

## NATIONAL EMPLOYMENT STANDARDS – ANNUAL LEAVE

Annual leave forms part of the 'safety net' of the National Employment Standards (NES), which came into effect on 1 January 2010. The NES applies to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Awards, agreements and employment contracts can provide more favourable terms and conditions in addition to the minimum entitlements set out under the NES.

The NES establishes (Section 86 - 94, Fair Work Act, 2009 (Cth), (FW Act)):

- > the minimum entitlements of annual leave;
- > when annual leave can be taken;
- > the rate of pay;
- > continuation of entitlements when there is a transfer of business; and
- > cashing out options.

**Entitlement to Annual Leave**  See Fair Work Act s. 87

The annual leave entitlement is four weeks (or pro rata thereof), or five weeks for a continuous shiftworker.

Only permanent employees, full-time and part-time, are entitled to annual leave. Casual employees are not entitled to annual leave.

Annual leave accrues progressively and accumulates from year to year.

From 1 January 2010 an employee (other than a casual employee) is entitled to four weeks of paid annual leave for each year of service with the employer or the pro-rata equivalent for a part-time employee. The entitlement accrues on a continuous basis according to the number of ordinary hours worked. An employee is still entitled to all annual leave accrued prior to the introduction of the NES.

The NES does not provide a calculation for the accrual of annual leave. Employers should ensure annual leave is regularly credited to employees. Payroll systems will generally allow for this calculation.

This is particularly important when employment ends. When an employee's employment ends they should be paid annual leave up to the end date of employment. In addition, some awards may contain ancillary terms that prescribe the calculation of annual leave accrual which must be complied with.

An employee classified as a 'shift worker' is entitled to five weeks paid annual leave. The definition of a shift worker can usually be found in the applicable award or agreement.

Where an employee is not covered by an award/agreement (or where an award or agreement does not contain a definition of a shift worker) they will qualify for the shift worker entitlement if all of the following apply:

- > they are employed in an enterprise where shifts are continuously rostered 24 hours a day for seven days a week;
- > they are regularly rostered to work those shifts; and
- > they regularly work on Sundays and public holidays.

Check awards and agreements as they may supplement the NES by providing additional annual leave entitlements. Award/agreement-free employees may agree with their employer to purchase extra annual leave in exchange for foregoing an equivalent amount of pay.

## Requirements for Accruing and Taking Annual Leave See Fair Work Act s. 88

Annual leave does not have to be taken each year as the entitlement can accumulate from year to year. This is unlike the former Workplace Relations Act 1996, which stipulated that the employer could instruct an employee to take annual leave if the employee had accrued more than two years annual leave. It is up to each employer and employee to agree on when and for how long paid annual leave may be taken. However, the employer must not unreasonably refuse an employee's request to take paid annual leave.

An employee is not on paid annual leave if the period during which they take paid annual leave:

- > includes a day or part-day that is a public holiday; and
- > includes a period of any other leave (other than unpaid parental leave), or a period of absence from employment due to community service leave.

## Directing Employees to Take Leave

In certain circumstances, an employer can direct an employee to take annual leave. To be able to do this, an award or agreement must include terms that require an employee to take paid annual leave, or allow the employee to be directed to take leave. The requirement in the award or agreement must be reasonable. The NES allows an employer to require an award/agreement free employee to take a period of annual leave, but only if the requirement is reasonable.

### What is reasonable?

A requirement to take annual leave may be reasonable if the employee has accrued an excessive amount of paid annual leave or the employer's enterprise is being shut down for a period. Section 382 of the Fair Work Bill 2008 Explanatory Memorandum, however, clarifies this in more detail:

In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:

- > the needs of the employee and the business
- > any agreed arrangement with the employee
- > custom and practice of the business
- > timing of the direction or requirement to take leave
- > reasonableness of the period of notice given.

Matters that could be either incorporated into an award or agreement, or agreed upon, include:

- > paid annual leave may be taken in advance of accrual
- > paid annual leave must be taken within a fixed period of time after it is accrued
- > a specified period of notice must be given before taking paid annual leave.

Therefore, if an employer wishes to direct an employee to take a period of paid annual leave, they must first read the employee's applicable award or agreement to see if there are any provisions allowing this.

Alternatively, for employees who are award/agreement free, an employer may direct an employee to take a period of paid leave, provided that such direction is reasonable.

## Stand Down of Employees See Fair Work Act s. 524

An employer is able to stand down an employee during a period where the employee cannot be usefully employed due to:

- > industrial action (other than industrial action organised or engaged in by the employer);
- > a breakdown of machinery or equipment (provided the employer cannot reasonably be held responsible for the breakdown); or
- > a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

If an employer does stand down an employee for one of the reasons listed above, the employer is not required to pay the employee during this period; however employers may offer employees the opportunity to use some of their annual leave during this period. While this is not considered to be 'forced annual leave' it is an opportunity for employers to potentially bring down annual leave accruals and ensure employees are still receiving regular payments.

