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INFORMATION NOTE NO. 3

REVISED OCTOBER 2011

HOLIDAYS AND HOLIDAY PAY

Arrangements for holidays and holiday pay should be agreed between employers and workers or their representatives. Disagreements over holidays and holiday pay are common if entitlements are not clearly set out in writing. Such disagreements may lead to deterioration in employment relations and possible complaints to industrial tribunals.

Holiday entitlement and the law

The Working Time Regulations (Northern Ireland) 1998 (as amended) (the Regulations) set down the minimum annual leave provisions for workers although some employers may provide more generous contractual holidays. The Regulations apply to all workers whether employed on a full-time or part-time basis, temporary or permanent contract and to agency workers and freelancers.

Under the Regulations, workers have the right to:

- 5.6 weeks' paid leave each year, capped at 28 days (from 1 April 2009)
- receive a payment for untaken statutory leave entitlement on termination of employment.

Workers who already receive contractual leave which is 28 days or more are not entitled to an increase as a result of the increases from 1 April 2009.

The provisions in the Regulations on holidays and holiday pay do not, at present, apply to workers in the armed forces or police or parts of the civil protection services where their activities conflict with the statutory entitlement to paid annual leave.

Schedule 2 of the Regulations makes special provisions for annual leave in relation to agricultural workers. Their holidays are laid down by the Agricultural Wages Board for Northern Ireland (telephone number 028 9052 0813).

<http://www.dardni.gov.uk/index/fisheries-farming-and-food/enforcement-awb/enforcement-dard-holiday-entitlement.htm>

Public holidays and the law

There is no statutory entitlement to paid leave for public holidays. Generally, public holidays include bank holidays, holidays by Royal Proclamation and 'common law holidays'. Banks are not allowed to operate on bank holidays. When public holidays in the Christmas and New Year period fall on Saturdays and Sundays, alternative week days are declared public holidays. Any right to paid time off for such holidays depends on the terms of the worker's contract. If the contract does not refer to public holidays then the right to paid leave may have built up through custom and practice. Paid public holidays can be counted as part of the statutory 5.6 weeks holiday entitlement under the Working Time Regulations 1998 (as amended).

Providing information on holiday entitlements to workers

Employers are required by law to provide all employees, within two months of commencing employment, a written statement of employment particulars. The law requires this written statement to contain details of holidays and holiday pay entitlements. Details of holiday pay and entitlements may also be included in the employee's written contract, where there is one.

The written statement or contract should contain sufficient detail to enable the employee's entitlement to be precisely calculated, including any entitlement to accrued holiday pay on the termination of employment.

Part-time worker's holiday entitlements

Annual Leave Entitlements

Part-time workers are entitled to the same holidays as full-time workers, calculated on a pro-rata basis. For example, an employee who works three days a week is entitled to 16.8 days paid holiday - their normal working week multiplied by 5.6. Holiday entitlements for part-time workers can also be calculated in hours where their number of hours worked per day varies. For example, an employee who works fifteen hours a week which includes two days at six hours per day and one day at three hours is entitled to 84 hours holidays per year – their normal week multiplied by 5.6.

Public Holiday Entitlements

The Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000 provide that part-time workers should not be treated less favourably than comparable full-timers in regard to their contractual terms. As most bank and public holidays fall

on a Monday those staff who do not normally work that day could be disadvantaged. Good practice suggests that such workers should be given a pro rata entitlement of days off in lieu according to the number of hours they work. For example, an employee who works three days per week is entitled to three fifths of the public holiday entitlement that a full time worker who works five days per week is entitled to.

→ Guidance on the rights of Part-time workers can be found on www.delni.gov.uk

Agency and casual worker's holiday entitlements

Agency and casual workers are entitled to holidays under the Regulations in the same way as other workers. However, entitlement will depend on their employment relationship, pattern of work and length of service and may be calculated on a pro rata basis. Where this is the case, wages on each termination will normally contain an element of holiday pay where the appropriate leave entitlement has not been taken.

Establishing the holiday leave year

The Regulations stipulate that the leave year will begin:

- on the date the worker began working for the current employer; or
- 23 November (the anniversary of the Regulations becoming law); or
- on a date set by the employer which should be set out in the written statement of main terms and conditions – perhaps, for example, from April to March.

