

GUIDANCE ON THE WORKING TIME (AMENDMENT) REGULATIONS 2003 (Statutory Instrument 2003 No. 1684) – IMPLEMENTATION FOR DOCTORS IN TRAINING

This guidance should be read in conjunction with HSC 2003/001 “Protecting staff, delivering services” and HSC 1998/204 “Working Time Regulations: Implementation in the NHS”. These are available on the Department of Health website at www.doh.gov.uk/publications/coinh.html, or on www.doh.gov.uk/workingtime.

HSC 2003/001 summarised the key provisions of the WTD as it will apply to doctors in training from 1 August 2004. It also included detailed guidance on achieving WTD compliance. More recently, further information has been made available on the Department of Health WTD website at <http://www.doh.gov.uk/workingtime/planningframework/index.htm> to assist with planning for WTD compliance. This provides access, through website links, to a range of key sources of information, guidance and contacts. This planning framework is presented in a logical sequence to help with trust planning for compliance and includes information on working patterns.

HSC 1998/204 notified the NHS of the provisions of the 1998 Working Time Regulations, which apply to all NHS staff currently with the exception of doctors in training. It also included detailed guidance, which still applies, about implementing the regulations for all other NHS staff.

Further information on the 2003 DTI guidance “Your Guide to the Working Time Regulations” can be obtained on <http://www.dti.gov.uk/er/>

THE WTD (AMENDMENT) REGULATIONS 2003 - DEROGATION

The provisions of the Working Time (Amendment) Regulations 2003

Working Time Limits

- From 1 August 2004, doctors in training will be subject to weekly working time limits, which will be phased in as follows:
 - 58 hours from 1 August 2004 to 31 July 2007.
 - 56 hours from 1 August 2007 to 31 July 2009.
 - 48 hours from 1 August 2009.
- **It is not possible to derogate from the average weekly working time limit, only from the rest requirements.**
- Doctors in training are already restricted to no more than 56 hours' actual work on average per week from 1 August 2003, as part of their contract.
- An individual junior doctor can sign a waiver and 'opt out' of the 58-hour WTD ceiling after 1st August 2004, but contractually can do no more than an average of 56 hours actual work a week. The waiver is voluntary and workers cannot be required to sign it.
- Workers cannot 'opt out' of the rest requirements.

Reference period

- The average weekly working time of doctors in training is averaged over a 26-week reference period. Days when the doctor is absent on leave should be excluded from the calculation.
- Where a doctor in training has worked for his/her employer for less than 26 weeks, the reference period applicable is the period that has elapsed since s/he started work for the employer.

What is “working time”?

- NHS Employers should ensure that appropriate records of hours worked are kept where necessary. Regular checks on working hours are already routinely made in the course of the “New Deal” diary monitoring exercises (see AL(MD)1/01); employers should be aware that these do not measure working time as defined under WTR but can be used to indicate where further monitoring may be necessary.
- However, employers should note that the New Deal and Working Time Directive definitions of “work” and “rest” differ and cannot simply be merged from August 2004, as they deal with similar but not entirely overlapping issues. The ‘New Deal’ definition of work underpins the junior doctors’ contract, while the Working Time Directive definition applies to health and safety legislation. It will continue to be necessary to consider the implications of both systems when designing rotas.
- The Working Time Regulations state that working time is when someone is *“working, at his employer’s disposal and carrying out his activity or duties”*.

The SIMAP and Jaeger cases

- On 3 October 2000 a judgement was passed at the European Court of Justice (ECJ) in a case concerning the status of 'on-call' time.* The judgement related to doctors employed in primary health care teams though a similar approach may now be taken in other areas. It indicated that 'on-call' time will be working time when a worker is required to be at their place of work. When a worker is away from the workplace when 'on-call' and accordingly free to pursue leisure activities, on-call time is not 'working time' unless the worker is actually called in to work.
- The recent ECJ judgment on 9 September 2003 in the “Jaeger” case (Landeshauptstadt Kiel v Dr Med Norbert Jaeger, case C-151/02) has confirmed the SiMAP judgment.
- The implication of SIMAP and Jaeger for the NHS is that time spent resident on call for clinical purposes will count as “working time” in its entirety, even if the doctor in training is resting (or even sleeping) for the whole of the on call period.

