



# THE SCOTTISH OFFICE

Department of Health

NHS  
MEL (1999) 1

NHS Management Executive  
St. Andrew's House  
Edinburgh EH1 3DG

14<sup>th</sup> January 1999

Dear Colleague

## WORKING TIME REGULATIONS IMPLEMENTATION IN THE NHS IN SCOTLAND

### Summary

1. This circular and the supporting guidance provide a framework to assist with the implementation of the Working Time Regulations in the NHS in Scotland. The supporting guidance provides an explanation of the Regulations, together with working examples of calculations where appropriate. All NHS in Scotland employers are expected to follow the guidance in conjunction with the Central Consultant and Specialists Committee (CCSC) agreement for career grade doctors and the General Whitley Council (GWC) agreements copies of which are included at Chapters 13 and 14 of the supporting guidance.

2. Annex A to this Circular provides a brief summary of the Regulations.

### Action

3. Health Boards and NHS Trusts will need to put mechanisms in place to implement the Working Time Regulations, having regard to the attached guidance and the collective agreements made in the GWC and CCSC.

### Enquiries

4. Employees should direct their personal enquiries to their employing Health Board or Trust.

### Addressees

#### For information:

General Managers, Health Boards

General Manager, Common Services  
Agency

General Manager, State Hospitals  
Board for Scotland

Chief Executive, Health Education  
Board for Scotland

Chief Executives, NHS Trusts

Executive Director, SCPMDE

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5. Employers are asked to make their own arrangements for obtaining any additional copies of this circular.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Naysmith'.

Robin Naysmith  
Assistant Director of Human Resources (Policy)

## **THE WORKING TIME REGULATIONS: BRIEF SUMMARY**

### **Introduction**

1. The Working Time Regulations are an important addition to health and safety protection for workers. Government policy favours maximum flexibility in implementation but believes that all workers should be protected from the risks of working long hours, which could affect their health and safety.
2. The Regulations form a part of the Government's objective to create a flexible labour market underpinned by minimum standards. The Regulations protect the most vulnerable workers against working excessive hours and give them a right to rest breaks, rest periods away from work and paid annual leave.
3. Agreements to implement the Regulations in the NHS have been made under Regulation 23 in the GWC (for those covered by Whitley arrangements) and under Regulation 21 for career grade doctors (not doctors in training) in the CCSC.

### **Purpose of the Regulations**

4. The Regulations implement the EC Working Time Directive (93/104/EC) and the EC Young Workers Directive (94/33/EC) which relates to the working time of adolescents.

### **Coverage**

5. The Regulations apply to "workers" over the minimum school leaving age.
6. The definition of "worker" covers those with a contract of employment plus a wider group who undertake work under other forms of contract (e.g. bank and temporary workers, freelancers etc) but does not cover the self-employed. The Regulations exclude workers involved in the following sectors: transport; sea fishing, other work at sea; and doctors in training. They also exclude certain activities of the armed forces, police and the civil protection services.
7. There are some special provisions that relate to adolescent workers. These are workers who are over the minimum school leaving age but under 18.

### **Worker**

8. For the purposes of the following text and supporting guidance the term "worker" covers both bank staff and all other staff with an employment contract.

### **Weekly Working Hours Limits**

9. The Regulations set a working time limit of an average of 48 hours per week. The standard averaging period is 17 weeks, but can be extended to 26 weeks if the workers are covered by one of the "exceptions" (e.g. under the CCSC agreement) or up to 52 weeks by a collective or workforce agreement.

10. The Management and Staff Sides of the GWC have agreed that the averaging period for those covered by Whitley agreements should be 17 weeks. For career grade doctors covered by the CCSC, negotiations have been conducted under Regulation 21. For those staff, their working time will be averaged over 26 weeks in accordance with the Regulations.

11. Individuals can, by written agreement, choose to disapply the weekly working hours limit but where they choose to do so, employers are required to maintain records of the hours which are worked.

### **Rest Breaks and Rest Periods**

#### **Adult Workers**

12. Adult workers will be entitled to not less than one day off each week, not less than 11 hours consecutive rest per day and a minimum 20 minutes rest break if their working day is longer than 6 hours.

#### **Definition of "On Call"**

13. "Working Time" is defined as when a worker is "working, at his employer's disposal and carrying out his/her activity or duties". For the time to be "working time" all three elements must be satisfied. This means that although an employee who is "on call" can be contractually paid for being "on call", for the purposes of the Regulations, "working time" will not start until they receive a call to go to work. Once the worker receives the call or the employer has contacted them by some other means, "working time" will commence from then on.

14. A distinction should be made between those workers who need to respond immediately and those who are warned in advance (e.g. theatre nurses who may be advised that they will be needed in a couple of hours). In the latter case "working time" should not start until the worker has left his/her residence.

#### **Definition of "Sleep Ins"**

15. Those workers who are required by their employer to be at their place of work and sleeping-in, will be considered to be working as they are at their employer's disposal and carrying out their duties. NHS employers may wish to reconsider their sleep-in arrangements to ensure that workers are sleeping-in only when absolutely necessary.

#### **Bank Staff**

16. The Regulations apply to "workers". Bank staff are considered to be workers and therefore able to benefit from the entitlements provided for in these Regulations.

#### **Measures Relating to Night Time Working**

17. Night workers are subject to a working time limit of an average of 8 hours in each 24-hour period over an averaging period of 17 weeks.

18. Night workers whose work involves special hazards or heavy physical or mental strain are subject to an 8-hour limit for each 24 hour period and this may not be extended.

19. Adult night workers are entitled to a health assessment (an adolescent worker to a health and capacities assessment) before being required to perform night work and periodically thereafter. The health assessment is free to the employee. The cost will have to be met by the employer.

### **Paid Annual Leave**

20. Workers are entitled to three weeks paid annual leave from 1st October 1998 (rising to 4 weeks for any leave year beginning after 23rd November 1999). For workers who have just started work with an employer, annual leave may only be taken after a 13 week qualifying period has been completed, although leave will accrue during this period. There is no statutory entitlement to bank and public holidays. These can be used as annual leave to satisfy the Regulations.

21. Where contractual entitlements are more advantageous than the provisions of the Regulations, a worker may exercise whichever entitlement is the more favourable.

### **Enforcement**

22. The limits (e.g. the weekly working time and night work limits), other night work provisions and record keeping requirements in the Regulations will be enforced by the health and safety enforcing authorities, i.e., the Health and Safety Executive and Local Authorities.

23. The entitlements (e.g. the daily and weekly rest periods, daily rest breaks and the paid annual leave) will be enforced by Employment Tribunals. Further information about Employment Tribunals is available from the Employment Tribunal Service.

### **Right not to Suffer Detriment**

24. The Regulations state that an individual has the right not to suffer detriment when exercising their rights under the Working Time Regulations and can have recourse to make claims through Employment Tribunals.

**SUPPORTING GUIDANCE  
WORKING TIME REGULATIONS: IMPLEMENTATION  
IN THE NHS IN SCOTLAND**

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## **INTRODUCTION**

The Working Time Directive provides for minimum daily and weekly rest periods, annual paid holidays, a limit on the working week to an average of 48 hours and restrictions on night work. It excludes from its scope transport, work at sea (including off shore exploration and production) and doctors in training.

The Directive was adopted in member states on 23 November 1996. Implementing legislation was delayed in the UK following the previous administration's appeal to the European Court of Justice to have the Directive annulled. The appeal was unsuccessful and the Directive became directly effective in the UK on 23 November 1996 for emanations of the State. Following the issue on 6 December 1996 of the DTI consultation document the NHS Executive consulted a cross-section of NHS employers in order to form a consolidated NHS view. This view was sent to DTI on 11 March 1997.

### **Second Public Consultation**

Following the General Election in May 1997, the new government took the opportunity to consider responses to the first consultation document. The NHS Executive was involved in further discussions with DTI colleagues regarding NHS concerns, and the preparation of draft Regulations. DTI issued a public consultation document in April 1998. The NHS Executive after consulting a number of NHS employers, sent a consolidated view to DTI in June 1998. The final Regulations were laid before Parliament on 31 July 1998 and came into force on 1 October 1998.

