

Brachers Bitesize

Holiday Pay 2024

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Presented by:
Colin Smith & Petra Venton
Employment and HR



Welcome

Presenters



Colin Smith

Employment and HR

ColinSmith@brachers.co.uk



Petra Venton

Employment and HR

PetraVenton@brachers.co.uk

Introduction

1. Sound Check
2. Slides
3. Survey



Today's Session

What we aim to cover

1. A “week's pay” – what do the new rules say about what counts?
2. Carry over – what do the new rules provide for?
3. Irregular Hours/Part Year workers and Holiday Entitlement
4. Rolled Up Holiday Pay option for Irregular Hours/Part Year workers



Implementation Timetable

Implementation Timetable

- The Employment Rights (Amendment, Revocation and Transitional Provisions) Regulations 2023.
- The new provisions on pay and carry forward of leave came into force on **1 January 2024**.
- The changes that apply to part year and irregular workers come into force from **1 April 2024** at the earliest and in many cases far later.
- The new rolled up holiday pay option apply to leave years starting on or after **1 April 2024**.

Leave Year Examples

Leave Years and the new rules:

- 1 April – 31 March leave year – new rules apply from 1 April 2024
- 1 January to 31 December leave year – new rules apply from 1 January 2025
- 31 March – 30 March leave year – new rules apply from 30 March 2025

Determining your Leave Year

What determines your leave year?

- A “relevant agreement”
- This is usually a written contract of employment, but could also be a collective or workforce agreement.
- If you don't have a relevant agreement:
 - it is the anniversary of the worker's start date,
 - unless the worker started work on or before 1 October 1998 in which case the leave year starts on 1 October for Regulation 13 and 13A cases but not regulation 15B cases.



Types of holiday

Types of holiday – 13, 13A and 15B!

What type of holiday is a worker taking?

- **Regulation 13** – this is the four weeks' leave which originally derived from the Working Time Directive
- **Regulation 13A** – this is the 1.6 weeks' leave which derived from domestic legislation
- **Regulation 15B** – this is a new right to rolled up (hours based) holiday entitlement for irregular and part year workers



Holiday Pay – What is Pay?

Holiday Pay

- The Regulations restate and codify retained EU and domestic case law on what should be included in a "week's pay" when calculating holiday pay.
- Pay received by a worker whilst they are on holiday should reflect what they would have earned if they had been at work and working.
- Workers with irregular hours or differing rates of pay – averaging calculation over previous 52 weeks
- Workers with regular hours and fixed pay – pay they would have received during that period.

Holiday Pay

A week's pay for holiday under Reg 13 and 15B WTR (if this option is chosen) will include payments:

- which are intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out (which would include commission payments);
- for professional or personal status relating to length of service, seniority or professional qualifications; and
- which have been regularly paid to a worker in the 52 weeks preceding the calculation date (such as overtime payments).

Holiday Pay

- The amended definition of a week's pay will **not** apply to the 1.6 weeks' Reg 13A WTR holiday.
- The current definition of a week's pay, set out in the Employment Rights Act 1996, will continue to apply.
- In practice most employers apply one approach to both entitlements as it often too complex to separate and administer two systems.
- If you wish to pay different rates of pay for the different types of leave, you will need to explain this clearly and consistently to your workers.
- You will also need to be able to identify which of the two leave entitlements is being exercised for any period of leave!



Carry Over Rules

Carry Over

- The WTR are being amended to make current case law part of statutory law.
- The theory is that this is not a change to current principles derived from case law.
- Different rules apply to different causes of carry over.
- Different periods of time then apply to the different reasons.
- Different rules also apply to the different entitlements under regulation 13, regulation 13A and new regulation 15B (rolled up holiday) entitlements.

