

Insights

LONG HOT SUMMER? HOW SHOULD UK EMPLOYERS DEAL WITH THE QUESTION OF HOLIDAY DURING YEAR 2 OF COVID?

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SUMMARY

Lydia Octon-Burke considers the impact of the COVID-19 pandemic on annual leave entitlement and carry-over moving into 2021 and practical tips for employers.

At the beginning of another year impacted by COVID-19, many employers have found themselves with employees having large amounts of outstanding annual leave carried over from 2020. Stuck in lockdown once again, employees are increasingly less willing to want to take annual leave, given that COVID-19 is likely to be with us for many months to come. Even if the vaccine programme is successful, it is likely that limits on travel abroad and social interaction will continue for some time.

All workers/employees are entitled to 5.6 weeks' annual leave in each leave year, which equates to 28 days for someone who works 5 days a week. This is made up of:

1. Four weeks' statutory leave
2. 1.6 weeks' additional leave

Additional leave is more flexible and able to be carried over through direct agreement between employer and employee. As a general rule, however, four weeks' statutory leave was more restricted and could only be taken in the leave year to which it related (i.e. the "use it or lose it" rule). This was amended last year to allow carry-over when *"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)"*.

In practice, the government probably intended this provision to be used very rarely, encouraging employers to insist that employees take annual leave during the leave year, not least to support their mental health and avoid burn out.

In addition to the statutory provisions, it is very common for employment contracts to limit carry-over to a certain number of days, such as 5. However, given the limited holiday opportunities in 2020, it appears many employees reached the end of 2020 wanting to carry-over the maximum number of days accrued, which in some cases was many more days than permitted under carry-over provisions in contracts of employment and/or policies.

Whilst some employers made the tough decision to enforce limited annual leave carry-over at the end of 2020, others agreed to allow additional carry-over, leaving employees with even more days to use in 2021, and limited inclination (or opportunity) to use them.

There is no practical financial solution - it is unlawful to pay employees in lieu of accrued leave except on termination of employment (see below). Employers cannot pay off accrued leave during employment.

Employers should therefore be focusing now on how to avoid the same situation happening again at the end of this year.

CAN EMPLOYERS FORCE EMPLOYEES TO TAKE ANNUAL LEAVE?

Under the Working Time Regulations 1998, employers can request employees to take annual leave at specific times, providing they give twice as much notice as the length of the leave (e.g. two weeks' notice for one weeks' leave). As with carry-over, contracts of employment frequently provide for specific periods of notice. However, when trying to exercise this right, employers have found employees unwilling to take leave, given the limited ability to leave the house during lockdowns. To maintain employee morale and avoid risk, best practice is to seek agreement from employees and be careful about how any requirement is communicated.

WHAT HAPPENS TO HOLIDAY ENTITLEMENT IF EMPLOYMENT TERMINATES E.G. THROUGH REDUNDANCY?

Given increasing numbers of redundancies, employers also need to be mindful of how increased carry-over can affect payments when employment terminates. Employees can only be paid in lieu of accrued annual leave when their employment terminates and it is usual practice to make a payment for accrued leave when employees leave. This is normally provided for under employment contracts.

Alternatively, employers may require employees to take annual leave during their notice period, whether notice periods are worked or spent on garden leave. Garden leave clauses frequently require that employees take all accrued annual leave during garden leave periods. However, whether on garden leave or at work, if such a provision is not in place employers can still request that employees take their annual leave during their notice period, but the notice period must be long enough to cover both the required notice and the leave itself. Any days the employee cannot take

must be paid out separately. It is worth noting that garden leave clauses sometimes require employers to require employees to take any period of accrued leave, and this requirement is something to look out for, as otherwise the accrued leave remains outstanding.

It is important therefore for employers to consider fully any employee's annual leave entitlement and relevant contractual terms prior to discussing any payments on termination.

PRACTICAL TIPS FOR EMPLOYERS

1. Actively encourage employees/workers to take leave throughout the year through regular reminders rather than waiting until later in the year, as well as communicating the importance of taking annual leave for employee health and safety/well-being.
2. Be clear about carry-over policy but be willing to change it if circumstances change.
3. Make booking time off as simple as possible.
4. Be fair - it does not always make sense for example to allow one employee to use all their annual leave in the summer, whilst other employees are not allowed to do this and are instead required to take it during lockdown periods. This will likely lead to resentment and resistance. Be clear with employees that they need to spread out their leave for fairness.
5. Be mindful of accrued annual leave when making redundancies or when employment terminates for any another reason - employees may have more days accrued leave than expected.
6. Look out for garden leave clauses/notice clauses providing that employers must actively require employees to take accrued annual leave during notice periods.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at COVID-19HRLabour&EmploymentIssues@bclplaw.com

RELATED CAPABILITIES

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