

EMC HR Bulletin – In Deep with Darren

October 2026

This month, Darren outlines implications for employers following planned changes to the compliance and enforcement of holiday pay by the Fair Work Agency.

The Fair Work Agency, which was set up by the Employment Rights Act 2025 formally started work in April of this year. The legislation that falls within its remit is set out in Schedule 7 of the Employment Rights Act 2025 and covers such matters as the minimum wage, the regulation of employment agencies, statutory sick pay, and the right to annual leave under the Working Time Regulations. So far, the FWA has taken over enforcement relating to employment agencies and has replaced the Gangmasters and Labour Abuse Authority. While it now has formal responsibility for the enforcement of the minimum wage, in practise this is currently being delivered through a contract with HMRC, prior to a full transfer anticipated for April 2027. This first year of the FWA's operation is very much a time of transition as it builds its capacity and internal structure.

When it comes to annual leave and holiday pay, the FWA is expected to be given the power to enforce those aspects of the Working Time Regulations at some point in 2027. The precise date is yet to be confirmed but it will certainly not be before April.

Over the summer the government has been consulting on how holiday pay enforcement will work. It's important to bear in mind that the FWA will only be concerned with statutory holiday pay entitlement under the Working Time Regulations. Any holiday entitlement going beyond the statutory minimum will continue to be a matter for the individual to enforce as best they can through the Employment Tribunal system.

Workers will, of course, continue to be able to bring their own individual claims relating to statutory holiday pay. But the enforcement powers of the FWA represent a significant change. Employers who do not comply with the requirement to give their workers paid annual leave currently only face action from those individuals who choose to bring a claim. The tribunal can only provide a remedy in relation to the specific

failures to pay annual leave identified by the individuals concerned. This means that even if an employer loses a claim and the tribunal rules that the worker is entitled to paid annual leave there is no automatic mechanism to extend that to other workers who may be in the same position. The employer can pay what it owes to the individuals who have claimed and choose to sit back and wait to see if other workers follow their example.

When the FWA is given the power to step in, it will be able to take a whole-employer approach and enforce compliance with the rules in relation to the workforce as a whole.

The powers that the FWA is given under the Employment Rights Act in relation to holiday pay essentially mirror those already enjoyed by HMRC when it comes to enforcing the minimum wage. In its consultation, the government has resisted any suggestion that they should be watered down. That means that the Agency will have the power to carry out investigations, for the purposes of which it will be able to gain access to an employee's employer's records. It is worth remembering that one little-noticed change introduced by the Employment Rights Act 2025 was a requirement for an employer to keep records which are adequate to show that its obligations in relation to annual leave and pay are being complied with. If the FWA does launch an investigation. The employer should be able to provide it with enough information to demonstrate that all workers are being given the paid annual leave to which they're entitled.

Where the Agency finds that there has been an underpayment of holiday pay it will be able to issue a formal notice to that effect, which will require the payment of arrears to the affected workers. The Agency will also be able to require the employer to pay a civil penalty directly to the government. In its consultation, the government makes it clear that it intends for this regime to operate in the same way as it does for enforcement of the National Minimum Wage. That means that the maximum penalty will be set at £20,000 per worker or 200% of the arrears owing to that worker, whichever is the lower. If the employer pays its arrears promptly (the consultation suggests 14 days), then the penalty will be halved. Nevertheless, bearing in mind that failures in relation to holiday pay often affect a large number of individuals, getting this wrong will be a costly mistake.

There is another respect in which enforcement action by the FWA can be of more consequence than that brought by an individual worker. An individual must bring a tribunal claim within the relevant time limit (generally now 6 months) and cannot claim an unlawful deduction of wages going back more than 2 years. However, the government proposes that the enforcement period for the FWA will be 6 years as it currently is in relation to the National Minimum Wage. This means that, in theory, a worker would be able to recover much more in the way of arrears of holiday pay through the FWA than through the Employment Tribunal system. However, any enforcement carried out by the FWA will not be able to go back further than the day the Act was given Royal Assent, which was 18 December 2025.

It is important to appreciate that the Fair Work Agency will not have the resources to monitor every large employer for holiday pay compliance. Local authorities should not expect their summers to be ruined by dawn raids from inspectors looking to check their annual leave records. Enforcement will be intelligence-led, which essentially means that someone will have to have reported the employer to the Fair Work Agency and provided evidence of a serious level of non-compliance. The consultation also indicates that the main focus of state enforcement will be to support lower-income workers and workers in more vulnerable or precarious employment.



We all know how complex calculating holiday pay can be, and the consultation seeks to reassure employers that the FWA will work with them to ensure that they understand their obligations and provide opportunities for them to correct any underpayment (rather than moving immediately to punitive enforcement action). Local authorities, of course, would already be expected to be on top of this issue – but I have the impression that in recent years difficulties over holiday pay calculation have rather subsided. This has been helped to some extent by the changes to the Working Time Regulations made in 2023 which allow rolled-up holiday pay for irregular hours and part-year workers.

The consultation closed on 22 September 2026 and we await the government's response. I think, however, that its proposals are not very controversial, given the statutory framework, and we can be reasonably confident that what is set out in this consultation document will eventually be translated into policy. Whether the FWA will be able to take over responsibility for holiday pay enforcement by April 2027 remains to be seen. When it comes to the implementation of the Employment Rights Act, I've learned not to count my chickens before they are hatched.

