



HOLIDAYS ACT COMPLIANCE

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Employment New Zealand



Overview

- The Labour Inspectorate
- Common issues
- Resources & information available



Employment New Zealand

Employment Standards

**LABOUR
INSPECTORATE**
FAIR WORKPLACES

63.9 Labour Inspectors

8.9 Labour Standards Officers

5,032 Employment Standards interventions

+58% from 2022/2023 (Includes Triage and Allocation Assessments)

549 Investigations

36% of investigation conducted involved migrant exploitation

30% of investigations involved a regulatory partner

\$3,169,542 Total Dollars Awarded (Penalties, wage arrears, fines or other monies awarded)

623 Labour Standards, Guided Self Resolution cases completed

45% Guided Self Resolution within 30 days

Recognised Seasonal Employer (RSE) Scheme

795 RSE accommodation checks

86 Applications or renewal audits

106 RSE related incidents and

529 Application to recruit

86 Supplementary Seasonal Employer (SSE) checks

281 Active minimum wage exemption permits

Employment in New Zealand

164,250 employers employing
2.4 million employees

Information and Education



63,640 calls and **7,133** emails on employed-related issues received by MBIE's Service Centre



4,616, 686 sessions on the Employment NZ Website

New Employment New Zealand website launched **25 June 2024**



152,366 Facebook and **64,295** LinkedIn followers as at 30 June 2024

53,411 new users subscribed for our employment learning modules

31,694 sessions on the employment agreement builder via Employment New Zealand's website

303,427 downloads, with 29,894 downloads of the Holiday and Leave Guide



Key minimum employee rights

- **Minimum Wage:** \$23.15 for adults from 1 April 2024
- **Public Holidays:** 12 public holidays per year
- **Annual Holidays:** 4 weeks' paid annual holiday per year after 12 months
- **Sick leave:** 10 days' per year after 6 months
- **Bereavement leave:** 3 days (or 1 day) after 6 months
- **Family violence leave:** 10 days per year after 6 months
- **Rest and meal breaks**
- **Records:** Employee records must be made available to employees if they ask for them



Our work – Holidays Act

IT Newsroom

\$25m to fix health's holidays hangover

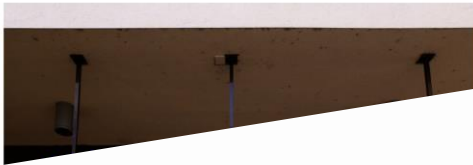
Health workers will get their long-awaited holiday pay next year, Te Whatu Ora says. David Williams reports.

17/11/2022

McDonald's begins paying out 60,000 staff after payroll botch-up

5:22 pm on 7 August 2024

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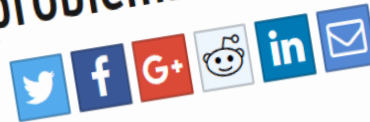
Holidays Act fix: Cost of backpay for health workers balloons to \$2b

10:29 am on 17 November 2022

Thousands affected by payroll problems

5:49 pm on 30 March 2016

Chris Bramwell, Deputy Political Editor - [@chrisbramwell](#)



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Worker at Taupo restaurant did 12.5 hours unpaid overtime every week for two years

Staff Reporter

August 15, 2024 - 11:47am

Share



The business, which was operating in Taupo before it went into liquidation, will have to pay over \$56,000.



