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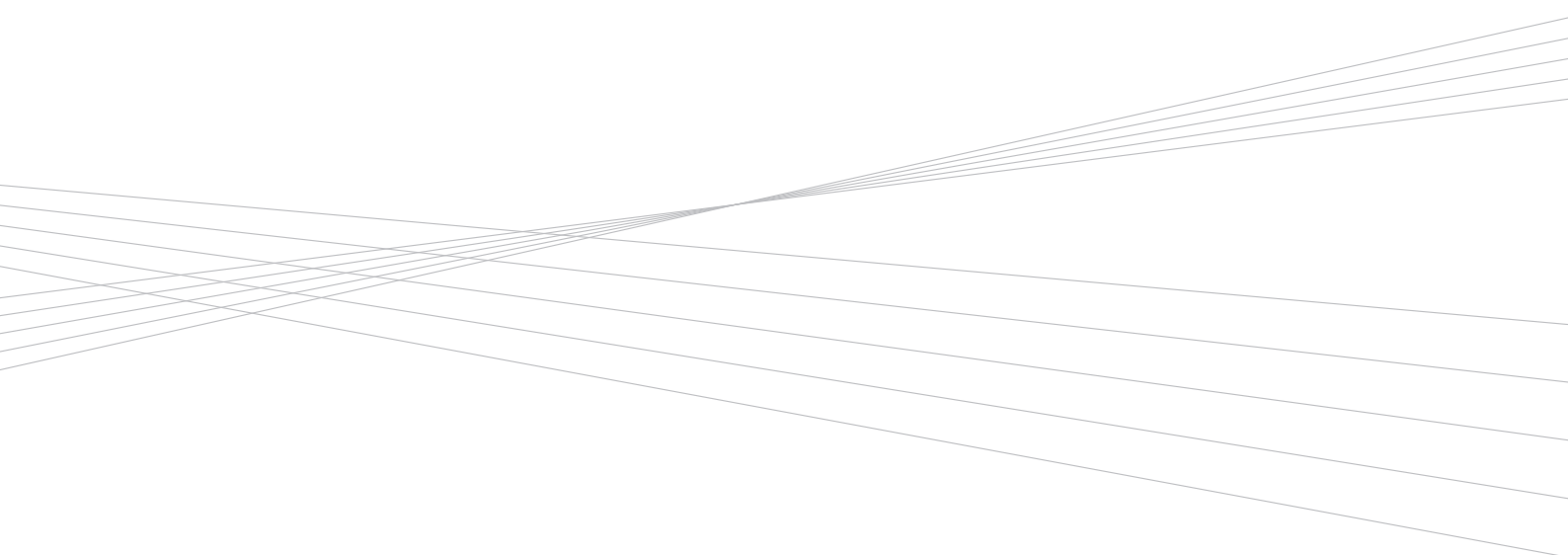
Employment Law Newsletter No 4

HOLIDAYS

10 FAQs under UK and German law

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SLAUGHTER AND MAY





Introduction

As the holiday season approaches, many employees will be looking forward to a well-earned summer break. This briefing examines the provisions of both UK and German employment law governing the right to take annual leave. It answers ten “frequently asked questions” on the basic legal provisions, the operation of the right in practice, and some of the trickier areas (including the interrelationship of holidays with sick leave).

The right to annual leave in both UK and German law stems from the EU Working Time Directive (the “**Directive**”). Article 7 of the Directive entitles workers to a minimum of four weeks paid annual leave per year. It also prohibits any payment *in lieu* of this entitlement, except on termination. However, provisions for the exercise of the right to annual leave are largely left to national law.

In the **UK** the Directive is implemented via the Working Time Regulations 1998 (“**WTR**”). In **Germany** the equivalent legislation is the German Federal Holiday Act (*Bundesurlaubsgesetz* – “**BUrlG**”).

