

Guidance on Abatement of Leave

Introduction

This guidance applies to all Council employees with the exception of Teachers.

Rules and Regulations

Under the **Working Time (Amendment) Regulations 2007** employees are entitled to a minimum of 28 days leave per year and employees must have the opportunity to take the appropriate annual leave entitlement. In order to comply with Working Time Regulations, any abatement must meet the minimum statutory entitlement of 28 days leave (including public holidays) per year.

EP&M Terms and Conditions of Employment state that 'where an employee has been absent due to sickness for a period exceeding three months (either one period of sickness or an aggregate of more than one period) over a rolling period of the previous 12 months, annual leave will be abated to a period proportionate to the actual service given during the leave year'.

Chief Officials Terms and Conditions of Employment state that 'where an official has been absent through sickness for a period exceeding three months during a leave year' the authority has discretion to 'limit the annual leave to a period of at least the proportionate amount equal to the period(s) of actual service given during the leave year'.

The **Craftworker Agreement** states that 'where an employee has been absent through illness for a period exceeding three months the Council will limit the annual leave to the service given during the leave year or statutory obligations'.

General Principles

1. All employees will have their annual leave entitlement abated if they have been absent for **90 days** or more. This can either be one period of sickness or an aggregate of more than one period.
2. Periods of pregnancy related absence (i.e. sickness absence which occurs during the pregnancy) should be discounted when considering whether leave needs to be abated.
3. Where the employee's absence is related to an underlying medical condition which means that reasonable adjustments need to be considered, advice should be sought as to whether leave should be abated.
4. The 90 days include all calendar days (Monday to Sunday) regardless of whether an employee works full time or part time.
5. A **rolling year** period is generally used when calculating the abatement trigger i.e. the previous 12 month period from date of return to work.

6. The 90 day trigger does not require to be in one leave year. Where the 90 days absence covers two leave years, the amount of abatement should be proportionate to the period of absence in each of the leave years.
7. If there is a continuous period of absence for more than the 12 month rolling period, then the entire period of absence is included in the abatement calculation, even if that goes back further than the 12 month rolling period. If the absence is not continuous i.e. there is a break in the absence, the abatement calculation will only pick up any absence within the 12 month rolling period.
8. For any employee who has had a further absence due to sickness of **90 days or more** in a rolling year since the end of the previous abatement calculation, the abatement calculation for the affected year(s) should be recalculated on the basis of the number of days of sickness absence in the leave year(s). The 90 days absence can either be one period of sickness or an aggregate of more than one period.
9. Whilst previous continuous local authority service will be recognised for the calculation of annual leave and sickness entitlement when someone joins the Council from another local authority, any annual leave that is subsequently abated will be to the statutory minimum of 28 days (including public holidays).
10. Abatement can be applied in cases of industrial injury, where the 90 day abatement trigger is met.
11. If an employee changes their contracted working hours in a calendar year for which an abatement calculation has already been applied, the previous abatement calculation will be taken into account when recalculating their leave entitlement due to the change in hours.
12. An employee can request to use annual leave during a period of sickness absence. Where required, an abatement calculation will be carried out whilst the employee is still off sick, to determine how much leave they have to use. In these circumstances, when the period of sickness absence ends, the abatement calculation will be revisited to take into account the entire period of sickness absence.

Carry Forward of Leave

Any annual leave (subject to abatement) that cannot be taken due to illness must still be available to take on the employee's return to work (even if the return to work occurs in the following leave year). In order for their leave to be re-instated, employees must submit a 'fit note' indicating that they were unfit for work and over what period. Annual leave should be abated to the statutory minimum (28 days including public holidays) prior to it being carried forward to the following leave year. It is recommended that any days carried forward be used within a specified period e.g. immediately on return from long term sickness absence or within three months of return to work.

This applies only to long term sickness cases where employees choose not to take their leave during their period of sickness absence (see below).

Requesting Annual Leave during Sickness Absence

An employee can request annual leave during a period of sickness absence and indeed, they should be encouraged to do so in order to avoid a build up of annual leave which would potentially need to be carried forward into the following leave year.

Where an employee indicates that they intend to take annual leave during a period of sickness absence, or it becomes apparent that they have taken annual leave e.g. because they are unavailable for meetings or occupational health appointments, the relevant days/hours should be deducted from their annual leave card.

