



Department for  
Business & Trade

# Retained EU Employment Law

Consultation on reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations

Closing date: 7 July 2023

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# Foreword

## Our record

We are proud of the UK's record on employment standards, having raised domestic standards over recent years to make them some of the highest in the world.

Our high standards were never dependent on us mirroring the same rules as the EU. The UK has been at the forefront of the development of workers' rights long before we joined the European Communities in 1973. Many rights which are now found in EU law were already implemented in the UK, such as the right to equal pay and to paternity leave. In addition, the UK provides for stronger protections for workers than are required by EU law. For example, we have one of the highest minimum wages in Europe, which increased again on 1 April, while in the EU there is no right to a minimum wage.

It was also this Government that ended the free movement of people, further protecting the wages of lower-skilled workers. UK workers are entitled to 5.6 weeks of annual leave compared with the EU requirement of 4 weeks. We provide a year of maternity leave with the option to convert up to 50 weeks of that leave to shared parental leave to enable parents to share care, while the EU minimum maternity leave is just 14 weeks.

Alongside this record, the increase in employment that the Government has overseen since 2010 is proof that there is no contradiction between high employment and high standards. Under this Government we have seen employment near record highs and unemployment near record lows. The number of payroll employees for March 2023 was 30.0 million, 1.0 million above pre-pandemic levels, and at 3.8%, the unemployment rate has rarely been lower in the last 50 years. The UK's flexible labour market is at the heart of this success. It enables businesses to start-up, grow and create jobs, and provides opportunities for the people of this country.

As a Government, we are committed to building on our record of protecting and enhancing workers' rights. We are currently backing six Private Members' Bills, which will give benefits like easier access to flexible working. On 1 April 2023, we increased the National Living Wage by 9.7%, the largest ever cash increase. We have extended the ban on using exclusivity clauses for the lowest paid, ensuring an estimated 1.5 million people have the option to pick up extra work if they want to. We have closed an unfair loophole to stop agency workers being employed on cheaper rates than permanent workers. And we have brought in world-leading legislation that gives parents a new legal right to two week's paid bereavement leave for those who suffer the devastating loss of a child.

We are also ensuring that everyone is playing by the rules. Since 2014, we have named and shamed 2,500 employers who had failed to pay the minimum wage. We have quadrupled the maximum fine for employers who treat their workers badly. We are taking action to address the practice of dismissal and re-engagement, also known as ‘fire and rehire’.

## **Our Vision**

We want to make Britain the most dynamic place in the world to work, and to launch, grow and do business. To get there, we must build on and strengthen our flexible and thriving labour market. This will help drive growth and promote more competition in UK markets as we build a high-skills, high-wage economy, with a business-friendly culture, where creative enterprise is encouraged and rewarded.

Throughout the Brexit process, the Government has been clear that we have no intention of abandoning our strong record on workers’ rights.

## **Seizing the opportunities of Brexit**

The Retained EU Law (Revocation and Reform) Bill provides an opportunity to reflect on retained EU employment law and is an integral step in the Prime Minister’s mission to boost the UK economy, putting business, consumers, and the British public first. Through this consultation, we are confirming our intention to preserve rights such as the right to maternity leave, annual leave, and protections for part-time and fixed-term workers.

We have also identified several regulations where we see opportunities for improvements following our exit from the EU. These proposals do not seek to remove rights, but instead remove unnecessary bureaucracy in the way those rights operate, allowing business to benefit from the additional freedoms we have through Brexit.

By ensuring that employment regulations are fit for purpose, entrepreneurial businesses will have more opportunity to innovate, experiment, and capitalise on the UK’s global leadership in areas like clean energy technologies, life sciences, and digital services. This will cement our position as a world-class place to start and grow a business.

We want to use this consultation as part of our ongoing dialogue with businesses and workers to set out an employment rights framework that will retain our global position as a dynamic, vibrant, and flexible economy.

## **Why we are consulting**

### **Retained EU Law**

The Retained EU law (Revocation and Reform) Bill provides us with an opportunity to put the UK statute book on a sustainable footing, following our exit from the EU. The Bill enables the UK government, via Parliament, to replace years of EU regulation with a more agile, home-grown regulatory approach that specifically meets the needs of the UK - seizing the benefits of Brexit to create the best regulated economy in the world, stimulating economic growth, innovation, and job creation.

After our exit from the EU, the European Union (Withdrawal) Act of 2018 preserved a substantial amount of EU law in our domestic legal framework as retained EU law (REUL). However, this category of law was never intended to sit on the statute book indefinitely. Many EU laws retained after Brexit were agreed as part of a complex compromise in Brussels, between 28 different EU member states, and these were not subject to the same levels of Parliamentary scrutiny as UK domestic legislation.

The Bill will reclaim the sovereignty of the UK Parliament by downgrading the special status REUL currently has in our legal system - ending the supremacy of EU law by the end of 2023 – and re-establishing the supremacy of laws created by the UK legal system. The Bill will also make it easier to amend, revoke or replace REUL, in the best interests of the UK.

Alongside the Bill, the Government has been conducting a comprehensive review of all retained EU law to ensure that our regulations are tailored to the needs of the UK economy and help create the conditions for growth.

### **Preserving our strong framework of rights**

The Government has been clear throughout this process that we have no intention of abandoning our strong record on workers' rights, having raised domestic standards over recent years to make them some of the highest in the world.

