

UCU guidance on Covid-19 and annual leave

On 26 March 2020 the government introduced the *Working Time (Coronavirus) (Amendment) Regulations 2020* (<http://www.legislation.gov.uk/ukxi/2020/365/made>), which came into force with immediate effect.

The new regulations amend the existing *Working Time Regulations 1998* to introduce a temporary exception which allows employees and workers to carry over up to four weeks' paid holiday into their next two holiday leave years where '*it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus*'.

It should be noted that the new regulations refer only to statutory holiday entitlement, not any further contractual leave entitlement, and the additional carry-over applies only if it has not been reasonably practicable for a worker/employee to take their leave in the current leave year due to Covid-19. ACAS guidance (<https://www.acas.org.uk/coronavirus/using-holiday>) provides examples of where this might be the case:

'This law applies for any holiday the employee or worker does not take because of coronavirus, for example if:

- *they're self-isolating or too sick to take holiday before the end of their leave year*
- *they've had to continue working and could not take paid holiday*

They may also be able to carry over holiday if they've been 'furloughed' and cannot reasonably use it in their holiday year.'

The regulations are clearly aimed at key workers and services¹ impacted by Covid-19, although the regulations are not explicitly restricted to any particular group of workers.

¹ The explanatory memorandum which accompanies the regulations explains that: 'Many businesses are face (sic) increasing demand due to the coronavirus situation. Businesses also have reduced workforces as staff fall ill, are required to self-isolate or need to provide care for dependents who are ill or self-isolating. These businesses may be forced to either deny their healthy staff holiday or ask them not to take it, or risk compromising their operations. In this situation, the exemption will ensure that businesses are able to continue operations at a crucial time, without either breaching the WTR or their staff risking losing their holiday.'

ACAS guidance points out that 'During the coronavirus outbreak, it may not be possible for staff to take all their holiday entitlement during the current holiday year. Employers should still be encouraging workers and employees to take their paid holiday. Employees and workers should also make requests for paid holiday throughout their holiday year, if possible.'

The regulations themselves and the explanatory memorandum that accompanies them, are drafted in fairly general terms and, as there is not yet any case law on their appropriate interpretation/implementation, it is difficult to provide definitive advice to UCU branches and members on the implications of the regulations for entitlements to carry-over of annual leave. The advice provided below is therefore provisional and may be subject to change in light of further official guidance becoming available.

What should UCU branches be seeking in negotiations with employers?

Branches should seek assurances that staff will be treated fairly and transparently with regard to annual leave and carry-over of leave entitlement during and as a consequence of the Covid-19 crisis. If not already in place, seek agreement that:

- there will be no enforced periods of leave due to Covid-19, other than those already provided for in contracts of employment
- recognises the need for staff to be allowed to take leave during the crisis but also that allows them to cancel by giving the appropriate notice pre-booked leave if they need to e.g. because of extra work demands
- establishes the amount of untaken annual leave that can be carried over where staff have been unable to take leave due to increased workloads etc.
- staff will be paid in lieu of all untaken leave should they leave employment (this is a statutory requirement anyway)
- the tone of management messages about annual leave will encourage staff to take leave as usual while also assuring them that they will not lose out on leave entitlement.

In light of the *Working Time (Coronavirus) (Amendment) Regulations 2020*, branches may wish to seek agreement that staff be able to carry-over up to four weeks of leave. As noted above however, it is not certain that staff in sectors covered by UCU will be able to rely on the new regulations to claim entitlement to carry over more leave than usual policy allows, unless it can be demonstrated that it was not reasonably practicable for them to take their leave due to Covid-19.

Q&As for UCU members

Can I carry-over untaken leave?

This will depend on your contract, any existing local collective agreement between your employer and UCU/the recognised trade unions, and/or whether the leave is covered by the new regulations. Your branch may have reached a collective agreement with your employer that allows a more generous approach to the carry-over of annual leave during the Covid-19 crisis.

