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INFORMATION SHEET

PUBLIC HOLIDAYS

What are Public Holidays?

Certain public holidays form part of the National Employment Standards (NES) and apply to all employees covered by the national workplace relations system, regardless of the terms of any applicable industrial instrument or contract of employment.

The NES provides employees with a right to be absent from work on a day or part-day that is a public holiday. An employer can request that an employee works on a public holiday, however, an employee retains the right to refuse to do so if;

- i. the request to work on a public holiday is not reasonable, or
- ii. the refusal to work is reasonable in the circumstances.

Additional information is provided below in the frequently asked questions about what issues are to be considered when determining what is a reasonable refusal to work on a public holiday.

This NES additionally guarantees payment when the employee is absent from work on a day they would have worked except for the fact that it was a public holiday.

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

Frequently Asked Questions

1. What days are recognised as public holidays under the National Employment Standards?

Answer: The following days are public holidays under the National Employment Standards:

- i. 1 January (New Year's Day)
- ii. 26 January (Australia Day)
- iii. Good Friday
- iv. Easter Monday
- v. 25 April (Anzac Day)
- vi. Queen's Birthday (the day on which it is celebrated in a State or Territory or a region of a State or Territory)
- vii. 25 December (Christmas Day)
- viii. 26 December (Boxing Day)

2. Can a public holiday be substituted for another day?

Answer: If under the law of a State or Territory, a day or part-day is substituted for any of the recognised public holidays under the NES, then the substituted day or part-day is the public holiday.

3. Can employees make a request to substitute a public holiday or part-day for another day or part-day?

Answer: An Award or Agreement may include provisions for an employer and employee to agree to substitute a public holiday or part-day for another day or part-day. Furthermore, an employer and an award/agreement free employee may agree to substitute a public holiday or part-day for another day or part-day.

Caution- An employer must not exert undue influence or pressure on an employee in relation to agreeing to substitute a public holiday for another day or part-day.

4. What are the factors that will be considered in determining whether a request to work or a refusal to work on a public holiday is reasonable?

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

- i. The nature of the employer's workplace (including its operational requirements) and the nature of the work performed by the employee
- ii. The employee's personal circumstances, including family responsibilities
- iii. Whether the employee could reasonably expect that the employer might request work on the public holiday
- iv. 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
- v. The type of employment (i.e. full time, part time, casual or shift work)
- vi. The amount of notice in advance of the public holiday given by the employer when making the request
- vii. The amount of notice in advance of the public holiday given by the employee in refusing the request
- viii. Any other relevant matter.

Caution- Due to the nature of the indicators listed above, determining whether a refusal to work in reasonable is subjective in nature and there can be no guarantee that a Court reviewing a decision made by an employer will form the same view. Considerable care is needed in dealing with this issue should it arise as there can be significant consequences for employers should they breach the provisions of the Fair Work Act 2009.

5. What amount is payable to an employee if they are employee absent from work due to a public holiday?

Answer: If an employee (other than a casual 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. The base rate of pay to be paid excludes;

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

6. Is an employee entitled to receive payment if the public holiday falls on a day they are not ordinarily required to work?

Answer: No. An employee is not entitled to receive any payment if the public holiday falls on a day that the employee would have not ordinarily worked. For example, a part-time or casual employee is not entitled to payment if their hours do not include the day of the week on which the public holiday falls.

7. Can an employee's rostered day off fall on a public holiday?

Answer: This depends on the terms of any Award or Agreement that applies to the employment of the employee. The issue is treated differently depending on the terms of the Award or the Agreement. Employers need to check the Award or Agreement that covers their employees to determine the entitlement. Award or Agreement free employees can have a public holiday fall on their rostered day off and they do not automatically receive an additional day off at another time.

8. Are employees entitled to receive public holiday penalty rates when working on a public holiday?

Answer: If the Award or Agreement that covers the employee provides for penalty rates to be paid if an employee works on a public holiday, then the employee is generally entitled to those penalty rates. However, if the employee is not covered by an Award or Agreement, whilst there is an entitlement to the public holiday, the NES does not provide any entitlement to penalty rates. In addition, an employee and an employer may have agreed by way of an Individual Flexibility Agreement, or in some cases, a contract of employment to vary the entitlement to penalty rates on public holidays. The circumstances as to how this is done and what entitlement is payable will vary from case to case and the terms of any agreement will need to be examined before the actual entitlement can be determined.

