

## Coronavirus and holiday entitlement – frequently asked questions – 6 April 2020

### Coronavirus Job Retention Scheme

The latest HMRC guidance (updated on 6 April 2020) provides further details of how employers can make a claim for wage costs through the Coronavirus Job Retention Scheme, but there are still questions left answered. The guidance does not address holiday entitlement during a period of furlough so we are left with the Acas guidance which is not absolutely clear on this point

The Acas guidance continues to give furlough as one of three reasons why a worker may be unable to take annual leave because of coronavirus which has led a number of employment lawyers to comment that this seems inconsistent with existing case law (such as the Supreme Court decision in *Russell v Transocean*).

The revised guidance includes a new section on the treatment of bank holidays which states:

*“Bank holidays are usually part of the legal minimum 5.6 weeks’ paid holiday. Employees and workers must get their usual pay for bank holidays.*

*Employees and workers may still be required to use a day’s paid holiday for bank holidays, including when they’re furloughed. If bank holidays are given on top of the 5.6 week’s paid holiday, employees and workers should check their contract or talk to their employer about taking this holiday.*

*If employees and workers usually work on bank holidays but are currently furloughed, they should check with their employer to see if they have to take holiday on that day or if they can take the time off at a later date.*

*If employees and workers cannot take bank holidays off due to coronavirus, they should use the holiday at a later date in their leave year.*

*If this is not possible, bank holidays can be included in the 4 weeks’ paid holiday that can be carried over. This holiday can be taken at any time over a 2-year period.”*

This has raised concern with employers firstly because it states that workers “must get their usual pay for bank holidays” and secondly because it recognises an employer’s right to require a worker to use a day’s paid holiday for bank holidays even during a period of furlough.

We understand that the government may publish additional guidance. The responses set out below, reflect our current view, but are subject to change following updated government guidance.

#### **1. Does holiday continue to accrue for employees on furlough?**

*Yes, on the basis that the situation seems analogous to an employee on sabbatical, although it is worth noting that there is no case law specifically dealing with the issue of annual leave accrual in this context. It is not clear what the correct rate of pay is for such holiday.*

*An employer could attempt to negotiate a change in contractual terms such that any annual leave over and above statutory leave does not accrue during furlough leave, but this may make furlough leave less attractive to employees and it is not clear whether an employer is entitled to add extra conditions to furlough leave, beyond a reduction in pay.*

## **2. Can employees on furlough take holiday?**

*ACAS guidance is that if an employee is furloughed, they can still request and take their holiday in the usual way. The guidance states that this includes taking bank holidays. However, the same ACAS guidance later states employees might be able to carry over holiday that they have not been able to take because they were on furlough. This implies that employees cannot take holiday during furlough. The position is therefore uncertain and employers will be keen to ensure that eligibility for government payments under the Scheme are maintained. It would be prudent to wait for further clarification before granting an employee request to take holiday in the furlough period. In practice however, we consider it unlikely that employees will be making requests to use holiday during the furlough period.*

## **3. Could holiday costs give grounds for an employer proceeding with redundancies, rather than putting employees on furlough?**

*It would be prudent to wait for further clarification on the treatment of holiday under the furlough scheme before progressing any proposals to make redundancies, but if holiday continues to accrue during furlough and it has to be paid by reference to an employee's normal remuneration, this could have a significant influence on an employer's forecasting and cost planning.*

### **Other holiday queries**

## **4. Do we have to allow all of our employees to cancel their currently booked holiday?**

*No. Unless your holiday policy provides otherwise, an employer can require its employees to continue to take pre-booked holiday, but should consider the impact of this from an employee relations perspective and subject to holiday cancellation which may sought due to sickness (see below).*

## **5. Are employees on sickness absence or who are self-isolating during a pre-booked holiday, allowed to reschedule the leave?**

*Normally, an employee on holiday who falls ill must be allowed to reschedule their holiday for another time, when they are not ill. Workers who are subject to self-isolation because they have COVID-19, or symptoms of it, or have been advised by a doctor or NHS 111 to self-isolate should be treated in the same way as any other worker who is absent due to ill health.*

*Where a worker is subject to self-isolation because government guidance recommends that they do so (for example, if they live with someone with symptoms) but they are not incapable of working due to their own ill health then the position is less clear. Such individuals will be entitled to Statutory Sickness Pay (SSP) because of the new rules on deemed incapacity. However, entitlement to SSP is not, necessarily, enough to bring them within the case law on rescheduling of annual leave for employees who are incapable to work due to ill health.*

*A period of self-isolation (where the employee is not also sick) does not have the same purpose as normal sick leave (because the purpose is containment of disease rather than allowing the worker to recover). However, it is also arguable that a period of self-isolation during which the worker is unable to leave their home would not be regarded as a period during which the worker can enjoy a period of relaxation and leisure (the purpose of annual leave). It is therefore arguable that the principle that sickness absence and annual leave have a fundamentally different purpose may also be extended to self-isolation and annual leave. If that were correct, employers would be required allow workers to reschedule at least the four weeks' leave contained in regulation 13 of the WTR 1998 where it is affected by self-isolation. However, the view may also be taken that there is no reason why a worker would not be able to have rest and relaxation during a period of self-isolation, where they are not ill.*

*We recommend approaching this based on your annual leave and carry over planning is for after the lockdown has ceased and taking into consideration staff morale and ER issues. It is important that employers deal with this issue fairly and consistently and the approach should be set out clearly and communicated to employees.*

## **6. Do we have to allow employees to carry over more than 5 days holiday into 2021?**

*If it is **not reasonably practicable** for an employee to take their leave in the current leave year, then the Working Time (Coronavirus) (Amendment) Regulations 2020 provide that up to four weeks' statutory leave can be carried forward and taken in the following two leave years.*

*The driver behind this legislative change is ensuring that key workers who may have holiday requests cancelled in the height of the outbreak are not disadvantaged. For the majority of staff, it is likely to be reasonably practicable to take their leave in the current leave year. The situation is likely to be best managed through pro-active employee communications which emphasise the importance of taking annual leave for health and wellbeing (even where it is not possible to go away on holiday in the traditional sense). Employers should also review their holiday policy and contractual provisions to ensure that treatment is consistent with those provisions and/or any policy changes are communicated as soon as possible.*

*It is worth noting that it has been held previously that employees should be permitted to carry over unused statutory holiday in circumstances where they have not had an effective opportunity to take their Working Time Directive (WTD) four weeks' leave. This requires an employer to show that it has provided sufficient information to the employee about their holiday entitlement and the potential loss of untaken holiday at the end of the leave year.*

*In most cases, we therefore think it is worth keeping track of employees' holiday and writing to them, in good time before the end of the holiday year, firstly, to encourage them to take their holiday and, secondly, to remind them that they will lose their entitlement if they do not take it (subject to any existing carry-over arrangements).*

## **7. We are happy for our employees to carry over leave, what do we need to do?**

*The Working Time (Coronavirus) (Amendment) Regulations 2020 only apply in respect of four weeks' WTD leave to the extent that it was not reasonably practicable to take that leave. Holiday which could have been taken, additional Working Time Regulations 1.6 weeks leave and additional contractual holiday are not covered by these amending Regulations. Employers will need to consider putting in place an agreement with employees which allows all (or more) of their leave to be carried forward (as this is unlikely to be permitted under existing contracts of employment).*