

Frequently Asked Questions: New Rules on Annual Leave and Sick Leave

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Welcome to the ByrneWallace Employment Law team's guide to the new rules on annual leave and sick leave.

Introduction

Since 1 August 2015, employees who have been absent from work due to medically certified illness have been entitled to accrue annual leave as if they were at work. The change became effective when the Minister for Jobs, Enterprise and Innovation brought into operation a limited number of sections of the *Workplace Relations Act 2015*.

In this guide we address the most frequently asked questions received since the new legislation came into operation.

1. Where can I find the new provision that allows annual leave to accrue to employees who are sick?
2. Can employees demand annual leave during their sick leave?
3. Has this not been the rule for years already?
4. What about uncertified sick leave? Many of our employees work part-time; it is often not worth their while to obtain certificates from their doctor when they become sick.
5. What do I do about sick leave which occurred prior to 1 August 2015?
6. How much annual leave can be accrued by employees who are on long-term sick leave?
7. Our leave year runs from January to December. Can I base my calculations on that leave year?
8. How do I calculate the entitlements of an employee returning from a long period of sick leave?
9. Does an employee have a greater or lesser leave entitlement depending on the month of the year in which he or she returns to work from a period of long-term sick leave?
10. Can I terminate the employment of an employee who has been absent for a long time due to illness?
11. How do I calculate the entitlement of a person who is dismissed during the leave year?
12. What about employees who have died?
13. Is it only statutory annual leave that accrues during sick leave?
14. What is the situation in relation to public holidays?

1. Where can I find the new provision that allows annual leave to accrue to employees who are sick?

Section 86 of the *Workplace Relations Act 2015* inserted a new section into the *Organisation of Working Time Act 1997* as follows.

“19(1A) For the purposes of this section, a day that 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 a day on which the employee was [at work].”

2. Can employees demand annual leave during their sick leave?

No. No employer is required to permit an employee to take annual leave while the employee is on sick leave. Section 19(2) of the *Organisation of Working Time Act 1997* provides as follows.

“A day which would be regarded as a day of annual leave shall, if the employee concerned is ill on that day and furnishes to his or her employer a certificate of a registered medical practitioner in respect of his or her illness, not be regarded, for the purposes of this Act, as a day of annual leave.”

Section 20 of the *Organisation of Working Time Act 1997* provides that the “times at which annual leave is granted to an employee shall be determined by his or her employer having regard to work requirements.”

This right (on the part of an employer) is subject to certain conditions, but these conditions are not relevant to the point under consideration. The net effect of these provisions is that an employer is not required to permit an employee to take annual leave while he or she on sick leave. The employee’s sick leave must end (whether because he or she becomes well; or because he or she retires, resigns, is dismissed or dies) before the employee can receive a benefit in respect of annual leave.

3. Has this not been the rule for years already?

Many employers have been allowing the accrual of annual leave during sick leave for a number of years prior to this year.

The genesis of the new provision was a decision of the Court of Justice of the European Union (CJEU) in 2009 in the joined cases of *Stringer and Schultz Hoff C-520/06 and C-350/06*. That decision related to the right to paid holidays prescribed by Article 7 of the Working Time Directive, which is the Directive on which the *Organisation of Working Time Act 1997* is based.

In that decision, the CJEU decided that the right to paid holidays prescribed by Article 7 of the Working Time Directive is not conditional on the number of hours worked by a worker in the period to which the leave relates.

The CJEU in *Dominguez v CICOA, C-282-10* decided that Article 7 of Working Time Directive has “direct effect”. This means that employees of an emanation of the State (i.e. public servants and certain related types of employee) are already entitled to have periods of sick leave count towards the accrual of annual leave. In practice, this has meant that public sector employees have received the benefit of this provision for several years.

4. What about uncertified sick leave? Many of our employees work part-time; it is often not worth their while to obtain certificates from their doctor when they become sick.

The right to accrue annual leave while on sick leave is limited to certified sick leave. Uncertified sick leave does not count towards annual leave.

5. What do I do about sick leave which occurred prior to 1 August 2015?

The amendment does not express itself to be retrospective. It appears reasonable to take it that time spent on certified sick leave prior to 1 August 2015 will not count as “working time” for the purposes of accruing annual leave.

This may be arguable. The Labour Court may determine that giving retrospective effect to the new provisions is required to achieve conformity between the Directive and the *Organisation of Working Time Act 1997*. However, such a position could be challenged having regard to principles of European law and in the Constitution which prohibit certain types of retrospective legislation.

6. How much annual leave can be accrued by employees who are on long-term sick leave?

Annual leave does not accrue indefinitely during periods of sick leave. There is a 15 month carry-over period. Section 20(c) of the *Organisation of Working Time Act 1997* as amended provides that where the employee -

is, due to illness, unable to take all or any part of his or her annual leave during that leave year or the 6 months thereafter, and

has provided a certificate of a registered medical practitioner in respect of that illness to his or her employer

then the leave must be taken within the period of 15 months after the end of that leave year.

