

## Department for Business, Energy and Industrial Strategy

### CONSULTATION ON CALCULATING HOLIDAY ENTITLEMENT FOR PART-YEAR AND IRREGULAR HOURS WORKERS MEASURES TO EXTEND THE BAN ON EXCLUSIVITY CLAUSES IN CONTRACTS OF EMPLOYMENT

#### Consultation response from Lewis Silkin LLP

Lewis Silkin is a leading specialist employment law practice. We have around 160 specialist employment and immigration lawyers, including 33 partners, based in London, Oxford, Manchester, Cardiff, Dublin, Belfast and Hong Kong. We are ranked in the top tier of employment practices by the independent legal directories and many of our lawyers are recognised as leading practitioners in employment law.

This response is submitted on behalf of Lewis Silkin, rather than our clients, and is based on our experience in practice of advising predominantly medium to large-sized employers across a variety of sectors.

We are responding only to those questions where we have specific views based on our experience as a law firm specialising in employment law.

We are happy for you to publish our response.

#### **Question 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 Supreme Court's ruling in *Harper v. Brazel* has left many employers puzzled by the counter intuitive outcome that those working part of a year end up having a larger paid holiday entitlement than part time workers who work the same number of hours each week across the year. Many employers are also struggling to operate a holiday system that is legally compliant. Our view, therefore, is that ensuring that holiday is proportionate to the hours worked, is a sensible and constructive proposal.

As set out below, however, our preferred approach for the calculation of holiday entitlement would be more nuanced, allowing for different calculation methods for different types of irregular hours or part year workers.

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

Our view is that, on the one hand, the ability to calculate a fixed pot of leave at the beginning of a leave year by reference to the hours worked in the previous leave year would be simple and certain for some categories of worker. This would work well for workers whose hours do not vary significantly from year to year and whose engagement is likely to have significant longevity.

On the other hand, the proposed methodology has some drawbacks:

- ▶ In order for the worker to have a complete holiday year to look back on, employers could potentially be operating the proposed "first year of employment" calculation method for almost two years. This assumes a significant degree of longevity before a worker even moves onto the "standard" method of calculation. It could also be administratively burdensome for employers to operate two calculation methods within the same group of workers depending on length of service.
- ▶ The proposed lookback model assumes that irregular hours or part year workers never know their working time in advance. This is not the case. Some employees working part of the year or irregular hours will already know the total number of hours they will be working for each holiday year, even if their

working pattern is less predictable. For example, some part-year workers might know that they are working two days each week for every week in term time, and some irregular hours workers might be operating under an annualised hours contract where they know their hours commitment for the year. For these workers, it does not make sense to base their current year's holiday entitlement on last year's hours.

- ▶ At the other end of the spectrum, workers whose hours vary significantly from year to year could face a significant disparity between the amount of work they are doing in the current holiday year and the amount of holiday they are able to take. For example, suppose that an individual worked very few hours in the last holiday year but has significantly upped their hours in the current holiday year. They will end up with a relatively small pot of holiday (based on last year's hours) but are working a lot of hours. If there is a significant mismatch between hours being worked and holiday entitlement, it would be at odds with the underlying health and safety aim of annual leave to provide a proportionate amount of rest.
- ▶ It is unclear how the fixed reference period would cater for periods of absence such as maternity leave or sickness absence. Without clarity on this, employers may be exposed to allegations of discrimination arising from how leave has been calculated.
- ▶ What would be the "truing-up" mechanism for workers who leave during a holiday year? Would the holiday entitlement on termination be adjusted, either up or down, to reflect the hours actually worked in that holiday year or would it still be based on hours worked last year?
- ▶ For those engaged on short contracts of less than a month, the proposed method of looking back at the preceding month (for the first year of employment) would mean this group can never take leave during a contract of this duration (contrary to Reg 15A of the WTR). In reality such a worker would always be paid in lieu of holiday on termination of the contract. Allowing rolled up holiday pay would be simpler and would better reflect the reality of that working pattern.

Our view, therefore, is that there are significant downsides to the fixed reference period being the *only* way of calculating holiday entitlement for irregular hours or part-year workers. We would instead propose that the legislation allows for alternative lawful calculation methods **in addition** to the one proposed. Depending on business needs and the nature of their working population, employers would specify their chosen method in contractual documentation.

