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Cadw'n ddiogel yn ystod Pandemig y Coronafeirws

Mae Llywodraeth Cymru wedi pasio deddfwriaeth frys yn llacio'r cyfyngiad ar gario drosodd y pedair wythnos o wyliau sy'n deillio o'r Gyfarwyddeb Oriau Gwaith.

Mae Rheoliadau Diwygio Oriau Gwaith (Coronafeirws) 2020 yn diwygio Rheoliad 13 o Reoliadau Oriau Gwaith 1998 i ganiatáu i unrhyw wyliau sy'n deillio o'r Gyfarwyddeb Oriau Gwaith gael eu cario drosodd lle nad oedd yn rhesymol ymarferol i'w cymryd yn y flwyddyn wyliau 'o ganlyniad i effeithiau'r coronafeirws (gan gynnwys ar y gweithiwr, y cyflogwr neu ar yr economi neu'r gymdeithas ehangach)'. (Rheoliad Newydd 13(10)).

Newidiwyd y gyfraith i ganiatáu gwyliau na ellid eu cymryd gan nad oedd yn rhesymol ymarferol i'w cymryd o ganlyniad i Covid 19. Mae'r newid hwn yn caniatáu i wyliau gael eu cario drosodd a'u cymryd yn ystod y ddwy flynedd nesaf o wyliau blynyddol. (Rheoliad Newydd 13(11)). Bwriad hyn yw lleihau'r her o gael rhannau helaeth o'r gweithlu yn cael dwywaith cymaint o wyliau yn 2021 ag y byddent fel arfer yn eu cael pe na baent yn gallu eu cymryd o ganlyniad i argyfwng y coronafeirws.

Yn ôl statud, mae hawl gan weithiwr i wyliau blynyddol o 5.6 wythnos. Fodd bynnag, o'r cyfanswm hwnnw, mae pedair wythnos o wyliau statudol bob amser wedi bod yn amodol ar ddarpariaethau 'eu defnyddio neu eu colli' o dan y Gyfarwyddeb Oriau Gwaith sy'n atal pobl rhag cario eu gwyliau drosodd i flwyddyn arall. Mae hyn bellach wedi newid.

Yn rhesymol ymarferol

Nid yw'n glir eto o dan ba amgylchiadau y byddai wedi bod yn rhesymol ymarferol i beidio â chymryd gwyliau yn y flwyddyn wyliau berthnasol. Mae *Cyngor ar y coronafeirws i gyflogwyr a chyflogeion* ACAS yn awgrymu y byddai'n gymwys dan yr amgylchiadau canlynol:

- Pan fydd gweithiwr yn hunanyysu neu'n rhy sâl i gymryd gwyliau cyn diwedd ei flwyddyn wyliau
- Pan fydd gweithiwr wedi cael ei ddiswyddo neu ei roi ar ffyrlo
- Pan fydd yn ofynnol i weithiwr barhau i weithio ac na allai gymryd gwyliau â thâl

(Rhoddir sylw i'r mater o ran p'un a yw'n rhesymol ymarferol i weithwyr sydd wedi'u rhoi ar ffyrlo gymryd gwyliau yng Nghanllawiau ACAS: [coronavirus/using holidays](#)

Rheswm da

Gellir cymryd gwyliau blynyddol a gaiff eu cario drosodd yn ystod y ddwy flynedd yn union ar ôl y flwyddyn wyliau y disgwylir i'r gwyliau hynny gael eu cymryd ynddi. Bydd cyflogwyr ond yn gallu gwrthod cais i gario gwyliau drosodd pan fydd ganddynt 'reswm da'. (Rheoliad Newydd 13(12)). Ni chaiff rheswm da ei ddiffinio.

Taliad yn lle gwyliau blynyddol

Mae Rheoliad 14 o'r Gyfarwyddeb Oriau Gwaith hefyd wedi'i ddiwygio er mwyn sicrhau y bydd gweithiwr yn cael taliad yn lle unrhyw wyliau blynyddol nas cymerwyd a gaiff eu cario drosodd, os caiff ei gyflogaeth ei therfynu cyn iddo gael y cyfle i'w cymryd (Rheoliad Newydd 14(5)).

