and that the week is defined *when the annual holidays are taken* and not when they are earned, if annual holidays balances are kept in any other unit than a week, a recalculation of the balance will be necessary when work patterns change.

Example:

Javier works 20 hours a week for the first year of his employment and receives his four-week entitlement at the end of that year. Halfway through the second year he changes to a 40-hour week. Prior to the change, he has taken 16 hours annual holidays.

If Javier's balance is kept in weeks, then he has taken 4/5 of a week's annual holidays before the change in hours, and so his balance is three and 1/5 of a week. When his hours change, his balance remains the same (it is just 'worth' more when translated into hours).

If Javier's balance is kept in hours, then, before the change in hours, he has taken 16 hours from his total entitlement of 80 hours, so his balance is 64 hours. However, when his hours change, this balance must be recalculated because it is not in weeks. 64 hours is equivalent to three and 1/5 weeks. When his hours change to 40 a week, this remaining entitlement will now be equivalent to 128 hours and so his balance will have to be adjusted. (If it is not adjusted, his effective balance under the new hours will only be one and 3/5 weeks and this will be non-compliant).

Examples of work pattern changes include:

- when both parties agree to move from part-time to full-time work (or vice versa)
- when both parties agree for an employee to change their shift or roster pattern
- when both parties agree for a PAYG employee to move to permanent full-time employment
- an employee with an agreed pattern of hours whose additional hours gradually increase (without explicit agreement) resulting in either:
    - a new, but still predictable, work pattern
    - a new, but unpredictable, work pattern (such that the originally agreed hours can no longer form the basis of the annual holidays entitlement)
- a university student who works a regular Saturday job for most of the year, but then changes to full-time work over the Christmas/summer holidays (see example of Anna below)
- a shift worker who starts taking on extra shifts to the point where a regular new shift pattern has emerged
- a PAYG employee whose work starts off as 'irregular or intermittent', but gradually shifts to a full-time work pattern.

Example:

Anna is university student who, through most of the year, normally works every Saturday (ie one day – eight hours – a week) in a retail store. She is paid $28 an hour. She occasionally picks up extra hours on demand (ie on late nights, and during the short holidays). However, she works full-time during December/January, (Monday to Friday, eight hours a day, 40 hours a week), first to cover the Christmas rush and then to cover other staff who wish to take their summer holidays. Anna wants some time off around New Year to celebrate with her friends. How should her annual holidays entitlement be considered over this period?

This kind of scenario emphasises once more the importance of the employer and employee agreeing how the annual holidays provisions of the Act are to be met. The Act permits employers and employees to reach a specific agreement between them on what genuinely constitutes a working week. If the employer has certain expectations during this time, for example, around restricting annual holidays due to the absence of back-up staff, then this needs to be discussed. In the absence of any agreement, it is necessary to assess what genuinely constitutes a working week for Anna at the time she wishes to take annual holidays.

Many employees in situations similar to this are likely to be on casual employment agreements and employers might well think that they can simply be paid eight percent PAYG if the employee agrees. This approach is unlikely to be compliant. Just because an employee is on a casual employment agreement does not necessarily mean they meet the criteria for PAYG holiday pay. Anna's work pattern is quite regular and she would not meet the PAYG requirements.

She may be on a permanent agreement that provides for one day a week for most of the year, and then full-time over December/January, or there may be other lawful alternatives.

The safe approach, if she is either on a casual or permanent agreement, is to recognise that she is working full-time at the time she wishes to take annual holidays, and so a week is 40 hours and her OWP is $1,120 (which will clearly be more than her AWE).

An employer might argue that her 'usual' working week is one day (eight hours), her OWP is $224 and that the period during December/January is a temporary variation around this and so these should remain the basis for Anna's holiday calculations. However, this approach is not recommended as it would mean that, for two days off in January, Anna's balance would reduce by two weeks, and this would not be compliant.

Annual holidays – payment for annual holidays taken (Step 3)

The basics

The amount paid for annual holidays is not necessarily the same as wages or salary. It depends on what the employee was paid in the time leading up to their annual holidays being taken. Annual holidays are paid at whichever is greater of:

- the employee's ordinary weekly pay (OWP) at the beginning of the annual holidays; or
- the employee's average weekly earnings (AWE) for the previous 12 months immediately before the end of the last pay period before the annual holidays.

See the Detailed definitions section on Page 17 more information on the calculation of OWP.

AWE is calculated as the gross earnings (GE) for the 12 months immediately before the end of the last pay period before the annual holidays are taken, divided by 52. If the employee has been working less than 12 months, then that period is used and the divisor is reduced so that it represents the number of whole or part weeks in that period. As with the LWOP calculation (see 'Leave without pay (LWOP)' below), each week and part week counts as 'one'. (Though note that counting part weeks as less than one will also be compliant as reducing the divisor will increase AWE).

Example:

Gemma has been working for her employer for less than a year when she takes a period of annual holidays to be taken in advance. She started work 12½ weeks before the end of the last pay period before she takes this holiday. To calculate Gemma's AWE for the purpose of calculating her holiday pay involves dividing her gross earnings for this period by 13 (12 for each of the complete weeks + 1 for the part week).

See the Detailed definitions section on Page 16 more information on the calculation of GE.

The Act requires the employer to pay the employee their holiday pay before the holiday is taken. However, the employer and employee can agree for the holiday pay to be paid in the period that the holiday is taken, ie as part of the normal pay run. This second way is most likely to be common practice (and what most employers and employees expect). It is also likely to be more administratively simple to pay holiday pay in this way. To achieve this, employers must include an appropriate clause in employment agreements.

The Act gives different ways to work out annual holiday payments, depending on the situation. These circumstances include, for example, when:

- an employee has been working for 12 months or more and has an entitlement to annual holidays
- an employee takes annual holidays in advance of receiving their entitlement during their first or subsequent years of employment
- an employee's employment comes to an end
- an employer has a closedown period.

In addition, the *Parental Leave and Employment Protection Act 1987* describes how annual holidays may be paid in a period following parental leave.

Employees may also request that up to one week of their minimum annual holiday entitlement be paid out each year.

The Act also provides that employees who either (i) are on a genuine fixed-term agreement of less than 12 months, or (ii) have work that is so intermittent or irregular that it is impracticable to provide four weeks' annual holidays, can agree to receive pay-as-you-go (PAYG) holiday pay. Incorrect application of this particular provision is a common cause of non-compliance with the Holidays Act and so particular attention should be paid to its correct application. See the 'Pay-as-you-go (PAYG) holiday pay section for more details.

Payment when an employee has an entitlement to annual holidays

When an employee takes an annual holiday after an entitlement to annual holidays has arisen, payment for the annual holiday is calculated by applying the greater of OWP and AWE to the agreed portion of the annual holiday entitlement that is taken.

Payment when an employee takes annual holidays in advance of receiving their entitlement

An employer may agree to allow an employee to take an agreed portion of their annual holidays entitlement in advance of an entitlement to annual holidays arising. As with payment for annual holidays when an entitlement has arisen, payment for annual holidays taken in advance is calculated by applying the greater of OWP and AWE to the agreed portion of the annual holiday entitlement that is being taken in advance.

If an employee has worked for less than 12 months and requests annual holidays in advance, the period for calculating AWE is the period from the start of employment up to the end of the last pay period before the annual holiday, and the divisor of 52 is reduced so that it represents the number of whole or part weeks that the employee has worked.

Payment when employment comes to an end

See Calculating annual holiday payments on termination section on Page 86 for details of how to calculate outstanding holiday pay when employment ends.

Closedown periods

See Annual closedown periods section on Page 52 for details of what happens when an employer has a closedown period and an employee is required to take annual holidays during this time.

Payment for annual holidays after parental leave

Under the *Parental Leave and Employment Protection Act 1987*, if the employee becomes entitled to annual holidays during parental leave, or the 12 months following the employee's return to work, payment for that annual holiday is made at the rate of their AWE over the year before the annual holiday is taken (meaning the OWP is not used). If the employee has previous entitlements to annual holidays they have not used, then that is calculated as the greater of the OWP or AWE as normal under the *Holidays Act 2003*.

Paying out portion of annual holiday entitlement

Employees may request, in writing, that their employer pay out up to one week of their minimum annual holiday entitlement each year. This is sometimes referred to as 'cashing up' one week's annual holidays.

The employee must make the request to the employer. If an employer incorrectly paid out a portion of the employee's annual holidays where the employee did not make a request for the payment, the employee's entitlement to take (and be paid for) the portion of the annual holidays remains in force as if the payment had not been made.

Employees can ask their employer to pay out less than one week of their annual holiday entitlement at a time. They can make more requests until one week of their annual holiday entitlement is paid out in each entitlement year (at each 12 months of continuous employment from the employee's annual holidays anniversary). Employers must keep a record of any paying out of annual holidays in the employee's holiday and leave record.

Employers must consider any request within a reasonable timeframe and can decline a request. The employer must give their answer in writing and they do not have to give a reason.

However, if the employer has a policy that does not allow paying out of annual holidays, employees are not entitled to make a request.

How do the 'paying out' provisions apply if the employee has more than four weeks entitlement?

The paying out provisions only relate to the four-week minimum entitlement. Any annual holidays entitlements over and above the legal minimum may be dealt with as a purely contractual matter between the employer and employee.

If minimum entitlements have rolled over (for example, where an employee has six weeks' entitlement following an anniversary date because two weeks from the previous year were unused), the paying out provisions still apply, ie the employee can still only cash up one week in the entitlement year.

One way to avoid confusion would be for any additional entitlement over and above the four-week minimum to be coded differently in payroll system.

Pay-as-you-go (PAYG) holiday pay

The Act makes special provision for two groups of employees in relation to annual holidays:

- employees on a genuine fixed-term contract lasting less than 12 months
- employees whose work is so intermittent or irregular that it is impracticable to provide four weeks' annual holidays.

Employees who meet either of these criteria can agree in their employment agreement to receive annual holiday pay as part of their regular pay instead of receiving paid annual holidays. The annual holiday pay for this group must be:

- no less than eight percent of their gross earnings in the pay period; and
- an identifiable component of the employee's pay, made in addition to salary/wages and any other agreed payments.

If an employer has paid PAYG holiday pay to an employee who does not meet the criteria above, the employee becomes entitled to annual holidays (and payment for them) in the usual way *despite any PAYG payments that have already been made*. The employer cannot 'claim back' any PAYG holiday payments already made in this situation.

Employees on a fixed-term agreement of less than 12 months

The fixed-term agreement must comply with the provisions of fixed-term employment set out in s66 of the *Employment Relations Act* and be for less than 12 months. If the employee is employed by the same employer on subsequent fixed-term agreements of less than 12 months, both parties may agree to continue paying PAYG holiday pay.

Employers need to carefully consider any fixed-term agreements linked to finishing a project or workload, if there is a chance it could last longer than 12 months. If a fixed-term agreement could go over 12 months, the employer and employee need to discuss entitlements and renegotiate the relevant employment agreement as soon as possible and amend the payroll accordingly.

If the employee moves straight from a fixed-term agreement of less than 12 months to a permanent employment agreement (ie with no break in service):

- the employee's employment agreement must be amended to reflect the change
- the employee's anniversary date remains the date they originally started on the fixed-term contract
- the holiday pay for annual holidays the employee becomes entitled to is reduced by the amount of PAYG holiday pay already paid.

The Act does not specify how this last point is to happen, so it will be necessary for both parties to agree this. For example, they could agree that the employee receives no (or reduced) holiday pay when they take annual holidays until the amount already paid is reached.

Employees whose work is so intermittent or irregular that it is impracticable to provide four weeks' annual holidays

Just because an employee has a variable work pattern and/or is defined as a casual employee by the employer, this does not mean that they necessarily meet the criteria for PAYG holiday pay. The key is that their work is so intermittent or irregular that it is impracticable to provide these employees with four weeks' annual holidays.

Distinguishing features between an employee with highly variable hours/days, that does not meet the criteria for PAYG, and a PAYG employee might include:

Employees with highly variable hours/days each week with no discernible pattern	***Employees whose work is so intermittent or irregular to make provision of annual holidays impracticable***
On a permanent employment agreement	May be on a casual employment agreement
Have a minimum number of contracted hours with significant but variable additional hours and days	No minimum number of hours and no expectation of ongoing employment
Works at least the minimum number of contracted hours most (if not all) weeks	Has significant periods without work
Employment is regular and ongoing even if not predictable	Employment is so intermittent and irregular as to make provision of annual holidays impracticable

It is essential that employers monitor each employee's work pattern in case a regular pattern of work develops, in which instance the employee could move to being a part or full time employee.

Unlike the case of fixed-term employees moving onto permanent agreements, the Act does not prescribe what should happen if an 'intermittent/irregular' employee moves to a 'regular/permanent' arrangement (either by explicit agreement or because the work pattern has become regular and ongoing). The important factor is that there will be some specific date at which the employee no longer fits the criteria for PAYG holiday pay.

