

The British Medical Association's response to the Consultation on reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations

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FOREWORD

The British Medical Association (BMA) is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

The BMA has undertaken this response on behalf of its members, as well as patients to the NHS, in order to highlight fundamental issues in the proposals within the consultation that would be of detriment to both doctors and patients within the NHS.

RESPONSE TO THE CONSULTATION

Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

Please explain your answer, including consideration of the costs and benefits that may affect employers and/or workers.

From the perspective of doctors, it is essential that the daily working hours are recorded to ensure both that doctors are fairly paid for the hours they are working rather than those that they are scheduled to work (which are routinely a significant underestimation of how long a doctor will have to work depending on what kind of shift they undertake) and that the working hours of doctors do not exceed the contractual and legislative safeguards put in place.

Any attempt to undermine the recording of these hours will have a profound, long lasting and damaging impact on doctors and the wider functioning of the NHS. In the context of enduring NHS pressures and the scale of the staffing crisis, such a change to the recording of daily working hours poses significant risk to staff retention and wellbeing. Without guarantees that the hours they have worked will be accurately remunerated or that they will not be subject to rotas which breach the safeguards that protect them and their patients, more doctors could leave the NHS. The health service cannot afford to lose any more doctors.

It is imperative that there is mutual agreement between the employee and their employer of the hours that have been worked. Primarily, this provides protection to both parties. The employee can ensure that they are working within the agreed contractual safe working limits, and the employer will not breach the legislative regulations they are bound by.

We note the evidence that has been provided in the consultation with regard to the immediate cost benefits to employers in removing this provision. However, firstly, given that many employers already have these procedures in place, in particular in the NHS, to then remove these procedures, particularly when they have such clear benefits, would be costly from the perspective of

administrative costs, which we don't think are reasonably reflected in the costing analysis, let alone the cost it will have in terms of ensuring safe working.

Further to this, it cannot be understated that the long term cost in preventing contractual breaches and in safeguarding and protecting the workforce that this provision provides would greatly outweigh any short term benefit.

There are clear evidence and links between the impact of working unsafe hours and the subsequent negative impact on patient care. Doctors work long shifts already, and the implicit requirement for staff to patch over systemic gaps with demonstrably unsafe levels of unpaid overtime has tangible safety implications – for both staff and patients.

The situation at present is already seeing a significant amount of unsafe working levels. With the latest NHS staff survey confirming 57% of doctors go to work despite not feeling well enough to perform their duties, and 77% report experiencing unrealistic time pressures, the level of risk both to staff and patients within the NHS is already significantly high¹. We are, even with the current reporting measures, already seeing new clinical negligence claims and reported incidents in the NHS is going up: from 10,684 in 2018/19 to 11,682 in 2019/20 (an increase of 9.3%)².

This is before we consider the significant and continually mounting evidence base that demonstrates that when doctors are working under conditions of chronic stress – potentially suffering with varying degrees of physical and emotional exhaustion, fatigue, and other symptoms of burnout – mistakes are much more likely to happen.

A study by Stanford University School of Medicine found that doctors who reported at least one major symptom of burnout were more than twice as likely to have reported a major medical error within the previous three months³. Any move therefore that undermines measures to prevent the burnout of doctors and other staff will only lead to worse patient care, worse health and wellbeing of staff and a subsequent worse social and economic cost.

Not recording working hours has the potential to have a disproportionate negative impact on disabled doctors, pregnant doctors and women doctors. Each of these groups are more likely to work reduced or fixed hours either for their health or caring arrangements. Employers being required to record working hours allows for adjustments to be made to working patterns that allow these groups to participate in the workforce. A failure to do so may have a negative impact on health and safety and retention.

We would therefore urge the Government to reconsider this proposal.

How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes (for employers)?

Very Important

¹ NHS Staff Survey, NHS England and NHS Improvement (May 2021)

² Annual report and accounts 2019/20, NHS Resolution (2020)

³ Tawfik, D.S., Profit, J., Morgenthaler, T.I., Satele, D.V., Sinsky, C.A., Dyrbye, L.N., Tutty, M.A., West, C.P. and Shanafelt, T.D., 2018, November. Physician burnout, well-being, and work unit safety grades in relationship to reported medical errors. In Mayo Clinic Proceedings (Vol. 93, No. 11, pp. 1571-1580). Elsevier

- Important
- Neither important nor unimportant
- Unimportant
- Don't know

Please explain your answer.

It is extremely important for both the enforcement of rights for workers and the preventing of disputes for Employers. Record keeping under the WTR and the different contracts ensures that doctors are not working beyond safe limits and employers are not, either purposefully or accidentally, requiring doctors to work outside of these limits. By record keeping, both sides prevent disputes. To put the onus only on the employee as proposed, the employer will be exposed because there is no ability to ensure that their employees are working safe hours and that they are being paid for the hours they are working.

This will therefore also put doctors in harms way with regard to potential bullying from employers. This is not in line with the NHS priorities in the different strategies being proposed nor would it be conducive to supporting tackling the waiting list and other NHS priorities to have working environments that have opportunities for bullying and conflicts in the workplace.

