

## A-Z Guide

# ANNUAL HOLIDAYS



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# Overview

At the end of each completed 12 months of continuous employment, an employee is entitled to 4 weeks' paid annual holidays.

The entitlement to annual holidays is a weekly entitlement; however, an employer and employee may agree how that entitlement is to be met based on what genuinely constitutes a working week for the employee.

Continuous employment does not include, unless an employer and employee agree, unpaid leave of greater than 1 week (this does not include when the employee is sick, injured, bereaved, on paid holidays, on ACC, on parental leave, or on protected voluntary service or training).

If an employee's employment is broken by unpaid leave, the date they become entitled to annual holidays may change.

An employer may have only 1 "customary" closedown period in any 12-month period during which it may require employees to take their annual holidays; however, it may close down its operations or discontinue the work of its employees on arrangements that apply during those times, by agreement.

An employee may take annual holidays in advance, if the employer agrees.

If an employer and employee agree, and certain conditions are met, the employer may pay the employee's annual holiday pay regularly with the employee's pay.

If an employer requires an employee to take annual holidays, the employer must give the employee 14 days' notice of that requirement.

The calculation of annual holiday pay depends on the circumstances which apply. Different calculations apply to the calculation of annual holiday pay which is taken in advance, after entitlement has arisen, on termination of employment, at a closedown period, and after a period of parental leave.

If an employee (or the employee's spouse or dependant) is sick or injured while taking annual holidays, the employer may agree to reinstate the employee's annual holiday and grant sick leave for the period.

If an employee suffers a bereavement while taking annual holidays, the employer must reinstate the employee's annual holiday and grant bereavement leave for the period.

If an employee (or the employee's spouse or dependant) becomes sick or is injured, or the employee suffers a bereavement before the employee's scheduled annual holidays, then the employer must allow the taking of sick or bereavement leave.

If an employee becomes entitled to annual holidays during or after a period of parental leave, the employer should require the employee to take those annual holidays sooner rather than later because the value of those annual holidays increases with time.

An employer is required to keep a detailed holiday and leave record for every employee.

An employer is required to provide every new employee with information about the employee's entitlements under the Holidays Act 2003.

The provisions of the Holidays Act 2003 are enforceable in the Employment Relations Authority.



# Introduction

The Holidays Act 2003 governs the provision of annual holidays. It provides for the minimum entitlement to annual holidays or annual holiday pay to all employees who are employed in New Zealand. The Holidays Act 2003 does not prevent an employer from providing an employee with enhanced or additional entitlements by agreement. However, it does render any employment agreement that excludes, restricts, or reduces an employee's entitlements under the Act, ineffective to that extent. Each employment is a separate and distinct relationship under the Holidays Act 2003. An employee who has several part-time jobs has separate entitlements with each employer.

The purpose of the Holidays Act 2003, in respect of annual holidays, is set out in the Act. It is to:

- Provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time when the holidays are taken; and
- Require employers to pay employees at the end of their employment for annual holidays not taken; and
- Enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

**This A-Z Guide deals with annual holidays. Separate A-Z Guides deal with:**

- Public Holidays
- Sick Leave
- Bereavement Leave
- Leave Forms
- Parental Leave
- Holidays Act 2003

# Definitions

## Average weekly earnings

Average weekly earnings means 1/52 of an employee's gross earnings. Average weekly earnings represent the amount of earnings an employee has earned, which meet the definition of gross earnings, in the relevant 52 week period.

## Employee

An employee is a person of any age employed by an employer to do any work for hire or reward under a contract of service. A homeworker may be an employee under this Act. This does not include a person intending to work or a volunteer.

## Gross earnings

Gross earnings, in relation to an employee for the period during which the earnings are being assessed, means all the payments that the employer is required to pay under the employee's employment agreement. This includes:

- Salary or wages; and
- Allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to their employment); and
- Payments for:
  - Annual holidays; and
  - Public holidays; and
  - Alternative holidays; and
  - Sick leave; and
  - Bereavement leave; and
- Productivity or incentive-based payments (including commission); and
- Overtime; and
- The cash value of any board or lodgings that are provided by the employer to the employee unless they are provided when:
  - The work done by the employee requires the employee to stay overnight in a residence other than the employee's usual place of residence; or
  - The board and lodgings are provided because of special circumstances; and
  - The first week compensation payable under section 97 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 or its predecessors.

Gross earnings do not include:

- Any discretionary payments; and
- Any weekly compensation payable under the Accident Compensation Act 2001; and
- Any payment for absence provided for by the Volunteers Employment Protection Act 1973; and
- Any payment to reimburse an employee for costs incurred in or related to the employee's employment; and
- Any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

Gross earnings also exclude any payments made when cashing-up a portion of the statutory annual leave entitlement.

**Discretionary payment** is now defined in the Act as:

- A payment that the employer is not bound, by the employee's employment agreement, to pay the employee; but
- Does not include a payment that the employer is bound, by the employee's employment agreement, to pay the employee, even though:
- The amount to be paid is not specified in that employment agreement and the employer may determine the amount to be paid; or
- The employer is required under that employment agreement to make the payment only if certain conditions are met.

