

A-Z Guide

BREAKS



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| Length of employee's work period | Minimum number of rest and/or meal breaks employees are entitled to |
|----------------------------------|---|
| 0 – 2 hours | No breaks |
| 2 – 4 hours | 1 x 10 minute paid rest break |
| 4 – 6 hours | 1 x 10 minute paid rest break 1 x 30 minute unpaid meal break |
| 6 – 8 hours | 2 x 10 minute paid rest break 1 x 30 minute unpaid meal break |
| 10 – 12 hours | 3 x 10 minute paid rest break 1 x 30 minute unpaid meal break |
| 12 – 14 hours | 3 x 10 minute paid rest break 2 x 30 minute unpaid meal break |
| 14 – 16 hours | 4 x 10 minute paid rest break 2 x 30 minute unpaid meal break |

Overview

- Employees must be given set rest and meal breaks based on the length of their work period, to help them work safely and productively.
- Infant feeding laws exist, creating rights for employees to appropriate facilities and breaks in order to breastfeed or express milk.

Introduction

This A-Z guide provides a brief outline of the requirements for employers in regard to the provision of rest, meal and infant feeding breaks in the workplace.

Prior to 6 May 2019, employers were required to provide employees with a reasonable opportunity to take rest and meal breaks that were of an appropriate duration. The law did not specify the number, duration or position of breaks within the workday, and employers were also allowed to substitute breaks with reasonable compensation.

The Employment Relations Amendment Act 2018 ("the Act") effective from 6 May 2019, requires that employees have set rest and meal breaks. The number and duration of breaks will depend on the hours worked. Employers and employees can still agree on the timing of, but in the absence of agreement, the Act requires breaks to be taken at specific times during a work period, so long as it is reasonable and practicable to do so.

The Act provides an exemption from the set rest and meal break entitlements in certain circumstances for essential services or employers that engage in the protection of New Zealand's national security.

Rest and Meal Breaks

Employees are entitled to breaks based on the length of their work period. This is defined in the Act as a period beginning at the time an employee starts work, and ends at the time an employee finishes work, in accordance with the employee's terms and conditions of employment.

The following sets out the minimum rest and meal breaks an employee is entitled to, based on the length of an employee's work period:

- A work period of more than two hours, but not more than four hours – one 10-minute paid rest break;

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- A work period of more than four hours, but not more than six hours – one 10-minute paid rest break and one 30-minute unpaid meal break; and
- A work period of more than six hours, but not more than eight hours – two 10-minute paid rest breaks and one 30-minute unpaid meal break.

Where more than eight hours have been worked, the employee should be entitled to the breaks as above as though the employee's work period had started at the end of the eighth hour.

Timing of breaks

The employer and employee can agree when the rest and meal breaks are to be taken. Both parties have an obligation to negotiate in good faith as to the timing of breaks. Employers should also consider their health and safety obligations in agreeing to the timing of breaks, for example, to manage the risks that may arise from fatigue.

If the parties cannot agree on the timing of breaks, the employer should provide breaks according to the times set in the Act, so far as it is reasonable and practicable to do so.

The timing of breaks is based on the length of the employee's work period. The following sets out when each break should be taken, so far as is reasonable and practicable, in situations where the parties have not reached agreement on the timing of breaks:

- A work period of **two hours or more, but not more than four hours** – provide the rest break in the middle of the work period;
- A work period of **more than four hours, but not more than six hours** – provide the rest break one-third of the way through the work period, and the meal break two-thirds of the way through the work period;
- A work period of **more than six hours, but not more than eight hours** – provide the meal break in the middle of the work period, a rest break between the start of the work period and the meal break, and a rest break between the meal break and the finish of the work period.

Where more than eight hours have been worked, the employer may re-apply the above.

Exempt employers

The Act provides an exemption from the set rest and meal break entitlements in certain circumstances for essential services or employers that engage in the protection of New Zealand's national security. The exemption applies in the following two situations, if all the conditions are met:

- If the employer is engaged in an essential service (a service specified in Schedule 1 Section 69ZEA of the Employment Relations Act 2000); and
 - continuity of service or production in the essential service is critical to the public interest, including (without limitation) services affecting public safety; and
 - the employer would incur unreasonable costs in replacing an employee, employed in the essential service, during the rest and meal breaks:
 - with another person who has sufficient skills and experience; and
 - without compromising public safety.
- If the employer is engaged in the protection of New Zealand's national security; and
 - continuity of service is critical to New Zealand's national security; and

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- the employer would incur unreasonable costs in replacing an employee, employed in the protection of New Zealand's national security, during the rest and meal breaks:
 - with another person who has sufficient skills and experience; and
 - without compromising New Zealand's national security.

Where the exemption applies, and employer and employee can agree on breaks being taken in a different manner than set out in the Act, including the number and timing of breaks. If an exempt employer and employee are unable to reach agreement on alternative breaks, the employee is entitled to compensation. The compensation must be reasonable and designed to compensate the employee for the failure to provide set breaks.

Examples of reasonable compensation may include:

- Time off work at an alternative time, for example allowing a later start time or an earlier finish time, or an accumulation of time off work that the employee would otherwise have taken as a rest/meal break; and/or
- Financial compensation, at a minimum related to the amount of time that the employee was required to work but would otherwise have taken as a rest/meal break.

If both time off work and financial compensation is provided to the employee, the total amount of time off and the compensation must be at least equivalent to the amount of time that the employee would otherwise have taken as a rest break or meal break.