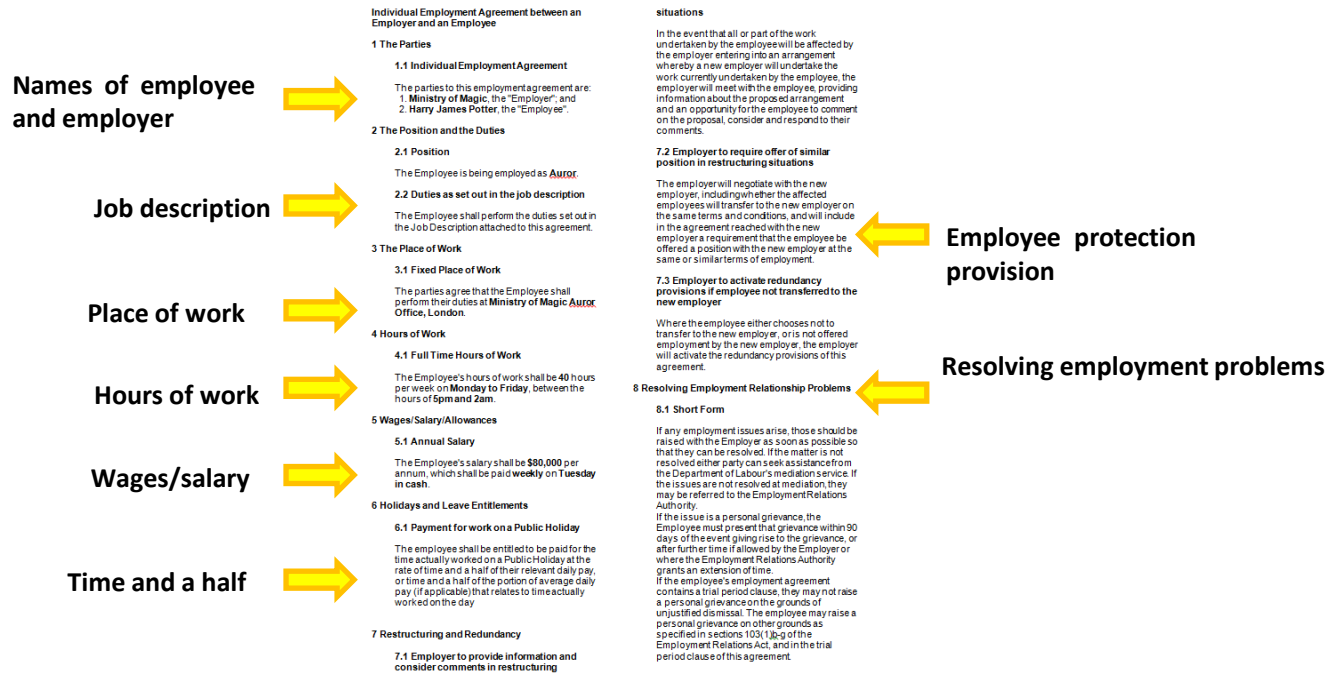
Common areas of non-compliance

- Lack of employment agreements
- Poor record keeping
- Agreement not being reached between employers and employees
 - Accruing vs entitlement
 - Section 17 agreements
- Calculations:
 - (OWP or OWP2) v AWE
 - RDP or ADP
- Incorrect use of “casual”
- Poor processes



Employment Agreements

- All employees must be given a written employment agreement



Record keeping

For each employee the employer **must** keep complete and accurate:

- Wages & time records – s130(1) of the *Employment Relations Act 2000*
- Holiday & leave records - s81(2) of the *Holidays Act 2003*

Records **must** be:

