



MINIMUM CONDITION OF EMPLOYMENT: PUBLIC HOLIDAYS GUIDANCE NOTE

This information is current as at the effective date above and does not seek to detail historical entitlements or arrangements. References to the Minimum Conditions of Employment Act 1993 (WA) in this Guidance Note refers to the legislation in force as of 31 January 2025.

1. Background

The 2018 Ministerial Review of the State Industrial Relations System (**Ministerial Review**) considered state employment laws, including contemporisation of minimum conditions contained in the *Minimum Conditions of Employment Act 1993 (WA)* (**MCE Act**). This included consideration of whether the minimum conditions for Western Australian employees covered by state employment laws ought to reflect the National Employment Standards and other minimum conditions in the *Fair Work Act 2009 (Cth)* (**FW Act**).

Whilst some provisions in the FW Act already apply to State-industrial relations system employees, the Ministerial Review highlighted inconsistencies between the minimum conditions in the MCE Act and the FW Act. In its recommendations, the Ministerial Review detailed legislative changes that would align MCE Act conditions with FW Act entitlements, whilst retaining state-based entitlements which were already superior for employees covered by the MCE Act.

In 2022, the State Government introduced its first stage of industrial reforms in response to recommendations from the Ministerial Review and the 2019 Inquiry into Wage Theft in Western Australia. Changes included protections for vulnerable workers, mechanisms to tackle wage theft and the modernisation of Western Australian state employment laws.

The *Industrial Relations Legislation Amendment Act 2024 (Act)* is the State Government's second stage of reforms. The Act includes further improvements to the minimum conditions for State-industrial relations system employees by adopting certain minimum conditions of employment equivalent to that contained in the FW Act.

Public Holiday Minimum Conditions

From 31 January 2025, the MCE Act provides a new public holiday entitlement to:

- Provide employees with an entitlement to be absent from work on a day (or part day) that is a public holiday;
- Allow an employer to request an employee to work on a public holiday, if reasonable;
- Allow an employee to refuse a request to work if the request is not reasonable, or refuse a request, if the refusal is reasonable; and
- Prescribe factors which must be considered when determining whether a request, or a refusal of a request, is reasonable.

Changes are to align entitlements for State-industrial relations system employees with those in the national system. The first public holiday under these changes will be Labour Day Monday, 3 March 2025.



2. Entitlement to be absent on a public holiday

Subsection 30(1) of the MCE Act provides an employee with an entitlement to be absent from work on a day, or part of a day, that is a public holiday.

The public holiday entitlement will apply to the following public holidays listed in Schedule 1 of the MCE Act:

New Year's Day	Australia Day
Labour Day	Good Friday
Easter Sunday	Easter Monday
ANZAC Day	Western Australia Day
Sovereign's Birthday	Christmas Day
Boxing Day	Any special day appointed by proclamation under section 7 of the <i>Public and Bank Holidays Act 1972 (WA)</i>

Application of the public holiday minimum condition will also need to be considered against WA Health industrial agreement public holiday provisions and whether they provide substituted public holidays as subsection 32(1) of the MCE Act confirms that an industrial agreement may provide for an employer and employee to agree to substituted public holidays.

Where another day or part of day is substituted for a public holiday, the substituted public holiday or part of the day is taken to be the public holiday and the public holiday in the MCE Act is not considered the public holiday. Subsection 32(4) confirms that the same entitlements and obligations regarding employers requesting employees to work and their right to be absent on a public holiday applies to the substituted public holiday(s).

The MCE Act includes an amended definition of "minimum condition of employment" at subsection 3(1)(g) to recognise an employee's entitlement prescribed by Part 4 relating to the new public holiday entitlement. This amendment at (g) means an entitlement prescribed by Part 4 relating to a public holiday will be a minimum condition of employment, including an employee's:

- (i) right to be absent from work on a public holiday; or
- (ii) to be paid if absent from work on a public holiday; or
- (iii) to refuse (on reasonable grounds) a request to work on a public holiday.

Subsection 5(1) of the MCE Act confirms that the minimum conditions of employment extend to and bind all employees and employers and cannot be displaced by an industrial instrument or contract of employment. Subsection 5(2) provides that a provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.

Therefore, the new provisions regarding public holidays are binding on the WA health system and will override WA Health industrial agreements to the extent of any inconsistencies.

3. Employers requesting employees to work on a public holiday

Subsection 30(2) of the MCE Act provides that an employer may request that an employee work on a day or part day that is a public holiday, if the request is reasonable.



