

Furlough Leave & Holidays

The updated government guidance issued on 4th April made no mention of whether holidays can be taken while an employee is on furlough leave. However, ACAS guidance has been updated to state that if an employee is furloughed “they can still request and take their holidays in the usual way” and this would include bank holidays. The link to the ACAS Guidance is here <https://www.acas.org.uk/coronavirus/using-holiday>.

As the government has not contradicted ACAS, it would seem they have by default, endorsed this approach and perhaps this will be clarified in the next round of government guidance. If that is correct, then an employee can be on annual leave at the same time as they are on furlough leave.

Bank Holidays are commonly identified as part of annual leave entitlement in employment contracts. ACAS guidance indicates that employers can still require a furloughed employee to use a days’ annual leave for a bank holiday and this suggests the same would apply to any other annual leave days provided the correct notice is given.

However there are contrary views in case law (based on cases which indicate that employees cannot be required to take annual leave where they are sick or on maternity leave) which is that being required to take annual leave while on furlough, in the current climate of virtual lockdown, would be incompatible with the purpose of annual leave ie a period of rest **and** leisure, to rest from work. Further it would not be appropriate to require employees to use up all or most of their annual leave during furlough as that would potentially be an abuse of the employers’ Working Time Regulations rights and also incompatible with the purpose of the new amendment Regulations allowing employees to carry forward up to four weeks annual leave over the next two year period.

We therefore anticipate that employers can rely on the ACAS guidance to cover the forthcoming Easter and May bank holidays and any pre-scheduled Easter shut downs, but they should ensure they do not insist employees take a disproportionate level of annual leave when on furlough.

In terms of pay, holiday pay must be paid at the employees “normal pay” (pre-furlough) as furlough does not alter existing employment law on holiday pay.

Scottish Engineering have made clear that further government guidance on this topic would be welcomed.