**Calculating holiday entitlement for part-year and irregular hours workers**

Consultation – closing date 9 March 2023

*Submission completed on behalf of the Employment Law Committee of the Birmingham Law Society*

1. **What is your name?**

Birmingham Law Society

1. **What is your email address? If you enter your email address when responding online then you will automatically receive an acknowledgement email when you submit your response.**

[Charlie – please can you add in the appropriate email address for consultation responses from the Birmingham Law Society]

1. **What is your organisation?**

A law society representing more than 5,500 legal professionals across Birmingham and the Greater Midlands.

1. **Are you happy for your response to be published?**

* **Yes**
* **Yes, but without identifying information**
* **No, I want my response to be treated as confidential**

[Charlie – please can you confirm the BLS’s preferred approach here to consultation responses.]

1. **Are you (select the appropriate option):**

* **An individual**
* **An employer**
* **Representing employers’ or employees’ interests**
* **Other (please specify)**

Other. This response is submitted on behalf of the Employment Law Committee of the Birmingham Law Society. It is not therefore submitted in the capacity of employer or worker, nor as representative for either, but rather as an interested party commenting on the employment law implications for both employers and workers alike. We have therefore responded to questions addressed to either employer or worker where we have comments to make.

1. **Are you (select the appropriate option):**

* **An employer or someone who is responding on behalf of an employer**
* **Employed (you are an employee or a worker)**
* **Self-employed**
* **Unemployed – Looking for work**
* **Unemployed – Not looking for work**
* **Retired**
* **Not looking for work – Other (please specify)**

Not looking for work – Other. This response is submitted on behalf of the Employment Law Committee of the Birmingham Law Society. It is not therefore submitted in the capacity of employer or worker, nor as representative for either, but rather as an interested party commenting on the employment law implications for both employers and workers alike. We have therefore responded to questions addressed to either employer or worker where we have comments to make.

**If you are an employer:**

1. **How would you classify your organisation?**

* **Private sector organisation**
* **Public sector organisation**
* **Charity or voluntary sector organisation**
* **Other (please specify)**

[Not applicable so no response provided]

1. **How many people work for your organisation?**

* **Micro business (<10 people)**
* **Small business (10-49 people)**
* **Medium business (50-249 people)**
* **Large business (250+ people)**
* **Don’t know**

[Not applicable so no response provided]

**If you are employed:**

1. **What type of organisation do you work for?**

* **Private sector organisation**
* **Public sector organisation**
* **Charity or voluntary sector organisation**
* **Other (please specify)**

[Not applicable so no response provided]

1. **How many people work for your organisation?**

* **Micro business (<10 people)**
* **Small business (10-49 people)**
* **Medium business (50-249 people)**
* **Large business (250+ people)**
* **Don’t know**

[Not applicable so no response provided]

**If you are an agency worker:**

**11. What are your contractual arrangements?**

* **Contract for services with employment business**
* **Contract of service (employment) with employment business**
* **Contract for services with umbrella company**
* **Limited company contractor / personal service company**
* **Other (please specify)**
* **Don’t know**

[Not applicable so no response provided]

**12. How often do you receive holiday pay and entitlement**

* **During assignments**
* **At the end of assignments only**
* **Other (please specify)**
* **Don’t know**

[Not applicable so no response provided]

**If you represent employers or employees:**

**13. Who do you represent?**

* **A trade union**
* **An industry or employers’ association**
* **Other (please specify)**

Other.This response is submitted on behalf of the Employment Law Committee of the Birmingham Law Society. It is not therefore submitted in the capacity of employer or worker, nor as representative for either, but rather as an interested party commenting on the employment law implications for both employers and workers alike. We have therefore responded to questions addressed to either employer or worker where we have comments to make.

1. **For employers: If you employ workers with irregular hours, how do you calculate their holiday entitlement?**

We are unable to comment on any specific calculation as we are not responding as an employer. We note that under the present legislation there is no need to calculate entitlement for statutory holidays as it is a flat 5.6 weeks’ leave for workers who are employed throughout the whole of the holiday year. It is, however, of note that there is no formal statutory mechanism for converting 5.6 weeks’ leave into days or hours for irregular workers and this can lead to administrative difficulties in expressing holiday entitlement in anything other than weeks (or fractions of a week).

