

ANNUAL HOLIDAYS

**COPYRIGHT**

© Aidmax Limited May 2016

All rights reserved. This document is for the exclusive use of members of The Retirement Villages Association of New Zealand Inc. The authors have asserted their rights.

**DISCLAIMER**

This publication is a general guide only. No person should act on any statement contained in this guide, without first getting professional advice. For specific advice applicable to your circumstances, contact 0800 692 384.

TABLE OF CONTENTS

**DISCLAIMER** 3

**CHAPTER 1 -THE HOLIDAYS ACT 2003** 3

MINIMUM ENTITLEMENTS 3

ALL EMPLOYEES ARE COVERED 3

QUALIFYING PERIODS 4

HOLIDAYS AND LEAVE RECORDS 4

KEY TERMS 5

**CHAPTER 2 – ANNUAL HOLIDAYS** 8

CONTINUOUS EMPLOYMENT 8

4 WEEKS OF TIME 9

TIMING 9

HOLIDAY PAY CALCULATIONS 10

RELATIONSHIP BETWEEN ANNUAL HOLIDAYS AND ENTITLEMENTS 13

***DISCLAIMER***

*The guide is presented in plain language where possible, to make the subject easier to understand. For instance, where phrases like ‘annual holidays’ are used more than once in a sentence, the repetitions are simplified to ‘holidays’. And some much-used key phrases like ‘ordinary weekly pay’ are abbreviated. Be aware that it is not a substitute for the Act.*

# chapter 1 - THE holidays ACT 2003

The purpose of the Act is to promote balance between work and other aspects of employees’ lives and, to that end, to provide employees with minimum entitlements for the following:

* Annual holidays to provide for rest and recreation
* Public holidays to observe days of national, religious, or cultural significance
* Sick leave for employees who are unable to attend work because they are sick or injured, or because someone who depends on them is sick or injured
* Bereavement leave for employees who are unable to attend work because of bereavement.

For this reason the Act creates separate rights to (a) take holidays and leave and (b) to be paid for it. Both of these rights are set out in detail in the Act, but can still be amazingly difficult to implement.

For instance, the right to take annual leave has to do with time – 4 weeks per year. The issues that arise are how to measure 4 weeks, how to deal with unpaid absences, how to deal with part time workers, when the holidays can be taken and what to do with annual and other shutdown periods.

The right to be paid for any holidays and leave brings other challenges, the biggest of which is that the amount of holiday pay depends on whether it is for holidays on entitlement, or for holidays in advance, or for holidays due on termination within 12 months, or for holidays due on termination after 12 months. That’s before one looks at problems calculating a week’s pay for people who work irregular hours or days of the week, or rotating rosters, or who work overtime or get incentive payments periodically, or who have been away from work for some time.

## minimum ENTITLEMENTS

The Holidays Act 2003 sets the minimum paid annual, public holidays, sick and bereavement leave that employers must allow employees. You can provide more holidays or leave than the Act prescribes. If you provide for less in your employment agreements, your employees are still entitled to what the Act says.

## ALL EMPLOYEES are COVERED

The Act applies to all employees – fixed term, permanent full time or part-time and casual. See the key terms below for more information.

**QUALIFYING PERIODS**

* Public holidays – no waiting period
* Annual leave - 12 months of continuous service
* Sick and bereavement leave – either 6 months of current continuous employment or over a period of 6 months, at least an average of 10 hours a week, and at least 1 hour in every week or at least 40 hours in every month.

**HOLIDAYS AND LEAVE RECORDS**

Holidays and leave records must be kept for each employee, for a period of six years. Failure to do so carries a maximum penalty of $10,000 for an individual and $20,000 for a company or other body corporate.

