

Holiday reforms: What employers need to know

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The Government has now published its guidance to its new legislation on holiday entitlement and holiday pay, the [Employment Rights \(Amendment, Revocation and Transitional Provision\) Regulations 2023](#) (the Regulations) which came into force on 1 January 2024.

We consider the guidance and the Regulations and in particular the main changes employers should be aware of and what steps they should be taking as a result.

The Regulations

- With effect from 1 January 2024, have brought in and clarified workers' rights in respect of holiday pay and carrying holiday over.
- With effect from 1 April 2024, will bring changes to how holiday entitlement and pay is calculated for "irregular-hours workers" and "part-year workers".

Employers should note that, whilst the guidance seeks to remove any uncertainty of how to interpret and implement the Regulations, some grey areas remain. Further, the guidance is simply that, guidance, and even states that it is not intended to be relied upon in any specific context and that employers should take legal advice about the Regulations.

Changes effective from 1 January 2024

The main changes already now in force are:

- Holiday pay of full-year workers for their EU-derived holiday (four weeks of the 5.6 weeks' statutory holiday entitlement) is to be calculated using their 'normal remuneration' (see below). Put simply, this puts into law all the judgments about the calculation of holiday pay handed down over recent years since the very first cases Lock and Williams almost ten years ago.
- A worker's right to carry over holiday entitlement in certain circumstances that would otherwise have been lost due to the UK rescinding EU-derived laws (by way of the Retained EU Law (Revocation and Reform) Act 2023) following Brexit. The circumstances are when:
 - they have been unable to holiday due to sickness or family leave.
 - they have been denied their right to take paid leave; or
 - have not been informed that they would lose it at the end of the holiday year if they did not take it.
- The removal of the right to carry-over holiday if Covid for one reason or another has led to the worker being unable to take their holiday.

Changes with effect from 1 April 2024

The Regulations have, in part, been introduced to try to rectify the potential unfairness arising from the Supreme Court's judgment in [Harpur Trust v Brazel](#) which granted some part-year workers (such as term-time only workers) and some zero-hours workers a greater entitlement to holiday entitlement and holiday pay when compared by proportion of time worked to other workers who work regular hours or all year round. Accordingly, the Regulations provide employers of irregular-hours workers and/or part-year workers the option to either pay those workers:

- holiday pay when holiday is taken and to calculate that holiday pay using a 52-week average; or
- rolled-up holiday pay applies the well-established 12.07% calculation and then not pay any holiday pay when holiday is actually taken.

These changes apply to holiday years start on or after 1 April 2024. This means that, if an employer's holiday year follows the calendar year and starts on 1 January, these changes will not take effect until 1 January 2025.

‘Normal remuneration’ holiday pay

Under the Regulations, from the start of this year, employers must pay full-year workers four weeks of their 5.6 weeks' holiday pay calculated using 'normal remuneration' and the other 1.6 weeks may be calculated using their basic rate of pay. However, the Regulations do not state which comes when in any holiday year.

If an employer intends to pay the two different rates of holiday pay to a full-year worker, following the recent decision in *Agnew*, they must distinguish clearly between the two different holidays (that is, those making up the four-week-normal-remuneration holiday and those making up the basic-pay holiday of 1.6 weeks). Although the guidance does not expressly state how this may be achieved, reference is made to employers "explaining this clearly and consistently to the worker, for example in the worker's contract or staff handbook".

Irregular-hours workers and part-year workers, under the Regulations, must have all of their 5.6 weeks' holiday pay calculated using 'normal remuneration' irrespective of whether the employer chooses to pay rolled-up holiday pay or as a 52-week average.

The guidance states that 'normal remuneration' includes:

- Payments, including commission or bonus payments, intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out (for more information about bonuses, see below).
- payments relating to professional or personal status relating to length of service, seniority or professional qualifications.
- Other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.

It goes on to state that workers with regular hours and fixed pay must receive the same holiday pay as the pay they would receive if they were at work and working. For example, workers typically on a fixed monthly salary, if they take a week's holiday will receive the same pay at the end of the month as they normally receive.

The guidance contains a number of useful worked examples setting out how to calculate holiday accrual for irregular-hours workers and part-year workers, including when one leaves part way through a holiday year or is on maternity or family-related leave. However, employers may find themselves having to run numerous calculations in order to ensure they comply with the Regulations.

Definition of irregular-hours worker and part-year worker

If employers are going to take advantage of the changes, for example, by introducing or continuing to use rolled-up holiday pay or knowing which workers they must not pay basic-pay holiday for 1.6 weeks of holiday, it is important they know who is either an irregular-hours worker or a part-year worker.

The guidance sets out that a casual worker on a true zero-hours contract would be classed as an irregular-hours worker whilst a worker on a fixed rotating two-week shift pattern would not. However, the guidance does not address, for example, a worker on a minimum-hours contract if they work more than the minimum number of hours specified each week. Given that worker's hours could be said to be irregular, it could be argued that they fall under the Regulations as an irregular-hours worker.

A part-year worker according to the guidance is a worker who under their contract has periods of one week or longer in the year where they do not work and are not paid. This is designed to capture those, like Ms Brazel, who are hourly-paid term-time workers. The guidance also states that a worker who is paid an annualised flat salary over 12 months but has periods of time lasting more than a week where they are not working is not a part-year worker for the purposes of the Regulations because, whilst there are weeks where the worker is not working, they are still paid. However, as this arguably does not take account of the fact that the pay received during those weeks is for work done during the working weeks, an Employment Tribunal may take a different view.

Rolled-up holiday pay

The guidance reminds employers that, if they are considering changing to rolled-up holiday pay for their irregular-hours workers and/or part-year workers, it may amount to a contractual variation and so steps to address that should be taken. It also highlights the steps employers should take to communicate the use of rolled-up holiday pay and itemising it clearly on payslips. As already pointed out,

employers should calculate rolled-up holiday pay using the worker's 'normal remuneration' which could include regular payments, such as overtime, commission and bonuses.

Annual bonuses

Since the Lock case, a debate has been ongoing as to whether or not annual bonuses should be included in 'normal remuneration'. Whilst the guidance does not expressly deal with this point, it does refer to "the legal principle that a worker should not suffer financially for taking holiday. The amount of pay that a worker receives for the holiday they take depends on the number of hours they work and how they are paid for those hours".

It seems, therefore, that if a worker's ability to earn their bonus is unaffected by them taking holiday, that bonus would not be part of their 'normal remuneration'. Indeed, the Government's updated generic holiday pay guidance states that a 'normal' rate of pay does not usually include bonus payments. However, what is clear is that the debate has not been settled and employers should take advice about their annual bonus schemes.

Use it or lose it

Both the Regulations and the guidance are silent on what steps an employer should take to make it clear to workers that any untaken accrued holiday will be lost at the end of the holiday year. With that lack of clarity, employers should take advice to determine what would be best for them.

Steps for employers to take

We recommend you:

1. Check your methods of calculating holiday pay, in particular the composition of 'normal remuneration' and the inclusion of bonuses, comply with the Regulations.
2. Check your holiday policies and procedures reflect the Regulations' carry-over provisions and consider the benefits, costs and risks of encouraging workers to take all of their holiday and how to warn them it will be lost at the end of the holiday year if they do not;
3. Identify who on your workforce is an irregular-hours worker or a part-year worker coming under the Regulations; and
4. Consider which of the two holiday pay options, if any, you will adopt for irregular-hours workers and part-year workers.

If you would like to discuss the implication of the new employment Regulations further, then please contact us.

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