

A-Z Guide

Sick Leave



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Use This Guide to Understand

- An employee is entitled to sick leave after they have completed 6 months' current continuous employment with the employer or, if that does not apply, after the employee has over a period of 6 months worked for the employer for at least an average of 10 hours a week during that period and not less than 1 hour in every week or 40 hours in every month during that period.
- As of the 24 July 2021, an employee who becomes entitled to sick leave is entitled to 10 days' sick leave to be taken when the employee, or the employee's spouse or dependant, is sick or injured.
- An employee may carry over up to 10 days' sick leave to a maximum of 20 days' current entitlement in any year.
- An employer and employee may agree that sick leave may be taken in advance.
- An employer must pay an employee the employee's Relevant Daily Pay or Average Daily Pay for every day taken as sick leave that would otherwise be a working day for the employee.
- An employer and employee may agree to reinstate annual leave for a period that the employee would otherwise take sick leave instead of annual holidays.
- If an employee is sick before a scheduled annual holiday starts the employer must allow the employee to take sick leave.
- You can require proof of illness or injury if the employee is away for three consecutive days. You may also require proof when the employee is away for *less than* three consecutive calendar days; in this case you must inform the employee as soon as possible of the requirement to provide a medical certificate and must pay for the cost of the certificate.
- If an employee is required to provide proof of illness or injury in support of sick leave you may withhold payment for that sick leave until the required proof is provided.
- Proof of injury or illness includes a medical certificate.
- An employer and employee may agree to additional or enhanced sick leave entitlements and different rules can apply in relation to the enhanced entitlements.
- You are required to keep a detailed holiday and leave record for every employee.
- You are required to provide every new employee with information about their entitlements under the Holidays Act 2003.
- The provisions of the Holidays Act 2003 are enforceable in the Employment Relations Authority.

What is Sick Leave?

Sick leave is provided for in the Holidays Act 2003. This provides for the minimum entitlement to sick leave for all employees who are employed in New Zealand. The purpose of sick leave is to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on them for care is sick or injured.

You can provide an employee with enhanced or additional entitlements, but you cannot exclude, restrict or reduce an employee's entitlements under the Act.

Each employment is a separate and distinct relationship under the Holidays Act 2003. An employee who has several part-time jobs has separate entitlements with each employer.

This **A-Z Guide** deals with sick leave. Separate **A-Z Guides** deal with:

- Annual Holidays
- Public Holidays
- Domestic Leave
- Bereavement Leave
- Leave Forms
- Parental Leave
- Holidays Act 2003



Entitlement to Sick Leave

Who is eligible?

An employee is entitled to sick leave after they have completed 6 months' current continuous employment with the employer (this applies regardless of how many hours an employee worked during those six months).

An employee may also be entitled to sick leave where the service is not continuous (e.g. casual work) but they have, over a period of 6 months, worked for the employer for:

- At least an average of 10 hours a week during that period; and
- No less than 1 hour in every week during that period or no less than 40 hours in every month during that period.

“Current continuous employment”

The term “current continuous employment” is not defined in the Holidays Act 2003 although continuous employment for the purpose of annual holidays is. The definition of continuous service in relation to annual leave includes any period during which the employee was:

- On paid holidays or leave
- On parental leave
- On protected voluntary service or training
- Receiving weekly compensation from ACC
- On unpaid sick leave or unpaid bereavement leave
- On unpaid leave for any other reason for a period of no more than 1 week

Number of days' entitlement

When an employee becomes eligible for sick leave, they are entitled to 10 days' sick leave. This applies to all employees, including part-time employees.

After the initial entitlement arises on reaching 6 months' continuous employment, a further 10 days' sick leave entitlement arises for each subsequent 12-month period of continuous employment. Employees may also carry over up to 10 days' sick leave to a maximum of 20 days' current entitlement in any year.

