

# **AROUND THE CLOCK**

***A NEGOTIATORS GUIDE TO THE  
WORKING TIME REGULATIONS;  
SHIFT WORK AND FLEXIBLE WORKING***

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REGULATIONS; SHIFT WORK AND FLEXIBLE WORKING***

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**Society of Radiographers' Responsible Officer:**

**First edition**

**ISBN**

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**£15 to SCoR members**

**£25 non-members**

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## **Table of Contents**

- 1. Introduction**
- 2. The Effects of Long Working Hours**
- 3. The Working Time Regulations 1998**
- 4. Implementation of Working Time Regulations in the NHS**
- 5. Enforcement and Remedies**
- 6. Shift Work**
- 7. New ways of working (including flexible working)**

**Appendix 1 – exemptions from working time regulations (Page 45)**

**Appendix 2 – DH definition of ‘exceptional circumstances (Page 48)**

**Roman Numerals: Bibliography (Page 50)**

## 1. Introduction

Since the adoption in 1993 of the European Working Time Directive and subsequent transposition into UK law, controls on working hours are now embedded in many workplaces in the UK. Despite its shortcomings such as the continued ability to opt out of the 48 hours week, the UK Working Time Regulations 1998 has afforded increased protection to many workers. However, workers in the UK top the European long working hours league and healthcare sector is by no means an exemplar employer when it comes to long working hours.

A recent survey of staff working in the acute sector of the NHS found that 'seventy per cent of staff reported that they regularly worked more than their contracted hours. Only thirty-four per cent were paid for the extra hours they worked'.

With increasing pressure to deliver Government targets and be leaner and more efficient an increasing number of our members are working unpaid overtime; performing on call duties without adequate compensatory rest or working through obligatory rest breaks. What's more, where shift work has been introduced there is often little consideration to health and safety risks of working patterns or the implications on the family life of those affected. Increasingly our members are being seen as commodities and that is not only destructive to their health and welfare but has an impact on service delivery including patient safety and quality of care.

This guidance aims to help SoR representatives redress the balance. Negotiating on working time is a good opportunity for Industrial Relations and Health and Safety Representatives to work together as it is a far reaching issue which encompasses health, safety and welfare at work as well as pay and conditions.

This guidance not only covers the legal imperative to comply with the working time regulations but also addresses issues such as the health and safety implications of shift work and long working hours; flexible working; negotiating working hours for members and the legal requirements when changing contractual hours.

Whilst the SoR can ensure that the contents of this guide are correct at the time of going to press, the Working time Regulations 1998 are subject to regular challenge in the European Court and tests at employment tribunals so members and SoR representatives should regularly check the '**At Work**' pages of the SoR website ([www.sor.org.uk](http://www.sor.org.uk)) to keep up to date with any changes. The Department of Trade and Industry also hosts a website on the working time regulations which is continuously updated, this can be accessed at [www.berr.gov.uk](http://www.berr.gov.uk)

This guidance does not cover working time in relation to young workers, for further information on these readers should go to the Department for Business, Enterprise and Regulatory Reform website. It does not cover those sectors excluded or partially excluded from the regulations such as mobile workers in the aviation sector or certain transport sectors.

## 2. The Effects of Long Working Hours

The negative effects of working long hours are becoming increasingly recognised. The working time directive is essentially a European health and safety directive which was brought in to address the health and safety effects of working long hours. There is also an increasing body of evidence on the social effects of working long hours and how this can impact on family life and some evidence that it can affect productivity. This chapter looks at the effects of long working hours.

### Health Effects

The health effects of long working hours are well document and of particular concern is cardiovascular disease and coronary heart disease. A major longitudinal study of civil servants found that high job demands were associated with coronary heart disease and angina. <sup>i</sup> Whilst there was no direct link between long hours it is likely that where there are high job demands people have to work longer hours, this is born out in subsequent research by the Chartered Institute of Personnel and Development (CIPD)<sup>ii</sup>.

In countries such as China and Japan they even recognize death by overwork which is called *guolaosi* and *karoshi* respectively, but there is no English word for death by overwork although campaigners site cases in the UK where death has been linked to over work <sup>iii</sup>.

In addition to the physical health effects, a 2003 literature review carried out on behalf of the Health and Safety Executive (HSE) found an association between working long hours and stress and other negative psychological health outcomes.<sup>iv</sup> The same literature review, perhaps unsurprisingly found a strong link between working long hours and fatigue.

### Safety Effects

In 2005 a major study looking at the relationship between working hours and injury found that those who work extra hours are 61% more likely to be injured on the job than those who do not. Furthermore the researchers found that there was 37% increase in risk for those doing twelve hours a day compared to those working less hours.<sup>v</sup>

The HSE also cite fatigue as a contributory factor in numerous well document accidents including Three Mile Island in 1979, Bhopal in 1984, Challenger Space Shuttle in 1986, Chernobyl in 1986, Clapham Junction in 1988 and Exxon Valdez in 1989.<sup>vi</sup>

In relation to work in the health sector, a study of medical practitioners in Germany, found a positive correlation between long working hours and accidents, both at the workplace and when traveling to and from work.<sup>vii</sup>

### **Social and Domestic Life**

The HSE point out that a happy social and domestic life is key to an individual's health and well being. However the amount of time spent with family and friends can be affected by long working hours and can impact on health and well being.<sup>viii</sup> The HSE's 2003 literature review looking at the evidence on long working hours concluded that working long hours impacts negatively on home and family life. The importance of a 'work-life balance' has been much publicised and the NHS has promoted this through the Improving Working Lives initiative. The work life balance and flexible working initiatives will be explored later in this guidance.

### **Performance Effects**

A 2003 survey report by the CIPD<sup>ix</sup> found that most respondents reported that working long hours has had some sort of negative effect on their job performance, including making mistakes at least sometimes, taking longer to complete a task or performing less well generally.

**There are more health effects associated with shift work patterns, including the effects on circadian rhythms and these are detailed further in the section on shift working.**

### 3. The Working Time Regulations 1998

#### Summary of Key Requirements

The working time regulations place the following requirements on an employer

- A limit of an *average* of 48 working hours per week that a worker can be required to work. [Regulation 4]
- Rights to a rest break of 20 minutes during a working day of 6 hours or longer. [Regulation 12]
- A right to 11 hours rest per day.[Regulation 10]
- A right to a 24 hour rest period each week. [Regulation 11]
- A limit of an *average* of 8 hours work in 24 which night workers can be required to work. [Regulation 6]
- A right to 4 weeks paid leave per year.[Regulation 13]
- A right to free health assessments for night workers.

On an initial glance of the above table the regulations look straightforward but there is additional information which should be read and understood by anyone negotiating working time arrangements. There are also some derogation (exceptions to the rule) where certain activities are not fully covered by parts of the regulations. Some of these derogations have implications for workers in the health service.

The regulations frequently refer to 'agreements' and there are a number of circumstances in which employers and workers may enter into an agreement to effectively modify or adapt the requirements of the regulations. The legislation allows for three types of possible agreements, collective agreements; workforce agreements and relevant agreements. In the NHS, where trade unions are recognized agreements such as the one reached on working time in the Agenda for Change terms and conditions are known as 'collective agreements'. In organisations where a trade union is not recognized workforce agreements can be negotiated. The term relevant agreement is a catch all phrase which covers both collective and workforce agreements.

The following section will explore each requirement in depth

## Definitions:

### Who is a Worker?

**Regulation 2** states that a “worker” is someone who has entered into or works under a contract of employment or any other contract, whether express or implied, whether oral or in writing and whether that contract is with the employer or through an agency.

The regulations make specific provision for agency workers. **Regulations 36** provides that where an individual is employed to carry out work for an employer under an arrangement made between an agency and the employer and that the individual is not a worker because of the absence of a contract between that individual and the agency or employer, then the regulations will apply as if that individual were a worker employed by whichever party is responsible for paying the worker in respect of the work.