If an employer is an accredited employer, within the meaning of section 181 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 and pays weekly compensation to an injured employee under Part 2 of Schedule 1 of that Act, the gross earnings of the employee does not include these payments of weekly compensation.

## Ordinary weekly pay

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

This includes:

- Productivity or incentive-based payments (including commission) if those payments are a regular part of the employee's pay; and
- Payments for overtime if those payments are a regular part of the employee's pay; and
- The cash value of any board or lodgings provided by the employer to the employee.

Ordinary weekly pay does not include:

- Productivity or incentive-based payments; and
- Payments for overtime, if those payments are not a regular part of the employee's pay; and
- Any one-off or exceptional payments; and
- Any discretionary payments that the employer is not bound, under the terms of the employee's employment agreement, to pay; and
- Any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

## Best practice

Your employment agreements should be drafted so that it is clear what the ordinary working week and what the ordinary weekly pay for an employee are.

## Alternative definition of ordinary weekly pay

When under the above definition it is not possible to determine an employee's ordinary weekly pay, the pay must be calculated in accordance with the formula:

$$(a - b) / c$$

Where:

- **a** 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; and
- **b** is the total amount of non-regular productivity or incentive-based payments; non-regular payments for overtime; and any one-off or exceptional payments.
- **c** is 4.

## Special rates of ordinary weekly pay

An employment agreement may specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay if the rate is equal to, or greater than, what would otherwise be calculated under either the definition or alternative definition of ordinary weekly pay.

# Entitlement to Annual Holidays

When reading what follows, it is easier to understand what is being explained if you think of the entitlement to annual holidays as an entitlement to take 4 weeks' holiday which arises at a particular point in time and remains an entitlement until the holiday is taken, but do not think of its monetary value. The value of annual holiday pay, which will be discussed later, is dependent on a number of factors and may differ depending on the circumstances.

The 12 months of continuous employment includes any period that an employee is on:

- Unpaid sick leave; or
- Unpaid bereavement leave; or
- Paid holidays or paid leave; or
- Parental leave under the Parental Leave and Employment Protection Act 1987; or
- Voluntary service or training under the Volunteers Employment Protection Act 1973; or
- Accident compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or its predecessors.

The entitlement to paid annual holidays on completion of 12 months' continuous employment increased to 4 weeks on 1 April 2007. Holiday pay for incomplete years is calculated at eight per cent.

## Moving entitlement dates

The idea of continuous employment, for entitlement purposes, creates the possibility of a moving entitlement date. When an employee takes greater than 1 week of unpaid leave, the anniversary may, or may not be extended by the leave taken beyond 1 week. If the anniversary date is not extended, the divisor for average weekly earnings calculations must be reduced.

When an employer and employee agree that any period of unpaid leave greater than 1 week taken for any reason other than for illness or injury or bereavement will not be counted as part of the 12-month period of continuous employment, then the date on which the employee next becomes entitled to annual holidays will be more than 12 months after the last date on which entitlement arose. This new date should be extended by the number of weeks of unpaid leave, minus one week.

When an employer and employee agree that any period of unpaid leave greater than 1 week taken for any reason other than for illness or injury or bereavement will be counted as part of the 12-month period of continuous employment, then the date on which the employee next becomes entitled to annual holidays will be 12 months after the last date on which entitlement arose.

When an employer has a closedown period each year then there is no possibility of a moving entitlement for the employees affected by that closedown, unless the employer and employee agree that the employee's 12 months of continuous employment will not be treated as commencing on the date of the closedown.

If an employee takes a period of unpaid leave greater than 1 week for any reason other than illness or injury or bereavement then, depending on the agreement reached between the employer and employee, either:

The period taken to complete 12 months of continuous employment will extend by the whole or part weeks greater than 1 week that the employee was on the unpaid leave; or

The 12 months of continuous employment will include the period taken as unpaid leave but the divisor of 52 weeks to be used for the purpose of calculating the employee's average weekly earnings will be reduced by the number of whole or part weeks that the employee was on the unpaid leave.

## Continuous employment is presumed

When an employer dismisses an employee (any termination of an employee's employment by the employer is a dismissal) and then re-employs the employee within 1 month of the dismissal, the employee's employment must be treated as being continuous for the purpose of the employee's entitlement to annual holidays, unless a labour inspector determines otherwise.

## Meeting entitlement

An employer and employee may agree on how the employee's entitlement to 4 weeks' annual holidays is to be met based on what genuinely constitutes a working week for the employee. An employee can only be on annual holiday on a day that is otherwise a working day, so if an employee is employed to work a 5-day working week then that employee's entitlement to 4 weeks' annual holidays may be met by the taking of 20 working days as annual holidays. Alternatively, if an employee is employed to work part-time 2 days a week, then that employee's entitlement to annual holidays may be met by the taking of 8 working days as annual holidays over 4 weeks.

