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SUBJECT:	NES and Requests to Work on a Public Holiday
ATTENTION:	Chief Executive Officer

In a landmark decision, the Federal Court last week made clear that employers must not require employees to work on a public holiday until they have first made a request for them to do so – even where a modern award, enterprise agreement or employment contract contemplates public holiday work.

The decision is likely to have implications for all employers who require and roster employees to perform work on a public holiday.

As background, under the National Employment Standards in the Fair Work Act:

- a) employees are entitled to be absent from work on a public holiday; however
- b) an employer can request that they work on the public holiday if the request is reasonable; but
- c) if the request is not reasonable, or an employee's refusal is reasonable, the employee may refuse the request.

The above propositions are not new and have been part of the Fair Work Act since it commenced.

However, in *CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51, the Full Court of the Federal Court has examined, and displaced certain longstanding assumptions about the correct process or mechanism by which an employer must comply with the relevant provisions.

In that case, a group of labour-hire mining employees were subject to a blanket requirement to work on public holidays, specifically Christmas Day and Boxing Day. The employer had not ever communicated to its employees that they had any ability to refuse to work on a public holiday and the relevant employees accordingly understood that if rostered, they were required to work the public holiday and could not put forward their circumstances to be vacated from any such requirement to work.

The Full Court found that the blanket requirement by the employer to work on a public holiday was in breach of the NES. The Court stated that this is because a requirement to do something cannot properly be construed as a 'request', and therefore in relation to the Christmas Day and Boxing Day public holidays, there was never a request to work, as contemplated by the NES. The matter has been remitted to the primary judge for determination of the remedy and financial penalty to be imposed on the employer for the contravention of the NES – noting that the primary judge had earlier found that the employer did not breach the NES.

In terms of the practicalities of scheduling work on a public holiday, the Full Court stated:

An employer is able to have a roster which includes public holidays. All that is required is that an employer ensures that employees understand either that the roster is in draft requesting those employees who have been allocated to the holiday work that they indicate whether they accept or refuse that allocation, or where a request is made before the roster is finalised.

While not unreasonable, precise alignment with the above will require many employers to adjust and review their current rostering arrangements, policies and / or contracts of employment.

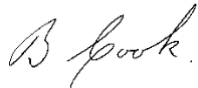
Moving forward, in circumstances where an employer requires work to be performed on a public holiday, they must first make a request, with an opportunity for employees to respond with any reasons why the request is not accepted.

If the employer's request is reasonable, or an employee's refusal is unreasonable, the employee can be required to work on the public holiday.

In determining whether an employee's refusal is reasonable, the employer must consider the employee's reasons – having regard to a range of factors prescribed by the NES. The terms of a modern award, enterprise agreement or employment contract will be relevant, but not determinative, of whether or not a request is reasonable or an employee's refusal is reasonable.

SIAG is available to discuss the decision with you and provide tailored legal advice, as may be necessary, in order to ensure that there is compliance with the NES and any resulting disruption to your current processes is minimised.

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447.



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