

Business Clinic

Whether it's a legal, tax, insurance, management or land issue, *Farmers Weekly's* experts can help

How can I get my correct holiday pay entitlement?

Q Following your article about farmworkers' entitlement to have overtime accounted for in their holiday pay (News, 27 August), I would like some advice. My employer has always calculated my holiday pay on my basic weekly wage. Some time ago, I broached the subject that overtime should be part of the calculation. The response from my employer was to threaten me with dismissal or the prospect of a court battle. I have worked for this employer for three years and, like so many other farm workers, regularly work about 70 hours a week between February and October, so overtime pay is a considerable part of my regular earnings. What steps do you advise I take to ensure I get the correct holiday pay please?



Natalie Ward
Senior associate
Thrings

A I am sorry you received a negative response when you raised the issue of holiday pay and overtime with your employer. However, you are correct: your holiday pay should be calculated based on your basic weekly wage inclusive of overtime.

The Working Time Directive (WTD) requires workers to receive their "normal remuneration" during periods of WTD leave, that is, the four weeks' leave under regulation 13 of the Working Time Regulations (WTR) 1998 (this doesn't apply to the statutory holiday entitlement of 1.6 additional weeks leave that UK employees are entitled to under the WTR).

In recent years, case law has established that overtime, whether voluntary or contractual, should be taken into account by an employer when looking at average earnings over the past 52 weeks and calculating what they need to pay an employee for their four weeks' paid leave.

As some time has passed since you last spoke to your employer, you may wish to consider having another conversation with them. You can discuss, in broad terms, that it is a statutory requirement for holiday pay to be calculated based on a worker's normal remuneration taking into account any overtime.

Given that it's a relatively new concept, your employer may be unaware of the changes or feel flummoxed by your request. You could present them with some evidence of the requirements, including online advice from Acas or copies of *Farmers Weekly* articles.

Framing the conversation in broader terms may help take the attention away from you specifically and make it a general matter for them to address.

If your employer remains unreceptive, you could raise a formal grievance, setting out your complaint in writing and instigating your employer's grievance procedure.

Raising a concern about wrongdoing at work that also affects your colleagues – such as a failure to pay appropriate holiday pay – is likely to constitute whistleblowing.

If your employer doesn't have a whistleblowing policy, raising a grievance should be an adequate means of making the necessary disclosure, as long as you have provided sufficient information that shows your employer is failing to comply with a legal obligation.

If your employer rejects your grievance and still refuses to take any overtime into consideration when calculating your holiday pay, you may wish to consider bringing an unlawful deduction of wages claim in an employment tribunal (ET). This is when a worker or

employee has been unpaid or underpaid wages (of which your holiday pay forms part).

If your employer dismisses you or subjects you to some other detriment for raising the issue of underpayment of holiday pay, you may also have a claim for automatic unfair dismissal or for detriment under the whistleblowing legislation.

If you decide you want to bring a claim in an ET, you must contact Acas immediately and instigate the early conciliation process prior to submitting any claim.

Claims in an ET should be brought within three months of the date of dismissal and/or the date the last deduction was made and/or the date of any other detriment suffered. In relation to holiday pay, where there is a series of deductions, the time limit begins with the last deduction in the series.

You can claim up to two years of deductions as long as there isn't a gap of three months or more between the deductions.

Once the early conciliation process has concluded, and assuming you have not managed to negotiate a settlement with your employer, you are free to issue a claim with the ET.

Early conciliation presses pause on the normal time limits for issuing claims in the ET, so you should seek appropriate legal advice to ensure you don't miss the applicable deadline for issuing your claim.



Overtime, whether voluntary or contractual, should be taken into account

MEDIA WORLD IMAGES/ALAMY STOCK PHOTO

Who is responsible for insuring farm building projects?

Q We're starting a big building project on the farm next spring to add a new parlour and cow housing complex. I've been told I should check on insurance, but I am not sure where to start – who covers what for such a project and what are my responsibilities?



Ian Berry
Associate director
A-Plan Rural
Insurance

A Construction is a complicated business and there are risks, from the design phase through to construction and handover. These include human factors (such as design failure, the construction process itself or workmanship), the farm environment and employees from different companies working in close proximity on site.

Losses or damage arising from these risks can run to millions of pounds worth of costs, so comprehensive insurance is critical. The necessary covers include:

- Contract works (works in progress and materials on site)
- Employers' liability (claims brought by employees)
- Public liability (claims brought by members of the public)
- Hired-in plant (rented tools, machinery and other equipment)
- Professional indemnity (for professional advisers – it covers them for compensation payable for rectifying mistakes).

So, who is responsible for insuring the project?

Most commonly, the farmer (or employer) will commission an architect to design the building.

Fit for purpose

Check candidates have professional indemnity insurance and ask to see copies of the documentation. Share these with a lawyer, insurance broker and/or rural insurance company to verify it is fit for purpose.

Once plans for the building are complete, farmers usually select a building company (or main contractor), who constructs the building, bringing in specialist subcontractors and professionals where necessary.

For a brand-new building, normally it is the main contractor's responsibility to insure the project, but do not rely on a



It is essential to ensure that the different parties involved have the correct insurance cover in place before work starts

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verbal agreement on this – put the agreement in writing, no matter what the scale of the project.

Paperwork before building work

Before work commences, have a lawyer draft a building contract that stipulates who is responsible for insuring the works.

