

Bargaining Support Group



**Bargaining
on leave**

UNISON
the public service union



BARGAINING ON LEAVE

Introduction

This guide is intended to assist negotiators in bargaining over the key features of leave entitlements. It breaks down the topic into four main areas:

- Firstly, it offers arguments to help make the case for improving leave entitlement, built around the norms for annual leave and the demonstrable benefits;
- Secondly, it sets out the important dimensions of leave policy beyond the basic entitlement that can be shaped through bargaining;
- Thirdly, it outlines the implications of rulings over recent years for ensuring correct payment of wages during leave;
- Finally, it offers a model leave policy as a template for local adjustment and as a basis for negotiation.

Throughout the guide, bargaining checklists are offered within each section to summarise the most important actions.

To jump to a particular part of the guide, follow the contents listing overleaf.

If you have any feedback that could improve the content of the guide, contact Bargaining Support at bsg@unison.co.uk

Please note that this guide is separate to UNISON's guidance on annual leave issues during the Covid-19 pandemic, which is set out in Bargaining over Workplace Issues During the Covid-19 Pandemic on this link

<https://www.unison.org.uk/get-involved/in-your-workplace/key-documents-tools-activists/bargaining-guides/>

And matters relating to annual leave and the Job Retention Scheme are set out on this link

<https://www.unison.org.uk/get-help/services-support/legal-services/>

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Making a case for improvements to basic leave entitlement

Background

Few would deny that the right to leave from work is essential to enable workers to rest and recuperate. And most employers would recognise that annual leave protects staff well-being, with beneficial consequences for the organisation's sickness absence rates, productivity, retention and recruitment of staff.

These factors contributed to the establishment of the EU Working Time Directive in 1993, which set out a baseline annual leave entitlement of four weeks, below which no organisation's policy could fall. The UK's Working Time Regulations 1998 ('WTR 1998') were later amended in 2007 to clarify that the minimum entitlement was 5.6 weeks, which translated into 28 days a year for any worker on a standard full-time five-day week.

All workers are entitled to at least 5.6 weeks' paid annual leave per year, regardless of their length of service. The minimum rights provided under the WTR 1998 are calculated in 'weeks' rather than hours and it can be complicated to calculate the amount of annual leave accrued and the amount of holiday pay to be paid where it is not known in advance what hours will be worked. This is particularly particularly problematic for members who work part-time irregular hours or under a zero-hour contract.

With public / bank holidays (usually running at 10 days a year in Northern Ireland and eight days a year across the rest of the UK) allowable as part of the WTR 1998 entitlement, basic leave can be squeezed considerably to between 18 and 20 days, putting UK workers on one of the lowest statutory entitlements in Europe.

In trying to push well beyond these minimums, negotiators are on the strongest ground in putting a case to an employer for improved annual leave when they can demonstrate that the entitlement of the workforce they represent is lower than the norms for the economy as a whole, the relevant sector in which the employer operates or other roles within the employer's operations.

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Norms for annual leave entitlement

Across the economy, data from the Labour Research Department (LRD), based on figures from over 300 employers, suggests that the median leave entitlement in the first year of employment (excluding bank and public holidays) is 25 days, rising to 29 days after five years of service. In the public sector, entitlement is higher at 26 days in the first year, rising to 30 after five, while in the private sector it is slightly lower, starting at 25 days and rising to 26 days.¹

Average annual leave entitlement	Whole economy	Private sector	Public sector
In first year of employment	25 days	25 days	26 days
After five years of employment	29 days	26 days	30 days

As is the case with many dimensions of terms and conditions, the difference between the annual leave entitlement in the public and private sector is sometimes used to attack the public sector with claims that its workers enjoy “privileged” conditions in comparison to their private sector counterparts. These crude comparisons fail to take account of the fact that the private sector covers a multitude of small employers where minimal annual leave entitlement is more commonplace than in larger employers.

In addition, union representation itself is liable to play a part in the differential, with the much higher proportion of union membership in the public sector helping to drive up annual leave entitlement more successfully than in the private sector, where union membership is often low.

Within the bargaining groups covering the majority of UNISON’s membership, leave entitlements (excluding bank and public holidays) vary markedly and are summarised below.

Bargaining Group	Basic leave	Service related additions
NHS - Agenda for Change	27 days	29 days after 5 years 33 days after 10 years
Local Government – England / Wales / Northern Ireland	21 days	25 days after 5 years
Local Government - Scotland	20 days	25 days after 5 years
Police Staff - England and Wales	23 days	28 days after 5 years
Police Staff - Scotland	28 days	34 days after 4 years
Probation Staff	25 days plus 2 service days	30 days after 5 years plus 3 service days after 7 years
Sixth Form Colleges	22 days plus 2 extra statutory days	25 days after 5 years plus 2 extra statutory days
Youth & Community Workers	30 days	35 days after 5 years

¹ These figures are based on averages from the Labour Research Department’s Payline database. The LRD database is liable to carry data on relatively large employers, which tends to make it a good comparator for staff in the public sector. The public sector figures themselves may be slightly elevated by the number of universities within the sample, which often carry a leave entitlement in line with academic terms.

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In sectors such as local government, where local agreements sometimes vary from the national agreement, improvements on the national norm have been achieved across a number of councils, including some that start staff on 26 days.

Within central government, departments commonly start staff on 25 days annual leave, rising to 30 days after five years.

Special considerations apply for members who work during term-time only ('TTO'). As explained below, these members are affected by how the law must be applied for calculating minimum entitlements to annual leave and holiday pay. This is often very complicated when representing groups of TTO members, so it is important to seek further advice by contacting your regional lead for TTO members or the union's national education team where necessary.