## CHAPTER ONE (Regulation 2)

### INTERPRETATION

In the Regulations and for the purposes of this guidance:

<b>"the 1996 Act"</b>	means the Employment Rights Act 1996;
<b>"adult worker"</b>	means a worker who has attained the age of 18;
<b>"adolescent worker"</b>	means a worker who has attained the age of 15 but not the age of 18 and who, as respects England and Wales, is over compulsory school age (construed in accordance with section 8 of the Education Act 1996) and, as respects Scotland, is over school age (construed in accordance with section 31 of the Education (Scotland) Act 1980)
<b>"the armed forces"</b>	means any of the naval, military and air forces of the Crown;
<b>"calendar year"</b>	means the period of twelve months beginning with 1st January in any year;
<b>"the civil protection services"</b>	includes the police, fire brigades and ambulance services, customs and immigration officers, the prison service, the coastguard, and lifeboat crew and other voluntary rescue services;
<b>"collective agreement"</b>	means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992, the trade union parties to which are independent trade unions within the meaning of section 5 of that Act;
<b>"day"</b>	means a period of 24 hours beginning at midnight;
<b>"employer"</b>	in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed;
<b>"employment"</b>	in relation to a worker, means employment under his/her contract, and "employed" shall be construed accordingly;

**"night time"**

in relation to a worker, means a period:

- (a) the duration of which is not less than seven hours, and
- (b) which includes the period between midnight and 5 am,

which is determined for the purposes of these Regulations by a relevant agreement, or, in default of such a determination, the period between 11 pm and 6 am;

**"night work"**

means work during night time;

**"night worker"**

means a worker

- (a) who, as a normal course, works at least three hours of his/her daily working time during night time, or
- (b) who is likely, during night time, to work at least such proportion of his/her annual working time as may be specified for the purposes of these Regulations in a collective agreement or a workforce agreement;

and, for the purpose of paragraph (a) of this definition, a person works hours as a normal course (without prejudice to the generality of that expression) if s/he works such hours on the majority of days on which s/he works;

**"relevant agreement"**

in relation to a worker, means a workforce agreement which applies to him/her, any provision of a collective agreement which forms part of a contract between him/her and his/her employer, or any other agreement in writing which is legally enforceable as between the worker and his/her employer;

**"relevant training"**

means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training-

- (a) the immediate provider of which is an education institution or a person whose main business is the provision of training, and
- (b) which is provided on a course run by that institution or person;

**"rest period"**

in relation to a worker, means a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations;

**"shift work"**

means any method of organising work in shifts whereby workers succeed each other at the same workstations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

**"shift worker"**

means any worker whose work schedule is part of shift work;

**"worker"**

means an individual who has entered into or works under (or, where the employment has ceased, worked under)

- (a) a contract of employment; or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly;

**"workforce agreement"**

means an agreement between an employer and workers employed by him/her or their representatives in respect of which the conditions set out in Schedule 1 to the Regulations are satisfied;

**"working time"**

in relation to a worker, means-

- (a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,
- (b) any period during which he is receiving relevant training, and
- (c) any additional period which is to be treated as working time for the purpose of the Regulations under a relevant agreement;

and "work" shall be construed accordingly;

**"Working Time Directive"**

means Council Directive 93/104/EC of 23rd November 1993 concerning certain aspects of the organisation of working time;

**"Young Worker"**

means a worker who has attained the age of 15 but not the age of 18 and who, as respects England and Wales, is over compulsory school age (construed in accordance with section 8 of the Education Act 1996) and, as respects Scotland, is over school age (construed in accordance with section 31 of the Education (Scotland) Act 1980), and

**"Young Workers Directive"**

means Council Directive 94/33/EC of 22nd June 1994 on the protection of young people at work.

## **CHAPTER TWO (Regulation 4)**

### **MAXIMUM WORKING TIME LIMITS**

NHS Employers will need to take all reasonable steps to ensure that their workers do not normally work more than an average of 48 hours (the maximum weekly limit) over a 17 week reference period, unless there are exceptional circumstances. It is the employer's responsibility to ensure that the maximum weekly limit is complied with. However individual workers who wish to work over the maximum weekly limit can do so provided that they agree in writing (see Regulation 5).

- 2.1 The NHS Executive has agreed with the Central Consultant and Specialists Committee (CCSC) that career grade doctors will be covered by Regulation 21 (see 8.5). Agreement has been reached with the General Whitley Council (GWC) that Whitley staff will be covered by Regulation 23 (see 8.6).

#### **Determination of Reference Period**

- 2.2 The standard reference period for averaging the 48 hour limit is 17 weeks. This can however be extended up to 52 weeks by a collective/workforce agreement. It has been agreed in the GWC that the normal reference period should be 17 weeks unless there are exceptional circumstances when it may be extended to 26 weeks. In such a situation it is a matter for local employers and the Staff Side to decide what these circumstances are, by collective agreement.
- 2.3 If a worker has worked for an employer for less than 17 weeks, the reference period is the period worked to that date. For example, when a worker has worked for four weeks their average working time should be calculated as an average over that period. NHS employers need to be careful with new workers with regard to overtime, to ensure that they do not exceed the average 48 hours because of a short busy period.
- 2.4 A separate agreement has been made with CCSC for career grade doctors that they will be covered by Regulation 21 because of their special responsibilities for patient care. This means that the reference period for all career grade doctors covered by the CCSC agreement is 26 weeks.

#### **Calculation of Average Working Time**

- 2.5 The average weekly working time is calculated by dividing the total number of hours worked during the reference period by the number of weeks in the reference period.
- 2.6 The calculation of average weekly working time should not to be affected by periods where a worker is absent due to annual leave entitlement, sick leave and maternity leave. If any of this leave occurs within a reference period, then an equivalent number of days to the period of leave should be added from the next reference period (see example 2 of calculations).

## **On - Call**

- 2.7 The NHS Executive considers that time when a worker is "on call" but otherwise free to pursue their own activities, is not working time.
- 2.8 "Working Time" is defined as when a worker is "working, at his employer's disposal and carrying out his/her activity or duties".
- 2.9 For the time to be "working time" all three elements must be satisfied. This means that although a worker who is "on call" can be contractually paid for being "on call", for the purposes of the Regulations "working time" will not start until they receive a call to go to work. Once the worker receives the call or the employer has contacted them by some other means, "working time" will commence from then on.
- 2.10 This also includes for example doctors who may be called to give advice over the telephone. The period they are on the telephone giving such advice can be counted as "working time".
- 2.11 A distinction should be made between those workers who need to respond immediately and those who are warned in advance (e.g. theatre nurses who may be advised that they will be needed in a couple of hours). In the latter case working time should not start until the worker has left his/her residence.

## **Sleep - Ins**

- 2.12 Those workers who are required by their employer to be at their place of work and sleeping-in, will be considered to be working as they are at their employer's disposal and carrying out their duties. NHS employers may wish to reconsider their sleep-in arrangements to ensure that workers are sleeping-in only when absolutely necessary.

## **Workers with more than one Employer**

- 2.13 Some workers have more than one employer. They may have a permanent contract and work separately on the bank for their own or another employer. In these cases both employers will have to ensure that these workers do not work over the maximum weekly limit.
- 2.14 In cases where workers have more than one employer, all that is required of the employer is to take reasonable steps to ensure that workers are not working beyond the statutory limit. This can be easily done by, including a special box in a time sheet asking whether or not the person has another employer. Provided this question has been asked, the employer has carried out their legal obligations, irrespective of whether or not the worker is willing to answer that question.
- 2.15 If a worker is working over the maximum weekly limit between the two employers, it is recommended that both employers obtain agreement in writing from the worker agreeing to disapply the maximum weekly limit.

- 2.16 Each employer would be responsible for ensuring that they provide adequate rest breaks according to the hours worked for them. Therefore if a worker is entitled to compensatory rest from working with employer A, then employer A should ensure it is given. Employer B should not be penalised.
- 2.17 NHS employers will have to take adequate steps to ensure that patient care is not affected as a result of workers working over the maximum weekly limit.

### Example calculations

The average weekly hours can be calculated by using the equation:

$$A+B / C$$

Where: A is the total number of hours worked during the reference period.

B is the total number of hours worked, immediately after the reference period, during the number of working days equal to the number of days missed due to annual leave entitlement, sick leave and maternity leave; and

C is the number of weeks in the reference period.

- 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. He has no leave of any sort during the reference period.

The total hours worked is:

17 weeks of 40 hours and 10 weeks of 12 hours of overtime  
 $(17 \times 40) + (10 \times 12) = 800$

The average is calculated as follows:

$800 / 17 = 47.1$  hours per week

**Therefore the average limit of 48 hours has been complied with.**

- 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 twelve weeks of the 17 week reference period. He also takes 8 days sick leave during the reference period.

Of the 17 week reference period 15 weeks and 2 days were worked together with 12 weeks of 8 hours overtime. Therefore the total hours worked for the 17 week reference period:

$(15 \times 40) + (2 \times 8) + (12 \times 8) = 712$

## **CHAPTER THREE (Regulation 5)**

### **AGREEING TO WORK OVER THE MAXIMUM WEEKLY WORKING TIME**

The maximum weekly working time is 48 hours averaged over 17 weeks (for those covered by GWC agreements) and 26 weeks (for those covered by CCSC agreements). However, an individual worker can, if they wish, agree with their employer to work over the maximum weekly limit in normal circumstances. If they do so, the agreement must be in writing. The worker can bring the agreement to an end at any time provided that adequate notice (not less than 7 days) is given in writing.