Your contract will probably specify an amount of leave that you are entitled to carry-over. This is the minimum that you will be allowed to carry-over. Whether you can carry over leave in line with the new regulations will depend on an assessment of whether it was 'not reasonably practicable' for you to take some or all of your statutory leave because of Covid-19.

If you think that you will be unable to take your leave before the end of the current leave year, e.g. because you have been self-isolating or sick, or due to extra workload, speak to your line manager to seek their agreement for you to carry-over untaken leave. If they refuse to allow you to carry-over all untaken leave contact your UCU branch directly. If due to sickness you are receiving less than your normal pay it may be more financially advantageous for you to take annual leave as that is paid at your normal rate of pay.

Can I take annual leave while furloughed?

ACAS guidance states that: *'Employees or workers who are temporarily sent home because there's no work ('furloughed workers'), can request and take their holiday in the usual way, if their employer agrees. This includes bank holidays.'*

Furloughed workers must get their usual pay in full, for any holiday they take.'

Do I continue to accrue annual leave if I am furloughed?

Your right to annual leave is an employment right derived from statute. Although HMRC guidance does not currently deal explicitly with the effect of furloughing on annual leave, it does confirm that: *'Employees that have been furloughed have the same rights as they did previously'*. It appears to be the case based on statute that annual leave will continue to accrue during furlough.

Can my employer make me take leave, or cancel leave, during the Covid-19 crisis?

Whilst this is possible, we would expect employers/managers to avoid this, except at times already specified in contracts of employments. ACAS guidance states:

'Employers have the right to tell employees and workers when to take holiday.

An employer could, for example, shut for a week and tell everyone to use their holiday entitlement.

If the employer decides to do this, they must tell staff at least twice as many days before as the amount of days they need people to take.

For example, if they want to close for 5 days, they should tell everyone at least 10 days before.

Employers can also cancel pre-booked paid holiday. If they decide to do this, they must give staff at least the same number of days' notice as the original holiday request.

For example, if an employee has booked 5 days holiday, the employer must tell them at least 5 days before the holiday starts that it's cancelled.'

Your contract will normally state any periods during which annual leave cannot be taken, or at which leave must be taken (e.g. Christmas or Easter closure periods); it may also state that requests for leave will not be unreasonably refused. If you are refused annual leave the test would be whether such a refusal was reasonable. This may depend on the notice you gave, the work situation, for example if other staff members are working or on leave, and your own circumstances.

If you have a request for leave refused, or are told that you are to be required to take leave at a particular time other than one already provided for in your contract, you should contact your UCU branch directly.

I had leave booked for a holiday which has now been cancelled, can I cancel the leave?

ACAS guidance states: *'An employee may no longer want to take time off they'd previously booked, for example because their hotel cancelled the booking. Their employer can insist they still take the time off, but it's best practice to get agreement from the employee.*

If the employee wants to change when they take this time off, they'll need to get agreement from their employer.'

Am I required to take leave if my employer is unable to provide me with work to do from home?

No. UCU expects employers to pay staff as normal whether working from home is possible or not. Employers may be able to access the government's coronavirus job retention scheme (CJRS) and furlough workers where it is impossible for them to work from home (see separate UCU guidance on the CJRS at:

https://www.ucu.org.uk/media/10842/UCU-guidance-on-the-Coronavirus-job-retention-scheme/pdf/ucu_covid19_furloughed-staff.pdf)

Am I required to use leave to look after my children or other household members during the Covid-19 crisis?

No. Government guidance confirms that: *'Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.'*

If I leave my employment will I be paid for any untaken leave?

Payment in lieu of untaken leave at the end of employment is a statutory requirement unaffected by any temporary arrangements due to Covid-19. You should therefore receive such payment (subject to tax and national insurance contributions) including leave carried over under contract, by agreement, or under the *Working Time (Coronavirus) (Amendment) Regulations 2020*.