Where an employee is on half or nil sick pay they should receive full pay for the leave period and their future half/nil pay dates will be extended by the equivalent number of annual leave days. Notification should be sent to Payroll who will make the relevant amendments. In order to ensure that the annual leave days are excluded from the sickness statistics, the field for 'hours lost' should also be reduced by the equivalent number of hours.

Where an employee on long term sick leave uses annual leave during the period of sickness absence, the number of days taken as annual leave should not be included when calculating the 90 day abatement trigger, nor should they be included as sick days in the first part of the abatement calculation which looks at 365 days in the year minus the number of days off sick. The days taken as annual leave during the period of sickness absence should however be included when calculating how many days leave have been taken in the leave year.

Phased Return to Work

For the purposes of abatement of annual leave, the period of phased return should **not** be included in the abatement calculation. Please see guidance on Phased Return to Work for further details.

Payment for Annual Leave

No payment will be made for untaken holidays except on termination of employment, other than in exceptional circumstances.

Accounting for Leave that has Already been Taken

If at the point of abatement an employee has used their full leave entitlement, under normal circumstances days/hours will be deducted from their current or next year's entitlement (providing this would still leave them with the minimum days for that leave year required by the Working Time Regulations i.e. 28 days including public holidays). Where the employee requests it, or where the employee owes more leave than can be deducted from the current or next leave year, the equivalent can be reclaimed in monetary terms through a deduction from salary or the employee can work back the hours (or a combination of these options).

When the abated entitlement is calculated, any days/hours leave already taken during the leave year will be deducted.

Communication with Employees

Managers must advise all employees who are absent from work that their annual leave entitlement will be abated if they are absent for an aggregate period of 90 days or more in a rolling 12 month period. Managers should also ensure that arrangements are put in place for employees to carry forward any untaken leave, subject to abatement.

Unpaid Leave

The Special Leave Policy (which applies to all Council employees except Teachers and those other employees under SNCT terms and conditions) states the following: “For periods of unpaid leave which exceed 90 days, annual leave entitlement will be recalculated based on the number of days lost, this will not be less than the statutory minimum annual leave entitlement”. In practice, this means that the same method of calculation used for abatement of leave due to sickness absence is also applied to periods of authorised and unauthorised unpaid leave. Where an employee has authorised or unauthorised unpaid leave totalling more than 90 days in a rolling 12 month period, the abatement calculation applies. Where an employee is absent due to sickness for more than 90 days and also has authorised or unauthorised unpaid leave for more than 90 days during a rolling 12 month period, these absence types will be aggregated into one abatement calculation.

Notes on the Calculation

- 365 days should be used as the full year figure, including in a leap year.
- If an employee whose leave is being abated has worked on a public holiday which fell outwith the sickness absence period then this day should **not** be included in the calculation. This is because the purpose of including the public holidays in the calculation is to determine whether or not the employee has enough leave in the year (annual leave + public holidays) to meet the statutory minimum of 28 days.
- A half day of absence recorded on PSe should **not** be included in the abatement calculation.

Worked Example for Full Time Employees

Background

An employee has 27 days annual leave plus 7 public holidays. They had taken 17 days of their 2010 entitlement prior to going off sick on 25 October 2010. They did not take any further annual leave before returning to work on 21 February 2011.

Pattern of Absence

68 days absence from 25 October to 31 December 2010

51 days absence from 1 January to 20 February 2011

119 days absence in rolling 12 month period

Solution

The employee meets the 90 day abatement trigger. The period of absence spans 2 leave years; therefore both annual leave years should be abated proportionately. The abatement calculation should be based on the 12 month period prior to the return to work date i.e. all absences within the period 21 February 2010 to 21 February 2011.

Abatement Calculation for 2010

$$\frac{(365-68)}{365} \times 27 = 22 \text{ days (rounded to the nearest half day)}$$

Abated annual leave entitlement for 2010 = 22 days

Public holidays which fall outwith sickness absence period(s) = 4

Abated entitlement would be 26 days (annual leave + public holidays).

Note - this figure would have to be **increased** to 28 days (including public holidays) in order to meet the statutory minimum.