3.1 In normal circumstances workers should not be expected to work over an average of 48 hours per week (the maximum weekly limit) on a regular basis. However, there may be circumstances where a worker might agree to work more than the maximum weekly limit averaged over 17 weeks. In these circumstances, the worker has to agree in writing that the maximum weekly limit does not apply to him/her. The written agreement should:

- identify the worker,
- set out the terms of the agreement - which may apply indefinitely or relate to a specified period,
- specify a period of notice (not less than 7 days and not more than 3 months) under which the worker may terminate the agreement.

To end the agreement, a worker must give written notice to their employer.

The option to agree to work more than the maximum weekly limit is to be reviewed by the European Union by the year 2003.

### **Records Required**

3.2 For every individual who agrees to work more than the maximum weekly limit, the employer is obliged to keep records which:

- (a) identify the worker,
- (b) set out the terms of the agreement which may apply indefinitely or relate to a specified period,
- (c) specify the number of hours worked for the employer during each reference period since the agreement came into effect. (This excludes any period, which ended more than 2 years before the beginning of the applicable reference period.)

3.3 These records must be available for inspection by the Health and Safety Executive officer or any other authority, which is responsible for enforcement.

3.4 There is a requirement to keep records for all workers in some form or other, see Chapter 11.

## Questions & Answers

**Q: Can a worker be forced to agree to work over the maximum weekly limit because of a collective/workforce agreement?**

**A:** No. Only the worker can agree and this must be done in writing.

**Q: How long does an agreement to work more than the maximum weekly limit last?**

**A:** Although the Regulations allow the agreement to be for a specified period or indefinitely, the NHS Executive recommends that agreements should be for specified periods only. Subject to any provision in the agreement for a longer period of notice, the agreement can be terminated by the worker giving not less than 7 days notice to his employer.

**Q: What happens if the worker has more than one employer?**

**A:** In these cases both employers will have to ensure that such workers do not work over the maximum weekly limit. However for those workers who wish to work over the maximum weekly limit, both/all employers will have to obtain a written agreement.

**Q: Can a worker agree verbally to work over the maximum weekly limit?**

**A:** No, the Regulations clearly state that there must be a written agreement between the individual and employer.

## CHAPTER FOUR (Regulation 6)

### NIGHT WORK LIMITS

Night time is a period of at least 7 hours which includes the period from midnight to 5am. A night worker is someone who is classed as working for at least three hours daily working time during night time hours as a "normal course". Employers should ensure that the "normal" hours of their night workers do not exceed an average of 8 hours per 24 hours, over a 17 week period.

- 4.1 The Regulations require employers to take all reasonable steps to ensure that the "normal" hours of their night workers do not exceed an average of 8 hours in 24 hours over a 17 week period. This means that it is still possible to operate 12 hour shifts.
- 4.2 If an employer does have night workers, the following points will need to be considered:
  - what is working time
  - how much working time the night workers normally work
  - for any worker normally working in excess of an average of eight hours a night, how to reduce their working time or see if the flexibilities are relevant
  - if any worker performs work that poses "special hazards", and
  - what records are appropriate.
- 4.3 For the purpose of the limit on night work, it is a night worker's "normal" hours of work which are relevant. "Normal" hours are those which are regularly worked and/or fixed by contract of employment. The calculation is not affected by absence from work (e.g. due to sickness), as a worker's normal hours of work remain the same regardless of the "actual" hours worked.
- 4.4 It is the employer who is responsible for ensuring that no worker who is doing work of heavy physical or mental strain does more than 8 hours a night. The definition of heavy physical work or mental strain should be decided at local level, as part of a risk assessment. This can be done in line with Health and Safety arrangements or by a collective agreement.

## Example Calculations

4.5 Average night hours can be calculated using the following equation:

$$A/B - C$$

Where:

- A is the number of hours during the applicable reference period which are normal working hours for that worker.
- B is the number of days during the applicable reference periods
- C is the number of hours of weekly rest to which a worker is entitled under the Regulations (i.e. 24 hours for seven days) divided by 24. (It should be noted that this is not the total amount of hours that the worker is at rest each week. Only the hours making up the weekly rest period that the worker is entitled to under the Regulations are counted)

A night worker normally works 4 x 12 hour shifts each week. Therefore, the total number of normal hours of work for a 17 week reference period would be :

17 weeks of 4 shifts of 12 hours

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

There are 119 days in the reference period and 17 weekly rest periods of 24 hours to which the worker is entitled. Therefore, C is:

$$17 \times 24/24 = 17$$

The calculation becomes the total of hours divided by the number of days a worker would be required to work:

$$816/119-17$$

This equals an average of 8 hours in each 24 hour period.

## **HEALTH ASSESSMENTS (Regulation 7)**

- 4.6 A night worker is entitled to a free health check at regular intervals. The frequency of repeat assessments will vary between individuals, according to factors such as the type of night work, its duration and the age and health of the individual worker. Repeat assessments are not necessary where the employer believes that the original assessment remains valid. Where appropriate, the employer should be guided by the judgement of a health care professional. As a rule of thumb, it would be prudent for repeat health assessments to be completed annually.
- 4.7 The purpose of a health assessment is to determine whether a worker is fit to carry out the night work to which they are assigned. Under health and safety legislation, an employer should already have conducted an assessment of the health and safety risks to which the worker is exposed. This risk assessment entails the identification of hazards in the workplace and an assessment of the extent to which these might harm the worker followed by appropriate action to control and reduce exposure.
- 4.8 While workplace hazards are unlikely to change with night work, risks arising from them might nonetheless be greater at night, particularly where individuals are suffering from, or susceptible to, certain medical conditions. It is likely that only a very few workers will be permanently unfit to work at night. There are few if any health factors that absolutely rule out night work in every case.
- 4.9 Health assessments in the NHS should be a function for local occupational health services. If there is no access to local occupational health services then the employer can arrange for workers to consult their own GP or can buy in a suitable external occupational health service. The assessments are to be conducted within the context of these regulations. The employer should pay for the assessment and provide paid time off for it.
- 4.10 Two types of information arise from the health assessment. The first may be in the form of a simple fitness-for-work statement, which should be provided by the health care professional to the employer. The second type of information is clinical information, which must remain confidential and can only be released to an employer (or any other third party) with the worker's written consent. Screening questionnaires containing non-clinical information can be stored with an individual's personnel records.

## **TRANSFER OF NIGHT WORKERS TO DAY WORK (Regulation 7)**

- 4.11 A night worker is entitled to be transferred, whenever possible, to other suitable work which is not at night, where a registered medical practitioner has advised the employer that the worker is suffering from health problems connected with the fact that they work at night. Where a worker's fitness for night work becomes affected by a disability, employers have a duty under the Disability Discrimination Act 1995 to

make reasonable adjustments, which might include changes to the worker's hours of work.

- 4.12 Where a worker is identified by a medical practitioner as having health problems related to night work they should be offered, wherever possible, the option to transfer to suitable day work with pay and conditions of service appropriate for day work.

### **Compensatory Rest**

- 4.13 Where the worker is required to work during any time which is supposed to be rest time then the worker must:
- a. be permitted to take "equivalent periods (the same number of hours lost) of compensatory rest": or
  - b. in exceptional cases, where providing equivalent compensatory rest is not possible, be granted rest in order to protect a worker's health and safety.

In practice, exceptional circumstances will be rare, but will also be self-evident. For example, they might arise if a worker left the employment before compensatory rest could be provided.

### **Questions and Answers**

**Q: If a worker works 1 night in 10 on a rota basis, would they be considered a night worker?**

**A:** Yes. A worker may be said to work at night "as a normal course" if they work such hours on a regular basis which results in them working regularly at night time, as opposed to on an infrequent or ad hoc basis.

**Q: Are night workers also entitled to daily and weekly rest periods and daily rest breaks?**

**A:** Yes. The provisions in the Regulations apply to all workers. Night workers have been singled out for special treatment regarding their hours of work because of the potential health & safety risks of working at night.

**Q: What is the health assessment for?**

**A:** It is intended to determine whether the worker is fit to undertake the night work to which he/she is assigned

**Q: Will the health assessment be confidential?**

**A:** Yes, the information shall not be disclosed to any person other than the worker unless he/she has given their consent in writing or unless the assessment is confined to a simple statement that he/she is fit for night work, ie, that it does not contain any personal information.

