

Guidance on implementing the EC directive on working time for consultants

April 2008

Introduction

The EC directive on working time is health and safety legislation to protect employees from working excessive hours. The regulations which implement the directive in law came into force on 1 October 1998, and as primary legislation provide for:

- a limit of an average of 48 hours worked per week, over a reference period.
- a limit of 8 hours worked in every 24 hour period for night work.
- a weekly rest period of 24 hours every week.
- an entitlement to 11 hours consecutive rest per day.
- an entitlement to a minimum 20 minute rest break where the working day is longer than 6 hours.
- a requirement on the employer to keep records of hours worked

All consultants are covered by the entitlements afforded under the Directive. Employers have a legal obligation to implement the directive, with strict penalties being imposed by the Health and Safety Executive for non-implementation.

In 1998, the Central Consultants and Specialists Committee (CCSC) of the BMA and the NHS Executive negotiated a collective agreement regarding the application of the directive for senior hospital doctors on national terms and conditions of service, including consultants, associate specialists, staff grade doctors, hospital practitioners and clinical assistants. This agreement applied derogations to inflexible hourly, daily and weekly limits under regulation 21 and in their place established the right of senior hospital doctors to take compensatory rest where the limits were exceeded. These derogations were applied to ensure that continuing responsibility to patients was maintained and the necessary protection for senior hospital doctors under the directive is retained.

The agreement set out in AL(MD) 6/98 (England) and NHS Circular PCS (DD) 1999/1 (Scotland). details the derogations agreed. This advance letter can be found here:

http://www.dh.gov.uk/en/PublicationsAndStatistics/LettersAndCirculars/AdvancedLetters/DH_4003839

These derogations were largely intended to allow local flexibility to help employers and employees continue to provide an appropriate standard of care to patients whilst offering appropriate periods of rest to senior hospital doctors.

The collective national agreement for senior hospital doctors on national terms and conditions of service therefore applies the derogations set out in regulation 21 of the directive. Regulation 21 provides for the 48-hour working week to apply over an averaged reference period of 26 weeks. It disapplies immediate entitlement to the specified rest periods in the legislation, i.e. a weekly rest period of 24 hours (or 48 hours every fortnight); a limit of 8 hours worked in every 24 hour period for night work; an entitlement to 11 hours consecutive rest per day; and an entitlement to a minimum 20 minute rest break where the working day is longer than 6 hours. As a result of the application of regulation 21, compensatory rest will be given in lieu whenever these entitlements are not taken as prescribed in the legislation.

Paragraph 4 of the advance letter summarises:

This means that the regulations relating to night working, daily rest, weekly rest and breaks at work do not apply to career grade hospital doctors. However, under Regulation 21, they will be able to accrue compensatory rest for hours worked during rest breaks. While career grade doctors will remain protected by the 48 hour weekly limit on hours, the application of Regulation 21 will enable career grade doctors to continue to carry out their duties flexibly and professionally ensuring that they are able to maintain continuity of service.

Since that agreement the degree to which the directive has been implemented has varied across the NHS. The CCSC is concerned at this inconsistency which is one of the reasons for producing this new guidance, the other reason being the evolving state of the law.

Two major rulings by the European Court of Justice (ECJ) (known as SiMAP and Jaeger) have had a significant impact on the application of the Directive. SiMAP¹ defined all time when the worker was required to be present on site as work and Jaeger² confirmed that this was the case even if the worker was allowed to sleep when their services were not required. Jaeger also covered aspects of compensatory rest, which is explained later in this guidance.

The introduction of the new consultant contract has meant that hours of work are more effectively monitored and it is easier to tell whether consultants are working in excess of the 48 hour limit and what breaks are taken. However, there is still a lack of clarity over how and when compensatory rest should be taken, for example, compensatory rest may end up being taken long after the rest might actually be needed for health and safety reasons. That is, when the doctor actually needs the rest to avoid fatigue in the workplace.

The agreement only covers periods of work for employers; private practice is thus excluded. Currently, individuals still have the right to 'opt out' of protection under the legislation, though this must be formally recorded. Members should give careful consideration to their responsibilities to themselves and their patients before agreeing to work in excess of this health and safety protection.

