

The one with the ...

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Context

- Brexit: The end of European Union derived legal principles from 31st December 2023. Unless replaced by UK Law.
- Retained EU Law Act (REULA) – changes to WTR 1998
- Direct effect, supremacy, etc
- ***Harper Trust v Brazel*** [2022] UKSC 21
 - a. Part-year worker (on full year, permanent contract, e.g. teacher) was entitled (under WTR 1998 and ERA 1996) to "weeks' pay" multiplied by 5.6 weeks. No pro-rata requirement under EU principles.
 - b. Government sought to legislate to change this situation.
 - c. Result: New regulations and changes from 1st April 2024

Key concepts

What is Holiday Pay?

- Legal right to 5.6 hours of paid leave per year for workers.
- Contractual holiday entitlement is something different

Employee / Worker / Independent contractor

- Dangers of misclassification

Legislation

- Working Time Regulations 1998 (& Working Time Directive)
- Retained EU Law (Revocation and Reform) Act 2023
- The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

When?

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When

- 1st January 2024
- Most of the 'new' rights /changes take effect in relation to leave years beginning on or after 1 April 2024
- Coronavirus Carry-over: use it by 31st March 2024

Guidance

- <https://www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations/holiday-pay-and-entitlement-reforms-from-1-january-2024#definition-of-an-irregular-hour-worker-and-a-part-year-worker>
- Source material: Regulations – *compare and contrast*



Definitions: Worker – Reg. 15F

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Irregular Hours (IR) worker – Reg 15F(1)(a)

- Each pay period: hours variable (contract)
- Multiple contracts: “in the round” – Reg 15F(2)

Part-year (PY) worker – Reg 15F(1)(b)

- Contract: required to work part of the year
- Contract: periods of no work and no pay



Codification: carry-over

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- Coronavirus carry-over of leave: **DELETED**
- 31st March 2024



Codification: carry-over

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Reg. 13(9)(a): exceptions to "use it or lose it"

A worker will be entitled to carry forward into the next year the leave that they should have been entitled to take if:

- the employer has refused to pay a worker their paid leave entitlement
- the employer has not given the worker a reasonable opportunity to take their leave and encouraged them to do so; or
- the employer failed to inform the worker that untaken leave will must be used before the end of the leave year to prevent it from being lost

Codification

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Including

- ***British Airways v Williams*** : professional services, etc: Reg 16(3ZA)(b)
- ***Lock v British Gas Trading*** : commission payments Reg 16(3ZA)(a)
- ***East of England Ambulance Service v Flowers***: overtime Reg 16(3ZA)(c)

Record keeping

- No formal requirement
- Reg. 9(1): “Adequate records” for required compliance
- Question: best practice?

How holiday entitlement is accrued?



- No change: if not irregular hours / part-year worker
- 1st April 2024: IH / PY worker
 - Holiday entitlement for these workers will be calculated as 12.07% of actual hours worked in a pay period.

Step	Calculation method	E.g.
1	Divide the hours worked in pay period by 100	$X \text{ (hours)} \div 100$
2	Multiply the answer to Step 1 by 12.07	$(X \div 100) \times 12.07$
3	Round up or down to the nearest hour	

How holiday entitlement is accrued?

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- **Why 12.07%?**
 - Answer: 5.6 hours leave entitlement (12.07% of 46.4 is 5.6)
- **Contract says different?** E.g. 6 weeks entitlement:
 - $(\text{total holiday entitlement} \div \text{remaining working weeks in the year}) \times 100$
- **Early leaver** – any shortfalls paid in lieu on termination
 - 1. Calculate worker's full annual leave entitlement
 - 2. Work out the proportion of the leave year in employment
 - 3. Pro-rate based on the proportion of the year in employment

Hours worked

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Fixed hours per week, but not the same amount per day?

- Average working day: hours worked per week (X) ÷ days worked per week (Y)
- Statutory entitlement: Lower of 28 days or 5.6 x Y (days worked per week)
- Holiday entitlement (hours) : Average working day (hours) x Statutory entitlement (days)
- Early leaver (hours method):
 - Pro-rated as above
 - Multiply by Average working day to convert into hours

Harpur Trust v Brazel [2022]

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- Key point: Employers cannot pro-rate the annual leave entitlement proportionate to the amount of work carried out.
 - Entitlement to 5.6 weeks' annual leave per year
 - Irregular working hours? "Calendar Week Method" (s.224 ERA 1996)
 - Non-payable week (but employed): not taken into account in the assessment of a week's pay.
- No entitlement to pay 12.07% of the total hours worked, multiplied by the hourly rate of pay

Reform – Reg. 15B

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- Only applies to IH and PY workers
- Key concept: accrual in each leave year of up to 28 days per leave year
- Rate 12.07%
- Reg. 15C: if sick or statutory leave
- Reg 15E: No payment in lieu (other than on termination)

What rate is holiday pay calculated?

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- **Full-year workers**
 - Reg. 13 = “Normal” rate of pay
 - Reg. 13A = “Basic” rate of pay
- **Normal rate of pay (Reg. 16 (3ZA)):**
 - Payments, including commission payments, intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out
 - Payments relating to professional or personal status relating to length of service, seniority or professional qualifications
 - Other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date

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How to calculate how much?

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- **Full-year workers**
 - No change
- **IH and PY workers**
 - Two options
 - 52-week reference period – Reg. 16
 - Rolled-up at 12.07% - Reg.16A (2)



Rolled-up holiday pay

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- Calculated based on worker's total pay in pay period (frequency at which the worker gets paid) (Reg. 16A (1))
- Paid at the same time as the worker is paid for work done in each pay period (Reg. 16A (3))
- If worker goes off sick or takes maternity / family related leave during a pay period calculated according to average pay in each pay period during relevant 52-week period (Reg. 16A (5) and (6))
- Question: What does the contract say / variation to terms and conditions

Rolled-up holiday pay

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1

- Hours worked (in the pay period) x hourly rate

2

- Divided by 100 (rounding to the nearest pence)

3

- Multiply by 12.07

4

- Round up or down to the nearest pence

52-week reference period

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- Use average pay from last 52 weeks
- If not employed for 52 weeks however many **complete** weeks of data have/the number of weeks of their employment (Reg. 16 (3))
- Can go back up to 104 weeks prior to the first day of the worker's holiday (Reg. 16 (3) (f))
- Only count weeks that the worker was actually paid /exclude any periods of leave on which no pay was due (in contract to the calculation of holiday accrued) (Reg. 16. (3ZE))
- Exclude any weeks with time off sick or on maternity/family-related leave (Reg. 16. (3ZE))
- Week is Sunday – Saturday (Reg. 16 (3A), S228(3) ERA, Reg. 16 (3B))
 - Exception: workers whose pay is calculate don a week-by- week basis ending on a day other than Saturday. In these cases, a week is treated as ending with that other day.

52-week reference period

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1

- Calculate the **total** pay over the 52-week period/relevant reference period

2

- Divided by 52/total number of weeks in reference period

3

- Calculate average number of hours per week over the reference period

4

- Divide week's pay by average number of hours per week



Thank you