If a worker starts work part way through the company's leave year, the initial holiday entitlement is ordinarily based on the period from that date until the leave year ends. In most cases employers will calculate entitlement for a part year pro rata to the full year. So, if a worker begins work in July and the company's leave year runs from April to March, the entitlement will be approximately three-quarters of the full entitlement for that year.

Carrying over holidays into another leave year

Amendments to holiday entitlements from October 2007 include the right for employers and workers to agree that up to 1.6 weeks can be carried over into the next holiday year. A minimum of 4 weeks annual leave must be taken each year. Where an employer provides in excess of 5.6 weeks they may agree that this additional amount can also be carried over into the next holiday year.

Accrual of holidays

The Regulations permit an employer to operate a holiday accrual system for workers who are in their first year of employment (only). In practice this means that a new

worker will accrue one twelfth of their annual holiday entitlement each month they are employed. This will apply from the start of each month. For example, an individual who works five days per week and who has been employed for six months will have built up fourteen days annual leave. This is based on an annual entitlement of $28/12/6 = 14$ days (2.8 weeks).

Holiday entitlements during periods of absence

As long as a contract exists between the employer and the worker, the statutory minimum entitlement to paid holiday will continue to accrue during periods of absence, such as ordinary and additional maternity leave.

However, if a worker does not take annual leave within a leave year, then their statutory entitlement to paid holiday will be lost as they are not allowed to carry this over to the next leave year. However, a recent decision by the European Court of Justice (ECJ) in the case of Commissioners of Her Majesty's Revenue and Customs v Stringer and others suggests that workers who have been unable to take annual leave as a result of sickness during part of, or the entire leave year, should not lose their entitlement to annual leave provided for by the Working Time Regulations. The position on this matter is by no means clear and the case has been referred back to the House of Lords to make a decision in the light of the ECJ judgement.

Calculating holiday pay

For each week of their statutory leave entitlement workers are entitled to be paid a week's pay calculated in accordance with Part I, Chapter IV of the Employment Rights (Northern Ireland) Order 1996 as follows:

Workers with normal working hours

- If a worker's pay does not vary with the amount of work done then a week's pay is the amount due for a week's work under the worker's contract. Pay for non contractual overtime is excluded.
- If a worker's pay varies with the amount of work done such as with piece work or where a week's pay is partly made up of variable bonuses or commissions then the amount of a week's pay is the pay for the normal weekly working hours multiplied by the workers average hourly rate over the previous twelve weeks. To calculate a week's holiday pay for a worker, their weekly pay for the previous twelve weeks is added up and divided by the total number of hours worked during the same twelve week period. This total, the average hourly rate is then multiplied by the normal weekly working hours. Any week in which no pay was due should be replaced by the last previous week in which pay was received to bring the total to twelve.
- Shift and rota workers, whose pay varies because they work their normal hours at varying times and in varying amounts in different weeks, have their week's pay calculated differently. Their average weekly hours of work, in the

preceding twelve weeks, are multiplied by their average hourly rate. The hourly rate is calculated as above and includes any shift allowance which is payable.

Workers with no normal working hours

- If a worker has no normal working hours then a week's pay is the average pay received over the preceding 12 weeks. Any week for which no pay was due should be replaced by the last previous week for which pay was due.

For example to calculate holiday pay due for a worker whose hourly rate is £6.08* and whose hours of work vary from week to week, has worked for six weeks at 45 hours, three weeks at 25 hours and three weeks at 40 hours is entitled to holiday pay for a week's holiday of:

$$(6 \times 45) + (3 \times 25) + (3 \times 40) / 12 \times £6.08 = \underline{£235.60}$$

→ An interactive tool to enable employers to calculate annual holiday entitlements is available on www.businesslink.gov.uk.

Applying for holidays

Requesting holidays

Workers are required to give notice to their employers if they wish to take a holiday. The notice must be twice as long as the period of leave requested. For example, a worker requesting one week's holiday needs to give two week's notice. The employer can refuse permission by giving notice at least as long as the leave requested, in this example this would be one week.

Putting restrictions on when holidays can be taken

Restrictions on taking holidays may be expressly stated in the contract of employment, implied from custom and practice or incorporated into individual contracts from a collective agreement between the employer and Trade Union(s).

