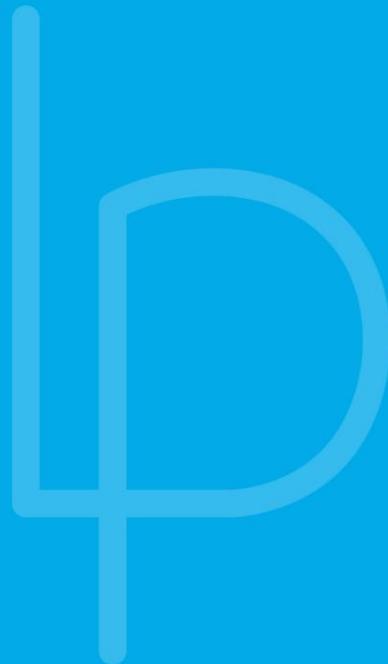


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Hours of Work



Hours of Work

Workers and employers are free to agree any hours of work they choose up to the maximum working hours set out in the Working Time regulations 1998.

Where there is any chance that a worker may have to work hours or shift patterns that are close to the WTR maximums, contractual terms relating to hours should be drafted with the main provisions of the WTR in mind.

Certain job sectors are excluded or partially excluded. There are other cases where the regulations do not apply.

The areas of the WTR which impact on working hours are:

- o the 48-hour maximum working week
WTR 1998, SI 1998/1833, reg 4(1)
- o opting out of the 48-hour maximum working week
WTR 1998, SI 1998/1833, reg 5
- o daily rest periods
WTR 1998, SI 1998/1833, reg 10(1)
- o weekly rest periods
WTR 1998, SI 1998/1833, reg 11
- o rest breaks
WTR 1998, SI 1998/1833, reg 12
- o special case exemptions and working through breaks
WTR 1998, SI 1998/1833, reg 24

The maximum working week

Unless a worker opts out of their rights, they have the right to work no more than an average 48-hour working week.

To work out the average working week:

- o work out the average number of weekly hours over a 17-week period
- o if the worker has not yet worked for 17 weeks it is calculated over the actual number of weeks that they have worked
- o do not include periods of *basic* annual leave or sickness in the calculation. *Additional* annual leave *is* included in the calculation
- o use a 26-week reference period where there is a 'special case' exemption
- o extend the reference period up to a maximum of 52 weeks where there is a collective agreement

Opting out of the maximum working week

It is possible for employers and workers to agree that the worker will work more than 48 hours a week. In order to be valid, an agreement must:

References: WTR 1998, SI 1998/1833, reg 5

- o be in writing
- o be made with each individual worker that it applies to separately
- o state that it is disapplying the 48 hour maximum working week rather than simply specifying a number of hours of work

An employer can include an opt-out provision in a contract of employment, as long as it is signed by the worker. However, this leaves scope for the worker to suggest later that they only agreed to the opt-out to get the job. It is therefore better to get them to sign an opt out agreement after employment has begun and separately from the contract of employment itself.

An worker who has signed an opt-out can change his mind as long as he gives proper notice. If the opt-out does not include a specific notice period, then he must give seven days' notice. An employer can require more notice (up to a maximum of three months) but must specify this in the opt-out document.

Daily rest periods

A worker is entitled to at least eleven hours of rest in any twenty-four hour period. The eleven hours do not have to be in the same day; so if the worker leaves work at 11 pm on Monday, they can start work at 10 am on the Tuesday, as they will have had eleven consecutive hours off.

Weekly rest periods

A worker is entitled to at least one 24-hour period of uninterrupted time off work every week. The twenty-four hours must be consecutive but can run across two days. The employer can choose to vary this entitlement and allow either:

- o one rest period of at least 48 hours every fourteen days, or
- o two periods of at least 24 hours rest every fourteen days

Rest breaks

If a worker works for more than six hours a day, they are entitled to leave their workstation (if they wish) to take a rest break (for a minimum of 20 minutes). Workers are entitled to only one rest break no matter how long beyond six hours they work.

Corps of Commissionaires Management v Hughes [2009] IRLR 122

A rest break must be a period which:

References: Gallagher v Alpha Catering Services [2005] IRLR 102

- o the worker knows in advance will be uninterrupted
- o is uninterrupted
- o the worker can use as he pleases

The entitlement to a rest break can be removed or extended in a collective agreement dealing with working time.

Special case exemptions

Where there is a 'special case' exemption the worker may be required to work without a daily or weekly rest period or rest break but must be given an equivalent period of compensatory rest to make up for the time lost or, failing that, appropriate protection to safeguard their health and safety.

