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Holiday Pay

We all love a holiday but when it comes to managing your workers' annual leave entitlements it's not always as straight forward as you might think.

Entitlement to annual leave

Under the Working Time Regulations 1998 (as amended) the majority of workers are entitled to 5.6 weeks paid leave each year. This entitlement applies to employees and to most agency and freelance staff. No matter how short the period of employment or engagement, the worker has the right to be paid for leave accrued during that time.

To increase worker commitment, you may choose to provide an enhanced entitlement which is more than the minimum statutory requirements. The contract of employment or written statement of particulars should include details of the total annual leave entitlement and should state whether any bank or public holidays are included within this leave entitlement. Bank or public holidays do not need to be given as paid leave and, therefore, if they are in fact paid, they can be incorporated into the maximum 28-day entitlement.

Part-time workers are entitled to fewer days of paid holiday than full-time workers. They're entitled to at least 5.6 weeks of paid holiday but, in their case, this amounts to fewer than 28 days because they work fewer hours per week.

If your full-time workers are entitled to paid public holiday leave, then, to avoid disadvantaging any part-time workers who may not work on the relevant day, all part-time workers should receive a pro-rated number of paid public holidays.

I'm often asked how employers should treat workers employed on a casual or zero hours contract. To ensure equal treatment with the rest of your workforce, the simplest way is to calculate their entitlement based on their working hours over a set period e.g. the preceding 12 weeks.

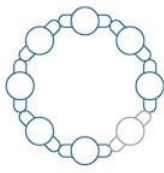
What payments should be included.

So, we've established how much leave should be paid, but what payments should you include? When considering this question, ask yourself - what payments does the worker regularly receive? If any payments aren't included, would there be a financial disadvantage to the individual taking annual leave? On this premise, basic pay, contractual overtime, bonuses, commission or shift work should all be included.

Seems straight forward enough, or maybe not? Recent case law has confused matters by suggesting that all overtime both contractual and non-contractual should be included when calculating holiday pay. This includes compulsory overtime, guaranteed overtime, regular non-guaranteed overtime and voluntary overtime. The leading cases on this issue are probably the decisions of the European Court of Justice (on referral from the UK) and of the Court of Appeal in the case of *Lock v British Gas Trading Ltd* and of the Employment Appeal Tribunal in the conjoined appeals of *Bear Scotland Limited v Fulton and others*; *Hertel (UK) Limited v Wood and others*; and *Amec Group Ltd v Law and others*.

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The combined effect of those cases is a clear rule that workers' holiday pay (for the annual leave to which they are entitled under EU law) should reflect the inclusion of payments which they receive normally in respect of overtime or commission.

Overall, the predominant trend in the case law seems to be that holiday pay should take into account commission, overtime, bonuses and other allowances. It's worth reviewing your processes to ensure that your workers' holiday pay takes account of these factors.

Annual leave entitlement during long term leave

During long term leave of absence from work for maternity, paternity or adoption, the entitlement to annual leave continues to accrue.

Entitlement to holidays during sickness absence, on the other hand, involves complex issues which have been the subject of high level litigation in the UK and the EU. The basic principle, however, is that a worker is entitled to holiday pay during sickness absence (even if they are not entitled to statutory sick pay).

Some key areas for you to consider in relation to this are:

- Workers on sick leave continue to accrue the annual holiday leave to which they are entitled under the Working Time Regulations.
- It is not lawful to provide that the right to annual holiday will be lost at the end of a holiday year where the worker has been on sick leave.
- You should not force a worker to take a holiday while on sick leave or say – “use the holiday or it will be lost”.
- A worker who becomes sick during pre-arranged annual leave, can stop their annual leave, take sick leave, then resume the remainder of their annual leave at a later date.
- Workers on long term sick leave could potentially accumulate significant periods of untaken leave, which should be taken, or paid for, once the worker returns to work or leaves.

Payment on Termination

On termination of a worker's employment or engagement, you can either allow outstanding annual leave to be taken prior to the last day of work or provide payment for it in their final salary. This is the only time at which a worker can be given payment in place of taking statutory leave. It's worth noting that even if a worker is dismissed for gross misconduct, you must pay for untaken statutory annual leave.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply at the relevant time.

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