BMA

BMA Consultants Committee guidance on working during COVID-19 for Consultants working in England

The COVID-19 pandemic and the demands it has placed on the NHS have imposed unprecedented burdens on consultants, who have had to work not only differently but have had to work above and beyond their contracted hours under intense pressure. As well as going above and beyond in delivering direct clinical care to patients, consultants have demonstrated extraordinary leadership over the last 6 months, transforming clinical services to ensure that they could operate under the restrictions resulting from the COVID-19 pandemic.

During the first phase, consultants simply did this extra work without question, putting patients' needs before their own when responding to this national emergency. The hours they worked were often excessive, particularly in the out of hours periods. In the majority of cases annual and study leave was cancelled. The toll that this has taken on the workforce has been stark. Sadly, and all too frequently, this additional work has neither been recognised nor properly remunerated.

It is clear that infection rates are rising once again and that a second wave is coming. For many regions it has already arrived. The BMA are concerned about the impact that dealing with a second wave will have on an already stretched and fatigued workforce. In addition, there are some important differences that mean the second wave may be more difficult to manage than the first.

Firstly, during the first wave, all non-urgent elective activity was cancelled. Not only did this free up staff capacity that allowed different working patterns to be implemented, it also freed up a significant number of beds that could be used to support patients with COVID-19. Given the very substantial backlog in elective work that has built over the last 6 months, the government has insisted that elective activity continues and there are no indications that this will be cancelled on a scale seen in phase 1. This will seriously limit the ability for consultants to redirect their focus to caring for those patients with COVID-19 and is likely to result in consultants being asked to work an even greater number of hours.

Secondly, we are heading into winter. The pressure on NHS beds is always greater at this time of the year and whereas many hospitals were at 50% of capacity during phase 1, our hospitals are already full, often with patients once again waiting in ED corridors. In addition, the combination of COVID-19 with influenza and other 'winter viruses' in circulation, will make it extremely difficult to manage patients with suspected COVID-19, particularly given the limited and inconsistent access to testing.

Finally, as noted above, the first phase has taken a significant toll on the workforce with many consultants not having had a break or period of leave for 6 months and in some cases even longer. It is essential to protect staff and the patients that they care for; we must ensure that the health and wellbeing of consultants is prioritised. We have therefore produced this guidance on developing new working patterns, incorporating many of the lessons learned from the first wave of COVID-19.

Changes to working patterns

Contractual protections

It is, of course, understandable that you, as a consultant, will want to do as much as you can to support patients during this period. However, it is important to be aware that not only should you ensure that you look after your own health, but you have contractual protections that ensure you cannot be forced to undertake additional work without your agreement. The key contractual provisions relating to this are summarised below:

1. **Job planning**: You have an agreed job plan with your employer detailing your clinical commitments Any changes to this must be reached by mutual agreement with the individual consultant. In particular Schedule 3 Clause 1 (of the Terms and Conditions of Service for the 2003 Consultant Contract) states:

   "Job planning will be based on a partnership approach. The clinical manager will prepare a draft job plan, which will then be discussed and agreed with the consultant."

   Consequently, any new ways of working must first be discussed with you and agreed before any variation can take place. If agreement cannot be reached, there is a clear mediation and appeals process.

2. **Out of hours work**:
   Non-emergency work at weekends or outside the hours of 7am to 7pm Monday to Friday must be scheduled in advance by mutual agreement. You have the right to refuse to undertake such work without suffering any detriment as a result. If you are a consultant whose specialty by its nature involves dealing routinely with emergency cases, e.g. A&E consultants, then 'non-emergency work' for these purposes includes your regular work.

   In practice, this means that you are entitled to refuse to do work such as planned ward rounds, planned theatre/procedure lists, and planned radiology lists if it is not part of an existing on-call arrangement or already agreed within your job plan. If you choose to do this work, you are entitled to agree for this to be paid at extra-contractual rates.

