

The Definitive Employer's Guide

to Annual Leave and Pay



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Employment Law / HR / Health & Safety

Welcome to the **Definitive Employer's Guide** to Annual Leave and Pay



In this guide, we will explore how to determine annual leave entitlements, whether employees can carry over leave to the next holiday year, what happens if an employee falls sick while on leave and how to calculate holiday pay amongst many more topics. All the while, we will highlight expert tips and warnings to make sure that your approach is in line with the law and best practice.

If you have more questions, please do not hesitate to get in touch.

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Senior Employment Law Adviser

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Should we have an annual leave policy in place?



Every organisation should have workplace rules regarding annual leave. These will typically be found in the employee's Contract of Employment or Employee Handbook.

Entitlement

It is a legal requirement to provide written details regarding holiday entitlement. You should specify how many days of leave the employee is entitled to and whether it includes bank holidays. It is also important to make clear to employees starting in the middle of the year, the amount of holiday they are entitled to will be proportional to the amount of days remaining in the leave year.

Booking

In your policy, you should reiterate that all annual leave must be agreed in advance with line managers. This will prevent employees from booking their holidays and making commitments without having first obtained authorisation.

Limits

You should lay down how many consecutive working days can be booked, for example, 10 days and/or how many people can be off work at one time.

Procedure and notice

You should specify how much notice the employee must provide when booking annual leave.

Leave year

In your policy, you should make it clear what the holiday year is. For example, it could be the calendar year (1st January- 31st December), fiscal year (1st April to 31st March) or from the date when the employee started working.



EXPERT TIPS!

It is easier to manage if you agree on the same leave year for all employees.

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Should we have an annual leave policy in place?



Carry over

You should specify your rules for carrying over untaken holiday entitlement from one annual leave year to another.

Restrictions

Explain that your managers may refuse a request for leave if it would result in the workplace being understaffed or otherwise negatively affect the organisation. You may also, on providing reasonable notice, require employees to take leave at certain times of the year, or refrain from taking leave during certain busy periods.

Leave at the end of employment

You should clearly state that employees who leave their employment during the course of a holiday year will be entitled to a pro-rata payment reflecting leave accrued but not taken.

Where an employee has, at the time their employment ends, taken a larger proportion of their leave entitlement than the proportion of the holiday year that has expired, then a deduction can be made from the final payment of salary to reflect the holiday which has been taken but not accrued. This right to deduct should be clearly stated within the Contract of Employment.



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How much annual leave are employees entitled to?



All **workers** are entitled to annual leave. This includes employees, but excludes the self-employed.

Full-time

Full-time employees have the right to 5.6 weeks (28 days) of paid annual leave per year. The first 20 days' leave are provided by European law and the additional 8 days are prescribed by the UK Working Time Regulations.

Employers can provide more generous allowances than those provided by statute, but no less.

Part-time

Those working part-time are entitled to the same amount of holiday as full-time employees, but their entitlement is calculated on a pro rata basis. Their entitlement is calculated by multiplying the number of days worked per week by 5.6.

For example, if an employee works three days a week, they will be entitled to 16.8 days of annual paid leave.

Irregular hours

In some cases, employees work different hours each week. For example, a worker on a zero hours contract in the retail sector may work 40 hours a week in the run up to Christmas, but once the festive season has ended, their hours may fluctuate greatly week to week.

The easiest way to determine the holiday entitlement for those on zero hours contracts is by calculating it on the basis of the hours they have actually worked. The holiday entitlement of 5.6 weeks is equivalent to 12.07% of the hours they have worked. Therefore if they have worked 12 hours, they have the right to 1 hour 27 minutes.



EXPERT TIPS!

If you are in doubt when calculating leave entitlements, seek legal advice.

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How much annual leave are employees entitled to?



REMEMBER...

Generally bank holidays are counted as part of the statutory 5.6 weeks.

Bank holidays

The law does not provide employees with a statutory right to time off on bank holidays. Whether they will be required to work or not will depend on the **terms in the Contract of Employment**.

The employee's contract may say something along the lines that in addition to all bank and public holidays, the employee is entitled to X working days of holiday. Alternatively, the contract may say the employee's annual leave entitlement of X days is inclusive of bank and public holidays.



EXPERT TIPS!

Leave the **drafting to the professionals** to ensure that your contracts will stand up to scrutiny. Our Employment Law Advisers can draft your employee's Contract of Employment to meet legal requirements and align with your business interests.

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How much annual leave are employees entitled to?



Although in many cases, employers do grant employees time off on bank holidays, the nature of some organisations means that it is essential that employees work to meet business or operational demands, for example, in the case of retail, transport and public services.

