



Pay and the minimum wage



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Department of Labour
TE TARI MAHI



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The Department of Labour provides information and investigates problems to do with employment and workplace health and safety. We can help employers and employees with:

- › employment conditions
- › minimum legal requirements
- › problem resolution
- › health and safety
- › ways to work better
- › labour market information.

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0800 20 90 20

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

■ Disclaimer

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Department of Labour is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

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→ Introduction

Employees generally agree to be employed, under some kind of contract of service, to work for some form of payment. This can include wages, salary, commission and piece rates.

Employers must ensure that employees are paid fairly and need to understand minimum pay entitlements for all employees including:

- › adults
- › trainees
- › new entrants
- › children, and
- › people with disabilities.

Paying employees fairly also means:

- › women and men must receive the same pay rates for doing the same or substantially similar work
- › an employer cannot discriminate due to an employee's colour, race, ethnic or national origins, sex (including pregnancy or childbirth status), marital or family status, age, disability, religious or ethical belief, political opinion, sexual orientation or union activity.

This guide helps employers and employees ensure the correct calculation of wages. Topics covered include:

- › when and how wages should be paid
- › deductions
- › minimum pay
- › working out annual holiday pay
- › working out pay for other holidays and leave
- › entitlements at the end of employment
- › keeping accurate records.



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→ When and how wages should be paid

The Wages Protection Act 1983 sets out the way wages must be paid, and prevents unlawful deductions from wages.

Employees should be paid on the day and at the intervals that have been agreed with the employer. Employers cannot change the normal pay day without the agreement of the employee.

Employers are obliged to pay wages in cash (i.e. New Zealand coins or banknotes) unless:

- › the employee is employed by the Crown (government) or a local authority – then they can be paid by cheque
- › an employee has requested in writing or given the employer written consent to pay wages by postal order, money order, cheque or direct credit
- › the employee is away from the proper or usual place for the payment of their wages – then they can be paid by postal order, money order, or cheque
- › the employment agreement permits some other form of payment.

Employers can't put any requirements on their employee about how the employee spends their wages.

→ Deductions

Employers generally can't make deductions (take money) from employees' wages. Employers can only do this where:

- › an employee has agreed to or requested the deduction in writing. The employee can vary or withdraw this consent by giving notice in writing at any time. The employer must then vary or stop the deductions within two weeks of receiving the notice or as soon as practicable
- › an employment agreement says the money can be taken out (for example, for union fees in a collective agreement)
- › an employer wishes to recover overpayments where the employee has been absent from work without the employer's authority, been on strike, locked out or suspended. The employer may only recover an overpayment 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 Court directs that a deduction be made
- › a bargaining fee arrangement applies to the employee
- › an employee is required by law (for example, income tax, child support payments or other statutory purposes) to make payments.

If an employee is provided with board and lodging the employer may deduct the costs of board or lodging where the amount is fixed under any Act, determination or agreement. If the amount payable is not fixed, the employer may deduct no more than 15% for board, or no more than 5% for lodging.

If there is a breach of the Act or an employment agreement, call the Department of Labour free on 0800 20 90 20.



→ Minimum pay

■ The minimum wage

There are three minimum wage rates:

- › the **adult minimum wage** applies to all employees aged 16 and over who are not new entrants or trainees
- › the **new entrants minimum wage** applies to employees aged 16 and 17, except for those who have completed 200 hours or three months of employment in the workforce, whichever is shorter; or who are supervising or training other workers; or who are trainees
- › the **training minimum wage** applies only to employees aged 16 and over who are doing recognised industry training involving at least 60 credits a year.

There is no statutory minimum wage for employees who are under 16 years old.

A small number of people hold an exemption from the minimum wage (see the section about minimum wage exemptions).

The minimum wage rates are reviewed every year. Information on the current minimum wage is provided on the Department of Labour website www.dol.govt.nz/er/pay.

Employees have to be paid at least the minimum hourly wage rate for any extra time worked over eight hours a day or 40 hours a week.

Anyone who thinks they are being paid less than the minimum wage should call the Department of Labour free on 0800 20 90 20.

