

Holidays and Holiday Pay

Department of Economic Development

Rheynn Lhiasaghey Tarmaynagh

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Introduction

The Annual Leave Regulations 2007 made under powers in the Employment Act 2006, will ensure that almost all workers will have a basic legal right to four weeks' paid leave each year.

The main purpose of this Guide is to explain the Annual Leave Regulations (referred to hereafter in the Guide as 'the Regulations'). It also sets out other relevant matters (such as the requirement in the Employment Act 2006 to record details of terms and conditions relating to holidays in the statement of particulars of the terms of employment).

The booklet is written in general terms and is not intended to be a complete or authoritative statement of the law. In a work of this size, it is impossible to provide a definitive statement of the law, which in any case is the function of the Employment Tribunal and the High Court. Only the official wording of Acts, Regulations and Orders, and the interpretation given by the Courts, are authoritative.

No responsibility can be accepted for errors or omissions, or their consequences.

1. The law about holiday entitlement: general principles

The Regulations set down the minimum legal entitlement of workers to paid annual leave. Employers may, of course, provide more generous contractual holidays.

Under the Regulations, workers are entitled to:

- 4 weeks' paid leave each year ('**statutory leave**'); and
- payment, when their employment terminates, for any leave to which they are entitled but which they have not taken (but there is no provision permitting payments in lieu of leave under any other circumstances).

A week's leave should allow workers to be away from work for a week. It should be the same amount of time as the working week: if a person works a 5 day week, he or she is entitled to 20 days' leave; if he or she works a 3-day week, the entitlement is 12 days' leave.

Where a worker's regime is based on weekly or monthly hours rather than a fixed number of days, (so that the number of days worked in a week or the length of shifts etc. may vary) it will not normally be possible to say what a 'day' means so that a different basis of calculation is required:

Example 1 A person who works 35 hours a week is entitled to $35 \times 4 = 140$ hours' paid holiday.

Example 2 A person works 150 hours a month. The total amount of hours worked in a year will be $12 \times 150 = 1800$. $\frac{4}{52} \times 1800$ equates to 138.46 hours' paid holiday.

This entitlement is not in addition to any annual leave given to a worker under a contract of employment ('**contractual leave**'). The one is set off against the other, so that the amount of leave a worker is entitled to is whichever of the two kinds of leave is longer. Further, where contractual and statutory provisions differ a worker may take advantage of whichever right is, in any particular respect, the more favourable.

Where contractual leave is longer than the 4 weeks provided for in the Regulations, the Regulations will not apply to any leave in excess of the minimum 4-week entitlement.

If a worker does not take the leave to which he or she is entitled during the leave year, the employer will not usually be in breach of his obligations: a breach only arises once the worker asks for leave and the employer refuses. A worker who does not take his or her leave may, however, have a valid Employment Tribunal

claim against the employer where pressure of work imposed by the employer is the reason for not taking the leave; in such a circumstance the Tribunal could find the employer to be in breach of the Regulations even though there has been no actual refusal of entitlement. Employers may guard against such a possibility by exercising their powers under the Regulations to require workers to take their leave.

2. Bank holidays

The entitlement to leave under the Regulations is not additional to bank holidays. Where a bank holiday is taken as paid leave, it will count as one day of a worker's annual leave under the Regulations.

2.1 What are bank holidays?

Certain days in each year are customarily treated as public holidays. Some of those days (or, where they fall on a Saturday or Sunday, alternative days) are designated by law as 'bank holidays', that is, days on which banks are not open and on which certain kinds of public business cannot be transacted.

2.2 Is a worker entitled to a day off on a bank holiday?

A worker has no entitlement to a day off on a bank holiday under the Regulations. Whether a worker is entitled to take a day off, with or without pay, on a bank holiday depends on the terms of his or her contract.

2.3 Paid leave on bank holidays

There is no general statutory entitlement to paid leave, or to an enhanced rate of pay for working, on a bank holiday.

Subject to the normal restrictions on when leave may be taken (see 9 below), a worker who is not otherwise paid in respect of bank holidays may take a bank holiday as part of his or her annual leave entitlement in order to receive payment for the holiday.

3. Whom do the Regulations cover?

The Regulations cover most **workers** over school leaving age.

3.1 What is a 'worker'?

For the purpose of the Regulations, a 'worker' is:

- an employee, that is, someone who has a contract of employment;
- a person who works under some other contract for a party to the contract (not being a client or customer);
- an agency worker, that is, someone supplied by an employment business to work for its client (see further at 12.4);
- a person receiving on-the-job training or work experience, unless placed by an educational institution or other body providing training (in this case the person providing the training is the 'employer' for the purpose of the Regulations).