Recommended actions for Local Negotiating Committees

Following consideration of this guidance, LNCs should meet with the employer management to reach agreement (or revision of the agreement) on the framework for local arrangements to implement the provisions. LNCs should also seek to ensure that consultants are aware of their rights in this area and how to record and monitor their work.

Where consultants wish to opt out of the 48 hour limit LNCs should seek to ensure that the correct procedure has been followed. A template form of words is included later in this guidance.

LNCs will have to pay particular attention to the way compensatory rest is monitored, calculated and taken. Further details are provided below, but consultants and LNCs should be aware that compensatory rest applies to all interruptions of rest and that includes lunch breaks as well as time spent on-call from home. An example local policy on compensatory rest is included below.

What is work?

Under the Directive, work is defined as:

- any period during which the employee is working, at their employer's disposal and carrying out their activity or duties
- any period during which the employee is receiving relevant training and
- any additional period which is to be treated as working time for the purpose of the Regulations under a relevant agreement.

This definition includes all working periods other than those when on-call from home, off-site and available but not actively carrying out any duties. Under the legislation, on-call duty (apart from resident on-call) is only defined as work when a doctor is actively carrying out NHS duties. The definition of work in the legislation is non-negotiable by LNCs or employers although discussion at a European level on whether a third definition of working time (non-active resident on-call time) should be introduced has been ongoing since 2005. The CCSC is against such a move.

¹ *Sindicato de Médicos de Asistencia Pública v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, 2000

² *Landeshauptstadt Kiel v Norbert Jaeger*, 2003

At the time the directive was introduced the 2003 contract had not been introduced and there was ambiguity about what counted as working time and the CCSC's earlier guidance included a list of duties which would count as work. However, the 2003 contract has removed this uncertainty.

Calculation of hours worked

In order to assess the number of hours worked, on average each week, employees will be required to monitor their hours on an occasional basis. The NHS agreement refers to the calculation of hours worked over a 26 week reference period. However, it has been agreed between the CCSC and the NHS Executive that monitoring the number of hours worked over a period of 26 weeks will not be necessary. It was therefore agreed that the best way to calculate the average number of hours worked would be over a shorter period, specifically a minimum of 4 weeks, or over the doctor's usual rota cycle, as preferred. The intention was to identify a typical working period much in the same way a weekly job plan would. The average figure for the monitoring period is taken as valid for the 26 week reference period.

Periods of annual leave (including bank holidays and statutory days), sick leave, maternity leave and study leave are excluded from the calculation of hours worked. The Directive states that average hours should be calculated by aggregating all hours worked in the 26 week period and adding these to the hours worked during the number of days following the end of the 26-week period that is equal to the number of excluded days (annual leave etc) taken during the 26-week period. This sum should then be divided by 26 weeks.

Most consultants will now be familiar with the keeping of a diary for job planning purposes and the monitoring of hours for EWTD can be carried out through the use of a job planning diary. A diary is available on the BMA website here:

<http://www.bma.org.uk/ap.nsf/Content/jobplanningdiaryversion6>

Consultants should remember that 12PAs do not necessarily equate to 48 hours of work. For example, if consultant A worked a 12PA week but 2 of those PAs were carried out in premium time (weekends or 7pm-7am in the week), those PAs could only last 3 hours each rather than 4 (unless an alternative arrangement has been reached such as higher pay for 4 hour premium time PAs). In that case, the 12PA week would be only 46 hours (10PAs at 4 hours = 40 + 2 PAs at 3 hours each = 6). 48 hours would correspond to 12.5 PAs in this example.

(i) Non-resident on-call

Under the definitions of work in the directive, when a doctor is on-call, working time should be assessed on the basis that work begins when the individual is called and begins the work related activity. This means that work carried out in any block should be counted. Work ends when the doctor resumes the non-work activity. The CCSC and the NHS Executive have agreed that on-call time will be calculated in 30 minute blocks, however long the activity takes to complete. For example, work encroaching upon any block shall be counted as one period of 30 minutes.

