



## Thomas More Chambers

---

### **Holiday Entitlement and Pay under the Furlough Scheme**

*This article should be read in conjunction with other articles on this subject including: [The Coronavirus Job Retention Scheme - Update](#) dated 14 April 2020.*

#### **Introduction**

Many employers have been raising concerns about holiday pay and how it operates during the Covid-19 pandemic, especially in the case of workers who have been furloughed. This article addresses these issues.

#### **Government guidance**

On 13 May 2020, the Government published new guidance on the topic. This can be read here: <https://www.gov.uk/guidance/holiday-entitlement-and-pay-during-coronavirus-covid-19>

The guidance is designed to cover both furloughed and non-furloughed workers.

#### **Holiday entitlement**

By law, most workers have a statutory entitlement of 5.6 weeks' paid holiday per year. Statutory holiday is split into two elements: 4 weeks derived from EU law; 1.6 weeks derived from UK law. Some workers will, by contract, be entitled to a greater amount of paid holiday than this (contractual holiday entitlement). The genuinely self-employed do not have any statutory holiday rights.



The statutory paid holiday accrues regardless of whether the worker is on sick leave, maternity leave, parental and adoption leave, as well as on other types of statutory leave. The Government has provided a calculator tool for employers which can be found here: <https://www.gov.uk/calculate-your-holiday-entitlement>

Furloughed workers continue to accrue statutory holiday entitlements.

### **Employers requiring workers to take holiday**

Employers have a statutory right, with proper notice, to require workers to take holiday or not take holiday on particular dates: regulation 15 of the Working Time Regulations 1998.

The more challenging issue is raised when an employer wishes to compel furloughed workers to take their holiday entitlement while they are on furlough.

It is clear that furloughed workers can take holiday without disrupting their furlough position. The guidance clearly states that employers **can** require workers to take holiday while on furlough. It states:

“If an employer requires a worker to take holiday while on furlough, the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday.”

In circumstances where a worker cannot derive the benefits of holiday leave for reasons caused by Covid-19, the guidance appears to suggest that an employer should not require a worker to take holiday during furlough. As stated, however, as a matter of law employers can direct employees when they must take paid holiday leave.

### **Holiday pay**

The standard guidance provided by the Government covering holiday pay can be read here: <https://www.gov.uk/guidance/holiday-entitlement-and-pay-during-coronavirus-covid-19>



The underlying concept is that a worker should not be financially worse off through taking holiday and that holiday pay is calculated in reference to their ordinary earnings. Where the worker has variable hours or pay, this is calculated as an average of the previous 52-weeks of remuneration excluding weeks in which there was no remuneration.

For furloughed workers, their rate of holiday pay **should not** simply be the rate of pay they receive on furlough (unless the employer and worker has entered into a specific agreement not to reduce the worker's pay during furlough). In other words, the worker should be paid a rate of holiday pay calculated by reference to their ordinary **pre-furlough remuneration**.

Importantly, where the calculated rate is **above** the pay the worker receives while on furlough, the employer must pay the worker the difference. However, the employer can of course continue to claim the 80% grant from Government throughout this period, which the guidance states should "cover most of the cost of holiday pay".

### **Carrying annual leave into future years**

The ordinary rule is that the 1.6 weeks of leave can, with agreement, be carried forward in to the next holiday year. The other 4 weeks cannot be carried forward. However, where a worker cannot take annual leave because of being on maternity leave or sick, employers must allow the other 4 weeks to be carried forward as well.

The Government has made new Regulations that clarify annual leave during the pandemic. [The Working Time \(Coronavirus\) \(Amendment\) Regulations 2020](#) include the following:

“(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two years immediately following the leave year in respect of which it was due.”



Therefore, where it has not been reasonably practicable for a worker to take some or all of the 4 weeks' holiday due to the effects of coronavirus, the untaken amount must be carried forward into the following two years. This is the "carried holiday" entitlement and lasts two years.

