

# Holidays Amendment Bill

Government Bill

## Explanatory note

### General policy statement

This Bill amends the Holidays Act 2003 (the **principal Act**) to improve the overall operation and efficiency of the principal Act. The Bill makes changes to the principal Act by—

- allowing employees and employers to agree to the employer paying out up to 1 week of an employee’s minimum entitlement to annual holidays at the employee’s request:
- amending the calculation and application of payment for public holidays, alternative holidays, sick leave, and bereavement leave:
- allowing employers and employees to agree to transfer the observance of public holidays to another working day:
- allowing employers to direct when an alternative holiday is taken, should the employer and employee not reach an agreement:
- providing an additional test (the “but for” test) to the factors for determining a day that would otherwise be a working day under section 12 of the principal Act:
- allowing employers to request proof of sickness or injury within the first 3 consecutive calendar days of an employee taking sick leave without first having reasonable grounds to suspect that the sick leave is not genuine:

- clarifying employees' entitlements during a closedown period on days that would otherwise be working days for the employee:
- increasing the maximum penalties for non-compliance with the principal Act to \$10,000 for individuals and \$20,000 for companies and other bodies corporate:
- including a definition of discretionary payments in the principal Act:
- clarifying the meaning of allowances in the principal Act.

These changes seek to provide greater choice for employers and employees, make the principal Act easier for employers and employees to understand and comply with, and improve the balance of fairness between employees and employers.

#### **Paying out annual holiday entitlement**

This Bill will allow an employee and employer to agree that an employer may pay out up to 1 week of an employee's minimum annual holiday entitlement in any 1 entitlement year, at the employee's request. Allowing employers and employees to agree that up to 1 week of an employee's minimum annual holiday entitlement may be paid out does not affect current agreements that employers and employees may have to pay out any annual holiday entitlements that are above the minimum statutory entitlement of 4 weeks.

#### *Policy intent*

The statutory provision for annual holidays recognises the importance of providing employees with the opportunity for rest and recreation and promotes work-life balance. However, there may be some individual circumstances where an employee would prefer to exchange up to 1 week of his or her annual holidays for payment. Allowing a portion of an employee's annual holiday entitlement to be paid out provides employees with more choice about how they exercise their minimum entitlement to annual holidays. Employees can either take annual holidays as holidays away from work or agree that a portion of their annual holidays be paid out. This change does not alter employees' minimum entitlement to 4 weeks' annual holidays.

*Employees may only request payout of annual holidays to which they are entitled*

An employee's request to have a portion of his or her annual holidays paid out only applies to annual holidays to which the employee is entitled. An employer and employee cannot agree to pay out annual holidays in advance of the employee's entitlement arising.

*Maximum of 1 week's annual holidays may be paid out in entitlement year*

A maximum of 1 week's annual holiday entitlement may be paid out in any 1 entitlement year, regardless of any existing entitlements from previous years. It is possible for employees to request that less than a week be paid out. Setting a maximum on the amount of holidays that may be paid out in any entitlement year ensures that employees still have a minimum of 3 weeks' annual holidays away from work in the course of the year.

*Payment for annual holidays paid out*

The proposal in the Bill to allow an employee to request that a portion of his or her annual holidays entitlement be paid out is not intended to provide financial incentives for paying out or taking annual holidays away from work. For this reason, the same rate of pay is to be used for paying out annual holidays and taking annual holidays away from work.

*Protections for employees and employers*

The criteria for paying out annual holidays provide protections to employers and employees and ensure that both parties have a common understanding of their agreement. There must be a genuine agreement between an employer and employee, which can only be instigated by the employee. Employees cannot be pressured into requesting that a portion of their annual holidays be paid out, and employers cannot be pressured to agree to a request for a payout.

*Employer may have policy preventing payout*

Employers may have a policy that the employer does not have to consider an employee's request to have a portion of his or her annual holidays paid out. Employers are expected (but are not required by

the Bill) to consult their employees on the development of any policy preventing the payout of annual holidays and advise potential new employees of the policy before they accept an offer of employment. This is intended to lower compliance costs for those businesses that are never able to or do not wish to agree to paying out annual holidays. It means that employers do not have to consider requests that they would never agree to and that they are up front with employees about their position on paying out annual holidays. It is not intended that a policy limiting the ability to pay out annual holidays can be extended to the taking of annual holidays as holidays away from work.

