

Module 008

Recent changes to employment law

From this module you will learn:

- The regulations covering holiday pay for staff and locums
- Guidance on the Fit for Work service and flexible working requests
- Parental leave provisions covering maternity, shared paternal leave and adoption

August

Clinical: Skin

● Scars and stretch marks	August 1*
● Urticaria	August 8
● Warts and verrucas	August 15*
● Baby skincare	August 22

Practice: Changes in employment law August 29*

*Online only for Update Plus subscribers

Ben Smith and Hollie Ryan

Charles Russell Speechlys LLP

There have been many changes to employment law recently, and this article provides an overview for pharmacy employers and managers regarding how these changes may affect them. It covers the legislation they should be aware of when considering holiday pay, locum employment, employees on sick leave and requests for parental leave.

Holiday pay: where are we now?

Recent employment tribunal decisions show a trend towards including in the calculation of holiday pay all elements of pay that are regularly made to workers and employees that are intrinsic to the job. This includes travel allowances, commission and certain overtime payments.

By way of example, the recent and much publicised case of *Bear Scotland Ltd v Fulton* held that pay for non-guaranteed overtime (that is, overtime the employee is obliged to work if required to do so by his employer, but that the employer is not required to offer) must be included in the calculation of holiday pay.

Although it was not specifically dealt with in the above case, the same principle may also apply to the payment of holiday for voluntary overtime, particularly where a settled pattern has developed over a sufficient period of time to justify it being normal pay.

The upshot is that any money paid sufficiently regularly to be considered normal should be included in holiday pay. (Compulsory or guaranteed overtime should always have been included.)

Over what period should overtime be assessed?

Unfortunately, the reference period for calculating holiday pay remains unclear. The Working Time Regulations 1998 (which implemented the European Working Time Directive into UK legislation) calculate average pay with reference to the 12 weeks prior to the holiday, but this can cause anomalies if holiday follows a particularly busy period with significant overtime. A 12-month period may be



Myriad changes were made to employment law during the last parliament: make sure you're up to speed

more appropriate, although this will eventually be decided by the courts or legislative change. As a result of the above decision, pharmacy owners (like many employers) are currently faced with uncertainty regarding which payments should be included in holiday pay and their potential liability.

What are the risks?

Pharmacy businesses could face significant claims for backdated holiday pay where certain elements of pay above basic pay have not been paid to workers or employees as part of the calculation of their holiday pay. However, any such claim is likely to fail if three months have elapsed since the last 'deduction' of pay.

To minimise the impact of these tribunal decisions on businesses, the government has introduced regulations limiting back payments to two years. This applies to claims presented on or after 1 July 2015.

Importantly, this principle applies only to the first four weeks of workers' statutory annual leave entitlement for each year, not to the additional 1.6 weeks granted under the Working Time Regulations 1998 or to any additional holiday entitlement employers may have granted (see Case study 1, opposite).

When is a locum not a locum?

Generally, locums are treated as self-employed. However, there are a number of factors that

are taken into account when determining whether a locum is an employee, a worker or genuinely self-employed. Among other things, a tribunal will consider the extent of control that the owner has over the locum and whether the locum can choose to send another pharmacist to work in their place.

Importantly, it is evident that no single factor on its own is likely to be determinative of employment status; it is necessary to look at factors in the round.

HMRC considers a locum is likely to be genuinely self-employed if he or she:

- is engaged on a sessional or daily basis
- performs only the statutory requirements of a pharmacist's job, which is essentially dispensing and supervision of the sale of P medicines, and advising on medicines for the treatment of common ailments

On the other hand, HMRC is more likely to consider a locum is an employee if the locum takes over the full range of duties of an employed pharmacist, which may include:

- supervision of staff
- cashing-up
- re-ordering non-pharmacy stock, such as perfumes, sunglasses, toothpaste.

The Fit for Work service

The Fit for Work service is currently being rolled out across the UK. It is hoped that all employers nationally will be able to refer ►

eligible employees to occupational health from autumn 2015. The service will offer pharmacy businesses access to free occupational assistance for employees who have been absent on sick leave for four or more weeks. The service is set to offer a wide range of occupational health advice to employers and employees.

Employers will be able to claim up to £500 tax relief on payments for medical treatments for their employees where such treatments have been recommended under the scheme.

Update on family-friendly changes

A number of family-friendly changes were introduced in April this year, a summary of which is set out below.

Shared parental leave

On April 5 2015, a new system for shared parental leave (SPL) was introduced for all eligible employees. SPL allows employees who are parents (by birth or adoption) to choose how to share up to 50 weeks of leave in the first year of their child's life or in the first year following their child's placement for adoption.

