

## NATIONAL EMPLOYMENT STANDARDS – PUBLIC HOLIDAYS

Public Holidays 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.

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

**Overview**  See *Fair Work Act* s. 114 - 116

A public holiday is a day that the Australian, State or Territory governments have declared to be a holiday, such as Australia Day.

Under the NES most employees are entitled to a day off, and to be paid for public holidays, if they usually would have worked on that day. Some public holidays apply across Australia and some only apply in certain states, territories or regions.

Where a public holiday falls on a day on which an employee would normally work, an employee is entitled to payment for the public holiday at the base rate of pay for the employee's ordinary hours of work on that day or part-day. The base rate of pay excludes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts.

However, an employee is generally not entitled to payment if they do not ordinarily work on that day.

### 'Reasonable Grounds' to Request or Refuse to Work on a Public Holiday

Employees are protected from adverse action for having, using, or seeking to use their workplace right to reasonably refuse to work on a public holiday.

In determining whether a request (or a refusal of such a request) to work on a public holiday is reasonable, the following must be taken into account:

- > the nature of the employer's workplace (including its operational requirements) and the nature of the work performed by the employee;
- > the employee's personal circumstances, including family responsibilities;
- > whether the employee could reasonably expect that the employer might request work on the public holiday;
- > whether the employee is entitled to receive overtime payments, penalty rates, additional remuneration or other compensation that reflects an expectation of work on the public holiday;
- > the type of employment (e.g. full-time, part-time, casual or shiftwork);
- > the amount of notice in advance of the public holiday given by the employer when making the request;
- > the amount of notice in advance of the public holiday given by the employee in refusing the request; and
- > any other relevant matter.



**Note:** no single factor determines if a request or refusal is reasonable – all of them must be taken into account.

**Public Holidays in Australia**  See *Fair Work Act* s. 115

The following days are public holidays under the NES:

- > 1 January (New Year's Day);
- > 26 January (Australia Day);
- > Good Friday;
- > Easter Monday;
- > 25 April (Anzac Day);
- > Queen's birthday holiday (the day on which it is celebrated in a State or Territory or a region of a State or Territory);
- > 25 December (Christmas Day);
- > 26 December (Boxing Day); and
- > any other day or part-day declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory (or a region of the State or Territory) as a public holiday (please check the Public Holidays leave guide for additional State wide public holidays).

## Substitute and additional Public Holidays

The FW Act also refers to 'substitute days' under the law of State or Territory.

If under the law of a State or Territory, a day or part-day is substituted for any public holiday (including part day holidays), then the substituted day or part-day is the public holiday. A modern award or enterprise agreement may also permit an employee and employer to come to an agreement regarding the substitution of a public holiday.

**Substitute Public Holidays:** If a public holiday has been substituted under state or territory legislation, then the substitute day is the only day regarded as the public holiday and will attract any applicable penalty under an award, agreement or common law contract.

**Additional Public Holidays:** If an additional public holiday has been declared under state legislation, then both the actual public holiday and the additional day are declared public holidays and will attract any applicable penalty under an award, agreement or common law contract.

In Victoria, the *Public Holidays Act 1993* (Vic) (as amended in 2008) prescribes additional public holidays where Boxing Day or New Year's Day falls on a weekend.

## Payment for absence on a Public Holiday See *Fair Work Act* s. 116

The NES entitles all employees of national system employers including employees covered by a modern award or an enterprise agreement to a paid day off on a day that is a public holiday.

If an employee is absent from work on a day or part-day that is a public holiday, the employer must pay the employee the base rate of pay for the employee's ordinary hours of work on that day or part-day. An employee is not entitled to payment if they do not have ordinary hours of work on the public holiday.

For example, a full-time or part-time employee is not entitled to payment if their part-time or full time hours do not include the day of the week on which the public holiday falls, unless the award says otherwise.

Casual employees who are not rostered to work on the public holiday will not be entitled to payment for the public holiday under the NES.

An absence under this clause is generally defined in the following circumstances:

- > A business decides not to operate on the public holiday;
- > An employee is currently taking a period of paid annual leave or paid personal/carers' leave on the public holiday; or

- > In Victoria, under the *Long Service Leave Act 2018* (Vic), where an employee is taking a period of long service leave. (Employers should check the relevant long service leave legislation to ascertain whether payment for long service is exclusive of public holidays).

The base rate of pay as indicated section 116 of the FW Act is the employees' ordinary rate of pay but excludes the following:

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

## Payment for Work on a Public Holiday

There are no penalty rates for working on a public holiday under the NES for employees who are award or agreement free. Therefore, an employee will be paid at their ordinary rate of pay for any hours worked on the public holiday.

Employees covered by an award or enterprise agreement will need to refer to the relevant industrial instrument to determine the applicable rate of pay for working on a public holiday. Commonly, an industrial instrument such as a modern award will contain penalties for performing work a public holiday.

## Frequently Asked Questions

### What do I pay my employee if they are on a period of unpaid leave?

If the employee is on a period of unpaid leave and a public holiday falls within the period of unpaid leave, the employee is not entitled to payment for the public holiday, as the employee would have not worked during this period.

### What do I pay my employee if they take personal leave either side of a public holiday?

In this situation, the standard rules under the NES would still apply. The NES states if required by the employer, the employee must give evidence that would satisfy a reasonable person. This reasonable evidence could include a medical certificate or statutory declaration. If reasonable evidence is produced, the employee is entitled to personal leave payment.

### What do I pay my employee if they are on a period of paid annual leave on a day that is a public holiday?

If the employee is on paid annual leave on a day that is a public holiday, section 89(1) of the NES provides that he or she is taken not to be on paid annual leave on that day. Therefore, an employer would be required to pay the employee for an absence on a public holiday under section 116 of the FW Act.

### What do I pay my employee if they are on a period of paid personal/carer's leave on a day that is a public holiday?

If the employee is on paid personal/carer's leave on a day that is a public holiday, section 98 of the NES states that an employee is taken not to be on paid personal/carer's leave on that day. Therefore, an employer would be required to pay the employee for an absence on a public holiday under section 116 of the FW Act.

## 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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