To make good on this promise, we will ensure that retained EU employment law for which the Department for Business and Trade is responsible is preserved in areas where we are not either consulting on reforms or revoking legislation that is now irrelevant.

We will ensure that people continue to enjoy key protections as they do currently by preserving important retained EU employment law, including;

- Maternity and Parental Leave etc Regulations 1999
- Paternity and Adoption Leave etc Regulations 2002
- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- The Agency Workers Regulations 2010
- Information and Consultation of Employees Regulations 2004
- Transnational Information and Consultation of Employees Regulations 1999
- Areas of the Working Time Regulations not specified below
- Areas of the Transfer of Undertakings (Protection of Employment) regulations (TUPE) not specified below.

### **Identifying opportunities to reduce bureaucracy**

We have identified three areas that we believe could benefit from reform to ensure that they are fit for purpose for both businesses and workers alike. Our initial assessment has found that these areas are too onerous on business to be used effectively or too complex for workers to know, understand and use.

The three areas we are consulting on are:

- Record keeping requirements under the Working Time Regulations,
- Simplifying annual leave and holiday pay calculations in the Working Time Regulations,
- Consultation requirements under the Transfer of Undertakings (Protection of Employment), or 'TUPE', Regulations.

The consultation seeks views on specific proposals for these areas of retained EU employment law to ensure they are tailored to the needs of the UK economy and help create the conditions for growth. The Government has no intention of removing the important protections people enjoy under the Working Time Regulations or the TUPE regulations. We want to use this consultation as part of our ongoing dialogue with businesses and workers to set out an employment rights framework that will allow the UK labour market economy to grow and retain our global position as a dynamic, vibrant, and flexible economy.

## **Removing regulations that are no longer relevant**

As part of our review of retained EU employment law we have also identified several regulations which no longer operate as intended following our exit from the EU. These regulations were retained in 2018 as part of the withdrawal process. However, they were never intended to sit on the statute book indefinitely. We therefore intend to revoke the following regulations:

- The Posted Workers (Enforcement of Employment Rights) Regulations 2016
- The Posted Workers (Agency Workers) Regulations 2020
- The European Cooperative Society (Involvement of Employees) Regulations 2006

As the UK is no longer an EU member state, the concept of a 'posted worker' does not apply as it did during our membership of the EU. This is simply a tidying up of the statute book by removing regulations that no longer operate as intended, it does not impact workers' rights. The European Cooperative Society (Involvement of Employees) Regulations 2006 formed part of the EU legislation governing the establishment and operation of an entity known as the European cooperative society. The regulations governing them were revoked at the end of the Brexit implementation period.

The information gathered from this consultation will be used to inform the design of reforms that modernise our employment framework and ensure it is fit for purpose, while preserving the overall levels of protection for workers.

While we encourage respondents to answer as many questions as possible, you are not required to complete all the questions. There may be questions that do not apply to your circumstances.

## **Consultation details**

**Issued:** 12 May 2023

**Respond by:** 7 July 2023

**Enquiries to:** [reulemploymentlaw@beis.gov.uk](mailto:reulemploymentlaw@beis.gov.uk)

**Consultation reference:** Consultation on reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations

### **Audiences:**

Entrepreneurs, start-ups, micro businesses, SMEs, large businesses, multinational businesses, charities, trade bodies, trade unions, legal representatives, employment lawyers, HR professionals, individual employees, think-tanks, general public.

### **Territorial extent:**

Employment law is reserved for England, Wales and Scotland. It is a devolved matter in Northern Ireland.

The proposals in the document do not represent the established policy position of the Northern Ireland Executive or Assembly.

During our membership of the EU, all nations of the UK were required to meet our obligations under EU law. In some instances, the Northern Ireland Executive passed its own employment legislation to meet these obligations, for example, The Agency Workers Regulations (Northern Ireland) 2011. In other cases, the UK Government implemented our EU obligations by applying legislation on a UK wide basis. For example, parts of the TUPE regulations extend to Northern Ireland.



## How to respond

**Respond online at:** [https://ditresearch.eu.qualtrics.com/jfe/form/SV\\_06Sa8wldAZYeGTs](https://ditresearch.eu.qualtrics.com/jfe/form/SV_06Sa8wldAZYeGTs)

or

**Email to:** [reulemploymentlaw@beis.gov.uk](mailto:reulemploymentlaw@beis.gov.uk)

This consultation is available at:

<https://www.gov.uk/government/consultations/retained-eu-employment-law-reforms>

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

## Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018, and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws.

We will summarise all responses and publish this summary on [GOV.UK](https://www.gov.uk). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

## Quality assurance

This consultation has been carried out in accordance with the Government's [consultation principles](#).

# The proposals

## Executive Summary

The Government has been conducting a comprehensive review of all retained EU law to ensure that our regulations are tailored to the needs of the UK economy and help create the conditions for growth. The Government has been clear throughout this process that we have no intention of abandoning our strong record on workers' rights, having raised domestic standards over recent years to make them some of the highest in the world.

The table below sets out the key areas of retained EU employment law the Department for Business and Trade is responsible for and the proposed approach for each area.

