



Berryman Healthcare update

In sickness and on holiday

The legal position on holiday rights for employees on sick leave was in a state of uncertainty until recently. However, the law has now been clarified in the cases of *Stringer and others v HM Revenue & Customs* [2009] IRLR 214 and *Pereda v Madrid Movilidad SA* C-277/08. The European Court of Justice and the House of Lords have decided:

- that holiday entitlement under the Working Time Regulations (WTR) continues to accrue during periods of sick leave;
- that a worker on long-term sick leave can opt to take some of the time off as paid annual leave instead;
- that a worker whose employment terminates following an extended period of sickness absence is entitled to a payment in lieu of any untaken holiday; and
- that public-sector workers whose sick leave coincides with a planned period of annual leave have the right to defer their annual leave until a later date.

Analysis

The outcomes of these cases will certainly lead to additional costs for employers, especially in the healthcare sector where the level of employee absence due to sickness tends to be high. The greatest impact will occur where an employee is off on long-term sick leave, as the entitlement to paid leave will continue to accrue. The employee will have the option either to take the leave while off sick (and be paid for it) during the year or allow it to roll over and take it on his or her return to work. Logically, employees who receive sick pay over and above SSP will roll their holidays over and only take them once their company sick pay is exhausted, maximising their income but increasing the cost to the business. Even if the employee's employment is terminated during the sick leave, he or she will still be entitled to be paid for accrued leave (to WTR levels) on termination.

At present, only public sector workers have the right to defer annual leave which coincides with sickness; workers in the private sector will not be able to benefit from this decision, unless the legislation is amended. However, the amendment is likely to be made sooner rather than later – we will keep you posted.

Minimising the risk and the cost

You need to ensure robust recruitment strategies are in place to cover potential extended absences as a result of the decision. When engaging staff to cover maternity or sickness absence, ensure you bear in mind the additional cover you will need if the absent employee elects to take their accrued holiday. With statutory holidays accruing at four weeks per year of absence, this is potentially a huge cost to your business that will need to be monitored, budgeted and managed appropriately.

Review your contracts of employment to ensure that your business is protected, so far as possible. Many contracts contain a blanket ban on rolling-over holiday to subsequent years, but following Stringer these need to be amended to allow roll-over where their employee would otherwise be unable to take their holiday due to sickness.

In order to minimise the costs of holiday accruing during long-term sick leave, you should consider specifying in your contracts that, during sick leave, only holiday up to the statutory minimum will accrue, rather than to full contractual entitlement (if higher).

You could also simply increase your reliance on agency staff, leaving the agency to manage the costs of both holidays and sickness absence. However, this comes at a price and you would need to bear in mind the impact of the Temporary Workers Directive, which will provide for increased rights for agency workers when it is introduced into UK law. The implementation of this Directive was originally scheduled for 2010, but has been put on hold until 2011 following the recession. (It must be implemented by 5 December 2011 at the latest.)

Contact us

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