Employers are under **no legal obligation to pay an employee extra** for working on a bank holiday, but an employee may be entitled to more if this is stated in the **Contract of Employment or based on customary arrangements**. For example, the employer may decide to pay the employee time and a half or double time for working on a bank holiday if this is a long-standing practice.



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How is annual leave accrued?



There is a dangerous assumption that an employee does not have any rights until they have successfully completed their probationary period. This is not true. Statutory rights will depend on length of service, not whether they have passed their probationary period.

Annual leave is a right that is acquired from the employees' **first day of employment**. This means that as soon as they start their job with an employer, their entitlement to annual leave starts accruing (building up).

During the first year of employment, employers may decide to use an **accrual system** to calculate the employee's holiday entitlement. In each month, the employee will accrue one twelfth of their full annual leave entitlement.

If they begin a job mid-way through the year, they will have the right to only a proportion of the 5.6 weeks' annual leave which is equal to how much of the holiday year remains. They will receive their whole annual leave entitlement once the new annual leave holiday commences, subject to the accrual system referred to above.

Alternatively, employers may wish to give the employees pro-rata holiday entitlement upfront without needing them to accrue it.



REMEMBER...

If the employee wants to take time off for a holiday within the first few weeks of commencing employment, they may need to wait a bit before they have accrued enough days.

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How is annual leave accrued?



Accrual on zero hours contracts

If an individual is on a zero hours contract and is on an umbrella contract, i.e. one where they remain an employee/worker when they are not working, they will accrue leave during the entire duration of the contract, whether or not they are working. However if an individual is on separate and severable assignments, their annual leave entitlement will only accrue while they are working.



EXPERT TIPS!

To avoid a whole host of obligations, it should be drafted into the contract that each offer of work should be treated as an **entirely separate and severable assignment**. However, this must reflect the true position as a Tribunal will be entitled to look behind those terms if they do not.

Accrual while on sick leave or maternity leave

Statutory holiday entitlement continues to accrue while an employee is off work sick or on maternity leave.



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Can employees carry over untaken annual leave?



Employees must take **at least four weeks of leave** per year.

If an employee receives 28 days' leave, they can carry over **up to a maximum of eight days**. The terms regarding carrying over leave should be included in the terms of the Contract of Employment or Employee Handbook.

If the employer provides a more generous holiday entitlement than the statutory minimum, you may allow the employee to carry over any extra leave depending on what is laid down in the contract or handbook.

Carrying over leave not taken due to maternity leave

If an employee has been unable to take annual leave because they are on leave for a different reason, for example they are absent from work due to maternity leave, they can carry over their unused leave to the next year.



EXPERT TIPS!

Case law from the European Court of Justice (ECJ) states that it would constitute **discrimination** based on sex if a woman loses her right to statutory annual leave due to going on maternity leave, therefore employers will need to ask employees to use their annual leave before going on maternity leave, allow them to carry some over or ask them to take this annual leave before they return to work.

Carrying over leave not taken due to sick leave

An employer must allow the employee to carry over **up to 20 days if they were sick** and could not take leave. It can be carried forward for up to 18 months from the end of the holiday year when the leave was due to be taken.

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How should I allocate leave and manage multiple requests?



The law lays down that employees must take at least 20 days off during the holiday year, but it does **not give employees an automatic right to choose when to take leave.**

When an employee wishes to take time off, they will need to make a request according to your company's **procedure**, which should be found in your Employee Handbook. For example, you may ask for the employees to complete a form and give it to their line manager or ask them to submit a request through the company's intranet system.

They will also need to respect **notice periods**. Generally, employees should provide you with notice which is at least twice as long as the leave that they are requesting. This means that if they request one week of leave, they should provide you with at least two weeks of notice.



REMEMBER...

An employer is within their rights to **provide notice to an employee that they are to take leave on particular days that suit the business.** In order for this to occur, the employer must provide notice to the employee – this is the twice as long as the leave they wish to enforce.

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How should I allocate leave and manage multiple requests?



Managing requests

Most employers opt for an approach, whereby leave is granted on a **'first come first served basis'**.



EXPERT TIPS!

In your policy, it is useful to include that there may be exceptions to the 'first come first served' rule to ensure that holiday is spread through the year and on a fair and equitable basis.

There will be some times of year which are extremely popular, for example Easter, half-terms, summer and Christmas. If you are dealing with numerous requests, here are some tips:

- If your organisation is open all year round with no seasonable shutdowns, you could also consider allowing people to **choose** between time off at Christmas and summer. So if someone does not get the time off they

requested at Christmas, they could be given priority when they are booking leave for their summer holiday.

