

dti

**YOUR GUIDE TO THE WORKING
TIME REGULATIONS**

Workers and Employers

JULY 2003



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Your guide to the Working Time Regulations

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This booklet provides guidance on the limits on working time and the entitlements provided for in the Working Time Regulations 1998 (as amended). It gives general guidance only and should not be regarded as a complete or authoritative statement of the law.

Readers should be aware that there may be developments in new legislation or case law which affect the rights of workers.

Section 1: Who's who

A **worker** is:

- someone who has a contract of employment, or
- someone who is paid a regular salary or wage and works for an organisation, business or individual. Their employer normally provides the worker with work, controls when and how the work is done, supplies them with tools and other equipment, and pays tax and National Insurance contributions. This includes part-time and temporary workers and the majority of agency workers and freelancers.

Someone doing in-house training or a trainee on work experience – for example, doing a National Traineeship – is also a worker. A **young worker** is someone who is above the minimum school leaving age but under 18.

Where the regulations do not apply

If you are self-employed, running your own business and are free to work for different clients and customers, the Working Time Regulations do not apply to you.

Certain workers are not subject to these regulations, because they will be governed by sector-specific provisions. These are:

- Sea transport, as covered by the Seafarers' Directive (1999/63/EC).
- Mobile workers in inland waterways and lake transport.

- Workers on board sea going fishing vessels.
- Air transport, as covered by the Aviation Directive (2000/79/EC). This Directive affects all mobile workers in commercial air transport (both flight crew and cabin crew), but not workers employed in General Aviation.

Other workers are only subject to certain provisions of these regulations. These are:

- Mobile workers in road transport, as covered by the Road Transport Directive (2002/15/EC). This Directive affects mobile workers who are participating in road transport activities covered by EU drivers' hours rules. This includes drivers, members of the vehicle crew and any others who form part of the travelling staff.

From the 1 August 2003, workers subject to the Road Transport Directive benefit from the entitlement to paid annual leave and the right to health assessments for night workers under the Working Time Regulations.

The armed forces, the police and emergency services are outside the scope of the regulations in certain circumstances.

However, young workers in the armed forces, the police and emergency services, the aviation sector and the road transport sector, **are** covered by the young workers provisions in the Working Time Regulations.

The Department for Transport will implement separate working time legislation in the transport sector. See page 29 for contact details.

Sectors previously excluded from the Regulations

On 1 August 2003, the Working Time Regulations extend cover to the following sectors:

- Workers in air transport, other than those covered by the Aviation Directive.
- All workers in rail transport.
- Workers in road transport, other than those subject to the Road Transport Directive.
- Non-mobile workers in sea fishing, sea transport, inland waterways and lake transport.
- All workers in other work at sea, such as offshore work in the oil and gas industry.

From 1 August 2004, the regulations will extend in full to cover doctors in training with the exception of the weekly working time limits and special rules for the reference period, which will be phased in over a further five-year period (see page 5).

Section 2:

Working time limits

- Workers cannot be forced to work for more than 48 hours a week on average.
- Young workers may not ordinarily work more than 8 hours a day or 40 hours a week, although there are certain permitted exceptions (please see section entitled 'Special daily and weekly working time limits').
- Working time limits for doctors in training are being phased in gradually (please see section entitled 'Special daily and weekly working time limits').
- Working time includes travelling, where it is part of the job, working lunches and job-related training.
- Working time does not include travelling between home and work, lunch breaks, evening classes or day-release courses.
- The average weekly working time is normally calculated over 17 weeks. This can be longer in certain situations (26 weeks) and it can be extended by agreement (up to 52 weeks) (see page 20).
- Workers can agree to work beyond the 48-hour limit. The agreement must be in writing and signed by the worker. This is generally referred to as an opt-out. It can be for a specified period or an indefinite period. There is no opt-out available from the young workers limits.
- Workers can cancel the opt-out agreement whenever they want, although they must give their employer at least seven days' notice, or longer (up to three months) if this has been agreed.
- The working time limits do not apply if workers can decide how long they work (see page 21).

Employers must check:

- What counts as working time.
- How much time each worker spends working.
- If a worker is working more than an average of 48 hours a week, whether to reduce his or her hours or whether the worker wishes to sign an opt-out from the working time limit.
- What records need to be kept (see page 23).

More detailed information

If you are an employer, you must take all reasonable steps to ensure that workers you employ are not required to work more than an average of 48 hours a week, unless they have signed an opt-out agreement.

Special daily and weekly working time limits:-

Young Workers

Young workers may not ordinarily work more than:

- 8 hours a day
- 40 hours a week

These hours worked cannot be averaged out and there is no opt-out available.

They may work longer hours where this is necessary to either:

- maintain continuity of service or production, or
- respond to a surge in demand for a service or product.

and provided that:

- there is no adult available to perform the task, and
- the training needs of the young worker are not adversely affected.

Young workers who are employed on ships or as part of the armed forces are excluded from the working time limits under the Working Time Regulations.

Doctors in training

From 1 August 2004, doctors in training will be subject to weekly working time limits, which will be phased in as follows:

- 58 hours from 1 August 2004 to 31 July 2007.
- 56 hours from 1 August 2007 to 31 July 2009.
- 48 hours from 1 August 2009.

Their average weekly working time is calculated using a 26-week reference period (see page 6 for information on how the average weekly working time is calculated).

What is 'working time'?

The Working Time Regulations state that working time is when someone is 'working, at his employer's disposal and carrying out his activity or duties'.

This includes:

- Working lunches, such as business lunches.
- When a worker has to travel as part of his or her work, for example a 24-hour mobile repairman or travelling salesman.
- When a worker is undertaking training that is job-related.
- Time spent abroad working if a worker works for an employer who carries on business in Great Britain.