In this situation, the employer and employee could either agree to follow the same approach as for fixed-term employees (above), or the following:

- the employee's employment agreement should be amended to reflect the change (or a new agreement entered into)
- the anniversary date for the purposes of the annual holidays entitlement is reset to the date at which the employee is no longer eligible for PAYG holiday pay
- the AWE calculation for annual holidays that the employee then becomes entitled to should just go back to the date at which the employee is no longer eligible for PAYG holiday pay.

Note: The date from which the employee no longer meets the criteria for PAYG holiday pay under s28 is the date at which they should stop being paid PAYG holiday pay. Any PAYG holiday pay paid after this date is not recoverable.

'Casual' employees – a word of caution

While employees who meet the criteria for PAYG holiday pay are likely to be called casual employees (unless they are on a fixed-term contract of less than 12 months), this does not mean that all employees on a casual employment agreement meet these criteria.

Labour inspectors report that a common cause of non-compliance with the Act is employers assuming that, just because an employee is casual, then they can be paid PAYG holiday pay.

Leave without pay (LWOP)

What is LWOP?

Leave without pay ('LWOP') is a period of unpaid absence taken by an employee while staying employed with an employer. Unlike other types of holidays and leave, employees have no statutory right to LWOP. The ability to take LWOP is usually at the employer's discretion, subject to whatever may have been agreed on this issue in the employment agreement.

LWOP for a week or longer can affect how employers calculate an employee's annual holiday entitlements. Periods of LWOP that each last less than a week do not affect the annual holiday calculations, even if they collectively add up to more than a week.

The effect of LWOP on annual holiday entitlements

When an employee takes a period of unpaid leave of more than a week during the year, this can be managed in one of two 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, their next anniversary date (ie when they next become entitled to annual holidays) is pushed out by one week.
- the employer and employee can agree that the LWOP still counts as continuous employment, in which case the 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 and a half weeks' unpaid leave during the year, the divisor in the AWE calculation will be reduced by two, ie it becomes 50 instead of 52.

Example:

Sue took three weeks LWOP and a further 2½ weeks LWOP in the same year.

Under the first method above, Sue's next anniversary date can be pushed out by (3-1) + (2½-1) = 3½ weeks.

Under the second method above, the divisor of 52 in Sue's AWE calculation is reduced by the number of whole or part weeks of LWOP Sue took greater than one week. For the three-week period the divisor is reduced by two and for the 2½ week the divisor is also reduced by two (one for the whole week and one for the part week). Therefore, the divisor for her AWE calculation will be 48.

Annual closedown periods

Key messages in this section

For employers	For employees
You can close down your entire business, or any part of it.	Your employer can close down their entire business, or any part of it.
Closedowns are most common during the Christmas holiday period, but some seasonal industries can close down at other times.	Closedowns are most common during the Christmas holiday period, but some seasonal industries can close down at other times.
You can make your employees take their annual holidays over a closedown.	Your employer can make you take your annual holidays during a closedown.
While you can have as many closedowns as you agree with your employees, the specific provisions of the *Holidays Act 2003* relating to closedowns can only apply to one closedown per year.	While you can agree with your employer to any number of closedowns, they can only make you use your annual holidays for one closedown per year.
At least 14 days' advance notice needs to be given before any closedown.	Your employer needs to give you at least 14 days' notice before a closedown.

Annual holidays during a closedown

An employer can implement an annual closedown for the whole business (for example, over Christmas), or part of a business (such as a factory being closed for annual maintenance while the office stays open). During a closedown, an employer can legally make employees take their annual holidays. Employers must give their employees at least 14 days' notice of a closedown and may give much more. (Employers can have as many closedowns a year as they agree with their employees, but the specific provisions in the Act can only apply to one closedown each year.)

Customary nature of closedown periods

Under the Act, a closedown period is defined as one in which the employer "customarily" shuts down part or all of their business. This means that a closedown period cannot be unilaterally introduced or extended beyond its usual length without employee agreement.

Employees who are entitled to annual holidays at the time of closedown

Employees who have become entitled to annual holidays by the start of a closedown period (even if they currently have a zero annual holidays balance) can be required to use their holidays by their employer. If they do not have enough annual holidays to cover the whole period of the closedown, the employer and employee may agree to use annual holidays in advance of their next year's entitlement.

Employees who are not yet entitled to annual holidays at the time of closedown

If a closedown happens before an employee has become entitled to annual holidays, the

employer **must** pay the employee eight percent of their gross earnings to the date of the closedown (less any amount already paid either for annual holidays in advance or PAYG holiday pay), and then reset their anniversary date (see below). In addition, the employer and employee **may** also agree to the employee taking annual holidays in advance during the closedown period.

Entitlements during closedown periods

A closedown is not a break in continuous employment for the employee.

If a closedown period includes public holidays (for example, over Christmas and New Year), then the employee is paid for those public holidays, if these are otherwise working days for the employee, as if the closedown were not in effect. This is the same as if a public holiday falls during annual holidays - the employee gets a paid public holiday, if it is an otherwise working day for them.

Where an employee takes an alternative holiday, sick day, bereavement leave or family violence leave during the closedown on a day that is an otherwise working day for the employee, the employee gets the RDP or ADP for that day.

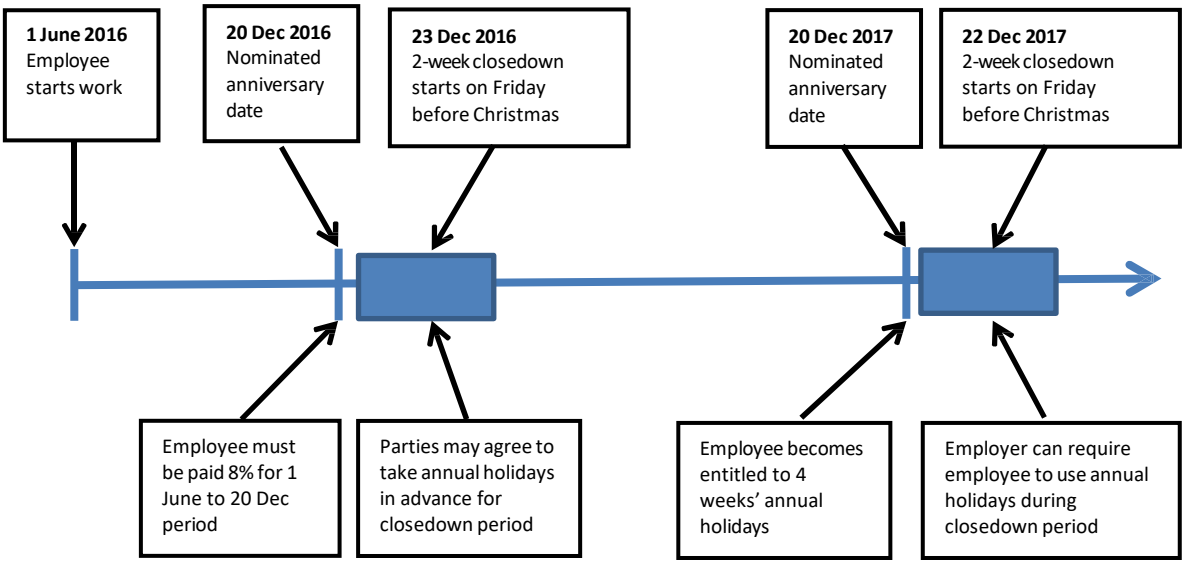
Moving an employee's anniversary date if they have worked less than a year

For an employee who has not yet become entitled to annual holidays (for example, who has worked less than a year), their anniversary date is reset to the date of the start of the closedown, or set to another date that is close to the date of the start of the closedown.

Moving the anniversary date follows from the requirement to pay the employee eight percent of gross earnings for the time worked so far.

However, often a closedown is on a slightly different date each year. To ensure that the employee will complete 12 months' continuous employment before the next closedown, the employer can nominate a date close to the start of the closedown period as the anniversary date.

The following timeline graphically indicates this situation:



Public holidays

Key messages in this section

For employers	For employees
If an employee does not work on a public holiday that falls on an otherwise working day for them, you must pay the employee in the normal pay cycle, as if they had worked as normal on the day. This is calculated at RDP, or ADP (where applicable).	If you do not work on a public holiday, and the public holiday falls on a day that would otherwise be a working day for you, you must be paid as if you had worked as normal on that day. The employer must calculate your pay on the basis of RDP, or ADP (where applicable).
You do not have to pay an employee for a whole day if they work on a public holiday, but only for the amount of time they actually work on the day.	If you work on a public holiday, you will be paid only for the amount of time you actually work on the day.
When calculating pay for working on a public holiday you should pay the employee the greater of: • the part of the employee's RDP (less any penal rates) for the time worked on the day plus half that amount again, or • the part of the employee's RDP for the time worked on the day, including any penal rates.	If you work on a public holiday, your employer must pay you the greater of: • the part of your RDP (less any penal rates) for the time worked on the day plus half that amount again, or • the part of your RDP for the time worked on the day, including any penal rates.
You and your employees can agree in writing to transfer the observance of public holidays to another working day to meet the needs of the business or the employee. The day to which the public holiday is transferred must also be an otherwise working day for the employee.	You and your employer can agree to transfer the day on which a public holiday is observed to another working day that meets the needs of you and the business. However, the day to which the public holiday is transferred must also be an otherwise working day for you.
An employee is entitled to a paid day off on the day the public holiday is transferred to. The employee should be paid their RDP (or ADP, where applicable) for the day.	If you agree to transfer the public holiday to another day, you must be paid your RDP (or ADP, (where applicable).

The public holidays

New Zealand has 12 public holidays a year:

- Christmas Day (25 December)
- Boxing Day (26 December)
- New Year's Day and the day after (1 and 2 January)
- Waitangi Day (6 February)
- ANZAC Day (25 April)
- Good Friday (date variable)
- Easter Monday (date variable)
- King's Birthday (first Monday in June)
- Matariki (date variable)
- Labour Day (fourth Monday in October)
- Provincial anniversary days (dates determined locally).

'Mondayising' of public holidays

- If Waitangi Day, ANZAC Day, Christmas Day, Boxing Day, New Year's Day or the day after New Year's Day fall 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 for Christmas Day, Boxing Day, New Year's Day and the day after New Year's Day when they fall on a Sunday) so that the employee still gets a paid day off if the employee would usually work on that day.
- If the holiday falls on a Saturday or Sunday and that day would otherwise be a working day for the employee, the holiday remains on the traditional day and the employee is entitled to that day off on pay. This may mean that, depending on how an organisation's operations are structured, some employees will have public holidays 'Mondayised' while others will observe them on the day that they fall.
- An employee is not entitled to more than four public holidays over the Christmas and New Year period, regardless of their work pattern.

Transfer of public holidays

Employers and employees can agree to transfer the observance of a public holiday to another working day to meet the needs of the business or the employee. They should make the agreement in writing.

The public holiday to be transferred must be transferred to another identified or identifiable calendar day or 24-hour period and be an otherwise working day for the employee. A request to transfer can be made by either the employee or employer and must be considered in good faith by the other party. Any agreement must meet the minimum requirements set out in law (see below). The agreement cannot reduce the number of public holidays which an employee gets.

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 (RDP) or average daily pay (ADP). It is important to consider whether the transfer of a public holiday may have an impact on an employee's pay. For example, if the parties agree to transfer a public holiday from a day where the employee would normally work eight hours to one where they would normally work four hours, then the employee's RDP would be determined on the basis of four hours.

The principle of good faith requires that the employer should make employees aware of how a transfer of a public holiday might affect their pay. It would not accord with the principle of good faith for employers to transfer a public holiday just to avoid having to pay employees what they would have been entitled to had they worked on the public holiday concerned.

If an employee works on the day the public holiday is transferred to, then they are paid at least time and a half for the hours worked and get a whole working day off work as an alternative holiday provided that it is an otherwise working day and the employee is not employed to work only on public holidays. You will find more information on alternative holidays, sometimes called 'days in lieu', in the Alternative holidays section' (Page 64). An employer and employee must both agree that the employee will work on the day to which the public holiday is transferred.

If an employee would have worked on a day that a public holiday is transferred to but cannot work because they are sick, they are paid for the day as if they had had a paid, unworked public holiday. They do not have sick leave deducted.

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.

When a public holiday is transferred, the day it is moved to becomes the public holiday for the employee.

