

**EMPLOYMENT
NEW ZEALAND**

Leave and holidays

A guide to employees' legal entitlements



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government

EMPLOYMENT NEW ZEALAND

Disclaimer. This guide provides an overview of leave and holidays entitlements information as at April 2019. This information is guidance only, is not legally binding, and should not be substituted for legal advice or for the wording of the Holidays Act 2003. MBIE does not accept any responsibility or liability for error of fact, omission, interpretation or opinion that may be present, nor for the consequences of any decisions based on this information.

Summary of recent changes made to the Leave and Holidays Guide:

Date of change November 2017

- › General review and editing for clarification, comprehension, and consistency.
- › Changes to:
 - › information relating to establishing annual holidays entitlements
 - › employees taking paid annual holidays in advance (inclusion of 'part weeks' in average weekly earnings calculation for employees with less than 12 months service)
 - › pay-as-you-go provisions (standardising content and replacing provisions for 'casual employees' to reflect wording of the Holidays Act (ie employees who work so intermittently or irregularly that it is impracticable for the employer to provide four weeks annual holidays).
- › Additional information:
 - › on the relationship between annual holidays and sick and bereavement leave
 - › about closedowns for employees with annual holidays entitlement
 - › regarding using RDP and ADP.
- › Correction to 'the effect of unpaid leave on annual holidays' section.
- › Recommendation to use RDP for working on a public holiday in all situations.

Date of change April 2019

The Domestic Violence – Victims' Protection Act

- › Changes to reflect law changes effective from 1 April 2019
- › A new section called 'Family violence leave'
- › A new section called, 'Relationship between family violence leave and annual holidays'
- › Changes and additional information on:
 - Payment for public and alternative holidays, sick, bereavement and family violence leave
 - Payment where an employee is sick, bereaved or affected by family violence on a public holiday
 - Sick leave, bereavement leave and family violence leave-
 - Employees' public holidays entitlements (flowchart)

Date of change July 2021

- › Minimum sick leave entitlements increased from 5 days' per year to 10 days'
- › 'Domestic violence leave' changed to 'Family violence leave'

Date of change November 2022

- › Queen's Birthday becomes King's Birthday
- › Public holidays entitlement was changed from 11 to 12 public holidays as Matariki becomes another public holiday

Date of change May 2023

- › Entitlements for employees who are on-call during public holidays (page 20 & 23)

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The Holidays Act 2003

This guide provides an overview of employees' minimum legal entitlements. For more detailed guidance and examples refer to the www.employment.govt.nz website or call us free on 0800 20 90 20.

A summary of employees' rights under the Holidays Act 2003 is:

- › All employees are entitled to at least four weeks' paid annual holidays (or 'annual leave') each year.
- › All employees are entitled to paid leave on public holidays, when the public holiday falls on a day that would otherwise be a working day for the employee. Where an employee works on a public holiday that work should be paid at the rate of time and a half (at least).
- › After six months continuous employment or meeting the 'hours worked test', employers must support their employees with sick leave, bereavement leave and family violence leave when required.

When negotiating employment agreements, any reference to forms of leave in the agreement (such as domestic leave, special leave or family leave) do not take away from the minimum statutory entitlements for annual holidays, public holidays, alternative holidays, sick leave, bereavement leave and family violence leave.

Annual holidays entitlements



As a minimum, all employees are entitled to four weeks' paid holidays a year. Employees generally get annual holiday entitlements after 12 months of continuous employment with their employer and then after every following 12 months of employment. Employment agreements can provide for earlier or extra days or weeks of holidays on top of the minimum legal entitlement.

In general, annual holidays can be taken at any time agreed between the employer and the employee. Employees must be given the opportunity to take at least two of the four weeks' holidays continuously. There are some circumstances where an employer can require an employee to take annual holidays.

Establishing entitlements

The Act requires that the parties determine an employee's entitlement to annual holidays based on what genuinely constitutes a week for each employee. In many cases, it will be clear what a week is, as the employee will work a fairly regular number of days (or hours) each week.

Where it is not clear how to meet the employee's entitlement to four weeks' annual holidays each year, the employer and employee may agree on how to meet the entitlement based on what is genuinely a working week for the employee. This will usually be done by working out either a number of days or hours that a week is equivalent to for that employee. Whatever is agreed, keeping each employee's annual holidays balance in weeks rather than days or hours is advised, because this is the unit provided for in the Holidays Act and the unit against which compliance will be measured.

The employee's entitlement to annual holidays will be affected by any changes to their work pattern. If there are changes, it is essential that the employee and employer have a discussion in good faith about the impact on annual holidays, agree 'what is a week' under the new work pattern and what the impact is on existing entitlements. This should be recorded in writing and communicated to the employer's payroll provider. With a changing work pattern, the employer and employee may need to have a discussion in good faith every time the employee takes annual holidays to agree on what portion of the four weeks' annual holidays entitlement is being taken.

Where agreement can't be reached, either party can call us free on **0800 20 90 20** for help.

The effect of various work patterns

Where employees are employed on a predictable work pattern which fits a 7 day cycle, working out their four weeks' paid annual holidays entitlement is relatively simple. On each anniversary date, the employee is entitled to four weeks' of paid annual holidays based on their regular work pattern.

Where an employee is employed on a predictable work pattern which doesn't fit a seven day cycle (eg four days on, four days off), the employer and employee should discuss in good faith and agree on how the four week entitlement will be provided. This may include: defining a week according to the longest period in the cycle, defining a week as an average across the cycle or not defining a week up front but instead agreeing this at the time the annual holidays are requested.

Where the employee's work pattern is unpredictable, then what a genuine working week is for that employee will only be able to be determined at the time the annual holidays are taken. The employer and employee should first try to work out whether there is a pattern to the employee's work that could be used as the basis for defining what a working week is for the employee. If this is not possible, one option is to define a week as an average number of days/hours determined over a suitable number of weeks prior to the holidays being taken. In this situation they should regularly look at the situation to see if a work pattern has developed.

If an employee is employed on a genuine fixed-term agreement of less than 12 months or if an employee's employment pattern is so intermittent or irregular that it isn't possible or practicable to try to provide four weeks' paid annual holidays, the employee can agree to be paid 8% of their gross earnings as annual holiday pay with their salary or wages (i.e. on a pay-as-you-go basis). The employee must agree to this in their employment agreement and the 8% must be an identifiable amount in wages and time records in addition to the employee's normal wages/salary, (and should be shown as a separate item on any pay-slip). Employees paid on a pay-as-you-go basis do not get specific time off for annual holidays. For more information see 'Pay-as-you-go provisions'.

Exceptions to annual holidays entitlement 12 months after start date

There are two exceptions to employees being entitled to their annual holidays 12 months after their start date. These are:

- › When the business has an annual closedown period and an employee is not entitled to annual holidays: (This is covered later under 'Regular annual closedowns').
- › When an employee takes unpaid leave of more than a week during the year: (This is covered under 'The effect of unpaid leave on annual holidays').

Payment for annual holidays

Payment for annual holidays is generally at the rate of **the greater of:**

- › the ordinary weekly pay at the start of the holiday or
- › the employee's average weekly earnings for the 12-month period just before the end of the pay period before the annual holiday is taken

Definition of ordinary weekly pay and average weekly earnings

Ordinary weekly pay is everything an employee is normally paid weekly under the employment agreement, including:

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

Ordinary weekly pay doesn't include irregular, one-off payments or discretionary payments or employer payments to an employee's superannuation scheme.

For many people, ordinary weekly pay is clear because they are paid the same amount each week.

If it isn't possible to work out ordinary weekly pay, use the following formula:

- › go to the end of the last regular pay period before the holiday
- › from that date, go back:
 - four calendar weeks, or;
 - if the pay period is longer than four weeks, go back the length of the pay period
- › work out the gross earnings for that period
- › deduct from the gross earnings any payments that are irregular or the employer doesn't have to pay, and
- › divide the answer by 4.

If an employment agreement has a specific rate for ordinary weekly pay, this rate must be compared with the actual ordinary weekly pay, and the greater of the two amounts must be used as the ordinary weekly pay rate.

Average weekly earnings is the employee's gross earnings over the 12 months just before the end of the last payroll period before the annual holiday is taken, divided by 52.

The following payments should be included in the gross earnings calculation:

- › salary and wages
- › allowances (but not reimbursing allowances), including availability and shift cancellation compensation
- › all overtime
- › productivity, performance or bonus payments (at risk payments)
- › commission or piece work payments
- › payment for annual, public and alternative holidays; and sick, bereavement and family violence leave
- › the cash value of board and lodgings
- › amounts that must be paid by the employer under ACC (i.e. the first week of compensation)
- › any other payments that must be made by the employer (eg under the terms of the employment agreement, workplace policies, incentive scheme rules etc).