An equivalent period of compensatory rest, as referred to in regulation 24(a), must be as near in character, quality and value to a rest break which meets the criteria in *Gallagher* of:

References: Hughes v Corps of Commissionaires Management (No. 2) [2011] IRLR 915 (CA)

Gallagher v Alpha Catering Services [2005] IRLR 102

- o the worker knowing in advance it will be uninterrupted
- o being uninterrupted
- o the worker being able to use it as he pleases

The phrase 'such protection as may be appropriate', as used in regulation 24(b), is wide enough to encompass not only rest which for some reason does not meet the requirements of regulation 24(a) (eg because the maximum break possible is less than 20 minutes) but also the provision of something which is not a rest at all but could involve any number of other measures ranging from the way in which the work is organised during the shift to health checks for workers.

References: *Hughes v Corps of Commissionaires Management (No. 2)* [2011] IRLR 100 (EAT)

The Court of Appeal has largely upheld the EAT's decision in *Hughes No. 2*, and also considered that regulation 24(b) was not engaged in this instance as the arrangements put in place by the employer fell under compensatory rest under regulation 24(a). It did not specifically endorse the EAT's view on the meaning of 'such protection as may be appropriate' but agreed with the EAT's rejection of the argument that the employer should have done a health and safety risk assessment on the specific risks arising from the fact that there was the potential for the rest break to be interrupted.

References: *Hughes v Corps of Commissionaires Management (No. 2)* [2011] IRLR 915 (CA) paras 64-68

The Court of Appeal also considered that cases where the employer can provide neither a *Gallagher* rest break nor a compensatory alternative will be exceptional.

On call

Time on call has been held by the ECJ and the EAT, to be working time for the purposes of the WTR 1998. Consequently, workers who are required to be on call, even if they are not actually working, are entitled to have the time on call included when calculating their average weekly hours. It also means that workers on call are entitled to the appropriate rest periods. So where, as in *Graylyns* a care worker was required to be on call for eleven hours per night, seven nights per week, she was entitled to a rest break of 20 minutes during the eleven hour period and the weekly rest period of 24 hours.

References: *Landeshauptstadt Kiel v Jaeger* [2003] IRLR 804

SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana [2000] IRLR 845

Hughes v Jones t/a Graylyns Residential Home (UKEAT/0159/08/MAA)

Night work

The WTR include several restrictions in relation to night work.

Night time

'Night time' is the period between 11pm and 6pm. This can be varied by a relevant agreement (eg a contract of employment) to be:

References: WTR 1998, SI 1998/1833, reg 2(1)

- o a period of not less than seven hours
- o which includes the period between midnight and 5am

Night worker

A 'night worker' is one who:

References: WTR 1998, SI 1998/1833, reg 2(1)

- o 'as a normal course' works at least three hours of their daily working time during night time
- o is specified as a night worker in a collective agreement or workforce agreement

A person work hours 'as a normal course' (without prejudice to the generality of that expression) if they work such hours on the majority of days on which they work. This has been interpreted as involving nothing more than the requirement that it should be a regular feature of the individual's employment.

References: WTR 1998, SI 1998/1833, reg 2(1)

R v A-G for Northern Ireland, ex p Burns [1999] IRLR 315

Restrictions on night work

An adult night workers cannot be required to work more than eight hours on average in a 24-hour period.

References: WTR 1998, SI 1998/1833, reg 6(1), 6(5)

The employer is required to 'take all reasonable steps, in keeping with the need to protect the health and safety of workers to ensure that the limit ... is complied with'.

References: WTR 1998, SI 1998/1833, reg 6(2)

These restrictions are cumulative with those on working time in general

References: WTR 1998, SI 1998/1833, reg 4

It is not possible to opt out of the restrictions on work at night.

Night-time working hours are calculated over a reference period of either:

References: WTR 1998, SI 1998/1833, reg 6(3), 6(4)

- o rolling periods of 17 weeks, or
- o if a relevant agreement (eg a contract of employment) provides for it, successive 17-week periods, or
- o if the worker has worked for less than 17 weeks, the period that has elapsed since they started work

Work involving special hazards or heavy strain

Actual working time must not exceed eight hours in any 24-hour period during which the night worker performs night work, if the work involves 'special hazards or heavy physical or mental strain'.

References: WTR 1998, SI 1998/1833, reg 6(7)

Averaging over a reference period longer than 24 hours is not possible.

Work involves special hazards or heavy physical or mental strain if:

References: WTR 1998, SI 1998/1833, reg 6(8)

- o it has been identified as such in a collective or workforce agreement which takes account of the specific effects and hazards of night work, or
- o it is recognised in a risk assessment made by the employer as involving a significant risk to the health or safety of workers performing that work

References: Management of Health and Safety at Work Regs 1999, SI 1999/3242, reg 3

Night work by young workers

No young worker is permitted to work at night.

References: WTR 1998, SI 1998/1833, reg 6A

Limited exceptions apply

Health assessments for night workers and transfer from night work

An employer must ensure that each night worker has the opportunity of a free health assessment at regular intervals of whatever duration may be appropriate in the individual's case. The original DTI Guidance indicated that the purpose of the health assessment is to determine the worker's fitness to carry out night work.