- In your workplace rules, you can impose **limits** on how many consecutive days of leave an employee may take at one time. This stops you being without valuable members for extended periods of time.
- Encourage **collaboration**. For employees who are parents, they will be particular keen to have time off during half terms and the long summer break, therefore you should encourage teams to collaborate with each other to coordinate leave. This will ensure operational requirements are met and issues are quickly resolved.
- Periodically **review** whether employees have taken leave. If they have a lot of leave still to take, remind them of how much leave they still have to take before the holiday year ends.
- Be **fair and consistent** in the way you allocate the requests.

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Can I refuse holiday requests or cancel pre-approved leave?



Employers can refuse a request for holiday on specific dates or cancel leave that has already been approved.

Refusing annual leave

If, for example, a number of employees in the same team or department want to take leave at the same time, you will need to think about whether it is viable to grant all the requests. You may need to reject one or two of the requests to make sure that all business demands are met and you are not placing too much of a burden on other employees to carry out the work.

To say no to a request, you must give the employee **counter notice**. The length of the notice must be equivalent to the period of leave that the employee was trying to book.

It is also possible that you oblige employees to take annual leave at certain times of the year, for example, if you close at Christmas time. Alternatively, there may be times when you may decide to prohibit employees taking annual leave at particularly busy times which require all hands on deck.

Cancelling annual leave

You may also find yourself in a situation where you have to cancel leave. For instance, a big project with a very tight deadline has just come in and you need all hands on deck to get it completed on time.

The law does allow an employer to cancel an employee's annual leave that you have previously approved. To do this, you must provide the appropriate amount of **notice**. The rule is that the length of the notice must be equivalent to the period of leave that the employee planned to take. This means that if an employee was due to take a week of holiday and you wish to cancel it, you must provide a minimum of a week's notice.

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! WARNING!

Before cancelling the leave, you should think about all the options. It is important to make sure that before you cancel, you have a **clear business reason** and only do it if absolutely necessary. If you cancel someone's leave which means they cannot take a booked holiday and they suffer financial loss, they may be able to argue that there has been breach of the implied duty of mutual trust and confidence and claim **constructive dismissal**.

You also need to be aware that you must not cancel annual leave if it means that the employee cannot take their **full statutory annual leave entitlement** in that leave year.



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How do I deal with annual leave and sickness issues?



There may be times when annual leave and sickness collide, which brings up a whole host of new issues for employers to deal with.

What happens if employee falls sick when on holiday?

Cases by the ECJ have held that if an employee becomes sick before or during a pre-arranged holiday, they are entitled to **postpone** their annual leave to another date. This may mean that they need to carry it over to the next holiday year. This applies to the first four weeks laid down in European law, not the additional 1.6 weeks.

If an employee does fall sick while on annual leave, you can:

- Ask them to report sickness absence in line with your company's reporting requirements.
- Carry out a return to work interview to ascertain the nature of the illness and whether they are fully recovered or it is part of an ongoing condition. This will help you determine next steps.
- Ask for medical evidence either from a GP or an Occupational Health Report.

If you have reason to believe someone's sickness is **not genuine**, for example someone has brought to your attention that they have posted lots of photos on Facebook of them having a lovely holiday, you may need to **investigate** the allegations of misconduct.

As part of an investigation, an employer may believe that the best way to prove that the employee is malingering is getting audio, photographic or video **evidence** that they are doing activities which conflict with their claims.



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★ REMEMBER...

The **Information Commissioner's Office's** guidance in the Employment Practices Code says that it will be rare for this covert surveillance (not telling the employee you are doing this) to be justified and should only be used in exceptional circumstances. Any video, audio or photographs should be shown to the employee for their comment. This allows the employee an opportunity to give an explanation for what could be seen as damaging evidence.

If you suspect an employee is malingering, you should not use **social media sites** to stalk employees and dig as much 'dirt' up as possible. You should only seek targeted and relevant information.

Only once you have carried out this investigation and have credible evidence can you proceed to a **disciplinary** hearing.

What can I do if an employee requests to take holiday during a period of sickness absence?

In most cases, the employee will make this type of request because they no longer qualify for Statutory Sick Pay.

The employee does have the right to nominate when they take their leave, even if on sick leave, subject to notice requirements. The employer is **within their rights** to issue a counter notice and refuse. However if you refuse and the employee is unlikely to return from sickness absence in that annual leave year, you could be acting in violation of the Working Time Regulations.

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What can I do if an employee pulls a sickie after a holiday request has been denied?

Employees may be quite disgruntled if their request for leave has been denied and they may be tempted to take the time off anyway. In this case what can you do?

Here are three key steps:

1. Prevention is key

Make sure your annual leave policy makes it clear that employees should request leave and get it approved before booking any holidays. You should encourage employees to book early to avoid disappointment and to collaborate with each other to coordinate leave.

Make sure you consistently hold return to work interviews after every period of absence. If people are aware that this is the company policy and it is always followed, it may help deter people from pulling sickies. After all, nobody wants to face intense questioning after their return to work! You should keep accurate records of these interviews as it will help you identify any patterns or trends.