### What is Working Time?

Working time is defined in **Regulations 2**, in relation to a worker, as:

- Any period during which he is working at his employer’s disposal and carrying out his activity or duties
- Any period during which he is receiving relevant training, and
- Any additional period which is to be treated as working time for the purposes of these regulations under a relevant agreement

The Department of Trade and Industry add that working time **includes**:

- Working lunches, such as business lunches.
- Time **on call** in the **workplace**
- When a worker has to travel as part of his or her work, for example someone travelling to several different sites throughout the working day.
- When a worker is undertaking training that is **job-related**
- Time spent abroad working if a worker works for an employer who carries on business in Great Britain.

This does not include:

- Routine travel between home and work.
- Rest breaks when **no** work is done.

### Scope

The regulations apply to all workers in the healthcare sector, although there are some derogations (exceptions to the rule). Page 45 details the derogations.

Restrictions on the weekly working hours of doctors in training are being phased in as follows: 58 hours from 1 August 2004 to 31 July 2007; 56 hours from 1 August 2007 to 31 July 2009; 48 hours from 1 August 2009. **However this only applies to junior doctors.**

### **The '48 hour' Working Week**

**Regulation 4** which detail the 48 hour limitation on the average working week is one of the most widely publicised and also one of the more easily misunderstood parts of the Regulations. The key word in relation to the 48 hour week is that it is an **average** 48 hour week.

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

**Regulation 25** states that workers and employers can agree to calculate the average weekly working time over a period of up to 52 weeks under a relevant agreement

### **Calculating the average working week**

The average weekly working time is calculated by dividing the number of hours worked by the number of weeks over which the average working week is being calculated:

$$\frac{A+B}{C}$$

Where:

**A** is the aggregate number of hours comprised in the worker's working time during the course of the reference period

**B** is the aggregate number of hours comprised in his or her working time during the course of the period beginning immediately after the end of the reference period and ending when the number of days in the subsequent period and ending when the number of days in that subsequent period on which he or she has worked equals the number of **excluded** days during the reference period; and

**C** is the number of weeks in the reference period

### **Excluded days are:**

Any period of annual leave taken by the worker under his or her entitlement

Any period of sick leave taken

Any period of maternity, paternity, adoption or parental leave

## Worked examples (from BERR website)

### Example 1:

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

The total hours worked is:

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

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

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

$$800$$

$$\frac{\quad}{17} = 47.1$$

hours a week

$$17$$

The average limit of 48 hours has been complied with.

### Example 2:

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

The total hours worked in the reference period is:

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

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

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

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

$$744 + 32$$

$$\frac{\quad}{17} = 45.6 \text{ hours per week}$$

$$17$$

The average limit of 48 hours has been complied with.

Workers **cannot** be forced to work for more than 48 hours a week on average. However, the working time limits do not apply if workers **opt out** and can decide how long they work

## **The Opt Out**

This is perhaps the most contentious part of the regulations and has been challenged by the trade union movement. Several European countries want the removal of the opt out from the working time directive – Britain is not one of them. There is concern that whilst the opt out is voluntary some employers may place undue pressure on employees to make them opt out.

**Regulation 5** provides the opportunity for individual workers to opt out of the 48 hour week by signing an individual opt out with the employer. Workers can agree to work longer than the 48-hour limit. An agreement must be in writing and signed by the worker. It can be for a specified period or an indefinite period.

Workers can cancel the opt-out agreement whenever they want, although they must give their employer at least seven days' notice, or longer (up to three months) if this has been agreed.

Workers have the right not to be dismissed or subjected to a detriment because of a refusal to enter into, or to continue, an individual opt-out agreement.

Even where a worker has signed an opt out, under the health and safety at work act 1974, employers still have a duty to take reasonable care to protect the health, safety and welfare at work of their employees. As mentioned earlier in this guidance, working excessively long hours has been linked to ill health and increased risk of accidents

## **Time off Work**

### **Rest Breaks at Work**

**Regulation 12** entitles workers to a rest break where daily working time is more than six hours. The details of such breaks, including their duration and the terms on which they are granted may be set by a relevant agreement. If there is no such agreement, a rest break should be an uninterrupted period of at least 20 minutes, which the worker is entitled to spend **away from their workstation**.

The Society of Radiographers has received advice that a 20 minute break should be provided for every 6 hours worked.

A recent European Court of Justice Case<sup>x</sup> decision means that employers must make sure that workers *can* take their rest.

In addition, the society of Radiographers advises that employers should ensure that workers *do take their* rest allowance

### **Daily Rest Periods**

**Regulation 10** states that workers are entitled to at least 11 hours consecutive rest in each 24 hour period during which they work. It is not necessary for the 11 hours to fall within the same calendar day, provided they are consecutive e.g. if a worker leaves work at 8pm and starts again at 7am on the following morning they will have received their full entitlement.

### **Weekly Rest Periods**

**Regulation 11** provides that a worker is entitled to an uninterrupted weekly rest period of not less than 24 hours in each seven day period during which he or she works for his or her employer. Each seven day period starts at midnight between Sunday and Monday unless a relevant agreement states otherwise.

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

### **Working at Night**

#### **Night time**

**Regulation 2** defines night time as a period between 11pm and 6am. Alternatively an agreement can stipulate a different period, however this period must be at least seven hours long and include the period from midnight to 5am.

#### **A night worker**

**Regulation 2** defines a night worker as anyone whose daily working time includes at least three hours of night time:

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

The DTI defines “as a normal course” as on a regular basis. A Court ruling found that a worker who worked at night for one third of his working time was a night worker.<sup>xi</sup> Occasional or ad-hoc work at night does not make a person a night worker.

## **Length of Night Work**

**Regulation 6** provides that the normal working hours of a night worker must not exceed an average of eight hours in each 24 hour period calculated over the applicable reference period. The standard reference period is 17 weeks although this can be modified by a relevant agreement. Employers have to take “all reasonable steps” to ensure this limit is complied with.

### **Calculating the average night work period**

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

Formulary:

$$\frac{A+B}{C}$$

Where:

**A** is the normal working hours during the reference period

**B** is the number of days during the reference period

**C** is the total number of hours during the reference period comprised in weekly rest periods spent by the worker in pursuance of his or her entitlement under Regulation 11 (weekly rest periods), divided by 24.

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

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

### Worked examples (from BERR website)

**Example 1:**

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

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

17 weeks of 4 shifts of 12 hours

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

There are 119 days (17 weeks) and the worker takes 17 weekly rest periods, as entitled to under the regulations. Therefore the number of days the worker could be asked to work is  $119 - 17 = 102$

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

$$\begin{array}{r} 816 \\ \hline 102 \\ \hline =8 \end{array}$$

This equals an average of 8 hours a day.

**Example 2:**

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

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

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

There are 119 days (17 weeks) and the worker takes 17 weekly rest periods, as entitled to under the regulations. Therefore the number of days the worker could be asked to work is:  $119 - 17 = 102$

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

$$\frac{768}{102} = 7.53$$

This equals an average of 7.53 hours a day.

**Night work and special hazards**

**Regulation 6** provides that night workers whose work involves special hazards or heavy physical or mental strain must not work over 8 hours in any 24 hour period.

Work of a night worker is regarded as involving special hazards or heavy physical or mental strain if it is:

- Identified as such in a collective or workforce agreement that takes account of the specific effects and hazards of night work, or
- Recognised in a risk assessment made by the employer under Regulation 3 of the Management of Health and Safety at Work Regulations 1999 as involving significant risk to the health and safety of workers

## **Night Workers Health Assessment**

Under **Regulation 7** there is provision for free health assessments for night workers before starting work and at regular intervals, and night workers suffering from health problems recognized as being connected with their work should be transferred wherever possible to suitable day work. Assessments are subject to the principle of medical confidentiality, in that they cannot be disclosed without the employee's written consent.

Employers must offer night workers free health assessments but workers are not obliged to take up health assessments unless they are contractually obliged to.

A health assessment can be made up of two parts: a questionnaire and a medical examination. The Department for Business Enterprise and Regulatory Reform suggest a questionnaire as an initial assessment and then a follow up medical examination for those who have indicated potential problems on their questionnaire. Health assessments must be offered before someone starts working nights and should then be repeated on a regular basis there on in.

A sample health questionnaire can be found on the web site for Department for Business Enterprise and Regulatory Reform .

