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## **Employees who are sick or take annual leave on a rostered public holiday**

In many industries, employees are rostered to work on public holidays. It is important for employers to understand how the National Employment Standards operate when an employee is sick or takes annual leave on a public holiday on which the employee was rostered to work.

Subsection 89(1) of the Fair Work Act provides that if a public holiday falls during a period of annual leave, the employee is taken to not be on paid annual leave for the day. Similarly, subsection 98(1) of the FW Act states that if the period during which an employee takes paid personal/carer's leave includes a public holiday, the employee is taken not to be on paid personal/carer's leave on the public holiday.

Section 116 of the FW Act is also relevant. It provides that if an employee is absent from employment on a public holiday, the employer must pay the employee at the base rate of pay for the employee's ordinary hours of work on the day.

The effects of ss 89(1), 98(1) and 116 of the FW Act for employees who are rostered to work their ordinary hours on a public holiday include:

- If the employee takes annual leave on the public holiday that the employee was rostered to work:
  - The employee is taken to not be on annual leave on the public holiday and no deduction can be made from the employee's annual leave accruals for the day; and
  - The employer must pay the employee at the 'base rate of pay' (as defined in section 16 of the Act) for the employee's ordinary hours of work on the public holiday.
- If the employee is absent due to illness on the public holiday that the employee was rostered to work:
  - The employee is taken to not be on personal/carer's leave on the public holiday and no deduction can be made from the employee's personal/carer's leave accruals for the day; and
  - The employer must pay the employee at the 'base rate of pay' for the employee's ordinary hours of work on the public holiday.

The above principles align with the judgment of Judge Altobelli of the Federal Circuit Court of Australia in [CFMEU v Glendell Mining Pty Ltd & Anor \[2015\] FCCA 3152](#) which was upheld on appeal by the Full Court of the Federal Court in [CFMEU v Glendell Mining Pty Limited \[2017\] FCAFC 35](#). These cases primarily dealt with how annual leave and personal/carer's leave entitlements that exceed the statutory minimum should be treated given that the employees in question were entitled to six weeks of annual leave and three weeks of personal/carer's leave each year. However, the four judges involved in these

cases, as well as Glendell Mining and the CFMEU, accepted that ss 89(1), 98(1) and 116 of the Fair Work Act have the effects that are outlined above.

For further advice or assistance on any public holiday or leave accrual issues, please contact Stephen Smith, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: [stephen.smith@actuslawyers.com.au](mailto:stephen.smith@actuslawyers.com.au).