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Annual leave - NES

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The annual leave provisions of the National Employment Standards should 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 Standards.

Amount of leave

The minimum period of annual leave under the National Employment Standards is the equivalent of four weeks' 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, the additional week's leave is 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.

Regularly required to work Sundays and holidays

To qualify for an additional week's annual leave, a shift worker must work on a continuous shift roster and is regularly required to work Sundays and public holidays. This means both situations must exist, ie the shift roster must be a 24-hour/7-day per week shift roster on which the employee works rotating shifts, with the nature of the roster being that an employee is regularly required to work Sundays and public holidays.

The basis for the awarding an extra week's annual leave was, in large measure, to provide an opportunity for greater leisure time with their families to compensate for those days when they were absent from home because of being required to work on Sundays and public holidays. A Full Bench of the (then) Australian Industrial Relations Commission considered the issue of entitlements to extra annual leave for seven-day continuous shift workers in [Media, Entertainment and Arts Alliance \[MEAA\] and Theatrical Employees \(Sydney Convention and Exhibition Centre\) Award 1989](#) [1995] AIRC Print M7325.

In this matter the MEAA made application for an extra week's annual leave for workers who regularly worked Sundays and holidays. In this decision the Full Bench adopted the threshold of 34 Sunday shifts and six public holiday shifts as the guideline to apply to seven day shift workers. This number of Sunday and public holiday shifts to qualify for an extra week's annual leave for seven day shift workers was determined in an earlier decision of the Industrial Commission of NSW in the Annual Leave Case — *In re Hospital Employees Conditions of Employment (State) Award* [1976] AR (NSW) 275.

A subsequent matter before the (then) Australian Industrial Relations Commission considered a claim for a proportionate entitlement to the extra week's annual leave where a number of members worked for six months on such a 7-day continuous shift roster. The tribunal determined that:

- for employees to be eligible for an extra week's annual leave it is required that they normally work on a continuous shift roster and regularly required to work Sundays and public holidays as part of that roster;
- should an employee normally work solely on a continuous shift roster but for part of a year be transferred to a five-day, day duty, roster the employee may be eligible for a proportionate amount

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of an extra week's annual leave;

- if a worker or section of workers do not usually work on a continuous shift roster and fall short of 34 Sundays and public holidays worked while on such a roster they are not eligible for an extra week's annual leave nor are they eligible for a proportionate amount of extra annual leave.

See [Australian Municipal, Administrative, Clerical and Services Union — Western Australian Branch v Western Power Corporation](#) [2004] AIRC 231 PR944613.

Part-time employees - continuous shift work

Part-time employees regularly working Sundays would not normally be entitled to an additional week's annual leave each year, unless otherwise provided under the applicable modern award or enterprise agreement. To qualify for the additional week's annual leave, a shift worker must work on a continuous shift roster and is regularly required to work Sundays and public holidays. This means both situations must exist, i.e. the shift roster must 24 hour/7 days per week on which the employee works rotating shifts, with the nature of the roster being the employee is regularly required to work Sundays and public holidays.

The (then) Australian Industrial Relations Commission determined that part-time employees working on Saturdays and Sundays does not constitute 'seven day shift work' for the purpose of an entitlement to the extra week's annual leave. See *Health Services Union of Australia v Clinpath Laboratories Pty Ltd* AIRC Print Q0584.

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Ordinary hours of work — accrual and payment

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 2 weeks' leave (76 hours) over a 6 month period. A part-time employee whose ordinary hours each week are 12 hours will also accrue 2 weeks' leave (24 hours) over the same 6 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

The Fair Work Act ([s22](#)) 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, or 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.

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Ordinary pay — taking annual leave

An employee is to be paid at their 'base rate of pay' for a period of annual leave. The Fair Work Act ([s16](#)) 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.

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Annual leave loading

Annual leave loading is not a condition under the National Employment Standards but is a common provision in modern awards. However, in the case of pro rata annual leave pay on termination of employment, the Standards include annual leave-related payments, such as annual leave loading, in annual leave pay on termination. This is because the Fair Work Act ([s90\(2\)](#)) states that the employee is to receive 'the amount the employee would have been paid had they taken annual leave'. The annual leave loading would be included in the employee's ordinary annual leave payment on termination regardless of the provisions of the applicable industrial instrument. See the commentary under 'annual leave loading' for further details on this employment condition.

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Taking leave

Under the National Employment Standards ([s88](#)), 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 the Fair Work Act (s94(5)), an employer may require an award/agreement free employee to take a period of annual leave but only if the request is reasonable.

The Explanatory Memorandum to the Fair Work Bill 2008 (para #382) states that in assessing the reasonableness of a requirement or direction under the National Employment Standards it is envisaged that the following are all relevant considerations:

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

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).