### Details to keep

For each employee, record all of the following information:

* the name of the employee
* the date on which the employee’s employment commenced:
* the days on which the employee actually works, if the information is relevant to the calculation of entitlements or payment for entitlements under this Act:
* the employee’s current entitlement to annual holidays:
* the date on which the employee last became entitled to annual holidays:
* the employee’s current entitlement to sick leave:
* the dates on which any annual holiday, sick leave, or bereavement leave has been taken:
* the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:
* the portion of any annual holidays that have been paid out in each entitlement year (if applicable):
* the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable):
* the dates of, and payments for, any public holiday on which the employee worked:
* the number of hours that the employee worked on any public holiday:
* the day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44A or 44B and the calendar day or period of 24 hours to which it has been transferred (if applicable):
* the date on which the employee became entitled to any alternative holiday:
* the details of the dates of, 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 holiday pay:
* the cash value of any board or lodgings, as agreed or determined under section 10:
* the details of any payment to which the employee is entitled under section 61(3) (which relates to payment in exchange for an alternative holiday):
* the date of the termination of the employee’s employment (if applicable):
* the amount paid to the employee as holiday pay upon the termination of the employee’s employment (if applicable):
* any other particulars that may be prescribed.

The holiday and leave record must be kept in written form or in a form or in a manner that allows the information to be easily accessed and converted into written form. It can be kept as part of the wages and time record that must be kept under section 130 of the Employment Relations Act 2000.

Employees, their representatives or union, and a labour inspector can ask to see the record at any time.

KEY TERMS - these are simplified to make it easier to understand, and you should refer to the Act for the legal definitions of the terms.

Average daily pay (ADP) - means gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made, divided by the number of whole or part days during which the employee earned the gross earnings, including any day on which the employee was on paid holiday or paid leave, but excluding any other day on which the employee did not actually work.

Average weekly earnings (AWE) means 1/52 of an employee’s gross earnings

Closedown period - means a period during which an employer customarily closes operations or discontinues the work of 1 or more employees, and then employees to take all or some of their annual holidays.

Discretionary payment (in plain language) - means a payment that the employer does not have to make under the employment agreement. It excludes payments that the employer must make under the employment agreement, even if -

(i) The employment agreement does not specify an amount, and the employer can decide how much to pay; or

(ii) The employment agreement requires payment only if certain conditions are met.

Employee - means a person of any age employed to do any work for hire or reward under a contract of service. It includes a homeworker but excludes –

* a person intending to work (Note: such a person is still covered by the Employment Relations Act)
* a volunteer who does not expect to be rewarded and who receives no reward
* persons engaged in film production, unless they are a party to or covered by a written employment agreement that provides that the person is an employee.

Holiday - means a paid annual holiday, a paid public holiday and an alternative holiday provided for working or being on call on a public holiday.

Holiday pay - means pay for an annual holiday or a public holiday, including an alternative holiday exchanged for payment.

Leave pay - means pay for sick and bereavement leave.

Ordinary weekly pay (OWP) - for the purposes of calculating annual holiday pay - means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week.

It includes -

* productivity or incentive-based payments (including commission) if those payments are a regular part of the employee’s pay
* payments for overtime if those payments are a regular part of the employee’s pay
* the cash value of any board or lodgings provided by the employer to the employee

It excludes -

* productivity or incentive-based payments that are not a regular part of the employee’s pay
* payments for overtime that are not a regular part of the employee’s pay
* any one-off or exceptional payments
* any discretionary payments that the employer is not bound, under the terms of the employee’s employment agreement, to pay the employee
* any payment of any employer contribution to a superannuation scheme for the benefit of the employee

If it is not possible to determine an employee’s ordinary weekly pay as set out above, the pay must be calculated with the formula (a minus b) divided by (c), where -

* is the employee’s gross earnings for -
* the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or
* if the employee’s normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made.
* (b) is the total amount of non-regular productivity or incentive based payments, non-regular overtime payments, discretionary payments and employer contributions to superannuation schemes for the employee’s benefit.
* (c) is 4.

The employment agreement could specify a special rate, but it must be the same as or more than would be calculated as set out above.

Otherwise a working day –

This key term applies when deciding an employee’s entitlements to a public holiday, an alternative holiday, sick leave, or bereavement leave.

If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed below -

* the employment agreement
* the employee’s work patterns
* any other relevant factors, including -
* whether the employee works for the employer only when work is available (a casual)
* the employer’s rosters or other similar systems
* the reasonable expectations of both that the employee would work on the day concerned.
* whether the employee would have worked on the day concerned if it had not been a public holiday, an alternative holiday, or if the employee had not been on sick or bereavement leave. If the day falls within a closedown period, the factors are considered as if the closedown period were not in effect.

