

Public Holidays

Overview

Public holidays are an entitlement under the National Employment Standards, which form part of the basic “safety net” available to all National System Employees.

The Live Performance Award 2010 or a collective agreement may provide for entitlements over and above these minimum standards, so it is important to be aware of the relevant provisions, which are outlined further below.

What is considered a public holiday?

A public holiday is defined in **section 115 of the NES** to include the following:

- 1 January (New Year’s Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- The Queen’s birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory)
- 25 December (Christmas Day)
- 26 December (Boxing Day)
- **Any additional public holiday declared by a state or territory**

State and territory legislation may substitute any of the above holidays for an alternative day. For example, in Victoria the *Public Holidays Act 1993* provides that where Christmas Day falls on a weekend, the public holiday will be observed on a subsequent weekday.



A collective agreement may grant a more generous public holiday entitlement by specifying that certain additional days are to be observed as public holidays, even if they are not prescribed by legislation.

In this case, only employees to whom the collective agreement applies will be entitled to these additional public holidays.

Directing an employee to work on a public holiday

An employee (other than a casual employee) is entitled to a paid day off on a public holiday, unless they do not usually work on that day. An employer can request that an employee work on a public holiday if the request is reasonable, taking into account the following factors in **section 114 of the NES**:

1. The nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;

2. The employee's personal circumstances, including family responsibilities;
3. Whether the employee could reasonably expect that the employer might request work on the public holiday;
4. 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;
5. The type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
6. The amount of notice in advance of the public holiday given by the employer when making the request;
7. 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;
8. Any other relevant matter.

No single factor is determinative – all must be taken into account. Employers should ensure that if work is required on a public holiday, notice to this employee is given as early as practicable.

Public Holiday falls on normal working day – not required to work

Section 116 of the NES provides that when an employee is absent on a public holiday, he or she is entitled to payment for ordinary hours of work on the day or part-day.

Generally speaking, employees who are not rostered to work on a public holiday are not entitled to payment for absence for that day (unless that day is a rostered day off, explained further below).

Where an employee has a paid day off on a public holiday, the absence is treated as time worked for overtime purposes. Similarly, where performers are given a paid public holiday off during a run of performances, the day off counts as a performance day.

Employers will not usually not be able to require employees to “make up” time lost due to a public holiday without paying overtime.

Casuals are not entitled to any payment for absence on a public holiday.

Public Holiday falls on rostered day off

As stated above, under the NES, an employee is only entitled to payment for absence on public holidays if they usually work ordinary hours on that day or part-day.

Some awards or agreements build on this minimum NES entitlement by requiring an additional payment or paid day off where a public holiday falls on a day when the employee does not usually work.

This is a common occurrence in the live performance industry, as Monday is often a rostered day off.

- Under the Live Performance Award 2010
 - The employee is entitled to an additional paid day off at a future time (as agreed by the parties), or be paid an additional day's pay instead, within seven days of the holiday.
- Under the Performers' Collective Agreement 2017
 - The employee is entitled to an additional day's annual leave (excluding leave loading).

Working on a public holiday

Modern awards will almost always provide for a penalty for employees working on a public holiday. Depending on the award and the type of employee concerned, this will either be expressed as:

1. **A "time-based penalty", calculated on the minimum award hourly rate, e.g. "double time"**
 - E.g. *"All work done by a musician on a public holiday must be paid for at double ordinary time rates..."* (clause 22.4, Live Performance Award 2010); or
2. **An additional percentage of the minimum award weekly wage paid to the employee**
 - E.g. *"For work on other public holidays the employee will be entitled to payment of an amount equivalent to 16.7% of the employee's weekly wage in addition to the employee's weekly wage for the week."*



Calculating public holiday penalties under the **Performers' Collective Agreement 2017** is similar to the method in point 2, above except that the penalty is calculated on the employee's negotiated weekly rate, unless the negotiated weekly rate exceeds a capped amount. Contact LPA for further information.

Travelling on a public holiday

In most cases, travel time is treated and paid as time worked. Therefore, any travel required on a public holiday will attract the relevant public holiday penalty rate.

There is an exception for performers and company dancers to whom the Live Performance Award 2010 or Performers' Collective Agreement 2017 applies (excluding casuals), to recognise the realities of a busy touring schedule.

If the employee agrees to travel on a public holiday, the employer is not required to pay the usual public holiday penalty. Instead, the employer is required to pay an additional:

- 1/12th of the employee's negotiated rate (for the PCA); or
- 1/12th of the minimum weekly rate (for the Live Performance Award)

In addition, where this agreement is reached, the travel day is counted as a day off for overtime purposes.