

Working on the basis that the first thing most people will wish to do when allowed to return to the workplace is go abroad on holiday, here are some FAQs around your rights and obligations as an employer.

Far less of this is law than good employment relations practice, but do keep in mind that after 15 months substantially confined to their own sofa or a ludicrously inflated B&B in Broadstairs, and with no sign yet of 2020's good weather in mitigation, your staff's pent-up psychological need for time out of the country will now be little short of visceral – news reports this week refer to 80 flights a day leaving the UK for Spain and we are not even supposed to be going there in the first place. You can expect staff emotions on this to run as hot as a plastic sunbed, so keeping a cool head on these issues while all around are losing theirs will be a key skill for HR. That is, unless you got to the holiday booking system first, in which case, well played and do send us a postcard.



1. Can I oblige my staff to take any or all of their holiday this year?

This might seem an odd question given the opening above, but even though overseas travel is now possible, the limits and conditions attached to it are still significant enough that many may not be able to face it – quarantine here or there, the cost of compulsory tests, 10 hours in Immigration at Heathrow, Broadstairs' no doubt many and varied attractions being comprehensively exhausted, etc. The government has recognised the difficulties caused to actual or wannabe holidaymakers through last-minute changes to its destination traffic lights and will now be looking at them every three weeks instead of weekly. However, there will still be little more depressing than booking somewhere nice and then finding that you cannot go, or, as a minimum, that your insurance is void. As a result, there may still be many who will find it more relaxing to stay at work, especially from home.

Many employers have created pseudo-formal rules or expectations around certain proportions of holiday being taken by particular points in the year, 30% by the end of June, 70% by August, etc. These are not effective as a matter of law to require those holidays to be taken. You may have a contractual right to require holiday to be taken at certain times (especially during garden leave or over Christmas or any other company-wide shutdown) but such clauses rarely go as far as allowing the employer to dictate the timing of holidays more generally. Therefore, you are probably thrown back on the Working Time Regulations 1998.

Regulation 15 allows you to require a worker to take leave (up to the Working Time Regulations minimum, at least) by written notice identifying the specific days on which the leave is to be taken (which is why those statements of expectation are not legally effective). That notice must be given not less than twice as many days in advance as the number of days required to be taken.

This is obviously wildly unattractive from the ER perspective but it will prevent the build-up of unmanageable holiday balances into 2022 if the employee stays, and substantial accrued pay-in-lieu entitlements if they do not. Compelling holiday may also be a service to otherwise reluctant employees whose physical or mental health could do with a little TLC after 15 months at home, even if they do not end up actually going anywhere.

2. Conversely, can I stop my employees going on holiday when they want?

Contractually, yes, provided that your terms of employment require that holidays are pre-agreed with you. Statutorily, also yes, even if the employee has already booked them, if you serve a notice on them under WTR Regulation 15(2)(b). This must identify the specific days on which holidays are not to be taken, and must be given to them at least the same number of days in advance as the number of days holidays you are preventing. You will not owe the employee any compensation for such a prohibition unless you had previously agreed that they could have those days and they incur cancellation charges as a result.

However, do remember that ER-wise this will really look like kicking someone already down, so you will want to show the clearest and most pressing reasons before taking that step and then be ready and willing to agree alternative leave arrangements at the earliest opportunity.

3. All my staff want to go on holiday at the same time – how do I choose which applications to grant?

The legal answer to this is that it does not matter, just so long as your choices cannot be tainted by complaints of discrimination or victimisation. While we absolutely do not recommend this as proper practice, it would, for example, be completely lawful to determine competing holiday applications by pulling names out of a hat, since Lady Luck may have favourites but she does not discriminate.

The practical answer must be that this will inevitably be a lengthy process of negotiation and disappointment. After the disruption to schooling caused by the pandemic, it is relatively easy to make a moral case for giving some level of priority outside term-time to those wishing to go away with children, especially their own. Similarly, where bumping someone up the batting order to grant some time away would be a reasonable adjustment for serious medical or disability purposes. After that, however, should you get into the relative emotional merits of each application? Does my long-unseen Granny in Greece trump his desperate need to escape difficult living conditions at home or her friend's flat on the Algarve only being available at that time?

We would recommend not going down that rabbit hole if possible, because that is only a very short distance from decisions based on Equality Act protected characteristics, which must obviously be avoided. Instead, you will need to be seen to focus first and foremost on the interests of the business. How many people do you need on deck in which roles at that time? Then from there downwards, look at factors that do relate to individuals (flexibility, time since last break, who got first dibs in prior years, children, the demands of the role, any overt signs of "battle-fatigue", is it for a non-repeatable event such as a wedding, etc.). Keep some decent notes of why those who got the nod were favoured on this occasion. As above, it will then be necessary from the ER perspective to give those whose requests are bounced some clear recognition of their disappointment. This will not usually be in money terms but certainly by way of apology and a commitment to priority at a later point.

4. Can I make my consent to the holiday dependent on whether the employee is going to a green or amber destination?

Yes. At present, the government continues to discourage leisure travel to amber countries, though from 17 May, it is no longer illegal and a reported 80 flights a day to Spain suggests that the public may have limited patience for any further COVID-19 precautions that are not mandatory. Quarantine at home and stringent testing is required for those returning from such countries and those rules apply whether or not your employee has been vaccinated. Therefore, if your employee can work from home on their return, you may decide not to take the point, but if they cannot, then the quarantine requirements for amber returners will essentially add up to another 10 days to their absence (see also 6 to 8 below).

