



Department for  
Business, Energy  
& Industrial Strategy

# HOLIDAY PAY

Guidance on calculating holiday pay for  
workers without fixed hours or pay

February 2019



**OGL**

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# Section 1

## Introduction

This document provides guidance on how statutory holiday pay may be calculated for workers without fixed hours or pay. It has been designed as a practical guide for employers with sections designed to respond to specific questions employers may have when calculating holiday pay for individuals who are working without fixed hours or fixed rates of pay.

Holiday pay is based on the principle that a worker should not suffer financially for taking holiday.

In simple terms, almost all workers, except those who are genuinely self-employed, are legally entitled to 5.6 weeks' paid holiday per year. This entitlement is derived from the Working Time Regulations 1998<sup>1</sup>.

The amount of pay that a worker receives for the holiday they take depends on the amount of hours they work and how they are paid for those hours. The principle is that pay received by a worker while they are on holiday should reflect what they would have earned if they had been at work.

A worker continues to accrue holiday entitlement while they are on sick leave, maternity leave, parental leave and adoption leave (collectively known as 'statutory leave'). A worker may request holiday at the same time they are on sick leave.

The majority of the UK's workforce are full-time employees on fixed hours and fixed pay. For these workers, typically on a fixed monthly salary, if they take a week's holiday, they will receive the same pay at the end of the month as they normally receive.

The situation becomes more complicated when a worker does not work fixed or regular hours and so does not receive the same amount of pay each week, month or other pay period. In these circumstances an employer should normally look back at a worker's previous 12 paid weeks (known as the holiday pay reference period) to calculate what that worker should be paid for a week's leave.

This guidance is intended to help employers pay the correct amount of holiday pay for all their workers. It is designed to complement the existing guidance on [GOV.UK](https://www.gov.uk) on the basics of holiday pay.

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<sup>1</sup> Working Time Regulations 1998: regulations 13, 13A, 15A and 16 (subject to a limited exception for services such as the armed forces or the police, see regulation 18(2)(a)). There is also separate legislation for particular sectors or occupations, such as for agricultural workers and seafarers (for example, see regulation 18 of the Working Time Regulations).

Please note:

- This guidance is focussed on the legal minimum entitlement of 5.6 weeks' paid holiday. Many individuals will have contracts entitling them to additional paid holiday beyond the statutory minimum. Individual contracts should be checked first.
- All of the illustrative holiday pay calculations provided in this guidance use gross pay data (before any taxes or deductions).
- All references to 'worker' refer to all individuals whose employment status is either as a 'worker' or an 'employee', meaning they are entitled to paid holiday. For further information on employment status and definitions please visit [GOV.UK](https://www.gov.uk).

## Using this guidance

This guidance has been designed to assist workers and employers in calculating holiday pay for individuals without fixed hours or fixed pay. Before reading this guidance please check the [information](#) on GOV.UK on the basics of how holiday pay should be calculated, which is likely to apply to the majority of workers.

This guidance contains additional detail and is designed to complement the guidance already available on GOV.UK. It should be used to help improve understanding of the rules around holiday pay. However, it does not and cannot provide definitive answers to individual queries, and in some places takes views on matters which are uncertain. It is not intended to be relied upon in any specific context or as a substitute for seeking advice (legal or otherwise) on a specific circumstance, as each case may be different.

Whether you are a worker or employer, if you are unsure about any aspect of holiday pay entitlement you can contact Acas:

- [www.acas.org.uk](http://www.acas.org.uk)
- Telephone: 0300 123 11 00
- Textphone: 18001 0300 123 1100

## Section 2

### 1. The 12-week holiday pay reference period and what to do if you don't have 12 weeks of pay data to use

At present, the legislation does not address what to do in these situations. The principle behind holiday pay is that a worker should not be financially worse off for taking holiday. For most employers, using the maximum number of whole weeks of pay information that is available to them, if they have less than 12 weeks, is likely to provide a fair representation.

The reference period must include weeks for which they were actually paid. It must not include weeks where they were not paid as they did not work<sup>2</sup>.

**For example**, if a worker started work 10 weeks ago, employers should use this pay data to calculate the worker's holiday pay and provide a fair rate of pay. The employer should use the methodology set out on [GOV.UK](https://www.gov.uk) to calculate a week's holiday pay.