Temporary Changes to Job Plan

If, however, after discussion between you and your clinical manager, you wish to agree a temporary change in your job plan in order to prioritise work towards COVID-19, you can do so. It is important to emphasise that this is only by mutual agreement and cannot be unilaterally imposed. Such a change might include swapping a planned clinic, theatre session or procedure list for an alternative DCC session to directly support the trust's COVID-19 response. We would recommend that if you agree to such a change that you clearly state and confirm in writing that you agree to do so on a temporary time limited basis and that this does not constitute a permanent change to your job plan. We would also recommend that you retain the right to return to your pre-existing job plan at a time of your choosing and this should be stated in the temporary job plan. It is advisable in agreeing temporary change that you do not increase your overall PA allocation in order to reduce the risk of burnout. Where work is required to be done on top of your contracted PAs this should be remunerated via extra contractual payments or time off in lieu.

A sample letter outlining the agreement of a temporary change in job plan can be found in Appendix A.

Part time workers

If you work part-time you also have an agreed job plan with your employer. You are not compelled to increase your hours or move to full-time working. If you choose to agree to increase your hours during the COVID pandemic, the same guidance applies as for full time workers. You should make it clear in writing that the change to your working hours is temporary and that you have the right to revert to your pre-existing job plan. If you choose to do additional hours, these are extra-contractual and as such you should be offered extra-contractual rates for this work.

Protecting against fatigue and burnout when changing work patterns

Consultants are frequently being asked to alter their work plans during the pandemic. Invariably this often means to providing a greater level of work at evenings, weekends and overnight. There is increasing evidence that these patterns of work are detrimental to the health of employees and the BMA are concerned that in many cases, consultants are being pressured to simply do these extra hours on top of their usual working hours. Furthermore, it is clear that the work consultants are being asked to do is of extremely high intensity and significantly more tiring, particularly when considering the prolonged periods spent wearing personal protective equipment.

In order to protect the health and well-being of consultants, as well as the safety of the patients, the BMA believe that instead of being pressured to do additional hours on top of already very busy job plans, that those consultants who agree to do this work first use their existing contracted PAs to cover the work needed, rather than simply increasing their hours.

As noted, this work that is being undertaken is both predominantly done during unsocial periods and is intense in nature. It is vital therefore that appropriate rest is available to maintain health and well-being. Historically, this type of intense working was almost exclusively in specialities such as emergency medicine and the Royal College of Emergency Medicine (RCEM) have done a significant amount of work in this regard.[1] RCEM have recognised the difficulties of high intensity shifts performed in the most antisocial hours. In order to protect staff and avoid burnout, RCEM have recommended reducing the number of hours that constitute a PA for high intensity working undertaken in premium time and overnight. The recommended length of a PA is 3 hours per PA in plain time (Monday to Friday 7am-7pm), 2 hours per PA between 7am and 7pm at weekends and bank holidays, 2 hours per PA between 7pm and 11pm (Monday- Sunday) and 1.5 hours per PA for high intensity on site working after 11pm (Monday to Sunday).

In addition, the BMA believe that for high intensity weekend working, 2 hours per PA should apply between 7am and 7pm. Furthermore, given the high intensity nature of COVID working and the additional demands of working with PPE, the BMA believe that when adopting work of this intensity, 3 hours per PA during plain time is more appropriate when considering a temporary change to such a high intensity job plan. Many specialities will be working at a similar intensity to emergency medicine consultants during the COVID-19 pandemic; the BMA believe that the length of a PA should be reduced in a consistent manner for all consultants who are working at comparable intensity.

Furthermore, consultants are increasingly being asked to undertake resident on call night shifts or twilight shifts. These working patterns were not envisaged when the 2003 contract was agreed, and the 3 hour per PA specified in the 2003 contract was essentially designed for on call working at a time when call back to the hospital was a rare event. Indeed the 2003 contract sets a maximum limit of 2 Programmed Activities (PA) per week for emergency work arising from on call. Furthermore, Schedule 7, Clause 6 of the consultant contract sets a limit of 3PAs occurring in premium time. Consequently, the BMA do not believe that 3hours per PA is appropriate for frequent twilight shifts or resident on-call/night shifts work patterns. It is also worth noting that there are no overtime rates built into the 2003 consultant contract, which contrast with other NHS contracts such as agenda for change workers who have contractually agreed provisions for overtime within the contract. It is also important to note that all time spent at the workplace is considered work and should be both paid and contribute to your PA allocation. This also applies to resident on call shifts

[1] https://www.rcem.ac.uk/docs/Workforce/RCEM_Consultant_Workforce_Document_(revised_Feb_2019).pdf

