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Circular 9/2004:- Sick Leave and the Organisation of Working Time Act 1997
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28 April 2004

Circular 9/2004: Sick Leave and the Organisation of Working Time Act 1997

A Dhuine Uasail

1. I am directed by the Minister for Finance to refer to the implications of the Organisation of Working Time Act 1997 in relation to the entitlement of staff on certified sick leave to public holidays and privilege days and the deduction of annual leave from staff exceeding the limits on uncertified sick leave.

Public holidays and privilege days

2. In accordance with the Organisation of Working Time Act, an employee who is absent from work on certified sick leave immediately before a public holiday or privilege day, is entitled to benefit from that public holiday or privilege day unless the absence is:

- (i) in excess of 52 weeks by reason of an occupational injury;
- (ii) in excess of 26 weeks by reason of illness or injury;
- (iii) in excess of 13 weeks caused by any reason not referred to in paragraphs (i) and (ii) above but being an absence authorised by the employer including a lay-off. Staff on Maternity, Adoptive, Parental and Term-Time Leave will maintain their entitlement to public holidays and privilege days;
- (iv) an absence by reason of a strike.

3. In accordance with the Organisation of Working Time Act staff, in respect of a public holiday or privilege day are entitled to whichever one of the following their employer determines, namely -

- (a) a paid day off on that day;
- (b) a paid day off within a month of that day;
- (c) an additional day of annual leave;
- (d) an additional day's pay.

Public Holidays, Privilege days and worksharing staff

4. The provisions in relation to the entitlement to public holidays and privilege days of staff availing of worksharing arrangements are set out in Appendix 1 to this circular. These entitlements, as in the case of full time staff are subject to the limits specified in paragraph 2, and to the provisions of paragraph 3, above.

Excessive uncertified sick leave

5. Circular 25/78 sets out the general provisions governing the granting of sick leave to civil servants. Paragraph 5 of Appendix A to Circular 25/78 states: *Sick leave for single or two-day absences in total not exceeding seven days in any period of twelve months, may be granted without medical certificate. If the number of days absence without medical certificate in any period of twelve months, reckoning backwards from the date of the latest absence, exceeds seven in the aggregate, the excess will be deducted from the annual leave allowance of the officer for the current leave year. If that allowance has been exhausted, the excess will be deducted from the annual leave allowance of the next succeeding year.*

6. Paragraph 12 of Circular 25/78 states: *if in any period of twelve months, reckoned from the date of the latest absence, an officer has been absent for five days on the plea of illness not covered by medical certificate, his attention will be drawn to the matter. In any case where the absences are unduly frequent or where the maximum of seven days allowable is regularly approached or taken year after year, the Head of the Department will consider, and decide at his discretion, whether the privilege of uncertified sick leave should be modified or withdrawn in that case.*

7. Departments cannot deduct leave from a member of staff in the circumstances outlined in paragraph 5 of Appendix A to Circular 25/78 where staff have a statutory entitlement to a certain minimum period of annual leave. Annual leave may be deducted in respect of that portion of an annual leave allowance which exceeds the statutory minimum. If the annual leave allowance has been reduced to the statutory minimum as a consequence of exceeding permissible limits on uncertified sick leave, deductions may also be made in respect of any annual leave allowance in excess of the statutory minimum from the succeeding leave year.

8. There is a strong need to counter any potential abuses of sick leave provisions in the interests of ensuring the delivery of an effective service. Therefore, where staff have exceeded the limits on uncertified sick leave as provided for in Circular 25/78 and leave may not be deducted from such staff as a consequence of their statutory entitlement to annual leave, an alternative form of action should be taken to deal with the matter as set out hereunder.

Unauthorised absence from duty

9. It is part of the terms and conditions of employment of all civil servants that no salary payment shall be made in respect of any unauthorised absence from duty. Section 5 of

the Payment of Wages Act 1991 sets out the terms and conditions that must be met before deductions can be made from the wages of employees. (See Appendix 2 attached to this circular).

Revised procedures in respect of excessive uncertified sick leave

10. Before introducing the revised procedures all staff in departments and all new appointees should be advised in writing that any period of uncertified sick leave in excess of 7 days in any twelve month period, will be regarded as an unauthorised absence from duty.

11. The privilege of uncertified sick leave may be modified or withdrawn in cases where absences are unduly frequent or the maximum of 7 days is regularly approached or taken year after year.

12. Where an officer takes more than 7 days uncertified sick leave he or she should be informed in writing that any such period will be regarded as an unauthorised absence from duty unless a satisfactory explanation is received within 14 days. In the absence of such an explanation, or where in the opinion of the Head of the Department such explanation is unsatisfactory, the officer should be informed of the decision to make a deduction from salary or, where appropriate, a deduction of annual leave in respect of such unauthorised absence.

13. Upon completion of the process, if a decision is made to make a deduction from salary, the officer must be informed in writing of the amount of the deduction and the reasons for such deduction at least one week prior to the making of the deduction. It is not permissible to make a deduction from salary more than six months after the incident which gave rise to the grounds for such deduction.

