

Leave and incapacity

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Introduction

When an employee is claiming incapacity payments, there is an impact on their ability to access other leave for the same period (section 116 of the SRC Act). This section sets out how the legislation applies to the different leave types.

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Annual and personal leave (recreation and sick/carers leave)

An employer may decide to grant an employee a period of leave when they are:

- partially incapacitated on a long-term basis
- working full time hours but remain unfit to work overtime or receive certain allowances, or
- working full-time hours but in a lower paid position to their pre-injury position.

An employee cannot be paid annual leave or personal leave for the same hours as they are paid compensation leave.

If an employee who has passed 45 weeks of incapacity is claiming compensation for a period of incapacity, and is receiving less than 100 per cent of their NWE, they cannot use other forms of paid leave to 'top up' their payments to 100 per cent of NWE.

An employee is not obliged to claim incapacity payments and may choose to apply for other forms of leave. If an employee's compensation is suspended under section 36, 37 or 57 of the SRC Act then they will not be entitled to incapacity payments for the period of the suspension. The employee may choose to apply for other forms of paid leave for that period. Approval of leave in these circumstances described is up to the employer to decide in line with their enterprise agreement or industrial award.

Where an employee is working reduced hours, for example on a graduated return to work program (GRTW), the employer may grant paid leave for the hours the employee would be working. They are still entitled to receive incapacity payments for the hours they are incapacitated.

In most cases, it is not recommended that recreation leave be granted where an employee has just commenced a GRTW program as this may hinder the expected outcome and duration of the return-to-work program.

Example: An employee is on a GRTW working 30 hours per week. Their normal full time hours are 40 per week. The employer can grant recreation leave for 30 hours per week and Comcare continues to pay incapacity payments for the remaining 10 hours per week. When calculating the incapacity payments in Pracsys, the hours and payment for the annual leave are entered as 'hours worked' and 'actual earnings' (gross). This ensures the appropriate adjustment percentage under section 19(3) is applied and the employee does not receive incapacity payments while they are on receipt of annual leave payments.

Note: Leave credits paid out, for example on separation or as part of a redundancy package, are not taken into account as actual earnings.

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Maternity leave

Where an employee takes maternity leave (whether it is paid maternity leave or unpaid), they may also claim incapacity payments from Comcare for the same period.

Note: Where an employee is in receipt of incapacity payments during a period they are on maternity leave, you should regularly obtain updated medical evidence to confirm the employee is still incapacitated for work as a result of their compensable condition, and the number of hours they are unfit to work (if they are not totally incapacitated for work). An employee on maternity leave will still only be entitled to incapacity payments where they are incapacitated for work as a result of their compensable condition. When supporting an employee who is on maternity leave who claims incapacity payments, you should display empathy, sensitivity and sound judgement.

Maternity leave at half-pay or unpaid

In cases where the employee takes maternity leave at half-pay or unpaid, their NWE should be reduced accordingly under section 8(10)(a) of the SRC Act. Section 8(10)(a) provides that where an employee's NWE is greater than the amount they would earn if not for their injury, then their NWE should be reduced to the amount they would be earning if not for the injury. In the scenario where an employee has taken maternity leave at half-pay or unpaid, if the employee was not injured their earnings would have been reduced to half-pay or to nil during that period. The NWE should therefore be reduced accordingly.

Example – unpaid maternity leave: The employee takes unpaid maternity leave for a period of six months. During this six-month period the employee would earn nil if they were not injured. As such, their NWE should be reduced to nil during this period, as per section 8(10)(a) of the SRC Act.

Maternity leave and incapacity - pre 45 weeks

If an employee claims incapacity during a period of maternity leave, paid maternity leave will be considered actual earnings (AE) for the purposes of calculating the employee's incapacity entitlements. In cases where the maternity leave is paid at a lower rate than the employee's NWE, the employee can continue to claim incapacity top-up (on provision of medical evidence to support their incapacity) and the amount of weekly maternity leave paid will be considered as AE.

Example – paid maternity leave: Due to their compensable condition the employee is working in a lower paid role but at their full NWH. The employee takes 12 weeks maternity leave at full pay and claims incapacity during the same period (as they are partially incapacitated). The maternity leave will be paid at the rate of the employee's current lower paid role. When

calculating the employee's incapacity entitlement over the 12 weeks, the entitlement will be the employee's NWE minus the gross actual earnings (the paid maternity leave). As the employee's NWE is higher than their actual earnings, the employee will be entitled to incapacity 'top up' for the 12 weeks they are on maternity leave. The 12 weeks will count towards the first 45 weeks of incapacity.

When calculating the incapacity payments in Pracsys for the above scenario, the maternity leave payment would be entered as 'actual earnings' to ensure the employee does not receive incapacity payments while they are in receipt of maternity leave payments.

Maternity leave and incapacity - post 45 weeks

The AE figure will be worked out the same way as if it is pre-45 weeks of incapacity, see above.

For an employee post 45 weeks, maternity leave will be considered as hours 'in employment' for the purpose of establishing the adjustment percentage used when calculating the employee's incapacity payments (section 19(3)). Therefore, if an employee claims incapacity and takes maternity leave for the same week, the employee will be considered to be 'employed' for the number of hours per week that they are on maternity leave. For example, if, but for the maternity leave, the employee would be working 25 hours per week, then they will be considered to be 'employed' for 25 hours during that week, for the purpose of the adjustment percentage (this is regardless of whether they take their leave at full pay or half pay).

