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Introduction

The provisions of the NES are to be read in conjunction with the minimum annual leave provisions of the applicable modern award. A modern award may provide annual leave conditions that are more beneficial than the provisions of the NES. In the case of annual leave, the 'standard' annual leave clause in modern awards will usually refer only to the NES.

See also annual leave in the A-Z [Annual leave overview](#).

Amount of leave

NES

The minimum period of annual leave under the NES is the equivalent of four weeks of leave per year.

A seven-day shift worker (ie works on shifts worked continuously 24 hours a day for 7 days per week and regularly required to work Sundays and public holidays) is entitled to an additional week's annual leave per annum, pro rated for an incomplete year's service.

Annual leave does not apply to casual employees.

An employee's entitlement to annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

The employer cannot unreasonably refuse to agree to a request by the employee to take paid annual leave. An employee is entitled to pro rata payment of annual leave on termination of employment.

Modern awards

The 'standard' annual leave clause in modern awards usually refers to the NES with respect to the amount of annual leave.

A modern award may provide a more specific definition of a shift worker and rate of accrual of leave regarding the entitlement to an additional week's annual leave per year.

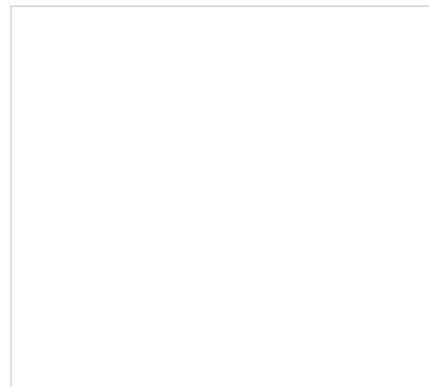
For example, the *Manufacturing and Associated Industries and Occupations Award 2010* defines a 'shift worker' as a seven-day shift worker who is regularly rostered to work on Sundays and public holidays. Where a shift worker is engaged for part of a 12-month period as a seven-day shift worker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven-day shift worker.

A modern award may also provide that an employer may reach agreement with the majority of employees concerned to convert the annual leave entitlement in the NES to an hourly entitlement for administrative ease (ie 152 hours for a full-time employee entitled to four weeks of annual leave or 190 hours for a seven-day continuous shift worker). See [s139](#) of the *Fair Work Act 2009*.

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Ordinary hours of work — accrual and payment

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Updated continuously by workplace expert **Paul Munro**

The employee's ordinary hours determine the rate at which the entitlement to annual leave accrues and also the entitlement to payment when annual leave is taken.

For example, a full-time employee whose ordinary hours each week are 38 will accrue two weeks of leave (76 hours) over a six-month period. A part-time employee whose ordinary hours each week are 12 hours will also accrue two weeks of leave (24 hours) over the same six-month period. The leave is payable at the employee's 'base rate of pay'. If an employee changes the basis of their employment (eg full-time to part-time), there is no loss of accrued leave, although the future rate of accrual will be different, based on the employee's new ordinary hours of work.

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Service

Section 22 of the Fair Work Act defines the meaning of the term 'service' for the purposes of accrual of leave. In calculating an employee's accrual of annual leave, certain absences from work are excluded. All absences on paid leave, eg annual leave, personal/carer's leave, long service leave, public holidays, jury service and compassionate leave, count as part of an employee's service for the purposes of accruing annual leave. The following periods of absence do NOT count as service for the purposes of accrual of annual leave:

- any period of unauthorised leave (eg strike action)
- any period of unpaid leave or unpaid authorised leave (except community service leave, or a period of stand down).

For example, an employee does not accrue annual leave during a period of unpaid parental leave, unpaid carer's leave or leave without pay. However, while an employee does not accrue annual leave during such absences, the absence does not break the continuity of service with the employer, meaning prior service with the employer is maintained.

Under s.130 of the Fair Work Act, an employee is not entitled to take or accrue any annual leave during a period when the employee is absent from work because of personal illness or injury, for which the employee is receiving workers compensation unless provided otherwise by the relevant Commonwealth, state or territory workers compensation law.

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Ordinary pay

NES

An employee is to be paid at their 'base rate of pay' for a period of annual leave. Section 16 of the Fair Work Act defines this term to mean an employee's pay for their ordinary working hours but excluding incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts.

Modern awards

Despite the ordinary pay provisions under the NES, a modern award may provide a more beneficial definition of ordinary pay for the purposes of annual leave.

