



Key Employment Information for Patients and their Carers

***“Work it Out”
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It is imperative to note the importance of Employment Agreements which contain terms and conditions of employment. The document below outlines the minimum statutory legal requirements, but under an Employment Agreement the individual may be entitled to more.

SICK LEAVE ENTITLEMENTS

Holiday Act 2003 section 63 (updated legislation 2021)

What leave is legally available to me should I need to take time off work for illness or to care for someone with an illness?

Most employees get a minimum of 10 days' paid sick leave per year after the first 6 months of continuous employment and another 10 days' sick leave for each 12-month period after that.

You are ineligible for 10 days of sick leave if you:

- Are engaged by an organisation as an independent contractor.
- Are a casual employee.
- Have not been working continuously for six months at the same employer.
- Have been working less than an average of 10 hours per week.
- Have not been working at least one hour every week or 40 hours in every month throughout the required six-month period.

Sick leave can be used when an employee is sick or injured, or when the employee's spouse or partner, or a person who depends on the employee for care (such as a child or elderly parent), is sick or injured.

At any time when the employee isn't entitled to sick leave (including during the first 6 months of employment), the employer can agree to the employee using sick leave in advance of their entitlement. Any sick leave anticipated can be deducted from their next entitlement.

Sick leave entitlements are not pro-rated in any way. For example, if a part-time employee works 3 days a week, they become entitled to 10 days' sick leave per year after being in employment for 6 months. Sick leave also accumulates to up to 20 days for part-time employees.

What are my options if I have run out of sick leave?

If you have run out of sick leave (or your spouse, partner or dependant is sick) you can:

- Ask your employer to give you sick leave in advance

- use some of your annual holidays, or
- you can ask to take unpaid leave.

What happened to any unused sick leave I may have had prior to diagnosis?

- Unused sick leave is automatically carried over to a maximum of 20 days' leave, unless more is provided for in the Employment Agreement. For example, if someone uses only 1 day of sick leave from the 10-day entitlement in a 12-month period, they can carry over the other 9 days, so their total entitlement is 19 days' sick leave in the next 12-month period.
- The maximum amount of sick leave that can be accumulated under the Holidays Act 2003 is 20 days. The employer and employee can agree that sick leave can accumulate to more than 20 days; they can do this in the employment agreement or through workplace policies.
- Unused sick leave can't be cashed-up or be part of any final payment to the employee when they leave, unless this is explicitly stated in the employment agreement.

What happens if I am on annual leave and fall ill or my dependant falls ill? Can I use sick leave instead of annual leave?

- If an employee (or their spouse, partner or dependant) falls sick before starting scheduled annual holidays, the employee can take the portion of annual holidays they're sick for, as sick leave.
- If an employee (or their spouse, partner or dependant) falls sick when they have already started a period of annual holidays, they can change the days they are sick to sick leave days rather than annual holidays, but only if their employer agrees.
- The employer can ask the employee to prove the sickness before allowing them to change their annual holidays for sick leave. Keeping an active record of your medical certificates can help when negotiating required leave periods with your employer.

What happens if I am on sick leave when a public holiday falls?

When an employee would have worked on a public holiday but is sick or bereaved, the day is treated as a paid unworked public holiday and:

- the employee would be paid their relevant daily pay or average daily pay, but would not be entitled to time and a half or an alternative holiday.
- no sick or bereavement leave is deducted.

LEAVE WITHOUT PAY

What are other leave options available to me if I have exhausted my sick leave but am unable to work while I have treatment or am caring for someone undergoing treatment?

You can request leave without pay. Leave without pay is when an employer lets an employee take time off work but doesn't pay them for this time. Leave without pay doesn't stop an employee's employment, and usually the employee returns to their same position with the same terms and conditions after taking leave without pay (unless the employee and employer agree otherwise).

- Employees **aren't** entitled to leave without pay; they can only take it if their employer agrees, and this must be in writing.
- The agreement could be contained in their employment agreement, or could be negotiated by the employee and employer at the time the employee asks for the leave.
- If the employee takes time off work without the employer's agreement, this is unauthorised leave and could result in a disciplinary process being taken.