## **Payment for Annual Leave** See Fair Work Act s. 90

When annual leave is taken, the minimum requirement is that an employee must be paid at their base rate of pay for the ordinary hours they would have worked during the period. Awards or agreements may specify additional loadings or requirements in relation to the payment for annual leave. Award/agreement free employees are not entitled to leave loading.

Unless otherwise stated in an award or agreement and for award/agreement free employees, an employee's base rate of pay (other than a pieceworker) is the rate of pay payable to them for their ordinary hours of work, which does not include the following:

- > incentive-based payments and bonuses
- > loadings
- > monetary allowances
- > overtime or penalty rates
- > any other separately identifiable amounts.

On termination of employment, an employer must pay a part-time or full-time employee any period of untaken paid annual leave.

## **Continuation of Entitlements (Transfers)** See Fair Work Act s. 91

The 'transfer of employment' provisions under the FW Act apply when an employee moves from one employer (the old employer) to another employer (the new employer) within three months, and there is either a transfer of business involved (through a transfer of assets, outsourcing, in-sourcing), or the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally count as service with the new employer for the purposes of entitlements under the FW Act. If this applies, an employee is not entitled to be 'paid out' for a period of untaken annual leave. Instead the entitlements should be transferred.

The exceptions to this are:

- > A new employer that is not an associated entity of the old employer has the option to not recognise a transferring employee's previous service for the purposes of NES entitlements to annual leave; and
- > If the new employer does not recognise an employee's service in relation to annual leave, the old employer will be required to pay out the employee's untaken annual leave.

## **Requirements Regarding Cashing Out Leave** See Fair Work Act s. 92-94

For employees covered by an award or agreement, cashing out annual leave is permitted if the award or agreement specifically allows it.

Award/agreement free employees may agree to cash out annual leave at any time, subject to the following:

- > the employee must retain an entitlement to at least four weeks paid annual leave (starting from the accrual commencing 1 January 2010);
- > there must be a separate agreement in writing on each occasion; and
- > the employee must be paid at least the full amount that would have been payable had the employee taken the leave the employee has cashed out.

It is unlawful for an employer to force (or try to force) an employee to make (or not make) an agreement to cash out annual leave.

### **Model Clauses contained in most Modern Awards:**

On the 29<sup>th</sup> June 2016 The Fair Work Commission finalised the model terms in relation to excessive leave accruals, cashing out, annual leave in advance and electronic funds transfer (EFT) payment for most modern awards. The model clause contains the following provisions:

The model clause re; excessive leave accruals contains the following provisions:

- > excessive leave is defined as the employee having accrued more than 8 weeks paid annual leave (or 10 weeks' paid annual leave for a shiftworker).
- > the employer should genuinely try to reach agreement with the employee to take leave prior to direction.
- > the employee should retain at least 6 weeks following direction.
- > the employer must not require the employee to take a period of leave less than one week.
- > the employer must give a minimum notice of 8 weeks and maximum of 12 months to take leave.

The model clause re; cashing out leave contains the following provisions:

- > each cashing out of a particular amount of paid annual leave must be in writing and this must state the amount of leave to be cashed out, the payment to be made to the employee and the date on which the payment is to be made. This agreement must be signed by both the employer and employee and kept in the employee's record.
- > the employee must be paid at least the full amount that would have been payable had the employee taken the leave the employee has cashed out.
- > the employee must retain an entitlement to at least four weeks paid annual leave
- > the maximum amount of annual leave that can be cashed out is two weeks in any 12 month period
- > there must not be any undue pressure or influence on an employee to make an agreement to cash out leave

The model clause re; cashing out leave in advance allows for the employer and the employee to make an agreement in writing for an employee to take a period of paid annual leave before the employee has accrued an entitlement to the leave. If on termination the employee has not accrued sufficient leave to 'make up' that time, employer's may deduct from any money due to the employee an amount equal to what was paid to the employee.

An employee paid by electronic funds transfer (EFT) may be paid in accordance with their usual pay cycle while on paid annual leave.

## **Do casuals accrue annual leave?**

No, casuals do not accrue annual leave.

## **Can anyone cash out their annual leave?**

Cashing out annual leave for award or agreement covered employees can only occur if the award or agreement allows for this. If employees are not covered by an award or agreement they can cash out annual leave, dependant on meeting the requirements of S92-94 as outlined above.

## **Can I force employees to take leave when we close our business, i.e. over the Christmas and New Year period?**

Employers can request employees covered by an award or agreement to take leave at specific times as long as this is covered in the award or agreement. Those employees not covered by an award or agreement can be directed to take annual leave as long as the request is reasonable.

## **Contacting the Victorian Chamber of Commerce and Industry**

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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