**Table 1: Proposals for key areas of retained EU employment law the Department for Business and Trade is responsible for**

<b>Name of Retained EU Law</b>	<b>Example of employment rights provided</b>	<b>Proposal</b>
<b>Working Time Regulations 1998</b>	Maximum average working week of 48 hours, keeping records of workers that opted out, minimum rest breaks – daily and weekly, annual leave and pay, protections for young workers and night workers.	Consult on record keeping requirements, merging the current annual leave entitlements, and introducing rolled-up holiday pay, while ensuring that workers' rights continue to be protected.
<b>Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)</b>	Protects employees' employment rights when the business or undertaking for which they work transfers to a new employer.	Consult on proposals to change the consultation requirements in the TUPE regulations, to simplify the transfer process, while ensuring that workers' rights continue to be protected.
<b>Maternity and Parental Leave etc Regulations 1999</b>	Alongside provisions in primary legislation, these Regulations provide rights for Maternity Leave and Parental Leave.	Preserve

<p><b>Paternity and Adoption Leave etc Regulations 2002</b></p>	<p>Provides rights to eligible employees to Paternity Leave and Adoption Leave.</p>	<p>Preserve</p>
<p><b>Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000</b></p>	<p>Provides part-time workers the right in principle not to be treated less favourably than full-time workers of the same employer who work under the same type of employment contract.</p>	<p>Preserve</p>
<p><b>Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002</b></p>	<p>Provides fixed-term employees the right in principle not to be treated less favourably than permanent employees of the same employer doing similar work.</p> <p>Also provides for fixed-term employees who have been continuously employed for 4 years, the right to a permanent contract.</p>	<p>Preserve</p>
<p><b>The Agency Workers Regulations 2010</b></p>	<p>Agency workers are entitled to equal treatment in relation to access to certain shared facilities and information on vacancies from day one. After 12 weeks with the same hirer and in the same role, they are entitled to the same basic working and employment conditions, including pay and annual leave, as directly recruited employees.</p>	<p>Preserve</p>

<b>Transnational Information and Consultation of Employees Regulations 1999</b>	<p>The Regulations provide for European Works Councils (EWC). An EWC is a forum through which a company can inform and consult employees on issues that affect more than one country where the business operates.</p>	<p>Preserve</p>
<b>Information and Consultation of Employees Regulations 2004</b>	<p>Gives workers' rights to request information and consultation arrangements in the workplace</p>	<p>Preserve</p>
<b>Posted Workers (Enforcement of Employment Rights) Regulations 2016</b>	<p>Under EU law 'posted workers' are workers temporarily sent by an employer in one EU State to provide services in another EU State. They remain employed by the sending employer and return to their home state once the service is complete.</p>	<p>Revoke</p>
<b>The Posted Workers (Agency Workers) Regulations 2020</b>	<p>Provided protections to posted workers who were also agency workers.</p>	<p>Revoke</p>
<b>The European Cooperative Society (Involvement of Employees) Regulations 2006</b>	<p>Guaranteed specific levels of participation and involvement for employees in European cooperative societies.</p>	<p>Revoke</p>

# Reducing the administrative burden of the Working Time Regulations

The Working Time Regulations are derived from the European Union Working Time Directive and create various entitlements for workers including minimum rest breaks and maximum working hours, as well as an entitlement to paid annual leave.

The Working Time Directive was intended to protect workers' health and safety by regulating working hours, rest periods, and entitlement to paid annual leave.

Before the regulations came into effect there were no general regulations in the UK relating to working time or entitlement to leave. However, the UK Government has gone further than the EU by giving workers 5.6 weeks of annual leave compared with the EU requirement of 4 weeks.

The key provisions in the Working Time Regulations include:

- A maximum average working week of 48 hours for adult workers, measured over a reference period of 17 weeks;
- Workers can 'opt-out' of the 48-hour limit in writing;
- Rest break of 20 mins for a working day of more than 6 hours;
- Annual leave of 5.6 weeks;
- Uninterrupted rest periods of 11 hours each day; and at least 24 hours each week (or 48 hours each fortnight);
- Special protections for young workers and night workers.

The Government will preserve these rights in domestic law and ensure that workers continue to enjoy them.

However, having left the European Union, the Government has been taking the opportunity to review record keeping requirements under the Working Time Regulations, assessing whether the rules that currently apply work in the best interests of businesses and workers and deliver on the Government's objective of creating the conditions for growth.

The Government is proposing removing the uncertainty for employers about their record-keeping obligations after a 2019 judgment of the Court of Justice of the European Union (*Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*).

## European court judgment on recording working hours

The 2019 judgment of the Court of Justice of the European Union (Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE) ruled that employers must have an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. This case held that records must be kept in relation to the right to a minimum daily rest period of 11 consecutive hours in each 24-hour period; the right to a minimum uninterrupted period of rest of 24 hours in each seven-day period; and the limit on the maximum weekly working time. The Government believes that this is disproportionate, particularly while the economy is recovering from the impact of the Covid-19 pandemic and the impacts of war in Ukraine. This does not give workers new substantive rights, and we believe in many cases such an obligation on employers would be damaging to relationships between employers and their workers.

We therefore propose to remove this uncertainty and the potential high cost of implementing a system of recording working hours by legislating to clarify that businesses do not have to keep a record of daily working hours of their workers.

