Think Ahead ACCA

Technical factsheet

Working time

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly.

These are:

The contract of employment

The standard statement of terms and conditions

Working time

Age discrimination

Dealing with sickness

Managing performance

Disciplinary, dismissal and grievance procedures

Unlawful discrimination

Redundancy

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Employment status: workers

The Working Time Regulations (WTR) were introduced in 1998 to give effect to the European Working Time Directive. They are a health and safety measure, primarily intended to ensure that working hours are limited, proper breaks are taken and that workers receive paid holidays. We do not know what impact a change of government will have on the current state of the law in this area, but a few amendments have already been made which would not be compatible with EU membership, and they are indicated as they arise below.

The legislative changes that are proposed by the new government do include the right for casual staff to be offered a permanent contract on the average numbers of work hours they have worked in the previous 12 weeks.

We don't currently know the full scope of this or exactly how it is going to work, neither do we have any detail about when it is going to come in. It appears that the previous legislation, which had been passed by parliament but not brought into force and which gave casual workers the right to request predictable hours, will not be enacted in their current form.

There do not appear to be any other substantive changes to the Working Time Regulations planned at the time of writing.

Details on the Working Time Regulations can be found at: bit.ly/leg-wtr98.

Who is covered?

The regulations cover employees and workers, eg direct casuals and agency workers, but not self-employed people, who are free to work for clients and customers as they choose. A person doing in-house training or a trainee on work experience is also a worker. A young worker is someone who is above the minimum school-leaving age but under 18.

There are certain types of work where the regulations do not apply, as they have their own sector-specific legal requirements, and this is mainly in transport-related areas, eg sea transport, workers on fishing vessels and those covered by the Aviation Directive.

Mobile workers in road transport are currently covered by the EU drivers' hours rules which were enacted into English law via the Road Transport (Working Time) Regulations 2005. This includes drivers, members of the vehicle crew and any others who form part of the travelling staff. They are entitled to paid annual leave and health assessments for night workers.

The armed forces, the police and emergency services are largely outside the scope of the regulations but young workers with jobs in these areas are covered.

What are the limits?

Other than in relation to the exceptions laid out above, workers cannot be required to work for more than 48 hours a week on average. The average weekly working time is normally calculated over 17 weeks although this can be extended by agreement with the workforce up to a maximum of 52 weeks: for example, offshore workers have their weekly hours averaged over 52 weeks.

Workers can agree that they are prepared to work longer than the 48-hour limit, unless they are young workers. This agreement is generally referred to as an ‘opt-out’, and it is in writing and signed by the worker. It can be for a specified period or an indefinite period. However, workers can give notice to withdraw from the opt-out agreement whenever they want, and this notice is a minimum of seven days or up to three months by agreement with their employer. Workers cannot be fairly dismissed or subjected to detriment for refusing to sign an opt-out or giving notice to terminate the opt-out agreement.

Employers must take all reasonable steps to ensure that their workers are not required to work more than an average of 48 hours a week, unless the employee has signed an opt-out agreement.

Young workers are subject to tighter limits. They may not ordinarily work more than eight hours a day or 40 hours a week, although there are certain permitted exceptions, and the averaging provisions and opt-out are not applicable to them.

The opt-out is used so frequently in the UK that many argue that the 48-hour limit is ineffective. It remains to be seen whether the new government will make any changes to this.

What is ‘working time’?

The regulations define working time as when someone is ‘working, at [their] employer’s disposal and carrying out [its] activity or duties’.

This includes:

- working lunches, such as business lunches
- travelling as part of work, eg going to clients if a worker is a travelling salesperson or a mobile repairperson
- job-related training
- time spent abroad working if the employer carries on business in the UK.

Working time is not:

- routine travel between home and work
- rest breaks when no work is done
- time spent travelling outside normal working hours, even if for work
- training such as non-job-related evening classes or day-release courses.

The position in relation to workers who are ‘on call’ has been the subject of quite a few cases. Please note that the rules about on-call work are different in relation to minimum wage, which is the subject of a separate set of court decisions and is outside the scope of this factsheet.

For the purposes of working time, it has been established that if a worker is on call at home, they may not be working for these purposes until they are actually called out. Whether or not this is the case depends on the restrictions placed on the worker: are they free to pursue their own leisure and travel plans, or are they required to remain close to their place of work, be available within certain times, and/or to ensure they are fit and ready to work at short notice? If the latter is the case, all the time they are on call should count as working time. Such workers could still be ‘working’ even if they are asleep in their own accommodation or flat onsite. An on-call worker who is present at the employer’s workplace, and away from home (eg in hospital or care home accommodation is probably technically ‘working’ for the purposes of the regulations,

although they may actually be asleep.

