



Public Holidays

This document has been created to provide Clubs with a summary of public holiday entitlements and rules primarily under the *Registered and Licensed Clubs Award 2020 (The Clubs Award)*. Please note that this is not an exhaustive list of everything that may apply to public holidays.

Under the National Employment Standards (NES), which applies to all employees, a number of public holidays each year are set down including Australia Day, Easter Monday, Christmas Day and any other day or part-day as prescribed by a State law or observed generally in a State.

Asking Employees to work on a Public Holiday

A Club can request an employee to work on public holidays where the request is reasonable e.g. the employee is genuinely needed, they have given enough notice or the employee should know they are required etc.

An employee however, can refuse this request provided that they have reasonable grounds to do so.

In terms of what will be deemed as reasonable grounds for asking an employee to work and their refusal to work should this occur, section 114(4) of the *Fair Work Act* sets out what must be taken into account:

- The nature of the employer's workplace and its operational requirements
- The work the employee does
- An employee's personal circumstances including their family responsibilities
- Whether the employee could reasonably expect that their employer might request them to work on a public holiday
- What payment an employee would be entitled to for working a public holiday
- The employment type of the employee e.g. full-time, part-time or casual
- Whether the employee has a salary that is intended to cover work on public holidays and what their contract says, if anything, about working on public holidays
- How much notice is being given to work a public holiday
- How much notice an employee is giving of their refusal to work

Reasonable grounds is not limited to the above and any other relevant matter can also be considered.

A Federal Court decision has now made it clear that when an employer wishes to have an employee work on a public holiday they must properly "request" them to work. This essentially means an employer has to provide them with a choice to work or not in order for the employee to be able to lawfully work on a public holiday.

The Federal Court has held that an employer can't just issue a roster in advance prior to making a request with an employee to work or without clearly specifying that the roster is a draft / open for discussion. As such prior

to having an employee work on a public holiday an employer should look to take steps such as sending a written request to each employee before a roster is finalised or share a draft roster and ask employees to let them know if they can work or not and if not why not.

The Federal Court did however also confirm that an employee can't unreasonably refuse a proper request to work and where this occurs they can be made to work.

Payment for Public Holiday – Working

Where someone works on a public holiday and is covered by an award or agreement they will be entitled to any penalty rates that are contained within. Under the Clubs Award, permanent and casual employees who works on a public holiday are entitled to a 250% loading. Permanent employees and are also entitled to be paid for a minimum of 4 hours work.

The penalty is also the same for overtime worked on a public holiday, however, a minimum payment of 4 hours also applies to a casual where they work overtime on a public holiday.

It is also possible for permanent employees covered by the Clubs Award (other than maintenance and horticultural employees) who work on a public holiday, by written agreement with their employers, to be paid a 150% loading instead but also receive:

- equivalent paid time to their annual leave balance; or
- an alternative paid day off taken within 28 days of the holiday falling due.

Where an employee is being paid above award or are on a salary and have an offset clause and/or an individual flexibility agreement then the penalty rates for working on a public holiday can potentially be covered by the above award payment. As always though a Club needs to ensure what they are being paid above is sufficient to offset what they are entitled to under the award.

Additionally, the Clubs Award also specifically states that certain clause entitlements will not apply to a Manager under the Clubs Award where they are receiving a salary that is at least a certain percentage in excess of the relevant minimum award rate. Where the salary is in excess of 50% of the minimum award annual rate then the section of the Clubs Award outlining the public holiday penalty rate will not apply.

Where an employee is award free they are not entitled to an extra amount of pay for working on public holidays.

Substitution of a Public Holiday

A Club can agree with all of its employees or individual employees, to substitute a public holiday for another work day. This can be done with award and award free employees.

The effect this will have is that the designated substitute day will be regarded as a public holiday and therefore public holiday penalty rates will be payable on that day instead.

Should a Club wish to do this then they must get clear consent from an employee to do so and can't place undue pressure on them to agree. Any agreement should be clearly specified in writing.

Payment for Public Holiday – Not Working

Under the NES where a permanent employee would ordinarily have worked on a day that a public holiday falls but does not do so (e.g. due to the Club closing or only operating with a skeleton crew) then they will be entitled to be paid at their base rate for the hours they would normally have worked that day. This also applies if they were asked / rostered to work but validly exercised a right to request to not work.

Where a permanent employee does not always work the same days then an assessment will need to be made as to whether the day the public holiday falls can be taken to be a day they "ordinarily" work. For example if the public holiday falls on a Monday and an employee works that day 3 out of 4 weeks then that would appear to be a day they would ordinarily work. In contrast someone who only works one or two Mondays every few months could be said to not ordinarily work that day.

