Holidays Amendment Act 2010

Public Act	2010 No 126
Date of assent	26 November 2010
Commencement	see section 2

Contents

		Page
1	Title	2
2	Commencement	2
3	Principal Act amended	2
	Part 1	
	Amendments to principal Act	
4	Interpretation	3
5	New sections 9 and 9A substituted	3
	9 Meaning of relevant daily pay	4
	9A Average daily pay	4
6	New section 11 substituted	5
	11 Labour Inspector may determine ordinary weekly pay, relevant daily pay, and average daily pay	5
7	Determination of what would otherwise be working day	5
8	Meaning of gross earnings	6
9	Purpose of this subpart	6
	15 Purpose of this subpart	6
10	New heading and sections 28A to 28F inserted	7
	Portion of annual holidays may be paid out	
	28A Employee may request portion of annual holidays be paid out	7
	28B Payment for annual holidays paid out	7
	28C Requirement to request payout prohibited	8
	28D Requirement to make payout prohibited	8
	28E Employer may have policy preventing payout	8

	28F Labour Inspector may determine payout	9
11	Purpose of this subpart	9
12	New sections 44A to 44C substituted	9
	44A Transferring part of public holiday	9
	44B Transferring whole of public holiday	11
	44C Employer may have policy preventing transfer	12
13	Requirements for alternative holiday	12
14	Proof of sickness or injury	12
15	Penalty for non-compliance	13
16	Holiday and leave record	13
17	Consequential amendments to principal Act	13
	Part 2	
	Amendments to other Acts and transitional provision	
18	Amendments to other Acts	14
19	Transitional provision	14
	Schedule 1	15
	Consequential amendments to principal Act	
	Schedule 2	17
	Amendments to other Acts	

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Holidays Amendment Act 2010.

2 Commencement

(1) Section 7(2) and Schedule 1 as far as it relates to section 29 of the principal Act come into force on the day after the date on which this Act receives the Royal assent.

(2) The rest of this Act comes into force on 1 April 2011.

3 Principal Act amended

This Act amends the Holidays Act 2003.

Part 1
Amendments to principal Act

4 Interpretation

(1) Section 5(1) is amended by inserting the following definitions in their appropriate alphabetical order:

"**average daily pay** means a rate of pay calculated in accordance with section 9A(2)

"**closedown period** has the meaning given to it by section 29

"**discretionary payment**—

"(a) means a payment that the employer is not bound, by the employee's employment agreement, to pay the employee; but

"(b) does not include a payment that the employer is bound, by the employee's employment agreement, to pay the employee, even though—

"(i) the amount to be paid is not specified in that employment agreement and the employer may determine the amount to be paid; or

"(ii) the employer is required under that employment agreement to make the payment only if certain conditions are met".

(2) Section 5(1) is amended by repealing the definition of **public holiday** and substituting the following definition:

"**public holiday**—

"(a) means a day specified in section 44(1); and

"(b) if there is a written agreement under section 44A or 44B,—

"(i) includes a calendar day or period of 24 hours agreed to be treated as a public holiday; but

"(ii) excludes the day (or part of a day) specified in section 44(1) agreed not to be treated as a public holiday".

5 New sections 9 and 9A substituted

Section 9 is repealed and the following sections are substituted:

"**9 Meaning of relevant daily pay**

"(1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave,—

"(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and

"(b) includes—

"(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned:

"(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned:

"(iii) the cash value of any board or lodgings provided by the employer to the employee; but

"(c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

"(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if the rate is equal to, or greater than, the rate that would otherwise be calculated under subsection (1).

"(3) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

"**9A Average daily pay**

"(1) An employer may use an employee's average daily pay for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if—

"(a) it is not possible or practicable to determine an employee's relevant daily pay under section 9(1); or

"(b) the employee's daily pay varies within the pay period when the holiday or leave falls.

"(2) The employee's average daily pay must be calculated in accordance with the following formula:

$$\frac{a}{b}$$

where—

a is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made

b is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

"(3) To avoid doubt, if subsection (2) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half)."

6 New section 11 substituted

Section 11 is repealed and the following section substituted:

"**11 Labour Inspector may determine ordinary weekly pay, relevant daily pay, and average daily pay**

"(1) This section applies if an employer and employee cannot agree on the amount of the employee's—

"(a) ordinary weekly pay under section 8; or

"(b) relevant daily pay under section 9; or

"(c) average daily pay under section 9A.