(ii) Resident on-call

The CCSC has produced guidance for consultants considering working as resident on-call which can be found here:

<http://www.bma.org.uk/ap.nsf/Content/CCSCguidancenote041207?OpenDocument&Highlight=2,resident,on-call>

Consultants do not have to agree to work as resident on-call, schedule 8, para 4 of the terms and conditions of service states:

Where unusually a consultant is asked to be resident at the hospital or other place of work during his or her on-call period, appropriate arrangements may be agreed locally. A consultant will only be resident during an on-call period by mutual agreement." (Sch. 8, Para. 4)

Work carried out whilst on-call contributes towards an individual doctor's total hours worked per week – all time spent as resident on-call counts towards working time. The hours worked on-call will be added to

the number of hours worked on other duties. This will provide each doctor with a calculation of the total number of hours worked each week, which can be averaged over the monitoring period. The results from the monitoring period will apply over the 26 week reference period, unless there is a change in work patterns, in which case, doctors will need to re-monitor hours worked during this reference period. These results will be reviewed in the following 26 week period, and annually as part of the practitioner's job plan review. Under this agreement, reference periods commence on 1 October and 1 April.

Covering absent colleagues.

In the first instance, doctors are required to monitor their hours worked individually and a decision should be taken at departmental level whether aggregation of hours worked will produce a true reflection of the hours worked by the individual.

Compensatory rest

The Directive allows employers to exclude the provisions in relation to length of night work, daily rest, weekly rest and rest breaks if compensatory rest is provided. This means that where rest is delayed or interrupted by work, compensatory rest must be granted. However, there is flexibility about how and when compensatory rest is calculated. The entitlement to compensatory rest will be granted by the employer 'wherever possible' (Regulation 24, Working Time Regulations 1998).

The CCSC's view is that rest should be taken within a reasonable period and before returning to work. The Jaeger judgment in the European Court of Justice examined the provision of compensatory rest and stated that:

'equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work'

The CCSC recommends that LNCs ensure that local agreements recognise the importance of ensuring rest is taken as soon as possible after a disruption to rest. The Directive is not aimed at providing extra periods of leave that consultants can accumulate over a period of time; it aims to ensure consultants are not tired when working.

The length of the rest period that should be taken is not clearly defined in the directive. In each situation the rest provided should make up for the rest missed; and, under the provisions of the Jaeger ruling, should be taken immediately after the end of the working period. The implications of the Jaeger ruling are that it will not be sufficient to aggregate the rest available to an individual over a period and assume that the minimum requirements have thus been met.

LNCs should discuss this with trust management but be mindful of the following factors:

- The length of disruption
- The nature of the disruption (did it require a return to the hospital or other significant disruption)
- The number of disruptions to a period of rest – if there are several then the rest might be assumed to be not a genuine period of rest

Example local agreement on compensatory rest:

The collective national agreement for senior hospital doctors, implementing the Working Time Regulations (1998), provides that where prescribed rest periods have been significantly interrupted, the doctor should take compensatory rest. This is not counted as annual leave. It is good practice for such compensatory rest to be taken immediately after the end of the working period. A doctor may commence work at a later time on the day following a significant interruption to rest, after notifying the responsible manager where work was to be performed. This provision is important for the maintenance of patient safety and shall not be taken as amending the doctor's rights under the Working Time Regulations. Any consultant having to take compensatory leave should ensure that colleagues are forewarned in order that appropriate cover arrangements can be arranged if necessary.

Doctors on part-time contracts are entitled to the same compensatory rest breaks as those doctors on whole-time contracts, as detailed above.

It is therefore essential that doctors monitor their hours worked and their entitlements to compensatory rest.

The LNC will play an important role in implementing the agreement across employers. As well as putting individual entitlements in place, the LNC should encourage systematic review of job plans to ensure that they effectively limit the excessive hours that some doctors are working. LNCs may need to agree different arrangements for different grades of doctor, because an agreement for consultants may not suit e.g. junior doctors working patterns.

Non-NHS work

With the changing nature of the NHS and increased plurality of provision, increasing numbers of consultants are working in a self employed contractor capacity. Derogation from Articles 3-6, 8 and 16 of the directive, which cover the 48 hour limit and other aspects, is possible for certain groups under Article 17 of the WTD. 'Persons with autonomous decision-taking powers' are one of these groups. The CCSC has sought legal advice on the definition of an autonomous worker. The advice received was that consultants' private practice work falls within the definition of "managing executives or other persons with autonomous decision making powers". Consultants undertaking private practice work could reasonably be regarded as either managing executives or persons with autonomous decision making powers or, if not, they could sign an opt out agreement. The position is the same for consultants operating through the vehicle of a partnership or limited company. This is because, in practice, when working through either of these vehicles, the consultant retains autonomous decision making powers.

