

Whitepaper – Hours of Work, Rest Breaks & Rest Periods

The Working Time Regulations 1998 impose limits on working hours. These regulations apply not only to "employees" but also to any person who undertakes to do or perform personally any work or services for an employer - whatever the nature of the contract or arrangement between them (whether express or implied, verbal or in writing). Accordingly, the regulations apply equally to freelancers who are categorised as workers, casual and seasonal workers, agency temps, work experience trainees, students and others, as they do to employees and apprentices.

The regulations also apply to all non-mobile, i.e. ancillary and support workers in the air, rail, road, sea, inland waterway and lake transport industries, and to some mobile workers, (e.g. young workers), in those industries.

The regulations do not, however, apply to people who are genuinely self-employed nor to people such as company directors or senior executives (with "autonomous decision-making powers") whose working hours are not measured or predetermined or who have a significant degree of control over the number of hours they work each week.

Specifically Excluded Categories

The limitations on working hours imposed by the regulations do not apply:

- To adult workers employed as domestic servants in private households.
- To certain adult mobile road transport workers.
- To seafarers and workers on board a sea-going fishing vessel.
- To workers on board a ship or hovercraft employed by an undertaking that operates services for passengers or goods by inland waterway or lake transport.
- To certain workers in the civil aviation industry.

Meaning of 'Working Time'

Workers will normally be deemed to be at work (and working) when they are at their employer's disposal and carrying out their designated duties and activities. Working time includes:

- Working lunches.
- Time spent travelling to and from a client or customer's premises;
- Attendance at employer-sponsored conferences & job-related training courses.
- Time spent abroad by export managers, sales representatives, engineers and others working for a UK employer.
- "On-call" time during which a worker is required to be at or near his or her place of work or where the worker may be free to pursue leisure activities, however these are subject to restrictions imposed by the employer.

Working time does not include:

- Routine travel to and from a worker's home and place of work.
- Meal and rest breaks when no work is done.
- Travelling time outside normal working hours.
- Attendance at non-job-related evening classes.
- "On-call" time when a worker is away from the workplace and/or free to pursue leisure activities without restrictions imposed by the employer.

Limits on Working Time

Workers aged 18 and over (adult workers) cannot be required to work more than an average of 48 hours a week calculated over a rolling (or static) reference period of 17 consecutive weeks. The reference period may be extended to a maximum of 52 weeks under the terms of a collective or workforce agreement, or to 26 weeks in the case of certain workers including road and construction workers, engineers, security guards, doctors in training, hospital workers, postal workers, refuse collection and incineration workers, agricultural workers and media workers.

Any term in a contract of employment or related agreement that purports to undermine an adult worker's right not to work more than an average of 48 hours a week is void and unenforceable.

Voluntary Opt-Outs

An adult worker may agree to work more than an average of 48 hours a week so long as he or she does so voluntarily and in writing. Any such agreement must remind the worker of his or her right to withdraw from the agreement on giving an agreed period of notice which must not be longer than three months nor less than seven days.

Any collective or workforce agreement, or term in a worker's contract, that attempts to override an individual's right to opt out of the 48-hour week is null and void. An opt-out agreement is a matter for the individual worker. It is not sufficient that a worker's contract refers to a collective agreement that permits an extension of hours beyond the 48-hour limit

A worker cannot be penalised, victimised, disciplined, or subjected to any other detriment, for refusing to sign an agreement opting out of the 48-hour week. Further, an employee cannot be dismissed for refusing to sign such an agreement.

Calculating Average Weekly Hours

The average number of hours worked by a worker in any week is calculated by adding together the hours (including overtime hours) worked by that worker during the period of 17 weeks ending with that week, and by dividing that total number of hours by 17. The same approach must be adopted if the reference period is 26 weeks or an agreed longer period of weeks up to 52 weeks.

The calculation is more complicated if at any time during the reference period, the worker is absent from work on statutory holiday, sick leave or maternity, paternity, adoption or parental leave. These are known as "excluded days". In such a situation, the worker's average weekly hours during the reference period must be calculated using the formula - $(A + B) / C$

A is the aggregate number of hours worked during the reference period;

B is the aggregate number of hours worked during the period that starts immediately after the reference period has expired and ends when the number of days worked equals the number of days that were excluded during the reference period.

C is the number of weeks in the reference period.

Young Workers

Young workers aged 16 and 17 may not be employed for more than 40 hours in any week (including overtime hours) or for more than eight hours on any day. These

limits are absolute and there is no provision for averaging. Young workers cannot elect to opt out of these limits.

An exception is permitted where due to unusual or unforeseeable circumstances, a young worker is required to undertake work that is temporary and which must be performed immediately and there is no adult worker available to perform it. A further exception is permitted where it is necessary for a young worker to work longer hours to maintain continuity of service or production or to respond to a surge in demand for a service or product if no adult worker is available to perform the task.

Meaning of 'Night Work'

"Night work" means work during night time. "Night time", in relation to a worker, means a period the duration of which is not less than seven hours, and which includes the period between midnight and 5 am. A "night worker" is a worker who regularly works at least three hours of his or her daily working time during night time and works 50% or more of their annual hours at night.

Restrictions on Night Work – Workers Aged 18 and Over

Night workers aged 18 and over cannot be required to work more than an average of eight hours in any 24 hour period, calculated over the standard reference period of 17 weeks (or over either of the extended reference periods of 26 or up to 52 weeks). However, any adult worker whose work at night involves special hazards or heavy physical or mental strain must not be required to work for more than eight hours in any period of 24 consecutive hours.

