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**CIRCULAR:** GEN/181/NAT/181/23  
**DATE:** 21 November 2023  
**SUBJECT:** NES and Requests to work on a Public Holiday  
**ATTENTION:** Chief Executive Officer

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Yesterday, the High Court refused a special leave to appeal request to challenge a Full Federal Court ruling clarifying when employees can reasonably refuse requests to work on public holidays.

The High Court's refusal, in *OS MCAP Pty Ltd v CFMMEU B24/2023*, re-affirms a landmark decision of the Full Federal Court, of 28 March 2023, 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.

With the Christmas period approaching this is a timely reminder that in circumstances where an employer requires work to be performed on a public holiday by an employee:

- an employer must first make a request, with an opportunity for employees to respond with any reasons why the request is not accepted, and
- 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 National Employment Standards (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 compliance with the NES.

### **Background**

Under the NES 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 Full Federal Court in *CFMMEU v OS MCAP Pty Ltd [2023] FCAFC 51* 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 Federal 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 now been referred to the primary judge for determination of the remedy and financial penalty to be imposed on the employer for the contravention of the NES.

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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