This does not include:

- Routine travel between home and work.
- Rest breaks when no work is done.
- Time spent travelling outside normal working time.
- Training such as non-job-related evening classes or day-release courses.

On 3 October 2000 the European Court of Justice gave judgement in a case concerning the status of 'on-call' time.* The judgement related to doctors employed in primary health care teams though a similar approach may now be taken in other areas. It indicated that 'on-call' time would be working time when a worker is required to be at his place of work. When a worker is permitted to be away from the workplace when 'on-call' and accordingly free to pursue leisure activities, on-call time is not 'working time'.

* Sindicato de Médicos de Asistencia Pública (SIMAP) - v - Conselleria de Sanidad y Consumo de la Generalidad Valenciana, Case C-303/98.

How is the average weekly working time calculated?

The number of hours worked each week should be averaged out over 17 weeks or however long a worker has been working for their employer if this is less than 17 weeks. This period of time is called the 'reference period'.

Workers and employers can agree to calculate the average weekly working time over a period of up to 52 weeks under a workforce or collective agreement. The reference period is also extended to 26 weeks in other circumstances, see page 21 for full details.

- Doctors in training have a 26-week reference period.
- The offshore sector has a 52-week reference period.

The average weekly working time is calculated by dividing the number of hours worked by the number of weeks over which the average working week is being calculated, for example 17.

When calculating the average weekly working time, if the worker is away during the reference period because he or she is taking paid annual leave, maternity, paternity, adoption or parental leave, or is off sick you will need to make up for this time in your calculation. Do this by adding the hours worked during the days which immediately followed the 17-week period – use the same number of days as those when work was missed.

Example 1:

A worker has a standard working week of 40 hours and does overtime of 12 hours a week for the first 10 weeks of the 17-week reference period. No leave is taken during the reference period.

The total hours worked is:

17 weeks of 40 hours and 10 weeks of 12 hours of overtime

$$(17 \times 40) + (10 \times 12) = 800$$

Therefore their average (total hours divided by number of weeks):

$$800 \div 17 = 47.1 \text{ hours a week}$$

The average limit of 48 hours has been complied with.

Example 2:

A worker has a standard working week of 40 hours (8 hours a day) and does overtime of 8 hours a week for the first 12 weeks of the 17-week reference period. 4 days' leave are also taken during the reference period.

The total hours worked in the reference period is:

16 weeks and 1 day (40 hours a week and 8 hours a day) and 12 weeks of 8 hours of overtime

$$(16 \times 40) + (1 \times 8) + (12 \times 8) = 744$$

Add the time worked to compensate for the 4-day leave, taken from the first 4 working days after the reference period. The worker does no overtime, so 4 days of 8 hours ($4 \times 8 = 32$) should be added to the total.

Therefore their average is (total hours divided by number of weeks):

$$(744 + 32) \div 17 = 45.6 \text{ hours per week}$$

The average limit of 48 hours has been complied with.

What if a worker agrees to work longer hours?

An individual worker may agree to work more than 48 hours a week. If so, he or she should sign an opt-out agreement, which they can cancel at any time. The employer and worker can agree how much notice is needed to cancel the agreement, which can be **up to** three months. In the absence of an agreed notice period, the worker needs to give a minimum of seven days' notice of cancellation.

Employers cannot force a worker to sign an opt-out. Any opt-out must be agreed to. Workers cannot be fairly dismissed or subjected to detriment for refusing to sign an opt-out.

Employers must keep a record of who has agreed to work longer hours.

Example of **opt-out agreement**

I (*name*) agree that I may work for more than an average of 48 hours a week. If I change my mind, I will give my employer (*amount of time – up to three months*) notice in writing to end this agreement.

Signed

Dated

When do these rules not apply – see page 20.

What to do if you are not receiving your rights as a worker – see page 23.

What records do employers need to keep – see page 23.

Section 3:

Working at night

- A night worker is someone who normally works at least three hours at night.
- Night time is between 11pm and 6am, although workers and employers may agree to vary this.
- Night workers should not work more than eight hours daily on average, including overtime where it is part of a night worker's normal hours of work.
- Nightly working time is calculated over 17 weeks. This can be longer in some situations.
- A night worker cannot opt-out of the night work limit.
- Young workers should not ordinarily work at night, although there are certain exceptions (please see section on 'Special night work limits for Young Workers' on page 10).

Employers must check:

- Whether they employ people who could be classified as night workers.
- How much working time night workers normally work.
- If night workers normally work more than eight hours a day on average, how they can reduce hours of work or whether any exceptions or flexibilities apply (see page 20).
- Whether a worker does work which may be particularly hazardous.

Mobile Workers

Mobile workers* are excluded from the night work limits. Instead, they are entitled to 'adequate rest'.

'Adequate rest' means that workers have regular rest periods. These should be sufficiently long and continuous to ensure that workers do not injure themselves, fellow workers or others and that they do not damage their health, either in the short term or in the longer term.

More detailed information

What is 'night time'?

Night time is the period between 11pm and 6am, though employers and workers can choose a different period. If they do, it must be at least seven hours long and include the period from midnight to 5am.

Who is a 'night worker'?

You will be a night worker if your daily working time includes at least three hours of night time:

- on most days you work;
- on a proportion of the days you work which is specified in a collective or workforce agreement; or
- often enough for it to be said that you work such hours 'as a normal course'.

* For the purposes of the Working Time Regulations, "mobile worker" means any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road or air.

The words 'as a normal course', means on a regular basis. There has been a Court ruling that a worker who worked at night for one third of his working time was a night worker. Occasional, or *ad hoc*, work at night does not make you a night worker.

Nightly working time should be averaged out over a reference period, which is usually 17 weeks. This period could be longer if agreed in a workforce or collective agreement. Night work limits do not apply in the special circumstances listed on page 20.