When transferring a public holiday, the minimum requirements are:

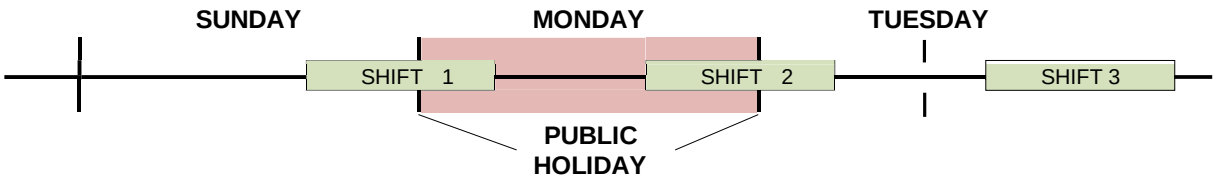
- the day it is being transferred to must be an identified or identifiable calendar date or 24-hour period, and
- the day must be an otherwise working day for the employee, and not another public holiday, and
- the purpose of the transfer cannot be to avoid paying the employee time and a half for working on a public holiday (see section Payment for working on public holidays, (Page 58) or to avoid providing them with an alternative holiday, and
- the transfer cannot reduce the number of public holidays the employee gets.

Transfer of part of a public holiday

Where an employee's shift overlaps two calendar days and one of those days is a public holiday, an employer and employee can agree to transfer the public holiday to a 24-hour period that begins or ends at any time on what would have been the public holiday, if the employee is due to work a shift in that 24-hour period.

This is to allow the employee to enjoy a whole shift off as a public holiday and means employers will not have to pay the employee at different rates for shifts that overlap onto a public holiday.

Example <u>Without agreement</u>

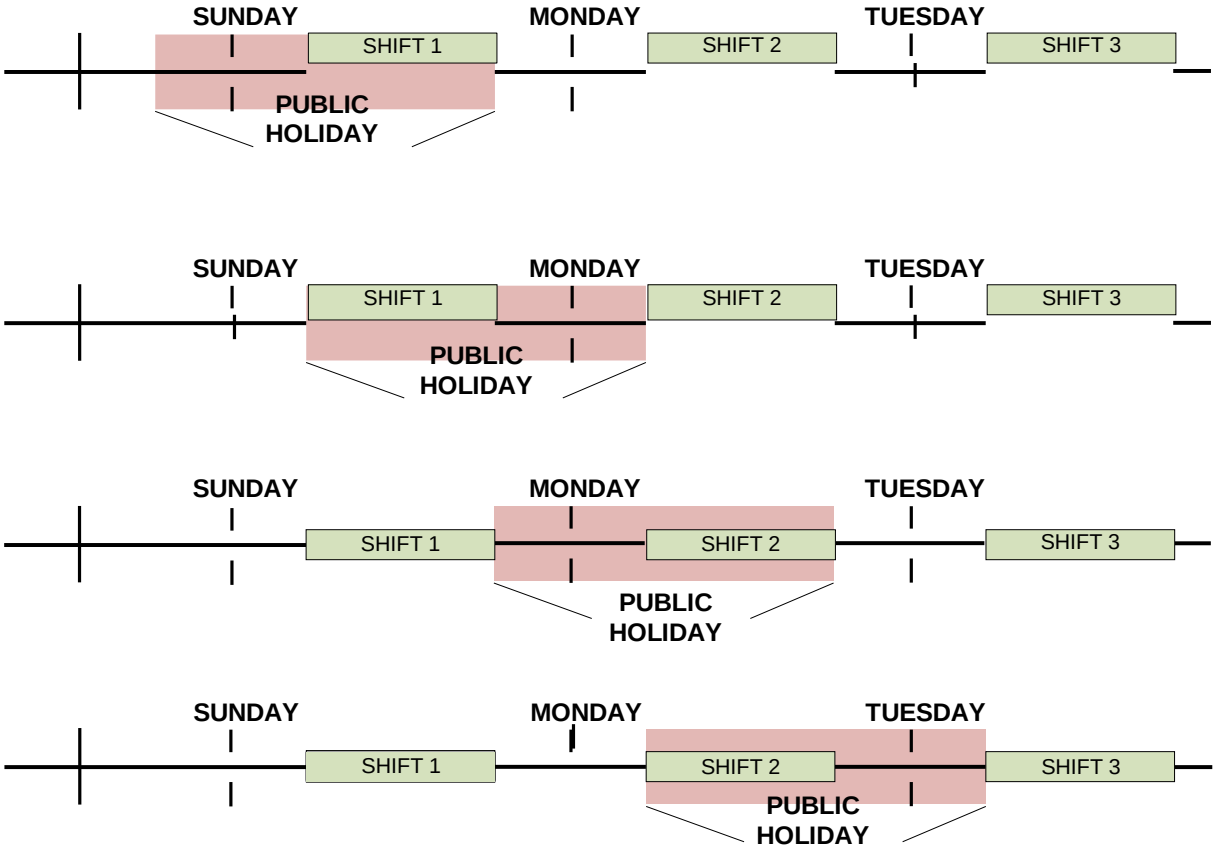


If the parties do not have a written agreement to transfer the public holiday, the employee would either:

- need to work until 11:59 pm on the Sunday shift, take the public holiday off, and resume work at 12:00 a.m. Tuesday, or
- if the employee has agreed to work on public holiday, then they would need to be paid the public holiday rates for those parts of the shifts that fall on the public holiday.

Example With agreement

If the parties have a written agreement, they can designate a 24-hour period to be treated as a public holiday, beginning or ending at any time during what would have been the public holiday, for example:



Requirement to work on a public holiday

An employer can 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 may be required to work on the holiday.

Availability provisions

Where, for example, an employee is required to be available to work public holidays that would not fall within their agreed and guaranteed hours, the *Employment Relations Act* provides that the employer will have to pay reasonable compensation (such as in the form of a regular weekly allowance) unless there is agreement that reasonable compensation is provided by way of salary.

Payment when the employee does not work on a public holiday

If an employee does not work on a public holiday that falls on an otherwise working day for them, the employee gets paid for that day in the normal pay cycle, as if they had worked as normal on the day. This is calculated at Relevant Daily Pay or Average Daily Pay (where applicable).

Payment for working on public holidays

Where an employee works on a public holiday that falls on an otherwise working day for them, they receive at least time and a half for the hours they worked, as well as an alternative holiday (see section Alternative holidays, Page 64).

Where an employee (i) works on a public holiday and it is not an otherwise working day, or (ii) is specifically employed to work only on public holidays (for example, an employee who is employed to work at the racetrack only for the Waitangi Day meeting), there is no entitlement to an alternative holiday, but the employee must still be paid at least time and a half.

When calculating pay for working on a public holiday, the Act provides that the employer must pay the employee the greater of:

(a) the portion of the employee's RDP or ADP (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or

(b) the portion of the employee's RDP that relates to the time actually worked on the day, including any penal rates.

With regard to (a) above, the employer must work out the employee's RDP for the time actually worked on the day (minus any penal rates) and then multiply this by one and a half. This figure must be compared to the employee's RDP (including any penal rates) and the employer must pay the greater amount[10].

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[10] The reference to 'RDP or ADP' means that employers should use RDP (or ADP, where applicable). It does not mean that employers must apply the greater of RDP or ADP.

Point to note:

You only need to consider penal rates when calculating pay for working on a public holiday if there is provision for these in the employment agreement. For the purposes of public holiday payments, a penal rate is an identifiable additional amount paid to compensate the employee for working on a particular day of the week or a public holiday. Penal rates do not include allowances, such as wet weather money, overtime rates, night rates or special rates for working a sixth or seventh day in a week.

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 with no additional payments, 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 $28.00 per hour. For time worked on a public holiday, the pay rate is $42.00 per hour (time and a half).*

If 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 part of the public holiday so that it covers one whole shift (see the section Transfer of part of a public holiday on Page 56).

When applying these provisions, it is important to note that employers are not required to pay employees for a whole day if they work on a public holiday, but only for the time they actually work on the day. For example, if the employee works only one hour on a public holiday, they are paid for that hour only, at the rate of time and a half, but they are still entitled to an alternative holiday if it is an otherwise working day for them, unless they are employed to work only on public holidays.

Employers may find the concept of RDP confusing in situations when an employee works on a public holiday. This is because it will be clear to employers what the employee received on the day – as opposed to having to determine what they would have received had the employee worked that day. For all practical purposes, therefore, employers can calculate an employee's earnings for working on a public holiday by applying time and a half (or the relevant penal rates if higher) to the contractual rate for the time worked on the public holiday day.

Similarly, the test for using ADP for the reason that it is 'not possible or practicable' to determine RDP will not be required when the employee works on the public holiday. While the Act gives employers the discretion to use ADP if an employee's daily pay varies within the pay period in which the holiday or leave falls, employees will likely expect to be paid for the hours they actually work on a public holiday. From a perspective of transparency and good faith, therefore, it is preferable not to apply ADP.

Example:

Double time for working on a public holiday

Kelly is paid $30 an hour for normal working hours. She is, however, entitled to double time for working on Sundays (a total of $60 an hour). ANZAC Day falls on a Sunday and Kelly works eight hours. Her RDP will therefore be $480.

Kelly is entitled to the greater of:

- the portion of RDP ($480) less any penal rates (ie less the double time rate of $240) that relates to the time actually worked on the day (leaving a total of $240) plus half that amount again (an extra $120) = a total of $360; or
- the portion of the employee's RDP that relates to the time actually worked on the day, including any penal rates = a total of $480.

Therefore, Kelly is entitled to a total of $480.

Entitlement if on call on a public holiday

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

Possible situation	Minimum entitlement
• Employee is called out on a public holiday o that is an otherwise working day for them.	• Payment at the rate of the greater of RDP x time and a half (not including penal rates) or RDP (including penal rates), for the actual time worked. • In addition, a whole working day off as an alternative holiday, paid at the rate of RDP or ADP (if applicable). This does not apply if the employee is employed to work or to be on call only on public holidays.
• Employee is called out on a public holiday o that is not an otherwise working day for them.	• Payment at the rate of the greater of RDP x time and a half (not including penal rates) or RDP (including penal rates), for the actual time worked. • There is no entitlement to an alternative holiday.
• Employee is not called out on public holiday o that is an otherwise working day for them, and o the nature of the restriction imposed by being on call is such that, for all practicable purposes, the employee has not had a whole holiday.	• Payment of RDP, or ADP (if applicable) • In addition, a whole working day off as an alternative holiday paid at the rate of RDP or ADP (if applicable). This does not apply if the employee is employed to work or to be on call only on public holidays.
• Employee is not called out on a public holiday o that is an Therefore, otherwise working day for them, and o the nature of the restriction imposed by being on call is not such that, for all practicable purposes, the employee has not had a whole holiday (the employee has had a whole holiday).	• Payment of RDP, or ADP (if applicable). • There is no entitlement to an alternative holiday.
• Employee is not called out on a public holiday o that is not an otherwise working day for them. This also applies if the employee is on call but is not called out on a public holiday if the employee is employed to work or be on call only on public holidays).	• There is no minimum entitlement.

For more information on payment for public holidays and alternative holidays refer to the following sections:

- Payment when the employee does not work on a public holiday
- Payment for working on public holidays
- Payment for an alternative holiday.

Determining whether being on call restricts an employee's freedom of action to an extent that for all practicable purposes the employee has not had a whole holiday needs to be addressed on an individual basis, with consideration of all the relevant circumstances. For example, if an employee is required to refrain from alcohol or stay within a certain distance from their place of work, this may constitute a restriction that means the employee has not had a whole holiday.

Where employees are required to be available to work public holidays that would not fall within their agreed and guaranteed hours, this needs to be covered by an availability provision in an employment agreement. The *Employment Relations Act* provides that the employer will have to pay reasonable compensation (for example, in the form of a regular weekly allowance) unless there is agreement that reasonable compensation is provided by way of salary. The employer must also have genuine reasons based on reasonable grounds for including an availability provision.

Any payment for being on call would need to be as included in the employee's employment agreement or as negotiated by the parties. Without a valid availability provision, the employee may refuse to work the holiday and may not be treated adversely for doing so.

Relationship with other types of leave and holidays

Relationship between public holidays and annual holidays

If a public holiday occurs during a period of annual holidays, it must be treated as a public holiday and not part of annual holidays.

Where an employee has outstanding annual holidays entitlements when their employment ends, the employee's final day of work is notionally extended by any annual holidays entitlement not taken. If a public holiday falls within this extended period, then the employee must also be paid for this day as a public holiday if it falls on a day that the employee would otherwise have worked.

Relationship between public holidays and sick leave

If an employee is sick on a public holiday, the day is to be treated as an unworked public holiday rather than as sick leave. This means that the employee will get a paid day off but the employee will not be entitled to time and a half or an alternative holiday.

If an employee is scheduled to work on a public holiday but works, for example, only for an hour, and then goes home sick, the employee will be entitled to time and a half for time worked and an alternative holiday (if the day was an otherwise working day for them). If the employee has sick leave owing, they would be able to use that for the remainder of the day, but that would be paid at normal rates, not time and a half.

Relationship between public holidays and family violence leave

If an employee is affected by family violence on a public holiday that is an otherwise working day, the day is to be treated as an unworked public holiday rather than as family violence leave. This means that the employee will get a paid day off but the employee will not be entitled to time and a half or an alternative holiday.