Part-time workers are entitled to the same paid leave as full-time workers, calculated on a pro-rata basis.

Example 1 A person who works 3 days a week is entitled to $3 \times 4 = 12$ days' paid holiday.

Example 2 A person who works 10 hours a week is entitled to $10 \times 4 = 40$ hours' paid holiday.

For the application of the Regulations to certain atypical workers see 12.

3.2 School leaving age

The Regulations do not apply to workers of compulsory school age. The upper limit of compulsory school age is a child's 16th birthday, except where on his or her 16th birthday the child is, or has during the past 12 months been, a registered pupil at a school in the Isle of Man. In that case he or she attains the upper limit on the Friday before the last Monday in May in the current school year (beginning on 1st September).

3.3 Agricultural workers

Agricultural workers are covered by the Regulations, but with modifications as they are subject to special legislation dealing with their wages and conditions of service (the Agricultural Wages Act 1952 and agricultural wages orders made

under that Act). In particular, the leave year of an agricultural worker will normally run from 6th April each year, or some other date specified in an agricultural wages order, and the dates on which leave is to be taken will be determined in accordance with the order.

For these reasons the rules in 9 below do not normally apply to agricultural workers. For further information contact:

The Secretary
Agricultural Wages Board
Department of Environment, Food and Agriculture
Hope Road
St Johns IM4 3AS

Tel (01624) 801263 Fax (01624) 801060

Email forestry@gov.im

3.4 Exclusions

The Regulations do not apply to the following groups:

- persons who are self-employed, running their own business and free to work for different clients and customers;
- the armed forces;
- the police;
- workers who are engaged in work wholly or mainly outside the Isle of Man;
- share fishermen; or
- individuals in their capacity as holders of judicial office who are remunerated on a daily fee-paid basis.

4. When do the Regulations come into operation?

The default date for the Regulations coming into operation is 30th September 2007.

However, where there is 'a relevant agreement' (see 8) which specifies a different leave year commencement date falling after 30th September 2007 then a worker's entitlement will begin from the date specified in that agreement.

Example Company A has a collective agreement (see 8) with a trade union that the commencement of the leave year is 1st January. Even though the Annual Leave Regulations come into force on 30th September 2007, in this case, the workers of Company A will only have rights under the Regulations from 1st January 2008.

Where an employer's leave year is to be other than the default date employers should ensure that a relevant agreement is in place prior to 30th September 2007 and, in the case of employees, that the commencement date of the leave year is contained in employees' written particulars.

5. Recording entitlement to holidays and holiday pay

In the case of employees, employers are legally obliged to provide details of any terms and conditions relating to holiday entitlement, including entitlement to public holidays and holiday pay. Such details should be sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment to be precisely calculated.

These details should be recorded in the written statement of particulars of employment which employers are required to issue to all employees under section 8 of the Employment Act 2006. Under the Act, a statement must be given to employees by the employer no later than 4 weeks after the start of employment. The requirement for a statement will not, however, apply in the following cases:

- employees employed for less than 4 weeks;
- employees whose employment is within 6 months of the ending of an earlier period of employment for which a statement was provided and of which the particulars there stated have not changed (but note that the date of commencement of continuous employment may have changed in such circumstances);
- employees whose employment is covered by a written contract containing all the relevant information.

Where annual leave entitlement arises purely out of the Regulations the particulars should record the basic elements of the statutory scheme and, in particular, any aspects of the Regulations where it is permitted to make variations by a 'relevant agreement' (see 8).

Where 'rolled-up holiday pay' is paid there are some additional requirements regarding pay statements. These apply to both employees and workers. See further 10.2 below.

6. How 'leave years' work

6.1 The leave year

A worker's entitlement to paid annual leave, including the right to payment for leave not taken when he or she leaves the job, begins on the first day of employment.

The entitlement is to take 4 weeks' paid leave in each '**leave year**'. The leave year begins —

- on whatever date is agreed between the worker and the employer in a 'relevant agreement' (see 8) (e.g. 1st April). This date should be specified in the written statement of particulars of employment (see 5 above).

If there is no agreed date, then the leave year begins —

- if the worker started work on or before 30th September 2007 on that date in the first year, and on the same date in each subsequent year;
- if the worker started work after 30th September 2007 on the start date in the first year, and on the same date in each subsequent year.

6.2 Carrying over leave

The Regulations make no provision for carrying over statutory leave from one leave year to the next. So if a worker's holiday rights are confined to those which he or she is granted by the Regulations and he or she does not exercise the right to take annual leave within a leave year, then the statutory entitlement to paid holiday will be lost.

