

Holidays

A worker's right to holiday essentially comes from two different sources: statute and their personal contract to work for you. A statute is a law or regulation that has been passed by Parliament. It is important to differentiate between these two sources as the way holiday can be implemented may depend on whether it is a basic statutory right or a contractual right above and beyond the requirements of UK legislation.

This guide summarises a worker's statutory rights to paid annual leave, and how they relate to agreed contractual rights. We then go on and look at some common issues which arise.

Statutory and contractual holiday rights

A worker's statutory right to paid holiday comes from The Working Time Regulations 1998 (the Regulations). There is a minimum entitlement, which originates from the European Working Time Directive, and an additional entitlement introduced by the UK Government independently of the Directive. A worker cannot contract out of these statutory rights.

It should be noted that the rights to statutory leave under the Regulations are not dependant on being an employee. Anyone who can be classed as a 'Worker' in law is entitled to these rights (with the exception of those in services such as the armed forces or police etc). Sometimes contractors and individuals who, in other respects, appear to be self-employed, may be able to claim such rights from the organisation they work for depending on the circumstances. Different provisions apply in respect of agricultural workers.

A worker's contractual right to paid or unpaid holiday comes from the contract itself, which can include collective agreements. The contract need not be in writing but, for employees, under the Employment Rights Act 1996 the entitlement to holidays, public holidays, holiday pay and the way holiday entitlement is calculated on termination of employment must be issued on their statement of main terms and conditions within two months of the start of employment. (Changes to this statement must be issued in writing at the earliest opportunity and in any event within one month of the change.)

The Regulations provide that any remuneration for holiday given under the contract goes towards discharging liability for paid leave under the Regulations, and vice versa, so that a worker is only entitled to be paid once. Workers with a contractual right to more paid holiday than the Regulations stipulate obviously have to be paid any additional amount according to their contract.

Statutory holiday rights under the Working Time Regulations 1998

The Working Time Regulations 1998 confer the right to both 'minimum' and 'additional' paid annual leave.

Minimum paid annual leave

A worker's minimum annual leave entitlement is four weeks' paid leave each year, whatever their normal 'week' is. The minimum statutory leave entitlement may not be replaced by payment in lieu unless employment is terminated, and cannot be carried over to the next leave year.

Additional paid annual leave

In addition to the minimum four weeks' paid leave, a worker is entitled to 0.8 weeks' additional annual leave from 1 October 2007, rising to 1.6 weeks on 1 April 2009. As a result, a worker's total entitlement to statutory annual leave before 1 April 2009 is 4.8 weeks, and from 1 April 2009 is 5.6 weeks. The total statutory entitlement must not exceed 28 days – which could be the case, for example, if someone works a six day week. The Regulations set out how to calculate the additional leave entitlement arising over the period of the introduction dates, depending on when the relevant leave year starts. A holiday entitlement calculator appears on the DBERR website.

Transitional provisions allow that, until 1 April 2009, the additional statutory leave entitlement may be replaced by a payment in lieu. From 1 April 2009, the additional entitlement cannot be replaced by a payment in lieu unless employment is terminated.

Unlike the minimum statutory leave entitlement, however, a 'relevant agreement' (such as a contract) may provide that additional leave can be carried over to the next leave year.

The introduction of additional annual leave affects mostly those businesses who previously counted bank and public holidays as part of a worker's entitlement to annual leave under the Regulations. There has been minimal impact for employers who previously allowed for paid bank and public holidays in addition to the minimum four weeks' leave. However, all employers need to ensure that part-time staff are given the entitlement pro-rata regardless of the days on which they work.

Employers who have not already done so should write to their employees informing them of any changes as a result of additional annual leave.

It is important for employers who, prior to 1 October 2007, already offered paid bank and public holidays in addition to minimum statutory leave to check the wording of their contracts and handbooks so that they do not end up paying for the additional statutory entitlement (first at 4.8 weeks and then at 5.6 weeks) **as well as** bank and public holidays. For example, a clause which states "You are entitled to paid public and bank holidays in addition to your statutory annual leave entitlement" would give a total of 36 days' annual leave for a full time worker as opposed to 28 days. Please contact us for further details.

