

Holidays Act 2003 2.0

Our thanks go to Kari Schmidt, Ana Fruean and Grace Titter for writing this article

In 2018 the Government established a Holidays Act Taskforce (the Taskforce) to suggest improvements to the Holidays Act 2003. In February the Minister for Workplace Relations released the Taskforce's report, which makes 22 recommendations. All of these have been accepted, and the government intends to introduce draft legislation into Parliament in early 2022.

We discuss the key recommendations (and other upcoming changes) below.

Most of these recommendations are not as yet law, and some of the details could well change as the eventual draft bill goes through the parliamentary process throughout the course of next year.

Stronger Entitlements to Leave

1. Bereavement leave and family violence leave would kick in for eligible employees from their first day of employment. An employee and their spouse are now entitled to bereavement leave in the event of a still-birth or miscarriage (see below for more detail).
2. Eligible employees would receive one day's sick leave from their first day of employment with an additional day given each month until the minimum entitlement is reached. The "wait six months" rule would cease to exist.
3. The Holidays (Increasing Sick Leave) Amendment Bill would, if passed, increase the minimum employee sick leave entitlement from 5 days per year to 10 days per year.
4. Bereavement leave of three days would be extended to include more family members, including cultural family groups and more modern family structures.
5. The parental leave override would be removed, meaning that employees returning from parental leave will receive their full rate for all annual holidays when they return from parental leave. Currently leave accrued during parental leave initially has a 'zero' value – it gradually increases to full value over the course of 12 months.
6. Employees would be entitled to take leave in advance on a pro-rata basis. At the moment employees have to wait 12 months before becoming entitled to take their accrued leave, although in practice most employers allow leave to be taken in advance. Under the new approach an employee would (for example) be entitled to take two weeks' leave after working for six months.

7. Employees would have the right to choose between having their leave entitlements paid out or transferred to a new employer when the business they work in is sold.

More Clarity

1. The aim is to put in place new clear and transparent rules and definitions for determining, calculating, and paying leave entitlements so that employers can have greater confidence they are meeting their obligations under the Act and their employees are receiving their correct entitlements.
2. The rules around 8% pay-as-you-go (PAYG) holiday pay would change, with the intention of providing more certainty (see below for more detail).
3. Employers would be required to provide their employees with payslips. Currently employers aren't legally required to provide payslips, although they must retain accurate records of wages, time worked, and leave and holiday pay.

Miscarriages and still births

The Taskforce recommended extending bereavement leave to include miscarriages. Parliament actioned this recommendation by passing the Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021. Now, the unplanned end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave for the mother and her partner or spouse. This law came into effect on 31 March 2021.

Pay-As-You-Go (PAYG) Holiday Pay

Under the current Act, employers can pay 8% holiday pay on an as you go basis (instead of providing four weeks' paid leave) if:

- the employee is employed on a fixed term of less than 12 months; or
- the employee works on an 'intermittent or irregular' basis.

The Taskforce recommends removing the first rule – fixed term agreements will no longer be a reason for employers to pay 8%, instead of providing leave.

It also recommends improving the definition of 'intermittent or irregular' to provide clarity for employers and employees. It has proposed a four-part test being:

1. the employee has no minimum number of hours and no expectation of ongoing employment;
2. the employer has no obligation to provide work and the employee has no obligation to accept work (in our view that requirement could cause problems);
3. there is no underlying pattern of work within each recurring 13-week review period, beginning on the first day of employment (Review Period); and
4. there is evidence of periods without work within each Review Period.

The Taskforce has also recommended that employers be required to review PAYG employees every 13 weeks to check eligibility for PAYG.

Conclusion

Many aspects of the Taskforce's recommendations will be positive, both for employers and employees. However, the devil will be in the detail, and some aspects of the recommendations are likely to cause difficulties for employers. More fundamentally, we do not think the changes proposed will remove much of the inherent uncertainty that is created for employers under the current regime, especially when dealing with employees who don't fit the normal "Monday to Friday, 9 to 5" mould.

If you have any questions about these recommendations, your holiday pay entitlements or obligations, or other employment matters, please feel free to contact Geoff Bevan at geoff.bevan@gallawaycookallan.co.nz or 027 230 6894, Jenna Riddle at jenna.riddle@gallawaycookallan.co.nz or 027 742 1032, or Gerrad Brimble at gerrad.brimble@gallawaycookallan.co.nz or 027 213 6864.