

How do you calculate annual leave entitlement for casual (including zero hour) and other atypical workers?

The Working Time Regulations 1998 (WTR) give workers the right to minimum holiday rights. And recent court rulings, the ruling in the Uber case being just one, means more individuals than ever have a holiday entitlement.

Calculating that entitlement for those working regular and fairly non-varied hours is fairly straight forward. But it becomes a whole different matter for those workers who work varied hours – especially those on zero-hours contracts. And, frankly, in that latter regard, there is no defined answer.

It used to be common for zero hour workers to be given rolled-up holiday pay (also calculated as a percentage uplift to hourly pay), regardless of whether they actually took holiday. However, rolled-up holiday pay was ruled as is contrary to the Working Time Directive 2003 (WTD) from which the WTR derives.

Instead, up until last year, many organisations adopted the “12.07%” approach to address this complex issue. But the Harpur Trust case (below) has since ruled that approach unlawful.

As a result of the Harpur Trust ruling, the government for department of ‘Business, Energy and Industrial Strategy’ (BEIS) has recently commenced a consultation exercise on the calculation of holiday entitlement received by part-year and irregular hours workers. BEIS proposes to introduce holiday entitlement reference periods for part-year and irregular hours workers, to ensure that their holiday pay and entitlement is directly proportionate to the time they spend working.

In the meantime, our question and answers factsheet provides answers to some questions you might have, and may help you avoid costly claims.

Are zero hour contract workers entitled to annual leave?

Zero-hours contract employees are entitled to annual leave just like any other employee. The minimum annual leave entitlement for all workers in the UK, including zero hour contract employees, is 5.6 weeks per year, or 28 days for a full-time worker. ‘Working Time Regulations 1998’ (‘WTR’) do not set out how to convert this into entitlement in days or hours for workers with irregular hours.

But it is difficult to calculate their entitlement given zero hour contract employees do not have a set number of hours per week or month, and their work schedule can vary greatly from one week to the next.

What’s the 12.07% approach and where does 12.07% come from?

As we have said above, workers are entitled to 5.6 weeks’ paid holiday each year. Given there are 52 weeks in a year, this leaves 46.4 working weeks. 5.6 is 12.07% of 46.4, so this figure represents holiday expressed as a percentage of working time.

Using the 12.07% approach, holiday entitlement would equate to just over seven minutes for each hour worked – 12.07% of 60 minutes equates to 7.242%. To illustrate, the Acas leaflet gave the example:

If you had worked 10 hours, you would be entitled to 72.6 minutes' paid holiday - $12.07\% \times 10$ hours = 1.21 hours = 72.6 minutes.

The trouble is, whilst this approach gives a fairly accurate entitlement for many, it doesn't give an accurate entitlement for some. The more non-working weeks an individual has, the less accurate the 12.07% approach is. This was the issue in the Harpur Trust case (below).

What's the Harpur Trust v Brazel case about?

In *Harpur Trust v Brazel*, the Supreme Court considered the 12.07% approach when calculating annual leave and holiday pay entitlements for those workers who work varying hours during certain weeks only of the year but have an overarching contract throughout that year.

The ruling was that the correct interpretation of the WTR is that holiday entitlement for part-year workers should not be pro-rated so that it is proportionate to the amount of work that they actually perform each year.

Part-year workers are entitled to 5.6 weeks of statutory annual leave calculated using a holiday entitlement reference period to determine their average weekly pay, ignoring any weeks in which they did not work. Therefore, the 12.07% approach (known as the "percentage method") is not compliant with the WTR and will often result in the worker receiving less than their statutory entitlement.

Therefore, any organisation which continues to use this method of calculation could lead to tribunal action being brought against it.

What does the law say on providing information to calculate this entitlement?

The law requires all workers to be issued with a section 1 statement. These statements must:

- be in writing,
- given to the worker on their first day of their engagement,
- and include prescribed information – this includes any terms and conditions relating to "entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated)".

This is difficult to do in any meaningful way for zero hour worker, especially as the 12.07% approach is no longer fit for purpose.

What is the current government guidance?

The current government guidance acknowledges that the WTR does not set out how to convert a weekly entitlement into days or hours for those working on zero hour contract basis with irregular hours. It suggests that, "in practice, if needed, employers may wish to calculate average days or hours worked each week based on a representative reference period, although the Regulations do not expressly provide for this".

The one matter it is clear on though is the organisation's obligation to ensure that each worker receives at least 5.6 weeks' annual leave per year!

What is a 'week's leave'?

For full-time and part-time workers who work the same number of days or hours every week, this is a straightforward question to answer. Similarly, where the worker takes a day's holiday, it is easy to determine what fraction of a week's leave is used up (and hence, what fraction of a week's pay should be given).

For workers on atypical work patterns, this is much more difficult. Neither the WTR nor the WTD set out any method of calculating how many days or hours constitute a week's leave in such circumstances, and none is suggested in any reported case law.

This raises particular problems for zero hour contract workers who may work different numbers of days or hours in each week, making it difficult to determine exactly what a week's holiday looks like.

What is a "representative" reference period for calculating the average hours in a week?

Neither the WTR nor the WTD set out any method for calculating how many days or hours constitute a week's leave. One approach is to use the 52-week reference period that is used for calculating holiday pay under the "week's pay" rules, in other words, the last 52 weeks in which remuneration has been earned.

For a full-time worker, or part-time worker with regular weekly hours, it is fairly clear what proportion of a week is equivalent to one working day.

For example, Michael, who works a three-day week (with the same number of hours each day) would use up a third of a week's leave and be entitled to a third of a week's pay for each working day taken as holiday.

