

Furlough and Holiday Entitlement

EMPLOYMENT LAW UPDATE 18.05.2020



Following the government's announcement that the Coronavirus Job Retention Scheme (commonly referred to as furlough leave) will run from 1st March 2020 to 31st October 2020, further guidance and clarification has been issued regarding various details of the scheme.

In recent months the issue of workers holiday entitlement under the scheme has been unclear and many employers have had to tackle the issue without definitive guidance from the government. Fortunately, the latest guidance has finally shed some light on this issue.

Furlough and holiday entitlement

A worker's holiday entitlement will continue to accrue in the usual way whilst the worker is on furlough leave. The worker is able to take holiday without disrupting the period of furlough leave.

Can an employer compel a worker to take holiday whilst on furlough?

Whilst it initially appears that the guidance permits employers to compel workers to take holiday whilst on furlough, the guidance requires employers to consider whether any restrictions that the worker may be under (such as the need to socially distance or self-isolate) would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday. This leaves some ambiguity, and employer should act cautiously as it is not yet known whether an Employment Tribunal will consider that a worker is able to rest, relax and enjoy leisure time if they have been forced to take holiday by their employer.

How much notice must be given to a worker to take holiday?

The required notice period an employer must give they wish to compel a worker to take holiday on particular days is double the length of the holiday (for example, if the duration of the holiday is 5 days, the employer must give the worker 10 days' notice).

If the employer wishes to cancel a worker's holiday or require the worker not to take holiday on particular dates, the notice period given to the worker must be the length of the planned holiday (for example, if the duration of the holiday is 7 days, the employer must give the worker 7 days' notice).

How much holiday pay should workers get?

The latest government guidance confirms that holiday pay during furlough leave must amount to "normal remuneration". As such, if a workers usual holiday pay exceeds the furlough rate of pay the employer will need to pay the employee the difference.

Can annual leave be carried forward?

The coronavirus legislation now permits workers to carry their holiday entitlement forward where the impact of coronavirus meant that it is not reasonably practicable for them to take holiday within the current leave year. The untaken leave can be carried forward into the following two years.

However, the updated guidance notes that workers will be unlikely to need to carry holiday forward their untaken holiday entitlement as they are able to take holiday during the furlough period.

This is of course on the provision that the employer pays the correct rate of holiday pay. If an employer is unable to fund the difference between holiday pay and furloughed pay, the worker will be unable to take leave.

How much holiday can an employer compel a worker to take?

Unfortunately there is currently no guidance on this issue. Employers who are considering compelling a worker to take annual leave should act carefully and reasonably in order to reduce the risk of a claim for constructive dismissal.

It is also advisable to ensure that the requirement to take holiday is applied consistently to all workers as failing to do so may give rise to claims for discrimination and constructive dismissal.

Equally, refusing or cancelling a workers leave could also be viewed as unreasonable and as such employers should do all that they can to ensure that workers are able to take as much of their holiday entitlement as possible during their furlough period.

If you have any queries relating to furlough or require assistance in relation to an employment law issue, including circumstances that will inevitably flow from the Coronavirus Job Retention Scheme, please contact Samantha Hyslop at samantha.hyslop@btmk.co.uk or **01702 238514** or Fiona McAnaw at fiona.mcanaw@btmk.co.uk or on **01702 238541**.