Extended leave on equivalent pay — award/agreement-free employee

The *Fair Work Regulations 2009* (Reg. 2.03) states that for s129(a) of the Fair Work Act, employers and award/agreement-free employees may agree to the provision of extra paid annual leave in exchange for foregoing an equivalent amount of pay. Section 129(a) of the Act states that the Regulations may permit employers, and award/agreement-free employees, to agree on matters that would or might otherwise be contrary to the National Employment Standards.

This means, for example, the employer may agree to the award/agreement-free employee's request for extended annual leave on half pay because of his or her award/agreement-free status. An employee with four weeks' accrued annual leave could (say) take eight weeks' annual leave on half pay. The employer, however, is not required to agree to the employee's request for extended annual leave.

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Taking/accruing annual leave — workers compensation

The Fair Work Act (s130) states that 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. The absence does not break an employee's service with the employer, meaning service prior to and subsequent to the absence on workers compensation is taken into account when calculating an employee's accrual of leave.

The *Workers Compensation & Rehabilitation Act 2003* [Qld] (s119A(2)) allows an employee to take and accrue annual leave during an employee's absence on workers compensation. In New South Wales, the *Workers Compensation Act 1987* [NSW] (s49) permits the taking of annual leave, a public holiday and long service leave during a period of workers compensation.

New South Wales

A full Federal Court upheld an order that required an aged care provider to pay a former employee the annual leave she accrued while she was absent from the workplace on workers' compensation. The decision confirms that employees receiving workers' compensation are also entitled to annual leave accrual, provided that "permission is given by the compensation law for dual receipt".

Under the *NSW WCA Act* (s49), workers are paid compensation even if they are entitled to receive a "payment, allowance or benefit for . . . annual holidays". The Court said that while the New South Wales Act did not create a "right" to receive annual leave payments while on workers' compensation, it provided the "opportunity" for a worker to receive both benefits. See *Anglican Care v NSW Nurses and Midwives' Association* [2015] FCAFC 81

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Annual leave in advance

Under the Fair Work Act (s94(6)), 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.

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Annual close down

The National Employment Standards do not provide for annual close down but provision may be made in the relevant modern award. Generally, a modern award allows an employer to close down an enterprise or part of it for the purpose of allowing annual leave to the affected employees provided the employer:

- gives at least four weeks' notice of the close down; 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 may only exercise the right to direct employees on one or two separate periods in a year, provided if taken in two separate periods one period must be at least 14 consecutive days including non-working days; 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.

Award/agreement-free employees

The Fair Work Act (s94(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 the Fair Work Act (s89), 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

The National Employment Standards 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 Standards which is the basis for calculating pro rata annual leave. If the employment ends and the employee has untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

Withholding of monies

Most modern awards provide that the notice of termination required to be given by the employee is the same as that required of an employer except there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due on termination under the award or the National Employment Standards, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice less any period of notice actually given by the employee.

The Fair Work Ombudsman is of the view that the terms of the modern award do not contravene the Fair Work Act (s90(2)) in this circumstance, although this issue has not been subject to judicial review.

The National Employment Standards override any provision in a modern award or enterprise agreement where there is an inconsistency.

Ordinary pay on termination

The Fair Work Act (s90(2)) provides a separate definition of ordinary pay when accrued annual leave is paid on termination of employment. It states that the employer must pay the employee the amount that would have been payable to the employee had the employee taken the leave. This would therefore include payments such as annual leave loading (where provided by the applicable industrial instrument) and shift penalties. See *Centennial Norther Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCA 136; and *Ryan v Whitehaven Coal Mining Company Pty Ltd* NSWLC (26 July 2013) (unreported).

Ordinary pay may also include other separately identifiable amounts that are subject to Fringe Benefit Tax, such as the value of a company-provided motor vehicle and company provided mobile phone. A car and/or mobile phone provided by the company as a 'tool of trade' however, would not be included in the employee's ordinary pay for purposes of annual leave pay on termination. The amount representing the employer component of Fringe Benefit Tax on the employee's Payment Summary (previously Group Certificate) may provide an agreed value for a company motor vehicle and/or a company mobile phone respectively.

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Cashing out annual leave

Award/agreement-free employees

Under the Fair Work Act (s94), 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 4 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.

Existing transitional instruments

Under 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, 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 National Employment Standards.

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.

