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The Art of Law

FAQS: PUBLIC HOLIDAYS CHRISTMAS / NEW YEAR 2010 – 2011

Public Holidays

1. Are there any transferred public holidays for Christmas and New Year 2010-2011?

Yes. Christmas and Boxing Day fall on Saturday and Sunday and thus will be recognised the following Monday and Tuesday, 27 and 28 December. Likewise, New Years Day and 2 January, which will be recognised on Monday and Tuesday, 3 and 4 January, for employees who usually work weekdays. For employees who would normally work weekends, these public holidays will be observed on the day that they fall and do not transfer.

2. What do I pay an employee for a public holiday if the employee does not work on the public holiday?

This depends on whether the day would “*otherwise be a working day*” for the employee. If so, the employee is entitled to the whole day as a holiday paid at the employee’s “*relevant daily pay*” for the day. If the employee would not have been working that day, then the employee is not entitled to any payment.

3. What would “otherwise be a working day”?

This is usually obvious, such as any day from Monday to Friday for a Monday to Friday worker. The question can be rephrased as ‘would it have been a working day for the employee if it wasn't a public holiday?’

However, where it is not obvious, such as when an employee works regularly but not on consistent days or a regular pattern, then an employer and employee should try and reach agreement. They should take into account the employment agreement, patterns of work, rosters, whether the employee only works when work is available, and any expectation that the employee had that he or she would have worked that day.

As an example if an employee often worked Thursdays, but not always, and Christmas falls on a Thursday then, subject to any factors that may be inconsistent with the employee usually working that day, it would be possible to conclude that the public holiday would “*otherwise be a working day*”. However, if an employee works on Thursdays for a number of weeks, because of a particular work requirement (e.g. completing a project prior to Christmas and the project is completed) then the employee could not have had a reasonable expectation of working on Christmas Thursday and it would be possible to conclude that the day would not “*otherwise be a working day*”.

4. What is “relevant daily pay”?

This is the amount of pay the employee would have received if the employee had worked the day and includes commissions, incentive payments, overtime that may otherwise be attributed to that day and the cash value of board or lodging provided to an employee. However, it does not include the time and a half that is required to be paid for work performed on the day under the Holidays Act 2003.

If it is not possible to calculate, reasonably accurately, what the employee would have received, the Holidays Act provides a formula that divides an employee’s “*gross earnings*” for the 4 weeks (or pay period if longer) immediately preceding the public holiday, by the number of days and part days worked by the employee in that period.

However, the formula should only be used where it is not possible to calculate what the employee would have likely received because the formula's use of "**gross earnings**" can significantly inflate the payment. As an example the relevant daily pay for Christmas day calculated by using the formula will include any bonus paid leading up to Christmas, even if it is an annual bonus, and any annual holiday payments made leading up to Christmas (acknowledging that annual holiday payment must be paid before the annual holiday is taken) divided by the day and part days worked in the period immediately prior to Christmas.

5. What are "gross earnings"?

This means all payments that an employer is required to make under the employee's employment agreement including not only salary and wages but allowances, holiday payments, commissions, bonuses, incentive and productivity payments, overtime, the cash value of board or lodging provided by an employer and any first week ACC payments made by an employer.

Note that discretionary payments (e.g. bonuses that are not required to be paid under the employee's employment agreement) and reimbursing payments (e.g. for mileage or entertainment costs) are not part of "gross earnings").

6. What do I pay an employee for working on a public holiday?

If an employee works on a public holiday, that employee is entitled to be paid, for the hours the employee works on that day, at the greater of:

(1) the employee's "*relevant daily pay*" if it includes a penal rate that is more than time and a half; or

(2) the employee's "*relevant daily pay*" less any penal rate that is less than time and a half, plus half that daily pay again (with the penal rate removed) i.e. time and a half excluding any contractual penal rate.

Note an employee is only entitled under the Holidays Act 2003 to payment for the actual hours worked on the day, not the hours an employee would normally work on that day. As an example if an employee normally works 8 hours but only works 3 hours on a public holiday, that employee is only entitled to be paid for working 3 hours.

7. Are employees entitled to take paid time off for having worked on a public holiday?

Employees are entitled to an alternative whole day off paid at their "*relevant daily pay*" if they have worked any time on a public holiday and that day would "*otherwise be a working day*". If the public holiday worked by the employee would not "*otherwise be a working day*" the employee is not entitled to any alternative holiday. **Note** the alternative day off is a whole paid day off even if the employee only worked part of a day on the public holiday. The alternative day off is paid at the employee's "*relevant daily pay*" for the day the employee takes off.

8. Can I require employees to work on a public holiday?

You can only require employees to work on a public holiday if the public holiday would "*otherwise be a working day*" for the employee and the employment agreement provides that an employee can be required to work on the public holiday.

