

WORKING TIME - QUESTIONS & ANSWERS

INCLUDING TYCO & TRAVEL TIME

Last Updated: July 2017

ANNUAL LEAVE & SICK LEAVE:

For employees who have been on long term sick leave before 1 August 2015, presumably company's normal policy applies rather than new amendment?

- The entitlement to annual leave while on sick leave is effective from 1 August 2015, and supersedes any policy or contractual term which may state otherwise.
- Employers should ensure that their contracts and policies reflect and are compliant with this amendment.
- If a company has employees who have been on certified sick leave since before 1 August 2015, they will have begun to accrue annual leave entitlements while on sick leave since 1 August 2015.

Can you give a specific example of calculating annual leave entitlements for employees on long term sick leave?

- No calculation of annual leave is necessary until the period of sick leave comes to an end.
- When the employee returns from sick leave, check the organization's annual leave policy in respect of the annual leave and when it runs from.
- However it is important to note that under Section 2 of the Organisation of Working Time Act 1997 that the leave year is defined as running from 1 April to 31 March, therefore annual leave entitlement should technically be calculated based on that year to avoid any breach.
- An employer must determine the dates of the employee's absences.
- An employer must also determine the untaken statutory annual leave accrued from the leave years and apply the 15 month carry over period in respect of the end of each leave year.

For Example

- John was absent from work from 1 November 2015 to 1 November 2017.
- Leave Year [as per legislation] 1 April 2015 to 31 March 2016 – more than 15 months will have passed since the end of this leave year by the time John returns to work therefore no annual leave for this year carries forward.
- Leave Year 1 April 2016 to 31 March 2017 – John will retain his accrued annual leave as the 15 month period from the end of this leave year will not have passed when he returns to work.
- Leave year beginning 1 April 2017 – John will accrue his annual leave up to his return to work and as normal thereafter.

Example of private sector employee on sick leave prior to 1 August 2015 when the right to accrue annual leave during sick leave commenced

- Mary was absent from work from 1 August 2013 to 1 July 2016
- No right to accrue annual leave existed from 1 August 2013 to 1 August 2015

- Mary accrued statutory annual leave from 1 August 2015 until the end of the leave year 31 March 2016 and for the leave year 1 April 2016 onwards.

In relation to annual leave entitlements accrued on sick leave, if 15 months have passed is the employee entitled to any annual leave?

- An employee's entitlement to carry over annual leave while on sick leave is subject to a 15 month carry over period after the leave year in question.
- If the employee has not returned to work before the expiration of the 15 month carry over period, then these accrued entitlements will be expired.
- However an employee will continue to accrue additional statutory annual leave entitlement if they remain on sick leave, subject always to a 15 month carry over period after the leave year in question.

Do you need to be back to work before the expiration of the 15 month period? (Annual leave during long term sick leave)

- An employee cannot demand annual leave during sick leave and so if they have not returned to work by the expiration of the 15 month carry over period after the leave year in question then the entitlement in respect of annual leave in that leave year will expire.
- However if the employee remains on certified sick leave then they will continue to accrue new annual leave entitlements, subject always to the 15 month carry over period after the leave year in question.

When a person is on long term sick leave must you tell them that they could be dismissed or it is okay to inform them, that they are not in a position to keep their job open indefinitely?

- While an employer is not required to keep a position open indefinitely, any dismissal for incapacity must adhere to the principles of natural justice and fair procedures and each case must be decided on its specific facts.
- Part of fair procedures is the requirement that an employee is aware that their job is at risk.
- The case law is clear that it is important that an employee receives fair notice that the possibility of his or her dismissal for incapacity was being considered.
- In practical terms this will normally require a three stage enquiry:
 - Firstly consider the factual position concerning the employee's capability to include an assessment of the degree of impairment arising from the illness, whether the illness is considered to be a disability at law and the likely duration of the illness.
 - Secondly, consider all medical evidence available to include the employee's medical evidence and evidence obtained independently. If the employee is not fully capable, Section 16(3) of the Employment Equality Acts requires the employer to consider what (if any) special treatment or facilities may be available by which the employee can become fully capable. The section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes normal cost will depend on the size of the organisation and its financial resources.
 - Thirdly, enquiries in relation to an employee's medical capacity could only be regarded as adequate if the employee concerned is allowed a full opportunity to present relevant medical evidence and submissions. Consideration also needs to be given of the conduct required of an employer prior to dismissing an employee for reasons of incapacity as set out in section 16(3) of the EEA. Specifically, an employer

