



## Can you be directed to take annual leave during a temporary shut down?

**Date: Monday May 10, 2021**

The notion of forced annual leave is not uncommon in Australia with many employees often requested (even required) to take annual leave during a temporary shut down of their employer's operations. This is especially common during traditional holidays, including Christmas/New Year and Easter. This triggers an important question: can an employer lawfully force you to take annual leave during a temporary shutdown?

Although many employees may be happy to take leave during festive holiday periods and school holidays, a large number of employees might prefer to work during such times. Those employees may be unhappy to be forced to take their annual leave at a time that they do not want to. They might argue that they should be allowed to decide when to use an entitlement they have worked to earn.

### Employees covered by a modern award

A majority of employees in Australia are covered by a modern award. Modern awards provide employees with minimum entitlements in addition to the entitlements provided by the *Fair Work Act*, the [National Employment Standards](#) and the minimum wage.

Most modern awards permit employers to direct their employees to take a period of annual leave during a shut down. Many modern awards include a standard term in relation to this.

The standard term often requires four weeks' notice. An example is that found at clause 32.5 of the *Clerks Award* which states that:

*“An employer may require an employee to take annual leave as part of a close-down of its operations, by giving at least 4 weeks’ notice.”*

Notably, though, not all modern awards impose the same conditions on the employer in relation to a direction to take annual leave. For example, while the standard term obliges the employer to provide 4 weeks' notice, some awards require a longer period of notice.

The *Plumbing and Fire Sprinklers Award*, for instance, states that 2 months' notice must be provided for any direction to take leave during the Christmas and New Year period if certain circumstances arise.

Similarly, the *Educational Services (Post-Secondary Education) Award 2020* requires the employer to provide the employee with notice as soon as practicable after the employer has decided that it intends to close-down. This might be far more than four weeks if the employer makes its decision a significant amount of time before the close-down occurs.

Every award is different and relates specifically to the industry and jobs it covers. Notably, all require a close-down of the employer's operations – that is, business stops for the length of the leave period.

You can find a list of awards and an option to "find my award" on the [Fair Work website here](#). You can also seek assistance from your union, about your award coverage and conditions.

## Employees who are not covered by an award/agreement

Although most Australian employees are covered by a modern award, some are not. This includes employees who are in particularly senior positions and other employees in a range of other award-free occupations.

For employees who are not covered by a modern award, section 94(5) of the *Fair Work Act* applies. Section 94(5) of the *Fair Work Act* provides that:

*An employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable.*

*Note: A requirement to take paid annual leave may be reasonable if, for example:*

*(a) the employee has accrued an excessive amount of paid annual leave; or*

*(b) the employer's enterprise is being shut down for a period (for example, between Christmas and New Year).*

The legislative note to section 94(5) provides that a direction to take annual leave between Christmas and New Year may be "reasonable".

If you think your enforced taking of annual leave is "unreasonable", contact us for advice: [1800 659 114](tel:1800659114)

Whether a direction to take annual leave in excess of the days between Christmas and New Year is “reasonable” will ultimately depend on the facts in the particular case. We would encourage employees in such a situation to [seek legal advice](#).

In addition to any applicable modern award and the *Fair Work Act*, your employment contract or an enterprise agreement may also include clauses dealing with your employer’s right to direct you to take annual leave if you have a certain amount accrued, for example, 8 weeks.

## Conclusion

If your employment is covered by a modern award, it is likely that your employer has the right to direct you to take annual leave as part of a shutdown of its operations. If your employment is award-free, an employer can still require you to take annual leave if that requirement is “reasonable”.

We can provide you with a broad range of advice in relation to these issues, including in relation to:

- whether a modern award covers your employment and, if it does, whether it provides your employer with a right to direct you to take annual leave;
- what entitlements you have under a modern award in relation to such a direction from your employer, such as the period of notice you are entitled to;
- whether a direction to take annual leave under section 94(5) of the *Fair Work Act* is “reasonable”; and
- the enforceability of any clause in your contract of employment relating to your employer’s right to direct you to take annual leave.

## Get help from an employment lawyer

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

Phone: [1800 659 114](tel:1800659114)

Email: [general@hallpayne.com.au](mailto:general@hallpayne.com.au)

For further information about your rights in relation to annual leave, visit our article [“All you ever wanted to know about your annual leave entitlements.”](#)

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