

Commissioner's Information Sheet

Treatment of public holiday rostering, recreation leave and personal leave for shiftworkers in the NTPS

This information sheet provides advice about the rostering of shiftworkers on public holidays and the deduction of recreation leave and personal leave taken on a public holiday.

Public holiday rostering

Section 114 of the *Fair Work Act 2009* (the FW Act) provides:

- an employee is entitled to be absent from their employment on a public holiday;
- however, an employer may request an employee to work on a public holiday if the request is reasonable;
- if an employer requests an employee to work on a public holiday, the employee may refuse the request if it is not reasonable, or the employee's refusal is reasonable.

Requesting rostered employees to work on a public holiday

To ensure compliance with the FW Act, agencies who require an employee to perform duty on a public holiday need to ensure that communications to employees about rosters include advice:

- a) that employees rostered on a public holiday are being requested to work on that public holiday
- b) that employees may refuse to work on that public holiday if they have reasonable grounds, and how to submit a refusal;
- c) that any refusals will be considered against the factors set out in section 114(4) of the FW Act to determine if the refusal is reasonable; and
- d) provide sufficient time before the public holiday to consider any refusals, determine whether they are reasonable and advise employees of the outcome of that consideration.

An example of the initial communication is set out below (note the time periods in here will depend on when rosters are issued and when the first public holiday in that roster appears):

"Enclosed is the roster for the period x to y.

Employees scheduled to undertake work on a public holiday in this roster are requested to work as scheduled.

If an employee considers they have reasonable grounds to refuse to work on a public holiday, they are to inform x of this and the circumstances of the refusal before [date].

The refusal will be considered against the factors set out in section 114(4) of the FW Act to determine if the refusal is reasonable and employees will be advised of the outcome".

Refer to the [Information Sheet](#) (link) issued by the Commissioner for Public Employment for more information".

Considering an employee's request not to work on a public holiday

An employer can require an employee to work on a public holiday who is involved in critical services, or where it is desirable to remain open on a public holiday, if:

- the employer has made a reasonable request for the employee to work the public holiday (for example where the employee works in a critical service or in an occupation that involves providing a 24/7 service), and
- if the employee has refused the request, that refusal was unreasonable.

In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, section 114(4) of the FW Act provides that the following must be considered:

- a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
- b) the employee's personal circumstances, including family responsibilities;
- c) whether the employee could reasonably expect that the employer might request work on the public holiday;
- d) whether the employee is entitled to receive overtime payments penalty, rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
- e) the type of employment of the employee (for example, whether fulltime, parttime, casual or shiftwork);
- f) the amount of notice in advance of the public holiday given by the employer when making the request;
- g) in relation to the refusal of a request, the amount of notice in advance of the public holiday given by the employee when refusing the request;
- h) any other relevant matter.

Examples of a reasonable refusal to work on a public holiday

Refusal example	Why is it reasonable?
The employee will be on prior approved leave at the time.	Prior agreement to be absent.
The employee has a medical operation planned that will require time off work and the public holiday falls within that period.	Prior notice given for utilisation of personal leave.
The employee has a special occasion relating to themselves or an immediate family member.	Prior notice given and reasonable employee disclosure of occasion.

Examples of an unreasonable refusal to work on public holiday

Refusal example	Why is it unreasonable?
Employee refuses to work on a public holiday and provides no reason for the refusal.	The employee accepted the shift worker job knowing that working on every day of the week (including public holidays) was a requirement of the role. The employee receives a consolidated allowance or composite salary that includes compensation in lieu of shift penalties (including for working on public holidays). The onus is on the employee to demonstrate that the refusal to work on a public holiday is reasonable. Without a clear explanation, the employee's refusal to work will therefore not be reasonable.
Employee refuses in advance to work on a public holiday because they need to stay home to care for their children who would usually be at school.	Public holiday dates and rosters are provided in advance giving the employee the ability to pre-arrange childcare for the public holiday. If reasonable time has been provided about roster arrangements, the request would generally be denied. Leave application or shift swap practices may apply.
Employee refuses to work on the Easter public holiday weekend because they have booked a holiday house a month in advance.	Public holiday dates are known and rosters are provided in advance. If reasonable time has been provided about roster arrangements, the request would generally be denied. Leave application or shift swap practices may apply.
Employee refuses to work on Christmas day a week in advance because they want to attend a family lunch.	Public holiday dates are known and rosters are provided in advance. If reasonable time has been provided about roster arrangements, the request would generally be denied. Leave application or shift swap practices may apply.