Gross earnings doesn't include (unless the employment agreement says otherwise): reimbursement payments, truly discretionary or ex gratia payments, payments for cashed-up holidays, payments made by ACC, or payments when an employee is on voluntary military service.

Remember: The greater figure of ordinary weekly pay and average weekly earnings must be used for calculating the employee's annual holiday pay.

When an employee is going to take annual holidays, the portion of the holidays entitlement being taken must be worked out, taking into account what a week means for that employee at the time the holiday is taken. If the employee's work pattern is predictable this will generally be the same as the 'week' agreed for establishing the employee's entitlement. This portion may be a period of weeks, or a period of less than a week.

For example, an employee who works 3 days per week has agreed with their employer that their four-week holiday entitlement will be 12 paid days. When they take a day off work; this will be one-third of a week of annual holidays. They will be paid the proportion of the greater of ordinary weekly pay or average weekly earnings for the period of holidays taken, ie one-third of the greater of ordinary weekly pay or average weekly earnings.

The Holidays Act 2003 provides different calculations of annual holiday payments in different situations:

- › Employees during their first year of service.
- › Employees after completion of 12 months service.
- › Employees taking annual holidays in advance.
- › Employees taking parental leave.
- › At the end of an employee's employment.

Employees during their first year of service

During the first year of employment, payment relating to annual holidays is made in three situations:

- › When an employer agrees to an employee taking holidays in advance, see 'Employees taking annual holidays in advance'.
- › Where there is a regular annual closedown of the workplace. See 'Regular annual closedowns'.
- › If the employee's employment ends. See 'Entitlements on leaving employment'.

Employees after completion of 12 months' service

After the completion of 12 months' service, when an employee takes annual holidays they are entitled to, they are paid the relevant portion of the greater of ordinary weekly pay and average weekly earnings for annual holidays taken. This calculation applies to all employees; including those whose pay has varied or whose work pattern has changed during the year. The calculation must be done at the time the employee takes the holiday.

For employees who have worked the same hours for the same rate of pay throughout the year, and haven't had any additional payments, ordinary weekly pay is often the greater amount, but this is not always the case so both calculations need to be done every time an employee takes holidays.

Employees taking annual holidays in advance

Employees can ask to take annual holidays before they are entitled to them; either because they haven't completed 12 months of service, or because they have already taken their current entitlement. The employer doesn't have to approve annual holidays in advance, unless the employee has a right to take annual holidays in advance in their employment agreement.

The payment for holidays taken in advance is the greater of the employee's ordinary weekly pay or average weekly earnings.

To work out average weekly earnings where the employee has less than 12 months' service, the employee's gross earnings from their start date until the last pay period before the holiday are divided by the number of whole or part weeks worked in the period.

To work out average weekly earnings where the employee has 12 months service or more, the 12 months prior to the end of the last pay period before the holiday are used.

An employer approving annual holidays in advance may ask the employee to agree in writing that any overpayment of holiday pay can be deducted from their final pay.

Employees taking parental leave

Time on parental leave is considered continuous service and taking parental leave doesn't affect entitlement to annual holidays. The employee is still entitled to four weeks each entitlement year.

However, under the Parental Leave and Employment Protection Act 1987, the payment for the annual holidays that the employee becomes entitled to while on parental leave and in the 12 month period following their return is affected by parental leave. The pay for those annual holidays is paid at the rate of the employee's average weekly earnings over the 12 months before the annual holidays. Note that if the employee has previous entitlements they hadn't taken before going on parental leave, then the normal calculation for annual holidays applies to the use of these entitlements.

At the end of an employee's employment

There are two ways to calculate payment for annual holidays at the end of employment depending on if the employment ends:

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

If an employee's employment ends before they have completed their first 12 months of service, they are entitled to a payment for annual holidays of 8% of gross earnings during the employment. The dollar value of this entitlement is reduced by any payment for annual holidays taken in advance during the employment or by any payment for annual holidays on a pay-as-you-go basis.

Where an employee's employment ends after becoming entitled to annual holidays, there are two amounts to be calculated, which are added together to get the total annual holiday payment to be made.

The first amount to be calculated is the greater of ordinary weekly pay or average weekly earnings for the annual holidays the employee has become entitled to, as if the holidays were being taken at the end of the employment. If the employee's rate of ordinary weekly pay at the time is not clear, the formula in the section 'Definition of ordinary weekly pay and average weekly earnings' is used to establish the correct figure. The 12 months prior to leaving are used to establish average weekly earnings.

The second amount to be calculated is annual holiday pay for the period since the employee last became entitled to holidays. This is calculated at 8% of the employee's gross earnings since their entitlement last arose. This figure includes the amount of holiday pay calculated above for the outstanding holiday entitlement.

If an employee has taken any annual holidays in advance or has received any holidays on a pay-as-you-go basis the amount paid for these is deducted from the final amount, see 'Entitlements on leaving employment'.



Example: Calculation of final payment for annual holidays.

Ted has been employed for one year and one month. He leaves his employment on 12 May, and the last date he became entitled to annual holidays was 12 April. Ted has already used one week of annual holidays, so has three weeks remaining at the end of his employment.

In relation to annual holidays, Ted is entitled to payment for:

- › the three weeks of annual holiday remaining from his four week entitlement from April at the rate of the greater of average weekly earnings or ordinary weekly pay, plus
- › 8% of gross earnings for the one month period between 12 April and 12 May. Gross earnings for the 8% calculation includes the holiday pay calculated above for Ted's three weeks of unused holidays.

Pay as you go provisions

An employee may be paid 8% of their gross earnings as annual holiday pay with their salary or wages (i.e. on a pay-as-you-go basis) in 2 specific situations:

- › if an employee is employed on a genuine fixed-term agreement of less than 12 months, or
- › if an employee's employment pattern is so intermittent or irregular that it isn't possible or practicable to try to provide four weeks' paid annual holidays,

The employee must agree to this in their employment agreement and the 8% must be an identifiable amount in the wages and time records, in addition to the employee's normal wages/salary, (and should be shown as a separate item on any pay-slip).

Employees paid on a pay-as-you-go basis do not get specific time off for annual holidays.

Employees on genuine fixed-term agreements of less than 12 months

The entitlement to four weeks' paid holiday after 12 months' service is sometimes not the best way to deal with holidays when the employment relationship is short-term. The Employment Relations Act 2000 allows for fixed-term employment agreements if there is a genuine reason for the fixed term. For example

- › The job is to prune trees in the west block, and your job will end when all of the trees are pruned. It is estimated that this job will take you and your co-workers two months.
- › The appointment is for a fixed term of four months to cover for an employee on parental leave.

If a fixed-term agreement is for less than 12 months, the employer and employee may agree to adding 8% of gross earnings to the employee's weekly earnings each week instead of getting a total of 8% of gross weekly earnings at the end of the fixed term. This is because these employees are not expected to reach 12 months service when they would normally become entitled to annual holidays.

This arrangement must be included in the employment agreement, and the 8% must appear as an identifiable component of the employee's pay in addition to the employee's normal wages/salary (and should show in the employee's pay-slip where the employee receives one). At the end of the fixed term, the employee will have received all pay relating to annual holidays and no further annual holidays payment or annual holidays will be due.

If the employee is later employed on one or more further fixed-term agreements of less than 12 months with the same employer, the same arrangement can be made, even when there is no break in employment, (as long as the employer and employee again agree in writing and it is an identifiable component of the employee's pay).

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

If an employee's employment becomes permanent, the payment of the additional 8% annual holiday pay in the employee's regular pay must stop. The employee will become entitled to four weeks' annual holidays 12 months after the start of their continuous employment (including any time they were on the final fixed term agreement before becoming permanent). However because the employer has already paid the employee 8% annual holiday pay during the fixed-term period of employment, the pay for annual holidays is reduced by the amount of holiday pay already paid at 8%. The employment agreement should be updated to reflect this change.

If the fixed-term agreement isn't genuine or is longer than 12 months

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

Examples of circumstances where this may occur include:

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

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

In some situations, eg if a fixed-term agreement is linked to project completion, there is a risk that it will go on for more than 12 months. The employee then becomes entitled to paid annual holidays, despite having already been paid on a pay-as-you-go basis. Therefore, pay-as-you-go arrangements are not recommended where it is possible that the employment will last longer than 12 months.

