

Holiday Pay

Paying workers correctly



For employers with workers who receive variable pay due to working variable hours, such as overtime or who are entitled to be paid additional elements of pay above basic pay such as commission and allowances, there are a number of important rules, principles and changes to be considered in relation the calculation and payment of holiday pay.

Overview



- Legislation, case law and guidance regarding holiday entitlement and the calculation of holiday pay has evolved over recent years. From 6 April 2020 new legislation was enacted to change one aspect (the length of the averaging period to be used in the variable pay calculation) in relation to certain holiday days, but a number of cases in recent years have significantly affected what pay should be included in the holiday pay calculation.
- Government guidance relating to variable pay workers provides for calculations to be performed in a specific way, but this should be considered in the context of case law and legislation.
- Workers are entitled to 5.6 weeks' leave per year – 4 weeks under the EU Working Time Directive and 1.6 additional weeks under the UK Working Time Regulations. The principle aim of the EU Directive is that the structure of pay/holidays should not deter a worker from taking at least 4 weeks' leave each year.
- Normal remuneration for EU purposes includes most elements of variable pay, to be calculated on an average basis (e.g. overtime, commission, allowances).
- UK holiday pay (the additional 1.6 weeks) is calculated according to the rules relating to a week's pay set out in the Employment Rights Act 1996 – Importantly, this is a different calculation from that for EU holiday pay. The critical point to determine is whether your workers have 'normal' or 'no normal' hours as a different holiday pay calculation is required for each.

Considerations



Below are some of the key considerations employers should be taking into account now:

- **Pay elements and cost impact** - as additional pay elements are deemed to fall within 'normal remuneration', holiday pay continues to become more expensive for employers.
- **Systems & processes** – as the rules currently operate, calculating holiday pay is complex and systems may not include the necessary functionality (which may be out of date and/or rely on manual intervention/work arounds). Taking account of changes driven by case law may be particularly challenging.
- Systems and employers may still apply "rolled up" holiday pay calculations which are technically not permissible. Consideration should therefore be given to the risks associated with this approach and whether it remains appropriate for the business.
- **Worker awareness** – increasing worker awareness of holiday pay entitlement is a specific aim of the government, as stated in the **Good Work Plan**. This has been demonstrated by the recent government announcement of a holiday pay marketing campaign.

Why focus on this now?



- **Inconsistencies and non-compliance** - Currently there is inconsistency as to how employers calculate holiday pay, with the government estimating that holiday pay is a £3.2bn a year problem in the UK.
- **Legislative changes** - From April 2020, employers should use an average of the previous 52 weeks' pay to calculate UK holiday pay, meaning a greater amount of data will need to be analysed (previously a basis of 12 weeks was used).
- **Government focus** - The UK government is increasing its focus on this area, see for example, the Good Work Plan (please see our separate document for more information) which includes reviewing worker's knowledge and rights in relation to holiday pay.
- **Single Enforcement Body** - It is anticipated that a statutory enforcement body will be introduced by the government in the foreseeable future. The aim of this will be to enforce worker rights proactively, independently from individual worker claims. This could be similar to how NMW is currently enforced with the financial risk of penalties and reputational risk of naming and shaming. This may eventually include holiday pay.

Key Questions for Employers



- Does the business have workers who receive variable pay (such as overtime, allowances, premiums) and / or who work variable hours?. If the answer is yes then we're into the world of needing to consider averaging.
- Does the business have workers who have what we refer to as "Normal Hours Contracts" - i.e. a fixed or guaranteed number of weekly hours stated in their employment contract? Similarly, does the organisation have workers who have "No-Normal Hours Contracts", who have no guaranteed hours - i.e. banked staff / zero hour contracts.
- Following on from question 2 above, has consideration been given to the differences in the calculations for those workers who have Normal Hours compared to those who do not have Normal Hours?
- When calculating holiday pay, do you calculate a worker's average pay (including any variable pay elements) from the previous 52 weeks or use a period other than 52 weeks?
 - With regards to the averaging period, does the business use a rolling averaging period or a fixed period?
 - Similarly, is any adjustment made to the length of the averaging period for any weeks when the worker has not undertaken any work (i.e. due to being on holiday or sick)?
- Does the holiday pay process take the monthly pay and break the pay down into separate weeks, or does it only apply averaging on a monthly basis?
- Who is responsible for managing holiday entitlement and holiday pay calculations within the organisation (e.g. HR, payroll) and is this an automated or manual process (e.g. excel)?
- Are you aware of the government's proposal to introduce a Single Enforcement Body to proactively enforce worker rights matters (including holiday pay), similar to how HMRC currently enforces National Minimum Wage)?
- If you are calculating an average already, is this applied to all holidays or only part of the holiday entitlement?

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How Deloitte can help

Deloitte can help employers navigate their way through the complexities of holiday pay:

- **Understand** – Facilitating a workshop with key stakeholders to discuss the rules and risks around holiday pay with relevant personnel and for Deloitte to understand the processes in place to calculate holiday entitlement and holiday payments.
- **Identify** – Undertaking a legal review (including holiday pay experts from the Pay Governance team) of contracts, policies, pay elements, systems and processes to identify any differences between the current legislation/case law and current calculations/processes used by the business.
- **Calculate and quantify** – Assessing and calculating any potential historical cost impact and potential future costs/savings arising from moving to a compliant position.
- **Systems and processes** – Update systems, processes and policies to be robust, consistent and improve compliance with holiday pay rules and principles. In most instances this is done by understanding the functionality available in different systems and advising on how the functionality can best be used to meet the relevant holiday pay requirements.
- **Communications** – Where required, we can assist employers with communicating changes to holiday pay to key stakeholders. This may be workers impacted by the change in calculations but also managers within the holiday booking and administration processes.
- **Dispute resolution** – We can help manage instances of worker complaints, including providing advice under legal privilege and where appropriate, using data analytics to perform updated/relevant calculations.
- **Ongoing compliance** – Undertaking periodic reviews to assess whether systems are working appropriately and general compliance with holiday pay.
- **Legal advice** – We can provide legal advice in many of the areas mentioned above, with certain advice being provided under legal privilege.

The Good
Work Plan

National
Minimum
Wage

Holiday Pay

Pensions
Automatic
Enrolment

Diversity
and Inclusion

Equal Pay



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