■ Piece rates

For employees on piece rates – for example, workers who get so many cents a kilogram for fruit picked, or so many dollars per garment produced – the total amount earned still can't be less than the minimum wage.

■ Who gets the minimum wage

Employees should get at least the minimum wage if they are 16 years of age and over, whether they are a full-time, part-time or casual employee, a home worker, or paid wholly or partly by commission. The minimum wage doesn't apply to people who have an exemption.

Employers and employees may agree to terms that are more than the legislative minimum, but may not agree to terms that are less.

■ Minimum wage exemption

The Minimum Wage Act 1983 provides that Labour Inspectors from the Department of Labour 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. Call the Department of Labour free on 0800 20 90 20 for more information.

■ Who is a new entrant

A new entrant is an employee who:

- › is 16 or 17 years of age; and
- › has not completed three months or 200 hours of employment, whichever is the shorter; and
- › is not supervising or training other workers; and
- › is not subject to the minimum training wage.

The adult minimum wage applies to a 16 or 17-year-old employee who is not subject to the training minimum wage, if they:

- › have completed three months or 200 hours of employment, whichever is the shorter, or
- › are supervising or training other workers.

■ How to calculate the three months or 200 hours of employment

The three months or 200 hours includes any employment undertaken after the age of 16 years old and includes employment undertaken with different employers. However, note that if an employee works for more than one employer during a month, then this only amounts to one month of employment.

By law employers are required to keep wage and time records for all employees. The wage and time records for employees aged under 20 years are required to show the employee's age. Employers can be asked to provide a written statement about the number of hours or the period worked.



■ Supervising or training other workers

Employees who are 16 or 17 years of age and supervising or training other workers are entitled to be paid at least the adult minimum wage rate.

There is no legal definition of “supervising or training other workers”. Who is considered to be a worker supervising or training other workers will depend on the facts of each individual situation.

In general, if an employee is 16 years of age or older and is overseeing the performance of another employee, or instructing another employee in the performance of their job it is likely he or she will fall within the category of supervising or training other workers. It is not necessary for an employee to have direct line management responsibility for other employees in order to qualify as an employee who is supervising or training other workers.

To fall within this category, the role of supervising or training would need to be a part of that person’s job, not a one-off event.

■ The minimum training wage

The minimum training wage applies to people who are required by their employment agreements to undertake recognised industry training involving at least 60 credits a year. The new entrants minimum wage does not apply to trainees.

An employee being paid less than the relevant minimum wage can contact a Labour Inspector, who may intervene in the workplace to recover any money owed and ensure further problems do not occur. Employees can also get help from the Department of Labour’s mediation services. Call the Department of Labour free on 0800 20 90 20.



→ Payment for annual holidays

All employees are entitled to at least four weeks' paid holidays a year. Employees get their annual holiday entitlements on their first and subsequent anniversaries after starting work. More information on establishing entitlements to holidays can be found on our website www.dol.govt.nz/er/holidaysandleave or by calling us free on 0800 20 90 20.

Payment for annual holidays is at the greater of either the ordinary weekly pay at the time the holiday is taken, or the employee's average weekly earnings over the 12-month period before the annual holiday is taken. These calculations apply to all employees, including those whose pay has varied over the year or whose work pattern has changed during the year.

■ Definitions: "Ordinary weekly pay" and "average weekly earnings"

"Ordinary weekly pay" represents everything an employee is normally paid weekly, including:

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

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

1. For many people, ordinary weekly pay is quite clear because they are paid the same amount each week.
2. Where ordinary weekly pay is unclear for any reason, the Act provides a formula for working it out. Ordinary weekly pay is established by:
 - › going to the end of the last pay period and from that date, going back
 - four weeks, or
 - if the pay period is longer than four weeks, the length of the pay period
 - › taking the gross earnings for that period
 - › deducting from the gross earnings any payments that are irregular or that the employer is not bound to pay
 - › dividing the answer by four.

3. Sometimes an employment agreement will include a specified ordinary weekly pay. If this is the case, the figure in the employment agreement should be compared with the actual ordinary weekly pay (as calculated under 1 or 2 above), and the greater of the two should be used as "ordinary weekly pay".

