

# Holiday changes factsheet

## What applies when?

The rules on holiday carry over and the calculation of Regulation 13 leave for workers with normal working hours apply from 1 January 2024.

The new rules on holiday accrual and pay for "irregular hours workers" and "part year workers" apply for the first holiday year starting after 1 April 2024.

That means employers will have more or less time to prepare for those changes depending on when their holiday year starts. For example, an employer with a calendar year as their holiday year will not need to be ready until 1 January 2025.

These rules only apply to statutory annual leave. Employers are free to apply a different approach to enhanced/contractual leave, although that needs to be clearly set out in holiday pay policies and/or contracts.

## What are the rules on carry over?

Due to different rules applying depending on the reasons a worker is carrying over their leave, these are most easily presented in a table. In the table below:

- Regulation 13 leave – means a worker's four week entitlement under Regulation 13 Working Time Regulations 1998
- Regulation 13A leave – means a worker's 'Additional Annual Leave' entitlement of 1.6 weeks' leave under Regulation 13A Working Time Regulations 1998

It may be helpful for employers to update their policies so they clearly set out when the different types of statutory leave will be deemed used.

Worker unable to take leave due to	Applies to	Carry over period
Statutory leave (all types of family leave)	Regulation 13 leave Regulation 13A leave	To next leave year
Sick leave	Regulation 13 leave only	18 months from end of leave year
Failure to remind/permit holiday	Regulation 13 leave only	Indefinite until worker has had a reasonable chance to take the leave

The third right above applies where:

1. A worker has not been allowed to take holiday at all (for example, if they have been mis-classified as self-employed);
2. A worker has not been given a reasonable opportunity to take their leave or encouraged to do so (for example, where it is not permitted due to business requirements); or
3. If an employer has not informed the worker that any leave not taken by the end of the leave year which cannot be carried forward will be lost.

It is not clear how far an employer has to go to remind workers of their leave. However, we anticipate that a reminder would need to be given at least early enough for a worker to still have time to serve a statutory notice to take their remaining leave.

"Unable" is not defined in statute. However, if there is time for a worker to take their leave after they have returned from family or sick leave then we believe it is arguable that they were able to take their leave.

## What are the rules on calculating holiday pay?

The recent Regulations only change the rules for calculating holiday pay for workers with normal working hours and irregular hours/part year workers (see below in relation to the latter).

When workers with normal working hours take their Regulation 13 leave, they should receive their basic pay plus what is effectively a 'holiday pay top-up' based on a 52 week average of the following:

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

The average needs to be calculated based on the 52 weeks leading up to the annual leave being taken. If annual leave starts on the last day of a week then the average is calculated to that day. Otherwise, the 52 weeks leading up to the last complete week before the first day's annual leave is used.

There is debate over whether the top-up calculation needs to include an annual bonus. That depends on whether that can be seen as a payment "intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract". Much will depend on the design of a scheme and what it rewards.

However, payments such as on-call payments, shift allowances or sleep-over allowances are likely to be covered provided they are paid regularly or can be seen as being intrinsically linked to the performance of tasks a worker is obliged to carry out under their contract.

It does not matter how often commission is paid – it always needs to be included. Similarly, it is not possible to avoid the obligation to include commission by arguing that holiday is built into the design of your commission scheme.

There is no guidance on how regularly overtime needs to be paid to be included. That will need to be resolved through case law. However, we believe once a month would be sufficient and would not be surprised if an employment tribunal considered once a quarter enough. Further, there is no minimum amount of overtime that needs to be worked for it to be included in the calculation: it just needs to be regular.

It is unlikely that one-off payments (for example in relation to the cost of living) need to be included.

The 52 week average does not count weeks in which someone was absent from work due to sick leave or statutory leave or no remuneration was due. It is necessary to work back to prior to the leave to find weeks of normal pay to bring in to the 52 week average calculation and bring it up to as close to 52 normal weeks' pay as possible (although there is a 104 week limit on this).

## What are "irregular hours" and "part year" workers?

The definition of an irregular hours worker is:

*"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."*

That definition is not easy to apply in practice. However:

- Employers will need to assess their workforce to see if they have workers who fall into this category.
- The key is whether paid hours differ from pay period to pay period. If a worker's hours fluctuate on a weekly basis through, say, a monthly pay period but they work the same overall number of hours each month they will not be caught.
- There is no definition of how often paid hours need to vary to meet the "mostly variable" test. However, it seems likely that if someone's paid hours are different in at least 75% of pay periods throughout a year that may be enough.
- It appears that one key requirement is that the hours vary under the terms of the contract: this suggests that employees who have variable hours due to voluntary overtime are not caught by the definition.

The definition of a part year worker is:

*"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."*

The key requirement is that there must be at least one week in which they are not required to work and for which they are not paid within a holiday year. That means that any term-time workers who are paid on an annualised basis will not be caught by this definition and are still entitled to 5.6 weeks' annual leave paid at a 52 week average of their remuneration in the normal way.

## What are the rules for irregular hours and part year workers?

- These workers accrue holiday at a rate of 12.07% of hours worked over a pay period.
- During sick leave or family leave they accrue holiday at 12.07% of their average hours per week prior to a period of leave (over a 52 week average).
- They can either be paid for their leave when they take it (based on a 52 week average calculated in the same way as for a worker with normal working hours) or they can be paid rolled-up holiday pay.
- The rolled-up holiday pay should be a 12.07% uplift to their remuneration for work done in a pay period. It needs to be paid at the same time as the employee's basic pay for the same period.
- If they are paid rolled-up holiday pay then their payslips need to clearly identify the payment of their holiday pay (ie it needs to be set out separately to their basic pay and any other elements of pay).