However, many workers have a contractual right to carry over holiday entitlement to the next year. As noted at 1 above where contractual and statutory provisions differ a worker may take advantage of whichever right is, in any particular respect, the more favourable so that in this case leave could be carried forward. In contrast, a carry forward provision, the purpose of which was for the employer to be able to *require* the worker to defer his or her leave beyond the year in which it was due would be unenforceable.

The Regulations make no provision for unused leave to be replaced with a payment in lieu, except where employment is terminated (see 11 below).

6.3 Starting work part-way through the leave year

Where the leave year is specified in the worker's contract, and he or she starts work part of the way through the leave year, his or her entitlement to leave in that year will be in proportion to the amount of that year which is left.

The period of leave to which the worker is entitled is calculated in weeks. Where the period is or includes part of a week, the part is calculated in days, and any fraction of a day is treated as a whole day.

Example A person employed to work 5 days a week starts work 14 weeks before the end of the leave year. Her entitlement will be $14/52 \times 4 \text{ weeks} = 1.07 \text{ weeks}$. This will be rounded up to 1 week plus 1 day.

6.4 Accrual of leave during the first year of employment

During the first year after a worker starts work, he or she is not entitled to take more than the entitlement which has built up since he or she started work. Leave entitlement builds up monthly in advance at the rate of one-twelfth of the annual entitlement, calculated in days, rounded up to the next half-day (any rounding-up will be deducted from the remaining leave). The employer may allow more than this minimum to be taken, at his option.

Example 1 A full-time worker is entitled to 20 days' leave per year. He is in his third month of employment. So he has built up an entitlement to $20 \times 3/12 = 5 \text{ days' leave}$.

Example 2 A part-time worker works 2 days a week, so is entitled to 8 days' leave per year. She is in her second month of employment. She has already built up an entitlement to $8 \times 2/12 = 1.33 \text{ days' leave}$, rounded up to $1\frac{1}{2} \text{ days}$.

Requests to take leave in the first year are subject to the same notice requirements as any other leave (see 9 below) and can be turned down.

7. Annual leave and other kinds of leave

7.1 Family leave

Annual leave cannot be taken at the same time as any kind of family leave.

Family leave (which is available to employees only) means: —

- ordinary maternity leave or additional maternity leave under section 79 or 81 of the Act and the Maternity Leave Regulations 2007;
- parental leave under section 84 or 85 of the Act and the Parental Leave (Disabled Child) Regulations 2007;
- paternity leave under section 90 or 91 of the Act and the Paternity Leave Regulations 2007; or
- ordinary adoption leave or additional adoption leave under section 95 or 96 of the Act and the Adoption Leave Regulations 2007.

Subject to the restriction on carrying leave over (see 6.2 above), where an employee is entitled to take any form of family leave, his or her entitlement to annual leave is unaffected.

Note that despite the formal incompatibility of annual leave and family leave, annual leave can, of course, be taken for a purpose or reason that overlaps with those for which family leave is available. In practical terms, employees might wish, for foreseeably short-term matters, to take leave that is paid when the 'equivalent' family leave would not be.

7.2 Interaction of annual leave and maternity leave

Because annual leave cannot be taken at the same time as maternity leave and there may be no contractual right to carry leave forward beyond the end of the leave year, an employee planning to take maternity leave should think carefully about the interaction of the two forms of leave.

Before an employee goes on maternity leave she may wish to consider taking any outstanding leave for the relevant leave year and perhaps delay the start of her maternity leave. Alternatively, depending upon the length of the maternity leave, it may, be possible for her to take annual leave in the period between the expiration of the maternity leave and the expiration of the leave year.

For example, a pregnant employee may start her maternity leave slightly earlier (but not sooner than 11 weeks before the expected week of childbirth) and then take her annual leave immediately after her period of maternity leave.

7.3 Effect of sick leave on annual leave entitlement

Annual leave cannot be taken at the same time as sick leave.

Where a worker takes sick leave not exceeding 26 weeks in a complete leave year, then his or her entitlement to annual leave will be unaffected. Similarly, if a worker is entitled to annual leave in part of a leave year (because he or she starts work part-way through the leave year), that entitlement is unaffected if he or she takes sick leave of up to 50% of that part-year.

However, where more than 26 weeks' sick leave is taken in a complete leave year (or more than 50% of a part-year), then the entitlement to annual leave is reduced. In such circumstances entitlement to leave is calculated in weeks, using the following formula:

$$\frac{8 \times ((52 \times P) - S)}{52}$$

where:

- S = the number of complete weeks of sick leave the worker takes in that leave year; and
- P = 1 in a complete leave year; or
in a part-year, the proportion of the leave year remaining on the date he or she started work.