#### *Enforcing payout provisions*

It is intended that Labour Inspectors and the Employment Relations Authority should have the powers required to enforce compliance with the paying out of annual holidays to ensure that employees receive their minimum entitlement to annual holidays. This includes extending Labour Inspectors' powers to bring an action for penalties relating to an employee's entitlement to, and payment for, annual holidays that are paid out. In line with their existing powers, Labour Inspectors will have the ability to determine the amount the employer is required to pay out and the portion of annual holidays being paid out where employers and employees cannot agree on 1 or both of these amounts (or on what was originally agreed between them). The Bill also provides that if an employer has incorrectly paid out a portion of the employee's annual holidays, the paid out portion of the employee's annual holidays is restored to the employee's annual holidays' balance, despite the payment being made.

#### **Calculating pay for public holidays, alternative holidays, sick leave, and bereavement leave**

The Bill provides for the payment of either relevant daily pay or average daily pay for public holidays, alternative holidays, sick leave, and bereavement leave. The Bill seeks to address the issues raised with the current provisions on relevant daily pay by making changes to when an employer may apply an averaging formula and the period the averaging formula applies to. The policy intent behind both relevant daily pay and average daily pay is to ensure a fair rate of pay for leave (particularly where a calculation is required to determine the rate of pay) and to ensure that an employer is able to assess quickly

whether relevant daily pay or average daily pay applies to an employee. The policy intent of relevant daily pay remains unchanged (that is, paying employees what they would have earned had they worked on the day so that employees are not financially disadvantaged). The policy intent for the average daily pay calculation is that the method for calculating this average daily rate is simple to apply and does not create financial incentives for employers or employees to request, refuse, or require leave to be taken at any particular time or times.

Average daily pay replaces the current 4 week averaging formula provided in section 9(3) of the principal Act. When calculating payment for leave, employers are still required to attempt to determine what an employee would have earned on the day (relevant daily pay) in the first instance. However, the trigger for when an employer may move to an averaging formula has been made more permissive. The averaging formula may be used when it is not possible or practicable to determine what the employee would have earned or where an employee's daily payment varies within the pay period in which the holiday or leave falls. In those situations, an employer may choose to continue to attempt to determine the employee's relevant daily pay or move to the average daily pay calculation. Where it is not possible to determine the employee's relevant daily pay, the employer must pay according to the employee's average daily pay. Employers and employees will still be allowed to agree to a rate of pay for public holidays, alternative holidays, sick leave, or bereavement leave that is equal to, or greater than, relevant daily pay.

### **Transferring observance of whole public holiday to another working day**

The Bill amends the principal Act to restore the ability of employers and employees to agree to transfer the observance of the whole of a public holiday to another working day. This change is intended to provide greater choice for employers and employees. The agreement may be with 1 employee or a group of employees, and may relate to the transfer of 1 or more public holidays. Employers and employees may agree to transfer public holidays because of the operational needs of the employer or the individual needs of the employee. For example, if Waitangi Day falls on a Wednesday, an employer and a group of employees who work Monday to Friday may agree to ob-

serve Waitangi Day on the Friday. Similarly, an employee may agree with his or her employer that he or she can observe Boxing Day on another working day that holds religious or cultural significance for the employee. The Bill sets out a number of criteria that employers and employees must meet if they wish to transfer a public holiday. Those criteria are designed to address previous concerns around determining whether there is a genuine agreement to transfer the public holiday. As with paying out a portion of annual holidays, employers may have a policy that the employer does not have to consider requests to transfer public holidays. It is intended that employers and employees will still be able to agree to transfer part of a public holiday as currently provided for in section 44A of the principal Act.

#### **Allowing employers to direct when alternative holiday must be taken**

The Bill amends the principal Act to change who can determine when an alternative holiday is to be taken if an employer and employee cannot agree. If an employer and employee are unable to reach agreement, the employer may reasonably determine when the alternative holiday is to be taken, irrespective of when the entitlement to an alternative holiday arose. The employer must give the employee at least 14 days' notice of the date on which the employer requires the alternative holiday to be taken. This change addresses concerns that the current arrangements can have a negative impact on business operations and productivity if employees choose to take an alternative holiday on a day that is not convenient for the operation of the employer's business.

#### **Additional factor for determining otherwise working day in section 12**

The Bill amends section 12(3) of the principal Act to insert an additional factor for determining what would otherwise be a working day. This factor is based on the current tool used by Labour Inspectors and is recognised in case law. It does not change the meaning of what would otherwise be a working day.

