



Public holidays and the National Employment Standards

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Public holidays form part of the National Employment Standards (NES). As of 1 January 2010, the NES apply 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 cannot exclude or provide for an entitlement less than the NES, and will have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

Overview

The NES provide an entitlement for employees to be absent from work on a day or part-day that is a public holiday.

The NES protect an employee's workplace right to reasonably refuse to work on a public holiday, and will guarantee payment where an employee is absent from work because of 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.

What days are public holidays?

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)
- 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.

Can a public holiday be substituted for another day?

If, under the law of a State or Territory, a day or part-day is substituted for any of the above days or part-days, then the substituted day or part-day is the public holiday.

An award or agreement may include provisions for an employer and employee to agree to substitute the above days or part-days for another day or part-day. Furthermore, an employer and an award/agreement-free employee may agree to substitute the above days or part-days for another day or part-day.

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.

What are reasonable grounds for requesting or refusing 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
- any other relevant matter.

What payment is required for an absence from work due to 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 (other than a casual 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 incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other separately identifiable amounts.

However, an employee is not entitled to payment if they do not have ordinary hours of work on the public holiday.

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

Illustrative example

Stephanie is a full-time employee who usually works overtime in addition to her ordinary hours of work on Tuesdays. She receives penalty rates for these overtime hours under the applicable modern award. Stephanie is absent on the public holiday on Tuesday, 26 January 2010, and is entitled to her base rate of pay for her ordinary hours. She is not entitled to payment for the overtime hours she would have usually worked had it not been a public holiday.

Stephanie's colleague John is a part-time employee who is rostered to work Wednesday to Friday each week. As John's ordinary hours of work do not include Tuesdays, he is not entitled to payment for the public holiday on 26 January 2010.

Further Information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at www.fwo.gov.au

For further information, visit www.fairwork.gov.au or contact Fair Work Online **13 13 94**.

Related publications

Introduction to the NES

Maximum working hours and the NES

Requests for flexible working arrangements and the NES

Parental leave and related entitlements and the NES

Annual leave and the NES

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