**1. Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?**

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

*Please explain your answer, including consideration of the costs and benefits that may affect employers and/or workers.*

**2. How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes (for employers)?**

- Very important
- Important
- Neither important nor unimportant
- Unimportant
- Don't know

*Please explain your answer.*

**3. What is your experience of record keeping under the Working Time Regulations? Beyond the proposal above, how, if at all, do you think they could be improved?**

*Please explain your answer*

**Questions for employers**

The following questions focus on what, if any, system your business currently has for recording the working hours of your workforce.

**4. Do you keep records to specifically meet the requirements set out in the Working Time Regulations?**

- Yes
- No
- Don't Know

*Please explain your answer. If you answered no, please explain which other records you keep to meet the requirements.*

**5. Do you keep working time records that go beyond the existing requirements set out in the Working Time Regulations?**

- Yes
- No
- Don't Know

*Please explain your answer, including considerations of the types of records that you keep and your reasons for doing this.*

**6. Do you currently have a system in place that records the daily working hours of all your staff?**

- Yes
- No
- Don't Know

*Please describe the system, including consideration of how the information is recorded practically, what information is recorded, the ways in which your system is automated, and whether the records are checked, verified and/or approved.*

## Questions for workers

The following questions focus on what, if any, role you currently have in recording your working hours.

**7. Are you: paid hourly; paid by task; or paid a salary or fixed amount, for example for each day, week, or month, regardless of the hours you work?**

- I am paid hourly
- I am paid by task
- I am paid a salary or a fixed amount for each day, week, or month
- Don't know
- Other (please explain)

**8. Does your employer keep records of your daily working hours?**

- Yes
- No
- Don't know

*If you answered yes, please provide more details of how you provide records of your working hours to your employer, whether the process is automated, and whether your employer checks, verifies, or approves the records.*



# Holiday pay and entitlement reform

## Introduction to Holiday Pay and Entitlement Legislation

Paid holiday entitlement is a key health and safety right. It is important that workers have time off work to rest and recover, and that they are paid for this time. Over time, the legislation governing holiday entitlement and holiday pay has become complex and, in some cases, can be challenging for employers to follow. There is a risk that in certain circumstances it may not be fully achieving its original intention.

The Retained EU Law (Revocation and Reform) Bill offers an opportunity to reflect on retained EU employment law and to provide clarity on complex holiday pay legislation to make it simpler for employers and workers to understand. The proposals do not seek to remove rights, but instead remove unnecessary bureaucracy in the way those rights operate.

The main pieces of legislation that govern holiday entitlement and pay for workers are the Working Time Regulations 1998 and the Employment Rights Act 1996. As the Working Time Regulations implement the EU Directive, they are considered retained EU law and are in scope of the Retained EU Law (Revocation and Reform) Bill. There is also a significant body of domestic and retained EU case law.

This section gives a brief overview of the current law on holiday pay and entitlement.

## Holiday Entitlement

Almost all workers are entitled to 5.6 weeks of paid annual leave each year; this includes agency workers, workers with irregular hours and workers on zero hours contracts. Part-time workers receive the same 5.6 weeks of annual leave that a full-time worker receives, but as a part-time worker has a shorter working week, a week will be a shorter period of time than a full-time worker. This leave entitlement is broadly granted under the Working Time Regulations, although workers in some sectors are covered by other regulations. Holiday entitlement in the Working Time Regulations is split into two allocations:

- 4 weeks under regulation 13, which implemented the leave required by the EU's Working Time Directive; and
- 1.6 weeks under regulation 13A, which is additional leave above the EU minimum requirements.

Although regulation 13 leave was originally derived from EU legislation, it currently remains part of domestic employment law following the UK's exit from the EU.

Holiday entitlements are split into leave years. This can be defined by an agreement between workers and employers, such as the employment contract, and could, for example, mirror the calendar year (1st January to 31st December) or the financial year (1st April to 31st March).

The Working Time Regulations set out which holiday can be carried into the next leave year, and which cannot:

- Regulation 13 grants 4 weeks of holiday that cannot be carried forward under usual circumstances.
- Regulation 13A grants a further 1.6 weeks that may be carried into the next leave year if a relevant agreement between a worker and their employer provides for it to do so.

Emergency temporary legislation was brought in during the pandemic to allow workers to carry over the 4 weeks of Regulation 13 leave into the following 2 leave years if they were unable to take it due to the effects of coronavirus.<sup>1</sup>

There are some exceptions to leave expiring. For example, case law has established that a worker who is unable to take holiday due to sickness or maternity leave would be entitled to carry it into a future leave year, to then be taken when they returned to work.

## **Holiday Pay**

The Working Time Regulations and sections 221-224 of the Employment Rights Act 1996 set out how to calculate a worker's holiday pay. The overarching principle is that holiday pay should reflect a worker's usual rate of pay for periods of actual work.

Where a worker has a constant rate of pay, they should receive the same pay they would have received if they had been at work. If a worker has variable pay, their holiday pay is calculated based on an average from their earnings in a 52-week reference period. Whether a worker has normal working hours or not will dictate which weeks are included in the reference period.

Recent case law has considered what must be included in holiday pay calculations. Where holiday pay had previously been calculated based on regular pay that workers received, it should include all components that form "usual pay", including regular overtime, regular commission, and regular bonuses. For example, in 2014 the Employment Appeal Tribunal ruled that regular overtime that employees were required to work by their employer should be factored into a worker's holiday pay.<sup>2</sup> This case law reaffirms the principle that, for the regulation 13 leave derived from EU law at least, holiday pay should be reflective of the pay that would have been earned if the worker was at work and working.