It is permissible under the Holidays Act 2003 to breakdown an employee's entitlement to annual holidays into hours so that the employee can take annual holidays in hourly units.

## Best practice

If your employment agreement with an employee has clearly stipulated the employee's ordinary working week and the employee's ordinary weekly pay, then determining what genuinely constitutes a working week for the employee should be straightforward. However, you may want to consider including in the agreement a provision that stipulates how you and the employee will agree about what genuinely constitutes a working week for the employee at any given time.

## Annual holidays in advance of entitlement

There is no legal obligation under this Act to allow employees to take annual holidays in advance of entitlement.

Even where an employer has a closedown period, the employer is not under a legal obligation to allow employees to take annual holidays in advance of entitlement. In this situation the employer has a right to pay an employee their annual holiday pay as a percentage of the employee's gross earnings for the year to date and commence the employee's next 12 months of continuous employment on the date on which the closedown begins.

## Best practice

Where annual holidays are granted to be taken in advance of entitlement, the amount paid in advance should not exceed 8 per cent of gross earnings to date. This is to avoid the situation where the employee resigns, but the annual leave owing to them is less than that owed to the company. Many payroll systems reflect this as accrued leave, but it is important not to confuse this with entitlement; employees have no right to take it. EMA Advice recommends including a forfeiture clause and a deduction clause in the relevant employment agreement and on the employee's leave request form if you are going to permit an employee to take annual holidays in advance of entitlement.

# Taking Annual Holidays

## Allowing

Once an employee has become entitled to annual holidays the employer must allow the employee to take a part or the whole of those holidays within 12 months after the entitlement has arisen. If an employee requests to take annual holidays you must not unreasonably withhold consent to that request.

If an employee wishes, the employer must allow the employee to take at least 2 weeks of their annual holiday entitlement in a continuous period. However, if the employee takes more than two weeks sporadically, then you are not obliged to allow the employee to take a continuous period of 2 weeks as annual holidays because they would have less than 2 weeks' annual leave entitlement left.

Unless an employer has a closedown period, an employer and employee must endeavour to agree as to when annual holidays are to be taken. If an employer's closedown period does not exhaust an employee's entitlement to annual holidays, then the employer and employee must endeavour to agree as to when the balance of annual holidays must be taken.



## Requiring employees to take

If an employee has become entitled to take annual holidays, but the employee's employer and the employee are unable to reach agreement as to when the employee will take his or her entitlement to annual holidays, then the employer may require the employee to take annual holidays. An employer cannot require an employee to take annual holidays in advance of the employee's entitlement arising, unless the employer has a closedown period and requires the employee to take annual holidays for the duration of the closedown period.

## Notice

In order to require an employee who is entitled to take annual holidays to take a part or the whole of those annual holidays the employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays. If the case law decided under the Holidays Act 1981 applies, this means that the notice must be directed to the employee individually and must provide details of the entitlement to annual entitlement and the days that it is to be taken on.

While the Act does not specify such, necessarily notice should be in writing. Unless the employee concerned objects or has not agreed, then notice via email would constitute notice in writing.

## Best practice

There are now several important reasons why you should allow your employees to take any annual holidays that they become entitled to within 12 months of entitlement. You have a duty, under the Health and Safety at Work Act 2015, to ensure the health and safety of your employees while at work.

Annual holidays are for rest and recreation; this is made clear in the purpose section of the Holidays Act 2003. Managing your employees' annual holiday entitlements so that your employees take holidays at least annually, is one simple way you can address potential issues such as fatigue and work-related stress.

Another important reason for allowing your employees to take annual holidays within this timeframe is the expense of those annual holidays for your organisation. As the value of average weekly earnings is determined by the previous 52 weeks (see below), when an employee is permitted to accumulate annual holidays, the value increases as the employee's earnings increase. The relative value may be minimal, but if it is a matter of several years between an entitlement to annual holidays arising and being taken, then the difference in the 2 values of the annual holiday may be significant.

You should clearly indicate in your employment agreements when your employees may take annual holidays and any preferred mechanisms for resolving disagreements over the taking of annual holidays.

# Closedowns

The Holidays Act 2003 provides for closedown periods (commonly referred to as customary closedowns) and closures of operations and discontinuances of work that are not a closedown period.

A closedown period is a period during which an employer customarily:

- Closes operations or discontinues the work of 1 or more employees; and
- Requires those employees to take all or some of their annual holidays.

If an employee without any entitlement to annual leave is required to discontinue their work for a closedown the employee's anniversary date for annual leave must be changed to the date on which the closedown began.

While an employer may have different closedown periods for each separate part of the employer's business, it is not possible to have more than one closedown period in any 12-month period. This is because in these situations the employer has particular rights, and it could unfairly disadvantage an employee if those rights were exercisable every time the employer closed its operations or discontinued the work of the employee.

## Closures that are not closedown periods

The Holidays Act 2003 does not limit an employer's ability to close its operations or discontinue the work of 1 or more of its employees by agreement at other times and on other arrangements. This type of closure may be referred to as a shutdown or a non-customary closedown, during which the employer does not have particular rights regarding employee leave, and cannot require employees who are not entitled to leave to discontinue work.

