



January 2010

# Employment Update

## Happy Holidays - the Holidays Act review

The start of a new year can be a relatively quiet time and many employees in New Zealand enjoy a summer holiday. But for employers, the need to calculate holiday pay can be a daunting prospect.

In the face of continued complaints about the Holidays Act 2003 (the Act) and the difficulties employers face in using and interpreting its provisions, the Government made a pre-election pledge to review the Act. Accordingly, a call was made last year for public submissions, and 241 were received as a result (including submissions made by our employment team).

The public submissions were considered by a Ministerial Advisory Group (the Group), the report of which was published in December 2009. In many instances, a lack of consensus among members of the Group has meant that two, often contradictory, recommendations are proposed in the report; one from the employer representatives and the other from the union representatives.

The seven main areas addressed by the review, together with the Group's recommendations, are summarised in this newsletter.

### 1. Relevant daily pay

Members of the Group appear to be in agreement that the way in which leave entitlements are calculated needs to be simplified. To that end, employer representatives have recommended having one rate, a "standard leave rate", at which all leave is paid (annual, sick and bereavement leave and public and alternative holidays). It is proposed that the standard leave rate would be calculated by dividing an employee's annual gross earnings by that employee's contractual hours for the period during which those gross earnings were earned. Contractual hours would not necessarily mean actual "hours" but would refer to whatever unit of time is best suited to the particular workplace (hours, days or weeks). This is referred to as "work units". Payment for such leave would then be calculated by multiplying the standard leave rate by the relevant number of work units of leave taken.

One benefit of this recommendation is that employers would only have to use one formula for calculating leave payments. However, for employees, the current recourse to ordinary weekly pay (where that amount is greater than 1/52 of annual gross earnings) would no longer be available. This means that, for example, an employee who received a pay rise just prior to taking annual holidays might be paid less than their new rate of pay while on annual leave. This consequence may be one reason why the union representatives' support for this new method of calculating leave extends only to those types of leave currently subject to the relevant daily pay definition (sick leave, bereavement leave, public holidays and alternative holidays) and not to annual holidays. The union representatives wish to retain the status quo for annual holiday pay calculations.

In terms of leave accrual, the employer representatives' recommendation is that annual holidays should be accrued at the rate of 4/52 of contractual hours, and sick leave at 1/52 of contractual hours. This is seen as a way of simplifying accrual where employees work irregular work patterns, and of remedying the relative sick leave entitlement disparity between employees who work different numbers of days per week.

Finally, the employer representatives have recommended that employers and employees should be able to agree to accumulate, use, and pay for leave in a way which is different to any prescribed method, provided that such agreement is reached in good faith and is informed and voluntary. This recommendation recognises that, while the legislation must necessarily be drafted to deal with the most common working arrangements, it does not suit all situations.

## 2. Trading annual holidays for cash

The proposal to allow employees the ability to "cash up" their fourth week of annual holidays has attracted significant attention. While supported by the employer representatives, this recommendation has been opposed by the union representatives who instead favour keeping the status quo.

The union representatives have expressed concern that such a change would have the effect of increasing working hours for "the most vulnerable workers". In response to such concerns, the employer representatives have recommended a number of safeguards be put in place to ensure that any trading of annual leave for cash only occurs where there is genuine agreement from the employee. The employer representatives' view is that, even with the ability to cash up the fourth week, employees would remain entitled to sufficient annual leave per annum.

## 3. Casual employees

On the issue of casual employees, the Group was in agreement recommending that the current leave entitlements for casual employees be maintained.

## 4. Transferring public holidays

The transfer of public holidays to other days has been a vexed and complicated issue ever since the Act came into force.

Due to the Holidays Transfer of Public Holidays Amendment Act 2008, public holidays can now only be transferred in the situation where an employee works a shift that crosses midnight on a public holiday. The Group has recommended that the ability of employers and employees to agree to transfer public holidays in other circumstances should be restored, subject to various conditions designed to ensure genuine agreement and the protection of employees' overall public holiday entitlements.

## 5. Accumulation of alternative holidays

The employer representatives' recommendation is that the number of work units that an employee works on a public holiday should be added to employees' annual holiday balance and then be taken in the same way as annual holidays, instead

of accruing alternative holidays. Union representatives oppose this change as it would remove the current entitlement of employees to receive a full day's alternative holiday irrespective of how much time was worked on the public holiday.

## 6. Treatment of public holidays

The review considered whether the current list of public holidays should be altered. The report notes that the most common change suggested by submitters was for Waitangi Day and ANZAC Day to be "Monday-ised" (like the Christmas and New Year holidays). Suggestions were also made for new or changed public holiday days.

The Group has recommended that no changes be made to the current treatment of public holidays, noting that there was "insufficient appetite" for change.

## 7. The status of Easter Sunday

While Easter Friday and Easter Monday are both currently public holidays, Easter Sunday is not. A vestige of an era when businesses were generally closed on Sundays, the question is whether this is still appropriate.