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

- This means that resident on call working patterns will not be a sensible use of doctors' time in most cases. Where the intensity of work merits it, doctors could work a full shift; where the work is of low intensity, a non-resident on call arrangement would be preferable.
- Employers will also need to go back to first principles and look at whether the service for patients could be delivered completely differently, for example by
 - using non-medical practitioners to provide first on call out of hours cover
 - collapsing tiers of cover and/or cross-covering between specialties
 - setting up multidisciplinary night teams
 - redesigning services across several sites in some cases.
- Further examples are contained in HSC 2003/001 *“Protecting staff, delivering services: implementing the European Working Time Directive for doctors in training”*.

Derogation from the Directive's rest provisions

- The rest provisions in the 2003 Regulations which are outlined below (length of night work, daily rest, weekly rest, and in-work rest breaks) **do not apply** in relation to a worker whose activities involve the need for continuity of service or production, as may be the case in relation to services provided by hospitals - specifically including the activities of doctors in training.
- The Government has specifically disapplied these provisions in respect of doctors in training in order to give NHS employers the flexibility to plan services around patients without being rigidly tied to certain patterns of rest for junior doctors. However it is important to realise that **this does not mean that doctors in training are not entitled to minimum periods of rest**. The rest provisions in the

Regulations are disapplied **subject to compensatory rest**, which means that the doctors should be allowed to take an **equivalent period of compensatory rest**.

Compensatory rest

- Compensatory rest is a period of rest the same length as the period of rest, or part of a period of rest, that the worker has missed. The purpose of the derogation is to ensure that where necessary this rest can be taken at times that fit in around patient services.
- Where possible, however, it is probably simpler for NHS employers to plan staffing patterns so that doctors in training receive their full rest entitlement under the Regulations and the need for compensatory rest is minimised.
- The full implications of the European Court of Justice judgement on Jaeger are still being considered. Further information about this in relation to compensatory rest will be issued as soon as possible.
- The rest provisions are outlined in the attached table.

HOURS OF WORK AND REST REQUIREMENTS – A COMPARISON

The following Table 1 compares the requirements of the New Deal with those of the Working Time Regulations, as they will apply to doctors in training from August 2004. The Working Time Regulations must be taken as applying in parallel with the New Deal – for each parameter where there are differences the more stringent of the requirements will apply.

| New Deal Requirements | | Working Time Regulations Requirements | | | | |
|---|-------------------|---|---------|---------|---------|----|
| Maximum contracted hours for each working pattern | | Maximum contracted hours for each working pattern | 2004 | 2007 | 2009 | |
| On-call rotas: | 72 hours per week | On-call rotas (resident) | 58 | 56 | 48 | |
| | | (non-resident) | Silent* | Silent* | Silent* | |
| Partial shifts and 24 hour partial shifts: | 64 hours per week | Partial shifts and 24 hour partial shifts (resident) | 58 | 56 | 48 | |
| Full shifts: | 56 hours per week | Full shifts: | 58 | 56 | 48 | |
| Maximum number of actual hours | | Maximum number of actual hours | | | | |
| Irrespective of the number of contracted hours, the number of hours on duty and the working pattern, no junior doctor should be expected to undertake more than 56 hours of actual work a week. | | Irrespective of the contracted hours, the hours on duty and the working pattern, the maximum number of hours of actual work of a junior doctor in a week should be: | | 58 | 56 | 48 |

Controls on duty periods

| Working pattern | Maximum continuous duty | Minimum period off duty between duty periods | Minimum continuous period off duty | Working pattern | Maximum continuous duty | Minimum period off duty between duty periods | Minimum continuous period off duty |
|--|--|--|------------------------------------|--|-------------------------|--|--|
| Full shift | 14 hours | 8 hours | 48 hours + 62 hours in 28 days | Full shift | 13 hours | 11 hours | one of 24 hours in each 7 day period or, |
| Partial shift | 16 hours (except 24 hour partial shifts) | 8 hours | 48 hours + 62 hours in 28 days | Partial shift | 13 hours | 11 hours | two of 24 hours in each 14 day period, or, |
| On-call rota | 32 hours (56 hours at weekend) | 12 hours | 48 hours + 62 hours in 21 days | On-call rota (res) | 13 hours | 11 hours | one of 48 hours in each 14 day period. |
| | | | | (non-res) | Silent* | 11 hours | |
| <ul style="list-style-type: none"> Maximum number of continuous duty days for all working patterns is 13 days, followed by a minimum of 48 hours off duty. Duty hours: all hours working or on-call (including rest while on duty). Actual hours: all hours on duty carrying out tasks for the employer, including periods of formal study leave or teaching. | | | | <ul style="list-style-type: none"> Maximum number of continuous duty days for all working patterns is 12 days, followed by a minimum of 48 hours off duty. Duty hours: all hours working or on-call (including rest while on duty). Working hours: all hours on duty at the place of work, including periods of formal study leave or teaching. | | | |

* Where Working Time Regulations are silent on aspects of the above, New Deal limits will apply.

