Holidays: The ghosts of Christmas presents yet to come

For so long now I have been asking Santa for a new Holidays Act

That wish has finally come true, but like every excitable kid who wants to open their presents as soon as they wake on Christmas morn, I am going to have to wait a just a little longer – in fact the exact date is 6 August 2028 when the new leave system comes into play.

While that may seem like an inordinate period of time to wait, the good news is that as employers we are going to have time to prepare; the changes will require significant updates to payroll systems, employment agreements, leave practices and education for both employer and employees.

In the meantime, and while not quite feeling like Ebenezer, it is timely to consider our current obligations over the Christmas period under the Holidays Act, but also, look to the future and celebrate the new Employment Leave Act and what that may bring.

What is an annual closedown?

A period where businesses can close down (either in whole or in part) for a set amount of time. A closedown period usually includes and runs through Christmas and New Year and is often for at least two weeks.

Can all employers closedown?

Absolutely, provided the annual close down has become a tradition (custom and practice) or it is provided for in your employment agreements.

What do I need to do in order to have a closedown?

You must give employees at least 14 days' notice. That notice should be in writing, and an email or letter will meet the requirements.

Can I operate more than one closedown?

Unfortunately, no, you can only have one closedown per year. You cannot close at Christmas and then again over, say, the Easter break. You can by agreement, with your employees, have another period where the business does not operate, but that will not be an official closedown.

Can an employee refuse to take their annual leave over a close down?

Some employees may feel aggrieved at being forced to take annual leave at times when they would prefer not to, but if it is provided for in an agreement, or is custom and practice, then an employer can direct an employee to take annual leave.

What do I pay an employee?

Stave three – Christmas present – Holidays Act 2003

Under the current Holidays Act, this is a question that employers grapple with.

The answer depends on the nature of the employment and whether the employee is permanent, part-time or casual, whether the employee has worked for more than 12 months and if there is sufficient annual leave available. It also depends on whether the public holidays that fall during the close down period would normally be working days for the employees. Each situation is different and there is no one size fits all approach.

If an employee does not have sufficient leave, then they must be paid 8% of their total gross earnings at the start of the closedown (less any leave taken remainder in advance). An employer and an employee must discuss and negotiate whether the closedown period will be taken as unpaid leave or as annual leave in advance. Good faith applies, but there is no obligation on an employer to grant leave in advance. In some cases, it may be a risk to do so if the employee reflects over the closedown and does not come back to work. The employer will have overpaid the employee and will be faced with the prospect of not being able to recover the overpayment or spend a disproportionate amount to recover.

For permanent employees who work a 5-day week, Monday to Friday, then with the way the holidays fall there is some Mondayisation of holidays this year.

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For part-time employee who work, for example, Thursday to Sunday then they will have an entitlement to Christmas Day, Boxing Day as well as New Year's Day and the 2nd of January as paid public holidays.

If the public holiday falls on a day that the employee would otherwise work, then they are entitled to be paid time and a half based on their relevant daily pay or the average daily pay for the hours worked and also receive an alternative day in lieu of taking the holiday.

If the public holiday falls on a day that the employee does not normally work, and they agree to work, then they are entitled to be paid time and a half, but they do not receive an alternative paid holiday.

If the public holiday is a day that the employee would otherwise work, but does not work on that day, then they are to be paid either their relevant daily or average daily pay depending on which calculation is used by the employer.

Working out whether a day is otherwise a working day has never been straight forward. As an employer you are meant to consider a number of factors including the agreement, work patterns, whether the employee works only when work is available, the rosters, the systems, the reasonable expectations of both parties that the employee would work, but for the day whether the employee would work.

Casual employees' entitlements are even more complex. To determine if an entitlement to a public holiday exists that will involve an analysis of the casual employee's pattern of work. If a casual employee regularly works a Wednesday, then they can reasonably expect to be paid for Christmas and New Year's Day. If the work is more sporadic then there may still be an opportunity to receive payment for a public holiday if the employee's pattern of work establishes that they regularly work, one of those days. For example, if a casual employee worked some Thursdays leading up to Christmas, then that may well be sufficient. A case from the Authority determined (wrongly, in our view) that working just one weekday day that the public holiday fell on in the past 6 months entitled the employee to a paid public holiday. Other factors need to be considered to determine a casual employee's entitlements so it always best to seek advice.

My employee has resigned and their last day is Christmas Eve, 24 December? Do I still have to pay them for the Christmas and New Year public holidays?

