

PrivateEdge

Guide to minimum holiday rights

This guidance offers practical advice to businesses in complying with minimum holiday rights for employees. The guidance contains advice regarding holiday pay and considerations for employers when drafting contracts. Following this guidance will help to reduce the risk of successful claims by employees.

Minimum holiday rights are contained in the Working Time Regulations 1998 (“WTR”). These rights apply to “workers”, a term which encompasses all employees and also includes individuals who may not be employees but who provide services personally, provided that in doing so they are not working for a client or a customer of a business or profession they are carrying on. Certain groups of workers are excluded from the provisions relating to paid holiday under the WTR, including seafarers and those working in civil aviation, but these will often benefit from equivalent legislation governing holiday entitlement.

Amount of holiday

Under the WTR, workers are entitled to 5.6 weeks of paid holiday per year. This equates to 28 days for a worker working five days a week. Many employers choose to explain holiday entitlement to workers in terms of days or hours rather than weeks – which is fine, provided in substance workers receive 5.6 weeks’ holiday.

This minimum amount of paid holiday is often referred to as “statutory” holiday, because it is prescribed by law. You may choose to offer more holiday to your workers but are not obliged to do so by the WTR. Strictly, the rights referred to in this guide only apply to WTR holiday and not any additional holiday allowance you give workers – but most employers will treat both WTR holiday and any additional holiday identically to avoid the practical problem of having two sets of holiday rules.

The holiday entitlement under the WTR is inclusive of bank and public holidays. In other words, you are not obliged to provide for 5.6 weeks’ holiday in addition to bank and public holidays. If you regard bank and public holidays as holiday for its workers, these days count towards the minimum holiday entitlement under the WTR. You can choose whether to express this to workers as (for example) “20 days’ holiday plus the 8 normal bank and public holidays” or “28 days’ holiday inclusive of the 8 normal bank and public holidays”.

Holiday entitlement is calculated pro-rata in the first year and final year of work, when the worker will almost always only be engaged or employed for part of the holiday year.

Taking holiday

The WTR impose default provisions for when the holiday year runs from and to, how much notice a worker has to give to take holiday, and how much notice you have to give to require a worker to take holiday. Usually, employers will vary these default arrangements in a written contract with the worker. When drafting contracts, you should consider whether:

- to specify a particular holiday year (employers usually opt for a calendar year or the business financial year);
- workers should be required to give longer notice of intention to take holiday than the default provisions (under which the notice only has to be twice as long as the period of holiday sought);

- requested holiday dates should require a manager's express (ideally, written) approval before the worker is at liberty to take the time off;
- there should be pre-set limits on the amount of annual leave that can be taken or requested in any given period (for example, no more than two weeks' holiday at a time or no more than one week's holiday in total during busy periods);
- workers should be obliged to take holiday at certain periods (e.g. a Christmas shut-down);
- workers who resign or are dismissed should be required to take any accrued but unused holiday during their notice period, rather than be paid in lieu (see below).

The key concept behind the WTR is that workers take their holiday entitlement, as far as possible, in the year in which it accrues. Although you are not obliged under the WTR to accept any particular holiday request from a worker, you should not refuse requests such that the worker is denied an opportunity to take their full holiday entitlement in the holiday year.

The WTR provide that holiday cannot be paid in lieu whilst the worker is still employed or engaged, and the only circumstance where a payment in lieu of any accrued holiday is permitted (and, indeed, necessary) is upon the termination of the arrangement. If a worker is unable to take all of their holiday in the holiday year (e.g. due to long term sickness or family leave), they may be entitled to carry the balance over into the following year.

Holiday pay

The rationale behind the WTR is that workers should receive during periods of holiday the pay they would normally receive had they been at work, in order that there is no financial disincentive to take holiday. The law is currently in a state of flux as to how far variable pay elements like bonuses, commission and overtime payments ought to be reflected in holiday pay, and how these elements are to be calculated. Historically, many employers paid only basic salary during periods of holiday. Recent cases have confirmed that excluding certain variable pay elements from the calculation of holiday pay can result in workers being underpaid during periods of holiday. However, there are rules and limits governing how the extent to which workers might be able to seek compensation for historically underpaid holiday. Holiday pay is a complicated area and employers should obtain specific legal advice on their obligations in this respect if they are in doubt.

It is no longer permissible to avoid paying a worker during periods of WTR holiday by claiming that the pay the worker normally receives whilst at work is enhanced to include pay that would otherwise be due during a period of holiday (a practice known as "rolling-up" holiday pay).

Remedies for breach

Failure to allow workers to take leave or to pay them the correct amount of holiday pay may result in workers claiming there has been an unlawful deduction from their wages or otherwise claim for compensation for breach of the WTR.

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Legal advice in black and white

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