

The government has issued a [consultation](#) containing proposals for legislative reform to address the challenges faced by many employers following the Supreme Court's decision in *Harpur Trust v Brazel* last year.

You may recall that in this decision the Supreme Court ruled that all workers (including part-year and other irregular-hours workers) are entitled to 5.6 weeks' paid leave per year, irrespective of the number of weeks worked, and that their holiday pay should be calculated in line with the relevant statutory provisions. Further details of the case can be found in our previous [alert](#). In very broad terms, that is because the statutorily required method of calculating holiday pay in s224 Employment Rights Act 1996 dictates that weeks in which no work is done are ignored in the averaging process by which the entitlement is assessed. That produces an answer which is entirely defensible as a matter of strict law but completely inequitable in practice.

The key proposal in the consultation document is that the statutory annual leave entitlement for part-year and casual workers should be calculated in two steps:

- Calculate the total hours a worker has worked in the previous 52-week reference period, including any weeks without work
- Multiply the total hours worked by 12.07% to determine the worker's total annual statutory holiday entitlement in hours

In other words, at the beginning of a leave year, an employer will be required to look back over the total hours worked in the previous 52 weeks (including non-working weeks) and use that figure to determine the worker's annual leave entitlement for that particular leave year. So, in the same way that an employer is currently required to look backwards over a 52-week reference period to determine a casual worker's holiday pay, they will be required to do a similar exercise to work out their holiday entitlement too.

But, as with all matters holiday pay related, things are not quite that simple! Although the length of the reference period will be the same, employers will not necessarily use the same 52 weeks' data for their calculations. This is because for the holiday entitlement calculation, the government proposes that employers use a fixed 52-week period (including non-working weeks) whereas for holiday pay purposes, employers will still be required to use a rolling 52-week period excluding those weeks. Got that? The government acknowledges this divergence is unwelcome but takes the view that this is the best way to align a worker's holiday entitlement with the actual time they spend working.

But how will this work for the first year of work? Or for casual workers on short-term assignments? Here, the government proposes that, during the first year, employers will be required to work out a worker's statutory holiday entitlement (in hours) on a monthly basis by reference to the number of hours worked in the previous month multiplied by 12.07%. Such an approach is likely to reflect what many employers were doing prior to the *Harpur Trust* decision anyway.

The consultation document also proposes a new means of calculating how much of their holiday entitlement a worker uses when they take one day off, something that employers have always struggled with when dealing with casual workers with irregular hours. The disconcertingly sensible suggestion is that employers calculate a flat average working day based on the average number of hours worked during the relevant reference period.

As indicated above, none of these proposals will change the way in which holiday pay is calculated for casual workers – this will still be by reference to the relevant provisions in the Working Time Regulations 1998 and the Employment Rights Act 1996.

Agency workers are also covered by this consultation. The government's suggestion is that, when an agency worker is on assignment, their holiday entitlement should be calculated in the same way as for other casual workers who are in their first year of work, namely 12.07% of the hours worked over the previous month. If an agency worker is not on assignment, they will not accrue holiday as they are not working, and these weeks will not be counted when calculating holiday entitlement for any subsequent assignments.

We anticipate these proposals will be welcomed by affected employers as they should certainly reduce the holiday pay burden that was imposed on them by the Supreme Court's ruling in *Harpur Trust*. Clearly, they will involve employers getting their heads (and their systems and procedures) around a different way of calculating holiday entitlement, but as these proposals are likely to broadly reflect the way in which many employers were calculating holiday entitlement for casual workers pre-*Harpur Trust*, this should not be a significant imposition. The end product is logical, fair and relatively easy to explain to staff, whereas anyone who has ever tried to draft a *Harpur*-compliant holiday pay term or policy will know that this inevitably brings on both a pounding headache and an urgent need to leave the HR profession.

The consultation closes on 9 March 2023. Such a short consultation period suggests, being charitable, that the government is keen to crack on with its proposals and that we can expect implementing legislation sooner rather than later if the proposals gain the backing of affected employers. Or less charitably, that it is going to take this path anyway and so is not really interested in encouraging any debate about it.

In the opening paragraphs to the consultation, the government says it now recognises that “over time, holiday pay and entitlement legislation has become complex and, in some cases, can be challenging for employers to follow due to changes in the law. There is a risk that, in certain circumstances, this legislation may not be fully achieving its original intention”, though this is obviously not news to any employer. The government says it is keen to address this disparity to ensure that holiday pay and entitlement received by workers is proportionate to the time they spend working. Some might say it is also keen to act because it is one of the employers most affected by *Harpur Trust* – according to the consultation document, an estimated 37% of the workers who will benefit from the ruling work in the education sector, in particular, teaching assistants who are employed as part-year workers.

Please Share Your Views

We would very much like to hear your views on the key questions posed by the government in its consultation document.

The collated (anonymous) responses will then inform our formal response to the consultation exercise.

Please take a few minutes to complete the [survey](#). For each question, please select one of the survey responses and/or provide any additional information you feel is appropriate in the box below the question. The information you provide in response to this survey will be treated as confidential and no names of organisations or individuals will be used as part of our formal response to the government.

We should be very grateful if you would respond to the survey by no later than Friday 10 February 2023.

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