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## Furlough Scheme and Holiday Pay

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As you will no doubt be aware, Furlough pay is a new type of paid statutory leave which has been introduced very quickly without any time to consider the employment law implications.

### **Holiday entitlement**

The worker's contract continues whilst under furlough, so their annual leave entitlement continues to accrue, as it does during any period of statutory leave whether that be sickness or family-related.

### **Requesting or changing holiday**

Both workers and employers can request to take holiday during a period of furlough. As long as they give double the notice to the period of time they wish to take as annual leave, this should be acceptable.

Conversely, if the employer or worker wishes to cancel or move leave, the notice required is the length of the leave entitlement. Thus, to cancel a week's leave the notice must be given such that it expires the day before the first day the holiday was due. With the agreement of both parties these notice requirements can be reduced.

Taking annual leave does not break a period of furlough. The legal risk of an employer forcing workers to take holiday during furlough is that the purpose of annual leave is to be able to rest during time away from the workplace, which could be argued is severely restricted during the lockdown.

Given that the CJRS has now been extended to 31 October many employers will have no choice but to insist on some leave being used during this time.

### **Bank holidays**

These are not additional or special days in respect to the 5.6 weeks holiday entitlement, they are just days that are part of annual leave when an employer potentially requires workers to take annual leave as the business is not operational.

Given that many businesses aren't currently fully operational it's up to the employer to decide whether the bank holidays that have fallen so far in April and May need to be assumed to have been taken as part of the worker's annual leave entitlement.

The workers should be paid for those days' holiday taken during furlough just as they would be for any other period of annual leave. If workers are unusually required to work on bank holidays the standard notice periods apply.

### **Holiday pay**

Any holiday entitlement that is taken, for bank holidays or any other days, must be paid based on the holiday pay regulations which changed on 6 April 2020 ([SI 2018/1378](#)). It is therefore important to distinguish between periods of leave taken up to 5 April 2020 and subsequently.

Prior to 6 April 2020, pay during annual leave for those with variable pay, was based on the pay in the 12 weeks prior to the holiday. From 6 April 2020 (in Great Britain but not Northern Ireland) pay over the 52 weeks prior to the holiday must be considered. For workers with less than 52 weeks' service, the maximum number of weeks of paid employment prior to the holiday date is considered.

As was the case with the 12 week averaging rule, any weeks in which there are no working hours are excluded from the pay calculation. It therefore seems entirely reasonable, although has not been spelled out in guidance, that any furlough weeks are excluded when calculating average pay.

It's highly likely, as there have been long periods of furlough now, that many employers will be counting back further to establish a maximum number of 52 worked weeks to include in the average. The legislation provides that an employer does not have to go back further than 104 weeks prior to the holiday week to establish the average pay.

The first four weeks of annual leave must be paid based on 'normal remuneration' and case law over recent years has defined that as pay 'intrinsically linked to the performance of the duties' so includes regular payments even to salaried staff of items such as commission, bonuses and overtime. The final 1.6 weeks, and any additional contractual leave, needs to be paid based on the 'value of week's pay' which does not necessarily have to include more than basic pay.

Whatever an employer chooses to include in the components used to calculate holiday pay during furlough, the worker is entitled to the full amount of 'normal remuneration' or the 'value of week's pay'. However, the CJRS claim can only be for a maximum of 80% up to the £2,500 cap. Any amounts over and above this will have to be fully employer funded.

If an employer cannot afford to fund the top up for holiday pay it would be reasonable to refuse a request to take holiday at this time. As the working time regulations have been amended annual leave can now be carried forward over the next two leave years. **Salary in lieu of holiday is not permitted in any circumstances other than termination of employment.**

*If you have any queries please do not hesitate to contact us or visit our website for further information.*

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