Perhaps unsurprisingly, the union representatives' position is that Easter Sunday should become a twelfth public holiday, while the employer representatives have recommended that the number of public holidays remains at eleven.

In the current economic climate, an increase in the number of public holidays seems unlikely. However, there is a possibility that Easter Sunday could replace Easter Monday as a public holiday but be Monday-ised in the same manner as the Christmas and New Year holidays.

## Consideration of the recommendations

The changes proposed will now be reviewed by the Minister of Labour and will no doubt continue to be debated. Given the divergence of views within the Group, it is by no means certain what will happen in terms of legislative reform.

We will continue to keep you updated as the recommendations are considered. You are also welcome to contact one of our employment law experts for more information on this review. In the meantime, we hope that you are enjoying your summer, including any remaining holidays.

## Updated from our Tax team

Recent tax changes permit employees to be paid a tax free allowance for relocation expenses where that employee is required to relocate because s/he will not be within a reasonable daily travelling distance of work.

The link below provides guidance from the IRD as to what is a reasonable daily travelling distance. As a rule of thumb, employees will be eligible for a tax free relocation allowance if their journey time to and from their existing house to their new job would be more than two hours a day, in total.

[Guidance on a "reasonable daily travelling distance"](#)

# contacts

## WELLINGTON

<b>Greg Cain</b> , Partner	T +64 4 498 5180
<b>Megan Richards</b> , Partner	T +64 4 498 5023
<b>Karen Spackman</b> , Partner	T +64 4 498 5105
<b>Steve Wragg</b> , Senior Associate	T +64 4 498 5041
<b>Katie Elkin</b> , Senior Associate	T +64 4 498 5054

## AUCKLAND

<b>Jennifer Mills</b> , Partner	T +64 9 353 9919
<b>Aaron Lloyd</b> , Partner	T +64 9 353 9971
<b>Bridget Smith</b> , Senior Associate	T+ 64 9 353 9968
<b>Emma Warden</b> , Senior Associate	T +64 9 353 9741
<b>Rochelle Price</b> , Special Counsel	T +64 9 353 9966

## MINTER ELLISON OFFICES

**Sydney** AURORA PLACE 88 PHILLIP STREET SYDNEY NSW 2000 • TELEPHONE +61 2 9921 8888

**Melbourne** RIALTO TOWERS 525 COLLINS STREET MELBOURNE VIC 3000 • TELEPHONE +61 3 8608 2000

**Canberra** 25 NATIONAL CIRCUIT FORREST, CANBERRA ACT 2603 • TELEPHONE +61 2 6225 3000

**Brisbane** WATERFRONT PLACE 1 EAGLE STREET BRISBANE QLD 4000 • TELEPHONE +61 7 3119 6000

**Gold Coast** \* 159 VARSITY PARADE VARSITY LAKES QLD 4227 • TELEPHONE +61 7 5553 9400

**Perth** \* LEVEL 49, CENTRAL PARK 152-158 ST GEORGE'S TERRACE PERTH WA 6000 • TELEPHONE +61 8 9429 7444

**Adelaide** \* GRENFELL CENTRE 25 GRENFELL STREET ADELAIDE SA 5000 • TELEPHONE +61 8 8233 5555

**Darwin** \* LEVEL 4, 66 SMITH STREET DARWIN NT 0800 AUSTRALIA • TELEPHONE +61 8 8901 5900

AUSTRALIA

**Auckland** MINTER ELLISON RUDD WATTS \* LUMLEY CENTRE 88 SHORTLAND STREET AUCKLAND 1010 NEW ZEALAND • TELEPHONE +64 9 353 9700

**Wellington** MINTER ELLISON RUDD WATTS \* 125 THE TERRACE WELLINGTON NEW ZEALAND • TELEPHONE +64 4 498 5000

NZ

**London** 10 DOMINION STREET LONDON EC2M 2EE UNITED KINGDOM • TELEPHONE +44 20 7448 4800

UK

**Hong Kong** 15TH FLOOR, HUTCHISON HOUSE 10 HARCOURT ROAD CENTRAL HONG KONG • TELEPHONE +852 2841 6888

**Shanghai** SUITE 4006-4007 40th FLOOR CITIC SQUARE 1168 NAN JING ROAD WEST SHANGHAI 200041 PEOPLE'S REPUBLIC OF CHINA • TELEPHONE +86 21 6288 2171

**Jakarta** MAKARIM & TAIRA S \*\* LEVEL 17 SUMMITMAS TOWER 1 JL JENDERAL SUDIRMAN 61-62 12190 JAKARTA • TELEPHONE +62 21 252 1272

ASIA

\* MINTER ELLISON LEGAL GROUP MEMBER

\*\* MINTER ELLISON ASSOCIATED OFFICE

### Disclaimer

The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Minter Ellison Rudd Watts does not accept liability for any errors it may contain.