

## Holidays and annual close downs – in a year of uncertainty

**With the countdown to Christmas holidays well and truly underway and with so many employers wondering whether they will have sufficient staff available to work over the summer period it is timely to provide employers with certainty around their legal obligations to ensure their existing employees are paid correctly when rostered over the holiday period.**

### What is an annual closedown?

A closedown is a period where businesses can close down (either in whole or in part) for a set period. The closedown period usually includes the Christmas and New Year period and will usually be for at least two weeks.

### Can all employers closedown?

Yes, provided the annual close down has become a tradition (custom and practice) or it is provided for in an employment agreement.

### What do I need to do in order to closedown?

You must give employees at least 14 days' notice. That notice should be in writing, to avoid later arguments. An email or letter is fine.

### Can I operate more than one closedown?

No, you can only have one closedown per year. You cannot close at Christmas and then again over the Easter break. You can by agreement, with your employees, have another period where the business does not operate, but it 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 by giving 14 days' notice in writing.

### What do I pay an employee?

This is often a question that employers grapple with the most. 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.

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## Holidays and annual close downs – in a year of uncertainty (Continued)

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.

This year Christmas Day and New Year's day fall on a Sunday with Boxing Day and 2 January fall on the Monday. In this situation Christmas Day and New Year's day are Tuesdayised and transferred to the next available weekday, Tuesday, while Boxing Day and 2 January remain observed on the day they fall, Monday.

For part-time employee who work, for example, Wednesday to Saturday then this year they will have no entitlements to a paid public holiday. That is because they do not normally work on the calendar date of the holiday and Tuesdayisation of Christmas Day means the public holiday falls on a day that is normally a day off for them.

If the public holiday falls on a day that the employee would otherwise work, and they are required to 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 that they work, 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 based on their relevant daily pay or average daily pay, 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.

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 Sunday 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 identifies that they regularly work one of those days. For example, if a casual employee worked 4 out of the past 6 Sundays leading up to Christmas then that gives a strong indication that Christmas Day can be treated as a public holiday for that employee.

Other factors need to be taken into account to determine what is an "otherwise working day" for employees so it always best to seek advice.

### **What happens if the employee is sick or suffers a bereavement during the closedown?**

If the day on which the employee is sick, or suffers a bereavement, is a day that the employee would otherwise have been working (but for the annual closedown) then they are entitled to be paid sick or bereavement leave rather than using up their annual leave.

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## Holidays and annual close downs – in a year of uncertainty (Continued)

This is contrasted with the situation where an employee is on annual leave outside a closedown period and becomes sick. In those circumstances, there is no mandatory obligation on the employer to allow the employee sick leave, although a fair and reasonable employer acting in good faith might grant sick leave subject to satisfactory evidence being provided.

### **Can an employer grant some employees annual leave over the Christmas / New Year period, but not others?**

Yes, an employer is not required to grant time off to every employee who wants annual leave. Employers need to be able to resource and operate their business as they see fit.

### **Can an employer go back on their decision to grant annual leave?**

Sometimes employers have a change of heart, which happens when they realise that they have insufficient cover over a busy period or an unexpected event occurs. Once annual leave is approved, it cannot be unilaterally withdrawn. Employees may have made plans for their annual leave. If an employer wants to withdraw leave then they can only do so in good faith and after having discussed and agreed with the employee. An employee is entitled to decline and an employer may need to incentivise an employee to delay their leave. For that, reason employers should be very careful about making sure they have sufficient cover over any busy period.

Similarly, an employee who has been granted annual leave does not have the automatic right to cancel their approved annual leave. Employers will often have

brought in extra staff to cover an employee's planned absence so the cancellation of leave requires communication and agreement.

### **Can I make my employees work overtime?**

If you have guaranteed hours included in an employee's employment agreement then only salaried employees can be required to work outside those hours.

For waged employees any additional overtime must be agreed, unless the employment agreement contains an availability provision and compensation to the employee for making themselves available to work outside their guaranteed hours.

In the absence of an availability provision, then an employee's free to agree or decline any requests to carry out overtime.

### **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 four public holidays.

### **An employee wants to cash-up some of their annual leave so they can really 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'.

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## Holidays and annual close downs – in a year of uncertainty (Continued)

If an employer pays out more than one week's statutory annual leave then the employee's entitlement remains, which means the employee will receive 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.

For employees who receive more than 4 weeks annual leave an employee and an employer may agree arrangements to cash up the additional 5th week. This would need to be at the employee's request and documented. An employer might do this if the employee had a large outstanding leave liability. The preferred course of action would of course be to agree with the employee that they take an extended period of annual leave over the holidays rather than cashing up too much of the leave entitlement.

### Want to know more?

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