This briefing only considers statutory minimum holiday under the Directive (as implemented by the WTR and BUrlG). Where employers grant additional holiday above the statutory minimum, they have the freedom to set different conditions on the eligibility for and exercise of those additional holiday rights. In relation to the statutory minimum, employers cannot derogate from the provisions of the WTR and the BUrlG save where a limited derogation is permitted by the provisions of that legislation (as noted below), or in the case of Germany, where further derogation is possible by collective bargaining agreement.

1. What is the amount of minimum annual leave?

In the **UK**, under the WTR, workers are entitled to 5.6 weeks annual leave each year. The WTR grant an additional 1.6 weeks leave on top of the four week minimum required by the Directive. The 5.6 weeks allowance equates to 28 days for a worker who works full time five days a week. The allowance is pro-rated during the first year of employment, and for workers who work less than five days a week. However, the allowance does not increase for those who work six or seven days a week.

The WTR prescribe when the holiday year will commence, although this can be (and usually is) overridden by agreement between the employer and the worker. They also provide for monthly accrual of the holiday entitlement during the first year of employment; although as no such provision is made for subsequent leave years, workers can choose to take all their holiday entitlement at the beginning of the leave year, without having to wait for it to accrue each month.

What about fractions of a day? Again, the WTR contain rules for the first year of employment, requiring any fractions of a day to be rounded up to the nearest half day. There are no equivalent provisions for subsequent leave years, so it is unclear what the exact requirement is. Most employers apply the first year provisions to subsequent years, so that fractions of a day are always rounded to the nearest half day.

In **Germany**, the minimum holiday entitlement is 24 days *p.a.* – based on a six-day working week. For employees working less days, the entitlement is *pro rata*, i.e. employees working five days per week are entitled to 20 days of leave. Severely handicapped employees (*Schwerbehinderte*) have claim to an additional five days leave *p.a.* pursuant to the German Social Security Code IX – *Sozialgesetzbuch IX*, SGB IX. Employers may and often do provide additional leave, either based on individual agreements or due to collective bargaining (*Tarifvertrag*) or shop agreement (*Betriebsvereinbarung*). Therefore German employees commonly have between 28 and 32 days of holiday *p.a.*, based on a five-day working week. The holiday year is equivalent to the calendar year. Holiday entitlements consisting of fractions of a day are rounded up to a full day if they add up to half a day or more.

During the first year of employment and in the year in which an employment relationship ends or becomes dormant, *e.g.* in case of parental leave, employees are entitled to one twelfth of the statutory minimum claim per calendar month of active employment. However, since holiday entitlement is earned on an annual rather than a monthly basis, employees may take their entire holiday entitlement for the full year at any time during the year. Consequently, an employee who changes jobs in the middle of the year may have its entire or none of its holiday entitlement left. Unlike the WTR in the UK, BUrlG therefore provides that an employee only has holiday entitlements for the ongoing year insofar as not taken in a previous employment relationship, and requires the former employer to provide a leaving employee with a formal statement regarding the holiday entitlements already taken or for which payment was provided *in lieu*.

2. How much are workers entitled to be paid during minimum annual leave?

In the **UK**, workers are entitled to “a week’s pay” for each week of leave. This is defined by reference to sections 221-224 of the Employment Rights Act 1996 (ERA 1996), which contain mechanisms for calculating a week’s pay depending on whether the worker has normal working hours, and whether his remuneration varies with the amount of work done. However, the cap which applies to the amount of a week’s pay under sections 221-224 ERA 1996 (currently £430) does not apply for the purposes of holiday pay under the WTR. Any contractual holiday payments made in respect of a particular holiday period may go towards satisfying the entitlement to pay under the WTR, and *vice versa*.

The amount of holiday pay should therefore be comparable with a worker’s normal remuneration. In terms of benefits and allowances which the worker receives on top of his salary, these should be included in the holiday pay calculation if they are ‘intrinsicly linked’ to the performance of the worker’s duties, or to his status, such as his qualifications or length of service. In contrast, allowances which are intended exclusively to cover ancillary costs arising in the course of employment need not be included in the calculation. If a worker is receiving benefits under a permanent health insurance (PHI) scheme, it seems that holiday pay is only payable at the rate of the PHI payments (which may be 50-75% of salary), rather than at the rate of the worker’s full salary.