The decision of the European Court of Justice (ECJ) in *Federacion de Servicios Privados v Tyco Integrated Security* has also indicated that when a worker is travelling between clients allocated by the employer, eg where they are a maintenance engineer or carer who visits a range of clients throughout their shift, then the time spent travelling between clients should be taken as working time and therefore counted for the purpose of calculating entitlement to breaks and holidays. The court also extended this to include both the first and last journey of the day, to and from the worker's home.

How is working time averaged?

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, normally 17 unless otherwise agreed. This is the reference period.

If the worker is away during the reference period because they are taking paid annual leave, maternity, paternity, adoption or parental leave, or is off sick, then the averaging is done by ignoring this period and averaging the last 17 weeks during which the worker was actually working.

Night workers

A night worker is someone who normally works at least three hours at night. Night time is normally between 11pm and 6am, although workers and employers may agree to vary this. Night workers should not work more than eight hours daily on average, including overtime where it is part of their normal hours of work, and this is averaged in the same way as ordinary work above. A night worker cannot opt out of the night-work limit and young workers are not normally permitted to work at night. Mobile workers are excluded from the night-work limits and are entitled to 'adequate rest', which is sufficiently long and continuous to ensure that workers do not injure themselves, fellow workers or others, and that they do not damage their health, either in the short or longer term.

Where the night work involves particular hazards or heavy physical strain, there is an

absolute limit of eight hours on the working day. Night workers must be offered a health assessment by the employer at least annually. This involves a questionnaire and, if there are any doubts about the worker's health, a medical examination. There is also a right to a health assessment for mobile workers and workers subject to the Road Transport Directive who are 'night workers'.

Breaks and rest periods

The following provisions are mandatory and the worker cannot 'opt out' of them.

Daily rest

A worker is entitled to a rest period of 11 uninterrupted hours within each rolling 24-hour period.

Weekly rest

A worker is entitled to one whole day off, ie 24 hours, in any seven days. Days off can be averaged over a two-week period, meaning workers can take a continuous 48 hours in a 14-day period instead of one day per week. Days off are taken in addition to paid annual leave.

Mobile workers are excluded from the usual rest break entitlements set out above. Instead, these workers are entitled to 'adequate rest'. 'Adequate rest' means that workers have regular rest periods. These should be sufficiently long and continuous to ensure that fatigue or other irregular working patterns do not cause workers to injure themselves, fellow workers or others, and that they do not damage their health, either in the short term or in the longer term. There are special rules for young workers.

Rest breaks

Workers are entitled to a minimum of one rest break of 20 minutes in any working shift that exceeds six hours.

The break should be taken during the six-hour period and not at the beginning or end of it. The exact time the breaks are taken is up to the employer to decide. Again,

employers must make sure that workers can take their rest.

Mobile workers are excluded from the usual rest-break entitlements under the Working Time Regulations, as are some other specific types of worker such as emergency services. Instead, these workers are entitled to 'adequate rest', on the same basis as weekly rest above.

Employers must make sure that workers can take their rest, and it has been confirmed that the employer must provide rest breaks; it is not for the worker to request them. There has also been a recent case which has established that an employee was unfairly dismissed when part of the reason for his refusal to work in accordance with his employer's instructions was that he believed he would not get any breaks at the site in question, having not been allowed to take one previously (*Pazur v Lexington Catering Services 2019*). In 2020, a small company, Renown Consultants, was required to pay £750,000 in fines and costs in relation to an accident in which two employees were killed, caused by their colleague's fatigue. The company was guilty of serious and systemic failures in their health and safety policies and supervision in relation to driving hours. From a health-and-safety perspective, and especially where workers are operating machinery or driving, it is critical for employers to set, monitor and enforce working-hour limits. Following an accident at work, this is an area that is frequently the first point of investigation for enforcement authorities.

Unmeasured working time

The working time limits and rest entitlements, apart from those applicable to young workers, do not apply if a worker can generally decide how long they work because of the particular nature of their job. This, in effect, means that most salaried staff will not be covered by the regulations. The reason for this is that technically most salaried staff work 'core hours' that do not exceed the 48-hour minimum, and any additional work they may perform is at their discretion.

Generally, therefore, the regulations will apply to:

- hourly paid workers and those claiming paid overtime, whose hours are specified

or demanded

- those working under close supervision, whose hours are specified or demanded
- a worker who is implicitly required to work – for example, because of specific output requirements to be achieved in a specified period.

This entire provision may be subject to abolition or amendment now that the UK has left the EU.

