



Annual leave 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.

Annual leave and the National Employment Standards

Annual leave forms 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 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 establish the minimum entitlements to annual leave, the circumstances about when annual leave can be taken, and the rate of pay employees should be paid.

The NES also set out what happens with annual leave when there is a transfer of employment, and the arrangements that apply to the cashing out of annual leave.

An employee is still entitled to annual leave accrued prior to 1 January 2010, subject to the rules for taking or cashing out annual leave contained under the NES.

What are the minimum entitlements to annual leave?

An employee (other than a casual employee) is entitled to four weeks of paid annual leave for each year of service with the employer. An employee's entitlement to annual leave accrues on a continuous basis according to the number of ordinary hours they worked.

An employee classified as a 'shiftworker' is entitled to five weeks paid annual leave. This is the case if an award or agreement applies to the employee, and defines or describes the employee as a shiftworker for the purposes of the NES.

An award or agreement-free employee can also qualify for the shiftworker entitlement of five weeks annual leave if all of the following apply to the employee:

- they are employed in an enterprise where shifts are continuously rostered 24 hours a day for seven days a week
- they are regularly rostered to work those shifts
- they regularly work on Sundays and public holidays.

Awards and agreements may supplement the NES by providing for additional annual leave entitlements. Award or agreement-free employees may agree with their employer to purchase extra annual leave in exchange for forgoing an equivalent amount of pay.

When can paid annual leave be taken?

Annual leave under the NES does not have to be taken each year, as the entitlement can accumulate. It is up to each employer and employee to agree on when and for how long paid annual leave may be taken.

However, the employer must not unreasonably refuse an employee's request to take paid annual leave. There is no maximum or minimum period of annual leave that may be taken.

An employee is not on paid annual leave if the period during which an employee takes paid annual leave:

- includes a day or part-day that is a public holiday
- includes a period of any other leave (other than unpaid parental leave), or a period of absence from employment due to community service leave.

In certain circumstances, an employer can direct an employee to take annual leave. In order for an employer to be able to do this, an award or agreement must include terms that require an employee to take paid annual leave, or allow the employee to be directed to take leave. The requirement in the award or agreement must be reasonable. Similarly, the NES allow an employer to require an award or agreement-free employee to take a period of annual leave, but only if the requirement is reasonable.

A requirement to take paid annual leave may be reasonable if, for example:

- the employee has accrued an excessive amount of paid annual leave
- the employer's enterprise is being shut down for a period (such as between Christmas and New Year).

In assessing reasonableness, the following factors are relevant:

- the needs of the employee and the employer's business
- any agreed arrangement with the employee
- custom and practice of the business
- timing of the direction or requirement to take leave
- reasonableness of the period of notice given.

An award or agreement can include terms dealing with the taking of paid annual leave. An employer and an award or agreement-free employee may agree on when and how paid annual leave may be taken.

Matters that could be either incorporated into an award or agreement, or agreed upon, include:

- that paid annual leave may be taken in advance of accrual
- that paid annual leave must be taken within a fixed period of time after it is accrued
- that a specified period of notice must be given before taking paid annual leave.

What payments are required when annual leave is taken?

When annual leave is taken, the minimum requirement is that an employee must be paid at their base rate of pay for the ordinary hours they would have worked during the period. An employee's base rate of pay (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, but not including any of the following:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates
- any other separately identifiable amounts.

On termination of employment, an employer must pay an employee in respect to any period of untaken paid annual leave.

Is annual leave payable on a transfer of employment?

The 'transfer of employment' provisions under the *Fair Work Act 2009* essentially apply when an employee moves from one employer (the old employer) to another employer (the new employer) within three months, and there is a transfer of business involved (through a transfer of assets, outsourcing, insourcing), or the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally count as service with the new employer for the purposes of entitlements under the *Fair Work Act 2009*. If this applies, an employee is not entitled to be paid for a period of untaken annual leave under the NES in relation to termination of their employment with the old employer.

However, there are exceptions to this general principle. A new employer that is not an associated entity of the old employer has the option to not recognise a transferring employee's previous service for the purposes of NES entitlements to annual leave. If the new employer does not recognise an employee's service in relation to annual leave, the old employer will be required to pay out the employee's untaken annual leave.

For more information on the transfer of business provisions and the impact on employee entitlements, please see the *Fair Work Ombudsman Fact Sheet – Transfer of Business*.

Can annual leave be cashed out?

For employees covered by an award or agreement, cashing out of annual leave is permitted if the award or agreement allows the practice. Award or agreement-free employees may agree to cash out annual leave at any time.

However, in all cases the following applies:

- the employee must retain an entitlement to at least four weeks paid annual leave
- there must be a separate agreement in writing on each occasion
- the employee must be paid at least the full amount that would have been payable had the employee taken the leave the employee has cashed out.

It is unlawful for an employer to force (or try to force) an employee to make (or not make) an agreement to cash out annual leave. For more information, please see the *Fair Work Ombudsman Fact Sheet - General Workplace Protections*.

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

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Long service leave and the NES

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