That depends on whether or not the employee has untaken annual leave. If the employee's annual leave entitlement, when added to their last day of employment, takes them through Christmas Day, Boxing Day and into the New Year then the employee must also be paid for the public holidays.

An employee wants to cash-up some of their annual leave so they can enjoy themselves over the holiday period. What are the obligations?

An employee can only request that one week of their statutory annual leave entitlement to be 'cashed-up. If an employer pays out more than one week's statutory annual leave then the employee's entitlement remains, which means the employee will receives more 'annual leave' than they are entitled to. For example, if an employee has four weeks' annual leave, then they are only entitled to cash-up one of those weeks. If the employer allows them to cash-up two weeks then they will still have three weeks annual leave remaining but would have also received the equivalent payment for two weeks, giving them a total 'entitlement' to five weeks.

Employment Leave Act – Stave four

So, is it going to be easier to determine entitlements and pay employees over the holiday period under the new law – absolutely it is!

Let's open that present a little more.

Under the new regime, annual and sick leave will accrue continuously in hours from an employee's first day of employment. Annual leave will accrue at a minimum rate of 0.0769 hours for every standard hour, while sick leave will accrue at a minimum rate of 0.0385 hours for every standard hour.

For employees, this means leave will build up and be "banked" progressively as they work rather than becoming available as a lump sum after six or 12 months.

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The new system introduces three categories of working hours: standard, additional and casual hours.

The distinction is important because it affects whether leave accrues or a Leave Compensation Payment is made instead.

Broadly, standard hours are the hours an employee is required to work under their employment agreement and which the employer must pay them for. Standard hours must be specified in an employee's employment agreement, work roster or, where required, a notional roster.

Where an employee has standard hours, but it is not possible to determine their number or pattern of hours, the employer and employee will need to agree a written "notional roster". This will be used to determine the employee's annual; sick, bereavement and family violence leave entitlements and must be kept up to date to reflect the employee's actual working arrangements.

The new Act also introduces Leave Compensation Payments (LCPs).

An LCP will generally apply to casual hours, and qualifying additional hours worked beyond an employee's standard hours.

Rather than accruing annual and sick leave on those hours, the employee will receive an additional payment of at least 12.5% of their ordinary hourly rate.

There are significant changes to public holiday entitlements too. If it is not clear from an employee's employment agreement or work pattern whether a public holiday falls on an otherwise working day, the new Act introduces a simple 13-week test. The day will be an otherwise working day if the employee has worked on at least 50% of the corresponding days during that previous 13-week period. That is so much easier to determine than trying to work your way through the current factors and consider your good faith obligations.

Alternative holidays will move to an hours-based approach.

Instead of an employee receiving a whole alternative day for working any part of a public holiday, alternative leave will accrue at a rate of one hour for each hour worked on the public holiday where it is an otherwise working day. So, if you have staff working a 4-hour shift on Boxing Day, they will no longer receive an entitlement o an alternative day of 8 hours (if that is their normal shift). Operationally and financially, that is significant.

The alternative day can be cashed up immediately rather than having to wait 12 months.

If an employee resigns just before Christmas, they will no longer be entitled to have their leave added to the end of their employment and receive additional payments for the 4 public holidays.

There will no longer be a need to pay an employee 8% of their gross earnings over the closedown period and adjust their anniversary date. The employee will receive their annual leave or unpaid leave or a combination of both over a closedown.

Cashing up leave is much more straightforward. An employee can cash up a maximum of 25% of their leave balance once a calendar year.

What should employers be doing?

Although the new employment leave regime will not apply until August 2028, there is a significant amount for employers to work through before then. In the early new year, we will have a new government formed, certainty, and the ability to start planning.
Payroll systems will need to accommodate hours-based leave accruals and Leave Compensation Payments.

Employers should also review their employment agreements and actual working arrangements to ensure employees' standard hours are accurately recorded and identify employees who may require a notional roster.

There are also new record-keeping requirements. Employers will be required to provide a pay statement for every pay period which, among other things, records the employee's pay and leave entitlements.

By 6 August 2028, employers will need to have converted existing leave balances.

The move from weeks and days to an hours-based system is a fundamental change to the way employee leave is managed.

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While August 2028 may seem some way off, employers who begin reviewing their agreements, working arrangements and payroll systems early will be best placed for a smooth transition.

Want to know more?

If you have any questions about current entitlements and obligations over the Christmas period or about the new system, please contact Malcolm Couling or anyone the Employment Team at Anderson Lloyd.

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