

ANNUAL LEAVE

Revised January 2012

Overview

This line manager briefing covers the topic of annual leave and aims to help line managers to understand the laws on holiday entitlement and holiday pay and how they have been interpreted by courts and tribunals. The briefing includes information on:

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1. Entitlement to annual leave

The Working Time Regulations 1998 oblige employers to grant workers a minimum period of paid holiday leave each year. There is no provision that allows employers to opt out of this duty.

The law also regulates the amount of pay that an employee is entitled to receive when taking statutory annual leave. The underlying principle is that, when an employee is on leave, he or she is entitled to continue to be paid his or her normal rate of pay.

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.

Scope of the law

The holiday provisions contained in the Working Time Regulations apply to all "workers". Over and above the organisation's direct employees, the term a worker includes contract staff, casual workers, homeworkers, agency temps and some freelance workers (although people in business on their own account are not in scope). Workers aged 16 and 17 are also entitled to paid annual holiday.

For the purpose of this briefing, the term an employee is used.

Statutory entitlement to annual leave

Since April 2009, all employees must be granted no less than 5.6 weeks paid annual leave. This equates to 28 days for someone working five days a week. The number of days is capped at 28, so an employee working six days a week would be entitled to only 28 days' leave. Public or bank holidays may be included within the 5.6 weeks, provided that paid time off is granted on those days (see 2. Bank and public holidays).

Employees qualify for paid annual leave from the first day of their employment. However, special rules are in place with regard to the taking of annual leave during the employees first year (see First year of employment).

Part-timers' 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 employees, including those that relate to holiday. Part-time employees are therefore entitled to the same paid holiday as equivalent full-time employees, but on a pro rata basis, calculated in accordance with the number of days or hours that the part-timer works per week.

Examples of annual leave entitlement for part-time employees	
Part-timer's working week	Statutory annual holiday entitlement
One day a week or equivalent (e.g. two half days)	5.6 days
One and a half days	8.4 days
Two days	11.2 days
Two and a half days (half a week)	14 days
Three days	16.8 days
Four days	22.4 days
Alternatively, holiday entitlement can be expressed as 5.6 weeks in all cases, with each "week" consisting of the same number of days that the employee works.	

Contractual holiday entitlement

Employee's 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 employee's statutory entitlements. Where employees have the right to additional contractual holiday entitlement (over and above the 5.6 weeks' statutory minimum), line managers need to be aware of and honour these entitlements.

2. Bank and public holidays

Did you know that ...
... contrary to popular belief, there is no statutory right for employees to be granted time off on any bank or public holiday, to be paid if a day off is granted on a bank or public holiday, or to be paid at an enhanced rate of pay if a bank or public holiday is worked.

Entitlement to paid time off on bank and public holidays may be contained in employee's contracts of employment and, if this is the case, the contract must be honoured. For example, if employees' contracts state that they are entitled to paid annual leave on 28 days plus bank and public holidays, they will be entitled to take paid time off on bank and public holidays in addition to 28 days.

However, there is no requirement to grant additional paid time off on bank or public holidays. Where the employer grants employees paid time off on bank and public holidays, those paid days may be counted as part of employees statutory annual leave entitlement. For example, if the 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 the time off is

granted on a bank or public holiday on an unpaid basis, that day cannot count towards statutory annual leave.

The UK recognises eight bank and public holidays. If the Government appoints an additional public holiday in one year, for example to celebrate the Queen's jubilee or a royal wedding, employees' entitlement to take an additional day's leave will depend on their employment contract. For example, if employees' contracts provide that they are entitled to 20 days' annual leave plus eight bank and public holidays, or to 28 days' annual leave, or if they specify the bank and public holidays to which employees are entitled, employees will not be entitled automatically to take annual leave on the additional day. However, if employees' contracts state that they are entitled to a number of days' annual leave (for example, 20 days) plus bank and public holidays, they will be entitled to take annual leave on the additional day, because the bank and public holidays are not specified.