Carry Over – Statutory Leave

- For regulation 13 (4 weeks), regulation 13A (1.6 weeks leave) and regulation 15B (new rolled up holiday entitlement)
- Where:
 - as a result of taking **a period of statutory leave** in any leave year,
 - a worker is **unable to take** some or all of the annual leave to which the worker is entitled in that leave year,
 - the worker is entitled to carry forward such untaken leave **into the following leave year.**

Carry Over – Sick Leave

- For regulation 13 (4 weeks) and 15B (new rolled up holiday entitlement)
- Where:
 - As a result of taking a **period of sick leave** in any leave year,
 - a worker **is unable to take** some or all of the annual leave to which the worker is entitled in that leave year,
 - the worker is entitled to carry forward such untaken leave into the following leave year **provided it is taken by the end of the period of 18 months from the end of the leave year in which the entitlement originally arose.**

Carry Over – Failure

- For regulation 13 (4 weeks) and regulation 15B (new rolled up holiday entitlement)
- Where:
 - in any leave year, **an employer fails** to:
 - **recognise a worker's right** to annual leave or paid annual leave;
 - give the worker a **reasonable opportunity** to take the leave or **encourage** them to do so; or
 - **inform** the worker that any leave not taken by the end of the leave year, which cannot be carried forward, will be lost.
- The worker can carry forward leave **until the end of the first full year in which there is no such failure by the employer.**

Carry Over

| Entitlements it applies to | Cause of carry over | Duration of Carry over |
|--|---------------------|---|
| Reg 13 (4 weeks) and 13A (1.6 weeks) and 15B (rolled up holiday pay) | Statutory Leave | Following leave year |
| Reg 13 and 15B Not 13A | Sick Leave | 18 months from the end of the leave year in which the entitlement arose |
| Reg 13 and 15B Not 13A | Failure to permit | Indefinitely until rectified. Then not beyond end of the first full leave year in which the failure did not apply. |
| Reg 13 and 15B Not 13A | Failure to promote | Indefinitely until rectified. Then not beyond end of the first full leave year in which the failure did not apply. |

A photograph of a crowded beach with numerous red and white striped umbrellas. The umbrellas are arranged in rows, and the ocean is visible in the background. A blue banner is overlaid on the bottom left of the image.

Irregular Hours and Part Year Workers

Hours Based Holiday Entitlement

Who does the hours based holiday entitlement apply to?

- New regulation 15B WTR 1998.
- Creates a new hours worked based holiday entitlement (12.07% of hours worked) for:
 - those who “work irregular hours”; and
 - “part-year workers”
- Permits an option to then pay rolled up holiday pay for these types of worker.

Irregular Hours Worker

Who is an “irregular hours worker”?

New Regulation 15F:

“a worker is an irregular hours worker, in relation to a leave year,

if the number of paid hours

that they will work in each pay period

during the term of their contract in that year

is, under the terms of their contract,

wholly or mostly variable”

Irregular Hours Worker

What does “wholly or mostly variable” mean?

No further clarification is provided in the legislation.

Government guidance:

2.1 Irregular hours worker

A worker is an irregular hours worker, in relation to a leave year, if the number of paid hours that they will work in each pay period during the term of their contract in that year is, under the terms of their contract, wholly or mostly variable.

Irregular Hours Worker

Examples

Kevin, a hospitality worker who works a different number of hours each week.

Kevin would qualify as an irregular hours worker if his contract says that the hours he works will be wholly or mostly variable in each pay period.

Kevin's contract could be a 'casual' contract, otherwise known as a zero-hours contract. Find more information on zero hour contracts.

Irregular Hours Worker

Examples

Paul, who has a rotating 2-week shift pattern where he works 15 hours in week 1 and 20 hours in week 2.

He does not work overtime.

*Paul would not qualify as an irregular hours worker **if his contracted hours are fixed during both week 1 and week 2.***

Given that Paul does not work overtime, it is not the case that his hours worked are wholly or mostly variable.

Instead, Paul's hours are fixed (just worked in a rotating shift pattern).

Part Year Worker

Who is a part year worker?

a worker is a part-year worker,

in relation to a leave year,

if, under the terms of their contract,

they are required to work only part of that year

and there are periods within that year (during the term of the contract) of at least a week

which they are not required to work

and for which they are not paid.

Part Year Worker

What does the government guidance say:

2.2 Part-year worker

A worker is a part-year worker, in relation to a leave year, if, under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid. This includes part-year workers who may have fixed hours.

