

# PUBLIC HOLIDAYS

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## Authority and Application

Clause 55 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) Departments and Agencies (Employers) and their Employees covered by the Agreement.

## Overview

Clause 55 of the Agreement outlines an Employee's (except Casual Employees) entitlement to be absent from work without loss of pay on a day the Employee would normally be required to work where a public holiday is declared on that day.

Employees required by the Employer to work on a public holiday will be entitled to penalty payments in accordance with clause 46 (Overtime) of the Agreement or in the case of shift-workers, clause 43 (Shift Work) of the Agreement.

## Relevant provisions of the Agreement

### Clause 55. Public Holidays

## Supplementary Guidance Information

### 1. Background

- 1.1. Section 114 of the *Fair Work Act 2009* (FW Act) sets out the minimum National Employment Standards (NES) entitlements for public holidays, which apply to all employees regardless of any award, agreement or contract. The NES provides an entitlement for employees to be absent from work on a day or part-day that is a public holiday in the place where the employee is based for work purposes.
- 1.2. Public holidays entitlements under the NES are read in conjunction with the *Public Holidays Act 1993* (Vic), which prescribes additional or substitute days as public holidays for Employees working in Victoria.
- 1.3. The entitlements outlined in clause 55 of the Agreement reflect these legislative entitlements.

### 2. Public Holidays during another period of leave

- 2.1. If a public holiday falls when an Employee is on leave, their entitlement to time off without loss of pay on the public holiday depends on whether they are on paid or unpaid leave.
- 2.2. If the period during which an Employee (other than a shift-worker) takes paid leave (for example, Personal/Carers Leave, Annual Leave, or Long Service Leave) includes a day or part day that is a prescribed public holiday, the Employee is taken not to be on paid leave for that day or part-day and is entitled to be absent from work without loss of pay.
- 2.3. For Shift Workers where the nature of the employment of Shift Workers does not permit the observance of Public Holidays as they occur, substituted leave will be granted by the Employer in accordance with clause 43.4 of the Agreement.
- 2.4. Clause 62.20 of the Agreement provides that, where a public holiday falls within a period of paid parental leave, a day in lieu will be granted to be taken by the Employee, immediately following the period of paid parental leave.
- 2.5. An Employee will not be paid for a public holiday that falls during a time when the Employee is on unpaid leave for any purpose.

### 3. Part-time Employees

- 3.1. Part time Employees are entitled to be absent from work without loss of pay on public holidays which fall on their ordinary work days only. For part-time Shift-workers a day's substitute leave will be made only in respect of those public holidays on which the part time Shift Worker would have worked had there been no public holiday (consistent with clause 43.4(a) of the Agreement).
- 3.2. Where a public holiday falls on a part-time Employees non-work day no additional payment or day in lieu is owed.

### 4. Casual Employees

- 4.1. Clause 35.1 of the Agreement provides that, the casual loading of 25 per cent, is in lieu of any entitlement to time off without loss of pay for any public holiday not worked by a casual Employee.
- 4.2. Where a Casual Employee is required to work on a public holiday they must be paid, including applicable overtime or shift penalties (as relevant) for time worked. The cumulative approach

to the calculation penalties should be applied to determine the appropriate hourly rate for casuals working on public holidays. This is explained in more detail in the table below:

<p>The '<b>cumulative approach</b>' involves applying the relative penalties on the base rate of pay with the casual loading added separately</p>	<p>100% penalty rate applied to base rate of \$25 per hour, with the 25% casual loading added separately = \$50 per hour, plus \$6.25 (being 25% of \$25) = \$56.25 per hour</p>
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**5. Declared additional or substitute public holidays under the *Public Holidays Act 1993* (Vic)**

5.1. The *Public Holidays Act 1993* (Vic) (Act) prescribes which days are public holidays in Victoria. Where this Act prescribes additional or substitute days or part-days on days other than those set out in clauses 55.1 and 55.3 of the Agreement, those days shall constitute additional or substituted holidays for the purpose of the Agreement.

**6. Employees working remotely from another state or territory**

6.1. Section 114 of the *Fair Work Act 2009* (FW Act) sets out the minimum NES entitlement for Employees to be absent from employment on a day which is a public holiday in the place where the Employee is based for work purposes.

6.2. Where an Employer agrees to allow an Employee to work remotely in another state or territory, but the position would otherwise be based in Victoria, the Employee will continue to be entitled to the public holidays prescribed in the Agreement (including any additional or substitute days declared or prescribed by the *Public Holidays Act 1993* (Vic), and not those prescribed in the other state or territory.

6.3. Where a public holiday in the other state or territory has different dates (e.g. Labour Day) substitution arrangements per clause 55.5 of the Agreement can be agreed between the Employee and Employer.

**7. Substitution of public holidays by agreement between an Employee and their Employer**

7.1. Clause 55.5 of the Agreement allows Employees, with the agreement of their Employer, to substitute a prescribed public holiday for another day to observe a religious or cultural occasion or like reason of significance to the Employee. For example, observing Chinese New Year instead of New Year's Day.

7.2. This clause is not intended to provide for substitution merely because the Employee objects to the purpose of the public holiday itself. Where an employee objects to the purpose of the public holiday, the Employer must still be satisfied that the substitution will allow the Employee to observe a religious or cultural occasion or like reason of significance. Where an Employer is not satisfied the substitution is to observe a religious or cultural occasion or like reason of significance, they may seek further advice from the Employee or use their discretion to reject the Employee's request.

7.3. Notwithstanding, sections 7.1 and 7.2 above, under clause 55.5 (b) of the Agreement, an Employee may also apply to their Employer to substitute Australia Day for another day of leave.

7.4. in agreeing to an Employee's request to substitute a public holiday, the Employer will consider operational requirements and also should consider factors such as whether the duties of the Employee can be safely performed on the declared public holiday, particularly in circumstances where there will be no or very few other Employees on duty.

- 7.5. Where an Employer agrees to the substitution of a declared public holiday, the Employee must report for work on the declared public holiday and will be entitled to a day off without loss of pay on the substituted day. Work performed on the declared public holiday will be paid at the Employee's ordinary rate of pay and any penalty rates that would usually apply to work performed on a declared public holiday do not apply.
- 7.6. Individual agreement between an Employee and Employer to substitute a public holiday for another day should be recorded in writing.
- 8. Rostering an Employee who is engaged to perform shift work to work on a public holiday**
- 8.1. In 2023, the Full Court of the Federal Court in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51, found that an employer who 'required' its employees to perform work on the Christmas and Boxing Day public holidays in 2019, without first 'requesting' its employees to do so, was contravention of the FW Act.
- 8.2. This decision has important implications for Employers who roster Shift Workers to work on public holidays. To ensure compliance with the NES, Employers should refer to the Shiftwork Common Policy for further guidance.

### **Making decisions under this policy**

Under s.20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

### **Dispute resolution**

An Employee who is directly affected by a decision made or action taken pursuant to clause 55 of the Agreement may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

## **Further Information**

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

## **Related policies or documents**

### **Common Policies**

- Annual Leave
- Personal/Carers Leave
- Long Service Leave
- Parental Leave
- Review of Actions

- Shift Work

All policies can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

Authorised by Industrial Relations Victoria:

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If you print and store this document, you may be looking at an obsolete version. Always check the latest version of this document at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.