

The furlough and holiday conundrum?

The guidance on the Coronavirus Job Retention Scheme and the "furloughing" of employees has left several unanswered questions, including those relating to holiday. Whilst we wait for further Government guidance to confirm the position, we've highlighted some of the questions you're likely to have and shared our thoughts and opinions on what the relationship between furlough and paid holiday might be. **Please note**, our thoughts here should not be taken as a statement of what the law is but, instead, should help shed some light on how this could play out.

Q: Can furloughed employees take paid holiday whilst on furlough?	A: Present HMRC furlough guidance is silent on the point. ACAS guidance suggests that their view is that holiday and furlough CAN'T be taken at the same time. But we believe that there is a good chance that furlough and holiday CAN be taken at the same time. Eligibility for furlough pay (assuming the employee was on the payroll on 28 February 2020) simply requires that the employee not be at work and not be working for you. If the employee is on paid "holiday", the requirements "not to be at work and not be working for you" would not be inconsistent with eligibility for reimbursement of furlough pay.
Q: If furlough and holiday can happen at the same time, can we INSTRUCT our employees to take holiday, even if they haven't asked to take it?	A: Yes, at least in respect of the statutory minimum 5.6 weeks (28 days for full timers) holiday. And provided that you comply with the legal requirements for length of notice to employees for holiday to be taken on particular dates. For "additional" contractual entitlement over and above this statutory minimum, it depends on what the employment contract says.
Q: If that's the case, should we furlough employees and then instruct them to take holiday at the same time?	A: No - at least not yet, unless you want to take a fairly big risk. Our recommendation is that you wait for further government guidance before considering this course of action. The risk, if our present opinion turns out to be wrong, is that a period of holiday interrupts a period of furlough; and that might mean not being able to recover furlough pay from HMRC. It is likely that further government guidance covering this point will be published before furlough leave, for most people, comes to an end.
Q: If holiday can be taken during furlough, should holiday pay be calculated by reference to the 80% of salary that can be recovered under the furlough scheme (not including commissions or bonuses etc)? Or by reference to "normal pay" as the law currently defines it?	A: Legally, the answer to this question is especially unclear. All contractual documents would need to be analysed. But our view is that holiday taken which is part of the statutory minimum 5.6 weeks holiday would be likely to have to be calculated by reference to "normal pay" as the law currently defines that term.

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<p>Q: My staff get the minimum 5.6 weeks holiday per year and are on furlough. If what you have said is right, does that mean that the Easter bank holidays will "count" as two days holiday taken, and so not have to be "given back" later in the year?</p>	<p>A: It depends what the contract says, and how your business operates. But, in principle, they may well not have to be "given back". If the contract specifies x number of days holiday entitlement "plus bank holidays" the Easter bank holidays will have already been designated as "holiday days" by the employment contract. If the contract says x number of days "including bank holidays", the position may be different. Ordinarily the safest approach would be to write to employees well in advance designating the dates of the Easter bank holidays specifically as "paid holiday". BUT...doing this right now, before further government guidance is published would represent a significant risk; and we therefore do not recommend it just yet.</p>
<p>Q: Are there any good legal reasons why your view of the likely legal position might be wrong?</p>	<p>A: Yes. Including the not so small matter of one possible interpretation of EU law. And we are humble enough to acknowledge that we might well prove to be wrong once further guidance or legislation is published. But we are willing to set out our view at this stage just in case it helps you think in advance about your staff challenges at this exceptionally difficult time for all employers.</p>
<p>Q: I read at the end of March about some new law which allows employees to carry over unused holiday so it can be used in the next two holiday years. Does that mean that all employees now always have the right to choose not to take their holiday in this holiday year?</p>	<p>A: No. You are referring to The Working Time (Coronavirus) (Amendment) Regulations 2020, which we'll just call "the Regulations". The Regulations came into force on 26 March 2020. In practical terms, the Regulations essentially permit carryover of "the first 4 weeks" of untaken holiday where an employer can't, for "good reason", permit the employee to take all holiday entitlement in this holiday year. But that doesn't mean that employees always necessarily have the right to insist on carryover in all circumstances.</p>

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