

Holiday Pay for part-year and irregular hours workers: the return of 12.07%

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Introduction

1. In the education sector, there are a number of roles where individuals are employed on a year-round contract but do not work every week of the year; for example, peripatetic music teachers may only work during term-time, and sports coaches just in school holidays.
2. Under the Working Time Regulations 1998 ('WTR'), all workers are entitled to 5.6 weeks' annual leave each year. For a full-time worker, working five days a week, this translates into 28 days' leave each year. For a part-time worker, this is pro-rated (for example, an employee working three days a week receives 16.8 days leave each year). However, problems arise for workers that do not work every week of the year. How is this calculated? Are they entitled to 5.6 weeks' leave or a proportion?
3. Those who work in the sector will remember that, for many years, the received wisdom for these workers was to calculate 12.07% of the hours worked in any given year. This came from ACAS guidance.¹ However, in *Harpur Trust v Brazel* [2022] UKSC 21, this practice was found to be unlawful, creating much confusion.
4. On 1 January 2024, the catchily titled The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 ('the Regulations') came into force, making a significant change to how annual leave and holiday pay are calculated for so-called part-year and irregular hours workers and reversing the effect of *Harpur Trust v Brazel*. New Government guidance has been published to assist our understanding of these changes: https://www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations/holiday-pay-and-entitlement-reforms-from-1-january-2024?mc_cid=c00bbd4c00&mc_eid=db53782f22

¹ 12.07% represents the proportion of the year a full year works is on holiday: 5.6 weeks / 4.64 weeks x 100 = 12.07

Summary of the changes

5. Under the regulations, the use of the '12.07% calculation' is back for two new categories of workers:
 - (a) **Irregular hours workers:** A worker for whom the number of paid hours they will work within a pay period is '*wholly or mostly variable*' (**reg 15F(1)(a) WTR**).
 - (b) **Part-year workers:** A worker for whom, in a given leave year and under the terms of their contract, has periods of at least a week in which they are not required to work and are not paid (**reg 15F(1)(b) WTR**). This category will be of particular relevance in the education field.
6. For these workers, annual leave will be calculated as **12.07% of the hours worked in each pay period** and will accrue throughout the year (**reg 15B WTR**). For example, if a worker is paid on the last day of each month, annual leave entitlement will be calculated as 12.07% of the hours worked in that month. The worker will 'accrue' those hours which can be taken as annual leave at any other point within that leave year.
7. At the point of taking annual leave, a worker can take up to the amount that has been accrued in that year, plus any that has been carried forward, less any that has already been taken (**reg 15B WTR**). Leave can be carried forward where there is an agreement to do so (e.g. in the employment contract), where the worker has been on sick leave or parental leave, or where an employer has not enabled the worker to take the leave they are due (**reg 15D WTR**).
8. **Holiday pay** is calculated as a 'week's pay' for each week of leave taken. For irregular hours and part-year workers, this is calculated by 'looking back' at the previous 52 weeks of work (discounting weeks not worked) and calculating an average week's pay (**reg 16(3ZA)-(3ZG) WTR**). To determine the hourly rate of pay, one must take a week's pay and divide it by the average hours worked per week during that period (**reg 16(1A) WTR**).
9. Finally, in a significant change, employers will now be able to pay '**rolled-up holiday pay**' ('RHP') to irregular hours and part-year workers instead of granting annual leave. This is the employer's decision – the worker cannot request it. It is calculated as 12.07% of the worker's total earnings within a pay period and will need to be paid with each payslip (marked as RHP) (**reg 16A WTR**).
10. These changes come into effect for **leave years beginning on or after 1 April 2024**.

Conclusion

11. This new regime is not perfect. Some of the definitions and calculation methods remain unclear and may be subject to further litigation in due course. Nevertheless, it is hoped that this may bring some clarity for many in the education sector who need to make these calculations on a regular basis for a variety of workers.
12. For a more detailed analysis of the new regulations, please see the [3PB Employment Law newsletter](#).
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