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

Employees who work intermittently or irregularly

If an employee works for their employer so intermittently or irregularly that it is impracticable for the employer to provide four weeks' annual holidays as paid time off, the employer and employee may agree to pay (at least) 8% of the employee's gross earnings to them as annual holidays pay-as-you-go.

This arrangement must be included in the employment agreement, and the 8% must appear as an identifiable component of pay in pay records in addition to the employee's normal wages/salary (and should show in the employee's pay-slip where the employee receives one). No further payment relating to annual holidays will be outstanding, no annual holidays will be due on termination of employment and no annual holidays are available to the employee.

If an employee agrees to enter into a pay-as-you-go arrangement, the employer should timetable regular reviews to check whether a regular cycle of work has developed. If it has, the employer and employee should enter into a new employment agreement (or agree to amend the current agreement) stating that the employee is entitled to annual holidays (and remove the 8% payment).

A word of caution- 'casual' employment

Don't assume that just because an employee is employed on a 'casual' employment agreement they will automatically qualify for annual holidays on a pay-as-you-go basis. The Holidays Act 2003 doesn't refer to 'casual work' it refers to intermittent or irregular employment.

When annual holiday pay must be paid

Employees are entitled to receive their pay for annual holidays before they start their holiday (unless their employment is ending). This ensures that employees have money available to them to pay for holiday costs such as travel and accommodation expenses, which may have to be paid in advance.

Employees may get their pay for annual holidays in their normal pay cycle for the period the holiday is taken but only if they have agreed to this. This agreement should be in writing (eg in the employment agreement).

Relationship between sick leave and annual holidays

- › If an employee becomes sick or injured before they begin annual holidays, their employer must let them take the relevant portion of annual holidays as sick leave instead.
- › If an employee becomes sick or injured while they are already on annual holidays, their employer may agree that they can take the relevant period as sick leave instead.

In these circumstances no annual holidays would be deducted for the period of sick leave, (but any paid sick leave would be deducted from the employee's sick leave balance).

Relationship between bereavement leave and annual holidays

- › If an employee suffers bereavement either before or while they are on annual holidays, their employer must allow the employee to take the relevant amount of bereavement leave instead of annual holidays (eg up to three days for a parent).

Relationship between family violence leave and annual holidays

- › If an employee is affected by family violence either before or while they are on annual holidays, their employer must let them take the relevant amount of family violence leave instead of annual holidays. In these circumstances no annual holidays would be deducted for the period of family violence leave, (but any paid family violence leave would be deducted from the employee's family violence leave balance).

Regular annual closedowns

Calculating an employee's annual holiday entitlement is different if the employer chooses to have a regular or customary annual closedown. The closedown can occur either:

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

An employer can only have this type of closedown once a year for any particular part of their business and they must give employees at least 14 days' advance notice of the closedown. An employer who wants to implement more than one closedown in any year can if their employees agree, but the employer can't make the employees take annual holidays using these provisions.

To determine whether a day that falls during a closedown period would be an 'otherwise working day' in regard to entitlements to public holidays, alternative holidays, sick leave, bereavement leave and family violence leave, see 'Public holidays during a closedown period'.

Employees with annual holidays entitlement

During a regular annual closedown, the employer can require employees with at least 12 months service to take their annual holidays entitlement during the period of the closedown. If the employee does not have enough annual holidays entitlement to cover the whole period, they will need to take unpaid leave or annual holidays in advance (if the employer agrees).

Employees with no annual holidays entitlement

Employees who have been employed for less than 12 months at the date of closedown have not worked long enough to be entitled to annual holidays. The employer must pay these employees 8% of their gross earnings since their start of employment less any payment for annual holidays taken in advance. In addition to the 8% payment, the employer and employee may agree to the employee taking annual holidays in advance (these holidays will be deducted from the next year's entitlement).

The employee's anniversary date for annual holidays entitlement must move to the date of the start of the closedown. Alternatively, the employer may choose to nominate another date reasonably close to the start of the closedown (eg where there is a Christmas closedown, the date could be set at 15 December) to ensure the anniversary date is always before the annual closedown starts. In these situations, the employee will not be entitled to any annual holidays for another 12 months.

Other than in this situation, an employer cannot nominate a particular date for annual holiday entitlements. The date of annual holiday entitlements is not adjusted by a second or later closedown.

For more information, see employment.govt.nz or call us free on **0800 20 90 20**.

The effect of unpaid leave on annual holidays

When an employee takes unpaid leave of more than a week during the year (not including unpaid sick, bereavement or family violence leave) either:

- › the time required before the employee becomes entitled to annual holidays is extended by the period of unpaid leave in excess of one week. For example, if an employee takes two weeks' unpaid leave, they become entitled to annual holidays one week after the anniversary of their starting date of employment, or
- › the employer and employee can agree that the unpaid leave will have no effect on the employee's annual holiday anniversary date. This means that the divisor used in the employee's average weekly earnings calculation must be changed to reflect the number of whole or part weeks greater than one week that the employee was on unpaid leave. For example, if an employee takes two weeks' unpaid leave during the year, it can be agreed that the employee's anniversary date won't change and the average weekly earnings for annual holiday pay is calculated on the basis of a 51 week year, not on the basis of 52 weeks.

Time on ACC, parental leave, voluntary military service leave, or other type of leave or holiday; doesn't affect the employee's anniversary date for annual holiday purposes.

Paying out annual holidays

Employees can ask their employer to pay out in cash up to one week of their four week minimum annual holidays entitlement in any entitlement year.

An entitlement year usually starts on the anniversary of the employee's employment start date. An employee who becomes entitled to annual holidays on their anniversary date can ask to have paid out up to 1 week of their annual holidays during any given entitlement year.

For example, an employee with an anniversary date of 1 June can ask that up to one week's holiday that they become entitled to on 1 June be paid out. Their request can be made at any point in the entitlement year that runs from 1 June to 31 May the following year.

Paying out of annual holidays can only be done if the employee asks in writing. Employees can ask to have less than a week's holiday at a time paid out and they can make more than one request, up to a maximum total pay-out of one week of the employee's annual holidays in any given entitlement year.

Employers must consider a request to cash up annual holidays in good faith and within a reasonable time (unless they have a policy that they don't pay out annual holidays). They can say no but must advise the employee of this in writing. They don't have to give a reason for their decision.

If an employer agrees to pay out a portion of the employee's annual holidays, they must make the payment as soon as practicable; (usually the next pay day). The payment must be calculated at the rate of the greater of the employee's average weekly earnings or ordinary weekly pay.

An employer can't make an employee ask for a pay out of any of their annual holidays or raise it in wage or salary negotiations or make pay out of annual holidays a condition of employment. However, an employment agreement can contain the process for making a pay-out request, (this must be consistent with legislation).

Employers can have a workplace policy that they won't consider requests for pay-out of annual holidays. This can apply to the whole or only some parts of the business. The policy can only cover whether the employer will consider any requests. It can't be about the amount of annual holidays an employee can have paid out or the number of requests an employee can make. An employer should consult with employees on the development of the policy, and advise new employees of the policy when they make an offer of employment, as part of their good faith obligations.

If an employer is found to have paid out a portion of the employee's annual holidays where the employee didn't ask for it, the employee can remain entitled to take the annual holidays paid out and also keep the amount already paid.

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

There are other details that employers and employees considering pay out requests might need to know, for example how it affects superannuation payments, Working for Families, child support and income tax and what happens when there is parental leave.

See employment.govt.nz for more information or call us free on **0800 20 90 20**. For tax related matters please contact Inland Revenue on **0800 227 774** or see www.ird.govt.nz.

Employment agreements and annual holidays

The annual holiday provisions in the Holidays Act 2003 are a minimum and apply even if the employment agreement doesn't include annual holiday entitlements or it has lesser entitlements. The employer can provide extra or better annual holidays entitlements and these should be recorded in the employment agreement. Any reference to holidays in the employment agreement must not take away from any of the minimum annual holidays entitlement while also including any additional annual holidays provisions.



Payment for public and alternative holidays, sick, bereavement and family violence leave

For unworked public holidays, alternative holidays, sick leave, bereavement leave and family violence leave employees are paid either at their relevant daily pay or average daily pay. See 'Payment for working on a public holiday' for payment information for working on a public holiday.

Definition of 'Relevant Daily Pay', 'Average Daily Pay' and 'Penal rates'

Definition: 'Relevant daily pay'

Relevant daily pay is used to calculate payment for public holidays, alternative holidays, sick leave, bereavement leave and family violence leave. It is the amount the employee would have received if they had worked on that day, and it includes:

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

It doesn't include payment of employer contributions to superannuation schemes for the benefit of the employee, or reimbursements payable to the employee, or in general, non-taxable allowances.