**Employers may request proof of sickness or injury within 3 consecutive calendar days without having reasonable grounds to suspect that sick leave is not genuine**

The Bill amends section 68(1A) of the principal Act to remove the requirement for an employer to have reasonable grounds to suspect that sick leave is not genuine before the employer can request proof of sickness or injury within 3 consecutive calendar days of an employee taking sick leave. This change is intended to reduce compliance costs for employers. Employers are still required to meet an employee's reasonable expenses in obtaining the proof.

**Clarifying employee entitlements during closedown period**

The Bill aims to clarify the original policy intent of the principal Act. It clarifies that an employee is entitled to be paid for public holidays, an alternative holiday, sick leave, or bereavement leave falling during a closedown period if the day would otherwise be a working day for the employee. The purpose of providing for closedown periods in the principal Act (sections 29 to 35) was to enable employers to manage their businesses while balancing the employees' annual holiday entitlements. It was not intended to have the effect that all days within the closedown period could be agreed to be treated as not otherwise working days.

**Increasing maximum penalties for non-compliance**

A number of changes are being made to the Employment Relations Act 2000 that relate to the function and powers of Labour Inspectors. To support these changes, the Bill proposes to increase the maximum penalties under the principal Act. The intention of increasing the amount of penalty is to signal to the courts that breaches are significant and warrant a higher penalty. The current penalty provisions are not adequately deterring non-compliance. Increasing those penalties provides an incentive for employers to comply and conveys a public message that breaches of minimum entitlements are not conducive to good commercial practice. This change is intended to promote compliance with minimum standards and not put employers who meet or exceed their employment obligations at a competitive disadvantage.

### **Clarifying meaning of discretionary payments and allowances**

To help ensure that discretionary payments and allowances are better understood and applied correctly, the Bill proposes to insert a definition of discretionary payments in the principal Act and to clarify the meaning of allowances. These changes reflect the existing policy intent.

### **Regulatory impact statement**

The Department of Labour produced a regulatory impact statement on 4 June 2010 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- [www.dol.govt.nz/publications/general/gen-ris.asp](http://www.dol.govt.nz/publications/general/gen-ris.asp)
- [www.treasury.govt.nz/publications/informationreleases/ris](http://www.treasury.govt.nz/publications/informationreleases/ris)

### **Clause by clause analysis**

*Clause 1* is the Title clause.

*Clause 2* relates to commencement of the Bill. *Clause 7(2)* and *Schedule 1*, as far as it relates to the amendment to section 29 of the principal Act, come into force on the day after the date on which the Bill receives the Royal assent. The rest of the Bill comes into force on **1 April 2011**.

*Clause 3* provides that the Bill amends the Holidays Act 2003.

## **Part 1**

### **Amendments to principal Act**

*Clause 4* amends section 5(1), which is an interpretation provision. The amendments—

- insert a definition of discretionary payment for the purposes of section 8(1)(c) (meaning of ordinary weekly pay) and section 14(b)(i) (meaning of gross earnings):
- insert a cross-reference to the definition of closedown period in section 29:
- substitute a new definition of public holiday because of *new sections 44A and 44B* (as inserted by *clause 12*).

*Clause 5* substitutes *new sections 9 and 9A*, which relate to relevant daily pay and average daily pay. *New section 9* re-enacts current section 9(1), (2), and (4) of the principal Act. *New section 9A* is a new provision. It provides that an employer may use the employee's average daily pay for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave if it is not possible or practicable to determine an employee's relevant daily pay under section 9 or if the employee's daily pay varies within the pay period in which the holiday or leave falls. *New section 9A(2)* sets out the formula for calculating the employee's average daily pay. *New section 9A(3)* clarifies that if the formula in *new section 9A(2)* is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

*Clause 6* substitutes *new section 11*, which provides that a Labour Inspector may determine an employee's ordinary weekly pay, relevant daily pay, or average daily pay. The amendment is consequential on *new section 9A* (which relates to average daily pay).

*Clause 7* amends section 12, which specifies factors that an employer and employee must take into account in determining what would otherwise be a working day for an employee if it is not clear whether a day would otherwise be a working day for the employee. *Subclause (1)* inserts *new section 12(3)(d)*, which provides that in determining if a day would otherwise be a working day for an employee, the employer and employee must also consider whether, but for the day being a public holiday, an alternative holiday, a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned. *Subclause (2)* inserts *new section 12(3A)*, which clarifies that, where a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave falls during a closedown period, the factors listed in section 12(3) must be taken into account as if the closedown period were not in effect.