5. Can I make my consent to the holiday dependent on whether the employee has been vaccinated?

Yes, in principle, but in practice the question is probably not worth asking. That is because the mandatory precautions around both green and amber countries are such that vaccination should make little difference to the chances of a returning employee bringing the COVID-19 virus into the workplace – green because of the testing and the criterion of very low COVID-19 incidence among the destination's population, and amber because of compulsory quarantine on their return.

6. Can I ask my employees where they are going on holiday in advance or where they went afterwards?

We have heard some commentators suggest that this would be the unnecessary acquisition of personal data and so is much to be discouraged. Really? Think – in all your time in HR or with friends or family, has anyone ever, ever, refused to tell you where they went or are going on holiday? Has anyone suggested that your question is an intrusion or that the answer is somehow classified, need-to-know or above your pay grade? Far more usually, the opposite is the problem – trying to prevent workmates droning on about holidays that they have had and you have not, or worse still, showing you the pictures.

We believe that an employer can and should ask that question. Where the destination may have legal consequences for it in terms of quarantine requirements, etc., requiring to know where the employee went seems like a very reasonable management request. As a result, their not responding should warrant some altogether more serious questions about why not. What are they hiding? Is the employee just trying to duck their quarantine obligations or to conceal that they have just had two weeks' sun, sand and street fighting for the sort of unsympathetic regime with which you might seriously not wish to be associated?



7. What are my obligations as employer around enforcing compulsory quarantine?

Where a person is required by law to self-isolate, as on their return from an amber country, then we must turn to the parenthetically over-cooked Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020. These require a person officially directed to self-isolate (other than via the NHS App) to notify the authorities of where they will be doing that – the designated place – and also (Regulation 8) tell their employer. Regulation 7 says that an employer aware of a quarantine obligation on its employee must not knowingly allow that employee to attend anywhere other than the designated place during the isolation period “for any purpose related to the worker’s employment”. Although these regulations refer to “employer” and “employment”, they apply equally to workers and agency workers, so this is not an issue for Schedule E employees only.

Therefore, an employer that allows an employee it knows is returning from an amber country straight back into the workplace is at least arguably committing an offence. It is not a precondition of its obligations that the employer has to have received that awareness from the employee under Regulation 8. Such is the publicity attached to the government’s traffic-light system that we believe the employer’s duty to exclude the employee from the workplace would arise directly on its knowing that he was just back from an amber country.

Individual company directors and managers also commit an offence under Regulation 7 if the employer’s breach is found to have been committed with their consent or connivance or through their negligence. We believe that there is a more than decent argument that not taking active steps to ascertain where your employee is going/has gone on leave could well constitute that negligence by itself. Turning a blind eye to allow the employee to come into work regardless would certainly be consent or connivance.

These regulations are enforced by a fixed penalty regime under which the guilty party (company, director or manager) is fined £1,000 for a first offence, up to £10,000 a shot from the fourth time onwards for those particularly slow to take the hint. The employee is staring down the barrel of the same thing and that is just for failing to notify you as their employer – the actual flouting of a post-holiday quarantine requirement can land them with a police visit and an unforgettable £10,000 holiday souvenir first time out.

8. What is the pay position during compulsory quarantine?

If the employee can work from home, then normal pay applies. If they are actually sick, whether with COVID-19 or something else, normal sick pay rules will apply. However, there is no entitlement to SSP for someone quarantining in these circumstances who is not unwell. In its Holiday and Leave during Coronavirus Guidance, Acas says brightly that “an employer can choose to pay them sick pay at the same rate as SSP or a higher rate if they want to”, but it is hard to think that embattled employers will greet the idea of paying someone to stay at home idle through their own decision to go to an amber country with anything but a colossal raspberry.

There would be no harm in your making it clear to employees now that any compulsory quarantine occasioned by their choice of overseas holiday destination would usually be unpaid.

9. What if my employee or their partner/family test positive and are not allowed to fly back?

Your normal sick pay rules will apply if it is your employee who tests positive, but otherwise we expect the position to be as for quarantine in the UK, i.e. that the extended absence is unpaid. You might agree to pay some or all of it out of their remaining holiday entitlement, but there would be no obligation on either party to do this.



10. Do any different rules apply if my employee is on furlough?

As at the end of March (the latest figures available from HMRC), there were still 4.2 million people in receipt of benefits from the CJRS. No doubt that number has shrunk following the unlocking of the retail and hospitality industries in April and May, but we suspect that around half that number will still be there when May's figures are released.

You are not allowed to furlough your employee specifically during their leave (i.e. to get the CJRS to pay 80% of their salary for their two weeks in, probably, Portugal), but there is nothing that prevents employees taking leave overseas while they are already furloughed, and there is quite a lot that makes it an actively good idea. Lockdown is difficult enough when you have the distractions of working from home and a full salary, but when you have nowhere to go, no one to see and nothing to do, the mental health benefits of a change of scene are all the more compelling. In addition, of course, it goes to reducing the accrued balance of untaken holidays, which you will otherwise have to pay out on termination if that is how it ends.

You can still oblige the employee to take holiday under the Working Time Regulations. You can also still prevent them taking leave on particular dates but there could be no good reason for that if they were not due in anyway. Similarly, allowing leave for someone who was not due to be working cannot cause a clash with others who were. The green/amber distinction only matters if the furlough is due to end within 10 days after the leave, failing which neither the vaccination nor destination nor quarantine questions much matter. If you have given notice to end their furlough, such that you do expect the employee back in the workplace within the following 10 days, then the position is as if they were working there already.



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