



## SHUTTING DOWN OVER CHRISTMAS AND NEW YEAR?

The holiday season is fast approaching with only 8 more Fridays until Christmas.

If your business or your clients' businesses are planning on a Christmas shutdown, now is the time to start preparing, especially when it comes to Christmas shutdown rules and directing staff to take leave.

### ***A shut down is not the same as a stand down.***

A stand down is when an employer directs its employees not to attend for work during a period in which an employee cannot usefully be employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible: section 524(1)(c) of the Fair Work Act 2009 (Cth). It goes without saying that the COVID-19 pandemic was (and continues to be for some) exactly the kind of event allowing businesses to stand down many or all of its employees without pay, under section 524 of the Act.

A shut down is when a business temporarily closes during traditionally slow business periods of the year, for example Christmas and New Year.

### ***Directing an employee to take annual leave***

An employer can direct an employee to take annual leave during a shut down if an applicable modern award or registered agreement allows it.

Most modern awards detail rules and directions about how and when an employer can direct an employee to take leave; for example, an employer may need to give an employee a prescribed amount of notice when directing the employee to take annual leave.

In circumstances where an employee is not covered by a modern award or a registered agreement, an employer can direct its employees to take annual leave if the direction is reasonable.

The Fair Work Commission has considered the following factors relevant in assessing the reasonableness of a direction by an employer that an employee takes annual leave:

- the needs of the business;
- the needs of the employee;
- any prior agreed arrangement/s between employer and employee;
- the time of notice given to the employee; and
- the business' past practices.

***What if an employee doesn't have enough annual leave?***

In circumstances where a modern award or agreement provides for it, an employer can direct an employee to take annual leave in advance of accrual, or unpaid leave, for some or all of the shut down.

***What if a modern award or agreement does not detail rules about shut downs?***

The situation for employees covered by a modern award or an enterprise agreement is not the same for award-free employees.

An employer cannot direct an employee to take leave unless an applicable modern award or enterprise agreement provides an ability for the employer to do; however, an employer and employee can agree that an employee will take annual leave (including in advance of accrual) or unpaid leave for some or all of the shut down time.

An employee cannot be forced to take unpaid leave; so, if an agreement cannot be reached between the employer and the employee, the employee will need to be paid their ordinary pay for the period of the shut down.



## ***What happens if a public holiday falls during an employee's annual leave?***

If a public holiday falls during an employee's period of annual leave, the employee must be paid for the public holiday. This means that an employer must pay its employees their applicable rate of pay for the public holiday. Accrued annual leave entitlements should not be deducted for any public holiday that falls during a shut down.

## ***Working during a shut down***

In circumstances where an employee continues to work during a shut down, the employee is entitled to receive his or her ordinary remuneration. If any of the days during the shut down are public holidays, these days are treated as public holidays. This means an employee should be given the day off without loss of pay or he or she should be paid public holiday rates (in circumstances where the employee is not remunerated by reference to an annualised salary or an aggregated hourly wage) as per the applicable award or enterprise agreement.

It is critical that businesses comply with any applicable directions in any modern award or enterprise agreement and engage in a consultation process with non-award covered employees. We would strongly encourage all businesses to check the applicable modern awards and or enterpriser agreements regarding directing employees to take annual leave. Consideration should also be given to the applicable public holidays during the Christmas New Year period and applicable rates of pay.

Christmas can be a stressful time; alleviate the stress and call Kate Walawski, Partner - Employment & Workplace Relations if you have any queries or concerns regarding closing your business over the Christmas New Year period.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

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