For example, an annual leave clause in modern awards may define ordinary pay to mean the employee's wages for the ordinary hours that would have been worked if not for the absence on annual leave, including allowances, loadings and penalties paid for all purposes of the award, first aid allowance and any other wages payable under the employee's contract of employment including any over award payment. The employee is not normally entitled to payments in respect of overtime, special rates or any other payment that is a reimbursement for expenses incurred by the employee.

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Annual leave loading and modern awards

Annual leave loading is a common provision in modern awards. In the case of a day worker, the loading is usually 17.5% calculated on the employee's ordinary pay as defined by the award (ie including allowances, loadings and penalties, etc). In the case of a shift worker, the employee receives a loading of 17.5% calculated on the employee's ordinary pay as defined by the award or the shift loading including relevant weekend penalty rates, whichever is the greater but not both.

Because of the provisions of the Fair Work Act (s.90(2)) annual leave loading is payable on pro rata annual leave on termination regardless of the terms of the modern award.

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Taking leave

NES

Under s.88 of the Fair Work Act, annual leave may be taken for a period agreed to between an employee and his/her employer.

An employer cannot unreasonably refuse to agree to a request by the employee to take paid annual leave.

The employer cannot direct an award/agreement covered employee to take annual leave, this being subject to the applicable modern award. However, under [s.94\(5\)](#) of the Fair Work Act, an employer may require an award/agreement free employee to take a period of annual leave but only if the request is reasonable. Examples of a reasonable request include the employee has accrued an excessive amount of annual leave (eg eight weeks or more), or the employer's business is being shut down for a period (Christmas–New Year close down).

Modern awards

Under most modern awards, notwithstanding the provisions of the NES, if an employer has genuinely attempted to reach agreement with an employee as to the timing of taking annual leave, the employer can require the employee to take annual leave by giving at least four weeks notice if the employee has eight or more weeks accrued annual leave and the amount of annual leave the employee is directed to take is equal to or less than one quarter of the amount of annual leave accrued.

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Annual leave in advance

Under [s.94\(6\)](#) of the Fair Work Act, an employer and an award/agreement free employee may agree on how and when annual leave is to be taken.

Matters that may be agreed upon include:

- that annual leave may be taken in advance of accrual;
- that annual leave must be taken within a fixed period of time after it is accrued;
- the form of application for annual leave; and
- that a specified period of notice must be given before taking annual leave.

Most modern awards provide for taking annual leave in advance of accrual. Modern awards usually provide that if leave is taken in advance and the employment terminates before the entitlement has accrued the employer may make a corresponding deduction from any money due on termination of employment.

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Annual close down

The NES does not provide for annual close down but provision may be made in the relevant modern award or enterprise agreement.

A modern award usually contains terms which allow an employer to close down an enterprise or part of it for the purpose of allowing annual leave. Whether the employee can be directed to take unpaid leave where insufficient annual leave is accrued is subject to the terms of the applicable modern award or enterprise agreement.

For example, the Manufacturing and Associated Industries and Occupations Award 2010 provides that an employee can be sent on unpaid leave during a close down, whereas, the Clerks – Private Sector Award 2010 is silent on this point although this Award does provide for the taking of annual leave in advance of entitlement.

Other terms relating to annual close down that may be provided by a modern award include:

- gives at least four weeks' notice of the close down (although some awards provide for a lengthier notice period); and
- the employee has sufficient leave to cover the period of the close down; and
- an employee with insufficient leave to cover the close down period is given unpaid leave for the duration of the close down; and
- the period of the close down counts as service; and
- the employer and the majority of employees may agree to three separate close down periods in a year provided one period is at least 14 consecutive days.

However, reference should be made to the applicable modern award to determine what conditions specifically apply to an annual close down.

Award/agreement free

If an employee is award/agreement free, the Fair Work Act (s.94(5)) provides that an employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable. Subsection 94(5)(b) states that a requirement to take paid annual leave may be reasonable if, for example, the employer's enterprise is being shut down for a period (for example, between Christmas and New Year). Matters that can be agreed upon by the parties include the amount of notice regarding the close down and **the payment of annual leave in advance of accrual (where the period of the close down exceeds the amount of an employee's accrued annual leave credits).**

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Interaction with other leave

Under [s.89](#) of the Fair Work Act, if during a period of annual leave a public holiday or part-holiday falls, or a period where the employee is eligible for personal/carer's leave (including compassionate leave), or a period of community service leave, the employee is taken not to be on annual leave for each day eligible for the other leave or public holiday.

The period of annual leave is not extended by any such absence but the employee is to be re-credited annual leave for each day of eligible absence.

