

The Working Time Regulations 1998



► **Inside**

Who is covered?

Overview of working time rules

Holiday pay

Other tricky holiday issues

Sanctions for non-compliance

Proposals for reform



The Working Time Regulations 1998 (WTR) implement the European Working Time Directive in the UK. The WTR currently remain unchanged after Brexit.

The WTR set out rules limiting working hours and provide for rest breaks and paid holidays.

This Inbrief looks at an employer's main obligations under the WTR.

Who is covered?

Employees and workers

The WTR cover both employees and "workers". Workers are individuals who work under a contract to perform personally work or services for another party who is not a client or customer.

This means temporary workers, agency workers and freelancers are covered. Self-employed workers who are genuinely in business on their own account are not covered by the WTR. See our [Inbrief on Employment Status](#) for more information.

Exclusions

Some types of employed worker are completely excluded from the WTR and others are excluded from specific rights. For example, the armed forces, police, doctors and rail workers are generally covered by the WTR but subject to specific exemptions. Sea and air transport workers are excluded from the WTR, but are subject to separate regulations with a similar purpose.

Overview of working time rules

Working time under the WTR covers any period during which a worker is working, carrying out his or her duties and at the employer's disposal or during which he or she is receiving relevant training. It does not include time spent "on call" away from the workplace, travelling to and from work or going to work-related social events.

An employer's main obligations under the WTR include the following:

48-hour week - Employers must take all reasonable steps to ensure that each worker's average working time (including overtime) does not exceed 48 hours a week. Workers can still work more than 48 hours in any one week, provided that the overall weekly

average is 48 hours or less over a rolling 17-week reference period.

Exemptions - There are various exemptions to the 48-hour limit on average weekly working time including the following:

- ▶ workers who have "opted-out" (see below)
- ▶ domestic servants in a private household
- ▶ workers with unmeasured working time (see below)
- ▶ mobile road transport workers
- ▶ certain members of the armed forces, police, emergency and civil protection services.

Unmeasured working time

Workers who control their working hours and whose time is neither monitored nor determined by their employer are exempted from specific rules, including the maximum 48-hour working week. For example, this would usually apply to roles such as managing executives. It would not, however, apply to ordinary line managers or supervisors or anyone who is required to work "core hours" or to be at work for a specified length of time.

Opting-out of the 48-hour week

A worker may opt-out of the 48-hour limit on average weekly working time if they do so in writing. The opt-out agreement can last indefinitely or for a fixed period. Where an opt-out agreement is in place, a worker can cancel it by giving at least seven days' notice (unless the opt-out agreement provides for longer notice, which cannot exceed 3 months).

Even if a worker has opted out, working excessively long hours is likely to pose a risk to their own health and safety or the health and safety of others. This may expose the employer to the risk of a claim as a result of an



employer's general duty to protect workers' health and safety. Employers cannot pressurise workers to sign an opt-out agreement or victimise workers who refuse to do so. In fact, a dismissal will be automatically unfair if the reason for the dismissal is the worker's refusal to opt-out of the 48-hour week. Employers must keep records covering the previous two years which show which workers have opted out.

Night workers

A night worker is someone who works for at least 3 hours during the night time as a regular feature of his or her working pattern. Someone who works nights only occasionally on an ad hoc basis will not normally be a night worker. Employers must take all reasonable steps to ensure that night workers' normal hours of work do not exceed an average of 8 hours a day, over a rolling 17-week reference period.

Employers must also ensure that night workers do not undertake work involving special hazards or heavy physical or mental strain for more than 8 hours a day.

Night workers must be offered free health assessments, both when starting night work and at regular intervals.

Rest periods and rest breaks

Employers are generally required to allow workers the following rest periods and rest breaks:

- ▶ a daily uninterrupted rest period of 11 hours
- ▶ a weekly rest period of 24 hours' uninterrupted rest a week or 48 hours a fortnight, at the employer's choice
- ▶ a rest break of 20 minutes when working more than 6 hours a day.

Employers must ensure that workers "can" take their rest periods or breaks but are not required to ensure workers take them.

"Adequate" rest breaks where work is monotonous

Where work puts the health and safety of a worker at risk, in particular because the work is monotonous, the employer must ensure that workers are given adequate rest breaks. This may involve granting further breaks in addition to the usual daily and weekly rest periods and breaks. Workers in excluded sectors and domestic workers are exempt from this right.

Paid holiday

Workers are entitled to 5.6 weeks paid annual leave (the equivalent to 28 days for a full-time worker) in each leave year. A part-time worker is entitled to a pro-rata amount of paid holiday according to the number of days worked each week.

The entitlement to 5.6 weeks paid annual leave is made up of:

- ▶ the right under the Directive to a minimum of four weeks' annual leave (20 days); and
- ▶ the domestic right to an additional 1.6 weeks' annual leave (8 days) which represents the number of bank holidays in a year (but need not be used for them).

The WTR state that the four weeks' "Directive" leave may only be taken in the leave year to which it relates, or else it will be lost (but see "Tricky issues" below). The additional 1.6 weeks entitlement may be carried forward into the next leave year if that is provided for in a "relevant agreement" (i.e., a contract of employment or a collective agreement).

