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FACT SHEET Annual Leave

Annual leave forms part of the National Employment Standards ('NES'), which is enshrined in the *Fair Work Act 2009* (the 'Act'). The NES applies to all private sector employees and represents the minimum entitlements of employment, regardless of the applicable industrial instrument or contract of employment.

ENTITLEMENTS TO ANNUAL LEAVE

EMPLOYEES OTHER THAN SHIFTWORKERS (AS DEFINED)

The NES provides that all employees (other than casuals) are entitled to four weeks of paid annual leave for each year of service with the employer. 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.

Note: the entitlement to four weeks' paid annual leave represents a full-time employee's entitlement and is based on 38 ordinary hours per week. A part-time employee's entitlement to annual leave is on a pro rata basis and should be a proportionate amount based on their ordinary hours of work.

SHIFTWORKER

Where an employee is classified as a 'shiftworker' they are entitled to five weeks' paid annual leave for each year of service with the employer.

Modern Awards or Agreements may define 'shiftwork' for the purposes of determining where an employee, subject to that industrial instrument, is entitled to five weeks' annual leave. By way of example clause 34 of the *Hospitality Industry (General) Award 2010* (the 'HIGA') defines a shiftworker as follows:

"A shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week"

NOTE: a similar definition of shiftworker is provided for in the NES for award/agreement free employees.

In order for an employee to be regarded as a shiftworker under the HIGA, it is the Australian Hotels Association's (AHA) position, the following three elements must be satisfied:

1. Seven Day Shiftworker

In order for an employee to be considered a seven day shiftworker:

- The business must operate seven days per week and operate 24 hours per day; AND
- The employee must work across the seven days of the week and not simply be available to work across the seven days of the week.

2. Business with Shifts Continuously Rostered

The business must roster shifts continuously over 24 hours per day and over 7 days per week. This element will only be satisfied where the entire business, as distinct from a Department or section within the business, meets this rostering requirement.

3. Employee Regularly Rostered

The employee must work a minimum of 34 Sundays and 6 public holidays in a year (based on the precedent set in *Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation* PR 944613).

TAKING ANNUAL LEAVE

EMPLOYEE'S REQUEST TO TAKE PAID ANNUAL LEAVE

Annual leave may be taken for any period agreed to between the employee and their employer. Annual leave does not have to be taken each year as the entitlement accumulates from year to year, that is, the accrual does not cease at the end of each year.

Where a request is made to take a period of paid annual leave the employer must not unreasonably refuse an employee's request. Where an employer refuses a request of paid annual leave, the employer must have well-founded reasons, such as operational requirements of the business, for refusing the leave.

EMPLOYER'S REQUEST TO TAKE PAID ANNUAL LEAVE

In certain circumstances an employer can direct an employee to take annual leave.

Note: the NES does not prescribe the notice an employer must give, therefore employers should refer to the applicable industrial instrument in the workplace, either an Award or Agreement, for terms which allow an employer to direct an employee to take annual leave.

Effective from 29 July 2016, clause 34.7 of the HIGA provides that an employer and an employee may agree for the employee to take annual leave where the employee has more than 8 weeks' paid annual leave accrued (or 10 weeks' leave for shiftworkers).

Where they cannot reach agreement under clause 34.7, clause 34.8 provides that the employer may direct the employee to take annual leave on the following conditions:

- It must not result in the employee retaining less than 6 weeks' leave accrual;
- The period of leave must not be for a period of less than one (1) week;
- The employer must not require the employee to take the leave less than 8 weeks or more than 12 months after the direction is given; and
- The request must not be inconsistent with any other arrangement agreed by the employer and the employee.

In addition, an employer and an Award/Agreement free employee may agree on when and how paid annual leave may be taken by the employee.

EMPLOYEE NOT TAKEN TO BE ON PAID ANNUAL LEAVE

In accordance with section 98 of the NES an employee is not on paid annual leave if the period during which an employee takes paid annual leave:

- Includes a day or part-day that is a public holiday; or
- Includes a period of any other leave (other than unpaid leave), or a period of absence from employment due to community service leave.

