



# FRAMEWORK FOR LOCAL DHB HOLIDAYS ACT REVIEW

The review process is intended to measure the compliance of the DHB payroll systems with the agreed baseline on the requirements of the Holidays Act.

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## National Governance

It is proposed that the tripartite HSRA-body has overall responsibility for the joint-governance of the roll-out of the review processes at DHB level. This involves:

- seeking updates from the DHBs and local organisers on the progress, timeframes and costs of remediating any identified compliance issues
- acting as a clearing house for issues arising in the course of the local reviews that cannot be resolved at the local level
- liaising with the State Services Commission and the Ministry of Business, Innovation and Employment (MBIE) on the progress of the DHB process at a national level
- providing guidance on the parameters/size of the samples based on this framework and the Baseline document
- co-ordinating the development of any national communications or educational material agreed as relevant to Holidays Act entitlements and the remediation process, and
- taking any other actions required to support the Holidays Act review process.

The HSRA will consider the resourcing necessary to undertake these actions at a national level including the need to contract in services such as project management, information technology, data management or other specialist skills.

**NB** It is acknowledged that NZBS has agreed to be part of this process, whilst acknowledging they are not party to HRSA, ERSG, NBAG and other DHB forums. RDA and the CNS unions are not party to these forums either. HSRA will consult with these unions as required.

## Roll-out

The review process will roll-out in tranches to the DHBs and NZBS. Acknowledging the potential resource pressures to support local reviews (including availability of appropriate audit support and national support) and potential local DHB resource pressures (including scheduled changes to payroll systems or processes), it is intended that the roll-out may proceed in tranches, although DHB readiness and availability of resources (internal and external to the DHB) may determine when a DHB can commence the process.

It is recommended that the first DHBs commencing the process will provide regular feedback to the other DHBs on the methodology, problems and issues encountered, and problem-solving advice. **The first tranche will consist of Auckland District Health Board and Northland District Health Board. Subsequent tranches will be confirmed with HSRA. All DHBs must have commenced the process by [agreed date].**

**NB** The core principles of this framework will apply to NZBS whilst practically taking into account the configuration, resources and structure of NZBS. RDA and the CNS unions are not party to these forums either. HSRA will consult with these unions as required.

## Timeframes

The parties acknowledge the difficulty in giving definitive timeframes for completion of this process given:

- the range of elements that need to be tested
- that the extent (if any) of non-compliance is not known at the outset
- the complexity of any fixes for non-compliance within the payroll system, and
- potential issues with any remediation involving former employees.

The parties also note the timeframes for Holidays Act compliance discussed with MBIE indicated a period of 18 months was common. In light of this, the parties agree the following timeframes for local DHB processes:

<b>Review</b> Testing DHB payroll systems against the Baseline	<b>3 months</b>
<b>Rectification</b> Fixing any identified issues of non-compliance in the DHB payroll system	An indicative timeframe of <b>3 to 9 months</b> after completion of the review depending on the complexity of issues identified
<b>Remediation</b> Calculating and paying any amounts owing to current and former employees arising from any identified non-compliance	An indicative timeframe of <b>6 months</b> after completion of the rectification, but subject to review depending on extent of any issues identified

DHBs will use best endeavours to meet these timeframes. Where a DHB does not consider it can meet these timeframes for its own review, it should identify this to HSRA, indicating the reasons for this, and its estimate of the time to complete the stage/process. The HSRA will consider whether additional support, guidance or assistance is needed to ensure that the process is completed in a timely fashion.

The Labour Inspectorate will require a Memorandum of Understanding with all DHBs with the status of Enforceable Undertakings for each of these processes.

## Auditors

DHBs will appoint auditors to undertake this work. The local DHB processes will be led by auditors with the requisite degree of independence from the DHB under audit and with the necessary skills to test DHB systems and processes against the agreed baseline. Auditors must be independent of local DHB management.