## Best practice

If you regularly close your operations or discontinue the work of 1 or more of your employees more than once any 12-month period, then you should ensure that your employment agreements clearly specify the arrangements that will apply during customary, and non-customary closedowns.

## Notice

Where an employer has a closedown period and requires its employees to take annual holidays during the closedown period, the notice requirements are the same for requiring annual leave to be taken under normal circumstances as discussed above.

## Nominal closedown dates

Where an employee is required to discontinue work during a closedown the employee's 12 months' continuous service must be treated as commencing on the date on which the closedown began. In order to avoid having a different date in each year on which the employee becomes entitled to annual holidays because the employer has a closedown period (the start date of which varies from time to time), the employer may nominate a date which must be treated as the date on which the closedown begins provided that the date nominated is reasonably proximate to the actual beginning of the closedown period.

# Annual Holiday Pay

Annual holiday pay is most often paid (and calculated) when an employee takes his or her annual holidays, but this is not always the case.

## Payment of annual holiday pay

Payment of annual holidays must be made by an employer to the employee before the holiday is taken, unless:

- The employer and employee agree that the employee is to be paid in the pay that relates to the period during which the holiday is taken; or
- The employee and employer have agreed that one week of the annual leave entitlement be exchanged for cash; or
- The employee's employment has come to an end.

If an employee's employment has come to an end (termination), the employer must pay the annual holiday pay in the pay that relates to the employee's final period of employment.

## Cashing up annual leave

An employee can request to cash up one week of their statutory annual leave. The employer chooses if they agree to this.

One week can be cashed-up for each entitlement year. An entitlement year is the period of 12 months' continuous employment beginning on the anniversary of the employee's employment. For the purposes of paying out holidays, if you have a customary closedown, continuous employment must be treated as commencing on the date the closedown began.

An employee who has large amounts of leave from previous years cannot back date the cashing up.

An employee can request less than one week and within the same year make a further request, provided the total request for the entitlement year does not exceed one week.

An employee who does not make a request or does not request the maximum in one year, cannot carry the balance over and request more than one week the following year.

The process for cashing up annual leave is as follows:

- The employee makes a request to the employer in writing. An employer cannot request them to cash up annual leave.
- The employer must consider the request within a reasonable time and reply in writing.
- The employer is under no obligation to agree to a request.

If the employer agrees to the request:

- The payment must be made as soon as is practicable.
- The rate of payment is the greater of ordinary weekly pay; or average weekly earnings for the last 12 months.
- They must keep records of the portion of annual leave cashed up in each entitlement year, the date and amount of payment.

If the employer declines the request, they must advise the employee in writing. The law specifically states the employer is not required to give a reason.

## Cashing up clauses in employment agreements and company policies

The law specifically provides:

- An employment agreement must not make requesting cash-up a term and condition of employment.
- An employment agreement must not make paying out annual holidays a term and condition of employment.
- Cashing up statutory annual holidays must not be raised in negotiations for an employment agreement relating to salary or wages
- The process by which a request is made may be included in the employment agreement or company policy.

If an employee has an entitlement above the minimum then that extra leave could be cashed up depending on the terms of their employment agreement.

## Payment of holiday pay with employee's pay

The Holidays Act 2003 permits “pay as you go holiday pay” but only in specified and narrow circumstances.

The Act permits an employer to pay annual holiday pay regularly with an employee's pay if:

- The employee is employed on a fixed term agreement within the meaning of section 66 of the Employment Relations Act 2000 for less than 12 months; or
- The employee 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.

If either of these 2 circumstances applies, then an employer may pay annual holiday to an employee regularly with the employee's pay, but only if:

- The employee agrees in his or her employment agreement; and
- The annual holiday pay is paid as an identifiable component of the employee's pay; and
- The annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.

If the employee is employed on a series of fixed term agreements of less than 12 months each, the employer and employee may agree to “pay as you go holiday pay”, regardless of the number of agreements. When an employee, who is employed on a fixed term employment agreement within the meaning of section 66 of the Employment Relations Act 2000, is employed for longer than 12 months and/or the employee's employment is made permanent, the employee will become entitled to annual holidays at the end of 12 months' continuous employment.

An employee who becomes entitled to annual holidays because the employee is employed for longer than 12 months and/or the employee's employment is made permanent, but who has received “pay as you go holiday pay”, is entitled to 4 weeks' annual holiday but the holiday pay is reduced by the amount that the employee has already received as “pay as you go holiday pay” (Example 1).

However, if an employer incorrectly pays an employee “pay as you go holiday pay” in circumstances not permitted by the Act, and the employee's employment continues for 12 months or longer, then despite those payments the employee becomes entitled to annual holidays and annual holiday pay without reduction.