Relationship between public holidays and unpaid leave

If a public holiday falls during a period when an employee is taking a planned time off without pay from work, they would not normally receive any payment for the public holiday. This is because it would not be an otherwise working day.

However, in certain situations the employee may be entitled to paid public holidays during a period of leave without pay. For example, the employee may be forced to take a period of unplanned leave without pay because they are sick and do not have enough sick leave to cover the day(s) in question. In these circumstances, an otherwise working day may apply. However, the employer and employee would have to take into account the factors set out in the Act on determining an otherwise working day (see Page 14 Otherwise working day ('OWD') with a view to reaching agreement on this.

Alternative holidays

Key messages in this section

For employers	For employees
If an employee works on a public holiday, which is an otherwise working day for them, they are entitled to an alternative holiday (unless the employee is employed to work only on public holidays).	If you work on a public holiday, which is an otherwise working day for you, you get an alternative holiday (unless you are employed to work only on public holidays).
Even if an employee works for just part of a public holiday (which is an otherwise working day for them) they are entitled to a whole working day off work as an alternative holiday.	Even if you work for just part of a public holiday you get a whole working day off work as an alternative holiday (as long as the public holiday falls on an otherwise working day).
You and the employee must agree to the date the alternative holiday is to be taken.	You and the employer must agree to the date your alternative holiday is to be taken.
On-call employees are entitled to an alternative holiday if they are called out to work on an otherwise working day for them, or if being on call meant they were restricted on how they spent their holiday.	You do not always get an alternative holiday if you are on call, unless you are called out to work on an otherwise working day for you, or being on call meant you did not get a proper holiday because you were so restricted in terms of how you could use your time.
After 12 months of being entitled to an alternative holiday, an employee can ask you to agree to exchange it for an agreed amount of payment.	After 12 months of being entitled to an alternative holiday, you can ask your employer to agree to exchange it for an agreed amount of payment.

How alternative holidays work

An alternative holiday is a public holiday taken at another time.

Employees get an alternative holiday when they work on a public holiday that falls on an otherwise working day for them. If an employee works for an employer only on a public holiday, then they are not entitled to the alternative holiday.

Employers and employees must agree on the date to be taken as an alternative holiday[11]. If an employer and employee cannot agree when an alternative holiday is to be taken, the employer may require the employee to take an alternative holiday on a date determined on a reasonable basis. The employer must give the employee at least 14 days' notice of the requirement to take the alternative holiday.

[11] Relevant provisions of employment agreements should be checked as these may give the employee the right to determine when they can take an alternative holiday.

An alternative holiday must be a whole working day off for the employee, regardless of the amount of time the employee actually works on the public holiday. For example, if an employee works a regular 40-hour week (five eight-hour days) from Monday to Friday and works for say only an hour on a public holiday, the employee is still entitled to a whole working day off work when taking the alternative holiday.

There may be situations where an employee who is entitled to an alternative holiday may wish to take this holiday in part days, for example by taking two half-days off work. However, the entitlement under the Act is phrased in terms of a 'whole working day off work' and it makes no provision for dividing up an alternative holiday into part days.

While there is nothing in the Act specifically preventing employers and employees from agreeing to divide up an alternative holidays into part days, employers should do so with caution. If the employee takes a whole day, the number of hours that constitute this day is not much of an issue, as it just means that the employee has had sufficient time away from work to be considered a whole 'day' for their purposes. In the case of a part day, however, it may not be clear how long this should be, for example, if the employee works variable and unpredictable hours.

Payment for an alternative holiday

An employee receives their RDP, or ADP (where applicable) for a day taken as an alternative holiday. For example, if an employee takes an alternative holiday on a Friday, then assuming they receive RDP, they will be paid the amount that they would have received had they worked on that Friday. This payment must be made in the pay period that relates to the alternative holiday.

If an employee works variable hours it would be consistent with the principle of good faith for employers to make employees aware that the day they wish to take as an alternative holiday may have implications for their pay. If, for example, an employee works eight hours a day from Tuesday to Friday but four hours on Monday, the employee would be paid for four hours if they took an alternative holiday on a Monday.

Payment for alternative holidays owing at termination

If any alternative holidays are outstanding at the time of resignation or termination of employment, these are paid out at the rate of pay for the employee's last day of employment, ie the employee's RDP, or ADP (if applicable).

Alternative holiday may be exchanged for payment

After 12 months of being entitled to an alternative holiday, an employee can ask the employer to agree to exchange it for an amount of payment also to be agreed. If agreed, this must be paid as soon as practicable after the agreement. There is no requirement to pay RDP, the amount of payment is purely negotiable.

It is not compliant with the Act for employers to exchange an alternative holiday for payment before 12 months have passed. For example, practices whereby employers and employees agree that an employee who has worked on a public holiday will receive both at least time and a half for working on a public holiday and be paid out for the alternative holiday in the same pay period (so that the employee is effectively paid out two and half times for working on the public holiday) would not be compliant.

Alternative holidays if an employee is on call for a public holiday

Where an employee is on call on a public holiday that falls on an otherwise working day for them, then if they are called into work, the employer must, in addition to paying a minimum of time and a half for the hours worked, (see Payment for working on public holidays, Page 58) give the employee an alternative holiday. This includes if being on call restricts the employee in a way that means they did not get a whole working day off work. This does not apply to an employee who:

- works for the employer only on public holidays, or
- is employed just to be on call on public holidays.

Sick leave

Key messages in this section

For employers	For employees
After six months of current continuous employment, employees become entitled to 10 days' sick leave. However, an employee may also be entitled to this if, over a six-month period, they worked for you for an average of at least 10 hours per week, including: • at least one hour per week, or • 40 hours a month. Any additional sick leave over and above the statutory entitlement is by agreement or otherwise at your discretion.	After six months of current continuous employment, you will be entitled to 10 days' sick leave. However, if you have not been employed continuously for six months, you may still be entitled to this, if over a six-month period, you worked for the employer for an average of at least 10 hours per week, including: • at least one hour per week, or • 40 hours a month. Any additional sick leave over and above the statutory entitlement is by agreement or otherwise at the employer's discretion.
Sick leave is for when an employee is sick or injured, or when their spouse, partner or dependant (like a child or elderly parent) is sick or injured.	Sick leave is for when you are sick or injured, or when your spouse, partner or dependant (like a child or elderly parent) is sick or injured.
Sick leave does not expire while the employee continues to work for you. Unused sick leave must be allowed to accumulate up to 20 days. This does not stop you from allowing employees to accumulate more than this.	Your sick leave does not expire while you are employed with the same employer. You must be allowed to accumulate up to 20 days of unused sick leave (or more by agreement).
Payment for sick leave should be at the rate of the employee's RDP, or ADP (where applicable). The payment must be paid in the pay that relates to the pay period in which the leave is taken.	You should be paid your RDP, or ADP where applicable) for each day of sick leave. Your employer must pay you for sick leave in the pay period in which you have taken this leave.
You do not need reasonable grounds before asking your employee to prove they are sick. If you require proof of sickness or injury within three calendar days from when the employee became sick or injured, you must pay their reasonable expenses in obtaining the medical certificate.	You must tell your employer as soon as you can that you are taking a sick day. If your employer requires proof of sickness or injury within three calendar days from when you became sick or injured, they must pay your reasonable expenses in obtaining the medical certificate.

Entitlements

Sick leave

All employees are entitled to a minimum of 10 days' paid sick leave per year as long as they have completed six months' current continuous employment. An employee is entitled to 10 days' sick leave for every 12-month period of employment once the six-month qualifying criteria have been met.

Minimum sick leave entitlements increased from 5 to 10 days per year from 24 July 2021. Employees get the extra five days per year when they reach their next entitlement date. The entitlement date will be either after reaching 6 months' employment or on their sick leave entitlement anniversary (12 months after they were last entitled to sick leave).

The entitlement to sick leave applies to all employees, whether they work on a full-time, part-time, permanent or fixed-term basis. It is important to note that the ten-day annual entitlement to sick leave cannot be pro-rated. The entitlement remains at ten days, regardless of whether the employee works, for example, six days a week or one day a week.

Current continuous employment and eligibility to sick leave

Current continuous employment is typically characterised by a regular work pattern and expectation of ongoing employment. However, if employment has not been continuous for a period of six months the employee may still get sick leave, if during those six months, they worked for the employer for an average of at least 10 hours per week over the six months, including:

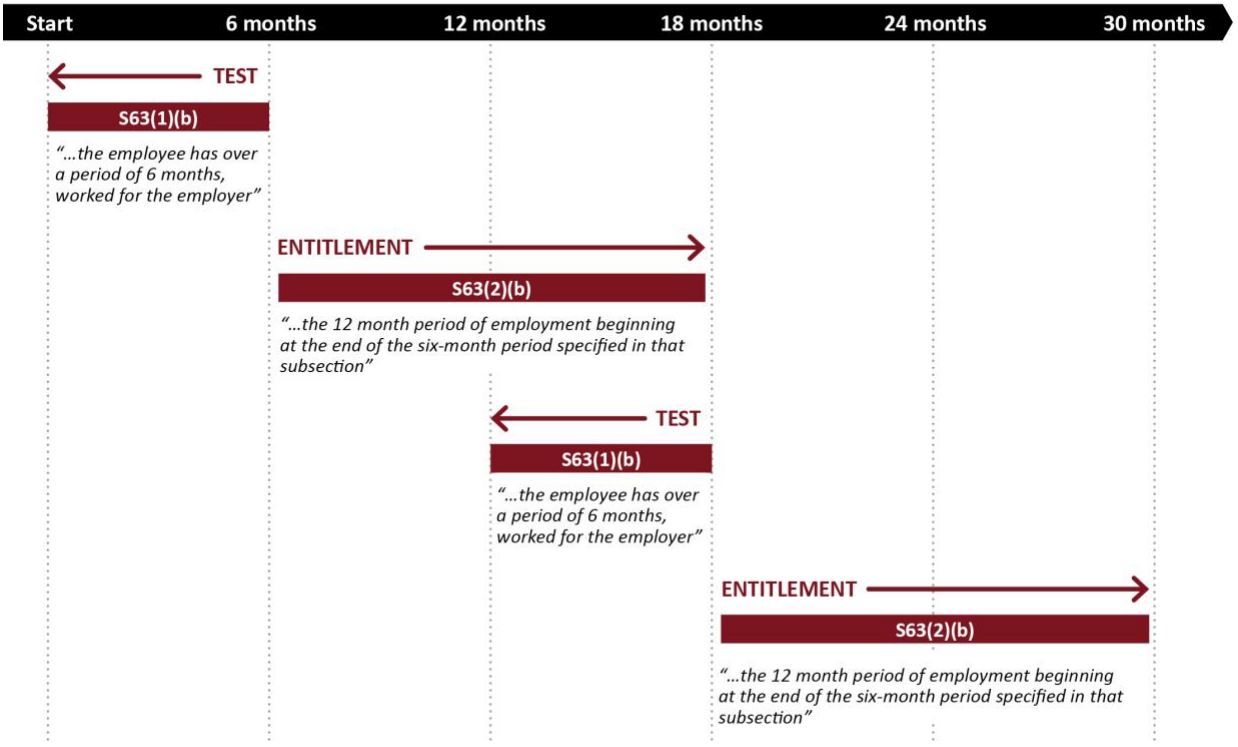
- at least one hour per week, or
- 40 hours a month.

Once an employee meets the six-month qualifying criteria, they get an entitlement to 10 days' sick leave, which is retained for the next 12-month period, regardless of whether or not the employee continues to meet the qualifying criteria over that period.

If the employee does not qualify for an entitlement at this point, then the six-month qualifying period keeps rolling. For example, if the employee has met the qualifying criteria for the previous four months, they would be eligible for sick leave if they continue to meet the criteria for the next two months.

The same applies when determining if an employee is eligible for a further entitlement of 10 days' sick leave at the end of the 12-month period after which an employee has first qualified for sick leave. At this point, an employer should look back six months to see if the employee has met the qualifying criteria over that period. If they do, then the employee is eligible for a new entitlement of 10 days for the next 12 months.

Establishing Sick, Bereavement and Family Violence leave entitlements



'Casual' employees – a word of caution

The term 'casual' does not appear anywhere in the Act. All employees, regardless of employment status, are entitled to receive sick leave (and bereavement leave and family violence leave) if they meet the required criteria.

Just because an employer refers to an employee as 'casual' does not mean that they are not entitled to leave under the Act. Employees referred to as 'casual' or on 'casual' employment agreements may often meet the qualifying criteria for entitlement to sick leave (and bereavement leave and family violence leave) and should be regularly assessed against the criteria in the Act.

Taking sick leave

Employees can take sick leave when:

- they are sick or injured
- their spouse, partner or dependent (such as a child or elderly parent) is sick or injured
- There is no definition of 'sick' in the Act. Generally, however, the Act envisages some sort of illness or incapacity. Moreover, the entitlement is phrased in terms of an employee being 'sick or injured', so the term 'sick' does include physical injury.