An employment agreement may include a special rate of relevant daily pay, this can be used to calculate payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave as long as the rate is equal to, or greater than, the rate calculated using the definition above.

Definition: 'Average daily pay'

Average daily pay may only be used if it isn't possible or practicable to determine relevant daily pay, or if the employee's daily pay varies within the pay period when the holiday or leave falls.

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

Definition: 'Penal rate'

For the purposes of payment for working on a public holiday, 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. A penal rate is usually stated in an employment agreement. Examples of penal rates include:

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

Penal rates (for the purposes of payment for working on a public holiday) don't include:

- › allowances, such as wet weather money
- › overtime rates
- › special rates for working a sixth or seventh day in a week.

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

Relevant daily pay or average daily pay?

In situations where relevant daily pay or average daily pay may be applied, generally it is preferable for employers to apply relevant daily pay. Using relevant daily pay where it is possible will always comply with the Holidays Act 2003. Employers need to take a pragmatic approach and use their judgment, taking account of the employee's work pattern and other relevant circumstances.

In many cases, determining relevant daily pay will be simple, as it will be clear what the employee would have earned on the day had they worked.

Even if it is not immediately obvious what relevant daily pay is, it does not always mean it can't be worked out. Employers should try to determine it, eg by looking at reasons for variation around the employee's work patterns. For example if some unscheduled overtime was worked by other employees on the day and the employee would have been required to do the overtime if they had been at work, the overtime would be included in the relevant daily pay.

Otherwise working day

Determining an employee's entitlement to payment for unworked public holidays, alternative holidays, sick leave, bereavement leave and family violence leave involves working out whether a day is an 'otherwise working day' for the employee. An employee is paid for a day off only if that day is an 'otherwise working day' for the employee. In many cases, whether a day would be an 'otherwise working day' is clear because the working week or roster is either constant or predictable, and both the employer and employee understand and agree about whether the employee would have otherwise worked on the day.

If it is not obvious whether a day would be an 'otherwise working day', the employer and employee must consider the following issues with a view to reaching agreement:

- › the employment agreement terms
- › the employee's usual work patterns
- › any other relevant factors such as:
 - the employer's rosters or other similar systems
 - whether the employee works for the employer only when work is available.
 - the reasonable expectations of the employer and employee of whether the employee would work on that day
- › 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

If the employer and employee can't agree, a Labour Inspector can determine the matter.

Examples of the application of 'otherwise working day'

- › If a part-time employee normally works four hours each day on Tuesday and Wednesday and eight hours on Friday, the employee will be given Good Friday off with eight hours' pay, but will not be entitled to a paid day off for Easter Monday because it is not a day they would otherwise have worked.
- › An employee's roster requires three 10-hour days on Monday to Wednesday one week (week 1) and the same hours on Thursday to Saturday the following week (week 2). If week 1 coincides with the week in which Good Friday falls, the employee won't get paid for Good Friday or Easter Monday because they wouldn't have been scheduled to work on that Friday or Monday. However, if week 2 coincides with Good Friday, the employee will be entitled to a holiday on pay for both Good Friday and Easter Monday.



Public holidays

Entitlements

Employees are entitled to a paid day off on a public holiday, if they would have worked on that day if it wasn't a public holiday (ie the public holiday falls on an 'otherwise working day' for the employee).

The public holidays

There are 12 public holidays. The public holidays are: Christmas and New 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 and Easter Monday (dates vary), King's Birthday (first Monday in June), Matariki (dates vary), Labour Day (fourth Monday in October) and the relevant provincial Anniversary Day (date determined locally).

Mondayisation

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 Saturday or Sunday and the employee is entitled to that day off on pay.

An employee is not entitled to more than four public holidays over the Christmas and New Year period, regardless of their work pattern, or more than 12 public holidays in one year.

Note that Easter Sunday is not a public holiday (but there are special provisions for shop employees who are asked to work on Easter Sunday, for more information see www.employment.govt.nz).

For more information on whether a day would otherwise be a working day see 'Otherwise working day'.

An employer and employee can agree to transfer a public holiday. See 'Transferring a public holiday'.

Transferring a public holiday

Employers and employees may agree (in writing) to transfer the observance of a public holiday(s) to another identified (or identifiable) working day to meet the needs of the business or the employee.

The public holiday must be transferred to another identified or identifiable calendar day or 24-hour period that is an 'otherwise working day' for the employee. A request to transfer can be made by either employee or employer and any agreement to transfer can't:

- › reduce the number of public holidays which an employee gets
- › have the purpose of avoiding paying the employee time and a half for working on a public holiday or giving them an alternative holiday.

An employee is entitled to a paid day off on the day the public holiday is transferred to. The employee must be paid at least their relevant daily pay or average daily pay for the day.

An employee can only work on the day the public holiday is transferred to if they agree.

If they do work, the day is treated like a worked public holiday and the employee:

- › is paid at least time and a half for the hours worked and
- › gets a whole day's alternative holiday if the day is an otherwise working day for them (and they are not only employed to work on public holidays). See 'Alternative holidays for working on public holidays'.

If the employee would have worked on a day that a public holiday is transferred to but can't work because they are sick, or are affected by family violence, they are paid for the day as if they had a paid, unworked public holiday, and no deduction is made from their sick leave or family violence leave entitlement.

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 annual holidays.

Transferring part of a public holiday

Employees working shifts that start and end on different days (and one or both of those days are public holidays) can agree with their employer to transfer part of the public holiday, so that it covers one whole shift. The transfer can only take place if:

- › the employee is due to work a shift in the period to which the public holiday is transferred
- › the purpose of the transfer isn't to avoid paying the employee time and a half for working on a public holiday or providing them with an alternative holiday.

Employers may have a policy that they will not transfer public holidays. This can refer to the transfer of part or the whole of a public holiday, and can relate to the whole of a business or some parts of the business.

Payment when the employee doesn't work on a public holiday

If an employee doesn't work on a public holiday that is an otherwise working day for them, the employee is paid their relevant daily pay (or average daily pay if applicable) for the day. For most employees working a regular pattern of hours, the pay cycle continues unchanged.

If the public holiday is on a day that is not an otherwise working day for the employee, and they don't work on it, they are not entitled to a payment for the day. For example, an employee who doesn't work on Fridays is not entitled to any payment for Good Friday (unless they work).

Payment for working on public holidays

If an employee works on any public holiday, they are paid at least time and a half for the time they actually work on the day.

The employee is entitled to the greater of either:

- › the portion of the employee's relevant daily pay (not including penal rates) that relates to the time actually worked on the day, multiplied by 1.5 (ie time and a half) or
- › the portion of the employee's relevant daily pay (including any penal rates) that relates to the time actually worked on the day.

Employees with penal rates are not entitled to time and a half on top of the penal rate in the employment agreement. For a definition of 'penal rates' see 'Definitions'.

Employees should be paid on the basis of relevant daily pay (rather than average daily pay) for working on a public holiday. This is because:

- › employers will always be able to work out relevant daily pay when the employee actually works on the public holiday,
- › employees generally expect to be paid relevant daily pay, and
- › using relevant daily pay (where this can be calculated) will always comply with the Holidays Act 2003.

Where an employee is specifically employed only to work on public holidays (for example, an employee who is only employed to work at the racetrack for the Waitangi Day meeting), they are not entitled to an alternative day's holiday, but they must still be paid at least time and a half.

Some employment agreements specify a salary rate with unspecified hours or patterns of work. Employees on these agreements must be paid at least time and a half for the time actually worked if they work on a public holiday.

For example, an employee who is entitled under their employment agreement to double time on Sunday, works on a public holiday on a Sunday. They get double time, because double time (ie their relevant daily pay including penal rates) is more than time and a half (ie relevant daily pay not including penal rates x time and a half).

Public holidays during a close-down period

If a business has a closedown period that includes public holidays (eg over the Christmas and New Year period) then the employee is entitled to a paid public holiday(s) if it falls on a day that would otherwise be a working day for them if the closedown were not in effect.

Payment where an employee is sick, bereaved or affected by family violence on a public holiday

If an employee was going to work on a public holiday but is sick, or is affected by family violence or bereaved, the day is treated as a paid unworked public holiday:

- › the employee would just receive their relevant daily pay (or average daily pay if applicable)
- › no sick, bereavement or family violence leave would be deducted.

The effect of various work patterns

The Holidays Act 2003 has public holiday entitlements for various work patterns including:

- › employees working shifts
- › employees on call
- › where it is not clear if the day is an otherwise working day for an employee.