If you would like details of leave entitlement across organisations in a specific sector, the Bargaining Support Group may be able to assist – contact them on bsg@unison.co.uk

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Benefits of improved annual leave

Particularly where it is difficult to use the leverage of better terms to be found elsewhere in a sector, the arguments for improved annual leave have to be built around the benefits that the policy can deliver for employers. That case can be summarised as follows:

- When questioned about the most important dimensions of a benefits package outside of salary, annual leave usually comes out by far the highest rated factor among staff - approximately three-fifths (59%) state that having more than 28 days of annual leave within their benefits package is important²;
- Surveys of why employees choose their employer have found that work-life balance (of which annual leave forms an important dimension) shares top spot with salary as a core reason for their decision, while work-life balance takes the outright top position for reasons staff stay with their employer³;
- Organisations with a positive work/life balance culture see just under a fifth of staff looking to leave each year compared to over a quarter in organisations with an inferior work/life balance⁴;
- Studies have suggested substantial benefits from staff taking their full annual leave – alongside greater productivity, workers display a marked tendency to reduced irritability, depression, forgetfulness and fatigue. As a consequence, staff have been shown to be 38% less prone to workplace accidents and 28% less likely to take sick leave⁵;
- UNISON's [guidance on bargaining over working hours](#) sets out further research on the damaging effects of excessive hours on productivity, staff well-being, recruitment and retention, as well as examples of sharing the benefits of automation, which may also be useful to reference in the context of annual leave.

The case for improved annual leave is often made as part of an [annual pay claim](#). Though the case can be taken up at any time, such a strategy can prove particularly useful when an organisation's budget for pay rises is tight, as increased leave raises the pay rate without the need for injections of extra cash.

² Hays Salary and Recruiting Trends 2019 Guide

³ Aviva Employee Benefits 2019 Survey

⁴ Hays Salary and Recruiting Trends 2019 Guide

⁵ US International Foundation of Employee Benefits Plans Survey 2016

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Checklist 1

- Consider making the case for improvements in annual leave entitlement based on comparison against leave norms and / or evidence of benefits to the employer.
- Consider the most advantageous timing of lodging a case – this may coincide with a pay claim where an organisation’s budget is tight for pay rises or the introduction of new technology on a significant scale presents an opportunity for making the case on the basis of sharing the benefits.
- Gather supporting evidence of the importance staff attach to annual leave and seek data from the employer on factors such as sickness absence, morale and turnover rates which can lend weight to the need for improved entitlement. The norms against which sickness absence and turnover rates can be compared are set out in the sick pay and pay claim guides on this page - [UNISON bargaining guides](#)

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Bargaining on other key features of leave policy

In addition to the question of basic leave, agreements need to thrash out the details of leave arrangements set out below, which can offer valuable additional flexibilities, supplements and safeguards for workers. Some elements may be defined by national agreements in some UNISON bargaining groups, but are mostly left to local determination.

The two key points to address are: (1) annual leave entitlement and (2) rate of pay for annual leave. Pay during leave is discussed later in this guidance.

Calculation of part-time entitlement

Holiday entitlement for staff who work less than full-time hours is usually calculated on a pro-rata basis, but special considerations apply for members who work irregular hours, such as term-time only (TTO) members. All workers are entitled to a minimum of 5.6 weeks annual leave.

Assuming that a working week is 5 days:

- If Person A works 5 days a week, they will have 5 days x 5.6 weeks' leave or 28 days.
- If Person B works 2 days a week, they will be entitled to 2 days x 5.6 weeks or 11.2 days.

So Person A and Person B are entitled to 5.6 weeks, but when Person A take a week's leave, they have 5 days off, as that is how many days they work in a week; and when Person B takes a week's leave they have 2 days off, as they only work 2 days in a week. Both Person A and Person B will be paid a week's wages for a week off, and the amounts they are paid will differ as they work a different number of days per week (see more below).

Accrual of leave in the first year of employment

During the first year of employment, while holiday entitlement is deemed to accrue at the rate of 1/12th of the total annual entitlement each month under the WTR 1998, this makes relevant calculations difficult for those who work irregular hours.

What is the 12.07% calculation based on?

Many employers have attempted to address this problem by setting a notional amount of annual leave entitlement and addressing the balance of what is owed at the end of each annual leave year. For example, many employers set annual leave as 12.07% of hours worked. This is because a year is 52 weeks. Subtracting the statutory entitlement of 5.6 weeks' holiday leaves 46.4 working weeks in the year. This statutory entitlement of 5.6 weeks is 12.07% of 46.4 worked weeks, so this figure represents holiday expressed as a percentage of working time.

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Different types of part-time working

There are various forms of part-time working that require slightly different methods for calculating leave entitlement, however the principle is always to ensure at least a like-for-like comparison of working hours performed by full-time staff against those performed by part-time staff. For TTO and part-year workers, the entitlement is potentially more generous in comparison.

Regular days worked over full year

The easiest calculations are for workers who are contracted for a set number of days each week of equal length. The examples below are based on a statutory entitlement to 5.6 weeks of annual leave.

For instance, if a worker is contracted for 2 days a week and the standard working week is five days, their holiday entitlement is 2 days multiplied for 5.6 weeks = 11.2 days.

Regular hours worked over full year

If a worker is contracted for a certain number of hours per week, the pro-rata rate is calculated against the standard number of hours per week for a full-time worker.

For example, if a worker is contracted for 12 hours a week in an organisation where the standard working week is 36 hours, they work a third of standard hours and therefore receive a third of the standard annual leave entitlement. Or $12/36 \times 5.6 \text{ weeks} = 1.86 \text{ weeks}$ or 66.96 hours.

Irregular hours worked over full year / Working for fixed part of full year

Some workers do not work a regular number of days or hours per week (such as zero hour contract workers or agency staff). Other workers may work a regular pattern but only over a part of the year (this scenario is most commonly associated with term-time working for employers in the education sector).

The actual non-working period for term-time workers is normally set according to scheduled terms which commonly result in 13 weeks of absence. For staff such as zero hours workers, the actual period of leave is also frequently notional. In both such cases, the key issue is usually not the period of leave but the calculation of holiday pay, which is set out for such workers in the Pay During Leave section of this guide.

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Public / bank holidays

Employers are not compelled to allow workers leave on public / bank holidays, they merely have to meet the minimum total leave requirements of the WTR 1998. However, public / bank holidays are normally a component of total leave and, in this case, pro-rata entitlement applies equally to public / bank holidays (the typical days by country are set out below). Therefore, if an individual's working pattern includes regularly working on a Monday (when public holidays tend to fall), the worker usually has to take annual leave for the excess of days taken over their public / bank holiday entitlement. Conversely, if an individual's working pattern rarely includes Mondays, they will be able to add the shortfall in public / bank holidays to their annual leave.