Rest requirements

| New Deal | | | | | New Deal with Working Time Regulations | | | | |
|--|----------------|---|---|---|--|----------------|---|---|---------------------------|
| Working pattern | Natural breaks | Minimum rest during the whole of each duty period | Minimum continuous rest guide | Timing of continuous rest | Working pattern | Natural breaks | Minimum rest during the whole of each duty period | Minimum continuous rest guide | Timing of continuous rest |
| Full shift | Yes | Natural breaks | At least a 30 minute continuous break after approximately every 4 hours continuous duty | At least a 30 minute continuous break after approximately 4 hours continuous duty | Full shift | Silent* | At least a 20 minute continuous break during shifts longer than 6 hours | At least a 20 minute continuous break during shifts longer than 6 hours | Silent* |
| Partial shift | Yes | Natural breaks if no out of hours duty. Otherwise one quarter of the out of hours duty period * | Frequent short periods of rest are not acceptable | At any time during the duty period | Partial shift | Silent* | At least a 20 minute continuous break during shifts longer than 6 hours | At least a 20 minute continuous break during shifts longer than 6 hours | Silent* |
| 24 hour partial shift | Yes | 6 hours | 4 hours | Between 10pm and 8am | 24 hour partial shift | Silent* | At least a 20 minute continuous break during shifts longer than 6 hours | At least a 20 minute continuous break during shifts longer than 6 hours | Silent* |
| On-call rotas | Yes | Mon-Fri: one half of the out of hours duty period **. Weekends: see revision note below | Minimum 5 hours | Between 10pm and 8am | On-call rotas | Silent* | At least a 20 minute continuous break during shifts longer than 6 hours | At least a 20 minute continuous break during shifts longer than 6 hours | Silent* |
| Reasonable expectation of rest: in each of the working patterns, rest targets must be met during at least 75% of all rostered duty periods. * e.g.: 5pm to 9am Mon to Fri = 4 hours; 8am to midnight Sat or Sun = 4 hours ** e.g.: 5pm to 9am Monday to Friday = 8 hours | | | | | Limits shown shaded above are subject to derogation and compensatory rest. | | | | |

* Where Working Time Regulations are silent on aspects of the above, New Deal limits will apply.

Weekend Rest requirements

| New Deal | | New Deal with Working Time Regulations | |
|--|-----------------------------|--|-----------------------------|
| Revision of weekend rest requirements for on-call rotas | | | |
| 1. If the agreed total rest expectation of 50% of the out-of-hours duty period within the duty period is achieved, this is acceptable and no further action is needed. For a weekend duty period of 9am Saturday to 5pm Monday, this would mean a total of 24 hours rest during that period. | | | |
| OR | | | |
| 2. At weekends, if the rest requirement equivalent to that for a weekday is achieved (8 hours for 24 hour period, 5 continuous between 10pm and 8am, on at least 75% of duty periods), but the total rest does not meet the requirement for the weekend (at least 50% of the out of hours duty period on 75% of occasions), the requirements of the New Deal will still be met if: | | | |
| (i) "equivalent paid rest" is built into the rota for each weekend worked, in the form of working days or half days (to count as a day or half day on duty for total hours purposes). This rest should be taken by the end of the Monday of the following week (i.e. within 8 days). | | No distinction is made between weekend and weekday working.* | |
| <i>However</i> , in exceptional circumstances, the period of equivalent paid rest built into the rota may be taken at another time in the rota cycle. This must be with the agreement of the individual trainee and apply to no more than 25% of weekends worked. | | | |
| AND | | | |
| (ii) the trust clearly demonstrates that the post is fully compliant with all the other hours limits and rest requirements of the New Deal, including the limit of an average 56 hours a week of actual work. | | | |
| Equivalent paid rest will be awarded for each weekend worked where the total rest requirement is not met, on the following basis: | | | |
| Total rest achieved per 48 hours weekend | Equivalent paid rest | Total rest achieved per 48 hours weekend | Equivalent paid rest |
| Greater than 20 hours, less than 24 | Half day (4 hours) | No provision or requirement for paid rest* | |
| Less than/equal to 20 hours | Full day (8 hours) | | |

* Where Working Time Regulations are silent on aspects of the above, New Deal limits will apply.