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Payment on termination

NES

The NES provides that an employee is to be paid any accrued balance of annual leave on termination of employment, by either party. There is no specific formula prescribed in the NES which is the basis for calculating pro rata annual leave.

Modern awards

While most modern awards refer to the NES, the annual leave clause of a modern award may require the employer to pay pro rata annual leave on termination at the employee's ordinary rate of pay as defined by the award. This means any payment will usually be calculated on the employee's ordinary rate of pay inclusive of allowances, loadings and penalty rates payable for all purposes of the award.

Reference should therefore be made to the applicable modern award to determine the method of calculating annual leave pay on termination.

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Cashing out annual leave

NES

Under [s.94](#) of the Fair Work Act, an employer and an award/agreement free employee may agree to the employee cashing out a particular amount of the employee's accrued annual leave.

The employee must be left with an annual leave balance of at least four weeks after cashing out has occurred.

Each agreement to cash out an amount of annual leave must be a separate agreement in writing.

The amount is equal to the employee's base rate of pay payable had the employee taken the annual leave.

Cashing out of annual leave is permissible where provided for under the terms of a modern award or enterprise agreement.

Modern awards

[Section 92](#) of the Fair Work Act states that annual leave must not be cashed out except in accordance with the terms of a modern award or enterprise agreement, or an agreement between an employer and an award/agreement free employee.

The Fair Work Commission has determined that terms providing cashing out of annual leave can be inserted into modern awards. Modern awards have not been varied as yet to reflect this general decision but is expected before the end of 2015.

If a modern award (or enterprise agreement) that applies to an employee does not include a cashing out provision for annual leave, cashing out of paid annual leave is not permitted.

Existing transitional instruments

Under [Schedule 3, Part 5 — Item 24](#) of the *Fair Work (Transitional and Consequential Amendments) Act 2009*, the terms of a cashing out of annual leave provision in an existing transitional instrument, eg Australian Workplace Agreement (AWA), workplace agreement, pre-reform certified agreement, will continue to apply until the existing agreement is terminated or replaced, subject to the 'no detriment test'.

This rule enables the continued operation of a term in a transitional instrument for the cashing out of annual leave, subject to the protections of the NES. Therefore, in order to cash out annual leave under the provision in the transitional instrument, the employee must retain a minimum balance of four weeks' leave, the agreement to cash out must be a separate written agreement and the cashed out leave must be paid at the full amount the employee would have received had the employee taken the leave foregone.

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Transitional instruments — no detriment rule

The *Fair Work (Transitional and Consequential Amendments) Act 2009* provides rules in relation to the interaction of 'transitional instruments' and the Fair Work Act, particularly the NES.

Transitional instruments are awards and agreements that operated under the previous *Workplace Relations Act 1996*. As most pre-reform federal awards and NAPSAs will be rescinded with the introduction of modern awards, it is existing agreements that will be mainly affected by the transitional rules. This includes Australian Workplace Agreements (AWAs), Individual Transitional Employment Agreements (ITEAs), union or non-union workplace agreements, pre-reform certified agreements or preserved state collective or individual agreements.

A term of a transitional instrument has no effect to the extent that it is detrimental to an employee, in any respect, when compared with an entitlement of the employee under the NES. The no detriment test applies on a 'line by line' basis. That is, the NES entitlement will continue to apply and prevail over the corresponding entitlement in the transitional instrument, if the term or entitlement in the transitional instrument is detrimental to an employee, in any respect. For example, a term in a transitional instrument about the amount of annual leave that an employee is entitled to, and the amount the employee is entitled to be paid while on leave, might continue to operate, but subject to more favourable accrual rules under the NES.

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Transfer of business

Fair Work Act

Under the transfer of business provisions of the Fair Work Act, the second employer is not obliged to recognise a transferring employee's prior service with the first employer for annual leave, in which case the first employer must pay out any untaken annual leave accrued to the first employer. However, the second employer should refer to the transmission of business provisions of the relevant modern award (if applicable) as arrangements may be made to transfer the accrued annual leave with the first employer to the second employer as part of the cost of purchasing the business.

Modern awards

Most modern awards refer to a 'transmission of business', as opposed to the term 'transfer of business' provided under the Fair Work Act, although it is presumed the circumstances considered are the same.

Generally, a modern award will provide that where a business is transmitted from one employer to another, the period of continuous service that an employee had with the transmitter must be deemed to be service with the transferee and taken into account when calculating annual leave. However, an employee is not entitled to leave or payment in lieu for any period in respect of which leave has been taken or paid for.

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