

# Holiday leave during the coronavirus

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Employers and employees are struggling with questions regarding holiday leave as a result of the coronavirus outbreak, as many employees are obligated to work from home as a result of government's or employers' measures. Can an employer designate part of this period as holiday? As a general rule, employers may not unilaterally impose a holiday, but they can ask employees to take holiday. They can also designate a certain period as a holiday in a collective labour agreement or in a written agreement with an individual employee. In that case, the trade unions and works council should be involved. In our view, the coronavirus outbreak will not generally affect the lapse, as of 1 July 2020, of statutory holiday accrued in 2019. Employees, with some exceptions such as chronically ill employees, will reasonably have been able to use their statutory holiday leave in the period of 2019 until the coronavirus outbreak. However, this may be different when it comes to the lapse of statutory holiday leave as of 1 July 2021. If measures relating to the coronavirus last substantially longer, there may be a turning point. This could be the case if employees are unable to go on holiday in the summer of 2020.

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## Main rule: no mandatory holiday

As a general rule, employers cannot oblige their employees to take holiday leave because (i) there is less work as a result of the coronavirus; (ii) staying at home is made mandatory by the government or the employer but they cannot work from home; (iii) they have to stay home due to a lack of day-care for their children; or (iv) they can only work fewer hours and/or less efficiently in view of day-care circumstances. An employer can however request employees to take holiday or unpaid leave, but there is no legal obligation for employees to consent to this. Such a request will need to be accompanied by the employees' entitlement to the payment of their salary during any holiday, even if they stay home and do not or cannot work.

## Designate holiday based on collective labour agreement or written agreement

Employers do have some possibilities open to them to designate certain days as mandatory holiday. Pursuant to article 7:638 (1)

DCC, employers must enable their employees to annually take the holiday leave that they are entitled to. Usually the employer determines the holiday dates in accordance with the employee's wishes, unless serious reasons prevent this. However, an employer can deviate from this general approach if the determination of a holiday is stipulated in a written agreement, a collective labour agreement or by law. Therefore, and only if stipulated in writing, an employer can determine when an employee must take a part of their holiday leave. Employers are advised to check the applicable collective labour agreement, the employment agreement and any applicable employee terms and benefits and holiday regulations to see if they can designate any mandatory holiday in the coming period.

If employers intend to unilaterally impose holiday based on individual written agreements or on an applicable provision in a collective labour agreement, they would be wise to involve trade unions and the works council. The employer can propose its intention to designate a certain period during which employees will have to take holiday leave, as part of a set of measures to mitigate the effects of the coronavirus outbreak on business operations. This allows all parties involved to find a fitting set of measures that reasonably divides the responsibilities and burdens.

## Lapse of statutory holiday – general rules

Under article 7:640a DCC, an employee's entitlement to the statutory minimum amount of holiday will lapse six months after the last day of the calendar year in which the entitlement was obtained, unless the employee has not reasonably been able to take holiday leave. It is possible to deviate from the six-month period in favour of the employee. This provision aims to encourage employees to take as much statutory holiday as possible in the year in which it was accrued, ensuring that employees recuperate sufficiently.

Taking holiday is the employee's responsibility, not the employer's. The ECJ has ruled that employers must enable their employees to take actual holiday leave, by informing them about their holiday entitlement and explaining what the consequences are of not taking holiday leave. If an employer fails to do so, the employee's holiday entitlement cannot lapse.

If an employee has not reasonably been able to take holiday leave during the entire calendar year of accrual and the following six months, the statutory days' holiday will not lapse until five years after the last day of the calendar year in which the entitlement started (article 7:642 DCC). In general, employees will not reasonably be able to take holiday if they are unfit for work and exempt from the obligation to reintegrate. If a chronically ill employee is capable of taking holiday and voluntarily chooses not to, the days' holiday not taken, will lapse. If an employee is partly unfit for work and the employer has enabled the employee to take actual holiday leave, the employee will only be able to claim that he was unable to take the statutory minimum of holiday in exceptional cases.

The burden to prove the impossibility of taking holiday leave falls on the employee. If an employee therefore believes that he or she was reasonably unable to take the statutory minimum of holiday

leave before the end of the expiration period, the employee must demonstrate this.

#### **Lapse of statutory holiday in light of coronavirus outbreak**

In our view, the coronavirus outbreak will, as a general rule, not have any effect on the lapse (on 1 July 2020) of accrued but unused statutory holiday from the 2019 calendar year. This means that employees, apart from specific exceptions, will reasonably have been able to use their 2019 statutory holiday leave until the coronavirus outbreak. (This does not of course apply to chronically ill employees who were not reasonably able to take holiday). In addition, specific circumstances can prevent an employee's statutory holiday from lapsing, that is, if an employee has been unable to actually take holiday leave (through the actions of the employer).

#### **Lapse of statutory holiday as of 1 July 2021**

It is currently unclear how long employers and employees will be impacted by the coronavirus outbreak. As things currently stand, it will only be during a limited and foreseeable period that employees cannot take holiday leave.

However, if the emergency measures relating to the coronavirus last substantially longer, there will be an inevitable turning point. It is hard to predict when this will be. This could be when employees are unable to go on holiday in the summer of 2020 because foreign travel is not possible and hotels and restaurants are still closed. It is conceivable that a court would then rule that the holiday accrued in 2020 will not lapse by 1 July 2021, especially given the importance of taking a holiday in this period of stress and worry.

As regards the lapse of statutory holiday, it is advisable for employers to clearly communicate this to employees and employee-representative bodies, such as works councils. If the company's interest requires that no holiday be taken by employees once restrictive measures are eased or lifted, employees may be encouraged to postpone their holiday when it is confirmed that their days' holiday will not lapse. If an employer does not plan to move the expiry date back, it is also advisable to communicate this to the employees and encourage them to take holiday leave before 1 July 2021. It will be more difficult for employees to prove inability to take holiday leave where the employer has taken a clear and well communicated point of view on this.

*If you have any employment-related questions during the coronavirus crisis, get in touch with our dedicated team at [employment@debrauw.com](mailto:employment@debrauw.com) or with your usual De Brauw contact.*

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