Where the period of leave to which a worker is entitled is or includes a proportion of a week, the proportion is calculated in days and any fraction of a day is treated as a whole day.

- Examples where more than 26 weeks' sick leave is taken during a complete leave year:

Example 1 A worker takes 39 weeks' sick leave in a complete leave year. P = 1 and S = 39, so leave entitlement is —

$$\frac{8 \times ((52 \times 1) - 39)}{52} = 2 \text{ weeks.}$$

Example 2 A full-time worker takes 49 weeks' sick leave in a complete leave year. P = 1 and S = 49, so leave entitlement is —

$$\frac{8 \times ((52 \times 1) - 49)}{52} = 0.46 \text{ weeks.}$$

The entitlement in days is $0.46 \times 5 = 2.3$ days, rounded up to 3 days.

A worker who is on sick leave for the whole of a leave year will have no statutory entitlement to annual leave for that year.

- Examples where sick leave is taken during a part leave year:

Where sick leave is taken in a part year (e.g. where the employment begins part-way through a leave year), first check whether entitlement to annual leave is reduced or not. There will be a reduction only if the number of weeks' sick leave taken (S) is more than $26 \times P$.

Example 3 A worker started work with 39 weeks of the leave year remaining, and takes 10 weeks' sick leave in that leave year.

$$P = 39/52 = 0.75$$

$$26 \times P = 19.5$$

$$S = 10$$

S is less than $26 \times P$, so the entitlement to annual leave is not reduced.

Example 4 A worker started work with 39 weeks of the leave year remaining, and takes 26 weeks' sick leave

$$26 \times P = 26 \times 39/52 = 19.5$$

$$S = 26$$

S is more than $26 \times P$, so the entitlement to annual leave is calculated as follows:

$$\frac{8 \times ((52 \times 0.75) - 26)}{52} = 2 \text{ weeks}$$

7.4 Extended or additional leave

A worker has no general right to take extended or additional leave without pay. Whether a worker should be allowed to take unpaid leave is a matter for agreement between the employer and the worker (or, if appropriate, a collective agreement with the worker's trade union). Employers may find it helpful to have a policy on extended leave which applies to all workers.

In the case of employees, if the employer and employee agree that the employee should return to work on a particular date, and the employer dismisses him or her for failing to do so, the employee may still be able to make a complaint of unfair dismissal to the Employment Tribunal. In such cases the employer must consider all the factors, and must act reasonably.

It should be noted that an employee may retain continuity of employment in certain circumstances even when absent from work and unpaid.

8. Agreements and variation of statutory rules

As a general rule, workers cannot contract out of their rights under the Regulations. In particular, an employer cannot 'buy out' a worker's right to leave by making a payment in lieu (except on termination of employment during a leave year: see 11 below).

However, the Regulations allow employers and workers to vary some aspects of the framework for annual leave by a '**relevant agreement**'.

A relevant agreement means —

- (a) any provision of a 'collective agreement' which forms part of a contract between the worker and the employer, or
- (b) any other agreement in writing which is legally enforceable as between the worker and the employer. (Inclusion of the relevant matter in the written particulars will usually be sufficient for this purpose - see below).

A **collective agreement** is an agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to matters such as the terms and conditions of employment. Such an agreement is only legally enforceable where it is in writing and the agreement contains a provision stating that the parties intend that the agreement shall be a legally enforceable contract.

Under the Employment Act 2007 most employees are entitled to a **written statement of particulars** of the terms of their contract of employment, which is a summary of the main terms of the contract. The primary purpose of the statement is to provide information, thereby avoiding misunderstandings and mismatched expectations and reducing the scope for disputes between employer and employee. However, there is nothing to stop the document also being called a 'contract of employment' or its including words to the effect that its contents are contractually binding. Even where the statement does not identify itself as a contract of employment, it will still normally be taken, by the Employment Tribunal or the High Court, as good evidence of the parties' rights and obligations. So, unless there is clear evidence of a later agreement on a different basis, its contents will usually be treated as legally enforceable.

The main variations which can be agreed are:

- the date of the leave year (which need not be the same for all workers – see 12.2);

- arrangements for the worker to compensate the employer on the termination of employment, where the worker has taken more leave than that to which he or she is entitled (see 11.3);
- arrangements to vary the notice periods for taking leave which employers are required to give to workers and which workers are required to give employers (see 9.3 below);
- extending the 12 week reference period used to calculate pay to a longer period not exceeding 26 weeks (see 10.1.5).