If workers work less than 48 hours a week on average, they will not exceed the night work limits.

The average hours worked at night are calculated by dividing the number of normal hours worked in the reference period – e.g. 17 weeks – by the number of days in the period, after the number of rest days which the worker has taken in relation to their entitlement under the regulations has been subtracted.

Normal hours of night work include overtime when it is part of a night worker's normal hours of work.

Example 1:

A night worker normally works four 12-hour shifts each week.

The total number of normal hours of work for a 17-week reference period is:

17 weeks of 4 shifts of 12 hours

$$17 \times (4 \times 12) = 816$$

There are 119 days (17 weeks) and the worker takes 17 weekly rest periods, as entitled to under the regulations.

Therefore the number of days the worker could be asked to work is:

$$119 - 17 = 102$$

To calculate the daily average working time, the total of hours is divided by the number of days a worker could be required to work.

$$816 \div 102 = 8$$

This equals an average of 8 hours a day.

Example 2:

A night worker normally works 5 days of 10 hours followed by 3 days of rest. The cycle starts at the beginning of the reference period (so there are 15 cycles of work). The worker takes 2 weeks' leave and works 6 hours overtime every five weeks. During this reference period, the overtime is worked in the fifth, tenth, and fifteenth weeks. The leave does not affect the calculation of normal hours, but the overtime does.

$$15 \text{ cycles of } 5 \text{ shifts of } 10 \text{ hours} = 15 \times (5 \times 10) = 750 \text{ hours}$$

$$6 \text{ hours overtime} \times 3 = 18 = 768 \text{ hours (including overtime)}$$

There are 119 days (17 weeks) and the worker takes 17 weekly rest periods, as entitled under the regulations. Therefore the number of days the worker could be asked to work is:

$$119 - 17 = 102$$

To calculate the daily average working time, the total of hours is divided by the number of days a worker could be required to work.

$$768 \div 102 = 7.53$$

This equals an average of 7.53 hours a day.

Special hazards

Where a night worker's work involves special hazards or heavy physical or mental strain, there is an absolute limit of eight hours on the worker's working time each day – this is not an average.

Work will involve a special hazard if it is identified:

- as such by agreement between an employer and workers in a collective agreement or workforce agreement; or
- as posing a significant risk by a risk assessment which an employer has conducted under the Management of Health and Safety at Work Regulations 1999.

Special night work limits for Young Workers

Young workers may not ordinarily work at night between 10pm and 6am, or between 11pm and 7am if the contract of employment provides for work after 10pm. However, exceptions apply in particular circumstances in the case of certain kinds of employment, as set out below.

Young workers may work throughout the night if they are employed in:

- Hospitals or similar establishments
- or in any of the following activities:
- Cultural
 - Artistic
 - Sporting
 - Advertising

Young workers may work between 10pm or 11pm to midnight and between 4am to 6am or 7am if they are employed in:

- Agriculture
- Retail trading
- Postal or newspaper deliveries
- A catering business
- A hotel, public house, restaurant, bar or similar establishment
- A bakery

The circumstances in which young workers may work are that the work they are required to do is necessary to either:

- maintain continuity of service or production, or
- respond to a surge in demand for service or product

and:

- there is no adult available to perform the task
- the employer ensures that the training needs of the young worker are not adversely affected
- the young worker is allowed an equivalent period of compensatory rest

Young workers must be adequately supervised where that is necessary for their protection.

Young workers in the film and television industry can expect to be covered by the derogation from the night work limit, on the grounds that night shooting, sometimes pre-scheduled, may be required to 'maintain continuity of production', and by the very nature of the work, there would be no adult available to perform the task. The young worker's training needs should not be adversely affected and he should receive compensatory rest (see page 21).

Young workers who are employed on ships or as part of the armed forces are excluded from the young workers night work provisions of the Working Time Regulations.

When do these rules not apply – see page 20.

What to do if you are not receiving your rights as a worker – see page 23.

What records do employers need to keep – see page 23.



Section 4: Health assessments for night workers

- If you are an employer you must offer night workers a free health assessment before they start working nights and on a regular basis while they are working nights. In many cases it will be appropriate to do this once a year, though employers can offer a health assessment more than once a year if they feel it is necessary.
- Workers do not have to take the opportunity to have a health assessment (but it must be offered by the employer).
- A health assessment can be made up of two parts: a questionnaire and a medical examination. The latter is only necessary if the employer has doubts about the worker's fitness for night work.
- Employers should get help from a suitably qualified health professional when devising and assessing the questionnaire. This could be from a doctor or nurse who understands how night working might affect health.
- The health assessment should take into account the type of work that will be done and the restrictions on the worker's working time under the regulations.
- If a worker suffers from problems which are caused or made worse by night work, the employer should transfer him or her to day work if possible.
- New and expectant mothers should be given special consideration.
- Special consideration should be given to young workers' suitability for night work, taking account of their physique, maturity and experience.

Employers must check:

- How to conduct the health assessment.
- How often health checks should be carried out.
- Whether any workers should be transferred to day work.
- What records need to be kept (see page 23).

More detailed information

To be sure workers are fit for night work, employers must offer a free health assessment to anyone who is about to start working nights and to all night workers on a regular basis.

Health and working at night

Every employer should regularly assess the health and safety risks to which their workers are exposed. They should identify hazards, assess how harmful they could be and take steps to reduce any risks.

It is rare that someone cannot work at night at all because of a medical condition. However, some workers may be more at risk working at night if they suffer from certain medical conditions.

Mobile workers and workers subject to the Road Transport Directive

Although excluded from the night work limit in the Working Time Regulations, mobile workers and workers subject to the Road Transport Directive who are 'night workers' are entitled to health assessments under the Regulations.

How employers should assess workers' health

As an employer it is suggested you take two steps to be sure workers are fit to work nights.

