



Coronavirus and Annual Leave UPDATED @ 20.05.20

Summary

On 13th May 2020 the government published more detailed guidance on annual leave impacts for employees during the Coronavirus pandemic.

Here are the #FACTS:

A Quick Reminder (of the Working Time Regulations)

The Working Time Regulations 1998 convey a range of health and safety protections on workers, including daily and weekly rest breaks and paid statutory annual leave.

Workers are entitled to a total of 5.6 weeks annual leave per year (which equates to 28 days for a 5 day a week worker) and can include public or bank holidays (in England, this is 8 days).

4 of the 5.6 weeks of annual leave granted by regulation 13 cannot generally be carried between leave years and must be taken without being carried forward, with the only general exceptions being when a worker cannot take annual leave due to sickness or maternity/adoption leave.

The remaining 1.6 weeks of annual leave can be carried forward by one leave year through an agreement between workers and their employers.

There is an obligation on an employer to ensure that their workers have an adequate opportunity to take their annual leave.

This annual leave cannot be replaced with a payment in lieu unless the worker is leaving employment.

The “Carrying Forward” Change due to COVID-19?

The changes will ensure all employers affected by COVID-19 have the flexibility to allow workers to carry over MORE annual leave.

The Working Time (Coronavirus) (Amendment) Regulations 2020 amends the Working Time Regulations 1998 to create a further exemption relating specifically to COVID-19.

Where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are entitled due to the coronavirus, they have a right to carry up to 4 weeks into the next 2 leave years.

What is a Holiday Year?

For the purposes of annual leave, a year is the leave year as agreed in writing between the worker and their employer, usually stipulated in a worker’s contract.

This is usually in line with the calendar year (1 January to 31 December) however it may be any year long period that is agreed upon. The holiday year is usually defined in the contract of employment or separate policy or Employee Handbook.

Which Businesses and Employees does it apply to?

All employers that are subject to the Working Time Regulations 1998 will also be subject to the changes in the Working Time (Coronavirus) (Amendment) Regulations 2020.

Note that the Working Time Regulations 1998 do not apply to all industries and there are some exceptions however these are few and far between.

Furlough and Annual Leave

Do employees still accrue holidays whilst on Furlough?

Yes. Statutory and enhanced contractual annual leave will continue to accrue as normal during a period of lay-off or furlough during the coronavirus (COVID-19) crisis.

This is because the contract of employment will continue to be in existence during this period.

This includes bank holidays if bank holidays are included in the contractual entitlement.

What do I pay employees who take annual leave (including bank holidays) during Furlough?

The taking of annual leave, including bank holidays, does NOT interrupt the furlough period.

The Employer can continue to claim the 80% (capped at £2500 per month) CJRS grant for periods of annual leave (Including bank holidays) HOWEVER it must ensure that it is paying the employee correctly which will usually require a top up payment funded by the employer.

Legislation requires that annual leave pay is to be paid at the employees' "normal" rate of pay. Broadly speaking, if pay is fixed, then this will be their normal salary and if pay varies (caused by regular overtime or contractual bonuses/commissions) then this will need to be calculated on the basis of the average pay received by the employee in the previous 52 working weeks.

Forcing the Taking and Cancelling of Holidays

Irrespective of the furlough/non furlough status of an employee, Employers can:

- Require employees to take annual leave; and
- Cancel an employee's annual leave (this may be due to the increased cost OR workload)

Providing they provide the correct amount of notice to the employee. The required notice periods are:

- If requiring/forcing annual leave: Double the length of the annual leave
- If cancelling annual leave: the length of the planned annual leave
- These timeframes are in advance of the first day of annual leave and notice must be given at least one day before the notice period starts.
- You may provide less notice with the employee's agreement

Top Tips

1. Engage with your employees and explain the reasons for you taking the action you are taking; and
2. Put any notice in writing via e-mail or letter to evidence the date notice served.
3. If you are applying different rules to different employees, ensure your rationale is non-discriminatory.

A More Detailed Look At:

The New Carry Forward Rules

The change in legislation due to the Coronavirus allows employers greater flexibility for their employees to carry forward annual leave of up to 4 weeks into the following 2 holiday years.

The guidance is clear that the carry forward applies when it has not been “reasonably practicable” for an employee to take annual leave as a result of coronavirus.

Employers should consider the following when considering “reasonably practicable”;

- Whether the business has faced a significant increase in demand due to coronavirus that would reasonably require the employee to be at work and cannot be met by alternative practical measures.
- The extent to which the businesses workforce is disrupted by coronavirus and the practical options available to the business to provide temporary cover of essential activities
- The health of the employee and how soon they need to take a period of rest and relaxation
- The length of time remaining in the employee’s holiday year, to enable the worker to take annual leave at a later date within the same holiday year
- The extent to which the worker taking leave would impact on the wider society’s response to, and recovery from, the coronavirus situation; and
- The ability of the remainder of the available workforce to provide cover for the employee going on leave.
- If the employer is unable to afford the top up payment which annual leave incurs.

Employers should do everything reasonably practicable to ensure that the employee is able to take their leave, or as much as possible in the correct holiday year before agreeing to carry forward annual leave.

If annual leave carried forward is granted, then employers should give employees the opportunity to take it at the earliest practicable opportunity and employers need to have a good reason to decline requests for carried forward holidays.

Carried forward statutory annual leave cannot usually be paid in lieu in later years. Contractual carried forward annual leave is subject to the rules in place within the employer’s workplace.

Bank Holidays

If Bank Holidays form part of the employee's annual leave then it is treated as a normal holiday and subject to the pay rules above.

It does not interrupt furlough and the employer can claim 80% (capped at £2500 per month) of the CJRS grant but will be subject to topping this payment up to ensure that the employee receives normal pay.

The Employer may defer the bank holiday however the relevant notice periods have to be adhered to (above)

If bank holidays are NOT included as part of an employee's annual leave entitlement, then there is no impact and the day continues to be a working day or a furloughed day with the appropriate payments made.

Agency Workers or Employees on Zero Hours Contracts

Annual leave accrual and entitlements as detailed in the service agreement or contract of employment continue to apply.

If the clause (as most do) refer to a % of annual leave being calculated for hours worked then during a period of furlough this continues however it will naturally be 0% because furlough means workless day.

The rules relating to bank holidays and forcing/cancelling annual leave also apply (as above) as do the rules on processing the correct payments for annual leave.

These categories of workers will almost certainly be classed as variable pay/hours workers and so their annual leave payment should be based on an average of 52 weeks, therefore any nil pay weeks will need to be swapped out with active weeks going back 104 weeks to generate the more reflective 52 week average.

**If you would like support on this, don't hesitate to contact your People
Co-Sourcer or hello@fact3.co.uk**