9. When can an employee take an alternative holiday?

The alternative holiday should be taken by agreement between employer and employee. In the absence of any agreement and within 12 months of the public holiday that resulted in the alternative day, an employee can give 14 days notice to the employer of the date the employee will be taking the alternative day, as long as the employee has taken into account the convenience of the employer. After 12 months the employer may give 14 days notice of a requirement to take the day or the employer and employee may agree to cash up the day.

10. What happens if an employee has resigned and the employee's notice expires just before Christmas?

Any entitlement to annual holidays that the employee has not taken must be projected forward from the employee's last day of work as if the employee was going to take the holidays. Any public holidays that fall within that period that that would "*otherwise be a working day*" for the

employee must be treated as a paid public holiday of the employee, i.e. the employee receives payment for the public holidays that fall within the deemed annual holiday period as well as their annual holiday entitlement.

11. What happens to an employee who is sick or bereaved on a public holiday?

If an employee has agreed or has been required to work on a public holiday, but is sick or bereaved, the day should be treated as an unworked public holiday. This means that if the day would otherwise have been a working day for the employee, he or she will receive relevant daily pay, and will not have a day's sick leave deducted. There will be no alternative holiday, and no time and a half.



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FAQS: CHRISTMAS CLOSEDOWN PERIODS

1. Can I have a Christmas close down?

Yes, as long as you have customarily had a Christmas close down.

2. What do I have to do to notify employees of a Christmas close down?

You must give your employees at least 14 days notice of your intention to close down over Christmas period and telling employees that they are required to take annual holidays during that period. It is prudent that you provide notice in writing. A general memo will do telling employees when the business will close and when it will re-open. It is also a good idea to explain what will happen with regard to holiday entitlements and holiday pay. However, you must ensure that each employee receives the memo. If you are intending to discontinue the work of any employee during that period because an employee does not have sufficient holiday or any holiday entitlements, it is recommended that employees in that category receive personal letters.

3. What happens if employees do not have enough holiday entitlements, or do not have any holiday entitlement?

If an employee has no annual holiday entitlement, i.e. the employee is within the employee's first year of employment, or has used the whole of any previous year's entitlement, and has not yet qualified for annual holiday in the subsequent year, the employer must pay 8% of the employee's gross earnings from the employee's anniversary of employment until the commencement of the closedown period and may discontinue the employee's work for the duration of the closedown period.

That employee's anniversary date in the calculation of annual holiday is then re-set with the date of the commencement of the closedown, i.e. the employee's annual holiday entitlements then become calculated from the commencement of the closedown in the future.

If an employee has some annual holiday entitlement, but it is not sufficient to cover the closedown period, the employee must be paid the holidays the employee is entitled to, and the employer and employee may agree that the employee takes annual holidays in advance.

The Holidays Act 2003 provides no solution if an employer and an employee cannot agree to take annual holiday in advance. If the same principle is applied as applies to employees who have no entitlement at the commencement of the closedown, then the employees who do not have sufficient holiday and cannot reach an agreement with regard to holiday taken in advance, would not be paid for the remainder of the closedown period. **Note:** At the time of drafting, there has been no judicial assistance on this point.

4. How are annual holidays paid?

Annual holidays are to be calculated and paid at the rate of the employee's "*average weekly earnings*" or "*ordinary weekly pay*" at the time the holiday is taken. The "*average*" weekly earnings is the employee's "*gross earnings*" divided by 52.

The "*ordinary weekly pay*" is the pay an employee receives under his or her employment agreement in an ordinary week and includes commission, bonuses, productivity, incentive pay, overtime, if they form part of the employee's regular pay and the cash value of any board and lodgings provided by the employer. However, it excludes any of the above listed payments (except the cash value of board and lodgings), if they are not part of an employee's regular pay as well as one off exceptional payments and any discretionary payments that the employer is not bound by the terms of employment to pay to the employee. If it is not possible to calculate

"ordinary weekly pay" on this basis, the Holidays Act 2003 provides a formula, based on the employee's gross earnings for the preceding four weeks.\

What happens to any public holidays that fall within Christmas Closedown?

If the public holidays would "*otherwise be working days*" for the employee, then those days are to be observed as public holidays and are not counted as annual holidays, e.g. for a Monday to Friday worker, Christmas and Boxing Day would be treated as public holidays, and the other working days in that week are treated as annual holiday. The Thursday and Friday of the following week are the New Year and 2nd of January public holidays.

5. What happens to an employee who is sick while on annual holidays?

If the employee becomes sick or injured immediately before the commencement of annual holidays, then those days are treated as sick leave and not annual holidays (assuming the employee has a sick leave entitlement).

If the annual holidays have already commenced, and the employee becomes sick or injured, an employer **may** allow an employee to take those days as sick leave if the employee has an entitlement.

6. What about bereavement leave in the same circumstances?

Any bereavement leave taken at the commencement of annual holidays or during the annual holidays, must be treated as bereavement leave (if the employee has an entitlement) and not annual holidays.