Bank and public holidays

England and Wales – Eight days - New Year's Day, Good Friday, Easter Monday, early May bank holiday, spring bank holiday, summer bank holiday, Christmas Day, Boxing Day.

Northern Ireland – Ten days – Eight listed above, plus St Patrick's Day and the Anniversary of the Battle of the Boyne

Scotland – Eight days - New Year's Day, 2 January, Good Friday, early May bank holiday, spring bank holiday, summer bank holiday, Christmas Day and Boxing Day. Since 2007, St Andrews Day has been an alternative, voluntary public holiday, which can replace an existing local holiday, though some employers, such as the Scottish Government, have awarded St Andrews Day as an additional public holiday.

The government sets out further examples of calculating holiday entitlement in relation to the statutory minimums in this [Holiday Entitlement Guidance](#)

And the government has provided a tool for working out holiday entitlement according to working arrangements on this link - <https://www.gov.uk/calculate-your-holiday-entitlement>

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In the calculation of pro-rata entitlement, ensure that the following rules are respected:

- Employers cannot round down entitlement e.g. interpreting 25.2 days as an entitlement to just 25 days. Therefore, there may be scope to argue that part days are rounded up to the nearest half day, e.g. 25.2 days becomes 25.5 days or 26.6 days becomes 27 days.
- Pro-rata calculations cannot reduce leave entitlement below the four-week legal minimum defined in the original EU Working Time Directive. Note that the four weeks relates to a week as defined by the part-time workers' arrangements. For instance, for a member of staff who works one day a week, four weeks leave is equivalent to four days, not the 20 days of a worker on a standard five-day week.
- When calculating the legal minimum for leave entitlement, employers can apply the Working Time Regulation cap of 5.6 weeks, though this is only likely to apply for workers who are contracted for more than a standard five-day week. However, this rule is only about ensuring employers are complying with legal minimums and of course has no bearing on reaching any agreements for leave above that level.
- The commonly used formula of calculating 12.07% hours worked is NOT necessarily appropriate for term-time workers due to the way the law requires calculation of time engaged under a contract (see above). This can still be relevant for part-time workers that work the full-year.

Please note that for those issues raised in this section that are affected by the Covid-19 pandemic, check the guidance set out in Bargaining over Workplace Issues During the Covid-19 Pandemic on this link

<https://www.unison.org.uk/get-involved/in-your-workplace/key-documents-tools-activists/bargaining-guides/>

Holiday year and leave accrual

The holiday year can be any 12 month period, but is most commonly defined as the calendar year (1 January to 31 December) or the financial year running from 1 April to 31 March. Some organisations set it according to a worker's start date, but negotiators should seek to avoid such arrangements as they can present immense complexity for the union in ensuring the enforcement of annual leave rights.

A worker continues to accrue their entitlement to annual leave throughout the holiday year while they are on sick leave, maternity leave, paternity leave, parental leave, shared parental leave and adoption leave.

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Sickness and leave

Agreements should make it clear that if a worker becomes sick while on leave, they are entitled to have their period of sickness reclassified as sickness absence if they follow the appropriate notification procedure.

A worker may also request to take annual leave while on sick leave (clearly this will usually be driven by a desire not to take a pay cut if their sickness terms don't allow for full pay), but a worker cannot be required to take annual leave while they are on sick leave.

Flexibility in taking leave across holiday years

Leave agreements frequently allow for a degree of flexibility in the taking of leave by permitting some carry-over of untaken leave to the following year, with the limit on the number of days usually set at five.

The only proviso to such rules is that they cannot result in a worker receiving less than the four weeks defined as the minimum by the EU Working Time Directive.

The exception to the rule protecting the four weeks is when a worker has been unable to take their leave due to sickness. In such circumstances, up to four weeks can be carried over, but must be taken within 18 months of the new holiday year starting.

Equally, agreements can allow for staff to raise their annual entitlement by borrowing a limited number of days from the following year. Again, this limit is normally set at five days where such a policy applies.

Some organisations have gone further by allowing for staff to buy and sell leave.

Surveys suggest that around a third of employers now allow employees to buy additional holiday leave and that figure grows to almost half (46%) in the public sector. The most common limit on such an entitlement is five days.⁶

A fifth of employers also allow their staff to sell holiday, usually at the beginning of the year, with the most common limit again set at five days. However, such arrangements cannot be allowed to lead to a worker's leave dropping below the working regulation minimum.

Such schemes often stipulate that objective justification has to be put forward for any refusal of an application to buy or sell leave and an appeal process allows the employee to take up any refusal with a senior figure outside their immediate line manager.

A temporary suspension of the normal rules limiting the carryover of leave was put in place by the Working Time (Coronavirus) Amendment Regulations 2020. These regulations enabled workers to carry forward the four-week EU minimum for 2020 into the two subsequent leave years where it was "not reasonably practicable to take leave conferred by regulation 13 [of the Working Time Regulations 1998] because of Coronavirus".

⁶ XpertHR, Annual Leave Survey 2019

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Encouraging the taking of leave

It is estimated that only one in three workers take their full annual leave allocation each year⁷. Therefore, it can be valuable to obtain a commitment from an employer to highlight among staff the importance of taking leave, require managers to flag excessive outstanding leave to staff as the year proceeds and monitor the prevalence of staff losing leave.

Collecting information on the reasons for untaken leave can act as a trigger for pressing an employer to address possible factors, such as tackling workload pressures, raising staffing levels and improved planning of staffing arrangements.

Notification of leave

The default notice period given by employees is twice the period taken. For instance, a two-week period of leave would require notification at least four weeks in advance.

Employers can also require leave to be taken on specific dates if the notice given is twice the period of that taken.

However, these notice periods can be varied by collective agreement and it may be valuable to argue for notification at shorter notice where there is clearly no detriment to the service or problems created in staffing levels.