In most occupations, there are no conditions that preclude a person from working nights however conditions such as diabetes, heart or circulatory disorders, stomach or intestinal disorders, any medical condition which causes sleeping difficulties may be aggravated by night work. Special provision should also be made for new and expectant mothers (for further information see SoR guidance on Health and Safety and Pregnancy).

## **Annual leave**

Regulation 13 provide a right to four weeks paid holiday for every worker, be they full or part time, in each leave year.

The Department for Business Enterprise and Regulatory Reform state that:

- A week's leave should allow workers to be away from work for a week. It should be the same amount of time as the working week i.e. if a worker does a 5 day week, he or she is entitled to 20 days leave; if he or she does a 3 day week the entitlement is 12 days.
- The leave entitlement under the regulations is not additional to bank holidays. There is no statutory right to take bank holidays off. Therefore a worker who is not otherwise paid in respect of bank holidays may take bank holidays as part of his or her annual leave entitlement in order to receive payment for these holidays
- Workers must give the employer notice that they want to take leave

- Employers can set the times that workers take their leave, for example for a Christmas shutdown.
- If workers' employment ends, he or she has a right to be paid for the leave time due and not taken.

Under the Work and Families Act 2006 the Government plans to make paid leave for Bank Holidays additional to the current statutory entitlement to four weeks paid holiday. If you work a five-day week, your holiday entitlement will increase from 20 days to 28 days (pro rate for part-time staff). If you already get four weeks' leave plus time off for Bank Holidays your leave entitlement will not change. The first four days extra paid leave will be introduced from 1 October 2007 and the next four days from 1 April 2009

### **Derogations or 'Exceptions to the rule'**

The following cases are cited in the Regulations (Regulation 21) as acceptable reasons for opting out, by agreement, of provisions relating to daily and weekly rest breaks; rest breaks during working time and length of night work.

- A worker works far away from where he or she lives. Or he or she constantly has to work in different places making it difficult to work to a set pattern
- The work involves security or surveillance to protect property or individuals
- The job requires round the clock staffing as in **hospitals**, residential institutions, prisons, media production companies, public utilities and in the case of workers concerned with the carriage of passengers on regular urban transport services or in industries where work cannot be interrupted on technical grounds.
- There are busy peak periods, such as may apply seasonally in agriculture, retail, tourism and postal services.
- **An emergency occurs or something unusual and unforeseen happens.**
- Where the worker works in rail transport and his activities are intermittent; he spends his time working on board trains; or his activities are linked to transport timetables and to ensuring the continuity and regularity of traffic.

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

### **Compensatory rest**

The Department for Business Enterprise and Regulatory Reform define compensatory rest as

A period of rest the same length as the period of rest, or part of a period of rest, that a worker has missed. The regulations give all workers a right to 90 hours of rest in a week. This is the total entitlement to daily and weekly rest periods.

Under the exceptions employers are allowed to give rest breaks in a different pattern to that set in the regulations. Further information on compensatory rest and its application in the NHS can be found in the next chapter.

### **Unmeasured working time**

Regulation 21 disapples the working time limits and rest entitlements for the groups of workers who can generally decide how long he or she works. The regulations give the following examples:

Managing executives or other persons with autonomous decision taking powers

Family workers

Workers officiating at religious ceremonies in churches and religious communities

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

**However, as mentioned earlier, no one can be forced to work more than an average of 48 hours a week against his or her will and this exception does not remove this protection from any worker.**

### **Record keeping**

There are three circumstances where employers have to keep records.

Regulation 9 requires an employer to keep records to show whether the limits on maximum working time (including night work) are being complied with. These records have to be kept for two years from the date on which they were made.

Under Regulation 4 employers must keep up to date records of all opted out workers, however they do not need to keep a record of how many hours an opted out worker works.

Records of offers of night worker health assessments should also be kept including the name of the night worker, when the assessment was offered (or when he or she had the assessment if there was one) and the results of any assessment (this has to be a simple statement as to whether they are fit or not fit to work rather than full medical details which as subject to medical confidentiality). These records must be kept for 2 years.

## **4. Implementation of Working Time Regulations in the NHS**

The previous chapter on the regulations and exemptions will almost certainly throw up questions on implementation the NHS. This chapter details their practical application in the NHS along with the relevant section from the Agenda for Change Terms Conditions Handbook (the full agreement can be found in (Section 27)). The Agenda for Change Terms and Conditions forms the collective agreement for the NHS, however in sections of the handbook there are also options for local agreements to be drawn up between locally recognised unions and employers. There are also tips for negotiators.

The Agenda for Change agreement recognises that the control of working hours as an integral element of managing health and safety at work and promoting health at work and calls on employers when organizing work to *“take account of the general principle of adapting work to the worker.”*

It is important to note that radiographers who **do not** participate in the on-call or standby rotas or work shift patterns are entitled to **all** provisions of the regulations, including daily and weekly rests.

### **Bank and agency work**

The NHS Employers advice confirms that the definition of worker covers bank and temporary workers. In the case of agency workers, the responsibility is most likely to lie with the agency, although it remains the responsibility of the NHS employer to comply with the requirement for in-work rest breaks.

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

It is important to note that, in the case of staff who work for more than one employer, all of the employers have joint responsibility for ensuring that the terms of the regulations are met. The NHS Employers guidance states that each employer must take reasonable steps to establish whether their staff are working for another employer and whether they are working over the average 48 hours. 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. Each employer is responsible for ensuring that they provide adequate rest breaks according to the hours worked for them.

### **Work related travel**

Many radiographers no longer have a fixed place of work, in some instances this may be across a trust with several sites geographically apart or to a mobile base as in the case of breast screening or other mobile units. Where there is no fixed

place of work the commute time to and from work may vary. Under regulations 21, this type of work pattern would make the worker exempt from the requirements for daily and weekly rest breaks; rest breaks during working time and length of night work. Where you choose to live and work is usually a matter of personal choice **but** as fatigue is a major cause of road traffic accidents it would seem illogical that someone who has to travel some distance from their workplace, particularly where their contract has changed from a fixed place of work to a variable place of work. Employers need to be aware when scheduling work patterns of the effect of extensive travel and try and compensate e.g. if on day 1 the worker is having to do a round trip of 150 miles, on day 2 where possible the work closer to home.

However, travel **between** sites during the working day should be counted as working time.

### **Negotiators Tips**

Members working at a trust in Wales have negotiated that if their daily commute changes from their 'normal place at work' e.g. when covering staff absences any additional travel time to a different site is counted as working time and any additional mileage claimed.

### **On call/Standby**

On call and standby are integral parts to providing a 24 hour radiography service. When the working time regulations came out there were varying opinions as to whether or not on call and/or standby work was considered as working time. Two judgements by the European court known as Jaeger<sup>xii</sup> and Simap<sup>xiii</sup> clarified the situation and found that when a person is on call/standby **at their place of work** this should be counted as working time because staff are not free to use the time as their own, even if they are able to sleep or rest and are not woken up by a call. However, when a person is on call/standby at their **home environment** it is only counted as working time when they leave their home to attend a call out or any time spent giving advice on the telephone from home.

### **Extract from AfC handbook on On-Call**

*Staff who are on call, i.e. available to work if called upon, will be regarded as working from the time they are required to undertake any work-related activity. Where staff are on-call but otherwise free to use the time as their own this will not count towards working time. This method of calculating working time will not affect on-call payments.*

*Where staff are required to '**sleep in**' on NHS premises for the duration of a specified period, local agreements should be made on **compensatory rest**.*

## Compensatory Rest and 'Exceptional Cases/Circumstances'

Health service workers who participate in standby and on call rotas or do shift working are subject to certain exemptions from the regulations including daily rest periods. However, as working excessive hours may result in harm to a member of staff or a patient the member of staff is entitled to **compensatory rest**.

The issue of compensatory rest is perhaps one of the most misunderstood and contentious parts of the regulations and implementation varies widely from trust to trust partly because the Agenda for Change Handbook allows for 'local arrangements'. The Jaeger case required that where workers have to work during a period which would otherwise be a rest period or rest break in order to safeguard continuity of treatment or care by them, **immediate compensatory rest** must be provided except, where in **exceptional cases** the workers concerned must be afforded appropriate protection.

