



# Motor Traders' Association of NSW Information Guide

## Annual Leave

The *Fair Work Act 2009* (the Act) and the National Employment Standards (NES) set out annual leave standards for all full time and part time employees. For Award covered employees employed under the Vehicle Manufacturing Repair Services and Retail Award 2010 (Vehicle Award), and the Clerks – Private Sector Award 2010 (Clerks Award), the NES and the Award requirements must be read together to determine entitlements. For Award-free employees, the NES on its own determines entitlements.

### Amount of accrual

An employee, other than a shiftworker (discussed below) is entitled to accrue an amount of paid annual leave progressively during the employee's period of service. Full time employees accrue 20 days of annual leave per year and part time workers accrue this on a pro-rata basis. Casual employees do not accrue any annual leave. To calculate the rate of accrual for part time and full time employees, the below formula is used.

$$\text{Ordinary hours worked each week} \div 13$$

Using this formula, a full time employee who works 38 hours per week accrues 2.923 hours of annual leave each week. Under the NES, maximum weekly hours are to be 38 hours plus reasonable additional hours. If an employee works overtime, and these hours are separately identifiable, the employee would only accrue annual leave on the ordinary hours worked.

In relation to Award-free employees, additional hours worked do not have to form part of ordinary hours for accrual purposes. The employer and employee can agree to cap the ordinary hours to 38 hours.

The Act provides a definition of *service and continuous service*. As defined, the period of service excludes any period of unauthorised absence or any period of unpaid leave. These absences do not break the continuity of service but importantly do not count towards the employee's length of continuous service for the purposes of accruing annual leave. This means that only actual ordinary hours worked will count towards the accrual of annual leave. However, there are some limited exceptions to this rule when the absence counts towards the employee's period of service – namely, absences due to community service leave or a period of stand down due to circumstances outside the control of the employer.

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## **Entitlement to take leave**

Employers may not unreasonably refuse an employee's request to take leave. For an employee to take an amount of annual leave they must have at least that amount of annual leave credited, or agree to take leave without pay. There are no maximum or minimum hours an employee can request to take as annual leave. Employers can reasonably refuse an employee's request for leave based on operational requirements of the business. It is good business practice to put refusals in writing.

## **Directing an employee to take annual leave**

### Award-covered employees

An employer may direct an Award-covered employee to take leave, if the below rules are met.

- The employee must have more than 8 weeks of annual leave accrued (10 weeks for shiftworkers) and the employer must have tried to genuinely reach an agreement with the employee as to the taking of annual leave;
- The employee must have at least 6 weeks of annual leave left over, after being directed to take annual leave by their employer;
- The employer cannot direct the employee to take any period of annual leave of less than one week;
- The employer must provide at least 8 weeks' notice as to the taking of the annual leave;
- The employer cannot require the employee to take the annual leave more than 12 months after the direction is given;
- The direction must not be inconsistent with any leave arrangement agreed by the employer and employee; and
- The direction must be made in writing and be kept by the employer for a minimum of seven years.

### Award-free employees

Under section 94(5) of the Act, employers of Award-free employees may require their employee to take a period of paid annual leave, only if the requirement is reasonable. A reasonable request may be where there is excessive accrual of annual leave, or the business is being shut down for the purpose of taking annual leave.

## **Paid leave in advance of accrued entitlement**

Awards allow employers to grant annual leave in advance. If this occurs, the Awards requires a written agreement to be formed. This written agreement must be signed by both the employer and employee (and their guardian, if a minor). The agreement must stipulate the amount of leave to be taken in advance and the date on which the leave is to commence. This agreement must be kept by the employer for a minimum of seven years.



If the employee leaves the company with a negative accrual of leave, the Awards allow the employer to automatically deduct the negative accrual from any remuneration owing to the employee on termination.

