

Annual Leave

This document has been created to provide Clubs with a summary of Annual Leave entitlements and rules primarily under the *Registered and Licensed Clubs Award 2020 (The Clubs Award)*. Please note that this is not an exhaustive list of everything that may apply to annual leave.

Accrual

A permanent employee (part-time and full-time employees) accrues the equivalent of 4 weeks of leave each year (or 5 weeks if they are defined as a shiftworker) and this leave accrues progressively throughout the year based on their ordinary hours of work.

For those who receive the standard 4 weeks of leave each year, annual leave would accrue at the rate of 0.076923 hours per hour worked. Annual leave accrues on ordinary hours only and not on any overtime hours worked and rolls over year to year.

A part-time employee will accrue leave on a proportional basis e.g. if they always work 19 hours a week and are not a shiftworker then they will be entitled to the equivalent of 76 hours of annual leave each year (19 x 4).

Essentially, a part-time employee is still entitled to 4 weeks of leave a year (or 5 if they are classed as a shiftworker) but a week will be based on their part-time ordinary hours.

As well as accruing on ordinary hours when an employee is working, annual leave will continue to accrue in the following circumstances:

- When an employee is on paid leave such as annual leave, paid sick/carer's leave & paid family & domestic violence leave
- when an employee is on long service leave
- when on community service leave and jury duty
- when an employee is on a stand down.

Annual leave will not accrue in the following circumstances:

- While an employee is on unpaid leave e.g. general unpaid leave and unpaid sick leave etc
- If an employee is on unpaid leave but is paid under the Paid Parental Leave Scheme
- For a period of annual leave an employee has cashed out (cashing out of annual leave is discussed later).

Payment

When an employee is on annual leave they will be entitled to be paid at their base rate of pay for the hours taken and base rate of pay will not include:

- overtime rates;
- penalty rates;
- allowances; or
- bonuses.

Base rate of pay however will include someone's above award hourly rate/salary rate.

When employment ends, an employee has to be paid any outstanding leave in the same manner as if they had taken the leave e.g. if they are entitled to annual leave loading then they need to be paid this on termination as well. An employer does not have to pay super on any unused leave payable on termination however.

Annual Leave Loading

An employee who is covered by a modern award such as the Clubs Award will be entitled to annual leave loading which is a 17.5% loading on top of the ordinary pay an employee would receive.

Where an employee is not covered by an award, there is no entitlement to leave loading.

It is possible to offset annual leave loading, where an employee is paid above award or paid a salary but in order to legally do so, there would need to be an offset clause present in the employee's contract and/or an individual flexibility agreement or other suitable agreement signed detailing this. An employer would also have to ensure they are paying sufficiently above award to offset the entitlement.

Generally, superannuation has to be paid on the annual leave loading component, unless an employer can show clear evidence that the loading is paid due to a lost opportunity to work overtime. No such wording indicating this exists in the Clubs Award and so those paid annual leave loading under the Clubs Award should receive super on this.

Shiftworkers - Entitlement to an Extra Week of Leave

An employee who is defined as a shiftworker is entitled to an additional week of annual leave in comparison to other employees, that being 5 weeks of paid annual leave a year.

If an award or registered agreement applies to an employee, and defines or describes them as a shiftworker for the purposes of the NES then they will be entitled to this additional week of leave.

The Clubs Award defines a shiftworker as a seven day shiftworker who is regularly rostered on to work Sundays and Public Holidays, and includes a club manager.

Firstly, when looking at what is meant by the term "seven day shiftworker" the case of *Bega Dairy and Drinks Pty Ltd formerly known as National Foods (Dairy Foods) Limited v United Workers' Union [2024] FWC*

171 clarified this. It was held that a seven day shiftworker did not need to be engaged on a 24/7 continuous roster but they did need to work on each of the seven days of the week. Whether full time or part time an employee will need to regularly work shifts that rotate across all seven days of the week during the relevant period. Someone on a fixed roster, that is the same days and times each week, would not be a seven day shiftworker.

To be entitled to the extra weeks leave though as well as being a seven day shiftworker an employee will also have to be regularly rostered on to work Sundays and Public Holidays. In terms of what is meant by regularly rostered on to work Sundays and Public Holidays, the case of *O'Neill v Roy Hill Holdings Pty Ltd [2015] FWC 2461* specified that an employee would have to work a minimum of 34 Sundays and 6 Public Holidays in a year.

If an employee is award free then they must be employed in an enterprise where shifts are continuously rostered 24 hours a day, 7 days a week, and they are regularly rostered to work Sundays and Public Holidays.

In regard to a shiftworker under the Clubs Award though, it is very important to be aware of the fact this also states at the end of the clause, "...and includes a club manager". The prevailing opinion on what this means is that all club managers under the Clubs Award will be entitled to 5 weeks annual leave. Accordingly, clubs should provide any permanent manager under the Clubs Award or an instrument with a similar clause with an additional weeks annual leave and if they do not do so then if challenged it is likely they will be held to be a shiftworker given the wording of this clause.

Taking of Leave

An employee can seek to use annual leave as soon as it is accumulated and an employee does not have to wait a period of time before being able to request to use it.

There is no maximum or minimum period of annual leave that can be taken and it is up to an employee and employer to agree on when leave is to be taken and the length of leave that can be taken.

An employer is able to refuse a request for annual leave, but can't do so unreasonably, needing a legitimate business reason for doing so. Some examples of what may constitute a valid reason include:

- Lack of sufficient notice being given by an employee;
- They have requested it during a particularly busy period of the year;
- There is no one to cover their absence e.g. others are already on leave during the period they requested.

It will ultimately come down to the specific circumstances in place at the time of the request though.

