

Consultation: Calculating holiday entitlement for part-year and irregular workers

Introduction

This is the response from the Universities and Colleges Employers Association (UCEA).

UCEA represents the views of higher education institutions (HEIs) across the UK in their capacity as employers. UCEA is a membership body funded by subscriptions from 175 HEIs in the UK, in addition to eight sector associate members. Our purpose is to support our member Higher Education (HE) employers in delivering excellent and world-leading higher education and research by representing their interests as employers and facilitating their work in delivering effective employment and workforce strategies.

HEIs are independent employers and determine their own employment policies, often in consultation with recognised trade unions; therefore, there are a variety of HR practices in place in the sector.

Our response is based on views provided by 45 of our member HE employers.

We do not wish our response to be published. We wish our response to be treated as **confidential**.

Summary response

UCEA welcomes the government's proposals to simplify the calculation of the holiday entitlement that a 'part year' or 'irregular hours' worker is entitled to. Whilst the legal basis for the Harper v Brazel ruling on the calculation of holiday entitlement for part-year workers is not disputed, it has the consequence of creating a disparity between workers, additional costs and administrative complexities for employers.

We note that the Government is not proposing to change the rules regarding the calculation of how much pay a worker is entitled to receive for each day/hour taken as holiday, and that the existing rules would still apply to pay (i.e. looking back over a rolling 52 weeks and not taking into account any unworked weeks).

In the HE sector, the 'percentage method' whereby holiday entitlement is calculated as a percentage of hours worked during a defined period has generally been used and preferred (in line with Acas guidance prior to the Harper v Brazel case). This is due to the large variety of mutually beneficial 'atypical' contract types and working arrangements that exist for education delivery - it is seen as the easiest way to administer holiday entitlement, whilst being an effective way of ensuring parity across the organisation. We have given careful consideration to the full range of proposals detailed in this consultation, but would urge the government to consider allowing employers to use the percentage method, as suggested for agency workers, for all part-year and irregular workers. The percentage to be used would be determined by individual HEIs based on contractual entitlements.

Current position on calculating holiday entitlement

If you employ workers with irregular hours, how do you calculate their holiday entitlement? (Q14)

HEIs are in the process of reviewing the way they calculate holiday entitlement for part-year and irregular workers in light of the Harper v Brazel ruling. However, this is proving challenging for many due to the administrative and technical complexities and costs involved. They are eagerly awaiting the outcome of this consultation and such reviews have been paused in anticipation of a simpler and fairer method of calculating holiday entitlement for these workers. In the meantime, HEIs are using a variety of methods for calculating the holiday entitlement of part-year and irregular workers, based on the contractual entitlements

of different categories of staff, and taking into account statutory bank holidays and university 'closure days'. However, the 'percentage method' has generally been used whereby holiday entitlement is calculated as a percentage of hours worked over a particular period, e.g. a month or a term. This means that holiday entitlement is pro-rated so that it is proportionate to the amount of work actually performed (in line with the Acas guidance prior to the changes brought about by the Harper v Brazel case). The percentage used in this calculation varies between HEIs from 12.07% (typically for irregular professional services staff) to around 25% (typically for irregular academic staff).

Introducing a 52-week holiday entitlement reference period

Would you agree that the information you currently collect to calculate holiday pay would be sufficient to calculate holiday entitlement using a reference period? (Q16)

UCEA **disagrees** that the information HEIs currently collect to calculate holiday pay would be sufficient for all HEIs to implement the proposed changes immediately. In many cases, existing systems would need to be reviewed and new systems implemented to capture the required data, or manual intervention will be necessary. Many HEIs employ a large number of workers on a variety of types of contracts across different faculties, colleges and services. The government's proposal would rely on accurate and centrally held records of hours worked on a weekly or monthly basis by these workers being kept by the employer/payroll department; this may require additional resource, and sufficient time to obtain the necessary records and implement the changes. HEIs will also require guidance on the best approach to adopt in the interim period.

Calculation of holiday entitlement using the 52-week reference period

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? (Q17)

UCEA **strongly agrees** that holiday entitlement should be calculated taking into account weeks without work, and calculating holiday entitlement according to hours actually worked. While the legal basis for the judgement in Harper v Brazel is understood, it has the consequence of a 'part year' worker or an 'irregular hours' worker being entitled to proportionately more holiday than, say, a comparable full-time or part-time worker with fixed hours through the year. The government's proposals would provide parity between part-time and part-year/irregular workers who work the same number of hours, and would therefore be more equitable. It would ensure that employers are not deterred from entering into mutually beneficial part-year or irregular working arrangements due to the cost, administrative burden or complexity of holiday entitlement arrangements. It would also remove the financial burden on HEIs which arises from the retrospective liabilities imposed by the Harper and Brazel ruling.