Relevant daily pay (RDP) (unless the context otherwise requires), for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave, means the amount of pay that the employee would have received had they worked on the day concerned, including -

(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned

(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned

(iii) the cash value of any board or lodgings provided by the employer to the employee.

It excludes employer contributions to a superannuation scheme for the benefit of the employee.

The employment agreement could specify a special rate but it must be the same as or more than would be calculated as set out above.

The pay that an employee would have received had they worked on a public holiday does not include the time and half payment that is prescribed by section 50(1)(a) of the Act for working on a public holiday.

CHAPTER 2 - ANNUAL HOLIDAYS

The purpose of annual holidays is to -

(a) provide all employees with a minimum of 4 weeks’ annual holidays to be paid at the time the holidays are taken; and

(b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and

(c) require employers to pay employees at the end of their employment for annual holidays not taken or paid out; and

(d) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

CONTINUOUS EMPLOYMENT

12 months of continuous employment includes any period during which the employee was –

* on paid holidays or leave under this Act; or
* on parental leave under the Parental Leave and Employment Protection Act 1987; or
* on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; or
* receiving weekly compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act as well as, or instead of, payment from the employer; or
* on unpaid sick leave or unpaid bereavement leave; or
* on unpaid leave for any other reason for a period of no more than 1 week.

Unpaid leave -

Note that all unpaid sick and bereavement leave is included.

When an employee takes more than one week of unpaid leave and you do not agree to include that as continuous service, the employee’s anniversary date must be extended by the number of weeks above the 1 allowed by law.

So, -

* if the employee took 8 weeks unpaid leave, the anniversary date is extended by 7 weeks (8-1)
* The employee will next become entitled to annual holidays 52 weeks + 7 weeks = 59 weeks after his/her last anniversary date
* An original anniversary date of 1 April becomes 19 May from the next year.

Any other unpaid leave of more than 1 week is excluded, but employer and employee can agree to include more than 1 week of unpaid leave in the 12 months of continuous service. In that case, the divisor of 52 used to calculate average weekly earnings is reduced by the number of whole or part weeks added to the one week allowed by law.

In summary - if you include excess unpaid leave, the divisor is reduced; if you exclude it, the anniversary date is extended.

Closedown periods and effect on anniversary date

Closedown period means a period during which an employer customarily closes operations or discontinues the work of one or more employees, and then employees to take all or some of their annual holidays.

While the Act limits such periods to 1 per year, an employer and employee may agree that the employer may close operations and discontinue the work of the employee at other times, and what arrangements will apply during those times.

It is possible to have different closedown periods for each separate part of the business.

An employee who is entitled to annual holidays at the commencement of a closedown period can be required to take annual holidays during the closedown period whether or not they agree to take the holidays.

An employee who is not yet entitled to annual holidays at the commencement of a closedown period can be required to discontinue their work during a closedown period.

In both these two cases the employee must be given at least 14 days’ notice of the requirement to take the annual holidays or to discontinue the work (as the case may be).

If an employee who is not yet entitled to annual holidays is required to discontinue work during a closedown period, the employee’s anniversary date moves to the date on which the closedown began. To avoid having a different date in each year, the employer may nominate a date on which the closedown begins, provided that the nominated date is reasonably close to the actual beginning of the closedown period.

When an employee re-joins an employer within 1 month of dismissal, employment is deemed to be continuous.

4 WEEKS OF TIME

Employer and employee can agree on what constitutes a working week for the employee. If an agreement is not possible, a labour inspector can determine it for them. The Inspector may take into account any matters that he thinks fit, including the factors set out in the key term Otherwise a Working Day above.

Employer and employee may agree (in writing) what genuinely constitutes a working week for the employee.

TIMING

When due

You must allow employees to take annual holidays within 12 months of becoming entitled to it. Holidays are taken at an agreed time, and where there is no agreement, the employee can be directed to take the holidays, on at least 14 days’ notice.

Employees can take at least 2 weeks in one continuous period. Applications for annual holidays may not be unreasonably refused.