When an employee is on a period of annual leave, they will not be taken to be on annual leave in the following scenarios:

- on a day or part-day that is a public holiday that falls during the period of leave;
- for the time they are on any other period of leave (other than unpaid parental leave); and
- during a period of absence due to community service leave.

Accordingly in the situations above an employee's annual leave balance can't be reduced. For example if an employee is on annual leave and they get sick they can request to use paid sick leave entitlements (should they have some accrued) instead of their annual leave for the period they are unwell.

Cashing Out

Clubs need to be aware of strict rules regulating the cashing out of leave, particularly under the Clubs Award.

Where there is agreement between an employer and employee an employee is able to cash out annual leave provided that there is a clear agreement in writing signed by both parties. If the employee is under 18 then it must also be signed by their parent or guardian.

The agreement needs to set out the amount of leave being paid out and the payment to be made and the date this payment will be made. In addition, clause 25.9 of the Clubs Award states any cash out:

- Must not result in the employee being left with less than 4 weeks accrual;
- The payment amount can't be less than the amount they would have received had they physically taken the leave (e.g. if they get leave loading then this has to be included in any cash out); and
- The maximum amount of accrued annual leave that can be cashed out in a 12 month period is 2 weeks.

Those employees covered by another award registered agreement such as an Enterprise Bargaining Agreement will need to check what rules on cashing out of annual leave it contains.

If an employee is not covered by an award or other agreement then they can also cash out leave where agreed upon in a written agreement, but they also can't be left with less than 4 weeks accrual (although the 2 week max in the Clubs Award does not apply).

Excessive Annual Leave

Where an employee is covered by the Clubs Award, an employer can direct them to take a period of annual leave where it has reached an excessive amount. In terms of what will be considered as excessive, an employee has to have more than 8 weeks of leave (or more than 10 weeks of leave in the case of a shift worker).

Before looking to direct an employee to take leave however, an employer and employee firstly have to make genuine attempts to agree on how to reduce or eliminate the excessive leave accrual.

Should attempts at agreeing on a means to reduce or eliminate the excessive leave be unsuccessful, an employer can direct the employee in writing to take a period of leave. In order to validly do so however, a direction must:

- Not result at any time in the employee's remaining accrued entitlement being less than 6 weeks when any other paid annual leave arrangements are taken into account;
- must not require the employee to take any period of leave of less than one week in length;
- must not require the employee to take a period of leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and

- not be inconsistent with any leave arrangement agreed by the employer and employee.

Where a direction is given, the employee can then make a request to take a period of leave as if the direction was not given and could result in the direction no longer having any effect.

An employee with excessive accrual can also request and be entitled to take leave if efforts with their employer have proved unsuccessful. This is covered in clause 25.7 of the Clubs Award but they can only give notice to their employer if:

- the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
- the employee has not been given a direction that, when any other paid annual leave arrangements are taken into account, would eliminate the employee's excessive leave accrual.

If a request under clause 25.7 is granted however then the direction must not result in the same things a direction by an employer can't result it e.g. remaining accrual being less than 6 weeks, the leave period taken being less than a week etc.

Clubs that have employees covered by a registered agreement such as an Enterprise Bargaining Agreement will need to check if their agreement talks about excessive leave, if so how much this is and any other rules.

Annual Leave in Advance

Both sections 94(6) and clause 25.8 of the Clubs Award allow for an employee to be granted annual leave before they have accrued it where this is mutually agreed to in writing. An employer is under no obligation to accept any request for leave in advance however, and it is purely at an employer's discretion to agree or disagree.

Any written agreement must clearly state how much leave is being taken in advance and the date when this will start. It also must be signed and if the employee is under 18, also by their parent or guardian.

Clause 25.8 of the Clubs Award states where an employee leaves employment before they have accrued sufficient leave to make up the deficit, an employer is entitled to deduct from any money due to the employee on termination an amount equal to the outstanding leave owed (this should be specified in any agreement for leave in advance). This is not specifically mentioned in the Fair Work Act so for any agreement with Award free employees it is even more important to have this included as a term if the agreement.

Employers should be wary of providing too much annual leave in advance as it increases the risk of an employee leaving before the deficit is made up and any outstanding wages being sufficient to offset this.

Closedown / Shutdown

Under the Clubs Award where a Club closes all or a part of its operation for a period of time (referred to as a closedown or shutdown) such as over the festive period, an employer can request that an employee uses their annual leave during this period.

In order to validly do so under the Clubs Award, the requirements as set out in clause 25.4 will need to be met which was expanded on and altered on 1 May 2023.

Firstly, the affected employees will need to be given 28 days' notice or a shorter period if there is agreement between the employer and a majority of relevant employees on this. If an employee is engaged after the notice is given and will be affected by the shutdown period then they must be given notice ASAP.

Any request must be in writing and deemed to be reasonable.

The direction may require an employee to take a period of annual leave to which they have accrued an entitlement. If an employee does not have sufficient leave to cover the period then they and the employer can agree for leave to be granted in advance in accordance with the requirements of clause 25.8 of the Clubs Award. There is no obligation on either party to agree to leave in advance though.

Importantly the changes made from 1 May 2023 state that employer and employee may also agree in writing for the periods they don't have annual leave for to be taken as leave without pay. This has now specified that any taking of unpaid leave has to be agreed on and as such should an employee not have sufficient leave to cover all of the period then this will not automatically be able to be treated as unpaid leave.

Should there be no written agreement from an employee to take unpaid leave during a period of shutdown then an employer will have to either find work for them to do or pay them their ordinary wages during this time. It has been suggested that an inclusion of a clause in an employee's contract specifying that they agree to take unpaid leave during a closedown / shutdown where they don't have sufficient annual leave could meet the clauses requirements but the validity of this has yet to be tested.