Record-keeping

Employers are required to keep records showing whether the limits on average working time, night work and provision of health and safety assessments are being observed in respect of each worker.

Holiday pay

Calculating holiday pay for some types of workers can be complex, and there have been a number of recent cases and legal reforms that have changed the position. There is an additional complication that some of the rules come from European decisions and so technically only apply to the 4 weeks of leave under the Directive – although many employers will choose to apply the same rules to all holiday pay.

The key issues to be aware of are as follows:

- ▶ Workers should be paid their "normal remuneration" during at least 4 weeks of holiday, not just their basic pay - this means that regular elements of pay such as overtime, allowances or commission may need to be included.
- ▶ For workers who have normal working hours but whose pay varies based on the time when work is done (such as shift workers) or the amount of commission earned (such as sales representatives), holiday pay must be based on average pay in the previous 52 weeks, ignoring weeks of no work.
- ▶ For workers without normal working hours, holiday pay must be based on average pay in the previous 52 weeks, ignoring weeks without pay.
- ▶ It is not permissible to base holiday pay on a percentage of a worker's hourly or daily rate of pay, such as



the 12.07% which was often used to simplify calculations.

- ▶ Claims for missing holiday pay can be brought as a claim for deduction from wages, which is limited to two years of back pay.
- ▶ If a worker has never been given any paid holiday at all (for example, because they have been misclassified as genuinely self-employed), they will accrue all of the missing holiday and there is no limit on back pay.

Other tricky holiday issues

The interaction of holiday rights with other employment rights, in particular sick leave and family-related leave, can give rise to various tricky practical and legal issues.

Holiday

There have been a number of high-profile cases dealing with the issue of sickness absence and holiday. Conflicting provisions in the Directive and the WTR have created significant uncertainty for employers in this area. The current position in relation to some of the key issues that arise in this area is summarised below:

- ▶ Workers on sick leave continue to accrue statutory holiday even though they are not at work. This accrual continues regardless of whether or not the worker is in receipt of contractual or statutory sick pay or whether they have exhausted any sick pay entitlement.
- ▶ Workers on sick leave are entitled to take statutory holiday (and be paid holiday pay) in the normal way, even where they have exhausted their right to contractual sick pay or statutory sick pay.
- ▶ An employer cannot require workers to take holiday during sick leave.

- ▶ European Court decisions have confirmed that a worker must be allowed to carry-over accrued statutory holiday where sick leave has prevented them from taking it.
- ▶ If a worker returns to work before the end of a holiday year and there is sufficient time remaining to take accrued statutory holiday that year, there is nothing to prevent an employer from requiring them to do so.
- ▶ It is still possible to restrict the extent to which holiday missed during sick leave can be carried over, if the carry-over period during which holiday may be taken is substantially longer than the holiday year - for example, restricting the carry-over of holiday to 18 months after the end of the holiday year in which it accrued.
- ▶ The principles described above apply only to the four weeks of holiday under the Directive.

Family leave

The holiday entitlements of workers on different types of family-related leave are not all treated in the same way. Under the WTR, where the leave year ends and a new one begins during a period of family-related leave, a worker may lose any unused statutory annual leave for the earlier year. However, for women on maternity leave, this would amount to unlawful discrimination - a woman should not lose her entitlement to statutory annual leave as a result of going on maternity leave.

Religious holidays

Employers should be aware of potential religion or belief discrimination if a worker requests annual leave to observe a religious holiday or festival. If an employer refuses such request, it may be indirect discrimination and the employer must be able to justify its

decision. If different religions are treated differently, this may also be direct discrimination (which cannot be justified).

Sanctions for non-compliance

An employer who fails to comply with its obligations under the WTR faces a potentially wide range of sanctions depending on the breach in question. These can include:

- ▶ “Improvement” or “prohibition” notices issued by the Health & Safety Executive or local authority inspectors, with the prospect of unlimited fines and up to two years’ imprisonment for directors if such a notice is not complied with.
- ▶ Compensation for workers in the Employment Tribunal where an individual has been subjected to a detriment or been unfairly dismissed.
- ▶ “Just and equitable” compensation for an employer’s refusal to permit a worker to take statutory holidays.
- ▶ A claim for the amount due under the WTR or a claim under the deduction from wages provisions of the Employment Rights Act 1996 where an employer fails to pay holiday pay.

It is automatically unfair to dismiss an employee for certain reasons connected with rights and entitlements under the WTR and no qualifying period is necessary.

Proposals for reform

As the UK has left the EU, it is possible for the government to change some aspects of the WTR if they wish to do so. For example, there has been considerable criticism of the way in which the holiday pay rules now operate. The government could take more radical steps such as altering the

48-hour week (although there are commitments in the Brexit deal which may limit how far they can go in removing worker protections). It is currently unclear what, if any, changes are likely to happen in the near future.

For more information on this subject please contact:



Laura Farnsworth
Partner

+44 (0)20 7074 8158

laura.farnsworth@lewissilkin.com