

Furlough & Holiday Leave – can you have both at the same time?

Introduction

The ACAS advice on whether or not holiday leave can be taken during a period of furlough has changed over the last 24 hours (albeit without notice or explanation). As the organisation designated by the Government to “improve organisations and working life through the promotion and facilitation of strong industrial relations practice” we have to consider the advice and the implications for the management of furlough. The link to the ACAS advice on this is <https://www.acas.org.uk/coronavirus/using-holiday>.

So, what’s the problem?

Since the Government introduced the furlough measures employers have been grappling with the question of whether or not staff members can take holiday leave whilst on furlough leave (i.e. can a staff member be on these two distinct periods of leave at the same time)? This is important to employers because they need to understand whether designating a period of holiday leave during furlough would mean that it effectively brings an end to furlough and prevents recovery of 80% of pay for which the scheme provides. The Government’s guidance on furlough is silent on the point. Therefore, the question has been the subject of speculation in employment law circles with opposing views expressed, using comparative alternatives, such as what the position is in relation to maternity leave (although that is also the subject of disagreement in these circles).

What’s the latest ACAS advice of today (7th April @ 10:59)

The latest ACAS advice, “last reviewed 6th April 2020”, comes down on the side of staff members being able to take holiday leave whilst on furlough, determining that a staff member can be on these two distinct periods of leave at the same time. The ACAS advice says that the holiday leave can be requested by the staff member and then approved by the employer or that the employer can give appropriate notice for the staff member to take leave during a period of furlough (appropriate notice in the absence of another relevant agreement is twice as many days as the leave to be taken) (see [Vista Advice Hub COVID 19](#): Requiring employees to take holiday to manage operational challenges).

We say that whichever side of this debate that employment lawyers may have previously been on, this is the best advice at present given the preeminent position that ACAS have in the world of industrial and employee relations. However, that is not to say that this advice will not change. In the week before the latest review ACAS were giving advice which completely contradicted this latest position and we have seen no explanation for a change in the previous advice. Therefore, we have to say that we cannot rule out further change and in the absence of clear Government guidance (insofar as that is ever clear) we actually anticipate that there will be further changes to the ACAS advice on this matter.

So, what are your options now and what’s the risk?

This leaves employers in a somewhat unsatisfactory position, adding uncertainty to the climate of uncertainty. In essence, we believe that you have two main options:

- You could act on the basis of this most up to date ACAS advice and allow staff members to take holiday leave during a period of furlough (whether by them requesting it or by you giving notice of it). You would then claim that back when the Government portal is up and running. However, given

the absence of clear Government guidance on the matter there is a risk that the claim for that period of leave could be rejected and that the Government could say that the holiday leave broke the period of continuous furlough (i.e. a minimum of 3 weeks). That could then mean that the period of leave after the holiday leave ended may not count as a period of furlough, which could mean that you cannot recover wage costs for that period. The only way to avoid that would be to designate a period of leave that is non-furlough that lasts for at least 3 weeks.

- You could disregard this most up to date ACAS advice and refuse to accept any request for holiday leave during furlough and not give notice to staff members to take holiday leave also. Your right to choose this option is unaffected by the furlough scheme. This approach has to some extent been anticipated by the Government because it has permitted staff members to carry over outstanding leave under the Working Time Regulations for a period of two years (i.e. up to 5.6 weeks per annum), which is in excess of the previous rules on carry over. However, employers who take that option should be mindful that post the coronavirus crisis that may leave a significant number of staff members with significant periods of leave to take within a relatively short timeframe.

In our view employers have to weigh up what is in their best industrial relations, financial interests and operational interests. It seems to us that if employers are using the furlough scheme because of a considered assessment that they would not be able to survive the coronavirus crisis because of the financial impact on their business, which would otherwise result in redundancies, then the risk of non-recovery set out in the first bullet point above may be too great to take. Therefore, the second bullet point may present as the best option for now pending absolute clarity of this issue.

Alternatively, if employers believe that whilst they may otherwise have had to make redundancies had it not been for the introduction of furlough, but that they may be able to survive the crisis and that they have sufficient confidence in the cashflow, then they may calculate that they can withstand the risk of non-recovery, and allow staff members to take holiday (or exercise the right to give staff members notice), if that is also in the best interests from an industrial relations and operational point of view. If this option is chosen we have to point out that the latest ACAS advice says nothing about the rate of pay for the holiday leave taken (i.e. whether staff members should be paid at the pre-furlough rate of pay or the rate of pay as varied by the furlough agreement). Therefore, employers have a choice to make in relation to the rate of pay if this option is chosen. That again brings in to focus the financial and industrial relations interests of the business. This is where we can help you work through your decision based upon the particular circumstances that you are facing and provide intensive support in any negotiations with trade unions.

Conclusion

There is no definitively correct answer to the question of whether you can be on holiday leave and furlough at the same time. Anybody who asserts otherwise is overlooking the absence of Government guidance on this aspect of furlough and overlooking the changing and conflicting advice coming from ACAS. The message is to take good advice that helps you to be well informed and to properly weigh up what is in your best interests taking account of the risks arising.

One given is that when drafting collective or individual furlough agreements, which we can assist with, employers will need to consider the following sorts of questions:

- What leave will accrue during furlough leave just statutory leave under the Working Time Regulations or all leave?
- What will happen to bank holidays and pre-booked annual leave falling within the furlough period and how will this be paid?
- Will employees be otherwise allowed or obliged to take annual leave during furlough leave?
- Should the Company include contingencies to account for any possible subsequent changes in Government guidance e.g. confirmation that if leave taken during furlough is paid at 80% but should have been paid at 100% it will be corrected or if leave should not be taken during furlough leave then any leave taken will be 'credited'?
- Will employees be able to trade non-statutory leave to top up their furlough pay from 80%?