Night work

The Government's definition of a night worker is reproduced below. It is unlikely that a consultant would fall within this definition but consultants should seek the advice of their local BMA office if they think they should be classed as a nightworker. The CCSC office would also be interested in hearing about any examples.

SECTION 3: WORKING AT NIGHT

A night worker is someone who normally works at least three hours at night.

Night time is 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 a night worker's normal hours of work.

Nightly working time is calculated over 17 weeks. This can be longer in some situations.

A night worker cannot opt-out of the night work limit

Young workers should not ordinarily work at night, although there are certain exceptions (please see Special night work limits for Young Workers).

Employers must check:

Whether you employ people who could be classified as night workers.

How much working time night workers normally work.

If night workers normally work more than eight hours a day on average, how they can reduce hours of work or whether any exceptions or flexibilities apply (See Section 8).

If a worker does work which may be particularly hazardous.

Who is a night worker?

You will be a "night worker" if your daily working time includes at least three hours of night time:

on most days you work;

on a proportion of the days you work which is specified in a collective or workforce agreement; or

often enough for it to be said that you work such hours "as a normal course".

The words "as a normal course", means on a regular basis. There has been a Court ruling that a worker who worked at night for one third of his working time was a night worker. Further clarification from the European Court is expected in due course. Occasional, or ad hoc, work at night does not make you a night worker.

Nightly working time should be averaged out over a reference period, which is usually 17 weeks. This period could be longer if agreed in a workforce or collective agreement.

Night work limits do not apply in the special circumstances - see Section 8.

From: http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page28978.html#working_at_night

Exceeding the 48 hour limit on working time

Under the terms of the directive, employers are required to develop effective processes to assess working hours. As soon as it is clear that the 48 hour average working week will be exceeded, then the employer will need to take steps, in consultation with the doctor, to reduce the doctor's excess working hours and work commitment. This will be achieved through a renegotiation of the job plan and should be carried out as soon as possible after the monitoring period.

The CCSC recommends that doctors with evidence of total hours worked in excess of the average 48 hour working week (including hours worked whilst on-call), should request a job plan review with the person responsible and discuss ways in which to reduce hours worked. If, after a minimum of four weeks following this review, the doctor continues to work in excess of the 48 hour limit, further consultation with the person responsible for the doctor's job plan should take place. Alternatively, the doctor should ensure that a record of the job plan meeting shows the nature and extent of the work, their voluntary opting out of the 48 hour weekly limit and the consequent appropriate adjustment of salaried PAs.

Under the terms of the collective agreement, employers are legally obliged to implement the terms of the agreement. If employers refuse to address the problem of hours worked in excess of the 48 hour limit and are therefore in breach of the regulations, legal proceedings may be taken against them. Under the terms of the directive, the Health and Safety Executive is the enforcing authority. The Executive is given the power to enforce this legislation. An employer found guilty of an offence may be liable to a fine or conviction under sections 33 and 42 of the Health and Safety at Work etc Act 1974.

A doctor has the right to present a complaint to an employment tribunal in circumstances where the employer has refused to permit a doctor any right he/she has to daily/weekly rest break entitlements. A doctor is entitled to claim compensation at a tribunal. This compensation could take into account the employers default in refusing to permit the doctor to exercise his/her legal right. It is recommended that BMA members contact their local BMA office in circumstances where they believe that they are not afforded the entitlements under this agreement.

The position of locum doctors

Senior hospital doctors in locum appointments will be covered by the terms of the agreement in the same way as for senior hospital doctors in substantive posts. Where a doctor is employed by an agency, the agency will be responsible for enforcing the Directive. Where employers employ locum career grade doctors either directly or indirectly they will be responsible for ensuring the provisions of this agreement are applied. Whether locums are employed through an agency or directly by the trust, the expectation is that employers remain within the spirit of the agreement.

