

Tick box



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Holiday pay and overtime forward fix – Branch Briefing (England)

June 2021

Background

In March 2021, UNISON shared a briefing about a [framework](#) agreement for NHS staff working under NHS terms and conditions (Agenda for Change) in England to ensure that they receive the correct holiday pay in relation to overtime. This framework set out how historic underpayments of holiday pay would be corrected going back over the last two full financial years up to 31 March 2021. Branches can find out more on our UNISON [FAQ and resource page](#).

The framework agreement resolved historic miscalculations, with employers taking responsibility to ensure holiday pay is inclusive of overtime payments from 1 April 2021. We understand that employers' work to find a national solution to the forward fix is complicated by several different factors, including the national Electronic Staff Records (ESR) system and local payroll methods of calculating holiday pay. For this reason, a national fix may be some time coming.

The forward fix

Section 13 of the NHS terms and conditions handbook has not changed. It already clearly states that holiday pay should be calculated based on what an individual would have received had they had been at work. From 1 April 2021, employers need to ensure payments for holiday pay include overtime, and additional standard time (for part time workers), and underpayments do not reoccur. Employers should be prepared to outline their plans for a solution with their trade unions partners. However, branches are not expected to sign up to collective agreements on payroll mechanisms. This is an employer responsibility.

There are several questions that would be helpful to ask employers about their plans which are set out below. In addition, employers should consider the [equality analysis](#) undertaken by the Department of Health and Social Care and discuss how to ensure local solutions are free from any discrimination. The analysis suggests potential areas employers need to consider when implementing the framework and should also apply to any future solutions.

If not, talk to UNISON.
Let's put it right together.





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Payments for annual leave

Two common methods of calculating holiday pay are in operation across the NHS.

Rolled up holiday pay

Where employers roll up holiday pay this is normally seen on payslips as '**WTD Payments**'. The method of calculation uses a percentage multiplier which is applied to hourly payments for work done. This method "rolls up" holiday pay in advance.

[ACAS](#) advise employers not to use this method. In 2011, the NHS Staff Council advised employers to move away from rolled up holiday pay in preference to Agenda for Change Average Pay. However, some NHS employers continue to use rolled up pay for permanent staff.

Rolled up holiday pay is still used by employers for those on bank contracts to ensure they can take the statutory 5.6 weeks holiday without loss of pay. This percentage payment can be set locally through a collective agreement.

Agenda for Change Average Pay

Where employers use the average pay function, holiday pay will normally be seen on payslips as '**AfC Absence**'. This method calculates the average pay that someone has received during a reference period, typically between 3 months and 52 weeks but can be longer or shorter depending on specific circumstances.

Employer considerations

The most recent holiday pay case law is clear that overtime should be included in the calculation of contractual holiday pay. However, case law around holiday pay is an evolving issue meaning some elements are still unknown and may require future legal testing. For now, employers will be considering issues and branches may want to ask questions about plans to get holiday right for members. Here are some points to consider:

Regularity and eligibility for payments

Regularity in the context of overtime and holiday pay is not yet defined. Although employers would like regularity thresholds (*for example, 4 periods of overtime worked in 12 months*), this is not a joint position. Branches should ask employers whether they intend to put in place regularity thresholds and how these will work. For example, what regularity threshold, who will this apply to and how will this be managed?



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If employers set the regularity threshold too high, non-eligible staff will not receive the correct holiday pay and may lead to claims for underpayment of wages. In line with the government Equality Impact [analysis](#), eligibility criteria can carry a risk of discrimination. Employers who chose to apply regularity criteria should take account of the direct and indirect impact of protected characteristics on eligibility.

Multiplier levels

Employers who still use the WTD system for holiday pay will need to consider the multiplier they use and how well this reimburses staff for overtime worked. As this method of reimbursement is not supported nationally, there is no collective position on what level this should be set at. If the percentage is too low it will not adequately compensate for holiday pay.

Regularly paid supplements

Although the National Framework Agreement only dealt with overtime and additional standard time, employers need to ensure holiday pay is inclusive of other regularly paid supplements. Section 13 of the NHS Terms and Conditions of service states that:

13.9 Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work.

Equality Impact

Whatever system is put in place, employers will need to complete an Equality Impact Assessment to ensure there is no detriment on grounds of protected characteristics.

Branch actions

Although branches are not expected to sign off payroll mechanisms, you may want to check against the following checklist.

- Speak to your employer to ensure they are aware of the [national framework](#) and are making plans to pay “corrective payments” to staff by September 2021
- Check that employers are putting in place systems to ensure staff are receiving the correct holiday pay from 1 April 2021
- Establish what payroll system is being used and who is covered by these arrangements