

# HOLIDAY ENTITLEMENT AND PAY - NEW CHANGES

February 2024

Further to the previous publication on [Holiday Entitlement and Pay](#), the Government has recently announced a change to the law relating to these items, which is effective from either 1 January 2024 or 6 April 2024, as detailed below.

Following on from the Government's 2023 consultation on holiday and pay, this briefing sets out the key matters which were considered and the changes.

## Carry Forward of Holiday

Where an employee has either been on family leave or sick leave, and therefore unable to take their annual leave, there are provisions to allow the leave to be carried forward. The new legislation seeks to set out the rules which will apply to employers in Great Britain and contains a few amendments to the current rules. The main changes are as follows:

1. A worker will be able to carry forward their full 5.6 week entitlement into the next holiday year if they cannot take it due to being on family leave
2. Workers on sick leave will only be permitted to carry forward their four weeks' entitlement if they are unable to take the leave due to sickness and it must be used within 18 months of the end of the holiday year in which the entitlement first arose. This is being introduced to prevent large amounts of annual leave building up whilst an employee is on long term sick leave and which often results in a large payment when the employment is terminated due to the employee being unable to return to work.

These rules are effective from 1 January 2024.

## Annual Leave

Currently, an employee's minimum holiday entitlement is made up of two elements:

1. Four weeks' leave, based on EU law
2. An extra 1.6 weeks' leave, based on UK law

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Under EU law, the four weeks' leave must be paid at "normal" pay whereas the 1.6 weeks' leave can be paid at "basic" pay. There was a proposal to merge the two types of leave such that they would both be paid at the same "normal" pay rate. However, this has not been adopted and hence the dual rates continue, although the employer can always choose to pay all leave at the normal (higher) rate.

### **Normal Pay**

This includes basic pay plus the following:

1. payments that are intrinsically linked to the performance of tasks which the worker is obliged to carry out under the terms of their contracts, including regular overtime payments and commission payments; plus
2. payments for professional or personal status relating to length of service, seniority or professional qualifications; plus
3. other payments, such as overtime payments, which have generally been regularly paid to the worker over the past fifty-two weeks.

### **Basic Pay**

This is amount that the employer is obliged to pay, i.e. basic pay, without any add ons, but including any guaranteed overtime.

There remains uncertainty as to whether some items of pay should be included in Normal Pay or Basic Pay and it is likely that this will only be clarified through case law. In addition, the guidance on which type of leave is being taken, and hence which rate should be paid, continues to be unclear; where the differing rates of holiday pay applies, it is hopefully dealt with through the employment contract; if not, the safest approach must be to pay at the normal rate first and basic pay thereafter.

This clarification of what is to be included in the two types of pay for holiday is effective from 1 January 2024.

### **Rolled Up Holiday Pay**

The new legislation will allow employers to once again calculate holiday pay using the 12.07% method, whereby each pay period includes an additional payment for holiday. This is calculated as 12.07% of the amount the employee is being paid in that pay period, based on the above definitions of normal and basic pay. There will no longer be an obligation to look back over the previous fifty-two weeks' earnings. 12.07% is arrived at by taking the annual leave of 5.6 weeks over the working year of 46.4 weeks (52 weeks less 5.6 weeks). Given the difficulty of determining normal and basic pay, many employers will "simply" calculate holiday pay as 12.07% of total pay in each pay period, which is administratively much easier to calculate and removes any dilemmas as to whether a pay element is normal and therefore should be included within the four weeks' pay calculations. Holiday pay must be clearly shown on the payslip as a separate pay element.

However, rolled up holiday can only be paid to employees who are either part year workers or workers on irregular hours. Hence any such worker will be able to be paid their holiday entitlement each pay period and then will not receive any payment when they take leave.

In addition, the employer is still obliged to ensure that the statutory minimum leave is taken, which is in proportion to the hours worked. This is not a simple task when the employer may not be aware of when the employee is taking leave, especially if the employee has a zero hours contract. Employers should try and ensure they have systems in place to record when employees are taking holiday.

The new legislation will include the definition of part-year workers and workers on irregular hours as follows:

## **Part-year workers**

This is a worker who is contractually required to work part of a leave year, with periods during the term of the contract when they are not required to work and will not be paid e.g. a term time only contract.

## **Workers on Irregular Hours**

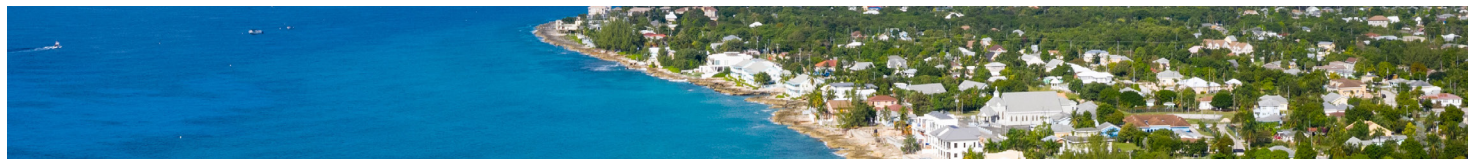
This is a worker whose hours are wholly or mostly variable in each pay period. This is primarily zero hours contracts and those under similar casual hours contracts.

The rolled up holiday pay regulations are to be effective for holiday years commencing on 1 April 2024; therefore if an employer has a calendar year holiday, the new legislation will not be effective until 1 January 2025.

## **Conclusions**

Whilst the introduction of the new rules may be seen as a missed opportunity, as there are still many practical issues for employers to deal with, the re-introduction of the 12.07% calculation is to be welcomed and removes some large anomalies which had arisen over the past year or so as a result of case law. Employers should review their employment contracts and policies and consider whether any changes are required. If changes to an employment contract are required, legal advice may be needed to ensure that it is permitted – as a minimum the employee must agree to any changes and, as the employer, these changes should be explained. It is unlikely that employees will agree to change in their holiday pay if it results in them being worse off.

As the above changes have been enacted in law and there remain various ambiguities in their interpretation, it is only once there is some case law in place that there should become certainty as to how the changes are to be implemented; however, this will typically take at least a year, if not more, before coming to the courts.



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