Rheoliad 13A(7) o'r Gyfarwyddeb Oriau Gwaith

O dan rheoliad 13A(7) o'r Gyfarwyddeb Oriau Gwaith, gellir cario'r hawl i wyliau blynyddol ychwanegol o 1.6 wythnos o dan y Gyfarwyddeb Oriau Gwaith drosodd i'r flwyddyn wyliau yn union ar ôl y flwyddyn wyliau y disgwylir i'r gwyliau hynny gael eu cymryd ynddi, lle mae cytundeb perthnasol yn caniatáu hynny.

Absenoldeb oherwydd salwch a gwyliau blynyddol

Yn dilyn cryn dipyn o gyfraith achosion, mae eithriadau yn berthnasol i'r rheol cario drosodd mewn perthynas â'r rhai ar absenoldeb salwch. Ni roddir sylw i'r eithriadau hynny yn y nodyn hwn.

Mae'r Llywodraeth wedi cyhoeddi canllawiau ar [Hawl i wyliau a thâl yn ystod y pandemig coronafeirws \(COVID-19\)](#), sy'n cynnwys canllawiau ar ffactorau i'w hystyried wrth benderfynu beth sy'n rhesymol ymarferol.

A all cyflogwr ganslo gwyliau wedi'u trefnu ymlaen llaw

Gall cyflogwr ganslo gwyliau wedi'u trefnu ymlaen llaw ar yr amod ei fod yn rhoi'r cyfnod o rybudd gofynnol. Bydd y cyfnod o rybudd gofynnol fel y'i nodir yn y contract cyflogaeth. Fel arall, o dan Rheoliad 15(4)(b) o'r Gyfarwyddeb Oriau Gwaith, rhaid i cyflogwr o leiaf roi rhybudd i'r gweithiwr o hyd y cyfnod o wyliau i'w canslo.

Os bydd cyflogwr yn canslo gwyliau heb reswm busnes clir, *gall* wynebu'r risg o hawliad diswyddo deongliadol annheg. Mae'n bosibl y bydd cyflogwr yn meddwl am ddigolledu'r gweithiwr. (Er enghraifft, gall gweithwyr golli blaendal neu daliad a drefnwyd ymlaen llaw).

Sut i nodi pa wyliau blynyddol y gellir eu cario drosodd?

Mae'r Gyfarwydddeb Oriau Gwaith yn dawel ynglŷn â'r drefn y tybir y caiff y gwahanol ddsbarthiadau o wyliau eu cymryd.

Mae hyn yn golygu bod yn rhaid i weithwyr fod â hawl i gymryd yr 1.6 wythnos o wyliau blynyddol (o dan Reoliad 13A) yn y flwyddyn y mae'r gwyliau yn cronni ynnddi, oni bai bod cytundeb perthnasol sy'n caniatáu iddynt gael eu cario drosodd.

Os nad oes cytundeb o'r fath yn bodoli, unwaith eto, gall hyn fod yn rhywbeth i'w drafod â'r cyflogwr er mwyn osgoi dryswch neu anhawster.

Annual leave during the Coronavirus Pandemic

The Government passed emergency legislation relaxing the restriction on carrying over the four weeks leave derived from the Working Time Directive (WTD).

The *Working Time (Coronavirus) Amendment Regulations 2020* amend Regulation 13 of the Working Time Regulations 1998 to permit the carry-over of untaken WTD leave where it was not reasonably practicable to take it in the leave year 'as a result of the effects of the coronavirus (including on the worker, the employer, the economy or society)'. (New Regulation 13(10)).

The law was changed to allow for leave that could not be taken because it was not reasonably practicable to take it due to Covid 19. This change allows for leave to be carried over and taken in the next two annual leave years. (New Regulation 13(11)). This is intended to alleviate the challenge of large parts of the workforce having twice as much holiday in 2021 as they normally would if they were unable to take it due to the coronavirus outbreak.