Part Year Worker

What does the government guidance say:

Examples

Melanie, a seasonal worker in the farming industry who only works and gets paid during spring and summer months.

Melanie would qualify as a part-year worker if her contract reflects that there are periods of time that last more than a week when she is not contracted to work and does not receive pay.

The regulations require that there must be a period of at least one week 'for which they are not paid' which means that it would still be possible for a worker to be paid 'during' that period so long as there is no expectation of them working in that period and nor are they receiving payment 'for' that period.

Irregular and Part Year Workers

How do I deal with a worker with more than one contract?

Reg 15F(2):

In a case where a worker has more than one contract with the same employer, the reference in paragraph (1)(a) to the number of paid hours that the worker will work under the terms of their contract being wholly or mostly variable includes a reference to the being wholly or mostly variable when the terms of their contracts with that employer are looked at in the round.

What about periods of absence for part year workers?

Reg 15F(3)

In determining whether a worker is a part-year worker in relation to a leave year, any period of sick leave or statutory leave taken by the worker in that leave year is to be ignored.

The Hours Based Entitlement – 15B

What is the entitlement to annual leave for part year/irregular hours workers?

- Reg 15B WTR (and won't be governed by Regs 13 and 13A WTR).
- Holiday entitlement will be calculated in hours rather than weeks
- Subject to a maximum of 28 days entitlement.
- It is one blanket entitlement, no distinction akin to the current Regulation 13 (4 weeks) and 13A (1.6 weeks) differences.
- An average over a 52-week reference period will be used to calculate the holiday accrued during a period of sick leave or statutory leave (such as maternity leave).
- **Accrues pay period (e.g. weekly or monthly) in arrears!**

Rolled Up Holiday - The Entitlement

Do we have to calculate entitlement this way or can we use the old system under regs 13 and 13A?

- If they are irregular hours workers or part year workers the entitlement must be determined under regulation 15B in hours not 4 weeks under regulation 13 and 1.6 weeks under regulation 13A.
- Note the method of payment rules are a choice.

Rolled Up Holiday Entitlement

How do you work out the entitlement?

Reg 15B(2) states that the amount of annual leave to which an irregular hours worker, or a part-year worker, is entitled at any time during a leave year is

- *the amount of annual leave that they have accrued in that year,*

plus

- *the amount of annual leave (if any) that they have carried forward into that leave year,*

less

- *the amount of annual leave (if any) that they have taken during that leave year.*

Rolled Up Holiday Entitlement

How do you work out the entitlement?

(3) In each leave year, an irregular hours worker, or a part-year worker, accrues annual leave:

(a) during any period of sick leave or statutory leave, in accordance with regulation 15C, and

(b) otherwise,

on the last day of each pay period

at the rate of 12.07% of

the number of hours that they have worked during that pay period.

Rolled Up Holiday Entitlement

How do you work out the entitlement?

(4) But a worker cannot, in any leave year, accrue more than 28 days of annual leave under this regulation.

Rolled Up Holiday Entitlement

What are “hours worked”?

The regulations do not further clarify what does and does not count as “*hours worked*”.

The government guidance states:

3.1 How statutory holiday entitlement is accrued

...

For leave years beginning on or after 1 April 2024, there is a new accrual method for irregular hour workers and part-year workers in the first year of employment and beyond.

Holiday entitlement for these workers will be calculated as 12.07% of actual hours worked in a pay period.

Rolled Up Holiday Entitlement

Do “hours worked” include all hours worked i.e. overtime?

It is not 100% clear.

In our initial view, based on the wording of “all hours worked” - yes.

This would also seem to fit with the intention of the regulations.

Rolled Up Holiday Entitlement

How do I deal with fractions of an hour:

Reg 15B(5):

Where the amount of annual leave that has accrued in a particular case includes a fraction of an hour, the fraction is to be treated as zero if it is less than 30 minutes and one hour if it is 30 minutes or more than 30 minutes.

Rolled Up Holiday Entitlement

Can I pay in lieu of rolled up holiday entitlement (rather than allow them to take it as holiday)?

- No
- Reg 15B(6):

Annual leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where the worker's employment is terminated.