In advance

Part of the annual holidays may be taken in advance, by agreement. There is no right to annual holidays in advance, even where an employee is not entitled to annual leave yet at the time of a customary closedown.

On the other hand, employees cannot be compelled to take unpaid leave during any other closedown, subject to any (written) agreement they may have in this regard.

HOLIDAY PAY CALCULATIONS

Holiday pay is calculated in different ways, depending on the circumstances. Holiday pay for the 12 months after an employee returns from parental leave, for instance, is calculated at the employee’s average weekly pay over the 12 months before they take those annual holidays.

On entitlement (in other words after 12 months) -

Pay must be for the agreed portion of the annual holidays, and calculated by using the higher of the following -

* OWP as at the beginning of the holiday; or
* AWE for the 12 months immediately before the end of the last pay period before the holiday.

In advance -

Pay must be for the agreed portion of the annual holidays, and calculated by using the higher of the following -

* OWP (ordinary weekly pay) as at the beginning of the holiday; or
* AWE (average weekly earnings) for -
* the 12 months immediately before the end of the last pay period before the holiday if the employee has more than 12 months service or
* if the employee has less than 12 months service, AWE for the period of employment before the end of the last pay period before the holiday. In the latter case the divisor of 52 must be reduced to the number of whole or part weeks that the employee worked.

On termination within 12 months -

If the employee has worked for less than 12 months, holiday pay is calculated at 8% of gross earnings less –

* any amount paid for annual holidays taken in advance; or
* paid with the employee’s pay under a fixed term or casual employment agreement.

On termination if entitlement has arisen (in other words a full year)

If employment comes to an end and the employee is entitled to annual holidays and the employee has not taken such holidays or has taken only some of it, holiday pay is calculated for the portion of the holidays entitlement not taken, by using the higher of the following–

* OWP (ordinary weekly pay) as at the date that employment ends, and
* AWE (average weekly earnings) during the 12 months immediately before the end of the last pay period before the end of employment.

On termination before further entitlement has arisen (in other words a part year)

If employment comes to an end and the employee is not entitled to annual holidays for a second or subsequent 12 month period because the employee has not worked for the whole of the second or subsequent 12 month period, then holiday pay is calculated at 8% of the employee’s gross earnings since the employee last became entitled to annual holidays, less any amount –

* paid to the employee for annual holidays taken in advance or
* paid with the employee’s pay under a fixed term or casual employment agreement.

During closedown -

If an employee has an annual holiday entitlement at the time of closedown, the period of the closedown must be taken by the employee as annual holidays.

If an employee is not entitled to enough annual holidays to cover the closedown period, the employer and employee can agree that the employee takes some of the closedown period as annual holidays in advance, the pay for which is calculated by using the higher of the following

* OWP as at the beginning of the holiday; or
* AWE for –
* the 12 months immediately before the end of the last pay period before the holiday if the employee has more than 12 months service or
* if the employee has less than 12 months service, AWE for the period of employment before the end of the last pay period before the holiday. In the latter case the divisor of 52 must be reduced to the number of whole or part weeks that the employee worked.

If the employee is not entitled to annual holidays at the time of the closedown, they must be paid 8% of their gross earnings since employment commenced or since the employee last became entitled to annual holidays (as the case may be), less any amount -

* paid to the employee for annual holidays taken in advance; or
* paid with the employee’s pay under a fixed term or casual employment agreement.

That employee is then not entitled to any annual holidays for the period of employment up to the date of the beginning of the closedown period or to any remuneration for the period of the closure or discontinuance of work.

If both parties agree, however, the employee could take the period of the closedown as annual holidays in advance, the pay for which is calculated by using the higher of the following –

* OWP as at the beginning of the holiday; or
* AWE for –
* the 12 months immediately before the end of the last pay period before the holiday if the employee has more than 12 months service or
* if the employee has less than 12 months service, AWE for the period of employment before the end of the last pay period before the holiday. In the latter case the divisor of 52 must be reduced to the number of whole or part weeks that the employee worked.

When to pay for annual holidays -

Annual holidays must be paid before the holiday starts, but it can be agreed that the employee be paid in the pay that relates to the period during which the holiday is taken.

