Bank holidays: an employer’s guide

The prospect of bank holidays will come as a welcome relief to many employees. However, not all employees are entitled to time off on bank holidays and much will depend on the wording of their contract of employment.

The issue of bank holidays can be tricky for employers to deal with, particularly where they employ part-timers or shift workers. The fact that four of the annual bank holidays in England and Wales derive from religious anniversaries can also raise difficulties with non-Christian employees.

These frequently asked questions from XpertHR will help employers grapple with the most complex issues relating to bank holidays.

The top 10 questions:
- Can employees be required to work on bank holidays?
- Are employees who are required to work on bank holidays entitled to pay in lieu of time off, or additional holiday?
- If a part-time or shift-working employee is not scheduled to work on a bank holiday, is he or she entitled to an additional day’s holiday?
- Can employees be required to take annual leave on bank holidays?
- Are employees entitled to time off for bank holidays in addition to the statutory minimum annual leave entitlement of 5.6 weeks?
- How should an employer deal with an employee who calls in sick on a bank holiday?
- Is an employee who is required to work on bank holidays entitled to extra pay?
- How should an employer deal with an employee who refuses to work on a bank holiday?
- Should employees who practise religions other than Christianity be given additional time off in lieu where a bank holiday is aligned to a Christian festival such as Easter?
- What is an employee’s holiday entitlement if an extra bank holiday is granted one year?

Further resources relating to holiday from XpertHR Professional

www.xperthr.co.uk
Top 10 Frequently Asked Questions on bank holidays

1. Can employees be required to work on bank holidays?

There is no statutory right for employees to take bank holidays off work. Any right to time off, payment for time off or extra pay for bank holidays worked depends on the terms of the employee’s contract of employment. Therefore, subject to the terms of the contract, employees can be required to work on bank holidays.

Under s.1 of the Employment Rights Act 1996, employers must give new employees a written statement of terms and conditions of employment. Under s.1(4)(d)(i) of the Act, the statement must contain terms relating to holiday entitlement, including bank holidays, and holiday pay. In the absence of a written statement, or written contract of employment, the rights relating to time off for bank holidays will depend either on what has been verbally agreed or on custom and practice. For example, if employees have been given paid time off for bank holidays in the past, it is likely that this will have become a contractual entitlement.

Any unilateral changes could constitute a fundamental breach of contract, enabling the employees to resign and claim constructive unfair dismissal if they have been employed for one year or more (two years where the employment began on or after 6 April 2012). Any employees who do not fulfil this service requirement can claim breach of contract, as there is no service requirement for such a claim.

2. Are employees who are required to work on bank holidays entitled to pay in lieu of time off, or additional holiday?

Whether or not employees are entitled to pay or time off in lieu of bank holidays worked depends on their overall holiday entitlement and the terms of their contract. If the entitlement is limited to the statutory minimum and employees work on a bank holiday, they must have a day off in lieu so that the total paid leave is 28 days per year (if they work a five-day week). Employees cannot be paid in lieu of statutory minimum holiday entitlement except on the termination of employment. However, where the contractual holiday entitlement in question exceeds the statutory minimum, whether or not employees are entitled to pay or time off in lieu depends on the terms of the employment contract, or any custom and practice in the business.

3. If a part-time or shift-working employee is not scheduled to work on a bank holiday, is he or she entitled to an additional day’s holiday?

An employer’s obligation to part-time workers must be considered in light of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), under which part-time workers are entitled to the same terms as comparable full-time workers, but on a pro rata basis.

The employer must ensure that a part-time employee receives his or her pro rated entitlement if bank holidays are included in the employee’s statutory minimum holiday entitlement, or if the employer grants an entitlement that exceeds the statutory minimum to its full-time workers.

To avoid treating a part-time employee less favourably than full-time employees, the employer should look at how many bank holidays the part-time employee will benefit from in light of the days of the week he or she works. If this results in a shortfall in the part-time employee’s entitlement to bank holidays, the employer should allow him or her additional holiday in lieu to take at another time.