## Local DHB Steering Committee

Each DHB will establish a DHB Steering Committee reporting to the Chief Executive. The Auditor will report to this committee. The key tasks/role of the DHB Steering Committee include:

- ensuring provision of the required resources for planning and delivery of project;
- providing management support, direction and advice to the project management based on the project reporting to the Committee;

- approving the project approach and project management methodology, including work plan, roles, responsibilities and timelines for implementation;
- approving a communication strategy with all key stakeholders and oversee the stakeholder management and change management processes;
- establishing delegation authorities and limits for the project management with regard to cost, time, resource, quality and scope;
- defining the acceptable risk profile thresholds for the program
- oversee the project quality assurance program;
- resolving matters of project cost, time risk, resource quality and scope escalated to the committee;
- monitoring project progress against approved project plans and delegations, and
- approving project closure.

Committee representation will vary depending on the size and structure of the DHB and their payroll service. It should include:

- Representatives nominated by the unions with members employed at the DHB. Nominations could include organisers and/or delegates, the GM HR and/or Senior HR representative, the CFO or senior representative, DHB Senior Manager(s) with responsibility for payroll and/or HR systems, a DHB IR/ER representative, and other relevant DHB senior management (such as IT, legal representative).

The local DHB Steering Committee should discuss and agree how the review itself will be undertaken, including appropriate assurances around the independence of the auditors, Steering Committee members and Holidays Act compliance teams. The local DHB Steering Committee would also liaise with HSRA, MBIE and others as appropriate.

Once the review is completed, the Steering Committee will be responsible for developing and recommending a programme for implementing the findings of the Holidays Act compliance review, defining the approach and process requirements for off-setting overpayments (if this is applicable) and action the review findings.

The auditors (supported by the Holidays Act compliance Team and local DBH Steering Committee) will need to agree on what aspects of work previously undertaken by or on behalf of the DHB prior to the date of implementation of this framework, can be of assistance in identifying potential current compliance or non-compliance with the agreed baseline (care should be taken to ensure that the underlying assumptions match the agreed baseline). Existing work undertaken may be used as evidence but cannot be used on its own to establish compliance or otherwise.

## Local DHB Holidays Act Compliance Teams

Each DHB would need to set up a Holidays Act Compliance Team to assist the auditors with the Holidays Act review. The teams would include:

- Project manager
- Payroll Manager and payroll subject matter experts from the DHB
- ER/HR specialists (as required)
- Vendor representative
- Auditor
- Communications team, and

- Local union representatives from each union, including organisers and delegates where appropriate

Where the agreed representative is a workplace delegate, they will be released from duty to undertake training, preparation and attendance for the purpose of the project.

Role of the Project Manager, who reports into the DHB Steering Committee, include:

- developing work plans for the review and programme implementation
- assigning roles, responsibilities and timelines for implementation
- identifying and managing risks, issues and mitigations
- monitoring and evaluating the progress of the work plan
- ensuring adequate resources and tools are available for the team
- removing barriers to programme implementation
- liaising and providing reporting to HSRA
- liaising with MBIE as required, and

The role of the Holidays Act Compliance Team will include:

- review and undertaking rectification and remediation where required
- developing a programme for implementing the Holidays Act compliance review
- performing assigned roles, responsibilities and timelines for implementation
- raising any risks with the project manager as they are identified
- raising any issues with the project manager as they occur (if not already identified)
- ensuring adherence to the programme of work
- developing a communication strategy with all key stakeholders
- liaising with MBIE as required, and
- action findings from the review

## Sampling Regime

The sampling process is the domain of the auditor, using the guidance in this Framework. Samples will be anonymised and all matters relating to the inspection of these samples will be maintained in confidence within the Holidays Act Compliance Team. A summary of the sampling process used will be reported to the Holidays Act Compliance Team and DHB Steering Committee to ensure the guidelines in the Framework have been taken into account, and unions/employees can have confidence in the process.

## Problem Resolution

Union organisers may seek advice from their unions or the CTU. The DHBs may seek advice from TAS ER Specialists or other advisers. Either party will have access to the HSRA national governance support.

## System Compliance Testing

This process will cover the system capability and assurances that the system has been programmed to be compliant with the calculations required to be undertaken within the Act. This assurance process will require participation and evidence from the vendor.

## System Configuration Testing

This process will audit the local system configuration against the requirements of the Baseline for compliance. This includes payroll input systems such as rostering and HR processes (such as leave and appointment policies).

