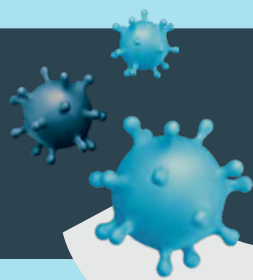


# SME DIGEST

ADVICE FOR SMALL & MEDIUM SIZED ENTERPRISES



Edited by Adam Bernstein

## HOLIDAY ENTITLEMENT

# CORONAVIRUS IMPACTS HOLIDAY ENTITLEMENTS



At this time of year, and to a lesser extent other times of the year too, thoughts turn to the trips and holidays we plan to take. In the short term, Coronavirus has put paid to that. But while we may not be able to travel, employees are still accruing holiday, and many are wondering how the rules will play out in the current climate.

*By Adam Bernstein*

Mid-May 2020, just as the government extended the Job Retention Scheme to the end of October, came more guidance on holiday entitlement and pay during the coronavirus emergency. There was guidance issued back in April which looked at holiday in terms of those furloughed; this new guidance applies to all workers.

### Employers can insist

According to the guidance, it's quite lawful for an employer to act to stop a worker taking time off on particular days. But to do this, the employer must give notice equivalent to double the length of the holiday that is planned to be taken. Similarly, where an employer wants to cancel holiday or stop a worker from taking holiday on a particular day, they must give notice equivalent to the length of the previously scheduled holiday.

But just as some are working normally, so others are furloughed, and government guidance says that the notice requirements apply to those both furloughed and working normally.

For the sake of workplace harmony alone, wise employers will speak to those furloughed before requiring them to take leave; an understanding will ease the process while diktats will only cause resentment. At the same time, before making demands sensible employers will think about limitations placed on workers that might undermine the whole point of a holiday – namely the ability to have rest and leisure time.

A question often posed is whether workers can be made to work on an official bank holiday. The response depends on the terms of the contract. But this aside, bank holidays aren't sacrosanct, and workers can be

required to work on these days provided they have sufficient notice and they still have their legal minimum leave of 5.6 weeks (or 28 days) for a full-time worker or pro rata for part timers.

### New provisions

Where matters get interesting is in the new provisions brought in by the Working Time (Coronavirus) (Amendment) Regulations 2020. These allow, in some circumstances, for leave to be carried over to another year.

The legal minimum of 5.6 weeks is made up of 4 weeks from EU law and 1.6 weeks from UK law. In normal circumstances the 4 weeks must be taken in the leave year that they relate to, while the law allows for 1.6 weeks to be carried over into the next leave year if there is a written agreement

to this effect. However, the law now allows where it is “reasonably practicable” for workers to take some or all of their leave as a result of the effects of coronavirus (whatever that may be – illness, lockdown or other relatable circumstance) into the following two leave years.

But what is “reasonably practical”? On this the guidance details factors that should be considered when making a decision:

- Whether the business has faced a significant increase in demand due to coronavirus that would reasonably require the worker to continue to be at work because there are no alternative practical measures;
- The extent to which the business’ workforce is disrupted by the coronavirus and the practical options available to the business to provide temporary cover for essential activities;
- The health of the worker and how soon a period of rest and relaxation is needed;
- The length of time remaining in the leave year to enable the worker to take holiday at a later date within the leave year;
- The extent to which the worker taking leave would impact on wider society’s response to, and recovery from, the coronavirus situation; and
- The ability of the remainder of the available workforce to provide cover for the worker going on leave.

Nevertheless, the guidance states that employers “should do everything reasonably practicable to ensure that workers are able to take as much of their leave as possible in the year to which it relates and, where leave is carried forward, workers should be given the opportunity to take holiday at the earliest opportunity.”

As for those furloughed, the guidance says that these workers

should be able to take leave while on furlough and so should be unlikely to need to carry over leave, a view which is in opposition to the stand taken by Acas in “Coronavirus: advice for employers and employees”. Acas takes the line that workers could carry over holiday if they have been furloughed and cannot reasonably use it in their holiday year. But what is reasonable in Acas’ view? The answer to this can be seen through one clear example - where an employer cannot pay the difference between a worker’s furlough pay and the normal rate of pay.

## New procedures

By definition of the new rules and coronavirus, there’s a fair chance that an employee will be left with both normal holiday and carried over holiday and this is going to raise the question of which gets used first. As the guidance explains, it is generally best to allow a worker to use holiday from the new holiday year before using any carried over leave because current year holiday cannot be carried forward if unused. An employer can only require a worker not to take carried holiday on particular days where the employer has a “good reason” to do so, but what this may be has not been stated.

Do employers have to tell workers that they can carry over leave? While there is no legal necessity to do so it might help employers later down the line; not only does it follow the spirit of the new law, but also case law has shown that holiday entitlement can only be lost if the worker had the opportunity to take it - this won’t apply if employees didn’t know about their rights and so couldn’t take the leave.

As noted at the very start, workers can be told to take holiday – including carried over leave – on given dates so long as the appropriate amount of notice is given.

## Payment issues

Another question that employees often ask is whether they can be paid in lieu of holiday that’s not been taken – it’s a question that’s become more pertinent with the new carry over provisions. The answer is that the law, specifically the Working Time Regulations 1998, state that statutory holiday entitlement can only be paid in lieu when an employee leaves the employer. The carry over provisions do not change this at all.

On top of this is how a furloughed worker should be paid for holiday taken. Here, the guidance says that the rules haven’t been changed; a worker on holiday should be paid in line with usual earnings and the existing rules. Where this may get difficult for an employer is in situations where a furloughed worker’s normal pay is higher than that during furlough as the rules require an employer in this situation to pay the difference even though it cannot be reclaimed through the Coronavirus Job Retention Scheme.

## In summary

It’s quite clear that employers need to watch the changing employment landscape and act accordingly. With tighter purse strings for all and a drawn out ‘emergency’, the risk of conflict and disputes will rise. Good legal advice could be helpful to those with questions or difficult situations to resolve.