German employees must be paid their average compensation during holiday leave. Pursuant to BUrlG, payment must be made *before* the employee goes on leave, unless provided otherwise by a collective bargaining agreement. In practice, this provision is commonly disregarded; employers just continue compensation payments on their regular schedule, and employees normally do not expect them to do otherwise.

The average compensation is determined on the basis of the compensation paid during the 13 weeks preceding the holiday. It includes supplementary payments or benefits in kind related to the actual work performed (for example shift premiums, commission payments) except overtime premiums. Compensation elements not related to the actual work performed (*e.g.* one-off payments, long service premiums or profit participation payments, etc.) do not count towards the average pay.

Extraordinary reductions of pay during the 13 week period (caused, for example, by short-time work, extended sickness, or business interruption) are disregarded for purposes of the calculation. However, increases in pay which take effect during the

13 week period must be taken into account. The treatment of pay increases which take effect during the employee's leave is controversial: While some legal writers argue that such higher compensation must be paid for the entire duration of the leave, the majority of legal writers hold that it must be paid from the day when the increase takes effect.

3. Who is entitled to minimum annual leave?

In the **UK**, the rights under the WTR attach to "workers". This is defined as employees and other individuals who provide personal service under a contract with the employer, provided that the employer is not a client or customer of any profession or business carried on by the individual. The definition therefore catches those such as self-employed consultants, who are not "employees", but who provide their services to the employer personally.

Agency workers will usually be caught within the "worker" definition. Responsibility for compliance with the WTR usually lies with the agency rather than the end user, as the party to whom the agency worker is contracted (and who is responsible for paying the worker). Agency workers may also be entitled to the same additional holiday and holiday pay above the statutory minimum that the end user grants to its own employees, since the Agency Workers Regulations 2010 came into force.

In **Germany** all "employees" fall into the scope of BUrlG as defined in sec. 2 thereof. The definition includes trainees, agency workers and quasi-employees, *i.e.* individuals who provide services personally and who only or predominantly work for or are paid by one person or entity and therefore, while legally independent, are economically dependant, similar to employees.

While executive employees (*leitende Angestellte*) also fall in the scope of BUrlG, managing directors or members of managing boards traditionally do not. Their holiday entitlement is exclusively dependant on the content of their service agreement and commonly lies between 28-32 days *p.a.* In light of recent precedent by the European Court of Justice however, the principle of non-applicability of the BUrlG to managing directors may be subject to change.

Agency workers may be entitled to additional days of paid leave than accorded to them by law, under their employment agreement or collective agreements applicable to them due to the principle that they are entitled to the same terms and conditions of work as the permanent staff of a business to which they are contracted.



4. Is the worker required to give notice in order to take annual leave?

In the **UK**, the answer is yes. The WTR require the worker to give notice before he can exercise his right to annual leave. The length of the notice must be at least twice the length of the period of leave that is requested. So for example if the worker wants to take a two week holiday, he must give at least four weeks' notice. That said, the notice provisions in the WTR are default provisions, which can be varied by a 'relevant agreement' between the employer and worker (that is, any applicable workforce or collective agreement, or any other legally enforceable written agreement between the employer and the worker (such as an employment contract)). The notice provisions in the WTR are also subject to the separate provisions allowing the employer to control when a worker takes annual leave (see below).

German employees also have to give advance notice of their intention to take holiday leave, upon which the employer *must* grant leave, unless overriding operational reasons or claims for leave by other employees prevail. There is no specific timing required for such notice unless agreed otherwise in a collective bargaining or shop agreement or in the individual employment agreement.

5. Can the employer control when a worker takes annual leave?

In the **UK**, again, the answer is yes. The employer can give notice either requiring workers to take leave on certain dates, or preventing workers taking leave on certain dates. The length of the notice from the employer must be at least twice the length of the period of leave that it requires the worker to take, or of at least the same length of the period during which the worker is prevented from taking leave. So for example if the employer wants the worker to take a two week holiday, he must give at least four weeks' notice. Alternatively, if the employer wants to prevent the worker taking a two week holiday, he must give at least two weeks' notice. However, as noted above, the notice provisions in the WTR are default provisions, which can be varied by a 'relevant agreement' between the employer and worker.