Where more requests are made for leave in particularly popular periods (such as Christmas or school holidays) than can be fulfilled, consideration has to be given to whether staff view the fairest system to be allowing leave for those who first make the request or whether a rota should apply.

Notification should state the acceptable form and recipient of the leave request (normally in writing to an employee's line manager) and impose a time limit on managers to respond.

Where an employer seeks to cancel leave, the Working Time Regulations require a notification period equivalent to the cancelled leave. For example, if the employer is seeking to cancel two weeks leave, at least two weeks' notice is required.

However, negotiators should seek to ensure that leave policies clearly state that cancellation of leave will only be sought under extreme circumstances, where all other options have been exhausted and where the employer gives consent.

⁷ YouGov Survey 2015

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Procedures during leave

Procedures to be observed during the taking of leave should ensure that leave delivers the opportunity for rest and recuperation that is intended by requiring:

- The setting of “out of office” responses to telephone and messaging enquiries that provide an alternative contact during a worker’s absence;
- The turning off of devices for receiving telephone and messaging enquiries unless there is an exceptional circumstance;
- The effective delegating of work during leave to avoid an excessive “pile-up” of work to be dealt with on return.

Calculation of leave for joiners or leavers

As in the case of part-time workers, joining or leaving an organisation part of the way through the holiday year requires a pro-rata calculation of leave entitlement in proportion to the part of the year worked.

For example, if a worker on a calendar holiday year completes their final day of employment at the end of March, they should be entitled to a quarter of their annual leave. It can be complicated to calculate the annual leave entitlement for the worker joining, particularly if they work irregular hours where it is not known in advance what hours will be worked.

Where a worker has taken more days leave than their pro-rata entitlement at the point they leave the organisation, they are generally deducted the pay for the extra days taken from their final pay packet. Where they have taken less than their entitlement, they will be entitled to pay at their normal rate of remuneration (including any other regular payments) for the shortfall.

Forms of special leave

As well as basic annual leave, it is commonplace for entitlement to allow for various forms of “special leave.” The following listing covers those forms of leave where it is not uncommon for leave to be paid in practice, though only some are required to be paid by law.

- *Release for jury service and other public duties*

In the case of jury service or where an employee is called as a witness to court proceedings, employers have to allow time off but are not under an obligation to pay for time off. Where time off is not paid, staff can claim from the government for loss of earnings instead.

Where an employer believes that the leave would cause significant damage to the business, they can request an employee to seek deferral. Staff cannot be treated detrimentally as a result of jury service unless they refuse a reasonable request to seek deferral.

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Reasonable time off must also be allowed for employees to perform public duties specified in the Employment Rights Act 1996 or Employment Rights (Northern Ireland) Order 1996.

The public functions cover:

- A magistrate (or justice of the peace);
- A local councillor;
- A school governor;
- A member of any statutory tribunal (such as an employment tribunal);
- A member of the managing or governing body of an educational establishment;
- A member of a health authority;
- A member of a school council or board in Scotland;
- A member of the Environment Agency or the Scottish Environment Protection agency;
- A member of the prison independent monitoring boards (England, Wales or Northern Ireland) or a member of the prison visiting committees (Scotland);
- A member of Scottish Water or a Water Customer Consultation Panel;
- A member of the Northern Ireland Library Authority;
- A member of a policing and community safety partnership or a district policing and community partnership, in Northern Ireland;

The right to reasonable time off doesn't apply to agency workers, members of the police service or civil servants, if their public duties are connected to political activities restricted under the terms of their employment.

Employees in the army reserves or other reserve forces also have certain protections under employment law if they're called up for service, as set out on this link.

<https://www.gov.uk/employee-reservist>

- *Time off to look for new work after a redundancy notice has been served*

Under the Employment Relations Act 1996 in Britain, or Employment Relations Order 1996 in Northern Ireland, staff who have been continuously employed for two years or more are entitled to "reasonable" paid time off if they are under notice of redundancy to look for work or retraining. For a full time worker this is frequently interpreted as an entitlement to two days, in line with guidance on remuneration set out in the legislation.

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- *Time off for ante natal and pre adoption appointments*

An employer must give paid time off for ante-natal care when it is required on the advice of a registered medical practitioner, midwife or health worker. Agency workers attain this right after 12 weeks of employment.

The partner of a pregnant woman is entitled to unpaid leave for up to two ante natal classes, with a six-and-a-half-hour limit on the total time off.

Similarly, in the case of adoption the primary adopter is entitled to time off for up to five pre-adoption appointments, and the partner is entitled to unpaid time off for up to two appointments, subject to the six-and-a-half-hour limit.

- *Compassionate leave (or time off for dependants) –*

The basic statutory entitlement to take compassionate leave is provided for under Section 57 (A) of the Employment Rights Act 1996.

The entitlement is defined in the following terms:

- Employees are entitled to time off to deal with an emergency involving a dependant. Examples of events that can be classified as an emergency are:
 - When a dependant is injured or assaulted, falls ill or gives birth;
 - When care arrangements unexpectedly falter;
 - When a dependant dies;
 - When events at a school or nursery arrangements demand intervention from the employee.
- A dependant could be a spouse, partner, child, parent or someone who depends on the employee for care;
- The amount of time is simply defined as what is “reasonable” to deal with the emergency;
- There is no statutory requirement on an employer to provide paid leave;
- The right to take time off to look after a dependant commences from the start of employment;

However, these legal minimums are simply the base on which bargaining can build. For instance, emergencies can be defined more widely than the governmental definition to include home emergencies such as fire, flooding, burglary or a broken boiler.

Given that a list of possible emergencies can never cover all eventualities, it may be of value to seek a clause allowing management discretion, while seeking safeguards against managers exercising their discretion inconsistently or in a discriminatory way by establishing some transparency over the days permitted and the reasons for both refusal and allowing leave.

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Research conducted by the Chartered Institute of Personnel and Development (CIPD) suggests that most employees are entitled to up to five days paid leave to deal with emergencies.

Within the framework of a compassionate leave policy it is not uncommon for organisations to have a specific entitlement that is suitably more generous in relation to bereavement

For instance, 10 days are allowed at NHS England and Wales, London South East Colleges and Cardiff Council.