A casual employee is not entitled to payment for a public holiday unless they work that day.

Base rate of pay doesn't include such things as bonuses, loadings, penalty rates, overtime, allowances etc.

If a part-time employee does not work on a public holiday and they would not ordinarily work on that day, then they will not be entitled to any payment.

The rule is different though for full-time employees as under clause 31.4 of the Clubs Award where a full-time employee has their rostered day off fall on a public holiday they must either receive:

- an extra day's pay;
- an alternative day off within 28 days; or
- an additional day's annual leave.

If a public holiday is a part-day public holiday, then clause 31.4 applies on a pro-rata basis for the number of ordinary hours on the part-day public holiday (part-day public holidays are discussed further later).

The exception to the above is where the public holiday is Easter Saturday and employees are only rostered to work Monday – Friday. In that instance they would not be entitled to any of the entitlements above on Easter Saturday.

Clause 31.4 won't apply to Club Managers who are being paid a salary of more than 50% of the minimum award annual rate. It also won't apply to maintenance & horticultural level 1-4 employees who have agreed in writing to payment of a salary not less than 33% of the minimum award annual rate as per clause 18.4(b).

Leave and Public Holidays

Where a public holiday falls while an employee is on paid leave (e.g. annual or personal leave) and it is a day on which they would ordinarily work then the employee will be entitled to be paid for the public holiday and must

not have leave deducted instead. For example a full-time employee who works Mon-Fri takes a week / 5 days off on annual leave with ANZAC Day falling on the Thursday during this period. As the employee ordinarily would have worked on Thursday they will be paid for that day as a public holiday and it will not be deducted from their balance meaning overall they would only use 4 days of leave that week.

An exception to this however, is long service leave taken under the SA Long Service Leave Act which specifies that where someone commences a period of leave then every day during that period including public holidays and days that would not normally have worked will be counted as a period of leave. Additionally where an employee is using annual leave during a period of unpaid parental leave and a public holiday falls they will not be taken to be on annual leave for this day but will not be entitled to any payment.

Where an employee is on a period of unpaid leave e.g. unpaid sick leave, an employee will not be entitled to payment for any public holiday that falls during this time.

Part-Day Public Holidays

As well as the full day public holidays, there are also two part-day public holidays that occur in SA. These are on Christmas Eve and New Year's Eve and operate from 7pm-12 midnight.

Should someone work on these days during this time then they will be entitled to the relevant public holiday rates under any award or agreement that covers them. Additionally, if a full-time or part-time employee does not work during the times of the part day public holiday but would ordinarily do so, they will be entitled to payment for the time they would have ordinarily worked at their ordinary rate.

Additionally where a full-time or part-time employee is asked to work during a part-day public holiday, it is on a day they are normally rostered to work and they validly exercise their right not to work they will also be entitled to be paid for that time at ordinary rates.

As previously mentioned where a full-time employee has an RDO fall on a day there is a part day public holiday they must receive one of the entitlements as specified in clause 31.4 on a pro rata basis (unless this is covered by a salary / above award payment).

Casuals who don't work during a part-public holiday are not entitled to any payment.

As with full public holidays, by mutual agreement an employer and employee can agree to have the part-day public holiday substituted for another part-day.

Christmas Day

In South Australia where Christmas Day falls on a Saturday this day is not taken to be a public holiday and instead the next Monday will be deemed as a public holiday instead. There has been discussion regarding having this changed in line with other States, however, at the time of writing this has not been altered.

Despite the above, under the Clubs Award in section 24.3(c) an employee other than a casual working on Christmas Day when it falls on a weekend and is not a prescribed public holiday under the NES (which in SA it is not on a Saturday) will be entitled to be paid 150% loading and entitled to the benefit of a substitute day.

When Christmas Day falls on a Sunday, both that day and the following Monday will be deemed as public holidays.

Proclamation / Boxing Day, New Year's Day & Australia Day

The *Holidays Act 1910* (SA) specifies that when Proclamation / Boxing Day, New Year's Day or Australia Day fall on a Saturday, that day is not a public holiday and instead the following Monday will be.

When New Year's Day or Australia Day falls on a Sunday however, both that day and the following Monday will be public holidays.

When Proclamation / Boxing Day falls on a Sunday the following Tuesday will be deemed as the public holiday as the Monday will be the designated day for the Christmas Day public holiday.

ANZAC Day

When ANZAC Day falls on a Saturday that day will be deemed as a public holiday, however, there is no additional or substitute day.

When it falls on a Sunday however, the following Monday will be deemed as public holiday and the Fair Work Ombudsman has held that the Sunday will also have public holiday rates apply.