For long term locum appointments, the same conditions will apply as for substantive posts. Where the appointment is for the short-term only, the reference period shall reflect the entire period of employment. For example, if the appointment is for one week, the reference period shall be for one week, and there will be a strict cap on the 48 hours worked. All other conditions remain as for substantive posts. Where rest breaks are infringed upon, compensatory rest will need to be built into the terms of the contracts. LNCs may wish to agree with trust management the average amount of compensatory rest to which doctors undertaking these locum posts are entitled to and to draw up contracts accordingly.

Doctors with more than one NHS employer

Where a doctor holds contracts of employment with more than one NHS employer, the regulations and this agreement will apply across all NHS posts. The NHS employers concerned should act in co-operation to ensure compliance. This will be achieved through the establishment of a lead employer (who has the greater number of PAs/ sessions worked by the practitioner). The lead employer will be responsible for monitoring hours worked and for keeping records. In circumstances where doctors hold separate contracts with the same employer, the regulations and agreement will also apply across both posts.

Disapplying the provisions of the directive and the collective agreement

(i) Protection

Under the working time regulations, employees who have exercised any entitlement under the directive should suffer no detriment. A decision to fall outwith the provisions of the agreement is an individual and voluntary one. Pressure must not be placed on an individual to take this option and vacancies cannot be advertised as requiring a potential applicant to volunteer. The provisions of the working time regulations are minimum requirements. Under the terms of the collective agreement, conditions currently in place which are more favourable to staff should not be changed simply to comply with the minimum provisions laid down in the Regulations (see above). This means that employers cannot place pressure upon doctors to increase the number of hours worked where these hours are less than the average 48 hour limit per week. In circumstances where doctors work less than 48 hours on average per week, but in such a pattern that provides them with high levels of compensatory rest (eg doctors on rolling shifts), they should receive the amount of rest which they have previously agreed and no less.

(ii) Procedure

Under the terms of the regulations, senior hospital doctors on national terms and conditions of service have two options:

- to be bound by the collective agreement.

Doctors are automatically covered by the terms of the collective agreement through amendments to the terms and conditions of service. No further action, other than the monitoring of hours and calculation of compensatory rest, needs to be taken by doctors, unless it becomes evident that average weekly hours worked exceed the 48 hour limit .

- to 'opt out' of the agreement and disapply the Regulations.

If a doctor does not wish to be bound by the terms of the agreement, and as such, wishes to 'opt out', as detailed under the regulations, this should be done in writing. Such agreements must relate to a specified period or apply indefinitely. To end any agreement a worker must give written notice to his employer. This notice period is to be agreed between the parties and must be between seven days and three months. Doctors who choose to opt out of this agreement should seek advice from their local BMA office. The statement of intent to opt out should be resubmitted annually by each doctor concerned.

Sample opt-out wording for consultants:

I, [name], agree with [name of employer] from [date] to disapply the 48-hour limit on working time as set out in Regulations 7 of the Working Time (Amendment) Regulations and to work more than an average of 48 hours in any seven-day period. [Insert here alternative arrangements/limits that may apply, eg 'and my hours of work shall be ... Up to a maximum of ...'] I confirm that this consent will continue on an indefinite basis while I remain an employee of [insert name of employer] subject to my being able to give [choose a period from seven days to a maximum of three months] written notice to the employer if I wish to revoke my agreement.

Signed

Dated

c.c. Local BMA representative

This is based on material taken from sample opt-out wording from page 58 Legal Essentials 'Working Time Regulations' by Hammonds (2003), with the permission of the publisher, the Chartered Institute of Personnel and Development, London.

Under the terms of the regulations, the employer must maintain records of hours worked for those doctors who choose to opt out of this agreement and make these available to the Health and Safety Executive. These doctors will still be required to keep their own diaries of hours worked and to ensure that these records accurately reflect their employers records. Under the terms of the regulations, records of such individual 'opt out' agreements must be kept and made available to the BMA locally. LNCs should ensure that names of doctors choosing to opt out from the agreement are made available by the trust.

The CCSC strongly recommends that doctors do not opt out of the collective agreement and are afforded full protection under this health and safety legislation. But if you do opt out, make sure you get paid the appropriate number of PAs.

Under the terms of the directive, doctors on national terms and conditions of service or equivalent are not entitled to be subject to the provisions of the directive outside of the collective national agreement. This means that they cannot request the application of the rest breaks and limits on hours worked, as outlined in the directive.