**Q: What is meant by regular intervals?**

**A:** The frequency of repeat assessments will vary between individuals, according to factors such as the type of night work, its duration and the age and health of the individual worker. As a rule of thumb, it would be prudent for repeat health assessments to be completed annually. Where appropriate, the employer should be guided by the judgement of a health care professional.

**Q: Should the health assessment take account of special hazards in relation to night work?**

**A:** NHS Management Executive believes that the health and safety risk assessment should have already identified any special hazards at night and those should be taken into account in any health assessment those workers whose work involves special hazards.

## **CHAPTER FIVE (Regulation 8)**

### **PATTERN OF WORK**

- 5.1 Where the pattern of work involves uninteruptible or monotonous activities the Regulations state that an employer should ensure that a worker is given adequate rest breaks in order to reduce risks to the health and safety of the worker.
- 5.2 As the Regulations are an integral element of managing health and safety at work and promoting health at work, it is appropriate that employers take account of the general principle of adapting work to the worker.

## **CHAPTER SIX (Regulations 10,11 and 12)**

### **REST PERIODS**

#### **Daily Rest (Regulation 10)**

- 6.1 A worker is entitled to a rest period of not less than 11 consecutive hours between each working day in each 24 hour period during which he/she works for his/her employer.

#### **Weekly Rest (Regulation 11)**

- 6.2 A week starts at midnight between Sunday and Monday.
- 6.3 A worker is entitled to an uninterrupted rest period of not less than 24 hours in each 7 day period. This may be averaged over a 2 week period i.e, a worker is entitled to 2 days rest over a fortnight. These may be successive days.
- 6.4 Daily and weekly rest are separate entitlements which should be taken consecutively, eg, one period of 35 hours consecutive rest per 7 day period. Where this is not possible they should receive equivalent rest over a 14 day period, either as one 70 hour period or two 35 hour periods. Weekly rest is also to be additional to any paid annual leave to which a worker may be entitled to under the Regulations.

#### **Young Workers**

- 6.5 The daily rest period for Young Workers must be not less than 12 hours consecutive rest, unless their activities involve periods of work that are split up over the day. This does not apply to adult workers.
- 6.6 Young workers' weekly rest periods may be interrupted if their activities of work are split up over the day or are of short duration and may be reduced where this is justified by technical or organisational requirements, but NOT to less than 36 consecutive hours.

#### **Compensatory Rest (Regulation 24)**

- 6.7 Where the worker is required to work during any time which is supposed to be rest time (e.g. daily or weekly rest periods) then the worker must:
- a. be permitted to take "equivalent periods (the same number of hours lost) of compensatory rest": or
  - b. in exceptional cases, where providing equivalent compensatory rest is not possible, be granted rest in order to protect a worker's health and safety.

In practice, exceptional circumstances will be rare, but will also be self-evident.

## **Shift Workers (Regulation 22)**

- 6.8 When a shift worker changes shift, it may not be possible for them to take their full rest entitlement before starting the new pattern of work. The Regulations state that in these circumstances, daily and weekly rest entitlements do not apply. However it is the NHSiS Management Executive view that where the full daily and weekly rest period cannot be taken the employer should make arrangements to allow equivalent compensatory rest as soon as possible.

## **Split Shift Workers**

- 6.9 The entitlement to daily and weekly rest also does not apply where a worker's work is split up over the day and so precludes taking 11 hours' continuous rest, for example, cleaning staff who have a morning and evening shift. . However it is the NHSiS Management Executive view that where the full daily and weekly rest period cannot be taken the employer should make arrangements to allow equivalent compensatory rest as soon as possible.

## **IN WORK REST BREAKS (Regulation 12)**

- 6.10 When daily working time is more than 6 hours a worker is entitled to a minimum uninterrupted break of 20 minutes, away from their work station. It should be a break in working time and should not be taken either at the start, or at the end, of a working day and should not overlap with a worker's daily rest. This means where a worker who starts at 8am and has a lunch break at 1pm he/she will not be entitled to an additional 20 minute rest break as he/she has already had a break.
- 6.11 The Regulations do not provide for in work rest breaks to be paid.
- 6.12 Where the worker is required to work during any time which is supposed to be rest time (e.g. during in-work rest breaks) then they are entitled to receive compensatory rest (see Paragraph 6.7).

## **Young Workers**

- 6.13 Where a young workers daily working time is more than four and a half hours he/she must have a break of at least 30 minutes (consecutive if possible) away from the work station if there is one. If on any day the young worker is employed by more than one employer, the number of hours worked in order to qualify for a rest period should be aggregated.

## **ENTITLEMENT UNDER OTHER PROVISIONS (Regulation 17)**

- 6.14 Where a worker is entitled to a rest period, a rest break or annual leave under the Regulations or under a separate provision (eg, a provision of his/her contract of employment), eg a lunch break, he/she may not exercise the two rights separately, but may take advantage of which ever right is the more favourable.

## **CHAPTER SEVEN (Regulation 13)**

### **ENTITLEMENT TO ANNUAL LEAVE**

- 7.1 Workers are entitled to 3 weeks paid annual leave from 1st October 1998 (rising to 4 weeks for any leave year beginning after 23rd November 1999). Where 23rd November 1999 falls within a workers leave year, their entitlement to leave is determined according to how much of the leave year falls either side of 23rd November.
- 7.2 Entitlement to annual leave is not in addition to existing contractual entitlements. Taking contractual paid leave in a particular leave year therefore counts against the workers entitlement under the Regulations. This means that those workers with substantive full time contracts, who work additionally for the bank, will not be entitled to further leave provided they already come within the scope of 7.1. Bank staff will only be entitled to annual leave if they do not receive contractual annual leave from any other employer.
- 7.3 Under the Regulations, leave may be taken in instalments but only in the leave year in respect of which it is due, and may not be replaced by a payment in lieu except where the workers employment is terminated.
- 7.4 Where a worker begins part way through a leave year he/she is entitled to leave proportionate to that period of the leave year remaining. If the period of leave includes a proportion of a week, this shall be calculated in days with any part days being treated as whole days.

#### **Qualifying Period**

- 7.5 A worker must have worked for the employer for 13 consecutive calendar weeks before the entitlement to leave arises. However during this time annual leave is still accrued. Contractually a worker may not be required to adhere to these restrictions.

#### **Public Holidays**

- 7.6 There is no statutory entitlement to bank and public holidays. These are simply days where a worker may receive paid leave under the terms of their contract. As with other contractual leave, this can be used to discharge an employer's responsibility for providing the statutory leave under the Regulations.

#### **Carry Over of Leave**

- 7.7 The Regulations do not allow carry over of statutory leave entitlement to annual leave. However, they do leave scope for individual employers and their workers to negotiate more favourable terms. The GWC currently offers more favourable terms, and so long as the minimum of statutory leave is offered every leave year, annual leave over

and above the four weeks (after October 1999) can be carried over to the following year. Bank and public holidays may be used for those purposes.

### **Compensation**

- 7.8 Where a worker's employment is terminated during the course of his/her leave year and where the proportion of leave taken is less than the proportion of the leave year which has expired, then he/she is entitled to a payment in lieu of leave.
- 7.9 A relevant agreement may provide that where a worker has taken more leave than that to which he/she is entitled at the date of termination, the employer should be compensated.
- 7.10 Compensation may be by way of either a payment, by undertaking additional work or otherwise.

### **Part-Time/Temporary Workers**

- 7.11 Part-time/temporary workers will be entitled to annual leave under the Regulations. A part time worker, working 2 days a week, would have a right to 6 days paid annual leave - ie, 3 weeks at 2 days a week. If a part-time worker's working time is set in terms of hours, then their annual leave might be expressed in terms of hours too. In the case of a worker working 24 hours a week the leave entitlement would become 72 hours - ie three weeks at 24 hours per week.

### **ENTITLEMENT UNDER OTHER PROVISIONS (Regulation 17)**

- 7.12 Where a worker is entitled to a rest period, rest break or annual leave under the Regulations or under a separate provision (eg, a provision of his/her contract), he/she may not exercise the two rights separately but may take advantage of which ever right is the more favourable.

### **DATES ON WHICH LEAVE IS TAKEN (Regulation 15)**

- 7.13 The Regulations provide for a procedure for employers and workers informing each other when leave is, and is not, to be taken. Employers and workers can make agreements as to what notice is required instead of the following procedure set out in the Regulations.

In the absence of an agreement the following applies:

- a) an employer can require a worker to take all or any of the leave to which he/she is entitled at specified times provided that he/she is given prior notice. The notice period should be at least twice the period of leave to be taken.

- b) A worker is required to give notice to the employer of when they wish to take leave. The notice period should be at least twice the period of the leave to be taken. An employer may refuse the worker permission to take leave requested. To do so, they must notify the worker within the period equivalent to the period of leave.