*Clause 8* amends section 14, which defines the term gross earnings. *Subclause (1)* amends section 14(a)(ii), to clarify that allowances exclude non-taxable payments to reimburse an employee for any actual costs related to the employee's employment. *Subclause (2)* adds *new section 14(c)(iv)*, which provides that an employee's gross earnings

exclude a payment made in accordance with *new section 28B* (which relates to payment for a portion of annual holidays that is paid out).

*Clause 9* substitutes *new section 15*, which relates to the purpose of subpart 1 of Part 2 (annual holidays). The main changes are that—

- *new section 15(a)* is consequentially amended to reflect the employee's entitlement to 4 weeks' annual holidays:
- *new section 15(b)* is consequentially amended to reflect the ability of an employee to request that up to 1 week of his or her annual holidays entitlement be paid out:
- current section 15(d) has not been re-enacted because the provision is spent.

*Clause 10* inserts a new heading and *new sections 28A to 28F*, which enable an employee to request that up to 1 week of his or her annual holidays in each entitlement year be paid out, as follows:

- *new section 28A* sets out the requirements for making a request:
- *new section 28B(1)* provides how the employee's payout is to be calculated and when it must be made. *New section 28B(2)* provides that if an employer has incorrectly paid out a portion of an employee's annual holidays where the employee did not make a request for payment or in circumstances where the request was not informed and voluntary, the employee's entitlement to take the annual holidays concerned remains in force as if the payment had not been made:
- *new section 28C* provides that an employment agreement must not include a provision that requires an employee to make a request for a portion of his or her annual holidays to be paid out. However, an employment agreement may contain a provision setting out the process for making a request under *new section 28A*:
- *new section 28D* provides that a requirement for an employer to pay out a portion of an employee's annual holidays entitlement must not be included in the employee's terms and conditions of employment (whether contained in an employment agreement or otherwise) or be raised in wage or salary negotiations between the employer and employee:
- *new section 28E* provides that an employer may have a policy that allows the employer to not have to consider requests under

*new section 28A* that applies to the whole of the employer's business or to some parts of the business but not to others:

- *new section 28F* provides that if an employer has agreed to pay out a portion of the employee's annual holidays but the employer and employee cannot agree on the portion of the annual holidays that are to be paid out or the amount of payment for those holidays, then a Labour Inspector may determine the matters for them.

*Clause 11* amends section 43(b), which relates to the purpose of sub-part 3 of Part 2 (public holidays) to reflect *new section 44B*, which relates to agreements to transfer the whole of a public holiday.

*Clause 12* repeals section 44A, which provides for the transfer of part of a public holiday to another working day, and substitutes *new sections 44A to 44C*, which provide for the transfer of part of a public holiday or the whole of a public holiday to another working day. *New section 44A* substantially re-enacts current section 44A but clarifies, among other things, that an agreement to transfer part of a day must be informed and voluntary and must not be for the purpose of avoiding the employee's entitlements under sections 50 and 56 of the principal Act (which relate to the requirement to pay time and half and to provide an alternative holiday for working on a public holiday) although the transfer may have that effect. *New section 44B* provides for the transfer of the whole of a public holiday to another identifiable calendar day or period of 24 hours if certain criteria are met. *New section 44C* provides that an employer may have a policy that allows the employer to not enter into agreements relating to the transfer of part, or the whole of, a public holiday under *new section 44A or 44B* that applies to the whole of the employer's business or to some parts but not to others.

*Clause 13* substitutes *new section 57(2) and (3)*, which provide that if an employer and employee cannot agree on when the employee is to take an alternative holiday provided under section 56, the employer—

- may determine, on a reasonable basis, when the employee is to take the alternative holiday; and
- must give the employee at least 14 days' notice of the requirement to take the alternative holiday.

*Clause 14* substitutes *new section 68(1A)*, which changes when an employer may require proof of sickness or injury within the 3 or more consecutive calendar days specified in section 68(1). An employer no longer needs to have reasonable grounds to suspect that the sick leave being taken by the employee is not genuine before requesting proof of sickness or injury.

*Clause 15* amends section 75, which specifies penalties for non-compliance with certain provisions of the principal Act. *Subclauses (1) and (2)* increase the penalties specified in section 75(1)—

- from \$5,000 to \$10,000 for an employer who is an individual; and
- from \$10,000 to \$20,000 for an employer that is a company or other body corporate.