3. Holiday pay

When an employee is on holiday, he or she is entitled to continue to be paid normally.

Overtime

Where overtime is worked, it need not normally be factored into the calculation of holiday pay unless the overtime is both compulsory and guaranteed by the employer under the employee's contract of employment. Equally, commission or periodic bonuses would not normally count towards an employee's holiday pay entitlement (but see No normal working hours).

Rolled-up holiday pay

It is not permissible to roll-up holiday pay into basic pay, i.e. pay an employee a higher hourly, daily or weekly wage, part of which is designated as holiday pay, with the result that, when the employee goes on leave, he or she receives no pay. The practice of rolled-up holiday pay was judged unlawful in 2006 by the European Court of Justice which ruled that payment for annual holiday must be made at the time holiday is actually taken.

No normal working hours

If an employee does not have normal working hours, for example if the amount of work fluctuates from week to week, if irregular shift patterns are involved, or if the employee is paid on a piece work basis, then the amount payable during statutory annual leave must be calculated as an average of the employees 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 (and hence received no pay), that week must be discounted and an earlier week counted instead.

4. Rules on the taking of annual leave

There are a number of provisions that govern, and in some cases restrict, what employers can do in respect of when and how employees use their statutory annual leave entitlement.

The holiday year

Employers can decide for themselves what their holiday year should be, for example the holiday year may run from January to December, from April to March or some other arrangement. This information should be contained in employees' contractual documentation.

Where an employer has not specified what the holiday year is, each individual employees 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 the organisations holiday year, statutory entitlement for that year stands to be calculated on a pro rata basis for that holiday year. For example, if the holiday year runs from January to December and a new recruit begins full-time employment on 1 October, holiday entitlement for that part-year would be 1.4 weeks (or seven days).

Employees must be allowed to take their statutory annual leave and be paid for it during their first year of employment. There can be no rule that requires employees to earn their holiday entitlement for a particular holiday year by first working for a year, or part of a year.

Special provisions apply to the taking of annual leave during the first 12 months of employment (the employees first calendar year of employment, not just the outstanding portion of the current holiday year):

- Statutory annual leave accrues from the first day of employment at the rate of one-twelfth of the statutory 5.6-week period for each month of employment (based on a five-day week, this would result in a figure of 2.33 days per month, i.e. 28 days divided by 12).
- Leave accrues on the first day of each month, i.e. in advance.
- Where the calculation of accrued leave results in a fraction of a day, this must be rounded up to the next half-day (although the rounding-up can be deducted when the next period of leave is taken).
- 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. However, it is not obliged to do so.

The provisions described above 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, see Timing of annual leave).

Carry-over of leave

Employers are restricted by law as regards permitting employees to carry over holiday leave from one holiday year to the next. Basically, employees may not be permitted to carry over any part of the first four weeks of statutory annual leave, i.e. this must be taken in the year during which it is earned. If it is not taken, it is lost. (But see Employees who fall sick just before or during holiday leave.)

However, this prohibition on carry-over of leave applies only to the first four weeks of statutory annual leave. This means that an employer may by 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.

There is no absolute right for employees to be permitted to carry forward holiday leave to the next holiday year. Rather any entitlement to do so is subject to agreement and line managers should refer to employee's contracts to clarify what is (or is not) permitted within the organisation.

Payment in lieu of annual leave

It is not permissible for an employer to buy out an employees statutory annual leave entitlement, i.e. give the employee a cash substitute (except on termination of employment (see 9. Holiday entitlement on termination of employment)). This prohibition on buy-out applies to the entire period of statutory annual leave, i.e. 5.6 weeks. Where an employer grants annual leave in excess of the 5.6 weeks' statutory minimum, it is free to make its own rules and arrangements regarding buy-out in respect of the portion of holiday leave that exceeds the 5.6 weeks.