An employee may be capable of working despite being sick or injured but require time off for a medical appointment to diagnose or treat an illness, injury or condition. In these circumstances, an employee would still be entitled to sick leave.

In the case of pregnancy, it has generally been held that a woman who is pregnant is not considered to be sick. However, employees who become ill during pregnancy have the same sick leave entitlements as other employees. It does not matter if the illness is related to the pregnancy, such as nausea or pre-eclampsia, or if it is a more general illness, such as colds or influenza[12] .

The intention of the term 'dependent' is to capture those people that may depend on the employee for care, such as a child. While there is no definition of the term 'dependent', there needs to be an established relationship with the person concerned, along with an expectation of care should that person be sick or injured. It does not necessarily mean that the dependence needs to be ongoing or permanent. It may be only during illness or injury that the dependency exists. Employers may require a certificate from a medical practitioner under the terms of the Act that the employee cannot attend work because the employee's spouse or partner or a person who depends on the employee for care is sick or injured.

However, if any person such as a spouse, partner or child is, for example, in hospital therefore not directly dependent on the employee for care (rather the hospital is caring for them), then it cannot be automatically assumed that the use of sick leave entitlements under the Act would be available. In some circumstances, there will be no dependency. In other circumstances, a person who is in hospital may continue to be dependent on the employee for care. Examples of this may include a sick, young child or infant, an elderly parent who remains emotionally dependent, or a person dependent on the employee for communication purposes. Each situation needs to be assessed on its own merits and determined on a case-by-case basis. An employee in a situation where sick leave entitlements are not available may attempt to negotiate for payment with their employer (although the employer is under no obligation to agree).

Although an employee would have to justify dependency to the employer to qualify for sick leave, an employee is not required to justify to the employer why one parent and not the other stayed at home to care for a child or other dependant. The Employment Tribunal has described this as "quite frankly, none of [the employer's] business"[13] .

Carrying over sick leave

Unused sick leave may be accumulated to a maximum of 20 days (this means that 10 days can be carried over into the next entitlement period). For example, if an employee has used none of their sick leave in the first year, they will receive another 10 days on their next entitlement date making a total of 20. If an employee has 8 days remaining, they can carry 8 over, so when the employee receives a new 10-day entitlement they will have a total of 18 days at the start of the entitlement year.

[12] Under s15 of the *Parental Leave and Employment Protection Act 1987* a female employee who is pregnant can also take a total of up to 10 days' special leave without pay for reasons connected with her pregnancy. This may include time-off for tiredness, consultations with primary care providers and antenatal classes.

[13] *Kidd v Henderson Construction Ltd* EmpT Christchurch CT 17/93 25 February 1993

CARRYING OVER SICK LEAVE EXAMPLE				
Initial 6 months qualifying period	**1st 12 months period (comes after the qualifying period)**	**2nd 12 months period**	**3rd 12 months period**	**4th 12 months period**
10-day entitlement	10-day entitlement plus up to 10 days unused entitlement carried over	10-day entitlement plus (up to 10 days unused entitlement carried over	10-day entitlement plus up to 10 days unused entitlement carried over	10-day entitlement plus up to 10 days unused entitlement carried over

Employers must allow employees to carry over any unused statutory sick leave entitlement to a maximum of 20 days. It is not a discretionary entitlement. Provisions in an employment agreement to cash up any unused statutory sick leave after a year will be null and void (this applies to the minimum 10 days' sick leave though the parties are free to attach such conditions to contractual entitlements over and above this).

Sick leave in advance

When the employee does not have enough sick leave (for example, during the first six months of employment), the employer and employee can agree to the employee anticipating (taking in advance) their sick leave entitlement. Any sick leave in advance is then deducted from the next entitlement. This should be made clear to the employee in advance, if this is to occur.

Relationship with other types of leave and holidays

Relationship between public holidays and sick leave

If an employee is sick on a public holiday that is an otherwise working day, the day is to be treated as an unworked public holiday rather than as sick leave. This means that the employee will get a paid day off but the employee will not be entitled to time and a half or an alternative holiday. The proof of sickness/injury would not apply if this was the case, as the day is to be treated as an unworked public holiday rather than sick leave.

Relationship between annual holiday and sick leave

If an employee goes on holiday and falls sick during those holidays, the employer may allow the employee, on agreement, to use sick leave instead of annual holidays. This has the effect of preserving the employee's holiday entitlement so they can have rest and recreation when they are well. There is, however, no automatic right of the employee to exchange annual holidays for sick leave.

If an employee has used up all of their sick leave the employer and employee may agree to the employee using their annual holiday entitlement for the remainder of the sickness or injury. It is important to note that an employer cannot require an employee to take their annual holiday entitlement in this situation.

If the employee has booked a period of annual holidays and becomes sick and remains sick when the annual holidays are due to be taken, the period of those annual holidays during which the employee continues to be sick must be treated as sick leave. Again, this has the effect of preserving the annual holidays for the employee to enjoy when they are able to.

Relationship between sick leave and extended parental leave

The *Parental Leave and Employment Protection Act 1987* provides employees with entitlement to take extended periods of parental leave – of up to a maximum of six months or 12 months (depending on the qualifying criteria set out in that Act).

The tests for entitlement are similar to those for sick leave, in that the employee must meet a six-month work test to qualify for a maximum 26-week duration of extended leave (or a 12-month work test if the maximum duration of extended leave is 52 weeks)[14].

The *Parental Leave and Employment Protection Act 1987* provides that where an employee resumes service with the same employer at the end of a period of parental leave, the employee's service, for the purpose of any rights and benefits that are conditional on unbroken service, shall not be broken.

Where an employee takes extended parental leave of at least six months, then for the purpose of entitlement to sick leave they will be deemed to have continuity of service over that period. They will therefore not be required to establish their entitlement to sick leave at the end of that six-month period.

Relationship between sick leave and unpaid leave (continuous employment)

Leave without pay is still technically "current continuous employment" (even though the employee does not get paid for this time) so this period would be included in the six-month qualifying period. If an employee is away on leave without pay, this will not extend out the entitlement time for sick leave and they would become entitled on their normal sick leave anniversary. Employers may wish to keep this in mind when granting leave without pay.

Entitlements to sick leave when there is a series of fixed-term employment agreements

If the duration of the fixed term is more than six months, the employee will be entitled to sick leave. However, if the employee is on a series of fixed-term agreements of less than six months, eligibility would depend on whether they would meet the minimum continuous service criteria for entitlement.

Care should be taken to ensure that the reason for the fixed-term nature is not to exclude or limit entitlements an employee would otherwise have received under the Act. Otherwise, the impact of the fixed-term will not be valid and entitlements may arise.

Proving sickness or injury

Employers can ask for proof of sickness or injury at any time after the employee takes sick leave.

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[14] Employees will meet these tests if they have worked for the same employer for an average of at least 10 hours a week in the six months / 12 months immediately preceding the expected date of parental leave.

If the employer requires proof **within three consecutive calendar days** of the employee being sick or injured, the employer must:

- tell the employee as early as possible that they need proof; and
- pay the reasonable expenses for getting proof.

If the employer requires proof of the employee's sick leave after the employee has been sick or injured for a period of **three or more consecutive calendar days,** whether or not the day(s) are otherwise working days for the employee, the employee pays the costs of getting such proof, unless otherwise agreed.

Employers do not need reasonable grounds to suspect the sick leave is not genuine before asking for proof but should remember their good faith obligations.

The three days are consecutive calendar days and can include a scheduled break.

Example:

Tim takes a day's sick leave on Tuesday, then has his scheduled break on Wednesday and another day's sick leave on Thursday. His employer can ask for proof of the sickness or injury on Thursday without having to pay for a doctor's visit, even though Thursday is only Tim's second day of leave.

Where the employee is using sick leave to care for another person, the employer can require proof that the other person is sick or injured.

The employer cannot make the employee visit a particular doctor. Employees have the right to choose their own doctor.

Where the employer believes the employee has misused their sick leave, this becomes an employment relationship problem under the *Employment Relations Act*. If the employer did not ask for proof of illness or injury at the time, they can still use the normal processes for dealing with employee problems, which may include disciplinary procedures.

Sick leave and ACC entitlements

The following rules apply in relation to the ACC scheme.

- If an employee has a work-related accident, the employer has to pay first-week compensation at 80% of the amount of earnings lost by the employee during this week of incapacity, and cannot make the employee take that time off as sick leave. ACC will pay weekly compensation for any subsequent weeks in which the employee continues to be off work.
- If an employee is on first-week compensation or weekly ACC compensation for a work-related injury, an employer and employee may agree to top up an employee's earnings to their full ordinary weekly pay by deducting from the employee's sick leave entitlement one day for every five days that the employer makes the top-up payment.
- An employer cannot make an employee take sick leave for time-off when the employee is receiving either first-week compensation from their employer or ongoing weekly compensation from ACC. If an employee is receiving weekly compensation from ACC (eg, after the first week), the employer does not have to pay the employee.

- Before paying first-week compensation, the employer may require the employee to meet reasonable requirements for evidence of the injury such as a certificate by a registered health professional nominated and paid by the employer.

Employers should also note that:

- ACC have their own definition of 'earnings as an employee'[15] which means that the amount of weekly compensation they pay will not necessarily equate to exactly 80% of ordinary weekly pay.

- If an employer agrees to top up an employee's earnings by deducting one day's sick leave for every five days of top-up payment, they have to top up the ACC payment to the level of ordinary weekly pay, (not RDP).

Example:

Brent works for a removals company and has injured his back while unloading a heavy piece of furniture. He is off work for three weeks. Brent has an agreement with his employer to top up his first week compensation and subsequent weekly ACC compensation on the basis of five days top up for one day's sick leave. The employer pays Brent his full ordinary weekly pay of $860 for the first week and deducts a day's sick leave from his balance. In the following two weeks, Brent receives weekly compensation that ACC has determined to be $670 per week. The employer pays Brent a top up of $190 a week for the next two weeks to bring him to his full ordinary weekly pay and deducts a further two days sick leave from Brent's account.

Sick for part of a day

The Act describes sick leave entitlement in terms of days. However, the employee and employer can agree that the employee may take sick leave on a pro-rata basis, such as hours or half-days. For example, if an employee worked a half-day then went home sick, their employer could agree to only deduct a half-day of paid sick leave.

The agreement need not necessarily be the subject of a relevant clause in an individual or collective employment agreement. It might, for instance, be covered in a workplace policy or else be the subject of a verbal agreement. The payroll system of some employers may already be configured to allow employees to submit applications for leave in units lower than a day, which, if approved, means that the employer has consented to such an arrangement.

Where there is provision for sick leave to be taken on a pro-rata basis, it is important to ensure that the total amount of sick leave entitlement provided is equivalent to at least 10 days per annum and that the amount of sick leave deducted from the entitlement is proportional to that part of the day on which the employee was sick.

See the next page for examples of sick leave allowable under the Act.

[15] Section 9(1) of the *Accident Compensation Act 2001* says: 'Earnings as an employee, in relation to any person and any [tax year], means all [PAYE income payments] of the person for the [tax year].'

Examples of sick leave allowable under the Act:

- Amy works a 30-hour week, six hours a day from Monday to Friday, and earns $25 an hour. She is sick on Wednesday. Her employer pays her RDP of $150 and deducts a day's sick leave from her balance.

- Sam earns $25 an hour and works a 40-hour week consisting of three 10-hour shifts Monday, Tuesday, Wednesday and two five-hour shifts on Thursday and Friday. Under the collective agreement that covers him, employees are entitled to take sick leave in half-day units. Sam needs to take a half-day's (2.5 hours) sick leave on Thursday to look after a sick child. He receives $125 for the day (made up of $62.50 for the hours worked and $62.50 in sick pay) and has a half-day deducted from his leave balance.

- Anita earns $25 an hour and works 36 hours a week, consisting of eight hours a day from Monday to Wednesday and six hours a day from Thursday to Friday. She feels unwell on Thursday and goes home two hours earlier than she would normally finish work. The employer has configured the payroll system in a way that allows employees to apply for sick leave entitlement in hourly units. As she works a six-hour day on Thursday, the amount to be deducted from her sick leave account needs to be in proportion to the part of the day that she was off sick. In this case a third (33.3%) of a day needs to be deducted from her sick leave account. If on the other hand she had taken two hours' sick leave on Tuesday, then her sick leave would only be deducted by a quarter of a day (25%).

