

October 2017

Position Statement- Estimating the Value of Holidays Act 2003 Underpayments

Introduction

It has become apparent that some employers in New Zealand have been underpaying minimum holiday entitlements through the end-to-end pay systems they have implemented in their businesses. Sometimes the amount of arrears involved is relatively modest for each individual employee but for employers with larger workforces the aggregate amount can involve larger amounts.

The entitlements contained in the Holidays Act are minimums that cannot be contracted out of. This means that where there is underpayment arising out of non-compliance with the Holidays Act, the only compliant approach is to fully calculate and pay each employee's Holidays Act arrears. This is the default stance which the Labour Inspectorate adopts. However, this approach may be impossible due to situations such as records failures, or impractical due to excessive time delays or cost implications. In these cases, an alternative approach may be to estimate the value of Holidays Act underpayments, and make payments in accordance with this estimation.

Although estimation may be a practical way for reducing the employer's risk in circumstances where full compliance is impossible or impractical, estimation cannot be guaranteed to achieve compliance. It should be noted that estimation of entitlements is not the way to comply with the Holidays Act going forward and what is being referred to in this statement is the estimation of arrears for past failures to comply with the legislation.

Estimation Instead of Exact Calculation

The minimum entitlements contained in the Holidays Act cannot be contracted out of. Therefore, any payment less than the full entitlement cannot be 'settled' by agreement between employer and employee.

It is the responsibility of employers to provide for at least the minimum Holidays Act entitlements. However, employees and employers may agree to provisions that are better than the minimum entitlements, and these provisions will be compliant.

For most employers who have found themselves non-compliant with the Holidays Act, being compliant will involve re-calculating each individual employee's entitlements and paying the resulting arrears. However, in certain cases, records may be missing, or the cost or time involved in re-calculation may be so great that it adversely affects business sustainability and means employees either do not receive their full entitlements at all, or, have to wait years to do so. In such cases a better outcome may be achieved by calculating an estimated figure of underpayment for each employee and then adding a margin to make it more likely that employees are not disadvantaged. In other words, the estimated arrears are likely to meet or exceed minimum entitlements.

Acceptance of such an estimated amount by an employee can avoid the need to perform complex re-calculation across an entire workforce. However, it does rely on on-going acceptance by the employee, and genuine attempts at a reasonable calculation by the employer.

Employers need to be aware that as employees and employers are not able to contract out of their minimum entitlements, employees do not have to accept an estimated amount. Where an employee accepts an estimate but later establishes reasonable grounds that they have not received their full entitlement they may seek to have their arrears repayment revisited. In the case where the estimated arrears show an underpayment compared to the actual entitlement, the employee is entitled to receive payment for the balance of the full amount of their minimum entitlements under the Holidays Act. This is so even if they have previously received payment of a reasonably estimated amount.

Employers have varying employment conditions, business systems and Holidays Act compliance issues. This means there is not a single precise method for arriving at an estimate that would make sense in all situations. What follows are guiding principles and a general approach which may assist parties to arrive at estimated figures which are more likely to be transparent, fair, acceptable, and ultimately enduring to employees and their representatives. The resulting outcomes could be more likely to be compliant with the Holidays Act, however without performing the exact calculations for each employee, this can never be guaranteed.

Principles

- Employers, employees and their representatives must engage with each other in **good faith**. Where the parties are working in an open, honest and transparent manner then arriving at a solution that is acceptable to many (or most) is far more likely.
- It is important that there is **early engagement** with employees and their representatives about the issues and options for addressing the non-compliance. Creating a methodology in isolation and then presenting it to employees as a 'take it or leave it' deal is likely to lead to reduced uptake by employees. Wherever possible, agreement should be sought with employees (and representatives).
- It must be clear that **employees do not have to accept an estimated figure** and a process should be made available to those that do not agree to an estimated figure.
- Where possible **estimation should be grounded in calculations** which have been performed in full, for sample employees. Employers should be prepared to disclose the rationale behind their estimates and be open to employees who are concerned that their particular situation may not fit within the assumptions.
- Once figures are estimated, an additional **margin loaded** means that the amounts paid to employees are more likely to meet or exceed the minimum entitlements if they were calculated in full. The loading of a margin also recognises the cost to affected employees of not having the use of money they were entitled to.