*Subclause (3)* inserts a cross-reference to *new sections 28A and 28B* in section 75(2), which specifies the provisions of the principal Act to which the penalties in section 75(1) apply to.

*Clause 16* amends section 81(2), which specifies the information that an employer must enter in an employee's holiday and leave record. The amendment inserts *new section 81(2)(ha), (hb) and (ja)*, which provide that the employer must enter information relating to—

- the portion of any annual holidays that have been paid out in each entitlement year (if applicable);
- the date and amount of payment, in each entitlement year, for any portion of annual holidays paid out (if applicable);
- the day or part of any public holiday specified in section 44(1) agreed to be transferred under *new section 44A or 44B* and the calendar day or period of 24 hours to which it has been transferred (if applicable).

*Clause 17* and *Schedule 1* make consequential amendments to the principal Act.

## **Part 2**

### **Consequential amendments**

*Clause 18* and *Schedule 2* make consequential amendments to other Acts.

*Clause 19* is a transitional provision, which clarifies that a request under *new section 28A* (as inserted by *clause 10*) may be made only

in relation to an entitlement year that begins on or after the commencement of the Bill.

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*Hon Kate Wilkinson*

## **Holidays Amendment Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

- 1 Title**  
This Act is the Holidays Amendment Act **2010**.
- 2 Commencement**
  - (1) **Section 7(2)** and **Schedule 1** as far as it relates to section 29 of the principal Act come into force on the day after the date 5 on which this Act receives the Royal assent.
  - (2) The rest of this Act comes into force on **1 April 2011**.
- 3 Principal Act amended**  
This Act amends the Holidays Act 2003.

## Part 1 Amendments to principal Act

### 4 Interpretation

- (1) Section 5(1) is amended by inserting the following definitions in their appropriate alphabetical order: 5
- “**average daily pay** means a rate of pay calculated in accordance with **section 9A(2)**
- “**closedown period** has the meaning given to it by section 29
- “**discretionary payment**—
- “(a) means payment of an amount that the employer is not bound, by the employee’s employment agreement, to pay the employee; but 10
- “(b) does not include payment of an amount where the amount to be paid is discretionary, even though the payment itself is provided for in the employment agreement”. 15
- (2) Section 5(1) is amended by repealing the definition of **public holiday** and substituting the following definition:
- “**public holiday**—
- “(a) means a day specified in section 44(1); and 20
- “(b) if there is a written agreement under **section 44A or 44B**,—
- “(i) includes a calendar day or period of 24 hours agreed to be treated as a public holiday; but
- “(ii) excludes the day (or part of a day) specified in section 44(1) agreed not to be treated as a public holiday”. 25

### 5 New sections 9 and 9A substituted

Section 9 is repealed and the following sections are substituted: 30

#### “9 Meaning of relevant daily pay

- “(1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave,— 35

- “(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
- “(b) includes—
- “(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned: 5
- “(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned: 10
- “(iii) the cash value of any board or lodgings provided by the employer to the employee; but
- “(c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee. 15
- “(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if the rate is equal to, or greater than, the rate that would otherwise be calculated under **subsection (1)**. 20
- “(3) To avoid doubt, if **subsection (1)(a)** is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).
- “**9A Average daily pay** 25
- “(1) An employer may use an employee’s average daily pay for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if—
- “(a) it is not possible or practicable to determine an employee’s relevant daily pay under **section 9(1)**; or 30
- “(b) the employee’s daily pay varies within the pay period when the holiday or leave falls.
- “(2) The employee’s average daily pay must be calculated in accordance with the following formula:
- $$\frac{a}{b}$$
- where— 35

- a is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made
- b is 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. 5
- “(3) To avoid doubt, if **subsection (2)** is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).” 10
- 6 New section 11 substituted**  
Section 11 is repealed and the following section substituted:
- “**11 Labour Inspector may determine ordinary weekly pay, relevant daily pay, and average daily pay** 15
- “(1) This section applies if an employer and employee cannot agree on the amount of the employee's—
- “(a) ordinary weekly pay under section 8; or
- “(b) relevant daily pay under **section 9**; or 20
- “(c) average daily pay under **section 9A**.
- “(2) A Labour Inspector may determine the amount of the employee's ordinary weekly pay, relevant daily pay, or average daily pay (as the case may be).
- “(3) In making a determination, a Labour Inspector must apply the provisions of section 8, **9**, or **9A** (as the case may be) to the circumstances of the employee as determined by the Labour Inspector.” 25
- 7 Determination of what would otherwise be working day**
- (1) Section 12(3) is amended by adding the following paragraph: 30
- “(d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.”
- (2) Section 12 is amended by inserting the following subsection after subsection (3): 35

“(3A) If the public holiday, alternative holiday, or day on which the employee was on sick leave or bereavement leave falls during a closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect.”