Health assessments

The regulations entitle doctors who regularly work during the night 'as a normal course', to a free, confidential and regular health assessment. The purpose of this assessment is to establish whether a worker is fit to carry out the night work to which he/she is assigned. These assessments may also be provided when a work related problem is identified. The night is defined as at least 7 hours inclusive of the hours 00.00 - 05.00 hours. The assessment must be in accordance with local agreements.

Clinical academics and the directive

Some doctors are employed by universities or research foundations but also hold honorary clinical contracts with employers for their clinical work or research in the NHS. Under the terms of the Directive, an employer should take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the number of hours worked does not exceed 48 hours per average working week. At present the above agreement does not apply to clinical academics. The obligation is therefore on both employers (university/ research foundations or NHS) to take reasonable steps to apply the legislation as written. It has been agreed between the NHS Executive and the CCSC that to ensure that an appropriate balance of hours is maintained between academic and clinical work, NHS employers should liaise with these other employers. NHS employers will need to be alert to the position and to ensure that the hours spent in NHS hospitals are properly monitored and the entitlements under the regulations, for example, to rest periods and rest breaks, applied as necessary.

All clinical academics are advised to monitor their hours worked in both university and NHS time, using the diary attached in appendix II. Clinical academics may wish to monitor hours worked for the university in a different colour marker to the NHS work, for ease of reference. This can be used to reduce hours worked, where necessary, to below an average of 48 hours per week and to calculate rest entitlements as detailed under the directive.

Appendix 4 - Agreement by the Joint Negotiating Committee (Seniors)

The working time directive

Implementation of the working time regulations (AL(MD)6/98)

19 November 1998

Introduction

1. The working time directive regulations came into force on 1 October 1998. This health and safety legislation has the potential to affect significantly the way care is delivered in the NHS. To ensure that continuity of service and established professional working patterns are maintained, the Joint Negotiating Committee (Seniors) has reached agreement to modify the application of

the directive, as allowed by regulation 21 of the working time regulations 1998. This agreement therefore applies to all career grade doctors on national terms and conditions of service.

2. If the directive were to be applied as written, and not modified by the NHS Executive and the CCSC, career grade doctors* would be entitled, irrespective of the nature of their contract B national terms and conditions or local terms and conditions B to the following limits in hours worked and specified entitlements:

an average of 48 hours per week, including the calculation of hours worked whilst on-call (to be calculated over a reference period of 17 weeks);

a limit of 8 hours worked in every 24 hours period for night work;

a weekly uninterrupted rest period of 24 hours. This would mean that doctors would not be available to be recalled to the hospital;

the uninterrupted rest period of not less than 48 hours in each 14 day period. This would mean that doctors would be unavailable to be contacted by the hospital during this period;

an entitlement to 11 hours consecutive rest in each 24 hour period;

an entitlement to a minimum 20 minutes rest break where the working day is longer than 6 hours.

* consultants, associate specialists, staff grades, clinical assistant, hospital practitioners and those employed directly by the NHS as locum doctors in these grades and any other doctor employed in NHS Hospitals (excluding doctors in junior grades).

Regulation 21

3. Regulation 21 provides that, subject to regulation 24 (compensatory rest), regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply. These regulations are outlined in annex A.

4. This means that the regulations relating to night working, daily rest, weekly rest and breaks at work do not apply to career grade hospital doctors. However, under regulation 21, they will be able to accrue compensatory rest for hours worked during rest breaks. While career grade doctors will remain protected by the 48 hour weekly limit on hours, the application of regulation 21 will enable career grade doctors to continue to carry out their duties flexibly and professionally ensuring that they are able to maintain continuity of service.

5. There is a general responsibility for employers and employees under health and safety law to protect as far as is practicable the health and safety at work of all employees. Control of working hours is an integral element of managing health and safety at work and promoting health at work. It is appropriate, therefore, that health service employers when organising work should take account, wherever possible, of the general principle of adapting work to the worker.

Exclusions

6. Doctors and dentists in training (pre-registration house officers, house officers, senior house officer, registrars, senior registrars, specialist registrars) and those acting as locum tenens in the training grades, are excluded from the provisions of the Working Time Directive and, therefore, from this agreement.