must show genuine engagement with the process of finding effective and practical measures to allow an employee to return to work.

Where a company has a leave year of January-December and limits any annual leave carried over into the New Year to e.g. 5 days to be taken before end of March, does the change to accruing/carrying annual leave impact here?

- If a company has an employee who is returning from sick leave then they must keep in mind the change to the entitlement to accrue and carry over annual leave entitlement.
- The right to carryover is for 15 months following the leave year in question and therefore this right will supercede any right in respect of carryover contained in the company policies.

The practice in our organisation was that once an employee was out on sick leave, any time absent from work on sick leave was not included in the calculation of annual leave entitlement, e.g. if the employee missed 1.5 months of work due to sick leave then we calculated the annual leave by dividing 20 days by 12 months and multiplying it by 10.5 to get the annual leave entitlement. We have an employee arguing that they have worked 1,365 hours in a year and so is entitled to full 20 days. Which is correct?

- Section 19 of the Organisation of Working Time Act 1997 sets out an employee's entitlement to annual leave as follows:
 - 1. Four working weeks in a leave year in which the employee works 1,365 hours or more; or
 - 2. 1/3 of a working week for each month in the leave year in which the employee works 117 hours; or
 - 3. 8% of the hours worked by the employee up to a maximum of 4 working weeks.
- Where an employee qualifies under 2 or more of the calculations above, he or she shall be entitled to whichever period of leave is greater.
- Therefore, if the employee in question has worked 1,365 hours in the year, notwithstanding any absence on sick leave, then they are entitled to 4 weeks of annual leave.
- In addition, pursuant to section 86(1) of the Workplace Relations Act 2015 employees on certified sick leave now accrue their annual leave entitlements while on sick leave.
- In cases where an employee has worked less than 1,365 hours in the year, whether due to sick leave or otherwise, then the methods of calculation set out in either (2) or (3) above may apply.

What changes do I need to make to take account of the changes to the annual leave entitlements while on sick leave?

- The changes apply with immediate effect from 1 August 2015 and so employers should update their contracts and policies to ensure that they accurately take account of these legislative changes.
- In addition, if you have employees who are on long term sick leave you must take this new right into account when calculating their annual leave entitlements, keeping in mind the 15 month carry over period for such accrued annual leave entitlements.

We have an employee who is on long term sick leave and has not submitted sick certificates for 4 months – do they still accrue annual leave entitlements?

- Section 86(1) of the Workplace Relations Act 2015 states that a day an employee was absent from work due to illness shall *'if the employee provided to his or her employer a certificate of a registered medical practitioner in respect of that illness'* be deemed to be working time for the purpose of calculation of annual leave entitlements.

- Therefore, if the sick leave is not medically certified, then it will not be considered as working time for the purpose of calculating annual leave entitlement.
- In such a situation employers should also consider their absence and sick leave policy which should set out the requirements for employees to provide certification for sick leave and any consequences of a failure to do so.

TYCO & TRAVEL TIME:

Do you have an idea of timelines of implementation for travel time for the private sector?

- Currently the Tyco case only has direct effect to the public sector.
- Implementing legislation will be required prior to it having legislative effect in the private sector.
- In the interim it is possible that an Irish court or tribunal could decide to apply the Tyco rationale in place of the strict provisions of the Organisation of Working Time Act 1997.
- Therefore employers in the private sector should be aware of the Tyco decision and be ready to take steps to protect themselves from any potential exposure.
- Once again it should be noted that this ruling applies to peripatetic workers only, and the CJEU recognised that travelling is an integral part of their work and it is inherent in the performance of their activity.