7.14 Any right or obligation mentioned above may be varied or excluded by relevant agreement or contract of employment.

#### **PAYMENT IN RESPECT OF PERIODS OF LEAVE (Regulation 16)**

7.15 A worker is entitled to paid annual leave at the rate of a week's pay in respect of each week of leave.

7.16 A worker is to be paid for their leave according to sections 221-224 of the Employment Rights Act 1996 which determine the amount of a week's pay for the purposes of that Act.

7.17 A normal week's pay is therefore:

- a. in the case of a worker with regular working hours, what they would earn for a normal working week.
- b. in the case of a worker whose normal working hours varies from week to week, set by the average rate of pay they get for their normal working hours multiplied by an average of their normal working hours over the previous 12 weeks.
- c. in the case of a worker with no normal working hours it is the average pay received over the previous 12 weeks.

7.18 A worker's normal working hours are said to be the normal hours fixed by their contract of employment. Overtime hours are not normal working hours unless the contract fixes a minimum number of hours, in which overtime is included, which is more than their notional fixed hours i.e. compulsory overtime.

7.19 It is important to note that the calculation of a week's wages runs contrary to the terms contained in GWC Handbooks for some staff groups. Prior to the Regulations there was no right to annual leave and it was simply left to the contract of employment to set whatever calculation method it wanted in respect of pay for annual leave. The purpose of the Regulations is to ensure the health and safety of workers and provide them with the right to take paid annual leave. This means that in order to take such leave, they should be paid the same amount for that leave as if they had been working. NHS employers therefore will need to make the necessary adjustments when calculating annual leave for those workers who have variable working hours.

- 7.20 The calculation under the Employment Rights Act 1996 need only apply to any statutory leave entitlement. Contractual leave over and above the statutory entitlement may be paid at the contractual rate.
- 7.21 Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this Regulation in respect of that period.

#### **Payment in Lieu on Termination**

- 7.22 Where a worker's entitlement to paid annual leave is paid in lieu because employment terminates during a leave year, a worker has a right to a proportion of their leave entitlement that is equivalent to the proportion of the leave year worked. The sum due in each case can be provided for in a relevant agreement.

## **CHAPTER EIGHT (Regulations 18,20, 21 and 23)**

### **EXCEPTIONS**

#### **Excluded Sectors**

- 8.1 The Regulations provide for various sectors of activity within the workforce to disapply certain Regulations. Of particular interest to the NHS is Regulation 18, which excludes "the activities of doctors in training" from the following Regulations.

4(1)(2)	48 hours average working time
6(1)(2)(7)	restrictions on length of night work
7(1)(6)	health assessment and transfer to day work
8	changes to pattern of work
10(1)	minimum daily rest
11(1)(2)	minimum weekly rest
12(1)	daily rest breaks
13	annual leave
16	payment in respect of annual leave

#### **Doctors in Training**

- 8.2 The scope of Doctors in training include the following:

Pre-Registration House Officers  
Senior House Officers  
Registrars  
Senior Registrars  
Specialist Registrars, and  
Locums employed in the NHS in those grades

### **FURTHER EXCEPTIONS**

- 8.3 The entitlement to certain provisions under the Regulations does not arise in a range of circumstances.

#### **Unmeasured Working Time (Regulation 20)**

- 8.4 Covers workers whose working time is not measured or predetermined or can be determined themselves. Examples of those that may fall into this category are managing executives or other persons with "*autonomous*" decision-taking powers and family workers. Effectively these workers will only be subject to the paid annual leave provisions.

The following Regulations do not apply:

4(1)(2)	48 hours average working time
6(1)(2)(7)	restrictions on length of night work
10(1)	minimum daily rest
11(1)(2)	minimum weekly rest
12(1)	daily rest breaks

The NHSiS Management Executive does not consider that there are any NHS workers whose work may be classified under Regulation 20 as even senior managers within the NHS are accountable for their working practices.

### **Other Special Cases (Regulation 21)**

- 8.5 This flexibility is dependent on workers receiving compensatory rest if they are required to work during any rest period. The specified circumstances include, those where the worker's activities involve the need for continuity of service or production (such as dock work, hospital services, the provision of utilities, civil protection services, agriculture, etc) and where there is a foreseeable surge of activity such as in tourism.

The following Regulations do not apply:

6(1)(2)(7)	restrictions on length of night work
10(1)	minimum daily rest
11(1)(2)	minimum weekly rest
12(1)	daily rest breaks

The NHSiS Management Executive does not consider that specified circumstances under Regulation 21 can be applied across all sectors of the NHS because it applies to the individual workers' activities "involving the need for continuity of service". Regulation 21 has been used as the basis for an agreement with the Central Consultant and Specialists Committee (CCSC) for career grade doctors, see Chapter 13.

### **Collective/Workforce Agreements (Regulation 23)**

- 8.6 Collective agreements can be made with an independent trade union. "Workforce" agreements can be made with workers where there is no recognised trade union and with groups of workers who have no part of their contract covered by a collective agreement. Flexibilities under Regulation 23 are subject to equivalent compensatory rest being provided in cases where a worker is required to work during a rest period.
- 8.7 The NHSiS Management Executive considers that a collective agreement is the most appropriate mechanism under which to implement the Regulations in the NHS. An agreement has been made under Regulation 23 in the GWC for those workers on national terms and conditions see Chapter 14.
- 8.8 A collective/workforce agreement may be used for the following purposes under the Regulations.

1. To add to what is working time. \*

2. To determine dates for the reference periods over which the weekly working time and night work limits are averaged. \*
3. To extend the reference period over which weekly working time is averaged up to 52 weeks.
4. The duration of night time. \*
5. To determine who is a night worker.
6. To vary or exclude the night work limits and referencing periods subject to the night workers receiving compensatory rest.
7. To determine who is a night worker whose work involves heavy mental or physical strain.
8. To vary or exclude an adult's daily rest period (of 11 consecutive hours), subject to the worker receiving compensatory rest.
9. To agree on which day a 7 day period will start for the purposes of averaging an adult worker's weekly rest period. \*
10. To vary or exclude an adult's weekly rest period (of 1 day a week) and the ability to average this over 2 weeks, subject to the worker receiving compensatory rest.
11. To vary or exclude an adult worker's in-work rest break and to agree its duration and terms subject to the worker receiving compensatory rest.
12. The setting of a leave year. \*
13. To decide arrangements for a reckoning up system for the paid annual leave entitlements when a worker leaves part way through a leave year\*

\* These provisions may also be made by Relevant agreement (ie, any agreement that is made between an individual, by collective or workforce agreement).

## **CHAPTER NINE (Regulation 9)**

### **RECORD KEEPING**

#### **Working Time Limits**

- 9.1 An employer will need to keep records that are adequate to show they have complied with the weekly working time limits. It is for the employer to determine what records need to be kept. The employer may be able to use existing records, or need to make new arrangements according to individual circumstances.
- 9.2 It will be fairly apparent in the majority of cases whether a worker is close to working in excess of the maximum weekly limit. It may be sufficient for those workers who keep regular hours to be asked to notify the employer should the hours worked change. The employer could monitor the hours worked by such workers more closely, or adjust the work they are asked to do, to ensure compliance.
- 9.3 An employer is not required to keep a running calculation of workers average weekly working time, though in some cases an employer may wish to monitor an individual worker's hours more closely.
- 9.4 In the case of hourly paid worker's, NHS employers may find keeping a worker's pay records would adequately demonstrate their working hours.
- 9.5 The Regulations state that the records must be kept for 2 years from the date on which they were made.
- 9.6 Where a worker has agreed to work over the average 48 hour weekly working limit, an employer is required to keep records of the number of hours that the worker has worked.

#### **Night Work Limits**

- 9.7 An employer will need to keep records that are adequate to show they have complied with the weekly working time limit. It is for the employer to determine what records need to be kept. The employer may be able to use existing records or need to make new arrangements according to individual circumstance.
- 9.8 The records must be kept for 2 years.

#### **Health Assessments for Night Workers and Other Night Work Provisions**

- 9.9 Employers need to keep records that are adequate to show they have complied with all the night work provisions.
- 9.10 The records must be kept for 2 years from the date on which they were made.

### **Rest Periods**

- 9.11 There is no requirement under the Regulations to keep records regarding rest periods, unless there is compensatory rest to be accounted for. In such instances it would be necessary to keep adequate records to show that the Regulations have been complied with.

### **Annual Leave**

- 9.12 There is no requirement to keep records of annual leave for the purposes of the Regulations. However, employers may wish to set up a mechanism in order to be satisfied that statutory requirements have been adhered to.

### **Availability of Records**

- 9.13 Records kept in accordance with the Regulations should be made available to the appropriate enforcing authorities (see Chapter 10) and also in the interests of good industrial relations, to staff side representatives.