PAID ANNUAL LEAVE

Every worker covered by the Working Time Regulations is entitled to at least 5.6 weeks' paid holiday (28 days for a five-day week or pro rata for those working part time or casually). This is made up of 20 days' basic holiday, which is an EU right, and an allowance for the 8 days for bank holidays in the UK. (National governments were left free to add on bank, religious and public holidays as appropriate.) This includes workers who are subject to the Road Transport Directive. This minimum period of leave must be granted to all workers, and cannot be paid in lieu or reduced below the minimum. A recent case concluded that it was unlawful for employees to have their 28-day annual leave entitlement reduced because they were paid double for bank holidays.
There have been some recent amendments to the rules about holiday, but the government did not take the opportunity to merge the two kinds of holiday into a single period of 28 days or make any changes to the split established when we were members of the EU.

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: if a worker does a five-day week, they are entitled to 28 days' leave; if they do a three-day week, the entitlement is 16.8 days' leave and so on. The entitlement is to 5.6 weeks; for some workers, bank holidays will be normal working days and their leave will be taken at other times, whereas for office-based workers, bank holidays will normally be part of annual leave and will come off their entitlement. For this reason, any pro rata calculation of leave entitlements should treat bank holidays in exactly the same way as other days. Employers are entitled to

require workers to take holidays at particular times and they should give reasonable notice if, for example, there is to be a Christmas or summer shutdown. Workers must give the employer notice that they want to take leave, and this is normally specified in the contract or handbook.

How is pay calculated?

Salaried staff will continue to be paid at their normal rate throughout their holiday. Those permanent staff who work part time will have their holiday worked out pro rata on the basis of the appropriate proportion of the full-time paid holiday allowance, eg 3/5 if they work three full days per week. With casual staff, holiday accumulates as hours are worked and should be paid separately as 'holiday pay'.

Holiday pay for casual staff has been a thorny issue for a number of years. The holiday entitlement of 5.6 weeks works out as equivalent to 12.07% of hours worked over a year: 5.6 weeks' holiday, divided by 46.4 weeks (52 weeks – 5.6 weeks). The 5.6 weeks are excluded from the calculation as the worker would not be at work during those 5.6 weeks in order to accrue annual leave.

Payment of a 'rolled-up' rate to casual staff, increasing their basic pay by 12.07%, to represent holiday entitlement was found to be unlawful following the Supreme Court decision in *Brazel v Harpur Trust*, with the court requiring average hours over the last 52 weeks worked to be calculated and paid on that basis. This is a very complex calculation and the average hours will depend upon when the holiday is taken/paid. The law has been changed in relation to all holiday years starting on or after 6 April 2024, although the Brazel calculation is still applicable for holiday years starting before this date. The new law is based on a return to the previous practice of holiday pay for casuals, uplifting basic pay by 12.07%. There is a useful calculator on the government website which is invaluable in working out holidays for casuals and part-time staff.

Holiday pay and overtime

Historically in the UK, holiday pay was always paid at basic rate. There has been a long-running saga about whether or not holiday pay should include an allowance for regular

overtime worked and/or commission that is an intrinsic part of pay. In a number of important cases the courts have established that basic pay should be uplifted to take account of that, ensuring that holiday pay reflects 'normal pay'. This has finally been resolved by legislation passed recently, In January 2024, the UK government introduced The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023, which provide as follows.

Firstly we need to distinguish between the two aspects of holiday entitlement in the UK: as stated above, workers are entitled to four weeks' leave based on EU law (EU leave); and an extra 1.6 weeks' leave based on UK law (UK leave). The position for many years now has been that the four weeks' EU leave must be paid at 'normal' pay, whereas employers have been able to pay the UK leave at basic pay only (for the majority of workers). This has not changed, but the government has confirmed the components which must be included when calculating a worker's 'normal' rate of pay for their four-week EU entitlement (effectively writing case law into the new legislation). Those are:

- payments, including commission payments, intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out;
- payments relating to professional or personal status relating to length of service, seniority or professional qualifications; and
- other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.

If employers are not yet calculating at least the four weeks EU law on the above basis, uplifting basic pay to include these components, they should now address this. Of course, for the sake of simplicity, many employers do not distinguish between the EU leave and UK leave for the purposes of calculations and calculate pay for the entire 5.6 weeks on the above basis. Clearly, if that's the case there is no need to revisit this, albeit it goes above and beyond the legal minimum.

In relation to the method for averaging these various uplifts, there is no clear guidance on this. In the UK, in order to calculate holidays for casual staff, a period of 12 weeks was used until it was increased to 52 weeks following *Brazel*, and some employers still

use one of these periods. In relation to commission, however, many employers took the view from the beginning that it was fairer to average it over 12 months. It would appear that any sensible approach to averaging is likely to be acceptable. It is suggested that the government calculator above is the best way of dealing with this.

How far back?