This new type of leave has not replaced the existing maternity leave provisions, but rather sits alongside them. Pharmacy owners should note that additional paternity leave and pay has been abolished now that SPL is available.

If they have not already done so, pharmacy owners should consider putting in place new policies and practices setting out who is entitled to SPL and the notification requirements that employees must satisfy in order to benefit from such leave. Good

Case study 1: Calculating holiday pay for an employee who works overtime

M&A Pharmacy employs Maria, who is a counter assistant in the company's busy London pharmacy.

Maria is contracted to work 28 hours per week, but regularly works 35 hours per week because M&A Pharmacy is one of the busiest pharmacies in the area. She has only ever been paid holiday based on her contractual hours, despite working an additional seven hours per week.

How should M&A calculate Maria's holiday pay?

M&A should calculate Maria's holiday pay for the first four weeks of her annual leave entitlement based on the 35 hours per week

that she works. The remaining 1.6 weeks should be calculated based on Maria's contractual hours.

Pharmacy owners should carefully review any payments to employees and workers over and above basic salary, and consider whether it is appropriate to make changes now to manage the risk, rather than wait for their hand to be forced.

Despite potential challenges, it is likely that the obligation to include normal remuneration in holiday pay will remain. The risk of paying all elements of pay for holiday pay (and being wrong) may be a risk worth taking to try to extinguish the risk of future claims.

communication between pharmacy owners and their employees will be key.

The new SPL regime is very detailed (see Case study 2, below) and advice should be sought when considering such issues.

Parental leave

Parental leave gives parents the right to unpaid leave and is separate to SPL. Previously, any such leave could be taken only within the first five years of a child's life. Recent changes have increased the age limit for such leave from five to 18 years. Eligible employees now have the right to 18 weeks' unpaid leave up to a child's 18th birthday.

Changes to statutory adoption leave and pay

In April this year, the 26-week qualifying period to be eligible to take adoption leave was removed. This brings adoption leave in line with maternity leave - it is now a day-one right.

Statutory adoption pay will also be brought into line with maternity pay so that an employee electing to take adoption leave would be entitled to 90 per cent of their average weekly earnings for the first six weeks.

Adoption leave has also been extended to surrogate parents and those employees who are, or will be, the parents of a child under a parental order. Where a couple adopts a ▶

Case study 2: Paternal leave and flexible working

Kate, a pharmacist at M&A Pharmacy, is pregnant. She informs her manager, Steve, that her baby is due on August 10, 2015. She has heard about the new system of shared parental leave and asks whether she has to take this or whether she can stay on maternity leave. She also wants to know if her husband, William, can take paternity leave if she comes back to work early.

Can Kate take maternity leave or must she take SPL?

Yes, she can take maternity leave - there is no obligation to take SPL. Her husband can take two weeks' ordinary paternity leave. If he wishes to take further leave, only SPL is available (provided he is eligible).

Having discussed this with her husband, Kate decides to take SPL and serves a notice of entitlement and her intention to take SPL three months before the baby is due. She says she wants to come back to work for three months one month after the birth and then work every other month for the remainder of SPL.

Does Steve have to agree to this?

Steve does not have to agree to discontinuous leave; he is only obliged to agree to continuous leave. There is no obligation to give any reasons for his refusal, and there is no right of appeal.

If Steve refuses, Kate has the option to take the SPL available as a continuous period or withdraw the notice and resubmit her request with a period of continuous leave. SPL can be taken in three blocks, so

Kate could serve three period-of-leave notices - each one for a period of continuous leave. Steve would not be able to refuse this.

At the end of her SPL is Kate entitled to come back to the same job?

If Kate takes maternity leave and SPL totalling less than 26 weeks, she is entitled to return to the same job. If her total is more than 26 weeks, she is entitled to return to the same job unless it is not reasonably practicable, in which case she is entitled to return to another job that is suitable and appropriate in the circumstances.

Shortly before Kate is due to return to work (full-time), she makes a flexible working request to work three days a week, one from home.

How should Steve deal with Kate's request? Can he refuse?

Steve must ensure that Kate's request is dealt with in a reasonable manner. He should not refuse the request outright without considering it properly. He should ensure that the Advisory, Conciliation and Arbitration Service (Acas) code is followed and ideally discuss the request with Kate before reaching a decision. He should allow Kate to be accompanied to any such meeting.

Steve may want to consider whether a compromise can be reached if he has competing requests. He must ensure that his approach is consistent. If he cannot accommodate Kate's request, he should explain the reasons fully and clearly. There is a risk that Kate may have a claim for indirect sex discrimination if her request is rejected.

child only one parent can elect to take adoption leave; the other parent may be able to take paternity leave, parental leave or SPL.