"Average weekly earnings" are determined by calculating gross earnings over the 12 months prior to the end of the last payroll period before the annual holiday is taken, and dividing that figure by 52. The following payments make up gross earnings and should be included in the calculation:

1. Salary and wages.
2. Allowances (but not reimbursing allowances).
3. All overtime.
4. Piece work.
5. At-risk, productivity or performance payments.
6. Commission.
7. Payment for annual holidays and public holidays.
8. Payment for sick and bereavement leave.
9. The cash value of board and lodgings supplied.
10. Amounts compulsorily paid by the employer under ACC (i.e. the first week of compensation).
11. Any other payments that are required to be made under the terms of the employment agreement.

Unless the employment agreement says otherwise, reimbursement payments and discretionary or ex gratia payments (for example, genuinely discretionary bonuses) are not included in these calculations; nor are payments made by ACC, or when an employee is on voluntary military service, or payments for cashed-up holidays.

Remember: When calculating both "ordinary weekly pay" and "average weekly earnings", the greater figure is used for the employee's annual holiday pay.

When an employee is to take annual holidays, the first step is to determine what portion of the



entitlement is being taken, taking into account what a week means for that employee. This portion may be a period of weeks, or a period of less than a week.

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

In this case, payment would be a proportion of ordinary weekly pay or average weekly earnings based on the period of leave taken, namely, one-third of the greater of those weekly earnings.

The Act describes how to calculate annual holiday payments in a variety of circumstances, such as:

- › Employees after completion of 12 months' service.
- › Employees during their first year of service.
- › Employees who take annual holidays in advance of entitlement.
- › On an employee's resignation or termination.
- › Employees on genuine fixed-term agreements.
- › Moving from fixed-term to permanent employment with the same employer.
- › Where the fixed-term agreement is not genuine or exceeds 12 months.
- › Employees with intermittent or irregular work patterns.
- › Some of these are detailed below and more details on how to make all these calculations can be found in the *Holidays and Leave* booklet.

■ When should annual holiday pay be paid?

Employees are entitled to receive their pay for annual holidays before the holiday commences, unless the employer and employee agree that the normal pay cycle will continue undisturbed by the time off work.

This provision is designed to ensure that employees have money available to them to pay for the travel and accommodation expenses involved in a holiday, which often are required either at the start of a holiday or in advance.

If an agreement is reached to pay the employee any annual holiday pay in their normal pay cycle, it is advisable to record it either as part of the employment agreement or in writing on a case-by-case basis.

■ Taking annual holidays in advance of entitlement

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

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

■ Regular annual closedowns

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

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

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

The Holidays Amendment Act 2010 clarifies how to determine whether a day that falls during a closedown period would be an otherwise working day in regard to entitlements to public holidays, alternative holidays, sick leave and bereavement leave. See section 12 of the Act.

For employees in their first year of employment, the level of annual holiday pay for the period of the closedown can be established by:

- › the employer paying the employee 8% of gross earnings to date, or



- › the employer and employee agreeing to the employee taking annual holidays in advance and being paid, even though the employee is not yet entitled to annual holidays.

If you are in doubt, the Department of Labour can assist with guidance by calling us free on **0800 20 90 20**.

■ **Cashing-up annual holidays**

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

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

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

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

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

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

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

at least the same as if the employee had taken the holidays.

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

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

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

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

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

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



■ Pay-as-you-go provisions

The Holidays Act 2003 allows “pay-as-you-go” holiday pay arrangements in these circumstances:

- › employees on genuine fixed-term agreements of less than 12 months – this reflects the fact that these employees are not expected to reach the date on which they would normally qualify for annual holidays; and/or
- › employees with a work pattern that is intermittent or irregular (genuine casual work) – this reflects the fact that the employee’s employment pattern may mean it is not meaningful or practicable to attempt to provide them with four weeks paid annual holidays; and
- › the arrangement must be recorded in writing and should be shown on the employee’s payslip.

Employees paid on a pay-as-you-go basis are not entitled to paid time off for annual holidays.