- **Step 1:** You ask workers to fill in a questionnaire which asks specific questions about their health which are relevant to the type of night work they will be doing.
- **Step 2:** If you are not certain they are fit for night work following the questionnaire results, you ask them to have a medical examination.

Health assessments must be offered before someone starts working nights. They should then be repeated on a regular basis afterwards.

Please see page 25 for a sample health questionnaire.

When the questionnaire has been answered by the night worker, it should be checked. Please remember that some people may not want to say they have a medical condition in case it affects their chances to work. If there are any doubts as to whether someone is fit for night work, the employer should ask the worker to have a medical examination.

When asking for a medical examination to be carried out, employers should explain to the doctor or nurse what type of work is involved.

The medical examination may produce two types of information:

- A simple fitness-for-work statement which will be given to the employer.
- Clinical information which is confidential and can only be released to an employer (or any other third party) with the worker's written consent.

What to do if a worker is unfit for night work?

If a qualified health professional advises that a night worker is suffering from health problems caused by or made worse by working at night, the worker has a right to be transferred, if possible, to suitable day work.

When do these rules not apply – see page 20.

What to do if you are not receiving your rights as a worker – see page 23.

What records do employers need to keep – see page 23.

Section 5:

Time off

Employers must check:

- How working time is arranged and whether workers can take the time off they are entitled to.
- Whether any exceptions or flexibilities apply (see page 20).
- The different entitlements for young workers.

Daily Rest

A worker is entitled to a rest period of 11 uninterrupted hours between each working day.

Weekly Rest

A worker is entitled to one whole day off a week.

Days off can be averaged over a two-week period, meaning workers can take two days off a fortnight. Days off are taken in addition to paid annual leave.

Employers must make sure that workers *can* take their rest, but are not required to make sure they *do* take their rest.

For information on when these entitlements may not apply, see page 20.

Mobile workers are excluded from the usual rest break entitlements under the Working Time Regulations. Instead, these workers are entitled to 'adequate rest'.

'Adequate rest' means that workers have regular rest periods. These should be sufficiently long and continuous to ensure

that fatigue or other irregular working patterns do not cause workers to injure themselves, fellow workers or others, and that they do not damage their health, either in the short term or in the longer term.

Special rules for Young Workers

Daily rest

A young worker is entitled to 12 uninterrupted hours in each 24-hour period in which they work. The rest may be interrupted if periods of work are split up over the day or do not last long.

A young worker's entitlement to daily rest can be reduced or excluded in exceptional circumstances only. Where this occurs, the young worker should receive compensatory rest within 3 weeks.

Weekly rest

Young workers are entitled to two days off each week. This cannot be averaged over a two-week period, and should normally be two consecutive days.

If the nature of the job makes it unavoidable, a young worker's weekly time off can be reduced to 36 hours, subject to them receiving compensatory rest (see page 21).

What to do if you are not receiving your rights as a worker – see page 23.

What records do employers need to keep – see page 23.

Section 6:

Rest breaks at work

Employers must check:

- How workers' working time is arranged and whether they are able to take the rest breaks they are entitled to.
- Whether any exceptions or flexibilities apply (see page 20).
- The different rest break periods young workers are entitled to.

If a worker is required to work for more than six hours at a stretch, he or she is entitled to a rest break of 20 minutes.

The break should be taken during the six-hour period and not at the beginning or end of it. The exact time the breaks are taken is up to the employer to decide.

Employers must make sure that workers *can* take their rest, but are not required to make sure they *do* take their rest.

Mobile workers are excluded from the usual rest break entitlements under the Working Time Regulations. Instead, these workers are entitled to 'adequate rest'.

'Adequate rest' means that workers have regular rest periods. These should be sufficiently long and continuous to ensure that fatigue or other irregular working patterns do not cause workers to injure themselves, fellow workers or others, and that they do not damage their health, either in the short term or in the longer term.

For information on when these entitlements may not apply, see page 20.

Special rules for Young Workers

Different rules apply to young workers. ***If a young worker is required to work for more than four and a half hours at a stretch, he or she is entitled to a rest break of 30 minutes.***

If a young worker is working for more than one employer, the time he or she is working for each one should be added together to see if they are entitled to a rest break.

A young worker's entitlement to breaks can be reduced or excluded in exceptional circumstances only. Where this occurs, the young worker should receive compensatory rest within 3 weeks.

What to do if you are not receiving your rights as a worker – see page 23.

What records do employers need to keep – see page 23.

Section 7:

Paid annual leave

- Every worker – whether part-time or full-time – covered by these regulations is entitled to four weeks' paid annual leave. This includes workers who are subject to the Road Transport Directive.
- A week's leave should allow workers to be away from work for a week. It should be the same amount of time as the working week: if a worker does a 5-day week, he or she is entitled to 20 days' leave; if he or she does a 3-day week, the entitlement is 12 days' leave.
- The leave entitlement under the regulations is not additional to bank holidays. There is no statutory right to take bank holidays off. Therefore a worker who is not otherwise paid in respect of bank holidays may take bank holidays as part of his or her annual leave entitlement in order to receive payment for these holidays.
- Workers must give the employer notice that they want to take leave.
- Employers can set the times that workers take their leave, for example for a Christmas shutdown.
- If a worker's employment ends, he or she has a right to be paid for the leave time due and not taken.

Employers must check:

- Who is entitled to annual leave.
- How much leave workers currently receive and whether it is enough.
- Whether workers receive a week's pay for each week of leave.

More detailed information

Workers are entitled to four weeks' paid leave each year.

This entitlement is not in addition to any annual leave given to a worker under an employment contract. One is set off against the other, so that the amount of leave a worker gets is whichever of the two kinds of leave is longer.

Who is entitled to paid annual leave?