An employer can require a worker to take holiday from time which is not "working time". Similarly, workers can be required to take annual leave during their notice period and/or garden leave, by specific provisions to that effect in their employment contract.

In **Germany**, as a rule, an employer may propose a time-period for an employee's leave, but he cannot direct the employee to take his or her leave during a specific time-period. However, an employer can agree plant closure times (*Betriebsurlaub*) with the works council of an establishment. These can affect the entire or part of an establishment. In such case, the employees of the affected (part of the) establishment must take the corresponding portion of their annual leave during such time.

Also, similar to the position in the UK, employees can be required to take annual leave during their notice period and/or garden leave either under their employment agreement or by explicit request by the employer.

6. What about public or bank holidays?

In the **UK**, the WTR grant workers an additional 1.6 weeks holiday above the four week minimum prescribed by the Directive. This equates to eight days for full-time workers. The additional entitlement was implemented in April 2009, primarily to correspond to the eight normal public holidays which exist in the UK. Previously, many employers had counted the eight UK public holidays towards the four week minimum entitlement under the Directive. However, despite the additional entitlement, there is still no right in the WTR to take annual leave on a public holiday. Such an entitlement will only exist if it is provided in the contract of employment (which it often is in the UK).

If the employer does grant annual leave on public holidays, it should also do so on a *pro rata* basis for part-time workers (and not simply grant such workers annual leave on days when they would normally work, as this could raise issues under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000). Part-time workers may then be able to take public holidays which fall on a normal work day, but also take additional days of annual leave where the number of public holidays which fall on a normal work day is less than their pro rated entitlement to the eight public holidays.

In **Germany**, the number of public holidays varies between approximately nine and 13 depending on the German Federal State in which the employee works. Time off on public holidays has to be granted in addition to leave pursuant to BUrlG. If one or several public holidays fall within the time-period of an employee's holiday leave, as a rule, these days are not deducted from the employee's holiday entitlement. However, this is different for employees who regularly work on public holidays; for these individuals, time off on such a day counts towards their holiday leave.

7. What about workers who are absent through maternity or sick leave?


In the **UK**, workers continue to accrue annual leave throughout their maternity leave period. However, workers cannot take holiday during this period. The usual position is that workers will take any outstanding holiday entitlement for the current holiday year before starting maternity leave, and then take any additional holiday entitlement which has accrued during maternity leave immediately before returning to work. In order to facilitate this, a worker must be permitted to carry over holiday to the next holiday year, where she is prohibited from taking it due to maternity leave.

Workers will also continue to accrue annual leave during any period of sickness absence. Unlike maternity leave, workers can choose to take annual leave during a period of sick leave, and the employer will only have limited scope for preventing this. It is currently unclear whether the worker must have given notice seeking to take annual leave during sickness absence, or in fact actually taken leave, in order to enforce that right and receive holiday pay.

In **Germany**, annual leave continues to accrue during maternity leave (and during any other periods during which a pregnant woman is prohibited from working – for example for reason of a general or individual employment ban (*Beschäftigungsverbot*) for health reasons or due to a job or a work environment which is hazardous to the unborn child) pursuant to the German Maternity Protection Act (*Mutterschutzgesetz – MuSchG*). This applies to both the statutory minimum entitlement as well as to any additional entitlements granted on an individual or collective basis. Leave that could not be taken prior to maternity leave and/or an employment ban during pregnancy can be taken upon the employee's return, and under certain conditions even until the end of the year following the employee's return. Annual leave cannot be taken during maternity leave. However, the taking of annual leave is possible during times of an employment ban, provided that the employer is in a position where he can assign the employee to a job which does not fall within the scope of such ban – and irrespective whether the employer does in fact assign the pregnant employee to such position.