When considering rostering for public holidays, to meet the requirements of subsection 30(2) of the MCE Act, Health Service Providers will need to first request the employee to work on the public holiday.

Subsection 30(4) of the MCE Act sets out a non-exhaustive list of factors which employers must take into account when determining if their request of an employee to work on a public holiday is reasonable, including:

- The nature and conduct of the employer's business or operations.
- The nature of the employee's work.
- The employee's personal circumstances, including family responsibilities.
- Whether the employee could reasonably have expected the employer to request that they work on a public holiday.
- Whether the employee is entitled to receive overtime payments, penalty rates or other compensation (including compensation in the form of an annualised salary) for, or a level of remuneration that reflects an expectation of, work on the public holiday.
- The type of employment of the employee (for example, whether full-time, part-time, casual or shift work).
- The amount of notice in advance of the public holiday given by the employer, when making a request.

Other factors not listed in subsection 30(4), which may be considered when determining if an employer's request is reasonable, may include:

- The Health Service Provider's capacity to find a replacement employee to perform the same work.
- Minimum staffing levels required to ensure service delivery is maintained.
- Any other relevant factor.

The method of such a request may depend on the nature of the business area or operations, number of employees required to work on a public holiday and timing required to publish employee rosters. Health Service Providers may make a request in a way which suits the operational needs of the business area.

Proposed actions to support Health Service Providers comply with subsection 30(2) of the MCE Act are detailed at **Attachment A**. Whilst not exhaustive, Health Service Providers may develop other actions and local policies to support compliance. This may include continuation of existing practices such as the use of Expressions of Interests, volunteer processes or other similar methods used to roster work on public holidays.

4. Employee refusal of a request to work on a public holiday

If a Health Service Provider requests an employee to work on a public holiday, subsection 30(3) of the MCE Act provides that an employee may refuse the request if:

- a) The request by the Health Service Provider is not reasonable, or
- b) The employee's refusal is reasonable.



In situations where an employee refuses to work on a public holiday, the employer will need to consider the factors listed in *Section 3 – Employers requesting employees to work on a public holiday*, to determine if the employee’s refusal was reasonable.

An employee’s refusal may be considered unreasonable where an employee refuses to work on a public holiday and has provided little or vague explanation or no notice.

Each refusal to work on a public holiday needs to be considered on a case-by-case basis and against the factors set out in Section 3. Some examples of where an employee’s refusal may not be considered reasonable are set out in **Attachment B**.

5. Requiring employees to work on a public holiday

Section 30 of the MCE Act is modelled on section 114 of the FW Act. In March 2023 the Full Court of the Federal Court¹ (**Full Court**) issued a decision that provides an interpretation of the term ‘request’ and how this should be read in the context of the public holiday entitlement at section 114 of the FW Act.

The Full Court held that making a ‘request’ means that the employer first asks the employee to work on the public holiday. This not only provides an opportunity for the employer to discuss their need for the employee to work on a public holiday, but also provides the employee with an opportunity to either accept or refuse the employer’s request, where reasonable.

In most cases, the issuing of finalised rosters represents a direction by the employer for an employee to work. The decision of the Full Court confirms that employers cannot require (i.e. roster) an employee to work on a public holiday, without first making a request.

However, the decision highlights the unique situation of organisations providing ‘critical services’ and ruled that requiring an employee to work on a public holiday is likely to be permissible as long as a request has first been made:

An employer can ultimately require employees to work on public holidays who are involved in critical services or where it is desirable (although “not critical”) to remain open on public holidays in circumstances where the employer has satisfied the obligations imposed upon it under subsections 114(2) and (3), namely, that it has made a request, that request is reasonable, and in circumstances where an employee’s refusal is not reasonable (taking into account the factors in subsection 114(4)).

An employer may require an employee to work on a public holiday, where the employer has demonstrated it has met the requirements of subsection 30(2) of the MCE Act, that being the employer first requested an employee to work on a public holiday, where reasonable, and the employee was provided with an opportunity to accept or refuse the shift.

The employer may require an employee to work where either (in consideration of the relevant factors in *Section 3 – Employers requesting employees to work on a public holiday*):

- a) The employee has not communicated their refusal to work a public holiday; or

¹ *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51



- b) The employer has determined that an employee's refusal was not reasonable against the relevant factors in Section 3.

6. Payment for public holidays

The current minimum condition for public holidays provides that full-time and part-time employees who are not required to work on a day solely because that day is a public holiday are entitled to be paid as if they were required to work on that day.