Part-time or shift-working employees who do not normally work on Mondays...
[when most bank holidays fall] would not benefit from as many bank holidays as other employees if they are not allowed time off in lieu. The decision in *McMenemy v Capita Business Services Limited* [2007] IRLR 400 CS suggests that, where an employer operates a seven-day-a-week business where full-time employees who do not work on Mondays also lose out on bank holidays, it is lawful for part-time employees to be treated the same way. However, for employers that operate a five-day-a-week business, it would be only part-time employees who would lose out on bank holidays, resulting in less favourable treatment, which could be unlawful under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

It is therefore safer to follow the best practice approach recommended by the Government and give part-time employees a pro rated allowance for paid bank holidays, irrespective of whether or not they normally work on the days on which bank holidays fall.

4. Can employees be required to take annual leave on bank holidays?

Employees can be required to take annual leave on bank holidays where the contract of employment provides for this. Even if the contract does not contain a provision to this effect, the Working Time Regulations 1998 (SI 1998/1833) state that an employer can give its employees notice to take annual leave on particular dates. In the absence of any relevant agreement stating otherwise, it must give notice equal to twice the length of the holiday period that it wishes the employee to take.

5. Are employees entitled to time off for bank holidays in addition to the statutory minimum annual leave entitlement of 5.6 weeks?

As a result of amendments to the Working Time Regulations 1998 (SI 1998/1833), the statutory minimum annual leave entitlement increased from four to 5.6 weeks between October 2007 and April 2009. There is no automatic entitlement to take time off on bank holidays in addition to this, unless the terms of the employment contract provide otherwise.

Under s.1 of the Employment Rights Act 1996, employers must give new employees a written statement of terms and conditions of employment. Under s.1(4)(d)(i) of the Act, the statement must contain terms relating to holiday entitlement, including bank holidays, and holiday pay.

Prior to the increase in holiday from four to 5.6 weeks, many employers worded contracts to the effect that employees were entitled to “statutory entitlement plus bank holidays”. Previously, this wording would have granted an entitlement to 20 days’ leave (for an employee working a five-day week) plus the bank holidays for the year. Following the increase, it denotes an entitlement to 28 days’ leave plus the bank holidays. Employers should check their organisation’s employment contracts to determine whether or not this could be an issue.

6. How should an employer deal with an employee who calls in sick on a bank holiday?

Employers should devise and communicate clear rules on how they will address the issue of staff absenteeism on bank holidays. This approach should assist in deterring employees from taking time off for sickness when they are not really ill.

The policy should provide that employees who call in sick may be subject to disciplinary action unless the employer is satisfied that the sickness was genuine. Employees can be required to provide medical evidence that the absence was due to sickness, but employers should keep in mind the practical
difficulties of requiring someone who is genuinely ill to visit his or her GP and obtain a sickness certificate for one day’s absence. Many GPs are unwilling to provide certification for very short periods of absence, and may charge for this service. The employer should agree to meet the cost of any doctor’s certificate provided if this is the case.

7. Is an employee who is required to work on bank holidays entitled to extra pay?

There is no statutory right to extra pay, for example time and a half or double time, when an employee works on a bank holiday. Any right to extra pay depends on the terms of the employee’s contract of employment.

Under s.1 of the Employment Rights Act 1996, employers must give new employees a written statement of terms and conditions of employment. Under s.1(4)(d)(i) of the Act, the statement must contain terms relating to holiday entitlement, including bank holidays, and holiday pay. Employers should stipulate the rate of pay for working on a bank holiday. There is no right for employees to be paid a higher rate than normal for working on a bank holiday, unless this is provided for in the contract.

