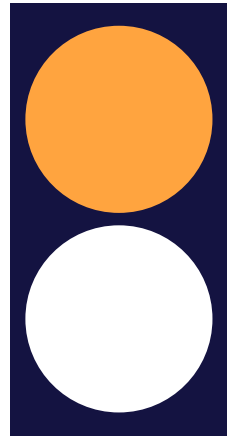


# EMPLOYMENT LAW

## ARTICLE: TEMPORARY SHUTDOWN RULES AND LEAVE ENTITLEMENTS

NOVEMBER 2023



### Introduction

When business clients start to prepare for upcoming holiday periods, especially the period over Christmas and New Year, some will be contemplating a temporary shutdown of their operations. Here at Ezra Legal, for example, we plan for an annual shutdown of two weeks, typically from Christmas Eve through to the second week in January.

In a significant development impacting workplaces across Australia, the Fair Work Commission (FWC) has introduced changes to the temporary/annual shutdown clauses in Modern Awards, effective from 1 May 2023.



*Planning for a Temporary Shutdown*

### 1.Changes to temporary shutdown rules

A new "model clause" has been inserted into 78 Modern Awards. This model clause allows employers to direct affected employees to take paid annual leave during a temporary shutdown and provides that employers must pay employees during the shutdown period if they do not have enough accrued annual leave to cover it.

Employers must provide at least 28 days' written notice of the shutdown, although longer notice periods may apply in some awards. Where a new employee commences after the 28 days' notice has been provided, the new employee must be advised of the shutdown as soon as reasonably practicable.

The key change to the Awards is the removal of the ability for employers to direct employees to take unpaid leave during a temporary shutdown where they do not have enough annual leave to cover the shutdown period.

Now, when an employee does not have the required annual leave for a shutdown the available options are:

- Take annual leave in advance, by agreement;
- Take leave without pay, by agreement;
- Take any accrued time off or rostered days.

If an agreement cannot be reached with the employee on annual leave in advance or leave without pay, the employer must pay the employee for the shutdown period.

## **2. Employment Contracts**

Within your employment contracts if you have the following noted: 'If an employee doesn't have enough annual leave for the duration of a shutdown period, the employee agrees to take leave without pay.'

This may be considered agreement for the employee to take leave without pay. ***But this is untested in the courts at this time.***

## ***3. Managing requests for annual leave throughout the year***

Employers cannot unreasonably refuse a request from an employee to take a period of annual leave. However, there may be requests for annual leave that would result in the employee not having enough annual leave remaining to cover a shutdown period.

If the employer has set the expectation from the commencement of employment that there is a shutdown and the employee will be required to use their annual leave for this i.e. a clause in employment contract, workplace policy or employee handbook, then it would be reasonable for an employer to refuse a request for annual leave during the year that will result in an employee not having sufficient leave to cover a shutdown.

Another option would be to negotiate an agreement from the employee to take leave without pay during the shutdown period if annual leave is approved during the year.

***Any agreement should be documented in writing.***

## ***4. Length of shutdown periods***

Employers may need to look at the length of a shutdown period to ensure the shutdown period is reasonable. A three-week shutdown doesn't leave much time for annual leave throughout the rest of the year, and it may be considered to be unreasonable to require employees to use annual leave for this length of time.

## ***5. Next steps for employers***

Employers are encouraged to:

- Review the shutdown clauses in the Modern Awards that apply to their employees;
- Add a shutdown clause to employment contracts specifying the employee agrees to take leave without pay where required;
- Monitor employees annual leave accruals;
- Provide proper written notice of shutdowns;
- Establish written agreements for employees taking leave in advance or leave without pay.

***At Ezra Legal, our team of commercial lawyers know that clear and accurate legal advice on HR and employment issues is critical to your commercial success. We provide commercially relevant legal and strategic advice on complex employment decisions, striking the right balance between legal considerations and commercial reality.***

# **Contact Information**

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