Employers may choose to:

- shut down for certain periods during which all or some groups of workers have to use their annual holiday entitlement;
- nominate particular dates as days of closure, when workers are expected to take annual leave, e.g. over the Christmas and New Year period;
- determine the maximum amounts of leave that can be taken on any one occasion and also the periods when leave may be taken.

Any clash of requested holiday dates may be resolved by management. For example consideration of the particular circumstances of the individuals concerned

as well as the needs of the business or by other means such as drawing lots or agreeing 'first come, first served'.

In the absence of an agreement on the taking of leave, the provisions of the Regulations apply where an employer can require a worker to take all or any of the leave to which a worker is entitled at specific times, provided that the worker is given prior notice. The notice period should be at least twice the period of leave to be taken. For example, employers wishing to have a Christmas shut down spanning one week would have to give at least two weeks' notice to their workers.

Worker's rights when holiday entitlement is denied

Workers denied statutory entitlements to paid annual leave under the Regulations should seek to settle disputes with their employer by talking through the problem. If the problem cannot be resolved informally, the worker should follow the organisation's grievance-procedure which should contain the principles contained in the LRA Code of Practice on Disciplinary and Grievance Procedures. The employee should put their complaint in writing to the employer. If it is not possible to reach an agreement in this way, workers may submit a complaint to an Industrial Tribunal within three months of the refusal. If the complaint is upheld, the tribunal will make a declaration to that effect and may award compensation to be paid to the worker by the employer.

→ [See](#) Information Note 1 – *Employee Grievances* www.lra.org.uk

Holiday entitlements upon termination of employment

Calculating holiday pay for leavers

No matter how short the period of employment, a worker has the right to be paid for leave accrued during that time. Under Part III of the Employment Rights (Northern Ireland) Order 1996 employers should include in a written statement of employment particulars sufficient detail to enable the precise calculation of a worker's entitlement to accrued holiday pay on termination of employment.

Accrued holiday on termination need not to be rounded to the nearest half day - payment can be made for the exact amount of leave accrued.

Unless a contract of employment improves the position, the provisions of the Regulations apply and payment for untaken leave should be calculated using the formula below:

(A x B) – C where:

A is the period of leave to which the worker is entitled

B is the proportion of the worker's leave year which expired before employment ended

C is the period of leave taken by the worker between the start of the leave year and the termination date

For example:

A worker, who works 5 days a week, qualifies for 5.6 weeks' annual leave and finished employment after 6 months, having taken 5 days' leave, will be entitled to:

In weeks, $5.6 \text{ weeks} \times 0.5 - 1 \text{ week} = 1.8 \text{ week's pay}$

or in days, $28 \text{ days} \times 0.5 - 5 \text{ days} = 9 \text{ day's pay}$

Recovering overpaid holiday pay upon termination of employment

Regulation 14 of the Regulations states that an employer and worker can draw up a 'relevant agreement', e.g. in the contract of employment to provide that a worker will compensate the employer, whether by payment, undertaking additional work or otherwise, if leave already taken is in excess of entitlement when employment ends.

There should be a 'relevant agreement' in place; if not, and a deduction of overpayment is made by the employer from the worker's final wage payment, the worker may have the right to submit a claim to an Industrial Tribunal under Part IV of the Employment Rights (Northern Ireland) Order 1996 - the right not to suffer unauthorised deductions.

Rolled up holiday pay

“Rolled-up” holiday pay refers to the practice of an employer agreeing with workers that their pay for annual leave is included in their hourly rate and paid as part of remuneration for working time, but not paid in respect of a specific period of leave actually taken - indeed the worker may not formally take any particular period of leave, but is treated as being on holiday when he or she is not working. This system has been criticised as discouraging workers from taking holidays. Following an ECJ Judgement on 16 March 2006, “Rolled-up” holiday pay is now considered unlawful under the Working Time Directive, and must be paid in respect of a specific period during which the worker actually takes leave.

Role of the Labour Relations Agency

The Labour Relations Agency can provide information and advice to employees and employers on holiday entitlements and in the event of complaints being made to an industrial tribunal a conciliation service. The Agency can also assist employers in drawing up the 'Statement of Main Terms and Conditions of Employment'

→ See LRA website for further information on services provided at www.lra.org.uk

Contact details are as follows:

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* is the current National Minimum Wage rate for workers aged 21 and over, effective from 1 October 2011