The Court in Jaeger did not define what would amount to an exceptional case, however it is generally regarded that major accidents such as a rail crash or terrorist attack would be regarded as an exceptional case.

In August 2006 the Department of Health issued guidance on its website around the interpretation of compensatory rest and interpretation of the Jaeger case which also referred to the need for compensatory rest. The DoH Information Note <sup>xiv</sup> which gives examples of exceptional circumstances, including a number of specialist/professional staff going off sick at the same time, can be found in Page 50 of this guidance.

Specifically the DH guidance points out that: *on every occasion, the central question will be whether it is objectively possible to provide immediate compensatory rest. It is therefore important that each case is considered separately, in accordance with its own facts in determining whether it is an exceptional one.*

It adds: *The exception for exceptional cases should be relied on only for specific circumstances, not in relation to continuing states of affairs, and only for the duration of the specific circumstances. Where these circumstances risk becoming a continuing states of affairs steps should be taken to rectify the situation.*

*Even in exceptional cases when compensatory rest does not have to be provided immediately, the worker must nevertheless be afforded appropriate protection. This might be in the form of deferred rest, which must be sufficient to enable the worker to recover from fatigue and ensure that there is not a risk to the health and safety of the worker, other staff or patients. Other forms of protection might include, for example, health assessments. What is appropriate*

*will depend on all the relevant circumstances in each particular case, but the measures adopted should protect the worker from adverse effects to his or her health which might result from periods of work without the necessary rest.*

### **Extract from Agenda for Changes Terms Handbook on Compensatory Rest**

#### **20 minute at work rest break**

*In exceptional circumstances and by agreement with the worker where rest break cannot be taken the unused entitlement should be claimed as a period of equivalent compensatory rest.*

#### **11 hours daily rest period**

*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 that will be available to locally recognised unions. Local arrangements should be agreed to ensure that a period of equivalent compensatory rest is provided. 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.*

*Where full daily rest cannot be taken because a worker is changing shifts the employer should make arrangements to allow equivalent compensatory rest.*

### **Negotiators Tips**

#### **Example of Compensatory Rest Agreement:**

***If the radiographers call (including travelling time) crosses the 10pm threshold on any day he/she accrues half day off to be taken within two weeks. (If that is not possible due to staffing levels it can be carried over further – it is never lost)***

***If the radiographers call crosses the midnight threshold he/she takes the day off if it is a working day (for the radiographer in question) If it is not a working day then it will become a lieu day to be taken within two weeks as above. This applies to all days and to all staff full or part time.***

## **Maximum Weekly Working Time**

The Agenda for Change Terms and Conditions handbook recognizes that working time will include time taken for training purposes, civic and public duties, health and safety and trade union duties

In the NHS the 48 hours limit is calculated over a 17 week period but can “*in exceptional circumstances for those health professionals involved in the need for continuous care relating to reception, treatment or care of patients*” be extended to a maximum of 26 weeks. Any extension of the 17 week period has to have prior agreement by locally recognized unions.

Working time is calculated exclusive of meal breaks, except where an individual is required to work during meals in which case such time should be counted as working time.

**There is no provision for exceptional circumstances to affect the 48 hour week.**

## **Opting out in the NHS**

**The Society of Radiographers strategy is “ The Opt out is not our policy and should only be contemplated as a last resort or in extreme cases. Any undue pressure by employers to force opt out should be resisted and reported to Regional Officer and not the trade union industrial relations department”**

Individual NHS employees can choose to opt out of the 48 hours average weekly limit and subsequently work more hours. However this option is voluntary and no pressure should be placed on an employee to take up this option. Records of written agreement outlining individual opt outs must be made available to locally recognised unions.

### **Negotiators Tips**

Working long hours can be detrimental to a members' health, and members should be discouraged from signing opt outs. However if you are aware of a number of members signing the opt out you may want to explore the reasons e.g. are they being coerced by the employer into signing an opt out or are there financial reasons why a number of members want to work long hours and get overtime payments. If it is the latter then you should inform the SoR TUIR department, if it is the former this should be raised locally with the department managers and/or at the Joint staff side committee or Health and Safety Committee.

## **Rest Breaks during Working Hours**

The AfC agreement states that all staff who work more than 6 hours a day should be entitled to a break of at least 20 minutes away from their workstation. The break should not be taken at the beginning or end of a period of working time. The agreement points out that *“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.”* **(See above and Appendix for information on exceptional circumstances)**

In line with a recent European judgment, the agreement points out that line managers should ensure that provision is made to allow compensatory rest to be taken. However, existing local agreements which already provide for breaks of more than 20 minutes e.g. lunch breaks will meet the requirements of this provision and no further action will be needed.

Of particular relevance to the radiographic workforce is the protection of employees who carry out work which is repetitive, continuous or requiring exceptional concentration. The AfC agreement points out that employers must ensure that workers involved in this type of work must have adequate rest breaks and that the advice of the occupational health services should be sought. Mammography and Sonography can be classed as repetitive and continuous and where reporting is carried out by a radiographer this would require exceptional concentration. In addition the assessment of radiotherapy doses would require exceptional concentration.

## **Negotiators Tips**

### **Daily Rest Periods**

In normal circumstances employees should have a rest period of not less than eleven hours in each 24 hour period. However the AfC agreement points out that *“in exceptional circumstances where this is not practicable due to the contingencies of the service daily rest may be less than eleven hours.”* The paragraph above and appendix xx gives a clearer definition of exceptional circumstances.

### **Weekly Rest Periods**

In line with the regulations, the AfC agreement states that *“all employees should receive an uninterrupted weekly rest period of 35 hours (including the eleven 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**

The following is an extract from the AfC agreement on night work and associated requirements:

*“Night-time is a period of at least seven 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 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 eight hours over a 17 week period.*

*Normal hours are those which are regularly worked and/or fixed by contract of employment. The calculation is not affected by absence from work, as a worker’s normal hours of work would remain the same regardless of the “actual” hours worked. Time worked as overtime is not normal work unless an employee’s contract fixes a minimum number of hours.*

*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 (sic).*

*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 eight hours in any 24 hour period during which the night worker performs night work.*

*All night workers are entitled to a regular free and confidential occupational 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 health assessment should be agreed by locally recognized unions in accordance with the advice on occupational health services issued by NHS Employers and the Health and Safety Commission’s Health Service Advisory Committee. Paid time off should be given to employees to attend occupational health assessments.*

*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.”*

## **Negotiators Tips**

“Normal course” is generally considered as 30% of annual working time on a night shift or one week in three on nights

## **Record Keeping**

The AfC agreement points out that employers must keep records which will be available to locally recognised unions. Records should specify that maximum working weekly time; rest breaks; daily rest and weekly rest periods and night work are complied with and that where there is an entitlement to compensatory rest this is provided for.

## **5. Enforcement and Remedies**

The Health and Safety Executive enforce the limits set by the working time regulations and whether records are kept. In theory, an employer who contravenes these provisions is guilty of an offence and may be liable to a fine or other sanction such as an improvement notice. In 2003 an employment agency was fined £30, 000 by the courts for a breach of the working time regulations, following the death of an employee involved in highway maintenance work.

In the period between 2002 and 2004, four NHS Trust were served improvement notices by the HSE for failing to keep records of working time. Under the terms of the improvement notice, employers are given a set period of time to achieve compliance.

In detail the HSE are responsible for enforcing the following provisions:

- The employer's duty to take reasonable steps to ensure compliance with the 48 hour week. [Reg 4 (2)]
- The employer's duty to take reasonable steps to ensure compliance with the limit on average hours for night workers [Reg 6(2)]
- The absolute limit on length of night work for night workers whose work involves special hazards or heavy physical or mental strain [Reg 6(7)]
- The provision of free health assessments for adult workers [Reg7(1)]
- The duty to transfer night workers who are suffering from health problems connected with the fact that they perform night work to day work [Reg 7 (6)]
- The duty to provide adequate rest breaks where the pattern of work is such as to put the health and safety of the worker at risk, in particular because the work is monotonous or the work rate pre-determined [Reg 8]

- The duty to keep records to show that the 48 hour week, the limits on length of night work and the provision of free health assessments are being complied with [Reg 9]
- The duty to provide equivalent compensatory rest where a worker is required to work during what would otherwise be a rest period or break due to a derogation (special case exemption) in the Regulations [Reg 24]

### **Remedy at Tribunal**

Where an employee is given an entitlement then the remedy for an employer's failure to grant this is by way of a complaint to an employment tribunal. This will apply in relation to an employer's refusal to allow an employee to exercise their entitlement to rest periods, rest breaks or annual leave.