9. When leave can be taken

9.1 Requirements by the employer

Restrictions on taking holidays may be:

- expressly stated in the contract of employment;
- implied from custom and practice under the common law; or
- incorporated into individual contracts from a collective agreement (see 8 above).

Subject to the prohibition on taking annual leave when on family leave or sick leave (see 7 above), employers may choose to:

- shut down for certain periods, during which all or some groups of workers have to use their annual holiday entitlement;
- nominate particular dates as days of closure, when workers are expected to take annual leave (for example, over the Christmas and New Year period);
- determine the maximum amounts of leave that can be taken on any one occasion, and the periods when leave may be taken.

Although workers cannot insist on taking leave at any time they choose, employers must allow them to take their leave at some time or times during the year.

If there is no relevant agreement (see 8 above) as to when leave is to be taken, an employer can give notice to a worker requiring him or her —

- to take at specific times all or any of the leave to which he or she is entitled, or
- not to take all or any of that leave at specific times.

9.2 Notice of worker's intention to take leave

If there is no relevant agreement (see 8 above) as to when leave is to be taken and the employer has not required a worker to take leave at particular times (see 9.1 above), the worker can give the employer notice, saying when he or she intends to take leave. However, the employer can refuse to allow leave to be taken at the time specified by giving the worker notice to that effect.

9.3 Period of employer's or worker's notice

Employers and workers can enter into a relevant agreement as to how and when:

- notice requiring leave to be taken or not to be taken,
- notice of intention to take leave, or
- notice refusing permission to take leave,

is to be given (see 8 above). This provides employers with flexibility where, for example, a number of other workers have also applied to take the same day off.

If there is no agreement, the period of an employer's or worker's notice to take leave at specific times must be least twice the period of leave to be taken. The period of an employer's notice not to take leave at specific times must be least as long as the times to which it relates.

Example 1 An employer wishing to have a Christmas shut-down spanning one week must give at least 2 weeks' notice to the workers.

Example 2 A worker who wants to take a day's leave must give the employer at least 2 days' notice. The employer can then reply within one day to refuse the leave.

10. Holiday pay

For each week of annual leave, a worker is entitled to be paid a **week's pay**.

10.1 Calculation of a week's pay

A week's pay is calculated in accordance with Schedule 6 to the Employment Act 2006 as follows:

10.1.1 Workers paid a fixed wage or salary

If a worker's pay does not vary with the amount of work done then a week's pay is the amount due for a week's work under the worker's contract. Pay for overtime hours is not included unless it is guaranteed overtime, i.e. required by the contract between the worker and the employer.

10.1.2 Workers on piece work or commission

For workers whose pay varies with the amount of work done (such as with piece work), or is partly made up of variable bonuses or commission directly related to that week's output, then a week's pay is the average hourly rate multiplied by the number of normal working hours.

To work out the average hourly rate, divide the weekly pay over the previous 12 weeks by the number of hours worked in the same period (the pay and hours of non-compulsory overtime are excluded). Any week in which the worker received no pay should be replaced by the week before the 12 weeks when he or she was paid, to bring the total to 12.

For workers who are on commission or performance-related bonuses, 12/13 of any quarterly bonus or 12/52 of any annual bonus should be included. Only bonuses specifically related to a week's work should be included; general 'profit-sharing' or other such bonuses are not included.

10.1.3 Shift and rota workers

Shift and rota workers, whose pay varies because they work their normal hours at varying times and in varying amounts in different weeks, have their week's pay calculated differently. Their average weekly hours of work in the preceding 12 weeks are multiplied by their average hourly rate. (To work out the average weekly hours of work, add up the hours worked over the past 12 weeks and divide by 12.) The hourly rate is calculated as in 10.1.2 above, and any shift allowance payable is to be included.

10.1.4 Workers with no normal working hours

If a worker has no normal working hours, for example an agency worker who works different hours every week or a sales representative who has no fixed hours and is paid commission only, then a week's pay is the average pay received over the preceding 12 weeks. Any week for which no pay was due should be replaced by the last previous week for which pay was due.

10.1.5 Variation of the 12 week reference period

Using the average of the last 12 weeks' pay in any of the cases set out at 10.1.2 to 10.1.4 above to calculate the holiday pay of workers with no normal working hours, can occasionally give rise to a problem for individual workers if the 12 week period which precedes the worker taking his or her leave has not been typical for that worker. For example, where a worker works many hours before Christmas and the New Year sales period, then works a reduced number of hours for three months then requests a period of paid leave, the pay element could be based on an unrepresentative period. For this reason workers and employers are permitted to extend the 12 week reference period to up to 26 weeks by way of a 'relevant agreement' (see 8).