Claims to annual leave continue to accrue during sick leave. In addition, days of sickness coming about during annual leave and which are proven to the employer by medical certificate do not count as holiday taken.

In contrast to the UK position, employees cannot take annual leave during sick leave. Usually, there is no incentive to do so either, as employees continue to receive their regular compensation for up to six weeks of sickness under the German Act on Continued Remuneration (*Entgeltfortzahlungsgesetz – "EFZG"*), or even longer under collective instruments or individual employment agreements.



Pursuant to precedent, contrary to the wording of BUrlG, annual leave that an employee cannot take during the holiday year or during the subsequent carry-over period of three months due to continuous sickness is not forfeited, but can be taken during the year of the employee's return to work and the subsequent carry-over period. This can lead to a rather large accumulation of holiday entitlements of an employee upon return from sickness. However, if employees are granted longer leave than the statutory minimum, employment contracts or collective instruments can restrict the principle of non-expiry to statutory leave with the consequence that any additional claims of a long-term sick employee expire at the end of the carry-over period of the year for which the relevant entitlements accrued.

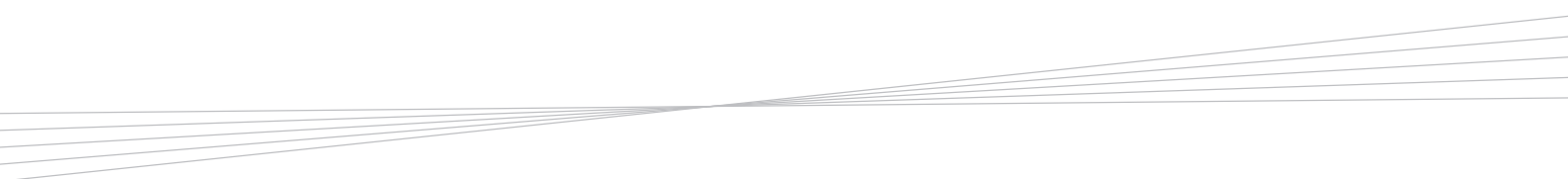
The same principles apply to leave for (health) prevention or rehabilitation measures: Holiday entitlements continue to accrue and days of annual leave cannot be taken for purposes of such measures. If the duration of such leave, added up with any times of sick leave for the same sickness, goes beyond the time-period for which compensation is paid under EFZG or pursuant to other instruments, the affected employees are no longer paid by the employer and yet cannot take annual leave to cover therefore.

8. Can workers be paid *in lieu* of their holiday entitlements?

In the **UK**, there is a general prohibition on payment *in lieu* of holiday entitlements during employment. This prevents an employer agreeing to pay the worker a sum of money *in lieu* of his entitlement to take annual leave (so-called 'rolled up holiday pay').

The WTR do provide for payment *in lieu* of outstanding holiday entitlements on termination of employment. The amount of the payment may be defined by a 'relevant agreement', or in default is calculated *via* a prescribed formula. It seems possible for the agreement between employer and worker to provide that on termination of employment the worker will receive a smaller amount than its statutory entitlement, for example when the worker is dismissed for gross misconduct. However, the agreement cannot provide for no payment at all.

In **Germany**, in an ongoing employment relationship payment *in lieu* of granting annual leave is not permissible. If employer and employee agree on such payment anyway, the employee may still claim the holiday entitlements covered thereby and, depending on the circumstances, may not have to pay back the contracted compensation. However, this principle only applies to the statutory minimum leave. Holiday entitlements in excess thereof may be compensated financially.



On the other hand, for employment relationships that have been terminated, employees may claim compensation for holiday entitlements that could not be taken prior to termination. Such claims become due at termination and may encompass both statutory minimum and any additional holiday entitlements. Compensation of the latter can be made subject to further conditions by the collective bargaining parties.

However, compensation of outstanding holiday entitlements is not mandatory. Employees can choose between receiving a compensation for untaken holiday or carrying their remaining holiday entitlement over to the next employer.

