EMPLOYMENT NEW ZEALAND

ETHICAL AND SUSTAINABLE WORK PRACTICES

Employer Self-assessment Guide

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MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

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

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

More information

Information, examples and answers to your questions about the topics covered here can be found on our website: **www.employment.govt.nz**

Disclaimer

The information in this publication has no statutory or regulatory effect and is of a guidance nature only. Guidance cannot override the law and is not legally binding.

Users of this guidance should not substitute this for legal advice.

The information should not be relied upon as a substitute for the wording of the Holidays Act 2003.
Note: further references are standardised in this document to either "the Act" or "the Holidays Act"

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Purpose

This publication is designed to assist employers as they complete the Employment Standards Self-assessment Checklist (Checklist). It includes information on employment standards from the Ministry of Business, Innovation and Employment (MBIE) and other government agencies.

Contents

SECTION 1

Employment and employment agreements

1.1 Individual and collective employment agreements

Employment agreements

Good employment relationships begin with a good recruitment process that ensures everyone has clear expectations about the role, working conditions and employment rights and responsibilities. A well written employment agreement reduces the risk of misunderstandings.

Every employee must have a written employment agreement. This can be either an individual agreement or a collective agreement. Collective employment agreements are negotiated in good faith between an employer and a registered union on behalf of their members. Employers must not unduly influence employees to join or not join a union.

Employers are required to retain a signed copy of the employment agreement or the current signed terms and conditions of employment. The employer must retain all employment agreements including any 'intended agreement' (or draft agreement) even if the employee has not signed it. Employees are entitled to a copy on request.

There are some provisions that must be included in employment agreements by law, and there are also a number of minimum conditions that must be met regardless of whether they are included in agreements, or even if the agreement says something different.

Individual employment agreements

If there is no relevant collective agreement, the employer and employee negotiate an individual employment agreement, which sets out the employee's terms and conditions of employment.

The agreement must be in writing and contain at least the required terms and conditions of employment.

The agreement must not have anything in it which is less than what is required by the legislation, or is inconsistent with the law. The parties may also negotiate to agree and include additional terms and conditions as relevant to their workplace.

Offering an individual employment agreement

An employer must, when offering a person employment under an individual employment agreement:

- give the person a copy of the intended individual employment agreement
- advise the person he or she is entitled to seek independent advice about the intended agreement
- give the person a reasonable opportunity to get that advice
- consider any issues that the employee raises and respond to them
- retain a copy of the agreement, and make sure it's easy to access.

What must be in an individual employment agreement

An individual employment agreement must include:

- the names of the employer and the employee (to make clear who the parties to the agreement are)
- a description of the work to be performed
- an indication of the place of work
- any agreed hours of work (including the number of guaranteed hours of work, the days of the week the work is to be performed, the start and finish times of work, and/or any flexibility in these), or where there are no agreed hours of work an indication of the times the employee is to work

- the wage rate or salary payable
- a provision confirming the right to at least time-and-a-half payment for working on a public holiday
- for most employees, an employment protection provision that will apply if the employer's business is sold or transferred, or if the employee's work is contracted out
- a plain explanation of services available to help resolve employment relationship problems
- a reference to the fact that sexual harassment personal grievances must be lodged within 12 months and that all other personal grievances must be lodged within 90 days
- any other matters agreed upon, such as trial periods or probationary arrangements
- if the employee is employed on a fixed-term, the way in which the employment will end and the reason why.

Although it's not required in the employment agreement, we recommend giving your employee information about their rights under the Holidays Act and where they can learn more.

What must be in a collective employment agreement

Collective employment agreements must be in writing, signed by employers and unions that are parties to the agreement, and include:

- a coverage clause stating the work that the agreement covers
- the wage rate or salary payable to employees covered by the agreement
- a plain explanation of services available to help resolve employment relationship problems, including the time period for bringing a personal grievance (which is 90 days, or 12 months if it relates to sexual harassment)
- the wage rate or salary payable for employees covered by the agreement
- a clause stating how the agreement can be changed
- the date or event upon which the agreement will expire
- a provision confirming the right to at least time-and-a-half payment for working on a public holiday
- in most cases, a provision stating how employees will be protected if the business is sold, transferred or contracted out.

Other than the above requirements, the parties agree what's in the collective employment agreement (unless the Employment Relations Authority is asked and agrees to fix the terms of agreement), as long as it is not unlawful.

The employer and the union need to keep a signed copy of the collective employment agreement and provide a copy to employees when they request it. The employer must give it to new employees who are not union members and whose work is covered by the coverage clause.

Related union information

Effective from 6 May 2019, the Employment Relations Amendment Act 2018 requires that:

- employers must provide new employees with an approved '**active choice form**' within the first ten days of employment, and return it to the applicable union unless the employee objects.
- the 30-day rule has been restored, so that for the first 30 days new employees must be employed under terms consistent with the applicable collective agreement. The employer and employee may agree additional more favourable terms than the collective agreement.

Further information

- Go to **www.legislation.govt.nz** and search 'Employment Relations Act 2000'.
  - See Part 5 for information on collective employment agreements.
  - See Part 6 for information on individual employment agreements.
- Go to **eab.business.govt.nz** to see the Employment Agreement Builder tool. Employers can use it to create their own individual employment agreement. It shows which clauses are compulsary and also includes optional clauses which enable an employer to tailor an agreement to suit their business.
- Go to **www.employment.govt.nz** and search 'employment agreements'. This section has general information as well as guidance on offering and negotiating employment agreements, and unfair bargaining.

1.2 Rest and meal breaks

Introduction

Rest and meal breaks benefit workplaces by helping employees work safely and productively.

Employees are entitled to set rest and meal breaks. The number of each type they get depends on the hours they work. An eight-hour work day must include two paid 10-minute rest breaks and one unpaid 30-minute meal break. A five-hour work day must include one 10-minute paid rest break and one 30-minute unpaid meal break.

Employers must pay for minimum rest breaks but don't have to pay for minimum meal breaks.

Employers and employees can agree when to take their breaks, as needed for the workplace. If they cannot agree, the law specifies when the breaks must be taken, where this is reasonable and practicable.

Some limited exemptions may apply for employers in specified essential services or national security services.

Employers must provide appropriate breaks and facilities for employees with babies who wish to breastfeed or express breast milk, where this is reasonable and practicable. These are unpaid breaks unless the employer agrees otherwise.

Further information

- Go to **www.legislation.govt.nz** and search 'Employment Relations Act 2000'. See Part 6C for information on breastfeeding facilities and breaks. See Part 6D for information on rest and meal breaks.
- Go to **www.employment.govt.nz** and search 'rest and meal breaks' or 'breastfeeding'.

1.3 Employment status

Introduction

Employment standards, such as the minimum wage, apply only to employees. Employment standards must be provided to all employees, being any person of any age employed to do any work for hire or reward who is not in business on their own account. (Note, though, that minimum wage requirements apply only to employees aged 16 years and older).

Sometimes people performing work are doing so, not as employees, but rather as self-employed contractors or unpaid volunteers.

Who is an employee?

An employee is anyone who has agreed to be employed, under a contract of service (commonly called an employment agreement), to work for some form of payment. This can include wages, salary, commission and piece rates. Employees include:

- homeworkers (a person who works for someone from a private home, but does not work on the house or its fittings or furniture)
- people who have been offered and have accepted a job
- fixed-term employees
- seasonal employees
- casual and part-time employees
- employees on probationary or trial periods
- workers paid by commission or piece-rates
- paid interns
- apprentices and trainees.

An employee is not:

- a self-employed or independent contractor
- a sharemilker
- a real estate agent whose agreement says they are an independent contractor
- a volunteer who does not expect a reward and does not receive an award for working
- in some cases, a person who is engaged in film production.

The definition of 'employee' in the Employment Relations Act 2000 directs that when deciding if a person is an employee, or not, it is the 'real nature' of the relationship that must be determined.

If there are people working in the business who are not employees, but who are independent contractors or volunteers, it is good practice to ensure that they sign an independent contractor agreement, or a volunteer agreement, setting out how they agree to work and their status, to help avoid any disputes or misunderstandings at a later date.

What is the difference between a self-employed contractor and an employee

Sometimes it is not clear if a worker is engaged as an employee or a contractor. Over time disputes through the courts have developed commonly applied tests. While each case is different, factors such as the following are often considered:

- the intention of the parties
- the degree of control involved
- how integrated the worker is into the business
- whether, or not, the person is really in business for themselves.