Using a fixed or rolling reference period

Would you agree that a fixed holiday entitlement reference period would make it easier to calculate holiday entitlement for workers with irregular hours? (Q18)

UCEA **agrees** that using a fixed holiday entitlement reference period would make calculating holiday entitlement easier than using a rolling reference period, and would also provide greater clarity for workers of their entitlement. However, working patterns can vary greatly from year to year, and issues may therefore arise from basing a worker's holiday entitlement on the work they completed in the previous year. A worker may have their holiday entitlement based on a very busy reference period and then do very little work in the following reference period - they would then have a relatively high holiday entitlement in proportion to the actual work they are doing during the current reference period. A rolling reference period would avoid such issues, but would be more difficult to administer, although

this would vary according to IT capabilities within individual HEIs. A solution to this issue would be to have a fixed reference period, but not in the form suggested. Instead the reference period would be based on the hours worked in the previous month, so that the worker accrues their holiday entitlement as they work. This would be similar to the approach the government has proposed for workers in their first year of employment (see Question 19 below).

Should this proposal come into effect, we would require further details of how this would work in practice with worked examples, and details of any flexibilities that may be allowed. For example, will it be possible to have a different reference period for different categories of staff; and will it be possible for employers to choose a reference period that fits in with existing practices such as one that is in line with the employer's existing holiday year? Employers will also need guidance on how to calculate holiday entitlement for part-year and irregular workers who were on long-term sick leave or maternity/family leave during the previous reference period, and for those who leave their employment during the reference period (in this instance, it may be the case that the worker has increased their hours significantly during the reference period in which they leave, but their holiday entitlement would have been based on the previous reference period during which they worked fewer hours).

Calculation of holiday entitlement using a reference period in the first year of employment

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? (Q19)

UCEA **agrees** that the fairest and simplest way to calculate holiday entitlement during the first year of employment would be by calculating an amount of annual leave based on the hours actually worked in each month as a proportion of the full time equivalent working time for that month (pro-rata). This would ensure equity between all staff and workers across the HEI. This would address the issue identified in Q18 above.

Calculation of how much holiday is used by taking a particular day off

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? (Q20)

UCEA **agrees** that the method of using a flat average working day would provide greater clarity and would be less time-consuming and administratively burdensome than calculating the average hours that would apply to each day of the week, particularly for employers who do not have HR systems with the functionality to do this easily.

However, we would question whether this would be a fair approach due to the fact that these workers would not be taking an amount of leave according to the hours they would actually have worked that day, and whether a disparity between these workers and those who do not work part-year or irregular hours would be created (these workers book annual leave in accordance with the number of hours they were due to work that day). This issue would be particularly problematic for workers with variable daily hours and compressed hours; and is particularly the case where the worker's actual work pattern, with scheduled hours per day, is clear at the outset. In these situations, it would be fairer to base holiday entitlement on the actual hours that would have been worked that day. It is less of an issue in cases where the hours due to be worked on a particular day are not known/scheduled well in advance, and in these situations an average working day (whether this is a flat average or dependant on the day of the week that the annual leave is taken) would be less problematic.

We recognise that due to the variations in working patterns that workers in HEIs have, it is difficult to find a single method that would provide a precise calculation of a day's holiday for all workers in all HEIs. Similarly, variations in the systems used to calculate holiday entitlement mean that there will be a difference in how individual HEIs are impacted at an administrative level by this proposed change. However, it is clear the calculation chosen would need to be fair for the majority of workers in the HEI, and an equality impact assessment would help to ensure that particular groups of staff are not disproportionately affected.

It is also important to note that in practice, many of these workers prefer not to take their annual leave during a period of working, and prefer to be paid in lieu of holiday to be used when they have completed a period of work. In these instances, HEIs acknowledge that due to the irregularity of hours worked, there is ample opportunity to take a break at other times. In these instances, workers are not required to 'apply' for holiday in the same way as full-year/regular hours staff but are effectively credited with holiday entitlement on a non-working day which is then treated as time off. Irregular workers are only scheduled to work when required by the employer. Should the government's proposal come into effect, employers will need to allocate additional days of work to the worker, simply to enable them to book them as annual leave. This would seem to be an unnecessary administrative burden.

If the government decides to introduce this method of calculating holiday entitlement, it would be helpful for employers to have a clear formula and worked examples of how this would work in practice. Would the flat average day be based on the individual's daily hours of their irregular work patterns or on a fixed organisational daily rate, for example? Furthermore, it should be noted that some employers only allow annual leave to be booked in full or half days, whilst others would prefer holiday to accrue in hours rather than days. Therefore, what flexibilities would be incorporated to take account of the different policies and practices that exist?

Calculating holiday entitlement for agency workers

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? (Q21)

UCEA **strongly agrees** that this would be the easiest way to calculate agency workers' holiday entitlement. This is a method that many employers and employees are accustomed to and find acceptable. It enables the agency and the employer to agree the cost of the assignment at the outset. Any other method would make financial planning more difficult, and would be more difficult to administer, increasing the potential for errors to be made. UCEA wishes the government to consider whether a percentage method, such as this, could be used for all part-year and irregular workers, and not just agency staff, taking into account statutory and contractual holiday entitlement.