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<sup>1</sup> The Working Time (Coronavirus) (Amendment) Regulations 2020:  
<https://www.legislation.gov.uk/uksi/2020/365/made>

<sup>2</sup> Bear Scotland Ltd v Fulton [2014] UKEATS 0047/13/0411

Workers must also be given the opportunity to take their statutory holiday entitlement – employers cannot generally buy it back or replace holiday with financial compensation if the worker remains in continuing employment. This is known as payment in lieu and is only lawful where a worker leaves their employment.

The current legislation creates an unhelpful divide between the two separate pots of annual leave, compounded by the growing body of case law which has built up on holiday pay. Now that we have left the EU, we have the opportunity to merge the two amounts of entitlement and create a singular annual leave entitlement of 5.6 weeks. We also propose setting out the minimum rate of holiday pay and arrangements for carrying over leave in legislation, alongside introducing rolled-up holiday pay as an additional option for calculating holiday pay.

### **Key Terms**

Throughout this section of the consultation, **holiday pay** and **holiday entitlement** are treated separately. For the avoidance of doubt, these terms are defined (for the purposes of this section) as follows:

**Holiday Entitlement** – The 5.6 weeks of statutory paid holiday that workers are entitled to under the Working Time Regulations. Holiday entitlement is also known as annual leave entitlement.

**Holiday Pay** – The pay that workers must receive when taking statutory holiday.

**Workers with irregular hours** – workers who have a completely irregular, non-repeating working pattern.

## Proposal 1: Create a single annual leave entitlement of 5.6 weeks

### Introduction

The Working Time Regulations currently give workers the right to paid annual leave. Regulation 13 provides 4 weeks of annual leave, which implements the leave required by the EU's Working Time Directive.<sup>3</sup> Regulation 13A provides an additional 1.6 weeks of annual leave which is above the EU minimum requirements. Currently, the Working Time Regulations restrict a worker's statutory annual leave to 28 days in a calendar year, which is the equivalent of 5.6 weeks where a worker works 5 days a week.<sup>4</sup>

The distinction between the two types of leave is important as currently there are different rules that apply to the EU derived and the domestic portions of holiday, including the rate at which holiday pay should be paid and whether each leave entitlement can be carried over into the following leave year.

Domestic and EU case law has set out what should be included in the 4 weeks of leave set out in regulation 13 so that it reflects a worker's "normal remuneration".<sup>5</sup> Many employers choose not to distinguish between the different leave entitlements, for example by ensuring all holiday pay reflects normal remuneration, to reduce the administrative burden of treating different periods of leave differently.

The current position is set out in Table 2 below.

**Table 2: Current differences between Regulation 13 and Regulation 13A annual leave**

	Regulation 13	Regulation 13A
<b>Amount</b>	4 weeks.	1.6 weeks.
<b>Derived from EU law?</b>	Implements minimum leave required by the EU Working Time Directive.	Additional leave above the EU's minimum leave requirement.

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<sup>3</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

<sup>4</sup> Regulation 13A(3), Working Time Regulations 1998.

<sup>5</sup> For example, *Lock v British Gas Trading Limited* [2014] CJEU C-539/12

<p><b>How is holiday pay calculated?</b></p>	<p>Workers should receive their normal remuneration, as set out under case law.</p> <p>This can include:</p> <ul style="list-style-type: none"> <li>• Commission</li> <li>• Bonuses</li> <li>• Some types of overtime, for example that is directly linked to work the worker is required to do, and is sufficiently regular and has been paid over a sufficient period.</li> </ul>	<p>Paid at basic pay rate.</p> <p>Does not need to reflect normal remuneration, unless the worker's contract or another binding agreement provides otherwise.</p>
<p><b>Can it be carried over into the next leave year?</b></p>	<p>No – except where a worker has been unable to take it in certain scenarios, defined by case law:</p> <ul style="list-style-type: none"> <li>• Being on long-term sick leave</li> <li>• Being on maternity, paternity, or parental leave.</li> </ul> <p>Temporary Covid regulations<sup>6</sup> allowed workers to carry over their regulation 13 leave.</p>	<p>Yes – if there is a written agreement between a worker and their employer.</p>
<p><b>Which leave should be used up first?</b></p>	<p>The Working Time Regulations do not specify whether regulation 13 or 13A leave should be used first in a leave year.</p>	
<p><b>Leave in first year of employment?</b></p>	<p>Regulation 15A says that workers should accrue 1/12th of their annual leave entitlement at the start of each month until the end of their first year of employment. It is not clear which leave entitlement accrues first.</p>	

<sup>6</sup> The Working Time (Coronavirus) (Amendment) Regulations 2020.

## **Create a single annual leave entitlement of 5.6 weeks**

The Government is aware of the administrative burden and complications arising from administering payroll systems that can distinguish between two distinct amounts of annual leave entitlement with different rules. The current distinctions between the entitlements in regulations 13 and 13A cause confusion for both workers and employers; employers are unsure how to calculate holiday pay for the different leave entitlement and which leave entitlement should accrue or be taken first, and workers are unclear about how their holiday should accrue in their first year of work and the rate of holiday pay they are owed due to the two separate calculations.