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## **8 Meaning of gross earnings**

(1) Section 14(a)(ii) is amended by inserting “(except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment)” after “allowances”.

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(2) Section 14(c) is amended by adding the following subparagraph:

“(iv) any payment made in accordance with **section 28B.**”

## **9 Purpose of this subpart**

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Section 15 is repealed and the following section substituted:

### **“15 Purpose of this subpart**

The purpose of this subpart is to—

“(a) provide all employees with a minimum of 4 weeks’ annual holidays to be paid at the time the holidays are taken; and

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“(b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and

“(c) require employers to pay employees at the end of their employment for annual holidays not taken or paid out; and

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“(d) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.”

## **10 New heading and sections 28A to 28F inserted**

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The following heading and sections are inserted after section 28:

*“Portion of annual holidays may be paid out***“28A Employee may request portion of annual holidays be paid out**

- “(1) An employee may request that his or her employer pay out a portion of the employee’s entitlement to annual holidays. 5
- “(2) A request under **subsection (1)**—
- “(a) must be informed and voluntary; and
  - “(b) must be in writing; and
  - “(c) may be made on 1 or more separate occasions until a maximum of 1 week of the employee’s annual holidays is paid out in each entitlement year. 10
- “(3) If an employee makes a request under **subsection (1)**, an employer must—
- “(a) consider the request within a reasonable time; and
  - “(b) advise the employee in writing as to whether the employer agrees to the request; and 15
  - “(c) if the employer agrees to the request, comply with **section 28B**.
- “(4) An employer—
- “(a) may decline an employee’s request; and 20
  - “(b) is not required to provide the employee with a reason for declining the request.
- “(5) In this section, **entitlement year**—
- “(a) means a period of 12 months continuous employment beginning on the anniversary of the employee’s employment; and 25
  - “(b) includes a period of 12 months continuous employment described in section 16(2).

**“28B Payment for annual holidays paid out**

- “(1) If an employer agrees to pay out a portion of the employee’s annual holidays under **section 28A(3)(c)**, the employer must pay the employee for that portion— 30
- “(a) in accordance with section 21(2); and
  - “(b) as soon as practicable after the employer has agreed to the employee’s request under that provision. 35
- “(2) If an employer has incorrectly paid out a portion of the employee’s annual holidays where the employee did not make a

request for the payment, or in circumstances where the employee's request for payment was not informed and voluntary, the employee's entitlement to take the portion of annual holidays concerned remains in force as if the payment had not been made.

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**“28C Requirement to request payout prohibited**

“(1) A requirement that an employee must make a request under **section 28A** for a portion of his or her annual holidays entitlement to be paid out must not be a term or condition of the employee's employment (whether contained in an employment agreement or otherwise).

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“(2) Despite **subsection (1)**, an employment agreement may set out the process for making a request under **section 28A**.

**“28D Requirement to make payout prohibited**

A requirement for an employer to pay out a portion of an employee's entitlement to annual holidays must not be—

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“(a) a term or condition of the employee's employment (whether contained in a written employment agreement or otherwise); or

“(b) raised in negotiations between the employer and employee about the employee's terms and conditions relating to salary or wages.

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**“28E Employer may have policy preventing payout**

“(1) An employer may adopt a policy that allows the employer to not consider a request under **section 28A** for a portion of an employee's annual holidays to be paid out.

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“(2) A policy under **subsection (1)** may apply to—

“(a) the whole of the employer's business; or

“(b) some parts of the employer's business but not to others.

“(3) If an employer has a policy under **subsection (1)**, **section 28A** does not apply in relation to any part of the employer's business to which the policy applies.

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**“28F Labour Inspector may determine payout**

“(1) This section applies if an employer has agreed to an employee’s request to pay out a portion of the employee’s annual holidays under **section 28A**, but the employer and employee cannot agree on—

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“(a) the portion of annual holidays that are to be, or have been, paid out; or

“(b) the amount that the employer is required to pay the employee for the annual holidays that are to be, or have been, paid out.

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“(2) A Labour Inspector may determine either or both of the following:

“(a) the portion of annual holidays paid out or to be paid out:

“(b) the amount payable for the annual holidays paid out or to be paid out.”

