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# EMPLOYERS IN AUSTRALIA MUST FIRST ASK EMPLOYEES TO WORK ON PUBLIC HOLIDAYS – YOUR 6-STEP COMPLIANCE PLAN

Insights  
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An Australian federal court recently held that employers can no longer arbitrarily schedule employees to work on public holidays without their agreement. Instead, the Full Court of the Federal Court of Australia ruled on March 28 that employers must first make a reasonable request to the employee in the form of an “ask,” and the employee must be given the opportunity to respond. Employers who fail to make a reasonable request risk violating the National Employment Standards (NES) and section 114 of the Fair Work Act 2009 (FW Act). Employers that operate businesses during public holidays must now ensure that they are operating in compliance with this decision and its implication. Here’s what you need to know about this ruling and a six-step plan for compliance.

## What Does the Law Say?

Section 114 of the FW Act gives employees in Australia the right to be absent from their employment on a day or part-day that is a public holiday. If an employer needs an employee to work during the public holiday, the employer must first make a reasonable request to the employee. After the reasonable request is made, the employee may refuse the request only if the refusal is reasonable. However, if the employer’s request is not reasonable, then the employee does not have to comply.

## What Did the Court Decide?

The Full Court’s recent decision centered around the definition and scope of the “reasonable” standard under

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section 114. The decision explained that a reasonable request must entail an “ask” from the employer and the opportunity and ability to refuse from the employee. The request must be made in the form of a question, and any “unilateral command” not intended to initiate a discussion could not suffice. Employers cannot assume that employees will work on public holidays simply because they were scheduled to do so.

### **Key Points From the Ruling**

However, this does not mean that employers can no longer include public holidays when drafting work schedules. You can still include public holidays in work schedules as long as employees understand that they retain the right of refusal, on reasonable grounds, before the schedule is finalized. Similarly, an employment contract may still include language indicating that employees may be asked to work on public holidays – and may even be required to do so if their refusal is unreasonable.

Section 114 provides important guidance on various factors that should be taken into consideration when determining whether a request or a refusal is reasonable. These factors include:

- The nature of the employer’s work or business (including operational requirements);
- The nature of the work performed by the employee;
- The employee’s personal circumstances, including family responsibilities;
- Whether the employee could reasonably expect that the employer might request work on the public holiday;
- Whether the employee is entitled to receive additional compensation for work on the public holiday;
- Employment type (full-time, part-time, casual, or shiftwork);
- The amount of notice in advance of the public holiday given by the employer when making the request; and
- In relation to the refusal of a request: the amount of notice in advance of the public holiday given by the employee when refusing the request.

The above list is not comprehensive and other similarly relevant factors should also be considered when determining the reasonableness of the employer's request or the employee's refusal. If the employer determines that their request is reasonable, then the employee must either have a reasonable explanation for refusal or work on the public holiday.

## **Your 6-Step Compliance Plan**

In light of the new decision, companies with employees in Australia should follow the process below when requesting employees to work on public holidays:

1. Ensure that the employment contract contains provisions that state employees may be requested to work on public holidays and may be required to do so if they cannot give a reasonable explanation for refusal.
2. Discuss the possibility of working on public holidays with employees in advance.
3. Make a reasonable request to work to the employee for every public holiday. The request must be made in the form of a question.
4. If you operate using work schedules or rosters, you should issue a draft schedule to the employee first. In this circumstance, the draft operates like a request and the employee can then indicate whether they'd like to accept or reject the schedule.
5. Give an opportunity to refuse the request.
6. If your request is reasonable but the employee chooses to refuse the assignment, you must assess the employee's refusal for reasonableness under section 114.

The decision heavily impacts employers in industries that continuously operate during public holidays such as healthcare, hospitality, retail, and leisure. To ensure compliance, employers with public holiday work needs should always make a reasonable request to relevant employees to work on public holidays in the form of a question, and the request must prompt a response and allow the employee the capacity to refuse.

## **Conclusion**

If your organization does business or employs individuals in Australia, please contact your Fisher Phillips attorney, the authors of this insight, or any attorney in our [International Practice Group](#) to learn more about the implications of this new ruling and how to stay compliant. We will monitor similar developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox.