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INFORMATION SHEET

ANNUAL LEAVE

What is an Employee's Annual Leave Entitlement?

Annual leave forms part of the National Employment Standards (NES), and as of 1 January 2010 applies to all full-time and part-time 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 cannot exclude or provide for an entitlement less than the NES and those that do, have no effect. An employer must not contravene a provision of the NES.

An employee (other than a casual employee) is entitled to 4 weeks' of paid annual leave for each year of service with the employer. An employee classified as a shiftworker is entitled to 5 weeks' annual leave.

Frequently Asked Questions

1. How much annual leave do full-time and part-time employees accrue for each year of service with their employer?

Answer: For each year of service with their employer, a full-time and part-time employee (other than a shiftworker) will accrue 4 weeks of paid annual leave.

An employee classified as a shiftworker will accrue 5 weeks paid annual leave.

2. What is a Shiftworker for the Purpose of Annual Leave Entitlements?

If the employee is covered by an Award or Enterprise Agreement, employers should refer to the full award or relevant legislation to determine if an employee is classified as a shiftworker. The definition and qualification requirements differ depending on which industrial instrument applies to the employment of the employee.

If the employee is not covered by an Award or Agreement, the definition of a shiftworker is:

- i. They are employed in an enterprise where shifts are continuously rostered 24 hours a day for 7 days a week;
- ii. They are regularly rostered to work with those shifts;
- iii. They regularly work on Sundays and Public Holidays.

3. Do casual employees receive the annual leave entitlement?

Answer: No. A casual employee does not accrue annual leave.

4. How is annual leave calculated for permanent full-time employees?

Answer: Full-time employees accrue annual leave at the rate of 2.923 hours per completed week of service. i.e. 52 weeks x 2.923 hours per week = 152 hours of annual leave for each completed year of service.

Example-

An employee has worked for the business on a full time basis (38 hours per week) for 20 weeks. His accrued annual leave at that time will be;

20 weeks x 2.923 hours = 58.46 hours of annual leave has been accrued

If an employee takes one week's annual leave (38 hours) this amount is deducted from the accrued total as indicated below.

58.46 hours – 38 hours = 20.46 hours of annual leave remain available to the employee to take.

Annual leave will then continue to accrue weekly, including during the period of annual leave that has been taken by the employee. The hours accrued during the period the employee took annual leave will be added to their total hours that remain. Annual leave is in effect a running total with more being added each week and amounts being deducted from the total as and when annual leave is taken.

5. How is annual leave calculated for permanent part-time employees?

Answer: Permanent part-time employees are entitled to four weeks paid annual leave for each year of completed service. Annual leave accrues on a pro rata basis according to the number of ordinary hours worked.

To calculate the total number of hours of annual leave a part-time employee has accrued, refer to the calculation below:

Example-

Using the above facts except that the employee works 10 hours per week rather than 38 hours per week.

20 weeks x (10/38) x 2.923 hours = 15.38 hours of annual leave has been accrued

If an employee takes one week's annual leave (10 hours) this amount is deducted from the accrued total as indicated below.

15.38 hours – 10 hours = 5.38 hours of annual leave remain available to the employee to take.

If the employee's hours differ each week, this calculation must be done weekly to determine the correct accrual of annual leave.

Most computerised payroll systems will calculate this accrual automatically.

6. Which absences are not counted as service with the employer, for the purpose of calculating annual leave?

Answer: A period of **service** with their employer is a period during which the employee is employed by the employer, but does not include any of the following periods (an excluded period):

- i. Any period of unauthorised absence;
- ii. Any period of unpaid leave or unpaid unauthorised absence, other than a period of absence under community service leave or a period of stand-down under the NES, an Agreement or Contract of Employment.

7. Is an employee's service with an employer broken if the employee has taken a period of unauthorised absence?

Answer: No. If an employee has taken a period of unauthorised absence this does not break the employee's continuity of service. However, the absence does not count towards the employee's length of service when calculating the employee's entitlements.

8. Which periods of absence are counted as service with an employer?

Answer: For the purpose of calculating an employee's paid annual leave entitlement, all absences taken by the employee as paid leave are counted towards to accrual of this entitlement. For example:

- i. Paid annual leave;
- ii. Paid personal/carer's leave;
- iii. Paid long service leave;
- iv. Public Holidays
- v. Jury service.

9. How much annual leave is an employee entitled to take at one time?

Answer: There is no minimum amount of annual leave that the employee can take at one time. Provided that both parties agree, an employee can take a part-day, single day or a number of days or weeks off.

10. Can an employer refuse an employee's request to take a period of annual leave?

Answer: The NES states that an employer should not unreasonably refuse a request from an employee to take annual leave. However, the NES does not define the meaning of 'unreasonably refuse' in this context, although the taking of annual leave may also be subject to the provisions of an applicable modern award or enterprise agreement.