10.2 Rolled-up holiday pay

A worker's holiday pay is normally paid when annual leave is taken. But in some cases it can be paid in instalments, on an accruing pro-rata basis, as an addition to the worker's ordinary wages. This is known as 'rolled-up' holiday pay, and is sometimes convenient to both employers and workers, particularly in short-term employment or where working patterns are irregular or unpredictable.

Rolled-up holiday pay may offer some advantages for a worker:

- He or she can be sure of receiving the pay, in case the employer ceases trading;
- Where he or she works for a series of employers, there is no need to claim small amounts of paid leave from each of them;
- He or she can save or invest the holiday pay in advance of taking leave;
- If overtime is paid at a contractual rate which includes rolled-up holiday pay, a worker will earn extra holiday pay on overtime.

The Regulations allow rolled-up holiday pay to be paid in respect of annual leave, subject to certain conditions which are intended to provide additional safeguards to workers:

- a 'relevant agreement' (see 8 above) must specify the amount or proportion of the gross pay which is in respect of a period of annual leave;
- the amount or proportion must be a genuine addition to the regular remuneration (i.e. the pay net of holiday pay); and
- a pay statement must specify the amount of remuneration in respect of the period of annual leave (even if the worker would not normally be entitled to receive a pay statement under section 14 of the Employment Act 2006, because he or she is not an employee).

Whilst the Regulations are not prescriptive as to what constitutes *a genuine addition* an additional payment of 4/48 (or 8.33%) of the worker's pay would be consistent with the conditions for paying rolled-up holiday pay.

Even where rolled up holiday pay is paid, the employer must still allow a worker to take the leave to which he or she is entitled at some point or times during the leave year if he or she asks to do so (see also 12 for some special cases).

Note that in the case of existing workers who are paid an enhanced rate of pay vis-à-vis other of the employer's workers then, provided that the holiday pay element can be said to be 'genuine' and fulfils the other condition of paying rolled up holiday pay (including a 'relevant agreement') its identification within the existing rate should suffice negating any need to increase the rate when the Regulations come into operation. However, where there is no specific element in the existing pay which is identifiable as holiday pay or its amount is so minimal or trivial that it cannot be said to be 'genuine' it may be difficult for the employer to demonstrate that the requirements of the regulations for paying rolled up holiday pay are met.

11. Payment on termination of employment

Where a worker's employment terminates in the course of a leave year, the employer must make a payment for any leave outstanding, calculated on a pro rata basis from the first day of the leave year (or the start of employment) to the last day of employment.

If the worker's contract entitles him or her to a payment in lieu of holiday pay which is greater than the statutory entitlement, the contractual entitlement prevails. The written statement of particulars of employment required by section 8 of the Employment Act 2006 must include sufficient detail to enable the worker's entitlement to accrued holiday pay on termination of employment to be calculated.

11.1 Calculation of payment in lieu

A payment in lieu under the Regulations is based on the amount of holiday pay to which the worker would have been entitled, if he or she had taken the outstanding annual leave, according to the formula —

$$(4 \times A) - B$$

where A = the proportion of the leave year which expired before the termination date

B = the period of leave taken between the start of the leave year and the termination date

The payment is not rounded up.

Any family leave (see 7.1 above) taken in the same leave year does not affect the payment, but as to sick leave, see 11.2 below.

Example 1 A worker finishes work after 26 weeks of the leave year, having taken 1 week's leave. The payment in lieu is —

$$(4 \times 26/52) - 1 = 1 \text{ week's pay.}$$

Example 2 A worker finishes work after 39 weeks of the leave year, 26 of which were spent on maternity leave. As family leave does not affect the entitlement to annual leave or payment in lieu, she is entitled to —

$$4 \times (39/52) - 0 = 3 \text{ weeks' pay}$$

Example 3 A full-time worker who works a 5-day working week finishes work after just 3 days of the leave year. 3 days is 0.6 of a working week, so he is entitled to —.

$$4 \times (0.6/52) - 0 = 0.46 \text{ of a week's pay}$$

11.2 Payment in lieu and sick leave

Payment in lieu is calculated so that:

- sick leave which does not exceed 50% of the period between the start of the leave year and the termination date does not affect the amount of the payment; but
- sick leave which exceeds 50% of the period between the start of the leave year and the termination date reduces the amount of the payment, which will be calculated in accordance with the following formula —

$$\frac{8 \times ((52 \times A) - S - B)}{52}$$

where S = the number of complete weeks of sick leave the worker has taken in that leave year.

Where sick leave has been taken in the same leave year, first check whether entitlement to annual leave is reduced or not. There will be a reduction only if the number of weeks' sick leave taken, S, is more than 26 x A.