Parents who adopt are also entitled to time off work to attend adoption appointments. The principal adopter will be entitled to take time off for up to five adoption appointments, while the secondary adopter will be entitled to take time off for up to two appointments.

Flexible working

Pharmacy owners may recall that last year the flexible working regime changed so that a statutory flexible working request can be made by any employee who has at least 26 weeks' continuous employment at the date the request is made. Changes may relate to any working arrangement, including but not limited to the hours of work, the times they are required to work and the place of work.

The application must be in writing, dated, and state that it is an application made under the statutory procedure. It must also specify the change the employee is seeking, when they wish the change to take effect, the effect they think the change would have on the employer, how any such effect could be dealt with and

whether the employee has previously made an application.

Pharmacy owners now have three months to complete the process of dealing with the request, including considering the request, discussing it with the employee and notifying the employee of the outcome, including any appeal. The period can be extended by agreement. As before, only one request can be made by an employee in any 12-month period.

The above is a general overview and we recommend that independent legal advice is sought for any specific concerns.

If you require further information in relation to the points raised in this article, contact Ben Smith (Ben.Smith@crsblaw.com) or Hollie Ryan (Hollie.Ryan@crsblaw.com), who are members of the healthcare team at Charles Russell Speechlys LLP.

Case study 3: Employee or not?

Chris had a written contract entitled 'An Agreement for Services with M&A Pharmacy'. He is described as a locum pharmacist, is paid gross and makes his own arrangements for income tax and national insurance contributions. He can occasionally refuse work. Chris' relationship with M&A Pharmacy has broken down and his contract has been terminated.

Is Chris eligible to bring a claim following termination of the agreement?

The above facts mirror the employment

tribunal case of *Wooler v Paydens*, in which Ms Wooler brought various claims against Paydens, including a failure to make payment in respect of holiday pay. The tribunal held that Ms Wooler was not an employee or self-employed, but that she was a worker and could therefore pursue a claim for backdated holiday pay.

This case is illustrative of the fact that pharmacy owners and locums must set out their working arrangements clearly in writing and their contracts must reflect what actually happens. Merely using labels such as 'contract for services' or 'self-employed' is not sufficient.

5-minute test

1. All elements of pay that are regularly made to employees, including overtime, should be included in the calculation of holiday pay.

True or false?

2. After 1 July 2015, back payments involving holiday pay claims are limited to one year.

True or false?

3. Including overtime in holiday pay calculations only applies to the first four weeks of workers' statutory annual leave.

True or false?

4. HMRC considers a locum self-employed

if they are engaged on a sessional or daily basis and perform only the statutory requirements of a pharmacist's job.

True or false?

5. The Fit for Work service offers employers free occupational assistance for employees who have been absent due to sick leave.

True or false?

6. Up to £1,000 tax relief can be claimed by employers for employees' medical treatments recommended by the Fit for Work service.

True or false?

7. Shared parental leave allows eligible employees who are parents to choose how

to share up to 38 weeks' leave in the first year of their child's life.

True or false?

8. Parents applying for statutory adoption leave do not require a 26-week qualifying period of employment to be eligible.

True or false?

9. Unpaid parental leave can only be taken within the first five years of a child's life.

True or false?

10. A request for flexible working can be made by any employee who has at least 26 weeks' continuous employment.

True or false?

Tips for your CPD entry on employment law

Reflect Should overtime be included in holiday pay calculations? What is the Fit for Work service? How many weeks' leave can parents take under the shared parental leave system?

Plan This article provides an overview for pharmacy employers and managers of the recent changes in employment law and the legislation they should be aware of when considering holiday pay, locum employment, employees on sick leave and parental leave requests.

Act Read the Update article and the suggested reading (below). Update and Update Plus subscribers can then access a 5-Minute Test and a pre-filled CPD logsheet at chemistanddruggist.co.uk/mycpd.

Find out more about employment tribunals on the Citizens Advice website tinyurl.com/employment1

Read more about the Fit for Work service on the Fit for Work website tinyurl.com/employment12

Improve your knowledge of shared parental leave on the Working Families website tinyurl.com/employment13

Find out more about flexible working from the Advisory, Conciliation and Arbitration Service (Acas) website tinyurl.com/employment14

Make sure all your employees have an up-to-date contract and all entitlements are met. Check that any contracts you have with locum pharmacists have clearly defined working arrangements.

Evaluate Have you improved your knowledge of employment law? Could you make changes to contracts or holiday payments to avoid problems?