### **Cashing out annual leave**

#### Award-covered employees

On 29 July 2016, the Awards were amended to allow the cashing out of annual leave. An employee and employer are now allowed to come to an agreement for the cashing out of annual leave if the following rules have been complied with:

- The employee must have an accrual of annual leave of at least four weeks after the cashing out has occurred;
- No more than two weeks of annual leave can be cashed out in any 12 month period;
- The payment for the cashed out annual leave must be the same as what the employee would have received, for if the employee physically took the leave;
- The employer cannot force or pressure the employee to cash out annual leave; and
- A written agreement needs to be made each time annual leave is cashed out. This agreement needs to:
  - Specify the amount of leave to be cashed out, the payment that will be made and when the payment will be made; and
  - Be signed by the employer and employee. If the employee is under 18 years of age, the agreement needs to be signed by the employee's parent or guardian.

The above agreement must be kept by the employer for a minimum of seven years.

#### Award-free employees

Section 94 of the Act allows Award-free employees to cash out annual leave. The employer and employee must agree, in writing to the cashing out of annual leave. Annual leave can only be cashed out if the employee will still have 4 weeks or more accrued annual leave left after cashing out. Under the Act, the employee must be paid what he/she would have been paid if he/she had actually taken the leave.

### **Public holidays, personal leave and other leave**

Where the period of leave includes a public holiday the employee is taken to not be on annual leave for that day or part day. This also applies to other leave such as personal leave e.g. sick leave, carer's leave, compassionate and community service leave – but not parental leave.

### **Payment for annual leave**

#### Vehicle Award

Under the Vehicle Award, annual leave is to be calculated based on the “wages” paid for the ordinary hours the employee would have worked during the period of annual leave,



including any first aid allowance that would have been paid and the 17.5% leave loading. The calculation also includes any over-Award payment. The employee is not entitled to payments for overtime, special rates or any other reimbursement payments which may have been payable for if the employee actually worked.

As a summary, under the Vehicle Award, employees are not entitled to the following payments when on annual leave because such payments are not paid for “all purposes” of the Award:

- Saturday, Sunday and public holiday penalty payments for ordinary hours that would have otherwise been worked during a period of annual leave
- Tool allowances and leading hand allowances
- Overtime payments
- Shift work rates, except where such rates exceed the 17.5% annual leave loading
- All reimbursement allowances e.g. travel and meal allowances
- Commission and bonuses that aren’t treated as wages (for Vehicle Salesperson Agreements, it is important to separate out such payments)

Members that are covered by the manufacturing section of the Vehicle Award should be aware that some penalty payments and allowances for security staff, drafting, planning and technical employees engaged under sections 2 and 3 of the Award are paid for all purposes of the Award. Therefore, these penalty payments and allowances must be included as a part of their wages paid for annual leave taken. Members that employ such staff may contact the MTANSW to discuss their individual position.

From 29 July 2016, the Vehicle Award now allows employees paid by electronic funds transfer to be paid in accordance with their usual pay cycle while on annual leave. This means an employer is no longer obligated to pay to the employee the entire amount of annual leave at the start of the leave period. This clause **only** applies to the Vehicle Award.

#### Clerks Award and Award-free employees

Annual leave for employees covered by the Clerks Award, and Award-free employees is paid at the base rate of pay for the period of annual leave taken. Section 16 of the Act defines base rate of pay. Under this section, the base rate of pay is simply the employee’s rate of pay payable for his or her ordinary hours of work. Incentive-based payments, bonuses, loadings, monetary allowances, overtime, penalty rates and any other separately identifiable amounts are not included in an employee’s base rate of pay. Therefore, only over-Award payments that relate to ordinary hours of work are payable as part of annual leave.

With an Award-free employee there is an opportunity to agree on the relevant payment that applies to their ordinary hours of work for the purposes of annual leave. Such agreement can classify the additional hours worked as separately identified amounts so that they are not payable on annual leave.