Annual leave days already taken and public holidays which fall outwith sickness absence period(s) (17 + 4 i.e. 21 days) should be **deducted** to give a total of **7 days** remaining for 2010. These days can be carried forward to 2011.

Abatement Calculation for 2011

$$\frac{(365-51)}{365} \times 27 = 23 \text{ days (rounded to the nearest half day)}$$

Abated annual leave entitlement for 2011 = 23 days

Public holidays which fall outwith sickness absence period(s) = 5 days

This gives a combined total of 28 days leave for 2011. This meets the statutory minimum.

However, had the combined total fallen below the statutory minimum, the total would need to be increased to ensure that the employee received 28 days. As this figure is inclusive of the public holidays which fell outwith sickness absence period(s) for the year, these would have to be deducted i.e. in this example, the 5 days public holidays which fell outwith sickness absence period(s).

Total Number of Days Due

The employee's total abated annual leave entitlement for 2011 is therefore:

	23 days (entitlement for 2011 i.e. 28 days minus 5 public holidays which fell outwith sickness absence period(s))
Plus	<u>7 days</u> (carried over from 2010)
Total	30 days

If the above employee had a further period of sickness absence totalling 90 days or more in 2011, their abated leave entitlement for 2011 would be recalculated as follows:

In addition to the previous 51 days of sickness absence in 2011 (from 01 January to 20 February 2011), employee is then off sick from 01 March 2011 to 04 June 2011 (96 days inclusive). This gives a total of 147 days of sickness absence in 2011.

Abatement Calculation for 2011

$$\frac{(365-147)}{365} \times 27 = 16 \text{ days (rounded to the nearest half day)}$$

Abated annual leave entitlement for 2011 = 16 days

Public holidays which fall outwith sickness absence period(s) = 3 days

This gives a combined total of 19 days leave for 2011. This figure would have to be increased to 28 days (including public holidays) in order to meet the statutory minimum.

As this figure is inclusive of the public holidays which fell outwith sickness absence period(s) for the year, these would have to be deducted i.e. in this example, the 3 public holidays which fell outwith sickness absence period(s).

Total Number of Days Due

The employee's total abated annual leave entitlement for 2011 is therefore:

	25 days (entitlement for 2011 i.e. 28 days minus 3 public holidays which fell outwith sickness absence period(s))
Plus	<u>7 days</u> (carried over from 2010)
Total	32 days

If the full time employee left part way through the second leave year (2011 in this case), the 2011 part of the calculation would be calculated as follows:

Employee left on 7 September 2011. This entitles them to 8/12ths of a full year leave entitlement (January to August inclusive).

Abatement Calculation for 2011

Pro-rated statutory minimum = 28 days x 8/12ths = 18.67 days

$\frac{(365-51)}{365} \times 27 = 23$ days (rounded to the nearest half day) x 8/12ths = 15.33 days

Abated annual leave entitlement for the part of the year during which the employee was employed = 15.33 days

Public holidays which fall outwith sickness absence period(s) during the part of the year the employee was employed = 2 days (1st January, 2nd January)

15.33 days annual leave + 2 days public holidays = 17.33 days. This is increased to 18.67 days to meet the statutory minimum.

The 2 public holidays which fell outwith sickness absence period during the part of the year the employee was employed are then deducted to give 16.67 days.

Abated leave entitlement for 2011 for the part of the year during which the employee was employed = **16.5 days** (rounded to the nearest half day)

Worked Example for Part Time Employees or any other Employees who have Leave Calculated in Hours

Background

An employee has 32 days annual leave plus 7 public holidays. They are a part time employee and work 28.5 hours per week. They have a total annual leave entitlement of 182.4 hours (32 days annual leave x 7.4 hours x (28.5 hours per week/37)). They had taken 114 hours of leave (annual leave plus public holidays) in 2010 prior to going off sick on 21 July 2010. They did not take any further annual leave before returning to work on 24 April 2011. The statutory minimum total leave entitlement for this employee is 159.6 hours (28 days annual leave x 7.4 hours x (28.5 hours per week/37)).

