

PAYING OUT ANNUAL HOLIDAYS

The proposed Holidays Amendment Bill provides for an employee's fourth week of annual leave to be paid out in cash. This new legislation has passed its first reading and now sits with the select committee. If passed it is expected that it will come into force on 1st April 2011.



In its current form, the Bill provides that:

1. Employees may request that their employer pay out a portion of their annual holiday entitlement. The request must be:
 - "informed and voluntary" (i.e. the employee should not be put under pressure to make the request, or misled into thinking they have to);
 - in writing; and
 - for up to one week of the employee's annual holiday entitlement (that is, an employee can make more than one request to have holidays cashed up – they can request their week be paid out in instalments of one or more days).
2. If an employee makes a request to have their annual holidays cashed up, the employer must:
 - consider the request within a reasonable time;
 - advise the employee, in writing, as to whether the employer agrees to the request; and
 - if the employer agrees to the request, make the payment in accordance with the legislation.
3. An employer
 - may decline an employee's request to have holidays cashed up;
 - does not have to give a reason why the request is declined; and
 - may have a policy (which applies to the whole business or a part of it) which provides that the employer does not have to consider an employee's request to cash up annual holidays.

If you have any questions about paying out annual holidays, please do not hesitate to contact the Employment Law team at Hesketh Henry on 375 8700 or employmentteam@heskethhenry.co.nz

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4. If the employer agrees to an employee's request to pay out part of the annual holiday entitlement, the employer must pay the employee:
 - in accordance with the usual calculation for holiday pay – that is, a rate based on the greater of the employee's ordinary weekly pay, and the average weekly earnings for the last 12 months; and
 - as soon as practicable after the employee's request.
5. If the employer incorrectly pays out a portion of annual holidays (i.e. if the employee has not requested it, or the request was not informed and voluntary), the employee is still entitled to that annual holiday. In other words, even though the employer has made a payment, the employee is still entitled to the annual holiday, off work, on pay. This would also apply if the employer paid out more than a week of annual holidays.
6. An employer must not:
 - require holidays to be paid out;
 - require employees to make a request to pay out (either in an employment agreement, or anywhere else); or
 - raise a requirement to pay out holidays as part of salary or wage negotiations.
7. If an employer has agreed to pay out a portion of the annual holidays, but the employer and employee cannot agree on the portion of holidays that are to be paid out, or the amount that is to be paid for the holidays, a labour inspector may determine the matter.

Employment agreements may contain a section setting out the process for making a request. If an employer wanted to 'encourage' employees to request a pay out of annual leave, it would be a good idea to set out this process, perhaps in the Employment Agreement, or even in the letter of offer. This way, employees are aware of their right to request a pay out, and the process that they need to follow. Employers will just need to word this carefully so they are not seen to be pressuring the employee to request a pay out.

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These FAQs were prepared by the Auckland Chamber of Commerce & the employment law team of Hesketh Henry. For more information please contact Jim Roberts on (09) 375 8723 or Alison Maelzer on (09) 375 7628 at Hesketh Henry.

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