Example 4 A worker finishes work after 36 weeks of the leave year, having taken 9 weeks' sick leave and no annual leave.

$$\begin{aligned} 26 \times A &= 26 \times 36/52 = 18 \\ S &= 9 \end{aligned}$$

S is less than 26 x A, so the payment in lieu is calculated without regard to the sick leave:

$$4 \times (36/52) - 0 = 2.77 \text{ weeks' pay}$$

Example 5 A worker finishes work after 39 weeks of the leave year, having taken 26 weeks' sick leave and 1 week's annual leave.

$$\begin{aligned} 26 \times A &= 26 \times 39/52 = 19.5 \\ S &= 26 \end{aligned}$$

S is more than 26 x A, so the payment in lieu is reduced to take account of the sick leave:

$$\frac{8 \times ((52 \times 39/52) - 26) - 1}{52} = 1 \text{ week's pay}$$

11.3 Excess leave at termination of employment

Where a worker leaves his or her job in the course of a leave year and has taken more than the appropriate proportion of the annual leave entitlement, the Regulations do not require him or her to compensate the employer for the excess.

Example A worker finishes work after 13 weeks, having taken 2 weeks' annual leave. Even though she has worked only 25% of the leave year and has taken 50% of her annual leave entitlement, she is not required to refund any holiday pay to the employer, or to work additional days without pay.

However, if a 'relevant agreement' (see 8 above) requires the worker to compensate the employer for leave taken above the entitlement when employment ends, whether by payment, undertaking additional work or otherwise, that provision is enforceable.

Where there is no relevant agreement entitling the employer to make a deduction from a worker's final wage payment in respect of excess leave, the worker may complain to the Employment Tribunal in respect of an unlawful deduction under section 21 of the Employment Act 2006.

12. Application of the Regulations to various atypical workers

12.1 General

Working out the holiday entitlement and holiday pay of some types of workers, such as casual workers engaged on an ad-hoc basis for frequent short periods, can be complex whilst, in addition, ensuring that groups such as agency workers or limited-term contract workers receive paid leave in accordance with the Regulations may require careful thought. Some general considerations in dealing with such atypical workers are as follows:

Pay

- In the case of short-term workers, ad-hoc workers, workers working irregular hours etc. payment of 'rolled up holiday pay' (see 10.2) may be a relatively straightforward way for employers to comply with the requirements of the Regulations. Rolled up holiday pay decouples holiday pay from holiday time so that holiday due can be taken either during or at the end of assignments without the need for complex calculations.
- Where 'rolled up holiday pay' is not used then wages on each termination will normally contain an element of holiday pay where the appropriate leave entitlement has not been taken. Such holiday pay should be calculated in accordance with 10.1.1 to 10.1.4 above depending upon the basis upon which the worker is paid.

Time off

- Short-term workers can be required to take their leave at the end of the contract but subject to those constraints discussed at 12.2 and 12.4 below.
- Where workers work irregular hours an historic, 'averaging' approach, based on hours worked, can be used to calculate length of holidays due although it is open to an employer operating an accrual system to allow a worker to exceed the leave he or she has accrued.
- Where 'rolled up holiday pay' is paid to workers working irregular hours (so that no additional pay is required when holiday is actually taken) and it is agreed that some holiday is to be taken during the contract, simply ensuring that the worker is permitted to be away from work for four weeks during the leave year will avoid the need for complex calculations as to the precise amount of time that is due.

12.2 Limited-term contract workers

A limited-term contract is one in which both parties agree at the outset when, or in what circumstances, the contract will come to an end. This covers a fixed-term contract, and one which is to terminate on a specified event (e.g. when a particular job is finished, or when another worker returns from maternity leave).

The Regulations apply to limited-term contract workers on the same basis as other workers. Thus, if a temporary worker's employment is to last beyond the end of the leave year, he or she must be allowed to take the appropriate amount of paid leave during that year.

Where employment lasts for 48 weeks or less it is not uncommon for the employer to require the worker to take all the leave when the contract terminates. But if the employer operates a standard leave year (see 6.1) and the contract of the limited-term contract worker spans two holiday years some paid holiday will have to be granted during the first leave year if the worker requests it. However, the Regulations do not prevent an employer from operating different leave years for different workers whilst an employer operating a standard leave year by a general 'relevant agreement' could seek to disapply that leave year in the case of limited-term contract-workers; the date that each such worker started work would be his or her leave year commencement date instead.

12.3 Term time only workers

It is common for teachers, other school staff and associated professionals to work under contracts which require them to perform their duties during the school terms only.

