

Insights

## ISSUES AROUND UNLIMITED LEAVE AND A FLEXIBLE WORKING REFRESHER

EMPLOYMENT LAW HORIZON SCANNING – PUBLICATION #3

Apr 12, 2022

### SUMMARY

In our third horizon scanning blog post, we focus on issues relating to the rise in companies in the UK offering unlimited paid holiday and the increase in flexible working requests. We also include a quick reminder on how to follow the statutory scheme.

### UNLIMITED ANNUAL LEAVE

In the UK, workers are entitled to a minimum of 5.6 weeks' annual leave in each leave year. This is equivalent to 28 days (including public holidays) for those who work five days a week.

In the US, unlimited paid holiday is an increasingly common benefit, and is often used by companies in the tech sector to attract and retain talent. Well-known global companies, especially those in the tech sector, have adopted unlimited paid holiday policies. Recruitment websites in the UK have shown that, recently, there has been a rise in UK companies following the US tech trend and also offering unlimited holiday. In the current market where 'The Great Resignation' is in full swing and where it is becoming harder for employers to attract and retain talent, many UK companies may consider introducing unlimited holiday in a bid to win (and retain) new talent.

It should be noted that we are referring in this post to *paid* unlimited holiday, where employees are able to take as much or as little holiday as they please per year, all of which is paid. It differs from arrangements where a company offers unlimited *unpaid* leave.

There are arguably a number of benefits to having such a policy, including increased productivity (as employees feel better rested and are less likely to experience periods of heightened stress and burnout), recruiting and retaining talent (as having unlimited holiday is an attractive benefit for many people, making the company stand out from the crowd) and improved wellbeing amongst

employees (not least because the ability to take more time off can help employees achieve a better work-life balance).

However, offering unlimited holiday to employees is not without difficulties or risks. For example:

- In the US, where employees have either no rights or very limited rights to paid holiday, unlimited paid holiday is a very unusual, generous benefit and is (relatively) simple to implement. In the UK however, full-time employees already have a right to 5.6 weeks paid holiday, so any “unlimited” holiday would actually be additional paid holiday on top of the 5.6 weeks already in place. This might reduce the perceived generosity of the benefit, and make it more complicated to administer;
- There is a risk that such a policy could lead to unfairness and possibly disaffection within the company. No two employees are the same and whilst some may take no additional holiday as a result of the policy, there will undoubtedly be others who make more use of the policy and take long periods of additional time off. This could lead to resentment, unfairness (with employees having to cover for people taking additional holiday), stress and employee dissatisfaction, which all run counter to the purpose of the policy. An employee who takes 5.6 weeks’ paid holiday in line with statutory entitlement might not be happy with a colleague in the same team taking 12/15 weeks and receiving the same remuneration;
- It is open to abuse. Clearly, people are recruited to carry out productive work of value to their employer, otherwise there is no point the employer recruiting them and paying them. Unlimited leave only works if the employee takes responsibility for managing their work and is able to work their leave around their contractual commitments. It could be perceived as allowing employees to take as much leave as they want but that is not the case; it only works if employees take responsibility for their workload and take leave responsibly without a diminution of service delivery. That requires trust; and
- Long periods of holiday could lead to employees, no matter how talented or experienced, losing touch with their day-to-day work and colleagues. In some occupations, skills can quickly atrophy if they are not practised regularly. People returning from a two-week holiday may take a couple of days to get back into the swing of things, a person returning after three months may take a lot longer. There may also be issues with employers preferring and promoting employees who do not take additional holiday - that makes sense; there is no prohibition on rewarding the most committed employees.

## **Advice to employers**

Introducing an unlimited leave policy is a brave step. It is not right for all businesses. It only works if there is a high level of trust and a responsible workforce that will not abuse it.

For those employers brave enough to try it, we would advise employers not to make unlimited leave a contractual right but instead to set it out in a policy document. We suggest that it is subject to a trial period, perhaps involving a small section of the workforce at first to see whether it works. The policy document should give the employer, in very clear and unambiguous wording, the right to move employees back to their contractual entitlement (i.e. 28 days per year) at their sole discretion. This means that if an employee is abusing the right to unlimited leave, or if the employer simply decides it was a bad idea, the employer has flexibility to move the employee back to no more than contractual entitlement. It might also be prudent for this policy document to set a maximum number of days which an employee can take in a block at any one time, to minimise the impact on teams. It would also be prudent for the employer to give the employee reasonable notice of this change. Employees should also still be required to seek advance approval of their leave, just like they currently are with almost all employers.