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**11 Purpose of this subpart**

Section 43 is amended by repealing paragraph (b) and substituting the following paragraph:

“(b) to provide for the transfer of public holidays (whether in whole or in part):”.

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**12 New sections 44A to 44C substituted**

Section 44A is repealed and the following sections are substituted:

**“44A Transferring part of public holiday**

“(1) This section applies if—

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“(a) an employee is to start work on a day and finish work on the following day; and

“(b) 1 or both of those days are specified in section 44(1).

“(2) If the criteria in **subsection (3)** are met, the employee and his or her employer may agree in writing (whether in an employment agreement or otherwise)—

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“(a) that part of 1 or both days specified in section 44(1) is to be treated as not part of a public holiday; and

“(b) that,—

- “(i) if the agreement relates to only 1 day specified in section 44(1), a period of 24 hours is to be treated as a public holiday if the period—
- “(A) is to start or finish during the day specified in section 44(1); and 5
  - “(B) includes the period from when the employee is to start work to when the employee is to finish work:
- “(ii) if the agreement relates to 2 days specified in section 44(1), 2 separate periods of 24 hours are 10 to be treated as public holidays if each period—
- “(A) is to start or finish during the days specified in section 44(1); and
  - “(B) includes the period from when the employee is to start work to when the employee is to finish work. 15
- “(3) The criteria are that—
- “(a) the agreement must be informed and voluntary; and
  - “(b) the purpose of the transfer is not to avoid the employee’s entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect. 20
- “(4) Where an agreement to transfer part of a public holiday applies, the employee’s entitlements under sections 50 and 56 apply only if the employee works during the period of 24 hours or 2 separate periods of 24 hours (as the case may be) to which that part of the public holiday has been transferred. 25
- “(5) To avoid doubt, an agreement under this section must not reduce the total number of paid public holidays that the employee is otherwise entitled to in any year. 30

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#### Example

An employee is to work from 10 pm on 24 April to 6 am on Anzac Day and from 10 pm on Anzac Day to 6 am on 26 April.

The employer and employee can agree to treat 10 pm to midnight on Anzac Day as not part of a public holiday in exchange for treating a period of 24 hours that finishes on Anzac Day as a public holiday. Just when the 24-hour period starts before or finishes after a work period is a matter for the parties to agree 35

**Example**—*continued*

on. For instance, they could agree that it runs from midday on 24 April to midday on Anzac Day.

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**“44B Transferring whole of public holiday**

- “(1) An employer and employee may agree in writing (whether in an employment agreement or otherwise)— 5
- “(a) that a public holiday specified in section 44(1) is to be observed by the employee on another calendar day or during a period of 24 hours (a **transfer**), if the criteria in **subsection (2)** are met; and
- “(b) the calendar day or period of 24 hours to which the public holiday is transferred is to be treated as the employee’s public holiday for the purposes of this subpart. 10
- “(2) The criteria are that—
- “(a) the agreement must be informed and voluntary; and
- “(b) the public holiday specified in section 44(1) to be transferred— 15
- “*(i)* is identified; and
- “*(ii)* would otherwise be a working day for the employee; and
- “*(c)* the calendar day or period of 24 hours to which the public holiday is to be transferred— 20
- “*(i)* is identified or identifiable; and
- “*(ii)* would otherwise be a working day for the employee; and
- “*(iii)* is not another public holiday or part of a public holiday; and 25
- “*(d)* the purpose of the transfer is not to avoid the employee’s entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect. 30
- “*(3)* Where an agreement to transfer a public holiday applies, the employee’s entitlements under sections 50 and 56 apply only if the employee works on the identified or identifiable calendar day or period of 24 hours to which the public holiday has been transferred. 35