The table below lists some indications of a contractor arrangement vs employment relationship.

Indications of a contractor arrangement:	Indications of an employment relationship:
The worker does not have an employment agreement.	The worker has an employment agreement.
The worker has a 'contract for services'.	The worker does not have a 'contract for services'.
The worker does not get paid holiday pay.	The worker gets holiday pay.
The worker does not get paid time and a half or receive an alternative holiday (day in lieu) for working on a public holiday.	The worker gets paid time and a half for working on a public holiday. The worker also receives an alternative holiday (day in lieu) for working on a public holiday that falls on a day they would usually work.

The worker usually has control over the work – including where, when and how they work.	The worker usually has little or no control over the work – including where, when and how they work.
The worker usually has discretion about when they work and how much time they spend working.	The worker usually has set times and days that they must work.
The worker can usually make themselves unavailable on certain days of the week, or for a longer period, such as if they are going on holiday.	The worker usually has to request permission to take time off work.
The worker usually has their own plan of what work to do each day and which site to work at. They usually do not need to be closely supervised or instructed how to do their job.	The worker can usually be told what work to do each day and which site to work at. They generally receive more supervision.
The worker usually provides their own tools and equipment to do the work.	The worker does not usually need to provide their own tools and equipment.
The worker is usually less integrated into the team. For example, they are not invited to organisation events.	The worker is usually integrated into the team and is invited to organisation events.
The worker is usually not reimbursed for work-related expenses (for example, petrol or equipment hire).	The worker is usually reimbursed for work-related expenses.
The worker usually does not wear the uniform of the organisation they are performing the work for.	The worker usually wears the uniform of the organisation they are working for (if it has one).
The worker usually charges a fee for their services.	The worker is usually paid a salary or wage.
The worker usually pays their own tax directly to the IRD.	The worker's PAYE tax is usually deducted from their pay before they receive it.
The worker is usually GST registered and generally pays their own ACC levies.	The worker is usually not GST registered and generally does not pay their own ACC levies.
The worker can usually decide how much to charge for their services and how many jobs to take on.	The worker cannot usually decide how much to charge the customer or how many jobs to take on.
The worker usually carries financial risk.	The worker usually does not carry financial risk.
The worker often performs work for multiple organisations.	The worker usually works for only one organisation.
The worker usually issues invoices to get paid.	The worker usually gets paid automatically (for example, each fortnight).

Please note these factors are considerations and are not definitive.

Further information

- Go to **www.legislation.govt.nz** and search 'Employment Relations Act 2000'. See Section 6 for the meaning of employee.
- Go to **www.employment.govt.nz** for more information about employment status and for general employment queries.

1.4 Eligibility to work in New Zealand

Introduction

People entitled to work in New Zealand are those who:

- are New Zealand or Australian citizens (including people born in the Cook Islands, Niue and Tokelau), or
- have a New Zealand residence visa, or
- have a New Zealand work visa or a condition on their New Zealand temporary visa showing they are allowed to work here.

Work visa conditions should be checked. Some visas allow only certain types of work, or work for specified employers. An employee is not entitled to work here just because they have a tax number. Use the VisaView tool to find out about whether a person is entitled to work and any visa conditions that apply.

Ensuring eligibility

Under the Immigration Act 2009, an employer must not employ a foreign national who is not entitled to work in New Zealand or is not entitled to work for that employer. This applies whether or not the employer knew that the foreign national was not entitled to work.

An employer must show that they took reasonable precautions and exercised due diligence to check whether the foreign national was entitled to work for the employer in New Zealand.

Infringement fees and penalties (fines) can be imposed for offences by employers (and up to seven years in prison for exploitation of a foreign national whom the employer allowed to work when they knew the person was not entitled to work). Employers must also ensure that workers are not employed in a manner that is inconsistent with a condition of their visa.

What is a good process to follow?

Employers are encouraged to have robust systems for checking entitlement to work and keep good records of this. The following are suggestions to help get started or to improve existing processes:

- ensure all job advertisements advise that evidence of entitlement to work in New Zealand will need to be provided if requested
- ensure all job application forms advise that evidence of entitlement to work in New Zealand will be required from both New Zealand citizens and non-New Zealanders during the recruitment stage
- use the **VisaView** service and/or documents at the interview or pre-employment stage to check work entitlement. (The free online service **VisaView** lets an employer check a prospective employee's entitlement to work in New Zealand for that employer).
- undertake identity checks with photo identification at the interview or pre-employment stage
- ensure copies of documentation are retained on an employee's record or file
- retain good records of work eligibility and identification checks, and keep good records of visa expiry dates.

Further information

- Go to **www.legislation.govt.nz** and search 'Immigration Act 2009'. See Part 10 for information on offences by employees.
- Go to **www.immigration.govt.nz** for information on employee eligibility, including the VisaView tool.

Records

Introduction

Employers are required to maintain wage and time records, and holiday and leave records.

Employee records must be made available to employees, their unions and Labour Inspectors if they ask for them and they must be kept for not less than six years. (**Note:** you may need to keep some information longer for tax purposes.)

Wage and time records

Wage and time records must include:

- the employee's name
- the employee's age, if under 20 years
- the employee's postal address
- the type of work the employee undertakes
- the type of employment agreement – individual or collective
- the title, expiry date and employee classification in any applicable collective agreement
- the number of hours worked each day in a pay period and the pay for those hours
- the wages paid each pay period and the method of calculation
- the details of any employment relations education leave taken.

If an employee's number of hours each day and pay are agreed upon, and the employee works those agreed (or 'usual') hours, it is sufficient to meet the obligation to record daily hours worked and corresponding pay if these usual hours and pay are accurately documented in one of the following:

(a) the wage and time record

(b) the employment agreement, or

(c) a roster or any other record used in the course of the employee's employment.

For an employee on a salary, 'usual hours' includes any additional hours worked that are consistent with the employment agreement. However, employers must record any extra hours worked if doing so is necessary to comply with minimum entitlement obligations, such as paying the minimum wage.

Holiday and leave records

As well as the wage and time records there are also record keeping requirements in relation to holidays and leave. These requirements include keeping a holiday and leave record of:

- the name of the employee (if not held elsewhere) so it is clear who the records relate to
- the date the employee commenced employment
- the number of hours worked each day in a pay period and the pay for those hours
- the date the employee last became entitled to annual holidays
- the employee's current entitlement to annual holidays
- the employee's current entitlement to sick leave and family violence leave
- the dates any annual holiday, sick, bereavement or family violence leave was taken
- the amount of payment for annual holidays, sick leave, bereavement leave and family violence leave taken
- the portion of any annual holidays that have been paid out in each entitlement year
- the date and amount of payment, in each entitlement year, for any annual holidays paid out
- the dates and payments for any public holiday worked

- the number of hours worked on any public holiday
- the day or part of any public holiday agreed to be transferred and the calendar day or period of 24 hours to which it has been transferred
- the date on which the employee became entitled to any alternative holiday for any public holiday worked
- the dates and payments for any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to payment
- the cash value of any board and lodgings provided
- the details of any payment the employee is entitled to for exchanging an alternative holiday for payment
- the date of termination of employment
- the amount paid as holiday pay on termination of employment.

Further information

- Go to **www.legislation.govt.nz** and search 'Employment Relations Act 2000'. See Section 130 for information on wage and time records.
- Use keywords 'Holidays Act 2003'. See Section 81 for information on holiday and leave records.
- Go to **www.employment.govt.nz** and search 'record-keeping' for templates for wage and time, and holiday and leave records.

Wages

3.1 Minimum wage

Introduction

Employees must receive at least the applicable minimum wage rate if they are 16 years and over.

Employers may agree with employees (aged 16 and over) to any wage rate, as long as it is not less than the applicable minimum wage rate. These employees must receive at least the applicable minimum wage rate for all hours worked. This applies to both employees who are paid on an hourly basis, and also to employees who are paid a salary, or in any other way eg by commission or piece-rates. Where a salary is paid, the salary must be at least equivalent to the current minimum wage for all hours actually worked by that employee.

There are three minimum wage rates:

- The minimum **adult rate** applies to all employees aged 16 or over unless they are a starting-out worker or trainee.
- The minimum **starting-out rate** applies to starting-out workers (see below).
- The minimum **training rate** applies to employees aged **20 years or over** who are doing recognised industry training involving at least 60 credits a year as part of their employment agreement, in order to become qualified for the occupation to which their employment agreement relates.