The key features of a bereavement policy have been summarised by ACAS in this model policy - <https://www.acas.org.uk/example-bereavement-policy>

Building around the core need for staff to be permitted time off, bereavement policies often set out:

- The right to keep bereavement private from work colleagues;
- A process for asking the employee what, if anything, they would like their work colleagues to know about the bereavement;
- A counselling service available for staff to access following a bereavement;
- Consideration of a staged return to work or other adaptations of working arrangements to ease a return.

UNISON's guidance on all other forms of leave is set out on this page <https://www.unison.org.uk/bargaining-guides/>

This includes leave for working parents – maternity, adoption, maternity support, shared parental and parental leave. These forms of leave are mostly paid, with the exception of parental leave.

The guidance also covers leave arrangements for disability leave, carers leave and medical appointment / health screening leave. These forms of leave are usually unpaid, but the guidance sets out the case that can be made for seeking paid entitlement.

Consideration should be given to the level of support among staff for extending various forms of special leave or whether their preference is to focus on basic leave entitlement. While some forms of special leave, such as for bereavement, could be expected to carry very broad support, others, such as extended paid time off to serve as a Justice of the Peace, may be seen as more divisive if staff feel that their workload increases significantly as a result.

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Checklist 2

- Ensure that the leave policy defines calculation of part-time entitlement on an appropriate pro-rata basis (subject to what has been said in relation to term time working) and leave accrual takes place throughout the various forms of working parent and sick leave.
- Where negotiating on behalf of TTO members, seek advice from regional lead and / or national education team.
- Seek a commitment from the employer to encourage the taking of leave, monitor cases of untaken leave and address the causes of untaken leave.
- Test staff support for arrangements to buy and sell leave in addition to the ability to carry over leave.
- Consider the fairest arrangements for allocation of leave during periods where requests exceed the number that can be granted.
- Ensure procedures during the period of leave do not detract from the ability of staff to enjoy rest and recuperation.
- Seek paid leave for the standard forms of special leave - jury service, seeking work while under notice of redundancy and ante natal / pre-adoption appointments.
- Seek terms for paid off time off to deal with emergencies of at least five days and time off to deal with bereavement at 10 days.

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Pay during leave

Recent developments

Over recent years, a raft of court rulings and legal changes have had a major impact on holiday pay entitlement.

Firstly, cases have been won that mean workers must be paid during annual leave at the rate of their normal remuneration, rather than simply their basic wage, which includes allowances “intrinsically linked” to their normal job, any regular overtime and sales commission which would have been earned if the period of leave had been worked normally.

This position on the scope of what must be included in holiday pay has emerged from the following main rulings:

- In 2012, the precedent for including payment of sales commission was established through the case of *Lock v British Gas Trading Ltd*. This case was brought and supported by UNISON;
- In 2014, the right to inclusion of payment for overtime which employees are regularly required to work was established in the *Bear Scotland v Fulton* ruling;
- In 2015, the Northern Ireland Court of Appeal ruled that voluntary overtime (work which the employer might request but the employee was not contractually obliged to work) should also be included in holiday pay calculations in the case of *Patterson v Castlereagh Borough Council*; and
- In 2019, a further precedent for including payment of regular voluntary overtime was set in the case of *Flowers v East of England Ambulance Service NHS Trust*. This was a case run and supported by UNISON and related to the particular circumstances of working in the ambulance service, where staff are required to attend a patient just before the end of their shift, as they cannot simply walk away when their shift finishes.

Secondly, for term-time workers, the 2019 Court of Appeal ruling on the case of *The Harpur Trust v Brazel* (where UNISON acted as an Intervener) established holiday pay for the full leave entitlement of at least 5.6 weeks per year must be paid. This had the effect of levelling up entitlements and ended unfair arrangements that had previously prevailed across organisations operating term-time systems. It was made possible because the rights under the WTR 1998 mean the length of time engaged under a contract (including time when not required to work, such as school holidays) must be used to calculate a week’s pay, rather than just the hours worked each month. Note that the current [NJC guidance](#) includes guidance on how the calculation of a week’s pay can be made in various scenarios.

Thirdly, for workers who do not receive regular basic pay, but see their hours and therefore income vary from week to week or month to month (such as zero hour contract workers), the Employment Rights (Employment Particulars and Paid Annual Leave) Regulations has set a new timeframe for calculating holiday pay. From April 2020, holiday pay is calculated according to average pay over 52 weeks where a member of staff has been employed for that period or for the total period employed where they have been employed for less than 52 weeks.

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The 52 weeks is for each week where the worker received payment and the employer has to go back up to 104 weeks for these records. If 52 weeks of payment cannot be found during this period, the average is calculated on the basis of the paid weeks within the two year period, just as where a worker has been employed for less than 52 weeks, the average is derived from all the paid weeks since their employment began.

Applying the regulations

In applying these regulations on holiday pay, the following positions should be borne in mind:

- Holiday pay calculated on the basis of the rules for normal remuneration applies to the four weeks leave guaranteed by the EU Working Time Directive. However, the case should be made that it should cover all leave on the basis of both fairness and the costly administrative complexity of implementing a policy that differentiates between the first four weeks of leave and subsequent leave.
- The employer may try to argue that some payments are not “regular” and therefore should not form part of normal remuneration. In UNISON’s view this “regularity” should be broadly defined – for example a piece of additional work should not have to be done every month, in order for it to be represented in the member’s holiday pay. And it does not matter if the amount of the payment is different each time, it could still count as regular.
- Check if the additional payments to basic pay included in holiday pay are pensionable. If so, ensure that member and employer contributions are being deducted when these payments are made.
- Where organisations have sought to pay higher rates when staff are working but make no payment during a holiday, this has been ruled unlawful as payment for annual leave must be made at the time it is taken.

In the case of workers who do not work regular hours, the following examples are intended to offer some clarity on how the regulations apply.

For workers who do not work a regular number of days or hours per week (such as zero hour contract workers or agency staff) several different approaches may apply and the legal position for holiday pay is very complicated in the first year of the contract.