The entitlement to paid annual leave, including the right to compensation payments for untaken leave when you leave your job, begins on the first day of employment.

However, the employer can optionally use an accrual system whereby, during the first year of employment, the proportion of the leave which may actually be taken (with the employer's agreement) builds up over the year. The amount of leave which may be taken accrues monthly in advance at the rate of one-twelfth of the annual entitlement each month.

Where this calculation does not result in an exact number of days, the amount of leave which may be taken is rounded up to the next half day. Any rounded up element is deducted from the leave remaining.

For example:

- A full-time worker who is in his or her third month of employment would have built up 5 days' leave. (The annual entitlement of 20 days multiplied by 3/12 equals 5 days).
- A part-timer who works three days a week and is still in his or her first month of employment would be able to take one day's leave. The annual entitlement of 12 days (four weeks times three days a week) multiplied by 1/12 equals one day.
- A full-time worker who is in his or her eighth month of employment would have built up 13.5 days' leave. The annual entitlement of 20 days multiplied by 8/12 equals 13.33 days, which is rounded up to 13.5 days.

Requests to take leave in the first year are subject to the same notice requirements as any other leave: see section below **'Giving notice to take leave'**.

At the end of a period of employment a worker will be able to claim for payment in lieu for any leave outstanding, calculated on a pro rata basis from the first day of the leave year or employment to the last day of employment, irrespective of how long that period may be in the current leave year. In this instance, leave is **not** rounded up to the nearest half day, but is paid on the actual amount due. For example, if a worker had accrued 2.66 days, then they would be paid for 2.66 days and not 3 days.

How 'leave years' work

If you are a worker, you will be entitled to take paid leave, which will be based on your 'leave year'; this will start at a date you agree with your employer. If you do not have an agreement, the leave year will start:

- On 1 October if you started work on or before 1 October 1998. Every leave year will then start on that date.
- On the date you started your job if you started work after 1 October 1998. Again, each leave year will then start on that date.

If you start work part of the way through an existing company leave year, your leave entitlement will be proportionate to the amount of time left during that year.

And if you leave your job part of the way through a leave year, your annual leave entitlement will be proportionate to the amount of the leave year that you have worked.

How to work out holiday pay due to workers who are leaving

The pay due can be worked out using the formula:

$$(A \times B) - C$$

where:

- **A** is the period of leave the worker is entitled to.
- **B** is how much of the worker's leave year has elapsed before they left their job.
- **C** is the amount of leave taken by the worker between the start of the leave year and the date they are leaving.

What is a week's leave?

A week's leave should allow you to be away from work for a week. So it is the same as the length of time you work in a normal week.

Giving notice to take leave

Employers and workers can agree how and when to give notice of when leave is to be taken.

In the absence of an agreement the notice period that a worker must give should be at least twice the period of the leave to be taken. An employer may refuse the worker permission to take leave requested within a period equivalent to the period of the leave. For example, if a worker wants to take a day's leave, he or she would have to give their employer at least two days' notice. If a worker has given the employer two days' notice that they want to take one day's leave, the employer can come back within one day to refuse the leave. This provides employers with flexibility where, for example, a number of other workers have also applied to take the same day off.

Calculating a week's pay

The following section explains how the amount a worker should be paid for their leave entitlement is calculated under the regulations.

For workers paid a fixed wage or salary (fixed hours and pay)

If you are a worker whose normal working hours do not vary, a week's pay is the pay due for the basic hours you are contracted to work. Pay for overtime hours is not included unless it is guaranteed overtime, i.e. required by the contract between you and your employer.

For piece workers or workers on commission (hours constant and pay varies)

If you are a worker whose pay varies with the amount of work done (such as with piece work) or when a week's pay is partly made up of variable bonuses or commission directly related to that week's output, then a week's pay is your average hourly rate multiplied by your normal working hours.

To calculate your hourly rate: divide your weekly pay over the previous 12 weeks by the number of hours you worked during the same period (the pay and hours of non-compulsory overtime is excluded). Any week in which you receive no pay is replaced by the week before the 12 weeks when you were paid, to bring the total to 12.

If you are on commission or performance-related bonuses, 12/13 of any quarterly bonus or 12/52 of any annual bonus is included. Only bonuses specifically related to a week's work should be included; general 'profit-sharing' or other such bonuses are not included.

A week's pay is the total eligible pay (excluding voluntary overtime but including relevant bonuses) over the 12-week period divided by 12.

For shift workers (hours and pay vary in a set pattern)

If you are a shift worker and you work a set pattern but the hours you work and the money you earn each week vary, you can work out your week's pay by finding the average number of hours you work each week and your average hourly rate.

To work out the average number of hours you work each week, add up all the hours you have worked over the past 12 weeks and divide them by 12. If you are a piece worker, you can work out your average hourly rate in the same way; i.e. add up how much you have earned over the past 12 weeks and divide it by the number of hours you have worked. **You should not include voluntary overtime in either of these calculations, but you include shift premia.**

For workers who work irregular hours (hours and pay vary)

If you do not work regular hours – you may be an agency worker who works different hours every week or a sales representative who gets paid commission only – you should average your pay out by adding up all your pay for the past 12 weeks and dividing it by 12. If you did not earn anything during one week, add in the pay from the week before the 12th week to bring the total up to 12.

What to do if you are not receiving your rights as a worker – see page 23.

What records do employers need to keep – see page 23.



Section 8: More about the application of the regulations

This section contains more information on:

- Exceptions to the rules
- Keeping records
- Enforcement

More about exceptions to the rules

There are four classes of exceptions where some of the rules may not apply.

1 Agreements

In general, employers and workers can agree that the night work limits, rights to rest periods and rest breaks may be varied, with the workers receiving 'compensatory rest' (see below). They may also agree to extend the reference period for the working time limits up to 52 weeks.