9. Can workers carry over untaken holiday?

In the **UK**, again, there is a general prohibition on a worker carrying over any unused holiday entitlement to the following leave year. Workers may be entitled to carry over part of the additional 1.6 weeks' entitlement, if this is provided for in a 'relevant agreement'.

Nonetheless, workers will be entitled to carry over holiday to the next leave year where they are unable to take annual leave due to maternity leave (see question 7 above). The same applies where a worker is unable or unwilling to take holiday during sickness absence.

In **Germany**, holiday entitlements can be carried over to March 31 of the following year by law if they could not be taken for overriding operational reasons (*aus dringenden betrieblichen Gründen*) or for overriding reasons lying within the individual employee (e.g. sickness). For employees who entered into a new job during the second half of the year, their (*pro rata*) holiday entitlement can be carried over until the end of the following year upon request.

Employees who were not able to take (all or part of) their holiday entitlements during the holiday year due to sickness, maternity or rehabilitation measures may carry these over and principally have to take such leave during the year of their return to work or the ensuing carry-over period.

10. And finally... What are the top five holiday destinations in the UK and Germany?

Within the UK, the concept of a “staycation” has become increasingly popular since the economic downturn began, with around 30% of British holiday makers opting to brave the British weather by holidaying within the UK.

Germans in Germany either climb mountains or go to the beach.

The top five holiday destinations are

	UK ¹	Germany ²
1	Cornwall	Bavaria
2	Scottish Highlands and Islands	Mecklenburg-West Pomerania
3	Lake District	Schleswig-Holstein
4	London	Lower Saxony
5	Yorkshire Dales	Baden-Württemberg

Conclusions

Similar to many instances of implementation of EU directives into national law, the WTR and the BUrlG each have their own distinct features. This makes it worthwhile to engage in the comparison of how similar issues are dealt with by each law, for example the carry-over of holiday entitlement from one employment to the next, and the treatment of bank/public holidays.

This area of law is also constantly developing. While in Germany the issue of a maximum carry-over period of holiday entitlements by long-term sick employees has been and currently is the subject of labour court proceedings, in the UK, the Government is currently consulting on amendments to the WTR, in order to accommodate the position of workers who are absent during sick leave by more generous carry-over provisions.

¹ According to research published by TripAdvisor and TravelSupermarket

² According to Forschungsgemeinschaft Urlaub und Reisen (FUR) Reiseanalyse 2012, cited after a brochure on facts and statistics of the German tourism market in 2011 (*Fakten und Zahlen zum deutschen Reisemarkt 2011*) by Deutscher Reiseverband (DRV), a lobbying organisation for the German tourism industry, which can be accessed under www.driv.de/fachthemen/statistik-und-marktforschung/fakten-und-zahlen.

Summary		
	UK	Germany
Minimum annual leave (five-day week)	28 days	20 days plus public/bank holidays
Entitlement transfers to new employer	No	Yes
Compensation during holiday	"A week's pay" for each week of leave	Continuation of average compensation
Individuals entitled to statutory leave	"Workers", incl. agency workers and individuals providing personal service under a contract with the "employer"	"Employees", incl. trainees, agency workers, executive employees (<i>leitende Angestellte</i>), and individuals providing personal service under a contract with the "employer" ("quasi-employees")
Notice by employee required	Yes; length of notice at least twice the length of the requested leave	Yes; no specific notice period
Employer can order the taking of leave	Yes; length of notice at least twice the length of the requested leave	No; except temporary plant closures agreed with a works council
Treatment of bank/public holidays	No separate entitlement for bank/public holidays	Do not count towards annual leave, unless employee regularly works on bank/public holidays
Accrual of holidays during maternity and sick leave	Yes	Yes
Taking of leave possible during sick leave	Yes	No
Payment <i>in lieu</i> of holiday entitlements possible	In principle only on termination of employment	Only on termination of employment
Carry over of untaken holiday possible	Only in part (under a relevant agreement), or in cases of sickness or maternity leave	Yes; until March 31 of the following year, except in case of sickness or maternity leave where carry-over principally extends until the end of the carry-over period of the year of return

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

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