Regarding travel time, where an employee does international travel is there an obligation to count travel time from home to airport, to different country etc, in working time for hours calculated, pay, overtime etc. (in a private sector company)

- The Tyco ruling only refers to workers who do not have a fixed place of work and who travel each day between their home and customers' premises on behalf of their employers.
- If the employee in question is not a peripatetic worker then the Tyco ruling does not apply to them.
- If they are a peripatetic workers in the private sector then Tyco does not have direct effect, and implementing legislation will be required however they should take note of this ruling and should take steps to protect themselves from any potential exposure.
- If a company has an employee who is not a peripatetic worker but who travels regularly for work, the question of working time and any payment in respect of travel time should be addressed in the terms and conditions of employment and the company policies.

How does the Tyco decision affect the rights of office based workers who may travel to meetings?

- The Tyco ruling applies to peripatetic worker only (Peripatetic is defined as a person who travels around or a follower of Aristotle. An example of a peripatetic is a traveling salesman.)
- Currently it only has direct effect in the public sector.
- Any other rights in respect of travel time will be a matter as between the employer and the employee and may be contained in the terms and conditions of employment or the company policies.
- It is likely that a test case will be brought in the near future addressing the conflict and disconnect between the terms of the National Minimum Wage Act 2000 (which specifically provides that 'working hours' does not include time spent travelling between an employee's place of residence and their place of work for the purposes of pay), the rationale in the Tyco decision, the Organisation of Working Time Act 1997 and the employment terms of workers who are seeking recognition that travel time constitutes working time in cases where workers

have no habitual or fixed place of work. It will then be up to the Labour Court and the adjudication officers to interpret Tyco in light of the existing Irish legislation.

COMMISSION & ALLOWANCES:

Commission: is it correct saying commission should be paid to the sales person while on annual leave?

- Typically the practice in Ireland in relation to the calculation of holiday pay is based on an hours worked calculation, rather than salary earned.
- While the Organisation of Working Time Act 1997 and the Holiday Pay Regulations (SI No 475/1997 The Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997) do not expressly refer to commission as forming part of annual leave pay, commission is expressly referred to in an explanatory booklet from the Department of Enterprise, Trade and Employment, which does not have legal effect but which can be taken into account by a Court.
- Furthermore, the Holiday Pay Regulations refer to bonuses being included in calculation of annual leave pay.
- This gives rise to an inference of commission being included.
- At present it is difficult to see how any Irish Court would find that annual leave pay should not include commission based on the current Irish legislation.
- The method of calculation of payment for annual leave is set out in the Holiday Pay Regulations.

In payment for annual leave, should this include care allowances/on call allowances/housing subsidies?

- SI No 475/1997 – Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997 (the “Holiday Pay Regulations”), at section 3, sets out the basis of calculation, for the purpose of the Organisation of Working Time Act 1997, of the normal weekly rate of an employee’s pay.
- It states that the sum that is paid in respect of the normal weekly pay includes any regular bonus or allowance the amount of which does not vary in relation to work done by the employee, but excluding any pay for overtime.
- Therefore, if the allowances or subsidies are amounts that do not vary it is likely that this should be included in the calculation.
- In addition, it should be kept in mind, following CJEU decisions such as Williams and Others v British Airways, Lock v British Gas Trading Ltd and Others, that if there is an intrinsic link between the allowances and the work that the employee is required to do then it is likely to be included in the calculation of annual leave payment.
- It may also depend on the terms of the contract of employment and so this should be reviewed in detail when determining whether or not such allowances/subsidies are included in the calculation of payment for annual leave.

CONTACT THE HR SUITE:

If you have any queries please do not hesitate to contact our office on 066-7102887 and we would be happy to deal with your query