DISCLOSURE OF ILLNESS

Do I legally have to disclose my illness to my employer?

No. An employee does not legally have to disclose their diagnosis, but if the employer has concerns around absenteeism from work or even work performance, an employer may start an investigation process with the employee to work out what is causing the issue. Honesty is advised to ensure that adequate support is given to the employee. It is recommended that both parties put together a plan on how to manage sick leave and duties whilst an employee is undergoing or recovering from treatment. If an employee does not disclose their illness and doesn't show up for work and/or is underperforming, then the employer can ask for independent medical advice. This

may lead to disciplinary action, should the employer not see sufficient evidence of improvement in performance after a reasonable assessment period.

Do I legally have to disclose my medical history to a potential new employer?

No. You don't legally need to declare your medical history, but you do need to be able to fulfil the duties of the role that you have applied for. If the employer asks you certain questions around your health and whether or not you can carry out the responsibilities of the role (usually in the interviewing stage), you have to legally ensure you give correct information. Candidates would normally sign an application to say all of the information is true and correct. Generally, an employer will ask employees whether they need any assistance before they start work. This will relate to having the correct workstation equipment and checking if they have RSI or any other injuries or illnesses that might affect their work. An employer cannot discriminate in the recruitment process if a candidate says they are sick, however a candidate needs to ensure they can carry out the duties of the role.

FLEXIBLE WORKING ENTITLEMENTS

Employment Relations Act, 2000 Part 6AA

I want/need to keep working but I want to reduce my hours or work more flexibly – what are my options?

If you have been recently diagnosed, have a conversation with your employer as quickly as possible to outline the situation and explain what you and your medical team advise. Chances are, you may be able to come to an informal short-term arrangement until more information about your diagnosis and treatment plan becomes available. For longer-term arrangements, as an **employee**, you have a "right to request" a flexible working arrangement.

You can ask:

- to change your working arrangements – either permanently or for a set time.
- anytime, from your first day of work.
- for any purpose or reason. For example, caring for someone with an illness or needing flexibility to attend ongoing medical appointments.

What do I need to do to submit a formal FWA?

The request must be in writing, such as by letter, email or by completing a form which can be downloaded.

- The employee needs to plan in advance before making a request. They need to make sure they:

- apply well in advance wherever possible.
- put in their request as soon as it's complete.
- keep a copy of the request and note when they sent it to their employer.
- The clearer the request, the better. It's up to the employee to explain the working arrangement they want and how it can be made to work for both employee and employer.
- The more the employee can explain about what they want and how they believe it might affect their employer and other staff, the easier it will be for the employer to consider the request.

The employer must reply as soon as possible, but within one month of the date requested. The employer will make the decision on whether or not to grant the request based on business grounds rather than personal circumstances.

Step-by-Step Guide

1. For a formal change in working hours, you need to make a request for a Flexible Working Agreement and it must be in writing.
2. It must have your name written on the request.
3. It needs to be dated with the day when your request was made.
4. It must show reference to Part 6AA of the Employment Relations Act 2000.
5. It should explain the working arrangement you are seeking and whether you want it to be permanent or for a set period of time.
6. It needs to state the date that you want the new working arrangement to start and, if the new working arrangement is for a set period of time, state the date you want the arrangement to end.
7. You must explain why you are requesting a flexible working arrangement, for example, to undergo treatment and allow for recovery.
8. It should also explain, in your view, what changes (if any) the employer may need to make to their current business arrangements if the request is approved, e.g. possible changes to the way the team works together, changes to the physical set-up of the workplace etc.

What grounds does my employer have for declining my request for flexible working?

The employer doesn't have to agree with the request if there is a good business reason for declining. However, most have an obligation to be a fair and reasonable employer and seriously consider each request.