Remember that in order to accurately calculate whether an employee's entitlement to minimum wages has been met, accurate time records of hours actually worked will be needed. Note that employees who are paid salaries, or are paid on a "flat rate", also need to receive at least the equivalent of the minimum wage for each hour worked. Be aware that if these employees work long hours, their payments might fall below the minimum wage rate for periods of time, and will need to be topped up. Keeping records of hours worked will allow you to double-check that all such employees are getting paid their legal minimums.

Starting-out workers

Starting-out workers are:

- **16- to 17-year-old** employees who have not yet completed six months of continuous employment with their current employer.
- **18- to 19-year-old** employees who have been paid a specified social security benefit for six months or more continuously, and who have not yet completed six months' continuous employment with any employer since they started being paid a benefit.

Once they have completed six months' continuous employment with a single employer, they will no longer be a starting-out worker, and must be paid at least the adult minimum wage rate.

- **16- to 19-year-old** employees who are required by their employment agreement to undertake industry training for at least 40 credits a year in order to become qualified in the area they are working in.

  The starting-out wage does not apply if the employee's role includes supervising or training other workers. If they are, then they must be paid at least the adult minimum wage.

Employees aged under 16

There is no minimum wage for employees aged under 16, but all other employment rights and entitlements still apply.

When looking at whether an employee who is 16 years or older is a starting-out worker, any time spent employed by an employer before the employee turned 16 must be included when calculating the time that employee has been continuously employed.

Who gets the minimum wage?

Employees should get at least the minimum wage if they are 16 years and over, whether they are a full-time, part-time, fixed-term or casual, a home-worker or paid wholly or partly by commission or piece rates.

Minimum wage exemptions

The Minimum Wage Act provides that Labour Inspectors from MBIE may issue minimum wage exemption permits to workers who are limited by a disability in carrying out the requirements of their work. This means a lower minimum wage rate is set for a particular person in a particular job for the period in the permit.

Current minimum wage rates

The minimum wage rates are reviewed every year. Current and previous rates can be found on the Employment New Zealand website. Go to **www.employment.govt.nz** and search 'minimum wage'.

Further information

› Go to **www.legislation.govt.nz** and search 'Minimum Wage Act 1982'.

3.2 Payment for trials and probation periods

Introduction

Information on 90-day trial periods and probation periods follows. Employees must receive at least the minimum wage if they are 16 years and over. This includes employees on trial periods and probation periods and those learning the job.

Trial periods

Employers can make an offer of employment to a prospective employee that includes a trial period of up to 90 days. Trial periods can be used in any industry and for any job.

Trial periods are voluntary, and must be negotiated in good faith and agreed in writing and as part of the employment agreement. If a trial period is not included in a written employment agreement, or if the employee starts work before they have signed the employment agreement, the trial period will not be valid. The employment agreement must state:

- from the very start of their employment, the employee will be on a trial for a set period which is not more than 90 days long (but can be shorter). The exact time period must be stated, and
- during the trial, the employer can dismiss the employee, and
- if the employer does so, the employee cannot bring a personal grievance or other legal proceedings about their dismissal.

A trial period can't be offered to (or imposed on) an employee who has been previously employed by that employer.

Employers cannot use a trial period to get work done without paying for it. If the employee is aged 16 years or over, at least the minimum wage must always be paid, including when an employee is on a trial period.

An employee who is dismissed before the end of a valid trial period can't raise a personal grievance on the grounds of unjustified dismissal, or other legal proceedings in respect of the dismissal. They can raise a personal grievance on any other grounds, such as discrimination, harassment or unjustified action by the employer. Parties must still deal with each other in good faith.

If any employment relationship problem arises, access to mediation is available at any point.

Employees on trial periods are entitled to all other minimum employment rights, for example in relation to health and safety, employment agreements, minimum pay, annual holidays, public holidays, leave and equal pay.

Probation periods

A probation period is another way of assessing that an employee can do a job.

If the first part of the employment relationship is a probation period this must be negotiated in good faith, agreed and recorded in writing in the employment agreement. The clause should also state how long the probation period will last.

If the probation period is not part of a written employment agreement, or if the employee starts work without signing the employment agreement, the probation period will not be valid.

A probation period allows the new employee to demonstrate their skills. Such arrangements may be permissible where the duration and tasks are limited and designed to give the employer a fair opportunity to assess the skills.

Employers may not use a probation period to get work done without paying for it. Also an employer cannot under pay or not pay an employee to train how to do the job when they first start work. If the employee is aged 16 or over, minimum wage must always be paid including when an employee is on a probation or training period. A probation period does not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.

Further information

- Go to **www.legislation.govt.nz** and search 'Employment Relations Act 2000'.
  - See Section 67 for information on probationary arrangements.
  - See Sections 67A and 67B for information on trial periods.
- Go to **www.employment.govt.nz** and search 'trial periods'.

3.3 Deductions from pay

Introduction

Deductions that are unlawful and/or unreasonable are prohibited.

Employers generally cannot make deductions (take money) from employees' wages.

Employers can only make reasonable deductions for a lawful purpose where:

- the employee asked for, or agreed to it in writing
- an employee has agreed in a collective employment agreement for money to be deducted (for example, for union fees to be paid in a collective agreement)
- an employer wishes to recover overpayments in very limited circumstances being where the employee has been: absent from work without the employer's authority; on strike, partial strike, locked out, or suspended. The employer may only recover such overpayments where it was not reasonably practicable to avoid making the overpayment. The employer must tell the employee of their intention to recover the overpayment before deducting any money and then make that deduction within two months of telling them
- a bargaining fee arrangement applies to the employee
- an employer is required by law (for example, income tax, child support payments, court directed payments or other statutory purposes) to make deductions.

Where an employer has obtained the employee's written consent or written request for deductions to be made from wages, note that the employee can vary or withdraw this consent by giving notice in writing at any time, and the employer must then vary or stop the deductions within two weeks of receiving the notice or as soon as practicable.

Pay deductions for partial strikes

If an employee takes part in a partial strike, the employer can choose one of two ways to reduce their pay.

1. Flat rate deduction: deduct 10% of the employee's pay for the strike period.
2. Proportional deduction: deduct a percentage based on how much work was not done.

To calculate a proportional deduction, the employer must:

1. Identify the employee's usual work hours for the day of the partial strike.
2. Determine which tasks weren't done due to the strike.
3. Estimate how long those tasks would have taken.
4. Work out the percentage of the day's usual hours that this time represents.

Consultation and specific written consent for deductions

For written consent to a deduction to be genuine it must be specific. This should include: what the deduction is for; the amount or how the amount would be determined and when the deduction would be made.

If a deduction is made relying on a general deductions clause in the employee's employment agreement, an employer must not make this deduction from wages without first consulting the worker.

As above, the employee can vary or withdraw their consent to a deduction by giving written notice. Employees should be made aware of this ability when their written consent or request is entered into.

Premiums or fees for employment as deductions

A premium is where an employer charges or receives a payment from an employee or from any other person to obtain or secure a job for a person. It is unlawful to charge a premium for employment. Sometimes bonding arrangements with deductions clauses can amount to the seeking of a premium.

Agreements that on-the-job training costs or costs relating to recruitment will be deducted from wages if the employee leaves within a certain period, can be viewed as the seeking of a premium. As noted above, any such costs must be lawful and reasonable, should be discussed and agreed with the employee in advance, and must refer back to the actual costs, for example by providing the third party invoices incurred.

Penalty clauses as deductions

Deductions from wages should be for a specific identifiable cost or a genuine estimate of cost.

If a deduction arrangement is: unreasonable, not a genuine estimation of cost, or significantly in excess of actual costs incurred by the employer: then it can be viewed as a way to ensure on-going performance by introducing a penalty for non-performance.

Deductions made on the basis of such an unreasonable arrangement can be considered unlawful.

Deductions for Personal Protective Equipment (PPE)

Where a worksite has significant hazards that could result in harm to an employee, the employer must provide suitable PPE and/or suitable personal protective clothing at no cost to the employee.

Further information

- Go to **www.legislation.govt.nz** and search 'Wages Protection Act 1983' for information on deductions.
- Go to **www.employment.govt.nz** and search 'deductions'.
- Go to **www.worksafe.govt.nz** and search 'PPE'.

3.4 Premiums and direction on spending wages

Premiums

It is unlawful for an employer to charge or receive a premium from an employee or from any other person to obtain or secure a job for a person. Such payments are called premiums. Penalties can be sought against employers who seek premiums from employees or receive premiums from third parties.