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2. Address the rumours

If you have heard through the grapevine that they intend to call in sick, you should hold a meeting with them to discuss what has come to your attention and whether there is any truth to the rumour.

You should also remind them that any unauthorised absences may result in disciplinary action



EXPERT TIPS!

In your **Employee Handbook**, you should have a provision regarding how employees who deliberately fail to attend work without a proper excuse or in breach of management instructions will be committing an act of gross misconduct, which could result in dismissal without notice or payment in lieu.

This can often do the trick and deter them from feigning sickness to get the desired time off.

3. Take action

If they have gone ahead and called in sick, you should carry out a return to work interview to probe into the reasons for the absence. Rather than openly accuse them, you should raise the issue that it could be seen as not a genuine absence as it occurred at the same time as when they wanted to go on holiday.

If they have been away from the workplace for seven days, they will need to provide you with a Fit Note from their GP.

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Holiday pay has been subject to a number of cases before both UK and European courts. It is an area which is constantly evolving and changing, therefore it is important that employers keep up with the developments.

What do we need to pay employees while they are on holiday?

The general rule is that for employees with **fixed working hours**, holiday pay amounts to their weekly **normal remuneration**.

For employees whose hours **differ from week to week**, holiday pay will be calculated on the average pay the employee earned in the previous 12 weeks in which they were paid.



REMEMBER...

For a worker on a zero hours contract for example, there may be a week when they have not worked at all. If this is the case, you need to count back a week to ensure that the rate is based on 12 weeks in which they were paid.

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Does commission need to be included as part of holiday pay?

The case of *Lock v British Gas* confirmed that **regular commission payments and allowances** that are inherently linked to the performance of the employee's role should be included when calculating holiday pay.

What the case did not clear up was what reference period to use. It is thought that a 12 week period should be used. However, if this is not representative of the employee's 'normal remuneration', you should use 12 months.

What about overtime?

The case of *Dudley Metropolitan Borough Council v Willetts and others*, it was concluded that voluntary overtime that is regularly worked should be included when working out an employee's holiday pay.

In the first binding decision, the Employment Appeal Tribunal made the following points:

- Payments for overtime (**whether that be compulsory, non-guaranteed or voluntary**) constitute remuneration as a matter of UK and EU law.



REMEMBER...

The general principle is that holiday pay should amount to the employee's weekly **normal remuneration**.

- For a payment to count as 'normal' it must have been **paid over a sufficient period of time**. This excludes payments which are not usually paid or are exceptional or made on an ad hoc basis. By way of example, payments made one week each month or one week in every five weeks, even if it is not paid more frequently or even each week, may amount to a sufficient period of time to count as 'normal'.

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This applies to the 20 days' leave provided by European law, not to the additional 8 days prescribed by the UK Working Time Regulations.

Is payment in lieu of holidays permissible?

An employer cannot pay in lieu of annual leave, except upon the termination of employment when any accrued, but untaken leave must be paid.

What could change?

Over the summer, the Taylor Review of Modern Working Practices was published, touching on a wide range of areas of employment law including holiday pay.

- In this 116 page government-commissioned review, it suggested that the **pay reference period** should be increased from 12 to 52 weeks in cases of casual and zero hours employees.

- It also says that individuals should be given the choice of whether they receive '**rolled up holiday pay**'. This involves not paying holiday pay while the employee is on leave, but paying the employee an extra amount during the weeks that the employee works. This practice has not been recommended by ACAS or the government in the past.

We will now have to wait and see how the government respond to these proposals.



EXPERT TIPS!

We send our clients monthly bulletins with all the **latest HR and Employment Law news** and regularly update the news page on our website with legislative updates, guides, FAQs, case analysis, government announcements, etc. Contact us to find out about how we can keep you in the know.

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To summarise, here are some key things you really need to know:

- 1 Full-time employees have the right to 5.6 weeks of paid annual leave per year.
- 2 Employees do not have a statutory right to time off on a bank holiday or to be paid extra if they do work one.
- 3 Annual leave begins to accrue from the employee's first day of employment, not after having completed the probationary period.
- 4 An employer is within their rights to provide notice to an employee that they are to take leave on particular days that suit the business.
- 5 Employers can refuse a request for holiday on specific dates or cancel leave that has already been approved by providing the required amount of notice.
- 6 If an employee is unable to take annual leave because they have been sick, they can carry up to 20 days over into the next leave year.
- 7 If an employee becomes sick before or during a pre-arranged holiday, they are entitled to postpone their annual leave to another date. This applies to the first four weeks laid down in European law, not the additional 1.6 weeks.
- 8 The general principle is that holiday pay amounts to the employee's weekly normal remuneration. This may include commission and overtime payments.

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