These agreements can be made by 'collective agreement' (between the employer and an independent trade union) or a 'workforce agreement'. If a worker has any part of their conditions determined by a collective agreement they cannot be subject to a workforce agreement.

A workforce agreement is made with elected representatives of the workforce in most cases (see below). A workforce agreement can apply to the whole workforce or to a group of workers. To be valid, a workforce agreement must:

- be in writing;

- have been circulated in draft to all workers to whom it applies together with the guidance to assist their understanding of it;
- be signed before it comes into effect either;
 - by all the representatives of the members of the workforce or group of workers; or
 - if there are 20 workers or fewer employed by a company, either by all representatives of a workforce or by a majority of the workforce;
- have effect for no more than five years.

2 Special circumstances

The night work limits (including the limit for special hazards), rights to rest periods and rest breaks do not apply where:

- A worker works far away from where he or she lives (this includes offshore work). Or he or she constantly has to work in different places making it difficult to work to a set pattern.
- The work involves security or surveillance to protect property or individuals.
- The job requires round-the-clock staffing as in hospitals, residential institutions, prisons, media production companies, public utilities, and in the case of workers concerned with the carriage of passengers on regular urban transport services or in industries where work cannot be interrupted on technical grounds.

- There are busy peak periods, such as may apply seasonally in agriculture, retail, tourism and postal services.
- An emergency occurs or something unusual and unforeseen happens.
- Where the worker works in rail transport and his activities are intermittent; he spends his time working on board trains; or his activities are linked to transport timetables and to ensuring the continuity and regularity of traffic.

In these cases, (except for the offshore sector) the reference period for the weekly working time limit is extended from 17 to 26 weeks. In addition workers are entitled to 'compensatory rest'.

What is 'compensatory rest'?

Compensatory rest is normally a period of rest the same length as the period of rest, or part of a period of rest, that a worker has missed.

The regulations give all workers a right to 90 hours of rest in a week. This is the total of your entitlement to daily and weekly rest periods. The exceptions allow you to take rest in a different pattern to that set out in the regulations.

The principle is that everyone gets his or her entitlement of 90 hours rest a week on average, although some rest may come slightly later than normal.

3 Unmeasured working time

The working time limits and rest entitlements, apart from those applicable to young workers, do not apply if a worker can decide how long he or she works.

A test, set out in the regulations, states that a worker falls into this category if 'the duration of his working time is not measured or predetermined, or can be determined by the worker himself'.

An employer needs to consider whether a worker passes this test. Workers such as senior managers, who can decide when to do their work, and how long they work, are likely to pass the test. Those without this freedom to choose are not.

4 Partly unmeasured working time

There is an exception for workers who have an element of their working time pre-determined, but otherwise decide how long they actually work.

There is a test. This is that:

'the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do work [in addition to that which is measured or pre-determined] the duration of which is not measured or pre-determined or can be determined by the worker himself'.

Any time spent on such additional work will not count as working time towards the weekly working time or night work limits. Simply put, additional hours which the worker chooses to do without being required to by his employer do not count as working time; therefore, this exception is restricted to those that have the capacity to choose how long they work. The key factor for this exception is worker choice without detriment.

Some or none of a worker's working time may meet the test. Any working time that does meet it will not count towards the 48-hour weekly working time limit or the night work limits.

This exception does not apply to:

- working time which is hourly paid;
- prescribed hours of work;
- situations where the worker works under close supervision;
- any time where a worker is expressly required to work, for example attendance of meetings;
- any time a worker is implicitly required to work, for example because of the loading or requirements of the job or because of possible detriment if the worker refuses.

Who will it apply to?

No one can be forced to work more than an average of 48 hours a week against his or her will; this does *not* remove this protection from *any* worker. It applies to working time – it is not confined to any particular category of worker (with the exception that young workers are excluded), but applies where the specific characteristics (i.e. the nature) of their work meet the test set out above.

Some examples

The examples given are for illustrative purposes and do not provide an exhaustive list.

- Worker **A** is paid by the hour. He occasionally works overtime, for which payment is made. The working time does not fall within the scope of this exception because it is measured.
- Worker **B's** work is closely supervised. **B** is told what to do and when. **B's** working time does not fall within the scope of this exception, as it is not determined by **B**.

- Worker **C's** contract specifies that she is to work 42 hours a week, but she regularly works longer because the volume of work is greater than could be done in the time. The nature of her job means that **C** works to deadlines and has to complete her work. She cannot control the volume of the work. The extra hours do not fall within the scope of this exception because she is required to do the work.
- Worker **D's** contract also requires a working week of 42 hours, but the volume of work coming to him is greater than someone could reasonably be expected to do in that time. However, he has discretion and a clear choice over how much work is done, how his work is done and how to meet his objectives, for example he can prioritise his tasks and so, if he chose to, he could limit his working week. Therefore, to the extent that he can limit them, the time worked beyond that required by his contract falls within the scope of this exception.
- Worker **E**, whose contract requires a working week of 40 hours, works in an environment where colleagues habitually do a 12-hour day even though the work does not always necessitate such hours. Worker **E** works the long hours because she is led to believe that her employer considers it unacceptable to work shorter hours. Therefore, the time does not fall within the scope of this exception because she is required by her employer to work the extra time.
- Worker **F** has a managerial or professional role which allows him to decide how and when he works, chooses what is done, establishes priorities and determines the time and effort that are devoted to tasks. Time worked above **F's** contracted hours will fall within the scope of this exception because he can determine the volume of his work.

