

Overview of the Holiday Legislation

What you need to know

Overview

In 2014, two employment tribunals; *Fulton v Bear Scotland* and *Lock v British Gas*; resulted in two new rulings regarding calculation of holiday pay. They state that overtime and commission **should** be included in the holiday pay calculation. This document provides an overview of the rulings and explains how they affect holiday pay.

Background

An overview of the legislation affecting holiday pay is provided below:

Act	Effect on holiday pay/payroll
Employment Rights Act	Employees should be provided with a written statement surrounding the terms and conditions of their employment. There is no guidance surrounding the calculation of holiday pay, other than it should be done consistently. Employees cannot have unlawful deductions of wages i.e. employer taking money from an employee's wage other than the statutory requirements (this only applies to certain pay elements)
European Working Time Directive	All employees throughout Europe are entitled to a minimum of 4 weeks paid annual leave
UK Working Time Regulations	In the UK employees are entitled to a minimum 5.6 weeks of paid leave to take into account bank holidays, which account for the additional 1.6 weeks of paid leave

The four weeks associated with the European Working Time Directive is often referred to as statutory leave and cannot be carried over into another holiday year. Employees should be encouraged to take these four weeks as a minimum. The taking of statutory leave is the basis for the appeal raised by *Lock* in *Lock v British Gas*.

Fulton v Bear Scotland

Fulton argued that not including compulsory overtime in the calculation of holiday pay was an unlawful deduction of wages, as overtime was part of the normal remuneration package. In November 2014 the European Appeal Tribunal (EAT) ruled in favour of *Fulton* and stipulated that holiday pay should include compulsory overtime in the calculation. The ruling does not affect voluntary overtime.

What is compulsory overtime?

Compulsory means the employee has no choice but to work the overtime. This includes:

Type	Definition
Guaranteed overtime	Contract of employment requires the employer to offer overtime and the employee to work it
Non-guaranteed overtime	The employee is required to work the overtime, but the employer is not required to offer it
Travel allowances	Taxable payment elements made for traveling time

Any overtime that the employer is NOT required to work is considered voluntary and outside of this ruling.

Lock v British Gas

The *Lock v British Gas* ruling stipulated that commission should be taken into account when calculating holiday pay. The *Lock* case argued there was a barrier to taking statutory holiday due to reduced pay (lack of commission) during periods of holiday. The European Court of Justice (ECJ) found in *Lock's* favour.

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Rules around the calculation of holiday pay

1. Calculated on a 12 week average
2. Applies to overtime and commission
3. Exclude periods of nil payments
4. Exclude statutory payments
5. Applies only to the four weeks holiday associated with the European Working Time Directive, **NOT** the additional 1.6 weeks in the UK Working Time Regulations

How does this affect holiday pay?

The rulings have not been written into UK legislation yet. The government have a taskforce in place to interpret the ruling and detail how it should be implemented.

At present UK companies have 4 options:

1. Do nothing and wait for further clarification
2. Pay annual leave based on average earnings over a 12 week period
3. Offer a two-tiered holiday pay system basing the first 20 days on average weekly earnings and the remaining 1.6 weeks holidays on static earnings
4. Pay additional holiday pay based on a percentage of all non-guaranteed overtime

Implementing a solution

If employers opt to act on the ruling there are a number of things that you need to consider.

There is no clear definition of how to calculate the payments, other than an average of 12 weeks. This poses questions such as:

1. What constitutes a day's or an hour's holiday pay?
2. How is holiday calculated for monthly paid individuals?
3. If a statutory payment is included in a pay period, should the whole pay period be excluded from the calculation?

The IRIS Holiday Pay Module provides a flexible solution, allowing the user to define how the payment should be calculated. Individual pay elements can be selected, future-proofing the solution, should other payment elements be affected in the future. This gives the user full control over the calculation.

The IRIS Holiday Pay Module will be updated in line with any changes to legislation allowing your business to remain compliant.

To find out more about the IRIS Holiday Pay Module, get in touch with us on 0844 815 5676