Response to BEIS

Calculating holiday entitlement for part-year and irregular hours workers

8th March 2023

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Executive summary

FCSA broadly welcomes the suggested amendments to legislation which are proposed alongside the consultation.

These proposals would go some way to bring the legislation up-to-date with modern working practices and apply a degree of fairness and common-sense to ways of working which the current legislation did not foresee.

Employment businesses in the temporary labour market often engage umbrella company service providers which, in turn, engage with workers, normally as employers, and to ensure that workers are not only paid, with tax and other deductions accurately calculated, but also receive employment rights and protections in accordance with UK legislation. These rights include the entitlement to paid holiday, as embedded in the Working Time Regulations (WTR).

However, it is FCSA's view that the proposals could usefully be extended to ensure that temporary or agency workers are not unintentionally disadvantaged by the WTR regarding holiday entitlement when working via an umbrella company.

It should be noted that organisations often engage with employment businesses or umbrella providers rather than employing temporary workers directly, and therefore the proposed changes will be useful to the entire supply chain.

What is an umbrella provider?

An umbrella provider is an organisation which employs an outsourced worker (a temporary worker, an agency worker or a contractor), allowing that worker to work across multiple contracts, multiple engagers (often referred to as end-users or end-clients) and a variety of business sectors whilst retaining full employment rights under an overarching contract of employment.

The advantages of umbrella employment to workers include:

- Ensuring full employment rights as set out by UK legislation.
- This includes holiday pay and statutory sickness/maternity/paternity and adoption pay.
- Access to a company/auto-enrol pension scheme.
- The workers PAYE deductions (tax and NI) are correctly calculated by the umbrella company and remitted to HMRC.
- The ability to build a continuous record of employment, thus giving the worker greater access to mortgages and other loan facilities.
- Provision of relevant insurance covers such as public, employer's liability and professional indemnity.
- The ability to move across multiple contracts without any of the accompanying administrative burden. This is taken care of by the umbrella employer.

Practical difficulties for umbrella providers

The value of contingent working to the UK economy is well understood. The flexibility afforded to both worker and end-client is undoubtedly a key benefit in these areas of the labour market. However, by its very nature, there are nuances within this sector which raise certain *de facto* difficulties for umbrella providers.

Umbrella companies often do not know the length of a worker's engagement at the outset. This information is required to set pay rates, deductions and holiday entitlement; but is often not provided by employment businesses.

The challenge presented by Harpur Trust is the retrospective review of time worked versus pay versus time off. Umbrella companies rarely know the anticipated length of an engagement, receiving contracts for (say) 12 months, but that is simply the date the employment business will review the engagement. In reality, a worker's assignment could be as short as one day or as long as ten years. Constantly looking back in the way required by the Harpur Trust judgement means that umbrella providers could be obliged to adjust historical pay calculations. This simply isn't practical, as payment from the employment agencies for the assignment has already been received and

the workers' gross has been paid accordingly.

The holiday catch-22 for umbrella employers

Under the current 1998 Working Time Regulations (WTR), an employee may only be paid in lieu of their holiday entitlement if they have accrued holiday outstanding on termination of their employment. It is not lawful to pay an employee in lieu of their statutory holiday entitlement while their employment is continuing (*regulation 13(9), WTR*).

It is also not lawful to pay an employee *in advance* of them taking their holiday (sometimes referred to as "rolled-up holiday pay"). One of the arguments against this practice is that if an employee has received their holiday pay in advance and will not, therefore, receive any pay at the time they take their holiday, they may be in a financially difficult position during that period of leave – this issue could disincentivise them from taking their holiday.

Therefore, there are a number of practical difficulties for umbrella providers which occur in this type of employment more than "regular" employment.

1. Many temporary workers *de facto* prefer not to take accrued holiday during periods when they are on assignment but prefer to do so in the down-time between assignments. Some go further than this by simply not taking holiday at all during lengthy assignments.

   Since the WTR does not currently permit payment in lieu of taking holiday except on termination of employment, and also limits "carry forward", this can lead to a scenario where the worker potentially loses the holiday entitlement – often referred to as "use it or lose it".

   a. It should be noted that some umbrella providers do pay in lieu of untaken holiday at the end of the holiday year, which is technically unlawful.

2. Many workers would quite simply prefer to be advanced the monetary equivalent of their holiday entitlement each pay period (perhaps setting this money aside for subsequently taking a holiday).

Technically neither practice described at 1a or 2 above is lawful under the current WTR, but both have the benefit of ensuring the worker receives their entire holiday pay. However, both give rise to a health and wellbeing risk that workers may not take leave at all.

To mitigate these risks, FCSA requires its Accredited members to remind workers, prominently and frequently, to take leave.

Further recommendations

FCSA recommends that careful consideration be given in any proposed changes to the WTR to permit umbrella providers to:

1. Lawfully operate advanced holiday pay.
2. Enable lawful payment in lieu of any outstanding balance of a worker's accrued holiday entitlement at the end of each holiday year.

The lawful operation of advanced holiday pay is also a recommendation of the *Taylor Review – Good Work Plan*[1] (at page 47).

FCSA recognises the potential difficulties that these proposals may give rise to in terms of ensuring the health and wellbeing intent of the WTR. We believe that this can be mitigated by a requirement in any legislation brought forward to:-

1. Make these options clear and prominent in documentation including but not limited to
    - Marketing materials
    - Illustration documents
    - Employment contracts
    - Employee handbooks

2. Remind workers on every payslip and/or accompanying reconciliation document of their accrued holiday entitlement or total advanced holiday pay (in both monetary and time terms).

