

How do holiday pay reforms affect the education sector?

📅 07 February 2024 👤 Sarah Linden

Academy trusts and schools will no doubt be aware that the Government recently introduced new legislation which brings in changes to holiday entitlement and pay. Holiday pay has long bedevilled the education sector.

So, what do these new legislative changes mean for education employers now? We examine whether it is plain sailing from here on out or whether there are further choppy waters ahead.

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 came into force on 1 January 2024. The regulations were much anticipated following the judgment in *Harpur Trust v Brazel* in July 2022 where the Supreme Court, when considering the holiday entitlement and pay of a visiting music teacher, determined that all workers were entitled to 5.6 weeks statutory holiday per year, regardless of how much work they performed.

Putting workers on the same footing

The decision put irregular hours and part-year workers on the same footing as full-year workers; their holiday entitlement could not be pro-rated to reflect their reduced working compared to a full-year worker. It also meant that part-year workers would receive a greater amount of holiday than part-time full-year workers, even where they worked the same number of hours.

The Supreme Court also clarified that employers must not use 12.07% of hours worked to calculate holiday entitlement, putting an end to the approach many academy trusts and schools had historically used.

The government's response

In response, the government commenced a consultation in January 2023 and, again, later in May 2023. The government lamented the state of holiday pay and entitlement, which it described as complex and challenging, and announced its intention to simplify statutory holiday.

The government criticised the 'disparity' created by the Supreme Court's decision in *Harpur Trust v Brazel*, instead setting out its stall that holiday pay and entitlement should be proportionate to the time a worker spent working. It proposed a number of changes to bring this about. So far, so simple.

However, when the new regulations were published in draft form in November 2023, there was a creeping realisation that these new rules would not result in a simplification of the previous rules. Instead, the regulations would create additional administrative burdens for employers and, in some cases, served to further complicate matters.

What do the new rules mean for education employers?

The regulations introduce two new statutory concepts: 'the irregular hours worker' and 'the part-year worker'. An irregular hours worker is someone whose hours are mostly variable during each pay period. A part-year worker is someone who is only required to work part of the year. Where a worker falls within one of those two categories, new rules come into force from the commencement of your next holiday year on or after 1 April 2024.

First up, employers need to calculate statutory holiday entitlement, being the amount of time off on leave workers receive. For irregular hours and part-year workers, the regulations provide that their holiday entitlement must be calculated in hours and this holiday entitlement accrues at the rate of 12.07% of the hours they actually work during the pay period, capped at 28 days.

Where a worker falls within this category, their statutory holiday entitlement can effectively be pro-rated under the calculation above, resulting in them receiving less than 5.6 weeks of statutory holiday in many cases. Less holiday entitlement means less holiday pay, potentially reducing the additional financial burden education employers faced after *Harpur Trust v Brazel*.

For employers to avail themselves of this new (potentially reduced) holiday entitlement accrual calculation, you will need to identify which of your workers are 'irregular hours' or 'part-year' workers. The likelihood is that you will employ some workers who perform varying hours; for example: peripatetic music teachers, casual staff, or examination invigilators.

How do you solve the problem of TTO holiday?

But what of part-year workers? At first glance, you would be forgiven for assuming that term-time only workers (TTOs) are part-year workers. We thought so too; after all, this was the government's stated intention behind amending the previous legislation. However, on 1 January 2024 the government published its non-statutory holiday pay guidance, which seems to suggest TTO workers cannot be part-year workers as there are no weeks during the year where they do not receive pay.

Employers will be familiar with the typical method of calculating TTO pay, whereby their worked weeks per year are added to their holiday entitlement weeks, to give a total paid weeks figure then paid to them across the year in 12 equal instalments. If the government's non-statutory guidance is correct, TTOs paid under this approach would not be part-year workers and would remain entitled to 5.6 weeks holiday per year, as was the case in *Harpur Trust v Brazel*, seemingly unravelling the purpose of the changes and undermining the intention the government set out in its holiday pay consultation in 2023.

“...the non-statutory guidance has got this wrong”

Put simply, we think the non-statutory guidance has got this wrong. Notably, the guidance is not legally binding and it's not the first time the government's non-statutory guidance on holiday pay has been incorrect - they previously recommended using the 12.07% method to calculate holiday which the Supreme Court found unlawful in *Harpur Trust v Brazel*.

Although part-year workers are paid in 12 equal instalments throughout the year, this is for administrative convenience only and the pay they receive during unworked weeks is deferred payment for work performed in an earlier pay period. The regulations themselves would appear to support this approach. For now, a degree of uncertainty remains unfortunately regarding the correct treatment of TTOs.