Interaction with consolidated allowances or composite salaries paid in lieu of shiftwork

While an employee who receives compensation in lieu of shift penalties for working on public holidays by way of a consolidated allowance or composite salary (e.g. Correctional Officers, Firefighters) may refuse to work on a public holiday, the fact they are compensated is a matter that falls within s.114(4)(d) of the FW Act (any other matter) as a factor to be considered in determining if that refusal is reasonable.

This, along with the understanding these employees have in taking up their offers of employment (being required to work on a roster that includes working on public holidays), means refusals from these employees will require exceptional circumstances to be considered reasonable. This emphasis is increased for employees who work in critical services (i.e. hospitals, correctional services, fire and emergency services).

In respect to employees working in critical services and whether they can be required to work on a public holiday, the Full Court in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51 (decision 28 March 2023) noted at paragraph 43 of the decision:

"An employer can ultimately require employees to work on public holidays who are involved in critical services ... in circumstances where the employer has satisfied the obligations imposed upon it under s 114(2) and (3), namely, that it has made a request, that request is reasonable, and in circumstances where an employee's refusal is not reasonable (taking into account the factors in s 114(4)).

Recreation leave

With some exceptions (e.g. Executive Contract Officers) the NTPS provides an entitlement of 6 weeks recreation leave per annum. The National Employment Standard (NES) in the FW Act is 4 weeks per annum.

Section 89(1) of the FW Act provides:

If the period during which an employee takes paid annual leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid annual leave on that public holiday.

The application of s.89(1) was considered in *Construction, Forestry, Mining and Energy Union (CFMEU) v Glendell Mining Pty Ltd* [2017] FCAFC (the Glendell decision) with the Full Court finding, by majority, that it only applies to the NES entitlement set by the FW Act (i.e. 4 weeks) and that if an employer provides leave greater than the NES this leave may be deducted from this component.

For the NTPS, this means that any recreation leave taken on a public holiday that is above 4 weeks per year is potentially available to be deducted. However, NTPS enterprise agreements generally include a provision that recreation leave is not to be deducted, and these provisions apply over the NES provision and, consequently, if an relevant EA provision applies no leave is to be deducted (also noting that recreation leave is applied for and approved in advance).

Personal leave

The NTPS entitlement is 3 weeks personal / carers leave per annum whereas the NES is 2 weeks per annum.

Section 98(1) of the FW Act states:

If the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer's leave on that public holiday.

The majority in the Glendell decision confirmed that as section 98 (personal/ carer's leave) is relevantly in the same terms as s.89(1) (recreation leave) the same reasoning applies, i.e. personal leave entitlements that are above the NES entitlement (of 2 weeks) may be deducted if taken on a public holiday.

Unlike recreation leave, NTPS enterprise agreements do not contain a provision that personal leave is not to be deducted if taken on a public holiday and, consequently, the entitlement above the NES (i.e. 5 days or the equivalent hours) per annum is available to be deducted.

Deduction of personal leave on a public holiday

Care is required to ensure personal leave deductions made on a public holiday are not from the NES leave entitlement, as this would be a breach of 98(1) of the FW Act.

Personal leave accrues as follows:

- (a) Ongoing employees: 3 weeks on commencement and 3 weeks after each 12 months of service
- (b) Fixed period employees: 2 days on commencement plus up to one week for each 2 months service up to a maximum of 3 weeks in the first 12 months and then 3 weeks after each 12 months of service.

The deduction of personal leave on a public holiday for ongoing employees and, those who have been on fixed period contracts for more than 12 months, is considered reasonable because:

- (a) leave accrues in advance;
- (b) for each year of service an employee accrues 5 days personal leave above the NES and the cumulative total of these days (e.g. at the commencement of the 3rd year of continuous service the cumulative total above the NES will total 3 weeks) is used when determining whether a leave deduction can occur;

- (c) the likelihood of a shift worker being rostered to work on more than 5 public holidays per year and for them to take personal leave on each of those days is negligible; and
- (d) as a safety net, if an employee takes more than 5 days of personal leave on more than 5 public holidays in a year and they believe a deduction should not have been made, they can provide the evidence to DCDD and request the deduction be reviewed. If leave has been deducted incorrectly, it is to be recredited.

As the administration of personal leave on a public holiday for fixed period employees with less than 12 months service is more complex in terms of their NES/above NES entitlement, out of the abundance of caution, leave is not deducted in the first year. However, from the second year leave commences accruing in the same manner as an ongoing employee and deductions can therefore be made.

To ensure proper management of personal leave, if a pattern of personal leave being taken on a public holiday is identified, an investigation should be undertaken to satisfy the agency the leave entitlement is being used appropriately.

Need more information?

Managers and employees who have any queries can seek advice from Workforce Services, Department of Corporate and Digital Development on 1800 225 547.