Summary of carry-over and buy-out restrictions		
First four weeks of statutory annual leave	Next 1.6 weeks of statutory annual leave	Any contractual leave over and above 5.6 weeks
no carry-over permitted	may by agreement be carried over to the next holiday year	employer is free to apply its own rules
no buy-out permitted except on termination	no buy-out permitted except on termination	employer is free to apply its own rules

5. Timing of annual leave

Special provisions are in force relating to the timing of statutory annual leave. These provisions essentially give managers certain options and choices as to the scheduling of employees leave.

Employees' notice of holiday dates

The employer is entitled to require employees to give notice in advance of taking statutory annual leave. The law says that the notice period should be twice the number of days that the employee wishes to take as leave. For example, an employee who wishes to take one week's statutory annual leave would be required to give his or her manager two weeks' notice of the start date of the proposed period of leave.

Even when the employer does operate a rule requiring employees to give a minimum period of notice of proposed holiday dates, managers may nevertheless wish to adopt a flexible approach in the event that a particular employee fails to give the stipulated amount of notice. It is important to promote work-life balance and denial of holiday dates for no real business reason would be in neither the managers nor the employee's best interests.

Refusing the dates requested

Where an employee has given notice requesting holiday on specified dates, the manager may refuse the dates requested by giving counter notice (for example if the timing of the proposed holiday would cause serious inconvenience for the department because it is a time of year when the department is especially busy or other employees have already been granted holiday). The counter notice must be at least equivalent to the number of days' leave that the employee requested. For example, if the employee gave two weeks' notice in respect of a request to take one week leave, the manager would have the option to refuse the dates requested by giving at least one weeks counter notice to that effect. Line managers should always fully explain the reason for the refusal to the employee in a considerate way.

Nomination of holiday days/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 equivalent (as a minimum) to twice the number of days that the employer is nominating as statutory annual leave, and specifying the days or dates in question. For example, if the employer wished to impose a 10-day shutdown over the Christmas period for the entire organisation, it would have to give at least 20 days' notice of the specific dates on which the employees would be required to take annual leave to all staff. However, realistically a longer period of notice would be needed in this type of situation to ensure that employees understood in good time that they had to save 10 days of their holiday entitlement for the end of the year.

The provisions described in 5. Timing of annual leave are the default provisions contained in the Working Time Regulations. However, it is open to an employer to set up an agreement with employees or their representatives setting out different rules. Line managers should always check their organisation's policies and procedures in this regard.

6. Managing annual leave

It is important (and advisable) for line managers to manage and organise their department in such a way as to ensure that all employees take their full statutory annual leave entitlement each holiday year. The statutory provisions for the scheduling of annual leave (see Nomination of holiday days/dates by the employer) can be a useful tool to help achieve this.

Ensuring that employees take their holiday

Whatever rules are in place within the organisation regarding the taking of annual leave, managers should aim to ensure that all employees plan and take their full entitlement to holiday. They should remember that the Working Time Regulations were introduced as a health and safety measure, i.e. to ensure that no one should be obliged to work excessive hours and that everyone should be granted adequate rest breaks and minimum amounts of holiday leave. An employee who has had a break from work is more likely to be fresh (and therefore productive) than someone who works on without proper breaks.

Work-life balance is a very important concept in today's world and is a key factor in terms of promoting employee engagement and motivation. An employee who neglects – for whatever reason – to take his or her full holiday entitlement is likely to feel that his or her balance is skewed. This can in turn lead to a loss of motivation and lower productivity. On the other hand, a policy that encourages the taking of annual leave will enhance employee morale, promote health and safety and ensure that no one feels guilty about taking the time off work to which he or she is entitled.

Organising holiday

Line managers should actively manage and organise their employees annual leave dates.

Dos and don'ts

Do encourage staff to submit dates for their holiday as far in advance as possible.

Do review regularly whether or not employees have taken, or at least planned to take, some of their holiday leave.