The Employment Relations Act 2000 allows for fixed-term employment agreements if, on appointment, there is a genuine reason for the fixed term. Where such a fixed-term agreement is for less than 12 months, an employee may agree to the employer adding 8% to their gross weekly earnings in lieu of annual holidays or in lieu of getting an aggregated 8% at the end of the fixed term.

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

If the employee is later employed on one or more further fixed-term agreements of less than 12 months with the same employer, the same arrangement can be made, even when there is no break in employment, provided the two parties agree and document the arrangement.

Fixed-term agreements are, in some cases, linked to the completion of projects. In these circumstances, there is a risk that the fixed term will exceed 12 months, at which time the employee becomes entitled to paid annual holidays, despite having already been paid on a pay-as-you-go basis. Therefore, pay-as-you-go arrangements are not recommended where it is possible that the employment will last longer than 12 months.

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

If an employee enters into a permanent working arrangement, the payment of the additional 8% annual holiday pay in the employee’s regular pay must cease.

The employee will then become entitled to four weeks annual holidays one year after the final fixed term period started. Because the employer has already paid the additional 8% annual holiday pay during the fixed term period, the pay for annual holidays is reduced by the amount of holiday pay already paid at 8% during the final period of fixed term employment.

■ Where the fixed term agreement is not genuine or exceeds 12 months

If an employer has incorrectly paid annual holiday pay on a pay-as-you-go basis, after 12 months’ continuous employment the employee will become entitled to paid annual holidays, and any amount paid on a pay-as-you-go basis may not be deducted from the employee’s annual holiday pay. Examples of circumstances where this occurs are:

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

■ Employees with irregular work patterns (genuine casual work)

Many employees who are described as “casual” are part-time employees whose future employment is actually clear – for example, supermarket or hospitality employees whose work pattern is established on a fortnightly roster. These employees are entitled to four weeks’ holiday calculated as described earlier.

For a minority of employees, however, this is not the case. Generally, these are employees whose employment is triggered by an event that cannot be accurately anticipated with no expectation of ongoing employment beyond the event, or whose work pattern can be described as so irregular or intermittent that the concept of four weeks away from work is difficult to apply. In such cases, an arrangement can be agreed to add 8% of the employee’s gross earnings as annual holiday pay to their pay.

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



Payment for other holidays and leave

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

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

Definition: 'Relevant daily pay'

Relevant daily pay is used to calculate payment for public holidays, alternative holidays, sick leave and bereavement leave. Relevant daily pay is the amount the employee would otherwise have earned on the day if they had worked, and includes:

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

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

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

It is advisable for the employer to attempt to calculate an employee's relevant daily pay in the first instance. An employer has the discretion to use either relevant daily pay or average daily

pay if their employee's pay varies within the pay period in question.

Definition: 'Average daily pay'

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

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

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

Definition: 'Penal rate'

A penal rate is an identifiable additional amount that is payable to compensate the employee for working on a particular day or type of day.

Examples include:

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

Allowances, such as wet weather money, are not penal rates, nor are overtime rates or special rates for working a sixth or seventh day in a week.



→ Public Holidays

Employees are entitled to a paid day off on a public holiday if it would otherwise be a working day. These public holidays are separate from and additional to annual holidays.

There are two groups of holidays, with slightly differing entitlements applying to each:

1. Christmas and New Year: Christmas Day (25 December), Boxing Day (26 December), New Year's Day and the day after (1 and 2 January).
2. All other holidays:
 - Waitangi Day (6 February)
 - Good Friday and Easter Monday (dates variable)
 - ANZAC Day (25 April)
 - Queen's Birthday (first Monday in June)
 - Labour Day (fourth Monday in October) and
 - Provincial Anniversary Day (date determined locally).

See more detailed information on public holidays in the *Holidays and Leave* booklet.

■ Payment when the employee does not work on a public holiday

If an employee has a day off on a public holiday, the employee is paid for that day if it would "otherwise be a working day" for them. The employee is entitled to be paid their 'relevant daily pay' or 'average daily pay' (see Definitions of 'Relevant Daily Pay', 'Average Daily Pay' and 'Penal Rates' on p.13). For most employees working a regular pattern of hours, the pay cycle continues unchanged.