We would also advise employers who wish to implement an unlimited leave policy simultaneously to implement a method of carefully monitoring annual leave to ensure that people are taking enough leave during the year. Ultimately, annual leave is a health and safety issue (the Working Time Regulations are essentially a health and safety measure) and should be taken to avoid intense periods of work-related stress and anxiety and employers have a duty to actively ask their employees to take their contractual entitlement to leave. Monitoring will also help identify cases where employees are taking excessive amounts of paid time off, which will help to reduce the risks outlined above.

From our experience of employees or workers who have had unlimited leave, it has been only people in positions of authority and responsibility who have handled it sensibly. In fact, they have not tended to take significantly more leave than those with restrictions but have valued not having someone keeping score.

## FLEXIBLE WORKING REQUESTS

Although many companies are now working back in the office part, if not all the time, there has undoubtedly been an increase in flexible working requests as a result of the Covid-19 pandemic. As we said in our first [horizon scanning blog post](#), employers were initially reluctant to respond decisively to flexible working requests as they grappled with what hybrid working would look like for their company. However, in this new world of work, employers will have to start making decisions.

Under the UK's statutory scheme, employees with at least 26 weeks' continuous employment have the legal right to make a request for flexible working. An employee can only make one request in any 12-month period. If the request is made in a certain manner, a procedure is triggered which the employer should follow. Employers have three months to make a decision (this period can be extended by mutual agreement) and can only refuse the request for one (or more) of the following reasons:

- Burden of additional costs;
- Detrimental impact on ability to meet customer demand;
- Inability to reorganise work amongst existing staff;
- Inability to recruit additional staff;
- Detrimental impact on quality;
- Detrimental impact on performance;
- Insufficiency of work during the periods the employee proposes to work; or
- Planned structural changes i.e. reorganisation.

As a matter of good practice, employers should arrange to speak to the employee as soon as possible after receiving the flexible working request. A meeting can be scheduled with the employee where their request and the reasons behind it can be discussed in detail. The employee should be offered a chance to be accompanied by a work colleague at this meeting (although it is not compulsory for the employer to offer this). If the request is refused, the employer should write to the employee informing them of the decision and setting out the reasons for the rejection.

## **Advice to employers**

If an employer receives a statutory flexible working request, they should ensure that they follow the statutory requirements for dealing with such a request by only refusing a request on the grounds of one (or more) of the permitted reasons and responding to the decision within three months (or within any agreed extended period). This will reduce the risk of a claim, and ensure the request is dealt with fairly.

Employers should also be mindful of employees who say that they are making a flexible working request on the basis of childcare needs and who argue that they worked remotely during the pandemic for a long period of time and that it worked well. Refusing such a request may lead to claims of indirect sex discrimination because the driving factor behind the request is childcare. In the UK, it is possible to justify indirect sex discrimination if you can show that the treatment was a proportionate means of achieving a legitimate aim. It may be difficult to run this argument successfully if the employee has worked from home for a long period of time already and has been performing to a satisfactory level. However, satisfactory performance from home during lockdowns or times when most people are working from home does not mean that it will be the same when there is more of a shift of other employees or other contacts being in the workplace.

It is also important that requests from parents or carers are not prioritised over requests from other employees. Flexible working requests should not be accepted or rejected on the basis of the motive

of the employee.

Employers should be willing to make time to discuss the employee's request and to suggest an alternative arrangement if it is felt that the employee's proposal will not work in its current form. Overall, employers should consider each request on a case-by-case basis and on its own merits.

## RELATED CAPABILITIES

- Employment & Labor

## MEET THE TEAM



### Jemma Green

London

[jemma.green@bclplaw.com](mailto:jemma.green@bclplaw.com)

[+44 \(0\) 20 3400 4575](tel:+442034004575)

---

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon ([kathrine.dixon@bclplaw.com](mailto:kathrine.dixon@bclplaw.com)) as the responsible attorney.