The government has legislated to increase the holiday pay reference period from 12 to 52 weeks. This change is designed to even out the seasonal variation in pay for many casual workers. Alongside this change, the government has also clarified that the holiday pay reference period should include as many whole weeks of pay information as are available (if less than 52 weeks). This change will become effective from 6 April 2020.

### 2. The definition of a 'week' for the purpose of the holiday pay reference period

The relevant definitions within the Employment Rights Act 1996 are:

- a week is defined as starting on a Sunday and ending on a Saturday<sup>3</sup>.
- The holiday pay reference period should start from the last whole week that was worked ending on or before the first day of leave, starting on a Sunday and ending on a Saturday<sup>4</sup>.

There is an exception for workers whose pay is calculated weekly by a week ending on a day other than Saturday. In these cases, a week is treated as ending with that other day<sup>5</sup>. For example, if a worker's pay is calculated by a week ending with a Wednesday, then the employer should treat a week as starting on a Thursday and finishing on a Wednesday.

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<sup>2</sup> Employment Rights Act 1996: sections 223(2) or 224(3), as applicable.

<sup>3</sup> Employment Rights Act 1996: section 235(1)

<sup>4</sup> Employment Rights Act 1996: sections 221(3), 222(4) and 224(2), as applicable.

<sup>5</sup> Employment Rights Act 1996: Section 235(1)

### 3. The date a holiday pay reference period should start from

Under the Employment Rights Act 1996, the holiday pay reference period starts from the last whole week ending on or before the first day of the period of leave. As noted above, this will typically be a week from Sunday to Saturday, but it could end on another day of the week if a worker is paid on a weekly basis.

**For example**, an employee is on a fixed shift pattern of 8 days on, 4 days off. The employee takes Monday 21 to Wednesday 23 October as annual leave. Their holiday pay should be calculated based on their average pay for the past 12 weeks<sup>6</sup>, with the first week calculated using pay data from Sunday 13 October to Saturday 19 October and so on. See Table 1 for details.

**Table 1: Illustration of the holiday pay reference period starting date for a shift worker**

Sun	Mon	Tues	Weds	Thurs	Fri	Sat	Reference Period Week
29 Sep Shift	30 Sep Non-work day	01 Oct Non-work day	02 Oct Non-work day	03 Oct Non-work day	04 Oct Shift	05 Oct Shift	Week 3
06 Oct Shift	07 Oct Shift	08 Oct Shift	09 Oct Shift	10 Oct Shift	11 Oct Shift	12 Oct Non-work day	Week 2
13 Oct Non-work day	14 Oct Non-work day	15 Oct Non-work day	16 Oct Shift	17 Oct Shift	18 Oct Shift	19 Oct Shift	Week 1
20 Oct Shift	21 Oct Holiday	22 Oct Holiday	23 Oct Holiday	24 Oct Non-work day	25 Oct Non-work day	26 Oct Non-work day	
27 Oct Non-work day	28 Oct Shift	29 Oct Shift	30 Oct Shift	31 Oct Shift	01 Nov	02 Nov	

**Please note:** Table 1 shows the first three weeks of the worker’s holiday pay reference period. An employer will need to use 12 paid weeks for a worker’s holiday pay reference period.

<sup>6</sup> Where the worker has normal working hours, using the calculation under section 222(2) of the Employment Rights Act 1996, or where the worker has no normal working hours, using the calculation under section 224(2). A worker has normal working hours where they are entitled to overtime pay if they work more than a fixed number of hours (see section 234).

## 4. Working out holiday pay for monthly paid workers

Where a worker is paid a regular monthly salary, with fixed hours and fixed pay, there is no need to make a separate holiday pay calculation. The individual will be paid their normal monthly amount for months where holiday has been taken.

For those individuals paid monthly, but where their pay varies (for example, depending on the amount of work done) their employer will need to use the holiday pay reference period.

In most cases, it will not be possible to simply use three months of pay data, as it will not correspond accurately with a 12-week reference period.

As noted previously in 'the date a holiday pay reference period should start from', the holiday pay reference period should start from the last whole week from Sunday to Saturday ending on or before the first day of the leave. In the case of a worker paid monthly, if that individual takes a day's leave mid-week then the first week used to calculate their holiday pay will be the preceding week's pay earned between Sunday and Saturday (see Table 1).