Bereavement leave

Key messages in this section

For employers	For employees
After six months of current continuous employment, employees are entitled to a set amount of bereavement leave for each bereavement. However, in certain circumstances (see below) some employees that have not been employed continuously for six months may still be entitled to bereavement leave.	After six months of current continuous employment, you can take a set amount of bereavement leave for each bereavement. However, in certain circumstances (see below) you may still be entitled to bereavement leave even if you have not been employed continuously for six months.
An employee can take three days for close family as defined in the Act. They can also take one day on the death of someone outside their immediate family if you accept that the employee has suffered a bereavement with regard to certain defined circumstances.	You can take three days for close family as defined in the Act. You can also take one day on the death of someone outside your immediate family if the employer accepts that you have suffered a bereavement with regard to certain defined factors.
Any other bereavement leave is by agreement or at your discretion.	Any other bereavement leave is by agreement or at your employer's discretion.

Entitlements

Most employees are entitled to bereavement leave regardless of their employment status (ie whether they work full time, part-time, or are employed on a permanent or fixed-term basis), provided they have six months' continuous employment.

However, if employment has not been continuous for six months they still get bereavement leave if, over a period of six months, they worked for the employer for at least an average of 10 hours per week, and either for:

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

An employee is entitled to bereavement leave after the six-month qualifying period, and then at each subsequent 12-month period of employment (providing the employee still qualifies) beginning at the end of the six-month period (see diagram on Page 69).

Taking bereavement leave

When an employee becomes entitled to bereavement leave, and suffers a bereavement, they can take:

- up to three days' bereavement leave if the death is of an immediate family member. This can be taken at any time and for any purpose relating to the death. Immediate family members are the employee's spouse or partner, parent, child, brother or sister, grandparent, grandchild or the spouse's or partner's parent. If there is more than one bereavement, the employee is entitled to three days' bereavement leave for each death.

- up to one day's leave if the employee suffers a bereavement outside the immediate family. In considering whether the employee has suffered a bereavement, the employer should take into consideration other 'relevant factors' including:
    - How close was the employee's association with the other person?
    - Whether the employee is responsible for aspects of the ceremonies around the death?
    - Whether the employee has cultural responsibilities they must fulfil in respect of the death?

The Act does not define a child, brother or sister, father or mother. Conceivably this could include step-parents, a step-brother or sister and step-children. Employers should assess each situation on its merits.

Employees do not have to use bereavement leave immediately, or on consecutive days. While entitlement to bereavement leave is phrased in 'days', employers may also allow the employee to use the entitlement in units lower than a day. However, it is important that this is agreed between the employer and employee and clearly recorded.

Below are examples of bereavement leave allowable under the Act.

Examples:

- Kevin 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. Kevin uses two days of paid bereavement leave to attend the funeral. Six months later, Kevin takes 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.

Taking bereavement leave without entitlement

An employer can agree to bereavement leave being taken in advance of entitlement, if for example, the employee does not yet meet the eligibility criteria. An employer can also agree to the employee taking extra days above their legal entitlement.

Payment for bereavement leave

Payment for bereavement leave is made where it is a day that the employee would otherwise have worked and must be at the rate of their RDP, or ADP (where applicable). Payment is made in the normal pay period.

Where the employee would have worked on a public holiday but was bereaved, the day is treated as a paid, unworked public holiday. The employee:

(a) gets their RDP or ADP

(b) does not get time and a half

(c) does not get an alternative holiday, and

(d) does not lose entitlement to a bereavement day.

Relationship with other types of leave and holidays

Relationship between bereavement leave and public holidays

If an employee has a bereavement on a public holiday that is an otherwise working day, the day is to be treated as an unworked public holiday rather than as bereavement leave. This means that the employee will get a paid day off but the employee will not be entitled to time and a half or an alternative holiday.

Relationship between bereavement leave and annual holidays

If an employee goes on annual holidays and has a bereavement during those holidays, the employer must exchange annual holidays for the appropriate number of days of bereavement leave, and that period should not be treated as annual holiday. This has the effect of preserving the employee's holiday entitlement so they can use this for rest and recreation.

Annual holidays may be used (with the agreement of the employer) when the employee has, for example, had a close relative die and needs more than the maximum entitlement under the Act.

Relationship between bereavement leave and parental leave

Where an employee takes parental leave of at least six months under *the Parental Leave and Employment Protection Act 1987*, then for the purpose of entitlement to bereavement leave they will be deemed to have continuity of service over that period. They will therefore not be required to establish or re-establish their entitlement to bereavement leave at the end of that six-month period.

Relationship between bereavement leave and unpaid leave

If an employee is away on leave without pay, this will not extend the entitlement time for bereavement leave and they would become entitled on their normal bereavement leave anniversary.

Entitlements to bereavement leave when there is a series of fixed-term employment agreements

If the duration of the fixed term is more than six months the employee will be entitled to bereavement leave. However, if the employee is on a series of fixed-term agreements of less than six months eligibility would depend on whether they would meet the minimum continuous service criteria for entitlement.

Care should be taken to ensure that the reason for the fixed-term nature is not to exclude or limit entitlements an employee would otherwise have received under the Act. Otherwise, the impact of the fixed term will not be valid and entitlements may arise.

Family violence leave

Key messages in this section

For employers	For employees
After six months of current continuous employment, employees become entitled to ten days' paid family violence leave. However, an employee may also be entitled to this if, over a six-month period, they worked for you for an average of at least 10 hours per week, including: • at least one hour per week, or • 40 hours a month. Any additional family violence leave over and above the statutory entitlement is by agreement or otherwise at your discretion.	After six months of current continuous employment, you will be entitled to up to ten days' paid family violence leave. However, if you have not been employed continuously for six months, you may still be entitled to this, if over a six-month period, you worked for the employer for an average of at least 10 hours per week, including: • at least one hour per week, or • 40 hours a month. Any additional family violence leave over and above the statutory entitlement is by agreement or otherwise at the employer's discretion.
Family violence leave is for when an employee is affected by family violence, or when a child living with them (including periodically) is affected by family violence.	Family violence leave is for when you are affected by family violence, or when a child living with you (including periodically) is affected by family violence.
Family violence leave can be taken regardless of how long ago the family violence occurred, including if it occurred before the person became an employee.	Family violence leave can be taken regardless of how long ago the family violence occurred, including if it occurred before you became an employee.
Unlike sick leave, unused family violence leave does not accumulate.	Your family violence leave does not accumulate.
Payment for family violence leave should be at the rate of the employee's RDP, or ADP (where applicable). The payment must be paid in the pay that relates to the pay period in which the leave is taken.	You should be paid your RDP, or ADP where applicable) for each day of family violence leave. Your employer must pay you for family violence leave in the pay period in which you have taken this leave.
Employees must tell you they intend to take family violence leave as soon as they realistically can.	You must tell your employer as early as possible on or before the day you are meant to work that you are taking family violence leave. If you cannot do that, you must tell your employer as soon as you can.
You can ask your employee for proof that they are affected by family violence. You do not need reasonable grounds before asking your employee to prove they are affected by family violence. If you ask your employee to provide proof but they fail, without reasonable excuse, to do so, you do not have to pay them for any family violence leave until they provide proof.	Your employer can ask for proof that you are affected by family violence. If your employer asks for proof but does not receive it, the employer is not required to pay you for any family violence leave taken until proof is provided, unless you have a 'reasonable excuse' for not being able to provide proof.

Entitlements
Family violence leave

All employees are entitled to a minimum of ten days' paid family violence leave per year, as long as they have worked for their employer for six months:

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

An employee is entitled to ten days' family violence leave for every 12-month period of employment once the six-month qualifying criteria have been met. Unlike sick leave, unused family violence leave does not accrue. An employee cannot carry forward any family violence leave not taken in any of those 12-month periods.

If in any year the work pattern does not meet the above test, then no new family violence leave entitlement arises but the employee can use any family violence leave they are already entitled to. The employee may requalify for family violence leave at any time they have met the six months' test. Family violence leave entitlements are not pro-rated. For example, if a part-time employee works three days a week, they still become entitled to ten days' family violence leave a year after being in employment for six months.

The entitlement to family violence leave applies to all employees, whether they work on a full-time, part-time, permanent or fixed-term basis. It is important to note that the ten-day annual entitlement to family violence leave cannot be pro-rated. The entitlement remains at ten days, regardless whether the employee works, for example, six days a week or one day a week.

Employees who are affected by family violence also have the right to request short-term (up to 2 months) flexible working arrangements.

'Casual' employees – a word of caution

The term 'casual' does not appear anywhere in the Act. All employees, regardless of employment status, are entitled to receive family violence leave if they meet the required criteria.
Just because an employer refers to an employee as 'casual' does not mean that they are not entitled to leave under the Act. Employees referred to as 'casual' or on 'casual' employment agreements may often meet the qualifying criteria for entitlement to family violence leave and should be regularly assessed against these criteria.

Taking family violence leave

Employees can take family violence leave when:

- they are affected by family violence
- a child who lives with them (including periodically) is affected by family violence.

Family violence is defined in section 9 of the Family Violence Act 2018 and includes:

- physical abuse,
- sexual abuse, and
- psychological abuse (such as intimidation, harassment, damage to property, threats of abuse, and financial or economic abuse).

There is no time limit on when the employee experienced family violence, so the family violence may have occurred prior to the law commencing, or prior to the employee becoming employed.

An employee may be capable of working despite being affected by family violence but require time off work to help them deal with the effects of family violence. For example, they might need to get help from a family violence support service, move house, go to court or support their children. In these circumstances, an employee would still be entitled to family violence leave.

Carrying over family violence leave

Unused family violence leave cannot be accumulated.

Family violence leave in advance

When the employee does not have enough family violence leave (for example during the first six months of employment), the employer and employee can agree to the employee anticipating (taking in advance) their family violence leave entitlement. Any family violence leave in advance is then deducted from the next entitlement. This should be made clear to the employee in advance, if this is to occur.

Running out of family violence leave

If an employee requires more leave to assist them to deal with the effects of the family violence than they are entitled to, the employer may allow the employee to take annual holidays or leave without pay if family violence leave is exhausted.

Employers can also provide more than 10 days of family violence leave and can decide this on a case-by-case basis.

Relationship with other types of leave and holidays

Relationship between public holidays and family violence leave

If an employee is affected by family violence on a public holiday that is an otherwise working day, the day is to be treated as an unworked public holiday rather than as family violence leave. This means that the employee will get a paid day off but the employee will not be entitled to time and a half or an alternative holiday.

The proof of family violence would not apply if this was the case, as the day is to be treated as an unworked public holiday rather than family violence leave.

Relationship between annual holiday and family violence leave

If an employee goes on holiday and becomes affected by family violence during those holidays, the employer may allow the employee, on agreement, to use family violence leave instead of annual holidays. This has the effect of preserving the employee's holiday entitlement so they can have rest and recreation when they are well. There is, however, no automatic right of the employee to exchange annual holidays for family violence leave.

If an employee has used up all of their family violence leave the employer and employee may agree to the employee using their annual holiday entitlement if more time off is needed to help them deal with the effects of the family violence. It is important to note that an employer cannot require an employee to take their annual holiday entitlement in this situation.

If the employee has booked a period of annual holidays and becomes affected by family violence and remains affected when the annual holidays are due to be taken, the period of those annual holidays during which the employee continues to be affected must be treated as family violence leave. Again, this has the effect of preserving the annual holidays for the employee to enjoy when they are able to.

Relationship between family violence leave and extended parental leave

The *Parental Leave and Employment Protection Act 1987* provides employees with entitlement to take extended periods of parental leave – of up to a maximum of six months or 12 months (depending on the qualifying criteria set out in that Act).

The tests for entitlement are similar to those for family violence leave, in that the employee must meet a six-month work test to qualify for a maximum 26-week duration of extended leave (or a 12-month work test if the maximum duration of extended leave is 52 weeks).

The *Parental Leave and Employment Protection Act 1987* provides that where an employee resumes service with the same employer at the end of a period of parental leave, the employee's service, for the purpose of any rights and benefits that are conditional on unbroken service, shall not be broken.

Where an employee takes extended parental leave of at least six months, then for the purpose of entitlement to family violence leave they will be deemed to have continuity of service over that period. They will therefore not be required to establish their entitlement to family violence leave at the end of that six-month period.

Relationship between family violence leave and unpaid leave (continuous employment)

Leave without pay is still technically "current continuous employment" (even though the employee does not get paid for this time) so this period would be included in the six-month qualifying period. If an employee is away on leave without pay, this will not extend out the entitlement time for family violence leave and they would become entitled on their normal family violence leave anniversary. Employers may wish to keep this in mind when granting leave without pay.

Entitlements to family violence leave when there is a series of fixed-term employment agreements

If the duration of the fixed term is more than six months, the employee will be entitled to family violence leave. However, if the employee is on a series of fixed-term agreements of less than six months, eligibility would depend on whether they would meet the minimum continuous service criteria for entitlement.

Care should be taken to ensure that the reason for the fixed-term nature is not to exclude or limit entitlements an employee would otherwise have received under the Act. Otherwise, the impact of the fixed-term will not be valid and entitlements may arise.