Some deduction or bonding arrangements where employees have agreed to have amounts deducted from their wages for on-the-job training or recruitment costs if they end their employment within a certain time, may also be considered premiums.

Direction on spending wages

An employer must not require an employee to spend their wages in a specific place or manner. Employers should take care to ensure that employment agreements or arrangements do not amount to such direction.

An example could be where an employment agreement specified an employee must dress a certain way for work and they must purchase that clothing from a specific supplier. This would likely be unlawful whereas a basic dress code expectation (where the employee can chose who they can purchase from) is acceptable.

Further information

- Go to **www.legislation.govt.nz** and search 'Wages Protection Act 1983'.
  - See Section 12 for information on direction on spending wages.
  - See Section 12A for information on premiums.

3.5 Equal pay and pay equity

Equal pay

The Equal Pay Act 1972 prohibits discrimination in the pay rate of employees, based on the sex of the employee.

Equal pay in this context is generally understood to mean a rate of remuneration for work in which there is no element of differentiation between male and female employees based on sex – where the work of male and female employees is substantially similar and calls for the same or substantially similar degrees of skill, effort and responsibility and is done under similar conditions.

Pay equity

Employers must also consider pay equity. The Equal Pay Act 1972 also has a simple and accessible process to address systemic sex-based pay discrimination across female-dominated (or historically female-dominated) industries.

Pay equity in this context is about women and men receiving the same pay for doing jobs that are different, but of equal value. The value of work is assessed in terms of skills, knowledge, responsibility, and effort and working conditions. Other considerations in setting remuneration can include market factors, productivity and performance. It means people have the same opportunities to participate fully in employment regardless of their gender.

More information on pay equity can be found on the Employment New Zealand website. Go to **www.employment.govt.nz** and search 'pay equity'.

Discrimination

The Human Rights Act 1993 and the Employment Relations Act 2000 prohibit sex discrimination in employment.

Further information

For information on equal pay

- Go to **www.legislation.govt.nz** and search 'Equal Pay Act 1992'.
- Go to **www.employment.govt.nz** and search 'equal pay'.

For information on discrimination

- Go to **www.legislation.govt.nz** and search 'Human Rights Act 1993'.
- Search 'Employment Relations Act 2000'. See Section 104.
- Go to **www.employment.govt.nz** and search 'discrimination'.

Holidays

4.1 Definitions and formulae

Introduction

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

- employees are entitled to paid annual holidays or equivalent holiday pay to provide the opportunity for rest and recreation.
- public holidays are for the observance of days of national, religious, or cultural significance which all employees should be entitled to take as paid leave, where possible and applicable. Where it is necessary for an employee to work on a public holiday that work should be specially rewarded.
- the employment relationship is important to the employee and employer in both financial and human aspects. Therefore, after a period of employment, employers must provide employees with sick leave, bereavement leave and family violence leave (as detailed in the Holidays Act 2003) when required.

Note: Key terms are explained further in this section and include: ordinary weekly pay, average weekly earnings, gross earnings, relevant daily pay, average daily pay and otherwise working day. Pay-As-You-Go (PAYG) holiday pay is explained in Section 4.5.

Annual holiday entitlements

All employees are entitled to at least four weeks' paid annual holidays a year. Most employees will become entitled to take paid annual holidays on their first and subsequent anniversaries after starting work. In limited circumstances, some employees may receive payment for holidays in their usual pay packets, if they are being paid on a Pay-As-You-Go (PAYG) basis.

Employers may agree to provide entitlements to paid holidays and leave over and above the minimum entitlements provided in the Holidays Act.

Annual holidays can be taken at any time agreed between the employer and the employee. If this cannot be agreed, or a closedown period applies, employers must give employees at least fourteen days' notice if they need their employees to take annual holidays at a certain time.Employees must be given the opportunity to take at least two of the four weeks' holidays continuously, if they wish to do so.

Establishing annual holiday entitlements

Employees will usually become entitled to their annual holiday entitlements on their anniversary of starting work. There are two circumstances where the employee's annual holiday anniversary date may be adjusted:

- when the business has an annual closedown period and an employee is not yet entitled to annual holidays.
- when an employee takes unpaid leave of more than a week during the year.

An employer and employee may agree on what 'four weeks' annual holidays means in their circumstances. Any agreement should ideally be recorded at the start of the employment relationship, even where it is clear what 'four weeks' means. Such an agreement will be in relation to the time away from work that four weeks' represents and does not affect the payment that will be due for those weeks when they are taken.

The agreement must be a genuine reflection of the employee's actual working week, some different scenarios are explained next.

Where employees are permanently employed on a consistent work pattern, establishing their entitlement is easy. On each anniversary of the date of commencing employment, the employee is entitled to four weeks of paid annual holidays.

Where an employee is employed on a work pattern that changes during the year, the employer and the employee should reach agreement on what 'four weeks' will be in terms of time away from work. Ideally this agreement should be made when the work pattern changes and recorded in writing. If this does not occur, it should be updated at the time leave is taken.

Where an employee is employed on a fixed-term agreement of less than 12 months, the employee and employer may agree to pay annual holiday pay with their wages. When this is agreed, annual holiday pay must be separately identified in the employee's employment agreement and wage and time records and shown as a separate item on any payslip (on a PAYG basis). This reflects the fact that these employees are not expected to still be employed on the date on which they would qualify for annual holidays. This is covered in more detail in Section 4.5.

Employees employed on a fixed-term agreement of less than 12 months do not have to receive annual holiday pay with their wages. If these employees do not receive PAYG payments, they will receive an annual holiday payment at the end of their employment in the normal way (less payment for any annual holidays they have taken in advance). Both the employment agreement and the payslips should be clear and consistent about what will happen to holiday pay when an employee is on a fixed-term agreement.

Where an employee has an irregular or changing work pattern over the entire 12 month period, so there is no pattern to the hours worked and the hours and days of work are entirely irregular, the principles of four weeks' annual holidays and reaching agreement on what will constitute 'four weeks' in terms of time away from work, still apply.

One method for determining annual holiday entitlements and payments when employees do not have a 'normal and predictable number of days and hours' worked each week follows.

1. Determine what a week is for each employee each time holidays are taken based on what genuinely constitutes a working week. An employer and employee may agree on how an employee's entitlement to four weeks' annual holidays is to be met based on what genuinely constitutes a working week for the employee (in accordance with section 17 of the Holidays Act 2003). This should be based on the employee's actual roster for the week in question. If this is not clear, it could involve a system of averaging where the working week is unpredictable and variable.
2. Determine what portion of a week an employee is taking each time holidays are taken.
3. Multiply the portion by the greater of average weekly earnings (AWE) or ordinary weekly pay (OWP) to calculate the payment for the holidays
4. Deduct the portion of the entitlement taken from the leave balance. For example, if the leave balance before the leave was 4 weeks and the portion being taken was 1.2 weeks, the leave balance following the leave would be 2.8 weeks.

Many types of employees are described as **'casual employees'**. The range of uses of this term means it is not possible to include a single definition of casual employee, and there is no definition of this term in the Holidays Act. However, where an employee's employment pattern is **so intermittent or irregular that it is not possible in practice to provide four weeks' paid holidays,** then as an alternative to the solution in the paragraph above, the employee and employer can agree that they be paid annual holiday pay with their regular pay (ie on a PAYG basis). This will be rare. This should be set out in the employment agreement and shown as a separate calculation on any pay slips. This is covered in more detail in section 4.5 of this Guide.

Payment for annual holidays

Payment for annual holidays is at the greater of either the **ordinary weekly pay (OWP)** at the time the holiday is taken or the employee's **average weekly earnings (AWE)** over the 12-month period ending at the end of the last pay period before the annual holiday is taken.

When an employee is to take annual holidays, the first step is to determine what proportion of the entitlement is being taken, taking into account what a week means for that employee. This proportion may be a period of weeks, or a period of less than a week.

For example, if an employee who works three days per week has agreed with their employer that their 4-week holiday entitlement will be 12 days, then takes a day off work this will be one-third of a week of annual holidays.

In this case, payment would be a proportion of OWP or AWE based on the period of leave taken, namely, one-third of the greater of those weekly calculations.

Ordinary weekly pay (OWP)

OWP is the amount an employee receives under their employment agreement for an ordinary working week, including payments that are a regular part of the employee's pay and relate to the work they do each week. OWP includes:

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

Intermittent or one-off payments as well as discretionary payments are not included in OWP.

