



Law Society  
of Scotland

# Consultation response

## Calculating holiday entitlement for part-year and irregular hours workers

March 2023



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Department for Business, Energy and Industrial Strategy consultation: Calculating holiday entitlement for part-year and irregular hours workers.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## General Comments

We wish to make a general observation that provision will also need to be made for termination of employment. It is not clear whether, for example, an irregular hours worker be entitled to be paid in lieu of their accrued holiday on termination of employment and if so, how will this entitlement be calculated. Consideration needs to be given to workers who have completed a full holiday year's service, and those who have yet to work a full holiday year.

## Consultation Questions

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*Note- Questions 1-6 are answered by the above information and by covering email. Questions 7-16 are not applicable.*

### **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?**

#### **• Agree**

Please explain your answer.

It is our view that, in line with general fairness principles, it is appropriate for holiday entitlement to be proportionate to the hours actually worked by workers. As a result, we agree that all weeks worked within a

<sup>1</sup> [Calculating holiday entitlement for part-year and irregular hours workers: consultation \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/consultations/calculating-holiday-entitlement-for-part-year-and-irregular-hours-workers)

fixed reference period should be used to calculate holiday entitlement to ensure that the average arrived at is reflective of a whole year. This method provides clarity and ensures that holiday entitlement is proportionate to the time spent working.

However, consideration should be given to the treatment of employees who are on family leave or absent on sick leave during the holiday entitlement reference period and therefore remain employed during this period but not actively 'working'. It may be indirectly discriminatory (on grounds of sex or disability) if employees who are absent for either of those reasons receive a lower holiday entitlement in the holiday year following their absence. Accordingly, it may be appropriate to exclude such periods from 'weeks without work' for the purposes of calculating the holiday entitlement. We recognise that this will not be easy to achieve in the case of sickness absence, as it will not always be clear which absences are disability-related.

In addition, the position in respect of which "workers" will be included within this category and to whom the holiday entitlement calculation will apply will need to be clarified. The current legislative framework with the Working Time Regulations 1998 makes reference to "workers" only and does not provide a distinction between those who work irregular hours (including part year workers) and those who have regular hours. Careful consideration will need to be given to the definitions used to determine who is subject to the holiday entitlement calculation and how other types of worker (e.g. part time workers) may or may not be impacted by that definition.

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

### **• Agree**

Please explain your answer.

We agree that using a set reference period of the 52 weeks worked in the previous holiday year to calculate the following year's holiday entitlement on paper makes it easier to calculate holiday for irregular hours workers and would ensure consistency across various employers. Additionally, it is our view that the proposed method would provide clarity about a worker's holiday entitlement at the start of the relevant holiday year.

We do however note some complexities in practice:

- The proposed changes would mean employers have to grapple with two different reference periods (a fixed reference period for holiday entitlement and a rolling reference period for holiday pay) and two different calculations when calculating a worker's holiday entitlement and holiday pay. There would also be differences in how those reference periods operate – for example, weeks with no work would count for holiday entitlement purposes and weeks with no work would not count for holiday pay purposes. Different rules would apply where workers do not yet have a full year's service. Having so many different reference periods and calculation methods is confusing and time-consuming to administer. Broader

changes to holiday entitlement and pay (at least for irregular hours workers) could simplify the overall process.

- A large number of irregular hours workers are not engaged for a period of longer than 52 weeks and as a result would never fall into this 52 week fixed reference period calculation.
- Using a fixed reference period, rather than a rolling reference period, would mean fewer irregular hours workers are covered by the 52 week reference period. This would mean that the interim workaround calculations detailed in question 19 will last for longer (see our answer to question 19 below).
- Many irregular hours workers have a high level of flexibility in the hours they work and there is no obligation in any year to work set hours or days. We would therefore query whether it would be appropriate to introduce a method of rolled up holiday pay (based on 12.07% of earnings) for such workers, rather than having to earmark certain days to take as annual leave. However, we note that consideration would need to be given to whether or not this would be possible, given that it may contravene various principles relating to leave under the EU Working Time Directive.
- Some workers' hours may vary significantly between one holiday year and the next holiday year, and their holiday entitlement in one holiday year may therefore not be reflective of the hours they have actually worked in that holiday year.
- If a worker was ill for a significant period in one holiday year this would have a negative impact on their holiday entitlement in the following year and could lead to a potential discrimination claim on the grounds of disability.
- Some irregular hours workers will know at the start of a holiday year the hours that they will be working for that holiday year. In those circumstances, it may be appropriate to use the actual hours to be worked in a holiday year by such workers to calculate their holiday entitlement for that holiday year, although we note that introducing an individualised approach to calculating holiday may create an additional administrative burden.

### **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**

Please explain your answer.

It is our view that this approach would ensure entitlement to holiday is proportionate to the time spent working and would ensure a fair approach is applied to all workers and across all employers.

We query how in practice the transition from the monthly calculation to a fixed 52 week reference period will work. We note that the 52 week calculation using the fixed reference period takes place at the start of a given holiday year. However, if a holiday year runs from January to December and an irregular hours worker joins a company in February, they could be on the monthly calculation for 23 months before they

have worked a full holiday year and therefore have a complete fixed reference period to refer to. We would suggest that a pro-rata method (rounding up to 12 months) is considered for use in cases where a worker has 6 or more months' service at the start of a holiday year.

**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?**

• **Don't know**

Please explain your answer.

It is our understanding that where an individual works irregular hours and wants a day off as holiday, employers would work out how many hours of their holiday entitlement this would use up by reference to an average working day.

We note that such method would be appropriate for some irregular hours workers who work similar working hours each day they spend working. However, we can see this resulting in holiday entitlement not being reflective of hours worked where a worker works longer hours on certain days of the week.

**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?**

• **Don't know**

Please explain your answer.

The 12.07% method has previously been criticised in the case of *Harpur Trust v Brazel*.<sup>2</sup> However, this percentage has long been used by employers and in our view this is the most appropriate method of calculation in order to retain consistency and not result in an overly onerous burden for employers.

<sup>2</sup> [2022] UKSC 21



## **22. Do you have any further comments about calculating holiday entitlement for agency workers? Please explain your answer**

For agency workers that are engaged for 12 weeks or more, consideration will need to be given to ensure that their holiday entitlement is calculated in such a way to ensure that the agency worker has the same basic working and employment conditions as they would be entitled to if they had been engaged directly.

### **For further information, please contact:**

Jennifer Paton  
Policy Team  
Law Society of Scotland  
DD: 0131 476 8136  
[JenniferPaton@lawscot.org.uk](mailto:JenniferPaton@lawscot.org.uk)