"(2) A Labour Inspector may determine the amount of the employee's ordinary weekly pay, relevant daily pay, or average daily pay (as the case may be).

"(3) In making a determination, a Labour Inspector must apply the provisions of section 8, 9, or 9A (as the case may be) to the circumstances of the employee as determined by the Labour Inspector."

7 Determination of what would otherwise be working day

(1) Section 12(3) is amended by adding the following paragraph:

"(d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned."

(2) Section 12 is amended by inserting the following subsection after subsection (3):

"(3A) If the public holiday, alternative holiday, or day on which the employee was on sick leave or bereavement leave falls during a closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect."

8 Meaning of gross earnings

(1) Section 14(a)(ii) is amended by inserting "(except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment)" after "allowances".

(2) Section 14(c) is amended by adding the following subparagraph:

"(iv) any payment made in accordance with section 28B."

9 Purpose of this subpart

Section 15 is repealed and the following section substituted:

"**15 Purpose of this subpart**

The purpose of this subpart is to—

"(a) provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time the holidays are taken; and

"(b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and

"(c) require employers to pay employees at the end of their employment for annual holidays not taken or paid out; and

"(d) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees."

10 New heading and sections 28A to 28F inserted

The following heading and sections are inserted after section 28:

"*Portion of annual holidays may be paid out*

"**28A Employee may request portion of annual holidays be paid out**

"(1) An employee may request that his or her employer pay out a portion of the employee's entitlement to annual holidays.

"(2) A request under subsection (1)—

"(a) must be in writing; and

"(b) may be made on 1 or more separate occasions until a maximum of 1 week of the employee's annual holidays is paid out in each entitlement year.

"(3) If an employee makes a request under subsection (1), an employer must—

"(a) consider the request within a reasonable time; and

"(b) advise the employee in writing as to whether the employer agrees to the request; and

"(c) if the employer agrees to the request, comply with section 28B.

"(4) An employer—

"(a) may decline an employee's request; and

"(b) is not required to provide the employee with a reason for declining the request.

"(5) In this section, **entitlement year**—

"(a) means a period of 12 months continuous employment beginning on the anniversary of the employee's employment; and

"(b) includes a period of 12 months continuous employment described in section 16(2).

"**28B Payment for annual holidays paid out**

"(1) If an employer agrees to pay out a portion of the employee's annual holidays under section 28A(3)(c), the employer must pay the employee for that portion—

"(a) in accordance with section 21(2); and

"(b) as soon as practicable after the employer has agreed to the employee's request under that provision.

"(2) If an employer has incorrectly paid out a portion of the employee's annual holidays where the employee did not make a request for the payment, the employee's entitlement to take the portion of annual holidays concerned remains in force as if the payment had not been made.

"**28C Requirement to request payout prohibited**

"(1) A requirement that an employee must make a request under section 28A for a portion of his or her annual holidays entitlement to be paid out must not be a term or condition of the employee's employment (whether contained in an employment agreement or otherwise).

"(2) Despite subsection (1), an employment agreement may set out the process for making a request under section 28A.

"**28D Requirement to make payout prohibited**

A requirement for an employer to pay out a portion of an employee's entitlement to annual holidays must not be—

"(a) a term or condition of the employee's employment (whether contained in a written employment agreement or otherwise); or

"(b) raised in negotiations between the employer and employee about the employee's terms and conditions relating to salary or wages.

"**28E Employer may have policy preventing payout**

"(1) An employer may adopt a policy that allows the employer to not consider a request under section 28A for a portion of an employee's annual holidays to be paid out.

"(2) A policy under subsection (1) may apply to—

"(a) the whole of the employer's business; or

"(b) some parts of the employer's business but not to others.

"(3) If an employer has a policy under subsection (1), section 28A does not apply in relation to any part of the employer's business to which the policy applies.

"**28F Labour Inspector may determine payout**

"(1) This section applies if an employer has agreed to an employee's request to pay out a portion of the employee's annual holidays under section 28A, but the employer and employee cannot agree on—

"(a) the portion of annual holidays that are to be, or have been, paid out; or

"(b) the amount that the employer is required to pay the employee for the annual holidays that are to be, or have been, paid out.