In order to solve the confusion and administrative burden caused by the separate annual leave entitlements, the Government proposes to **create one pot of annual leave entitlement for all workers in Great Britain**. We already have one of the most generous leave entitlements in Europe. Now that we have left the EU, we can legislate to combine the 4 weeks and 1.6 weeks of leave conferred in the Regulations into a single leave entitlement governed by one set of rules.

We propose to replace regulations 13 and 13A with a new regulation to create a new single statutory annual leave entitlement, which will set out the minimum rate that holiday pay should be paid at. Under this proposal, the total statutory annual leave entitlement for workers would not change. Workers would continue to be entitled to 5.6 weeks of paid statutory annual leave.

Table 3 sets out the proposed single leave entitlement that would replace the current leave entitlement in regulations 13 and 13A of the Working Time Regulations.

**Table 3: Proposed single leave entitlement**

<b>Proposed single leave entitlement</b>	
<b>Amount</b>	No change from current amount: 5.6 weeks statutory annual leave.
<b>Is it required?</b>	Following EU exit, we are no longer bound by the EU’s requirements on annual leave. However, we will continue to provide an annual leave entitlement greater than the EU’s required minimum.
<b>How is holiday pay calculated?</b>	We will use this consultation to explore how to define the rate of holiday pay in legislation.
<b>Can it be carried over into the next leave year?</b>	<p>No change from current arrangements: workers will be allowed to carry over 1.6 weeks into the following leave year if there is a written agreement between a worker and their employer.</p> <p>Not normally permissible to carry over the entire statutory annual leave entitlement, except where a worker has been unable to take it in certain scenarios:</p> <ul style="list-style-type: none"> <li>• Being on long-term sick leave</li> <li>• Being on maternity, paternity, adoption, or parental leave</li> </ul>
<b>Which leave should be used up first?</b>	<p>All leave will be in a single pot so there will be no legal requirement to take any part of the leave first.</p> <p>If employers choose to include bank holidays in the statutory entitlement, these days will need to be taken during the calendar year.</p>
<b>Leave in first year of employment?</b>	Workers would accrue their annual leave entitlement at the end of each pay period until the end of their first year of employment.

**9. Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses?**

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

*Please explain your answer.*

### **Change to Holiday Pay rate**

Combining the two existing leave entitlements into a single pot of statutory annual leave aims to reduce the costs that businesses face when trying to understand which legal framework applies and will help ensure that workers are receiving consistent amounts of holiday pay for their entire entitlement. Currently, the annual leave entitlement set out in regulations 13 and 13A respectively are required to be paid at different minimum rates, with the 4 weeks from regulation 13 paid at a worker's normal pay rate, and the 1.6 weeks paid at basic pay rate. We are keen to explore how we could define and legislate to introduce a single rate of holiday pay for the entire 5.6 weeks of entitlement.

Many businesses may already pay the entire 5.6 weeks of leave at a worker's normal rate of pay because of the administrative burden of having to pay leave at differing rates. We recognise that other businesses could face significant additional costs if the entire 5.6 weeks of leave was required to be paid at a worker's normal pay rate as a minimum. However, we also recognise the financial impact that requiring the 5.6 weeks of leave to be paid at a worker's basic pay rate as a minimum would have on workers.

What is considered 'normal remuneration' or pay is currently not clearly defined, neither in the Working Time Regulations, nor in the growing body of European Court of Justice (ECJ) and domestic case law and would be significantly challenging to write into legislation. We are seeking views from employers and workers on how holiday pay is currently calculated and how they think it should be defined in legislation.



**10. (For employers): What rate do you currently pay holiday pay at?**

- 5.6 weeks of statutory annual leave at normal pay (including certain types of overtime, commission, and bonuses)
- 4 weeks of statutory annual leave at normal pay and 1.6 weeks of statutory annual leave at basic pay
- Don't know
- Other (please explain)

**11. (For workers): What rate do you currently receive holiday pay at?**

- 5.6 weeks of statutory annual leave at normal pay (including certain types of overtime, commission, and bonuses)
- 4 weeks of statutory annual leave at normal pay and 1.6 weeks of statutory annual leave at basic pay
- Don't know
- Other (please explain)

**12. What rate do you think holiday pay should be paid at?**

- 5.6 weeks of statutory annual leave at basic pay
- 5.6 weeks of statutory annual leave at normal pay
- Don't know
- Other (please explain)

*Please explain briefly in your answer what you think should be included as part of the holiday pay rate you have selected.*

**Change to calculating leave in a worker's first year of employment**

Currently, under regulation 15A, workers should accrue 1/12th of their annual leave entitlement each month until the end of their first year of employment. It is not clear which of the two leave entitlements workers accrue first. This is at odds with regulations 13 and 13A which set out how to pro-rate holiday entitlement when a worker starts or leaves midway through a leave year.

We want to address the confusion caused by two conflicting calculations in legislation. The Government proposes that workers would accrue their annual leave entitlement at the end of each pay period until the end of their first year of employment, similar to what is currently described under regulation 15A. The Government wants to give employers the flexibility to provide annual leave entitlement when they pay their workers. We recognise that requiring annual leave entitlement to be provided monthly under regulation 15A can require a complicated calculation for employers, as a 'month' is not a standardised length.