Employers will need to use their records of hours worked, to confirm how much the worker is owed for weeks which fall in pay months that do not fall wholly within the pay reference period. This will be where a pay reference period straddles two calendar months, where a pay reference period ends part-way through a month or where a worker takes unpaid leave during a month.

If a worker is not paid weekly, it is still important to be able to work out what their pay is each week. This is because a weekly pay figure is used to determine a number of their entitlements, such as maternity pay and parental pay (if they pass the qualifying conditions) as well as holiday pay. The concept of weekly pay is used in legislation because it is always the same length, while the lengths of months and indeed years are changeable.

If a worker without normal working hours but a fixed hourly rate of pay is paid monthly, the employer should calculate their weekly earnings by using their records of hours worked. For workers with no normal working hours and a variable rate of pay, it may be necessary to use an average hourly rate to estimate a workers' weekly rate of pay<sup>7</sup>. When use of an average hourly rate of pay is necessary, the weekly rate of pay can be calculated by multiplying the hours worked in a week by the average hourly rate of pay, as shown by the following formula:

$(\text{Monthly pay} \div \text{hours worked in month}) = \text{average hourly pay.}$

- Average hourly pay x hours worked in week = weekly pay
- **For example:**
  - In a month a worker earns £1,250 and works 130 hours;
    - 25 hours in week 1
    - 20 hours in week 2,
    - 35 hours in week 3,

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<sup>7</sup> Section 224(2) of the Employment Rights Act 1996 requires the worker's "average weekly remuneration" to be calculated. The suggested approach of calculating an average hourly rate is one means of doing this.



- 35 hours in week 4
- 15 hours in week five (only part of the week falls in the month)
- Average hourly pay =  $\text{£}1,250 \div 130 = \text{£}9.62$ 
  - Pay for week one =  $\text{£}9.62 \times 25 \text{ hours} = \text{£}240.38$
  - Pay for week two =  $\text{£}9.62 \times 20 \text{ hours} = \text{£}192.31$
  - Pay for week three =  $\text{£}9.62 \times 35 \text{ hours} = \text{£}336.54$
  - Pay for week four =  $\text{£}9.62 \times 35 \text{ hours} = \text{£}336.54$
  - To calculate the pay for the week which falls across two months, data from both months would have to be used

**For example**, a retail worker with variable hours and pay is paid on the last working day of each month. They take a week’s holiday from 23 to 29 September, with their next pay date 30 Sept. If an employer uses their three most recent payslips, taking an average of the monthly pay figures for June, July and August, they will be ignoring weekly pay information that they should take into account. This would not be in line with holiday pay legislation.

**Table 2: A 12-week holiday pay reference period compared to a monthly payment cycle**

Sun	Mon	Tues	Weds	Thurs	Fri	Sat	Reference Period Week
29-Jun	30-Jun	01-Jul	02-Jul	03-Jul	04-Jul	05-Jul	Week 12
06-Jul	07-Jul	08-Jul	09-Jul	10-Jul	11-Jul	12-Jul	Week 11
13-Jul	14-Jul	15-Jul	16-Jul	17-Jul	18-Jul	19-Jul	Week 10
20-Jul	21-Jul	22-Jul	23-Jul	24-Jul	25-Jul	26-Jul	Week 9
27-Jul	28-Jul	29-Jul	30-Jul	31-Jul	01-Aug	02-Aug	Week 8
03-Aug	04-Aug	05-Aug	06-Aug	07-Aug	08-Aug	09-Aug	Week 7
10-Aug	11-Aug	12-Aug	13-Aug	14-Aug	15-Aug	16-Aug	Week 6
17-Aug	18-Aug	19-Aug	20-Aug	21-Aug	22-Aug	23-Aug	Week 5
24-Aug	25-Aug	26-Aug	27-Aug	28-Aug	29-Aug	30-Aug	Week 4
31-Aug	01-Sep	02-Sep	03-Sep	04-Sep	05-Sep	06-Sep	Week 3
07-Sep	08-Sep	09-Sep	10-Sep	11-Sep	12-Sep	13-Sep	Week 2
14-Sep	15-Sep	16-Sep	17-Sep	18-Sep	19-Sep	20-Sep	Week 1
21-Sep	22-Sep	23-Sep	24-Sep	25-Sep	26-Sep	27-Sep	
28-Sep	29-Sep	30-Sep	01-Oct	02-Oct	03-Oct	04-Oct	
<b>Key</b>							
Pay Day							
Holiday Taken							