Infant Feeding

From 1 April 2009, new laws regarding breastfeeding in the workplace took effect. An employee who is breastfeeding or expressing breast milk is entitled to request appropriate facilities and breaks in the workplace.

Facilities

Employers are required to ensure that, so far as is reasonable and practicable in the circumstances, appropriate facilities are provided in the workplace for an employee who is breastfeeding and who wishes to breastfeed in the workplace.

What is reasonable in the circumstances will depend on the employer's operational environment and resources.

Under the current law, the requirement is for 'appropriate' facilities to be provided. Employers may wish to access the Code of Employment Practice on Infant Feeding for suggestions as to facilities available to employees.

Breastfeeding advocates suggest providing a room or space that is of adequate size and contains, if possible, a fridge for storing expressed breast milk. The employee should also have access to a basin and running water if these (and the fridge) are not available in the space or room provided.

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Employers are required to provide appropriate breaks to an employee who is breastfeeding and wishes to breastfeed during a work period.

These breaks are paid only if the employee and employer agree that they are paid and are additional to the rest and meal breaks to which the employee is entitled, unless the parties agree that the breaks will be taken at the same time.



There is no definition of 'appropriate' breaks in the legislation, however the Code of Employment Practice on Infant Feeding indicates that this will differ for each employee due to the nature of breastfeeding, the needs and age of an infant, whether the employee is solely, and the operational environment the employee works in. An appropriate break is likely to be long enough for the employee to breastfeed or to express milk.

Frequently Asked Questions

Can the 30-minute unpaid break be taken at the end of the work day?

Some employers allow employees to work through their lunch break (and eat at their desk/workstation) in order to leave work 30 minutes earlier – be it due to childcare arrangements or the pursuit of personal interests, etc. Under the new legislative framework, we consider that such practices could be held to be non-compliant with the new rules. Firstly, breaks must be provided. Secondly, breaks must be unconstrained time away from work-related tasks. Thirdly, strictly interpreted a break under the new law means a period of time between two work periods. Hence, while the law allows the parties to agree on timing of breaks, there are limitations to such agreements and the above practice is unlikely to be compliant with the new law.

Similarly, the common practice of 'bundling' the rest breaks and to provide one 30-minute unpaid lunch break and one paid 20-minute break is likely to be technically non-compliant with the new law.

Can the employer direct the employee where to take their break or what to do during breaks?

Breaks are for attending to personal matters and must be a break from any kind of work-related tasks. The employer cannot constrain employees in respect of what they do during their breaks or where they take their breaks.

What if an employee does not want to take their breaks?

The employer is legally obliged to ensure that breaks are 'provided'. The employer needs to make sure that employees know and understand their entitlement to breaks and that they are taking them. In the extreme, the employer can (if not must) direct the employee to take the minimum breaks.

Does the employer have to provide breaks where an employee is sole charge?

Yes, unless an exception applies (for example, national security, essential services). Employers may consider closing the shop/store during breaks or agreeing to a different shift pattern (for example, with an overlap between employees to allow for each to have the requisite break/s).

Exemptions to rest and meal break requirements

The Act provides for limited exemptions from the set rest and meal break entitlements in certain circumstances, for example for essential services or employers that engage in the protection of New Zealand's national security. Where such exemption applies, an employer and employee can agree on breaks being taken in a different manner than set out in the Act, including the number and timing of breaks. If an exempt employer and employee are unable to reach agreement on alternative breaks, the employee is entitled to compensation. The compensation must be reasonable and designed to compensate the employee for the inability to take set breaks.

Other rules regarding breaks?



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Where an employee is a person who is required to take rest and meal, or under, any other legislation, the rules prescribed by, or under, any such other legislation prevails and applies instead of the rest and meal break regime set out in the Employment Relations Act 2000. An example for this is transport legislation, for example for truck drivers.

Do I need to make changes to my employment agreements?

That depends on what is currently recorded in your employment agreements. We recommend at least a basic clause like the following:

“The Employee is entitled to paid rest breaks (of ten minutes’ duration) and unpaid meal breaks (of 30 minutes’ duration) in accordance with the Employment Relations Act 2000. The timings of breaks will be in accordance with this Act, unless otherwise agreed between the as may be recorded in an appendix to this agreement, or in a roster, or as agreed with the employee from time to time, including verbal agreements on an ad-hoc basis).”

A provision in an employment agreement that excludes, restricts or reduces the employee’s entitlement to, meal breaks, or compensatory if legally permitted) has no effect and is not enforceable by the employer.

For sample clauses relating to breaks, please see our Sample Clauses document available on our website under resources.

Conclusions

The changes to rest and meal breaks remove the flexibility that existed under the law prior to 6 May 2019. It appears that the practical consequences and restraints on operational business needs or even employees’ personal preferences have not necessarily been fully considered by Parliament at the time. The recent (and ongoing) struggle of the transport industry, for example bus services, illustrates this.

However, indications from MBIE/the Labour Inspectorate are that it may not formally intervene as long as employees can and do take their minimum breaks.

In saying this, whilst the Labour Inspectorate may not intervene, employees may pursue a claim for breaches of the new rest and meal break provisions as an ‘add on’ to an unrelated personal grievance claim (for example an unjustified dismissal claim) by alleging that they have not been afforded with their minimum breaks. This could create additional bargaining leverage for those employees, in that such claim may expose an employer to potential risks including penalties for breaches of minimum entitlements, stand-down from employing migrant workers, and wage arrears for untaken rest breaks.

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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