Proving family violence

Employers can ask for proof that an employee is affected by family violence to be produced for family violence leave taken. The Act does not state what kind of proof would be acceptable. Employers and employees would be expected to engage in good faith with one another if proof is requested. That means being open, honest and responsive towards each other.

Employers can accept any type of proof that an employee is affected by family violence.

Providing proof may not be a simple task given the nature of family violence. Family Violence often happens behind closed doors, making it difficult to 'prove'. Ringing police or applying for a Protection Order are usually very big steps for someone affected by family violence.

Examples of proof:

- Letter or email about what's going on and how it affects the employee from either a:
    - support organisation – for example, a family violence support service or Oranga Tamariki.
    - support person.
- Report from a doctor or nurse.
- Report from a school.
- A declaration – a letter of evidence witnessed by an authorised person like a justice of the peace under the Oaths and Declarations Act 1957.
- Any court or police documents about the family violence.

If an employee is asked by their employer to provide proof and fails, without reasonable excuse, to do so, the employer is not required to pay the employee for any family violence leave in respect of which the proof is required until the employee complies with that request for proof. An example of a 'reasonable excuse' could be that they had to move home quickly and haven't had time to get proof.

If the employer requires proof of the employee being affected by family violence, the employer must tell the employee as early as possible that they need proof; and employers do not need reasonable grounds to suspect the family violence leave is not genuine before asking for proof but should remember their good faith obligations.

Where the employee is using family violence leave for a child that lives with them (including periodically), the employer can require proof that the child is affected by family violence.

Where the employer believes the employee has misused their family violence leave, this becomes an employment relationship problem under the *Employment Relations Act*. If the employer did not ask for proof of family violence at the time, they can still use the normal processes for dealing with employee problems, which may include disciplinary procedures.

Payment for family violence leave

Payment for family violence leave is made where it is a day that the employee would otherwise have worked and is made at the rate of (at least) the employee's relevant daily pay (or average daily if appropriate). Payment for family violence leave is made in the normal pay cycle.

Where relevant daily pay is used as the basis of calculation (see the Detailed definitions section under the 'Relevant Daily Pay (RDP)' section) the payment should include overtime when overtime would have been worked on the day.

Where the employee works continuously but to an irregular pattern, family violence leave could be taken eg if the employee was rostered to work on the particular day they are affected by family violence, or could have expected to be rostered. For more information see 'Otherwise working day'. The family violence leave is paid at the employee's relevant daily pay or average daily pay (if applicable).

Where the employee would have been working on a public holiday but is affected by family violence, the day is treated as a paid, unworked public holiday. Therefore:

- the employee is entitled to their relevant daily pay or average daily pay (if applicable) but isn't entitled to time and a half or an alternative holiday, and
- no family violence leave is deducted.

Family violence leave and ACC entitlements

The following rules apply in relation to the ACC scheme:

- If an employee has a work-related accident, the employer has to pay first-week compensation at 80% of the amount of earnings lost by the employee during this week of incapacity and cannot make the employee take that time off as family violence leave. ACC will pay weekly compensation for any subsequent weeks in which the employee continues to be off work.
- If an employee is on first-week compensation or weekly ACC compensation for a work-related injury, an employer and employee may agree to top up an employee's earnings to their full ordinary weekly pay by deducting from the employee's family violence leave entitlement one day for every five days that the employer makes the top-up payment.
- An employer cannot make an employee take family violence leave for time-off when the employee is receiving either first-week compensation from their employer or ongoing weekly compensation from ACC. If an employee is receiving weekly compensation from ACC (eg, after the first week), the employer does not have to pay the employee.
- Before paying first-week compensation, the employer may require the employee to meet reasonable requirements for evidence of the injury such as a certificate by a registered health professional nominated and paid by the employer.

Employers should also note that:

- ACC have their own definition of 'earnings as an employee', which means that the amount of weekly compensation they pay will not necessarily equate to exactly 80% of ordinary weekly pay.
- If an employer agrees to top up an employee's earnings by deducting one day's family violence leave for every five days of top-up payment, they have to top up the ACC payment to the level of ordinary weekly pay (not RDP).

Family violence leave for part of a day

The Act describes family violence leave entitlement in terms of days. However, the employee and employer can agree that the employee may take family violence leave on a pro-rata basis, such as hours or half-days. For example, if an employee worked a half-day then went home as a result of being affected by family violence, their employer could agree to only deduct a half- day of paid family violence leave.

The agreement need not necessarily be the subject of a relevant clause in an individual or collective employment agreement. It might, for instance, be covered in a workplace policy or else be the subject of a verbal agreement. The payroll system of some employers may already be configured to allow employees to submit applications for leave in units lower than a day, which, if approved, means that the employer has consented to such an arrangement.

Where there is provision for family violence leave to be taken on a pro-rata basis, it is important to ensure that the total amount of family violence leave entitlement provided is equivalent to at least ten days per annum and that the amount of family violence leave deducted from the entitlement is proportional to that part of the day on which the employee was affected by family violence.

Entitlements on finishing employment

Key messages in this section

For employers	For employees
When an employee finishes employment, you must pay them the holidays and leave entitlements they are owed, including annual holidays, alternative holidays and, in some cases, public holidays.	When you end your job, you get paid out for the holidays and leave entitlements you are owed, including annual holidays, alternative holidays and, in some cases, public holidays.
Unused sick leave, bereavement leave and family violence leave are not paid out, unless there is an agreement to do so.	Unused sick leave, bereavement leave and family violence leave are not paid out, unless there is an agreement to do so.
You must include the holidays and leave payment in the final pay.	You get your holidays and leave payment in your final pay.

Overview

On termination, an employee must be paid out in their final pay:

- any outstanding annual holiday entitlement calculated at the greater of the employee's ordinary weekly pay at the time of termination or average weekly earnings for the 12-month period prior to the end of the last pay period before termination; and
- annual holiday pay at eight percent of gross earnings for any part year worked since the last anniversary date (less any amount paid for holidays taken in advance); and
- any outstanding alternative holidays at RDP (or ADP where applicable) for the last day of employment; and
- upcoming public holidays (if the employee's outstanding annual holiday entitlement would include a public holiday if taken following termination).

Note that these are the statutory requirements, and any contractual entitlements such as notice and long service leave etc. will also have to be accounted for.

Calculating annual holiday payments on termination

Employers must pay employees for all untaken annual holiday entitlement they are due on termination at the greater of:

- the average weekly earnings for the 12 months prior to the end of the last pay period before termination, or
- the ordinary weekly pay at the time of termination.

If an employee's employment ends before they get their next annual holiday entitlement, employers must also pay at least eight percent of the employee's gross earnings from the date of the last entitlement (anniversary date) to the date of termination, less any amount for holidays taken in advance or already paid in the employee's regular pay (on a PAYG arrangement).

The gross earnings to which the eight percent is applied also includes:

- the value of the untaken annual holiday entitlement being paid out at termination
- alternative holidays paid out (see below)
- payment for public holidays (see below).

If an employee has taken annual holidays in advance but finishes employment before they are next entitled to the annual holidays, the employer can deduct the amount previously paid, as annual holidays in advance, from their final annual holiday pay calculation. If the amount the employer has previously paid as annual holidays is greater than the final holiday pay amount, the employer and employee need to agree in writing how this overpayment will be repaid.

Any deduction agreement must comply with the *Wages Protection Act 1983*, and employees have the right to refuse, withdraw or vary their consent to deductions from wages, so care should be taken. An employer must consult with employees before making a deduction and consent may be withdrawn at any time (including during the consultation). One option is for employers to ask employees to agree that any overpayments of holiday pay may be recovered when agreeing to annual holidays in advance. In this situation, consultation would still be required once the employer had calculated the specific amount and sought to deduct this from the employee's wages.

Calculating entitlements for alternative holidays on termination

If an employee is owed alternative holidays that they have not taken or exchanged for payment, these are paid out on termination. Such alternative holidays are paid out at the employee's RDP or ADP for their last day of work, no matter what their rate of pay was at the time of the worked public holiday. Alternative holidays do not extend the period of employment for the calculation of annual holiday pay.

Calculating public holiday payments on termination

On termination, the employee's final date of work is notionally extended by any annual holiday entitlement not taken. Any public holidays falling on what would have been otherwise working days during that extended period are covered by s40(3) of the Act and are to be paid accordingly.

Example:

Vae works a standard five day, 40-hour week. She is paid $1,000 a week. Her employment terminates one week before ANZAC day. On termination, she has two weeks' annual holidays outstanding and one alternative holiday outstanding. It has been 12 weeks since her last anniversary date. Her final pay includes:

- Her outstanding two weeks' annual holiday entitlement is paid at the greater of her OWP at the date of termination and AWE for the 12 months up to the end of the last pay period before termination. In this simplified example, assuming OWP=AWE=$1,000, she is paid $2,000 for her outstanding entitlement.
- Her outstanding annual holidays' entitlement would also have covered the ANZAC public holiday, so this is also paid at RDP, ie $200.
- For the one alternative holiday outstanding she is paid the RDP for her last day of work, in this case $200.
- For the 12 weeks since her last anniversary, she is paid at eight percent of gross earnings, and this must include the payments listed above,
  ie ($12,000 + $2,000 + $200 + $200) x 0.08 = $1,152.

Vae's total holiday and leave pay to be paid on termination is, therefore,
$2,000 + $200 + $200 + $1,152 = **$3,552**.

Sick leave, bereavement leave and family violence leave entitlements on termination

Employers do not have to pay out for unused sick leave, bereavement leave and family violence leave on termination unless otherwise agreed.

Annex 1: Gross earnings

The following table set outs many common payment types and lists whether they should be included or excluded from gross earnings.

Payment type	Include	Exclude	Seek advice	Comments
Salary/Wage payments				
Salary or wages	X			
Overtime	X			
Taxable non-reimbursing allowances (including compensation payable in relation to availability or shift cancellation provisions)	X			
Cash value of board or lodgings	X			
Payments made for keeping in touch days while on parental leave	X			
Statutory "travel between clients" payments (time spent in travel)	X			This only applies to payments under s14 of the *Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016*.
Statutory "travel between clients" payments (costs related to travel)		X		This only applies to payments under s19 of the *Home and community Support (Payment for Travel Between Clients) Settlement Act 2016*.
Leave payments				
Payments for statutory annual holidays or FBAPS leave taken	X			
Payments for additional contractual annual holidays or FBAPS leave taken	X			Where there is a contractual entitlement to additional FBAPS or annual holidays.
Contractual long service leave taken or paid out during employment	X			Where there is a contractual entitlement to long service leave.
Volunteer's leave payments under the *Volunteers Employment Protection Act 1973*		X		
Cashed up holiday/leave payments				
Cashed up alternative holidays	X			

Payment type	Include	Exclude	Seek advice	Comments
Cashed up statutory annual holidays payments		X		Only provides for a maximum of one week of the employee's annual holidays entitlement per entitlement year.
Cashed up annual holidays payments for extra holidays beyond the employee's statutory minimum annual holidays entitlement	X			If an employee is entitled to more than the statutory minimum annual holidays entitlement, and the employee and employer agree to cash up the employee's extra annual holidays entitlement, this additional payment should be included in Gross Earnings.
Bonuses and commissions				
Contractual incentive or productivity payments (whether included in the IEA/CEA, or as part of the remuneration package, agreed verbally or set out in another document)	X			
Contractual commission payments (whether included in the IEA/CEA, or as part of the remuneration package, agreed verbally or set out in another document)	X			
Truly discretionary payments (where the employer is not contractually required to make the payment), including discretionary leave		X		The definition of "discretionary" is narrow. It refers to whether the employer is contractually required to make the payment or not. If the employer is contractually required to make the payment, even if subject to conditions (for example, a bonus that will be paid if certain sales targets are met), the payment is not discretionary. It is not relevant that the amount of the payment may be determined unilaterally by the employer. The source of the contractual obligation is also not relevant (ie it does not have to be contained in an employment agreement, but could be found in a letter, policy or even a verbal agreement if there is sufficient evidence of it). The question is whether the employer is bound to make the payment. We recommend seeking legal advice to determine if a payment is truly discretionary.
Other benefits				
Employer contribution to superannuation scheme		X		Definition of superannuation scheme is wide and will include occupational schemes as well as KiwiSaver schemes.

Payment type	Include	Exclude	Seek advice	Comments
Employee share benefits			X	From April 2017, the deduction of income tax in respect of income received through employee share schemes may be processed through payroll. However, the provision of shares to an employee does not constitute a "payment" and, accordingly the cash value of such benefits is not necessarily required to be included in Gross Earnings for the purposes of holiday pay calculations. However, this is a complex area, and it is recommended that legal advice is sought.
Insurance benefits			X	This will depend on whether the benefit is a "payment" eg the employee receives a cash payment to subsidise insurance premiums and, if so, whether the payment is the reimbursement of costs incurred in the course of the employee's employment.
Employer ACC payments (not payments made by the Commission)				
First week of ACC compensation paid by the employer under s 97 of the *Accident Compensation Act 2001*	X			
Payment for sick leave that is used to top up the first week or other ACC compensation	X			It is common to use the sick leave entitlement to top up the weekly amount to 100 percent.
Weekly ACC compensation beyond the first week of compensation		X		Payments over and above first week statutory compensation should not be included.
Costs payments				
Payment for actual costs incurred by the employee related to the employee's employment		X		These payments are likely to be non-taxable payments to the employee.