Additional calculation methods we would propose would be:

1. For irregular hours or part year workers who know the total number of hours they will be working "up front" for each holiday year (even if their working pattern is less predictable): **holiday allowance could be calculated by pro-rating 5.6 weeks downwards to reflect the worker's agreed hours commitment for the coming holiday year. A look back mechanism would not be required.**
2. For workers whose hours vary significantly from year-to-year **holiday could accrue as they work, building up holiday entitlement for that current year at a rate of 12.07% of every hour worked.**
3. For casual workers who are not obliged to work any particular hours or days (whether on permanent contracts or not), our view is that a better solution would be for **employers to make a rolled-up holiday payment (e.g. based on 12.07% of earnings) rather than having to earmark any particular hours as holidays.**

We have received positive feedback from clients that these additional options would provide the flexibility needed to make holiday accrual workable across different working scenarios. On the option of rolled up holiday specifically, we have received feedback that this payment should be explicitly identified on payslips to prevent a suggestion that base salary has been increased. Also, from a welfare perspective, it has been suggested that both the work provider and worker should have a responsibility to ensure that adequate rest is both available and taken.

In addition, our impression from conversations with clients is that whilst the proposed change is in principle very welcome, many do not appreciate the detail of the consultation's proposed calculation method and are assuming instead that it is a simple "accrue as you go" system. We would therefore suggest that a low response rate to this consultation should not be interpreted as widespread approval of the look back mechanism specifically.

**Question 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?**

We agree that this would be quite a simple and logical calculation mechanism, ensuring a close correlation between hours worked and holiday accrued. Employers would, however, need a clear policy on whether they will permit workers to take holiday before it has accrued.

We would also note client feedback that fixed reference periods with no scope for flexibility can cause administrative difficulties. It would therefore be helpful for provisions on this point to allow employers some flexibility to define exactly how a month is calculated.

As set out above, however, we think a 'one size fits all approach' is unsatisfactory.

**Question 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?**

We agree that it is useful to have a specific mechanism for calculating a day's holiday as this currently poses a significant challenge to employers. However:

- ▶ It is unclear when employers would be required to resort to the flat average calculation method. Would this apply whenever an irregular hours worker sought to take time off, or would it only apply if the worker did not know what hours they were scheduled to work that day at the point the holiday was booked?
- ▶ The consultation rightly notes the risk of abuse if a worker seeks to take holiday on a particular day in order to maximise holiday pay while minimising time off. In these circumstances, would an employer be justified in refusing to authorise the leave?
- ▶ The two systems for holiday entitlement and pay could cause some problematic outcomes. For example, in the situation that a Saturday shift was longer than a weekday shift but also attracted a premium rate of pay. Under the proposed system, taking a Saturday off would reduce a worker's holiday entitlement by an average working day, but the average pay received would not reflect the higher rate that would have been received had the worker been in for that shift.
- ▶ The consultation tends to assume that all workers need to book specific days off. In reality, however, there are many types of casual worker relationships where the individual is under no obligation to work on a particular day and there is nothing to distinguish a day of holiday from a day of choosing not to work apart from the holiday pay. In those situations, it would be far simpler (and in line with common practice) to allow employers to make a rolled-up holiday payment (e.g. based on 12.07% of earnings) rather than having to earmark any particular hours as holidays.

**Question 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?**

We believe it is positive that the government recognises that agency workers should only be entitled to holiday for time spent on assignment. We also believe that it is helpful that calculations based on 12.07% of hours worked will potentially be given statutory authority.

We do, however, have a number of observations on the proposed method of calculating holiday entitlement for agency workers. As with other irregular workers, there are a spectrum of working arrangements for

agency workers, ranging from short term assignments with multiple end users, to long term arrangements with one. For this reason, we believe that:

- (a) it is not helpful to treat agency workers as an entirely separate category from other irregular workers. This particular view is supported by the clients who have shared feedback on this aspect of the consultation. Depending on their working arrangement, an agency worker may have more in common with other irregular workers than other agency workers; and
- (b) with this in mind, a “one size fits all” approach would not work for agency workers either - the ability to choose between a suite of options outlined in our response to question 18 above (i.e. the proposed look-back method; pro-rated fixed entitlement; incremental accrual; or rolled up holiday) would also work well for this group. In particular, the option of rolled up holiday pay will be both simple and fair arrangement for agency workers on short assignments or those who are working for more than one agency and / or assignment.

If rolled up holiday pay were permissible welfare mechanisms may need to be put in place to try to ensure that agency workers are having adequate breaks, although it's acknowledged that this may be a challenge if someone is working for multiple agencies.

**Question 22: Do you have any further comments about calculating holiday entitlement for agency workers? Please explain your answer.**

Whilst we recognise that this consultation is concerned with holiday entitlement rather than pay, these points are very much two sides of the same coin. For some agency workers, for example those working on short assignments and having some control over the days they work, the concept of 'booking time off' does not reflect the reality of how they are engaged. They simply do not agree to work on days that they wish to have off. Therefore, for such workers the entitlement to holiday is better reflected in an “uplift” in pay by means of rolled up holiday pay.