The *Explanatory Memorandum to the Fair Work Bill 2008* states that in assessing the reasonableness of a requirement or direction under the NES it is envisaged the following are relevant considerations:

- i. The needs of both the employee and the employer's business;
- ii. Any agreed arrangement with the employee;
- iii. The custom and practice in the business;
- iv. The timing of the requirement or direction to take leave; and
- v. The reasonableness of the period of notice given by the employee to take leave.

11. Can an employer direct an employee to take a period of paid annual leave?

Answer: The right of the employer to direct an employee who is covered under a modern award or enterprise agreement to take annual leave is subject to the relevant provisions of the industrial instrument.

A common provision in modern awards is the right of the employer to direct an employee to take annual leave where the employee has accrued an excessive amount of leave. An 'excessive amount of annual leave' is usually defined to mean a balance in excess of 8 weeks of leave.

This is usually a 'last resort', subsequent to the employer genuinely trying to reach agreement with the employee as to the timing of annual leave. Normally, the employer would be required to give at least 4 weeks of notice to the employee to take annual leave.

Under the *Fair Work Act 2009*, an employer may require an award/agreement-free employee to take a period of annual leave but only if the request is reasonable. A requirement to take paid annual leave may be reasonable if, for example:

- i. The employee has accrued an excessive amount of annual leave (i.e. 8 weeks or more); or
- ii. The employer's business is being shut down for a period (Christmas/New Year close down).

12. Does a permanent employee's entitlement to annual leave accrue whilst the employee is in a probation period?

Answer: Yes. Probation periods aren't a separate period of employment. While on probation, a permanent employee will accrue the same entitlements as an employee who isn't in a probation period.

13. At what rate is annual leave paid to a permanent employee?

Answer: If a permanent full-time or part-time employee takes a period of paid annual leave, the employer must generally pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period. However, some Awards and Agreements may provide for the payment of annual leave at the Employees usual rate of pay (as opposed to their base rate of pay) or may require annual leave loading to be paid. Employers should refer to the Award or Agreement covering the employee to determine at what rate annual leave is paid.

14. What is an employee's 'base rate of pay'?

Answer: The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- i. Incentive-based payments and bonuses;
- ii. Loadings;
- iii. Monetary allowances;
- iv. Overtime and penalty rates;
- v. Any other separately identifiable amounts.

15. What happens when the employment of an employee ends, and they have a period of untaken paid annual leave?

Answer: If, when the employment of a permanent full-time or part-time employee ends, and the employee has a period of untaken annual leave, the employee must pay the amount that would have been payable to the employee had the employee taken that period of annual leave.

16. What is annual leave loading?

Answer: Annual leave loading is not a condition under the National Employment Standards, but a common feature of Awards and Agreements or contracts of employment.

Eligible employees are usually entitled to a 17.5% annual leave loading calculated on the base weekly rate of pay defined by the industrial instrument that covers the employee. This entitlement is designed to compensate employees for notional loss of penalty rates and overtime earnings whilst on leave.

Annual leave loading is not a statutory entitlement for employees that are not covered by an award, however, it may still be payable in some circumstances where the entitlement has been included or previously paid under the employee's contract of employment.

17. Is annual leave and annual leave loading payable upon the termination of an employee's employment?

Answer: If an employee is entitled to annual leave loading during their period of employment, then they must be paid annual leave loading on annual leave paid out upon termination of their employment. This applies even if a clause in an Award, Agreement or contract expressly states that either entitlement is not payable.

This requirement is based on the provisions in the National Employment Standards which provides that a terminated employee with a period of untaken annual leave must be paid what they would have been paid if they had taken that period of leave.

18. Is a permanent employee taken to be on annual leave if a public holiday falls within the period of absence?

Answer: If a public holiday falls during an employee's period of annual leave, and the employee would have worked on that day had they not been on annual leave, the day is paid to the employee as a public holiday and **not** a day of annual leave.

19. What happens if an employee falls sick during an authorised period for paid annual leave?

Answer: Under the National Employment Standards, if during a period of annual leave a permanent employee falls sick, is injured, or is required to care for an immediate family or household member who is sick or injured, and the employee is eligible for personal/carer's leave, the employee is taken to be on personal leave and is not on annual leave for each day the employee is eligible for personal leave.

20. What happens if an employee has taken a period of paid annual leave and is required to engage in a community service activity (including jury service)?

Answer: Under the National Employment Standards, if during the period an employee takes paid annual leave and is required to engage in a community service activity (including jury duty or emergency service leave), the employee is taken to be on community service leave and not on paid annual leave for the period of community service leave.

21. Are permanent employees entitled to compassionate leave if the employee has taken a period of paid annual leave?

Answer: If a permanent employee has taken a period of paid annual leave, and during that period of leave qualifies for an entitlement to compassionate leave, the employee is taken to be on compassionate leave and not annual leave for up to 2 days compassionate leave for a particular permissible occasion.

22. Are permanent employee's entitled to cash-out their accrued annual leave?

Answer: For employees covered by an award or agreement, cashing out of annual leave is permitted if the award or agreement allows the practice. However, under the current Awards, most Awards do not permit the cashing out of annual leave.

