

COVID 19: Requiring employees to take holiday to manage operational challenges

The default position

Employers may give notice under Regulation 15(2) of the Working Time Regulations 1998 ('Regulations') requiring employees to take statutory holiday on specified dates. Such notice must be at least twice the length of the period of leave that the employee is being required to take. There are no explicit requirements about the form that this notice must take, but it would be sensible to do this in writing to provide evidence that the requisite notice has been given.

There appears to be no limit to the number of notices you can give, so you could, for example, give 2 weeks' notice today to use a week's holiday in 2 weeks' time – then in the following week, serve a further notice giving 2 weeks' notice to use a further week's holiday – that would result in an employee being required to use 2 consecutive weeks' holiday. This approach is probably against the spirit of the Regulations but is not contrary to them.

Whilst the above is the 'default' position in the Regulations, there are a couple of questions that might be worth exploring that might shorten these notice requirements if you need to:

Do you have a right to tell an employee to take days as holiday in your employment contracts?

If you do, the wording may be such that you can give less notice than the default position requires. Also, you could give notice to use the holiday in respect of both statutory and contractual holiday using this. As a first step, take a close look at the terms of the contract to check what is planned is within the parameters of what is permitted, then consider what level of notice would be required to demonstrate you are exercising it reasonably.

Do you recognise a trade union? If so, is there a helpful term in any collective agreement?

In respect of any employees covered by the relevant bargaining unit, do you have a term in a pre-existing collective agreement that allows you to give less notice than the default position? Such an agreement would cover all employees in the bargaining unit, but not those outside it. The term could apply also to contractual holiday, depending on how it is phrased.

If you recognise a union but don't have a helpful term in a collective agreement,

It might be possible to reach agreement with your recognised union that allows for shorter notice than the default position: The agreement would need to be in existence before you notified the employees to take the holiday – and obviously it would only apply to those employees in the bargaining unit.

Reach an agreement with your employee forum that you will give shorter notice than is required by the default position.

The first thing to check is that the forum is properly constituted to reach an agreement. This requires an election to have been carried out that fulfils particular requirements and so could mean that a forum elected for information and consultation purposes may be properly constituted. Talk to us if you think this could be a route forward for your organisation.

Reach agreement with employees

It is possible to agree with employees (individually) that you can give them shorter notice than the default position. The agreement will need to be in force before you use it and it's difficult to see in the current circumstances why they might agree – and of course you can't force anyone who won't do so.

Provided that you are limiting what you are seeking to agree just to the notice to take holiday, you are not seeking a change to the contract of employment – it's entering into a 'relevant agreement' under the Working Time Regulations with the employee – so collective consultation rules aren't triggered.

Consider making this change alongside other proposed contractual changes

If you are planning other contractual changes which require either collective or individual consultation with employees, consider including the right to give notice to use holiday that's shorter than the default position as part of one of the topics for consultation. We can help you with planning and implementing collective or individual consultation to change terms of employment.

Another option to consider

If you are wanting your employees to use up holiday to prevent operational challenges at a later date, you could also consider introducing a holiday purchase scheme or agreeing with employees that they can bring forward the contractual part of their holiday entitlement for the 2021 holiday year and use it early. Capture this agreement in writing to avoid challenges when the next holiday year comes around – and remember it can only apply to contractual holiday. We can also help you with that wording if that's something you wish to consider.

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