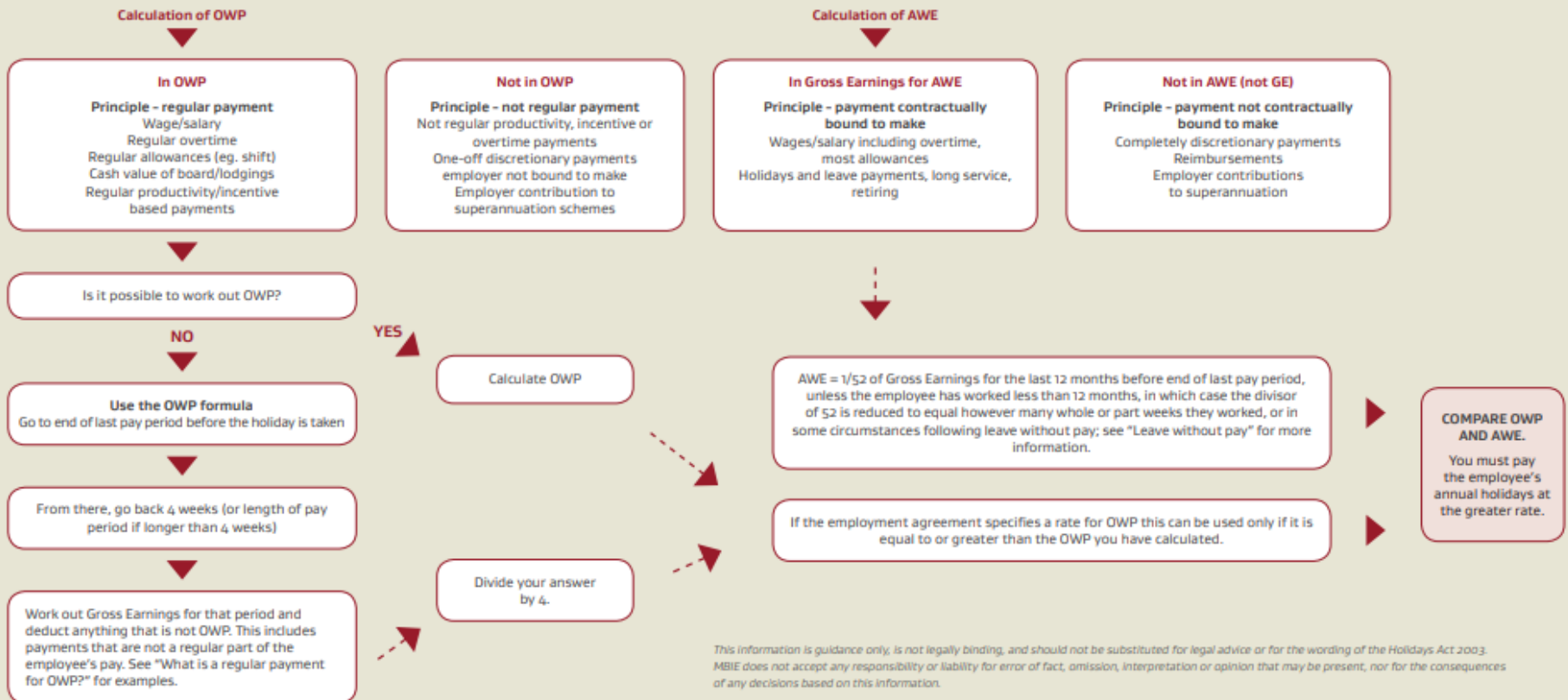
- provided immediately when requested
- in written form or easily accessed and converted to written form
- kept for 6 years
- accessible to employees and their representatives



OWP vs AWE

Ordinary Weekly Pay vs Average Weekly Earnings (OWP vs AWE)

Payment for annual holidays - you must pay the greater of Ordinary Weekly Pay (OWP) and Average Weekly Earnings (AWE)



RDP or ADP



Relevant daily pay (RDP) vs average daily pay (ADP) for bereavement leave, sick leave, domestic violence leave, unworked public holidays and alternative holidays

Use RDP in the first instance

- You must use RDP unless the employee's daily pay varies in the pay period or it is not possible or practicable to determine RDP. In these 2 situations only, you may (but don't have to) use ADP.

Deciding whether RDP is not practicable or not possible to calculate for that employee's situation

