

FACTSHEET: ANNUAL LEAVE

This factsheet is part of the employee leave section of the Employers' Guidebook. It gives more detail on annual leave and the legal requirements of employers to pay their employees annual leave under Vanuatu law.

1. WHAT IS THE MAIN LAW COVERING ANNUAL LEAVE?

Sections 29 – 32 of the Employment Act [Cap 160] (the Act) provide the law on annual leave entitlements for employees. Section 29 of the Act was amended in 2008 and 2009.

This means the Act has changed since it was last consolidated and published in 2006. An unofficial update of section 29 can be found in the *tools* section of this chapter.

2. ARE ALL EMPLOYEES ELIGIBLE TO CLAIM ANNUAL LEAVE?

Annual leave must be given to employees who have been in **continuous employment** for more than 1 year (section 29(1). In calculating continuous employment periods of absence due to accident at work, illness caused by work, maternity leave of periods up to 12 weeks, and other leave due to illness for periods of up to 3 months count as part of the period of continuous employment (section 29(3)).

GREY AREA: "Continuous employment" has been defined by the court (*Daniel v Nguyen Huu Hong* [2004] VUSC 40) as working more than 22 days a month. This means employees who work less days per month do not have to be given paid annual leave. The other option for defining continuous employment comes from section 54(2)(a), which defines continuous employment for the purposes of determining eligibility for severance allowance. Section 54(2)(a) requires the employee to work 4 or more days per week in order to be in continuous employment.

In practice many employers interpret continuous employment to mean workings 4 or more days per week and do not "count" the number of days per month an employee works.

John worked 3 days a week for Bizniz. He resigned after 11 months and is requesting to be paid his unused annual leave. What does Bizniz owe him?

Unless there was something in John's written contract of employment, nothing is owed. He is not in continuous employment.

3. HOW MUCH LEAVE MUST I GIVE MY EMPLOYEES?

The amount of leave that can be claimed increases with the employee's length of service **with you** (section 29). Rates are:

- 1 – 6 years of employment: 1.25 days per month or 15 days per year
- 7 – 19 years of employment: 1.75 days per month or 21 days per year
- 20 – 24 years of employment, for all employees except for agricultural workers: 3 days per month 36 days per year
- 25 – 29 years of employment, for all employees except agricultural workers: 4 days per month or 48 days per year
- 30 + years of employment, for all employees except agricultural workers: 6 days per month or 72 days per year for employees
- Agricultural workers who work for more than 20 years get 21 days per year.

NB This is the *minimum* amount of annual leave. Employers can choose to give more annual leave if they want to.

Sarah worked 5 days a week for Bizniz. She resigned after working for 10 years and 3 months. Each year she took 10 days of paid annual leave and is now requesting that her unpaid annual leave is paid. For the first 5 years Sarah's salary was 2000 vatu per day. It then increased to 3000 vatu per day. What does Bizniz owe Sarah?

Annual leave accumulates indefinitely and is paid at that rate at the time the employee either takes annual leave or leaves employment. For each unused day of annual leave Sarah is entitled to a payment of 3000 vatu.

For the first 6 years, Sarah was entitled to 15 days per year, or 1.25 days per month. She only took 10 days per year, so has unused leave of 5 days per year owing for those years.

$$5 \text{ days per year} \times 6 \text{ years} = 30 \text{ days.}$$

For the remaining years Sarah was entitled to 21 days per year, or 1.75 days per month. She still only took 10 days leave per year, so has 11 days leave owing for those years.

$$1 \text{ days per year} \times 4 \text{ years} = 44 \text{ days.}$$

She is also entitled to claim unused leave for the further 3 months at a rate of 1.75 days per month.

$$3 \text{ months} \times 1.75 = 5.25.$$

$$30 + 44 + 5.25 = 79.25 \times 3000 \text{ vatu} = 237,750 \text{ vatu.}$$

As well as illustrating the calculation this case study illustrates the large payments employers may have to pay at the end of employment if annual leave is not managed properly. Good records help with this! Remember as well that managing leave so that employees use most if not all of their leave each year is an important part of being a good employer. Employees need to take leave regularly in order to maintain good health.

There is a tool in this chapter of the VCCI Employers' Guidebook to help you with your leave records.

4. HOW MUCH DO I HAVE TO PAY MY EMPLOYEES WHILE THEY ARE ON LEAVE?

The amount of payment that must be given to the employee whilst he or she is on annual leave is the employee's usual salary or wage. The payment whilst on annual leave does not have to include any bonuses, overtime payments, or reimbursement of expenses.