## Best practice

EMA Advice strongly advises against the payment of “pay as you go holiday pay” in any circumstances. The Act specifies that deductions can only be made from future entitlements if the initial payments were paid correctly; if they are not then the employer may be required to pay twice. Situations in which this could occur include employees originally employed as casuals (whose employment was intermittent and irregular), but over a period of time effectively became permanent employees, or fixed term agreements that were found to not have been genuine fixed term agreement, or continued beyond their expiry dates. In either situation, the employer may be required to holiday pay additional to what was paid on a regular basis.

Refer to the **A-Z Guide on Casual Employees & Fixed Term Employment** for more information.

If an employee is employed on a fixed term agreement for a period of less than 12 months and is paid holiday pay on a “pay as you go holiday pay” basis and is then employed on a permanent basis without regular payments of annual holiday pay, this employee will become entitled to annual holidays after 12 months of continuous employment. This employee should be required to take the annual holidays to which they have become entitled soon after the entitlement arises.

The Holidays Act 2003 allows for the deduction of “pay as you go holiday pay” from annual holiday pay when it is paid to an employee who is taking annual holidays during employment but does not allow for this deduction from annual holiday pay that is payable when the employee’s employment ends.

If you do not require an employee in these circumstances to take the annual holidays to which the employee has become entitled, and the employee’s employment ends, then you will be obligated to pay the employee twice for the period of annual holiday already paid to the employee as “pay as you go holiday pay” (Example 1).

### Example 1

The employee was employed on a 6-month fixed term agreement within the meaning of section 66 of the Employment Relations Act 2000 and was paid “pay as you go holiday pay” at 8% for each pay period. At the end of six months the employee’s employment became permanent. After 14 months of continuous employment the employee took 4 weeks’ annual holidays.

Annual holiday pay = the greater of:

- Average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday; or
- Ordinary weekly pay as at the beginning of the annual holiday, minus annual holiday pay paid during first 6 months of employment as “pay as you go holiday pay”.

## Calculating annual holiday pay

The calculation of annual holiday pay is different in different circumstances.

### Entitlement

When an employee is to take an annual holiday after the employee's entitlement to annual holidays has arisen (after the anniversary date), the employer must pay the employee annual holiday pay for the agreed portion of the entitlement, at the greater of:

- The employee's ordinary weekly pay as at the beginning of the annual holiday; or
- The employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

### Adjustment of divisor of 52

If in the 12 months immediately before the end of the last pay period before the annual holiday the employee took a period of unpaid leave of more than 1 week for reasons other than illness, injury or bereavement which the employer and employee agreed would be counted as part of the employee's 12-months of continuous employment (see above), then the divisor of 52 to be used for the purpose of calculating the employee's average weekly earnings must be reduced by the number of whole or part weeks greater than 1 week that the employee was on the unpaid leave (Example 2).

#### Example 2

The employer and employee agreed that the employee's 6 weeks' unpaid leave, taken so the employee could travel overseas, would be included in the employee's 12 months of continuous employment.

Average weekly earnings = gross earnings for the last 12 months / 52 – (6-1) weeks

The new divisor is 47 weeks because the employee was on unpaid leave for 5 whole weeks greater than 1 week in the 12-month period of continuous employment.

## No entitlement – in advance

When an employee is to take an annual holiday before the employee's entitlement to annual holidays has arisen the employer must pay the employee annual holiday pay for the agreed portion of the entitlement yet to arise, at the greater of:

- The employee's ordinary weekly pay as at the beginning of the annual holiday; or
- The employee's average weekly earnings for:
  - The 12 months immediately before the end of the last pay period before the annual holiday if the employee has worked for the employer for 12 months or more; or
  - The period of employment before the end of the last pay period before the annual holiday if the employee has worked for the employer for less than 12 months.

There are 2 options because an entitlement to annual holidays is based on completion of 12 months' of continuous employment. An employee may take annual holidays in advance of entitlement before he or she has completed 12 months of continuous employment for the first time, or before he or she has completed 12 months of continuous employment for the next year of employment.

### Adjustment of divisor of 52

If an employee is to take annual holidays in advance of entitlement, the divisor of 52 must be reduced to reflect the number of weeks worked by the employee, if less than 12 months (Example 3).

The adjustment of the divisor in this instance is not reduced by any whole or part weeks for any period when the employee was absent for any reason and did not actually work. This is so that the average weekly earnings figure is a truer average.

#### Example 3

The employee has been employed by the employer for less than 12 months when the employer agrees to the employee taking 1 week of annual holidays in advance of entitlement.

Average weekly earnings = gross earnings for period of employment/number of whole or part weeks worked.

## No entitlement – at closedown period

If the employer has a closedown period during which an employee is required to take annual holidays for the duration of that closedown period, but the employee is not entitled to annual holidays then the employer must in respect of the closedown period pay the employee 8% of the employee's gross earnings since the commencement of the employee's employment or since the employee last became entitled to annual holidays (Example 4).

### Example 4

The employee is required to take annual holidays for the duration of the closedown period. The employee is not entitled to annual holidays; the employee's 12 months of continuous employment will be treated as commencing on the date the closedown began or on a date nominated by the employer that is reasonably proximate to the actual beginning of the closedown period.