## **CHAPTER TEN (Regulation 28)**

### **ENFORCEMENT**

- 10.1 The following limits will be enforced by the health and safety enforcing authorities i.e. the Health and Safety Executive (HSE) and Local Authority Environmental Health Officers.

- Weekly Working Time Limit
- Night Work Limit
- Health Assessments for Night Workers
- Pattern of Work
- Record Keeping

HSE is responsible for enforcing the working time limits where they apply in hospitals. Local Authority Officers are responsible for retailing, offices, hotels and catering, sports, leisure and consumer services.

- 10.2 The following entitlements will be enforced through the Employment Tribunals. Employment Tribunals provide an informal, accessible means for individuals to assert statutory rights and protection relating to their employment.

- Daily Rest
- Weekly Rest
- Rest Breaks
- Paid Annual Leave

- 10.3 Workers whose entitlements are denied or who suffer detriment as a result of asserting their rights may make a complaint to an Employment Tribunal. However, as a prior step a worker should seek to settle a dispute with their employer by mutual agreement - perhaps through the employer's own grievance or appeals, procedure, where one exists.
- 10.4 In line with normal Tribunal procedure, the complaint must normally be made within 3 months of the act or omission complained of, but this period may be extended if the Tribunal agrees that it was not reasonably practicable to bring the complaint within 3 months.
- 10.5 The Advisory, Conciliation and Arbitration Service (ACAS) has a duty to conciliate in claims under the Regulations. Where a claim is made, an ACAS conciliation officer will be allocated to the case. This officer will explain tribunal procedures, outline the law relating to the case and generally try to assist the parties to reach a settlement without the need for a tribunal hearing. ACAS conciliation is voluntary and free.
- 10.6 Where a complaint is upheld the Tribunal would make a declaration to that effect.

- 10.7 The Tribunal may make an award of compensation by the employer to the worker. If so, the Tribunal will have regard to both the employer's default in refusing to permit the exercise of the worker's entitlement, and any loss sustained by the worker as a consequence of that default.

## **CHAPTER ELEVEN**

### **OTHER NHS ISSUES**

#### **Bank Staff**

11.1 The Working Time Regulations apply to "workers" and it is the NHSiS Management Executive view that bank staff are workers irrespective of the complexities surrounding the nature of their employment relationship.

11.2 This chapter on bank staff covers the following issues:

- \* Paid Annual Leave Entitlement
- \* Record keeping
- \* Workers with more than one employer

#### **Paid Annual Leave**

11.3 It is the NHSiS Management Executive view that:

- a. Permanent staff who are working additional hours on the bank will already be under a contract of employment which entitles them to 4 or more weeks paid annual leave. As these staff are already entitled to annual leave, the requirement of the Regulations have been met and therefore no additional leave should be accrued whilst working on the bank.
- b. Staff who work solely on the bank could accrue their annual leave on pro rata basis. This may be calculated for example on a quarterly basis, in arrears, based on the hours worked.

#### **Qualifying Period**

11.4 Under the Regulations, a worker must have been employed by the employer for 13 calendar weeks before the entitlement to annual leave arises, although annual leave does accrue during this period. For the purposes of the qualifying period, any week in which the worker has an employment relationship with the employer, during a whole week or part week, will count towards the qualifying period. A break in the qualifying period would be where an employment relationship was broken for a period of at least a week.

11.5 For example, a worker who only works for a day or two each week would still become entitled to take paid annual leave at any time after the first 13 weeks of their relationship. After the qualifying period, a worker would have right to the full entitlement (pro rata if they were part-time), subject to the provisions relating to termination of employment.

## **Records**

11.6 Although bank staff conduct their work in unique circumstances it is imperative that the same record keeping practices are followed as those for permanent staff.

11.7 The areas for record keeping are listed below:

- \* hours worked under your employment
- \* hours worked for another employer
- \* a written agreement to work in excess of the average 48 hour limit (if applicable)
- \* health assessment details in cases of night workers
- \* compensatory rest accrued (if applicable)

## **Dual Employers**

11.8 As many NHS bank staff have a substantive contract with a Trust for whom they also work extra shifts on the bank at their own or another hospital, each employer must take reasonable steps to establish,

- a) whether their staff are working for another employer and
- b) whether they are working over the average of 48 hours.

This duty could easily be discharged by including a special box on any time sheet asking such questions.

11.9 By asking these questions the employer will have carried out their obligations required under legislation. Bank staff who work over the maximum weekly limit, if they wish to continue to do so, should sign a written agreement with the employers concerned, to this effect.

11.10 Each employer would be responsible for ensuring that they provide adequate rest breaks according to the hours worked for them. Therefore if there is entitlement to compensatory rest from working with employer A, then employer A should ensure it is given. Employer B should not be penalised.

## **Calculation of Annual Leave for Bank Staff**

11.11 It is the NHSiS Management Executive view that a sensible approach to this complicated administrative task would be to calculate annual leave on a quarterly basis, in arrears, on an hourly basis. This is only a suggested approach as the law is not yet certain. NHS employers must be aware that the leave entitlement is on an annual basis and not quarterly. Although the entitlement could be calculated provisionally on a quarterly basis, an annual calculation must also be made to ensure that the overall entitlement is accurate.

**Example:**

to accrue 3 weeks' annual leave over a year means  
3 weeks' leave: 49 weeks worked, therefore  
3 hours' leave: 49 hours worked  
1 hours leave: 16.333 hours = 1 hours leave per 16 hours worked.

When the leave entitlement becomes 4 weeks, the calculation would be as follows:

4 weeks leave: 48 weeks worked  
4 hours leave: 48 hours worked  
1 hours leave: 12 hours worked

**Agency Staff**

- 11.12 Agency staff will be covered under the scope of the Regulations and have a right to all the health and safety entitlements provided for. However, the responsibility for these staff is most likely to lie with the Agency.
- 11.13 NHS employers will wish to satisfy themselves that such provisions are adequately provided for in any contract to supply agency staff. Although the Agency will be recognised as the employer under the Regulations, it remains the responsibility of the NHS employer to comply with requirement for in work rest breaks.

## CHAPTER TWELVE

### AMBULANCE SERVICES

- 12.1 Regulation 18(c) states that certain provisions of the Regulations do not apply in relation to a worker:

"where characteristics peculiar to certain specified services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations".

- 12.2 The definition of civil protection services in Regulation 2 includes ambulance services.
- 12.3 It is not clear, however, to what extent the ambulance service as a whole is to be excluded. The use of the words "characteristics peculiar to specific activities.... inevitably conflict with the provisions..." in Regulation 18 suggest that not all workers will come within the exclusion.
- 12.4 It is the NHSiS Management Executive view that in those circumstances where specific activities of ambulance workers conflict with the provisions of the Regulations (for example in the event of a major incident) ambulance service employers are expected to apply the principles of the Regulations as far as possible.

## CHAPTER THIRTEEN

### AGREEMENT WITH THE CCSC FOR CAREER GRADE DOCTORS –

### THE WORKING TIME DIRECTIVE

### IMPLEMENTATION OF THE WORKING TIME REGULATIONS

#### Introduction

1. The Working Time Directive Regulations came into force on 1 October 1998. This health and safety legislation has the potential to affect significantly the way care is delivered in the NHS. To ensure that continuity of service and established professional working patterns are maintained, the Joint Negotiating Committee (Seniors) has reached agreement to modify the application of the Directive, as allowed by Regulation 21 of the Working Time Regulations 1998. **This agreement therefore applies to all career grade doctors on national terms and conditions of service.**
2. If the Directive were to be applied as written, and not modified by the NHS Executive and the CCSC, career grade doctors\* would be entitled, irrespective of the nature of their contract - national terms and conditions or local terms and conditions - to the following limits in hours worked and specified entitlements:
  - an average of 48 hours per week, including the calculation of hours worked whilst on-call (to be calculated over a reference period of 17 weeks)
  - a limit of 8 hours worked in every 24 hours period for night work
  - a weekly uninterrupted rest period of 24 hours. This would mean that doctors would not be available to be recalled to the hospital
  - one uninterrupted rest period of not less than 48 hours in each 14 day period. This would mean that doctors would be unavailable to be contacted by the hospital during this period
  - an entitlement to 11 hours consecutive rest in each 24 hour period
  - an entitlement to a minimum 20 minutes rest break where the working day is longer than 6 hours.