Do remind employees periodically how much annual leave they have outstanding.

Do ask any employee who has not taken any holiday or submitted any holiday

dates by for example the middle of the holiday year to nominate holiday dates as a matter of urgency.

Do ensure that holiday leave is planned in such a way that the department has adequate cover at all times.

Do be proactive in the management of holiday.

Don't leave the matter of holiday to chance.

Don't take the view that it is up to each individual to decide whether or not he or she wants to take holiday.

Don't wait until near the end of the holiday year before reviewing whether or not employees have taken all their holiday.

Don't give in to employees' requests for pay in lieu of holiday.

Don't make staff feel guilty about taking holiday.

It is no use a line manager waiting until (say) two months before the end of the holiday year before reviewing whether or not employees have taken all the holiday due to them. The manager needs to ensure a spread of holiday leave throughout the holiday year to ensure continuity of work.

If a particular employee has not taken any leave, or submitted a request to take leave by, say, halfway through the leave year, the line manager should speak to the individual and advise him or her that the full entitlement of holiday leave must be taken and that he or she should submit dates for leave within the next couple of weeks. If the employee still declines to submit holiday dates, the manager can nominate the dates on which the employee must take some or all of his or her holiday leave (see Nomination of holiday days/dates by the employer). The line manager should also arrange for an accurate record to be kept of all holiday leave taken.

7. Religious holidays

Legislation prohibits discrimination against any employee on account of religion, religious belief or philosophical belief. 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 legislation, unless the refusal of the time off can be objectively justified as being necessary in terms of the effective running of the business.

Line managers should therefore take a positive and supportive approach towards employees whose religious beliefs mean that they ask for time off work at a particular time of year. However, this does not mean that employers are obliged to grant additional leave to employees for religious reasons (indeed this could amount to direct discrimination against other employees). The issue is one of scheduling employee's holiday leave to accommodate religious holidays

wherever possible. The line manager should therefore advise employees (and remind them where appropriate) that, as soon as they know when a relevant religious holiday or festival falls, they should inform management if they wish to take holiday leave at that time. Management should do its best to accommodate the request.

Where it is known in advance that a number of employees of a particular religion are likely to want holiday leave at the same time, the manager should consult the staff (or their representatives) well in advance with a view to reaching a fair agreement on how to manage the situation, taking into account the business needs of the department and balancing this against the employees genuine need for time off work at a particular time.

8. Accrual of holiday during periods of absence

As a result of both statutory measures and court decisions, it is clear that when an employee is absent from work, for example on maternity or paternity leave or due to sickness, statutory annual leave continues to accrue.

Accrual of annual leave during periods of sickness absence

When an employee is absent from work on account of sickness, his or her contract of employment remains in force (unless terminated by either party) irrespective of whether or not he or she is being paid statutory or occupational sick pay. It follows that statutory annual leave continues to accrue as normal during all periods of sickness absence, whatever their length. This principle was confirmed by the European Court of Justice in January 2009.

Although the law in this area is uncertain, in practice the route of least risk will be for managers to do one of two things when an employee is off sick for all, or a substantial part, of the holiday year:

- Encourage the employee to commute a period of his or her sickness absence into paid holiday leave. However, the employee cannot be required to take holiday leave during a period of sickness absence.
- Permit 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. On 16 May 2011, the Government launched a consultation on changes to the Working Time Regulations to deal with the interaction between sickness and annual leave.

Where employees are granted holiday entitlement in excess of the statutory minimum, the employer can implement a rule to the effect that entitlement to the additional contractual leave will not accrue during periods of sickness absence of more than a defined period (for example one month) and line managers should check their organisation's policies and procedures in this regard.

Employees who fall sick just before or during holiday leave

The position with employees who fall sick before a period of planned annual leave was considered by the European Court of Justice (ECJ) in September 2009. The ECJ ruled that where a period of illness extends into a period that has been scheduled as statutory annual leave, the employee must be permitted, on request, to reschedule his or her annual leave for another time once he or she has recovered. This is the case even if it means allowing the annual leave to be carried forward to the next holiday year.