**Table 3: Pay data for the calculation in Table 4**

Month	Pay	Hours	Average Hourly Pay
June	£1,250	130 hours	£9.62
July	£1,100	100 hours	£11.00
August	£1,400	140 hours	£10.00
September	£750	80 hours	£9.38

**Table 4: Pay data calculation**

Reference Week	Dates	Hours Worked	Weeks' Pay
Week 1	15 September - 19 September	30 hours	30 hours x £9.38 = £281.25
Week 2	08 September - 12 September	15 hours	15 hours x £9.38 = £140.63
Week 3	01 September - 05 September	35 hours	35 hours x £9.38 = £328.13
Week 4	25 August – 29 August	40 hours	40 hours x £10.00 = £400.00
Week 5	18 August – 22 August	30 hours	30 hours x £10.00 = £300.00
Week 6	11 August – 15 August	35 hours	35 hours x £10.00 = £350.00
Week 7	04 August – 08 August	30 hours	30 hours x £10.00 = £300.00
Week 8	28 July – 01 August	25 hours (20 in July, 5 in August)	20 hours x £11 + 5 hours x £10 = £270.00
Week 9	21 July – 25 July	25 hours	25 hours x £11.00 = £275.00
Week 10	14 July – 18 July	20 hours	20 hours x £11.00 = £220.00
Week 11	07 July – 11 July	15 hours	15 hours x £11.00 = £165.00
Week 12	30 June – 04 July	25 hours (5 in June, 20 in July)	5 hours x £9.62 + 20 hours x £11 = £268.08

## 5. Calculating holiday pay for workers with irregular hours or those on zero-hours contracts

Workers with irregular hours or zero-hours contracts are entitled to paid holiday.

There is a holiday entitlement calculator on [GOV.UK](https://www.gov.uk) which will allow you to calculate how much holiday a worker on irregular hours or a zero-hours contract is entitled to within their current leave year.

For casual workers with no normal hours, including individuals on a zero-hours contract, the holiday pay they receive will be their average pay over the previous 12 weeks worked (taking the last whole week, in which they were paid, ending on a Saturday as the most recent week. Unless they are paid weekly on a day other than a Saturday – see previous section, ‘The definition of a ‘week’ for the purpose of the holiday pay reference period’).

The reference period must include the last 12 weeks for which they were actually paid, and so excludes any weeks where they were not paid.<sup>8</sup> This may mean that the actual reference period takes into account pay data from further back than 12 weeks from the date of their leave.

A paid week will include a week in which the worker or employee was paid any amount for work undertaken during that week. Only if no pay at all is received in a week, should it be discounted as part of the 12-week reference period.

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<sup>8</sup> Employment Rights Act 1996: section 224(3).

**For example**, a worker has the following gross pay data:

**Table 5: Illustration for paid and non-paid weeks**

Week	Gross pay	Paid/Unpaid week
Week 1	£300	Paid
Weeks 2-5	£350	Paid
Week 6	£0	Unpaid
Week 7	£10	Paid
Weeks 8-11	£100	Paid
Week 12	£150	Paid
Week 13	£400	Paid

An employer should discount Week 6 in the example above, substituting Week 13 for Week 6 to take the total to 12 weeks of pay data when calculating holiday pay for this period. A week's holiday taken in the week following would be paid at a rate of **£221.67 (which is the average weekly pay from the pay data in the table above)**.

## 6. Rules for individuals working on short contracts or temporary workers (including temporary agency workers)

Contract workers or temporary workers (including temporary agency workers) are entitled to paid holiday.

Short contract, temporary or agency workers should receive holiday pay in the normal way set out in this guidance. If the worker does not take their accrued holiday entitlement by the time they leave employment, they should be paid for this untaken holiday (known as 'payment in lieu'). This should be calculated by working out the individual's remaining holiday entitlement (a [GOV.UK calculator](#) is available) and then working out their holiday pay for this period (see the guidance [GOV.UK](#)).

**For example**, a worker is employed for two weeks. They start to accrue holiday entitlement from day 1 but take no holiday leave during the two-week period. At the end of their contract (termination of employment) they should be paid in lieu for all holiday accrued during this two-week period. There is a [holiday entitlement calculator](#) on GOV.UK which can be used to calculate the paid leave that a worker has accrued. Holiday pay for the leave accrued should then be calculated using an average of the two weeks in which they were paid.