For those employees who do not have continuous service, a further entitlement will arise for each subsequent 12-month period during which the employee works:

- At least an average of 10 hours a week during that period; and
- No less than 1 hour in every week during that period or no less than 40 hours in every month during that period.

Holidays (Increasing Sick Leave) Amendment Bill

As of the **24 July 2021**, the Holidays (Increasing Sick Leave) Amendment Bill came into effect. This means that when an employee becomes eligible for sick leave on or after the 24 July 2021, they will be entitled to 10 days' sick leave, instead of 5 days. This applies to all employees, including part-time employees.



Payment for sick leave

An employee is to be paid an amount equivalent to their Relevant Daily Pay or Average Daily Pay for each day of sick leave taken. The payment of sick leave must occur in the pay that relates to the pay period in which the leave is taken, unless proof of the illness or injury giving rise to the leave is required but has not been provided.

“Relevant daily pay”

Relevant daily pay, for the purposes of calculating payment for a public holiday, sick leave, or bereavement leave, means the amount of pay that the employee would have received had the employee worked on the day concerned. It includes:

- Productivity or incentive-based payments (including commission) if those payments would otherwise have been received on the day concerned; and
- Payments for overtime if those payments would otherwise have been received on the day concerned; and
- The cash value of any board or lodgings provided by the employer to the employee, unless the work done by the employer requires the employee to stay overnight in a place of residence other than the employee’s usual place of residence, or if the board or lodgings are provided because of special circumstances.

“Average daily pay”

If it is not possible to determine an employee’s Relevant Daily Pay because they have irregular work patterns, it is calculated by using the Average Daily Pay calculation:

$$\text{Average Daily Pay} = \frac{\text{a}}{\text{b}}$$

Where:

a is the employee’s Gross Earnings for the last 52 calendar weeks

b is the number of whole or part days during which the employee earned those Gross Earnings (including paid leave but excluding other days not worked).

Gross Earnings

Gross earnings, in relation to an employee for the period during which the earnings are being assessed, means all the payments that the employer is required to pay under the employee’s employment agreement. This includes:

- salary or wages
- allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to their employment)
- payments for annual holidays, public holidays, sick leave, bereavement leave
- productivity or incentive-based payments (including commission)
- overtime
- the cash value of any board or lodgings
- first week lost earnings for ACC

Gross earnings do not include any payments that the employer is not bound, by the terms of the employment agreement, to pay to the employee, for example:

- any discretionary payments
- any payment for absence provided for by the Volunteers Employment Protection Act 1973
- any payment to reimburse an employee for costs incurred in or related to the employee’s employment
- reimbursements of actual costs, or reasonably-assessed amounts to reimburse the employee for costs incurred by the employee related to the employment
- superannuation payments
- cashed-out statutory annual leave



When can sick leave be taken?

An employee may take sick leave if:

- The employee is sick or injured; or
- The employee's spouse is sick or injured; or
- A person who depends on the employee for care is sick or injured.

Carry over

An employee may carry over any sick leave that has not been taken by the end of the 12-month period, to any subsequent 12-month period. An employee may carry over up to 10 days' sick leave to a maximum of 20 days' current entitlement in any year.

You may allow an employee to carry over an entitlement to sick leave that is greater than or additional to the minimum entitlement.

Sick leave in advance of entitlement

An employer and employee may agree that the employee may take sick leave in advance of their entitlement. When sick leave is taken in advance, the amount of leave taken is to be deducted from the employee's next entitlement. You should ensure this is clearly understood by any employee requesting leave in advance.

Should the employment end before the employee is next entitled to sick leave the employer may recover the payment of sick leave in advance if they have the employee's written consent to this – either obtained at the time or in their employment agreement (by way of a deductions clause). If there is no consent, the employer will not be able to recover the payment.

Sick Leave and Annual Holidays

Where an employee (or their spouse or dependant) becomes sick or is injured while taking annual holidays the employee **may** take the period that the employee was sick or injured, as sick leave.