There are strict time limits on complaints to employment tribunals. A complaint must be presented to a tribunal before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted, or in the case of holiday pay, the date on which it is alleged that the payment should have been made. If the rest period or leave extends for more than one day, the limit starts to run on the date when the rest period or leave should have been permitted to begin.

### **Detriment**

Section 45 of the Employment Relations Act also make it unlawful to subject any employee to detriment because she/he refuses to exceed any limit on working time; refuses to work when entitled to a rest break; refuses to sign up to a workforce agreement or make any other agreement such as an individual opt-out from the 48 hour weekly working time limit; makes an allegation in good faith that the employer has contravened a right under the working time regulations or brings proceedings (i.e. complaint to tribunal) under the Regulations.

## 6. Shift Work

In today's 24 hour society more and more people are working shifts. Shift work has always been present in the health care environment with in-patient wards needing to be staffed by nurses, but until recently the majority of the radiographic workforce tended to work on call or on standby rather than a shift pattern.

The HSE<sup>xv</sup> defines shift work as:

- *A work activity scheduled outside standard daytime hours, where there may be a handover of duty from on individual or work group to another;*
- *A pattern of work where one employee replaces another on the same job with a 24 hour period.*

The majority of shift systems will be rotating shift systems i.e. those that change, these can either be forward rotating (where the shift progresses from morning to afternoon shift to night shift) or backward rotating (where the shift rotates from nights to afternoons to mornings). Shift systems can be rotate rapidly or slowly, a rapid rotation would include 2 to 3 shifts of the same pattern e.g. 2-3 mornings. However, healthcare workers may have the option of working permanent shifts e.g. permanent nights.

A number of radiology departments are moving towards a shift system, there are a variety of reasons for this including *perceived* financial savings, compliance with the working time directive and the NHS Healthcare Workforce 'Hospital at Night' project. The *Hospital at Night* project is being driven by the need to reduce doctors' hours to 48 hours by August 2009 and goes under the banner of delivering more effective, safe and quality care. In order to comply, changes will be needed to doctors on call systems and many trusts are moving towards shift systems which would include doctors working shifts in teams alongside other healthcare professionals such as radiographers. Further information can be found at [www.healthcareworkforce.nhs.uk/hospitalatnight.html](http://www.healthcareworkforce.nhs.uk/hospitalatnight.html)

Working a shift pattern may suit some people but there is a potential for substantial loss of earnings for many members who rely on on-call payments to supplement their basic salary. If employers are considering the implementation of a shift system, SoR industrial relations and health and safety representatives should ensure that they are consulted and can use the following arguments to resist any system which would not be favourable for the majority of members. Shift work is not an ideal situation nor is permanent night work and reps should therefore be clear that shift work should only be operated where there is an overwhelming operational need for such coverage.

### Shift work and health

There is a significant body of evidence linking shift work, especially night work to poor health. Shift work disrupts the body's circadian rhythms and can impact on

the quality and quantity of sleep an individual gets. Circadian rhythms are natural daily rhythms present in mammals which govern our bodily functions including temperature, hormone production, cell division and respiratory rate. Any disruption to the natural rhythm has the potential to cause health related problems.

There are a number of health effects associated with shift work including fatigue; anxiety and depression; adverse cardiovascular effects; gastrointestinal disorders and, amongst pregnant shift workers, an increased risk of miscarriage and babies with low birth weight or pre-maturity.<sup>xvi</sup>

### **Shift Work and Accidents**

We have already looked at the impact of long working hours on safety and accidents so it will come as no surprise that shift work has also been linked with an increased risk of accidents. Circadian rhythms are at their lowest between the hours of 2am and 6am and levels of alertness can be affected potentially leading to errors. The risk of errors, accidents and injuries has been found to be higher on the night shift; to rise with increasing shift length over eight hours; to increase over successive shifts, especially if they are night shifts; and to increase when there are not enough breaks.<sup>xvii xviii</sup>

### **Impact on Family and Social Life**

#### **Impact on family life:**

Workers who engage in shift work or who work long hours can experience disruption of family and social activities as many of these rhythms of the general population are oriented around the day. Saturday and Sunday work for example can preclude involvement in sporting events or religious activities. Shift work can lead to social marginalisation.

Family life and marital responsibilities can be severely disrupted by shift work or long hours. Childcare, housework, shopping and leaving a partner alone for periods of time can all lead to marital strain and family dysfunction.

Although on a positive side, for those shift workers who like relatively solitary leisure pursuits or who abhor the crowds can often find that shift scheduling provides them with greater opportunities to do what they want in non-working time.

## **Health effects**

### **Sleep.**

Sleep loss is a major effect of shift work. This is most noticeable after the night shift. The quality of sleep may be reduced by up to 2 hours a day, but there is also an effect on the quality of sleep.

One example that has been given is that the effect of shift work has been likened to a long distance traveller working in San Francisco and returning to London for any rest days.

### **Fatigue**

Fatigue is a common complaint among those working abnormal hours. It is particularly noticeable upon the night shift, less so on the morning shift and least on afternoon shift. Fatigue is a complaint that is very difficult to measure. Published evidence exists to suggest that there is a reduction in complaints of fatigue after improvement of physical fitness. Although this symptom is often cited as a major reason for intolerance to shift work.

### **Mental Health**

Shift working can be a potential psychosocial stressor. Stress is difficult to concept to define. Numerous reports have been published and all cite stress as a problem but lack scientific rigor, as they have data from self administered questionnaires and case reports.

Anxiety and depression indices also point to the likelihood of an adverse effect on mental health from shift work and long working hours. Nevertheless it must be remembered that, by and large, shift workers are a self selected population. Thus the question of whether shift work causes psychiatric mortality or shift workers have pre-existent psychiatric problems is not entirely resolved. There seems to be increased neuroticism with increasing years of shift work. But neuroticism in itself does not predict health related shift problems.

### **Cardiovascular Disorders**

A recent review of data collated from evidence from Scandinavian studies states suggests that shift workers have 40% increase in risk. Although the study goes on further to state that casual mechanisms are not well defined, but contributing factors include disruption of circadian rhythm, disturbed sociotemporal patterns and social support, stress, smoking, poor diet and lack of exercise. The health outcomes are mainly Angina pectoris, hypertension and myocardial infarction

### **Gastrointestinal Disorders**

Many shift workers complain of digestive disorders, which may be reflection on the poor quality of catering on some shifts. Night shift workers seem to have the most complaints of dyspepsia, heartburn, abdominal pains and flatulence.

### **Reproductive effects**

There is increasing evidence to suggest that shift work and particularly night work, may present special risks to women of child bearing age. Causative factors probably include disruption of the menstrual cycle and increased stress from the conflicts created by night work on family life. Specific health outcomes linked to shift work include risk of spontaneous abortion, low birth weight and prematurity.

### **Health and Safety Law and Shift Work**

In addition to the requirements of the Working Time Regulations there are other health and safety laws which must be followed when shift work is being implemented. We have already seen the potential detrimental effects shift work can have on workers health and their safety and that of patients so it is clear that it is a health and safety issue. The key pieces of health and safety legislation are as follows:

#### **Health and Safety at Work Act 1974**

When organising a new shift pattern employers must comply with the general requirement of sections 2 and 3 of the Health and Safety at Work etc. Act 1974 (HASWA). HASWA requires employers to ensure the health, safety and welfare of their employees and others affected by their activities.