Workers must take the annual leave that they are entitled to and be paid when they take it. It is not acceptable for an employer to add an amount on top of a worker's hourly rate to take account of holiday pay. This is known as 'rolled up' holiday pay. Following a European Court of Justice decision<sup>9</sup>, this is unlawful as workers should be encouraged to take leave from work (receiving their normal level of pay while they are on holiday). Rolled up holiday pay acts as a disincentive to take holiday, as a worker's hourly rate includes the additional top up amount. For further information please contact [Acas](#).

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<sup>9</sup> European Court of Justice – C-131/04 – Robinson-Steele and Others

## 7. Dealing with different periods of leave which have included unpaid leave during the holiday pay reference period

If an employee has taken a period of leave within the 12-week reference period, then any weeks on which no pay was due, should not be included. Instead, additional earlier paid weeks should be included to achieve the 12-week total.

**For example**, an employee works Monday to Friday on a changing shift pattern and is paid monthly. They take a week off work from Monday 7 July on unpaid parental leave. During this leave period, the employee continues to accrue holiday entitlement. The employee then returns to work for four weeks before taking a week’s holiday from Monday 11 August. The 12 weeks prior to the holiday therefore contain the weeks the employee was on unpaid parental leave. This week is excluded from the pay reference period as it is unpaid.

**Table 6: Reference period with unpaid week**

Sun	Mon	Tues	Weds	Thurs	Fri	Sat	Reference Period Week
29 June	30-Jun	01-Jul	02-Jul	03-Jul	04-Jul	05-Jul	Week 5
6 July	07-Jul	08-Jul	09-Jul	10-Jul	11-Jul	12-Jul	Unpaid week not included
13 July	14-Jul	15-Jul	16-Jul	17-Jul	18-Jul	19-Jul	Week 4
20 July	21-Jul	22-Jul	23-Jul	24-Jul	25-Jul	26-Jul	Week 3
27 July	28-Jul	29-Jul	30-Jul	31-Jul	01-Aug	02-Aug	Week 2
3 Aug	04-Aug	05-Aug	06-Aug	07-Aug	08-Aug	09-Aug	Week 1
10 Aug	11-Aug	12-Aug	13-Aug	14-Aug	15-Aug	16-Aug	

Key
Normal Working Week
Unpaid Parental Leave
Holiday Leave

**Please note:** Table 6 shows the first 5 weeks of the worker’s holiday pay reference period. An employer will need to use 12 paid weeks for a worker’s holiday pay reference period.

## 8. Differences between the right to paid holiday derived from European Union legislation compared to UK legislation

The right to paid holiday in the UK is set out in the Working Time Regulations 1998.<sup>10</sup> Regulation 13 states that workers are entitled to a minimum of 4 weeks' holiday, which is the amount guaranteed under EU law. In addition to this minimum entitlement under EU law, the UK provides for an additional 1.6 weeks of holiday under Regulation 13A. Regulation 16 provides that this holiday must be paid holiday.

In total this means that all workers are entitled to 5.6 weeks of paid holiday, but it is made up of EU-law and a UK-law derived elements. Full time workers will therefore benefit from a maximum of 28 days statutory leave per year.

Part-time workers get less paid holiday than full-time workers, in proportion to the number of days or hours per week that they work. They're still entitled to at least 5.6 weeks of paid holiday but this amounts to fewer than 28 days because they work fewer hours or days per week. For further details please view the [holiday entitlement guidance](#) on Gov.uk or speak to [Acas](#).

Workers can be provided with additional contractual leave, in excess of 5.6 weeks, the terms of which will be set out in their individual contracts.

Following rulings by the European Court of Justice<sup>11</sup>, holiday pay for the 4 weeks' leave guaranteed under EU law must be based on "normal remuneration". The principle is that the worker should be in the same financial position as they would have been had they not taken the leave. This is to ensure that workers are not deterred from taking leave by being financially disadvantaged as a result. "Normal remuneration" is interpreted to include payments that are normally received, including any commission, bonuses and overtime directly and intrinsically linked to the work that the worker is required to do. It also includes payments which relate to the status of the worker, such as allowances for seniority, length of service and professional qualifications. However, it does not include payments for expenses which the worker normally incurs when working, but does not incur when on leave, such as travel costs between different work locations.