The ECJ in this case noted that the purpose of annual leave is to allow the employee a period of rest, relaxation and leisure, while sickness absence is for the purpose of allowing the employee to recover from an illness or injury. Consequently, employees have the right to take their annual leave at a time other than during a period that coincides with a period of sick leave. The ECJ ruled that there can be no exceptions to this. On the ECJ's reasoning employees who fall sick while on annual leave, would also be able to reclaim their holiday entitlement.

Again, although the domestic law in this area is uncertain, the route of least risk will be to permit employees who fall sick before or during a period of holiday to take the holiday at another time, even if it means carrying it over to another leave year. It will be up to each employer as to whether to grant alternative holiday leave where the employee falls sick either immediately before or during any period of holiday in excess of the 5.6 weeks' statutory minimum, and line managers should refer to their organisation's policies and procedures on these matters.

Employers may decide to prescribe conditions that the employee must satisfy to be granted an alternative period of holiday leave at a later date, in particular that:

- the employee must produce a medical certificate to cover the whole period of incapacity;
- the employee must agree to be seen by an occupational doctor; and
- the dates of any replacement holiday leave can be determined by the employees manager,

and line managers should check their organisation's policies and procedures on these matters.

Holiday entitlement in relation to maternity, paternity and adoption leave

During maternity leave (to which all pregnant employees are entitled, regardless of length of service), the employees contract of employment remains in force for all purposes except remuneration. It follows that statutory and contractual holiday entitlement continues to accrue throughout the entire period of statutory maternity leave (which is up to 52 weeks).

It is advisable therefore for employers to adopt a policy on accrued holiday in respect of employees taking maternity leave, for example by requiring employees to use up all the current years holiday entitlement prior to the start of their maternity leave and (depending on how the dates of the employees maternity leave fit in with the employers holiday year) requiring them to take leave accrued during the maternity leave period within an agreed timescale after their return to work. The line manager should, once he or she knows the dates of the employee's proposed maternity leave, hold a meeting with her to discuss and agree how this is to be managed.

Employees who take adoption leave, ordinary paternity leave, or additional paternity leave are also entitled to the benefits of their contract of employment (except for remuneration) during leave, so the line manager should apply the same principles when managing their annual leave.

On a separate but related matter, the ECJ has ruled that where an employer operates an annual holiday shutdown, an employee who is on maternity leave at that time will be entitled to take an equivalent period of holiday leave at another time. The implications of this are that, where a woman is on maternity leave during a period when her employer has a shutdown for the purpose of annual holiday, she will be entitled to take an equivalent period of holiday leave at another time, either before or after her period of maternity leave.

9. Holiday entitlement on termination of employment

When an employee leaves his or her job part way through the holiday year (for any reason), 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 even if (for example) the employee has been dismissed for gross misconduct.

Taking holiday during the notice period

When an employee gives notice to terminate his or her employment, or is dismissed by the employer, there will be a period of notice (other than in cases of summary dismissal for gross misconduct). The length of the notice period will depend on the terms of the employee's contract. Some employers require employees to work their notice period, while others may prefer to pay the employee in lieu of notice, resulting in the employee's effective date of termination being brought forward. Where pay in lieu of notice is given, the employer needs to bear in mind that holiday entitlement should be calculated up to the date that the notice period (had it been worked) would have expired (unless there is provision in the contract of employment to the contrary).

Line managers should consult the organisation's policies and procedures as there are a number of rules that employers can choose to implement to deal with untaken holidays during the notice period:

- Employees may, on request, take some or all of their outstanding holiday entitlement during the notice period, subject to the agreement of line management in each individual case.