Annual holiday pay = 8% of employee's gross earnings since the commencement of employment or 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.

## When employment ends

When an employee's employment ends, and the employee is entitled to annual holidays, all or some of which have not been taken, the employer must pay the employee annual holiday pay for the portion of the annual holiday entitlement not taken, at the greater of:

- The employee's ordinary weekly pay as at the date of the end of the employee's employment; or
- The employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the end of the employee's employment.

Under this provision, if an employee's employment ends and the employee has taken annual holidays in advance of entitlement, the employer either pays the employee for the untaken balance of the employee's entitlement or pays the employee the employee's annual holiday pay minus the holiday pay already paid.

If an employee takes annual holidays in advance but then terminates their employment before the entitlement to annual holidays has arisen, the employee may owe the employer holiday pay. In order to recover this amount the employer and employee must agree, in writing, to the deduction of this amount from the employee's final pay.

If an employee's employment ends within 12 months of the employment then the employer must pay the employee annual holiday pay at 8% of the employee's gross earnings since the commencement of the employment, less any amount paid to the employee for annual holidays taken in advance (Example 5) or paid with the employee's pay as "pay as you go holiday pay" (Example 6).



**Example 5**

When the employee's employment ends, the employee has been employed for a total of 10 months. 3 months ago, the employee took 1 week's annual holiday in advance.

Annual holiday pay when employment ends = 8% of gross earnings since the commencement of employment, minus holiday pay paid to the employee for the 1 week annual holiday.

**Example 6**

When the employee's employment ends, the employee has been employed for a total of 10 months. Of those 10 months, the employee was employed on a fixed term agreement for the first 6 months. While employed on the fixed term agreement the employee received holidays pay as "pay as you go holiday pay".

Annual holiday pay when employment ends = 8% of gross earnings since the commencement of employment, minus holiday pay paid regularly with the employee's pay as "pay as you go holiday pay".

If an employee is paid "pay as you go holiday pay" in a 12 month period of employment and an entitlement to annual holidays arises, but the employee's employment is ended before the employee has taken any annual holidays, then the amount paid as "pay as you go holiday pay" cannot be deducted from the holiday pay owing (Example 8).

**Example 7: When the employment ends and the employee has entitled leave owing**

When the employee's employment ends, the employee has been employed for 15 months and has not taken any annual leave during this time.

Their last day of employment is 24 April and the last date they became entitled to annual holidays was 24 January.

Annual holiday pay when employment ends equals:

1. Payment for the remaining four weeks of **annual holidays entitlement** at the rate of the greater of:
  - The employee's ordinary weekly pay as at the date of the end of the employee's employment; or
  - The employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the end of the employee's employment.
2. Payment for the **period between the 24 January and 24 April** at the rate of 8% gross earnings. The value of the four weeks of entitled annual holidays are included in the 8% calculation.

**Example 8**

When the employee's employment ends, the employee has been employed for a total of 13 months. Of those 13 months, the employee was employed on a fixed term agreement for the first 6 months. While employed on the fixed term agreement the employee received holiday pay as "pay as you go holiday pay". Once the employee was employed for 12 continuous months, the employee became entitled to annual holidays; the employee has not taken any of those annual holidays when the employment ends.

Annual holiday pay when employment ends = for the annual holidays entitlement not taken, the greater of:

- Average weekly earnings for the 12 months immediately before the end of the employee's employment; or
- Ordinary weekly pay as at the date of the end of the employee's employment; and
- For the subsequent 12-month period of employment for which an entitlement to annual holidays has not arisen: 8% of gross earnings since the employee last became entitled to annual holidays

The gross earnings figure for the subsequent 12-month period of employment includes the annual holiday pay owing to the employee for the annual holiday entitlement not taken.

If an employee's employment ends in the second or subsequent year of employment in which the employee has not become entitled to annual holidays, then the employer must pay the employee their outstanding entitlement (see above) plus annual holiday pay for the incomplete year. This 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 (same as Example 4) or paid with the employee's pay as "pay as you go holiday pay".

## Other Issues

The Holidays Act 2003 sets out the relationships between annual holidays and public holidays, annual holidays and sick and bereavement leaves, and annual holidays and parental leave.

### Public holidays

An employee can only be on annual holiday on a day that is otherwise a working day. When an employee is taking annual holidays and a public holiday occurs on an otherwise working day, then that day must be treated as a public holiday, and not as part of the employee's annual holidays.

When an employee's employment ends and the employee is entitled to annual holidays (this does not include 8% for the incomplete year), all or some of which have not been taken, then for the purposes of determining whether or not the employee is entitled to payment for a public holiday that occurs after the employment has ended, you must treat the remaining annual holiday entitlement as being taken immediately after the date on which the employee's employment came to an end. Where a public holiday occurs during this time, the employee is entitled to payment for the public holiday.

