

Avoid the Holidays Act headache

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With the holiday season fast approaching, many employers may be wanting the gift of new holidays legislation. The current Holidays Act has proven tricky to comply with for many employers. Unfortunately, any relief is some time away - at least another Christmas or two. The Government set up a Taskforce last year to review the legislation and explore options for a new way forward. The Taskforce reported to the Minister in September after being delayed several months but the report is not yet public. Once the shape of the reform is announced it will work through the usual parliamentary process. There will likely be a considerable lead-in time before any new legislation comes into force to enable employers to adapt to the new requirements and transition their payroll systems. In the meantime, employers need to comply with the current Act, and failure to comply may result in costly remediation work that could go back six years (or more).

To assist ahead of these holidays, we summarise some of the relevant provisions that may apply.

This year the Christmas/New Year public holidays are on a Wednesday and Thursday. They are observed on those days unless employers and employees agree to transfer them to other days by complying with specific requirements in the Act. They can also agree to shift the holiday/s to a different 24-hour period where employees work over midnight starting or finishing on a public holiday (or both).

Employees are entitled to a paid day off on the public holiday if they otherwise would have worked that day. It is paid at their relevant daily pay (RDP) or (if applicable) average daily pay (ADP), with formulas provided in the legislation. A recent Employment Court case confirms that if both RDP and ADP are available, the employer can choose which to apply. Employers should also look carefully at whether overtime or commission payments factor into those calculations (even those payable over a longer timeframe eg weekly/monthly).

Employees can agree to work or can be required by their employment agreement to work on a public holiday. They must be paid at time and a half for the time worked as a minimum (and this must be stated in the employment agreement). Some agreements provide for more. If the day would normally have been a working day, employees also receive an alternative holiday to be taken at another time on pay. Employees who are on-call but not called in are also entitled to an alternative holiday if they don't enjoy a whole day off due to the level of restriction of being on-call.

Many employees take some annual holidays over the holiday season. Often this is by agreement. Some employers apply a customary 'closedown' requiring employees to cease work for a period with or without pay (technical requirements apply). In our experience, many employers use other informal arrangements, encouraging (rather than requiring) employees to use annual holidays over this period. This can be a good way of managing leave balances and ensuring that employees are properly rested and refreshed, without triggering the complicated closedown arrangements under the legislation. Alternatively, failing agreement, employers can require employees to take annual holidays by providing at least 14 days' notice.

Employees taking annual holidays remain entitled to any public holiday during that period if it would otherwise have been a working day for them.

Bereavement or family violence leave applies (instead of annual holidays) if that situation arises before or during planned annual holidays. Sick leave applies if the situation arises before planned annual holidays, but if it occurs during the annual holidays, employers can choose whether to treat it as annual holidays or sick leave.

Some employees resign ahead of the holiday season. In that situation (as always) if the employee is entitled to paid annual holidays, that balance is nominally added to their last day of work. Employees are entitled to be paid for any public holiday over that period that they otherwise would have worked, in addition to being paid out their annual holiday entitlement.

To avoid a Holidays Act headache, we recommend employers ensure they are compliant with the legislation ahead of the upcoming holidays, rather than leaving it to their New Year's resolution list or otherwise hoping that Parliament will fix it this holiday season. As a starting point MBIE provides useful guidance on the Holidays Act in both short form summaries and a long form booklet at www.employment.govt.nz.

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