9. Are employees entitled to receive public holiday penalty rates when the public holiday is a substituted day?

Answer: If the Award or Agreement provisions state that an employee working on a declared public holiday is entitled to receive public holiday penalty rates, then an employee working a substituted public holiday is entitled to be paid the relevant public holiday penalty rates for the ordinary hours worked.

The employer should refer to the applicable Award or Agreement when determining what public holiday penalty rate payable to the employee.

***Caution-** If a public holiday is substituted, then the substitute day is regarded as the public holiday. This substitute day is the only one that attracts the relevant penalty rates for working on public holidays (which depends on the award, agreement or any contract that applies.)*

10. What payment is made to an employee if there is a public holiday and an additional public holiday?

Answer: In some cases, State governments can declare an additional day as a public holiday as well as the actual day that the public holidays occurs. This most commonly occurs on days where the public holiday can fall on the weekend from time to time such as Australia Day.

If there is a public holiday and a declared additional public holiday (which is not a substituted day for that public holiday), both days are recognised as public holidays and in most cases, both days attract the relevant penalty rates for working on a public holiday.

This general position can be varied depending on the terms of an Award or Agreement that covers the employee so these documents need to be examined to determine the actual entitlement.

Award or Agreement free employees are not entitled to penalty rates for public holidays unless they have an agreement with their employer that varies this general position.

11. Are employees entitled to receive overtime penalty rates in addition to public holiday penalty rates if work is performed outside the rostered hours?

Answer: An employee who works hours on a public holiday in excess or outside the time worked on a normal shift are not entitled under most Awards to be paid overtime rates. As the public holiday rate will generally be in excess of that which is provided for overtime, the employee is just paid the public holiday rate for all hours worked. The employee does not get the penalty rate and the overtime rate as penalty rates are generally not compounded.

12. Can an employer change an employee's roster or ordinary hours of work to avoid a public holiday?

Answer: No. Employers cannot change an employee's roster or ordinary hours for the purpose of avoiding a public holiday obligation.

13. What happens if a public holiday falls within a period of an employee taking paid annual leave or paid personal/carer's leave?

Answer: Under the NES, if a public holiday falls during a period of paid annual or personal leave that is being taken by an employee, and the employee would have normally worked on that day had they not been on paid annual or personal leave, that day is treated and paid to the employee as a public holiday and not a day of paid annual or personal leave.

14. Should an employee be paid for a public holiday if they take personal (sick) leave either side of it?

Answer: Yes. An employer must pay an employee for the public holiday if it is a day the employee would normally work, and regardless if the employee has taken personal (sick) leave either side of it. For the day taken as personal (sick) leave the normal verification rules apply.

15. What happens if a public holiday falls within a period of an employee taking paid long service leave?

Answer: In most States, a public holiday that falls during a period of long service leave is treated as a public holiday and not a day of long service leave. The rules that operate in relation to this issue vary from State to State and are dependent on the long service leave legislation that operates in that State.

Caution- Employers must be aware that legislation where long service leave is extended is applicable in New South Wales, Victoria, Queensland, Western Australia, Tasmania and Australia Capital Territory. Legislation where long service leave is not extended is South Australia and Northern Territory.

16. Are public holidays paid if an employee has taken a period of unpaid leave?

Answer: No. Employees are not entitled to be paid for public holidays while they're on unpaid leave.

17. What happens if a public holiday falls within a period that an employee has taken has workers compensation?

Answer: An employee's entitlement to workers compensation when a public holiday occurs during any such absence is determined by the relevant state or territory workers compensation law.

18. What happens if a public holidays falls within a period that an employee has taken industrial action?

Answer: Under the *Fair Work Act 2009*, payments must not be made in relation to any duration of industrial action on that day. Payments must be withheld in relation to the actual period when industrial action was taken (i.e. if taken on a public holiday, payment at the appropriate penalty rate (if any) must be withheld).