- Management have the right to require employees to use up outstanding holiday entitlement during their notice period (subject to any required notice for the holiday dates) (see Nomination of holiday days/dates by the employer).
- Any pre-arranged (and approved) holiday dates will be honoured but no further holiday will be permitted during the notice period.
- Employees may not normally take holiday during their notice period as their presence at work will be needed to ensure an effective handover to another employee.
- Management will consider requests for holiday leave during the notice period, but there is no guarantee that any such requests will be granted.

Payment of outstanding holiday leave

When an employee leaves the organisation, the employer is obliged in law to make a payment in lieu of any statutory annual leave that the employee has accrued during the current holiday year, but not taken.

Entitlement should be calculated pro rata, based on the number of days that the employee has worked as a proportion of the total number of working days (not calendar days) in the leave year. For example, where the employer's holiday year runs from January to December, a full-time employee entitled to 28 days' statutory annual leave who leaves his or her employment at the end of September having taken 10 days' annual leave out of the current year's entitlement, will, as at the date of termination, have 11 days' outstanding holiday due, i.e. 28 days divided by 12 and multiplied by nine (to account for the fact that only nine months of the year have been worked), minus 10 days already taken. Where the calculation results in a fraction of a day, the employer may either pay the employee the appropriate fraction, or, if it is more convenient, round it up to the next whole day. It is not permitted to round down in these circumstances.

The requirement to make a payment in lieu of holiday accrued but not taken on termination applies only to the period of statutory annual leave imposed by the Working Time Regulations (5.6 weeks) and not to any holiday entitlement that the employer may grant over and above the statutory minimum. The payment or otherwise of holidays that are in excess of statutory annual leave on termination is a matter for the employer to determine and communicate as part of employees contracts of employment.

Clawing back holiday

The law allows employers, when an employee is leaving, to claw back any statutory holiday entitlement that the employee has taken in excess of the statutory holiday that he or she has accrued during the final holiday year. This could occur, for example, if an employee had taken two or more weeks' holiday early in the holiday year, and then resigned soon afterwards.

However, in order to be entitled to deduct the appropriate amount of money from the employees final pay, the employer must have a relevant agreement in place to permit the deduction, i.e. either a suitably worded clause in the

employees contract authorising a deduction from pay for holiday taken in excess of accrued entitlement or a separate written agreement to the same effect that the employee has signed in advance.

10. Remedies for employees denied holiday or holiday pay

Employers that do not allow their employees to take their full statutory annual leave entitlement each year, or that do not pay their employees the amount of holiday pay due to them when they take their annual leave, run a risk of tribunal claims, particularly when an employee is leaving the organisation.

Claims under the Working Time Regulations

Any employee who is denied his or her right to take and/or be paid for 5.6 weeks' statutory holiday leave may bring a complaint under the Working Time Regulations to an employment tribunal. There is no minimum length of service required to bring this type of claim to tribunal. The claim must be brought within three months of the date the employee alleges that he or she was denied the right to holiday.

If a claim succeeds, the tribunal will make a declaration that the employee's rights were breached and may order the employer to pay compensation on a just and equitable basis. Where the complaint is that the employee was denied holiday pay, the tribunal will order the employer to pay the sum due.

Claims under the Employment Rights Act

An employee who is denied statutory holiday pay can, as an alternative to bringing a complaint under the Working Time Regulations, claim under the Employment Rights Act 1996 that the employer made an unlawful deduction from his or her wages.

Under the Employment Rights Act, there is also a provision allowing for an individual who is denied paid holiday to bring a claim for a series of unlawful deductions from pay in circumstances where the employer has failed in successive years to pay some or all of the statutory holiday pay due. This means that an employee could bring a single claim for unpaid holiday pay over several successive years (arguing that the non-payments or underpayments form part of a series of unlawful deductions from pay). In a case of this type, the claim has to be brought within three months of the last in the series of deductions. Such a claim, if successful, could lead to the employer being ordered to pay the employee holiday pay backdated over several years.