New section 31 of the MCE Act provides that if an employee is absent from work on a public holiday in accordance with the new minimum condition in section 30, they are entitled to be paid:

- As if they were required to work their ordinary hours on the public holiday; and
- At the rate they would have received as payment for those hours under a WA Health industrial agreement, or contract of employment, whichever provides a higher rate.

The entitlement to be paid for an absence from work on a public holiday will not apply to:

- Casual employees.
- Employees who would not ordinarily work on a public holiday; or
- Employees on unpaid leave on the public holiday.

7. Resources

WA Health information

- [Industrial Relations Supplementary Information](#)
- [Awards and Agreements](#)

Private Sector Labour Relations

- [Public holiday minimum conditions](#)

Legislation

- [Minimum Conditions of Employment Act 1993](#)

8. Document Control

Version	Issued	Effective date	Amendment
1	27 February 2025	27 February 2025	Original Version



ATTACHMENT A

Proposed Actions to enable compliance with Section 30 of the *Minimum Condition of Employment Act 1993*

1. Amend roster practices to include draft rosters with notifications to employees seeking whether they refuse to work on a public holiday, where time permits.

Health Service Providers should consider amending local rostering practices to ensure that any roster covering a period inclusive of a public holiday is initially released as a draft roster – i.e. a request to work. This will provide employees the opportunity to refuse to work on the public holiday, or accept a shift and communicate an election of preference as to when they would like to work, where possible (eg. morning, afternoon or evening shift).

Employees should be advised of any minimum staffing requirements that need to be considered on public holidays.

The relevant rostering provisions are detailed in **Attachment C – WA Health Industrial Agreement Rostering Provisions**.

To ensure this is effective, the following steps should be taken:

- a) Rosters should be released, in draft form, two weeks prior to that required within the relevant WA Health Industrial Agreement.*
- b) Employees who are requested to work on a public holiday via the draft roster, are invited to consider the request during a two-week period.
- c) Any refusal to work the public holiday is considered in accordance with factors detailed in *Section 3 – Employers requesting employees to work on a public holiday* of this Guidance Note and the response provided to the Employee.
- d) Where no refusal to work is received or the employee has offered an alternative (eg. elected to work a morning over a night shift or on a different public holiday) which has been agreed by the employer, the employee is deemed to have consented to work the relevant public holiday rostered shift.

The draft roster is then confirmed and published as required by the WA Health Industrial Agreement.

** Where an industrial instrument does not prescribe timeframes for release of a roster, the request to work should be provided in a reasonable time period prior to publication/finalisation of the roster.*

Health Service Providers must ensure all Employees are aware of the above process and timelines involved.

2. Issue rosters with disclaimers.

Where it is not feasible to amend rostering practices to release a draft prior to publishing, employers may consider issuing formalised rosters with a disclaimer acknowledging employees have a right to be absent on the public holiday and that they can still refuse to work on a public holiday, but the refusal must be reasonable.



Health Service Providers will need to confirm timeframes for employees to submit a refusal in consideration of current rostering practices and industrial agreement provisions relating to the amendments of rosters. A template disclaimer is provided below.

[Health Service Provider] acknowledges that from 31 January 2025, under Section 30 of the Minimum Condition of Employment Act 1993 (MCE Act), an employee is entitled to be absent from work on a public holiday.

However, [Health Service Provider Name] may request an employee to work on a public holiday if that request is reasonable.

Where an employee is requested to work on a public holiday via this published roster, the employee may refuse the request:

- a) If the employer's request is not reasonable; or*
- b) The employee's refusal is reasonable.*

This published roster contains a public holiday(s) on [Date(s)], Employees will be able to submit a refusal to work that public holiday by [Date - at least 14 days' prior to the public holiday].

Where an employee's refusal to work a public holiday is received by [date], consistent with subsection 30(4) of the MCE Act, the following factors will be considered by managers when assessing if the refusal is reasonable:

- The nature and conduct of the business unit or operations.*
- The nature of the employee's work.*
- The employee's personal circumstances, including family responsibilities.*
- Whether the employee could reasonably have expected the employer to request that they work on a public holiday.*
- Whether the employee is entitled to receive overtime payments, penalty rates or other compensation (including compensation in the form of an annualised salary) for, or a level of remuneration that reflects an expectation of, work on the public holiday.*
- The type of employment of the employee (for example, whether full-time, part-time, casual or shift work).*
- The amount of notice in advance of the public holiday given by the employer, when making a request.*

Additional factors not in subsection 30(4), but are to be considered include:

- The employer's capacity to find a replacement employee to perform the same work.*
- Minimum staffing levels required to ensure service delivery is maintained.*
- Any other relevant factor.*

If your refusal to work on the named public holiday was not considered reasonable against the factors above, you will be required to work your rostered public holiday.