Revised procedures in respect of the calculation of a day's pay

14. Formerly, the calculation of a day's pay for weekly paid staff was 1/5 (20%) of a week's pay and for fortnightly paid staff was 1/7 (14.3%) of a week's pay. In order to introduce equity and consistency for all grades, it has been decided that the 7 day period will be used when calculating deductions in respect of excessive (more than 7 days) uncertified sick leave. This means that a day's pay will be calculated at 1/7 (14.3%) of a week's pay when deductions are being made in respect of unauthorised sick leave. One day's pay will be deducted in respect of each day's unauthorised sick leave.

15. Where a period of sick leave ends on a Saturday, Sunday or public holiday, or on any other day on which the officer was not required to work, the non-working day(s) before the day on which the officer returned to work should not normally be counted as sick leave and deductions should not be made in respect of those days. However, where a period of sick leave spans a weekend, public holiday, or any other day on which the officer was not required to work, and the officer remains on uncertified sick leave on the day(s) after the non-working days, those non-working days should be counted as sick leave and deductions should be made in respect of those days.

16. It has also been decided that pay being deducted in respect of special leave without pay, other than parental leave and worksharing, will be deducted at the 1/7 rate (14.3% of a week's pay) for all grades. Pay being deducted in respect of parental leave and worksharing will continue to be calculated at the 1/5 rate (20% of a week's pay) for all grades. Arrangements will be made to deal on a consistent basis with deductions from pay, for each day of such leave, in respect of any new special leave without pay introduced in the future.

17. As Term Time leave is taken in blocks of weeks, calculations in respect of the deduction of a day's pay does not arise.

18. The following summarises the arrangements for deductions from pay in respect of unpaid leave:

	Sick Leave	Other types of unpaid leave	Parental Leave and Worksharing
Weekly paid staff	<i>1/7 deduction</i>	<i>1/7 deduction</i>	1/5 deduction
Fortnightly paid staff	1/7 deduction	1/7 deduction	1/5 deduction

19. Where an officer regularly approaches or exceeds the limit of seven days uncertified sick leave year after year, the Head of the Department should consider withdrawing the privilege of uncertified sick leave as provided in Circular 25/78.

20. It should be noted that under the Payment of Wages Act, 1991 an employee may refer a complaint of unlawful deduction from wages by an employer to a Rights Commissioner. The complaint must normally be made within six months of the alleged contravention. The Rights Commissioner has, however, discretion to extend the six month limit up to twelve months, where he or she is satisfied that exceptional circumstances prevented the complaint being made in time. The decision of a Rights Commissioner is binding in the absence of an appeal to the Employment Appeals Tribunal.

21. The revised procedures in relation to sick leave should be brought to the attention of all staff.

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John O'Connell
Assistant Secretary

Appendix 1 to Circular 9/2004

Certified sick leave and calculation of entitlement to holidays and privilege days of worksharers. Applying Section 21 of the Organisation of Working Time Act 1997

In accordance with the Organisation of Working Time Act all staff, in respect of a public holiday or privilege day are entitled to whichever one of the following his or her employer determines, namely -

- (e) a paid day off on that day;
- (f) a paid day off within a month of that day;
- (g) an additional day of annual leave;
- (h) an additional day's pay.

Subject to the limits specified in Paragraph 2 of this Circular not being exceeded, the following provisions should be applied.

Work-sharers – “Week on, Week off”

1. Where the public holiday falls during the week that the officer is rostered on but out sick on the day of the public holiday, he or she is entitled to an additional day's leave.
2. Where the public holiday falls during the week that the officer is rostered off he or she receives an additional half-day's pay in accordance with the Department of Finance instructions of 27 February 1998 and 4 October 1998.

Work-sharers – Reduced hours, attending everyday

3. The application of this provision to work-sharers with reduced daily hours is similar to the way the legislation is applied to whole-time staff. On return to employment from a period of sick leave, the officer is entitled to an additional day of leave (i.e. one of their days) for each public holiday that fell while he or she was out sick.

Work-sharers – 2/ 3 /4 day week

4. Where the public holiday falls on a day that the officer is rostered on but is out sick, he or she is entitled to an additional day's leave.
5. Where the public holiday falls on a day that the officer is rostered off but is out sick, he or she receives additional pay in accordance with the Department of Finance instructions of 27 February 1998 and 4 October 1998, i.e. 20% of the work-sharing weekly wage.

Work-sharers – 3 day week, Monday a.m., Tuesday a.m., Wednesday, Thursday

6. Where the public holiday falls on a day that the officer is rostered on but is out sick, he is entitled to an additional day's leave equal to that which he or she would have worked on that day.

7. Where the public holiday falls on a day that the officer is rostered off but is out sick, he or she receives additional pay in accordance with the Department of Finance instructions of 27 February 1998 and 4 October 1998, i.e. 20% of his work-sharing weekly wage.

Appendix 2 to Circular 9/2004

Payment of Wages Act 1991

Section 5 of the Payment of Wages Act 1991 covers deductions made from the wages of employees. Section 5(2) covers deductions in respect of any act or omission of the employee. The section specifies that certain conditions must be met before a deduction is made from the salary of the employee. These conditions are:

- ◆ before an incident which gives rise to a deduction, an employee must either have been given a copy of the written term of the contract or written notice of the existence of an oral term (for the application of this provision in the civil service context see paragraph 10 of the Circular).
- ◆ before a deduction is made, the employee must be given one week's prior written notice of the act/omission which gave rise to it and the amount which will be deducted.
- ◆ an employer must not delay more than six months after discovering the act/omission before making the deduction.