1. **For workers: If you work irregular hours, how is your holiday entitlement calculated?**

See response to question 14 above.

1. **For employers: Would you agree that the information you currently collect to calculate holiday pay would be sufficient to calculate holiday entitlement using a reference period?**

* **Strongly agree**
* **Agree**
* **Neither agree nor disagree**
* **Disagree**
* **Strongly disagree**
* **Don’t know**

**Please explain your answer**

Disagree

Although in theory the information employers currently collect should be sufficient given their wider obligations to retain records for purposes such as NMW compliance and tax purposes, whether this information is accessible in a format that lends itself to calculating holiday entitlement in the ways proposed in the consultation will depend on the configuration of the individual payroll system. For example, some payroll systems collate information on a monthly basis but do not break down into hours worked each week (and vice versa). Therefore, there could be administration issues for employers in complying with the new proposed calculations depending upon on how their payroll system collates data and whether they are calculating entitlement under the annual “52 weeks” system or first year “monthly” system.

1. **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?**

* **Strongly agree**
* **Agree**
* **Neither agree nor disagree**
* **Disagree**
* **Strongly disagree**
* **Don’t know**

**Please explain your answer**

Agree

We agree in principle that this would be the fairest way to calculate entitlement when used in conjunction with the current statutory regime we have for calculating holiday pay (which will remain unchanged by the proposals). However, there is a concern that having different methods (and periods) to calculate statutory holiday entitlement and statutory holiday pay may be confusing for employers and workers and risks mistakes being made. It also increases the administrative burden on employers as, at present, they are not required to carry out any calculation in respect of statutory holiday entitlement (it is a flat 5.6 weeks).

Under the current proposals, employers will be required to carry out three separate calculations for part-year and irregular hours workers, namely:

* Calculation of statutory holiday entitlement (once each year/once each month for first year workers)
* Calculation of holiday pay (each time holiday is taken)
* Calculation of the average length of the working day for irregular workers (it is unclear how often the consultation is envisaging this exercise be carried out)

This would appear to increase the administrative burden upon employers. Therefore, if the aim of the proposals is (at least in part) to ease the burden, an alternative approach would be to simplify the statutory holiday pay calculation. For example, the same statutory holiday entitlement could be applied for all workers irrespective of the hours worked and then 12.07% could be used to calculate the pay received whilst on holiday. This would only require one calculation to be carried out when leave was taken. Although this may, on the face of it, appear to be controversial as it would result in part year and irregular hours works receiving a lower rate of pay whilst on holiday than during their working weeks (as this percentage takes into account any no-pay weeks), proportionally they will still receive the same amount of holiday pay over the course of the year as they would if the calculations in the current proposals are adopted. This is because their statutory holiday entitlement would not be reduced simply because they do not work in certain weeks.

If we take the example of Chad and Danica as cited in box 2 in the consultation paper, Danica works 696 hours in total over 52 weeks. Using the 12.07% method to calculate her holiday entitlement gives a total of 84 hours holiday per year. If we assume a notional rate of pay of £10 per hour (for ease of calculation) this would equate to £840 holiday pay over the course of the year.

However, if the simpler holiday pay calculation was used (using the same notional hourly rate of pay):

* Average salary over the previous 12 months multiplied by 12.07%
* (696 hours x £10 p.h.) x 12.07% = £840

The total amount of holiday pay received over the course of the year is still £840.

The difference is that in the first example, Danica is entitled to 84 hours of leave (approx. 3.6 weeks’ based on her working week of 23.2 hours) at a rate of £10 per hour of leave; in the second example, Danica is entitled to 5.6 weeks’ leave at a weekly rate of £150. This £150 is the average weekly rate taking into account both Danica’s worked weeks (30 weeks) and unworked weeks (16.4 weeks) – 696 hours a year / 46.4 working weeks per year x £10 per hour = £150 pay per week averaged across all weeks of the year, including unworked weeks.