3. Issuing periodic communications to employees within a team / business unit / branch.

A line manager may issue advice to their team on a periodic basis (e.g. monthly or quarterly) advising of the upcoming public holidays, which may fall during the next rostering period to seek out employees who will be interested in working on the relevant public holiday(s).

The line manager could state that employees may be rostered on those days and ask employees to:

- Consent to being rostered on the relevant public holidays falling during the relevant rostering periods and any shift preference of the employee (morning, afternoon, evening); or
- Advise whether the employee refuses the request to work on the relevant public holidays and confirm reasons for the employee's refusal.

Advice to employees will need to set out that their refusal will be considered against factors as detailed in subsection 30(4) of the MCE Act (listed in *Section 3 – Employers requesting employees to work on a public holiday*), as well as the following:

- The employer's capacity to find a replacement employee to perform the same work.
- Minimum staffing levels required to ensure service delivery is maintained.
- Any other relevant factor.

What will amount to a reasonable refusal will depend on specific circumstances raised by the employee.

Employees are to be advised that if their refusal to work on a public holiday is not considered reasonable against the factors detailed above, the employee will be required to work on the public holiday falling during the nominated rostering period.

4. Education for managers who are responsible for considering refusals

Health Service Providers are responsible for ensuring managers who are making decisions regarding rostering are aware of the changes under the *Minimum Conditions of Employment Act 1993*, the requirement to first request an employee to work on a public holiday and the factors which need to be considered when an employee refuses to work on a public holiday in determining if the refusal is reasonable.



ATTACHMENT B

Refusals which may not be considered reasonable

In consideration of factors set out in Section 3 of this Guidance Note, the table below provides examples of refusals to work on a public holiday which may not be considered reasonable.

The examples provided are general guidance only, noting that it will be necessary to consider an employee's refusal to work on a public holiday on a case-by-case basis in regard to the factors detailed in Section 3.

Examples have been identified and provided which would likely be considered not reasonable in the context of critical services and where a roster has been issued with reasonable advanced notice of the working requirements.

Generally, a bare refusal to work on a public holiday without a specific reason given by the employee for that refusal will not be reasonable.

Example	Why is it unreasonable?
Employee refuses to work on a public holiday without clearly explaining the reason/s for the refusal.	<p>If an employee refuses to work without explanation, or is vague in the reasons provided for the refusal (e.g. simply "I have plans" or "family responsibilities"), there is no way of assessing factors which are necessary to consider when determining if the refusal is reasonable or not.</p> <p>The onus is on the employee to demonstrate that the refusal to work on a public holiday is reasonable: see Clark v Ventura Transit Pty Ltd [2018] FCCA 468.</p> <p>Without a clear explanation, the refusal will therefore not be considered reasonable: see Pietraszek v Transpacific Industries Pty Ltd [2011] FWA 3698; Clark v Ventura Transit Pty Ltd [2018] FCCA 468.</p>
Employee refuses to work on a public holiday because they need to stay home to care for their children who would usually be at school.	In the context of the employee being put on notice several weeks in advance of the public holiday roster, there was sufficient time to arrange childcare arrangements for the public holiday.
Employee refuses to work on Easter Sunday or Christmas Day because it is important to spend time with family.	<p>In the context of the employee being put on notice several weeks in advance of the public holiday roster, this would not be considered a reasonable refusal.</p> <p>Responses such as this do not sufficiently demonstrate personal circumstances that warrant not working on the public holiday:</p>



	<p>(see <u>Australian Federated Union of Locomotive Employees v Aurizon Operations Ltd [2023] FWC 3473.</u>)</p>
<p>Employee is remunerated via an annualised salary arrangement and has already reasonably refused to work on public holidays.</p>	<p>Annualised salary arrangements will include payment in contemplation of an employee working and observing a certain number of public holidays in a year.</p> <p>Where an employee has reasonably refused public holidays and has not worked the public holiday quota required of their annualised salary arrangement, it may be unreasonable for them to refuse further requests to work on a public holiday.</p> <p>This only applies where an industrial instrument explicitly provides a limit on the number of public holidays which could be worked.</p>



ATTACHMENT C

WA HEALTH INDUSTRIAL AGREEMENT – ROSTERING PROVISIONS

- The rostering provisions of each of the WA Health industrial agreements are set out below.
- Proposed actions in Attachment A will also need to be considered against the provisions of any subsidiary / flexibility agreements which exist.

