

Whitepaper – Annual Leave

Entitlement to Annual Leave and Holiday Pay

The Working Time Regulations 1998 require employers to grant workers a minimum period of paid holiday leave each year.

Employers must by law ensure that every employee's written statement of key terms of employment includes a statement about terms and conditions relating to holiday entitlement, including public holidays and holiday pay. The statement must be sufficient to enable the employee to calculate precisely his or her entitlements.

The holiday provisions contained in the Working Time Regulations apply to all "workers". The term "worker" includes employees, contract staff, casual workers, homeworkers, agency temps and some freelance workers (although people in business on their own account are not within its scope). Workers aged 16 and 17 and those over the age of 65 are also entitled to paid annual holiday. The term 'employee' shall be used for ease of reference in the text below.

Statutory Entitlement to Annual Leave

All employees must be granted no less than 5.6 weeks' paid annual leave. This equates to 28 days for someone who works five days a week. The number of days can be capped at 28, so an employee working six days a week would still be entitled to only 28 days' leave (although the employer could choose to give more than 28 days). Public or bank holidays may be included as part of the minimum 5.6 weeks entitlement.

Part-time Staff Entitlements

It is unlawful to grant part-time employees less favourable terms and conditions of employment (on a pro rata basis) than comparable full-time employee; this general rule applies to annual leave. Accordingly, part-time employees are entitled to the same paid holiday as equivalent full-time employees, albeit on a pro rata basis, calculated in accordance with the number of days or hours that the part-timer works per week.

Contractual Holiday Entitlement

Employees' contracts may contain terms that entitle them to more paid holidays than legislation requires. Such terms are binding provided that they do not restrict or reduce the employees' statutory entitlements.

Bank and Public Holidays

Where the employer grants employees paid time off on bank or public holidays, those paid days may be counted as part of employees' statutory annual leave entitlement. e.g., if an employer grants its employees paid time off on eight public holidays each year, it need only grant 20 further days' paid annual leave, as the total of all paid days off will be equal to 28 (the statutory minimum for a five-day-week worker). However, if time off is granted on a bank or public holiday on an unpaid basis, that day cannot count towards statutory annual leave.

Holiday Pay

When an employee is on holiday, he or she is entitled to continue to be paid a 'normal weeks' pay'.

For employees with set contracted hours, where overtime is worked, it should be factored into the calculation of holiday pay when overtime is both compulsory and guaranteed by the employer under the employee's contract of employment. Case law has now evolved to cover regular voluntary overtime in this calculation.

Recent decisions have also extended the scope of normal pay to include regular bonus and commission payments and payments that are intrinsically linked to an employee's performance and/or status. If you do need to consider overtime and or commission / bonuses, you will need to look at calculating a 'normal weeks' pay' based upon the last 12 weeks prior to the annual leave being taken.

No Normal Working Hours

If an employee does not have normal working hours e.g., if irregular shift patterns are involved then the amount payable during statutory annual leave must be calculated as an average of the employee's actual pay during the 12 weeks that preceded the start of the holiday period. If, during the preceding 12 weeks, there was one or more weeks during which the employee did no work, that week must be discounted and an earlier week counted instead.

Rules and Restrictions on Taking Annual Leave

- **The holiday year**

Employers can decide for themselves what their holiday year should be. This information should be contained in employees' contractual documentation.

If an employer does not specify what the holiday year is, each individual employee's holiday year will run from the date that he or she started work for the organisation.

- **First year of employment**

For employees who commence employment part way through their employer's holiday year, their statutory entitlement for that year stands to be calculated on a pro rata basis for that holiday year. E.g. if the holiday year runs from January to December and a new recruit begins full-time employment on 1 July, holiday entitlement for that part-year would be 2.8 weeks (or fourteen days).

Employees must be allowed to take their statutory annual leave – and be paid for it – during their first year of employment.

The employer may limit the amount of paid annual leave that an employee is permitted to take at any particular time to the amount of leave accrued to date.

Statutory annual leave accrues from the first day of employment. If the calculation of accrued leave results in a fraction of a day's leave, this must be rounded up to the next half-day.

These rules apply only in the first year of employment. In subsequent years, no such accrual system applies and the full 5.6-week statutory annual leave entitlement is available to each employee from the start of the holiday year (although the scheduling of leave may be regulated by the employer).

Carry-Over of Leave

Employers may not permit employees to carry over any part of the first four weeks of their statutory annual leave. If these first four weeks are not taken in the year that they are earned they will, almost without exception, be lost.