Table 2

| New Deal with Working Time Regulations For August 2004 and after | | | |
|---|-------------|-------------|-------------|
| Maximum contracted hours for each working pattern | 2004 | 2007 | 2009 |
| On-call rotas (resident) | 58 | 56 | 48 |
| (non-resident) | 72 | 72 | 72 |
| Partial shifts and 24 hour partial shifts (resident) | 58 | 56 | 48 |
| Full shifts: | 56 | 56 | 48 |
| Maximum number of actual hours | | | |
| Irrespective of the contracted hours, the hours on duty and the working pattern, the maximum number of hours of actual work of a junior doctor in a week should be: | 56 | 56 | 48 |

Controls on duty periods

| Working pattern | Maximum continuous duty | Minimum period off duty between duty periods | Minimum continuous period off duty |
|--|--------------------------------|---|---|
| Full shift | 13 hours | 11 hours | 48 hours + 62 hours in 28 days |
| Partial shift | 13 hours | 11 hours | 48 hours + 62 hours in 28 days |
| On-call rota (res) | 13 hours | 11 hours | 48 hours + 62 hours in 21 days |
| (non-res) | 32 hours (56 at weekends) | 11 hours | |
| <ul style="list-style-type: none"> Maximum number of continuous duty days for all working patterns is 12 days, followed by a minimum of 48 hours off duty. Duty hours: all hours working or on-call (including rest while on duty). Working hours: all hours on duty at the place of work, including periods of formal study leave or teaching. | | | |

Rest requirements

| New Deal with Working Time Regulations | | | | |
|---|-----------------------|---|--|---|
| Working pattern | Natural breaks | Minimum rest during the whole of each duty period | Minimum continuous rest guide | Timing of continuous rest |
| Full shift | Yes | At least a 30 minute continuous break after approximately 4 hours continuous duty | At least a 30 minute continuous break after approximately 4 hours continuous duty | At least a 30 minute continuous break after approximately 4 hours continuous duty |
| Partial shift | Yes | One quarter of the out of hours duty period*, or at least a 20 minute continuous break during shifts longer than 6 hours if this is greater | At least a 20 minute continuous break during shifts longer than 6 hours Frequent short periods of rest are not acceptable | At any time during the duty period |
| 24 hour partial shift | Yes | 6 hours | 4 hours | Between 10pm and 8am |
| On-call rotas | Yes | Mon-Fri: one half of the out of hours duty period **. | Minimum 5 hours | Between 10pm and 8am |
| Weekends: see revision note below | | | | |

Note: TCS make reference to 'a 30 minute break after approximately 4 hours continuous duty' only in respect of full shifts. WTR requires those working any shift longer than 6 hours to receive a continuous break of at least 20 minutes

during the working period – this has been incorporated into the above table where necessary. Limits shown shaded above are subject to derogation and compensatory rest.

Reasonable expectation of rest in each of the working patterns, rest targets must be met during at least 75% of all rostered duty periods.

* e.g.: 5pm to 9am Mon to Fri = 4 hours; 8am to midnight Sat or Sun = 4 hours

** e.g.: 5pm to 9am Monday to Friday = 8 hours

Weekend Rest requirements

New Deal with Working Time Regulations

| Revision of weekend rest requirements for on-call rotas | |
|---|---|
| 1. | If the agreed total rest expectation of 50% of the out-of-hours duty period within the duty period is achieved, this is acceptable and no further action is needed. For a weekend duty period of 9am Saturday to 5pm Monday, this would mean a total of 24 hours rest during that period. |
| OR | |
| 2. | At weekends, if the rest requirement equivalent to that for a weekday is achieved (8 hours for 24 hour period, 5 continuous between 10pm and 8am, on at least 75% of duty periods), but the total rest does not meet the requirement for the weekend (at least 50% of the out of hours duty period on 75% of occasions), the requirements of the New Deal will still be met if: |
| (i) | “equivalent paid rest” is built into the rota for each weekend worked, in the form of working days or half days (to count as a day or half day on duty for total hours purposes). This rest should be taken by the end of the Monday of the following week (i.e. within 8 days). |
| <i>However</i> , in exceptional circumstances, the period of equivalent paid rest built into the rota may be taken at another time in the rota cycle. This must be with the agreement of the individual trainee and apply to no more than 25% of weekends worked. | |
| and | |
| (ii) | the trust clearly demonstrates that the post is fully compliant with all the other hours limits and rest requirements of the New Deal, including the limit of an average 56 hours a week of actual work. |
| Equivalent paid rest will be awarded for each weekend worked where the total rest requirement is not met, on the following basis: | |
| Total rest achieved per 48 hours weekend | Equivalent paid rest |
| Greater than 20 hours, less than 24 | Half day (4 hours) |
| Less than/equal to 20 hours | Full day (8 hours) |