References: WTR 1998, SI 1998/1833, reg 7

Note that the obligations to conduct a health assessment are additional to the employer's general duties, under the Management of Health and Safety at Work regulations 1999, to make a suitable and sufficient assessment of the risk to health and safety of employees.

References: MHSW Regs 1999, SI 1999/3242

Workers have a right, rather than an obligation, to have health assessments; the employer must offer the opportunity to have an assessment, but need not require the worker to undergo it.

Workers must not be assigned to night work unless this opportunity has been provided before the individual takes up the assignment, or a health assessment has been previously carried out, and the employer has no reason to believe the assessment no longer remains valid.

The regulations do not define what constitutes a health assessment, who may undertake it or how frequently further assessments should be afforded. Guidance on the BusinessLink website suggests the use of a health questionnaire, devised by the employer with advice from a qualified health professional, with a follow-up examination by a health professional 'where necessary'. The site suggests assessments are then offered on a 'regular basis'.

References: BusinessLink website: The rules about working at night

If the conclusion of the medical adviser is that the worker is fit to undertake (or continue to undertake) night work, or work in the restricted period, a statement to that effect may be communicated to the employer. Otherwise no information derived from the assessment may be passed to the employer without the worker's consent.

References: WTR 1998, SI 1998/1833, reg 7(5)

Where a registered medical practitioner advises the employers that a worker is suffering from health problems which the practitioner considers to be connected with the fact that the worker performs night work, the worker must be transferred to work that is not 'night work' if:

References: WTR 1998, SI 1998/1833, reg 7(6)

- o if there is other work that it is possible to transfer the employee to, and
- o the alternative work is work to which the employee is suited

This is a more limited duty than the equivalent for pregnant workers whose health is prejudiced by their normal duties, in that the regulation says nothing about protection of pay or other terms and conditions. It is probable in the great majority of cases that transfer from night work to day work would entail loss of unsocial hours premia, shift allowances or other benefits, and an offer of a transfer may therefore not be welcome to the worker if not accompanied by protection of pay and benefits.

Note however that where the health problem amounts to a disability within the meaning of the Equality Act 2010, the duty to make reasonable adjustments may impose stricter obligations on the employer.

A more problematic situation would be where the employer is put on notice that the worker has a health problem which is aggravated by night work, but there is no suitable alternative work available. If the employer is to comply with duties under the Health and Safety at Work etc. Act 1974, there may be no real alternative but to dismiss the employee, and, subject to any issue of procedural fairness, it is difficult to see how such a dismissal would not be fair under the ERA 1996. However, there are perhaps few, if any, health factors which completely rule out night work, although some conditions might be aggravated by night work.

References: HSWA 1974

Guidance

Further guidance is available on the BusinessLink and HSE websites.

References: BusinessLink website: The rules about working at night

HSE website: Managing shift work

Young workers

The regulations prescribe much stricter limits on the working time of young workers.

Young workers

A 'young worker' is one who:

- o has attained the age of 15
- o but not the age of 18, and
- o is over compulsory school age (ie, is or will be aged 16 on or before the next school leaving date)

References: Education Act 1996, s 8

Maximum working time for young workers

A young worker's working time must not exceed eight hours in any one day, or 40 in any week (starting at midnight between Sunday and Monday).

References: WTR 1998, SI 1998/1833, reg 5A

There is no averaging provision and no provision to opt out of these limits.

Where a young worker has two or more employers, hours worked for both or all must be aggregated, and the limits apply to the aggregated total. However, there is no specific obligation on employers to share information about the working hours of a young worker employed by both, and it is therefore not easy to see which of the employers would be liable for a young worker whose total working time exceeds the permitted maximum.

References: WTR 1998, SI 1998/1833, reg 5A

Very limited exceptions apply to the maximum working hours limit.

References: WTR 1998, SI 1998/1833, regs 27, 27A

Night work by young workers

No young worker is permitted to work during the 'restricted period', ie the period between 10pm and 6am or, where the worker's contract provides for them to work after 10pm, between 11pm and 7am.

References: WTR 1998, SI 1998/1833, reg 6A

An employer must ensure that no such work is undertaken.

References: WTR 1998, SI 1998/1833, reg 6A

Very limited exceptions apply.

References: WTR 1998, SI 1998/1833, regs 27, 27A

Young workers who are assigned to work at night must be offered a free assessment of their 'health and capabilities' before they take up the assignment (unless they have previously had such an assessment and the employer has no reason to believe that the assessment is no longer valid).

References: WTR 1998, SI 1998/1833, reg 7(2)

Note that the obligations to conduct a health assessment are additional to the employer's general duties, under the Management of Health and Safety at Work regulations 1999, to make a suitable and sufficient assessment of the risk to health and safety of employees.

References: MHSW regs 1999, SI 1999/3242

Guidance

Further guidance on employing young workers and the restrictions on their working time is available on the BusinessLink website.

References: BusinessLink website: Employing young people guidance