

Lockdown – public holidays and annual leave obligations

With the Easter public holidays set to fall during the current COVID-19 lockdown period it is necessary for employers and employees to understand their obligations and rights. In this article our specialist employment law team examines the issues of payments for public holidays as well as accruing annual leave during the lockdown.

Public Holidays

Employees are entitled to 11 paid public holidays each year provided the public holiday falls on a day that they would normally expect to work. For any employee who is asked and agrees to work on a public holiday, they are entitled to time a half (T1.5) and an alternative day's leave to take later at an agreed time.

Let's look at a number of different public holiday scenarios but before we do that, put the lockdown to one side. The lockdown, as significant as it is, is largely irrelevant for the purposes of determining an employee's entitlement to pay on a public holiday. The key consideration is whether or not the employee would have normally worked on the day, but for the fact that it was a public holiday. Much like a Christmas/ New Year closedown period, an employee is still entitled to the paid public holiday even though they may not be at work or even working during the lockdown.

Good Friday, quite obviously, falls on a Friday. There is no "mondayisation" like there is for ANZAC day if that day falls during the weekend. If an employee's work pattern and terms and conditions of employment or rosters result in the employee regularly working Fridays,

but not Mondays, then they are entitled to a paid public holiday for Good Friday, but not Easter Monday.

The employee is entitled to a payment that is not less than their Relevant Daily Pay (RDP) or Average Daily Pay (ADP). RDP means the amount of pay that the employee would have received had the employee worked on the day concerned and can include overtime, bonus payments and the cash value of any board and lodgings. RDP is used where the employee's work pattern is certain and you can easily determine the rate. That is the case even if the employee's hours fluctuate each day, so long as they work the same hours each day of each week.

For employees with differing total hours day-to-day and week-to-week (wages) then ADP should be applied. ADP is the gross earnings for a year divided by 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.

Q & A

What happens if we have negotiated a reduction in wages down to 80% in accordance with the Wage Subsidy Scheme – what does the employee get?

That depends on the employee's work patterns but if we assume the employee would normally work a "traditional" Monday to Friday week then RDP will be the new wages, divided by 5 days.

What if we are closed and passing on just the wage subsidy because we are non-essential and our employees cannot work?

RDP, for a full time employee receiving just the wage subsidy of \$585 per week, is \$117.

What if I have essential workers who are working during the lockdown, but have the public holiday off?

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Essential workers are likely to be continuing being paid at least 100% or their normal wages pre COVID-19, so nothing changes; they still receive their full entitlement and RDP will likely remain the same.

What if my essential workers are regularly working overtime during the lockdown and are doing more shifts leading up to Good Friday?

Because the employee's daily pay is varying within the pay period when Good Friday falls, ADP is more appropriate and fairer to the employee.

And, if they agree to work on Good Friday?

Then, ADP plus time and a half, plus an alternative day if Good Friday would have otherwise been a regular work day but for the lockdown.

What about casual employees?

That really depends on how they are being paid in the first place, whether they are true casual employees and what days they actually work. It might be a case of averaging their hours to determine but is so fact-specific it is difficult to provide a general answer.

Annual leave

One of the common questions we have been asked is: **How does annual leave accrue if employees are not working during the lockdown, but being paid the wage subsidy?**

The starting point is that it does not really matter whether the employee is being paid just the subsidy; \$585, or 80%, or their full contractual entitlement to wages. Annual leave will continue to accrue as it usually does under the Holidays Act 2003: on the basis of continuous employment. An employee becomes entitled to annual leave after 12 months' continuous employment. An employer and employee may agree on how an employee's entitlement to 4 weeks' annual holidays is to be met, based on what genuinely constitutes a working week for the employee.

The real question is **how should it be paid?**

If the annual leave entitlement has already arisen (they have been employed continuously for 12 months) then it is paid at the greater of Ordinary Weekly Pay (OWP) or Average Weekly Earnings (AWE). OWP is what the employee ordinarily receives including regular overtime, commission or regular incentive payments. If OWP is difficult to determine then AWE is 1/52 of an employee's gross earnings. Determining gross earnings raises yet more permutations.

For employees who work irregular and different hours week to week AWE is usually used.

If the full time Wage Subsidy of \$585 is the new negotiated OWP, following consultation and agreement, then annual leave will need to be calculated and paid based on the AWE. That is because the Holidays Act has many hooks and nuances and one of those requires the greatest value to be paid to the employee.

In this case the employee's average weekly earnings spread out over the year will be far greater than their current OWP. The longer the lockdown continues and the longer the employee receives the wage subsidy the closer the two values will be, but through until the end of the current wage subsidy period it will always be AWE.

If the employer allows an employee to take annual leave in advance, which is usually common practice, then the payment analysis will be the same.

Do I have to take my annual leave if I am asked to?

No, annual leave is taken by agreement. An employer can only require an employee to take annual leave following consultation in good faith and after attempting to reach agreement. If that fails, even then an employer can only lawfully require an employee to take leave after giving the employee 14 days' notice.

If the Employer is receiving a wage subsidy the declaration requires an employer not to unlawfully require an employee to take annual leave during the

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period of the subsidy. That does not prevent and employee from agreeing to take annual leave or an employer lawfully requiring an employee to take leave by giving the required notice. However, because the value of the annual leave will be less during the lockdown period, an employer acting in good faith would need to explain to their employee what entitlements they can expect if they want to take annual leave during the lockdown.

Should I take my annual leave now because it has more value than what it have in few months?

Probably, because it will be paid at your pre COVID-19 OWP and there is likely to be negligible difference.

Equally, if there is any doubts about the employer's ability to pay long term then now would be a good time.

However, when we come out of lockdown and when an employee's wages return to normal, annual leave will be paid at OWP because that will be greater than AWE so there is no real disadvantage in waiting until the end of the lockdown and the wages are back to pre COVID-19 levels.

If an employee is on annual leave and a public holiday falls within that period of leave are they still paid for the public holiday?

Yes, provided it was a day that they would otherwise work and in accordance with the calculations we have discussed above.

As you can see from this series of questions, the calculations are not exactly straight forward, at the best of times, and each case and entitlement to either a public holiday or annual leave depends on the facts

If you have any questions about public or annual holidays during Covid-19, please contact our specialist [Employment](#) Team.

Want to know more?