

Holidays and annual closedowns

What you need to know

We are not far off being able to put what can only be described as a "challenging" year behind us and look forward to some family time over a well-deserved 'summer break'. Many employers are taking the opportunity to have a longer closedown than would normally be the case.

There are a number of reasons for this including, not least, giving employees greater opportunity for rest and recovery, as well as reducing outstanding annual leave liabilities.

While we may be taking slightly longer domestic holidays this summer, the obligations around leave and annual leave closedowns have been clarified this year by the Employment Court.

Legal issues employers need to be familiar with

What is an annual closedown?

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

Can all employers closedown?

Aside from having the legal right to do so, you must give employees at least 14 days' notice. That notice should be in writing, as it will avoid a situation we have seen this year when one employee was dismissed for turning up one week late.

Can I operate more than one closedown?

No, you can only have one closedown in any one year. Therefore, 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 Holidays Act closedown'.

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

Some employees 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 is an employee entitled to be paid during a closedown?

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 whether there is sufficient annual leave available. It also depends on whether the public holidays that fall during the closedown period would normally be working days for the employee. 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 at the start of the closedown (less any amount taken as leave in advance). An employer and an employee can then 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

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What you need to know (Continued)

the overpayment or spend a disproportionate amount to recover it.

For permanent employees who work a 5-day week, Monday to Friday, then Christmas Day and New Year's Day will be observed on those days. Boxing Day and 2 January will Mondayise.

For part-time employee who works, for example, Tuesday to Friday then they will only have an entitlement to Christmas Day and New Year's Day as paid public holidays.

Casual employees' entitlements are even more complex. To determine if an entitlement to a public holiday exists will involve an analysis of the casual employee's pattern of work. If a casual employee regularly works a Friday then they can reasonably expect to be paid for Christmas Day 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 4 out of the past 6 Fridays leading up to Christmas then that may well be sufficient. Other factors need to be taken into account to determine a casual employee's entitlements 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.

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 coverage 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 period of 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 staff to cover any busy period

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?

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An employee can only request that one week of their statutory annual leave entitlement is 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 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?

If you have any questions about holidays and annual closedowns, please contact our specialist [employment](#) team.