

# The Working Time Regulations 1998



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The Working Time Regulations 1998 (WTR) were originally introduced to implement the European Working Time Directive in the UK. They remain in force (with some amendments) now that the UK has left the EU.

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.

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### 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.

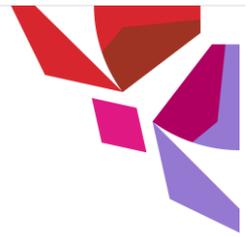
#### Unmeasured working time

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 that 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 their 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 during which night work is performed.

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 uninterrupted rest period of 24 hours' or 48 hours uninterrupted rest 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 actually 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 of paid annual leave (the equivalent to 28 days for a full-time worker working 5 days a week) in each leave year.

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

- ▶ basic annual leave of a minimum of four weeks (20 days); and
- ▶ additional annual leave of 1.6 weeks (8 days) which represents the number of UK bank holidays in a year (but need not be used for them).

A part-time worker is entitled to a pro-rata amount of paid holiday according to the number of days worked each week.

It is not clear when in the holiday year each of these types of leave is taken, but employers can address this in employment contracts (e.g. by specifying that the basic leave is taken first).

From 1 April 2024, there are special rules for irregular hours and part-year workers, under which holiday entitlement accrues at 12.07% of hours worked in each pay period (up to a maximum 28 days a year).

### Carry-over of holiday

The WTR state that the four weeks' basic leave may only be taken in the leave year to which it relates, or else it will be lost. The additional 1.6 weeks 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). See "tricky issues" below for special carry-forward rules for sickness and family-related leave.

A worker can also carry forward up to four weeks of untaken basic leave if their employer has not:

- ▶ recognised their right to take or be paid for leave, or
- ▶ given them a reasonable opportunity to take the leave or encouraged them to do so, or
- ▶ warned them of the risk of losing their entitlement at the end of the leave year.

The worker can keep carrying forward the holiday until the end of the first leave year in which the employer has not made these mistakes.

### Record-keeping

Employers are required to keep records that are adequate to show whether the limits on average working time, night work and provision of health and safety assessments are being observed in respect of each worker, and retain these records for two years.

### Holiday pay

Calculating holiday pay for some types of workers can be complex, and there have been a number of cases and legal reforms that have changed the position. There is an additional complication that some of the rules only apply to the four weeks of basic leave – although employers may



choose to apply the same rules to all holiday pay.

The key issues to be aware of are as follows:

- ▶ Workers may need to be paid more than just their basic pay during at least four weeks of holiday each year. Pay for the four weeks of basic leave must include payments linked to performing contractual tasks (such as commission), payments regularly paid in the last 52 weeks (such as overtime), and payments for professional or personal status (relating to length of service, seniority or qualifications).
- ▶ 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 in most cases to base holiday pay on a percentage of a worker's hourly or daily rate of pay. The exception is irregular hours or part-year workers, who for holiday years from 1 April 2024 can be paid 'rolled-up' holiday pay at the same time as basic pay. This must be paid at the rate of 12.07% of all pay for work done.
- ▶ 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.

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### 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.

### Sickness absence

There have been a number of high-profile cases dealing with the issue of sickness absence and holiday. The current position in relation to some of the key issues that arise in this area is summarised below. These provisions only apply to the basic four weeks of leave.

- ▶ 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.
- ▶ Under the WTR, a worker must be allowed to carry-over accrued statutory holiday of up to the four weeks of basic leave where sick leave has prevented them from taking it. This carried over leave must be used within 18 months of the end of the holiday year in which the entitlement originally arose.
- ▶ 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.

### Family-related leave

Under the WTR, workers can carry forward all 5.6 weeks of statutory leave into the next holiday year if they were unable to take it due to taking a period of family-related leave (including maternity, adoption and shared parental leave). Unlike with sick leave, the carried forward holiday does not have to be used within a particular period.

### Religious holidays

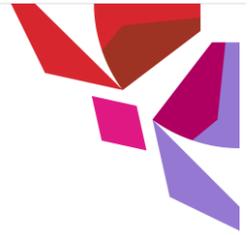
Employers should be aware of potential religion or belief discrimination if a worker requests annual leave to observe a religious holiday or festival. If an employer refuses such request, it may be indirect discrimination and the employer must be able to justify its decision. If different religions are treated differently, this may also be direct discrimination (which cannot be justified).

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### 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.

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### Future developments

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. There have already been some changes to rules on calculating holiday pay, holiday accrual and carry-forward of holiday, which are covered above. 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 the government can go in removing worker protections). It is currently unclear whether any further 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](mailto:laura.farnsworth@lewissilkin.com)