Provisions which apply to both minimum and additional statutory leave

There is no qualifying service requirement for either of these leave entitlements. The following provisions apply to both types of statutory leave.

Leave year

The leave year will be specified in the contract of employment. If it is not specified, it will start on 1 October where the employment commenced on or before 1 October 1998 or the anniversary of the date on which the worker commenced employment for all other cases.

Arrangements for when holiday may be taken

The employer and worker can agree provisions for arranging when leave can or cannot be taken, but a statutory system of notice for taking leave or not taking leave applies where no "relevant agreement" has been made. Where there is no relevant agreement, the Regulations stipulate the length of notice which must be given by the worker to take leave or by the employer to prevent leave being taken at a given point, and how that notice should be given.

It is advisable to make provisions in a contract or policy as to whether a worker can be required to take

unused holiday during a period of notice or garden leave and other terms relevant to holiday, such as Christmas shutdowns or how much leave may be taken at any one time.

Entitlement for incomplete leave years and payment in lieu at the end of employment

For workers who commence employment part way through the leave year, their right to annual leave in that leave year is proportionate to the amount of the leave year remaining when they started. However, in their first year of employment, workers may only take holiday that they have accrued. For this purpose holiday accrues at the rate of one twelfth of their statutory annual leave entitlement for each month or part of a month of service. Days accrued should be rounded up to the nearest half or full day (NB - only in relation to how much they have accrued at any given point – there is no longer rounding-up for the total leave entitlement in the first year). This rounded-up amount is then deducted from the remaining annual leave entitlement. It should be noted that the accrual system applies throughout the first year of employment and not simply until the end of the leave year in which they started.

Workers whose employment ends before the end of the leave year have a right to be paid in lieu for any untaken leave to which they are entitled. The amount is what is specified in a 'relevant agreement' (ie contract - this must be at least the worker's normal pay), or under the Regulations where there is no agreement. The Regulations essentially provide that the payment in lieu is the worker's pro-rata entitlement of untaken leave. For employees who receive an annual salary, daily pay for these purposes should be calculated by dividing annual salary by the number of days in the year the employee is contracted to work (not calendar days).

A 'relevant agreement' may also provide that a worker who has taken more leave than they were entitled to when employment ended should pay back his employer or undertake additional work. It is always advisable to include this in a contract, along with the right to make deductions for such payments, so that the employer may simply deduct it from the worker's final payment.

Enforcement

Workers can enforce their right to minimum or additional annual leave under the Regulations by presenting a complaint to an employment tribunal. If a complaint is upheld, the Tribunal will make a declaration to that effect and may order the employer to pay such compensation as it considers just and equitable in all the circumstances.

In addition, under the Employment Rights Act 1996:

- workers can go to an employment tribunal to enforce their right "not to be subjected to any detriment" for refusing to comply with a requirement of their employer contrary to the Regulations or to forgo a right conferred by the Regulations
- dismissal or redundancy of an employee for challenging the employer's refusal or failure to acknowledge rights under the Regulations will be automatically unfair, irrespective of the employee's length of service

Contractual holiday rights

An employer may specify contractual paid or even unpaid holiday which is more generous than the statutory provisions.

Contractual leave over and above the statutory entitlements is not subject to the statutory restrictions and can be paid in lieu and/or carried over into subsequent holiday years if the contract so allows. It would also be possible, for example, to provide that payment in lieu of untaken contractual holiday (in excess of statutory holiday) is not payable where an employee has been dismissed for gross misconduct. However employers should make it clear in contracts and policies how contractual entitlement is to be treated differently from statutory entitlement if applicable.

Bank and public holidays

There is no statutory right to have a day off or extra pay on a bank or public holiday. Additional annual leave was introduced in order to allow all workers an entitlement to eight days' leave (which equates to the number of bank and public holidays in England and Wales) in addition to the four weeks' minimum entitlement. However it does not confer a right to take this leave on bank or public holidays - that will depend on individual contracts.