7. Our leave year runs from January to December. Can I base my calculations on that leave year?

Doing that would not be compliant with the law. The "leave year" is defined by section 2 of the *Organisation of Working Time Act 1997* as running from 1 April to 31 March. Many employers operate different leave years, commonly the calendar year. Until now, in practice, using such a non-compliant leave year rarely gave rise to any significant breaches of the Act. However, there is a greater chance of a significant breach of the new provisions if an employer does not calculate the accrued entitlements of an employee returning from sick leave on the basis of the statutory leave year. Even if employers continue to operate a calendar-based leave year, they should use the statutory leave year to calculate the annual leave of employees returning from long-term sick leave.

8. How do I calculate the entitlements of an employee returning from a long period of sick leave?

An employee returning from long-term sick leave will have either two or three distinct "bundles" of annual leave, each of which must be taken before a certain deadline. The following steps can be followed to assess the entitlements of an employee who has been on a lengthy period of certified sick leave.

(a) No calculation is necessary until the period of sick leave comes to an end. The following calculations are made when the employee's period of sick leave ends.

- (b) Ignore any leave year which is not one of: the current leave year; the last leave year and the year before the last leave year. The employee has no entitlement in respect of any leave year prior to those years.
- (c) In each case, the "leave year" is the period from 1 April to 31 March. It is not the calendar year, or any other 12-month period that the company may use for administrative purposes.
- (d) In respect of the current leave year (the one in which the employee has returned to work) his or her annual leave will accrue in the normal way as if he or she had not been absent.
- (e) In respect of the last leave year:
 - (i) calculate how much untaken leave remains in respect of that year;
 - (ii) grant that amount of leave within 6 months of the end of that leave year unless doing so is not possible because of the period of sickness. That is to say, if the employee has come back within the period 1 April to 30 September after the end of the last leave year, grant the leave in respect of that year before 30 September. If the period of sickness extends for more than six months from the end of the last leave year (ie after 30 September) then the leave must be granted within 15 months of the end of that leave year (ie by 30 June of the following year).
- (f) In respect of the leave year before last:
 - (i) calculate how much untaken leave remains in respect of that year;
 - (ii) grant that amount of leave within 15 months of the end of that leave year (ie by 30 June the following year). If the 15-month period has passed the employee has lost the entitlement to leave in respect of that particular year.

9. Does an employee have a greater or lesser leave entitlement depending on the month of the year in which he or she returns to work from a period of long-term sick leave?

Yes. Where two employees have an equally-long period of long-term sick leave, but the first one returns in April and the second returns in July, then the one who returns in April has a greater accrued entitlement to annual leave.

10. Can I terminate the employment of an employee who has been absent for a long time due to illness?

An employer may terminate an employee's employment for incapacity (long-term sickness) subject to certain rules regarding fair procedures and, in the case of an employee with a disability, subject to obligations imposed by the *Employment Equality Acts 1998 to 2011* to include the requirement to make reasonable accommodation, if possible.

An employer may be precluded from terminating an employee's employment if the employee has a contractual entitlement to receive permanent health insurance in the event of long-term illness.

11. How do I calculate the entitlement of a person who is dismissed during the leave year?

As the law stood before the enactment of the *Workplace Relations Act 2015*, an employer was precluded from paying an employee in lieu of annual leave except where the employee's employment terminated during the leave year. An employee whose employment terminated during a very long period of sick leave had no entitlement to a payment in respect of annual leave.

The amended section 23(1) of the *Organisation of Working Time Act 1997* provides for payment in respect of annual leave for an employee who has been absent on long-term sick leave immediately before the termination of his or her employment.

The calculation is based on the same 15-month provision as described above in respect of an employee who is returning to work after illness.

12. What about employees who have died?

The *Organisation of Working Time Act 1997* already provided that the estate of an employee who dies without taking his or her full leave entitlement is entitled to be paid in respect of the untaken annual leave. Where an employee has been on long-term sick leave and dies before reaching retirement age, that employee's estate will be entitled to be paid in respect of annual leave in the current leave year; the previous leave year and possibly (depending on the date of death) the leave year before the last one.

This guide is provided for general information purposes only. It is not intended to be a comprehensive review of all changes introduced by the new Act, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues.

13. Is it only statutory annual leave that accrues during sick leave?

The import of the CJEU decisions is that only statutory annual leave must be carried over. There is no right under the Directive for additional days' leave. Where an employer provides additional leave in the contract of employment, he or she is not obliged to provide that such leave accrues during sick leave or (where already accrued prior to the start of the illness) that it is preserved during long periods of sick leave.

This is a matter which can be determined in each employee's contract of employment. The contract may provide either that the additional leave accrues, or does not accrue, during periods of sick leave.

14. What is the situation in relation to public holidays?

The *Workplace Relations Act 2015* does not amend section 21 of the *Organisation of Working Time Act 1997*. Time spent on sick leave will not count as time spent working for the purposes of the accrual of public holiday entitlements. However, the Third Schedule of the *Organisation of Working Time Act 1997* achieves an equivalent objective by permitting public holiday entitlements to accrue during certain periods of absence. These are:

- any absence due to a strike;
- any period up to 13 weeks for authorised absence that was not illness-related;
- any period up to 26 weeks for absence arising from illness or injury which was not workplace related; and
- any period up to 52 weeks for workplace-related injury.

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