Grounds for denying a flexible working request are:

- Cannot reorganise work among existing staff
- Cannot recruit additional staff
- Negative impact on quality



- Negative impact on performance
- Not enough work during the periods the employee proposes to work
- Planned structural changes
- Burden of additional costs
- Negative effect on the ability to meet customer demand.



INCOME PROTECTION AND LIFE INSURANCE

What is income protection and how do I find out if I am eligible through my employer?

Some employers offer an enhanced benefit in the form of income protection or life insurance. Income protection is where your salary, or part of it, will continue to be paid while you are on leave. Details of any such agreement will be in your employment contract. Life insurance is a lump sum paid out to your family in the event of your death.

There is usually a stand-down period before the income protection insurance kicks in. You will need to speak with your local HR person or direct manager to see if income protection or life insurance applies to you and what the process to claim it would be.

KIWISAVER

What happens to my Kiwisaver contributions if I go on leave?

If you are away on sick or annual leave, your personal and employer contributions will continue unless you take a contributions holiday.

What is a contributions holiday?

If you're an employee, once you've been a member of Kiwisaver for 12 months you can take a break from saving - this is called a contributions holiday.

To apply for a contributions holiday or an early contributions holiday you can:

1. apply online if you're registered for My KiwiSaver, or
2. print off and complete a Contributions holiday request (KS6) and post it to Inland Revenue (address details are on the form), or
3. call Inland Revenue on: 0800 549 472 (0800 KIWISAVER), or 04 978 0800 if calling from a cell phone.

Can I get an early contributions holiday if I haven't been a member for 12 months?

Inland Revenue will only consider an early contributions holiday if you're experiencing, or are likely to experience, financial hardship.

You'll need to provide evidence of financial hardship, for reasons outside your control, to support your application.

If your financial circumstances have changed for reasons **within** your control or discretion, Inland Revenue may not accept your application.

Can I draw out my KiwiSaver out early?

You may be able to **withdraw** your **KiwiSaver** savings **early** if you have an illness, injury or disability that either permanently affects your ability to work or poses a risk of death. You will most likely need to provide medical evidence to support your application. Call **0800 KIWISAVER (0800 549 472)**.

MEDICAL RETIREMENT OR MEDICAL INCAPACITY

What happens if I can't continue to work long term, but my employer can't keep my job open?

When an employee is no longer able to do their job due to illness or injury, it can be a challenging time for both employees and employers.

In these situations, employees often feel vulnerable and stressed. They may worry about placing stress on other staff and be concerned about what will happen to them financially if they lose their job.

Similarly, their employer may feel pressure about how long they're going to keep the job open and how they'll run their organisation. They might also worry about how to treat the staff member with dignity and manage the workload while they go through any process.

The law does not require an employer to keep an employee in employment if they are unable to fulfil their role, due to illness or injury, or not able to do their work. The question is how long an employer should keep the role open for the employee to return to.

Before making a decision on what to do, the employer needs to understand how long the employee is likely to be off work and whether they'll be able to do their job again.

To get this information, the employer should work in a positive and supportive way with their employee.

Employers should make sure that any investigation into understanding the medical situation for their employee is not viewed as a disciplinary investigation - the employee has not done anything wrong.

Employers should follow a fair and reasonable process.

What are the factors my employer needs to consider before deciding to end the employment relationship?

An employer needs to reasonably believe that an employee can no longer do their job and that the employer cannot reasonably keep the job open for them. To do this, the employer should consider a range of factors, including:

- The terms of the employment agreement.
- The nature and extent of the illness, including how long the employee has already been away from work. Where the incapacity is caused by a health issue, the employer will request appropriate medical advice to ensure a fair decision is made, with a complete understanding of the individual's condition. Sometimes it may be appropriate to ask for independent or specialist advice. Employees have the right to refuse to provide an employer with access to their medical information unless this is required in their employment agreement (even then, they can decline). If an employee is not willing to provide this information, the employer will make a decision based on the information available to them.
- The nature of the employment and how important the employee's role is to the employer's organisation. Consider:
 - the size of the organisation
 - if the employer has been able to manage for long periods of time without the employee or they've had to bring in someone else to do the job
 - what the financial impacts of the employee's absence are on the organisation
- The projected recovery and return to work timeline (which should be based on objective information such as a doctor's report).
- The employee's entitlement to sick leave (paid and unpaid).
- How long an employee has been employed with the employer.
- Steps the employer can take to help with rehabilitation, such as providing part-time or light duties.
- How long the employee would have been employed if not for the problem.
- If there are any alternatives to dismissal that are reasonable in the circumstances – such as part-time or reduced hours, or medical retirement.

