

Holiday pay and entitlement reforms

Audience: Schools, academies, and trusts

Action required: Familiarise yourself with the reforms ready to proactively implement when needed, and review policies and other relevant documentation where necessary

EPM support: Please contact your EPM Adviser for further details.

Summary

Following recent case law, the most notable of which has been the outcome of the Supreme Court case for *Harpur Trust v Brazel*, the Government has outlined guidance on the legislation that came into effect from 1 January 2024, intended to simplify holiday entitlement and pay calculations in the Working Time Regulations (WTR).

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

On 1 January 2024 The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations came into force and on the same date, the Government published non-statutory guidance on the legislative changes introduced. Find the guidance here > [Holiday pay and entitlement reforms from 1 January 2024](#)

The changes and guidance include the following key highlights, along with detailed examples and calculations for different scenarios:

- No single entitlement of 5.6 weeks annual holiday entitlement. Instead, regulations 13 and 13a, which determine the rate of pay for annual leave at 4 weeks normal pay and 1.6 weeks at basic pay, have been retained.
- Definition of what 'normal rate of pay' is in relation to the 4 weeks statutory leave (as specified by Regulation 13 of the WTR).
- Definition of "*irregular hours workers and part-year workers*."
- Introduced for "*irregular hours workers and part-year workers*" is the accrual of holiday entitlement method at a rate of 12.07% of hours worked in a pay period and, the option to use rolled-up holiday pay (RHP). These changes apply to holiday years commencing on or after 1 April 2024.
- A three-step process for calculating holiday entitlement in cases where a worker is on other leave, such as maternity or family-related leave, or is absent due to sickness, using a 52-week reference period.
- Removal of COVID carry-over holiday entitlement rules, such that relevant accrued holiday must be used by 31 March 2024.
- Clarification on record-keeping for employers to ensure that it is "adequate" to demonstrate compliance with the Working Time Regulations.

What is the main change?

The new regulations follow the Supreme Court ruling in *Harpur Trust v Brazel*, which caused difficulties for many employers in calculating holiday pay for part-year and casual workers. The ruling resulted in a part-year worker receiving the equivalent entitlement of 5.6 weeks' holiday of an all-year-round worker. It also resulted in the 12.07% calculation being unlawful, and instead, employers had to calculate holiday pay for casual workers based on the worker's average earnings over the previous 52 working weeks.

Accrual method

Under these new regulations, part-year and irregular hours workers who meet the new definitions can accrue an entitlement for each pay period at 12.07% of the number of hours worked for that pay period, which is applicable to leave years commencing on or after 1 April 2024.

This means that instead of automatically being entitled to a minimum 5.6 weeks' leave entitlement for the leave year regardless of how many weeks they work in the leave year, these workers will now accrue their entitlement as they work.

Employers now also have the option to pay the accrued holiday as rolled-up holiday pay (RHP). Rolled-up holiday pay (RHP) as an alternative method for calculating holiday pay is not applicable for workers who do not meet the new definitions.

Unfortunately, the government's guidance does not offer complete clarity, which we will explore when we dive deeper into the definitions of part-year and irregular hours workers.

Understanding the part-year workers definition

The legal definition of a part-year worker is a worker who, *"in relation to a leave year, if, under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid"*.

According to the government's non-statutory guidance, contracted part-year workers (e.g.

term-time only and term-time plus employees) who receive annualised pay, where their flat salary is equally spread over 12 months, do not qualify as part-year workers because there are no weeks where no pay is received. However, the Local Government Association (LGA) and some law firms disagree with the guidance.

If a worker has a contract that reflects periods lasting more than a week when the worker is not required to work *and* does not receive pay, the worker will qualify as a part-year worker and RHP can also be applied. This will include part-year casual workers, e.g. a teaching assistant working for one month with no fixed hours, who will be paid for the hours worked in that month. This worker may also be an irregular hours worker in accordance with the definition.

Understanding the irregular hours worker definition

Irregular hours workers are those whose working hours in each pay period are *"wholly or mostly variable"* under the terms of their contract. This means that genuine casual workers whose paid hours typically vary from week to week or month to month are considered irregular hours workers under the legislation.

In contrast, a casual Teaching Assistant who is working regularly and being paid the same number of hours each month is not likely to be an irregular hours worker in accordance with the legislation, nor a genuine casual worker.

52-week reference method

If preferred, the alternative option for calculating and paying holiday pay for irregular hours or part-year categories of workers is to use the 52-week reference period method of calculation to determine the amount the worker should be paid for a week's leave. This involves looking back at up to 104 weeks' worth of pay data to achieve 52 weeks in which the worker was paid to work out the average pay.