7. A separate agreement has been reached for non-medical staff covered by the general Whitley arrangements.

Protection

8. Doctors should suffer no detriment because they have exercised any of their entitlements under the Regulations. The provisions of the working time regulations are not maximum standards. Conditions currently in place which are more favourable to doctors should not be changed to a lower standard simply to comply with the minimum laid down in the Regulations. The Regulations protect employees against detriment imposed by the employer on account of any refusal to exceed any limit on working time applicable under the Regulations. An employee would have the right to pursue a claim that they had been subjected to a detriment through an employment tribunal. See chapter 10 of the working time regulations: implementation in the NHS (HSC 1998/204).

Reference periods

9. Under the directive employees should not be required to work more than 48 hours per seven day period calculated over an averaging period of 26 weeks (in accordance with Regulation 21).

10. The averaging reference period (as in paragraph 24) is the 26 weeks following the application of the Working Time Regulations on 1 October 1998 and each 26 week period thereafter. Alternatively, it begins when doctors start their employment or, if they have previously opted to work more than 48 hours (see paragraph 24) when the formal agreement to opt out terminates.

Working time

11. In assessing weekly working the following factors should be taken into account:

- doctors' normal contractual commitments as outlined in their job plans;
- additional duties, for example, management and other non-clinical duties, performed as a result of the needs of the service;
- work undertaken while doctors are on-call;
- where doctors are not formally on-call but have been contracted by the hospital.

See chapter 1 of the working time regulations: implementation in the NHS (HSC 1998/204) for the legal definition of working time.

On-call

12. Doctors who have to be on-call and so are available to work if called upon will not be regarded to be working unless they are required to undertake a work-related activity. Staff oncall but otherwise free to pursue time as their own will not be regarded as working unless and until they are actually contacted by the hospital.

13. Working time should be assessed on the basis that work begins when the individual is called and begins the work-related activity, for example, giving advice over the telephone or visiting a patient. For the purpose of calculating time worked on-call, travelling time is included in working time. The calculation of working time ends when the task is complete, for example, when the doctor returns home, or begins another activity at the end of a work-related telephone call.

Resident on-call

14. Employers should consider carefully whether the needs of the service require a career grade doctor to be compulsorily resident on-call.

15. Where career grade doctors are compulsorily resident on-call, time spent in residence is to be regarded as work for the purposes of this agreement.

Voluntarily resident on-call

16. There may be occasions when, in the interests of patient care, a senior hospital doctor may need to be resident on-call on a voluntary basis (that is, where there is no contractual requirement). Such residence falls within the provisions of paragraph 14 and 15 and time spent in residence should be regarded as work. In all other circumstances, where career grade doctors are voluntarily resident on-call, working time should be assessed on the basis that work begins when the individual is called and begins a work-related activity.

17. A local assessment may need to be made by the clinical director to decide whether residence in hospital is clinically necessary or merely personally convenient. The medical director should be consulted where there is a dispute. Where doctors are required to be resident due to clinical necessity they should be regarded as falling within the same provisions (see paragraph 15 above) as doctors who are compulsorily resident.

Compensatory rest periods

18. While agreement under regulation 21 (paragraph 3) excludes the application of the regulations relating to night working and daily rest, weekly rest and breaks at work it does so on the basis that, where a doctor is required to work during a rest period, an equivalent period of compensatory rest will be provided.

19. Compensatory rest should be available to doctors within a reasonable period. A system should be developed at a local level to ensure that compensatory rest is available as soon as is practicable.

20. Work patterns and workloads in all hospital specialties are broadly predictable. Employers should be able to assess the extent to which the minimum rest entitlement is not being met. From this information it should be possible to plan levels of compensatory rest required in particular clinical departments or directorates without the need to monitor individual doctors' hours. Management should work with the LNC to make sure all departments and units in a hospital have appropriate arrangements in place as soon as possible.

Monitoring and records

21. Employers should work with doctors locally to develop effective processes to assess working hours. As noted in paragraph 20 this will be most effective if the working hours and oncall commitments of doctors who can sensibly be grouped together, because their working patterns are similar, can be considered as a whole. The purpose of such monitoring is first to allow employers to act where they are in breach of the Regulations and, second, to allow proper planning of compensatory rest. JNC(S) will establish a monitoring group which will discuss any problems arising from these arrangements.