It may be easier for employers to calculate holiday accrued in weeks, given that annual leave entitlement is set out in weeks. Some employers may choose to provide their workers with annual leave entitlement more frequently than monthly, for example, if they pay their workers weekly or daily. Workers could expect to receive a steady amount of holiday entitlement as they had accrued it, which should provide greater certainty for irregular hours workers who are at risk of not receiving the correct holiday entitlement due to the complex legislative position.

The replacement regulations will set out a clear method for calculating holiday entitlement for workers in their first year of work. These regulations, alongside revised guidance, will provide much needed clarity for employers on which method should be considered the de facto approach.

The Government has recently consulted on calculating holiday entitlement for part-year and irregular hours workers.<sup>7</sup> The consultation also considered how entitlement could be calculated for irregular hours workers in their first year of work.

As with other elements of holiday pay and entitlement, employers may choose to provide more generous contractual terms and give workers a greater annual leave entitlement up front, for example, by pro-rating entitlement to the rest of the leave year, or by providing workers with annual leave at the beginning of each month or pay period if they have regular working hours.

**13. Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period?**

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

*Please explain your answer.*

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<sup>7</sup> <https://www.gov.uk/government/consultations/calculating-holiday-entitlement-for-part-year-and-irregular-hours-workers>

## **Change to carrying over leave due to COVID**

The Working Time (Coronavirus) (Amendment) Regulations 2020 were introduced in March 2020 as emergency temporary legislation to prevent workers from losing annual leave entitlement if they were unable to take it due to the effects of coronavirus. They amended the Working Time Regulations to allow workers to carry over the 4 weeks of regulation 13 leave into the following 2 leave years, if it was not reasonably practicable for a worker to take this leave in the year to which related. As we move on from the pandemic, we intend to remove these regulations as they are no longer needed.

### **14. Are there any unintended consequences of removing the Working Time (Coronavirus) (Amendment) Regulations 2020 that allow workers to carry over up to 4 weeks of leave due to the effects of COVID?**

- Yes
- No
- Don't know

*If yes, please explain your answer.*

## **Proposal 2: Introducing 'Rolled-Up' Holiday Pay**

### **Introduction**

When the Working Time Regulations came into force in 1998, most workers in the UK were on typical working patterns with a set number of days of a fixed length. The labour market has changed significantly in the following two decades, with the number of workers who have irregular hours increasing to more than 4.5 million. This increase in so-called 'atypical' work and the emergence of the gig economy (i.e., work conducted through digital platforms that match providers and customers on a short-term and payment by task basis) means that the legislation governing holiday pay and entitlement does not fully align with the current realities experienced by employers and workers.

The right to paid annual leave is key to ensuring that workers remain adequately rested to protect their health and safety. Workers who miss out on the holiday pay they are entitled to may not be able to afford to take time off work.

The Government is proposing to introduce 'rolled-up' holiday pay as an option for all workers. Rolled-up holiday pay is a system where a worker receives an additional amount or enhancement with every payslip to cover their holiday pay, as opposed to receiving holiday pay only when they take annual leave. This proposal would give employers a choice between using the existing 52-week holiday pay reference period and rolled-up holiday pay to calculate holiday pay for their workers with irregular hours.

Employers could also choose to use rolled-up holiday pay to calculate and pay the holiday pay of their workers who have regular hours, as it may present benefits to both workers and employers.

### **Current Holiday Pay Legislation**

The Working Time Regulations and sections 221-224 of the Employment Rights Act 1996<sup>8</sup> lay out how to calculate a worker's holiday pay. The overarching principle is that holiday pay should reflect a worker's usual rate of pay for periods of actual work. If a worker has variable pay, their holiday pay is calculated based on an average from their earnings in a 52-week reference period. This is known as the 52-week holiday pay reference period. The reference period must include the last 52 weeks in which they actually earned, and so excludes any weeks where no work was performed. Where a worker has been employed by their employer for less than 52 weeks, the reference period is shortened to the number of weeks of their employment. The Government has produced detailed guidance available on GOV.UK to aid employers and workers in correctly calculating holiday pay.<sup>9</sup>

Under the Working Time Regulations, the regulation 13 and 13A leave entitlements have different minimum required levels of holiday pay. Holiday pay for the 4 weeks of leave granted under regulation 13 of the Working Time Regulations should be paid at normal remuneration, while the additional 1.6 weeks of leave granted under regulation 13A only need to be paid at a worker's basic rate of pay.

### **Introducing Rolled-Up Holiday Pay**

Much of the complexity of holiday pay comes from aligning it to the pay that a worker would have received if they had been at work instead of on holiday. Allowing holiday pay to be paid as an enhancement to a worker's pay at the time that the worker performed work, instead of when they are on holiday, would ensure that the worker's holiday pay was as closely aligned to the pay that they would have received as possible.

This is known as **rolled-up holiday pay**, which is currently unlawful following a 2006 ECJ ruling<sup>10</sup>, due to concerns that workers may not be incentivised to take leave as they could earn more holiday pay by staying at work. In practice, rolled-up holiday is heavily used in the recruitment sector and the gig economy as a simple way to calculate holiday pay for workers on irregular hours or zero-hours contracts.

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<sup>8</sup> <https://www.legislation.gov.uk/ukpga/1996/18/section/221>

<sup>9</sup> <https://www.gov.uk/government/publications/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay--2>

<sup>10</sup> Joined cases of C. D. Robinson-Steele v R. D. Retail Services Ltd (C-131/04), Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield & Others v Hanson Clay Products Ltd (C-257/04)

The benefit of rolled-up holiday pay is the potential simplicity with which it can operate for employers and employees. The calculation of holiday pay by employers can become very straightforward, as an enhancement (for example, 12.07% of a worker's pay) would be calculated and paid to workers with every payslip.