For many people, OWP is quite clear because they are paid the same amount each week.

When it is not possible to determine OWP this way, the Holidays Act provides a formula for working it out, being:

- taking the employee's gross earnings for either:
  - the four calendar weeks before the end of the pay period immediately before the calculation is made, or
  - if the employee's pay period is longer than four weeks, that pay period immediately before the calculation is made
- deducting from the gross earnings any payments that are irregular or that the employer is not bound to pay; and
- dividing the answer by four.

Sometimes an employment agreement may specify a special rate for OWP. If this is the case, the figure in the employment agreement should be compared with the actual OWP (as described above), and the greater of the two should be used as the OWP.

Average weekly earnings (AWE)

AWE is determined by calculating gross earnings over the 12 months prior to the end of the last pay period before the annual holiday is taken, and dividing that figure by 52.

Gross earnings

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

- salary and wages
- allowances (but not reimbursing allowances)
- all overtime
- piece work
- productivity or performance payments, for example, most commissions, bonuses and incentives
- payment for annual holidays, public holidays and alternative holidays (including cashed-up alternative holidays)
- payment for sick, bereavement and family violence leave
- the cash value of board and lodgings supplied

- amounts compulsorily paid by the employer under ACC (ie the first week of compensation)
- any other payments that are required to be made under the terms of the employment agreement.

Unless the employment agreement says otherwise, gross earnings do not include:

- reimbursements
- any weekly compensation payable under the Accident Compensation Act 2001 that the employer does not have to make
- payment for leave from work when an employee is on volunteer leave for military service
- payment for annual holidays that have been cashed-up (up to 1 week each entitlement year)
- true discretionary payments.

When to use relevant daily pay (RDP) and average daily pay (ADP)

For public holidays, alternative holidays, sick leave, bereavement leave and family violence leave an employee is entitled to be paid either their RDP or ADP.

RDP is the amount the employee would otherwise have earned on the day if they had worked.

ADP is a daily average of the employee's gross earnings over the past 52 calendar weeks before the end of the pay period immediately before the calculation is made.

More detailed explanations of RDP and ADP follow in the next sub sections.

An employer may only use ADP instead of RDP in two circumstances being:

- where it is not possible or practicable to determine the employee's RDP, or
- the employee's daily pay varies within the pay period when the holiday or leave falls.

Relevant daily pay (RDP)

RDP is the amount the employee would otherwise have earned on the day if the had worked. RDP includes their wages or salary for the time they would have worked, plus any of the following that are relevant:

- regular daily allowances which are likely to be taxable, for example, an on-call allowance
- productivity or incentive payments like commission and piece rates if the employee would have received them if they'd worked on the day
- overtime payments if the employee would have received them if they'd worked on the day
- the cash value of board or lodgings if the employer has provided this.

RDP does not include:

- employer-contribution payments into an employment superannuation fund
- reimbursements payable to the employee for the day, which are likely to be non-taxable.

An employment agreement may specify a special rate of RDP for the purpose of calculating 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 that would otherwise be calculated using the method above.

Average daily pay (ADP)

ADP may be used where it is not possible or practicable to determine the employee's relevant daily pay (RDP), or if the employee's daily pay varies within the pay period when the holiday or leave falls.

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

Otherwise working day (OWD)

Thinking about whether a day would be an 'otherwise working day' (OWD) is key to determining an employee's entitlement regarding public holidays, alternative holidays, sick leave, bereavement leave and family violence leave.

In most cases, whether a day would be an OWD is clear because the working week or roster is constant and both the employer and employee can understand and agree about whether the employee would otherwise work on the day.

Where the employer and the employee cannot agree whether a day should be an OWD, they should consider the following issues:

- the employee's usual work patterns
- the employer's rosters or other similar systems
- the reasonable expectations of the employer and employee as to whether the employee would work on the day concerned
- whether the employee works for the employer only when work is available
- whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave, bereavement leave or family violence leave, the employee would have worked on the day concerned
- what the employment agreement says
- whether it is during a closedown period (if the day falls during a closedown period, the above factors need to be taken into account as if the closedown period were not in effect).

Further information

- Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See:
  - Sections 16 and 17 for information on annual holiday entitlements
  - Section 8 for information on ordinary weekly pay
  - Section 5 for information on average weekly earnings
  - Section 14 for information on gross earnings
  - Section 9 for information on relevant daily pay
  - Section 9A for information on average daily pay
  - Section 12 for information on otherwise working days.
- Go to **www.employment.govt.nz** for more information and tools about holiday entitlements. Use search terms 'leave and holidays', 'relevant daily pay' or 'average daily pay'.

4.2 Annual holidays – payment for holidays taken

Annual holidays after completion of 12 months' continuous employment

If an employee takes annual holidays after their entitlement has arisen, their annual holiday pay is the greater of:

- their ordinary weekly pay (OWP) as at the beginning of the annual holiday, or
- their average weekly earnings (AWE) for the 12 months immediately before the end of the last pay period before the annual holiday is taken.

These calculations apply to all employees in these circumstances, including those whose pay has varied over the year or whose work pattern has changed during the year.

Annual holidays in advance

Employees can ask to take paid annual holidays in advance where they do not have an entitlement – either because they have not completed 12 months of continuous employment, or because they have used all of their entitlement. In these circumstances, approval is at the discretion of the employer, unless a right to take annual holidays in advance is included in the relevant employment agreement.

The payment for holidays taken in advance is still based on the greater of the employee's OWP or AWE. To calculate the AWE where the employee has less than 12 months of continuous employment, the gross earnings from starting work until the last pay period before the holiday are divided by the number of weeks worked.

To calculate the AWE where the employee has been employed for more than 12 months but is taking annual holidays in advance of entitlement, the calculation covers the 12 months prior to the end of the last pay period before the holiday.

Further information

› Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See Section 21 for information about calculation of annual holiday pay. See Section 22 for information about calculation for annual holidays in advance.

4.3 Annual holidays – pay at termination

Introduction

The Holidays Act provides two ways to calculate payment for annual holidays on the ending or termination of employment. These are where:

› an employee's employment ends before they have completed their first 12 months of continuous employment (that is, before the employee is entitled to annual holidays), or

› the employment ends after 12 months (that is where an entitlement to take annual holidays has arisen for the first and any subsequent years of employment).

Less than 12 months' continuous employment

Where an employee's employment ends before they have completed their first 12 months of continuous employment, they are entitled to a payment for annual holidays of no less than 8% of gross earnings during the employment. This entitlement is reduced by any payment for annual holidays taken in advance during the employment or by any payment for annual holidays that has been legitimately paid on a Pay-As-You-Go (PAYG) basis.

The gross earnings figure, that the 8% calculation is applied to, includes the value of any alternative days or public holidays paid out at termination.

More than 12 months' continuous employment

Where an employee's employment ends after becoming entitled to annual holidays, the first amount to be calculated is the greater of Ordinary Weekly Pay or Average Weekly Earnings for the annual holidays to which the employee is entitled under the Holidays Act up to their most recent anniversary date, as if the holidays were being taken at the end of the employment.

The second amount to be calculated is annual holiday pay for the part-year since the employee last became entitled to holidays, which is calculated at 8% of gross earnings since the entitlement last arose. Payment for any annual holidays taken in advance is deducted from the final amount, as is any amount legitimately paid on a PAYG basis.

The gross earnings figure, that the 8% calculation is applied to, includes the value of the untaken annual holiday entitlement and any alternative days or public holidays paid out at termination.

Alternative holidays at termination

If an employee has untaken alternative holidays when their employment ends, these days are paid at the same rate as their relevant daily pay or average daily pay for the last day of the employee's work, regardless of the rate of pay at the time they accrued the alternative day.

Accrued alternative holidays do not extend the period of employment for the calculation of annual holiday pay but are included in the gross earnings for the part-year calculation where 8% is paid.

Public holidays at termination

Employees can sometimes be entitled to be paid for public holidays that fall after their last day at work. To work out whether the employee is entitled to be paid public holidays that happen after their employment has ended, treat any unused annual holidays that they are entitled to as if they were taking it immediately after their last day of employment.

If a public holiday falls within this period:

- the employee must be paid for it if it falls on a day that they usually would have worked if they were still employed, and
- the annual holiday is extended by one day for each public holiday that they were entitled to be paid for – this extended period may have more public holidays, which they may also need to be paid for. This can happen if:
  - they have worked for the employer for at least 12 months and are entitled to annual holidays, and
  - they have unused annual holidays they are entitled to at the time their employment ends.

