

Video: Exit from Lockdown: Considerations for businesses in the Channel Islands

Insights - 22/05/2020

COVID-19 has prompted a whole range of Employment Law questions, particularly as we exit lockdown. [In this video](#), our team explores key considerations for Channel Island employers around the subject of annual leave.

Please note that the information in this video was correct as at 22 May 2020.

You can read the content below, please note this is not a transcript.

How should employers approach the issue of annual leave and what are the rights of employers and employees during the Covid-19 pandemic?

Rachel DeSanges

The answer to many of the questions that employers are asking about annual leave during the pandemic will depend on:

- the specific wording of any contractual annual leave provisions and
- whether the business has successfully effected a variation to that provision

So in most cases, establishing what staff are entitled to, and what contractual changes they have consented to, will require an analysis of the specific contract terms and the content of any variation letter or other document that has been issued to employees.

Successful variation letters or agreements are crucial so as to avoid breach of contract claims which may lead to proceedings in both the Royal Court and the Employment Tribunal and so we would encourage employers to ensure that they give this careful consideration.

Unless the terms of the variation specifically state otherwise and are agreed by the employee,

variation is likely to last only for the duration of the pandemic, but businesses will need to consider whether a second variation letter is needed to revert to the original contract when businesses starts to return to normal.

In the event of legal action by an employee arising from contractual changes, the relevant Court or Tribunal will consider the specific facts of the variation and the conduct of the parties. It remains to be seen what, if any, weight will be attributed to the pandemic when assessing whether or not the employer acted reasonably in all the circumstances. We certainly cannot say that the pandemic is likely to be a 'get out of jail free' card.

In broad terms, what are the main differences between annual leave in Jersey, Guernsey and UK

Will Austin-Vautier

In Jersey, employees have a statutory right to 2 weeks of leave in each leave year, as well as paid time off work, or a day in lieu, on all public and bank holidays.

In Guernsey, holiday entitlement is a matter of contract rather than statute.

In the UK, the Working Time Directive, which is EU legislation, and the Working Time Regulations, underpin a lot of the current discussion about the correct approach to annual leave. Jersey and Guernsey are not bound by these laws however and the approach will be different in each Island.

Can an employer require employees to take a minimum number of days' leave within a certain time period to deplete the amount of leave remaining to be taken later in the year?

Will Austin-Vautier

With many holiday plans cancelled or postponed, some employees may be reluctant to take time off in the first half of this year, particularly if the leave days are paid at a lower rate than the normal wage.

This means untaken leave levels could be markedly higher in the latter part of 2020 than would be the norm, presenting a range of operational challenges.

Some employers might also want to ensure that holidays are taken now while the business is quiet or closed rather than when business is picking up later in the year.

In any case, employers in both Jersey and Guernsey should discuss any proposals to change policy around leave with their employees.

Some employers already require leave to be taken at certain times of the year, for example, where a business closes at Christmas. However, the employer may not have the express right under the

employment contract to require employees to take a proportion of their annual leave within a specified timescale.

If not, the employer's authority to do so is likely to be derived from an implied discretion.

The caveat is that an employer's discretion must be exercised rationally, so employers should consider in advance the business case for making such changes. For example, the business might take into account how many days of annual leave can normally be accommodated in the latter part of the year.

The business might also consider whether there is likely to be a 'bottle-neck' in work in the latter half of 2020 if restrictions are lifted. If so, that might support the reasonableness of the proposals, but the business would need to be prepared to articulate envisaged commercial and operational pressures as part of the discussions with staff about a potential variation to their terms.]

Under the Working Time Regulations in the UK, an employer can require an employee to take annual leave on certain dates as long as they give twice the number days' notice as the leave period, such as 2 weeks' notice for 1 week of leave. There is no equivalent rule in Jersey or Guernsey.

Can an employer refuse a request for leave, or temporarily defer the taking of leave, to ensure that there are enough staff to run the business?

Rachel DeSanges

While some employers are likely to be encouraging their employees to take holidays now while the business is quiet, other businesses will be experiencing peak demand with reduced staffing levels and may be considering restricting the taking of annual leave at this time.

For example, some business might want to tell staff that no holidays may be taken for the next 3 months.

Employees are often entitled to choose their leave dates, subject to giving any period of notice that the employer requires and any other company rules, such as in a policy or handbook.

