

Annual leave and the National Employment Standards

Overview

Annual leave forms part of the National Employment Standards (NES). The NES apply to all employees covered by the national workplace relations system. An award, employment contract, enterprise agreement or other registered agreement can't provide for conditions that are less than the NES or exclude the NES.

The NES establish the minimum entitlements to annual leave, how and when annual leave can be taken, and the pay rate employees should receive.

The NES also set out what happens with annual leave when there is a transfer of employment, and the arrangements that apply to the cashing out of annual leave.

What are the minimum entitlements to annual leave?

An employee (other than a casual employee) accumulates 4 weeks of paid annual leave for each year of service with the employer. An employee's entitlement to annual leave accumulates continuously based on the number of ordinary hours they work. Annual leave continues to accumulate when an employee is on:

- paid leave such as paid annual leave and paid sick/carer's leave
- long service leave
- unpaid leave that counts towards annual leave accrual, such as community service leave (including jury service)
- a stand down under section 524 of the Fair Work Act, an applicable enterprise agreement or the employee's contract of employment.

Annual leave will not accumulate in some circumstances, for example:

- on unpaid leave (unless it is provided for in an award or registered agreement)
- if an employee is taking unpaid leave from their employer while being paid by the Paid Parental Leave Scheme

- for a period of annual leave that has been cashed out.

An employee classified as a 'shiftworker' is entitled to 5 weeks of paid annual leave. This is the case if an award or registered agreement applies to the employee, and defines or describes the employee as a shiftworker for the purposes of the NES.

An award and agreement-free employee can also qualify for the shiftworker entitlement to 5 weeks of annual leave if all of the following apply:

- they are employed in an enterprise where shifts are continuously rostered 24 hours a day for 7 days a week
- they are regularly rostered to work those shifts
- they regularly work on Sundays and public holidays.

Awards and registered agreements can provide additional annual leave entitlements on top of the NES.

Award and agreement-free employees can agree with their employer to purchase extra annual leave in exchange for forgoing an equal amount of pay.

When can annual leave be taken?

Annual leave can be taken as soon as it is accumulated. It also does not have to be taken each year. There is no maximum or minimum period of annual leave that can be taken.

It is up to each employer and employee to agree on when and for how long annual leave can be taken. The employer must not unreasonably refuse an employee's request to take annual leave.

An employee isn't considered to be on annual leave in the following circumstances:

- on a day or part-day that is a public holiday
- for the time they are on any other period of leave (other than unpaid parental leave)
- or a period of absence due to community service leave.

This means an employee's annual leave balance won't be reduced for these periods of time away from work.

For example, if an employee is taking a week of annual leave, and a public holiday falls within that week, the public holiday will not be counted as annual leave and their annual leave balance won't be reduced for that day.

Similarly, if an employee is sick or injured while on annual leave, the employee can use their paid sick leave entitlement instead of using their annual leave for the time they are unwell.

What payments are required when annual leave is taken?

Under the NES, annual leave is paid at the employee's base pay rate for all ordinary hours worked. Ordinary hours under the NES can't exceed 38 hours in a week. The base rate does not include:

- overtime rates
- penalties
- allowances
- bonuses.

Awards and registered agreements can set out:

- a different method of payment for annual leave, for example, a rate of pay that is higher than the base rate of pay
- that annual leave loading is paid for annual leave.

On termination of employment, an employer must pay an employee for any period of untaken annual leave. The payment for the untaken leave has to be the same as what the employee would have been paid if they took the leave. This includes annual leave loading if it applied during employment.

Rules for taking annual leave

Awards and registered agreements can set out rules about taking, directing and granting annual leave.

An employer and an award and agreement-free employee can agree on when and how annual leave is taken. Award and agreement-free employees can agree on matters that include:

- taking annual leave in advance

- taking annual leave within a fixed period of time after it is accumulated
- providing a specified period of notice before taking annual leave
- cashing out annual leave.

Annual leave in advance

Some awards and registered agreements allow an employee to take annual leave in advance when their employer agrees in writing.

The agreement usually needs to:

- be signed by both the employer and the employee
- be signed by the employee's parent or guardian if the employee is under 18 years of age
- say how much annual leave is being taken in advance
- say the date the leave will start.

The employer must keep the agreement with the employee's records.

If an employee takes leave in advance and their employment ends before they've accumulated it all back, some awards and agreements allow the employer to deduct the amount still owing from their final pay. For employees under 18 years of age, a parent or guardian must also agree in writing to the deduction.

Direction to take annual leave

For employees covered by awards or registered agreements, an employer can only direct them to take annual leave if the award or registered agreement allows it and the requirement is reasonable.

For award and agreement-free employees, employers can only require them to take a period of annual leave if the requirement is reasonable.

A requirement to take annual leave may be reasonable if, for example:

- the employee has an excessive annual leave balance
- the business is being temporarily shut down for a period (such as between Christmas and New Year).

In assessing reasonableness, the following factors are relevant:

- the needs of the employee and the business
- any agreed arrangement with the employee
- custom and practice of the business
- timing of the direction or requirement to take leave
- the length of the period of notice given.

Excessive annual leave

Some awards and registered agreements include terms about taking annual leave when an employee has an excessive annual leave balance.

In certain circumstances the employer can direct an employee to take annual leave when they have an excessive annual leave balance.

Some awards and registered agreements give employees who have an excessive annual leave balance the right to notify their employer that they will take leave.

Generally, an annual leave balance is considered 'excessive' if an employee has more than:

- 8 weeks of annual leave, or
- 10 weeks of annual leave if they are a shiftworker.

Can annual leave be cashed out?

Some awards and registered agreements allow annual leave to be cashed out. Award and agreement-free employees may agree with their employer to cash out annual leave at any time.

However, whether or not an employee is award and agreement-free, the following applies:

- the employee must retain at least 4 weeks annual leave
- there must be a written agreement between the employee and employer on each occasion
- the payment for the cashed out leave has to be at least the amount that the employee would have been paid if they took the leave.

Annual leave does not accumulate for a period of annual leave that has been cashed out.

An award or registered agreement may also limit the amount of annual leave an employee can cash out or the timeframe in which it can be cashed out. For example, in most awards, the maximum amount of accrued annual leave that may be cashed out in any 12 month period is 2 weeks.

It is unlawful for an employer to force (or try to force) an employee to make (or not make) an agreement to cash out annual leave. For more information, please see our [Protections at work fact sheet](#) at fairwork.gov.au/factsheets

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