#### Example 9

When the employee's employment ends the employee, who worked Monday to Friday, has 1 week of annual holiday entitlement remaining to be taken. The employee's employment ends the week before Easter. The public holidays that will occur on otherwise working days in the 2 weeks immediately after the date on which the employee's employment ended, are Good Friday & Easter Monday. In this example, had the employee only been entitled to 4 days, they would not have been entitled to the public holidays.

M	T	W	T	F	S	S	M	T
AL	AL	AL	AL	PH	X	X	PH	AL

If an employee's employment ends and the employee is not entitled to annual holidays, then the employee will not be entitled to any payment in respect of any public holidays that occur on otherwise working days after the employment ends.

Refer to the **A-Z Guide on Public Holidays** for more information.

## Sick leave

### Sickness or injury while taking annual holidays

The Holidays Act 2003 allows an employer and employee to agree that, where the employee (or the employee's spouse or dependant) becomes sick or is injured while the employee is taking annual holidays, the employee may take the period that the employee was sick or injured, as sick leave.

### Sickness or injury before scheduled annual holidays

If however, an employee is scheduled to take annual holidays, but has not taken them when the employee (or the employee's spouse or dependant) becomes sick or is injured, then the employer must allow the employee to take sick leave for the relevant period. In this circumstance, the employer must grant the employee who is sick or injured the appropriate leave.

### Employer may allow annual holidays to be used if sick leave exhausted

If an employee has exhausted their entitlement to sick leave and the employee requests to use annual leave, an employer may agree to this. However, an employer may not require an employee to use annual leave for sickness.

Refer to the **A-Z Guide** on **Sick Leave** for more information.

## Bereavement leave

### Bereavement while taking annual holidays

If an employee is taking or is scheduled to take annual holidays and suffers a bereavement then the employer must allow the employee to take bereavement leave.

**Note:** If an employee is scheduled to take, or is taking, annual holidays in advance of entitlement and suffers a bereavement, but is not yet entitled to bereavement leave, then the bereavement leave that the employer must allow the employee to take, unless otherwise agreed, is unpaid bereavement leave.

### Employer may allow annual holidays to be used if bereavement leave exhausted

If an employee wants to take more than the allowed time for a bereavement, and the employee requests to use annual leave, an employer may agree to this. However, an employer may not require an employee to use annual leave for bereavement.

Refer to the **A-Z Guide** on **Bereavement Leave** for more information.

## Parental leave

Annual holidays continue to accrue while an employee is on parental leave, if that leave is parental leave within the meaning of the Parental Leave and Employment Protection Act 1987.

If an employee becomes entitled to annual holidays, during either:

- Any period when the employee is on parental leave; or
- Any period when the employee is subject to a period of preference; or
- The period of 12 months commencing on the date on which the employee returns to work after a period of parental leave or a period of preference; then

The employee is entitled to annual holidays. However, the value of those annual holidays is affected by the taking of parental leave.

When an employee who has become entitled to annual holidays in any of the above circumstances, takes those annual holidays, the employer must pay the employee annual holiday pay for the agreed portion of the entitlement at the rate of the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday. This is not at the greater of ordinary weekly pay or average weekly earnings, and includes any weeks in which the employee was not earning due to parental leave.

This differing method of calculation where parental leave is involved only applies when the employee takes leave to which they have become entitled; the Act makes no provision for when annual leave is taken in advance. Therefore, should an employee take annual leave in advance of an entitlement date for a year that includes parental leave, it is arguable that they should be paid the higher of average weekly earnings or ordinary pay. In short, should the employee take annual leave in advance, it likely will be worth substantially more than had they waited till after their entitlement date.

## Best practice

If an employee becomes entitled to annual holidays in any of the above circumstances, you should consider requiring the employee to take the annual holidays to which the employee has become entitled as soon as possible. Because this employee's annual holiday pay is payable at the rate of the employee's average weekly earnings for the 12 months immediately prior, the longer the employee works, the greater the value of that annual holiday pay.

Should an employee who has been on parental leave, but has no existing entitlement request leave in advance, it is not advisable for the employer to grant it, as it would be calculated at the normal rate. Employers who use payroll system that grant 'accrued' annual leave (i.e. allow employees to take leave in advance) throughout the year should take particular care.

Refer to the **A-Z Guide** on **Parental Leave**, for more information about parental leave.

## Holiday and leave records

The Holidays Act 2003 requires employers to keep holiday and leave records for each employee to record, among other things:

The name of the employee
The date employment commenced
The days on which the employee actually works if the information is relevant to the calculation of entitlements or payment under the Holidays 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 dates of, and payments for, any public holiday worked
The number of hours that the employee worked on any public holiday
The date on which the employee became entitled to any alternative holiday
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 payment
The cash value of any board or lodgings provided
The cash value of any alternative holidays that the employee has surrendered for payment
The date of termination
The amount paid for holidays on termination

A holiday and leave record must be kept in written form or in a form or manner that allows the information recorded to be easily accessed and converted into written form. The information entered in an employee's holiday and leave record must be kept for not less than 6 years after the date on which the information is entered. However, EMA recommends that you keep the information for the duration of the employee's employment, and for not less than 6 years after their employment ends.