Award or agreement-free employees may agree to cash out annual leave at any time subject to the following legislative limitations.

When cashing out annual leave, the following terms apply in all cases:

- i. The employer and the employee must not agree to the employee cashing out an amount of paid annual leave if the agreement would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks;
- ii. Each agreement to cash out a particular amount of paid annual leave must be a separate agreement in writing;
- iii. The employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

23. What happens to a permanent employee's accrued annual leave upon a transfer of employment?

Answer: Under the *Fair Work Act 2009* the transfer of employment provisions apply when an employee moves from one employer (i.e. the old employer) to another employer (i.e. the new employer) within 3 months, and there is a transfer of business involved (i.e. through a sale of business, transfer of assets, outsourcing, insourcing), or the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally be counted as service with the new employer for the purpose of entitlements, and therefore the employee's accrued entitlements transfer to the new employer.

However, if these conditions are not satisfied and the new employer is not an associated entity of the old employer, the new employer has the option to not recognise a transferring employee's previous service for the purpose of the NES entitlements to annual leave. If the new employer decides to not recognise a transferring employee's service, the old employer will be required to pay out the employee's untaken annual leave.

24. Does a permanent employee's entitlement to annual leave continue to accrue or can a period of annual leave be taken whilst an employee is on workers compensation?

Answer: No. The *Fair Work Act 2009* states that an employee is not entitled to take any paid or unpaid leave (except unpaid parental leave) or accrue any paid or unpaid leave provided under the NES during a period when the employee is absent from work because of personal illness or injury, for which the employee is receiving workers compensation, unless provided otherwise by the relevant Commonwealth, state or territory workers compensation law.

It is to be noted that an employee's absence whilst on workers compensation does not break their service with the employer, meaning service prior to and subsequent to the absence of workers compensation is taken into account when calculating an employee's accrual of leave.

25. Can an employer require a permanent employee to take annual leave concurrently with a period of notice of termination?

Answer: Where an employer gives notice of termination to an employee, generally, the answer is no. Industrial courts and tribunals have determined these are separate entitlements and provided for different reasons. Notice is provided to an employee to enable him or her to seek alternative work whilst still working.

26. Can a permanent employee take paid annual leave during their period of notice of resignation?

Answer: Yes. If an employee is approved by the employer to take a period of paid annual leave during their notice period of resignation, this would subsequently run concurrently with their notice period. However, an

employer could reasonably refuse an employee's request to take paid annual leave due to operational requirements, as the requirement for the employee to give the appropriate period of notice is to allow the employer sufficient time to fill the position.

27. What happens if an employee has insufficient accrued annual leave to cover a close down of the business?

Answer: The terms of the applicable modern award determine whether employees with insufficient accrued annual leave can be sent on leave without pay during the close down of the business. The relevant award will also determine whether the taking of annual leave in advance of accruing the entitlement by agreement between the employer and the employee is permissible.

The *Fair Work Act 2009* is silent in the matter in respect to award/agreement-free employees. It would seem that award/agreement-free employees cannot be sent on leave without pay at the direction of the employer, but would require mutual agreement for the employee to request leave without pay.

28. Does a permanent employee's annual leave entitlement continue to accrue if the employee has taken a rostered day off (RDO)?

Answer: No. Permanent employees are not entitled to accrue paid annual leave if they have taken a rostered day off.

29. Is a permanent employee's annual leave balance affected if the status of the employee's employment changes? i.e. permanent full-time to permanent part-time?

Answer: If a permanent full-time employee has a change in their employment status to permanent part-time or vice versa, there is no loss of accrued paid annual leave to the agreed date of change in employment.

However, the future rate for accruing this entitlement will be calculated on the employee's new ordinary hours of work.

30. Does a permanent employee's entitlement to paid annual leave continue to accrue if the employee has taken a period of Long Service Leave?

Answer: Yes. If a permanent employee has taken a period of long service leave, this does not break the employee's continuity of service the employer and therefore the employee's entitlement to paid annual leave will continue to progressively accrue.

31. What would happen if a permanent employee's request for paid annual leave has been approved, but the employer is then required to notify the employee that their position will be made redundant? Would the notice period of redundancy commence the date the employee returns from annual leave or can the notice period of redundancy and annual leave run concurrently?

Answer: If the employer notifies the employee that their position has been made redundant right before the employee commences their paid annual leave, then the days spent as annual leave will count towards the notice period of redundancy.

This stands as long as the employer intends for the employee to work through the provided notice period, and is paid their correct salary for the ordinary hours worked, and is paid out for the annual leave and other accrued entitlements owing as normally would. The employee's employment would continue through the notice period as if nothing has changed.



If the employer decides to pay the employee in lieu of notice and ending the employee's employment early, the employer would need to pay out the full notice period, in addition to any unused accumulated paid leave (including the accumulated paid annual leave the employee would have taken).