

2 DEC 2020

# 3CS Newsletter

## Employment

### CAN FIRMS ALLOW MORE HOLIDAY CARRY-OVER THIS YEAR?

How much holiday can furloughed staff or staff who can't take a break carry over to the next leave year? This simple question has a complicated answer. But firms will still need to address it, particularly if their staff have built up a lot of accrued holiday (sometimes while on furlough) and their holiday year-end looms on 31 December.

Employers can in general require staff to take holiday at certain preferred times and refuse holiday requests but that may not help if many employees all seek leave at the same time. Employers are not allowed to offer payment instead of statutory leave: the basic rule is 'use it or lose it'. If an employer offers more than the statutory minimum, the excess can in principle be 'bought out' - but what if this option isn't available or doesn't solve the problem? To keep business running smoothly, one obvious answer may be to release a bit of pressure and allow staff to take their holiday in the following year instead.



To examine how we can do this, it is important to understand that leave comes in three different types. There are two types of statutory leave: four weeks' leave (that is, 20 days for a full-timer) granted under the European Working Time Directive ('Basic Leave') and additional statutory leave of 1.6 weeks (that is, eight days for a full-timer). Anything over that is a contractual top-up, subject to whatever businesses agree with their staff.

The positive news is that any leave over four weeks can normally be dealt with by agreement. Firms usually have policies for carrying days over, limiting the number of days to five or eight and perhaps laying down a condition that it has to be taken within a certain period afterwards. Businesses could amend staff contracts, temporarily if necessary. The problem lies in the four weeks of Basic Leave that comes from the Directive because this has to be taken in the current holiday year.

Recognising that some workers would struggle to take their four weeks' Basic Leave this year, the government introduced The Working Time (Coronavirus) (Amendment) Regulations 2020 in March to allow for carrying 'Basic Leave' over for two holiday years after the current one. The new rule allows carry-over if, 'in any leave year it was not reasonably practicable for a worker to take some or all of [their] leave entitlement as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society)'.

The exact scope of this is unclear. Some have expressed the view that being on furlough leave is enough to trigger the new regulations but that does not seem to accord with the government's guidance. If the guidance is correct on the law, one solution is to require furloughed staff to take annual leave during furlough (but note that any period of holiday always has to be paid at the full rate).

Assuming that some Basic Leave can be carried over, you still have to work out how much. This question is affected by furlough leave and whether or not bank holidays are normally worked: five of them fell within the total furlough period. Over any Basic Leave that is left, there is some legal uncertainty as to how much of it *can* be carried over and that opens up the question as to whether Basic Leave is 'used up' first in the holiday year, leaving more days to carry over. One answer to this problem lies in contract. If your firm's contract or policy does not contain such a provision, you should consider amending it so that it does. That way, you will have more latitude to allow carrying over of holiday without having to rely on the new regulations.

If you would like advice on amending contracts or how to require staff to take leave or simply how best to manage the excess holiday accrued by your staff during the public health emergency, please contact us.

**John Clinch**  
Senior Associate, Employment

E: [john.clinch@3cslondon.com](mailto:john.clinch@3cslondon.com)



This newsletter is designed to provide general information only. It does not constitute legal or other professional advice and thus should not be relied on. Definitive advice can only be given with full knowledge of all relevant facts. If you would like to discuss any aspect further, please contact us.

Definitive advice can only be given with full knowledge of all relevant facts. If you would like to discuss any aspect further, please contact us.

3CS Corporate Solicitors Limited is a Solicitors Practice, authorised and regulated by the Solicitors Regulation Authority, No: 597935.

The registered office of 3CS Corporate Solicitors Ltd is 35 New Broad Street, London EC2M 1NH. Mainline Tel: 0207 194 8140 Web: [www.3cslondon.com](http://www.3cslondon.com)