Payment type	Include	Exclude	Seek advice	Comments
Payment of a reasonably assessed amount to reimburse for costs incurred by the employee related to the employee's employment		X		These payments may be non- taxable payments to the employee, but there may be exceptions where taxable payments constitute a reasonably assessed reimbursement. (If in doubt employers should seek advice regarding specific payments.)
Termination Payments				
Payment in lieu of notice	X			
Contractual retirement payment	X			
Contractual payment in lieu of long service leave	X			
Contractual redundancy compensation			X	The treatment of redundancy payments is not straightforward, and the courts have not yet considered this matter. It is recommended that employers seek legal advice on this issue. MBIE's position is that redundancy is not included in gross earnings because it is a compensatory payment and so not 'earnings' in the true sense. However, if an employer wants to minimise the risk of non-compliance, they should include redundancy payments in gross earnings.
Non-contractual payment of long service leave		X		Where there is no obligation to pay for unused leave on termination and the payment is made on a discretionary basis.
Non-contractual redundancy or retirement payments		X		Where there is no obligation to make these payments on termination and the payment is made on a discretionary basis.
Contractual payment of bonus or commission (whether on a pro- rated basis or otherwise)	X			This is the case even where the bonus or commission is calculated and/or paid after the termination date.

Payment type	Include	Exclude	Seek advice	Comments
Payment of public holidays occurring after termination but during the period of the employee's remaining annual holidays entitlement, s40(3)	X			Where a public holiday falls after termination, but during the period of the employee's annual holidays entitlement (had it been taken from the termination date), the public holiday must be paid according to the Act and the payment included in gross earnings.
Payment in settlement agreement reflecting contractual entitlements	X			
Additional monetary payment in settlement agreement not included in employment agreement		X		
Compensation pursuant to s123(1)(c)(i) of the *Employment Relations Act 2000*		X		These payments are to compensate the employee for "hurt and humiliation". They are not a contractual payment to the employee.
Other Payments				
Payments that are compensatory and would not ordinarily be considered "earnings"			X	As with redundancy there may be other payments that are genuinely compensatory and would not ordinarily be considered earnings as remuneration for carrying our work. It is recommended that advice is sought on whether any specific payment of this kind should be included in GE.
Payments where the context "otherwise requires" that they be excluded from gross earnings. The definition in s14 is a general definition of GE. GE is used elsewhere in the Act and it is possible that some types of payment may be excluded or included depending on the context where it is used.			X	This is an unsettled concept and seeking legal advice is recommended. GE is used in different sections in the Act. Those sections may provide a different context that may result in a different definition, in that specific context, than the general definition in s14.

Annex 2: Annual holidays – detailed scenarios

Scenario 1 – Sam (minor variation around contracted hours)

Sam is on a salary of $1,500 per week for a 40-hour/five-day week. However, the actual hours he works vary around these contracted hours to meet business demand.

Week ending	Days and hours worked							Number of days worked	Total hours	Variation around contracted hours %
	Mon	Tue	Wed	Thu	Fri	Sat	Sun			
12/06/2016	8	8	8	10	9	0	0	5	43	7.5
19/06/2016	8	8	6	8	8	0	0	5	38	-5
26/06/2016	8	8	8	8	8	0	0	5	40	0
3/07/2016	8	8	7	8	8	0	0	5	39	-2.5
10/07/2016	8	9	9	8	7	0	0	5	41	2.5
17/07/2016	6	8	8	8	8	0	0	5	38	-5
24/07/2016	8	8	8	8	8	0	0	5	40	0
31/07/2016	8	8	8	10	10	8	0	6	52	30
7/08/2016	8	8	8	8	8	0	0	5	40	0
14/08/2016	8	8	8	8	6	0	0	5	38	-5
21/08/2016	8	8	4	10	8	0	0	5	38	-5
28/08/2016	8	8	9	9	6	0	0	5	40	0
29/08/2016	8	8	8	8	8	0	0	5	40	0
4/09/2016	8	8	8	4 AH	AH					

Analysis

Considering the factors set out on Page 42, there is low week-to-week variation in both Sam's days and hours (the week when he works 52 hours as he has to come in at the weekend is clearly a one-off). It is clear that his contracted hours form a fair and reasonable reflection of what genuinely constitutes a working week for Sam.

Using scheduled hours (ie 40 hours for a week and eight hours for a day) is clearly an appropriate method for calculating Sam's annual holidays. So, for example, Sam requests one and a half days' (12 hours) annual holidays as indicated above. His balance will reduce by 12/40 = 0.3 of a week. The same result would be obtained calculating in days, ie 1.5/5 = 0.3.

Scenario 2 – Jeanie (moderate variation around contracted hours)

Jeanie's employment agreement stated that her normal hours were 10 hours a week, worked over five days. She was paid $14.25 an hour up to the period ending 30/12/2014 and then $15 thereafter. Her normal hours increased to 16 hours a week (from the 9/09/2014 pay period) but there was no formal change to her employment agreement. (For the purposes of this example, these increased hours will still be referred to as contracted hours).

Period Ending	Hours Worked	Number of days worked	Gross Pay	Contracted hours	Variation around contracted hours %
8/04/2014	17.75		252.94	20	-11.25
22/04/2014	39.25		559.31	20	96.25
6/05/2014	34.5		491.63	20	72.50
20/05/2014	32.25		459.56	20	61.25
3/06/2014	25.25		359.81	20	26.25
17/06/2014	22.5		320.63	20	12.50
1/07/2014	25.75		366.94	20	28.75
15/07/2014	34.75		495.19	20	73.75
29/07/2014	60.25		858.56	20	201.25
12/08/2014	20		285	20	0.00
26/08/2014	20		285	20	0.00
9/09/2014	37	10	527.25	32	15.63
23/09/2014	32	11	456	32	0.00
7/10/2014	37.25	12	530.81	32	16.41
21/10/2014	32	12	456	32	0.00
4/11/2014	32	12	456	32	0.00
18/11/2014	32	12	456	32	0.00
2/12/2014	32	12	456	32	0.00
16/12/2014	32	12	456	32	0.00
30/12/2014	32	10	456	32	0.00
13/01/2015	35	10	525	32	9.38
27/01/2015	38	12	570	32	18.75
10/02/2015	35.25	11	528.75	32	10.16
24/02/2015	45	12	675	32	40.63
10/03/2015	44.75	11	671.25	32	39.84
24/03/2015	44	11	660	32	37.50
7/04/2015	32	10	480	32	0.00
21/04/2015	36.5	12	547.5	32	14.06
5/05/2015	31.5	12	472.5	32	-1.56
19/05/2015	32	12	480	32	0.00
2/06/2015	45.5	12	682.5	32	42.19
16/06/2015	35	12	525	32	9.38
30/06/2015	32	12	480	32	0.00
14/07/2015	52.25	12	783.75	32	63.28
28/07/2015	32	12	480	32	

Analysis

Since Jeanie's normal/contracted hours increased to 16 hours a week, she consistently works five or six days a week, though she often works quite a few more hours than the scheduled 16 a week (or 32 a fortnight). The average percentage variation in her fortnightly hours over the period (when compared to the scheduled hours) is about 13 percent (and the median percentage variation is 10.16 percent).

Considering the factors set out on Page 42:

- the number of days she works each week are broadly consistent (either five or six)
- there is moderate variation in the number of hours she works each week
- the average number of weekly hours worked over this period is 18.2, which is not significantly higher than her scheduled hours of 16.

So the variation in the days worked each week is low, and there is moderate variation in the number of hours she works from week to week (and not a significant difference between average and scheduled hours). These combine to suggest that Jeanie's contracted/scheduled hours still form a fair and reasonable basis for her annual holidays calculations and the scheduled approach is therefore appropriate in this instance.

Jeanie requested 13 hours' annual holidays in the pay period 28/07/2015. Defining a week as 16 hours (her scheduled hours) means that Jeanie's annual holiday's balance will therefore decrease by 13/16 of a week.

In circumstances where the actual hours worked tend to be more than, and never or very rarely, less than, the contracted hours, consideration should be given to providing more annual holidays.

For pay for this annual holiday (refer to the section Annual holidays – payment for annual holidays taken (Step 3) for more details) it is immediately clear that the four-week average OWP will need to be used as Jeanie's pay is clearly varying from week to week.

This leads to a comparison of OWP = $315.94 and AWE = $264.61. Jeanie will, therefore, be paid 13/16 x $315.94 = $256.70 for this annual holiday.

Scenario 3 – Joseph (highly variable hours/days each week)

Joseph's employment agreement guaranteed him a minimum 10 hours a week, but he was regularly offered additional work when it was available. The work could take place on any days of the week. He is paid $20 an hour. The data below provides 12 weeks of his work pattern.

Week ending	Days and hours worked							Number of days worked	Total hours	Gross pay	Variation %
	Mon	Tue	Wed	Thu	Fri	Sat	Sun				
12/06/2016	4	8	10	4	6	6	0	6	38	760	280
19/06/2016	0	0	6	4	10	0	0	3	20	400	100
26/06/2016	6	6	0	0	8	10	10	5	40	800	300
3/07/2016	0	0	0	0	0	8	8	2	16	320	60
10/07/2016	0	0	0	10	0	0	0	1	10	200	0
17/07/2016	4	4	0	10	0	8	8	5	34	680	240
24/07/2016	8	8	8	8	8	10	0	6	50	1000	400
31/07/2016	8	0	0	10	8	0	0	3	26	520	160
7/08/2016	0	0	0	10	0	0	0	1	10	200	0
14/08/2016	8	8	0	0	8	4	0	4	28	560	180
21/08/2016	4	4	4	0	0	0	0	3	12	240	20
28/08/2016	8	8	0	10	8	10	0	5	44	880	340

Analysis

Joseph's hours and days each week are highly variable. The final column indicates the percentage variation in Joseph's hours (compared to his minimum contracted hours of 10 per week) for each pay period. The average variation in hours (compared to these contracted hours) over this period is 174 percent. He also works anywhere between one and six days a week with no discernible pattern.

Considering the factors set out on Page 40:

- the number of days he works each week is highly variable (anywhere from one to six)
- there is considerable variation in the number of hours he works each week
- the average number of weekly hours worked over this period is 27.4, which is considerably higher than his scheduled hours of 10.

In this situation, it is hard to identify a regular pattern of hours/days that could form the basis of the scheduled approach. One alternative approach (though not necessarily the only alternative) in this situation is to use some form of averaging.

As discussed in the section Annual holidays – determining the portion of entitlement taken (Step 2) a shorter averaging period is more appropriate if it is not unduly affected by one-off peaks or troughs.

Comparing a four-week and a 12-week average, there is not a great deal of difference between the two. Joseph's average weekly hours over the previous four weeks is 23.5 hours. His average weekly hours over the previous 12 weeks is 27.4 hours.

The table below describes three different examples of annual holidays requests that Joseph makes for the week following the 12 weeks covered above.

	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Example 1	AH	AH	AH	AH	AH	AH	AH
Example 2	4	4	AH	10	0	0	0
Example 3	4	4	4	AH	AH	AH	AH

Example 1 is straightforward as Joseph is requesting one-week annual holidays. His balance will reduce by one week and he will be paid at the greater of OWP/AWE for that week.

Examples 2 and 3 depend on what agreement Joseph reaches with his employer about whether the days requested are OWDs and, if so, how many hours he would have worked.

As discussed in the Detailed definitions section on Page 14, the Act prescribes certain factors that must be taken into account when considering this question. For example, if Joseph is rostered to work on any of those days, they would then be considered OWDs. The roster would also be likely to indicate the hours.

So, for example, if Joseph was rostered to work eight hours on the Wednesday in Example 2, and it had been agreed that a four-week average defined his annual holidays entitlement, then Joseph has taken 8/23.5 = 0.34 of a week off and his annual holidays balance will reduce by this amount.

If there is no roster to assist with answering this question, then, among other things, the historical work pattern and the expectations of the parties would need to be taken into account in reaching an agreement. Referring to the data above, given that Joseph has only worked one Wednesday in the last four (and four in the last twelve), with no discernible pattern to the Wednesdays worked, they may agree that it would not be an OWD.

Note

Applying the provisions of the Act to someone with a genuinely unpredictable work pattern is complex. There is clearly no single 'right' answer. The main thing that a labour inspector would be looking for is whether the parties have made a reasonable attempt, in good faith, to arrive at, and agree, a solution for the provision of entitlements.

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