"(2) A Labour Inspector may determine either or both of the following:

"(a) the portion of annual holidays paid out or to be paid out:

"(b) the amount payable for the annual holidays paid out or to be paid out."

11 Purpose of this subpart

Section 43 is amended by repealing paragraph (b) and substituting the following paragraph:

"(b) to provide for the transfer of public holidays (whether in whole or in part):".

12 New sections 44A to 44C substituted

Section 44A is repealed and the following sections are substituted:

"**44A Transferring part of public holiday**

"(1) This section applies if—

"(a) an employee is to start work on a day and finish work on the following day; and

"(b) 1 or both of those days are specified in section 44(1).

"(2) If the criterion in subsection (3) is met, the employee and his or her employer may agree in writing (whether in an employment agreement or otherwise)—

"(a) that part of 1 or both days specified in section 44(1) is to be treated as not part of a public holiday; and

"(b) that,—

"(i) if the agreement relates to only 1 day specified in section 44(1), a period of 24 hours is to be treated as a public holiday if the period—

"(A) is to start or finish during the day specified in section 44(1); and

"(B) includes the period from when the employee is to start work to when the employee is to finish work:

"(ii) if the agreement relates to 2 days specified in section 44(1), 2 separate periods of 24 hours are to be treated as public holidays if each period—

"(A) is to start or finish during the days specified in section 44(1); and

"(B) includes the period from when the employee is to start work to when the employee is to finish work.

"(3) The criterion is that the purpose of the transfer is not to avoid the employee's entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect.

"(4) Where an agreement to transfer part of a public holiday applies, the employee's entitlements under sections 50 and 56 apply only if the employee works during the period of 24 hours or 2 separate periods of 24 hours (as the case may be) to which that part of the public holiday has been transferred.

"(5) To avoid doubt, an agreement under this section must not reduce the total number of paid public holidays that the employee is otherwise entitled to in any year.

Example

An employee is to work from 10 pm on 24 April to 6 am on Anzac Day and from 10 pm on Anzac Day to 6 am on 26 April.

The employer and employee can agree to treat 10 pm to midnight on Anzac Day as not part of a public holiday in exchange for treating a period of 24 hours that finishes on Anzac Day as a public holiday. Just when the 24-hour period starts before or finishes after a work period is a matter for the parties to agree on. For instance, they could agree that it runs from midday on 24 April to midday on Anzac Day.

"44B Transferring whole of public holiday

"(1) An employer and employee may agree in writing (whether in an employment agreement or otherwise)—

"(a) that a public holiday specified in section 44(1) is to be observed by the employee on another calendar day or during a period of 24 hours (a **transfer**), if the criteria in subsection (2) are met; and

"(b) the calendar day or period of 24 hours to which the public holiday is transferred is to be treated as the employee's public holiday for the purposes of this subpart.

"(2) The criteria are that—

"(a) the public holiday specified in section 44(1) to be transferred—

"(i) is identified; and

"(ii) would otherwise be a working day for the employee; and

"(b) the calendar day or period of 24 hours to which the public holiday is to be transferred—

"(i) is identified or identifiable; and

"(ii) would otherwise be a working day for the employee; and

"(iii) is not another public holiday or part of a public holiday; and

"(c) the purpose of the transfer is not to avoid the employee's entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect.

"(3) Where an agreement to transfer a public holiday applies, the employee's entitlements under sections 50 and 56 apply only if the employee works on the identified or identifiable calendar day or period of 24 hours to which the public holiday has been transferred.

"(4) To avoid doubt, an agreement under this section—

"(a) may be made in relation to 1 or more of the public holidays specified in section 44(1); but

"(b) must not reduce the total number of paid public holidays that the employee is otherwise entitled to in any year.

"**44C Employer may have policy preventing transfer**

"(1) An employer may adopt a policy that allows the employer to not enter into agreements that enable all or part of a public holiday being transferred under section 44A or 44B.

"(2) A policy under subsection (1) may apply to—

"(a) the whole of the employer's business; or

"(b) some parts of the employer's business but not to others.

"(3) If an employer adopts a policy under subsection (1), sections 44A and 44B do not apply in relation to any parts of the employer's business to which the policy applies.

13 Requirements for alternative holiday

(1) Section 57(1) is amended by adding "; and" and also by adding the following paragraph:

"(d) not be taken on a public holiday."