In the absence of a written statement, or written contract of employment, an employee’s rights relating to bank holidays depend either on what has been verbally agreed or on custom and practice. For example, if employees have been paid an enhanced rate for working bank holidays in the past, it is likely that this will have become a contractual entitlement. Any unilateral changes could constitute a fundamental breach of contract, enabling the employees to resign and claim constructive unfair dismissal if they have been employed for one year or more (two years where the employment began on or after 6 April 2012). Any employees who do not fulfil this service requirement can claim breach of contract, as there is no service requirement for such a claim.

8. How should an employer deal with an employee who refuses to work on a bank holiday?

The action an employer can take will depend on the employee’s contract of employment. If the employee does not have the contractual right to time off on bank holidays but refuses to attend work, the employer can treat this as a disciplinary issue. The employer should comply with its own policy for managing disciplinary issues as well as the Acas code of practice on disciplinary and grievance procedures (PDF format, 1.58 MB) (on the Acas website).

If the contract provides that the employee is entitled to take bank holidays as annual leave, the employer cannot insist that the employee works and cannot take any form of disciplinary action. The employer could seek the employee’s written agreement to work on the bank holiday in return for a day in lieu to be taken at some other time, or it could consider increasing the payment for the day as an incentive.

9. Should employees who practise religions other than Christianity be given additional time off in lieu where a bank holiday is aligned to a Christian festival such as Easter?

There is no requirement for employers to allow additional time off in lieu for employees who practise religions other than Christianity. This would result in more favourable treatment for certain religious groups, and amount to unlawful direct discrimination. Employees have the option of using their holiday entitlement to request time off for religious purposes.

However, employers should be aware of their obligations under the Equality Act 2010, which protects workers against direct and indirect discrimination because of
any religion, religious or philosophical belief, or lack of religion or belief. Arguably, if employees are required to take annual leave on bank holidays due to the closure of the workplace, this could amount to indirect discrimination against employees of religions other than Christianity, who have to use additional annual leave to request time off for religious purposes. However, an employer is likely to be able to justify this requirement on the grounds that it is not feasible to operate on public holidays, for example because custom is limited and its suppliers are closed.

10. What is an employee’s holiday entitlement if an extra bank holiday is granted one year?

If an extra bank holiday is announced to mark a particular occasion, for example a royal wedding or the Queen’s jubilee, whether or not employees are entitled to an additional day’s holiday will depend on the wording of the employment contract. Employees do not have an automatic right to paid time off on a bank holiday.

If the employment contract states that the employee’s annual leave entitlement is a certain number of days plus bank holidays, he or she will be entitled to the additional day off. However, if the contract states that the entitlement is to a certain number of days, and is silent on the issue of bank holidays, the employee will not be entitled to an additional day’s leave. Neither will the employee be entitled to an extra day if entitlement is expressed as a certain number of days “plus eight bank holidays”, or if the contract specifies which bank holidays are included.

Even where employees do not have a contractual entitlement to paid time off on the additional bank holiday, employers should consider providing this as a gesture of goodwill, where possible, or providing time off in lieu if employees are required to work on that day. Employers that ignore the additional bank holiday should be prepared for a negative reaction from their employees.
More information on XpertHR Professional

If you found these frequently asked questions useful, you may also be interested in the following XpertHR Professional content:

❯ Model bank and public holidays contract clause
❯ Model religious holidays contract clause
❯ Line manager briefing on annual leave
❯ Model holiday policy
❯ Letter declining holiday request

Other questions from the XpertHR Professional FAQs section

❯ Can employees work elsewhere during their annual leave?
❯ Can an employee be required to use up outstanding holiday entitlement during his or her notice period?
❯ Can an employee be required to take his or her outstanding leave while on garden leave?
❯ Where an employee’s contract is terminated during his or her probationary period is the employee entitled to holiday pay on termination?
❯ Do employees on maternity leave continue to accrue holiday during this period?

From the XpertHR Professional Worked Examples section

❯ Worked examples on holiday accrual in first year of employment
❯ Worked examples on holiday notice requirements
❯ Worked examples on holiday pay on termination

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