- Worker **G** for reasons of personal interest or self-motivation, chooses to go beyond the work that is expected of her, for example spending additional hours studying, thinking and reading about her work in addition to any formal employer-required training. Such time will fall within the scope of this exception because **G** determines the duration of the additional hours of work.
- Worker **H** is a well-paid sales representative who chooses to work beyond the hours necessary to meet her targets for reasons of personal motivation, for example additional commission. These additional hours will fall within the scope of the exception because **H** determines the volume of her work.*
- You need only make occasional checks of workers who do standard hours and who are unlikely to reach the average 48-hour limit. However, you should monitor the hours of workers who appear to be close to the working time limit – and make sure they do not work too many hours.
- You need to keep an up-to-date record of workers who have agreed to work more than 48 hours a week, but you do not need to record how many hours they actually work.
- You must offer regular health assessments to night workers. You should keep a record of: the name of the night worker, when an assessment was offered (or when he or she had the assessment if there was one) and the result of any assessment. Records must be kept for 2 years.

More about keeping records

What records do employers need to keep?

If you are an employer, you need to keep records that show:

- The weekly working time and night work limits are complied with in your business. It is for you to determine what records need to be kept for this purpose. You may be able to use existing records maintained for other purposes, such as pay, or you may need to make new arrangements.
- You do not have to keep a running total of how much time workers work on average each week. How you monitor your workers' hours depends on particular contracts and work patterns.

More about enforcement

How are the regulations enforced?

Enforcement is split between different authorities. The limits and health assessment requirements (for night workers), are enforced by the Health and Safety Executive (HSE), local authority environmental health departments, the Civil Aviation Authority (CAA) and the Vehicle and Operator Services Agency (VOSA). The entitlements to rest and leave are enforced through employment tribunals.

* It should be noted that under National Minimum Wage (NMW) legislation, employers are required to keep records sufficient to show that the NMW has been paid. Therefore, it is unlikely that a worker earning close to the NMW would fall within the exception as their working time should be measured.

Enforcement of employers' obligations

The HSE enforce the limits and obligations to provide health assessments in factories, building sites, mines, farms, fairgrounds, quarries, chemical plants, nuclear installations, offshore installations, railways, schools, hospitals and in relation to mobile workers in road transport other than those referred to below i.e. employed taxi drivers and couriers. Enforcement will be in line with the Health and Safety Commission's (HSC) Enforcement Policy Statement.

Local authority officers ensure the regulations are followed in shops and retailing, offices, hotels and catering, sports, leisure, and consumer services.

CAA enforce the limits and obligations to provide a health assessment for night workers, in relation to a mobile worker who works in general aviation, including the general aviation corporate sector.

VOSA enforce the working time limits and health assessments if a night worker in relation to a mobile worker covered by:

- the United Kingdom domestic driver's hours code, which is set out in Part VI of the Transport Act 1968.

VOSA also enforce the health assessments if a night worker, in relation to a mobile worker to whom one or more of the following applies:

- Council Regulation (EEC) 3820/85, or
- the European Agreement concerning the Work Crews of Vehicles engaged in International Road Transport (AETR) of 1 July 1970.

Entitlements

If you are a worker and you feel you are not receiving your entitlements, we suggest you take the following steps:

- Talk to your manager; you may be able to settle the matter straight away.
- Contact a trade union representative (if you have one). They will be able to advise you what to do.
- If you cannot resolve the matter, you can make a claim at an employment tribunal.

If you want to make a claim under the regulations, the Advisory, Conciliation and Arbitration Service (ACAS) will offer the services of a conciliator to help the employer and worker to reach a settlement without the need for a tribunal hearing. Part of the conciliator's role is to explain how tribunals work and how a tribunal arrives at decisions. This service is free of charge.

If you want to take a complaint to a tribunal, you should do so within three months. The tribunals offer an informal way of ensuring that workers are given their rights. These tribunals generally have three members: a legally qualified chairperson and two other lay members who have experience of dealing with work-related problems.

For contact details for further information on enforcement see page 28.

Section 9: Sample health questionnaire

This health questionnaire is provided for sample purposes only. Make sure you ask a qualified health professional to help you devise this form.

Are you fit to work nights?

The purpose of this questionnaire is to ensure that you are suited to working at night. All the information you provide will be kept confidential.

Type of work/duration of night work

1. Surname
2. First and second name/s
3. Sex M/F
4. Date of birth
5. Permanent address
6. Job title
7. National insurance no.
8. Department /clock no.

Do you suffer from any of the following health conditions? Y/N

- Diabetes
- Heart or circulatory disorders
- Stomach or intestinal disorders
- Any condition which causes difficulties sleeping
- Chronic chest disorders, especially if night-time symptoms are troublesome
- Any medical condition requiring medication to a strict timetable
- Any other health factors that might affect fitness at work

If you have answered 'yes' to the above question, you may be asked to see a doctor or nurse for further assessment.

I, the undersigned, confirm that the above is correct to the best of my knowledge.

Signed Date

Assessment

[this gives an indication of whether the worker is fit to work nights or should see a doctor or nurse for a medical examination]

Signed Date

Section 10: Frequently asked questions

Can my employer make me sign an opt-out agreement?

No. Any opt-out must be agreed to. You cannot be fairly dismissed or subject to a detriment if you refuse to sign it.

What should an employer do about a worker with a second job?

If a worker is known to have a second job, an employer should ask the worker to consider signing an opt-out agreement if the total time worked is in excess of 48 hours a week. If a worker does not wish to sign an opt-out in this situation, the worker should consider reducing their hours to comply with the 48-hour limit.

More generally, employers may wish to make an enquiry of their workforce about any additional employment. However, if a worker does not tell an employer about other employment and the employer has no reason to suspect that the worker has another job, it is extremely unlikely that the employer would be found not to have complied.

As a worker, do I have to have a health assessment?

No. But your employer must still offer you one before you become a night worker and thereafter on a regular basis.

Are workers paid for rest breaks?

This is up to the employer and the worker to agree between them. In many cases this will be determined by the existing contract.