(2) Section 57 is amended by repealing subsections (2) and (3) and substituting the following subsections:

"(2) If an employer and employee cannot agree under subsection (1)(a) on when an alternative holiday is to be taken, the day must be taken on a date determined, on a reasonable basis, by the employer.

"(3) If subsection (2) applies, the employer must give the employee at least 14 days' notice of the requirement to take the alternative holiday."

14 Proof of sickness or injury

(1) Section 68 is amended by repealing subsection (1A) and substituting the following subsection:

"(1A) Despite subsection (1), the employer may require proof of sickness or injury within 3 consecutive calendar days if the employer—

"(a) informs the employee as early as possible that the proof is required; and

"(b) agrees to meet the employee's reasonable expenses in obtaining the proof."

(2) Section 68(3) is amended by omitting "(within the meaning of the Medical Practitioners Act 1995)".

(3) Section 68 is amended by adding the following subsection:

"(5) In this section, **medical practitioner** means a health practitioner who is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine."

15 Penalty for non-compliance

(1) Section 75(1)(a) is amended by omitting "$5,000" and substituting "$10,000".

(2) Section 75(1)(b) is amended by omitting "$10,000" and substituting "$20,000".

(3) Section 75(2) is amended by inserting the following paragraph after paragraph (b):

"(ba) sections 28A and 28B (which relate to a request by an employee for a portion of his or her annual holidays to be paid out and payment for that portion):".

16 Holiday and leave record

(1) Section 81(2) is amended by inserting the following paragraphs after paragraph (h):

"(ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable):

"(hb) the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable):".

(2) Section 81(2) is amended by inserting the following paragraph after paragraph (j):

"(ja) the day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44A or 44B and the calendar day or period of 24 hours to which it has been transferred (if applicable):".

17 Consequential amendments to principal Act

The principal Act is consequentially amended in the manner set out in Schedule 1 of this Act.

Part 2
Amendments to other Acts and transitional provision

18 Amendments to other Acts

The Acts listed in Schedule 2 are amended in the manner set out in that schedule.

19 Transitional provision

To avoid doubt, a request under section 28A of the principal Act (as inserted by section 10 of this Act) may be made only in relation to an entitlement year that begins on or after the commencement of this Act.

Schedule 1

s 17

Consequential amendments to principal Act

Section 16(4)

Repeal and substitute:

"(4) An employee's entitlement to annual holidays remains in force until the employee has—

"(a) taken all of the entitlement as paid holidays; or

"(b) been paid out under section 28B for the entitlement in the entitlement year."

Section 29

Omit "sections 30 to 35" and substitute "sections 12(3A) and 30 to 35".

Section 29(b)

Omit: "his or her" and substitute "the employer's".

Section 35(1)

Insert "or 28A(5)" after "section 16(1)".

Subpart 2 of Part 2

Repeal.

Section 49

Insert "or average daily pay" after "relevant daily pay".

Section 50(1)(a)

Insert "or average daily pay" after "relevant daily pay".

Section 52(3)

Insert "or average daily pay" after "relevant daily pay".

Section 53(4)

Insert "or average daily pay" after "relevant daily pay".

Section 58
Repeal.

Section 60(1)
Insert “or average daily pay” after “relevant daily pay”.

Section 60(2)(b)(i)
Insert “or average daily pay” after “relevant daily pay”.

Section 61(2)(b)
Omit “section 58” and substitute “section 57(2)”.

Section 71(1)
Insert “or average daily pay” after “relevant daily pay”.

Schedule 1
Repeal.

Schedule 2 s 18
Amendments to other Acts

Employment Relations Act 2000 (2000 No 24)

Section 79(1): repeal and substitute:

"(1) An employer must pay to an eligible employee the employee's relevant daily pay as defined in section 9 of the Holidays Act 2003 or average daily pay calculated in accordance with section 9A of that Act (as the case may be) for every day or part of a day taken by the employee as employment relations education leave."

Parental Leave and Employment Protection Act 1987 (1987 No 129)

Section 42(2): add "is taken or paid out".

Legislative history

16 August 2010	Introduction (Bill 195–1)
24 August 2010	First reading and referral to Transport and Industrial Relations Committee
2 November 2010	Reported from Transport and Industrial Relations Committee (Bill 195–2)
16 November 2010	Second reading, committee of the whole House (Bill 195–3)
23 November 2010	Third reading
26 November 2010	Royal assent

This Act is administered by the Department of Labour.

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