

## COMPLIANCE OBLIGATIONS NATIONAL EMPLOYMENT STANDARDS ANNUAL LEAVE

### What is the entitlement to annual leave?

The National Employment Standards (“NES”) provide a minimum entitlement for employees (other than casual employees) to 4 weeks annual leave. Any award or agreement may provide for more beneficial entitlements but cannot provide for less than the NES.

For a shift worker, the minimum entitlement is increased to 5 weeks annual leave if a modern award or agreement applies or they are award or agreement free but meet the definition of shift worker under the Fair Work Act.

The Nurses Award 2010 provides a minimum entitlement of 5 weeks annual leave for Practice Nurses. For a Nurse who works shift work the entitlement will increase to 6 weeks annual leave.

Casual employees do not have an entitlement to paid annual leave.

### How does annual leave accrue?

Annual leave accrues progressively during a year of service according to the employee’s ordinary hours of work and then is cumulative from year to year. A part time employee will accrue annual leave progressively throughout the year according to their part time hours and therefore has a pro-rata entitlement to annual leave.

### Can annual leave be cashed out?

An employee may cash out their accrued annual leave provided the entitlement is found within an Award. Cashing out must not result in the employee’s total remaining leave falling below 4 weeks leave.

Please note that the Health Professionals and Support Services Award 2010 and the Nurses Award 2010 do not have cashing out provisions.

Each cashing out must be by a separate written agreement between the employer and the employee.

Any cashing out must be at the rate of pay the employee would have received had the leave been taken.

### **What is the rate of payment for annual leave?**

Payment for annual leave is at the employee's base rate of pay for the employee's ordinary hours of work. The base rate of pay does not include overtime, penalties or allowances.

In order to determine an employee's ordinary hours of work for agreement/award free employees, the Fair Work Act provides as follows: if the employer and employee come to an agreement concerning ordinary hours of work, then it will be those hours agreed that annual leave will be accrued upon. For example, there may be an agreement that an employee's ordinary hours are 40 hours per week. If there is no agreement, ordinary hours will be 38 hours a week for a full time employee; and for an employee who is not full time, the lesser of 38 hours or the usual weekly hours of work.

If the employee is not a full time employee who does not have usual weekly hours of work, the regulations may prescribe what the usual hours of work will be.

Also note that an award covered employee may have an entitlement to payment of an annual leave loading upon hours taken as annual leave.

### **Is Annual Leave Loading payable?**

Both the Health Professionals and Support Services Award 2010 and the Nurses Award 2010 make provision for the payment of annual leave loading, typically 17.5%. For shift workers, an employee may be entitled to either the 17.5% loading or the shift loading including weekend penalty rates, whichever is the greater.

### **Payment for annual leave on termination**

An employee is entitled to be paid out any accrued, but untaken, annual leave on termination of employment.

The Fair Work Ombudsman (FWO) has taken the view that employees may be entitled to receive the loading on any untaken annual leave on termination, depending on the provision in an award. This is because the NES provides for the payment of accrued leave on termination that the employee would have received had the leave been taken.

### **Can payment be made in advance?**

By agreement between an employer and an employee annual leave may be paid in advance. If it is, and the employee subsequently leaves the employment, the employer may recover the overpayment from any monies owed to the employee on termination.

### **How does annual leave interact with public holidays?**

Where a public holiday falls within a period of annual leave, the employee is taken not to be on annual leave during the public holiday.

### **What happens on a transfer of employment?**

Subject to a term in a modern award or enterprise agreement to the contrary, where there is a transfer of employment between non-associated entities, the second employer is not required to recognise the service of the employee with the first employer. In this case, the first employer would pay out the annual leave.

If service with the first employer is recognised by the second employer, the employee's accrued annual leave entitlement will be transferred to their employment with the second employer.

### **Can an employee be forced to take paid annual leave?**

The Health Professionals and Support Services Award 2010 and the Nurses Award 2010 include terms about the taking of annual leave. The employer may request the employee to take annual leave provided the request is reasonable. Examples include where the Practice shuts down over Christmas/New Year or where the employee's leave balance is excessive e.g. 8 weeks is considered a useful guide.

### **Can You refuse to grant leave?**

An employer cannot unreasonably refuse a request for accrued annual leave. Factors to take into account would include how much notice was given, the purpose of the leave and other circumstances of the employee, the length of time since previous leave was taken and the amount of the accrual.

### **How does annual leave interact with other forms of leave?**

If an employee takes annual leave and becomes entitled to personal/carers leave, compassionate leave or community service leave, the employee is not taken to be on annual leave during that period.

### **Workers Compensation and Annual Leave**

Where an employee is in receipt of workers compensation payments, the employee is not entitled to take or accrue annual leave during this period, unless provided for under a relevant workers compensation Act.

In WA, under s80 of the Workers' Compensation and Injury Management Act, both Annual Leave and worker's compensation payments may be taken concurrently. The Act is silent on accrual so it appears the FWA would apply and annual leave would not accrue during a period on worker's compensation.

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