Employees working shifts are entitled to not less than

- › their relevant daily pay (or average daily pay if applicable) for their normal rostered shift when they take a public holiday as a day off work on an otherwise working day for them
- › the greater of time and a half not including penal rates, or relevant daily pay including penal rates in their employment agreement, for hours worked, if they work on a public holiday. If the employee is working a shift that includes some time on the public holiday, only the time actually worked on the public holiday is paid at the minimum time and a half payment rate; the balance may be paid at the normal rate of pay (unless the employee and employer agree to transfer the public holiday so that it covers one whole shift). In addition, if the day would otherwise be a working day, they get a whole day's alternative holiday for each public holiday or part of a public holiday the shift covers.



Examples of working shifts on a public holiday

1. An employee starts at 10pm on Christmas Day and finishes work at 6am on Boxing Day. The employee is entitled to eight hours' pay of at least time and a half and two alternative holidays (one each for Christmas and Boxing Day).
2. An employee works from 10pm on Christmas Eve until 6am on Christmas morning. The employee works the same shift beginning on Christmas Day night, finishing on the morning of Boxing Day. The employee is entitled to two hours' pay at ordinary time and six hours' pay of at least time and a half for the first shift, and to 8 hours' pay of at least time and a half for the second shift, and to two alternative holidays (one each for Christmas Day and Boxing Day).
3. An employee working an eight hour shift starting on ANZAC Day at 10pm is paid two hours' pay of at least time and a half, six hours' pay at the normal hourly rate, plus a full day's alternative holiday.

Employees on call on public holidays have entitlements depending on the arrangement:

- › If the employee is called out, they are entitled to at least time and a half for the time worked, plus a full day's paid alternative holiday if the day would otherwise be a working day for them (in addition to any on call allowance they may get under their employment agreement).
- › If an employee is not called out but must restrict their activities to the extent that they have not enjoyed a full holiday (eg, if they are required to stay at home all day), if the day would otherwise be a working day for them, they are entitled to their relevant daily pay (or average daily pay, where applicable) and a full day's paid alternative holiday (even if they are not called out).
- › If an employee is not called out and is not required to restrict activities (eg, if the employee can choose not to accept the call-out), then they are not entitled to an alternative holiday. If the day would otherwise be a working day for them, they are entitled to their relevant daily pay (or average daily pay, where applicable) as an unworked public holiday.

An employee would also be entitled to any on-call payment eg in their employment agreement.

Employees who work or are on call only on public holidays are not entitled to alternative holidays.

Where it is not clear if it is an otherwise working day

Where it is not clear if a public holiday is an otherwise working day for the employee, the otherwise working day principles must be applied. See 'Otherwise working day'.

Requiring an employee to work on a public holiday

An employer can require an employee to work on a public holiday if:

- › the public holiday falls on a day the employee would otherwise have worked, and
- › the employee is required to work on the public holiday under their employment agreement.

Alternative holidays for working public holidays

If an employee works on a public holiday that is an otherwise working day for the employee they are entitled to an alternative holiday (another day off on pay). See 'Otherwise working day'. The employee gets the full day off, even if they only work for a small part of the day. This includes employees working shifts and some employees on call and is in addition to being paid time and a half for the hours worked on the public holiday.

The alternative holiday recognises that the employee has missed out on having a day off work and means they can take a day off at another time. It can be taken at any time agreed by the employer and employee, and is paid at the employee's relevant daily pay (or average daily pay where applicable) for the day the holiday is taken.

If an employer and employee can't agree when an alternative holiday is to be taken, the employer may decide the date, on a reasonable basis and must give the employee at least 14 days' notice.

If an alternative holiday is unused at the end of employment, it is paid out at the rate of the relevant daily pay (or average daily pay) of the employee's last day of work.

When there is no entitlement to an alternative holiday

An employee is not entitled to an alternative holiday if they:

- › work on a public holiday and that day is not an otherwise working day, or
- › are on call on a public holiday but are not required to restrict their activities, or
- › are only employed to work or be on call on public holidays.

Alternative holiday may be exchanged for payment

If an employee doesn't take their alternative holiday within 12 months of becoming entitled to it, the employee and employer can agree for the alternative holiday to be exchanged for payment. The payment amount for the alternative holiday must be agreed between the employer and employee and it must be paid as soon as practicable once the agreement has been made.

Employment agreements and public holidays

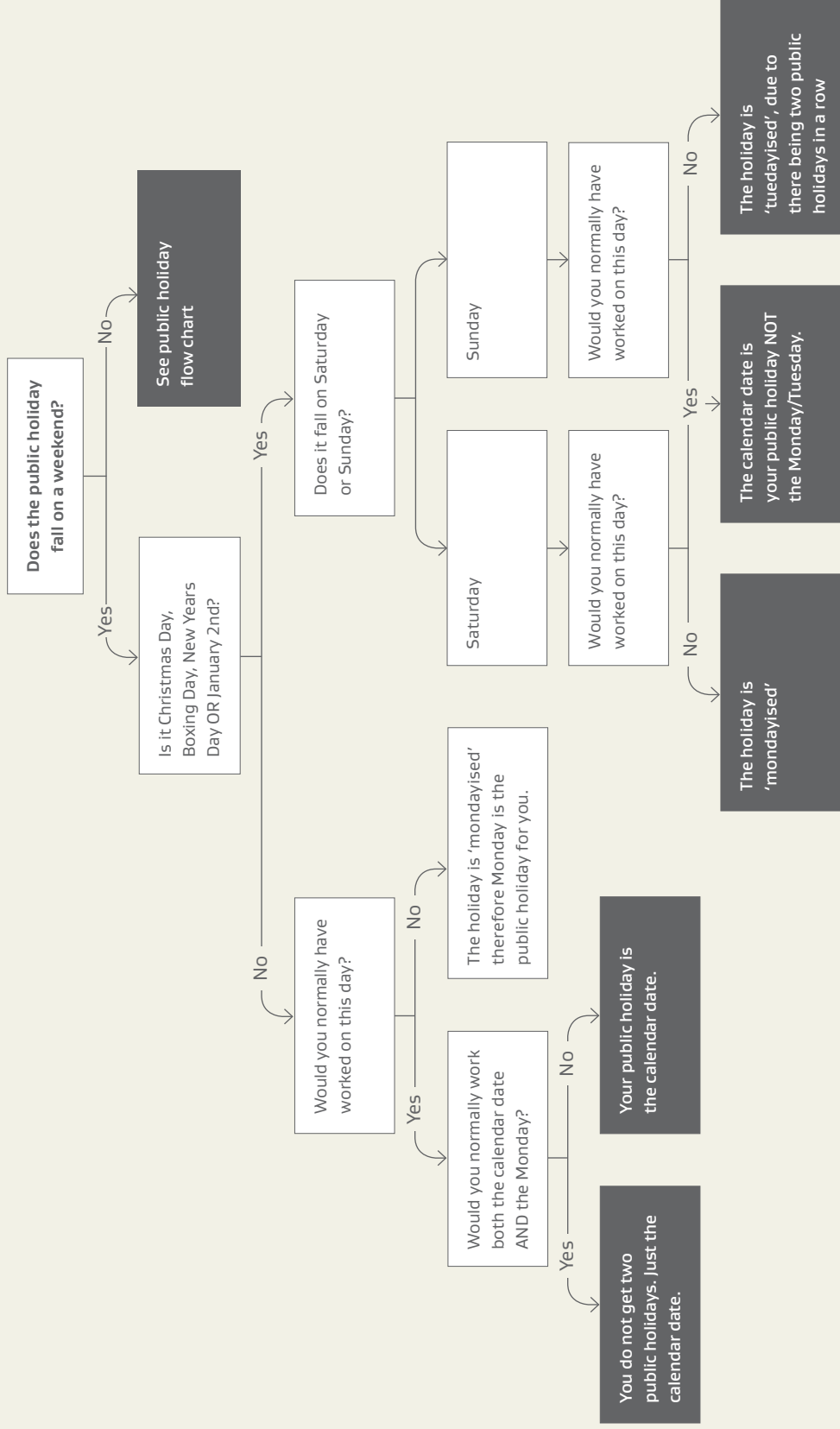
Employment agreements after 1 April 2004 must state that the employee will be paid at least time and a half for working on a public holiday. They cannot state that the relevant daily pay or average daily pay includes a time and a half component.

