

Fair Work Commission hands down contentious annual leave shutdown Decision – Implications that members should be aware of

On 22 December 2022, a Full Bench of the Fair Work Commission (FWC) handed down a contentious majority [Decision](#) on annual leave shut down provisions, as part of its 4 yearly review of modern awards. As a result of the FWC Decision, the annual leave shutdown provisions in 78 modern awards will be amended, including the *Vehicle Repair, Services and Retail Award 2020* (Vehicle Award).

Limited success in opposing the changes

Members may recall that VACC lodged a [submission](#) in relation to the matter following receipt of member feedback provided through a survey conducted in November 2022. VACC's submission opposed the provisional view of the Full Bench majority that it should delete provisions contained in the Vehicle Award (and other modern awards) that provide that employees with insufficient accrued paid annual leave to cover the entire close down period are on leave without pay for the remaining balance of the close down.

VACC also submitted that if the FWC Full Bench determined to proceed with the proposed change without amendment, the effective date of such a decision be deferred until after the common Christmas - New Year 2022/2023 close down period to give employers and employees sufficient time to understand the impact of the changes, and to take steps to minimise the adverse impact that may otherwise occur.

Whilst the FWC Full Bench majority ultimately decided to amend the current provisions under the Vehicle Award (and other modern awards) broadly in line with its earlier provisional view, key matters raised on behalf of members in VACC's submission were nevertheless reflected in the following improvements:

- a delay in the effective date of the changes to the Vehicle Award (and other modern awards) **until 1 May 2023**.
- an amendment to the originally proposed model shutdown clause to provide clarity that where an employee has exhausted their paid annual leave entitlement, the remainder of the shutdown period may be taken as **leave without pay**. However, such leave must be **agreed in writing**.
- the rejection of an alternative provision proposed by some other parties, that would have provided an ability to direct employees to take paid annual leave in advance. The FWC rejected the proposal for reasons including VACC's concern that there is no mechanism enabling employers to recover monies where an employee subsequently leaves employment with a negative annual leave balance.

Action Steps for Employers:

From commencement of the changes on 1 May 2023, the biggest practical change for employers under the Vehicle Award will be that an employee who does not have sufficient paid annual leave to cover the entire period of the shutdown period, will no longer automatically be deemed to be on leave without pay.

In preparation of this change, members are therefore encouraged to:

- ensure that employees **have/will have accrued sufficient paid annual leave to cover the entirety of a planned shutdown period** – and take this into consideration when deciding whether to approve employee annual leave requests for other times of the year; or
- ensure an employee has **agreed, in writing, to take leave without pay for the balance** of the shutdown period that they have not accrued sufficient paid annual leave. Such written agreement may be recorded, for example, through an exchange of emails or text messages.

Accordingly, if an employee wished to take a period of paid annual leave during the year that would result in the employee having insufficient paid annual leave to cover a planned shutdown period (e.g. Christmas – New Year Closedown) – the employer could reasonably refuse to approve the request; or alternatively, make approval of the employee's annual leave request conditional upon the employee agreeing, in writing, to take leave without pay for the balance of the shutdown period.

- consider updating their employment contracts to provide clarity for new employees that it is a condition of their employment that they agree to take a period of leave without pay in the event that they have insufficient paid annual leave accrued to cover the entirety of a shutdown period.

Members seeking further information and assistance, including in regard to drafting of employment contracts, are encouraged to contact the Workplace Relations team on 03 9829 1123 or ir@vacc.com.au

Daniel Hodges
Executive Manager – Workplace Relations
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