

Freelancer Holiday Pay

Playing the percentages

What's the correct holiday pay accrual rate for freelancers? It's a seemingly simple question, but it has managed to cause no end of confusion and disagreement over the years.

Opinion and practice tends to be divided into two main camps. Some argue that the correct rate is 10.77% of the individual's total pay. Others insist that anything less than 12.07% will result in them receiving less holiday pay than the minimum required under the Working Time Regulations 1998 (i.e. the equivalent of 5.6 weeks paid holiday per year).

So which is correct?

The basis for the two differing views

The logic underpinning the argument in favour of 12.07% is reasonably straightforward and, at first glance, quite compelling. It's based on the premise that, if you are entitled to a total of 5.6 weeks' paid holiday per year, you only have to work for 46.4 weeks (i.e. 52 less 5.6) in order to qualify for your 5.6 weeks' entitlement. It therefore follows that your holiday must accrue at the rate of 5.6 weeks (total annual entitlement) divided by 46.4 weeks (total number of weeks worked). This gives a rate of 12.07%.

On the other hand, those in the 10.77% camp argue that holiday continues to accrue across the whole year, including during any time spent on holiday, meaning that it accrues at the rate of 5.6 weeks divided by the full 52 weeks of the year. This produces a rate of 10.77%.

Those in favour of 12.07% rightly point out that their position is supported by the ACAS guidance leaflet on holiday and holiday pay. And given that ACAS is generally quite reliable when it comes to this sort of thing, it's not particularly surprising that many employers proceed on the assumption that 12.07% is the figure to use if you want to comply with the minimum statutory requirements. It also comes as no surprise that trade unions such as BECTU support this view.

The problem with 12.07%

The main problem with using a rate of 12.07% is that it is almost always wrong. In fact, the only situation in which it will result in the correct amount of holiday pay being paid is when the freelancer actually takes their full holiday entitlement. In practice, this rarely happens, particularly with short-term assignments. That being the case, an accrual rate of 12.07% will generally result in an overpayment of holiday pay compared to what is legally required.

This can be illustrated with a simple example. Assume that Jack is engaged on a freelance basis for 26 weeks and is paid at the rate of £750 per week. He is entitled to the pro rata equivalent of 5.6 weeks' paid holiday per year, so a total of 2.8 weeks over his 26 week engagement. Let's assume that he takes

1 week's holiday (unpaid) during the engagement out of his 2.8 week entitlement. If a holiday accrual rate of 12.07% is used, Jack will end up being paid a total of £21,013.13, broken down as follows:-

Basic pay: 25 weeks worked @ £750 per week	=	£18,750
Holiday 1 week (unpaid)	=	£0
Holiday pay accrued (12.07% of £18,750)	=	£2,263.13
TOTAL	=	£21,013.13

Now compare this to what an employee – let's call her Jill - would be paid in exactly the same situation (i.e. she is paid £750 per week for 26 weeks during which she takes a one week holiday). The key difference is that, unlike Jack, she is paid for her week's holiday meaning that she is entitled to a payment in lieu of 1.8 weeks accrued but untaken holiday entitlement on the termination of her employment. Her salary and holiday pay over the same 26 week period will be as follows:

Basic pay: 25 weeks worked @ £750 per week	=	£18,750
Holiday pay for 1 week's holiday taken	=	£750
Pay in lieu of untaken holiday (1.8 weeks @ £750 p.w.)	=	£1,350
TOTAL	=	£20,850

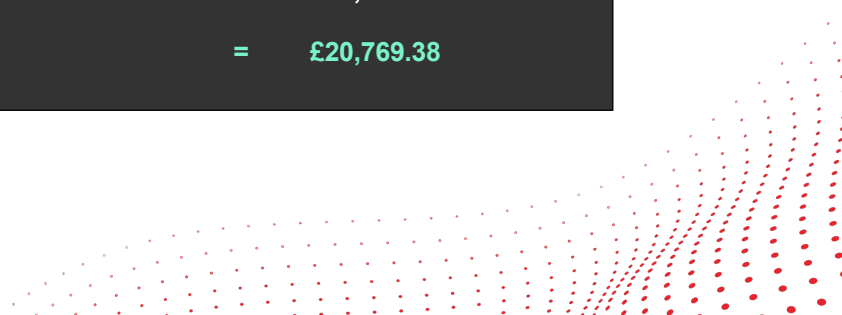
It is clear from the above that the accrual rate of 12.07% results in Jack (the freelancer) being paid more than Jill (the employee) despite the fact that they are both entitled to exactly the same rate of pay, work exactly the same number of days, and take the same amount of holiday.

Admittedly the discrepancy is relatively minor in the above scenario (it would be more if the engagement was longer and/or the fee was higher and/or less than a week's holiday was taken). But for an employer which uses a lot of freelancers – which is often the case in the media industry – the difference will obviously add up over time to a much greater figure.

Does this mean that 10.77% is correct?

Not necessarily. It depends on whether or not the freelancer is paid for any days taken as holiday during the term of his contract. If he isn't, an accrual rate of 10.77% will mean that he ends up not being paid enough. For example, if an accrual rate of 10.77% is used for Jack in the same scenario outlined above, he would end up being paid a total of £20,769.38, broken down as follows:

Basic pay: 25 weeks worked @ £750 per week	=	£18,750
Holiday 1 week (unpaid)	=	£0
Holiday pay accrued (10.77% of £18,750)	=	£2,019.38
TOTAL	=	£20,769.38



So this also produces the wrong result because it means that Jack ends up getting paid a little less than Jill and therefore less than the correct amount required by the Working Time Regulations.

So what is the correct answer?

The only way of ensuring that exactly the right amount of holiday pay is paid is to use an accrual rate of 10.77% but also ensure that, if any holiday is taken during the contract period, it is paid at the normal daily or weekly rate at the time it is taken. Any such holiday pay should then be deducted from the holiday payment at the end of the contract.

The calculation below shows how this works:-

Basic pay: 25 weeks worked @ £750 per week	=	£18,750
Holiday pay for 1 week's holiday taken	=	£750
Holiday pay accrued: (10.77% of £19,500 less £750 already paid)	=	£1,350
TOTAL	=	£20,850

It is only by using this method that Jack would end up being paid the same as Jill and the exact amount required by the Working Time Regulations.

Conclusion

What this means in practice can be summarised as follows:-

- If you calculate holiday pay using a rate of 12.07% then you will be paying more than is required under the legislation unless steps are taken to ensure that the freelancer takes all their holiday entitlement prior to the end of their contract.
- On the other hand, if you calculate holiday pay using a rate of 10.77% then you will end up paying less than the required amount if the freelancer takes any unpaid leave during their engagement.
- The best way of ensuring that exactly the right amount of holiday pay is paid is to use an accrual rate of 10.77% but at the same time ensure that, if any leave is taken, it is paid at the normal daily or weekly rate. Any amount already paid should then be deducted from the amount paid in lieu of untaken holiday on termination.

For further information please contact:



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This bulletin does not constitute legal advice. Specific legal advice should be taken before acting on any of the issues covered above.