Issues identified at this level will need to be assessed as to the likely impact on the level of compliance with the minimum requirements of the Act and/or the employment agreements.

Remediation of issues identified at this point of the review will include implementing the necessary fix to the system configuration and documenting the further remediation steps needed to be taken.

The existence of identified issues at this point need not affect the commencement of the review process, which should continue prior to remediation actions within the system, subject to an acknowledgement of how the identified issues at this point may affect the rest of the process.

## Sampling

It is intended that payroll sampling will form part of the quality assurance work to test that DHB payroll system, configuration, and policies and processes generate outcomes that are compliant with the Holidays Act, as established in the Baseline document.

The Holidays Act DHB Steering Committee and auditors, with input from the Compliance Team, should confirm the parameters/size of the samples based on this framework and the Baseline document. Decisions on the size of the sample will need to balance the scope and coverage of the test with the time and resource required to undertake it.

The sample should be established using an agreed auditing methodology. The sample should include:

Full-time fixed hours	Employees working full time fixed hours (including true salaried employees)
Full-time variable hours	Employees working full-time on a rostered, rotating basis where hours may vary on a weekly or daily (shift-length) basis.  Including the following examples: <ul style="list-style-type: none"><li>▪ Employees that work their contracted hours together with high levels of on-call.</li><li>▪ Employees that work their contracted hours together with regular overtime.</li><li>▪ Employees that work 10 hour and 12 hour shifts/duties</li><li>▪ Employees that work mixed shift/duty lengths.</li></ul>
Part-time fixed hours	Employees working fixed part-time hours (including true salaried employees)
Part-time variable hours	Employees working part-time on a rostered, rotating basis where hours may vary on a weekly or daily (shift-length) basis

	<p>Including the following examples:</p> <ul style="list-style-type: none"> <li>▪ Employees that work their contracted hours together with high levels of on-call.</li> <li>▪ Employees that work their contracted hours together with regular overtime.</li> <li>▪ Employees that work 10 hour and 12 hour shifts/duties</li> <li>▪ Employees that work mixed shift/duty lengths.</li> </ul>
Casual	<p>Employees with no fixed work pattern, engaged on an as needed basis with no requirement to accept work (or expectation of ongoing employment).</p> <p>The sampling process for casuals will be conducted in accordance with the agreed process to review PAYG annual leave (as outlined below).</p>
Terminated	Employees who are no longer employed (only relevant for testing termination pays for annual holidays entitlements).
Multiple job holders	Employees with more than two employment agreements and/or their FTE is divided into more than one position.

Within the boundaries of the agreed sample parameters, a representative spread of different occupational groups should be captured.

The objective is to establish a manageable sample size that reflects common employment configurations/work patterns, and will give the parties confidence that systematic payroll issues can be identified.

Sampling should be of the current payroll setup (e.g. last 12 months).

Where sampling identifies an apparent issue of non-compliance, the auditors should give consideration to undertaking a second sampling of other employees who match their characteristics to determine whether the issue is systematic or one-off.

System, configuration and process changes occurring during the period considered by the review (from 1 May 2010) should be identified, and their impact on any compliance areas considered.

## Approach to PAYG Leave

The following is the agreed approach between the CTU, Unions and DHBs to apply to remediate employees being paid PAYG leave, or who have been paid PAYG in the past: **Principles:**

1. The assessment and analysis for remediation of employees being paid PAYG leave, or who have paid PAYG leave in the past, will be conducted in a transparent and bipartite nature.
2. Individual employees are entitled to request a detailed assessment of their situation should they disagree with the outcome of the applied steps below.

