

Calculating holiday entitlement for part-year and irregular hours workers: consultation

Consultation questions

1. What is your name?

Tania Bowers

2. What is your email address?

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3. What is your organisation?

Association of Professional Staffing Companies (Global) Ltd

4. Are you happy for your response to be published?

- Yes

5. Are you (select the appropriate option):

- Representing employers' or employees' interests

6. Are you (select the appropriate option):

- An employer or someone who is responding on behalf of an employer

If you are an employer:

7. How would you classify your organisation?

- Private sector organisation

8. How many people work for your organisation?

Small business (10-49 people)

If you represent employers or employees:

13. Who do you represent?

- An industry or employers' association

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

Not applicable to APSCo's employees as employees work regular hours. Response is largely limited to impact on agency workers and umbrella company employees of our recruitment company and outsourcing members supplying services into professional skilled sectors of economy: STEM, general professional, finance and banking, clinical healthcare, qualified teaching and social work.

16. 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?

- Agree

17. 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

The main inequity in holiday entitlement between irregular hour and part year employees/ workers and regular hour workers/employees arises from the legal position confirmed by the Supreme Court in the Harpur Trust case. Namely, that weeks without work in a holiday entitlement reference period must not be taken into account when calculating holiday entitlement for irregular hours and part year workers.

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

- Neither agree nor disagree

Holiday entitlement and pay for agency workers is generally accrued on an hourly or daily basis depending on hours actually worked and contractual rate (whether calculated daily or hourly). This is a form of "fixed holiday entitlement reference period" so we agree with the question, but the reference period itself to be used is key.

It would be fair to adopt the approach suggested for agency workers, namely that they accrue holiday entitlement month to month based on 12.07% of the hours worked in that month for everyone, not just agency workers. The annual calculation could lead to unfairness because workers whose working hours have increased from one year to the next will find that their holiday entitlement and pay is less than 12.07% of the hours, they are working that year. Arguably the month-to-month accrual proposal (currently proposed to be limited to agency workers and other workers who are in their first year of employment) would be fairer and simpler to understand, even though it makes holiday entitlement difficult to predict in advance.

19. 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?

- Agree

That is a method broadly consistent with standard contractual UK holiday pay and leave clauses. However, it is highly unlikely that a worker's first year of employment will coincide exactly with the employer's holiday year, in which case it is not clear which rules the government proposes would take precedence. The government will need to clarify this.

The fairest approach is to accrue 12.07% of their hours worked during that month.

20. 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?

- Disagree

It is difficult for an employee to easily calculate their entitlement and could result in unfair variations in holiday entitlement. Accruing entitlement on the 12.07% basis of hours worked is simple to calculate and to explain.

This proposal might prove unnecessarily complicated. The simplest solution may be simply to agree with workers how many hours they are going to take on a case by case basis, rather than impose new statutory concepts like an average day.

21. 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?

- Agree

This will result in a fairer, more accurate calculation of holiday entitlement for agency workers and will make it easier to calculate their holiday entitlement and holiday pay.

There are two further points to be made:

1. This calculation referred to in qu. 21 should also clearly apply to agency workers employed by umbrella companies or recruitment companies under contracts **of** service.

Note that in the consultation there is reference in agency workers to contracts **for** services "**employed**" by umbrella companies. The traditional engagement structure within the UK umbrella market is for agency workers to be employed on contracts **of** services. Anecdotally we are being told by members that some umbrella companies are engaging new contractors on contracts **for** services as **workers** partly to mitigate their liabilities in respect of holiday pay and entitlement. We anticipate that some umbrella companies may also be seeking to **transfer** existing employees on employment contracts to contracts for services, thus potentially invoking "fire and rehire" considerations.

Umbrella companies are adopting the practice used by the recruitment industry of "no contract between assignments" and anecdotally we know that members and umbrella companies are issuing P45s to workers at the end of an assignment so there can be no accrual of liability.

2. Across APSCo's Compliance + sectors; teaching, clinical healthcare and qualified social work, atypical working is standard – for example an agency worker teacher providing services to multiple schools via multiple agencies on an ad hoc basis. Our members in these sectors tell us that the calculation referred to in Qu21 will still be problematic to calculate, administrative and complex to explain to their agency workforce.

Their preference is for Government to recognise the practice of rolled up/advanced holiday pay, which it is now able to do as part of its review of EU derived regulation.

As Government is aware the practice of "rolled up" holiday pay or "advanced holiday pay" is widespread within the recruitment and umbrella employer market, despite rolled up holiday pay being unlawful. This has been the practical solution adopted by engagers to the problem this consultation is thankfully seeking to resolve. It is also popular with workers/umbrella employers as ensures worker pay is received by the worker and not kept by the engager, pursuant to contract, at the end of a holiday period or the end of an engagement. We recognise it can raise issues of employees/workers not being aware of, or prompted to take their statutory leave entitlement. This can be dealt with by guidance, education and process.

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

See answer to Qu 21 above.