Using the simplified pay calculation method, it is acknowledged that employers would need to accommodate a higher amount of statutory annual leave (5.6 weeks) than is proposed under the consultation; however, this reflects what part year and irregular workers are entitled to at the moment and so does not result in an increase in statutory leave entitlement overall. It does, however, result in a decrease in costs to employers as it reduces holiday pay entitlement compared to the current position; again, the reduction is commensurate with the cost-reductions under the current proposals. More significantly, it is considerably quickly and easier to administer, and so would likely save considerable administration costs, increase transparency for workers and reduce the risk of mistakes.

Further administrative savings could be introduced by limiting when calculations needed to be carried out. For example, for workers with more than a year’s service, could holiday pay be based on the previous year’s working hours (as is suggested for statutory holiday entitlement), allowing for one calculation to be run at the start of the year rather than each time holiday is taken? Because of the potential for abuse (see question 18 below), it would be sensible to require a reconciliation at the end of the year to allow for over/underpayments to be corrected.

1. **Would you agree that a fixed holiday entitlement reference period would make it easier to calculate holiday entitlement for workers with irregular hours?**

* **Strongly agree**
* **Agree**
* **Neither agree nor disagree**
* **Disagree**
* **Strongly disagree**
* **Don’t know**

**Please explain your answer**

Agree

We agree in principle, if the current system for calculating holiday pay is retained, as a fixed holiday entitlement reference period allows for the calculation to be done at the start of the holiday year and means that the entitlement is proportionate to the hours the worker worked in the previous year. However, please see our comments above as to whether this approach is the right way to address the current issues or whether a simplification of how holiday pay is calculated should be considered.

One area of concern regarding using the hours worked in the previous year to calculate entitlement is that it could be open to abuse. For example, an employer could deliberately keep the worker’s hours low in the first year of employment in order to reduce the holiday entitlement in both the first and the second years. If the worker’s hours were then significantly increased in the second year, the holiday entitlement would be disproportionately low compared to the current hours worked. Conversely, a worker whose hours substantially reduced in year 2 would get the benefit of an unfairly high leave entitlement. Therefore, with this approach, it is likely that there would need to be a system for reconciliation at the end of each year to reflect the hours actually worked that year. We recognise that to do so would, however, involve another averaging calculation and therefore again increase the administrative burden on employers (as well as increasing the risk of mistakes and potentially decreasing transparency for workers).

1. **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?**

* **Strongly agree**
* **Agree**
* **Neither agree nor disagree**
* **Disagree**
* **Strongly disagree**
* **Don’t know**

**Please explain your answer**

Agree

We agree that, if the current proposals to split out statutory holiday entitlement and holiday pay are retained, this would seem to be the most sensible option. Anything else would involve hypothesising about what hours a worker may work in any given month. The proposal as it stands, provides clarity on the amount of holiday accrued proportionate to the number of hours worked in the previous month.

1. **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?**

* **Strongly agree**
* **Agree**
* **Neither agree nor disagree**
* **Disagree**
* **Strongly disagree**
* **Don’t know**

**Please explain your answer**

Agree

We agree that, from an administrative perspective, this would be a simpler method than having to calculate the average daily working hours for each day of the week. However, if the starting premise is that leave is calculated in weeks, and an employer operates over five days a week, an alternative could be to treat any day in which leave is taken as one fifth of a week for leave purposes.

1. **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?**

* **Strongly agree**
* **Agree**
* **Neither agree nor disagree**
* **Disagree**
* **Strongly disagree**
* **Don’t know**

**Please explain your answer.**

Agree

We agree in principle as it is one simple calculation. However, the reference in this question to 12.07% being used to make it easier to calculate both holiday entitlement *and* holiday pay has the potential to cause for confusion for employers. The reference to both holiday pay and holiday entitlement means it is likely to be interpreted by employers who use agency workers to mean that they can also use the 12.07% method to calculate holiday pay. We understand that this is not the intention of this consultation and that instead the averaging provisions of a week’s pay as set out in sections 221, 222, 223 and 224 of the Employment Rights Act 1996 are still proposed be used for the purposes of calculating holiday pay. (We have, however, set out above our comment son simplifying the calculation of holiday pay and these comments would be equally applicable to agency workers.)

1. **Do you have any further comments about calculating holiday entitlement for agency workers?**

**Please explain your answer**

[No additional comments to make.]