*\*consultants, associate specialists, staff grades, clinical assistant, hospital practitioners and those employed directly by the NHS as locum doctors in these grades and any other doctor employed in NHS Hospitals (excluding doctors in junior grades).*

## **Regulation 21**

3. Regulation 21 provides that, subject to regulation 24 (compensatory rest), regulations 6(1),(2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply. These regulations are outlined in Annex A.
4. This means that the regulations relating to night working, daily rest, weekly rest and breaks at work do not apply to career grade hospital doctors. However, under Regulation 21, they will be able to accrue compensatory rest for hours worked during rest breaks. While career grade doctors will remain protected by the 48 hour weekly limit on hours, the application of Regulation 21 will enable career grade doctors to continue to carry out their duties flexibly and professionally ensuring that they are able to maintain continuity of service.
5. There is a general responsibility for employers and employees under health and safety law to protect as far as is practicable the health and safety at work of all employees. Control of working hours is an integral element of managing health and safety at work and promoting health at work. It is appropriate, therefore, that health service employers when organising work should take account, wherever possible, of the general principle of adapting work to the worker.

## **Exclusions**

6. Doctors and dentists in training (pre-registration house officers, house officers, senior house officers, registrars, senior registrars, specialist registrars) and those acting as locum tenens in the training grades, are excluded from the provisions of the Working Time Directive and, therefore, from this agreement.
7. A separate agreement has been reached for non-medical staff covered by the General Whitley arrangements.

## **Protection**

8. Doctors should suffer no detriment because they have exercised any of their entitlements under the Regulations. The provisions of the Working Time Regulations are not maximum standards. Conditions currently in place which are more favourable to doctors should not be changed to a lower standard simply to comply with the minimum laid down in the Regulations. The Regulations protect employees against detriment imposed by the employer on account of any refusal to exceed any limit on working time applicable under the Regulations. An employee would have the right to pursue a claim that they had been subjected to a detriment through an Employment Tribunal. See Chapter 10 of the *Working Time Regulations: Implementation in the NHS in Scotland*.

## Reference periods

9. Under the Directive employees should not be required to work more than 48 hours per seven day period calculated over an averaging period of 26 weeks (in accordance with Regulation 21).
10. The averaging reference period (as in paragraph 24) is the 26 weeks following the application of the Working Time Regulations on 1 October 1998 and each 26 week period thereafter. Alternatively, it begins when doctors start their employment or, if they have previously opted to work more than 48 hours (see paragraph 24) when the formal agreement to opt out terminates.

## Working Time

11. In assessing weekly working the following factors should be taken into account:
  - doctors' normal contractual commitments as outlined in their job plans;
  - additional duties, for example, management and other non-clinical duties, performed as a result of the needs of the service;
  - work undertaken while doctors are on-call;
  - where doctors are not formally on-call but have been contacted by the hospital.

See Chapter 1 of the *Working Time Regulations: Implementation in the NHS in Scotland* for the legal definition of working time.

## On-call

12. Doctors who have to be on-call and so are available to work if called upon will not be regarded to be working unless they are required to undertake a work-related activity. Staff on-call but otherwise free to pursue time as their own will not be regarded as working unless and until they are actually contacted by the hospital.
13. Working time should be assessed on the basis that work begins when the individual is called and begins the work-related activity, for example, giving advice over the telephone or visiting a patient. For the purpose of calculating time worked on-call, travelling time is included in working time. The calculation of working time ends when the task is complete, for example, when the doctor returns home, or begins another activity at the end of a work-related telephone call.

## Resident On-Call

14. Employers should consider carefully whether the needs of the service require a career grade doctor to be compulsorily resident on-call.

15. Where career grade doctors are compulsorily resident on-call, time spent in residence is to be regarded as work for the purposes of this agreement.

### **Voluntarily resident on-call**

16. There may be occasions when, in the interests of patient care, a senior hospital doctor may need to be resident on-call on a voluntary basis (that is, where there is no contractual requirement). Such residence falls within the provisions of paragraph 14 and 15 and time spent in residence should be regarded as work. In all other circumstances, where career grade doctors are voluntarily resident on-call, working time should be assessed on the basis that work begins when the individual is called and begins a work-related activity.
17. A local assessment may need to be made by the clinical director to decide whether residence in hospital is clinically necessary or merely personally convenient. The medical director should be consulted where there is a dispute. Where doctors are required to be resident due to clinical necessity they should be regarded as falling within the same provisions (see paragraph 15 above) as doctors who are compulsorily resident.

### **Compensatory rest periods**

18. While agreement under Regulation 21 (paragraph 3) excludes the application of the regulations relating to night working and daily rest, weekly rest and breaks at work it does so on the basis that, where a doctor is required to work during a rest period, an equivalent period of compensatory rest will be provided.
19. Compensatory rest should be available to doctors within a reasonable period. A system should be developed at a local level to ensure that compensatory rest is available as soon as is practicable.
20. Work patterns and workloads in all hospital specialties are broadly predictable. Employers should be able to assess the extent to which the minimum rest entitlement is not being met. From this information it should be possible to plan levels of compensatory rest required in particular clinical departments or directorates without the need to monitor individual doctor's hours. Management should work with the LNC to make sure all departments and units in a hospital have appropriate arrangements in place as soon as possible.

### **Monitoring and Records**

21. Employers should work with doctors locally to develop effective processes to assess working hours. As noted in paragraph 20 this will be most effective if the working hours and on-call commitments of doctors who can sensibly be grouped together, because their working patterns are similar, can be considered as a whole. The purpose of such monitoring is first to allow employers to act where they are in breach of the Regulations and, second, to allow proper planning of compensatory rest. JNC(S) will

establish a monitoring group which will discuss any problems arising from these arrangements.

22. Employers need only monitor the hours worked of individual doctors where there is doubt whether the hours of work or rest entitlements of a doctor depart significantly from the general compliance level of the groups of doctors monitored by the employer.
23. Records of the agreed monitoring processes and the results of that monitoring for groups of doctors (as in paragraph 21) should be kept.

#### **Individual option to work more than 48 hours a week**

24. Individuals may choose to agree to work more than the 48 hours average weekly limit. A decision to exercise this option must be:
  - individual
  - voluntary
  - and, pressure must not be placed on an individual to take this option.
25. In order for this agreement to apply, the employer must:
  - maintain a record of which doctors have made this type of agreement,
  - what terms the doctor has agreed to (such as whether it will last indefinitely or if it is for a specific period)
  - specify the numbers of hours worked for the employer during each reference period since the agreement came into effect.

These records must be made available to the Health and Safety Executive and to the BMA locally. Chapter 3 of - *Working Time Regulations: Implementation in the NHS in Scotland* refers.

#### **Working for more than one NHS employer**

26. Where a doctor holds contracts of employment with more than one NHS employer, the Regulations and this agreement apply across all NHS posts. The NHS employers concerned should act in co-operation to ensure compliance. However, lead responsibility will rest with the employer with whom the individual holds the greater contractual commitment.

#### **Clinical academics and honorary contract holders**

27. Some doctors are employed by, for example, universities or research foundations but also hold honorary contracts to facilitate clinical work or research in the NHS. These doctors are, at present, covered by the Working Time Regulations without any derogation - that is, this collective agreement does not apply to them. To ensure that an appropriate balance of hours is maintained between academic and clinical work, NHS employers should liaise with these other employers. Responsibility for ensuring

that Working Time Regulations are complied with, however, rests with the principal employing body. NHS employers will, however, need to be alert to the position and to ensure that the hours spent in NHS hospitals are properly monitored and the entitlements under the Regulations, for example, to rest period and rest breaks, applied as necessary.

### **Health assessments**

28. Any doctors who meet, or who are about to take up work which means they would meet, the definition of a night worker under the Regulations are entitled to a free health assessment as specified under regulation 7 of the Directive. Chapter 4 of *Working Time Regulations: Implementation in the NHS in Scotland* refers. This means a health assessment must be available without cost to doctor who should not suffer any loss of pay or incur other expenses because of undergoing the assessment. The purpose of the assessment is to decide whether doctors are fit to undertake the night work to which they have been assigned.
29. No other provisions of the Regulations relating to night work apply under this agreement.

### **Locums in the career grades**

30. Where locum doctors are directly employed by a locum agency it will be the responsibility of the agency to ensure compliance with the Working Time Directive.
31. Where trusts employ locum career grade doctors either directly or indirectly they will be responsible for ensuring that the provisions of this agreement are applied.
32. Whether locums doctors are employed directly by an agency or directly by the NHS we would expect trusts to remain within the spirit of this agreement.
33. Where the locum appointment is for the short-term only, the reference period shall reflect the entire period of employment. For example, if the appointment is for one week, the reference period shall be for one week, and there will be a strict cap on the 48 hours worked. All other conditions remain as for substantive posts.

### **Career grade doctors employed on NHS Trust contracts**

34. We recommend strongly that the provisions of this agreement, including the monitoring arrangements, should be applied by NHS employers locally to all career grade doctors, whether or not they are employed on national terms and conditions of service.