Table 1. Recommended length of Programmed Activities if agreeing a temporary change in job plan

Day	7 am to 7pm	7pm-11pm	11pm-7am (For high intensity working)
Monday to Friday	3 hours per PA	2 hours per PA	1.5 hours per PA
Saturday, Sunday and Bank Holidays	2 hours per PA	2 hours per PA	1.5 hours per PA

Job planning process

The process of job planning has not been abandoned. The job planning process is part of your contract. Changes to your job plans can occur only prospectively, by mutual consent and as part of the formal job-planning process associated with your contract. Changes to your job plan cannot be unilaterally imposed by your employer. You can see the latest job planning guidance, which remains in place during the COVID-19 pandemic, here.

If you are not happy with a proposed change to your job plan, you have the right to mediation locally, and then appeal nationally. During this period of mediation and appeal your current job plan remains unchanged, even despite agreement to temporarily alter patterns of work. If you need help with this please contact us.

SPA (supporting professional activities) time

SPA time is essential in ensuring that consultants continue to deliver high quality clinical care. Indeed, SPA time has never been more important than it is now as consultants have rapidly learned how to treat patients with a new serious disease whilst simultaneously trying to reorganise clinical services on an unprecedented scale, to ensure patients can be treated during this pandemic. In such a fast-moving clinical situation it is essential that new treatments and procedures are rapidly assimilated by other consultants: you will need sufficient time for this to happen – SPA time.

It Is essential that SPA time continues to be recognised and remunerated. Given the pressures in these difficult times, it is appropriate that SPA time is reprioritised towards supporting the COVID-19 pandemic but it should not be suspended or simply converted to direct clinical care sessions. Suspending SPA time or converting it to direct clinical care (DCC) time will not only vastly limit the ability for consultants to further reconfigure services to ensure that as many patients as possible can access clinical care, but very high proportions

of direct clinical care sessions within job plans, particularly when these are at very high intensity, are simply likely to lead to burn out of consultant staff.

If SPA time is reapportioned to COVID -19 related SPA, then other commitments that would normally be undertaken in SPA time should be removed with no expectation for these to be repaid at a later date. For example, some trusts have temporarily suspended mandatory training and if this has happened, time allocated to this activity could be used for COVID-19 SPA activity.

Undertaking clinical activity within SPA time

As noted, SPA time should continue to be supported, but in an emergency it may be necessary to undertake DCC activity within a SPA or other sessions (e.g. administration time). The BMA is aware of some trusts that have refused to remunerate consultants on such occasions as they claim the consultant is already being paid and “cannot be paid twice”. This is not the case as in the vast majority of instances, the SPA or administration time has not been cancelled by the trust and they still expect that the work that would normally be done in these sessions to be completed. In reality, this work is in effect time shifted to outside of your normal working hours and it is therefore appropriate to be paid for this time at the rates above or to have a subsequent DCC session cancelled to allow time for the displaced work to be completed.

If it becomes a regular occurrence that you are being asked to perform DCC work in SPA time, then the trust should make appropriate changes to the service to prevent this happening in the future.

Annual, study and professional leave

During the first spike of COVID-19 infection many consultants worked extraordinary hours under stressful and exacting conditions; fatigue became a serious issue, exacerbated for some by the cancellation of leave bookings. The second spike suggests that our response to COVID-19 may well be much longer term. In that case appropriate provisions for rest and taking of annual leave must be part of any working patterns; **consultants must be allowed to take planned leave**. It is not acceptable to have to work for extended periods without being able to take proper leave, as was the case for many in the first peak, and as we know has proven to be unsustainable.

Whilst employers can lawfully cancel pre-booked days of annual leave, they have to act reasonably. For example, if it is an important family event then it might not be lawful to cancel your holiday.

You have a good argument for asking for reimbursement of any reasonable losses you suffer (unless already covered by insurance).

Your employer is legally obliged to offer at least one day notice for each day of leave to be cancelled. In the first instance, employers should do this on a voluntary basis rather than enforcing cancellations.

Under the Working Time (Coronavirus) (Amendment) Regulations (2020) you are entitled to carry over 20 days of annual leave over a two-year period.

NHS Employers have stated where employees cannot use their full entitlement of annual leave because of the pandemic, employers should consider revising their local policies to exercise maximum flexibilities in relation to carrying over of leave to the next leave year.