Employers have often been concerned as to how far back employees might be able to go in claiming unpaid holiday. The government therefore introduced the Deduction from Wages (Limitation) Regulations 2014**.** These regulations do two things:

1. Limit all unlawful deductions claims to two years before the date the employment tribunal claim (ET1) is lodged (but not certain categories of unlawful deductions claims such as claims for statutory maternity pay, statutory sick pay and guarantee payments, which remain unaffected).
2. Explicitly state that the right to paid holiday is **not** incorporated as a term in employment contracts, which means that the employee cannot make a civil claim which could mean being able to claim up to six years' worth of holiday pay.

The effect is to limit any chance employees have of bringing claims for back holiday pay for more than 2 years, either in the tribunal or civil courts. It had previously been held that if there was more than a three month gap between underpayments of holiday, the employee could not claim any further back, which also limited the level of claims. However in the case of *Chief Constable of the Police Service of Northern Ireland and another v Agnew and others (Northern Ireland) 2023*, the Supreme Court has held that a three-month gap in a series of deductions for underpaid holiday pay does not automatically break the chain of deductions, if the deductions are factually linked to the same underlying cause. As a result of the decision, more than 3,700 employees have to be paid for their underpaid holiday pay dating back to 1998 and amounting to more than £30m.

It is very important, also, for businesses to recognise the significance of the cases of *The Sash Window Workshop v King* and *Smith v Pimlico Plumbers*, which concerned

‘self-employed’ contractors who, after long years of working direct with the companies on a self-employed basis, won the argument that they should have been treated as a worker throughout their employment. During their period of service, they had never been granted any paid holiday; any leave they took was unpaid. In the King case the ECJ concluded that Mr King had a claim for back holiday pay for the entire period of his employment, amounting to many thousands of pounds. The same conclusion was reached in Mr Smith’s case. Because it was a non-payment rather than an underpayment, the regulations did not apply here, and the accrual continued to carry over, year on year, throughout the employment, with the sum due being payable as a lump sum at termination. The consequences of allocating the wrong status to those working for you have just become considerably graver. For further information please see *Technical factsheet: Employment status: workers*. Commentators are not clear what effect this decision has on the regulations and on back claims for underpaid, rather than unpaid, holiday. It would seem likely that where holiday has been granted, but underpaid, claims will be limited to two years.

How ‘leave years’ work

If the employee is entitled to paid leave, it will be based on a ‘holiday year’. This is normally specified by the employer. If a worker starts work part of the way through an existing leave year, their leave entitlement will be proportionate to the amount of time left during that year. If they leave their job part of the way through a leave year, the annual leave entitlement will be proportionate to the amount of the leave year that they have worked.

The entitlement to paid annual leave begins on the first day of employment but an accrual system can be used for the first year so that the worker can only take leave that they have earned so far during the year. The amount of leave that may be taken builds up monthly in advance at the rate of one-twelfth of the annual entitlement each month. This does not apply to subsequent years, when the employee can take leave at any stage during the year as long as they have permission to do so.

When a worker’s employment ends, the employer must pay them for any annual leave

due and untaken in their final pay. It is also advisable to provide in the contract of employment for the employer to claw back holiday that has been taken in excess of entitlement, and to reserve the right to require an employee to take the balance of any leave owing during notice.

More on keeping records

What records do employers need to keep?

Employers need to keep records that show that they comply with the weekly working time and night-work limits. It is for them to determine what records need to be kept for this purpose; it may be possible to use existing records maintained for other purposes, such as pay, or new arrangements may need to be made.

Employers do not have to keep a running total of how much time workers work on average each week. How workers' hours are monitored depends on particular contracts and work patterns.

Employers need only make occasional checks of workers who do standard hours and who are unlikely to reach the average 48-hour limit. However, it is necessary to monitor hours of workers who appear to be close to the working-time limit to ensure that they do not work too many hours. Employers need to keep an up-to-date record of workers who have agreed to work more than 48 hours a week, but they do not need to record how many hours they actually work.

Employers must offer regular health assessments to night workers. They should keep a record of: the name of the night worker; when an assessment was offered (or when they had the assessment if there was one); and the result of any assessment. Records must be kept for two years.

More about enforcement

The Health and Safety Executive (HSE), local authorities and other enforcement agencies are responsible for enforcing the limits set out in the regulations, including the 48-hour week and the provisions on night work. Where the regulations give the worker

an entitlement – for example, to rest breaks or to annual leave – then the remedy is for the worker to make a complaint to an employment tribunal, which may make a declaration that the complaint is well founded and may award compensation; this can be whatever sum is just and equitable.

These regulations are very detailed and the HSE has a useful guide: bit.ly/hse-wtd.

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