In the UK, the main building contract is the Joint Contracts Tribunal (JCT). There are several types available, depending on the project, but the most used are the Standard Building Contract and Design and Build Contract.

Once agreed, the contract should identify the main contractor as responsible for insuring the project, which will include works undertaken by any subcontractors or professionals they employ.

However, check the main contractor has the appropriate cover in place with the necessary indemnity limits. Often, everything will be contained within a contract works policy.

Again, ask to see the documentation and send it to a lawyer, insurance broker and/or rural insurance provider for review. Do not begin works until insurance documentation has been approved by these parties and the JCT contract is agreed and signed.

If the building project includes work carried out on an existing structure with an existing

value, then certain insurance responsibilities may fall solely or jointly (with the main contractor) to the farmer (or 'employer') named in the JCT.

When a project completes, the contractor will provide a certificate of final completion and the contract works policy will automatically terminate. At this point, be sure to arrange cover for the new building on a standard property owner's policy. It can often be added to an existing farm policy.

Self-build construction projects

Sometimes, farmers may construct the building themselves, hiring in specialist tradespeople and equipment.

In these circumstances, it is their responsibility to identify, source and purchase the insurance policies needed.

Some farm insurance includes automatic contract works cover up to a certain limit, which covers works in progress and materials on site until completion on an all-risks basis.

However, this is a complex area, so consult an insurance broker and/or rural insurer as soon as possible to ensure the appropriate cover is in place before works begin and to avoid delays. It is not always possible to obtain cover once works are under way.

DO YOU HAVE A QUESTION FOR THE PANEL?

Outline the issue and *Farmers Weekly* will put your question to a member of the panel.

Send your enquiry to Business Clinic, *Farmers Weekly*, Quadrant House, The Quadrant, Sutton, Surrey SM2 5AS, and include a telephone number. You can also email fw-businessclinic@markallengroup.com

Our expert partners



Carter Jonas

THRINGS
SOLICITORS

Can I make a new field entrance through hedge?

Q I would like to create a new field entrance. This would be dug through the hedge bank and across a few metres of unused ground to reach an existing farm track, which is also a bridleway. I own all the ground concerned including the track and it is in a national park. There are some changes in level but it is all easily achievable with a small digger. Am I entitled to carry out this work without transgressing any planning legislation?



Nicola Quick,
Planning expert
Carter Jonas

A This is an interesting question but I'm afraid the likely answer is no. I am assuming this is a new entrance on to a track between two fields. If it is a new entrance on to a classified road, a planning application would definitely be required.

Countryside hedgerows are protected under The Hedgerow Regulations 1997, which prohibit the removal of most countryside hedgerows without first notifying the local planning authority. There are specific criteria to determine if the hedgerow is protected under these rules relating to its length, location and "importance".

Length – it is protected if it is:

- More than 20m long with gaps of 20m or less along its length
- Less than 20m long, but meets another hedge at each end.

Location – it is protected if, among other things, it is on or adjacent to "land used for agriculture or forestry".

"Importance" – it is protected if it is at least 30 years old and meets one of the following criteria:

- Marks all or part of a parish boundary that existed before 1850
- Contains an archaeological feature such as a scheduled monument
- Is completely or partly in or next to an archaeological site listed on an Historic Environment Record (HER), (formerly a Sites and Monuments Record)
- Marks the boundary of an estate or manor or looks to be related to any building or other feature that is part of the estate or manor that existed before 1600



The removal of most countryside hedges is prohibited without first notifying the local planning authority

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● Is part of a field system or looks to be related to any building or other feature associated with the field system that existed before 1845 – you can check the County Records Office for this information

- Contains protected species listed in the Wildlife and Countryside Act 1981
- Contains species that are endangered, vulnerable and rare and identified in the British Red Data books
- Includes woody species and associated features as specified in Schedule 1, Part II Criteria, paragraph 7(1) of the Hedgerow Regulations – the number of woody species needed to meet this criteria is one fewer in northern counties.

You can find more information about these criteria at: gov.uk/guidance/countryside-hedgerows-regulation-and-management

Apply to National Park Authority

In your circumstances, you would have to make an application to the National Park Authority providing details of the section of hedge you wish to remove. After acknowledgement they will have 42 days to respond.

They will consult your parish council, so I would recommend you speak to them beforehand about your proposal. The outcome will result in either a hedgerow retention notice (in other words, it must be kept) or a written notice giving you permission to remove it. You

will have up to two years from the date of the written notice to undertake the works.

There are some additional points to consider. If consent is given for you to proceed, you need to ensure the bridlepath is not obstructed during the works.

If permitted, you will need to consider whether your works will harm nesting birds or destroy nests. If so, you should undertake the work outside the main nesting and breeding season (1 March to 31 August). You will need to check that none of the trees within the hedgerow is protected by a Tree Preservation Order. If you are felling trees, check whether you require a felling licence.

Finally, if your land is within a stewardship agreement, you need to consider if it impacts on any of your obligations. If so, you will need to notify the Rural Payments Agency.

The extension of the track could fall under your permitted development rights, alternatively a planning application would be required.

Note – if you were not in a national park, using your agricultural permitted development rights for the track would prevent you using your Class Q permitted development rights for 10 years. However, the Class Q rights do not apply in national parks, as they are covered under article 2(3) land in national planning guidance.