Often time and a half is easy to work out. If the employee has regular hours each week and is paid an hourly rate with no additional payments, then they are entitled to one and a half times their relevant daily pay for the time worked on a public holiday. For example: *"The pay rate is \$28.00 per hour. For time worked on a public holiday, the pay rate is \$42.00 per hour (time and a half).*

In other cases, there is more than one way to work out time and a half, depending on what the employer and employee want. This may be a day rate, part-day rate or hourly rate. Any agreed basis for working out pay for working on a public holiday must be no less than the minimum entitlement set out in the Act and should be included in the employee's employment agreement.



Mondayisation of Public Holidays Flow Chart





Employees' public holidays entitlements

This chart covers your minimum public holiday entitlements.

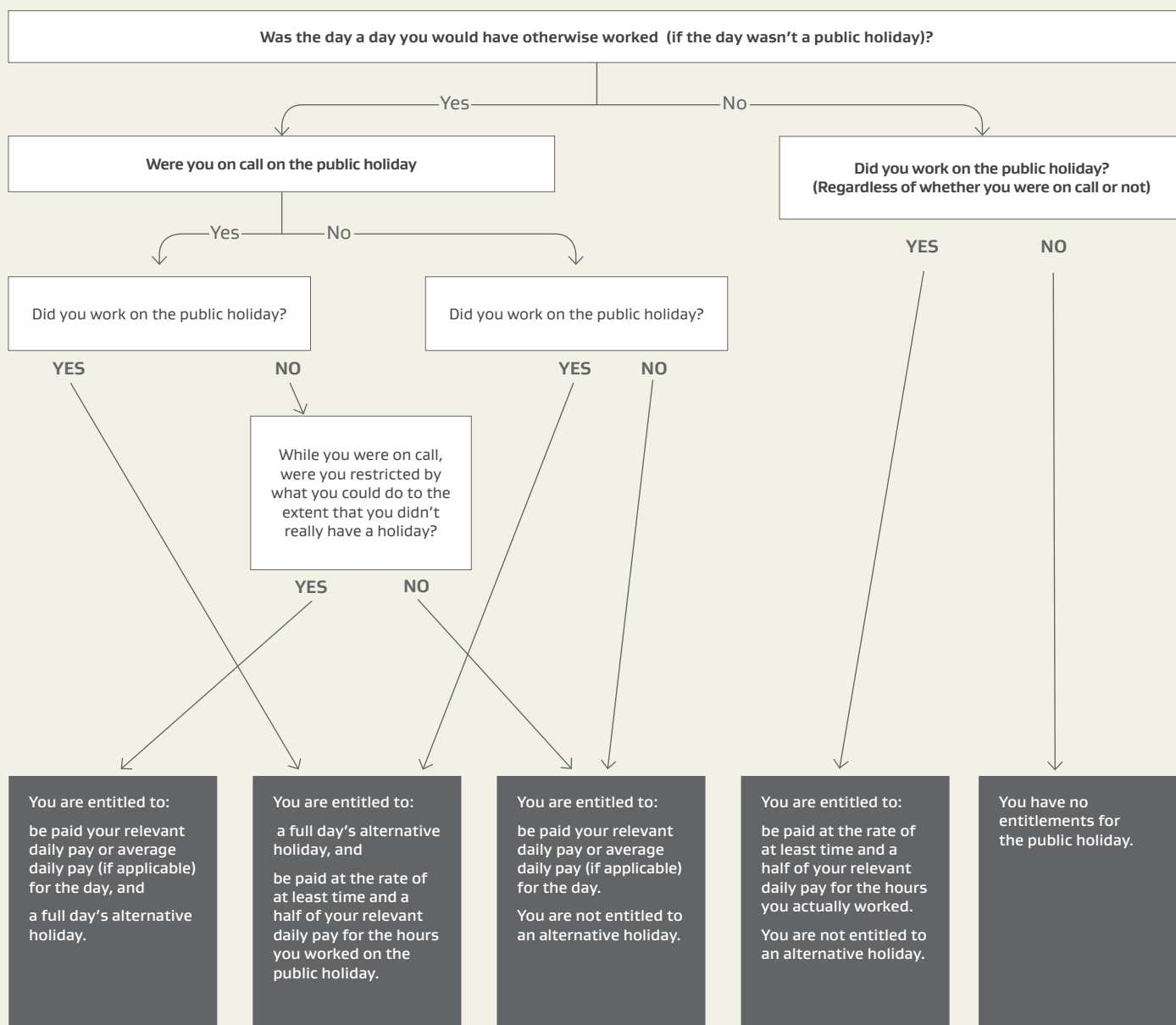
If you are entitled to penal rates for working on a public holiday (or on a particular day of the week and the public holiday falls on that day), and you do work on the public holiday, you will be entitled to be paid at the rate of the greater of: time and a half times your relevant daily pay (not including penal rates) and your relevant daily pay (including penal rates), for the hours you actually work.

For more information about whether a day is a day that you would otherwise have worked, please see otherwise working day.

For information about 'Mondayisation or Tuesdayisation' of public holidays, please see the Mondayisation of public holidays flow chart.

For more information about relevant daily pay and average daily pay please see Relevant daily pay (RDP) vs average daily pay (ADP) for bereavement, sick leave, family violence leave, unworked public holidays and alternative holidays.

If you are only employed to work on public holidays or be on call on public holidays, you will not be entitled to an alternative holiday, but will be entitled to be paid at the rate of at least time and a half of your relevant daily pay for any hours you actually work on a public holiday.



This information is guidance only, is not legally binding, and should not be substituted for legal advice or for the wording of the Holidays Act 2003. MBIE does not accept any responsibility or liability for error of fact, omission, interpretation or opinion that may be present, nor for the consequences of any decisions based on this information.



Sick leave

Entitlements

All employees are entitled to sick leave whether they are full or part-time, permanent or fixed-term employees or 'casual', providing that 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.

Employees get a minimum of 10 days' paid sick leave a year after the first six months and another 10 days' sick leave for each 12-month period after that. If in any year the work pattern does not meet the above test, then no new sick leave entitlement arises but the employee can use any sick leave they are already entitled to. The employee may requalify for sick leave at any time they have met the six months' test. Sick leave entitlements are not pro-rated. For example, if a part-time employee works three days a week, they still become entitled to 10 days' sick leave a year after being in employment for six months.

Minimum sick leave entitlements increased from 5 to 10 days per year from 24 July 2021. Employees get the extra 10 days per year when they reach their next entitlement date. This 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).

Sick leave can be used when an employee is sick or injured, or when the employee's spouse or partner or a person who depends on the employee for care (such as a child or elderly parent) is sick or injured.

At any time when the employee isn't entitled to sick leave (including during the first six months of employment), the employer and employee can agree to the employee taking sick leave in advance and that any sick leave taken in advance can be deducted from their entitlement. Any such agreement should be recorded in writing.

Unused sick leave must be carried over to a maximum of 20 days' total leave entitlement, unless more is provided for in the employment agreement. For example, if someone uses only one day's sick leave from the 10-day entitlement in a 12-month period, they can carry over the other nine days, so in the next 12-month period, their total entitlement is 19 days' sick leave. Unused sick leave is not paid out during or at the end of employment, unless this is agreed as part of the employment agreement.

Sick leave and ACC entitlements

The following rules apply in relation to the ACC scheme:

- › When the employee is taking leave for the first week of a non-work accident, sick leave may be used.
- › If an employee has a work-related accident, the employer has to pay 'first week compensation' and can't make the employee take the time off as sick leave.
- › If an employee is getting 'first week compensation' for a work-related accident, an employer and employee can agree that the employer will top up the 'first week compensation' payment from 80% to 100% by deducting 1 day of sick leave for each five days' taken off work.
- › If an employee has a work-related or non-work-related accident and stays on weekly compensation, the employer can't make the employee take time off as sick leave.
- › If an employee is receiving weekly compensation from ACC, the employer doesn't have to pay the employee.
- › If the employee is on ACC for more than 5 days (for either workplace or non-work accidents), the employer and employee can agree that the employer will top up the ACC payment from 80% to 100% by deducting one day of sick leave for each five days taken off work.

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

Payment for sick leave

Payment for sick 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 sick leave is made in the normal pay cycle.

For example, if an employee who normally works eight hours Tuesday to Friday is sick on Tuesday, they would receive a payment of eight hours pay as their relevant daily pay.

Where relevant daily pay is used as the basis of calculation (see 'Definitions' under the 'Payment for public and alternative holidays, sick, bereavement and family violence leave' section) the payment should include overtime when overtime would have been worked on the day. For example, if the employment agreement specifies an hour for lunch but the employee, at the employer's request, usually takes only half an hour for lunch and works the extra half hour, the employee's sick leave payment would include the extra half hour they are normally paid.