Are bank holidays additional to my annual leave?

No. If you take a bank holiday as paid leave, it will count as one day of your annual leave under the regulations. There is no statutory right to take bank holidays off or receive payment for them, though you may have a right to do so under your contract of employment.

Can I take my leave when I want?

You do not have the right to take leave any time you choose. Your employer must agree your leave times, although he or she must also agree to give you leave at some point during the year.

I have a number of workers working long hours – I am not sure whether they think this is expected of them or whether they are working voluntarily. As an employer, what should I do?

It is suggested that an employer make it clear to workers that they are not expected to work beyond the hours fixed in their terms and conditions. If this is made clear and workers are not required to work beyond these hours, it would be reasonable to assume that, unless workers indicate otherwise, the additional hours are voluntary and fall within the scope of the partly unmeasured working time exception.

I have a member of staff who has not taken her paid annual leave, but is going on maternity leave soon. How will annual leave and maternity leave interact?

Annual leave cannot be taken at the same time as maternity leave. Before an employee goes on maternity leave she may wish to consider taking any outstanding leave for the relevant leave year and perhaps delay the start of her maternity leave. Alternatively, it may, depending upon the length of the maternity leave, be possible for her to take annual leave in the period between the expiration of the maternity leave and the expiration of the leave year. For example, a pregnant employee may start her maternity leave slightly earlier (but not sooner than 11 weeks before the expected week of confinement) and then take her annual leave immediately after her period of maternity leave.

I run a small business; if I want to close my business for a certain length of time, do I have to pay holiday pay to my workers whilst my business is closed?

Employers have the right to set the times that their workers take their annual leave, for example, during a Christmas shutdown. Holiday pay would have to be paid to their workers, providing they had not exhausted their leave entitlement for the current leave year.

I am a HGV driver. What provisions of the Working Time Regulations will apply to me?

You would be entitled to paid annual leave and health assessments if a night worker. Specific provisions on rest entitlements and working time limits for HGV drivers will come into effect when the Road Transport Directive is implemented in March 2005.

I am about to take paid paternity leave. Can I receive my paid annual leave at the same time?

No. You cannot receive paternity leave payment and paid annual leave for the same period of time.

I employ a 16-year old apprentice who works alongside me. I work a 9-hour day. Can my apprentice work the same hours as me?

Young workers (i.e. 16 and 17 year olds) can only work a maximum 8-hour day. However, any breaks that a young worker receives are not classed as working time.

Section 11: Useful names, numbers and addresses

Working time contacts

For help with matters about **time off, rest breaks, paid annual leave and other general employment information**, call the **Advisory, Conciliation and Arbitration Service (ACAS) National Helpline** on: **08457 474747**.

or refer to the ACAS website at: **www.acas.org.uk**

If you need information about making a claim or going to a **tribunal**, please call the **Employment Tribunals Service** enquiry line on: **08457 959775**

or refer to the Employment Tribunals website at: **www.ets.gov.uk**

If you want to find out more about tribunals, read the *Understanding Employment Tribunals* series of booklets which are available from local Employment Service Jobcentres or Citizens Advice Bureaux.

For help with matters to do with the **weekly and night working time limits and health assessments**, you should:

Call the **Health and Safety Executive (HSE) Infoline** on **08701 545500** or contact the Environmental Health Department of your Local Authority, or:

Write to:

HSE Infoline
Caerphilly Business Park
Caerphilly
CF83 3GG

Alternatively, you can email the HSE at: **hseinformationservices@natbrit.com**

or refer to the HSE website at: **www.hse.gov.uk**

For help with matters to do with the **working time limits and health assessments for mobile workers in General Aviation**, including General Aviation Corporate sector, email: **WorkingTimeEnquiries@caa.co.uk**

or write to:

Working Time Advisor
Civil Aviation Authority
Aviation House
Gatwick Airport South
West Sussex
RH6 0YR

For help with matters to do with the **working time limits and health assessments of certain mobile workers (see page 23) in the Road Transport sector**, **VOSA** can be contacted on:

Tel: **0870 6060 440**.

Contacts for other working time legislation

Air transport workers covered by the Aviation Directive

The Aviation Directive covers mobile personnel in civil aviation, excluding Corporate and General Aviation, and will be implemented in the UK by the Department for Transport. Information on the Directive can be obtained from:

Aviation Directorate
Department for Transport
Zone 1/27, Great Minster House
76 Marsham Street
London SW1P 4DR

Tel: **020 7944 5881**

Road transport workers covered by the Road Transport Directive

The Road Transport Directive covers certain mobile workers in road transport and will be implemented in the UK by the Department for Transport. Information on the Directive can be obtained from:

Department for Transport
Road Freight Operations Division
Zone 2/23, Great Minster House
76 Marsham Street
London SW1P 4DR

or

Email: workingtime@dft.gsi.gov.uk

also the Department for Transport website can be found at:

www.dft.gov.uk

Sea transport workers covered by the Seafarers' Directive

The Seafarers' Directive covers seafarers on sea-going ships and has been implemented in the UK through the Merchant Shipping (Hours of Work) Regulations 2002. Information on the Regulations can be obtained from:

Maritime and Coastguard Agency (MCA)

Tel: **023 8032 9100**

Mobile workers in inland waterway and lake transport

Working time legislation for mobile workers in inland waterways and lake transport will be implemented by the Department for Transport through the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003. Information on the legislation can be obtained from:

Maritime and Coastguard Agency (MCA)

Tel: **023 8032 9209**

Sea fishing

Working time legislation for sea fishermen will be implemented by an amendment to the Merchant Shipping Act. Information on the legislation can be obtained from:

Maritime and Coastguard Agency (MCA)

Tel: **023 8032 9100**

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www.dti.gov.uk/er



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