Pattern of Absence

164 days absence from 21 July to 31 December 2010

114 days absence from 1 January to 24 April 2011

278 days absence in rolling 12 month period

Solution

The employee meets the 90 day abatement trigger. The period of absence spans 2 leave years; therefore both annual leave years should be abated proportionately. The abatement calculation should be based on the 12 month period prior to the calculation end date.

Abatement Calculation for 2010

$$\frac{(365-164)}{365} \times 182.4 = 100.44 \text{ hours}$$

Abated annual leave entitlement for 2010 = 100.44 hours

Public holidays which fall outwith sickness absence period(s) = 4 days or 22.8 hours

$$(4 \text{ days public holidays} \times 7.4 \text{ hours} \times (28.5 \text{ hours per week}/37) = 22.8 \text{ hours})$$

Abated entitlement would be 123.24 hours (annual leave + public holidays which fell outwith sickness absence period(s)).

Note - this figure would have to be **increased** to 159.6 hours (including public holidays) in order to meet the statutory minimum.

The 114 hours of leave already taken should be deducted from the statutory minimum entitlement of 159.6 hours to give a total of **45.6** hours to be carried forward to 2011.

Abatement Calculation for 2011

$$\frac{(365-114)}{365} \times 182.4 = 125.43 \text{ hours}$$

Abated annual leave entitlement for 2011 = 125.43 hours

Public holidays which fall outwith sickness absence period(s) = 5 days or 28.5 hours

(5 days public holidays x 7.4 hours x (28.5 hours per week/37) = 28.5 hours)

This gives a combined total of 153.93 hours leave for 2011. This figure would have to be increased to **159.6** hours (including public holidays) in order to meet the statutory minimum.

Total Number of Hours Due

The employee's total abated annual leave entitlement for 2011 is therefore:

	159.6 hours (entitlement for 2011)
Plus	<u>45.6 hours</u> (carried over from 2010)
Total	205.2 hours

Worked Example for Part Year Employees (Non 47 Week Year)

Background

An employee is contracted for 27.5 hours for 39 weeks per year and has more than 10 years service. This entitles them to 6.3 paid holiday weeks per year (full time entitlement of 42 days/52*39) including public holidays, or 31.5 days inclusive of public holidays. This entitles them to 26.25 days annual leave (31.5 days paid leave entitlement minus (7 days public holidays/52*39)) exclusive of public holidays. They went off sick on 03 June 2010 and returned to work on 02 July 2011. The statutory minimum total leave entitlement for this employee is 24.39 days (28 days leave/52*45.3 paid weeks per year).

As part year workers who work around school term time have to take 5 days leave during Easter, 5 days leave during October and the balance of leave during the Summer, 5 days annual leave were taken prior to going off sick in 2010 (Easter holidays). There were 4 public holidays in 2010 outwith the sickness absence period (1st and 2nd January, Good Friday and May Day) and 3 public holidays in 2011 outwith the sickness absence period (Christmas Day, Boxing Day and Hogmanay).

Pattern of Absence

212 days absence from 03 June to 31 December 2010

182 days absence from 1 January to 01 July 2011

394 days absence in rolling 12 month period

Solution

The employee meets the 90 day abatement trigger. The period of absence spans 2 leave years; therefore both annual leave years should be abated proportionately. The abatement calculation should be based on the 12 month period prior to the calculation end date.

Abatement Calculation for 2010

$$\frac{(365-212)}{365} \times 26.25 = 11 \text{ days}$$

Abated annual leave entitlement for 2010 = 11 days

Public holidays which fall outwith sickness absence period(s) = 4 days/52*39 = 3 days

Abated entitlement would be 14 days (annual leave + public holidays which fall outwith sickness absence period).

Note - this figure would have to be **increased** to 24.39 days (including public holidays) in order to meet the statutory minimum.

Prior to going off sick in 2010, the employee had 3 days public holidays (pro-rated based on working 39 weeks per year) and 5 days annual leave (the Easter break) = 8 days.

The 8 days of leave already taken should be deducted from the statutory minimum entitlement of 24.39 days to give a total of **16.39** days to be carried forward to 2011.

Abatement Calculation for 2011

$$\frac{(365-182)}{365} \times 26.25 = 13.16 \text{ days}$$

Abated annual leave entitlement for 2011 = 13.16 days

Public holidays which fall outwith sickness absence period(s) = 3 days/52*39 = 2.25 days

This gives a combined total of 15.41 days leave for 2011. This figure would have to be increased to 24.39 days (including public holidays) in order to meet the statutory minimum.