If the employee's wage varies depending on the number of hours worked then the amount of payment must be **at least equal to the average daily pay** over the past 12 months (section 31).

In practice VNPF contributions are paid on remuneration given to employees whilst they are on annual leave.

5. HOW DO I DECIDE WHEN THE EMPLOYEE GETS TO TAKE ANNUAL LEAVE? CAN I GIVE A PAYMENT IN LIEU OF PROVIDING ANNUAL LEAVE?

The **employer** sets the date at which the employee will take annual leave, although as far as possible the employee's requests should be taken into account when leave dates are set (section 30(3)). This means that under law you are not obliged to give the employee annual leave if he or she requests leave with very short notice. As a good employer you should however, have a cooperative relationship with staff. Accommodating reasonable employee requests wherever possible helps to build this cooperative relationship.

GREY AREA: Under the law, leave is to be taken in either 1 or 2 periods each year (section 30(1)). In practice many people do not fully comply with this, because employees request to be allowed to take one or two days off at various points throughout the year. If this flexibility is working in favour of the employee this is acceptable (section 6).

GREY AREA: There is nothing in the law that permits you to give your employee a payment in lieu of providing annual leave. The only time that this might possibly be legal is if the employee requests it, so it is an advantage to the employee (section 6). However, taking annual leave is important for the physical and mental health of employees and good employers should ensure that annual leave is regularly used by their employees.

Jimmy comes to work one day and asks if he can take paid annual leave for the next three days because his sister has arrived in town. Bizniz has already arranged for one other staff member to go on leave and is short staffed. The manager does not want Jimmy to go on leave. Does the manager have to give Jimmy permission to take leave, either paid or unpaid?

A good employer will, as far as possible, take into account employee requests regarding leave but does not have to approve the taking of annual leave on short notice. Bizniz does not need to approve leave for Jimmy, either paid or unpaid.

If Bizniz does not approve leave then it should consider putting into writing that if Jimmy fails to come to work he will be in direct breach of an instruction which will be serious misconduct. If Jimmy is not given leave but then does not come to work he can be terminated for serious misconduct (see section on termination).

6. MY EMPLOYEE HAS NOT WORKED FOR 1 YEAR YET AND HAS ASKED TO TAKE ANNUAL LEAVE. DO I HAVE TO GIVE IT TO HER?

You do not have to allow an employee to take annual leave before he or she has worked a full year. However, annual leave starts to accumulate as soon as an employee starts to work. If an employee leaves before working a full year then he or she may be entitled to be paid for unused annual leave (see below). A good employer should maintain a cooperative working relationship with employees. Once an employee has worked for 6 months and earns the right to be paid for unused annual leave if he or she resigns a good employer would allow reasonable leave requests.

7. WHAT HAPPENS TO UNUSED ANNUAL LEAVE WHEN AN EMPLOYEE LEAVES?

The employer must pay out all unused annual leave on termination (section 32). Annual leave **accumulates indefinitely** and is paid at the pay rate on which the employee leaves your company.

Although employees do not lose their annual leave, the textbox above illustrates why it is in your best interest as an employer to ensure employees are regularly using their leave. Doing this avoids large payouts at the end of the employment relationship. It also helps to ensure the health of your employees, and healthy employees are more productive employees.

8. WHAT HAPPENS IF THE EMPLOYEE LEAVES BEFORE WORKING FOR 1 YEAR AND BECOMING ELIGIBLE TO TAKE ANNUAL LEAVE?

If the **employer terminates** the employee for any reason before he or she has worked for 1 full year then he or she is entitled to a payment of 1.25 days salary per month worked (section 32). Even if the employee was on a probationary period he or she is entitled to be paid this allowance in lieu of unused annual leave.

If the **employee resigns** then he or she must have worked for at least 6 months before being entitled to the payment for unused annual leave (section 32).

9. WHAT RECORDS DO I NEED TO KEEP ABOUT ANNUAL LEAVE?

There are no laws that require you to keep leave records. However good employers should keep records of leave because records:

- help you to make sure that you are providing leave in accordance with the law;
- help you to control costs and manage human resources by ensuring that annual leave is not accumulating;
- reduce disputes as to what is owed when employment is terminated; and
- allow you to check that employees are not abusing leave provisions by taking too much leave.

A simple form for recording annual leave is included in the *tools* section of this chapter.