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

■ Payment for working on public holidays

The starting point for payment for working on a public holiday is the employee's relevant daily pay or average daily pay (see Definitions of 'Relevant Daily Pay', 'Average Daily Pay' and 'Penal Rates' on p.13). If an employee works on any public holiday, that work is paid a minimum payment of time and a half for the time they actually work on the day.

As of 1 April 2011, an employee is entitled to the greater of either:

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

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

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

Examples of how time and a half of relevant daily pay or time and a half of average daily pay may be calculated can be found in the *Holidays and Leave* booklet.

Where the employee is working a shift that includes some time on the public holiday, only the time actually worked on the public holiday attracts the minimum time and a half payment; the balance may be paid at the normal rate of pay. That is unless the employee and employer agree to transfer the public holiday so that it covers one whole shift (see below).

Where the person is specifically employed only to work on public holidays (for example, an employee who is only employed to work at the racetrack for the Waitangi Day meeting), there is no entitlement to an alternative day's holiday, but the employee must still be paid at least time and a half.

Some employment agreements specify a salary rate with unspecified hours or patterns of work, or set specific wage rates for public holidays.



Employees on such agreements must be paid at least time and a half for the time actually worked if they work on a public holiday.

Employment agreements can also include specified penal rates for particular days worked – for example, double time for working on a Sunday. Where a public holiday falls on such a day, the employee is entitled to the portion of their relevant daily pay that relates to the time actually worked on the day, including any penal rate in the employment agreement, or time and a half of the portion of relevant daily pay or average daily pay that relates to the time actually worked on the day excluding any penal rate, whichever is the greater. They are not entitled to time and a half on top of the penal rate in the employment agreement.

Therefore, an employee who works on an ANZAC Day that falls on a Sunday, and who is entitled under their employment agreement to double time rates on Sunday, receives double time, as the double time rate is more than the time and a half provided for in the Holidays Act.

■ **Payment where an employee is sick or bereaved on a public holiday**

Where the employee would have been working on a public holiday but is sick or bereaved, the day would be treated as a paid unworked public holiday. Therefore:

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

■ **Transferring a public holiday**

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

An employee is entitled to a paid day off on the day the public holiday is transferred to. The employee should be paid their relevant daily pay or average daily pay for the day (see Definitions of 'Relevant Daily Pay', 'Average Daily Pay' and 'Penal Rates' on p.13).

If the employee works on the day the public holiday is transferred to, then they are entitled to be paid time and a half for the hours worked and to receive a whole day's alternative holiday.

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

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

Employees working shifts that start and end on different days can transfer part of a public holiday, by agreement with their employer, so that the public holiday covers one whole shift.

Employers may have a workplace policy that they will not transfer public holidays.

■ **Alternative holidays for working public holidays**

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

This provision includes employees working shifts and some employees on call. Both types of employees get the full day off, even if they only work for a small part of the day.

The alternative holiday can be taken at any time mutually agreeable to the employer and employee, and is paid at the employee's relevant daily pay or average daily pay (where applicable) for the day taken off.

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

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

See the Department of Labour website www.dol.govt.nz/er/holidaysandleave or call us free on 0800 20 90 20.



■ Employment agreements

Employment agreements need to specifically provide that an employee will receive at least time and a half for working on a public holiday. Any such provision must be consistent with the Holidays Act 2003.

An employment agreement cannot specify that the rate of pay already includes a component for time and a half.

In most cases, what time and a half means will be easy to identify. For example, if the employee has regular hours each week and is paid an hourly rate and no additional payments, then under relevant daily pay they are entitled to one and a half times that rate for the time worked on a public holiday, as in the following clause:

“The pay rate for this position is \$15 per hour. For time worked on a public holiday, the pay rate is \$22.50 per hour (time and a half)”.

In other cases, there are a number of ways this can be done appropriately, depending on the wishes of the employer and employee. This may be a day rate, part-day rate or hourly rate.

The basis on which pay for work on a public holiday is calculated should ideally be included in the employee’s employment agreement, if the person is likely to work on a public holiday.

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

As of 1 July 2011, employers must retain a signed copy of the employment agreement or the current signed terms and conditions of employment.

