

**Berg Kaprow Lewis**

Working time regulations

Regulations covering working hours apply to almost every business. Working time regulations aim to improve health and safety by controlling the hours employees work.

This briefing covers:

- The rules governing working hours, rest periods, annual leave and night work under the working time regulations.
- How to keep your paperwork in order.
- How the regulations are enforced.

1 The working week

Central to the working time regulations is the worker's statutory right to a maximum average working week of 48 hours.

1.1 Hours worked are averaged out over a 17-week 'reference period'.

- If the workers agree, the average can be calculated over successive 17-week periods, rather than on a rolling basis.
- For some special cases, the reference period is 26 weeks.
- The reference period may be extended to up to 52 weeks by agreement (eg where work fluctuates over the year).
- The average must be calculated in a way which takes into account periods of leave, sickness and so on. For example, a worker who has been on holiday for half of a 17-week period cannot be forced to work 96 hours a week for the remainder.
- For workers who have been employed for less than 17 weeks, the average is calculated from the time the worker started employment.

There are plans to permit extension of the reference period to 52 weeks, but to limit the number of hours worked in any one week to a maximum of 65.

1.2 Working hours include any time when the worker is at the employer's disposal and is expected to carry out activities for the employer.

- Work-related training is counted as part of the working week.
- Travel time to and from work is not counted as working hours (but travel as part of the employee's duties is).
- Lunch breaks are not working hours (but a working lunch is).
- Being on standby to be called out, if the employee is at the place of work, is counted as working hours. If the employee is on

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call and free to pursue leisure activities, it is not. For transport workers 'periods of availability' known in advance do not count as working time.

There is European agreement to clarify the position of 'on call' workers by a more precise definition of on call time as opposed to working and resting time.

1.3 Workers (at the moment) can **voluntarily agree** to disapply the 48-hour limit.

- There must be a suitable written agreement.
- Workers cannot be forced to agree to disapply the limit.
Pressuring workers to agree to disapply the limit is a breach of the regulations.
- Workers can be offered overtime which takes them over the limit, but cannot be forced to work the overtime.
Workers who regularly work overtime which takes them over the limit must have signed an opt out agreement.
- Employers may consult on and agree a system of annualised hours whereby the

total number of hours worked do not exceed an average of 48 hours per week over a period of one year. This means that employees have to work their annual quota first before becoming entitled to overtime.

- Transport workers are excluded from the opt-out arrangements but may work up to 60 hours in any one week, provided the 48-hour average is not exceeded.

Arrangements for opt-outs are also under review by European legislators.

► Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

2 Night work

2.1 Night workers (who regularly work at least three hours during night time) should not exceed an average of **eight hours** in each 24-hour period, averaged over 17 weeks.

- Night time is a period of at least seven hours which includes the hours from midnight to 5am. Unless otherwise agreed by the employer and workers, night time runs from 11pm to 6am.
- The averaging period can be extended by agreement or in specified circumstances.
- There is no opt out facility for night work regulations.

2.2 Night workers whose work involves **special hazards** or physical or mental strain are limited to eight hours for every 24-hour period (eg workers in the steel industry).

- There are some exemptions in health and public services (eg nursing homes).
- Night workers in the transport industry are limited to ten hours in 24.

2.3 Night workers are entitled to a **health assessment** before being required to perform night work.

- 16-18 year olds should not normally be allowed to work nights.
- Adolescent workers are entitled to a health and capacities assessment, which covers the worker's physical and psychological abilities to do the work.
- Assessments should be repeated regularly.

3 Breaks

3.1 Workers are entitled to a minimum **20-minute rest break** in each shift lasting over six hours.

- In specified circumstances, rest breaks can be accumulated (see box opposite).

Special cases

The maximum working hours apply to almost everyone (including transport and temporary workers). But the regulations allow for some derogations which modify the rules.

A The maximum working week does not apply to workers with **unmeasured working time** or who determine their own hours of work.

- This is a limited exclusion category but typically includes managing executives and family workers.
- The genuinely self-employed are also excluded.

B In specified circumstances, workers can receive **compensatory rest** when the demands of work do not allow the specified breaks. These include:

- Activities involving the need for continuity of service (eg hospital services, utilities).
- Activities where there is a foreseeable surge in demand (eg tourism).
There are plans to introduce a requirement that compensatory rest should be taken within 72 hours.

C The rules do not apply in the case of unexpected and **unpredictable** occurrences which are beyond the employer's control.

- Adolescent workers (over the minimum school leaving age, but under 18) are entitled to at least 30 minutes, if they work longer than four and a half hours.

3.2 Workers are entitled to **11 hours'** **consecutive rest** between shifts each day.

- In specified circumstances, rest periods can be accumulated.
- Adolescents are entitled to 12 hours' consecutive rest each day.

3.3 Workers are entitled to **one day off** each week, or two days off every two weeks.

Paid or unpaid leave?

There are specific occasions where you are obliged to give staff time off.

A You must give **paid** time off to employees who are:

- Carrying out duties or receiving training as a health and safety representative.
- Carrying out duties related to your business as a representative of a recognised trade union or receiving training as a trade union representative.
- Looking for a job or arranging training for future employment while being made redundant.
- Aged between 16 and 18 and are training to NVQ Level 2 or equivalent. If they pass their 18th birthday, you must pay them until the training is complete.
- Carrying out duties or receiving training as an employee representative for consultation over collective redundancies or business transfers.

