Canberra Business Chamber

ANNUAL LEAVE

Workplace Relations Fact Sheet – August 2016

Annual Leave

Employees, other than casual employees, are entitled to accrue paid annual leave.

Full time employees accrue up to 20 days' annual leave per year under the National Employment Standards (NES).

Part time employees are generally entitled to annual leave on a pro rata basis.

The *Fair Work Act 2009* (Cth) (**FW Act**) specifically provides that shift workers are entitled to five weeks of annual leave per year. A shift worker is:

- Determined in accordance with the applicable modern award or an enterprise agreement; or
- An employee who is employed in a business in which shifts are continuously rostered 24 hours a day, seven days a week; and
    - The employee is regularly rostered to work those shifts; and
    - Regularly works on Sundays and public holidays.

Section 22(2) of the FW Act defines various periods which do not account as service for the accrual of annual leave which includes:

- any period of unauthorised absence; and
- any period of unpaid leave or unpaid authorised absence, other than periods of community service leave, periods of stand down or other periods prescribed in regulations.

Payment Rate

Under the NES, an employer must pay annual leave at the employee's base rate of pay for their ordinary hours during the period of leave. This doesn't include separate entitlements such as incentive-based payments and bonuses, loadings, allowances, overtime or penalty rates.

Awards and agreements may provide for annual leave to be paid at a higher rate than required by the NES (for example, payment of 17.5% annual leave loading in addition to the ordinary rate of pay).

If, on termination of employment, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had they taken the leave.

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Calculating Annual Leave

To calculate the amount of annual leave accrued for full time and part time employees either:

1. Divide the number of ordinary hours worked by an employee over a period by 13; or
2. Multiply the number of ordinary hours worked by an employee by 0.07692.

Example

Ordinary hours worked = 38

Annual leave accrued = 38 / 13 = 2.923 hours

Annual leave accrued = 38 x 0.07692 = 2.923 hours

Under the NES, an employee's entitlement to annual leave accrues progressively during a year of service according to their ordinary hours of work and accumulates year to year.

Taking Annual Leave

Paid annual leave is to be taken at a time agreed between an employee and his or her employer. The employer must not unreasonably refuse to agree to a request for an employee to take paid annual leave.

However, employers often have policies which require an employee to give appropriate notice of their desire to take leave, require it to be put in writing, or other circumstances which may allow the employer to refuse the request on reasonable business grounds.

Annual Leave in Advance

Most awards now allow employees to take annual leave in advance of the entitlement accruing if their employer agrees in writing. The agreement must:

- State the amount of annual leave to be taken in advance and the date on which the leave is to commence; and
- Be signed by the employer and employee and, if the employee is under 18 years of age, by their parent or guardian.

The clause also provides that:

- The employer must keep a copy of the agreement as an employee record; and
- If, on the termination of the employee's employment, the employee has not accrued an entitlement to the period of annual leave taken in accordance with the agreement, the employer may deduct an amount equal to the amount that was paid to the employee from the employee's termination pay.

Cashing out Annual Leave

Paid annual leave must not be cashed out unless:

- It is permitted by a modern award or an enterprise agreement; or
- As agreed between an employer and an award/agreement free employee.

When cashing out annual leave the following terms apply:

- an employee must have four (4) weeks' paid annual leave remaining;
- each agreement to cash out annual leave must be made in writing; and
- the employee must be paid the full amount they would have received had they taken the annual leave.

Most modern awards also require that:

- the maximum amount of annual leave that may be cashed out in any 12-month period is 2 weeks;
- the agreement states the amount of leave to be cashed out and the payment to be made to the employee;
- the agreement states the date that the payment is made to the employee;
- the agreement be signed by the employer and the employee and, if the employee is under 18 years of age, by their parent or guardian; and
- the employer must keep a copy of the agreement as an employee record.

Excessive Annual Leave

The FW Act provides that modern awards and enterprise agreements may provide for terms which allow an employer to require an employee to take annual leave, provided that the requirements are reasonable.

Most modern awards now enable employers to direct employees with excessive annual leave balances to take leave if:

- An employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' annual leave for a shiftworker); and
- An employer has genuinely tried to reach agreement on how to reduce or eliminate the excessive accrual but agreement is not reached.

A direction:

- Is of no effect if the employee would have less than 6 weeks' accrued leave remaining after the direction;
- Must not require the employee to take less than one week of leave;
- Must provide at least 8 weeks' notice to the employee (but not more than 12 months' notice) before the mandatory leave period is to begin; and
- Must not be inconsistent with any leave arrangement agreed by the employer and the employee.

A clause will also come into operation from the first full pay period on or after 29 July 2017 which enables employees to make a written request to take leave which the employer must grant in circumstances where:

- The employee has genuinely tried to reach agreement with an employer but agreement is not reached;
- The employee has had an excessive leave accrual for more than six months at the time of giving notice;
- The employee has not been given a direction by the employee to take leave that would eliminate the employee's excessive leave accrual;
- If granted, the employee's remaining leave balance will be at least 6 weeks;
- The period of leave is for at least one week;
- The leave period requested is no less than 8 weeks or more than 12 months after the notice is given; and
- The employee has not requested more than 4 weeks' paid annual leave by this mechanism (or 5 weeks' paid annual leave for a shiftworker) in any period of 12 months.