

As we highlighted in our [alert](#), there have been a number of changes recently to the Working Time Regulations 1998 (WTR) in relation to holidays and holiday pay.

If you have not done so already, now is the time to review your holiday/holiday pay practices to ensure they are compliant with the new statutory obligations and that you are minimising the scope for any future claims arising from noncompliance. To assist you, we have put together our ten-point checklist below, which highlights the key issues for you to consider. If you have any questions in relation to these, please speak to one of the partners listed at the back of this alert or your usual contact in the Labour & Employment team.

1

Review How You Calculate Statutory Holiday Pay for Your Workforce

The rules governing the calculation of statutory holiday pay remain complicated despite the recent changes, especially for atypical working arrangements.

For example, the amended WTR now set out certain types of payment that must be taken into account when determining a worker's holiday pay for the purposes of the four weeks' leave entitlement under Regulation 13. Questions still remain, however, about exactly which payments are caught, especially when it comes to bonuses.

Review your current approach to ensure you are comfortable that it does not expose you to the risk of material claims.

While we know that many employers have already changed their holiday pay calculations to reflect previous domestic and European case law (which the changes to the WTR are largely intended to reflect), not all employers have done so. The risk of future claims is likely to be greater now the position is set out in legislation.

If you intend to maintain/introduce a distinction in holiday pay calculations between the four weeks' leave under Regulation 13 and the additional 1.6 weeks' leave under Regulation 13A, ensure this is clearly set out in your contracts/policies. Remember that you would need to consult with staff about any proposed changes to their terms and conditions of employment.

2

Take a Look at the Holiday/Holiday Pay Clauses in Your Contracts

The holiday wording in your template contracts of employment may need tweaking to reflect the recent changes to the WTR, e.g. if they contain any express provisions governing the carry-over of leave.

3

Consider the Holiday/Holiday Pay Arrangements for Any Irregular-hours/Part-year Workers, e.g. Casual Workers

You should also review the contracts for any irregular-hours or part-year workers, as new rules are being introduced governing holiday entitlement and holiday pay calculations. These will apply in relation to leave years beginning on or after 1 April 2024. If you are proposing to introduce rolled-up holiday pay for any casual workers, for example, your template contracts will need amending. You should also ensure you are providing the required information in any pay statements. Again, remember that you would need to consult with staff about proposed changes to their terms and conditions.

4

Do You Want to Introduce Rolled-up Holiday Pay?

The government is giving employers the ability to pay rolled-up holiday pay for irregular hours workers and part-year workers. These changes will also only apply to leave years beginning on or after 1 April 2024.

If you have been paying rolled-up holiday pay anyway (as some employers have continued to do), ensure your arrangements mirror the new statutory provisions.

5

Review the Status of Any Self-employed Individuals To Ensure You Are Comfortable That They Are Genuinely Self-employed

Genuinely self-employed individuals are not entitled to holidays or holiday pay under the WTR – this right is only available to workers and employees. If, however, you have inadvertently misclassified individuals as self-employed, they may seek to recover any unpaid holiday pay (either because they were not paid holiday pay when they took leave or because they were not allowed to take holiday). Previous case law has shown us that such sums may be significant, not least because if the claim is brought under the WTR, there is no two-year statutory backstop on the amounts that can be recovered.

6

Check Any Rules Governing the Carry-over of Leave

The amended WTR now set out the position governing the carry-over of leave in certain situations, e.g. where an employee has been unable to take their leave due to sickness/taking a period of family-related leave (e.g. maternity leave). Ensure your policies/procedures reflect the statutory provisions.

7

“Use It or Lose It” – Ensure You Are Reminding Your Staff To Take Leave or They May Lose It

The amended WTR now make it clear that if an employer fails to inform workers that any leave not taken by the end of the leave year that cannot be carried over will be lost, then such workers will be able to carry forward such leave. This will also be the case if employers have not given workers a reasonable opportunity to take the leave to which they are entitled.

Employers should therefore be making it clear in their contracts/policies/procedures that leave will be lost if it is not taken in the relevant leave year, except where carry-over is permitted. Taking such steps (combined with monitoring usage and communicating with staff – see below) should reduce the risk of workers subsequently claiming that they are entitled to carry over leave (and be paid for it) from previous holiday years.

8

Monitor the Taking of Holidays

In light of the increased financial risks for employers if they do not ensure their workers are taking their statutory leave, employers should have systems in place to make sure that they do so. For example, it may be appropriate to send out periodic emails/reminders reminding staff to take leave if they have not already done so.

Similarly, if you are introducing rolled-up holiday pay for your irregular hours/part-year workers, you should still be checking that they are taking their statutory leave during the relevant leave year – the use of rolled-up holiday pay may increase the likelihood that staff opt not to take leave and just get paid for it instead.

9

Corporate Transactions – Carry Out Due Diligence

Ensure you are carrying out careful due diligence in relation to the employment status of individuals and how holidays and holiday pay are calculated so you are aware of the potential financial liabilities of noncompliance.

10

Leave Affected by COVID-19

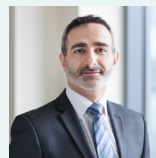
Just for completeness, if you have any workers who were entitled to carry over any untaken leave because their work was affected by COVID-19, they should use that leave before 31 March.

If you have any questions about the changes outlined above, please speak to your usual contact in the Labour & Employment team or one of the following:

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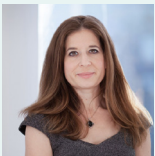
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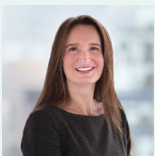
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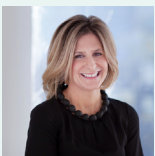
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