If an employee is scheduled to take annual holidays but has not taken them when the employee (or the employee's spouse or dependant) becomes sick or is injured, then the employer **must allow** the employee to take sick leave for the relevant period.

These provisions apply to both annual holidays that an employee may take in advance of entitlement, and to annual holidays that an employee takes after entitlement has arisen.

Sick Leave and Public Holidays

If an employee is required, or has agreed, to work on a public holiday but does not work on the day because they are taking sick leave then the day must be treated as a public holiday and not as sick leave. The employee's entitlements for the day should be calculated based on the day being a public holiday that they have not worked therefore the employee:

- Is entitled to either Relevant Daily Pay or Average Daily Pay for that day;
- Is not entitled to any time and a half payment;
- Is not entitled to an alternative holiday.

Refer to the **A-Z Guide on Public Holidays** – Holidays Act 2003, for more information.



Sick Leave and Accident Compensation

Sick leave may be accessed by an employee during the first week of absence due to a personal injury that is not work-related. An employee is not required to use their sick leave for any time for which:

- The employer is required to pay an employee first week compensation for a work-related personal injury; or
- The employee is being paid weekly compensation for work-related personal injury within the meaning of the Accident Compensation Act 2001 or its predecessors.

Note: The Act stipulates that an employer may not require an employee to take as sick leave any time for which the employee is being paid weekly compensation for a work-related personal injury. This in all likelihood extends to a personal injury that is not work-related as well.

The provisions of the Holidays Act 2003 do not prevent an employer and employee agreeing to any arrangement that will apply to sick leave that is greater than or additional to the minimum entitlement.

If you pay an employee the difference between the employee's first week compensation or weekly compensation, and the employee's ordinary weekly pay, then you may agree with the employee that 1 day of leave entitlement will be deducted for every 5 whole days that you make the top-up from the employee's current sick leave entitlement.

Notification of Sick Leave

An employee who intends to take sick leave must notify you of that intention as early as possible before the employee is due to start work on the day that is intended to be taken as sick leave. However, if that is not practicable, the employee must notify you of that intention as early as possible after the time the employee is due to start work on the day that is intended to be taken as sick leave.

Failure of an employee to notify that they are taking sick leave should be dealt with through your disciplinary procedures. Expectations in relation to notification should be clearly set out to the employee as well as the consequences of failure to notify. Consequences could include counselling, reprimands or warnings depending on the seriousness of the incident. Any disciplinary action taken should be as a result of a disciplinary procedure which is procedurally fair.

Refer to the **A-Z Guide** on **Discipline** for further information.

Medical Certificates

You may require an employee to produce proof of the sickness or injury for which the employee is taking, or is to take, if the sickness or injury giving rise to the leave is for a period of 3 or more consecutive calendar days. The days do not have to otherwise be working days for the employee.

You may also to require proof when the employee is away for *less than* three consecutive calendar days, provided that you:

- Inform the employee as early as possible that proof is required; and
- Agree to meet the employee's reasonable expenses in obtaining that proof.

If an employee is required to provide proof of illness or injury and fails to do so, you may withhold payment for any sick leave in respect of which the proof is required until the employee complies with the requirement.



Proof of sickness or injury may include a certificate from a health practitioner (within the meaning of the Health Practitioners Competence Assurance Act 2003) that:

- The employee is not fit to attend work because of sickness or injury; or
- The employee cannot attend work because the employee's spouse, or a person who depends on the employee for care, is sick or injured.

These laws in relation to the provision of medical certificates do not apply to any sick leave which is over and above the minimum entitlements to sick leave, under the Holidays Act 2003. The Act does not prevent an employer and employee from agreeing that the employee will produce proof of sickness or injury for sick leave which is provided to the employee in addition to the minimum entitlement. If there is no agreement in relation to leave above the minimum entitlements to sick leave under the Act or unpaid sick leave, the employer will not be able to rely on the provisions of the Holidays Act to require employees to provide medical certificates.