The main distinction is between those engaged under a succession of individual contracts and those employed under an ongoing ‘umbrella’ contract. There is an important legal difference between these scenarios, as Reg 13(9) WTR 1998 prohibits payment in lieu of annual leave during employment.

- For workers employed under a series of short discrete contracts, it is common to be paid the accrued holiday entitlement at the end of each contract, as many employers will want to avoid legal risk from attempting to pay ‘rolled-up’ holiday pay. Such a system will be unlawful unless the employer can prove it is a ‘transparent and comprehensible’ arrangement.

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The amount of accrued annual leave is based upon the length of the assignment and the rate of a week's pay from an average of the earlier weeks when remuneration was earned. From 6 April 2020, calculating the average paid weeks will extend up to 104 weeks before the relevant calculation date.

Example: Joe began employment for Company A on 1 December 2019, working between 10 and 20 hours each week until the contract ends on 30 April 2020. Joe then works for Company A again from 1 September 2020 until 31 December 2020. Permanent full-time employees work 35 hours per week and are paid the statutory minimum for holiday pay. Joe does not take any annual leave in either contract and at the point his employment ends for both contracts, the average number of hours worked is exactly 18 per week. Joe should be paid 18 hours x 5/12th x 5.6 weeks' entitlement for the first contract. Joe should separately receive 18 weeks x 3/12th x 5.6 weeks' entitlement for the second contract.

- Where the worker's employment continues through an overarching 'umbrella' contract, then the basic position is that s/he will continue to accrue annual leave entitlement even while not working and must be paid the statutory minimum 5.6 weeks' entitlement. This is because the Court of Appeal has decided that 'part-year' Term Time Only workers on permanent contracts are still entitled to 5.6 weeks' annual leave and this entitlement could not be pro-rated to take account of periods in the year when no work is done.

Example: Mo begins employment for Company B on 1 September 2019 working at a school on a number of 'assignments' each week of the academic year until the funding for the project ends and his employment terminates on 31 March 2021. Mo is paid monthly and told by Company B that he must take his annual leave during school holidays. During the first academic year, Mo worked 20 hours per week and is paid the same monthly wage throughout. During the second academic year, Mo worked 10 hours per week and is paid the same monthly wage throughout. Mo was paid a total of 20 hours x 5.6 weeks' for the first annual leave year and 10 hours x 7/12th x 5.6 weeks' entitlement for the second annual leave year.

- Where workers' hours and income vary from week to week or month to month (such as zero hour contract workers), but their working arrangements do not fall under either of the two scenarios above, the Employment Rights (Employment Particulars and Paid Annual Leave) Regulations amend Reg 16 WTR 1998 and increase the reference period for calculating holiday pay. From 6 April 2020, holiday pay is calculated from the average wages earned in the previous 52 weeks before the calculation date, or where they have been employed for less than 52 weeks, the average is from the complete weeks employed before the calculation date. Previously, the reference period was 12 weeks before the calculation date.

Each of the 52 weeks must be where the worker received payment and the employer must go back up to 104 weeks for these records where an individual has worked on and off for such a period. If 52 weeks of payment cannot be found, the average is calculated on the basis of the paid weeks up to 104 weeks before the calculation date. This means that a zero hours contract worker should receive full average pay for holiday taken.

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One further complication should be noted in relation to term-time workers - applying a figure of 12.07% on calculating holiday pay is not appropriate for those working part of the year. The calculation for holiday pay under the WTR 1998 must be made in 'weeks' on the period engaged under the contract rather than hours worked. The Court of Appeal (Harpur Trust v. Brazel & UNISON) held in 2019 that for zero hour contract workers employed 'part-year', such as Mrs Brazel (a person who worked TTO) the entitlement to 5.6 weeks' annual leave could not be pro-rated for periods in the year when no work was done. The Harpur Trust is appealing this decision to the Supreme Court, but the law as it stands is that all workers (including TTO workers) are entitled to a minimum of 5.6 weeks' paid leave each year.

A term time worker works during term time, and this can be 39 weeks a year (depending on the school), and their annual leave entitlement is 5.6 weeks. This is their minimum statutory entitlement. They will be paid for that entitlement at the rate of a normal week's leave. So if they work 5 days a week, they will be entitled to 5.6 weeks' wages. If they work 2 days a week, they will be entitled to 2/5th of 5.6 weeks' wages. There is no further pro-rata reduction for the fact that they work 39 weeks a year, unlike their full-year equivalent who works 46.6 weeks a year.

Recovering back pay

If it becomes apparent that staff have not been paid correctly for their periods of leave, negotiators should plainly seek an agreement from the employer to make good the shortfall. However, negotiators should be aware of the importance of speed if a legal route needs to be pursued as some employers have sought to limit their liability by incorporating the additions on current pay with the intention that claims for back pay go out of time.

In such cases about historically underpaid holiday pay, the time for bringing a claim will usually run from the date on which they were last underpaid in respect of annual leave immediately before the first time they were paid the additional sums. This is not always straightforward to calculate and sometimes may also involve considering different types of legal claims with alternative time limits, especially for term-time only workers. Generally speaking, if more than three months elapse from the last time an individual was underpaid (i.e. received holiday pay that did not include additional sums) then that individual may be unable to pursue a claim through an employment tribunal.

If members think they have a case, they will need to complete the Case Form which has been produced for dealing with these claims. This form is available on the UNISON website at <https://www.unison.org.uk/news/article/2020/04/electronic-case-form/>.

Once received in the region, referrals should be inputted to the CASE system and sent to Thompsons with supporting documentation to ensure that nothing is missed. On receipt of a Case Form, if there appears to be a potential claim for holiday pay with reasonable prospects of success then early conciliation must be commenced before relevant time limits expire. Please take advice as strict time limits mean that a member could be barred from bringing a legal claim.

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If the claim cannot be resolved during early conciliation and is submitted to a tribunal, then the lawyer with conduct of the claim would be responsible for resubmitting the claims. In most cases, this will be Thompsons Solicitors. Once a claim has been submitted, it must be re-submitted every three months to make sure that there is not a break of more than three months between the deductions. The tribunals have been known to dispense of this rule, but that will be down to particular judges.

