

Furlough and holidays

Based on the Coronavirus Job Retention Scheme Guidance (the **Guidance**) and the Working Time Regulations (**WTR**).

Will employees continue to accrue holiday during furlough?

On 17 April 2020 the Guidance was updated to confirm that employees will continue to accrue annual leave during furlough. This is unsurprising and in accordance with the Working Time Regulations 1998.

Can annual leave be taken during furlough?

The Guidance confirms that workers can take annual leave during furlough, and this reflects the position in the *Acas guidance*.

Can an employer require a worker to take holiday during furlough?

Employers looking at their short-term financial position, may decide not to instruct workers to take their annual leave during furlough as they will need to top up the furlough pay. Employers may go further than that and designate furlough as a period during which no annual leave may be taken. Given that it is possible to carry leave forward to the next two holiday years, the employer may be less concerned than it otherwise would be about workers having annual leave accrued on their return from furlough.

However, given that the Guidance advises that employers can recoup an employee's holiday pay via the CJRS up to the 80%/£2,500 limit, some employers may take the view that it would be cost effective to direct workers to take annual leave (giving the notice required under the WTR 1998).

WTR - Notice by employer that leave must be taken

An employer may give notice ordering a worker to take statutory holiday on specified dates (*regulation 15(2), WTR 1998*). Such notice must be at least twice the length of the period of leave that the worker is being ordered to take (*regulation 15(4)(a)*). There are no explicit requirements about the form that this notice must take.

Example: employer's notice - If the employer requires the worker to take two weeks' leave, it must give at least four weeks' notice to the worker.

Where a worker does not take annual leave in the relevant leave year because they were on furlough, can they carry it forward to the next leave year?

The government has passed emergency legislation relaxing the restriction on carrying over the four weeks' leave derived from the WTR (i.e. the 20 days). The new laws permit the carry-over of any untaken WTD leave where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)".

Employees can therefore ask to carry over unused holiday (based on the 20 days, not the 28 days).

Can a worker be prevented from taking statutory annual leave during furlough?

The Guidance confirms that an employee can take annual leave during furlough if they give the required notice. However, it is possible that an employer could exercise its right to designate furlough as a period during which no annual leave may be taken or otherwise give **counter-notice** in response to a holiday request.

Can an employer require employees to take accrued holiday once the furlough period comes to an end?

In principle, the employer could require that annual leave is taken once the furlough period comes to an end.

What pay is a worker entitled to where they take annual leave during furlough?

Statutory holiday pay entitlement depends upon whether the worker has normal working hours and how they are paid. The *Acas guidance* states that workers must receive their usual holiday pay in full. The Guidance confirms that holiday taken during furlough should be paid in accordance with the WTR but an employer can only recover the 80%/£2,500 cap from the CJRS in respect of any annual leave taken so the employer will need to meet the shortfall.

The current rules under the WTR for calculating pay during holiday will still apply (normal hours, commission and reference periods etc.)

If a worker has pre-arranged annual leave which falls during furlough, is the worker entitled to take that leave?

The employer may wish to cancel any annual leave which has already been booked, if there is enough time before the leave for the employer to give the required notice (**Counter Notice – see below**).

If a worker has pre-arranged annual leave which falls during furlough, is the worker entitled to cancel that leave?

The WTR do not provide for cancellation of a notice to take annual leave by a worker. However, the contract of employment or the employer's holiday policy may provide a mechanism for workers to do so.

In either event, employers would need to ensure that they do not breach the **implied term of trust and confidence** in refusing to accept a worker's withdrawal of notice to take annual leave, or by issuing notice that the worker must still take annual leave on the days in question.

Employers could in theory refuse to cancel any pre-arranged holidays which fall during the furlough period, and insist that the employees take holidays as planned. They would then be paid full pay for the holidays, not 80% (you pay 100% and claim back 80%).

WTR - Employer's counter-notice

An employer may refuse a worker's holiday request by serving a **counter-notice**. This must be given at least as many calendar days before the date on which the leave is due to start as the number of days which the employer is refusing (*regulation 15(4)(b), WTR*).

Example: employer's counter-notice - If the worker has requested six days' leave and the employer wishes to refuse five days of the request, it must give notice at least five calendar days before the date on which the leave was due to start

Bank Holidays

If the employer decides to continue to treat the bank holidays as statutory annual leave then they should be paid accordingly (normal pay for the leave).

If employee usually work bank holidays, their employer can agree that this is included in the CJRS grant payment.

If the employee usually has bank holidays off, their employer will need to either top up their pay to their usual holiday pay or give the employee a day off in lieu.

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