If a request for access to, or a copy of, or a certified extract from, information in relation to an employee is made by:

- The employee
- An authorised representative of the employee
- A representative of a union of which the employee is a member
- A labour inspector

Then an employer who receives such a request must comply with the request as soon as is practicable by allowing that person to view the record or by providing a copy or certified extract of the information concerned.

Refer to the **A-Z Guide on Records and the Holidays Act 2003**, for more information.

# Enforcement

## Rights and obligations

The Holidays Act 2003 stipulates that when dealing with each other under the Act an employer and employee must deal with each other in good faith.

The Act also requires that an employer must inform a new employee, at the time the employee enters into an employment agreement with the employer, about:

- The employee's entitlements under the Act; and
- That the employee can obtain further information about his or her entitlements from either the union of which the employee is a member (if applicable) or the Ministry of Business, Innovation and Employment (formerly the Department of Labour).

The provisions of the Holidays Act 2003 may be enforced by:

- An employee
- An authorised representative of an employee
- A representative of a union of which the employee is a member
- An employer
- A labour inspector

However, any entitlements that an employee enjoys that are additional to the minimum entitlements contained in this Act may be enforced only by an employee, an authorised representative of an employee, or a representative of a union of which the employee is a member. While any of the above persons may enforce the Act, only a labour inspector may bring an action for a penalty against an employer for failure to comply with the Act.

An action to recover unpaid holiday pay or unpaid leave pay may be brought by any person who may enforce the provisions of the Act. The Act may be enforced by applying to the Employment Relations Authority.

Every labour inspector has, in addition to the powers conferred by this Act, powers of entry under the Employment Relations Act 2000. These powers enable a labour inspector to enter, at any reasonable hour, any premises where any person is employed or where the labour inspector has reasonable cause to believe that any person is employed, and to:

- Interview any person, or any employer, or any employee
- Require the production of, and to inspect and take copies from any holiday and leave record
- Require any employer to supply to the labour inspector a copy of the holiday and leave record or employment agreement or both of any employee of that employer
- Question any employer about compliance with the Holidays Act 2003

## Determinations by labour inspectors

The Holidays Act 2003 provides that, where an employer and employee are unable to agree, a labour inspector may make a determination about:

- For the purposes of the ordinary weekly pay or relevant daily pay of the employee, the cash value of any board or lodgings provided by the employer to the employee
- The ordinary weekly pay and the relevant daily pay
- Whether a day would otherwise be a working day for the employee
- How the employee's entitlement to annual holidays may be met
- The amount of pay the employee must receive for working on a public holiday which occurs on a day that would otherwise be a working day for the employee
- That the employee's employer acted in good faith and did not act for the purpose of evading its obligations under the Holidays Act 2003 when the employer dismisses an employee and then re-employs the employee within 1 month after the dismissal

Before making a determination under the Act a labour inspector must discuss the matter with both parties and give each party an opportunity to comment on what the labour inspector proposes to consider in making the determination. A determination made by a labour inspector may be overturned by the Employment Relations Authority. To avoid a determination by a labour inspector you and your employee should agree on these matters as part of the employee's employment agreement.

## Penalties

A labour inspector may bring an action against an employer, for the employer's failure to comply with any of the following provisions (which are related to annual holidays):

- **Section 16:** An employee's entitlement to 4 weeks' annual holidays after completion of 12 months of continuous employment
- **Section 21:** The calculation of annual holiday pay for annual holidays that an employee takes after their entitlement has arisen
- **Section 22:** The calculation of annual holiday pay for annual holidays that an employee takes in advance
- **Section 23:** The calculation of annual holiday pay if an employee's employment ends before the employee has worked for 12 months of continuous employment
- **Section 24:** The calculation of annual holiday pay if an employee's employment ends and the employee has become entitled to annual holidays
- **Section 25:** The calculation of annual holiday pay if an employee's employment ends and the employee has not become entitled to annual holidays for a second or subsequent 12-month period of employment
- **Section 25A:** The amount of gross earnings for the purposes of calculating annual holiday pay for sections 24 and 25 may include payments paid to an employee for annual holidays
- **Section 26:** When an employer must pay an employee for annual holidays
- **Section 27:** When an employer may pay an employee annual holiday pay regularly with the employee's pay
- **Section 75:** The failure to keep or to provide access to a holiday and leave record

An action for a penalty cannot be commenced against an employer if more than 12 months have transpired since the cause of action became known, or should reasonably have become known, to the labour inspector.



# Conclusion

This A-Z guide has been designed to help you manage your employees' annual holiday entitlements. It has set out the requirements of the Holidays Act 2003 and guided you on recommended best practice. If you have any questions that remain unanswered by this guide or need assistance with the drafting or redrafting of your employment agreements, or just want to talk to a real person about your holiday issues, contact EMA AdviceLine on 0800 300 362. The team can put you in touch with your Employment Relations Consultant who will help you with your employment agreements and holiday and leave policies.

## Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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