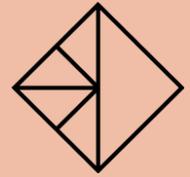


Employees' rights to public holiday payments during the covid-19 lockdown



As the Easter holidays are approaching, there is a lot of confusion around how to pay employees correctly while New Zealand businesses are under Covid Alert Level 4 lockdown.

A preliminary point to note is that although the situation is novel, and not one that current legislation (or relevant interpreting case law) directly caters for, all standard employment law rules must still apply.

This means that legislation such as the Employment Relations Act 2000, the Holidays Act 2003 and the Minimum Wage Act 1983 are still in force.

Holidays Act: calculation

Our starting point is the obligations imposed on employers for payment of public holidays under the Holidays Act (**Holidays Act**).

So, where an employee **works** on a public holiday, then they are entitled to payment for all time worked on the public holiday, at a rate of:

- Time and a half, calculated as the greater of—
 - the portion of the employee's *relevant daily pay* or *average daily pay* (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
 - the portion of the employee's *relevant daily pay* that relates to the time actually worked on the day.

If this would '*otherwise be a working day*' for the employee, then they are also entitled to an alternative holiday.

If an employee **does not work** on a public holiday, which is "*otherwise be a working day*" for the employee, then the employee is entitled to payment at not less than the employee's *relevant daily pay* or *average daily pay* for that day.

If an employee **does not work** on a public holiday that is not "*otherwise be a working day*" for the employee, then the employee is not entitled to any payment for that day under the Holidays Act.



Andrew Shaw

Partner

D +64 3 353 8014

M +64 29 244 90018

E andrew.shaw@laneneave.co.nz



Fiona McMillan

Partner

D +64 9 300 6264

M +64 27 351 2000

E fiona.mcmillan@laneneave.co.nz



The Holidays Act: “*Otherwise be a working day*”

If an employee is working during the lockdown period, either as an essential worker or at home, then the usual rules apply to determine whether the public holidays would “*otherwise be a working day*”.

The difficulty employers have under the current circumstances, is determining whether the public holidays over the lockdown period would “*otherwise be a working day*” for their employees who are not working.

The Holidays Act states that to understand what would “*otherwise be a working day*”; the employer and employee must seek to reach agreement having regard to the following factors:

- The employee’s employment agreement – does it contemplate lockdowns? (which most will not);
- The employee’s work patterns – which for a four week period may be no work or limited work during the lockdown;
- Any other relevant factors, including:
 - whether the employee works for the employer only when work is available – work is not available for many employees during the lockdown;
 - the employer’s rosters or other similar systems – which presumably for those not working will be not completed; and
 - the reasonable expectations of the employer and employee that the employee would work on the day concerned – there can be no reasonable expectation for any employees to work during the lock down period; and
- Whether, **but for** the day being a public holiday, the employee would have worked on the day – the lockdown would indicate no.

We suggest that employers consider the above criteria with your employees, and decide for your business, whether these public holidays would “*otherwise be a working day*”.

Holidays Act: payment

Taking into account the above, we consider that for employers, **where you are simply passing the wage subsidy** onto employees:

- If they **do not work** on the public holiday – continue paying the employee the wage subsidy, which is paid to qualifying employers



in a lump sum for a 12 week period, during which time three public holidays fall; or

- If they **do work** on the public holiday – continue paying the employee the wage subsidy, but pay them at time and a half that amount and give them an alternative holiday (if it would otherwise be a working day for them). Arguably, the time and a half payment should be calculated on the amount of the Wage Subsidy. The alternative day, which may be taken at a much later time, should be calculated at the employee's *relevant daily pay* or *average daily pay* at that time (assuming that the Wage Subsidy no longer applies).

While the above two scenarios do not fit neatly into the provisions of the Holidays Act, as the Wage Subsidy is provided in unprecedented circumstances by way of a lump sum for 12 weeks, during which period the public holidays fall, this is arguably the most practical way through.

- For employees who **you are paying at a rate above the amounts of the Wage Subsidy (whether or not you are receiving the Wage Subsidy)**, nothing changes and their entitlement to public holidays is as usual under the Holidays Act, except you may be calculating this amount at rate lower than their usual pay, in terms of their *relevant daily pay* or *average daily pay*.

We note that our conclusions above are based on the Wage Subsidy as it currently stands, and that it may change subject to further Government guidance on this point.

We understand that this is a challenging and complex time for both employers and employees, so please contact the Lane Neave Employment Law team if you require assistance.