Enterprise agreements

The Fair Work Act (s93) allows an enterprise agreement to include terms that relate to cashing out annual leave. Under s93(2), annual leave cannot be cashed out if the leave balance would be less than four weeks, each cashing out must be the subject of written agreement and there must be no discounting of the payment. Provided the terms of an enterprise agreement meet the requirements of s93(2) these terms will pass the Better Off Overall Test. See [Re Armacell Australia Pty Ltd and Others](#) [2010] FWA 9985; [2010] FWAFB 9985; [Wilmridge Pty Ltd as Trustee for the O'Neill Family Trust re Direct Paper Supplies Enterprise Agreement 2010](#) [2010] FWA 8314; [EDI Downer Works Pty Ltd re Downer EDI \(Tamworth\) Enterprise Agreement 2010](#) [2010] FWA 8333.

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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 National Employment Standards. Transitional instruments are awards and agreements that operated under the previous Workplace Relations Act. Pre-Fair Work agreements are mainly affected by the transitional rules. This includes Australian Workplace Agreements (AWA), Individual Transitional Employment Agreements (ITEA), 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 National Employment Standards. The no detriment test applies on a 'line by line' basis. That is, the Standards 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 Standards.

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Transfer of business

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.

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Working for another employer during leave

Provided the work performed with the second employer does not conflict in any way with the business interests of the first employer, an employee is free to work for another employer while on a period of annual leave, as the National Employment Standards does not imply any control by the first employer over the activities of an employee while on annual leave.

Purchased leave

This refers to allowing employees to increase their annual leave entitlements in exchange for sacrificing the equivalent salary value.

How does it work?

Employees may increase their amount of annual leave entitlement, typically by an extra two or four weeks per year, in exchange for giving up the equivalent amount of salary.

For example, if they take four weeks annual leave and four weeks purchased leave, they are paid for the equivalent of 48 weeks of the year, but payment is spread out evenly over the full 52 weeks.

It is not a case, however, of an employee deciding at short notice that they would like to take four weeks' extra annual leave because something has come up. Most employers with a purchased leave policy require employees to submit their applications to cover a calendar year at the beginning of that year.

This is not essential for all businesses to do, but it does make it easier to plan and schedule work around the absences, and to calculate and spread out the reduced rate of remuneration.

Who uses it?

The most frequent users of purchased leave tend to be parents who need to care for children during school holidays, as the latter periods amount to much longer than four weeks per year.

School holiday periods are known well in advance, so it is easy for parents to comply with the 'start of year' application deadline noted above.

This brings us to the second business planning issue: if you employ a lot of parents, can your business cope with school holiday periods if most of them want to take leave then? You may have to look at a rostering arrangement, eg some employees can take Term 1 holidays, others take Term 2, etc.

Then there is the impact on other employees. Purchased leave could be used to cover study, travel, voluntary work, taking part in election campaigns, or various other events. Or an employee who is financially secure may simply prefer to sacrifice some income in order to take more holidays each year.

Just because parents seeking to cover school holidays are likely to be the main users of purchased leave does not mean you should confine the benefit to them. What if you have a single person who wants to take time off to prepare for and compete in a triathlon? To deny that employee access to purchased leave as well could well amount to discrimination.

The legal position

Legislation and awards set minimum standards for annual leave, generally of four weeks per year, but sometimes more for certain industries or certain types of work. Employers can obviously provide more generous entitlements to employees if they wish, so there is no legal impediment to the offering of purchased leave arrangements to employees.

One issue that may require care, however, is the employee's remuneration level. As purchased leave reduces this level, you need to check that remuneration does not fall below any statutory minimum rate as set by an award, agreement or the National Employment Standards.

How much leave?

The most common arrangements are four two or four extra weeks' leave per year. Usually they specify minimum 'blocks' of leave, eg 2 x 1 week or 2 x 2 weeks, or take the whole entitlement at once. Calculations of remuneration can become very messy if you allow purchase of shorter periods of leave than this. They will also be messy if you don't set specific amounts of purchased leave, eg two or four weeks.

Even if an employee only wants, say, seven extra days, better to require them to take two weeks. It's better to apply flexibility towards the standard annual leave entitlement, which does not affect calculations of remuneration (apart from the annual leave loading).

Administration

Most organisations find it necessary for employees to indicate their purchased leave intentions in advance, eg at the beginning of a calendar or financial year.

Most organisations have a standard leave application form, which should be adaptable to purchased leave applications.

The scheme normally operates on an annual basis. That means that an employee makes a decision each year whether to apply for purchased leave. If they do not take purchased leave the following year, their remuneration returns to normal.

Taking purchased leave does not affect entitlement to, or accruals of, other forms of leave. It may be joined to other types of leave, for example a period of accrued annual leave may be immediately followed by a period of purchased leave.

The bottom line

Purchased leave can be a very effective benefit, highly valued by many employees. However, it is not a matter of employees taking extra leave at short notice when they want to do so; it requires some restrictions and attention to administration to keep it under control.

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