

Holidays Act Reform

For what seems like an eternity we have been waiting for an overhaul of the Holidays legislation. Employers and Employees want legislation that is easily applied, understood and not at all complex. But the Holidays Act has been a political football since 2011 with no one looking like breaking the deadlock.

The previous Government had set about reviewing the Holidays Act 2003, which was no longer fit for purpose and simply did not recognise the modern way the labour force worked. A Taskforce made 22 recommendations, jointly agreed by Business leaders and Unions. It was anticipated that the new legislation would come into force in early 2023. That never happened, an election did and now the new Government has set about the unenviable task of trying to implement a set of rules that is both clear and transparent.

The Minister for Workplace Relations and Safety Brooke van Velden says “Although the previous Government spent many years working on a solution, the advice I have received from officials has led me to the conclusion that there are further opportunities to improve the simplicity and workability of the legislation. In some areas the previous Government’s decisions would end up increasing complexity and compliance costs. As a consequence, we now have a commitment to make changes that increase certainty and reduce complexity.

Targeted consultation with the Ministry of Business, Innovation and Employment (MBIE) and key stakeholders is scheduled for September 2024 to consult on a draft Bill with the optimistic hope that by

December 2024 we will have a Bill ready for the legislative process. Those timelines seem unrealistic, but we are heading in the right direction. The question is; will the proposed changes bring about sensible and achievable legislation? From what I have read, I have considerable doubt, but until we see draft legislation and consultation has occurred we will not know for certain.

In the meantime, this article sets out some of the key proposals, as they currently stand.

Annual Leave Entitlements

Employees will accrue their four-week annual leave entitlement continuously during employment rather than becoming entitled to annual leave after 12 months' 'continuous employment'. Annual leave is expected to be a weeks' based accrual system accruing at a rate of not less than 0.0768 weeks per week of employment. That already sounds confusing, but it is meant to provide certainty and we are told it will by including a new methodology for determining a week.

There will also be a new 'greater of three' methodology for calculating annual leave payments: Ordinary Weekly Leave Pay (which does not include variable components of pay) and quarterly (13 – weeks) and annual average weekly earnings.

Pay as you Go (8%) – Objective criteria will be established in determining eligibility for using pay-as-you-go along with a clear framework for reviewing its use during employment. Pay as you go will conceivably be allowed for longer periods than the current 12 months.

The requirement to pay annual leave in advance during closedown periods will be removed, but there will be greater transparency around how employees are notified about any closedown periods and they will have access to their accrued annual leave.

Holidays Act (Continued)

FBAPS leave

One of the, many, criticisms, about the current legislation is that we are talking not just about holidays, but also family violence leave, bereavement, alternative, public holidays and sick leave (FBAPS) as well. Some of the key changes in this area include:

- Only one calculation is going to be required, which will comprise four parts: a base rate for wages or salary plus fixed allowances plus an average of productivity or incentive payments received plus the cash value of board and lodgings. That sounds difficult to reconcile!
- Eligible employees will have access to FBS leave entitlements from the first day of their employment.
- For employees eligible for sick leave after 6 months - two days will be available on day one, a further four days after three months and a further four days after six months.
- The eligibility criteria, we are informed, will be clearer.
- There will be an ability to take part days of FBS leave – proportionate to the time that would have been worked.
- Pro-rating sick leave, proportional to hours of work. This means, for example that employees who only work 25 hours a week could be entitled to 6.25 sick days a year, while full-time employees will continue to receive the full 10 days.
- Bereavement leave was not considered inclusive of varied family arrangements or cultural practices so the proposal is to extend the current 3 days.

Gross Earnings

There will be a new definition of gross earnings to provide clarity around which payment types to include. This is important because gross earnings is a fundamental concept in the calculation of leave.

End of Employment Payments

We are going to have only one payment calculation for annual leave when employment ends, rather than the current two. Although no details have been provided of what the calculation may look like.

Sale and transfer of business

Vulnerable employees aside, leave entitlements and the payment/ transfer of those will be negotiated between incoming and outgoing employer.

Currently employees are meant to be paid out when a business is sold or there is a transfer, but practically in the majority of situations employees just agree to transfer their leave entitlements as part of any sale or transfer of any business. Going forward employees will be able to agree to transfer their entitlements to a new purchaser.

New Employment Protection clause that requires:

- Whether or not employment will be treated as continuous for the purpose of determining the employee's service-related entitlement;
- Whether or not the new employer will recognise all or part of the employee's annual and alternative holiday entitlements not taken or exchanged for payment before the date of transfer (instead of the outgoing employer paying them out in accordance with the Act);
- Whether or not the new employer will recognise all or part of an employee's family violence, bereavement and sick (FBS) leave entitlements not taken or exchanged for payment before the date of transfer;

Holidays Act (Continued)

- Whether or not, where recognition of annual leave and alternative holiday and FBS leave entitlements is negotiated, an employee will be provided a choice in the matter or it will be automatic if they choose to transfer their employment.

Information about Pay and leave entitlements

Currently, there is no requirement for employers to directly inform employees about how their pay and leave has been calculated. There will be a requirement for a "pay statement" in each pay period to provide greater transparency about leave and pay for all employees. For example, how annual leave or FBAPS leave was arrived at.

Returning from parental leave

Currently when an employee returns from parental leave their annual leave is based on their average weekly earnings over the previous 52 weeks. New payment method removes this 'override' provision so employees returning from parental leave will be paid according to the normal rules for annual leave.

Cashing up leave

An employee will after the completion of the first 12 months of employment be able to request to exchange up to one week of accrued annual leave entitlement for payment in each subsequent 12-month period.

Summary

What we know about the current proposed changes only reinforces how much uncertainty still needs to be resolved if we are going to get an Act that is truly modern and reflective of the way we work. Time will tell if the legislation can be made workable.

Want to know more?

If you have any questions, please contact our specialist [Employment team](#).