The additional 1.6 weeks provided under Regulation 13A, and which are not derived from EU law, are not covered by the above European Court judgments. Therefore, strictly speaking, unless the worker's contract or another binding agreement provides otherwise, holiday pay for these additional weeks does not need to reflect normal remuneration in the same way that holiday under regulation 13 does. Employers can of course choose to calculate all holiday pay on the same basis if they wish.

For further information on what elements of pay may be included in holiday pay calculations, please contact [Acas](#). If an employer is making regular payments to a worker, such as commission, bonuses and overtime, then these may need to be taken into account for holiday pay calculations. If this is the case, then it may be appropriate to seek independent legal advice.

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<sup>10</sup> There is also separate legislation for some specific occupations or sectors, such as for seafarers (see regulation 18 Working Time Regulations 1998).

<sup>11</sup> For example see European Court of Justice - C-539/12 - Lock v British Gas Trading Ltd.



## 9. Differences in treatment between EU and UK legislation when calculating holiday pay

There is a challenge in applying the holiday pay rates that are derived from Regulation 13, 13A and contractual holiday entitlement. The law does not state whether the holiday entitlement under Regulation 13 or 13A should be used first. For example, it is not necessarily the case that the first 4 weeks of holiday should be treated as Regulation 13 holiday and the remaining 1.6 weeks as 13A holiday.

If an employer wishes to pay different holiday rates for different periods of holiday based on whether it is Regulation 13 or Regulation 13A leave, then they may wish to consider explaining this clearly and consistently to the worker. Many employers choose not to distinguish between Regulation 13 and Regulation 13A leave, to reduce the administrative burden of treating different periods of holiday differently. In this case, all leave should be calculated as if it is Regulation 13 leave (i.e. including all elements deemed to constitute 'normal remuneration').

## 10. Calculating holiday pay for those leaving a job

A worker or employee can only be paid for holiday they have not taken if they are leaving a job (known as 'payment in lieu').<sup>12</sup> In these circumstances an employer must pay the individual for any outstanding statutory holiday that has not been taken, and for any contractual holiday if that it was the contract provides.

The outstanding statutory holiday pay is calculated in accordance with the methodology set out on [GOV.UK \(unless the worker's contract provides for more than this\)](#). There is also a [holiday entitlement calculator](#) on GOV.UK that can be used to work out an individual's statutory holiday entitlement within their current leave year.

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<sup>12</sup> Regulation 14 Working Time Regulations 1998.

**For example**, a worker with no normal working hours starts on 1 February and works irregular hours on different rates of pay for the next 12 weeks before leaving their job<sup>13</sup> on 26 April. They take no paid holiday during this period. An employer will then take the following steps:

**Table 7**

Steps	Action	Working example
Step 1	Start by calculating how many hours the individual has worked during the 12 weeks.	Between 1 February (start date) and 26 April (leaving date) the worker has been paid for 458 hours. The worker has taken no holiday during this period.
Step 2	Take the total number of hours worked and use this to calculate the holiday entitlement for the individual, using the GOV.UK <a href="#">calculator</a> .  The employer should provide payment in lieu for the individual's untaken holiday entitlement, based on the worker's average hourly rate of pay over the past 12 weeks in which the worker was paid.	Using the calculator, 458 hours of paid work provides the individual with a holiday entitlement of 55 hours 17 minutes. This figure is 12.07% of 458 hours.  <b>Please note:</b> 12.07% is 5.6 weeks' holiday, divided by 46.4 weeks (52 weeks in a year minus 5.6 weeks). The 5.6 weeks are excluded from the calculation as the worker would not be at work during those 5.6 weeks in order to accrue annual leave.
Step 3	The next step is to work out the worker's average hourly rate of pay over the past 12 weeks. The employer needs to look at the number of hours worked and the pay received for each of the past 12 weeks.	The worker has the following pay data: <ul style="list-style-type: none"> <li>• <b>Week 1:</b> 36 hours, paid at £9 per hour. Weekly wage is £324</li> <li>• <b>Weeks 2-10:</b> 38 hours per week, paid at £10 per hour. Weekly wage of £380.</li> <li>• <b>Weeks 11 &amp; 12:</b> 40 hours per week, paid at £11 per hour. Weekly wage of £440.</li> </ul>
Step 4	The employer will then add together their total pay over the 12 weeks and divide this by their total hours over the 12 weeks. This will provide their average hourly rate over the 12 weeks (their holiday pay reference period).	The calculation would be:  Total pay: $324 + (380 \times 9) + (440 \times 2) = 4,624$  Total hours: $36 + (38 \times 9) + (40 \times 2) = 458$

<sup>13</sup> If a worker has not worked for 12 weeks, please refer back to point 1 in Section 2 of this guidance.