B You must give time off — but payment is **discretionary** — to employees who are:

- Undertaking public duties, such as acting as a magistrate, a member of a local authority, police authority, health authority or NHS trust, a member of the Volunteer Reserve Service within the Army (TA), Navy, or Royal Marines, or a member of an environmental agency.
- Taking part in recognised trade union activities that are not directly related to your business.

You do not have to release employees for jury service, but you risk prosecution for contempt of court if you choose not to. It is illegal to subject employees to any detriment for undertaking jury service.

- In specified circumstances, days off can be accumulated and given later.
- Adolescents are entitled to two days off per week.

4 Holidays and leave

You are obliged by law to give everyone who works for you paid annual leave — unless they are genuinely self-employed.

4.1 The **legal minimum** is four weeks per year, including bank holidays and public holidays.

- In many industries it is common to give bank and public holidays in addition to the minimum four weeks.
- Bank and public holidays can form part of the statutory leave allowance.
- You cannot replace the holiday entitlement with pay in lieu, except when employment comes to an end.

4.2 Workers will normally be paid for a holiday at the **time** it is taken. Following a European Court of Justice's (ECJ) judgement on 16 March 2006, it is no longer possible to pay 'rolled up holiday pay' (ie weekly pay which includes a payment equal to one week's holiday pay accrual).

- Prior to the ECJ judgement the provision for rolled up holiday pay had to be clearly stated in the employee's contract of employment. You should now renegotiate contracts that involve rolled up holiday pay so that future holidays are paid at the time the leave is taken.
- Care should be taken to follow the correct consultation process to change contracts or you may find yourself with a claim for constructive dismissal.

4.3 Workers are entitled to take leave from the **start** of their employment.

- You cannot impose a 'service requirement'. For example, you cannot make new workers wait six months before they can use any of their holiday entitlement.
- Leave must accrue at one-twelfth of the annual entitlement for each month worked, rounded to the nearest half day.

4.4 **Part-time workers** are also entitled to paid annual leave.

- Their entitlement is calculated pro rata to the number of hours worked. For example, if full-time, five-days-per-week

■ In England and Wales there are eight bank and public holidays a year.

These are the three bank holiday Mondays, Christmas Day, Boxing Day, New Year's Day, Good Friday and Easter Monday.

workers get five weeks' paid holiday a year, part-timers doing the equivalent of two days' work a week will be entitled to two weeks' leave.

- Most fixed-term employees are entitled to no less favourable treatment. The exceptions include apprentices, agency workers, work experience placements of less than one year and people on government training schemes.

4.5 You can exercise some control over the **timing** of employees' holidays.

- You can require them to take some holiday at specified times. For example, if you close your whole factory over one or two weeks of the year.
- You can require them not to take holiday at some specified times eg at or around the time of your industry's trade show.
- You can specify how much holiday can be taken at any one time. You must give appropriate notice ahead of each week you require people to take their holiday.

4.6 You need a system for deciding on **holiday dates**.

- Many businesses work on a 'first come, first served' basis. Others allow senior people, or those with longer service, to choose their dates first.
- Specify that you need reasonable notice on holiday dates — say, one month.
- You might also state that no more than one or two staff in any one department should be off at the same time.

4.7 You need a policy on **holiday rollovers**.

- For example, you might specify that no more than two weeks of unused holiday can be carried into the following year.

5 Paperwork

To avoid problems later on, make sure you have accurate and up-to-date records.

5.1 You may need to keep records to show that you are complying with the requirements of the **working time regulations**.

- If you employ on a contract for a normal nine-to-five environment, you do not need to keep special records. Payslips that quote hours worked are sufficient.
- You should keep records of night work and any related health assessments. Records must be kept for at least two years.

5.2 You must keep a record of workers who have agreed that the **48-hour limit** will not apply to them.

- Agreements should be in writing and signed by the worker.
- Reference to an opt out agreement should be made in the worker's contract but the agreement itself should not be incorporated within the contract and signed separately.
- The agreement can be cancelled at any time, but the worker must give the employer seven days' notice, or longer if agreed (up to three months). Records must be available for inspection by the relevant authorities (see **6**).

6 Enforcement

6.1 The working time limits are enforced by the **health and safety** authorities.

- This is usually the Health and Safety Executive (HSE) for factories and the local authority for offices, shops and so on.

6.2 Entitlements to rest periods, breaks and leave are enforced by **employment tribunals** and the county court system.

6.3 In practice, you are most likely to run into problems if an **employee complains**.

6.4 **Penalties** for breaches of the regulations can be high.

- Breaches of working time limits can lead to improvement notices being issued. Subsequent failure to comply can lead to unlimited fines and imprisonment.
- Employment tribunals can order appropriate compensation payments (limited to £56,800 where there has been a dismissal).

7 Getting help

7.1 For more information on the **working time** regulations, request the free booklet 'Changing patterns of work' from Acas on 08457 47 47 47 or visit www.acas.org.uk.

7.2 For guidance on the **limits** of working time visit www.dti.gov.uk/er/work_time_regs.

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