This prohibition on carry-over applies only to the first four weeks of statutory annual leave. This means that an employer may by workforce agreement permit employees to carry forward periods of annual leave that are over and above the first four weeks, including any annual leave granted that is in excess of the 5.6-week statutory minimum. However, there is no absolute right for employees to be permitted to carry forward holiday leave to the next holiday year. Any entitlement to do so is subject to agreement.

Payment in Lieu of Annual Leave

Except on termination of employment, an employer is not permitted to give an employee a cash substitute in respect of any untaken statutory annual leave entitlement i.e. a payment in lieu cannot be made for any part of the minimum 5.6 week statutory leave entitlement.

Nomination of Holiday Dates by the Employer

Employers may, if they wish, nominate specified days or dates on which an employee, or a group of employees, must (or must not) take some or all of their statutory annual leave. This can be done by giving the employees notice at least twice the number of days that the employer is nominating as statutory annual leave, and specifying the days or dates in question. E.g., if the employer wished to impose an eight-day shutdown over the Christmas period for the entire organisation, it would have to give at least 16 days' notice of the specific dates on which the employees would be required to take annual leave to all staff.

In practice, an employer would wish to regulate this area in their contractual documentation or policies, or as a minimum provide a longer period of notice to ensure that employees understood in sufficient time that they must save eight days of their holiday entitlement for the period of the shutdown.

Religious Holidays

Denial of holiday leave on a day or date that has special religious significance for a particular employee may amount to indirect discrimination under the regulations in force which prohibit discrimination against any employee on account of religion, religious belief or philosophical belief.

Employers are not obliged to grant additional leave to employees for religious reasons. In fact to do so could amount to direct discrimination against other employees not granted additional leave.

However, employers should advise employees that, as soon as they know when a religious holiday will fall they should inform management if they wish to take holiday leave at that time. While an employer is not obliged to grant the request if the refusal can be objectively justified as being necessary in terms of the effective running of its business, it will be the safer approach to attempt to accommodate the request.

Accrual of Holiday During Periods of Sickness Absence

If an employee is absent from work, due to sickness, (whatever the length of the absence) statutory annual leave continues to accrue.

When an employee is off sick for all, or a substantial part, of the holiday year an employer may consider:

- encouraging the employee to take a period of his or her sickness absence into paid holiday leave. However, the employee cannot be forced to take holiday leave during a period of sickness absence.

- permitting the employee to take the statutory annual leave that he or she has accrued on return to work, whether that is in the same holiday year or the following one.

If employees are granted holiday entitlement in excess of the statutory minimum, the employer may wish to stop accrual of that entitlement during periods of sickness absence of more than a specified period (e.g. one month).

Accrual of Holiday During Maternity Leave

During maternity leave the employee's contract of employment remains in force for all purposes except remuneration. It follows that both the statutory and any additional contractual holiday entitlement continue to accrue throughout the entire period of statutory maternity leave which can last up to 52 weeks.

As a result, employers may wish to consider requiring employees to use up all the current year's holiday entitlement prior to the start of their maternity leave. If the dates of the employee's maternity leave fit in with the employer's holiday year they may also wish to require employees to take leave accrued during the maternity leave period within an agreed timescale after their return to work.

Holiday Entitlement on Termination of Employment

When an employee leaves his or her job part way through the holiday year, he or she will be entitled to be paid for any statutory holiday accrued but not taken as at the date of termination. This will be the case whatever the reason for dismissal even if the termination was due to gross misconduct.

- **Taking holiday during the notice period**

When an employee gives notice to terminate his or her employment, or is dismissed contractually by the employer, there will be a period of notice. The length of the notice period will depend on the terms of the employee's contract. If the employer pays wages or salary in lieu of notice, the employee's holiday entitlement should be calculated up to the date that the notice period (had it been worked) would have ended.

- **Payment of outstanding holiday leave**

If an employee leaves his or her employment, the employer must make a payment in lieu of any untaken statutory annual leave that the employee has accrued during the current holiday year.

The requirement to make a payment in lieu of holiday accrued but not taken on termination applies only to the minimum period of statutory annual leave (5.6 weeks). It does apply to any holiday entitlement that the

employer may grant over and above the statutory minimum. The position re payment in respect of additional leave on termination is a matter for the employer to deal with as part of employees' contracts of employment.

- **Excess holiday taken by employee**

An employer is entitled to deduct money from an employee's final wage or salary if the employee has taken in excess of the statutory holiday that he or she has accrued during the final holiday year. However, such a deduction may only be made if the employer has a relevant agreement in place to permit the deduction, i.e. a suitably worded clause in the employee's contract authorising the deduction or a separate written agreement to the same effect that the employee has signed in advance.

This information is provided for general reference purposes only. If you have a specific enquiry relating to this topic please contact Wirehouse on:

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Annual Leave updated 08/08/2019