



The Human Resources Specialists

**December 2010
HR KNOWHOW
WHAT'S NEW**

In this edition:

Welcomed Change is here for Employers

- **Employment Law Reforms:
Holidays Act
*Employment Relations Act***
- **Leave – 2010/2011**

The amendments to the Employment Relations Act and Holidays Act were passed into law 23 November 2010. The amendments are significant and welcomed changes for employers.

Minister of Labour Kate Wilkinson has said that the changes will provide greater clarity increased flexibility and choice for both employers and employees.

Holidays Act

In effect from 27 November 2010

- **Employee's entitlements to Public Holidays during a closedown**

The amended Act has confirmed employees' entitlements to Public Holidays during a closedown and reversed a recent decision at the Employment Court.

Employees are entitled to be paid for Public Holidays, Alternative Leave, Sick Leave, or Bereavement Leave during a closedown period if the day would otherwise be a working day for the employee. In determining this, it must be considered as if the closedown were not in effect.

The purpose of a closedown period is to enable employers to manage business needs while balancing employees' annual leave 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.

In effect from 1 April 2011

Employment Relations Act

- **90 Day Trial – extension to all workplaces**

The 90 day trial period for new employees is extended to all employers not just those with less than 20 staff. The 90 day trial must be agreed, documented in the employee's employment agreement, and both parties signed the employment agreement before the commencement of employment. In the case of a dismissal within the trial period the law relating to good faith, disadvantage, discrimination, sexual or racial harassment applies.

Following on from our recent newsletter – a new employee is one that has signed the employment agreement before commencing employment. We suggest that the start date is amended to ensure you have the signed paperwork before letting the employee in the door.

The trial period clause needs to be carefully drafted, kept simple and in line with the legislation. A recent case has raised prickly issues as to the application of this provision.

We have developed tools to help you manage/assess during the first 90 days and to know exactly how the employee is performing. Please contact us 09 377 9891 if you would like to further discuss.

- **Dispute Resolution**

Test to determine whether an employer's action is justified

In determining whether the employer's actions were justified in the case of a dismissal – the test will now be “whether the employer's actions, and how the employer acted, were what a fair and reasonable employer **could** have done in all the circumstances at the time the dismissal or action occurred”.

This will provide a range of options open to the employer, as opposed to the current test of “would do”, which only allows for one reasonable action.

There will be consideration of whether or not the process has been fair and reasonable, whether a proper investigation has been conducted, whether the matters at hand have been properly communicated to the employee, that there has been a reasonable opportunity for the employee to respond to the matters raised and the employer has considered the reasons given by the employee with an open mind.

Consideration of the resources of the employer

Importantly for small to medium businesses the resources of the employer will be considered in any decision. Currently it is a very blunt instrument with our largest companies facing the same level of penalty as our smallest.

Employment Relations Authority & Employment Court

The Authority or Court will not determine a dismissal or an action to be unjustifiable solely because of defects in the process, if the defects were minor and did not result in the employee being treated unfairly.

The Authority and Court will be given the explicit ability to dismiss frivolous or vexatious claims. Unfortunately claims can then be challenged in the Court within 28 days of the Authority's decision.

Reinstatement as the primary remedy for an unjustified dismissal is repealed, yet remains available as a remedy.

Penalties for delaying behaviour at the Authority, including failure to attend without sufficient cause.

Promotion of mediation by ensuring that the Authority will offer priority to mediated cases.

An improvement to the way the Authority operates which would see a more “judicial mode operation” and allow parties the “right to cross-examine witnesses”.

- **Union access / Communication**

Employers would be able to regulate union access to workplaces. Consent could be withheld, provided grounds are not unreasonable. Employers would be required to respond to a request for union access as soon as reasonably practicable but no later than the working day after the request is received. Failure to respond within 2 working days after the request is received will be treated as providing consent.

Employers would have the right to communicate directly with their staff while bargaining during collective negotiations, provided such communications are consistent with the duty of good faith.

- **Penalties double for breaches of Employment Relations & Holidays Act**

Maximum penalties will double, increasing from \$5,000 to \$10,000 for individuals and from \$10,000 to \$20,000 for companies, both under the Employment Relations and Holidays Act; and

Labour Inspectors will have wider powers, and more flexibility to address both low level and ongoing non-compliance.

The increased penalties illustrate that the Courts are no longer willing to tolerate non-compliance and employers must adhere to the legislative standards.

Holidays Act

- **1 week's annual leave exchanged for payment**

An employee and employer can agree for up to 1 week of an employee's annual leave entitlement to be paid out, at the employee's request.

Annual leave can only be paid out where an entitlement has arisen and therefore will not apply to accrued leave. Payment is capped at 1 week in any 1 entitlement year. The calculation of the payment of leave will be as if the employee were taking the leave. Payment can be made on 1 or more separate occasions until the 1 week cap is reached.

Employers will not need to agree to the request and do not need to provide a reason for declining the request. Where employers receive a request they must consider the request, advise the employee in writing as to whether the employer accepts or declines the request and respond in a reasonable timeframe.

Employers are entitled to have a policy that allows the employer to rule out all requests for a pay out. This could apply to the whole or part of the business. This is intended to reduce compliance costs for businesses where it is not financially practicable to pay out leave.

If an employer has incorrectly paid out a portion of the employee's annual leave i.e. which falls outside the 1 week's leave in any 1 entitlement year and/or inaccurately calculated the amount of the annual leave, the paid out portion is restored to the employee's annual leave balance, regardless of the payment being made.

It would be unlawful for employers to require employees' leave to be paid out, even if the requirement is specified and agreed in the employment agreement. The payment for leave could not be raised in negotiations relating to salary or wages.

The ability for leave to be paid out will provide employees with the option if that is what they prefer while ensuring that they still have to take a decent break during the year.

- **Average daily pay – (public holidays, alternative holidays, sick leave, and bereavement leave)**

Relevant daily pay and average daily pay applies to the calculation for payment of Public Holidays, Alternative Holidays, Sick Leave or Bereavement Leave.

Where employees have variable hours or it is not possible or practicable to determine what the employee would have earned, employers must calculate the leave over the preceding 52 weeks or whatever lesser period the employee has worked for that employer.

Average daily pay: a
 —
 b

a = employee's gross earnings for 52 calendar weeks before the end of the pay period immediately before the calculation is made

b = 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

This is a significant change for employers who have peaks in their business pre-Christmas and pay commission / incentives – as the average daily pay will remove the false inflation caused by averaging over 4 weeks, as is the case now.

Currently employer KiwiSaver contributions are excluded from relevant daily pay.

- **Medical Certificates**

Employers will be able to request an employee to produce proof of sickness or injury after one day of sick leave, without the need for reasonable grounds to suspect that the sick leave is not genuine.

Employers will need to meet an employee's reasonable expenses in obtaining the medical certificate, if the certificate is requested within 3 consecutive calendar days.

Currently, employers can only require a medical certificate after three or more consecutive calendar days, or within three days if there are reasonable grounds to suspect that the leave is not genuine.

This change will remove uncertainty around when employers have reasonable grounds to request proof. Employers will have the ability manage 1 day sickies particularly that repeated "Monday".

- **Alternative Leave**

The timing of all alternative leave will need to be agreed between the parties and failing agreement, the employer can determine the date on which the alternative leave will be taken, on at least 14 days' notice.

Employers will be able to prevent any negative impact on business operations and productivity by having the final say on when alternative leave is taken and have control (like annual leave) with managing alternative leave balances

Currently, employees who wish to take alternative leave within 12 months of the entitlement arising and where the parties can not agree on the date that the leave is to be taken, the employee can determine the date that is convenient to him/her.

- **Public Holidays transfer to another working day**

The parties can agree to transfer the observance of a Public Holiday to another working day. The agreement may be with 1 employee or a group of employees, and may relate to the transfer of 1 or more Public Holidays, and be in writing.

