
ANNUAL AND BANK HOLIDAYS DURING COVID-19 and JOB RETENTION SCHEME

The relationship between the Government’s Coronavirus Job Retention Scheme (CJRS) and annual holiday entitlement has been the subject of many enquiries into the BESA’s Employment Affairs Department and seems to be one of the most confusing aspects of the CJRS – it is simply not addressed in the Government’s guidance.

That said, the question of annual leave has, to some degree, been addressed in guidance issued by the Advisory, Conciliation and Arbitration Service (ACAS) [guidance](#)

The ACAS guidance states that workers can continue to request to take annual leave while they are on furlough. It says: *If an employee is 'furloughed' (temporarily sent home because there's no work), they can still request and take their holiday in the usual way. This includes taking bank holidays.*

Working Time Regulations 1998

The right to paid annual leave is set out in the Working Time Regulations 1998 [WTR '98]. This sets out a statutory right to 5.6 weeks annual holiday entitlement for a full-time worker. It comprises 4 weeks annual leave, plus an additional 1.6 weeks to reflect the usual eight UK public/bank holidays.

The generally accepted position appears to be that as workers on furlough remain employed, the 5.6 weeks of statutory annual entitlement (5.6 weeks) will continue to accrue. An employer could agree to reduce any enhanced contractual holiday (beyond the statutory minimum of 5.6 weeks per year) to reflect the fact that an employee has been on furlough, but employees will retain their right to annual leave under the WTR '98.

With effect from 27 March 2020, the Working Time (Coronavirus) (Amendment) Regulations 2020 relaxed the provisions governing the carrying over of holiday entitlement in the event that *'it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled... as a result of the effects of coronavirus'*.

This amendment has not had the effect, however, of overriding existing arrangements under which employers and their workers have agreed to treat recognised public/ bank holidays as part of the employees statutory and/or contractual leave entitlement. Rather, it has created an exception to the legal duty placed on employers to ensure that workers take their full statutory leave entitlement. As a result, there is now a flexibility – but not a requirement – for employers and workers to agree to carry over up to four weeks’ untaken statutory leave into the next two leave years.

Recognised Bank/Public Holidays

The ACAS guidance confirms that ‘*Employees and workers may still be required to use a day’s paid holiday for bank holidays, including when they’re furloughed*’. This appears to provide confirmation that employers may rely on existing employment contract and/or collective agreement provisions (such as the HVAC/BESA Agreement) which include public/ bank holidays in workers’ statutory and/or contractual leave entitlement.

Existing arrangements whereby workers take recognised public/ bank holidays as part of their statutory and/or contractual holiday entitlement remain unchanged. Accordingly, employers are free to treat the four banks holidays that fall during the CJRS period, i.e. **Good Friday** (10 April), **Easter Monday** (13 April), **VE Day** (8 May) and the **Spring Bank Holiday** (25 May), in the normal way for all their workers, whether furloughed or still at work. If non-furloughed workers are required to undertake work on a public/ bank holiday day, then this too should be managed in the usual way, in accordance with their employment contract or collective agreement.

Rate of pay

If workers choose to take periods of annual leave during furlough, or are required to do so, there is an additional question about the rate of holiday pay they should receive.

The ACAS guidance states that ‘*furloughed workers must get their usual pay in full, for any holiday they take*’. An argument could be made for holiday pay (including recognised bank/public holidays) during furlough to be paid at a reduced rate of 80%. However, the correct course of action would be for holiday pay to be paid at the usual remuneration pre-furlough, consistent with the WTR ‘98.

Under the WTR ‘98, statutory holiday pay is paid at the rate of ‘a week’s pay’. This is calculated in accordance with the Employment Rights Act 1996 (see table below). You should note, that with effect from **6 April 2020**, the reference period for calculating average earnings increased to 52 weeks (originally 12 weeks).

Where workers are furloughed, we can see no reason why employers would not be entitled to be reimbursed for this holiday payment up to the value of the 80% furlough grant provided for under the Government’s CJRS. Any difference between the furloughed workers’ holiday-pay and furlough-pay entitlements should, however, be funded by the employer.

Worker’s hours	Amount of a week's pay
Normal working hours and employee's remuneration does not vary with amount of work done	The amount payable for the week by the employer assuming the employee works for all the normal working hours
Normal working hours but employee's remuneration varies with the amount of work done, e.g. the employee is a piece worker or the employee's remuneration varies by reason of commission	The amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration in respect of the previous 52 weeks

Worker's hours	Amount of a week's pay
<p>Normal working hours on days or times that differ so that the remuneration varies according to the incidence of those days or times, e.g. where certain shifts attract premiums</p>	<p>The amount of remuneration for the average number of weekly working hours at the average hourly rate of remuneration - where the average number of weekly working hours is the total number of normal hours worked in the preceding 52 weeks divided by 52, and the average hourly rate of remuneration is remuneration for the hours worked in the 52-week period divided by the number of hours in that period</p>
<p>No normal working hours</p>	<p>The average weekly remuneration for the previous 52 weeks</p>

Note

In putting together this guidance note, BESA has relied on the information available at a point in time. Should further, or updated, guidance become available at a later date that specifically relates to annual leave and furloughed workers, this note will be amended.