- If the employer is at fault for the employee's problems in any way. For example, where the employer may have failed to provide a safe workplace, causing mental stress to the employee, who then has to take a lengthy period of time off to recover.

After making the decision that it is reasonable for the employment relationship to end, the employer should decide which process to take. There are two possible options: medical retirement or dismissal due to medical incapacity.

What is medical retirement?

Medical retirement allows an employee to leave an organisation with dignity. It is different from normal retirement, because after normal retirement, the employee doesn't often work again. After medical retirement, the employee often looks for a different job that is not limited by the illness or injury. Medical retirement must be agreed by both the employer and the employee. Employers should consider discussing it as a possible option with the employee before deciding on dismissal for incapacity. Medical retirement provisions may be in an employment agreement or workplace policy, but even if they're not, the employer and employee can still agree to medical retirement (the agreement should be in writing).

Medical retirement usually has benefits to both parties:

- The employer has some certainty, is able to hire someone else for the job sooner, and reduces the chance of a personal grievance.
- For the employee, having medical retirement as the reason for leaving will be reflected in their record of service and in any references that the employer gives them (rather than dismissal for incapacity). A medical retirement package may include a financial payment which can provide some financial security while the employee gets better and considers future options. Sometimes a medical retirement package includes career support, EAP counselling or medical assistance.

It is good for the employee to have a representative or support person with them for any conversation on medical retirement. A support person can be helpful for the employee in what can be an emotional conversation, and it will mean that they have someone else in the room who is less personally affected and can hear the information, ask questions, and talk the options through with the employee either during or after the meeting/s.

If, after a fair process and discussion has been held, the employee does not agree to medical retirement, and doesn't want to resign or otherwise leave their employment, and the employer decides there is no alternative but for the employment relationship to end, then the employer may need to use dismissal for medical incapacity.

What does a dismissal for medical incapacity involve?

When dismissing an employee for incapacity, the employer must follow the principles of a fair process. See above for the list of considerations the employer must consider before they make the decision to end the employment relationship.

Employers should be aware that it is common for a dismissal for medical incapacity process to take a number of weeks, if not months, and there will be a number of meetings or exchanges of information. This makes sure that both parties have had an opportunity to present evidence and give feedback, and ensures that all alternatives have been considered.

It's important to note that dismissal for medical incapacity is a lengthy and complex route to go down for the employee and employer alike and is fairly rare. Open communication with your employer can help avoid this. Keeping the employer informed about your recovery journey will help you set expectations with them as to how much you can work as you get the help you require.

GOVERNMENT BENEFITS

What are some of the government benefits I can consider if I can no longer work?

- **Supported Living:** People who have or are caring for someone with a health condition and injury or disability (permanent).
- **Emergency Benefit:** Assistance for people who are unable to earn enough to support themselves and their family and are not eligible to receive another benefit. In some cases, this is because of sickness, injury, disability or caring responsibilities.
- **Disability allowance:** Helps with regular, ongoing costs because of a condition that will last longer than 6 months.
- **Jobseeker support:** For people who have to stop work for a while or reduce hours.
- **New employment transition grant:** People who are working and have no sick leave and are not on the benefit anymore, but can't work because of the sickness.
- **Sole parent support** – People supporting a child 14 years and younger.



Refer to the step-by-step guide to apply for government benefits for further information.

Information sources

<https://www.employment.govt.nz/>

<https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/leave-and-holidays.pdf>

<http://www.kiwisaver.govt.nz/>

<https://www.workandincome.govt.nz/>