■ The effect of various work patterns

The Holidays Act 2003 addresses the public holiday entitlements for employees in a number of work patterns where entitlements are unclear, including:

- › employees working shifts
- › employees on call
- › where the parties dispute whether a day would “otherwise be a working day”.

Employees working shifts are entitled to no less than:

- › their relevant daily pay for their normal rostered shift when they take a public holiday as a day off work
- › the greater of time and a half or relevant daily pay including penal rates in their employment agreement for hours worked on the public holiday, plus, if the day would otherwise be a working day, an alternative holiday for each public holiday or part of a public holiday the shift covers.

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

- › If the employee is called out, they are entitled to at least time and a half for the time worked, plus a full day’s paid alternative holiday if the day would otherwise be a working day for them.
- › If the employee is required to restrict activities on the day to the extent that they have not enjoyed a full holiday – for example, if the employee is required to stay at home all day, but is not called out – the employee is entitled to a full day’s paid alternative holiday if the day would otherwise be a working day for them.
- › If the employee is on call, but is not required to restrict activities – for example, if the employee can choose not to accept the call-out – entitlement to an alternative holiday would arise only if the employee accepts a call-out and the day would otherwise have been a working day for the employee.

If the employee is not called out but the day would otherwise be a working day, they would be entitled to their relevant daily pay or average daily pay, where applicable. Any payment for being on call would be as included in the employee’s employment agreement or as negotiated by the parties.



→ Payment for sick leave

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

Where relevant daily pay is used as the basis of calculation (see Definitions of 'Relevant Daily Pay', 'Average Daily Pay' and 'Penal Rates' on p.13) the payment can include overtime when overtime would have been worked on the day. For example, if the employment agreement specifies an hour for lunch but the employee, at the employer's request, usually takes only half an hour for lunch, the employee's sick leave payment would include the extra half hour normally paid for.

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

Where the employee works continuously but to an irregular pattern, sick leave would be payable if the employee was rostered to work on the particular day leave is taken, or could have expected to be rostered. The sick leave would be paid at the employee's relevant daily pay or average daily pay. Payment for sick leave is made in the normal pay cycle.

→ Payment for bereavement leave

Payment for bereavement leave should be at the rate the employee would ordinarily be paid on the day leave is taken, their relevant daily pay, or their average daily pay (where applicable). Payment for bereavement leave is made in the normal pay cycle.



→ Entitlements on Resignation or end of employment

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

■ Annual holidays

The Act provides two ways to calculate payment for annual holidays on resignation or termination. These are:

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

Where an employee resigns or employment ends before they have completed their first 12 months of service, they are entitled to a payment for annual holidays of 8% of gross earnings during the employment. This entitlement is reduced by any payment for annual holidays taken in advance

during the employment or by any payment for annual holidays on a pay-as-you-go basis.

Where an employee resigns or employment ends after becoming entitled to annual holidays, the first amount to be calculated is the greater of ordinary weekly pay or average weekly earnings for the annual holidays to which the employee is entitled under the Act, as if the holidays were being taken at the end of the employment.

If the employee's rate of ordinary weekly pay at the time is not clear, the calculation shown in the "Definitions" (on p.9) is used to establish the correct figure. The 12 months prior to leaving are used to establish average weekly earnings.

The second amount to be calculated is annual holiday pay for the period since the employee last became entitled to holidays, which is calculated at 8% of gross earnings since the entitlement last arose.

The payment for any annual holidays taken in advance is deducted from the final amount, as is any amount paid on a pay-as-you-go basis.

Example: Calculation of final payment for annual holidays

Ted leaves his employment on 12 May, and the last date he became entitled to annual holidays was 12 April. Ted is entitled to:

- › payment for any holidays remaining of his four week entitlement on 12 April (and payment for any outstanding holidays from earlier entitlement) at the greater of average weekly earnings or ordinary weekly pay
- › payment at 8% of gross earnings for the one month period between 12 April and 12 May.



■ Public holidays

On resignation or termination, the employee's final date of work is notionally extended by any annual holiday entitlements not taken, and any public holidays falling during that period must be dealt with in accordance with the Holidays Act 2003.