A 52-week reference period method should be used when calculating the holiday entitlement accrued by part-year and irregular hours workers when they are on maternity or other family leave or sickness absence. This method relies on you having the number of hours the individual has worked in each period going

back 52 weeks to work out an average used to determine the amount of holiday accrued in that period, which highlights the need for "adequate" record keeping, which will also enable you to demonstrate there have been no breaches of the WTR if challenged. Please refer to the government's non-statutory guidance for detailed calculation examples > [Holiday pay and entitlement reforms from 1 January 2024](#)

LGA update

The Local Government Association (LGA) issued an Advisory Bulletin in February 2024 followed by an amendment to the NJC Green Book for support staff in March 2024, reversing the requirement of 5.6 weeks minimum leave entitlement for support staff (excluding Northern Ireland where it still applies), which had previously been introduced following the *Harpur Trust v Brazel* outcome. The LGA are of the view that the government's guidance is incorrect and interpret that TTO workers paid an annualised salary are part-year workers in accordance with the legislative definition i.e. *"...there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid."*

The NJC have updated the Green Book Part 4.12 guidance advising where an employer provides the Green Book minimum annual leave entitlement of 33 days (including bank holidays and extra-statutory days) for workers with less than 5 years' service, the annual leave entitlement equates to an effective accrual rate of 14.49% and would therefore be above the minimum 12.07% required by the WTR. Therefore, if you follow the Green Book, where a TTO employee has a total annual leave entitlement when calculated pro rata on their weeks worked that is less than 5.6 weeks, there will no longer be a statutory requirement to increase the amount of annual leave paid to at least 5.6 weeks. This only affects TTO employees working 39 weeks with less than 5 years' service with a Green Book full time equivalent entitlement of 33 days annual leave.

Who is correct?

The challenge here is that this is untested and therefore a degree of uncertainty remains until such time that case law clarifies it.

If the government's guidance is correct, TTO employees would remain entitled to 5.6 weeks holiday per year, as was the case in *Harpur Trust v Brazel*, and the new accrual method and RHP does not apply to them.

If the LGA is correct, there will no longer be a statutory requirement to increase the amount of annual leave paid to TTO employees to at least 5.6 weeks, and the new accrual method of calculating statutory holiday entitlement at a rate of 12.07% of the hours worked in the pay period could apply for TTO employees, which has the potential consequence of reducing holiday pay.

In practice, this is likely to affect few employers because, following previous guidance and updates to the Green Book resulting from *Brazel*, many employers have already contractually increased the number of weeks' paid leave entitlement for Green Book TTO employees with less than 5 years' service so that it did not fall below 5.6 weeks. There are also many employers with more generous contractual holiday schemes and for their term-time employees there were no changes needed.

What action do I need to take?

For schools and academy trusts who follow the NJC Green Book where you proportionately pro rata the enhanced full-time equivalent contractual holiday entitlement, it results in your TTO employees receiving in excess of 5.6 weeks holiday entitlement in most cases and, if you have already topped up the weeks' paid entitlement (or added an allowance to pay the difference) for any TTO employees who were in receipt of less than 5.6 weeks once pro rata on their weeks worked, you are compliant with the *Harpur Trust v Brazel* case law and you do not need to make any changes.

If you have a contractual holiday scheme that results in any TTO employees receiving less than the statutory minimum of 5.6 weeks e.g. if you follow Green Book (TTO employees working 38 weeks with 33 days entitlement for less than 5 years' service) when pro rata on their weeks worked, and you have not yet taken any action to address that then you will need to consider your approach. We recommend that you seek advice from your EPM Adviser to

discuss your individual circumstances before taking any action because this is a complex area of law that is still evolving.

We expect that most schools and trusts are not likely to make any changes to reduce their current holiday entitlement for existing staff, particularly in respect of TTO employees. Considering the current circumstances in the sector with employers tackling a recruitment and retention crisis, reducing holiday entitlement for the few employees who were given a top up to 5.6 weeks, would require a contractual change and agreement with the employee, which is unlikely to be obtained and could negatively impact on employee and trade union relations. Please contact EPM for further advice if you are considering making a change for existing employees.

The NJC has advised they are continuing to work on joint guidance for TTO employees in respect of sickness absence and sick pay, and maternity, parental leave, shared parental leave and adoption leave, which we look forward to reviewing once received. The Government is also reportedly reviewing their non-statutory guidance.

Taking into consideration the complexities of the changes to the WTR and the conflicting views amongst experts on this matter, we will continue to keep a close watch on any developments in this space.

You should also check that your contracts are clear on giving workers a reasonable opportunity to take their holiday entitlement. If your contracts state that workers must take their holidays during school closure periods, which is likely to be the case, then they'll have the opportunity to take their holiday.

You may want to review arrangements for casual and zero hours workers commencing after the Regulations become applicable. We have included an alternative template Letter of Engagement for casual workers based on the accrual method with RHP available on our Customer hub under **[Employer Branding and Attracting Employees > Contracts of Employer & Terms and Conditions](#)**.

What support will EPM provide?

By familiarising yourself with the reforms, particularly those which relate to a change to the current position, you can be ready to proactively implement and manage this through the payroll for casual workers to holiday leave years commencing on or after 1 April 2024.

If you are an EPM Payroll customer, a variance option for applying RHP will be available on the EPM Portal from April 2024, which you may choose to use when paying accrued holiday pay to workers who you determine are 'part-year or irregular hours' workers in accordance with the WTR.

Please be mindful that if casual workers begin to work regularly or at any point become an employee who no longer meets the definition of a part-year or irregular hours worker, you should consider offering the individual a contract of employment and move away from using RHP.

For further details, please [view our FAQs](#) or speak to your EPM Adviser to discuss your school or trust's individual circumstances and look out for our upcoming webinar with further information.