## **Payment of annual leave on termination**

### Vehicle Award employees

On termination, an employee's accrued annual leave must be paid at the applicable rate that is no less than the employee's actual rate of pay. The leave annual loading of 17.5% must also be paid on termination. A decision of the Full Court of the Federal Court on 23 July 2015 confirmed that this leave loading is payable on termination. This decision means that since 1 January 2010 the 17.5% annual leave loading should have been paid upon the termination of employment. Members may now receive claims for back pay of such entitlements which must now be paid.

### Clerks Award and Award-free employees

Employees covered by the Clerks Award and Award-free employees are to be paid their accrued annual leave at the base rate of pay upon termination. Employees under the Clerks Award must be paid the annual leave loading of 17.5% (as per the abovementioned decision). However, Award-free employees do not need to be paid this loading (unless an agreement exists).

### **Shiftworkers**

Under section 87(1) of the *Act*, shiftworkers are entitled to five weeks annual leave per year. This arises where an Award defines the employee as a shiftworker for the purposes of the NES. For Award-free employees, a shiftworker is one that meets the requirements of section 87(3) of the *Act*. Under the Clerks and Vehicle Awards it is unlikely that members will have many (if any) employees classified as shiftworkers.

### Vehicle Award employees

Clause 29.5 of the Vehicle Award provides that a shiftworker is a 'seven day shiftworker' who is regularly rostered on to work Sundays and public holidays. The Award provides that where an employee with 12 months' of continuous service is engaged for part of the 12 month period as a seven day shiftworker, the employee must have their annual leave entitlements increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.

### Clerks Award employees

Clause 30.2 of the Clerks Award defines a 'seven day shiftworker' as an employee who is regularly rostered to work on Sundays and public holidays in a business where shifts are continuously rostered 24 hours a day, seven days a week.

### Award-free employees

As stated, for an Award-free employee to be classified as a shiftworker they must meet the requirements of section 87(3) of the *Act*. The employee must either be in a class prescribed under the NES, or:





- (1) Be employed in a business where shifts are continuously rostered 24/7,
- (2) Regularly be rostered to work those shifts, and
- (3) Regularly work on Sundays and public holidays

#### Calculating annual leave entitlements for shiftworkers

If your employee is defined as a shiftworker, they are entitled to 5/52 of the number of ordinary hours worked. For a full time employee who works 38 ordinary hours, this would equate to an accrual of 3.6538444 hours per week (calculation:  $38 \times 5/52$  (0.0961538) = 3.6538444).

#### **Annual leave close down**

An employer must provide 4 weeks' notice of their intention to shut down the business, or any part of the business. The employee will be entitled to be paid annual leave during this period. If the employee does not have sufficient hours of annual leave accrued, part of the close down period can be leave without pay.

#### **Accruing and taking leave during workers compensation**

A Full Court of the Federal Court decision of June 2015 ruled that NSW employees receiving workers compensation are entitled to accrue and take annual leave while on workers compensation. This decision will also have application in the ACT, where the relevant legislation also allows employees on workers compensation to accrue or take annual leave. As at February 2016, there is a Bill before the Federal Parliament by the Liberal Government to amend the *Fair Work Act* to ensure that annual leave does not accrue whilst an employee is absent on workers compensation. We will advise members if and when the legislation becomes law.

The case dealt specifically with the accrual and the taking of annual leave while on workers compensation and did not touch on the accrual of personal/carer's leave. Therefore, the MTA maintains that until decided otherwise, personal/carer's leave will not accrue while an employee is on workers compensation.

#### **Superannuation payable on annual leave**

Superannuation is payable on annual leave taken during employment. However, superannuation is not payable on annual leave paid on termination.

#### **UPDATED AND ISSUED AUGUST 2016**

**Members who require further assistance utilising this information should contact MTA's Employment Relations Department (02) 9016 9000.**

This Information Guide is provided by the Motor Traders' Association of New South Wales for its Members. Information provided is intended to be a guide only. Specific advice should be sought by calling 02 9016 9000.

# Employment Relations Information guide