For example, if an employee is to finish work four days before a public holiday and accrued annual holidays represent more than four days, the employee is entitled to a day's payment at their relevant daily pay or average daily pay (if applicable) for the public holiday if it is a day on which they would normally have worked.

Public holidays falling during the notice period are dealt with in terms of the general provisions of the Act.

■ Alternative holidays

If an employee has alternative holidays that accrued from working on a public holiday and that have not yet been taken or paid out, the days are paid on resignation at the same rate as their relevant daily pay or average daily pay for the last day of the employee's work, regardless of the rate of pay at the time they accrued.

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

■ Sick leave and bereavement leave

Employees continue to be entitled to sick leave and bereavement leave during the period they are working out their notice. There is no entitlement to receive payment for unused sick leave on resignation.

Example: 'Calculation on termination'

Jason resigns and finishes work on Friday, 16 October. Jason has been paid up to the preceding Tuesday 9 October. He has three days' accrued alternative holidays and is entitled to four weeks' paid annual holidays. He last became entitled to annual holidays on 25 June.

His final payment is made up of:

- › payment for his work since the last pay period – that is, eight days' pay for Wednesday, 10 October through to Friday 16 October
- › payment for his three accrued alternative holidays at the relevant daily pay rate for working on Friday 16 October or at his average daily pay rate (if applicable)
- › payment of four weeks' annual holiday pay calculated as per the definitions of "ordinary weekly pay" and "average weekly earnings"
- › an additional day's payment for Labour Day at relevant daily pay or average daily pay (if applicable), as it falls during the four weeks' notional annual holidays added to the end of his employment
- › an additional 8% of his gross earnings since 25 June 2009.

These gross earnings include:

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



→ Keeping accurate records

The Employment Relations and Holidays Acts require employers to maintain wage, time, holiday and leave records for their employees.

Employee records must be made available to employees, their unions and Department of Labour Inspectors if they ask for them. They can be kept in electronic or paper files and must be kept for six years.

There are legal requirements for paying wages and keeping wage, time, holiday and leave records. Legally, wages have to be paid in cash. Other methods need an employee's written agreement.

Wages 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 hours worked each day, including start time, finish time and any non-paid breaks taken, and days of employment in each pay period
- › the wages paid each pay day and the method of calculation
- › details of employment relations leave taken.

Holiday and leave records must include:

- › the name of the employee
- › the date employment commenced
- › the days on which an employee works, if the information is relevant to entitlement or payment under the Holidays Act 2003
- › the date the employee last became entitled to annual holidays
- › the employee's current entitlement to annual holidays

- › the employee's current entitlement to sick leave
- › the dates any annual holiday, sick or bereavement leave was taken
- › the amount of payment for any annual holidays, sick leave and bereavement leave taken
- › the 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 of and payment 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 payment of any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to payment
- › the cash value of board and lodgings provided
- › the date of termination
- › the amount of pay for holidays on termination.

Holiday and leave records or the employee's file should also include:

- › any agreements to transfer holidays
- › any requests to cash up annual holidays
- › the anniversaries when the employee becomes entitled to conditions under either minimum legal entitlements or additional provisions in the employment agreement.



An employee's file should also include:

- › a signed copy of the employment agreement with the employee or details of the collective agreement under which he or she has been employed
- › a letter offering appointment
- › evidence that the employee is entitled to work in New Zealand
- › details of citizenship or work permits held
- › a tax code declaration (IR330) completed by the employee
- › a job description
- › a personal profile
- › an application form
- › the employee's personal information such as home contact details
- › details of who to contact in case of an emergency
- › details of the bank account to be credited with wages (if this is the agreed method of payment).

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

Examples of templates for wage and time records, and holiday and leave records, can be downloaded from the Department of Labour's website www.dol.govt.nz or phone the Department of Labour free on 0800 20 90 20.

→ Further information and help

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

You could also talk to your local union, employers' association or another professional employment advisor.

Please note this pamphlet is a guide only and may not be accurate for all situations. It should not be used as a substitute for legislation or for legal or other expert advice.



⇒ More information

www.dol.govt.nz

0800 20 90 20

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