#### **Management of Health, Safety and Welfare Regulations 1999**

Under the Management of Health, Safety and Welfare Regulations 1999 employers are required to identify any risks to the health and safety of employees and introduce reasonably practicable measures to reduce the risks. In other words, as shift work can affect health (and safety) there is a requirement to carry out a risk assessment.

Specifically, under Regulation 17 of the Management of Health and Safety at Work Regulations 1999 where a pregnant employee is given a certificate by a registered medical practitioner or a registered midwife which states that it is necessary for her health and safety that she should not be at work at night, alternative hours of work should be offered.

#### **Safety Representatives and Safety Committee Regulations 1977**

Under the Safety Representatives and Safety Committee Regulations 1977, safety representatives have a right to be consulted on matters that can affect the health and safety of members. They have the right to be consulted in 'good time', which means before any decisions are made.

## Workplace Health, Safety and Welfare Regulations 1992

Under the Approved Code of Practice for the Workplace Health, Safety and Welfare Regulations, employers should provide workers who work during hours or at places where hot food cannot be obtained in, or reasonably near to the workplace with means for heating their own food.

### Employment Relations

As with any other aspects of the employment contract, any changes must be subject to negotiation and agreement through the SoR.

Changes must not be enforced through the threat to give 90 days notice of the change. Reps need to be clear that this is notice of termination of contract i.e. ending the current contract (dismissal) and offering to reinstate on the new terms and conditions. This is an unacceptable way of implementing change. It is completely at odds with the concept of 'partnership working' and must be strongly rejected. Reps should contact their Regional Officer immediately for advice should this option be muted. Such a threat is likely to result in a dispute and possibly industrial action.

### What a Good Shift System Looks Like

If arguments fail, or the majority of members are in favour of moving towards a shift system. The next step is to negotiate the best possible shift system.

The following recommendations stem from research papers on the issue of shift work and the HSE's comprehensive guidance on shift work and health. They should be followed to ensure that the health and safety of employees is being protected. It is recommended that any work schedule change should be first temporary and evaluated carefully. The benefits of the change must outweigh the possible negative aspects. Advice on how to evaluate a system can be found below.

<b>Shift Pattern</b>	Shift system worked by employees included in the Labour market. Most frequently worked shift pattern by men and women is a two-shift system involving an early/late shift or double day shift. <ul style="list-style-type: none"><li>• Shift Patterns that maximise the number of weekends off for staff are generally preferred</li><li>• Shiftwork is likely to be less stressful when it is flexible to employees needs. (e.g. being able to swap shifts)</li></ul>
<b>Shift Rotation</b>	Forward rotating shift systems are preferable to backward rotating.
<b>Night Shifts</b>	Permanent night shifts should be avoided
<b>Shift Timing</b>	Research suggests that a 6am start is the 'worst of both worlds' for many workers – too early to allow proper pre-shift sleep with

	<p>people not seeing the start as early enough to adapt their lifestyle, but too early to allow for that lack of adaption. This tends to suggest that a later time, even by only one hour might be beneficial.</p> <ul style="list-style-type: none"> <li>• Positive benefit from to workers from being involved in the determination of their own shift patterns – this should be raised in discussions.</li> <li>• Bear in mind the needs of workers with caring responsibilities – start/finish times can be critical in enabling such workers to manage external caring responsibilities with the minimum of disruption</li> </ul>
<b>Shift Duration</b>	Shifts should not be planned to be longer than 12 hours
<b>Rest Breaks</b>	<p>Scheduling of rest breaks, duration and facilities, (especially where other commercial sources of food and refreshment may not be available) are important for the control of many of the risks arising from shift and night work E.g. Fatigue (mental and physical)</p>
<b>Physical Environment</b>	<p><b>Temperature:</b> The body tends to lower its temperature as the circadian rhythm swings towards sleep. Thus, for late and early morning shifts – workplace temperatures should be increased if physical comfort is to be maintained.</p> <p><b>Lighting:</b> Research suggests that lighting has an effect on the circadian rhythm, through altered Melatonin levels. (Melatonin is a hormone produced towards the sleep phase of the circadian cycle and study evidence has shown that bright lighting, at daylight levels, can suppress melatonin production, thus relieving the individual of its fatigue-inducing potential. Further research is clearly needed to clarify this aspect of fatigue management and different approaches may be recommended</p> <p><b>First Aid:</b> Requirement for first aid is dependent upon an assessment of need, conducted by the employer. Assessment should take into account in respect of shift workers on late and night shifts.</p>

<p><b>Welfare</b></p>	<p><b>Employee Assistance:</b>  Details of employee assistance programmes, whether internal or provided via external contracts.  These contacts need to be clearly identified to workers, perhaps as part of training and risk awareness training</p> <p><b>Travel:</b></p> <ul style="list-style-type: none"> <li>• Early and late traveling can bring its own risks to safety, especially for those traveling in remote areas on their own. In planning shift work and schedules such issues need to be addressed as part of general risk assessments.</li> <li>• Training in shift specific risks should address issues of fatigue when driving home.</li> </ul> <p><b>Training:</b>  Two key aspects to training issues:</p> <ol style="list-style-type: none"> <li>1. <b>Job Training:</b> Some organisations ignore the fact that training for employees may need to be adapted to take account of the needs of shift workers.</li> <li>2. <b>Risk Management Training:</b> <ul style="list-style-type: none"> <li>• Workers should receive specific training and awareness on risks associated with shift work.</li> <li>• Way the employer has responded to minimise such risks</li> <li>• Positive steps the workers can take – in terms of lifestyle management to reduce risk further (poor diet as a result of shift work, sleep management issues, advice and guidance on stress issues)</li> <li>• Information for women regarding effects of shift work on pregnancy (to include risk assessment responses by the employer)</li> <li>• What health assessments are night workers entitled to under the Working Time Regulations (also beneficial to explain why workers should take up the opportunity of these assessments)</li> </ul> </li> </ol>
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## **Negotiating Tips**

### **Before**

- Ensure
- consultation with safety representatives and industrial relations representatives **BEFORE** system is implemented
- Canvass opinion amongst members on the impact this will have on them financially and socially.
- Ask questions on why it is necessary to implement a shift system.
- Assess proposals to see whether a system can be implemented with existing staff numbers (taking into account the number of staff working in the department, the number likely to be off sick, on holiday or on training at any one time).

### **When system is being implemented**

- Ensure that best practice in shift systems is being implemented (including shift patterns, welfare facilities and communication)
- Check compliance against the working time regulations
- Ask for the new schedule to be trailed for a temporary period (e.g. 3 months) before changes to contract.
- Ensure employers evaluate the new schedule
- Survey members to see the impact of the new system on their health and social circumstances.
- Ask for self rostering software to be trailed (and if successful purchased) so that members have some control/say over their shift patterns.
- Encourage members to report any accidents or near misses that they feel may be linked to increased fatigue due to new shift working patterns.

## **1. New Ways of Working**

### **Flexible working – key issues**

#### **Changing workforce**

The UK workforce is now more diverse than ever before, reflecting changes in society and the make up of the population. Women comprise almost half the workforce and these figures are rising. Many of them are working parents, some are lone parents and overall there are more people at work with caring responsibilities. The workforce is ageing and responsibilities for older people are increasing. The demand for part-time and other flexible working patterns is increasing as a consequence.

#### **Rights for employees**

Employees who are parents of children aged under six or of disabled children aged under 18 have the right to apply to work flexibly and their employers will have a duty to consider these requests seriously

### **The need to compete**

Good working practices and the benefits that employers and employees derive from them are key to the success of modern companies in an increasingly competitive market. Parents, carers, disabled people and older people may be effectively excluded from employment by the hours or the location of the work. Any barriers to the employment and retention of the best people for the job are very costly for businesses and undermine their efficiency, productivity and competitiveness. Flexible working arrangements can help individuals to balance their work and their home responsibilities; businesses which offer them are better placed to attract and retain the best talent.

The new right to apply to work flexibly applies only to eligible working parents but flexible working is relevant to many other people in the workforce at various stages of their working life.