Again, the employer's authority to do so is likely to be derived from an implied discretion with the caveat that an employer's discretion must be exercised rationally. Employers should consider in advance the business case for making such changes.

Making the 'right' decision on such issues will be dependent on a number of factors including -

- the starting position under the contract
- how individual employees have been impacted in terms of their annual leave arrangements

- how the Covid-19 pandemic might improve or deteriorate in 2020, and
- how it has impacted on the business and its operating requirements.

When considering requests for annual leave can businesses prioritise requests from staff members in certain groups?

Will Austin-Vautier

Business can prioritise annual leave requests from staff in certain groups, such as those who are not currently required to work within the business, or those whose circumstances would make it more difficult for them to attend work. This might include employees over age 65 or who are more vulnerable due to medical conditions and parents with child care requirements.

Prioritising annual leave requests is likely to form part of the overarching discretion reserved to the employer to manage the employment relationship. Any such discretion should be exercised reasonably. For example, prioritising requests from employees who are not currently required in the workplace may be appropriate if the business is busy, or short-staffed.

The business should be fair and consistent in such decisions unless there is a clear business need for different treatment for different staff. There is a risk of discrimination claims and reduced employee morale and goodwill.

Bearing in mind the employer's duty of care for employees and any health and safety requirements, the employer should also take into account the importance of well-being and employees having a break from their work, even at a very busy time.

Unused leave

If employees request to carry forward annual leave to 2021, does the business have to agree?

Rachel DeSanges

There is no legal right to carry leave entitlement over from one leave year to another unless the employee's contract allows for it.

Many employers in Jersey and Guernsey do not permit employees to carry forward leave to the following leave year. We often see this stated in employment contracts. If this is not in the contract and the employer chooses not to vary the contract, employees will lose any leave that has not been taken in the current leave year.

The UK Working Time Regulations have been amended recently to allow employees to carry forward up to four weeks of annual leave into the next 2 leave years. This will apply where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are

entitled due to Covid-19. There is no equivalent provision in Jersey or Guernsey.

Does an employer have to offer pay in lieu of any untaken leave at the end of the year?

Rachel DeSanges

If the employment contract provides that an employee will be paid for any untaken leave at year-end, then the employer will be obliged to honour that provision, or apply a variation to the employment contract.

If this is the case, employers will need to consider their policy carefully as there could be a considerable amount of untaken leave to pay for at the end of the current leave year.

We are seeing many employers, at least in the first instance, request that employees consider taking all their leave by the end of the year to avoid this situation and in most cases employees seem happy to oblige.

Cancelling leave

If an employee wishes to cancel or change their annual leave dates can the employer refuse?

Will Austin-Vautier

With many holiday plans cancelled or postponed, many employees may be looking to cancel their leave.

Unless this has been agreed, for example, in the contract of employment, an employer is not obliged to approve a request to cancel annual leave. If the employee wants to take their leave on different dates, they must agree this with the employer in the usual way.

Employees do not have the right to take their leave whenever they want to. The employer can refuse to cancel leave and may wish to do so where there is a legitimate reason.

Employers may be reluctant to agree to cancel leave if they have already taken steps to ensure that work is covered by other staff during that period, particularly if the employee requests to cancel leave at short notice.

With travel restrictions now likely to continue at least until July, and possibly much longer, employees may be more likely to be willing to use their annual leave for 'on-Island' holidays.

Can an employer cancel annual leave that has already been booked by staff?

Will Austin-Vautier

Some employers might want to cancel annual leave days that have already been booked by their

staff. This might be because the business provides an essential service and is very busy, or because other staff are not available to work due to shielding, self-isolation or sickness.

The employer's authority to do so is likely to be derived from an implied discretion. This may be implied with reference to various other discretions expressly reserved to the employer under the annual leave policy or implied in general terms in light of the nature of the specific contractual relationship; an employer needs to manage its operational affairs.

The caveat is that an employer's discretion must be exercised rationally, so employers should consider in advance the business case for making such changes.

In theory, the business can direct employees to change their leave dates. But the employer should take care to protect the well-being of staff at this time. Employers in Jersey should not cancel annual leave if this will mean that the employee is prevented from taking their statutory minimum of two weeks.

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