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Carrying over annual leave – what are the rules



24/7 professional support for businesses, across employment law, HR and health and safety

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Date: On demand

Run time: Approx 50 mins

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The detail contained within this webinar is based on GB and Northern Ireland employment legislation.

Members in the jurisdictions of Republic of Ireland, Jersey, Guernsey and Isle of Man are asked to please contact the Advice Service to obtain the information relevant to your jurisdiction.

Today we will cover...

- Who is entitled to statutory annual leave?
- Minimum entitlements
- Contractual entitlements
- The rules around taking leave
- Carrying over annual leave
- Buying and selling annual leave entitlement

Who is entitled to statutory annual leave?

Entitled:

- Employees
- Part time employees
- Fixed term employees
- Workers
- Zero hours workers
- Variable hours workers
- Agency workers
- Apprentices

Not entitled:

- Truly self-employed
- Volunteers

Minimum entitlements

- Minimum 5.6 working weeks
 - 4 weeks from EU law and 1.6 weeks from the UK Government
- This equates to 28 days for a 5 day week worker
- It is capped at 28 days
- Can include public/bank holidays

Contractual entitlements

- Employers can give workers additional leave in excess of the statutory minimum – this is a good recruitment and retention tool
- The statutory rules only apply to the minimum 5.6 weeks so employers can generally set their own rules for the excess leave
- This could be, for example, that annual leave entitlement will be reduced if an employee commits a disciplinary offence
- You cannot do this with the statutory minimum amount, however

The rules around taking leave

Employers have flexibility with:

- Deciding when the leave year runs from;
- Refusing annual leave requests;
- When leave can be taken;
- When leave cannot be taken;
- How it is taken e.g. must be in minimum blocks of one day;

The rules around taking leave

Employers have flexibility with:

- Enforcing leave;
- How many people can be off at one time;
- How much leave can be taken at one time;
- Cancelling a period of leave that the worker has booked

Three different elements of annual leave

Annual leave entitlement is broken into 3 parts:

- Basic (4 weeks under EU law)
- Additional (1.6 weeks under UK law)
- Contractual (Anything over 5.6 weeks)

Carrying over basic leave entitlement

Basic (4 weeks under EU law) can only be taken in the leave year in respect of which it is due i.e. not to be carried over

- But:
- When employee has been unable to take leave due to sickness absence, the 4 weeks must be carried over. An 18 month limit, starting from the end of the leave year in which the leave was due, is permitted after which the leave will be lost
- When employee has been unable to take leave due to maternity leave, the 4 weeks must be carried over
- Where an employer has told the worker that leave will be unpaid, this may deter workers from taking their leave, and the right to 4 weeks' leave will carry over
- Where the employer has not provided sufficient information about entitlement and potential loss if not taken by end of leave year, the right to 4 weeks' leave will carry over

Carrying over additional leave entitlement

Additional (1.6 weeks) may be carried over into the next leave year in accordance with a relevant agreement.

- Most commonly in a contract of employment or collective agreement
- Relevant agreement also includes any written agreement between employer and employee e.g. letter or email of agreement
- Agreement can allow for all of the 1.6 weeks to be carried over, or a specific lower amount
- Allowing carry over of the additional entitlement creates administrative work – keeping track of how much each employee is taking over
- Many employers put a time limit on using it e.g. carried over leave must be taken first and within first 3 months of the leave year

Effect of coronavirus on carry over

- The law on annual leave carry over was relaxed as a response to coronavirus.
- The aim was to help employers who were under pressure from the impact of coronavirus to manage their workforce.
- Employees could have been on furlough/lay off/not been permitted to take leave because demand for service had increased etc.
- A note on furlough – although annual leave could be taken during furlough and could even be enforced during that time, an employer may have had a rule that no annual leave was permitted due to the required uplift to 100% pay.

Carry over of basic entitlement permitted

- Legislation now gives employees and workers the statutory right to carry-over their first basic 4 week entitlement into the next two leave years.
- This is if it is not 'reasonably practicable' to take it in the current leave year.
- This does not extend to the additional (1.6 week) entitlement because it is already permissible to carry that over subject to relevant agreement.

Factors to consider

Based on the Government's guidelines, here are the various factors employers must consider when deciding whether it was 'reasonably practicable' to take leave:

- whether the business has faced a significant increase in demand due to coronavirus that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures
- the extent to which the business' workforce is disrupted by the coronavirus and the practical options available to the business to provide temporary cover of essential activities
- the health of the worker and how soon they need to take a period of rest and relaxation

Factors to consider

- the length of time remaining in the worker's leave year, to enable the worker to take holiday at a later date within the leave year;
- the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the coronavirus situation;
- the ability of the remainder of the available workforce to provide cover for the worker going on leave

Factors to consider

- Employees should still be encouraged to take their paid holidays in the current leave year
- If it is reasonably practicable to take annual leave this year, then employers can still insist that it is. Employers can decline holiday cancellation requests and suggest ways their employees can take leave if there is nothing preventing it

Buying back annual leave

- Some employers offer the possibility of buying back annual leave from their employees. This is especially useful for those who have banked a lot due to the pandemic
- This can form part of a flexible benefits scheme
- This can be sold by the employee in exchange for wages or another benefit
- If an employer offers this, the rules should be expressly set out in the organisations handbook, holiday policy, or individual contracts of employment
- If an employee wishes to do this, it should be recorded in writing that they have read and understood the rules around it

Selling more annual leave

- Some employees may want to take more annual leave than their allocation
- The simplest way to do this would be to agree unpaid leave, or bring forward leave from the next year (this is only applicable to contractual leave)
- Alternatively, they can enter an agreement to buy more annual leave from their employer via a deduction from wages
- This can form part of a flexible benefits scheme
- Again, the rules need to be clear in the organisations handbook, holiday policy, or individual contracts of employment.
- A record should be kept of the employees agreement and that they have read and understood the rules around it

The mechanics and pitfalls of buying / selling annual leave

- The days rate should be calculated as 1/260 of salary. This is similar to payment in lieu of holiday on termination
- Technically, the right to statutory annual leave (so 5.6 weeks) can only be waived with a settlement agreement or COT3
- Where there is no settlement, legally workers that “sell” their statutory leave can still argue they have a right to take it. This could mean:
 - Where the worker is terminated within an annual leave year, they could assert their right to be paid in lieu for the leave they had sold.
 - The worker could insist on taking the leave anyway, even after they have received the money for the “sale”
- Employers can try to avoid this with a written agreement that if they do decide to take the sold annual leave, the value of the benefit they received would be deducted from their pay. This must be signed before the purchase takes place

Summary

- Employees are entitled to 5.6 weeks of annual leave minimum.
- 4 weeks annual leave cannot usually be carried over but this was relaxed in response to coronavirus.
- Leave can be carried over to the next two leave years where it is not reasonably practicable to take it in the current leave year as a result of coronavirus.
- If it is reasonably practicable, employers can insist that annual leave is still taken in the year it is accrued.
- Another option is to consider buying back annual leave, or offering to sell more to those that want an extended break from work.

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