



ACCRUAL OF LEAVE – SECTION 116 – SAFETY, REHABILITATION AND COMPENSATION ACT 1988

PURPOSE

The following scheme guidance provides information about accrual of leave permitted by section 116 of the Safety, Rehabilitation and Compensation Act 1988 (the SRC Act).

BACKGROUND

Section 130 of the Fair Work Act 2009 (legislation.gov.au) (the Fair Work Act) bars the accrual of any National Employment Standards (NES)¹ leave (including 'sick leave' as paid personal leave and 'recreation leave' as paid annual leave) during a period when an employee is absent from work because of an injury for which the employee is receiving workers' compensation. However, it does not bar accrual of NES leave during such a period if permitted by a compensation law.

Section 116 of the SRC Act is a compensation law that permits the accrual of sick leave and recreation leave entitlements during each of the first 45 weeks of post-determination compensation leave; and the accrual of long service leave entitlements during the whole of the post-determination compensation leave period.

GUIDANCE

When does the 45 weeks of post-determination compensation leave commence?

*Compensation leave*² means any period during which an employee is absent from their employment due to an incapacity for work resulting from an injury in respect of which compensation is payable under section 19 or section 22 of the SRC Act. 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 relevant authority determines the incapacity compensation claim in favour of the employee (post-determination compensation leave³).

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 period⁴).

1 The NES are the minimum terms and conditions of employment set out in the Fair Work Act that apply to national system employees. The Fair Work Ombudsman, whose functions include promoting and monitoring compliance with the Fair Work Act, provides further information here: <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards>.

2 Subsection 4(1) of the SRC Act provides the compensation leave definition.

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Example 1

Employee A sustains a right knee injury in the course of their employment on 8 May 2020. The employee is incapacitated for work as a result of the injury from 9 May to 30 May 2020.

The relevant authority accepts liability for 'anterior cruciate ligament tear (right) knee' on 18 May 2020. The relevant authority then determines incapacity compensation is payable under section 19 of the SRC Act on 19 May 2020.

- > The pre-determination period starts on 8 May (the day when the employee is injured) and ends on 19 May 2020 (the day the claim for incapacity compensation is determined).
- > Compensation leave taken in the period 9 May to 19 May 2020 (before the end of the pre-determination period) does not count towards the first 45 weeks of leave accrual permitted by the SRC Act.
- > Compensation leave taken in the period 20 May to 30 May 2020 (after the end of the pre-determination period) does count towards the first 45 weeks of leave accrual permitted by the SRC Act.

- Date of injury
- Pre-determination period
- The day the claim for incapacity compensation is determined
- The day the 45 weeks of post-determination compensation leave commences

MAY 2020

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

If the incapacity compensation claim is rejected and later accepted (following a reconsideration or appeal decision of the Administrative Review 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 a relevant authority or the day after the date of a merits review decision made by the Administrative Review 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.

Example 2

Employee B suffers from a psychological ailment alleged to be caused by bullying and harassment at their place of work. The employee is incapacitated for work as a result of the ailment from 6 February to 2 April 2020 and fit to return to work three days per week from 3 April to 22 July 2020.

The relevant authority rejects liability for a 'depressive disorder' on 17 March 2020 and the employee requests a reconsideration of the determination.

On 6 July 2020, the relevant authority sets aside the injury determination under section 14 of the SRC Act and accepts liability for a 'depressive disorder' sustained on 6 February 2020, being the day that the employee first sought medical treatment for their disease.

- > The relevant authority then determines incapacity compensation is payable under section 19 of the SRC Act on 9 July 2020.
- > The pre-determination period starts on 6 February (the day the employee is injured) and ends on 9 July 2020 (the day the claim for incapacity compensation is determined in favour of the employee).
- > Compensation leave taken in the period 6 February to 9 July 2020 (before the end of the pre-determination period) does not count towards the first 45 weeks of leave accrual permitted by the SRC Act.
- > Compensation leave taken in the period 10 July to 22 July 2020 (after the end of the pre-determination period) does count towards the first 45 weeks of leave accrual permitted by the SRC Act.

Example 3

Employee C suffers from bursitis of the left shoulder alleged to be caused by their work. The employee is first incapacitated for work as a result of the bursitis from 1 September 2019.

On 2 December 2019, the relevant authority makes a reviewable decision to reject liability for incapacity compensation under section 19 of the SRC Act in relation to the bursitis. The employee appeals to the Administrative Review Tribunal and on 1 December 2020, the Tribunal sets aside the relevant authority's decision and determines that incapacity compensation is payable under section 19.

- > The pre-determination period starts on 1 September 2019 (the day the employee is injured) and ends on 1 December 2020 (the day the claim for incapacity compensation is determined in favour of the employee).
- > Compensation leave taken in the period 1 September 2019 to 1 December 2020 (before the end of the pre-determination period) does not count towards the first 45 weeks of leave accrual permitted by the SRC Act.
- > Compensation leave taken from 2 December 2020 (after the end of the pre-determination period) does count towards the first 45 weeks of leave accrual permitted by the SRC Act.

Counting the first 45 weeks of post-determination compensation leave

The first 45 weeks of post-determination compensation leave are counted on a weekly basis. That is, one hour, one day, or a working week of post-determination compensation leave within a 7-day period is counted as one of the first 45 weeks of post-determination compensation leave.

The day after the determination that incapacity compensation is payable under section 19 or 22 of the SRC Act in respect of an injury, each 7-day period must be examined to assess if *compensation leave* occurred in that period. If yes, then one week is counted towards the first 45 weeks of post-determination compensation leave accrual permitted by section 116 of the SRC Act.

The first 45 weeks of post-determination compensation leave do not need to be consecutive, and the way each week is counted does not need to align with the first 45 weeks of incapacity compensation under section 19 (Division 3, Part II) of the SRC Act.