Despite the uncertainty caused by government's non-statutory guidance, we suspect most education employers will take the view that these workers are likely to be 'part-year' workers to avail themselves of the new accrual method of calculating (a potentially reduced) statutory holiday entitlement, which has the consequence of reducing holiday pay and saving education employers money at a time when budgets are already stretched to breaking point. We recommend that trusts and schools consider amending their TTO contracts to make the position clear.

For schools that follow the NJC Green Book

For many education employers, the argument may be purely academic where they already offer their full-time equivalent workers holiday entitlement exceeding the statutory minimum. For those trusts and schools who follow the NJC Green Book, support staff holiday entitlement currently stands at 33 days for those with 1-5 years' service and 36 days for those with over 5 years' service (inclusive of bank holidays). Where employers proportionately pro-rate their full-time employees' enhanced contractual holiday entitlement for TTO working, in most cases it will result in the TTO receiving in excess of 28 days' holiday. If you have a contractual holiday scheme that, when pro-rated, results in your TTOs receiving in excess of 5.6 weeks' leave, you don't need to worry about pro-rating their statutory holiday entitlement.

Can you use rolled-up holiday pay?

Yes, for irregular hours and part-year workers. The regulations provide for the possibility of paying rolled-up holiday pay, rather than paying irregular hours and part-year workers their statutory holiday pay at the time leave is taken. The new rules set out that rolled-up

holiday pay is to be calculated by applying an uplift of 12.07% to a worker's remuneration for work done in each pay period. This is likely to be a simpler approach to irregular hours holiday pay for education employers.

However, like so much else, it comes with a catch. You cannot simply pay workers rolled-up holiday pay; you must also allow them to take their holiday entitlement, being time off work. Holiday entitlement is, at heart, a health and safety measure after all. You will need to ensure that any rolled-up holiday pay arrangement is set out in workers' contracts, undertaking any associated consultation where this is a change to the existing arrangements. Employers will also need to itemise rolled-up holiday pay separately on workers' payslips.

What about the other changes?

The new regulations also set out a number of other changes which effect education employers. Notably, workers now have the statutory right to carry-over their leave where they are unable to take it as a result of statutory family leave (e.g. maternity leave) or due to a period of sickness absence. Another headline change is the introduction of the requirement to calculate workers' holiday entitlement accrual in hours separately whilst on statutory family leave or off sick as an average across a 52-week reference period.

One of the most significant changes is that employers will now be required to give workers a reasonable opportunity to take their leave, encourage them to do so and must inform the worker that any untaken leave will be lost. This is likely to require a change to your policies and procedures, as well as additional communications with your workers to remind them of the position.

If an employer fails to recognise a worker's entitlement to annual leave or holiday pay, the worker has a statutory entitlement to carry over their leave until the employer recognises and corrects the position, or alternatively a claim for this rolled-over leave accrual will crystallise upon termination of employment which could serve to be very expensive for employers.

Finally, some education employers overlook the inclusion of regular overtime in workers' holiday pay. Since workers should be paid the same when they are on holiday as when they are at work, if your worker regularly undertakes overtime, you should include those overtime payments when calculating their normal remuneration for the purpose of holiday pay.

What should you do now?

It is likely that all trusts and schools will have to make some changes to comply with the new regulations and to avoid claims.

Education employers should ensure that they understand the new rules on holiday since the education sector is likely to be impacted to a far greater degree than many other sectors. Having understood the regulations, you should put the necessary administrative changes in place to ensure your compliance with the new rules for irregular hours and part-year workers from the commencement of your next holiday year on or after 1 April 2024.

The existing rules on holiday entitlement and pay – including the entitlement to 5.6 weeks statutory holiday for all workers – continues to apply until the beginning of your next holiday year on or after 1 April 2024. Additionally, TTOs remain entitled to proportionately pro-rated contractual holiday entitlement and pay. Any historic non-compliance should be identified to ensure that you have understood your legal liability and reported upon the same internally within your organisation.

How can Browne Jacobson help?

To support our clients' understanding and implementation of the new regulations, we've developed training and a toolkit of resources to help you prepare for 1 April. These can be purchased separately, or together for a discount.

- Our Holiday Pay Training consists of an intensive 2.5 hour live remote training session, to equip your key personnel with the knowledge and understanding of what the new regulations mean for your workers and how to navigate this in practice in your organisation.
- Our Holiday Pay Support Pack contains a detailed guidance note explaining holiday pay and a host of resources to aid your implementation of the new rules including worked examples, template contract wording and letters to staff, decision tree and template briefing to Exec/Trustees.

If you have other questions, please do not hesitate to contact us.

Key contact

Sarah Linden
Senior Associate

sarah.linden@brownejacobson.com

+44 (0)330 045 2186

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