- Note the same carry over rules for failure apply

Rolled Up Holiday Entitlement

Do I have to use the rolled up option for irregular/part year workers?

- Yes and No
- For entitlement in hours – Yes
- For method of payment – No.
- Employers will be able to choose from the two systems for payment the current/historic 52 weeks average approach or the new rolled up approach.

Rolled Up Holiday Entitlement

Can I use rolled up holiday for all of my workers?

- For entitlement – No
- For payment method - No
- The new hours based regulation 15B entitlement is only lawful for irregular hours or part year workers.
- The new optional regulation 16A rolled up pay approach is only lawful for irregular hours or part year workers.

Rolled Up Holiday Payment

How do we pay for rolled up holiday entitlement?

- Pay for such workers is addressed in a new regulation 16A:

16A:

(1) This regulation applies in relation to pay due to a worker under regulation 16(1) in respect of leave to which the worker is entitled under regulation 15B.

(2) Such holiday pay may be paid by way of a 12.07% uplift to the worker's remuneration for work done.

(3) Holiday pay paid in accordance with paragraph (2) must be paid at the same time as the worker's remuneration for work done.

Rolled Up Holiday Payment

How do we pay for rolled up holiday entitlement?

- An itemised pay statement is required:

*(7) Where an employer pays a worker holiday pay in the way described in paragraph (2) or (5) **any itemised pay statement provided by the employer to the worker must indicate the amount of holiday pay that has been paid for the period to which the statement relates.***

Rolled Up Holiday Payment

Does the 12.07% apply to enhanced pay rates i.e. overtime rates or shift allowances?

- It is not 100% clear from the new regulations.
- In our initial view – Yes.

“the worker’s remuneration for work done.”

- Government Guidance:

*Employers using rolled-up holiday pay should calculate it based on a worker’s **total pay** in a pay period.*

The holiday pay should be paid at the same time as the worker is paid for the work done in each pay period.

Rolled Up Holiday Payment

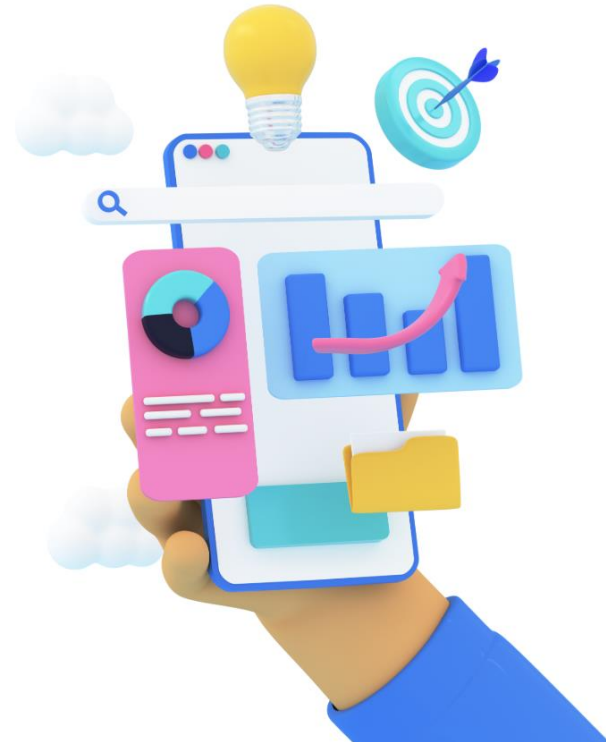
Government Example:

- *Mark works irregular hours and is paid fortnightly. His hourly rate is £11 per hour (normal hourly rate) for shifts 7am to 11:59pm and £12 per hour (enhanced hourly rate) for shifts midnight to 6:59am.*
- *In the fortnight 1 August to 14 August, Mark worked 40 hours.*
- *He worked 20 hours at normal rate (£11 per hour) and 20 hours at an enhanced rate (£12 per hour).*
- *To work out how much rolled-up holiday pay Mark is entitled to, you will need to calculate 12.07% of Mark's **total pay** in this pay period.*
- *As Table 7 shows, the calculation for rolled-up holiday pay applies to a worker's total pay in a pay period, **regardless of differing hourly rates of pay.***

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