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ANNUAL LEAVE

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Workers are entitled to paid annual leave. We consider their entitlement and some complications. If you are an employer in the London and Kent area, Capworth Advisory can provide you with assistance or any additional information required.

Background

Under the Working Time Regulations 1998 (as amended), workers are entitled to paid statutory annual leave of 5.6 weeks (28 days if the employee works five days a week). This basic entitlement is inclusive of bank holidays. This annual leave entitlement is now closer to that of workers in other European countries, where holiday allowance is typically more generous. Workers in Ireland are entitled to 29 days; the highest minimum entitlement is in Austria at 38 days.

Payment for annual leave

A worker is entitled to be paid in respect of any period of annual leave for which they are entitled, at a rate of one week's pay for each week's leave. For employees with normal working hours a week's pay is the pay due for the basic hours the employee is contracted to work. Any regular contractual bonuses or allowances (except expense allowances) which do not vary with the amount of work done are also included. Where a worker has variable pay, a week's pay is based on their average weekly earnings. From 6 April 2020, the average must be calculated from the previous 52 weeks, discounting any weeks where no pay was received.

When calculating a week's pay, some additional elements may need taking into account in addition to base pay.

Commission has previously not been included in the calculation of holiday pay, however, following a ruling by the European Court of Justice (ECJ) which was upheld by the Court of Appeal, when commission is related to the number of sales made whilst at work, it should also be included in the calculation of holiday pay. There was a further appeal to the Supreme Court, which was not granted and employers will now be required to comply with this ruling.

Guaranteed and non-guaranteed overtime should also be included along with regular voluntary overtime payments. The difference between non-guaranteed and voluntary overtime is that the employee is obliged to do non-guaranteed overtime if it is offered, but can turn down voluntary overtime. Where the voluntary overtime is irregular or ad hoc it does not need to be included unless it extends for a sufficient period of time on a regular and/or recurring basis. This includes overtime regularly worked at certain points in the year, for example at Christmas, as well as frequently worked overtime throughout the year.

These additional elements need only be included for the four weeks of statutory leave required by European law which is lower than the UK minimum of 5.6 weeks, it can be excluded for any additional days above this.

Under the Regulations any statutory annual leave may not be replaced by a payment in lieu, except on termination of employment. In such cases, a payment can be made for any untaken leave in the leave year that termination occurs. Payment may also be due for any carried over leave because of maternity/adoption leave or sickness.

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Rolled up leave

The ECJ has ruled that it is unlawful for employers to roll up workers' annual leave payments. In accordance with this it is recommended that employers renegotiate contracts involving such pay for existing workers as soon as possible so that payment for statutory annual leave is made at the time when the leave is taken.

Requesting leave

Employees should be allowed to choose when they take some of their leave although many employers do set certain conditions, for example that only a certain number of workers may take leave at the same time or that workers may not take more than a certain number of consecutive working days off in one go.

It is common for employers to have a procedure in place for these instances and it should include the procedure for notification. If this is excluded then the legal position is that an employee requesting a period of leave must give notice of at least twice the period of leave to his or her employer. A similar arrangement of notice

must be given by the employer if they are requesting the employee to take leave at specific times.

First year of employment

Workers accrue their annual leave entitlement on a pro rata basis during their first year of employment. This is calculated in relation to the proportion of the employment year worked. Therefore, the annual leave entitlement will accrue over the course of the worker's first year of employment at the rate of 1/12 of the annual entitlement, starting on the first day of each month. If the calculation does not result in an exact number of days then the figure will be rounded up to the nearest half day.

Annual leave and part time employees

Under the Regulations, time off for bank holidays should be pro rata. Part time workers are currently entitled to 5.6 weeks' holiday, based on the hours a week that they work, regardless of whether they work on days on which bank holidays fall.

Contractual annual leave entitlement

An employer can increase a worker's statutory annual leave entitlement via a contractual arrangement. In such cases any unused additional annual leave may be carried over to the next leave year. This is often a matter of employer discretion and will depend on the terms of the contract.

Annual leave accrual during maternity and adoption leave

An employee continues to accrue their statutory annual leave entitlement of 5.6 weeks and any additional contractual annual leave entitlement throughout both ordinary maternity leave (OML) and additional maternity leave (AML).

Sickness during holiday

Employees are now entitled to reclassify statutory holiday as sick leave if they fall ill whilst on prearranged statutory holiday. This means that they are entitled to take the statutory holiday they have missed at a later date. If they are unable to take the rest of their statutory holiday that holiday year they can carry it over to the next holiday year. If you offer more than 5.6 weeks holiday a year, you do not have to allow an employee to reclassify any additional (contractual) holiday as sickness absence. However, you will have to ensure that they can take their full statutory

holiday at other times. If you pay contractual sick pay, you can minimise the scope for abuse by making contractual sick pay in these circumstances contingent on the employee notifying you on the first day of illness that they are ill and, possibly, requiring them to provide a medical certificate from the first day of their illness.

Employees who are on sick leave can ask their employer to re-classify their absence as statutory holiday in order to receive holiday pay. If an employee on sick leave does not want to take their outstanding statutory holiday before your current leave year ends, they should be permitted to carry it over into the next leave year. Employees returning from sick leave can take their statutory holiday entitlement for the current year on their return but, if there is insufficient time for them to take it, they should be allowed to carry it forward to the next leave year.

Recovery of overpayment of holiday

Employee contracts should make clear that if an employee takes more holiday than he or she is entitled to during the course of a leave year, the company will be entitled to recover the overpayment of holiday pay by deducting it from the employee's wages or salary. It is advisable for the company to consult with the employee before making the deduction.

How we can help

If you are an employer in the Kent area we will be more than happy to provide you with assistance or any additional information required. Please contact us at Capworth Advisory for more detailed advice on annual leave.