Restrictions on Night Work – Workers Aged 16 and 17

Young workers aged 16 and 17 may not be employed at night during the "restricted period" (i.e. between 10 pm and 6 am or, if their contract requires them to work after 10 pm, between 11 pm and 7 am).

These restrictions do not apply to young workers employed in hospitals or similar establishments (or in connection with cultural, artistic, sporting or advertising activities) if their employment after 10 or 11 pm is necessary to maintain continuity of service or production or to respond to a surge in demand for a service or products on the proviso there are no adult workers available to perform the work.

The restrictions also do not apply to young persons employed in bakeries, catering businesses, hotels, public houses, restaurants, bars or in agriculture, retail trading or postal or newspaper deliveries if their employment after 10 or 11 pm is necessary

to maintain continuity of service or production or to respond to a surge in demand for a service or products on the proviso there are no adult workers available to perform the work. However, there is an absolute prohibition on their employment between midnight and 4.

Young workers in the excluded categories who continue to work after 10 or 11 pm must be supervised by one or more adult workers (if such supervision is necessary for their protection) and must be allowed equivalent periods of compensatory rest if required to continue working during their normal rest breaks or rest periods.

On Call Stand-By Shifts

Recently the Court of Justice of the European Union (CJEU) has ruled that where an employer places considerable restrictions on an employee's free time while doing an on-call shift when he is away from the place of work, the time spent by the employee on-call may be classed as working time. It is important for the employer to establish whether the on call stand-by shift is classed as overtime as this will impact on minimum rest periods as well as the maximum 48-hour working week, unless the employee has opted out.

Rest Breaks and Rest Periods

The Working Time Regulations provide that workers aged 18 and over have the following rights:

- A minimum rest break of 20 minutes in the course of any working day that exceeds six hours;
- A minimum daily rest period of at least 11 consecutive hours in each 24-hour period during which they work for the employer; and
- An uninterrupted weekly rest period of at least 24 hours (this can be replaced by two uninterrupted rest periods of not less than 24 hours in each 14-day period, or one uninterrupted rest period of not less than 48 hours in each 14-day period).

The entitlement to a minimum rest break of 20 minutes is to a single rest break in any working day that exceeds six hours and not to a rest break for every six hours worked. The terms of a collective or workforce agreement can vary the right of adult workers to rest breaks and rest periods, as long the employer undertakes to provide equivalent periods of compensatory rest.

Workers under the age of 18 but who are above compulsory school age have the following rights:

- A minimum break of 30 min during any working day that lasts more than 4.5 hours;

- A minimum daily rest period of at least 12 consecutive hours in each 24-hour period during which they work for the employer (although this rest period may be interrupted if periods of work are split up over the working day or are of short duration); and
- An uninterrupted weekly rest period of at least 48 hours (although this may be interrupted in the case of activities involving periods of work that are split up over the day or are of short duration, and may be reduced where this is justified by technical or organisational reasons, but not to less than 36 consecutive hours).

If, on any day, a young worker is employed by more than one employer, the time that he or she is working for each one should be added together to determine if the young worker is entitled to a rest break. There are no exceptions to the rules prescribing minimum rest breaks and rest periods for adolescent workers apart from a force majeure exception.

In terms of this exception, the right to a minimum daily rest period and rest break does not apply in relation to a young worker where the employer requires him or her to perform work that no adult worker is available to perform on the proviso this is the result of unforeseeable circumstances beyond the employer's control.

Exception for Adult Shift Workers

The rights to a minimum daily and weekly rest period do not apply in relation to:

- A shift worker when he or she changes shift and cannot take a daily or weekly rest period between the end of one shift and the start of the next; or
- A worker engaged in activities involving periods of work split up over the day, as may be the case with, for example, cleaning staff.

Payment

There is no obligation on employers to pay their workers for their rest breaks. Whether or not breaks are paid will depend on the terms of the employment contract.

Special Cases

The provisions on rest breaks and rest periods do not apply in the following circumstances:

- Where the worker's activities are such that his or her place of work and place of residence are distant from one another, including cases where the worker is employed in offshore work, or his or her different places of work are distant from one another.
- Where the worker is engaged in security and surveillance activities requiring a permanent presence so as to protect property or individuals e.g. security workers.

- Where the worker's activities involve the need for continuity of service or production, e.g. hospitals or similar establishments, residential institutions and prisons and the carriage of passengers on regular urban transport services. The exception is dependent on the requirement for continuity in relation to the worker's activities, not those of the employer.
- Where there is a foreseeable surge of activity, as may be the case in relation to, for example, agriculture, tourism and postal services. This would cover seasonal variations, such as the summer months in relation to tourism, and the Christmas period in relation to the postal service.
- Where the worker's activities are affected by unusual and unforeseeable circumstances.

Such workers are entitled to equivalent periods of compensatory rest. If, in exceptional circumstances, an employer finds it impossible to grant compensatory periods of rest, it must make other appropriate provisions to safeguard the health, safety and wellbeing of the worker employees.

Mobile workers who have no fixed place of work, and spend time travelling from home to the first and last customer should have this time considered as working time. The Court added that because the workers are at the employer's disposal for the time of the journeys, they act under their employer's instructions and cannot use that time freely to pursue their own interest. Employers should be aware that this may have an impact on breaks if the working day is extended as a result of travelling time.

Complaints to an Employment Tribunal

Workers who have been denied their statutory rights to minimum rest breaks or rest periods (including their right to equivalent periods of compensatory rest) may complain to an employment tribunal. If a tribunal finds that a complaint is well founded it must make a declaration to that effect, and may make an award of compensation. The amount of any such compensation shall be what the tribunal considers just and equitable in all the circumstances.

**This information is provided for general reference purposes only.
If you have a specific enquiry relating to this topic please contact Wirehouse on:**

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