

CORPORATE AND COMMERCIAL

COVID-19: Practical Considerations: Annual leave and furlough

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Guidance for companies
in Northern Ireland.



What happens to annual leave during furlough?

The Coronavirus Job Retention Scheme Guidance ("CJRS Guidance") confirms that employees continue to accrue annual leave whilst on furlough. Any annual leave taken during furlough should be paid at the worker's "normal" rate of remuneration i.e. not the reduced 80% rate under the CJRS. However, employers will only be able to recover 80% of the holiday pay from the government.

Can employees be prevented from taking annual leave when they are furloughed?

Employers can request their employees to defer taking annual leave, in accordance with Regulation 18(2)(b) of the Working Time Regulations (Northern Ireland) 2016 ("WTR(NI) 2016"). Employers may wish to do this because employees will be entitled to their usual holiday pay during annual leave and employers will be obliged to pay the additional amounts due to the employee over the 80% (subject to £2,500 cap) payable by the government under the CJRS.

On 24 April 2020, the Working Time (Coronavirus) (Amendment) Regulations (Northern Ireland) 2020 ("2020 Regulations") came into force. The 2020 Regulations amend the WTR(NI) 2016 and

permit annual leave that could not be taken as a result of Coronavirus to be carried into the following two leave years. However, carry over is limited to the 20 day basic entitlement under Regulation 15 of the WTR(NI) 2016.

Can employers require employees to take annual leave when they are furloughed?

Employers may want their employees to use annual leave whilst on furlough to diminish the amount of annual leave that has accrued when business picks up again.

Regulation 18(2)(a) of the WTR(NI) 2016 enables employers to require workers to take their annual leave at a specific time, provided that they are given twice the amount of notice of the period of leave that they are being asked to take.

For example, if an employer plans to close for a week (being five working days), employees should be given ten working-days' notice of the closure. This means that employers could ask employees who are on furlough for three weeks to take the third week as annual leave, provided that they were notified of this at the beginning of the furlough period.

This document is a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

What happens to bank holidays that occur during furlough leave?

The CJRS Guidance specifically deals with bank holidays during furlough and distinguishes between employees who would usually work bank holidays and those who would usually have them as part of their leave.

If an employee usually works bank holidays then the employer can agree that this is included in the grant payment. Alternatively, if the employee usually takes the bank holiday as leave then the employer would either have to top up their usual holiday pay, or give the employee a day of holiday in lieu.

However, as set out above, employers may require that employees defer taking holidays during furlough, provided that employees are provided with sufficient notice. If this happens,

employees must be permitted to take the holiday at a later date. It may also be possible for untaken bank holidays to be carried over to the following two leave years in accordance with the 2020 Regulations.

How can employers deal with holiday requests when employees return to site?

Following the end of lockdown, employers may not want their employees taking annual leave as they try to rebuild their business and restore normality. Employers can prevent employees from taking annual leave at particular times provided they give the correct notice to their employees, as set out above.

However, employers should be aware that the 2020 Regulations permit employees to carry over their basic annual leave entitlement to the following

two leave years if they were unable to use all or part of it as a result of the effects of Coronavirus. The carry-over provisions are still in their infancy and specific advice should be sought if this situation arises.

Upon return to site, employers should ensure that they:

- (a) have clear communication channels with their employees in relation to annual leave;
- (b) act in a manner that is consistent and fair to all employees when dealing with leave requests; and
- (c) monitor their business needs and keep the position on annual leave under review.

KEY CONTACTS



Alan Taylor
Partner
D: +44 28 9026 2671
M: +44 77 7245 9461
alan.taylor@arthurcox.com



William Curry
Partner
D: +44 28 9026 5881
M: +44 79 1890 6415
william.curry@arthurcox.com



Cahal Carvill
Partner
D: +44 28 9026 2659
M: +44 75 8788 2055
cahal.carvill@arthurcox.com



Chris Ritchie
Partner
D: +44 28 9026 5541
M: +44 79 1890 6420
chris.ritchie@arthurcox.com



Rosemary Lundy
Partner
D: +44 28 9026 2673
M: +44 79 1890 6405
rosemary.lundy@arthurcox.com



Emma-Jane Flannery
Partner
D: +44 28 9026 5897
M: +44 79 1890 6373
emma-jane.flannery@arthurcox.com