



## Human Resources & Health and Safety



Do you employ staff?

### When Annual Leave and Employee Illness Overlap

#### Two Statutory Rights

Under the Working Time Regulations, employees and workers are legally entitled to paid leave away from work. The purpose of this leave is to provide employees / workers with relaxation and leisure time away from the workplace, as being overworked can easily lead to physical or mental health issues. A full-time employee / worker is entitled to a minimum of 5.6 weeks / 28 days paid annual leave each year, which includes any UK specific national bank/public holidays. Employees who are contracted to work part-time, on a zero hours basis or who work irregular hours, should have their holiday entitlement calculated on a pro-rata basis. With regards to pay, the law states that employees should receive their 'regular' pay for their annual leave, to ensure they do not suffer a financial detriment by being away from the workplace. This means that if an employee regularly works over-time, or if an employee regularly receives commission or bonus payments, then this should be considered when calculating their holiday pay. Employers are currently advised to use the previous 12 weeks as a reference for calculating the average pay an employee receives, but as of April 2020 this will be increasing to the previous 52 weeks.

Employees are also legally permitted to take time off work due to illness and, if eligible, to receive statutory sick pay whilst they are unable to work, for up to a maximum of 28 weeks. The purpose of this right is to give people the chance to recover from an illness or injury without the pressure of also having to attend work. Employees can only self-certify their absence for the first seven calendar days, after which they are required to provide medical evidence to support their need to be absent from work. Employees are only entitled to receive SSP from the fourth day of absence onwards, and only if they provide the appropriate documentation / evidence as soon as possible. The amount of time the employee is permitted to be away from the workplace is entirely dependent upon the situation. Employers are able to manage employees for their attendance record, but this must be done in a sensitive and reasonable way, with the Equality Act 2010 and relevant protected characteristics in mind.

The above are two separate statutory employment rights, but in some circumstances, they may interact and overlap. This newsletter explores the different ways this might happen and advises on the key points you should be aware of when managing employees.

### Unexpected Illness During (or Just Before) a short-term Pre-Booked Holiday

With genuine illness, employees do not choose when they fall ill, so periods of sickness and annual leave can occasionally overlap. Common colds etc. rarely impact an employee's ability to have an enjoyable rest from work, but there may be times when employees are significantly unwell or injured and are unable to enjoy or go on a pre-booked holiday from work. When this happens, employees can request that their annual leave is cancelled, and their absence from work be recorded as "absent due to illness" instead. In this case, they would retain their annual leave entitlement and pay, to be used for another time, and during their absence they would, if eligible, receive either company or statutory sick pay.

This can be frustrating, and an employer may think that, if the employee is away from work and getting rest, does it matter if they're marked as "absent" or "on holiday"? Whilst there is logic to this argument, it is important to manage and record the absence properly and to not deny an employee their statutory right because of frustration or ignorance. You cannot force an employee to take annual leave, so if they wish to cancel their annual leave and be absent from work due to sickness, they are able to do so.

However, at the same time, this does not mean that all of your employees can suddenly "fall ill" whilst on holiday and demand extra time off. You are able to edit your policies and procedures to include rules for when you will, or will not allow an employee to reclaim their annual leave. For example, you could impose a rule that states the employee must comply fully with the Company's Absence Management Procedure and notify you of their sickness on the first day it affects their holiday. You could also impose a rule that says you will only allow employees to reclaim their annual leave if the period of leave affected by sickness or injury is covered by a valid medical certificate, and that this medical certificate must be provided within a specified time frame.

### Annual Leave and Long-Term Sickness

Employers often ask what happens to holiday entitlement when an employee is absent from work on a longer-term basis, with many employers thinking that the employee being away from the workplace means that they are not "earning" their holiday entitlement. However, this is not the case. The right to holiday leave and pay is a statutory right and unaffected by an employee's illness or injury. If an employee is absent from work on a long-term basis due to illness or injury, one that removes them from the workplace for months at a time, it may be likely that they could have a condition or injury which would be deemed to be a protected characteristic, i.e. a "disability" as set out in the Equality Act 2010. Denying them their right to accrue paid leave from work due to their long-term absence, could be considered an act of discrimination. Because of this, employees continue to accrue holiday during a long-term absence, and they should be permitted to "carry over" any accrued but untaken holiday entitlement into the next holiday year, to prevent them from losing their entitlement. The only reason they're not using their holiday entitlement is because they are unable to, their illness or injury prevents them from using it, so it is not fair for say they must "lose" this entitlement in the same way you would for another employee who has simply mismanaged their holiday entitlement.

You may be thinking that, instead of allowing an employee to carry over a possibly large amount of annual leave from one year to another, it would make more sense to simply pay the employee their holiday pay. Many employers prefer this as it prevents an employee who has already been absent from the workplace from being absent from the workplace again, but technically this actually goes against what the legislation intends. Paying the employee is only meeting part of their statutory right, it does not meet the requirement to provide an employee with an opportunity to 'be away from' the workplace for rest and relaxation. If the employee requested the leave at a later date, after they have been paid for their accrued holiday entitlement, you would need to agree to this and provide the employee with a period of unpaid leave so that the right to 'be away from' the workplace has been complied with. If you didn't do this, the employee could claim that you have denied them their statutory right. To manage the impact this would have on the workplace, you should impose a reasonable time limit during which the "rolled over" annual leave can be taken. When deciding upon the time limit, consideration should be given to whether the employee had opportunity to use their annual leave before or after their illness, before the subsequent holiday year began, and consideration should also be given to the amount of leave the employee has carried over. Asking an employee to use three weeks of leave in the next month is unrealistic but asking them to use three weeks of leave over the next three months is much more achievable.

### How Can We Help

If you have any queries relating to the content of this newsletter, or any other HR related topic, please don't hesitate to contact us via [hradvice@hasslefreehr.co.uk](mailto:hradvice@hasslefreehr.co.uk)