We propose that rolled-up holiday pay is paid at 12.07%, as this is the proportion of statutory annual leave in relation to the working weeks of each year (5.6 weeks of statutory annual leave divided by 46.4 working weeks of the year). In other words, statutory annual leave entitlement is 12.07% of hours worked by a worker. Introducing rolled-up holiday pay would ensure that workers with irregular hours receive their holiday pay regularly and up front.

Employers would need to make their workers aware if they choose to start paying rolled-up holiday pay and this payment would have to be clearly marked on a worker's payslip as their holiday pay. When the worker goes on holiday, they would not receive any further pay whilst away as they would have already received their holiday pay whilst working. We propose that rolled-up holiday pay should be **paid at 12.07% of a worker's pay on each payslip**, as 12.07% is the proportion of the year taken up by statutory annual leave. Employers would need to adjust this percentage to account for any contractual leave they offer beyond the statutory annual leave entitlement.

The Taylor Review into Modern Working Practices<sup>11</sup> noted that rolled-up holiday pay has significant benefits for some workers, particularly in casual working arrangements or in the gig economy.

Now that the UK has left the European Union, we are consulting on introducing this proposal as an additional method that employers may choose to use for calculating and paying holiday pay for all workers.

#### **15. Do you think that rolled-up holiday pay should be introduced?**

- Yes, rolled-up holiday pay should be introduced as an option for employers in relation to all workers
- No, rolled-up holiday pay should not be introduced
- Don't know
- Other (please explain)

*Please explain your answer.*

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<sup>11</sup> <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

**16. Would your existing payroll system be able to calculate holiday pay using the rolled-up holiday pay calculation as well as the 52-week holiday pay reference period?**

- Yes
- No
- Don't know

*Please explain your answer.*

# The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) implement the EU Acquired Rights Directive. The purpose of the TUPE Regulations is to protect employees' employment rights when the business or undertaking for which they work transfers to a new employer. TUPE may also apply when a business changes owner, or when a service transfers to a new provider (for example when another company takes over a cleaning contract).

Where TUPE applies, employees' employment and associated rights legally transfer from their previous employer to their new one. Some changes to terms of employment are allowed under specific circumstances, for example, where there is an economic, technical, or organisational (ETO) reason for the variation.

The Government recognises that the TUPE regulations provide important protections for employees, and they provide a legal framework for transfers of staff. However, we know that businesses can find certain aspects of the TUPE regulations burdensome.

The Government is therefore planning changes to the consultation requirements in the TUPE regulations, to simplify the transfer process, while ensuring that workers' rights continue to be protected.

## **TUPE consultation requirements**

In advance of a transfer, the current employer (the transferor) and the new employer (the transferee) need to inform and consult with the affected workforce's existing representatives or arrange elections for representatives if they are not already in place before the transfer takes place.

The transferor must inform representatives about:

- The fact that the transfer is to take place and the date or proposed date of the transfer;
- The reasons for the transfer;
- The legal, economic and social implications of the transfer for any affected employees;
- The measures (e.g., business reorganisation) envisaged in relation to any affected employees;
- The measures envisaged in relation to any affected employees by the new employer; and
- Agency workers used (if applicable).

As part of the consultation on a TUPE transfer, the employer must consider and respond to any representations during the consultation and, if they reject them, the employer must state the reasons. The employer must also allow representatives access to the affected employees.

Currently, micro businesses (with fewer than 10 employees) may inform and consult affected employees directly if there are no existing appropriate representatives in place, for example, if there is no recognised trade union. This means that they are not required to arrange elections for new employee representatives. Larger businesses, however, are required to arrange elections for affected employees to elect new employee representatives if they are not already in place, which can add to the complexity of the TUPE transfer process. Businesses with 10 or more employees are also required to arrange elections for employee representatives even if they are undertaking a very small transfer (e.g., a transfer of just two employees).

The Government recognises the importance of consultation with employees and employees' representatives on TUPE transfers. However, we want to ensure that businesses are not unduly burdened by the current requirement for businesses (which are not microbusinesses) to arrange elections for employee representatives if they are not already in place. We are proposing that the flexibility for employers to consult directly with employees is extended to small businesses (if there are no existing employee representatives in place), and to all sizes of business where a transfer of a small number of employees is proposed. Businesses without existing representatives would be able to consult directly with employees if that were simpler and easier for the business, rather than arranging elections for affected employees to vote for new representatives. Direct consultation with employees would only be allowed if no existing employee representatives were in place. If employee representatives were already in place, then the employer would still be required to consult with them. This will allow businesses – which do not have existing employee representatives in place – to consult directly with workers and involve their workers directly in conversations about the transfer.

Businesses with 50 employees or more would still be required to arrange elections for worker representatives, if they are not already in place (unless they were involved with a small transfer of fewer than 10 employees).

**17. Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives?**

- Yes
- No



*Please explain your answer*

**18. Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives?**

- Yes
- No

*Please explain your answer*

**19. What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees?**

*Please explain your answer*

**20. What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved?**

*Please explain your answer*

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