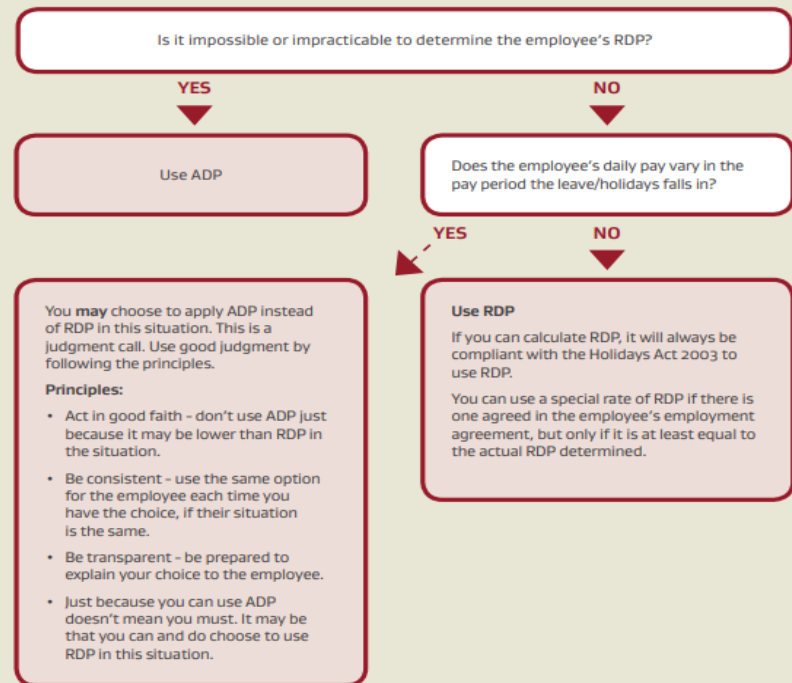
- Even if RDP is not immediately obvious, this doesn't mean it is impossible to calculate.
- Don't just assume that you can't calculate RDP because there is some variation in the employee's work.
- If an employee works variable hours, it may still be possible and practicable to work out RDP eg by looking at the reasons for the variation in the employee's work patterns.
- To assess whether it is not possible or practicable to calculate RDP, an employee's work pattern and pay structure are the relevant factors to look at (rather than the size or complexity of the employer's workforce and payroll operation).
- In a situation where you know that an employee would have done overtime if they had worked on the day, but you don't know how much, you could still use RDP instead of ADP. You could do this by applying eg a maximum amount of overtime that the employee could have worked on that day.

Things to consider if you have a choice but are unsure of whether to choose ADP:

- Use your judgment carefully and consistently.
- Look at the employee's work pattern and see if you can work out what hours they would have worked on the day. Be sure to include overtime in RDP if you can see that the employee would have worked overtime on the day and if so, how much.
- If the employee gets a daily commission or incentive, see if it is more or less consistent from day-to-day or if there is a regular pattern you can use to determine RDP. If you can't work out how much commission or incentive to assign to a particular day, you may want to consider using ADP.

Each calculation is a new and separate calculation

- Don't assume you can use a 'set and forget' approach to RDP and ADP or just do what you did the last time. Just because it was impossible or impracticable to determine the employee's RDP or the employee's pay in the pay period varied on a previous occasion doesn't mean this will be the situation every time the employee goes on leave or holiday. Likewise, just because you had a choice to use RDP or ADP on a previous occasion doesn't mean you will have this choice on each occasion.
- If there has been any variation in the employee's work pattern, you may need to reassess their situation.
- You may need to assess the employee's situation and work pattern each time they take leave/holiday.



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Otherwise working day (OWD)

A day an employee would have worked had the day not been FBAPS.

Factors employee and employer must consider to determine whether it is an OWD:

- employment agreement
- employee's work patterns
- section 12 lists other relevant factors to consider
 - “Including”
- whether, but for the day being a FBAPS, the employee would have worked on the day concerned



Classification / What is “casual”?

“Because of the casual nature of your work, you will not be entitled to paid holidays, sick leave and bereavement leave” CAUTION/RISK!

- Not defined in the Act
- Section 28:
 - Fixed term for less than 12 months
 - “intermittent or irregular”
 - Impracticable vs. practical
 - Hours test
- Consequence of being incorrect
 - *Section 28(4):“...despite those payments, the employee becomes entitled to annual holidays in accordance with section 16”*
- Set reminders for testing and retesting



Case law on “casual” employment?