Total Leave Due

The employee's total annual leave entitlement for 2011 is therefore:

	24.39 days (entitlement for 2011)
Plus	<u>16.39 days</u> (carried over from 2010)
Total	40.78 days

Leave which falls outwith sickness absence period(s) = 21.25 days annual leave + 2.25 public holidays = 23.5 days

* Please note that in this example, 21.25 days annual leave is the full year entitlement of 26.25 days minus the 5 days annual leave which fell within sickness absence periods (during Easter break).

Balance of leave for year = 17.28 days

17.28 days x 7.4 FTE hours x 27.5 hours / 37 FTE hours per week = 95.04 hours

Total accrued leave entitlement (abated) = 95 hours

Worked Example for Part Year Employees (47 Week Year)

Background

An employee is contracted for 27.5 hours for 47 weeks per year (inclusive of holiday entitlement). The employee has a continuous service start date after April 2000 and has more than 5 years service. As per the 47 week year table, this entitles them to 6.6 paid holiday weeks per year (or 33 days) including public holidays. This entitles them to 27 days annual leave (30 days/52*47) exclusive of public holidays. This means that they work 40.4 weeks per year (47 contracted weeks minus 6.6 holiday weeks). They were off sick for 2 days in November 2010 and a total of 133 days in 2011, returning to work on 5th October 2011. The statutory minimum total leave entitlement for this employee is 25 days (28 days leave/52*47 paid weeks per year).

Part year workers who work around school term time have to take 5 days leave during Easter, 5 days leave during October and the balance of leave during the Summer. In 2011 5 days annual leave were taken prior to going off sick (Easter holidays) and 5 days annual leave will be taken during the October break. The employee was off sick for the duration of the Summer break in 2011. All 7 public holidays in 2010 fell outwith the sickness absence period, as did all 7 public holidays in 2011.

Pattern of Absence

2 days absence in November 2010

133 days absence ending on 5 October 2011

135 days absence in rolling 12 month period

Solution

The employee meets the 90 day abatement trigger. The period of absence spans 2 leave years; therefore both annual leave years should be abated proportionately. The abatement calculation should be based on the 12 month period prior to the calculation end date.

Abatement Calculation for 2010

$$\frac{(365-2) \times 27}{365} = 26.85 \text{ days}$$

Abated annual leave entitlement for 2010 = 26.85 days

Public holidays which fall outwith sickness absence period(s) = $7 \text{ days} / 52 * 40.4 = 5.43$ days.

Abated entitlement would be 32.28 days (annual leave + public holidays which fall outwith sickness absence period).

Prior to going off sick in 2010, the employee had taken 5 days annual leave in the Easter break, 5 days annual leave in the October break and 17 days annual leave in the Summer. In addition, all 5.43 (pro-rated) public holidays fell outwith the sickness absence period. This equates to a total of 32.43 days leave taken in 2010.

The 32.43 days of leave already taken should be deducted from the abated leave entitlement of 32.28 days to give a total of **0.15** days to be deducted from the 2011 entitlement.

Abatement Calculation for 2011

$$\frac{(365-133)}{365} \times 27 = 17.16 \text{ days}$$

Abated annual leave entitlement for 2011 = 13.16 days

Public holidays which fall outwith sickness absence period(s) = $7 \text{ days} / 52 * 40.4 = 5.43$ days

This gives a combined total of 18.59 days leave for 2011. This figure would have to be increased to 25 days (including public holidays) in order to meet the statutory minimum.

Total Leave Due

The employee's total annual leave entitlement for 2011 is therefore:

	25 days (entitlement for 2011)
Minus	<u>0.15 days</u> (deduction carried over from 2010)
Total	24.85 days

Leave which falls outwith sickness absence period(s) = 10 days annual leave + 5.43 public holidays = 15.43 days

Balance of leave for year = 9.42 days

$9.42 \text{ days} \times 7.4 \text{ FTE hours} \times 27.5 \text{ hours} / 37 \text{ FTE hours per week} = 51.81 \text{ hours}$

Total accrued leave entitlement (abated) = 52 hours