It would also be adding significant amounts to the workload of individual doctors and HR representatives within the NHS, rather than the standard process in place. This would therefore take away time they should be providing to patient care.

All doctors are negatively impacted from working unsafe hours and the removal of the WRT, however disabled doctors may be particularly at risk with the symptoms of man conditions being enhanced under fatigue, stress and exhaustion.

As previously noted, there would be a substantive cost in not facilitating record keeping, both directly in disputes caused by a lack of appropriate time checking, and in terms of workforce pressures as a consequence of doctors working unsafe hours that breach legislation and contractual safeguards. We would therefore be strongly advocating it's importance.

Are you: paid hourly; paid by task; or paid a salary or fixed amount, for example for each day, week, or month, regardless of the hours you work?

- I am paid hourly
- I am paid by task
- I am paid a salary or a fixed amount for each day, week, or month
- Don't know
- Other (please explain)

Does your employer keep records of your daily working hours?

- Yes
- No
- Don't know

If you answered yes, please provide more details of how you provide records of your working hours to your employer, whether the process is automated, and whether your employer checks, verifies, or approves the records.

Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

Please explain your answer.

Whilst doctors in the vast majority of cases have contracts that provide contractual entitlements that exceed these limits, we would still emphasise that any move to ensure the statutory amount is fairer and sets the bar for the minimum amount of leave at a higher rate would be beneficial. We would therefore welcome this step,

(For workers): What rate do you currently receive holiday pay at?

- 5.6 weeks of statutory annual leave at normal pay (including certain types of overtime, commission, and bonuses)
- 4 weeks of statutory annual leave at normal pay and 1.6 weeks of statutory annual leave at basic pay
- Don't know
- Other (please explain)

Most doctors have a variety of contractual terms for holidays, dependent on your experience and what role you work in within the workforce. Each is at a minimum the 5.6 weeks at normal pay.

What rate do you think holiday pay should be paid at?

- 5.6 weeks of statutory annual leave at basic pay
- 5.6 weeks of statutory annual leave at normal pay
- Don't know
- Other (please explain)

Please explain briefly in your answer what you think should be included as part of the holiday pay rate you have selected.

Given the additional working arrangements and the at times mandated auxiliary work doctors undertake, it would be a necessity for doctors and for other groups on similar working arrangements to have normal pay rather than merely basic pay factored into annual leave.

Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

Please explain your answer.

Are there any unintended consequences of removing the Working Time (Coronavirus) (Amendment) Regulations 2020 that allow workers to carry over up to 4 weeks of leave due to the effects of COVID?

- Yes
- No
- Don't know

If yes, please explain your answer.

Given that, particularly in the medical workforce, there are still cases of COVID that would require at points for leave to be carried over, we feel this would be a short sighted and unnecessary measure to remove something that does little to encumber employers at present.

Do you think that rolled-up holiday pay should be introduced?

- Yes, rolled-up holiday pay should be introduced as an option for employers in relation to all workers
- No, rolled-up holiday pay should not be introduced
- Don't know
- Other (please explain)

Please explain your answer.

The BMA is clear that rolling up holiday pay would be absolutely not a fair option to introduce. Firstly, it would fail to achieve the key health and safety requirement for time off. This is protected time that ensures the wellbeing and safety of both doctors and patients to ensure that doctors are best able to work safely having had reasonable rest. Rolling up holiday pay would undermine the need for doctors to take this necessary leave.

The maintenance of the need for doctors to take this leave is only meaningfully achieved if you have linkage between an hourly pay rate and a separate additional amount that covers you for holiday. It risks taking advantage of people's need for work without taking provision for annual leave. Therefore, we would be absolutely against this proposal.

Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

- Yes
- No

Whilst there will be very few employers of doctors with fewer than 50 employees, we would be absolutely against any undermining of the principle that employee representatives would not be in place to represent workers. Preventing employees from having elected representatives or trade union representation puts them at risk of being vulnerable to agreements that would not in fact benefit them nor their fellow employees. It has been clear that elected representatives ensures that all workers are better served and protected in conversations with their employer. Any legislation that undermines this principle therefore must be rejected.

Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

Yes

No

Please explain your answer

Again, we would emphasise that, whilst there will be very few employers of doctors with fewer than 50 employees, we would be absolutely against any undermining of the principle that employee representatives would not be in place to represent workers. Preventing employees from having elected representatives or trade union representation puts them at risk of being vulnerable to agreements that would not in fact benefit them nor their fellow employees. It has been clear that elected representatives ensures that all workers are better served and protected in conversations with their employer. Any legislation that undermines this principle therefore must be rejected.

What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees?

Please explain your answer

As noted, preventing employees from having elected representatives or trade union representation puts them at risk of being vulnerable to agreements that would not in fact benefit them nor their fellow employees. It has been clear that elected representatives ensures that all workers are better served and protected in conversations with their employer. Any legislation that undermines this principle therefore must be rejected.