**REGULATION 21**

Regulation 21 provides that, subject to regulation 24 (compensatory rest), the following regulations do not apply:

**Night Work**

6. (1) A night worker's normal hours of work in any reference period which is applicable in his case shall not exceed an average of eight hours for each 24 hours.
- (2) An employer shall take all reasonable steps , in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each night worker employed by him.
- (7) An employer shall ensure that no night worker employed by him whose work involves special hazards or heavy physical or mental strain works for more than eight hours in any 24-hour period during which the night worker performs night work.

**Daily Rest**

10. (1) An adult worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.

**Weekly rest period**

11. (1) Subject to paragraph (2), an adult worker is entitled to uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.
- (2) If his employer so determines an adult worker shall be entitled to either -
  - (a) two uninterrupted rest periods each of not less than 24 hours in each 14 - day period during which he works for his employer; or
  - (b) one interrupted rest period of not less than 48 hours in each such 14-day period, in place of the entitlement provided for in paragraph (1).

**Rest breaks**

12. (1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.

## **CHAPTER FOURTEEN**

### **AGREEMENT REACHED WITH THE GENERAL WHITLEY COUNCIL**

The GWC agreement is an example of a collective agreement. NHS employers may wish to consider this as a model for staff on local terms and conditions.

### **SECTION 44 OF GWC HANDBOOK**

#### **IMPLEMENTATION OF THE WORKING TIME REGULATIONS**

1. The GWC has reached agreement in accordance with Regulation 23 of the Working Time Regulations 1998 in relation to workers within the purview of the Whitley Councils.
2. There is a general responsibility for employers and employees under health and safety law to protect as far as is practicable the health and safety at work of all employees. Control on working hours should be regarded as an integral element of managing health and safety at work and promoting health at work. It is therefore appropriate that health service employers, when organising work, should take account of the general principle of adapting work to the worker.
3. In reaching local arrangements to implement this Agreement, employers or employees are expected to ensure that no arrangements are reached which discriminate against members of staff with family or other carer responsibilities.

#### **Exceptions**

4. Doctors in training are excluded from the provisions of this agreement. Arrangements for career grade doctors are the subject of a separate agreement.
5. Regulation 18 of the Working Time Regulations states:

"Regulations 4(1) and (2), 6(1), (2) and (7), 7(1), and (6), 8, 10(1), 11(1) and (2), 12(1), 13 and 16 do not apply- .....

(c) where characteristics peculiar to certain specified services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with provisions of these Regulations."

Regulation 2 cites ambulance services within the definition of civil protection services. In the case of employees unable to benefit from the protection of the Working Time Regulations, Ambulance services employers are expected to apply the principles of the Regulations and this Agreement as far as the exigencies of the service permit.

## **Protection**

6. Employees must suffer no detriment because they have exercised any of their entitlements under the Regulations. The provisions of the Working Time Regulations are not maximum standards and conditions which are currently in place and more favourable to staff should not be worsened.

## **Records**

7. Employers must keep records, which will be available to locally recognised unions, which are adequate to ensure that the limits specified in paragraphs 8 (maximum working weekly time), 14 (rest breaks), 16 (daily rest), 18 (weekly rest periods), 19 (night work) are complied with and that where there is an entitlement to compensatory rest this is provided for.

## **Maximum Weekly Working Time**

8. Working time is any time when an employee is "working, at his employer's disposal and carrying out activities or duties". For time to be classed as working time all three elements must be satisfied. Such time may or may not, happen to coincide with the time for which a worker receives pay or with the time during which he/she may be required to work under a contract of employment. Working time will include time taken for training purposes, civic and public duties, health and safety and trades union duties.
9. Employees will normally not be expected to work more than 48 hours per each seven day period calculated over an averaging period of 17 weeks. In exceptional circumstances for those health professionals involved in the need for continuous care related to reception, treatment or care of patients, the reference period may be extended by agreement with locally recognised unions to a maximum of 26 weeks.
10. Unless it is agreed with locally recognised unions to the contrary the averaging reference period (as per paragraph 8) is the 17 weeks immediately preceding each day in the course of a worker's employment.
11. Working time will be calculated exclusive of meal breaks except where individuals are required to work during meals in which case such time should be counted as working time.

## **Individual Option to Work More Than 48 Hours per Week**

12. Individuals may choose to agree to work more than the 48 hours average weekly limit if they agree with their employer in writing. A decision to exercise this option is an individual, voluntary one and no pressure should be placed on an employee to take this option. Such an individual agreement may either relate to a specified period or apply indefinitely. To end any agreement a worker must give written notice to his/her employer. This can take the form of a previously specified notice period of up to three months written in any agreement or if no notice period is specified only seven

days notice would be required. Records of such agreements must be kept and be made available to locally recognised unions.

### **Staff "On Call"**

13. Staff who have to be "on -call", (being called in to work from outside the premises), and so are available to work if called upon, will be regarded as working from when they are required to undertake any work related activity. Where staff are "on call" but otherwise free to pursue time as their own this will not count towards working time. This method of calculating working time will not affect "on-call" payments (see also para 8) .
14. Where staff are required to "sleep in" on NHS premises for the duration of a specified period, they are not free to pursue their time as their own and so are regarded as working for the purposes of this agreement. Local agreements should be made for compensatory rest taking account of intensity of work.

### **Rest Breaks**

15. Where the working day is longer than six hours, all staff are entitled to take a break of at least 20 minutes. Rest breaks must be taken during the period of work and should not be taken either at the start or the end of a period of working time. Employees should be able to take this rest break away from their work station. In exceptional circumstances and by agreement with the worker, where a rest break cannot be taken the unused entitlement should be claimed as a period of equivalent compensatory rest. Line managers should ensure that provision is made to allow compensatory rest to be taken, this should normally be within two weeks. Existing local arrangements which already provide for breaks of more than 20 minutes (eg lunch breaks) will meet the requirements of this provision and no further action will be needed.
16. In circumstances where work is repetitive, continuous or requiring exceptional concentration employers must ensure the provision of adequate rest breaks as an integral part of their duty to protect health and safety of their employee. In such circumstances the advice of local Occupational Health Services should be sought.

### **Minimum Daily Rest Periods**

17. Employees should normally have a rest period of not less than 11 hours in each 24 hour period. In exceptional circumstances where this is not practicable because of the contingencies of the service daily rest may be less than 11 hours. In these circumstances records should be kept by the employer which will be available to locally recognised unions. Local arrangements should be agreed to ensure that a period of equivalent compensatory rest is provided. Compensatory rest should be provided within a reasonable time from when the entitlement to rest was modified usually within two weeks. Any proposed regular amendment to the minimum daily rest period must be agreed with locally recognised unions. It is recognised that in some emergency situations compensatory rest may not always be possible.

18. Where full daily rest can not be taken because a worker is changing shifts the employer should make arrangements to allow equivalent compensatory rest as soon as is practicable.

### **Weekly Rest Periods**

19. All employees should receive an uninterrupted weekly rest period of 35 hours (including the 11 hours of daily rest) in each seven day period for which they work for their employer. Where this is not possible they should receive equivalent rest over a 14 day period, either as one 70 hour period or two 35 hour periods.

### **Night Work**

20. Night time is a period of at least 7 hours which includes the period from midnight to 5 am. A night worker is someone who is classed as working for at least three hours daily working time during night time hours as a "normal course". Employers should ensure that the "normal" hours of their night workers does not exceed an average of 8 hours over a seventeen week period.
21. "Normal hours" are those which are regularly worked and/or fixed by contract of employment. Calculation is not affected by absence from work, as a workers normal hours of work would remain the same regardless of the "actual" hours worked. Time worked as overtime is not normal work unless an employees' contract fixes a minimum number of hours.

### **Special Hazards or Heavy Physical or Mental Strain**

22. Employers must identify special hazards faced by night workers by identifying them in risk assessments as involving a significant risk to health and safety undertaken in accordance with the Management of Health and Safety at Work Regulations 1992.
23. Employers should ensure that night workers, whose work does involve special hazards or heavy physical or mental strain, **do not actually** work for more than 8 hours in any 24 hour period during which the night worker performs night work.

### **Health Assessment for Night Workers\Transfer to day work**

24. All night workers are entitled to a regular free and confidential health assessment and additionally when a work related problem is identified to determine whether the worker is fit to undertake the night work to which he/she is assigned. The format and content of the assessment of the health assessment should be agreed locally by recognised trade unions and professional organisations with the advice of the Occupational Health Services. Paid time off should be given to employees to attend health assessments.

25. Employees identified by a medical practitioner as having health problems related to night work should be offered wherever possible the option of transfer to suitable day work with appropriate pay and conditions of service.