Browne Jacobson

Holiday entitlement and pay: Reforms ahead

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The Government has published its response to the previous Retained EU Employment Law consultation. This response has been extended to include not only this consultation but a previous consultation on Calculating holiday entitlement for part-year and irregular hours workers. Draft legislation has also been produced, giving further information as to how these proposals are intended to operate in practice.

The press release which announces these reforms states that "these proposals don't change existing workers' rights in the UK" and instead are aimed at removing "unnecessary bureaucracy".

In this update, we take at a look at the proposed holiday entitlement and pay reforms in more detail to see how these may in fact affect existing rights.

Structure of the reforms and timing

The reforms seek to distinguish between those who work irregular hours and/or part-year workers, and all "other workers". Precisely what is meant by irregular hours and part-year workers is not set out in the consultation response but these terms are defined in the draft legislation. An irregular worker is a worker whose paid hours in each pay period are, under the terms of their contract, wholly or mostly variable. A part-year worker is a worker who, under the terms of their contract, is required to work for only part of the year and there are periods of at least a week when they are not required to work and for which they are not paid. Part-year workers may well have regular hours of work but the definition would not cover those who work each week but are only employed for part of the year (i.e. those who are employed for less than a year).

The draft legislation is intended to come into force in part on 1 January 2024, alleviating some of the uncertainty that would have arisen in respect of the calculation of holiday pay (as well as carry-forward rights) as a result of the Retained EU Law (Revocation and Reform) Act 2023. However, the new regime that will apply to irregular hours and/or part-year workers is delayed slightly to apply to any leave years starting on or after 1 April 2024.

"Other Workers"

For workers with normal hours of work and who are not part-year workers, the changes appear on the face of it to be fairly minimal. There are no proposed changes to the statutory holiday entitlement and no proposed changes to how leave accrues during the first year of employment.

With respect to pay, the changes are being presented as tweaks. There will still be two distinct pots of statutory leave – one of 4 weeks and one of 1.6 weeks. 1.6 weeks will be paid at the basic rate of pay, with 4 weeks paid at "normal remuneration", intended to reflect previous EU case law on what needs to be included within holiday pay. What is "normal remuneration" is defined in the draft legislation (albeit that the term "normal remuneration" is not used) as including:

1. payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;
2. payments for professional or personal status relating to length of service, seniority or professional qualifications;
3. other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation

date.

When calculating “normal remuneration”, provisions are included for averaging any of the above payments which would not otherwise be accounted for within the definition of a week’s pay under sections 221 to 224 of the Employment Rights Act 1996. However, these averaging provisions are currently drafted slightly differently than those set out in the Employment Rights Act (as already tweaked by the Working Time Regulations 1998). Specific reference to a 52-week averaging period is also a different approach than is currently the case when calculating “normal remuneration” under EU case law, where there is no one set “reference period” that applies in all cases.

Irregular hours and/or part-year workers

For those who work irregular hours and/or part-year workers, the changes are more substantive. To address the disparity arising as a result of the decision of the Supreme Court in Harpur Trust v Brazel – which means part-year workers who overall work the same number of hours as part-time whole-year workers are entitled to more annual leave – the Government is proposing that an accrual method based on 12.07% of hours worked in the previous pay period will be used to calculate statutory leave entitlement. The reference to “pay period” is a deliberate acknowledgement that not all employers will calculate hours and pay on a monthly basis. Overall accrual under the 12.07% methodology is, however, capped at 28 days in the holiday year in the draft legislation. Any accrual which results in a fraction of an hour will be treated as zero if it is less than 30 minutes, and an hour if it is 30 minutes or more.

This accrual method is not just limited to the first year of employment but will apply “beyond”, albeit that the response notes that employers will remain free to choose to provide a greater annual leave entitlement up front (meaning that they do not have to insist on accrual before leave is taken). There are specific provisions included as to how holiday accrual should be calculated where a worker is absent due to sick leave or family-friendly statutory leave.

The calculation of pay for this group of workers is also expressed differently; all holiday accrued under the 12.07% methodology will include the “normal remuneration” payments mentioned previously – not just 4 weeks of the leave. Whilst irregular hours workers already have all remuneration within the reference period counted when calculating averages, this would represent a change for normal-hours part-year workers whose pay is not just limited to basic pay.

There will also be the option available (although it is not compulsory) to employers to pay rolled-up holiday pay for this group of workers. The same option is not being extended to “other workers”. Where rolled-up holiday pay is paid, pay will be calculated on the worker’s total earnings in the pay period with an uplift of 12.07% applied. Rolled up holiday pay must be paid at the same time as their usual pay for work done, and the amount of holiday pay must be itemised on their pay statement. Again, there are provisions included for how to calculate rolled-up holiday pay during periods of sick leave or family-friendly statutory leave.

Other changes

There are further changes includes within the response and draft legislation. Some of these are to put on a legislative basis previous EU case law – such as the ability to carry forward 4 weeks’ annual leave that cannot be taken due to sick leave and any statutory leave when is cannot be taken due to family-friendly statutory leave. Similarly, carry forward provisions are included for 4 weeks’ leave where an employer fails to

1. recognise a worker’s right to 4 weeks’ leave or to payment for that leave in accordance with the statutory requirements;
2. give the worker a reasonable opportunity to take 4 weeks’ leave or encourage them to do so; or
3. inform the worker that any of the four weeks’ leave not taken by the end of the leave year, which cannot be carried forward, will be lost.

Provisions relating to the keeping of records are amended to clarify that employers need not record a worker’s daily working hours provided that they can otherwise demonstrate compliance with the Working Time Regulations 1998 regarding weekly working limits and provisions relating to night work without this. Lastly, provisions which allowed employees to carry forward leave in certain circumstances due to the effects of coronavirus are being removed as these are felt no longer to be relevant.

Type of leave

In Chief Constable of the Police Service of Northern Ireland and another v Agnew and others, the Supreme Court held that there no requirement as a matter of law to take leave derived from different sources in a particular order – it was not the case that the fours weeks’ leave derived from EU law needed to be taken first and that “additional” domestic leave (1.6 weeks) or contractual leave followed. The draft legislation doesn’t change this – it is silent on how the two pots of leave are to be treated in practice and so provides no guidance on

how to determine which type of leave is being taken. Under Agnew, in so far as it is not practicable to distinguish between different types of leave then all the leave to which the worker is entitled must form part of a single, composite pot; employers who don't wish to pay all holiday at the higher "normal remuneration" rate for "other workers", will need to consider how the different types of leave will be distinguished to avoid having to run complex calculations on composite leave periods.

Practical steps

Holiday pay and entitlement is a complex area, particularly for some groups of workers. Any proposals which increase certainty and simplify calculations will be welcomed. However, these new proposals do change the existing holiday entitlement and pay structures in fundamental ways for some workers and it will be important for employers to understand the how the two distinct groups (irregular hours and/or part-year workers, and then all other workers) fit their current workforce so that they can be clear on what statutory regime will apply to each worker, and how it will affect existing and any new contracts of employment, any existing policies, and current payroll approaches to averaging.

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