**Steps:**

3. Identify the employees who received PAYG currently, or in the past;
4. Remove from that pool fixed term employees or those engaged for less than 12 months;
5. Identify employees receiving PAYG more than 12 months. This is an automatic trigger to undertake further investigation as per step 7 below;
6. Conduct an analysis of the gaps in engagements of employment as per the following:
  - Identify commencement date;
  - Determine gaps in service;
  - Conduct a gaps test:
    - Add up all annual leave, BAPs leave = maximum gap
    - Determine how many pay periods within the maximum gap;
    - if the gap in engagement is so large that it could not have been covered by annual leave, sick leave or bereavement leave, then the gap can be treated as a break in employment for remediation purposes.
7. Identify work patterns - The assessment is to be conducted on an individualised basis because the outcomes will be different for each employee / type of employee.
8. Once assessments have been carried out, the DHB to provide a list of employees receiving PAYG to the relevant union representatives (personal information can be redacted such as providing employee number instead of employee name)
9. The union is to undertake its assessment of a random sample.
10. The unions and DHBs will consult and agree on whether the sampling is sufficient to apply to groups of employee, or an individual employee-by-employee analysis needs to be conducted.
11. Outcomes of assessment:
  - For employees still engaged, if a pattern is identified those not entitled to PAYG are to be provided with annual leave and provided with a leave record for the leave.
  - For employees who have been terminated, the employee is to be paid their annual holiday entitlement. OWP for these employees will be what is a week at the time of termination.

Regarding compliance moving forward, the employer needs to ensure they have processes in place to ensure employees receiving pay-as-you-go regularly with their pay continue to satisfy the criteria in section 28.

In addition to the above, employees are to be assessed to determine eligibility for public holidays and to be paid accordingly.

## Remediation

Where systematic non-compliance issues are identified, it is proposed to remediate these for existing and previous staff back to 1 May 2010 (being 6 years prior to when the CTU wrote to DHB Chief Executives proposing a national process).

The following are the expected remediation steps where issues of non-compliance are identified:

**Step 1:** Review, identify issues, plan to fix, test fix, implement fix and ensure compliance for existing staff

**Step 2:** Undertake process to remediate for existing staff

### **Step 3: Undertake process to remediate for previous staff**

Given the interaction of elements of Holiday Act entitlements, it is unlikely to be practical to remediate individual issues on an 'as identified' basis. However, where it is possible to group issues (such as bereavement, public holidays, sick leave and annual holidays) then consideration should be given to "batching" the remediation where it is practicable to do so and will not require substantial subsequent reworking, based on its impact on other Holidays Act elements (such as gross earnings).

Where the need to remediate non-compliance is identified, HSRA will support the development of common mechanisms such as a single national website, national advertising, social media, use of registration bodies, staff notices, communication to last known address, and union communications to facilitate a single point of contact and communication for former employees. There are precedents from the work undertaken by NZ Police and NZ Post.

## **Agreements to support review and remediation**

The following agreements between the CTU, Unions and DHBs support the operation of the review and remediation process. The parties agree:

- For the purposes of remediation, the calculation used to determine annual holiday pay will be as follows: OWP (as per s8(1)) will be compared to the last 4 calendar weeks (or longer if the period contains unpaid leave) as per (s8(2)) and Average Weekly Earnings. The highest of the three will be paid.
- For the purposes of remediation, the calculation used to determine payment for BAPS will be as follows: A comparison between RDP and ADP will be taken and the higher paid.
- Regarding inclusion of regular overtime in determination OWP, if an employee believes regular overtime has not been included in OWP the employee can raise this with their employer who will consider in good faith.
- That while the Act provides annual holidays in weeks, and that DHBs currently manage annual holidays in hours – it is agreed that annual holiday entitlements will continue to be managed in hours in the interim, and in accordance with the interpretation outlined in the baseline document. The parties also acknowledge the communications issues associated with a change in the unit of annual holidays and the need for a staged process.
- Given pragmatic and practical considerations around the completeness of information, and the manner in which Holiday Act entitlements 'roll forward', it is accepted that information prior to 1 May 2010 will be accepted as the basis on which any post 1 May 2010 remediation is based.
- There will need to be further local discussion on how allowances that continue during a period of leave – including leave under the Holidays Act – are treated in payroll systems to avoid double payment.

