



April 1 2011 is a date all employers should take note of because this is when the majority of changes to the Holidays Act 2003 and the Employment Relations Act 2000 come into force.

We've outlined some of the key changes you need to know.

## HOLIDAYS ACT 2003

### Cashing up leave

Employees will be able to request to have up to one week's annual holidays paid out. It is at the employer's discretion to agree to the request to cash up. If the employer does not agree they do not have to give a reason. Cashing up annual holidays cannot be a negotiated term or condition of the employment agreement.

This will only affect annual holiday entitlements that fall on or after 1 April 2011.

There are a couple of things to note about the one week cash up; firstly it is not included in gross earnings and secondly, it needs to be recorded in the employee's holiday and leave record.

### Average Daily Pay

Payment for public holidays, alternative holiday, sick leave and bereavement leave is usually paid out at **Relevant Daily Pay** i.e. the amount the worker would have received had they worked that day. For instance, a person may work eight hours a day, Monday - Friday. If he or she is away sick on Wednesday they are paid sick leave of eight hours for that day.

However from 1 April 2011 an employer may use the new **Average Daily Pay** calculation where it is not possible or practicable to determine relevant daily pay, or where the employee's daily payment varies within the pay period in which the holiday or leave falls.

For example a salesperson is on a base salary and commission; which means their daily pay will fluctuate. They work Monday to Saturday and Labour Day falls on a Monday which they take off as a holiday. The employer can use the **Average Daily Pay** calculation to work out their pay for that day.

That is, the gross earnings earned over the previous 52 weeks are divided by the number of whole or part days worked over that period. It should be noted that if a part day was worked then it's counted as one day worked for the calculation. For example if an employee works 210 full days and six part days, their gross earnings are divided by 216 days.

### Proof of sickness or injury

The changes to the Holidays Act allow

employers to seek proof of sickness or injury from an employee within the first three consecutive calendar days of sick leave, if the employer informs the employee as early as possible that proof is required, and agrees to meet the employee's reasonable expenses in obtaining the proof.

For example an employer may ask for proof of sickness

or injury after the worker has been away for one day but they will need to let their staff member know as early as possible that proof is required and also agree to meet the employee's reasonable expenses incurred in obtaining it.

### Transferring Public holidays

From April 1 2011 employers and employees can agree to transfer the employee's observance of a public holiday to a different working day if certain criteria are met.

There are two situations where this may occur.

- Employers and employees can transfer part of a public holiday, in cases where an employee is to start work on one day and finish on the following day.
- Employers and employees may agree to transfer the observance of public holidays to another working day to meet the needs of the business or the individual needs of the employee. For example, an employer and employee may agree to transfer the Boxing Day public holiday to the 26 January so the employee can celebrate Australia Day as their public holiday.

### Alternative Holiday

Where an employer and employee cannot agree on what day the alternative holiday should be taken, employers now have the final say, on a reasonable basis, as to when an alternative holiday is taken. Employers will be able to give employees 14 days notice of when they require them to take the alternative holiday.

## EMPLOYMENT RELATIONS ACT 2000

### 90 Day Trial

The 90 day trial period provision will apply to all workplaces from 1 April 2011. Previously, it could only be used in workplaces with fewer than 20 employees. An agreement to include the 90 day trial must be in writing and cover specific requirements.

The requirements are:

- that the worker is on a trial period for a specified time starting at the beginning of the worker's employment (no longer than 90 days);

- that the employer may dismiss the worker during the trial period and

- if the worker is dismissed he or she cannot bring a personal grievance or other legal proceedings in respect of the dismissal.

The agreement must be in place before the employee starts his or her first day of work.

Trial periods only apply to **new** employees. If someone works for a business and then resigns but applies for a job at the same business a year later - then the 90 day trial provision cannot be used.

### Test of Justification

The test of justification for grievances (including dismissals) has been changed from what a fair and reasonable employer would have done in all the circumstances of the case to what a fair and reasonable employer **could** have done in all the circumstances. This change recognises that there is a range of fair and reasonable responses that could be made by an employer in any situation.

When the test is applied the Court or Authority must consider specific criteria.

For example, the employer must give the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking an action against the employee. They can also consider other matters if appropriate.

An employer's decision to dismiss will not be overturned solely because of minor procedural defects if these defects did not result in the probability that the employee was treated unfairly.

### Union access and collective bargaining

From 1 April 2011, union representatives will require an employer's consent before entering a workplace. However, employers must respond to the request as soon as is reasonably practicable but no later than two working days after the request is received and the employer cannot unreasonably withhold consent. The employer must provide written reasons for a refusal.

The Act clarifies that an employer may communicate directly with the employer's employees while bargaining for a collective employment agreement is underway. Such communications must be consistent with the duty of good faith (including not undermining the union or the bargaining) and may include information about the employer's proposals for the collective agreement.

### New powers to ensure efficiency and

### compliance

The Employment Relations Authority will now have the power to dismiss frivolous and vexatious proceedings and make an order for costs against the offending party. The decision can be appealed to the Court.

The Authority can also fine a person who obstructs or delays an Authority investigation including failure to turn up to a hearing as a party.

Labour Inspector functions have been spelt out in the changes to the Employment Relations Act and their powers have been extended to encourage compliance.

### Increased Penalties

Maximum penalties for non-compliance of the Holidays Act and the Employment Relations Act have doubled from \$5000 for an individual to \$10,000 and from \$10,000 for a company to \$20,000.

### Employment Agreements (1 July 2011)

While the majority of the changes to both Acts come into effect on 1 April 2011, employers will have until 1 July 2011 to meet a new requirement to retain a signed copy of their employee's employment agreement or a copy of their terms and conditions. An employer must still keep a copy where an employee has not signed the employment agreement.

This applies to all employment agreements or terms and conditions provided before or after the Employment Relations Act 2000. This means that all employers must keep a copy of all their employees' employment agreements or terms and conditions, no matter when they were employed. For example, if an employee was employed in 1992 and does not have a written employment agreement their employer would have to draw up an agreement, ask the employee to sign it and keep a copy of it.

If an employee requests a copy of their agreement or terms and conditions, then employers must provide them with it.

Along with the Employment Relations and Holidays Acts changing the minimum wage is going up. From 1 April 2011, the adult minimum wage will increase to \$13.00 an hour. The new entrants' minimum wage and the training minimum wage will increase to \$10.40 an hour.

To find out more about the changes visit <http://ers.govt.nz/updates/>