In such cases workers are unlikely to be engaged under separate, short-term contracts centred on the school terms and it would be usual for an 'umbrella' contract to operate irrespective of the gaps between school terms. This would particularly be the case where salary is paid in equal instalments throughout the year (not just during term time).

Such workers can be regarded as having the school holidays as annual leave so that their employers will be operating an 'annual leave policy' which exceeds the requirements of the Regulations. In these circumstances the creation of a statutory leave entitlement during the time when the workers are actually required to perform their duties is likely to be unnecessary.

12.4 Agency workers

Although the term 'employment agency' is widely used, the correct term for an organisation that hires out workers on a temporary basis to other organisations is 'employment business', so the expression 'employment business' is used in this

section. However, the term 'agency worker' is commonly used, sometimes even in legislation itself (e.g. the Minimum Wage Act); so, for the individuals concerned, that term is used here.

An employment business typically engages a worker and then supplies him or her to work for its client (the 'principal') in some capacity. The employment business typically pays the worker's remuneration direct, whilst the principal pays the employment business a fee which covers the worker's remuneration, national insurance contributions etc. and a profit element for the business.

Under the Regulations whichever of the employment business or the principal is responsible for paying or actually pays the worker, is responsible for ensuring he or she is able to take paid annual leave.

The triangular relationship between the employment business, principal and worker is necessarily more complex than other working relationships where there are only two parties are involved. The employment business should ensure that arrangements between the agency worker and the principal are in place under which the worker can be allowed to take the leave to which he or she is entitled, if he or she asks to do so.

The application of the right to paid leave may vary according to the particular contractual arrangement between the employment business and the agency worker:

- Where an 'umbrella' contract operates during the gaps between assignments with different clients then the employment business and worker may agree that some or all of the leave be taken between different assignments.
- Where workers are engaged under separate, short-term contracts then the employment business and worker may still agree that some or all of the leave be taken between different assignments but where such a worker requests leave and employment is continuing he or she should be permitted to take leave at times when he or she should otherwise have been required to work.

13. What can a worker do if the entitlement to paid leave is denied?

If an employer refuses to give a worker paid annual leave in accordance with the Regulations (whether by refusing to allow him or her to take leave, or by not paying holiday pay), the worker should first seek to settle the dispute with the employer by discussion. If the dispute cannot be resolved informally, the worker should follow the employer's grievance procedure. It may also be useful to contact a trade union representative (where there is one) or the Manx Industrial Relations Service (see 15 below). A worker may in any case make a complaint to the Employment Tribunal.

Where the worker intends to bring a complaint to the Tribunal:

- if the dispute relates to a refusal to allow the worker to take leave, the complaint must be made within 3 months of the refusal;
- if the dispute relates to holiday pay, the complaint must be made within 3 months of the date when it should have been paid or, where it relates to more than one amount, when the last of them should have been paid. (But the Tribunal cannot hear a complaint in respect of an amount which should have been paid more than 12 months before the complaint is made.)

Where the complaint is upheld, the Tribunal will make a declaration to that effect. If the complaint relates to refusal to allow leave to be taken, it may award compensation to the worker. If the complaint relates to holiday pay, it must order the employer to pay the amount due.

Contact details for the Employment Tribunal are as follows:

The Clerk to the Employment Tribunal
5th Floor
Victory House
Prospect Hill
Douglas IM1 1EQ

Tel. (01624) 672942
Fax (01624) 687050

14. Checklist for employers

Employers should check:

- who is entitled to annual leave;
- how much leave workers currently receive and whether it is enough;
- whether workers receive a week's pay for each week of leave;
- that where the commencement date of the leave year is other than the default date a relevant agreement is in place before 30th September 2007 (see 4);
- that, where desirable, relevant agreements are in place covering any other permitted variations of the Regulations (see 8);
- in the case of employees, whether the written particulars are sufficient (see 5 above);
- that sufficient records (see 5 above) are kept to establish, in each leave year —
 - how much leave every worker is entitled to, and
 - how much leave every worker has taken;
- where 'rolled-up holiday pay' is to be paid, that the conditions set out at 10.2 above are fulfilled.

15. Further information

Further information regarding the Regulations and related matters can be obtained from the Manx Industrial Relations Service.

Where a worker wishes to make a claim under the Regulations, the Manx Industrial Relations Service can offer conciliation in order to help the employer and worker reach a settlement without the need for a Tribunal hearing. This service is free of charge.

Contact details are as follows:

Manx Industrial Relations Service
5th Floor
Victory House
Prospect Hill
Douglas IM1 1EQ

Tel. (01624) 672942

Fax (01624) 687050

Email iro@ir.gov.im

Web www.gov.im/mirs