- “(4) To avoid doubt, an agreement under this section—
- “(a) may be made in relation to 1 or more of the public holidays specified in section 44(1); but
  - “(b) must not reduce the total number of paid public holidays that the employee is otherwise entitled to in any year. 5
- “**44C Employer may have policy preventing transfer**
- “(1) An employer may adopt a policy that allows the employer to not enter into agreements that enable all or part of a public holiday being transferred under **section 44A** or **44B**.
- “(2) A policy under **subsection (1)** may apply to— 10
- “(a) the whole of the employer’s business; or
  - “(b) some parts of the employer’s business but not to others.
- “(3) If an employer adopts a policy under **subsection (1)**, **sections 44A and 44B** do not apply in relation to any parts of the employer’s business to which the policy applies. 15
- 13 Requirements for alternative holiday**
- Section 57 is amended by repealing subsections (2) and (3) and substituting the following subsections:
- “(2) If an employer and employee cannot agree under subsection (1)(a) on when an alternative holiday is to be taken, the day 20 must be taken on a date determined, on a reasonable basis, by the employer.
- “(3) If **subsection (2)** applies, the employer must give the employee at least 14 days’ notice of the requirement to take the alternative holiday.” 25
- 14 Proof of sickness or injury**
- Section 68 is amended by repealing subsection (1A) and substituting the following subsection:
- “(1A) Despite subsection (1), the employer may require proof of sickness or injury within 3 consecutive calendar days if the 30 employer—
- “(a) informs the employee as early as possible that the proof is required; and
  - “(b) agrees to meet the employee’s reasonable expenses in obtaining the proof.” 35

**15 Penalty for non-compliance**

(1) Section 75(1)(a) is amended by omitting “\$5,000” and substituting “\$10,000”.

(2) Section 75(1)(b) is amended by omitting “\$10,000” and substituting “\$20,000”. 5

(3) Section 75(2) is amended by inserting the following paragraph after paragraph (b):

“(ba) **sections 28A and 28B** (which relate to a request by an employee for a portion of his or her annual holidays to be paid out and payment for that portion):”. 10

**16 Holiday and leave record**

(1) Section 81(2) is amended by inserting the following paragraphs after paragraph (h):

“(ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable): 15

“(hb) the date and amount of payment, in each entitlement year, for any annual holidays paid out under **section 28B** (if applicable):”.

(2) Section 81(2) is amended by inserting the following paragraph after paragraph (j): 20

“(ja) the day or part of any public holiday specified in section 44(1) agreed to be transferred under **section 44A or 44B** and the calendar day or period of 24 hours to which it has been transferred (if applicable):”.

**17 Consequential amendments to principal Act** 25

The principal Act is consequentially amended in the manner set out in **Schedule 1** of this Act.

**Part 2****Amendments to other Acts and transitional provision** 30**18 Amendments to other Acts**

The Acts listed in **Schedule 2** are amended in the manner set out in that schedule.

**19 Transitional provision**

To avoid doubt, a request under **section 28A** of the principal Act (as inserted by **section 10** of this Act) may be made only in relation to an entitlement year that begins on or after the commencement of this Act.

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**Schedule 1** **s 17**  
**Consequential amendments to principal Act**

**Section 16(4)**

Repeal and substitute: 5

“(4) An employee’s entitlement to annual holidays remains in force until the employee has—

“(a) taken all of the entitlement as paid holidays; or

“(b) been paid out under **section 28B** for the entitlement in the entitlement year.” 10

**Section 29**

Omit “sections 30 to 35” and substitute “**sections 12(3A)** and 30 to 35”.

**Section 29(b)**

Omit: “his or her” and substitute “the employer’s”. 15

**Section 35(1)**

Insert “or **28A(5)**” after “section 16(1)”.

**Subpart 2 of Part 2**

Repeal.

**Section 49**20

Insert “or average daily pay” after “relevant daily pay”.

**Section 50(1)(a)**

Insert “or average daily pay” after “relevant daily pay”.

**Section 52(3)**25

Insert “or average daily pay” after “relevant daily pay”.

**Section 53(4)**

Insert “or average daily pay” after “relevant daily pay”.

**Section 58**

Repeal.

**Section 60(1)**

Insert “or average daily pay” after “relevant daily pay”.

**Section 60(2)(b)(i)**

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Insert “or average daily pay” after “relevant daily pay”.

**Section 61(2)(b)**

Omit “section 58” and substitute “**section 57(2)**”.

**Section 71(1)**

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Insert “or average daily pay” after “relevant daily pay”.

**Schedule 1**

Repeal.

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**Schedule 2**  
**Amendments to other Acts**

**s 18**

**Employment Relations Act 2000 (2000 No 24)**

Section 79(1): repeal and substitute:

“(1) An employer must pay to an eligible employee the employee’s relevant daily pay as defined in **section 9** of the Holidays Act 2003 or average daily pay calculated in accordance with **section 9A** of that Act (as the case may be) for every day or part of a day taken by the employee as employment relations education leave.”

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**Parental Leave and Employment Protection Act 1987 (1987 No 129)**

Section 42(2): add “is taken or paid out”.