Employees may prefer different patterns of work for various reasons such as further education, religious observances, or interests or responsibilities outside the workplace. It makes good sense for employers to develop and implement flexible working policies and practices for all their staff. Those that do will find it easier to deal with requests from employees for flexible working because they will already have a clearly thought out strategy in place. Businesses which rise to the challenge of a diverse workforce and its changing priorities will be better able to respond to commercial opportunities and the pressures of a society which increasingly demands round-the-clock availability of goods and services in the private and public sectors. A positive response to people's customs and employment needs will also improve relations with local communities and enhance the reputation of the organisation.

### **What is flexible working?**

Flexible working covers a wide range of options including:

#### **Part-time working**

There is no set pattern to part-time working. It may involve a later start and earlier finish time than a full-time position, working mornings or afternoons only, fewer working days in the week or any other arrangement of working time whereby the employee is contracted to work less than normal basic full-time hours.

#### **Flexi-time**

Allows employees to choose, within agreed limits, when to begin and end work and may be planned to enable individuals to attend to domestic or other responsibilities. Employees may be required to work during some essential periods (known as core times) and must work an agreed number of hours within an 'accounting period' which is typically four weeks. Outside core times are flexible bands when employees may choose whether to be at work or not. This enables employees to vary their start, finish and lunch times and usually, within

agreed limits, employees can carry over to the next accounting period any excess or deficit in the number of hours they are required to work.

### **Staggered hours**

This is where employees in the same workplace have different start, finish and break times and can be an effective means of covering longer opening hours.

### **Compressed working hours**

Allow employees to work their total number of agreed hours over fewer working days. Often a five day working week is compressed into four days.

### **Job sharing**

Involves two people carrying out the work which would normally be done by one person. The work is not split but shared. There is no set model for managing time which may involve working a set number of hours each day, each week or alternate weeks.

### **Shift working**

This is the pattern of work in which one employee replaces another on the same job within a 24 hour period. Shift workers normally work in crews which operate as separate shift teams. Shift systems typically operate over morning, afternoon and night shift periods and may provide continuous cover over 24 hours per day, seven days per week.

### **Shift swapping**

Enables employees to negotiate their working times by re-arranging shifts amongst themselves with the proviso that the required shifts must be covered.

### **Self-rostering**

Allows employees to nominate the shifts which they would like to work leaving employers to compile shift patterns which match the individual preferences of staff to agreed staffing levels.

### **Time off in lieu or banked hours**

This allows employees to take time off to compensate them for extra hours worked.

### **Term-time working**

Enables an employee to remain on a permanent contract but also to be able to take paid or unpaid leave during school holidays.

### **Annual Hours**

This is a system whereby the hours which an employee is contracted to work are calculated over a whole year. Usually the annual hours are split into two parts.

The larger part consists of set shifts with the remaining shifts unallocated. Usually the employee is paid for unallocated shifts and owes time to the employer. The employer keeps these hours in reserve and can call on the employee to work at short notice as demand dictates.

### **Additional leave entitlement**

May be agreed either unpaid or paid with salary re-calculated to take account of extra leave. Additional leave may also be agreed as part of an annual hours arrangement.

### **V-time working**

This is a voluntary arrangement whereby an employee reduces the number of hours worked for an agreed period with a guarantee that full-time employment will be available again at the end of this period.

### **Working from home**

This arrangement can cover a wide range of jobs from sewing and assembly work to managerial and professional functions. New technology makes communication with office and customers possible by telephone, fax and e-mail from home, car or other remote locations.

### **Unique working patterns**

These are individually tailored patterns which may involve a combination of options.

### **Career breaks**

Some employers offer unpaid breaks to their employees with a guarantee that they will be able to return to work at the end of the agreed period.

More detailed information on many of the options for flexible working are in the Acas Advisory booklet - Changing patterns of work.

### **What are the benefits to employers of flexible working?**

Many employers are acknowledging that it makes good business sense to introduce flexible working arrangements to enable their employees to achieve a better work–life balance. They recognise that as well as providing a better quality of life for their employees they can also increase the competitiveness and profitability of the business.

Organisations are under constant pressure to produce goods and services, of the right quality and the right price, as and when customers want them. This pressure can often mean that new ways of working have to be found to make the best use of staff and other resources.

For example:

The cost and complexity of capital equipment may mean that organisations cannot afford to leave it standing idle. Customers want goods and services outside traditional standard working hours. Some organisations have seasonal peaks and troughs and a consequent fluctuation in the demand for employees during the year.

Flexible working arrangements can help employers to address these pressures by enabling them to:

- Maximise available labour
- improve customer service
- Increase productivity
- Reduce absenteeism, turnover, sickness and stress
- Attract a wider range of candidates such as part-time workers
- Reduce recruitment costs
- Retain valued employees
- Increase employee commitment, morale and loyalty
- Increase the organisation's ability to deal with change by innovation and creativity.

### **What are the benefits to employees of flexible working?**

Many organisations already have flexible working arrangements and identify the following benefits:

- Greater sense of responsibility, ownership and control of working life
- Better relations with management
- Increased loyalty and commitment
- Improved well-being, less stress
- More time to focus on life outside work
- Better able to cope with children and other care pressure
- More opportunity to continue a career.

### **Developing a business case**

A strong business case will link the company's objectives and business plan with the benefits of providing flexible working arrangements. Both qualitative and quantitative factors need to be taken into account as well as the values and culture of the business. These factors may include:

- Cost savings:
- Advertising and recruitment
- Training/induction
- Sick absence/unplanned absenteeism
- Agency cover

- Office space
- Fewer disciplinary problems
- Recruitment and retention:
- Increased number of applicants for vacancies:
- Attracting the best person
- Higher levels of employee commitment
- Retention of valued employees
- Increased flexibility for customers:
- Extended opening hours
- Better cover
- Improved employee relations:
- increased staff morale
- Better motivation
- Improved loyalty and commitment
- Enhanced reputation as a good employer:
- Better relationship with local community
- Policy in line with best practice
- Influences potential local customers
- Compliance with legislation

Business objectives can be compromised when employees struggle to balance their family responsibilities with those of their work. Failing to implement flexible working arrangements may add costs to the business in terms of:

- Poor performance
- High levels of absenteeism and sick absence
- High staff turnover, recruitment and training costs
- Failure to attract the best applicants
- Reduced customer service.

### **Introducing a flexible working policy**

The business case will identify the core operational needs of the organisation and will enable a clearly formulated policy to be produced which will balance these needs with those of the workforce. Carefully designed policies have many advantages over an ad hoc approach. Workers can be more effective when uncertainties about the organisation's intentions and any inconsistencies in management decisions are removed. Involving workers and their representatives in the development, implementation and operation of policies is more likely to make them acceptable and successful.

This can be done by conducting employee surveys, discussing ideas openly in consultative meetings and generally seeking employees' views making full use of any existing communications or consultation arrangements – for example joint consultative committees.

An effective flexible working policy will:

- Have the endorsement of senior management
- Be fair, consistent and clearly understood by all users
- Inform managers of the objectives
- Set realistic expectations:
- Satisfy legal requirements
- Set realistic expectations
- Identify core business needs
- Demonstrate the commitment of the business to flexible working
- Find creative solution
- Value the contribution of employees
- Monitor and evaluate the results
- Set out training available for managers and give the opportunity to take part

### **Communicating the policy**

Communicating the policy effectively to all employees is vital to its success. Organisations may wish to incorporate flexible working policies into contracts or terms and conditions of employment. Staff handbooks can also be a useful source of reference. On-going training and support will be needed for managers, HR staff and others involved, eg payroll. Good communication within the organisation can help to solve problems by sharing ideas and solutions and therefore it may be beneficial to include regular updates on flexible working arrangements in meeting agendas, newsletters, intranets etc. The induction process for new employees should include familiarisation with the policy.

