



DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update: Public holidays in lockdown

Overview

With Good Friday and Easter Monday occurring during the COVID-19 Alert Level 4 lockdown (and possibly ANZAC Day if the lockdown is extended), it is important employers understand their obligations regarding payment for public holidays.

The obligations imposed by the Holidays Act 2003 (**Holidays Act**) continue to apply. In general, this means:

- An Employee who works on a public holiday will be entitled to time and a half. The Employee will also be entitled to an alternative paid day's leave, if this day is a day they ordinarily work.
- An Employee who does not work on the public holiday, but ordinarily would work that day, is entitled to be paid their '*relevant daily pay*' or '*average daily pay*'.
- An Employee who does not work on the public holiday, and would not ordinarily work on that day, is not entitled to payment.

To determine how these rules should be applied to Employees who are not working on the public holiday as a result of the lockdown, we recommend applying a two-step approach.

Step 1: Determine whether the public holiday would '*otherwise be a working day*' for the Employee

For Employees who have continued to work through the lockdown, either from home or as an essential worker, the question of whether they ordinarily work on a given day, and what they should be paid, should be relatively straightforward. Consider whether the Employee would have worked if the day was not a public holiday (i.e. apply a '*but for*' approach).

What seems unclear is whether people who can't work during the lockdown are entitled to be paid as they usually would. Some advisors consider the day would not otherwise be a working day,

because people aren't working. We take the view that employers should pay public holidays at this time based on the Employee's usual work patterns. Although they may be performing no work at the moment, that has only been the case over the past couple of weeks.

If there has been consultation and agreement to different days of work, shifts etc, that could be relied on to say there has been a valid variation of previous working days.

Unless the Employee's employment agreement (or a correctly recorded variation) provides otherwise (i.e. what will happen during such a civil emergency) we recommend Employers pay Employees for the public holidays if, but for the current situation, those days would otherwise have been working days for the Employee. If there is ambiguity, the parties need to discuss the above criteria with Employees and decide whether a public holiday would '*otherwise be a working day*'.

If the Employer decides after any consultation that the day would not '*otherwise be a working day*' (because no work is available during lockdown), if the Employer is receiving the Government Wage Subsidy, we recommend the Employer still pay the Employee at least the subsidy amount as a gesture of good faith.

Step 2: Determine the rate which the Employee should be paid if the day would '*otherwise be a working day*' under step 1.

Employers must pay Employees '*not less than the Employee's relevant daily pay or average daily pay for that day*'.

Relevant daily pay is the amount the Employee would have received if the Employee had worked that day and includes additional payments such as overtime and bonus payments. This calculation is used where the Employee works a regular pattern.

Average daily pay is used where an Employee's work pattern is irregular. It is calculated by dividing the Employee's gross yearly earnings by the number of days on which the Employee earned those gross earnings (i.e. the calculation also includes any paid leave).

Generally, this will mean Employees for whom the public holiday is an otherwise working day should receive payment at the same rate as they have been receiving throughout the lockdown. Where Employees work irregular hours, the relatively short period of the lockdown means that under the averaging approach they will be entitled to a payment that will be almost identical to the amount they would have received had the lockdown not occurred.

Common fact scenarios

1. *An Employee is working normal hours and at their normal rate during the lockdown but is not working on the public holiday (otherwise a working day).*

The Employee will be entitled to payment for the public holiday as if there was no lockdown (i.e. paid for the public holiday at their ordinary rate).

2. *An Employee is working normal hours and at their normal rate during the lockdown and is working on the public holiday.*

If the Employee works regular hours, the Employee will be entitled to payment for the public holiday at 1.5 times their ordinary rate of pay. If this day would 'otherwise be a working day' for the Employee, the Employee will also be entitled to a paid alternative holiday, to be taken at a later agreed date.

3. *An Employee is not working and not being paid during the lockdown.*

The Employee will not be entitled to any payment for the public holiday. Note: if

there is a successful challenge to the legality of non-payment, there is a risk of a finding the holiday should have been on pay, if otherwise a working day.

4. *An Employee is not working in the lockdown but is being paid some proportion of usual pay (minimum the Government Subsidy). The day would otherwise be a working day.*

We recommend paying the Employee what they are being paid for a usual day.

5. *An Employee is working reduced hours or at a reduced rate during the lockdown but is not working on the public holiday. It would otherwise be a working day.*

If the Employee works regular hours, the Employee will be entitled to payment for the public holiday at the rate they are being paid throughout the lockdown.

If the Employee does not work regular hours, they are entitled to be paid in accordance with their average daily pay.

6. *An Employee is working reduced hours or at a reduced rate during the lockdown and is working on the public holiday.*

The Employee will be entitled to payment for the public holiday at 1.5 times the rate they are being paid throughout the lockdown. If this day is an 'otherwise working day' for the Employee, the Employee will also be entitled to equal paid time off in lieu, to be taken at a later agreed date.

7. *An Employee is taking annual leave on the public holiday.*

The Employee will be entitled to payment at their ordinary rate of pay and should not have a day of annual leave deducted from their accrued entitlements.