

Workers Compensation and the accrual/taking of leave entitlements

Treatment under the Fair Work Act 2009

Since 1 January 2010 the provisions governing the accrual of annual leave and personal/carer's leave during an employee's absence on workers compensation, changed with the introduction of the National Employment Standards (NES). The previous Workplace Relations Act 1996 allowed for the accrual of leave during an employee's absence on workers compensation.

Section 130 of the Fair Work Act (which refers to the NES) states:

'An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a compensation period) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a compensation law) of the Commonwealth, a State or a Territory that is about workers compensation.'

This means that an employee does not accrue any type of leave, whether it be annual leave, personal/carer's leave, long service leave etc. whilst the employee is fully absent on workers compensation.

In New South Wales workers are entitled to take a period of annual leave or long service leave or a public holiday during their absence on workers compensation. This is prescribed in section 49 of the *Workers Compensation Act 1987*. However, an employee is not entitled to take any accrued paid personal/carer's leave when absent on workers compensation.

Public holidays

It would depend upon the Workers Compensation legislation in each State and Territory.

In New South Wales, section 49 of the *Workers Compensation Act 1987*, states that an employee is entitled to receive workers compensation payments for any period of incapacity, even though the employee is entitled to receive a payment for 'holidays, annual holidays or long service leave'.

Therefore, where an Act, such as the Fair Work Act, or industrial instrument, such as an award, provides for an employee to take a day off without loss of pay for a public holiday, an employee on workers compensation will also receive their normal entitlement from the workers compensation insurer.

An employee who is absent from work on a public holiday is entitled to be paid for his or her ordinary hours that would have been worked on the day at the base rate of pay (i.e. excluding incentive-based payments and bonuses, loadings, overtime or penalty rates, monetary allowances or any other separately identifiable amounts).

Long service leave

The accrual of long service leave during an absence on workers compensation depends on the relevant state or territory legislation, or the applicable long service leave provision in a (previous) award. The accrual of leave during workers compensation can vary depending on the jurisdiction.

The Federal Meat Industry Awards and the new Meat Industry Award 2010 do not provide for the accrual of long service leave whilst the person is absent on workers compensation.

For award free persons, it would depend upon the provisions of the relevant State and Territory long service leave legislation. For example, under New South Wales and Queensland legislation, an employee continues to accrue long service leave during an absence on workers compensation, whereas, under Victorian legislation, an employee ceases to accrue long service leave when an absence from work exceeds 48 weeks in any year on account of illness or injury.

Reference should be made to the relevant state or territory long service leave statute (or award provision where applicable) to establish an employee's accrual of long service leave during an employee's absence on workers compensation.

Superannuation

Employers may be unsure whether they are required to pay employer contributions into an employee's superannuation fund whilst the employee is absent on workers compensation. Under the Superannuation Guarantee (SG) legislation, the employer must contribute 9 per cent of an employee's ordinary time earnings (OTE) to the employee's nominated (or default) super fund.

The Australian Tax Office produced SG Ruling 2009/2, which identifies the types of payments that are included or excluded from OTE, including workers compensation payments. The ruling states that workers compensation payments, including top-up payments, where no work is performed by the employee, are NOT included in an employee's OTE for the purposes of calculating the SG.

Conversely, workers compensation payments, including top-up payments, where work is performed by the employee, are to be included in the employee's OTE for the purposes of the SG.