New temporary statutory rules introduced by the government to deal with COVID-19 pressures mean that employees who are unable to take their annual leave entitlement due to COVID-19, can carry over up to 20 days (pro-rated for part-time staff) of annual leave over a two-year period. However:

- if employees cannot take bank holidays off due to COVID-19, they should use the annual leave at a later date in their leave year
- if this is not possible, bank holidays can be included in the 20 days' annual leave that can be carried over. This holiday can be taken at any time over a two-year period.

As study and professional leave operate across a three-year cycle, they can be carried over such that you should not lose your entitlement because of the pandemic. It follows that agreed local study leave budgets should similarly roll over (many study leave budgets – both time and funding – are over 3 years, e.g. 30 days in a 3 year period).

What if I am asked to provide cover for an absent colleague?

There needs to be clear and understood limits to the level of cover that any individual can be expected to provide.

There is generally an expectation that individuals will cooperate with their employer to provide cover for colleagues at an equivalent level where they are sufficiently competent to do so and, crucially, where providing such cover is 'practicable'.

There is no strict definition of 'practicable' but in general terms it means something close to 'able to be done' or 'able to be put into practice'.

Whether something is practicable or not in a given situation will depend on the circumstances, including your personal circumstances.

An example

If, for example, you have caring responsibilities towards family members, you may be justified in saying that it is not practicable for you to provide unforeseen, short notice cover that conflicts with these responsibilities.

Alternatively, if providing the cover requested would compromise patient care or safety because it's above your competency, then it would not be practicable to provide the cover.

Coming to an agreement with your employer

Unless there are local or national arrangements already in place, you are encouraged to come to agreement locally with your employer on:

- what is deemed to be practicable
- what the proposed cover entails
- that the work is of a suitable nature to be covered by you
- that the right clinical need has been prioritised in a situation where clinical personnel are limited in number.

In establishing suitability, due regard must be given to your duty to recognise and work within the limits of your professional competence, as well as your assessment of the likely impact on your wellbeing.

It may be necessary to agree to re-arrange other duties (e.g. cancelling a clinic) for you in the short term in order to provide adequate cover for the prioritised work.

Generally, it is only expected to cover absent colleagues for a short period e.g. up to 72 hours. This is allows internal cover to be provided where practicable to cover a Weekend (Friday evening to Monday). This additional activity should be remunerated in line with the BMA recommended rates above. Beyond 72 hours, if colleagues remain absent then it is the trust's responsibility to arrange cover including securing the services of a locum.

Your contractual obligation

Consultants (including clinical academics) are only contractually obliged to provide cover for other consultants and associate specialists – there is no obligation for them to provide cover for junior colleagues and this is dealt with under any locally agreed 'acting down' policy.

Read the specific BMA guidance on consultant cover for colleagues.

Being asked to move to a different specialty

During the first wave of the coronavirus pandemic many consultants were asked to move from their customary area of specialty practice to another clinical role, outside of their usual areas of practice, so as to offer additional personnel to those other clinical services. This was as a consequence of the reduction in activity in their usual clinical specialty combined with a large increase in the clinical workload of another specialty, for instance that of Intensive Therapy Units.

The decision to move to another clinical specialty is similar to other job planning decisions, a matter best approached by individual discussion and agreement. Those moves were made possible during the first wave by a general reduction in activity in all other areas of clinical activity with the exception of urgent and emergency care and activity related to the

pandemic. During subsequent peaks there is an expectation that standard, including elective, clinical activity will be preserved. However, it is difficult to see how such activity could, in reality, be preserved should consultants be moved into other clinical areas. If you require further advice about redeployment you can see our guidance here

Remuneration for Extra- contractual COVID-19 work

The BMA firmly believes that wherever possible, consultants should not be asked to increase their hours and, subject to agreement with the consultant, employers should first seek to use existing contracted PAs to support work during the pandemic, with appropriate reductions in the length of a PA to recognise both the detrimental impacts of increasing the amount of work done during antisocial periods and the very high intensity of this work.