### **The Remediation Process**

The remediation process is to be carried out in accordance with the following agreed principles and processes:

- Where remediation is required, affected employees will be provided with a detailed breakdown of their entitlements as assessed with the Baseline document, compared to payments actually received for the period of assessment.
- Where on this basis the employee has been overpaid, no automatic recovery actions will be taken by the employer.
- The employer must comply with the Wages Protections Act 1983 in relation to any recovery of overpayments. For the purpose of this process, any general deductions clause in a collective agreement or individual contract does not apply.
- Where it can be demonstrated that the overpayment falls into the deductions authorised by statute category the employer must show consent to deduct. The deductions must not be unreasonable (s 5A).
- In this case of a genuine overpayment, the employer should:
  - write to the employee explaining the reason for and circumstances surrounding the overpayment and asking for a meeting to consult and agree;
  - Provide clear information in writing detailing the overpayment;
  - The employee must be informed of, and have access to, representation if desired;
  - The employer and employee are to agree on how the overpayment will be recouped. This agreement is to be reduced to writing consistent with the requirement that the employer must obtain the worker's written consent to deduct (s 5).
- For the above process, an agreed template letter should be considered.
- Contractual entitlements above the statutory minimum will not be treated as 'overpayments' relative to the Holidays Act minimum.

### Annual Holiday Entitlements

- If current payroll practices identify the need for remediation of the basis on which annual holiday entitlements are calculated, these will be made on a prospective basis and current annual leave balances (entitlements plus leave in advance less leave taken) will not be adjusted as part of any remediation process. The parties note that:
  - The expectation of employees as to their current leave balances, and the leave arrangements/plans that may have been made on that basis
  - The significant complexities in recalculating leave entitlements over the remediation period (from 1 May 2010)
  - The complexities of communicating the change in leave balances to employees where practices have operated in good faith
- Notwithstanding the above, at the employee's initiation, there will be a mechanism for the current employee to seek to have their annual holiday entitlements recalculated, subject to agreement that if they have received more leave than they were entitled to, their current leave balances will be reduced appropriately, including where applicable, to negative balances.

### Treatment of Annual Leave Going Forward When Employee's FTE Changes

Using contracted hours as the basis on which annual leave entitlements are established means that – going forward – leave balances (covering both entitlement leave and 'accrued' leave) should be amended to reflect any permanent changes to an employees contracted hours of work.

The formula for establishing the new balance is

$$\text{Current leave balance} \div \text{current contracted weekly hours [gives leave balance in weeks]} \times \text{new contracted weekly hours}$$

This would need to be effected in the payroll system by an adjustment line

Appropriate education should be provided to employees around change of practice to be compliant with the Act.

### Out of scope issues

In terms of issues that are out of scope, it is agreed that the review process wouldn't be:

- resolving areas of current dispute around MECA entitlement.
- amending individual's written employment contract. However, the review will look at whether the individual received the appropriate entitlements relative to their employment as a casual employee based on their work patterns, as determined by applying the Labour Inspectorate's guidance as is outlined in section 'Approach to PAYG Leave'
- checking the actual information provided as inputs in the payroll system (e.g. time and attendance records, e-rostering). This does not preclude identification and rectification of systematic issues with data input processes, nor of specific issues of entitlements being raised in the usual manner.

Employees who are concerned that their entitlement has been wrongly assessed must have an avenue to bring evidence of incorrect payment. Each DHB should identify a contact point and provide details of the contact point to the DHB Steering Committee and employees.

Further, agreement is being sought from the Labour Inspectorate of the Ministry of Business, Innovation and Employment (MBIE) that the Baseline document and agreed joint-review framework meets their expectations of a robust assessment of the extent of payroll compliance with the Holidays Act

## Central Support/Network of Practice

It is proposed that central support/network of practice arrangements are developed to ensure DHB payroll managers can support one another with compliance or related payroll questions that arise through the review process. Health unions and the CTU are to have involvement at these discussions via the mechanism of the local Holidays Act compliance steering group.

This will provide a forum to maintain the currency of the Baseline document, including national positions on issues raised through the review that have not been covered such as may arise from new legislation or from court decisions. It is noted that the Baseline remains a joint document and formal amendments would require engagement and discussion with the CTU and health unions.

This would include access to central legal advice through TAS Strategic Workforce Services legal advisers.

This might also provide a basis for common development of methodologies and system fixes.

## Communications

The parties, through the HSRA and local Steering Groups, will develop communication material to ensure DHB employees are aware of the national process and the impacts of it on how their leave entitlements are reported and managed.