Was there an obligation on the employer to provide work to the employee and employee to accept an offer of work?

- *Jinkinson v Oceania Gold (NZ) Ltd* – established a **six criteria assessment**:
 1. Hours of work each week
 2. Work is allocated in advance by roster
 3. Regular pattern of work
 4. Expectation of continuity of employment
 5. Notice before an employee is absent or on leave
 6. Employee works consistent starting and finishing times
- Other factors that have been considered to help with assessment include but not limited to:
 - Wording of the job advertisement
 - What was said during the job interview
 - Consistency or inconsistency of terms throughout the employment agreement



Poor Processes

- Information doesn't always get to payroll
 - Payroll can only make the right payment if they get all the information they need
 - GIGO
- Complicated structures can make compliance harder
- Judgement calls are needed
 - Who is making these?
 - What is regular?
 - What is an otherwise working day?
 - Which calculation should be used?

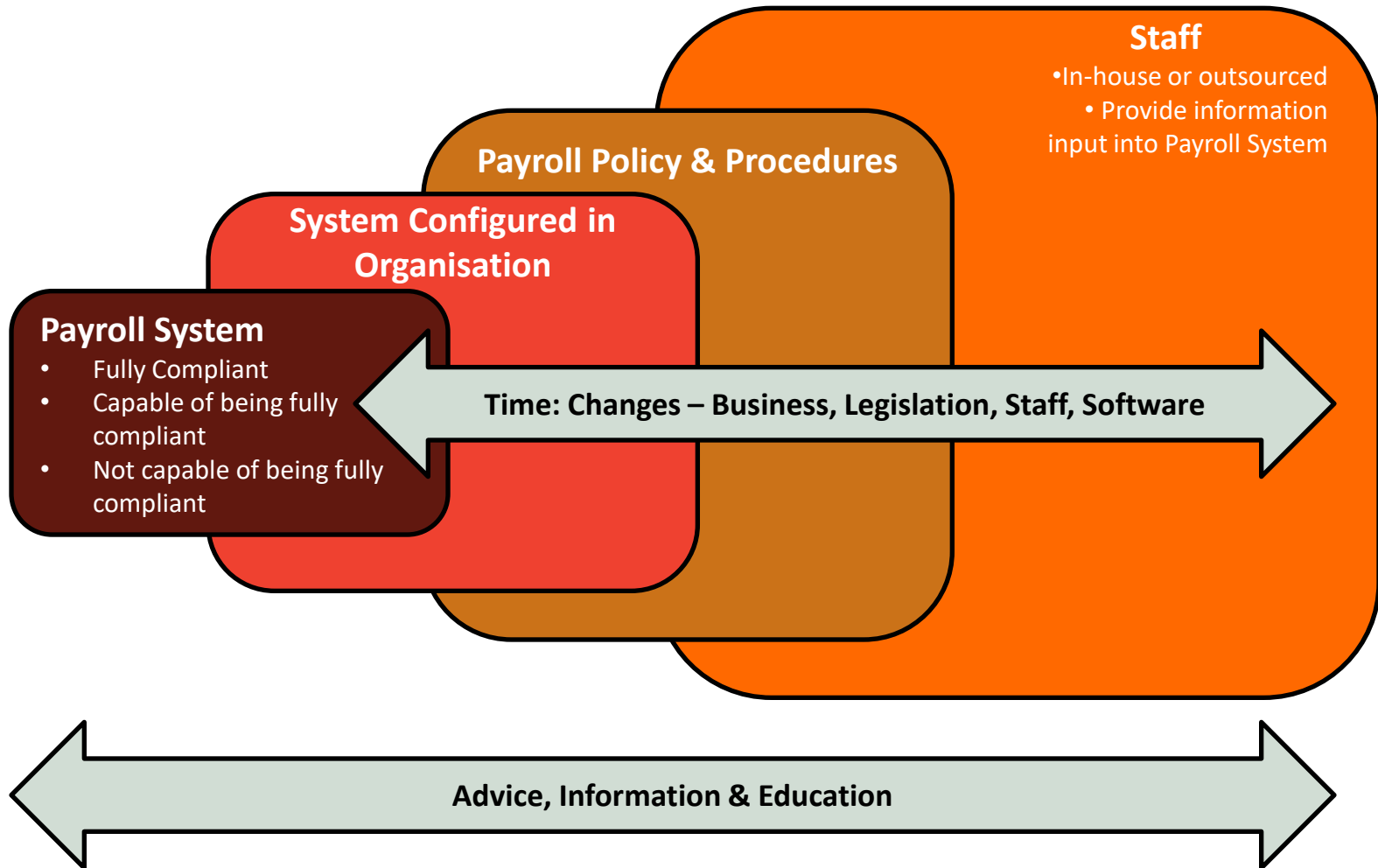


What we have seen

- Most employers have had a form of non-compliance
 - Some instances of industry wide non-compliance
- A set and forget mentality to payroll has been a common occurrence
 - Presumption the system got it right - GIGO
- The Act requires agreement between parties
 - Section 17 haven't been widely used
- How the Regulator responded to non-compliance
 - Investigations
 - Industry engagement
 - Information and education



Issues with compliance traverse the payroll function



Reducing the risk of non-compliance

- ✓ Engage with employees
- ✓ Educate employees on their entitlements
- ✓ Keep **accurate** and compliant records
- ✓ Respond to changes in employees' work arrangements
- ✓ Ensure necessary information provided to payroll
- ✓ Keep up to date with changes to legislation and case law
- ✓ Regularly test payroll system for compliance with the Act