When calculating the incapacity payments in Pracsys for the above scenario, the hours on maternity leave would be entered as 'hours worked' and the maternity leave payment would be entered as 'actual earnings' (gross). This will ensure the appropriate adjustment percentage is applied under section 19(3) and the employee does not receive incapacity payments while they are in receipt of maternity leave payments.

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Public holidays

For any public holiday, it is the employer's responsibility to pay the employee for the day at the employee's normal salary, taking into account any provisions in the agency's Enterprise Agreement. In submitting a claim for time off work (CTOW) for a week where there was a public holiday, whatever amount the employee actually earned that week (including the amount for

the public holiday) is recorded as actual earnings, and any hours the employee worked that week (including any hours the employee would have worked on the public holiday if it were not a public holiday) are included as hours worked.

Example: A totally incapacitated employee is claiming incapacity in a week with a public holiday. As the employee is entitled to be paid for the public holiday (in line with their agency's Enterprise Agreement) the amount payable for the public holiday is included in their actual earnings. However, as the employee did not work that week, the hours the employee worked remains at nil. For employee's post-45 weeks, the adjustment percentage would remain at 75 per cent.

Example: An employee (post-45 weeks) on a graduated return to work (GRTW) is claiming incapacity in a week with a public holiday. As the employee is entitled to be paid for the public holiday (in line with their agency's Enterprise Agreement) the amount payable for the public holiday is included in their actual earnings. So that the employee is not disadvantaged by there being a public holiday, Comcare will consider the hours the employee 'worked' during the week to include the hours they would normally have worked as part of their GRTW on the day of the public holiday. The employee's adjustment percentage is therefore not going to be impacted in a week that includes a public holiday.

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Rostered days off (RDO)

Rostered days off (RDOs) are similar to flex arrangements in that employees generally work slightly longer hours each day in return for an RDO once a month. Regardless of whether an employee is entitled to RDOs or not, their entitlement to incapacity payments are calculated in the usual way having regard to their NWH, NWE, and any AE.

RDO arrangements are a matter for the employer to decide, having regard to their enterprise bargaining agreement.

Overtime and allowances while on other leave

If the employee's NWE includes amount(s) for overtime and/or allowances that are not payable when the employee is on annual, maternity or other personal leave, then the employee should not receive those allowances while on other leave.

If an allowance would normally be paid while the employee was on leave then it should continue to be paid.

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Accrual of leave

The SRC Act provides that sick leave and recreation leave entitlements continue to accrue as normal during the first 45 weeks, during which the employee is on 'post-determination compensation leave' (section 116).

The SRC Act defines:

- post-determination compensation leave as compensation leave that takes place after the end of the pre-determination period in relation to the claim for compensation, and
- pre-determination period as the period from the start of the day when the employee is injured until the end of the day on which Comcare determines the claim.

The 45-week period of sick leave and recreation leave accrual permitted by section 116 of the SRC Act commences when the employee is on their first period of compensation leave after the day the Comcare determines the incapacity compensation claim in favour of the employee (post-determination compensation leave). Section 116 does not apply to periods of

compensation leave that occur before and, on the day, the relevant authority determines the incapacity compensation claim in favour of the employee (pre-determination period).

This means the 45-week count for sick leave and recreation leave accrual will not be the exact same period as the 45 weeks of incapacity at 100 per cent NWE minus AE (section 19(2) of the SRC Act). This is because the 45-week count for sick leave and recreation leave accrual starts the day after the first claim for incapacity is determined, whereas the 45-week count for 100 per cent NWE minus AE starts from the first day of incapacity claimed.

If the incapacity compensation claim is rejected and later accepted (following a reconsideration or appeal decision of the Administrative Appeals Tribunal) the post-determination compensation leave period commences on the first day of compensation leave after the day the claim for incapacity compensation is determined in favour of the employee. That may be the day after the date of the reviewable decision made by Comcare or the day after the date of a merits review decision made by the Administrative Appeals Tribunal in which it is determined that incapacity compensation is payable under sections 19 or 22 of the SRC Act, as the case may be.

If an employee remains on compensation leave after the first 45 weeks post-determination compensation leave, there is no provision under the SRC Act that addresses how subsequent leave should accrue other than long service leave. Long service leave continues to accrue as normal during any period of compensation leave (i.e. as if the employee were not absent from work).

Any accrual of sick or recreation leave after the first 45 weeks post-determination compensation leave, is for the employer to determine in line with their enterprise agreement or industrial award.

The below table sets out how leave is accrued post-determination compensation leave throughout the claim lifecycle:

| | Sick leave | Recreation leave | Long service leave |
|--|--------------------------------|------------------|--------------------|
| Totally absent/part hours: first 45 weeks | Normal Accrual | Normal Accrual | Normal Accrual |
| Totally absent/part | Employer to determine specific | | Normal Accrual |

| | | |
|-----------------------|--|--|
| hours: | arrangements based on their enterprise | |
| after 45 weeks | agreement or industrial award | |

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