Where employment ends, annual holiday pay must be paid in the pay that relates to the employee’s final period of employment.

Holiday pay with regular pay -

Only casual and fixed term employees may be paid their annual holiday pay together with their pay. A casual employee is described as a person who ‘works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks’ annual holidays’.

A fixed term employee, for this purpose, is someone employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement of less than 12 months, or a consecutive series of such agreements.

The employee must agree to this arrangement in their employment agreement, the holiday pay must be paid as an identifiable component of the employee’s pay, and the holiday pay must be at least 8% of gross earnings.

If the fixed-term agreement becomes permanent, the employee becomes entitled to 4 weeks paid annual holidays at the end of 12 months’ continuous employment (including the period of that fixed-term agreement), but the amount of the holiday pay due is reduced by the amount that the employee has already received.

If an employer has incorrectly paid annual holiday pay with an employee’s pay, and the employee’s employment continues for 12 months or more, the employee becomes entitled to annual holidays and pay despite those payments.

Paying out up to 1 week -

Employees can ask to cash up a maximum of 1 week of annual holidays per year. The effect is that the employee takes 3 weeks of annual holidays in that year, but is paid for 4. If the employee is entitled to more than 4 weeks of annual holidays per year, they can also cash up the extra portion above 4 weeks. Each year stands on its own, and if payout is not requested, it cannot be carried over.

Requests must be considered and replied to in writing within a reasonable time. No reason needs to be given if the request is declined. Employers can have a policy against payouts, either for part(s) of, or for the whole organisation.

Payment is made as soon as practicable after approval, at the greater of OWP at the beginning of the holiday or AWE for the 12 months immediately before the end of the last pay period before the holiday.

If the employer incorrectly pays out a portion of an employee’s holidays where the employee did not apply for it, the employee’s entitlement remains as if the payment was not made.

Payouts cannot be a term or condition of employment or be raised during wage or salary negotiations, but employment agreements can set out a process for making such requests.

RELATIONSHIP BETWEEN ANNUAL HOLIDAYS AND ENTITLEMENTS

Sick and bereavement leave -

If an employee or their spouse or partner or dependant becomes sick or injured while on annual holidays, you can decide whether to grant sick leave instead of annual holiday while they are sick. In case of bereavement during annual holidays, you must grant bereavement leave.

If an employee, their spouse or partner, or a dependant becomes sick or injured, or the employee suffers bereavement after annual holidays have been approved, they must be allowed to take sick or bereavement, as the case may be.

If an employee who has no sick leave left becomes or remains sick or injured or his spouse or partner or a dependant becomes or remains so, they cannot be forced to take annual holidays. However, if the employee requests annual leave, it can be granted. Likewise when an employee requires more bereavement leave than the law allows.

Public holidays -

Public holidays that fall during an employee’s annual holidays and on what would otherwise be a working day, must be treated as public holidays and not as annual holidays.

Employees are entitled to be paid for public holidays that occur after their employment has ended, if the employee had outstanding annual holidays due and the public holidays fall during that time. For instance, if the employee had 14 days of annual holidays left over from the previous year, and there was a public holiday 10 days after employment ended, they are entitled to payment for it. This only applies to annual holidays to which the employee was entitled, not incomplete years (for which they would have been paid 8%).

Parental leave -

Because parental leave is included in continuous employment, an employee’s entitlement to annual holidays continues while they are on parental leave. However, the Parental Leave and Employment Protection Act 1987 (PLEPA) sets out a different rate of pay at which annual holidays are paid – see section 42(2) of the Act. If an employee becomes entitled to paid annual holidays-

* While they are on parental leave; or
* During a period of preference in obtaining employment; or
* During the 12 months following their return to work from parental leave or after a period of preference in obtaining employment starts then holiday pay for that holiday is calculated by using AWE (average weekly earnings) for the 12 months immediately before the end of the last pay period before the annual holiday is taken or paid out.

As PLEPA (Parental Leave and Employment Protection Act 1987) does not make any reference to annual holidays in advance during parental leave, the rate at which such pay would be calculated is not clear, but is likely to be higher than what is set out above.