An Approach

Before attempting remediation the employer must be sure they fully understand the compliance issues they have with the Holidays Act, and how these issues are to be remedied. To be clear, estimation of entitlement is not the way to comply with the Holidays Act going forward and what is being referred to in this statement is the estimation of arrears for past failures to comply with the legislation.

It is worth noting that where there have been payments in excess of minimum entitlements these payments cannot be offset against underpayments as a matter of course. If such situations present then employers need to consider their obligations under the Wages Protection Act 1983.

Care should be taken to consider non-compliance issues that impact entitlement to leave itself as well as the payment for the leave. For example it may be that employees have not been allotted all the alternative holidays they are entitled to and so their balances need to increase.

Arrears of wages (including Holidays Act entitlements) can be sought back for six years and so the period over which any working should be performed is the past six years, on the presumption the non-compliance and employment goes back six years.

- Identify what compliance issues exist (eg. which sections of the Holidays Act have been breached).
- Identify what needs to change to ensure compliance in the future, and plan for the remedy.
- Identify what needs to change to ensure recalculations are compliant.
- Create a list of all employees (past and present) that could potentially have been affected by the non-compliance.
- Employer, employees and their representatives engage on the methodology for arriving at estimates and consider the types of employees the business has and the nature of the Holidays Act non-compliance in order to decide relevant groupings of employees. The involvement of employees and their representatives in this stage of the process is more likely to lead to estimates that are acceptable for affected employees and therefore ultimately sustainable.
- Some groups of employees are likely to be more or less affected by the non-compliance. For example, issues around inclusion of certain allowances in the gross earnings may be a bigger issue for those working as say sales reps versus those working in despatch. Another example could be that a change in pay conditions some time previously means a more pronounced effect for those that have been employed for longer in comparison to those who have been employed more recently.
- For each group select a sample of employees on which to perform full calculations.
- Document the decisions that have been made about the groupings and the samples selected.
- Perform the full calculations for the sample employees.¹
- Analyse the outcome of the sample employees. If there are big variations in underpayments within the groups selected, consider what might be causing this and decide whether this means different groupings are required. If different employee groupings are decided, select further samples within these groups and perform full calculations for those selected.
- Using analysis of the sample calculations determine a mechanism for estimating underpayments. How this works will largely depend on the particular non-compliance. For many Holidays Act breaches the length of service and level of remuneration will influence the underpayment so would often be factors in arriving at a fair estimate.
- Where a margin is to be provided for extra assurance, determine a relevant way to add it to the estimated underpayment. For example where certain types of overtime have been left out of holiday pay calculations one way to add a margin could be to add a percentage to the estimated arrears. Another example could be where the non-compliance may be around non-payment for public holidays due to a lack of understanding around otherwise working days for employees with variable working patterns, the margin could be to assume that the employee would have been entitled to all public holidays.
- Ensure there is an internal process available for (and communicated to) employees who do not agree to an estimated figure and ask to have their entitlements calculated in full. It is likely that such calculations will take time and involve engagement with the individual employee (or their representative).

¹ It would be expected that the sample employees for who full calculations have been performed would receive payment of no less than their full entitlement as calculated.

- Upon acceptance by any employees – ensure that detailed records are retained of how the estimate was calculated, the resulting payments and the fact of acceptance.

Note for employees

If Holidays Act non-compliance is identified in your workplace and affects you, remember you do not have to agree to an estimated amount.

Should your employer come to you with a 'take it or leave it' offer where the above principles and approach has not been used then you may want to seek independent advice.

Conclusion

The principles and approach described above are meant to assist employers and employees where large and complex repayment calculations have arisen due to systemic non-compliance with Holidays Act requirements. This is in particular where the non-compliance occurred due to misapplication of end-to-end business and pay systems. This process will not be an appropriate response to claims by individual employees where the issues are not systemic, or for issues that can be dealt with in the normal course of business. The contents of this statement are intended to help employers and employees arrive at repayments which are practically able to be calculated in a timely manner without prohibitive cost and lengthy time delays.

It is important to note that where this approach is used, it will not be possible to be absolutely certain that each employee has received their proper entitlement. This means that even after an agreement has been reached, there is some risk that further action by, or on behalf of, an employee may occur.