These provisions do not prevent an employer who is otherwise legally authorised to so require, from requiring an employee to establish that there are no relevant health and safety reasons or hygiene reasons that prevent the employee from working. Refer to the **A-Z Guides** on **Medical Certificates** and **Medical Examinations** for more information.

Other Issues

Termination of employment

An employee is not entitled to be paid for any sick leave that has not been taken before their final day of employment. The provisions of the Holidays Act 2003 do not prevent an employer and employee agreeing to any arrangement that will apply to sick leave that is greater than or additional to the minimum entitlement.

Holiday and leave records

The Holidays Act 2003 requires you to keep a holiday and leave record for each employee that records (amongst other things):

- The employee's name; and
- The date on which the employee's employment commenced; and
- The employee's current entitlement to sick leave; and
- The cash value of any board or lodgings that is included in ordinary weekly pay and relevant daily pay; and
- The dates on which any sick leave has been taken; and
- The amount of payment for any sick leave that has been taken; and
- The date of the termination of the employee's employment.

A holiday and leave record must be kept in written form or in a form or in a manner that allows the information recorded to be easily accessed and converted into written form.

The information entered in an employee's holiday and leave record must be kept for not less than 6 years after the date on which the information is entered. However, EMA Advice recommends that you keep the information for the duration of the employee's employment, and for not less than 6 years after the employee's employment ends.

You may receive a request for access to information in relation to an employee. This may be made by the employee directly, or by their authorised representative, an authorised representative of a union of which the employee is a member, or a labour inspector. If you receive such a request, you must comply with the request as soon as practicable by allowing that person to view the record or by providing a copy or certified extract (as appropriate) of the information concerned.

Refer to the **A-Z Guide** on **Records** and the **Holidays Act 2003**, for more information.



Enforcement

An employer and employee must deal with each other in good faith. An employer must also inform a new employee, at the time the employee enters into an employment agreement with the employer, about:

- The employee's entitlements under the Holidays Act 2003; and
- That the employee can obtain further information about his or her entitlements from either the union of which the employee is a member (if applicable) or the Ministry of Business, Innovation and Employment (formerly the Department of Labour).

The provisions of the Holidays Act may be enforced by an employee, their authorised representative, a representative of a union of which the employee is a member, an employer, or a labour inspector.

However, any entitlements that an employee enjoys that are additional to the minimum entitlements contained in this Act may be enforced only by an employee, an authorised representative (of an employee), or a representative of a union of which the employee is a member.

While any of the above persons may enforce the Act, only a labour inspector may bring an action for a penalty against an employer for failure to comply with the Act. An action to recover unpaid holiday pay or unpaid leave pay may be brought by any person who may enforce the provisions of the Act.

The Act may be enforced by applying to the Employment Relations Authority.

Every labour inspector has powers of entry under the Employment Relations Act 2000. These powers enable a labour inspector to enter at any reasonable hour, any premises where any person is employed or where the labour inspector has reasonable cause to believe that any person is employed, and to:

- Interview any person, or any employer, or any employee; and
- Require the production of, and to inspect and take copies from any holiday and leave record; and
- Require any employer to supply to the labour inspector a copy of the holiday and leave record or employment agreement or both of any employee of that employer; and
- Question any employer about compliance with the Holidays Act 2003.

Where an employer and employee are unable to agree, a labour inspector may make a determination about whether a day would otherwise be a working day for the employee, Relevant Daily Pay, and for the purposes of the Ordinary Weekly Pay or Relevant Daily Pay of the employee, the cash value of any board or lodgings provided by the employer to the employee.

For Your Business

Sick leave provisions enable you to assist your employee where they are unable to work due to sickness or injury. The entitlements are set out in the Holidays Act 2003, although you can also agree to enhanced or additional entitlements. To help manage sick leave, the law permits you to require your employees to provide a medical certificate in certain situations.



Remember

- Always call AdviceLine to check you have the latest guide
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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Published: **March 2023**