Employers must give workers the opportunity to take any leave they cannot carry forward before the end of the leave year. The 2020 Regulations leave an employer's ability to require a worker to take annual leave unaffected.

The guidance expressly suggests that, where "multiple entitlements" to holiday build up (as is the case when untaken leave is carried forward), then workers should be allowed to take the holiday from the entitlement that expires first.

Under regulation 12 of the 2020 Regulations an employer can only refuse a worker's request to take "carried holiday" if it has a "good reason" for the refusal.

The guidance specifically addresses the issue as to what factors may amount to a good reason for refusal. It lists the following factors:

- Whether business faced significant increase in demand due to coronavirus that would reasonable require the worker to continue to be at work;
- Extent to which business' workforce is disrupted and temporary cover available for essential activities;
- Health of the worker and their need for a period of rest and relaxation;
- Length of time remaining in worker's leave year;
- If the worker taking leave would have wider impact on society's response to and recovery from coronavirus;
- Ability of remaining workforce to offer cover.

In the case of furloughed workers, the guidance suggests three further points:

- Workers on furlough are unlikely to need to carry forward their statutory leave, as they will be able to take it during the furlough period in most cases. This seems to



run counter to the earlier section of the guidance which questions whether a worker can properly make use of holiday in the circumstances imposed by coronavirus because they cannot rest, relax and make use of leisure time;

- Furloughed workers taking leave must be paid the correct rate of holiday pay. If the employer is unable to afford to fund any difference due to the impact on their business, then “it is likely” this would mean it would not be reasonably practicable for them to take annual leave; and
- In such a case, the worker must be allowed to carry over their untaken leave, and then given a chance to take it, before the end of the next two leave years.

The guidance provides two worker examples. In the first, the worker has two months of their leave year left. The employer and the worker reach a compromise that the worker will take just one week of leave (rather than two), where a significant proportion of the employer’s workforce is unable to work in the months remaining before the leave year expires.

In the second, the worker has just started a new leave year. The employer anticipates significant increase in demand lasting three months. The employer agrees with the worker that it will not be reasonably practicable for the worker to use their annual leave for the next three months. After this time, the worker will be free to take leave, within the rest of the leave year.

The guidance suggests it is best practice for employers to inform workers of both the need to carry leave forward and how much leave will be carried.

### **Agency staff**

The guidance states that where holiday rights exist under the Regulations, they remain unchanged when workers are on furlough. Some agency workers on a contract for services may not be entitled to the accrual of holiday or to take holiday under the Working Time Regulations while on furlough because they are not workers or treated as workers.

Agency workers with worker status can take holiday they are entitled to under the Regulations or contract of employment while on furlough. Employers have a similar right to control when agency workers are able to take leave as described for workers and employees



above (where it is permitted by the Working Time Regulations and the agency worker's contract).

**27 MAY 2020**

**MANUS EGAN  
PATRICK WISE-WALSH (Pupil)  
THOMAS MORE CHAMBERS**

*In these unprecedented times the Thomas More Chambers Employment Law Team understands the importance of working closely with all our professional clients to best serve the needs of our mutual clients under difficult circumstances.*

*The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues, including those arising from the Covid-19 pandemic. We are well used to working remotely and can arrange for confidential telephone or video conferences and meetings on a variety of platforms with you and our mutual clients. In addition, we all are well used to paperless working and to dealing with remote hearings and are always happy to assist in setting them up.*

*The Thomas More Chambers Employment Law Team is able to assist instructing sources on any employment law issues arising from the Coronavirus crisis. If you need such assistance, please contact Craig Brown, Senior Civil Clerk on 020 7404 7000 or at [cbrown@thomasmore.co.uk](mailto:cbrown@thomasmore.co.uk).*

*No responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by any member of Thomas More Chambers. The information and commentary does not, and is not intended to, amount to legal advice and the writers do not intend that it should be relied upon. You are strongly advised to obtain specific personal advice from a lawyer about any legal proceedings or matters and not to rely on the information or comments in this bulletin.*