For example, an employee who is on annual leave may take personal/carer's leave during that period (provided the employee satisfies the notice and evidence requirements for personal/carer's leave). The employee will not be taken to be on annual leave for that period where the personal/carer's leave is approved and therefore the employee's annual leave entitlements should not be deducted for that period.

Refer: QHA's Personal/Carer's Leave and Compassionate Leave Fact Sheet

PAYMENT

PAYMENT DURING ANNUAL LEAVE

When an employee takes a period of paid annual leave the employer must pay the employee for that time at their base rate of pay for the ordinary hours they would have worked during that period (provided the employee has annual leave accrued).

An employee's base rate of pay is the rate of pay payable to the employee for their ordinary hours of work, but does not include any of the following:

- Incentive-based payment and bonuses
- Loadings
- Monetary allowances
- Overtime or penalty rates
- Any other separately identifiable amounts.

In some instances the applicable industrial instrument or contract of employment may provide for additional leave loadings where an employee takes a period of annual leave. By way of example the HIGA provides at clause 34.2 that in addition to payment of the employee's base rate of pay during a period of annual leave, the employer is required to pay an additional leave loading of 17.5%.

The NES does not prescribe any annual leave loadings.

OVERAWARD PAYMENTS

In the instance a HIGA covered employee is paid an overaward wage, for example, the employee receives \$2 more per hour than that specified as the wage rate for the employee's award classification, the employer may, through the clear stating of this in the employee's contract of employment, confirm that the annual leave loading is only payable on the wage rate provided as per the position classification, not the overaward amount.

Such wording must also recognise the possibility of award wage rates increasing in July of each year.

Please contact the QHA for advice on the appropriate wording for such a payment arrangement.

PAYMENT UPON TERMINATION OF EMPLOYMENT

In accordance with section 90(2) of the NES, on termination of employment an employer must pay an employee for any unused annual leave at the amount that would have been payable to the employee had the employee taken that period of leave – this includes any leave loadings prescribed by the relevant industrial instrument.

TAKING ANNUAL LEAVE IN ADVANCE

Effective from 29 July 2016, the HIGA provides at clause 34.5 that an employer and an employee may agree to the employee taking a period of annual leave before the employee has accrued an entitlement to the leave.

The agreement must be in writing and must specify:

1. The amount of leave to be taken in advance; and
2. The date on which the leave is to commence.

The agreement must be signed by the employer and the employee. If the employee is under 18 years of age, the employee's parent or guardian must sign the agreement.

The clause further provides that, where the employee's employment is terminated before they have accrued the entitlement already taken, the employer may deduct an amount from the employee's termination payment equal to the amount of leave taken but not accrued.

Schedule I of the HIGA provides a template agreement for taking annual leave in advance.

CASHING OUT OF ANNUAL LEAVE

Award or Agreement covered employees may only cash out annual leave where such provisions are provided for in the applicable industrial instrument. Effective from 29 July 2016, the HIGA contains provisions for cashing out a paid annual leave entitlement instead of taking the leave.

As per clause 34.6 of the HIGA, an employer and employee may agree, in writing, for the employee to cash out part of their paid annual leave entitlement. The agreement must specify the amount of leave to be cashed out as well as the date and amount of the payment to be made to the employee.

The maximum amount of leave that may be cashed out in any 12 month period is 2 weeks. However, there is no minimum period that may be cashed out at any one time.

An Award/Agreement free employee may also agree to cash out annual leave in accordance with the NES.

In all cases, whether cashing out of annual leave is provided under an Award, an Agreement or the NES, the following terms apply:

- The employee must retain at least four weeks paid annual leave entitlement after the cash out;
- There must be a separate agreement in writing on each occasion of cashing out; and
- The employee must be paid at least the full amount that would have been payable had the employee taken the leave the employee has cashed out.

It is unlawful for an employer to force or apply duress to an employee to make, or not to make, an agreement to cash out annual leave. Employers who engage in such conduct may find themselves in breach of the general protections provisions.

Refer: QHA's General Protections Fact Sheet

Schedule J of the HIGA contains a template agreement for cashing out annual leave.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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