Industrial Agreement coverage	Applicable clauses	Requirements
Medical Practitioners	Clause 33 - On call and Recall	<ul style="list-style-type: none"> • Where practicable, on-call rosters to be posted at least 14 days' in advance.
Medical Practitioners (DiTs)	Clause 16 - Rosters	<ul style="list-style-type: none"> • Operate over either a 14 day or 28-day cycle, which are to be aligned to either one or two consecutive pay period(s). • Rosters to be provided at least 14 days prior to commencement. • Where possible, rosters to be published at least 21 days' prior to their commencement. • Rosters not to be amended during currency, except in cases of emergency, or if the practitioner concern agrees. • Practitioners can do shift swaps with approval from Head of Department. • The Employer, the Association and practitioners concerned, may agree in writing to a roster that does not conform with Clause 16 or Clause 15 – Hours of Duty.
Registered Nurses	Clause 28 - Hours of Work and Rostering	<ul style="list-style-type: none"> • A 14-day roster will ordinarily be posted 28 days prior to the commencing date of the first working period in the roster. • Rosters may be posted less than 28 days prior, but not less than 14 days prior, to the commencing date of the first working period in the roster, in extenuating circumstances. • Night shift employees – need to be consulted prior to be rostered for day and/or afternoon shifts, including Employers to provide notice to employees, before temporary change is directed and rostered.
Salaried Officers	Clause 17 - Rostering	<ul style="list-style-type: none"> • Details posting and changes to rosters. • Roster to be published at least 14 days before in comes into operation, and where possible, 28 days prior to commencement of the first shift on the roster. • Can be altered due to circumstances that could not have reasonably foreseen. • If the roster is to be altered, resulting in a shift that needs to be filled, Employer to endeavour to offer the shift to suitable employees on a basis which promotes equity and the preference for permanent and direct employment. • As it relates to safe rostering practices, in setting the roster, the employer and employee will give consideration to: <ul style="list-style-type: none"> ○ The employee's health and safety. ○ The employee's start and finish times in the preceding week and month. ○ Breaks required to manage fatigue.



Enrolled Nurses, Assistants-in-Nursing, Health Workers, Aboriginal Health Practitioners	Clause 20 - Rosters	<ul style="list-style-type: none">• Rosters may be altered at any time if the hospital exigencies render any alteration necessary.• Where practicable rosters will be posted at least 14 days prior to the commencing date of the first working period in the roster.• Rosters to be posted at least seven days prior to the commencing date of the first working period in the roster.
Hospital Support Workers	Clause 13 - Hours of Work	<ul style="list-style-type: none">• Must be posted 14 days prior to operation.• May be altered at any time because of a circumstance which the Employer could not have reasonably foreseen.• employee concerned will be notified before the end of the shift immediately prior to the changed shift or on the day before the changed shift commences, where practicable.• Provides rostering principles that the employer must consider, if considering a change to the roster, regardless of whether the change is 'major' or not.• Provisions to deal with major changes to rostering, which provides a Consultative Committee process.
Engineering & Building Services	Clause 12 - Hours of Work & Rostering	<ul style="list-style-type: none">• Roster will be established and maintained by the Employer in accordance with the operational requirements of the Employer after consultation with the employees to whom the rosters apply.• Rosters to be posted at least 48 hours' before it comes into operation.
Dental Officers & Technicians	Clauses 23 & 25 - Shift Work Allowance	<ul style="list-style-type: none">• Roster periods commence at the beginning of a pay period and continue for 14 consecutive days.• Rosters are to be made available at least 5 clear working days prior to commencement.• A roster may only be altered on account of a contingency, which the Employer could not have been reasonably expected to foreseen.• When a roster is altered, the employee concerned will be notified of the changed shift 24 hours before the changed shift commences.
Public Service Officers	Clause 21 – Shift Work Allowance, PSA	<ul style="list-style-type: none">• Roster periods commence at the beginning of a pay period and continue for 14 consecutive days.• Rosters are to be made available at least 5 clear working days prior to commencement.• A roster may only be altered on account of a contingency, which the Employer could not have been reasonably expected to foreseen.• When a roster is altered, the employee concerned will be notified of the changed shift 24 hours before the changed shift commences.