The formula for calculating Michael's annual leave entitlement would be as follows:

(annual leave entitlement in weeks) x (amount of days worked per week) = entitlement.

The calculation would be $5.6 \times 3 = 16.8$ days (which would usually be rounded up to 17 days)

However, for zero-hours workers, things are not so clear. If the worker works an irregular, unpredictable pattern, with different numbers of days each week, with (say) a six-hour shift on some days and an eight-hour shift on other days, how should an employer work out what one day's paid holiday equates to, as a proportion of their leave entitlement?

The difficulty arises because it is not possible to calculate, in advance, the employee's annual holiday entitlement in days or hours, without knowing at the start of the year how many days or hours they will work that year.

So what should we do?

Whilst there is no current legislative method of calculating the entitlement, 'BEIS' has issued guidance (which can be accessed via: [https://www.gov.uk/guidance/zero-hours-contract-workers-annual-leave-entitlement](#)) on how to calculate certain zero hour contract workers leave entitlements.

This gives the following example – in this example, the organisation is adopting a 26 week referencing period.

Caroline is a zero hour contract worker who has an irregular pattern of work. She requests a week's paid holiday. She is away from work for seven calendar days. Her holiday pay would need to be a week's pay, calculated as an average of the last 52 remunerated weeks (or since the start of employment, if she has not worked for 52 weeks) Her annual holiday entitlement of 5.6 weeks would be reduced by 1 week, leaving her with 4.6 weeks to take.

Later in the year, having taken another three whole weeks' holiday, Caroline now has 1.6 weeks remaining.

Caroline requests two days' holiday. Over the last 26 weeks, all of which have been working weeks, she has worked 75 days, averaging 2.88 days per week. The employer treats the two days' holiday as equivalent to 0.69 weeks ($2 \div 2.88$). It therefore pays her $0.69 \times$ a weeks' pay in respect of the two days' holiday (calculated in accordance with the ERA 1996).

She now has 0.91 weeks remaining.

Towards the end of the holiday year (having taken another single day as holiday), the worker has 0.35 weeks' holiday entitlement to take before the end of the year.

Due to an increase in her working time, she now works on average 3.4 days a week. 0.35 of a week's holiday is equivalent to 1.19 days ($3.4 \times 0.35 = 1.19$).

She therefore takes annual leave of 1.19 days and is paid $0.35 \times$ a week's pay. (In practice this would be likely to involve her being absent from work for 1.5 or 2 consecutive days, with part of that treated simply as non-working time rather than paid holiday.)

This is really confusing, do you have any practical suggestions?

Yes!

In practice employers may wish to calculate average days or hours worked each week based on a representative reference period, although the WTR do not expressly provide for this. In all cases, employers must ensure that each worker receives at least 5.6 weeks' annual leave per year.

Therefore, an employer can insist on the worker waiting until they have worked enough days to build up their holiday entitlement before they can take it.

This is known as an 'accrual' system.

By way of example, if the worker has only worked continuously for one month, they may only be allowed to take one twelfth of their annual holiday allowance, which is supported by Regulation 15a of the WTR for employees within their first year of employment. Zero hour contract workers are entitled to take holiday during their employment and to be paid in respect of unused holiday on termination of employment.

It's commonly accepted that many zero hour contract workers may not wish to take up their annual leave. Therefore, organisations may wish to review the entitlement the worker has accrued over a reference period and ask them whether they would like to take annual leave, or be paid in lieu.

The sporadic nature of these working arrangements can very often mean that there are gaps in the worker's employment, breaking the continuity of service for the purposes of accruing greater statutory rights. Therefore, where there is a break in the working arrangement, the worker will still be entitled to be paid for any accrued holiday that has not been taken.

This approach should be handled carefully and documented.

What is the current BEIS consultation on holiday calculations about?

As mentioned above, BEIS is consulting on the calculation of holiday entitlement received by part-year and irregular hours workers, following the Harpur Trust decision (above). It's proposed that holiday entitlement reference periods are introduced for part-year and irregular hours workers so that organisations can ensure that holiday pay and entitlement is directly proportionate to the time its workers spend working.

BEIS also wants to understand how entitlement is currently calculated for agency workers and how the consultation proposal might be implemented.

It's also currently proposing that the length of the holiday entitlement reference period should mirror the length of the current holiday pay reference period for consistency. This would, in turn, mean that organisations would be required to hold records of time spent working by such workers; this would be similar to the data already required to calculate holiday pay to demonstrate compliance with the National Minimum Wage Regulations 2015.

BEIS believes that by legislating, it would provide clarity to workers, who would be assured that their entitlement would be calculated according to steps clearly set out in future regulations. It would also provide employers with a clearly defined method to use, rather than having to spend time interpreting complex case law, and will ensure holiday entitlement is calculated consistently for workers with irregular hours. Something all organisations employing atypical workers will undoubtedly welcome!

Are there any free tools which help calculate holiday entitlement?

Yes!

There is a calculator on GOV.UK which is designed to help organisations calculate statutory holiday entitlement for some of the different types of working patterns and different lengths of time in employment. [This can be found here](#)

How can Wilson Browne help?

At Wilson Browne our employment solicitors can advise you on how you can ensure your business is keeping up to date with the regulations within this developing area of the law.

With offices in Corby, Higham Ferrers and Rushden, Kettering, Leicester, Northampton and Wellingborough we can offer you a friendly face-to-face meeting at a convenient location.

Our initial chat is free so please get in touch by calling 0800 088 6004 or completing our online contact form.