However an agreement must not reduce the total number of paid Public Holidays that an employee is otherwise entitled to in any year.

- **Including a definition of Discretionary Payments**

The definition of a discretionary payment is payment of an amount that the employer is not bound to pay under the employment agreement, and excludes payment even though the amount of the payment is not specified in the employment agreement and the employer will determine the amount.

Discretionary payments would also exclude payments where the employer is only required to make the payment if certain conditions are met, and is provided for in the employment agreement.

Our interpretation of this definition is that any reference to a bonus in an employment agreement could be excluded from qualifying as discretionary, and therefore attract 8% holiday pay.

Please call us on 09 377 9891 if you would like us to review your discretionary bonus / incentive clauses and/or would like to vary your employees' agreements.

- **Clarifying the meaning of allowances in the definition of gross earnings**

While allowances are included in employees' gross earnings, it excludes allowances specifically relating to non taxable

payments to reimburse an employee for actual costs related to the employee's employment.

Annual leave exchanged for payment would also be excluded from an employee's gross earnings.

- **Holiday Leave Records**

Employers will be required to maintain additional records relating to the:

- Portion, date and amount of annual leave paid out in each entitlement year
- Day or part of any Public Holiday transferred to another part or whole day

From 1 July 2011

- **Individual Employment Agreements**

Employers will be required to:

- Retain a signed copy of an employee's agreement.
- Retain a copy of any unsigned employment agreement which has been provided to an employee
- Provide a copy of the employment agreement to the employee upon request, as soon as is reasonably practicable

To avoid doubt – an intended employment agreement must not be treated as the employee's employment agreement if the employee has not signed the intended employment agreement or has not agreed to the terms and conditions of the intended agreement.

Employers can be liable for penalties if they failure to comply with these requirements - from 1 April the maximum penalty will be \$10,000.

Leave - 2010/2011

Public Holidays

The 4 Public Holidays will fall on the weekend over this Christmas period and will be observed as follows:

Christmas Day / 1 January -

- on the Saturday for an employee who would normally work on a Saturday, OR
- on the following Monday for an employee who would normally not work on a Saturday

Boxing Day / 2 January -

- on the Sunday for an employee who would normally work on a Sunday, OR
- on the following Tuesday for an employee who would normally not work on a Tuesday

As clarified by the amended Act, Public Holidays that fall during a closedown are treated as paid Public Holidays, and not taken as an Annual Leave day.

Closedown Requirements

Where a Company closes down over the Christmas period an employer can require employees with sufficient annual leave entitlement to take annual leave at this time. Employers must give employees 14 days' notice of such requirement and we advise that this should be in writing.

For those employees who do not have annual leave entitlement at the time of the closedown there are a couple of options for the treatment of leave during this period. If you would like to clarify the best practice for your employees in this instance, please contact HR KnowHow on 377 9891 or at kh@knowhow.co.nz

Leave calculations

We are experts in leave calculations and are happy to prepare the calculations or cross check your calculations.

Leave Request Form

Please find attached the HR KnowHow Leave Request form. A leave form is not only needed for administration and planning purposes, but also to ensure that employers comply with the record keeping under the Holidays Act.

KnowHow Closedown

We will be closed for the Christmas and New Year period from 23 December with the office re-opening on Monday 10 January.

From Helen, Kerry and from me, we wish you a very happy Christmas and New Year to you and your families.

Thank you for all your support in 2010 and we look forward to working with you in 2011.

Referrals

We are very grateful to our clients who provide us with referrals. If you know of an employer who needs support in managing employment matters or perhaps needs employment agreements please pass on our contact details or let us know and we will contact them to outline what we do.

Please do let us know if there is more we can do to assist you with your HR matters.

Sylvia Wood
Director

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www.hrknowhow.co.nz

The Employer's Resource

Employment Agreements, Company Policy and Procedures, Health and Safety Manuals/Systems Compliance, Restructuring, Redundancies, Managing Performance, Mediations, Dispute Resolution, Personal Grievances, Compliance, Termination

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