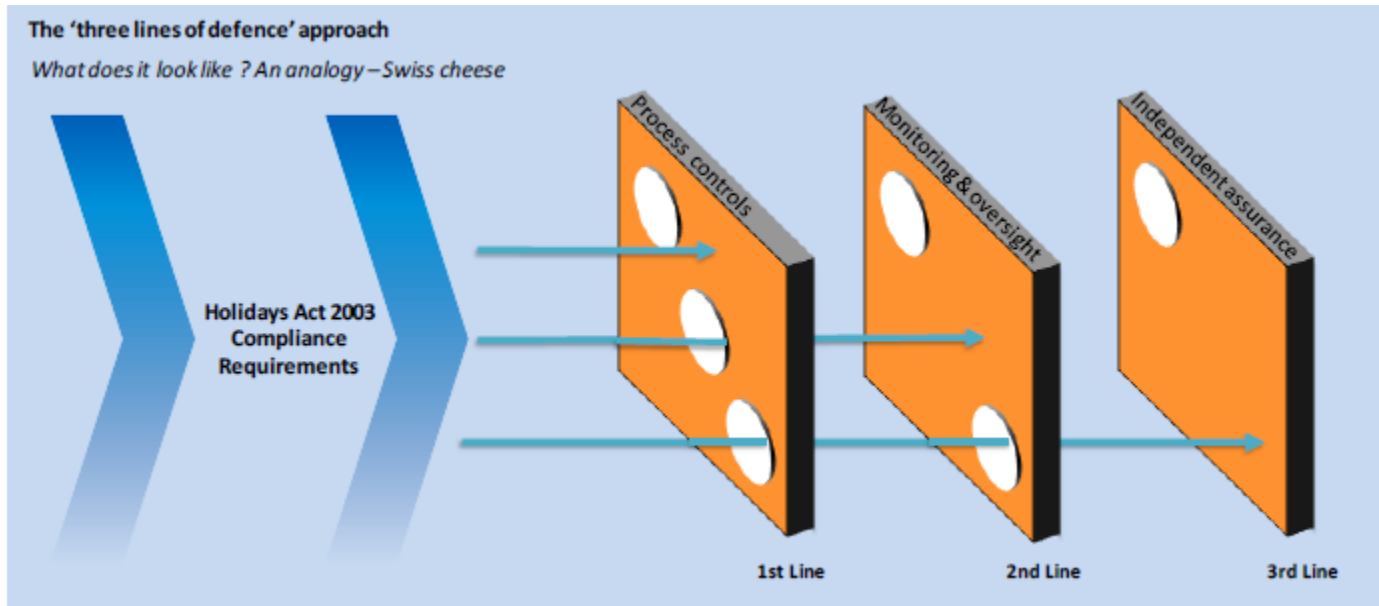


Testing Compliance

- What is a **week** –
 - Is this correct for all employees?
 - Section 17 Agreements
 - What is your process when hours/days change?
- What should be included in **gross earnings**?
- What payments are **regular**?
- Are **Relevant Daily Pay** (RDP) and/or **Average Daily Pay** (ADP) correct?
- How are **otherwise working days** being assessed?



Assurance Framework



Your three lines of defence

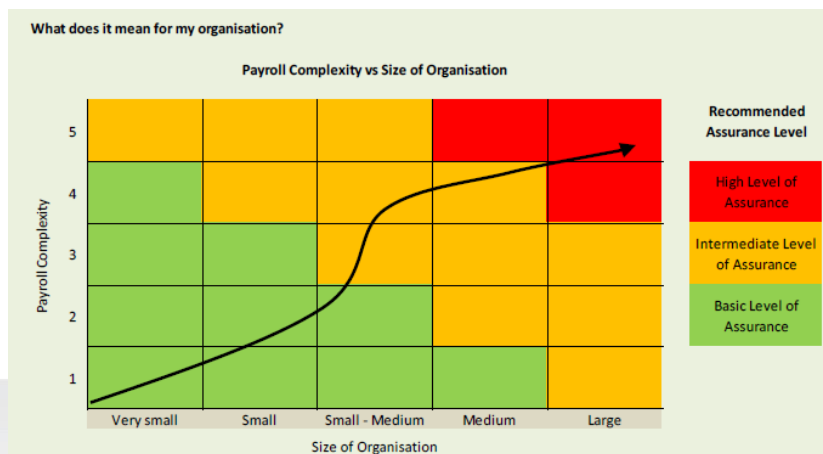
1. **Process controls** – keep accurate records and get the right information to payroll
2. **Monitoring and oversight** – perform checks
3. **Independent assurance** – external checks



What is the right level of assurance?

Consider the following:

- **the size of your organisation** - Small, medium and large will require different lines of defence
- **the complexity of working arrangements** you have with employees
 - Flexible working arrangements
 - Shift work
 - Additional pay – bonuses, allowances, commission
- **the number of manual intervention** required for payroll



Useful Links

Addressing Holidays Act non-compliance – <https://www.employment.govt.nz/resolving-problems/addressing-holidays-act-non-compliance#scroll-to-3>

- *Holidays Act 2003: Guidance on annual holidays, domestic violence leave, bereavement leave, alternative holidays, public holidays and sick leave.*
- Assessing whether your payroll system can comply with the *Holidays Act 2003*
- Holidays Act remediation:
 - *Estimating the Value of Holidays Act 2003 Underpayments*
 - *Accounting for Overpayments through Holidays Act Re-calculations*
 - *Remediation calculations checklist*
 - *FAQs for employers completing Holidays Act remediation calculations*

Employment Services

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



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A guide to employment
in New Zealand



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Holidays Act 2003

Guidance on annual holidays, family violence leave, bereavement leave, alternative holidays, public holidays and sick leave

A photograph of a family of four (a man, a woman, and two children) sitting outdoors and smiling. The man is on the left, the woman is on the right, and two children are in the center. The photo is partially overlaid by a colorful geometric graphic of overlapping triangles in purple, blue, green, and orange.

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Hikina Whakatutuki

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Minimum employment rights and responsibilities

A photograph of a woman and a man sitting at a table in an office setting, looking at a laptop screen together. The woman has red hair and is wearing a grey top, while the man has dark hair and is wearing a red and white checkered shirt.

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Questions