During the first 45 weeks of post-determination compensation leave sick leave and recreation leave entitlements continue to accrue as though the employee was not absent from work.

Example 4

Employee A's right knee symptoms are settling down and the employee returns to work with regular physiotherapy treatment to maximise recovery. This example builds on Example 1 copied out below.

Example 1

Employee A sustains a right knee injury in the course of their employment on 8 May 2020. The employee is incapacitated for work as a result of the injury from 9 May to 30 May 2020.

The relevant authority accepts liability for 'anterior cruciate ligament tear (right) knee' on 18 May 2020. The relevant authority then determines incapacity compensation is payable under section 19 of the SRC Act on 19 May 2020.

- > The pre-determination period starts on 8 May (the day when the employee is injured) and ends on 19 May 2020 (the day the claim for incapacity compensation is determined).
- > Compensation leave taken in the period 9 May to 19 May 2020 (before the end of the pre-determination period) does not count towards the first 45 weeks of leave accrual permitted by the SRC Act.
- > Compensation leave taken in the period 20 May to 30 May 2020 (after the end of the pre-determination period) does count towards the first 45 weeks of leave accrual permitted by the SRC Act.

Prior to the injury, the employee ordinarily works 5 days per week, Monday to Friday. From 31 May to 5 July 2020 the employee takes time off work each Thursday, from 3:00 to 4:30pm (1.5 hours), to attend physiotherapy treatment.

The relevant authority determines incapacity compensation is payable under section 19 of the SRC Act in relation to each period the employee is absent from their employment due to an incapacity for work.

- > The pre-determination period starts on 8 May and ends on 19 May 2020 (see Example 1 above).
- > Compensation leave taken in the period after the end of the pre-determination period (i.e. on and from 20 May 2020) counts towards the first 45 weeks of leave accrual permitted by the SRC Act.
- > 20 May 2020 falls on a Wednesday so the 7-day period (a week) is taken to be Wednesday to Tuesday.
- > The 5 days post-determination *compensation leave* taken in the 7-day period 20 May to 26 May 2020 counts as 1 week towards the 45 week period.
- > The 1 day plus 1.5 hours post-determination compensation leave taken in the 7-day period 27 May to 2 June 2020 counts as 1 week towards the 45 week period.
- > The 1.5 hours post-determination compensation leave taken in each of the 7-day periods 3 to 9 June, 10 to 16 June, 17 to 23 June, 24 June to 30 June and 1 July to 7 July count as 5 weeks towards the 45 week period.
- > Therefore, post-determination compensation leave in the period 20 May to 7 July 2020 counts as 7 weeks in total, leaving Employee A with 38 weeks left in which they can accrue sick leave (as paid personal leave under the NES) and recreation leave (as paid annual leave under the NES) entitlements.
- > Any *compensation leave* taken during the 45 week post-determination compensation leave period will be counted for the purpose of leave accrual as if the employee was not absent from work.

Accrual of leave while absent from work and undertaking a full-time or part-time rehabilitation program

If an employee:

- > is incapacitated for work⁵ as a result of an injury in respect of which compensation has been determined to be payable under section 19; and
- > subsequently undertakes a rehabilitation program that involves time off work (e.g., a graduated return to work or time off work to attend medical appointments) in relation to that injury and receives incapacity compensation under section 37(5);

the employee's absence from work undertaking the rehabilitation program is compensation leave and counts towards the 45 weeks of post-determination compensation leave.

Accrual of leave outside the first 45 weeks of post-determination compensation leave

Pre-determination period

The SRC Act does not expressly deal with the accrual of leave entitlements during the pre-determination period. Accrual of NES leave in this period is governed by the Fair Work Act and instruments made under that Act.

The pre-determination period⁶ commences from the start of the day the employee is injured until the end of the day the relevant authority determines the incapacity compensation claim in favour of the employee.⁷

After the first 45 weeks of post-determination compensation leave

Where an employee is on *compensation leave* after the first 45 weeks of post determination compensation leave, section 116 of the SRC Act permits the ongoing accrual of long service leave entitlements (i.e. as if the employee were not absent from work).

The SRC Act does not expressly deal with the accrual of sick leave and recreation leave entitlements after the first 45 weeks of post-determination compensation leave and accordingly does not permit such accrual. In the absence of the SRC Act permitting such accrual, section 130 of the Fair Work Act bars the accrual of any NES leave during a period when an employee is absent from work because of an injury for which the employee is receiving workers' compensation.

Under the Fair Work Act where an employee has returned to work on reduced hours, sick leave and recreation leave entitlements should accrue pro rata, based on the employee's actual hours of work.

Date of Effect

This guidance applies to all incapacity compensation that was or is payable to an employee (under section 19, 22 and 37(5) of the SRC Act) on and from 1 July 2006.⁸

Further Questions?

For more information, please contact Comcare's Scheme Policy and Design team on 1300 366 979 or email scheme.policy@comcare.gov.au.

⁵ Subsection 4(9) provides the incapacity for work definition.

⁶ Subsection 4(1) of the SRC Act provides the pre-determination period definition.

⁷ Scheme employers may grant leave during the pre-determination period and, in the case of Commonwealth employers, if the claim for incapacity compensation is subsequently accepted, section 23A of the SRC Act provides for the repayment of salary and the re-crediting of leave taken. Sections 112A and 112B also permit Comcare in certain circumstances to make incapacity compensation payments relating to the pre-determination period directly to certain Commonwealth employers.

⁸ Section 116 of the SRC Act was amended by the *Financial Framework Legislation Amendment Act 2006* with effect from 1 July 2006, as part of the measures to provide for salary recovery and access to leave during the period before a claim is successfully determined.