During the process, it is very important to manage members' expectations as in addition to the dangers of a claim running out of time a variety of complex factors in determining normal remuneration can impact on each member's claim.

To give claims the greatest chance of success, it is important that members provide as much evidence as possible (for example hours of work and payslips) regarding what leave they have taken and, if possible, what work they have done which has given rise to additional payments. Employers should have these records, but it will be helpful if members have this information themselves.

The more "regular" a payment is, the more likely it is that a member will be successful in claiming that they should be remunerated for that work, even when they are on leave. The important thing is that the payment in question (payment for overtime, commission, etc.) is a regular one - the precise amount of the payment, e.g. the precise amount of overtime worked, does not necessarily need to be the same every time.

In the NHS, a framework has been agreed for correcting historic miscalculations of holiday pay. The agreements for England is set out on this [link](#), for Scotland on this [link](#) and discussions are expected in Wales and Northern Ireland with a view to establishing similar arrangements.

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Checklist 3

- 1) Ensure that holiday pay complies with requirement to incorporate appropriate allowances, bonuses, overtime and commission.
- 2) Make the case for incorporation to cover all holiday pay and not just the four weeks defined by the EU Working Time Directive
- 3) Where resolution of underpayment on current or back pay cannot be reached, pursue the procedure set out above, noting the need for speed to avoid claims running out of time and collection of supporting evidence, particularly in relation to regularity of payment.
- 4) In the case of term-time workers ensure enforcement of ruling in *Harpur Trust v Brazel & UNISON* [2019] that they must be paid as a minimum for the full 5.6 weeks annual leave specified in the UK working time regulations.

UNISON has access to the Labour Research Department Payline database, which contains details of leave agreements for employers across the economy. For details of how to access Payline contact the Bargaining Support Group on bsg@unison.co.uk



The UNISON [agreements library](#) contains a wide variety of leave related agreements with employers across the public services. UNISON staff have access to this database and if branches wish to check for the availability of a particular agreement, please contact the Bargaining Support Group on bsg@unison.co.uk

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Appendix 1 – Model Annual Leave Agreement

ANNUAL LEAVE AGREEMENT BETWEEN [NAME OF EMPLOYER] AND [UNISON BRANCH]

1. General principles

- 1.1 Both [Name of employer] and [UNISON branch] recognise the importance of annual leave in improving the quality of working life for staff by providing a balance with personal lives and allowing recuperation from the demands of work.
- 1.2 Equally, the benefits of annual leave to [Name of employer] are recognised in terms of maintaining staff morale and productivity, reducing sickness absence and improving the ability of [name of employer] to recruit and retain staff.
- 1.3 The agreement seeks to provide a fair and non-discriminatory set of clear arrangements for handling entitlement to annual leave and bank holidays.
- 1.4 The agreement applies to all staff who are employed at [name of employer] regardless of their type of contract.
- 1.5 The agreement shall be the subject of regular review between [name of employer] and [UNISON branch], with a view to agreeing suitable changes in the light of experience in operation of the agreement.

2. Number of days' basic entitlement

- 2.1 The annual leave period shall run from 1 January to 31 December each year [the financial year of 1 April to 31 March is a commonplace alternative, but whatever period is chosen ensure that the calendar year is a standard period for all staff]
- 2.2 Leave entitlement on appointment will be [30 days is at the top end of public service employer entitlements but what is realistic will depend on the norms of the employer's sector] in addition to the eight public holidays [10 days in Northern Ireland].
- 2.3 Entitlement shall increase by one day each year for the first five years of service.
- 2.4 All part time staff will have their entitlement calculated on the appropriate pro-rata basis.
- 2.5 Pro-rata entitlement shall be rounded up to the nearest half or full day.

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3. Accrual of leave

- 3.1 New recruits will accrue a pro-rata leave entitlement based on the proportion of the leave year remaining.
- 3.2 On termination of employment, accrued leave entitlement will be based on the proportion of the year worked. Where staff have not worked their entitlement, they will receive payment in lieu. Where staff have taken leave in excess of their entitlement, a deduction will be made from the final pay packet.
- 3.3 It is recognised that a member of staff continues to accrue leave throughout the holiday year while they are on sick leave, maternity leave, paternity leave, parental leave, shared parental leave or adoption leave.
- 3.4 It is recognised that a member of staff may request to take annual leave while on sick leave, but a member of staff cannot be required to take annual leave while they are on sick leave.
- 3.5 Where a member of staff dies whilst working for the organisation, an allowance equivalent to that part of the annual leave entitlement not taken at the date of death shall be paid to the member of staff's personal representative. No deduction from the final salary payment will be made in respect of annual leave taken in excess of entitlement at the date of death.

4. Flexibility in taking of leave

- 4.1 [Name of employer] will publicise leave entitlement to staff, paying particular attention to informing staff on part-time or irregular hour contracts.
- 4.2 Managers will seek to encourage staff to take their full allocation of annual leave in each calendar year.
- 4.3 Managers will monitor leave taken and highlight where staff have substantial build-up of leave. However, staff will have the flexibility set out below available in the taking of leave.
- 4.4 Up to five days annual leave may be carried forward on agreement with the manager and taken in the ensuing leave year. [It may be useful to amend any such clause to acknowledge the temporary impact of the Covid-19 pandemic – “In recognition of the build-up in leave resulting from the Covid-19 pandemic and the temporary relaxation of Working Time Regulations, staff shall be permitted to carry over up to four weeks leave to be taken over the next two leave years following the 2020 pandemic and entitlement above the four weeks for one leave year]
- 4.5 Up to five days annual leave may be borrowed from the following year on agreement with the manager and taken in the current leave year.

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- 4.6 Care will be taken to ensure that any such adjustments will not lead to the member of staff falling below the four-week minimum specified in the EU Working Time Directive. [As noted above, this rule has been temporarily suspended following the Covid-19 pandemic, therefore, until suspension measures end, could be phrased as “Care will be taken to ensure that any such adjustments will not lead to the member of staff falling below the four week minimum specified in the EU Working Time Directive, subsequent to the temporary arrangements of the leave year covering the 2020 Covid-19 pandemic.”]
- 4.7 The carry-over of leave to the following leave year will be unlimited where a member of staff has been unable to take their leave due to sickness absence.
- 4.8 If outstanding leave at the end of the calendar year exceeds the permitted five days standard carry-over, the number of days lost will be recorded and the reasons that the entitled days have not been taken will be established with a view to action that addresses underlying issues blocking the taking of leave, such as workload pressures or ineffective planning of staffing arrangements.