Workers are entitled by statute to 5.6 weeks holiday. However of that total 4 weeks statutory leave has always been subject to 'use it or lose it' provisions under the WTR which prevent it from being carried over to another year. This has now changed.

Reasonably practicable

It is not yet clear what circumstances will mean that it was not reasonably practicable to take leave in the relevant leave year. The ACAS *Coronavirus advice for employers and employees* suggests that it would apply where a worker:

- Is self-isolating or too sick to take leave before the end of their leave year
- Has been put on lay off or furlough
- Has been required to continue working and could not take paid holiday

(The issue of whether it is reasonably practicable for workers placed on furlough to take leave is addressed in ACAS Guidance: [coronavirus/using holidays](#))

The amended Regulations would cover, for example, the situation where the employer does not allow an employee to take annual leave during the crisis due to an increased workload or lack of cover. **However, where an employee chooses not to take leave because they are unable to go on holiday due to travel restrictions, this is arguably not a situation where it is not reasonably practicable for them to take it.**

Good reason

Carried over leave can be taken in the two leave years immediately following the leave year in which it was due. Employers will only be able to refuse a request to carry over where they have 'good reason'. (New Regulation 13(12)). Good reason is not defined.

Payment in lieu

Regulation 14 of the WTR is also amended to ensure a worker will be paid in lieu for any untaken carried over leave where their employment is terminated before they have had the chance to take it (New Regulation 14(5)).

Regulation 13A(7) WTR

Under reg.13A(7) WTR the additional 1.6 weeks additional leave entitlement under the WTR can be carried forward into the leave year immediately following the leave year in respect of which it is due, where a relevant agreement provides for this.

Sickness absence and annual leave

Following much caselaw exceptions apply to the carry over rule in relation to those on sick leave. Those exceptions are not addressed in this note.

The Government has published guidance on [Holiday entitlement and pay during coronavirus \(COVID-19\)](#), which includes guidance on factors to consider when deciding what is reasonably practicable.

Can an employer cancel a pre-booked period of leave

An employer can cancel a pre-booked period of leave provided it gives the required notice. The required notice will be as provided for in the contract of employment or if silent, under Regulation 15(4)(b) WTR an employer must give the employee notice of at least length of the period of leave to be cancelled.

If an employer cancels a period of leave without a clear business reason then it *may* face the risk of an unfair constructive dismissal claim. An employer may think of

compensating the employee in the alternative. (For eg employees may lose pre-booked deposit or payment).

How to identify which annual leave is subject to carry over?

The WTR are silent on the order in which the different classes of holiday leave are deemed to be taken.

This means that employees must be entitled to take the 1.6 weeks of annual leave (under Regulation 13A) in the year in which it accrues unless there is a relevant agreement which permits this to be carried over.

Where there is no such agreement, again this may be something to be addressed with employers to avoid confusion or difficulty.

Furlough employees

Where employees are furloughed, the employer must pay them at their normal full rate of pay for a period of annual leave, rather than any reduced furlough rate. Employers may decide to refuse requests for annual leave from furloughed employees where they cannot afford to top up the employee's pay. In this situation, the employee should be allowed to carry over up to four weeks' leave, if it is not reasonably practicable for them to take it during the leave year.

Case law has established that the purpose of annual leave is to enable employees to rest from carrying out work and enjoy a period of relaxation and leisure (*KHS AG v Schulte* [2012] IRLR 156 ECJ), so an employee may argue that they should be allowed to take their annual leave after the furlough period, carrying it over if necessary. The government guidance on holiday entitlement during coronavirus states that employers should consider if "restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time". Ultimately, it will be for tribunals and courts to decide whether an employee should be allowed to carry over leave under the amended Regulations. The safest option may be for employers to allow furloughed employees to carry over annual leave that they do not take while furloughed.