



Retained EU Employment Law

Consultation on reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings Protection of Employment) Regulations

Submission by Prospect to the Department for Business & Trade

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www.prospect.org.uk

Introduction and Summary

Prospect is an independent trade union representing over 150,000 members. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect welcomes the opportunity to respond to the consultation on reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations.

Before addressing the specific questions in the consultation document, we would like to make a number of general points in this introductory section of our response. We have had the benefit of seeing the TUC's response to this consultation and can confirm that Prospect is in agreement with the points made by the TUC.

Prior to the Withdrawal Act, commitments were made by Government, such that workers' rights would be maintained and enhanced on leaving the European Union. As a strong point of principle, there should be no regression on existing rights.

We welcome the decision to remove the sunset provisions that were originally contained in the Retained EU Law (Revocation and Reform) Act 2023 ("REUL Bill) and to significantly reduce the EU based statutory instruments that were due to be repealed on 31 December 2023. However, we still have ongoing concerns that the REUL Bill gives ministers significant powers to delete or amend important rights and upends the interpretation of existing rights by removing the supremacy of EU law and abolishing the general principles of EU law.

Further, the impact of the REUL Bill on case law and the ability of the courts to depart from retained case law more often, could lead to significant changes in the law, creating much uncertainty for both workers and businesses.

We are concerned that the proposals set out in this consultation could have a serious impact on the health and safety of workers. Employers should have good systems in place to ensure that their workers are not working long hours and have proper rest periods.

In particular, we are very concerned by the suggestion that all annual leave entitlements could be paid at the lower 'basic pay' rate instead of being paid at a rate that reflects their normal remuneration. Any step to reduce entitlements, such that workers are less inclined to take their leave because of the financial implications, would be a significant backwards step.

CONSULTATION QUESTIONS

Specific questions:

1. **Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?**

Disagree (see below)

2. **How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes (for employers)?**

Important

Entitlement to daily and weekly rest breaks, maximum hours of working and paid annual leave is key to ensuring safe working practices and the health and well-being of workers.

Employers should have reliable and accurate systems of recording the working patterns of their workers to ensure that workers are having proper periods of rest. This is especially important for night workers, workers who work shifts and workers who undertake overtime.

We believe that employers should do more to ensure that their workers are having proper rest periods and are taking their annual leave entitlements. The primary purpose of rest periods and holiday entitlement is for the health and safety of workers. Employers should also do more to ensure that workers have the ability to 'disconnect' from work during these periods.

We would be very concerned about any reduction to the rights workers currently have and any reduction in the record keeping obligations on employers. Employers must keep records to ensure compliance with the minimum wage. It is not unreasonable for employers to keep similar records of working hours to ensure workers are having proper periods of rest.

3. **What is your experience of record keeping under the Working Time Regulations? Beyond the proposal above, how, if at all, do you think they could be improved?**

N/A

4. **Do you keep records to specifically meet the requirements set out in the Working Time Regulations?**

N/A

5. **Do you keep working time records that go beyond the existing requirements set out in the Working Time Regulations?**

N/A

6. **Do you currently have a system in place that records the daily working hours of all your staff?**

N/A

Questions for workers

7. **Are you: paid hourly; paid by task; or paid a salary or fixed amount, for example for each day, week, or month, regardless of the hours you work?**

N/A

8. **Does your employer keep records of your daily working hours?**

N/A

9. **Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses?**

Agree **if** the statutory leave entitlement is paid at 'normal pay' (including basic pay, commission, bonuses and some types of overtime).

We recognise that there is great uncertainty around holiday entitlements and holiday pay, particularly for those on irregular or part-year contracts and that this has led to significant litigation around this issue. We consider that creating a single statutory leave entitlement would make it easier to calculate holiday pay entitlements and for workers to understand whether they are being properly paid when taking periods of holiday.

However, we are of the strong view that there should only be a single 'pot' of statutory leave entitlement if holiday pay is paid at 'normal rate' as is currently the position in respect of the 4 weeks' 'EU leave', which includes basic pay, commission, bonuses and some types of overtime.

Many workers do undertake overtime, particularly in areas of industry that are under-resourced and this can make up a significant part of a worker's pay.

We would have serious concerns if holiday was paid at the 'basic rate' for the full 5.6 weeks, should a single pot of statutory leave be created. The primary purpose of annual leave is to protect the health and well-being of workers. Any step to reduce entitlements, such that workers are less inclined to take their leave because of the financial implications, would be a significant backwards step.

The 'normal pay' under the EU leave reflects regular overtime, regular commission and regular bonuses and so is simply reflective of what a worker would have earned if they were working.