5. Notification of leave

- 5.1 Staff will give written notification to their line manager for leave and endeavour to lodge their request at least twice the period requested in advance.
- 5.2 Where a line manager is absent, a clearly defined recipient for leave notification will be provided to staff.
- 5.3 The line manager will endeavor to respond within two days of the request being lodged or sooner where the requested leave is within that period.
- 5.4 The line manager will set out whether the requested leave is authorised and in the event of rejection specify clear reasons, indicating why adequate staffing cover could not be arranged to allow the leave and / or why work could not be set aside for the duration of the leave.
- 5.5 [If staff are supportive of a rota system during popular periods, consider inserting a clause that states: “Where requests for leave persistently exceed the leave that can be granted while still ensuring adequate staffing levels for particularly popular periods, managers may specify a deadline for requests so that leave can be granted on a rota basis rather than ‘first come, first served’.”]
- 5.6 If a member of staff falls sick whilst on annual leave, they should report their sickness to their manager immediately in accordance with the sickness absence policy, so that absence can be recorded appropriately.
- 5.7 Requests to staff to cancel leave will only be made where all other options have been exhausted and will only be implemented where the employee gives consent.

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6. Procedure during leave

- 6.1 [Name of employer] recognises the need for leave to allow staff proper rest and recuperation. Toward that end, the following standard procedures will be observed during leave:
- 6.1.1 The setting of “out of office” responses to telephone and messaging enquiries that provide an alternative contact during a worker’s absence;
 - 6.1.2 The turning off of devices for receiving telephone and messaging enquiries unless there is an exceptional circumstance;
 - 6.1.3 The effective delegating of work during leave to avoid an excessive “pile-up” of work to be dealt with on return.

7. Special leave

7.1 [Name of employer] recognises that paid leave should also apply in the following special circumstances:

- 7.1.1 Where staff are called to jury service or as a court witness, they will be permitted leave for the duration of the time they are required to attend those proceedings.
- 7.1.2 Where staff are under notice of redundancy, they will be permitted up to two days leave to look for work or retraining.
- 7.1.3 Where staff are required on the advice of a registered medical practitioner, midwife or health worker, to attend an ante-natal class, they will be permitted leave for up to five classes.

The partner of a pregnant woman will be permitted leave to attend up to two ante natal classes.

In the case of adoption, the primary adopter will be permitted leave to attend up to five pre-adoption appointments, and the partner up to two appointments.

- 7.1.4 Up to five days compassionate leave will be granted to allow staff to deal with emergency situations.

An emergency will be classified as:

- When a dependant is injured or assaulted, falls ill or gives birth;
- When care arrangements for a dependant unexpectedly falter;
- When events at a school or nursery arrangements demand intervention from the employee.
- When damage to staff accommodation demands immediate attention, such as a fire, flood, burglary or a broken boiler.

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A dependant will be defined as a spouse, partner, child, parent or other close relative who has come to depend on the employee for care. This will include other relatives, friends or unrelated children who live in a worker's home, as well as those who "reasonably" depend on a worker's help in case of an emergency;

It is recognised that the classification of an emergency cannot cover all events and line managers must exercise sensitive discretion in judging what other events may qualify as an emergency.

However, reasons for granting will be recorded and assessed across the organisation to ensure consistency and fairness

- 7.1.5 Up to 10 days bereavement leave will be granted in the event of a death of a dependant. In the event of a death of a child before the age of 18 or a stillbirth, Statutory Parental Bereavement Leave of two weeks shall apply for the parent (meaning the biological parent, adoptive parent or parent of a child born to a surrogate) or parent's partner.

Following a bereavement, managers will judge an appropriate time to:

- Check with the employee what, if anything, they would like their work colleagues to know about the bereavement.
- Highlight counselling services available for staff if they judge that it would be of assistance in recovering from the bereavement;
- Consider with the member of staff whether a staged return to work or other adaptations of working arrangements should be put in place to ease a return.

8. Pay during annual leave

- 8.1 Staff will receive their normal remuneration during periods of annual leave and period of special leave.
- 8.2 Normal remuneration will include all regular allowances, overtime and commission that would have been earned if the period had been worked normally.
- 8.3 Where staff work irregular hours, the rate of pay shall be based on the average across 52 weeks where staff have worked for [Name of employer] for the that time or the period since their employment began where they have not, in accordance with the Employment Rights (Employment Particulars and Paid Annual Leave) Regulations.
- 8.4 Where staff work on a term-time basis, they shall be entitled to the full-time leave entitlement at their average weekly rate of pay.

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9. Signatories

This agreement comes into force on:

Date:.....

This agreement will be reviewed on:

Date:.....

SIGNED for [Employer Name]

DATE

SIGNED for [UNISON Branch]

DATE

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Appendix 2 - Glossary of Commonly Used Terms

Phrase	What it means
Accrual of leave	The rate at which an amount of annual leave increases and can be taken during each annual leave year.
Entitlement to leave	The amount of annual leave that can be taken. The minimum entitlement is 5.6 weeks per year.
Holiday pay / Payment for entitlement to annual leave	The amount of wages to be paid for annual leave taken. The calculation can be complicated where pay varies depending on a person's normal week's wage.
Part-time worker	A person who works fewer hours than a full-time comparator.
Part-year worker	A person who works only set periods of time each year (typically 39 weeks) but remains engaged under a contract throughout the year. Such individuals might also be a part-time worker and an example are TTO workers in the education sector.
TTO workers	Members who work during term time only.
WTR 1998	The minimum legal rights for annual leave in the UK are set by the Working Time Regulations 1998. These rights must be interpreted in accordance with the Working Time Directive and EU law on annual leave.
Zero Hour Contract workers	Individuals who work irregular hours which are not fixed over a reference period.

Disclaimer

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