

October 2020

Frequently Asked Questions - For employers completing Holidays Act 2003 remediation calculations

How far back should re-calculations go?

Once non-compliance with the *Holidays Act 2003* is identified, the expectation of the Labour Inspectorate is that the employer will remediate any arrears owing to employees at least six years from the date on which the non-compliance first became known, or should reasonably have been known, to the employer. The Inspectorate notes that this will trigger an employer's duty of good faith towards all affected employees, and employers should engage with employees accordingly.

Some employers need additional time to plan the process of how to complete re-calculations and make any remediation payments required to employees, which can take additional time after the need to calculate and pay arrears has been identified. This additional planning time should not affect the starting point for calculating arrears owed to employees. Any planning involved is an internal matter, which may be undertaken by employers to ensure, from an operational perspective, that arrears payments are made correctly to all affected employees, as smoothly as possible.

Can overpayments be off-set vs underpayments?

The Inspectorate ensures underpayments are repaid but the relevant employment legislation does **not** allow employers to off-set any overpayments in the calculation of arrears without first obtaining written consent from the affected employee. The reason for this is that employees are entitled to minimum entitlements under the *Holidays Act 2003* but the Act does not prevent an employer from providing an employee with enhanced or additional entitlements. If an employer wishes to recover any overpayments from any of its employees the employer is required to comply with the requirements of the *Wages Protection Act 1983*.

The Inspectorate has developed a Position Statement on "*Accounting for overpayments through Holidays Act Re-calculations*" that confirms that an employer must comply with the Wages Protection Act and outlines that gross earnings used for remediation calculations can be adjusted to account for **genuine** mistaken overpayments provided that the employer first consults with affected employees in good faith. The Position Statement is available [here](#).

What information does a Labour Inspector need when calculations are checked?

The Inspectorate has created a checklist setting out the main information a Labour Inspector needs to see when it has required an employer to re-calculate its employees' holiday and leave payments.

The checklist is available [here](#).

Is there a minimum amount that an employer is required to pay to employees?

After working through their remediation calculations some employers ask if there is a minimum amount of arrears that they are required to pay out to employees (for example, amounts less than \$1.00). The answer to this is that the Inspectorate expects payment to be made to any employee owed arrears irrespective of the amount involved. The reason for this is that any arrears identified are **minimum** entitlements under the

Holidays Act. If an employer chooses not to pay amounts less than a particular minimum amount then that employer will hold the risk of affected employees coming forward to seek payment, and payment will then be required.

What about past employees?

Employers are expected to attempt to contact and pay arrears owing to past employees as well as current employees. While it is recognised that an employer may not be able to locate or contact all past employees the employer should use “reasonable endeavours” to contact past employees.

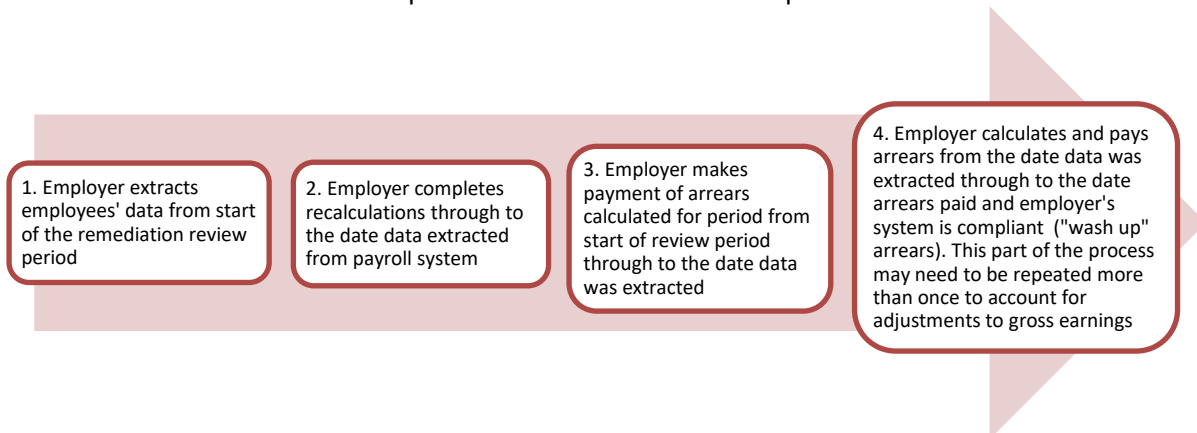
Use of the last known personal contact details (eg. email address, postal address or cell phone number) the employer holds is the logical starting point for this. Some employers also put advertisements in the paper, release media statements, use social media and establish portals on their website for past employees to make contact and provide their updated details. Employers with multiple locations, a large number of past employees and a long remediation period should consider multiple avenues for contacting past employees.

As past employees come forward and make contact, an employer should continue to make payment to those individuals as soon as it is reasonably able to do so (eg. in the next pay cycle).

How long does an employer need to keep making remediation payments?

Remediation calculations completed by an employer are usually completed to a specific date but it may take some time until payment of those arrears are made and the employer has made all the changes required their end-to-end payroll system to ensure that it is compliant with the Act. This means that employers will also be required to calculate and pay further remediation arrears (sometimes called “wash up” arrears) for the period from the date the remediation calculations were first completed until their end-to-end payroll system complies with the *Holidays Act*.

The timeline below shows the steps involved in the recalculation process.



What about any unclaimed arrears owed to employees?

When employees cannot be contacted the Inspectorate does not require employers to pay any unpaid arrears to the MBIE trust account as there is no authority in the legislation for this. The employer may wish to refer to the Inland Revenue Department's website or take advice regarding any obligations it has under the [Unclaimed Monies Act 1971](#).