#### **The right to apply for flexible working:**

Parents of children aged under six and parents of disabled children aged under 18 have the right to apply to work flexibly and their employers have a duty to consider such requests seriously. The application can cover:

- Hours of work
- Times of work
- Place of work (as between home and place of business only)

#### **Who can apply?**

The following conditions must be satisfied in order for an application for flexible working to be made under the new right. The applicant must:

- Be an employee (who has entered into or works under a contract of employment – agency workers or members of the armed forces are not eligible)
- Have a child under six or a disabled child under 18
- Have parental responsibility for the child (this includes biological parents,

legal guardians, adoptive and foster parents and spouses of these, including same sex partners as long as they have parental responsibility for the child)

- Be making the application in order to be able to care for the child
- Have worked for their employer for 26 weeks continuously at the date that the application is made
- Not have made another application to work flexibly under the right during the past 12 months
- 

### **How must the application be made?**

The employee must comply with the following requirements:

- The application must be made in writing, stating that it is being made under the statutory right to apply for flexible working
- The application must confirm the employee's relationship to the child
- The application must set out the employee's proposal and explain what effect the employee thinks this will have on the employer's business and how this may be dealt with
- The application must specify a start date for the proposed change giving the employer reasonable time to consider the proposal and implement it. This may take 12–14 weeks.
- The application must state whether a previous application has been made and if so the date on which it was made
- The application must be dated.

Employees should be aware that if the employer approves their application, the variation in contractual terms is a permanent one and the employee has no automatic right to change back to their previous pattern of work, unless the application seeks the variation for a specified time period only. A trial period may be agreed.

### **How must the employer respond to the applicant?**

In order to comply with the procedural requirements the employer must:

- Arrange a meeting with the employee within 28 days of receiving the application to discuss the request. This meeting is not required if the employer agrees to the terms of the application and notifies the employee accordingly within 28 days of receiving the application.
- Allow the employee to be accompanied by a work colleague if they so wish
- Notify the employee of their decision within 14 days of the date of the meeting.

This notification will either:

- Accept the request and establish a start date and any other action or confirm a compromise agreed at the meeting or reject the request and set out clear business reasons for the rejection together with notification of the appeals process.
- Arrange to hear the employee's appeal within 14 days of being informed of

the employee's decision to appeal. The employee must be allowed to be accompanied by a work colleague if they so wish.

- Notify the employee of the decision on the appeal within 14 days
- after the date of the meeting.

The notification will either:

- Uphold the appeal, specify the agreed variation and start date or
- Dismiss the appeal, state the grounds for the decision and contain as sufficient explanation of the refusal.
- The employer and the employee can agree to extend any of these time limits. The employer must record this agreement in writing, specifying the period to which the extension relates and the date on which the extension is to end. A copy of this record must be sent to the employee.

### **On what grounds can applicants be refused?**

Applications for flexible working arrangements can be refused only for the following reasons:

- The burden of additional costs
- Detrimental effect on ability to meet customer demand
- Inability to re-organise work among existing staff
- Inability to recruit additional staff
- Detrimental impact on quality
- Detrimental impact on performance
- Insufficiency of work during the periods the employee proposes to work
- Planned structural changes

### **What can an employee do if an employer refuses an application for flexible working?**

Wherever possible it is better to reach agreement on flexible working within the workplace. There are a number of options open if the employer refuses the application at the appeal stage of the procedure including:

- Informal discussions with the employer – there may be some simple misunderstanding of the procedure or facts which can be resolved by an informal route
- Use of the employer's internal grievance procedure
- Assistance from a third party such as a trade union representative or some other suitably experienced person
- Ask Acas to help find a solution – by providing information or where appropriate through a process of conciliation
- Where agreement cannot be reached other options are:
- Referral to the Acas Arbitration Scheme
- Complaint to an employment tribunal

## **Appendix 1 – Exemptions in Healthcare**

### **A. TOTAL EXEMPTION**

The categories of activity which are totally exempt from the Regulations are:

- junior/career grade doctors
- transport services
- security services
- ambulance workers

The scope of junior/career grade doctors includes:

- pre-registration House Officers
- Senior House Officers
- Registrars
- Senior Registrars
- Specialist Registrars
- Locums employed in the NHS in those grades

However, from August 2003 there will be a limit on the maximum working hours for junior/career grade doctors of 56 hours per week, which will be incorporated into doctors' contracts of employment. In addition from August 2004 the maximum working week will increase to 58 hours per week and the Working Time daily and weekly rest periods will also be enforced.

## **B. PARTIAL EXEMPTION**

The Regulations allow for partial exemption where there is a need for 24 hour continuity of service provision.

Where there is a need for 24 hour continuity of service provision exemptions are allowed from the following:

- daily rest periods
- weekly rest periods
- night work

However there is no exemption from the 48 hour maximum working week limit.

## **C. EXEMPTION BY AGREEMENT**

An individual employee may choose to opt out of the 48 hour working week limit.

An employee can make a decision at a later stage to work within the 48 hour working week limit by giving his/her employer 3 month's notice, in writing, of the intended change in the agreement.

It is important to note that this exemption can only be undertaken on an individual basis, not collectively within a department. In addition employees should not be put under pressure by employers to work beyond the maximum weekly limit if they choose not to.

## **D. EXEMPTION BY LOCAL AGREEMENT**

Exemption from:

- the maximum length of night work
- daily rest periods
- weekly rest periods
- compensatory rest

Can be made by local agreement.

Local agreements are negotiated with a Trust's Staffside Representatives.

However local agreements cannot be used to alter the ruling on the 48-hour working week limit, as this exemption can be only undertaken on an individual basis.

## **Appendix 2 – DH guidance on exceptional circumstances**

A number of other factors may also be relevant in assessing whether an exceptional case exists, including (this is not an exhaustive list and each of these factors will need to be considered in the light of all the circumstances and may not be sufficient on their own):

### **Difficulties in finding additional health care professionals in rural or isolated areas;**

For example, some community midwives cover large rural areas and recruitment can be challenging in these areas. They have regular programmed work timetabled during normal working days but are occasionally called out at unpredictable times e.g. to help mothers facing unexpected complications. In addition, the size of the geographical area covered by the midwives means that it could be difficult for colleagues from adjoining areas to handle call outs, or to cover programmed daytime or out of hours work which cannot be cancelled or deferred, e.g. because the midwife was required to attend a home birth the next date, to enable the requisite compensatory rest to be taken immediately. Additionally, legislation dictates that only a registered midwife or registered medical practitioner can attend a woman in childbirth (plus student doctors/midwives and others in an emergency)

### **The nature of the specialty;**

For example, the nature of a patient's condition might mean that he or she needed continuous care from a single specialist who, because of those needs, could only take short breaks and/or a shorter rest period. In one case, a consultant with additional training in paediatric anaesthesia cared for a very sick child suffering from septicaemia for six hours until completing a handover to the specialist recovery team who arrived from Aberdeen Hospital at 1am. The specialist recovery team had to assemble their personnel and kit and travel 220 miles via air ambulance to the island off Scotland where the hospital was located. The consultant had worked a 12 hours shift and the patient arrived on hour before the end of their shift. The lower level of patient demand in the hospital had only a single consultant with specialist training in paediatric anaesthesia on the island. The consultant returned to work at 8 am the next morning. She could not cancel the next day's work because the next patient required her specialist care and there was insufficient time to arrange highly skilled cover. In these circumstances, the consultant received 7 hours daily rest being unable to receive the 4 hours compensatory rest she may have been entitled to before having to start the next day's work.

### **The need to maintain prescribed competency levels by fulfilling specialist medical requirements;**

There may be circumstances where a qualified doctor needs to treat a minimum number and type of cases to maintain safe practice in accordance with recognized criteria for the specialty or profession. Meeting such criteria can be more difficult in, for example geographically isolated areas, where the intensity of the work may be lower. Recruiting extra suitably qualified people to ensure colleagues take their rest breaks on time may not be a solution because the resulting dilution of specialist work amongst bigger teams could mean competency levels are not maintained. However, lower intensities of work could mean more opportunities to intersperse duties with short breaks. Also, effective design of patient services should ensure that immediate compensatory rest is provided in all but exceptional circumstances.

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- <sup>xiv</sup> Department of Health Information Note on Exceptional Circumstances and Compensatory Rest accessed at [http://www.healthcareworkforce.nhs.uk/working\\_time\\_directive/wtd\\_resources/dh\\_-\\_information\\_note.html](http://www.healthcareworkforce.nhs.uk/working_time_directive/wtd_resources/dh_-_information_note.html) July 2007
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