

## Holidays – all I want for Christmas is a new Act!

**Changes to the Holidays Act have been long overdue given how unworkable the existing legislation is. Targeted consultation on a draft bill began in September, but exactly where that has landed is anyone's guess**

What we currently know is that the requirement to pay annual leave in advance during closedown periods is likely to be removed, but there will be greater transparency around how employees are notified about any closedown periods and they will have access to their accrued annual leave on a pro-rata basis in advance of their entitlement.

That said, with the countdown to the Christmas period on we are still left wondering when and if there will be some new law any time soon. While we remain optimistic that any new legislation will reflect the modern working environment, it is important for employers to understand what their existing obligations are over the festive period.

In this article some of the more commonly asked questions are answered.

### What is 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?

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

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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 no Mondayisation of holidays this year

For part-time employees who work, for example, Wednesday to Saturday then they will have an entitlement to Christmas Day, Boxing Day as well as New Year's Day and the 2<sup>nd</sup> 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.

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 Wednesdays leading up to Christmas then that may well be sufficient. Other factors need to be considered 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 contrasts 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.

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### Can I make my employees work overtime?

If you have set 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.

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 5<sup>th</sup> 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.

### 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.

### Want to know more?

If this article raises any questions or concerns, please get in touch with one of our [Employment Team](#).

### 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 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