22. Employers need only monitor the hours worked of individual doctors where there is doubt whether the hours of work or rest entitlements of a doctor depart significantly from the general

compliance level of the groups of doctors monitored by the employer.

23. Records of the agreed monitoring processes and the results of that monitoring for groups of doctors (as in paragraph 21) should be kept.

[Individual option to work more than 48 hours a week](#)

24. Individuals may choose to agree to work more than the 48 hours average weekly limit. A decision to exercise this option must be:

individual

voluntary

and, pressure must not be placed on an individual to take this option.

25. In order for this agreement to apply, this employer must:

maintain a record of which doctors have made this type of agreement;

what terms the doctor has agreed to (such as whether it will last indefinitely or if it is for a specific period);

specify the numbers of hours worked for the employer during each reference period since the agreement came into effect.

These records must be made available to the Health and Safety Executive and to the BMA locally. Chapter 3 of B working time regulations: implementation in the NHS (HSC 1998/204) refers.

[Working for more than one NHS employer](#)

26. Where a doctor holds contracts of employment with more than one NHS employer, the regulations and this agreement apply across all NHS posts. The NHS employers concerned should act in co-operation to ensure compliance. However, lead responsibility will rest with the employer with whom the individual holds the greater contractual commitment.

[Clinical academics and honorary contract holders](#)

27. Some doctors are employed by, for example, universities or research foundations but also hold honorary contracts to facilitate clinical work or research in the NHS. These doctors are, at present, covered by the working time regulations without any derogation B that is, this collective agreement does not apply to them. To ensure that an appropriate balance of hours is maintained between academic and clinical work, NHS employers should liaise with these other employers. Responsibility for ensuring that working time regulations are complied with, however, rests with the principal employing body. NHS employers will, however, need to be alert to the position and to ensure that the hours spent in NHS hospitals are properly monitored and the entitlements under the regulations, for example, to rest period and rest breaks, applied as necessary.

[Health assessments](#)

28. Any doctors who meet, or who are about to take up work which means they would meet, the definition of a night worker under the Regulations are entitled to a free health assessment as specified under regulation 7 of the directive. Chapter 4 of working time regulations: Implementation in NHS (HSC 1998/204) refers. This means a health assessment must be available without cost to doctor who should not suffer any loss of pay or incur other expenses because of undergoing the assessment. The purpose of the assessment is to decide whether doctors are fit to undertake the night work to which they have been assigned.

29. No other provisions of the regulations relating to night work apply under this agreement.

[Locums in the career grades](#)

30. Where locum doctors are directly employed by a locum agency it will be the responsibility of the agency to ensure compliance with the working time directive.

31. Where employers employ locum career grade doctors either directly or indirectly they will be responsible for ensuring that the provisions of this agreement are applied.

32. Whether locums doctors are employed directly by an agency or directly by the NHS we would expect employers to remain within the spirit of this agreement.

33. Where the locum appointment is for the short-term only, the reference period shall reflect the entire period of employment. For example, if the appointment is for one week, the reference period shall be for one week, and there will be a strict cap on the 48 hours worked. All other conditions remain as for substantive posts.

[Career grade doctors employed on NHS trust contracts](#)

34. We recommend strongly that the provisions of this agreement, including the monitoring arrangements, should be applied by NHS employers locally to all career grade doctors, whether or not they are employed on national terms and conditions of service.

Annex a

[Regulation 21 B AL\(MD\)6/98](#)

Regulation 21 provides that, subject to regulation 24 (compensatory rest), the following regulations do not apply;

Night work

(1) A night worker's normal hours of work in any reference period which is applicable in his case shall not exceed an average of eight hours for each 24 hours.

(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each night worker employed by him.

(7) An employer shall ensure that no night worker employed by him whose work involves special hazards or heavy physical or mental strain works for more than eight hours in any 24-hour period during which the night worker performs night work.

Daily rest

(1) An adult worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.

Weekly rest period

(1) Subject to paragraph (2), an adult worker is entitled to uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.

(2) If his employer so determines an adult worker shall be entitled to either -

a) two uninterrupted rest periods each of not less than 24 hours in each 14 B day period during which he works for his employer; or

b) one interrupted rest period of not less than 48 hours in each such 14 B day period, in place of the entitlement provided for in paragraph (1).

Rest breaks

(1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.