TAKE IT OR LEAVE IT

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Labour, Employment and Workplace Safety Alert

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Annual leave for many employees is not annual – they bank it, they don't have a rest from work and the leave liability of the employer grows. Other employees can't get enough and want to cut into future entitlements. Employers usually want their staff to take their leave, preferably not at times inconvenient to the business, and especially during a close down period. The Fair Work Commission has tried to address this issue for award covered employees recently, but the result is imperfect for employers.

From August 2016, the Fair Work Commission's annual leave determinations take effect and provide greater flexibility in managing annual leave, but still tinged with some complications for employers.

GREATER FLEXIBILITY FOR EMPLOYERS AND EMPLOYEES

For employees covered by the majority of modern awards, employers are now able to:

- direct employees to take annual leave if they have accrued an excessive amount
- grant their employees annual leave in advance
- allow their employees to cash out up to two weeks' annual leave per year, as long as their remaining leave does not dip below four weeks.

Until now, employers were unable to do this in relation to the majority of award-covered employees. These changes will now put award-covered employees in a similar, but not the same, position as award/enterprise agreement free employees under the *Fair Work Act 2009*.

Example notices and agreements regarding the new annual leave provisions are now attached to the modern awards.

The provisions will be the same in many awards, but there are some key differences in some industries, so it is important that you carefully review the award that applies to your employees.

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NEW CLAUSES BREAK DEADLOCK ON ANNUAL LEAVE DISAGREEMENTS

The default clause encourages employers and employees to agree to reduce excessive annual leave. If agreement can't be reached, the default clause allows employers to direct an employee to take at least a week's annual leave if all the following conditions are met:

- they have accrued over eight weeks' leave (or 10 weeks for a shift worker)
- the parties have attempted to agree on how to reduce the excess leave
- the direction will not result in the employee's remaining leave dipping below six weeks
- there is at least eight weeks' notice of the leave
- the leave is to be taken within 12 months.

However, the default clause operates both ways. Employees are also able to use this clause to break a deadlock if the employee and employer can't agree on how to reduce the excess leave. By giving the same amount of notice, employees can demand that they take leave, regardless of the consent of the employer or the inconvenience to the business. This highlights the importance of managing leave entitlements before they accrue to eight weeks, otherwise you may find that your employee is entitled to take leave at the worst possible time.

WHAT IF I WANT TO CLOSE OVER THE HOLIDAYS?

The issue of an annual office shutdown period is not covered in the recent annual leave decision. Instead, this is being considered on an award-by-award basis.

While it may be common practice, there is no ability to make your award-covered employees take time off over a shutdown period unless the award specifically permits it. If annual shutdowns are an important part of your organisation, you may want to review any applicable awards to confirm whether you have the ability to direct employees to take their annual leave during that time. If not, there is nothing to prevent employers from encouraging employees to take time off at this time.

Your award may also be one of those where submissions have been made to vary the award to introduce an annual shutdown.

If you are unsure about which new annual leave terms will apply to your employees, or have any questions about changes to modern awards, please feel free to contact us for assistance.

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