[1] Good work: the Taylor review of modern working practices (publishing.service.gov.uk)

Appendix - response to the consultation questions

1. What is your name?

- Chris Bryce, CEO, FCSA

2. What is your email address?

- chris.bryce@fcsa.org.uk

3. What is your organisation

- Freelancer and Contractor Services Association Ltd

4. Are you happy for your response to be published?

- Yes

5. Are you (select the appropriate option):

- Representing employers' interests

6. Are you (select the appropriate option):

- Other

  FCSA is the UK's leading membership body committed to raising standards and setting best practice in the employment services sector. FCSA is an independent non-profit organisation.

Questions 7-11 do not apply to FCSA

13. Who do you represent?

- An industry or employers' association

Questions 14 and 15 do not apply to FCSA

16. For employers: Would you agree that the information you currently collect to calculate holiday pay would be sufficient to calculate holiday entitlement using a reference period?

- Disagree

  Umbrella providers often don't know the overall length of an engagement until it comes to an end. Therefore, working with a lengthy pay reference period (e.g. 12 months) is a challenge. FCSA would point out that in not having knowledge of the length of the engagement at the outset means that umbrella providers often do not hold all required information.

17. Do you agree that including weeks without work in a holiday entitlement reference period would be the fairest way to calculate holiday entitlement for a worker with irregular hours and part-year workers?

- Strongly agree

  The *status quo* can give rise to a situation where a part-year worker can effectively become entitled to 5.6 weeks of holiday whilst only having worked a few days in a reference period. This is clearly not logical and may be regarded as unfair to both other workers and to the employer.

18. Would you agree that a fixed holiday entitlement reference period would make it easier to calculate holiday entitlement for workers with irregular hours?

- Agree

  Calculations and explanations thereof can seem unnecessarily complicated and confusing to workers. Clarity on this subject would enable employers to provide clear information to workers.

  However, this proposal could potentially lead to unfairness. Workers whose working hours have increased from one year to the next could find that their holiday entitlement and pay is less than 12.07% of the hours they are working that year. Arguably the month-to-month accrual proposal (currently proposed to be limited to workers in their first year of employment) would be fairer and simpler to understand, despite the fact that it makes holiday entitlement difficult to predict in advance.

19. Do you agree that accruing holiday entitlement at the end of each month based on the hours worked during that month would be the fairest way to calculate holiday entitlement for workers on irregular hours in their first year of employment?

- Agree

  This is a common-sense approach which is fair. FCSA would caution that there is a potential for this proposal to lead to confusion. Unless a worker's employment starts at the very beginning of a leave year (which is unlikely) there will be a potentially significant overlap between the end of the first year of employment (during which the month-to-month accrual rules would apply) and the beginning of the first full leave year (during which holiday would be calculated based on the hours worked in the previous leave year). It is not clear which rules the government proposes would take precedence. This will need to be clarified.

20. Would you agree that using a flat average working day would make it easier to calculate how much holiday a worker with irregular hours uses when they take a day off?

- Agree

  This is the simplest approach and avoids unnecessarily complicated calculations, but this proposal might also prove unnecessarily complicated. If the government is proposing an annual holiday entitlement expressed in hours (rather than weeks), then the simplest solution may be simply to let workers take an agreed number of hours' holiday, rather than impose new statutory concepts like an average day.

21. Would you agree that calculating agency workers' holiday entitlement as 12.07% of their hours worked at the end of each month whilst on assignment would make it easier to calculate their holiday entitlement and holiday pay?

- Strongly agree

  This is the simplest approach and avoids unnecessarily complicated calculations. Furthermore, if HMG published this figure in guidance, then workers can be sure that their employer are applying it correctly.

  We note that the consultation document seems to suggest that separate calculations would be done for each assignment rather than considering the total number of hours worked in a calendar month irrespective of whether those hours were worked across different assignment. Many umbrella organisations employ workers who work on multiple different assignments each week and the umbrella providers do not always know precisely how many hours the worker has spent on each assignment (as opposed to how many hours they've worked that day or week in total). In those circumstances it would be impossible to calculate the holiday entitlement accrued in respect of each individual assignment.

22. Do you have any further comments about calculating holiday entitlement for agency workers?

The consultation document does not address what would happen regarding the accrual of holiday for those on sick leave, maternity leave or other family-related leave. The proposal to calculate holiday entitlement by reference to hours worked would mean that holiday entitlement would be reduced by weeks of family-related leave in which inevitably no work is done. The legislation will need to address this to ensure that those taking sick leave or family leave do not find themselves with a resulting loss of holiday entitlement or pay.

The consultation suggests a different approach to reference periods be used for agency workers when the duration of a single assignment is longer than 52 weeks.

1. "The Government's proposed approach to calculate statutory holiday entitlement as 12.07% of hours worked at the end of each month of an assignment, or at the end of an assignment (if shorter than a month), is the simplest way to ensure that agency workers receive the paid annual leave they are entitled to."

and

2. "…where agency workers have a contract for employment with an umbrella company that is longer than a year or are on one assignment that lasts longer than a year, their statutory holiday entitlement would be calculated by using the 52-week reference period set out earlier in this consultation."

FCSA observes that having two distinct approaches based on assignment length may be confusing for workers and strongly recommends that the approach in 1 above be adopted regardless of assignment length.

Please also see "further recommendations" section above.