Steps	Action	Working example
		<p>Total pay (4,624) ÷ total hours (458) = 10.10.</p> <p>Average hourly rate over the past 12 weeks is £10.10.</p>
Step 5	The 12-week average hourly rate is then used to work out what that individual should be paid for their untaken holiday entitlement.	<p>The average hourly rate is £10.10.</p> <p>The holiday leave entitlement is 55 hours 17 mins. 17 mins is 28% or 0.28 of 60 mins. The calculation would be:</p> <p><math>10.10 \times 55.28 = \text{£}558.11</math></p> <p>The individual is owed £558.11 for their untaken holiday entitlement.</p>

Please note that if a worker's contract is terminated and then they are subsequently re-hired on a new contract, their holiday pay reference period for the subsequent contract should not include paid weeks from their original contract.

In the case of a TUPE (Transfer of Undertakings Protection of Employment) process or a transfer from one area of a business to another, as long as any changes count as [continuous employment](#), then that worker would be able to look back over pay received across this period (to before the transfer) as part of their holiday pay reference period. Please contact [Acas](#) for further information on continuous employment.

## 11. Calculating holiday pay for term-time workers

This will depend on the term time worker's contract.

If they have a full-time, permanent contract, then it is likely that they will be paid their normal weekly rate of pay for all school holiday periods (typically 13 weeks of leave per year).

If they have a part-time permanent contract, then they will also likely receive their normal weekly rate of pay for all school holiday periods.

If however they are only paid for hours actually worked and so not during school holiday periods, such as:

- a worker paid by the hour;
- a supply teacher provided by an agency;
- a temporary worker on a short-term contract;
- a worker on a zero-hours contract;

then an employer should apply a 12-week holiday pay reference period (substituting any whole weeks in which no pay was received for weeks in which pay, however minimal, was received) to calculate the correct amount of holiday pay. The 12-week holiday pay reference was judged to be appropriate for term-time workers in the 2018 *Brazel v The Harpur Trust* case<sup>14</sup>.

**For example**, a part-time music teacher has a zero-hours contract entitling them to 5.6 weeks' annual leave. They have a term-time contract meaning they work 32 weeks per year. They must take their 5.6 weeks of annual leave during the school holidays. They should therefore be paid for 5.6 weeks of leave taken at some point during the school holidays.

The school breaks up for summer holidays on Friday 25 July and the teacher decides to take a two-week paid holiday in mid-August before school returns on 10 September. The employer should therefore take an average of the teacher's pay rate over the last 12 weeks in which they worked, starting with the last week at the end of the summer term and omitting any other periods of school holiday in which the teacher was not paid.

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<sup>14</sup> Employment Appeal Tribunal – UKEAT/0102/17/LA – Mrs L Brazel v The Harpur Trust

**Table 8: Illustration of holiday pay for a term-time worker on a zero-hours contract**

Sun	Mon	Tues	Weds	Thurs	Fri	Sat	Reference Period Week
13-Jul	14-Jul	15-Jul	16-Jul	17-Jul	18-Jul	19-Jul	Week 2
20-Jul	21-Jul	22-Jul	23-Jul	24-Jul	25-Jul	26-Jul	Week 1
27-Jul	28-Jul	29-Jul	30-Jul	31-Jul	01-Aug	02-Aug	
03-Aug	04-Aug	05-Aug	06-Aug	07-Aug	08-Aug	09-Aug	
10-Aug	11-Aug	12-Aug	13-Aug	14-Aug	15-Aug	16-Aug	
17-Aug	18-Aug	19-Aug	20-Aug	21-Aug	22-Aug	23-Aug	
24-Aug	25-Aug	26-Aug	27-Aug	28-Aug	29-Aug	30-Aug	
31-Aug	01-Sep	02-Sep	03-Sep	04-Sep	05-Sep	06-Sep	
07-Sep	08-Sep	09-Sep	10-Sep	11-Sep	12-Sep	13-Sep	

Key
Normal Working Time
School Holidays
Holiday Taken

**Please note:** Table 8 shows the first two weeks of the worker’s holiday pay reference period. An employer will need to use 12 paid weeks for a worker’s holiday pay reference period.

