

Q and A briefing on employer and employees responsibilities in the wake of Coronavirus

On 23 March 2020 the Foreign and Commonwealth Office (FCO) updated its advice for travellers to return to the UK where they can do so through commercial flights. On Monday 30 March 2020 the Government then announced a repatriation package to rescue those stranded around the world. As part of our ongoing briefings for trade unions and workers we address the employment rights of those who are stranded abroad as a consequence of the outbreak of Coronavirus and consider the new legislation dealing with carrying over statutory annual leave.

What pay is an employee entitled to if they are abroad on holiday and are trying to return to the UK?

Assuming the worker is well and that they are still on annual leave they continue to be entitled to be paid holiday pay for the full period of their annual leave.

What about employees on holiday abroad who are well but have not been able to get a commercial flight home and whose leave has expired. Are they still entitled to be paid?

The starting point is that employers are only obliged to pay employees when they are working or on authorised leave such as holiday or sickness absence. However, this is subject to the employee's contract of employment. Therefore it will be necessary to check the contract of employment or where a trade union is recognised, any relevant collective agreement, to see if it provides for paid time off where an employee is unable to get to work due to travel disruption. This could include a right to take compassionate leave or emergency leave. In the absence of any contractual right to be paid in these circumstances the general rule is that there is no obligation on an employer to pay an employee who is unable to work. These though are highly unusual circumstances and where there would still be work for the employee to do when they return, it would be good industrial practice to continue to pay the employee given the reason for their absence is outside of their control. This could include a mixture of normal pay as a goodwill gesture, allowing the employee to treat any further absence as paid annual leave or where the employee has exhausted their annual leave a period of unpaid leave. However where the employer refuses to pay the employee, in the absence of a clear right to be paid under the terms of the contract of employment or collective agreement, there is unlikely to be a legal remedy.

Where an employee was advised to go into self-quarantine for 14 days when they arrived abroad to start their holiday, what should they be paid?

Although, there are no specific provisions covering the situation of individuals who are detained abroad they could argue that they should be treated in the same way as those who self-isolate and as such be entitled to sick pay. In particular, government [guidance](#) for British people returning from abroad, states that individuals should follow the local authority advice of the Country they are based at the time if they are advised to go into quarantine.

However, if an employee is not entitled to contractual sick pay or if a further period of sickness absence would mean that they would hit triggers in a sickness absence policy, they may decide to remain on paid annual leave.

Can an employee who is in quarantine request that their annual leave be treated as sickness absence?

As stated above, an employee who is in quarantine in accordance with the local authority advice of the Country they are based should be treated as being on sick leave. A worker can request that the period of statutory annual leave which coincides with the period of quarantine, be treated as sick leave rather than holiday. Whether a worker wishes to request that the employer treat the period of annual leave as sick leave will very much depend on the amount of sick pay they are entitled to and whether they have exhausted their contractual sick pay entitlement. Workers will also wish to take into account previous periods of sickness absence in case they are approaching any triggers in a sickness absence policy.

If a worker is on sick leave what happens to the annual leave they have not been able to take before the end of the leave year?

The Working Time (Coronavirus) (Amendment) Regulations 2020 which came into force on 26 March 2020 provide for some or all of the four weeks statutory annual leave to be carried over for a period of two years where it was not reasonably practicable to take some or all of the statutory leave as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society). While it is unclear what circumstances are covered by the term “not reasonably practicable” it is widely drafted. ACAS suggests that the following should mean that it was not reasonably practicable for the worker to take the leave:

- where they are self-isolating and too sick to take holiday before the end of their leave year.
- where they are laid off or are on furlough leave.
- where they have been required to continue working and could not take paid holiday.

Where a worker is entitled to additional contractual leave the employer may argue that as the annual leave is contractual they do not have a right to carry this over. There is case law which has held that an individual's holiday entitlement must be considered a "composite whole", with

each day's leave consisting of entitlement under all sources taken together. The worker should therefore assert that the holiday leave they were unable to take is the statutory four weeks leave and that they should be allowed to carry it over for a period of two years on the basis that the reason they were not able to take it was because they took sickness absence as a result of the effects of coronavirus. If the employer does not agree the worker should lodge a grievance. Where the union is recognised it may be possible to negotiate a collective resolution on how leave may be carried forward.

What can a worker do if the employer refuses to allow them to take sick leave while they are self-isolating and insists that they take holiday?

The courts have held that workers are allowed to take annual leave in situations where they would otherwise be on sick leave and on reduced sick pay. It is for the worker to choose whether to take sick leave during a period of the statutory annual leave. However employers cannot make a worker to take annual leave when they are absent on sick leave.

What happens if a worker is stranded abroad while on holiday and who has been advised to quarantine, but the employer refuses to allow them to treat the holiday period as sick leave?

Where the employer rejects a request to treat the holiday period as sick leave as a result of the worker being advised to quarantine while abroad they should lodge a letter of protest confirming that they do not accept that the leave should be treated as holiday and request that it should be carried over into the next annual leave year. They should also lodge a grievance on the ground that the employer has acted in breach of the implied term of trust and confidence. If the employer refuses to carry over the annual leave to the next leave year they may have a legal claim for a declaration as to their entitlement to annual leave.

Where a worker is sick during a period of contractual annual leave as stated above, it can be argued that there is case law which allows an employee to determine which period of leave should be carried over.

Can an employee who was required to self-quarantine be allowed to work on their return to the UK?

The general position is yes if they are fit and well to do so and they work in a business that has not been required to close. Government [guidance](#) requires workers to work from home and states that employers should take every possible step to facilitate their employees working from home. Where they work in an industry which means they cannot work from home, provided the individual is well and neither the individual nor any of their household are self-isolating they

can travel to work. In that case the employer must comply with their duty to ensure the health, safety and welfare of all workers by having safe systems in place to prevent the risks from coronavirus including ensuring that social distancing is maintained.

Can workers be required to take annual leave when they are on furlough leave?

The government's guidance on the job retention scheme does not address this directly. However, as the employer cannot claim for holiday pay which must be paid at the worker's normal salary (or an average over 12 weeks (52 weeks on or after 6 April 2020) for workers who do not have normal working hours) it seems unlikely that a worker who is on furlough leave will be able to take holiday leave during the period of furlough leave. Our initial view, (based on the governments guidance which states that those who have been furloughed have the same rights as they did previously), is that the right to holidays throughout the period of furlough leave should accrue unless and until there is further clarification.

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