However, the BMA recognise that simply repurposing your DCC PAs to accommodate temporary COVID-19 working is not always possible and that you may be asked by your employer to work outside your existing contract of employment or agreed job plan. You have the right to decline such work and it is important for your health and well-being that you don't feel pressured to work too many hours. However, if you do agree to work additional and/or extra-contractual hours, these should be properly remunerated with additional payment for these additional hours, with the rates negotiated locally and in advance, confirmed in writing. The BMA believe that a nationally agreed rate for out of hours working would be helpful for both employers and consultants; during the first phase of COVID-19 the BMA approached the Department of Health and Social Care (DHSC) and NHS Employers (NHSE) in order to seek agreement regarding this. Unfortunately, despite our best efforts, NHSE and DHSE, were not given a mandate by government to agree rates for extra-contractual work and instead suggested that this was left to local agreements. This led to a variety of different rates being agreed and on occasion different rates were agreed by different consultants working within the same trust. Clearly this is not equitable and consumed unnecessary amounts of discussion time, that could have been better utilised caring for patients. As we are now entering the second wave, we have once again approached NHSE and DHSC to discuss nationally agreed rates for extra-contractual work. We are awaiting a formal response but suspect that they will once again prefer to leave this to local agreements.

To support consultants and Trusts, the BMA have suggested this framework to be used for discussion locally in agreeing rates for extra contractual work. However we reiterate that wherever possible and by agreement with the consultant, reallocation of existing PAs and time of in lieu should be offered rather than simply increasing hours in order to reduce the risks of burnout.

A sample letter for you to send to your clinical director that specifies your agreed rates of remuneration can be found in Appendix B. **It is essential that you secure agreement on remuneration for any additional work you undertake in writing in advance.**

Principles when determining the extra-contractual rate for a Programmed activity.

- **The rate offered should be equitable for all consultants**

One of the anomalies of the 2003 consultant contract is that consultants with a longer period of consultant service will receive different rates of pay even when doing the same

role due to the tiered salary scale. This discriminates against younger consultants and also contributes to the gender pay gap as there is a higher proportion of women at the lower end of the consultant salary scale. Certainly, for extra contractual work, it is appropriate to pay consultants at the same rate of pay regardless of their length of service and it would potentially be discriminatory to offer younger consultants in particular a rate of pay that is lower than older consultants for such work.

- **The rate offered should not be at a lower cost to the trust than the cost of a PA for consultants currently employed by the trust**

Extra-contractual work is by its nature discretionary and it is appropriate that such discretionary overtime rate is paid at a higher rate than the employer pays for work within a standard contract of employment. This should be the case for all consultants and no consultant should be expected to do overtime at a rate of pay that is at a lower rate for their employer than that paid under their standard terms and conditions. The BMA have therefore calculated the cost of a PA to your employer under the 2003 contract (taking into account pensionable CEAs, Annual & Study Leave, and other employer-borne costs), and believe this should be the minimum standard cost of a PA for extra contractual work for all consultants. ***This has been calculated at a minimum of £422 per PA (see below for duration of PA),*** the breakdown of this calculation can be found in Appendix C.

- **The length of a PA should vary to reflect the antisocial nature and high intensity work being undertaken consistent with the approach for PAs that for part of a temporary job plan**

For high intensity extra-contractual work such as that required to support the COVID-19 pandemic, it is essential that the number of hours that constitute a PA are reduced in a similar manner to those for contracted PAs that are subject to a temporary change in job plan (see above). Not only does this maintain a consistent approach but again reduces the risk of burnout. The recommended length of PAs for extra contractual work are the same as outlined in table 1. The recommended length of such an extracontractual PA is 3 hours per PA in plain time, 2 hours per PA between 7am and 7pm at weekends and bank holidays, 2 hours per PA between 7pm and 11pm every day and 1.5 hours per PA for high intensity working after 11pm every day.

Shadow On-call/Second on call rotas

A number of organisations have implemented shadow on call rotas to cover periods of sickness absence or “second on” on call rotas to come in if “first on” consultants are busy. Again, this is a change to your job plan and can only be implemented by mutual agreement. If agreeing to this change, it is again essential that you make clear to your employer in writing that this is a temporary change and that you reserve the right to revert to your pre-existing job plan. Some trusts have refused to remunerate these shadow rotas and second on-call rotas beyond the existing frequency and PA rates for predictable emergency and emergency work within the contract. This is not appropriate and indeed in some cases, simply altering the on-call frequency may result in only a modest increase in remuneration (e.g. changing from 3% to 5% supplement), despite the impact on the working life of the consultant being very significant. It needs to be acknowledged that by undertaking a shadow

or second on-call rota, the consultant needs to remain available and that this causes significant restriction on their time.