If the employee normally works eight hours Tuesday to Friday and four hours on Saturday and is sick on Saturday, the employer can choose to pay the employee their relevant daily pay or average daily pay for the sick day (because the employee's daily pay varies in the pay period). But they should act in good faith and whichever option they choose, they should use this method consistently.

Where the employee works continuously but to an irregular pattern, sick leave could be taken eg if the employee was rostered to work on the particular day they are sick, or could have expected to be rostered. For more information see 'Otherwise working day'. The sick 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 sick, 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 sick leave is deducted.

Informing the employer and proof of illness

Employees must notify the employer of their intention to take sick leave as early as possible before they are due to start work, or if that isn't practical, as early as possible.

Employers can ask for proof of sickness or injury at any time once an employee takes sick leave. Where the employee is using sick leave to care for another person, such as a spouse or child, the employer can similarly require proof of illness or injury for that person.

Special rules apply if the employer asks for proof within three consecutive calendar days of the employee becoming sick or injured. The employer must inform the employee as early as possible that the proof is required, and pay the reasonable expenses of getting proof. Employers don't have to have reasonable grounds to suspect that the sick leave isn't genuine before asking for proof within these first 3 consecutive calendar days (but they should remember their good faith obligations).

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

The employer can't make the employee visit a particular doctor, i.e. the employee has the right to choose their own doctor.

If an employee fails, without reasonable excuse, to provide proof of illness or injury when required by the employer to do so, the employer doesn't have to pay the employee for their time off work until proof is provided.

If the employer thinks that the employee has misused their sick leave, this can be dealt with as an employment relationship problem and a disciplinary process or the Employment Mediation Service could be used. If the employer didn't ask for proof of illness or injury at the time, they could still use the normal processes for dealing with problems of employee misconduct.

Employment agreements and sick leave

The minimum sick leave provisions in the Holidays Act 2003 apply even if the employment agreement doesn't include sick leave entitlements or it has lesser entitlements.

The employer can provide extra or better sick leave entitlements and these should be recorded in the employment agreement. For example the employer could agree that unused sick leave carried over to the next year will not be capped at 10 days. Any reference to sick leave in the employment agreement should maintain the minimum sick leave entitlement while also including any additional sick leave provisions.

When negotiating employment agreements, any reference to specific forms of leave in the agreement (such as domestic leave, special leave or family leave) must not take away from the minimum statutory entitlement for sick leave while also including any special arrangements.



Bereavement leave

Entitlements

All employees are entitled to bereavement leave for the next 12 months, full, part-time, permanent, fixed-term employees and 'casual', providing that 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.

The entitlement to bereavement leave is subject to the same test each 12 months.

There are two separate entitlements to bereavement leave:

- › An employee can take up to three days' paid leave on the death of the employee's spouse or partner, parent, child, sibling, grandparent, grandchild, or their spouse's or partner's parent.
- › An employee can take up to one day's paid leave if their employer accepts they have suffered a bereavement (of a person not already covered above) taking into consideration:
 - how close the employee's association with the other person was
 - 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.

If there is more than one bereavement at the same time, the employee is entitled to the relevant days' bereavement leave for each bereavement.

Using bereavement leave

Bereavement leave can be taken at any time and for any purpose relating to the death. Employees do not have to use bereavement leave immediately, or on consecutive days eg:

- › Bob is entitled to three days' bereavement leave when his brother Jack is killed in an accident. The funeral is in Sydney. Bob uses two days of bereavement leave to attend the funeral and one month later, Bob 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 bereavement leave to attend the unveiling of his grandmother's headstone.
- › Joyce takes two days' paid bereavement leave when her sister dies. Over the next several weeks, she takes two more half days of bereavement leave to talk to the lawyer about her sister's will.

Where an employee suffers bereavement before or while they are on annual holidays, the employer must allow the employee to take the relevant amount of bereavement leave instead of annual holidays.

Payment for bereavement leave

Payment for bereavement leave is made where the leave is taken on 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 pay if it is not practicable or possible to work out the employee's relevant daily pay, or if the employee's daily pay varies within the pay period). Payment for bereavement leave is made in the normal pay cycle.

If the employee would have been working on a public holiday but suffers bereavement, the day would be treated as a paid, unworked public holiday. In this situation, the employee would be paid relevant daily pay or average daily pay (where applicable) but wouldn't get an alternative holiday, and no bereavement leave would be deducted.

Employment agreements and bereavement leave

The minimum bereavement leave provisions in the Holidays Act 2003 apply even if the employment agreement doesn't include bereavement leave entitlements or it has lesser entitlements. The employer can provide extra or better bereavement leave entitlements and these should be recorded in the employment agreement. For example, the employer could choose offer the employee three days' bereavement leave on the death of a niece or nephew in addition to the family members included in the Act. Any reference to bereavement leave in the employment agreement should maintain the minimum bereavement leave entitlement while also including any additional bereavement leave provisions.



Family violence leave

Entitlements

All employees are entitled to family violence leave whether they are full or part-time, permanent or fixed-term employees or 'casual', providing that 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.

Employees get a minimum of ten days' paid family violence leave a year after the first six months and another ten days' family violence leave for each 12-month period after that. 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.

Family violence leave can be used when an employee is affected by family violence, or when a child living with them (including periodically) is affected by family violence.

Family violence is defined in 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).

Family violence leave can be taken regardless of how long ago the family violence occurred, including if it occurred prior to the law commencing, or prior to the employee becoming employed.

At any time when the employee isn't entitled to family violence leave (including during the first six months of employment), the employer and employee can agree to the employee taking family violence leave in advance and that any family violence leave taken in advance can be deducted from their entitlement. Any such agreement should be recorded in writing.

Unused family violence leave is not paid out during or at the end of employment, unless this is agreed as part of the employment agreement.

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

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 'Definitions' under the 'Payment for public and alternative holidays, sick, bereavement and family violence leave' 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:

- › When the employee is taking leave for the first week of a non-work accident, family violence leave may be used.
- › If an employee has a work-related accident, the employer has to pay 'first week compensation' and can't make the employee take the time off as family violence leave.
- › If an employee is getting 'first week compensation' for a work-related accident, an employer and employee can agree that the employer will top up the 'first week compensation' payment from 80% to 100% by deducting 1 day of family violence leave for each five days' taken off work.

- › If an employee has a work-related or non-work-related accident and stays on weekly compensation, the employer can't make the employee take time off as family violence leave.
- › If an employee is receiving weekly compensation from ACC, the employer doesn't have to pay the employee.
- › If the employee is on ACC for more than 5 days (for either workplace or non-work accidents), the employer and employee can agree that the employer will top up the ACC payment from 80% to 100% by deducting one day of family violence leave for each five days taken off work.

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

Informing the employer and proof of family violence

Employees must notify the employer of their intention to take family violence leave as early as possible before they are due to start work, or if that isn't practical, as early as possible.

Employers can ask for proof that an employee is a person affected by family violence to be produced for family violence leave taken. Where the employee is using family violence leave because there lives with them (including periodically) a child who is affected by family violence, the employer can similarly ask for proof of family violence for that person.

The law does not state what kind of proof would be acceptable. Employers and employees are 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 a person 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 a victim.

If the employer requests a formal document, this could include items such as a letter or email from a support agency (e.g. a family violence agency or Oranga Tamariki – Ministry for Children) or support person who can explain the employee's circumstances and the impact on the employee, a report from a medical practitioner or 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), or any court or police documents.

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.

If the employer thinks that the employee has misused their family violence leave, this can be dealt with as an employment relationship problem and a disciplinary process or the Employment Mediation Service could be used. If the employer didn't ask for proof of family violence leave at the time, they could still use the normal processes for dealing with problems of employee misconduct.

Employment agreements and family violence leave

The minimum family violence leave provisions in the Holidays Act 2003 apply even if the employment agreement doesn't include family violence leave entitlements or it has lesser entitlements. The employer can provide extra or better family violence leave entitlements and these should be recorded in the employment agreement.

When negotiating employment agreements, any reference to specific forms of leave in the agreement (such as domestic leave, special leave or family leave) must not take away from the minimum statutory entitlement for family violence leave while also including any special arrangements.

Employment New Zealand can provide further information and assistance on family violence leave. See www.employment.govt.nz or call us free on **0800 20 90 20**.



Entitlements on leaving employment

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

Public holidays

On termination of employment, the employee's end date is notionally extended by any unused annual holiday entitlement, and any public holidays falling during that period must be dealt with as if the employee was still employed.