Furthermore, as is recognised in the consultation document, many employers already pay the 1.6 weeks' UK leave at 'normal rate' in any event. We expect that this is because it becomes much more administratively burdensome for different rules to apply to different parts of leave, so one entitlement does seem sensible, if it is paid at 'normal rate'.

10. (For employers): What rate do you currently pay holiday pay at?

N/A

11. (For workers): What rate do you currently receive holiday pay at?

N/A

12. What do you think holiday pay should be paid at?

5.6 weeks of statutory annual leave at normal pay.

See above response – question 9

13. Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period?

Disagree. We do not agree and would be concerned that workers would in fact lose the last part of their leave entitlement as they will not have accrued any leave until the end of that period and will therefore not have been able to take it before the end of their leave year.

Even if carry over provisions were introduced, workers would be unable to take their full leave entitlement in the relevant leave year should they wish to do so.

14. Are there any unintended consequences of removing the Working Time (Coronavirus) (Amendment) Regulations 2020 that allow workers to carry over up to 4 weeks of leave due to the effects of COVID?

Yes. For some workers, it may still not have been reasonably practicable for them to take some or all of the leave they are entitled to because of the effects of coronavirus.

This could particularly be the case for workers who have long covid and who may meet the definition of a disabled person under the Equality Act 2010¹.

¹ Mr T Burke v Turning Point Scotland - [EMPLOYMENT TRIBUNALS \(SCOTLAND\)](https://www.employmenttribunals.scot.nhs.uk/)
(publishing.service.gov.uk)

15. Do you think that rolled up holiday pay should be introduced?

No, rolled-up holiday pay should not be introduced.

We do not believe that rolled up holiday pay should be introduced for all workers.

Judgements in the EU and the UK have rejected rolled up holiday pay as a method for paying for periods of holiday, highlighting the importance of taking periods of actual rest for health and well-being.

We would be concerned that by introducing rolled up holiday pay, workers will be disincentivised from taking holiday as, at the time they take it, they would receive no pay.

There is also a risk that by using the 12.07% (rolled up holiday pay) method to calculate holiday pay, this will lead to an increase in agency type contracts, as there is a financial incentive for agencies to limit holiday entitlement and pay.

This could lead to a normalisation of the 12.07% method for workers on irregular hours or precarious contracts where the statutory minimum percentage becomes the standard formula for calculation of holiday pay. The 12.07% approach was criticised in the Supreme Court judgement in Harpur Trust v Brazel. We believe that the decision in Harpur Trust v Brazel should be followed.

As a general point of principle, employers should be obliged to remind workers of their statutory entitlement to holiday pay and to encourage them to take leave on the grounds of health and wellbeing.

We also note that we are still waiting for the Government's response to the consultation on Calculating holiday entitlement for part-year and irregular hours workers. Prospect's response to this consultation can be found here: <https://library.prospect.org.uk/download/2023/00261>.

16. Would your existing payroll system be able to calculate holiday pay using the rolled-up holiday calculation as well as the 52-week holiday pay reference period?

N/A

17. Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

18. Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

19. What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees?

No, we do not agree with any reduction in consultation requirements. Employers should continue to consult with employee representatives where a TUPE transfer is taking place. Employee representatives act as a channel for collating and raising the concerns that individual workers have.

Those that are elected are often considered by fellow workers to have specific knowledge and/or can best represent their views.

We agree with the TUC that this proposal will not assist good employers who are able to channel questions and concerns rather than having to cover issues separately for all individuals.

As a general point, Prospect believes that trade union representatives are best placed to consult with employers on behalf of workers. We consider that there should be greater trade union representation in workplaces. A unionised workplace will help ensure that minimum rights are maintained and enforced. The government should give unions better rights of access to workplaces to ensure that workers engage with information about their work and encourage the positive role of collective bargaining.

20. What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved?

The TUPE Regulations are extremely important in protecting workers' existing contractual rights when transferring to a new employer or where there is a service provision change. Any weakening of TUPE would be extremely detrimental to workers, would create much uncertainty and could lead to a diminution in the contractual rights that workers have.

We fully agree with the TUC that the government should resist any calls to limit TUPE to employees and not to workers. This would have a significant detrimental impact on workers and would likely lead to more insecure work.

We would also like to see further improvements in the TUPE Regulations, for example:

- Stronger enforcement mechanisms and better remedies where an employer has failed to consult with the relevant parties.
- Limiting the scope for an employer to make changes to contractual terms.
- Trade union recognition should be transferred to the transferee without exception and employers should not be able to seek to vary terms of a contract that derive from a collective agreement after one year of the transfer.