The BMA recommends that these rotas are paid at a 'standby rate' that applies when you available but not working. The BMA minimum recommended standby rate, when not working but available is £50 per hour.

Any time that is subsequently spent undertaking predictable or unpredictable emergency work during the 'standby period' is remunerated as outlined above for extra-contractual work, i.e. £422 per PA, with the PA length as in Table 1.

What If you can't agree a change in your working pattern or your trust does not agree to these rates of pay?

You may find yourself unable to agree to work a temporarily requested work pattern or roster, or to take on certain clinical responsibilities during the pandemic, for a variety of reasons.

Declining to accept temporary changes to your working patterns or additional work must be without detriment. It is important to remember that:

- You do not have to agree to change your normal hours.
- If you have already changed your hours and wish to revert back, you have a right to do so.

Appendix A

Sample letter for temporary change to job plan

Dear clinical director,

Following our helpful meeting on [DATE], I agree to temporarily change my job plan to support the trust's COVID-19 response. As discussed, I wish to clarify that this change is temporary, and I retain the right to revert to my pre-existing job plan (Attached) at any stage subject to giving 2 weeks' notice.

The changes we have agreed are listed below:

- Substituting 1PA Clinic (4 hours of DCC) normally occurring Monday pm to 1PA of ward cover on Monday pm
- Substituting 2 PA Theatre list (8 hours of DCC) Friday to 2 high intensity PAs (4 hours DCC) on Saturday at the BMA recommended 2 hours per PA rate.

Yours sincerely,

Appendix B

Sample letter for agreeing additional shifts.

Dear clinical director,

Thank you for asking me to undertake additional work to help support the trust during the pandemic. I am of course happy to do this but as you are aware this work is in addition to my normal job plan. I think it is appropriate that the rates of pay for this work are comparable to that which the trust are already paying other consultants and as such I expect that I will be paid at least the minimum rate recommended by the BMA.

For clarity these rates are:

Please enter your rates here…..

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I would be grateful if you could confirm your acceptance of these rates prior to me undertaking the additional work.

Yours sincerely,

Appendix C

What does a PA already cost your trust under the 2003 contract?
At the top of the consultant payscale, the standard contractual rate over a 52-week year equates to £213 per PA. However, this includes paid study and annual leave and trusts generally do not offer additional annual leave when working additional hours. It is therefore more appropriate to base this over a typical 42 week working year. This therefore equates to £264 per PA. Furthermore, many consultants will have existing pensionable CEA awards and we have therefore based a recommended minimum rate for a PA based on a local Level 9 rate to ensure that work for additional hours is not remunerated at a level lower than some consultants are currently receiving under contractual terms. This means that your trust is already paying some consultants £350 per PA under the current 2003 contract (and those with national clinical excellence awards will be receiving even higher rates). Finally, when assessing the costs to the employer it is reasonable to include the employers pension contributions. These are currently 20.68%.

Putting this all together, the cost to your employer for some consultants on a 10 PA contract is £422 per PA. However, it is reasonable that extra-contractual work is remunerated at a higher rate than under the standard contractual terms. We have therefore suggested that for extra contractual work, 1 PA is equivalent to 3 hours in plain time and 2 hours in premium time. For resident night shifts we agree with the recommendation of 1.5 hours per PA after 11pm for high intensity work done on site.

Whilst these rates may seem high initially to your employer, £141 per hour is what 1 hour in premium time currently costs your employer under current 2003 contract rates for a number of consultants in your trust. It is also important to note that because of a decade of pay restraint, even these rates have been reduced by approximately 30% compared to inflation. Had these rates kept up with inflation, a standard 1-hour PA in premium time would have cost your employer £183. In addition, this compares with rates for medicolegal work, and private practice of £300-£500 per hour and as such is not excessive for the highly skilled nature of work performed by a consultant. As mentioned above, the BMA recommend that wherever possible, time off in lieu is given rather than increasing hours to ensure that consultants are not working excessive hours.