The important point to note now is that part-time workers must be given additional statutory leave pro-rata even if they do not normally work on days on which bank or public holidays fall. Whether part-time workers are entitled to bank or public holidays **as well as** additional statutory leave will depend on the wording of the contract in question and also potentially the employer's practice in relation to full-time workers. Employers should check contracts and take legal advice to make sure the wording reflects the employer's intention for part-time workers as well as full-time workers.

For some employers who provide 20 days' leave plus paid public and bank holidays and whose leave year runs from April to March, there is a possibility of not providing the full additional statutory entitlement if Easter falls late one year and early another. This is obviously unlikely but if you think you are affected please contact us.

Interplay with other periods of leave

Maternity leave

A worker who takes maternity leave continues to be entitled to her statutory leave, and, at least in relation to minimum statutory leave, is entitled to take it at a different time from her maternity leave. Since the minimum statutory leave cannot be carried over into the next holiday year, nor paid in lieu, employers should make sure that workers take any minimum statutory leave remaining in that leave year before maternity leave starts. Additional statutory leave could be carried over with the worker's agreement. Similarly, when a woman returns from maternity leave she will be entitled to her full year's entitlement of statutory leave even though she may not have worked for a proportion of the leave year.

With regard to any enhanced contractual holiday entitlement, employees whose Expected Week of Childbirth (EWC) begins on or after 5 October 2008 will be entitled to this for their entire maternity leave (ie during Ordinary Maternity Leave and Additional Maternity Leave) since they are now entitled to the same benefits during both AML and OML as if they had not been absent. Employees whose EWC is before 5 October 2008 may only be entitled to accrue contractual leave during OML and not during AML depending on the terms of their contract.

Sick leave

The position with regard to sick leave has been the subject of a long-running line of cases. In 2005, the Court of Appeal ruled that a worker absent on long-term sick leave was not entitled to statutory leave under the regulations, but this was referred to the European Court of Justice (ECJ). In January 2009, the ECJ held that a worker who has been absent on sick leave for the whole or part of a leave year still has the right to their whole minimum statutory leave entitlement (ie four weeks). Thus when they return to work they must be given the opportunity to take it, or, if their employment is terminated, be paid for untaken minimum statutory leave. The difficulty with this from a UK perspective is that, under the Regulations, minimum statutory leave cannot be carried over to another holiday year, but the ECJ found that such employees must be allowed to carry it over. In addition, the ECJ said that, whilst employees on long-term sick leave must be allowed to take their leave at some point, this could be during sick leave (which might assist operationally and perhaps prevent leave being carried over indefinitely). However the Court of Appeal's decision in 2005 means this is not allowed in the UK. The case (*HMRC v Stringer and others*) is now going back to the House of Lords to apply the ECJ's decision to UK law, and the Regulations may well be amended in due course.

In practice this means that employees on long term sick leave do not lose their right to be paid for minimum statutory leave. Those who work for public bodies may be able to claim the benefit of the ECJ's decision immediately by relying on the Working Time Directive itself, and public sector employers should seek our advice about this. Private sector employers may wish to wait and see the interpretation of the House of Lords, but it is a cost that they too are likely to bear in due course. However the ECJ's decision does not apply to additional statutory leave or contractual leave in excess of the statutory minimum, and in theory these would not have to accrue during sick leave. Individual contracts or policies will determine what

happens in each case.

Contracts or policies should also specify any rules regarding short term sick leave and holidays. For example, if an employee falls ill for a few days during time booked as holiday, does it count as holiday or sick leave? If it counts as sick leave, what are the notification requirements? Is an employee who is sick during a bank holiday entitled to take holiday in lieu at another time? A carefully thought-out contract or policy addressing these questions may prevent disputes and other costs further down the line.

Contacts

For further information or guidance on this subject, please contact the Employment law team at employmentinfo@bllaw.co.uk or call us:

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