



**We all look forward to our holidays, whether it is for travel or to spend time with friends and family. But the subject of holiday pay has been causing concern recently since a number of cases in relation to the calculation of holiday pay have increased employees' rights.**

Gill Wilkinson, employment law specialist at Ware & Kay in York & Wetherby sets out what you need to know and what you should be doing as an employer to ensure that you stay on the right side of the law.

## **The Working Time Regulations**

The right to paid holiday is set out in the Working Time Regulations and, despite the fact that the regulations have been in force for more than 16 years, there are still grey areas. The law in this area continues to develop as the courts interpret what the regulations say on a case-by-case basis. Due to the constant change, it is very important to consult an expert employment solicitor.

## **How holiday pay is calculated**

The regulations provide for 5.6 weeks' (or 28 days') paid leave per year and state that a worker has the right to receive a week's pay for a week of leave. There are complex rules for calculating a week's pay and recent cases have sought to clarify what should be included. European law says that holiday pay should be the same as normal remuneration.

## **Commission**

Commission must be included in holiday pay if it is linked to the performance of tasks required under the contract, otherwise there is a disincentive for a worker to take a holiday. This only applies to

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the first four weeks of leave that a worker takes each year. It is currently not clear what the reference period should be for calculating commission. Most employers look at the commission earned over the last 12 weeks before the holiday in order to work out the average per week.

### Overtime

Normal remuneration must be paid in respect of annual leave and the courts have interpreted this to mean that non-guaranteed overtime (that is, overtime that the employer is not obliged to provide but the worker has to do if offered) should be included in holiday pay for the first four weeks' leave each year.

For other types of overtime:

- if it is guaranteed and compulsory, overtime pay needs to be included in holiday pay as it will be normal pay; and
- in relation to voluntary overtime (that is, overtime that the worker can refuse to do), there is no binding decision yet, but it should be taken into account if it is worked regularly so that it forms part of normal pay.

### Allowances

Far as other payments are concerned, such as allowances, they should be included if the worker would have received them when working normal hours. This does not include expenses or ancillary costs, such as travel or subsistence. Shift premiums and status payments, such as 'acting up' allowances, also need to be taken into account.

### Bonuses

Bonuses must be included in holiday pay if they are linked to the performance of tasks required under the contract. This means that productivity, attendance, performance and team bonuses should probably all be included, depending on the circumstances, and an average amount calculated based on the last 12 weeks' pay before the holiday.

### How far back do you go?

Workers only have three months from the last underpayment of holiday pay in which to bring a claim in the employment tribunal. They can only claim for historical underpayments if there was less than three months between each payment of holiday pay. This limits historical claims. In addition, the government intends to introduce a cap of two years on claims for back pay, which will apply to claims issued on or after 1 July 2015.

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### Financial Advice

Email [law@warekay.co.uk](mailto:law@warekay.co.uk)  
Web [www.warekay.co.uk](http://www.warekay.co.uk)

## Liability

Even if you use the services of a payroll bureau, you will still be liable to your employees if they have not received all of the holiday pay due to them. This is because their claims will be against you as their employer. Whether or not you can take action against a payroll bureau will depend on whether they have been negligent in miscalculating holiday pay.

## What you should be doing

There are a number of unanswered questions still to be decided by the courts. In the meantime, we recommend that you review your holiday pay arrangements and, in particular, whether you currently include all of the various elements of pay in your calculation.

You will need to decide whether there are additional elements that you should be including and you may need to update your payroll system to calculate holiday pay correctly. You should calculate your exposure to employment tribunal claims for underpaid holiday pay and decide whether you should be making a provision in your accounts. If any grievances or tribunal claims are brought in relation to holiday pay, you will need to deal with them promptly. If the cost implications are substantial, you may want to consider offsetting the increase in holiday pay by reducing other benefits but you should take legal advice before doing so, as this is a complex area and could also lead to a claim.

The calculation of holiday pay will vary between different organisations, depending on the various elements that make up pay, and you should take specific advice on your situation.

If you would like us to update your holiday policy or you need advice on calculating holiday pay or dealing with any grievances or claims, please contact Gill Wilkinson for advice.

## Ware & Kay

### Contact us

For a free, no obligation discussion call Gill Wilkinson on York **01904 716000** or Wetherby **01937 583210**.