Example: calculation of final pay

Ted has been employed for one year and one month. He leaves his employment on 4 February, and the last date he became entitled to annual holidays was 4 January. Ted has already used one week of annual holiday so has three weeks remaining at the end of his employment. Ted also has two alternative holidays from working on public holidays that are left untaken at the end of his employment. Ted is entitled to:

- payment for Waitangi Day on 6 February
- payment for the two alternative holidays
- payment for the three weeks of annual holidays remaining of his four week entitlement from 4 January at the greater of average weekly earnings or ordinary weekly pay
- payment at 8% of gross earnings for the one month period between 4 January and 4 February. The gross earnings for the 8% calculation also include the holiday pay paid to Ted for his three weeks of unused holiday and the value of the Waitangi Day payment and payment for the two alternative holidays.

Unless agreed otherwise, the employer must pay outstanding holiday pay on the payday that relates to the employee's final period of employment. This is normally what would have been the next scheduled payday had the employment not ended.

Further information

› Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See:

- Section 23 for information on calculating holiday pay if the employment ends within 12 months
- Section 24 for information on calculating holiday pay if the entitlement to leave has arisen at termination
- Section 25 for information on calculating holiday pay if the employment ends before further entitlement has arisen
- Section 26 for information on payments may be cumulative
- Section 40 for information on the relationship between annual holidays an public holidays
- Section 60 for information on payment for alternative holidays.

4.4 Annual holidays – closedowns

Regular annual closedowns

The method of calculating the annual holiday entitlement is different where the employer chooses to have a regular or customary annual closedown. This closedown can occur either:

› across the entire workplace (for example, where a company closes over the Christmas/New Year period), or

› for part of an enterprise (for example, where the factory closes for maintenance while the office, dispatch and sales departments remain open).

The employer may implement such a closure only once a year and require employees to take annual holidays during the period of the closedown, even where this requires employees to take time off for which they are not fully reimbursed (eg unpaid leave). The employer is required to provide employees with at least 14 days' advance notice of the closedown.

For employees with no entitlement to annual holidays at the start of the regular closedown, the employer must pay 8% of their gross earnings since:

› the start of their employment, if they've not worked for their employer continuously for 12 months, or

› their last anniversary date for annual holidays, if they've already worked for their employer for at least 12 months – minus any amount already paid as 8% pay-as-you-go, or already taken as annual holidays in advance. The employer and employee can also agree that annual holidays can be taken in advance for the closedown period.

For employees who have worked less than a year at the start of the regular closedown, the anniversary date for their annual holidays entitlement will be moved to the date the closedown starts (or another nearby date that their employer chooses) – meaning they'll receive their next leave entitlement 12 months from this date. If the employer chooses another date this date must be reasonably connected to the timing of the regular annual closedown. For example, where there is a Christmas closedown, the date could be set at 15 December to ensure that it always comes before the annual closedown commences.

Entitlement to public holidays during a closedown period

If a business has a closedown period that includes public holidays (as can happen over the Christmas and New Year period) then the employee is entitled to paid public holidays if they would be 'otherwise working days' for them.

Further information

› Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See Sections 29-35 for information on closedowns.

4.5 Pay-As-You-Go (PAYG) holiday pay

Introduction

Pay-As-You-Go (PAYG) holiday pay refers to an arrangement where 8% of the employee's gross earnings are paid as annual holiday pay, in addition to their regular pay. The 8% payment is instead of the employee receiving an entitlement to take paid annual holidays at a later date.

There are only two circumstances where an employee and employer can do this:

› the employment is a genuine fixed-term agreement of less than one year, or

› the work is so intermittent or irregular that four weeks away from work is simply not possible in practice to provide.

In addition, this must be agreed to in the employee's employment agreement, and it must be paid in addition to the employee's regular pay, and must be identified as a separate component of the employee's regular pay (eg it cannot be incorporated into an hourly rate or salary, but must be paid on top of the usual hourly rate or salary payments).

It is important for employers to monitor employee work patterns to ensure they are still eligible to receive 8% PAYG. For example, an employee whose work pattern became regular and predictable would become entitled to 4 weeks' paid annual holiday 12 months later (in addition to any 8% PAYG they had already received).

Genuine fixed-term agreements of less than one year

The Employment Relations Act allows for fixed-term employment agreements if, on appointment, there is a genuine reason for the fixed-term. The employer must have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way, and the employer must also advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.

The employer must make sure that the employment agreement states in writing the way in which the employment will end, and the reasons for it.

Examples of genuine reasons:

› The job is to prune trees in the West Block, and your job will cease when all of the trees are pruned. I estimate that this pruning job will take you and your co-workers two months from the start date.

› This appointment is for a fixed-term to cover for an employee who is taking four months' leave. The employer must then specify the end date.

Where an employee is employed on a fixed-term agreement of less than 12 months, the employee and employer may agree to pay annual holiday pay with their wages, meaning that 8% of the employee's gross earnings will be added to their pay. This additional sum will be paid to the employee every pay cycle, and they will not receive paid annual holidays.

Any such arrangement must be included in the employment agreement and the 8% must appear as a separate and identifiable amount in the records and on the employee's payslip. On the completion of the fixed-term, the employee will have received all pay for annual holidays. No further payment will be outstanding and no annual holidays are available.

If the employee is later employed on one, or more, further fixed-term agreement/s of less than 12 months with the same employer, the same arrangement can be made, provided it is genuine and the two parties

agree and document the arrangement. Each fixed-term agreement must have its own genuine reason, and must set this out. Be aware that if you employ someone on a fixed-term, and keep extending that term, there is a risk that the law would see them as a permanent employee.

If the employer has incorrectly paid annual holiday pay on a PAYG basis, after 12 months' continuous employment, the employee will become entitled to paid annual holidays, and any amount paid on a PAYG basis may not be deducted from the employee's annual pay. Examples of incorrectly applying PAYG holiday pay for fixed-term agreements include:

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

Note that if PAYG holiday pay is paid, but the fixed-term exceeds 12 months, there is a risk to the employer that the employee will also become entitled to paid annual holidays despite (that is, in addition to) the 8% payments. Therefore PAYG arrangements are not recommended where it is possible that the employment will last longer than 12 months.

Intermittent or irregular work

Many employees who are described as '**casual**' are part-time employees who actually have an expectation of ongoing employment – for example, supermarket or hospitality employees whose work pattern is established on a fortnightly (or other) roster. Employees with a pattern of work, even where that pattern of work shows they work infrequently but with some predictability, are entitled to four weeks' holiday calculated as described earlier in this guide. In each case, the employer should take time to reassess the employee's actual pattern of work that often develops and changes over time. Carrying out an assessment at regular intervals will often help answer questions about an employee's entitlements. For a minority of employees, however, this is not the case. If the employee's work pattern is so intermittent or irregular that it's not possible in practice for the employer to provide the employee with four weeks of paid annual holidays, an arrangement can be agreed to add 8% of the employee's gross earnings as annual holiday pay to their pay.

For these employees, the arrangement to pay holiday pay at the rate of 8% in addition to the usual pay instead of providing an entitlement to paid holidays, must be by genuine agreement and be included in the employment agreement. The 8% annual holiday pay should appear as a separate and identifiable amount in records and on the employee's payslip. The 8% holiday pay must be paid in addition to the employee's salary or wages.

On the termination of the employment relationship, no additional pay for annual holidays is due.

Should an employer have incorrectly applied annual holiday pay on a PAYG basis then the employee will become entitled to their annual holidays as per normal and will be due payment for these regardless of the amounts already paid on the PAYG arrangement. Therefore it is recommended that employers be very careful about using this PAYG arrangement, and ensure that the employees in question are genuinely irregular and intermittent in their work pattern to the point that it is impossible in practice to calculate holiday pay in the usual manner.

If an employee agrees to enter into such an arrangement (which must be recorded in writing in the employment agreement), the employer would be wise to keep it under review to see whether a regular cycle of work has developed. If this occurs, the employer and employee should enter into a new employment agreement that provides for the employee to take annual holidays and that removes the 8% payment.

Here are two examples of intermittent or irregular employment for the purposes of the Holidays Act:

- a retired employee who is called back in emergencies to cover for sickness.
- a specialist tradesperson who works only when a particular process (such as a repairing machine) is required.

Further information

- Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See Section 28 for information on PAYG.
- Search 'Employment Relations Act 2000'. See Section 66 for information on fixed-term employment.