For example, if an employee finishes work 4 days before a public holiday and has more than four days annual holidays left from their entitlement, their annual holidays entitlement notionally extends their employment by the length of the annual holidays. This means the employee is entitled to a day's payment at their relevant daily pay or average daily pay (if applicable) for the public holiday if it is an otherwise working day for them (a day they would have worked had it not been a public holiday and had they still been employed).

Public holidays falling during an employee's notice period are treated in the usual way where they fall on a day which would otherwise be a working day for the employee.

Alternative holidays

If an employee has alternative holidays earned from working on a public holiday and that have not been taken or paid out, they are paid out at the end of employment at the rate of the employee's relevant daily pay or average daily pay for the last day of work.

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

Sick leave, bereavement leave and family violence leave

Employees continue to be entitled to sick leave, bereavement leave and family violence leave during their notice period. Unused sick leave and family violence leave isn't paid out at the end of employment (unless this is required by the employment agreement).

Annual holidays

Any annual holidays that the employee is entitled to but has not taken (or been paid out) must be paid out on termination of employment.

The employee must also be paid 8% of their gross earnings since their last anniversary date for annual holidays (or their start date if applicable) less any amount for annual holidays taken in advance or paid under pay-as-you-go provisions.



Example: 'Calculation on termination of employment'

Jason works five days a week, Monday to Friday. He resigns and finishes work on Friday, 16 October. Jason has already been paid up to Tuesday 6 October. He has three days' alternative holidays earned and gets four weeks' annual holidays per year. He last became entitled to annual holidays on 25 June (after his first 12 month of continuous work) and he has not taken any of this entitlement.

His final payment is made up of:

- › payment of wages since the last pay period – that is, eight days' pay for Wednesday, 7 October through to Friday 16 October
- › payment for his three days alternative holidays earned at his relevant daily pay rate (or at his average daily pay rate if applicable) for Friday 16 October
- › payment of four weeks' annual holiday pay calculated at the rate of the greater of ordinary weekly pay or average weekly earnings
- › an additional day's payment for Labour Day (26 October) at relevant daily pay (or average daily pay if applicable), because it falls during the four weeks' notional annual holidays added to the end of his employment
- › an additional 8% of his gross earnings since 25 June.

Gross earnings for the 8% calculation include:

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



Record-keeping requirements

Employers must make sure they:

- › keep employees' wages and time records
- › keep employees' holiday and leave records.

Legislation requires employers to keep wages and time and holiday and leave records for each employee. Holiday and leave records can be kept separately or as part of the wages and time records. The record can be electronic as long as it can be accessed easily and converted to written form. Employers must keep records in enough detail to show that the employer has complied with providing employees with their minimum entitlements. If records are incomplete or inaccurate the employer may not be able to calculate annual holiday pay correctly. Good record-keeping helps to ensure that employees get the correct entitlements and helps protect the employer in the case of a dispute. There are examples of wages and time and holiday and leave records at www.employment.govt.nz.

The following information must be recorded:

- › the employee's name, postal address, age (if under 20 years) and the date they started work
- › whether they're on an individual employment agreement or a collective agreement (with the title and expiry date of the agreement and the employee's classification)
- › a signed copy of the employee's individual agreement (or a copy of the intended agreement if there isn't a signed agreement)
- › the kind of work they are employed for

- › the number of hours worked each day in each pay period and the pay for those hours. If these are agreed and they work them as usual hours then a statement of those usual hours and pay will be enough. This can be recorded in:
 - the wages and time record
 - employment agreement
 - a roster, or
 - any other document or record normally used during employment
- › for an employee on a salary, usual hours include any additional hours worked that are consistent with the employment agreement. However, an employer must record additional hours if they're required to show that they're complying with minimum entitlements
- › details of any employment relations education leave taken
- › the wages paid in each pay period and how these have been calculated
- › the dates they last became entitled to annual holidays, sick leave and family violence leave and their current entitlement to annual holidays, sick leave and family violence leave
- › the dates of leave taken, including annual holidays, sick leave, bereavement leave and family violence leave, and payment received for each
- › the date and amount of payment and the portion of any annual holidays that have been paid out each entitlement year
- › the dates and number of hours worked on public holidays and the payment for these
- › the date (or 24-hour period) the public holiday or any part of it has been transferred to, and the date the employee became entitled to any alternative holiday
- › the dates of, and payments for, any public holiday or alternative holiday they didn't work but were entitled to holiday pay
- › the cash value of any alternative holidays exchanged for payment
- › the cash value for any board and lodgings provided
- › the date when employment ended, and the amount of holiday pay they received at the end of employment
- › a copy of their tax code declaration (IR330).

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

Employment Agreements

Under the Employment Relations Act 2000, every employee must have a written employment agreement, which can be individual or collective.

Employers must keep a signed copy of the employment agreement or the current signed terms and conditions of employment (from 1 July 2011). The employer must also keep an intended agreement even if the employee hasn't signed it. The employer must give the employee a copy of their current terms and conditions if asked to by the employee.

All employment agreements must include a provision stating that the employee gets paid at least time and a half for working on a public holiday (see 'Payment for working on public holidays'). When entering into an employment agreement, an employer must also inform the employee about the employee's entitlements under the Holidays Act 2003, and that the employee can obtain further information about their entitlements from a union or from Employment New Zealand. The easiest way for an employer to show that they have met their statutory obligations to inform employees of their entitlements is to include relevant provisions in the employment agreement. If the employment agreement does not include holiday and leave provisions (that are the same, or better than the minimum provisions under the Act), the minimum entitlements under the Holidays Act 2003 apply.

When negotiating employment agreements, any reference to specific forms of holidays and leave in the agreement (such as domestic leave, special leave or family leave) must not take away from the minimum statutory entitlement (eg for bereavement leave, sick leave and family violence leave) while also including any special arrangements.

Be sure that any negotiated changes are in writing.

The on-line employment agreement builder can help you draft an individual employment agreement. It contains the minimum provisions required and other entitlements that are frequently included in agreements. This can be customised for the needs of each workplace and employee.

To access the employment agreement builder, see <https://eab.business.govt.nz>.

Other types of leave

Parental leave

Under the Parental Leave and Employment Protection Act 1987, if an employee (or their partner) are:

- › having a baby or going to take the permanent primary responsibility for a child under six years, and
- › the employee has worked for any employer/s for at least an average of 10 hours a week for any 26 of the 52 weeks just before the baby's due date or the date they become responsible for the child under the age of 6,

they may be eligible for parental leave payments for up to 26 weeks. In addition, they may also be entitled to unpaid parental leave if they have worked for the same employer for an average of 10 hours a week for at least 6 months. Employees who have worked for the employer for at least 12 months or more have increased entitlements.

An employee can take annual holidays (or other paid leave) at the start of their parental leave and their parental leave payment period will start at the end of their holidays (or paid leave).

If the employee becomes entitled to annual holidays during parental leave or in the following 12 months, annual holiday pay is paid at the rate of their average weekly earnings over the 12 months just before taking the annual holidays. (If the employee has previous annual holidays entitlements they haven't taken, then the normal calculation for annual holidays applies to that leave.)

Employment New Zealand can provide further information and assistance on parental leave and payments. See www.employment.govt.nz or call us free on **0800 20 90 20**.

Employment relations education leave

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

An employee attending employment relations leave is paid either their relevant daily pay or average daily pay (if applicable).

Defence force volunteers

Under the Volunteers Employment Protection Act 1973, if an employee does full-time or part-time voluntary training in any of the armed forces the employer has to let the employee take unpaid leave for training.

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

For more information, see www.employment.govt.nz or call us free on **0800 20 90 20**.

Resolving problems

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

They should:

- › be clear about the facts
- › talk to the other party
- › deal with issues promptly but allow enough time for both parties to seek advice and think through the issues
- › make sure everyone follows the process for issue resolution outlined in the employee's employment agreement.

If the employer and employee can't resolve the problem themselves, they may call Employment New Zealand to clarify their obligations (0800 20 90 20), and can participate in mediation, either through the Employment Mediation Services or through independent mediators.

If the problem is still not resolved, they can go to the Employment Relations Authority for a determination.

If either party is dissatisfied with the determination of the Employment Relations Authority, the issue can be taken to the Employment Court.

If a problem is a personal grievance, the employee must raise it with the employer within 90 days of the action complained of, or after they became aware of it, unless the employer agrees to the personal grievance being raised late (if the employer doesn't agree the employee can apply to the Employment Relations Authority).

For more detailed information about problem resolution see: www.employment.govt.nz



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