



Holiday and Furlough - The Five Minute Guide

By **Philip Cameron** - 28 August 2020

Holiday entitlement is a notoriously tricky area at the best of times. The recent availability of the Coronavirus Job Retention Scheme (CJRS) has added a further layer of complexity. Below we try to unpick the issue simply and clearly.

The Guidance

When the CJRS was first announced, the government was silent on how to treat holiday in the context of furlough. Employment lawyers scratched their heads trying to work out answers to questions such as: could employees take holiday during furlough, what about holiday carry-over, and can an employer require a furloughed employee to take holiday? Many of these questions were finally answered by Government [guidance](#) published in May.

Entitlement

It's always best to return to first principles when analysing questions of holiday entitlement.

There are two different types of holiday:

- Statutory - the minimum 20 days enshrined in law together with 8 public holidays (in England);
- Contractual holiday - any other entitlement that an employer wishes to give on top of the statutory minimum.

Contractual holiday is governed by the terms of the employment contract; this note is concerned only with statutory holiday, which is where the complications lie.

Carry Over

Ordinarily employees must take their statutory holiday in the particular leave year and cannot carry it over into the next year. The thinking behind this is that employees must take a break from work to enable rest and relaxation.

There are exceptions to the principle of no carry-over: for example, where employees have not been able to take holiday because they have been on long-term sickness absence or on maternity leave. In such cases, an employer must allow for carry over of the 20 days.

The Government passed emergency legislation this summer to relax the carry over rule, ensuring businesses have the flexibility they need to respond to the coronavirus pandemic and to protect workers from losing their statutory holiday entitlement, in cases where, for example, holiday is not permitted as the employee is needed to work. This new law allows workers to carry over holiday for up to a further two leave years where the impact of coronavirus means that it has not been reasonably practicable to take it in the leave year to which it relates.

It has its limits though as the Government has stated that this is unlikely to apply to furloughed workers.

Some employers will have been extremely busy during lockdown and may have wanted to limit the taking of holiday by employees. That too is something that an employer can do, provided it gives adequate notice. The new rules on carry over will help employers with this and prevent employees accruing large holiday balances that they will want to take later in the year.

Given that travel and hospitality have been severely restricted, many employees may have been reluctant to take holiday. But, as set out above, an employer can require employees to take holiday.

Mandated Leave

It is clear from the Government guidance that employees are able to take holiday whilst furloughed and that employers can require furloughed employees to take holiday. There may be exceptions to this such as those who were shielding as it is unlikely that they will have been able to enjoy a period of rest and relaxation.

Wary of employees losing annual leave, or accruing large amounts to take in the future, many employers have been requiring employees to take a certain amount of their annual leave by a particular date. This is entirely lawful provided that minimum statutory notice is given (in essence, the notice must be twice the length of the leave sought, i.e two weeks' notice is required for a holiday of one week).

It would appear that we are in full holiday season at the moment and the country seems to have taken its traditional summer break as in previous years, albeit largely in the UK.

Fears about large holiday accruals and a demand for leave in the second half of the year may therefore be misplaced given the flexibility that employers have.

Holiday Pay

The trickiest issue is what employees are paid for their holidays.

Although this remains unclear, the view of the Government and ACAS is that salaried employees are entitled to be paid at their "normal" rate (i.e. their pre-furlough pay) for holidays (or bank holidays that they wouldn't otherwise normally work) unless they have agreed to a permanent reduction in their normal salary (not any temporary reduction during the furlough period).

For employees who are not salaried but have variable pay, the position is more complicated and outside the scope of this short article.

In Conclusion...

Annual leave and holiday pay are a bit tricky at the best of times. Add in furlough, new rules on carry over and fluctuation in normal pay – it's a perfect storm in the Mediterranean. However, like many HR issues, having an open and sensible dialogue with employees about rules and expectations is the best way to keep an even keel.

If you have any questions about holiday pay and furlough please email info@gqlittler.com.