4.6 Cashing-up annual holidays

Employees are able to ask their employer to be paid out, in cash, up to one week of their entitlement to annual holidays per year.

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

Cashing-up annual holidays can only be at the employee's request and the request must be made in writing. Employees may request to cash-up less than a week at a time. More than one request may be made until a maximum of one week of the employee's annual holiday entitlement is paid out in each entitlement year. This means that the employer will need to keep a record of any annual holidays that have been cashed up, including the date they were cashed up, and how much of the employee's entitlement was cashed up. Remember that a maximum of 1 week of annual holidays can be cashed up in any 12 months. Note that if the employee has used all of their annual holiday entitlement, there will be no annual holidays to be cashed up.

The cashing-up provisions only apply to an employee's minimum holidays entitlement. In workplaces where employees get more than the minimum of 4 weeks' annual holidays, they may be able to cash-up the extra weeks. It depends on what it says in their employment agreement or workplace policy, and if their employer agrees to it. Employees must have at least 3 weeks of annual holidays that they can take off work.

Any request must be considered within a reasonable time and may be declined. However, this does not apply if the employer has a policy that does not allow cashing-up (see discussion below). The employee must be advised of the decision in writing and the employer is not required to provide a reason for their decision.

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

An employer cannot pressure an employee into cashing-up holidays. Cashing-up cannot be raised in wage or salary negotiations or be a condition of employment. Requests to cash up cannot be included in an employment agreement. However, an employment agreement may outline the process for making such a request. The process must meet the minimum requirements set out in the legislation, that is, 28A to 28F of the Holidays Act 2003.

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

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

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

Further information

- Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See Sections 28A to 28F for information on portion of annual holidays may be paid out.

  Cashing-up holidays is usually treated as income, so standard deductions (for example, tax, Kiwisaver, child support) may apply. It could also affect income-based entitlements like Working for Families or parental leave, so any impacts should be considered and discussed.
- Go to **www.kiwisaver.govt.nz** for information about Kiwisaver.
- Go to **www.ird.govt.nz** for information about Working for Families and child support.
- Go to **www.employment.govt.nz** and search 'parental leave'.
- For tax related matters contact Inland Revenue.

4.7 Public holidays

Introduction

The following chart shows the 12 public holidays observed in New Zealand. Some of the public holidays are observed on different dates each year. The holidays in the coloured boxes transfer to other days if they fall on weekend days (sometimes called 'Mondayising').

Public holiday dates for the current, previous and future years can be found on the Employment New Zealand website:

New Zealand public holidays

New Year's Day	1 Jan
Day after New Year's Day	2 Jan
Waitangi Day	6 Feb
Good Friday	date varies according to church calendar
Easter Monday	
ANZAC Day	25 Apr
King's Birthday	first Mon in Jun
Matariki	date varies according to the Māori lunar calendar (maramataka) (always on a Friday).
Labour Day	fourth Mon in Oct
Christmas Day	25 Dec
Boxing Day	26 Dec
Provincial Anniversary	varies depending on province (never a weekend)

Payment when the employee does not work on a public holiday

Where the public holiday falls on an employee's otherwise working day then they are entitled to have that day off work on pay, subject to the limited exceptions (see below). The pay for that day would be their relevant daily pay (RDP) or average daily pay (ADP). See section 4.1.

An employee who does not normally work on the day in question and who does not work, is not entitled to payment for the day. For example, a part-time employee who never works on Friday has no entitlement to payment for Good Friday.

Requiring an employee to work on a public holiday

An employer may require an employee to work on a public holiday when:

- the public holiday falls on a day the employee would otherwise have worked, and
- the employee's employment agreement specifies that the employee will be (or can be) required to work on the holiday.

Payment for work performed on a public holiday

If an employee works on any public holiday, that work is paid at a minimum payment of time-and-a-half for the time they actually work on the day. Payment must be for all work actually done on the day – if the employee works for a part day, or works longer than normal; they get paid for the time they actually worked, plus half that amount again.

If the employee gets paid penal rates (rates higher than the minimum legislation rates that employers and employees agree to for working additional days like weekends or public holidays) then the following should apply:

The employee's pay should be calculated as the greater of either:

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

The only time an employer may choose to use ADP to calculate an employee's pay for working on a public holiday, will be when that employee's daily pay varies in the pay period in question and it is 'not possible or practicable' to determine RDP.

If the daily pay varies in the pay period and the employer chooses to use ADP to determine the employee's pay for working on a public holiday, they must work out the portion of the employee's ADP that relates to the time actually worked on the day (minus any penal rates) and then multiply by one and a half.

Some employment agreements contain a special or penal rate for payment on a public holiday. In this situation, the figure (RDP or ADP, multiplied by one and a half) must be compared to the employees' Relevant Daily Pay (including any penal rates) and the employer must pay the greater amount.

Alternative holidays for working public holidays

If an employee works on a public holiday, they are entitled to be paid at least time and a half for the hours they actually work and if it is an otherwise working day for the employee they are also entitled to another full day off on pay.

This paid alternative holiday recognises that the employee has missed out on having a day off work on a day of national significance and enables them to take a paid day off at another time.

Entitlements to an alternative holiday do not apply where the employee only works for the employer on public holidays.

When taking an alternative holiday employees get the full day off paid on their relevant daily pay (RDP) or average daily pay (ADP) for the day taken, even if they only worked for a small part of the public holiday day.

The alternative holiday can be taken at any time mutually agreeable to the employer and employee, and is paid at the employee's RDP or ADP (where applicable) for the day taken off. However, the alternative holiday must be taken on a day that is an otherwise working day for the employee and cannot be taken on a public holiday.

If an employer and employee cannot agree when an alternative holiday is to be taken, the employer may determine the date, on a reasonable basis. The employer must give the employee at least 14 days' notice of the requirement to take the alternative holiday. Alternative holidays can also be cashed out after 12 months at the employee's request, if the employer agrees.

If any alternative holidays are outstanding at the end of employment, these are paid out at the rate of pay for the employee's last day of work (the RDP or ADP for that day).

Employees on call on public holidays

On-call employees – no call out – paid holiday but no alternative holiday

If, on a day they would otherwise be working, an employee:

- is on call and is called out, they are entitled to at least time and a half for the time worked – plus an alternative holiday
- is on call and has to limit their activities on the day to the extent that they haven't enjoyed a full holiday – for example, if they are required to stay at home all day - but are not called out, they are entitled to be paid at their relevant daily pay, or average daily pay (if applicable), and also get an alternative holiday
- is on call and but does not have to limit their activities on the day - meaning they have enjoyed a full holiday – and are not called out, they are entitled to be paid at their relevant daily pay, or average daily pay (if applicable), but do not get an alternative holiday

Note: An exception applies to the above, whereby an employee will not be entitled to an alternative holiday if they are employed to work, or be on call, only on public holidays.

Public holidays that fall during annual holidays

If a public holiday falls during a period of annual holidays, the employee is entitled to be paid the day as a public holiday if it is otherwise a working day for them and the day is not to be treated as part of their annual holidays. This means the public holiday must not be deducted from their annual holiday balance, or counted towards annual holiday taken, even though the employee had a paid day off.

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

Where the employee would have been working on a public holiday but is sick or bereaved or affected by family violence, the day would be treated as a paid, unworked public holiday. Therefore, the employee would be paid for the day at their relevant daily pay (or average daily pay) but they would not be due time-and-a-half or an alternative holiday.

Mondayisation

Special rules of transfer apply when some public holidays fall on weekends.

Christmas Day, Boxing Day, New Year's Day and Day after New Year's Day

If any of these public holidays 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 (depending on the circumstances) so that the employee still gets a paid day off if the employee would usually work on these days.

If the holiday falls on a Saturday or Sunday and that day would otherwise be a working day for the employee, the holiday remains at the traditional day and the employee is entitled to that day off on pay (unless their employment agreement requires them to work on this public holiday).

An employee cannot be entitled to more than four public holidays over the Christmas and New Year period, regardless of their work pattern.

Waitangi Day and Anzac Day

If the holiday falls on a Saturday or Sunday and that day would not otherwise be a working day for the employee, the holiday is transferred to the following Monday so that the employee still gets a paid day off if the employee would usually work on these days.

If the holiday falls on a Saturday or Sunday and that day would otherwise be a working day for the employee, the holiday remains at the traditional day and the employee is entitled to that day off on full pay (unless their employment agreement requires them to work on this public holiday).

Further information

- Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See Sections 43 - 61A for information on public holidays.
- Go to **www.employment.govt.nz** and search 'public holidays'.