## 12. When to pay a worker for holidays they have taken

It is considered best practice for an employer to pay their workers promptly according to their pay reference period (for example weekly or monthly) as agreed in their contract or contractual relationship.

This can be challenging when a worker, for example, receives a higher pay rate for overtime worked within their holiday pay reference period, but this overtime needs to be approved by an employer at the end of the month (after payroll cut off) before it becomes payable. In these types of instances, where an employer is genuinely unable to pay the appropriate amount of holiday pay in the pay reference period in which the leave was taken, it may be acceptable for the employer to correct this underpayment in the following pay reference period, providing the worker is receiving their normal rate of pay whilst on holiday.

**For example**, a worker is paid monthly on day 21 of each month. The payroll cut-off is day 15 of the month and therefore on day 21 they are paid for hours worked from days 1 to 14 and for scheduled or contractual hours for the remainder of the month. Therefore they are partially paid in arrears and partially in advance.

If a worker takes holiday within the month, but after day 14, or their pay for the month includes variable elements (for example: overtime, bonuses or commission) that are not approved until the end of the month, then the holiday pay that the worker receives on day 21 may not account for elements of pay that should be included. In these situations, it may be acceptable for an employer to pay a worker for any additional holiday pay they are entitled to in the pay reference period that follows immediately afterwards, providing the worker is not thereby disincentivised from taking the holiday.

## Section 3: Case law regarding holiday pay

*Employers may wish to consider the following legal judgments when determining how they should calculate holiday pay for their workers in different circumstances. These are some of the key cases in the area, but this is only a partial list. Employers may wish to consider other cases that may be more relevant to their circumstances, and also seek independent legal advice.*

### **1. Court of Justice of the European Union (CJEU) – C-131/04 – Robinson-Steele v RD Retail Services Ltd (2006)**

The Court ruled that rolled-up holiday pay schemes are contrary to the Working Time Directive, because they could deter workers from taking their holidays. Therefore such schemes are unlawful. However, the Court went on to say that if it was transparent and comprehensible that the sums in question were in respect of annual leave then those sums could be set off against the employer’s holiday pay liability.

### **2. CJEU – C-155/10 – Williams and others v British Airways plc (2011)**

The CJEU ruled that pilots’ holiday pay entitlement should not be limited to basic salary but instead correspond to “normal remuneration”. That meant that pilots should be entitled to holiday pay in respect of elements of their pay (i) linked intrinsically to the performance of tasks which form part of their contracted employment, and (ii) relating to their personal and professional status as an airline pilot.

### **3. CJEU – C-539/12 – Lock v British Gas Trading Ltd (2014)**

Mr Lock used to be a sales consultant for British Gas. He was paid basic salary and results-based commission but only basic pay during leave. A reference was made to the CJEU which ruled that results-based commission must be included when calculating holiday pay so that the worker received their normal pay whilst on holiday.

### **4. Employment Appeal Tribunal (EAT) – UKEATS/0047/13 - Bear Scotland Ltd v Fulton (2014)**

The EAT found that regular overtime, which employees are obliged to perform if requested by the employer, should be included for holiday pay purposes. It also found that holiday pay claims for a series of underpayments will not succeed for earlier underpayments where there has been a gap of three months or more in the series.

### **5. EAT – UKEAT/0334/16 - Dudley Metropolitan Borough Council v Mr G Willets and others (2017)**

This case concerned 56 council workers who repair and improve housing. The EAT ruled that payments for purely voluntary overtime should be included in holiday pay if they are regular enough to constitute “normal pay”.

**6. EAT – UKEAT/0102/17/LA – Mrs L Brazel v The Harpur Trust (2018)**

Mrs Brazel was a visiting music teacher engaged by the Harpur Trust. She was a term-time worker, working 32 weeks a year. The school calculated her holiday pay on a 'pro-rata' basis, using the normal 12.07% calculation to do so. However the EAT ruled that she should be paid on the basis of section 224 of the Employment Rights Act – i.e averaging pay over the last 12 weeks where the worker has actually worked.



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