4.8 Other leave

Entitlement to sick leave

There is a minimum provision of 10 days' paid sick leave a year after the first six months of continuous employment and an additional 10 days' sick leave after each subsequent 12-month period. (Note the subsequent 12-month period is counted from the employee's 6-month anniversary, so the sick leave anniversary will be different from the employee's annual holiday's anniversary.)

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

At any time when the employee does not have a sick leave entitlement (including during the first six months of continuous employment), the employer and employee can agree to the employee anticipating the sick leave entitlement. In this case, any sick leave taken can be deducted from the next entitlement that arises.

Employers and employees can also agree on unpaid sick leave, noting employers must act in good faith in response to any such request. This is sometimes done where the employee has no entitlement to paid sick leave yet, or has used up their entitlement. In such cases, care should be taken to document the agreement and accurately record the leave.

Unused sick leave is automatically carried over. For example, if someone uses only one day's sick leave from the 10-day entitlement in a 12-month period, they may carry over the other nine days, so in the next 12-month period, the total entitlement is 19 days' sick leave. A employee can accumulate up to 20 days' sick leave, although employment agreements can provide more generous sick leave and/or accumulation.

Accumulated sick leave cannot be exchanged for cash, or form part of any final payment to the employee on resignation or termination, unless the employer and employee agree to this.

Sick leave entitlements are not pro-rated in any way. For example, even if a part-time employee works three days a week, they become entitled to 10 days' sick leave a year after being in continuous employment for six months.

Entitlement to bereavement leave

There are two separate entitlements to bereavement leave after six-months' continuous employment:

An employee is entitled to bereavement leave for a minimum of three days per bereavement in the following circumstances:

- The employee's immediate family member dies (for example, parent, child, partner or spouse, grandparent, grandchild, brother, sister, parent-in-law).
- The employee has a miscarriage or stillbirth.
- Another person has a miscarriage or stillbirth and the employee:
  - is the person's partner
  - is the person's former partner and would have been a biological parent of a child born as a result of the pregnancy
  - had agreed to be the primary carer of a child born as a result of the pregnancy (for example, through a formal adoption or a whangai arrangement)
  - is the partner of a person who had agreed to be the primary carer of a child born as a result of the pregnancy.

  An employee is entitled to bereavement leave for a minimum of one day per bereavement if another person dies and the employer accepts the employee had a bereavement.

  In considering whether a bereavement has occurred, the employer should take into consideration:
  - how close the association was between the employee and the other person
  - whether the employee is responsible for any aspects of the ceremonies around the death
  - whether the employee has any cultural responsibilities they need to fulfil in respect of the death.

Any application for bereavement leave should be treated by the employer in good faith.

Entitlement to family violence leave

There is a minimum provision of 10 days' paid family violence leave a year after the first six months of continuous employment and an additional 10 days' paid family violence leave leave after each subsequent 12-month period. (Note, the subsequent 12-month period is counted from the employee's 6-month anniversary, so the family violence leave anniversary will be different from the employee's annual holiday anniversary.)

Unlike sick leave, unused family violence leave does not accumulate. An employee cannot carry forward any family violence leave not taken in a 12-month period.

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 employee becoming employed.

At any time when the employee isn't entitled to family violence leave (including during the first six months of continuous 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.

Employers and employees can also agree on unpaid family violence leave, noting employers must act in good faith in response to any such request. For example, the employee might have no entitlement to paid family violence leave yet, or has used up their entitlement. In such cases, care should be taken to document the agreement and accurately record the leave.

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.

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 continuously with the same employer.

Employees who are affected by family violence also have the right to request short-term (up to two months) flexible working arrangements. The requirements for this are set out in the Employment Relations Act 2000.

Payment for sick, bereavement and family violence leave

Payment for sick leave, bereavement leave and family violence leave should be at the rate the employee would ordinarily be paid on the day leave is taken (Relevant Daily Pay (RDP) or Average Daily Pay (ADP) where applicable).

Where the employee would have been working on a public holiday but is sick or suffered bereavement or is affected by family violence, the day would be treated as a paid, unworked public holiday.

An employer must pay an employee for each day of sick, bereavement, or family violence leave they take on a day they would otherwise have worked, for example if the employee was rostered to work on that day. The sick, bereavement, or family violence leave would be paid at the employee's relevant daily pay (RDP) or average daily pay (ADP).

Leave entitlement for non-continuous employees

Employees who have not worked for an employer continuously for at least six months will still be entitled to sick, bereavement and family violence leave if they have worked for the employer for a period of six months for:

- an average of 10 hours per week, and
- at least one hour in every week or 40 hours in every month.

Parental leave

Under the Parental Leave and Employment Protection Act 1987, both male and female employees may become entitled to parental leave, if they have worked for the employer for the required length of time, and if they and their spouse/partner are going to have a child or become permanent primary caregivers of a child under six years old.

Care of a child

Parental leave is for:

- a biological mother who is pregnant or has given birth to a child
- a person who takes permanent primary responsibility for the care, development, and upbringing of a child under six years old (such as by adoption)
- the spouse or partner of a person who is pregnant or taking permanent primary care of a child under the age of six years.

Remember that 'spouse' and 'partner' includes a spouse, a civil union partner, or a de facto partner.

How long the employee needs to have been employed for

An employee may have an entitlement to parental leave if they meet either the 6-month employment test, or the 12-month employment test.

The 6-month employment test is:

- where the employee has been employed by the same employer
- for at least an average of 10 hours a week
- in the six months immediately preceding either:
  - the expected date of delivery of the child, or
  - the assumption of responsibility for the care of the child under six.

The 12-month employment test is:

- where the employee has been employed by the same employer
- for at least an average of 10 hours a week
- in the 12 months immediately preceding either:
  - the expected date of delivery of the child, or
  - the assumption of responsibility for the care of the child under six.

If your employee is expecting to have a baby or assume care of a child, and they meet either the six-month employment test, or the 12-month employment test, they may be entitled to leave from your employment and in most circumstances employment protection while they are on leave. Your employee will have to notify you of their intention to take parental leave, and you will have to respond.

Further information

- Go to **www.employment.govt.nz** and search 'parental leave'.

While you are not required to pay an employee while they are taking parental leave, they may qualify for up to 26 weeks of parental leave payments. This is administered through IRD, and you and your employee will need to complete a form. Go to **www.ird.govt.nz** for more information.

You and your employee can also agree on keeping in touch days, where your employee can return to paid work during their parental leave, for up to 64 hours. Find out more on the Employment New Zealand website. Go to **www.employment.govt.nz** and search 'parental leave'.

If the employee becomes entitled to annual holidays during parental leave or in the following year, that holiday pay can be paid at the rate of their average weekly earnings over the year before the annual holidays. The employer does not have use the greater of average weekly earnings and ordinary weekly pay. Payments to the employee such as for 'keeping in touch' hours, need to be included in these calculations. Note that if the employee has previous entitlements they hadn't used, then the normal pay provisions in the Holidays Act still apply to that leave.

Sick leave and family violence leave relationship to ACC entitlements

The following rules apply in relation to the ACC scheme:

- When the employee is taking leave for the first week of a non-work accident, sick leave or family violence leave (if applicable) may be used.
- If an employee has a work-related accident, the employer has to pay 'first week compensation' and cannot require the employee to take that time off as other leave.
- If an employee is receiving 'first week compensation' for a work-related accident, an employer and employee can (in most circumstances) agree that the employer will top up the 'first week compensation' payment from 80% to 100% by using one day of the employee's sick leave entitlement (or family violence leave entitlement, if applicable).
- If an employee has a work-related or non-work-related accident and remains on weekly compensation, the employer cannot require the employee to take time off as other leave.
- If an employee is receiving weekly compensation from ACC, the employer has no obligation to pay the employee.

Where the period of leave on ACC is in excess of five days (for either workplace or non-work accidents), the employer and employee can (in most circumstances) agree that the employer will top up the ACC payment from 80% to 100% by reducing the employee's sick leave or family violence leave (if applicable) entitlement by one day for each five days' leave taken.

Further information

- Go to **www.legislation.govt.nz** and search 'Holidays Act 2003'. See Sections 63 to 72 for information about sick, bereavement and family violence leave.
- Go to **www.employment.govt.nz** for further information about sick, bereavement, family violence and parental leave, as well as flexible working for employees affected by family violence.
- Go to **www.acc.co.nz** for information about ACC entitlements.

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