

# Technical factsheet

## Working time

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

- The contract of employment
- The standard statement of terms and conditions
- Working time
- Age discrimination
- Dealing with sickness
- Managing performance
- Disciplinary, dismissal and grievance procedures
- Unlawful discrimination
- Redundancy
- Settlement offers
- Family-friendly rights
- Employment status: workers

The Working Time Regulations were introduced in 1998 to give effect to the European Working Time Directive. They are a health and safety measure, primarily intended to ensure that working hours are limited, proper breaks are taken and that workers receive paid holidays. We do not know what impact Brexit will have on these regulations as the government will be free to repeal them if it chooses to do so. It is thought to be unlikely that there will be a wholesale repeal, but there may be some elements that are less popular with government and employers, and which may be subject to change. These are indicated as they arise below.

Details on the Working Time Regulations can be found at: [bit.ly/leg-wtr98](https://bit.ly/leg-wtr98).

**Who is covered?**

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

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

Mobile workers in road transport are covered by the EU drivers' hours rules. This includes drivers, members of the vehicle crew and any others who form part of the travelling staff. They are entitled to paid annual leave and health assessments for night workers under the Working Time Regulations.

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

**What are the limits?**

Workers cannot be required to work for more than 48 hours a week on average. The average weekly working time is normally calculated over 17 weeks although this can be extended by agreement with the workforce up to a maximum of 52 weeks; for example, weekly hours are averaged over 52 weeks for offshore workers.

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

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

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

The opt-out is used so frequently in the UK that many argue that the 48-hour limit is ineffective. For this reason, and because the limit on working hours is quite unpopular with employers, some people think that the 48-hour limit may be removed altogether following Brexit.

### **What is 'working time'?**

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

This includes:

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

Working time is not:

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

The position in relation to workers who are 'on call' has been the subject of quite a few cases. It has been established that if a worker is on call at home but free to pursue leisure activities, they are not working for these purposes until they are actually called out. Where employees are on call but actually at their place of work, then they may be taken to be 'working' for the purposes of the regulations and breaks etc should be calculated accordingly. The only exception to this appears to be where the worker's place of work is also their actual home, ie a warden provided with their own flat in a care home; these people are working only when they are called out. Otherwise, all on-call workers who are not at home are probably technically 'working' for the purposes of the regulations although they may actually be asleep.

There has been a recent Court of Appeal decision on the minimum wage (not on working time) in relation to domiciliary care workers. The court said that where a worker is at their place of work and is on call, but is expected to be asleep for most of the time, they are only entitled to minimum wage for the time they are 'awake and working'. This is not directly relevant to working time, and it seems likely that the approach laid out above, taking into account all hours spent at the client's premises, will still be relevant when calculating hours worked for the purposes of holidays and entitlement to breaks. There have been long-term plans in the EU to treat such hours as 'inactive' but there has not been any progress on this, and since we are now leaving the EU this is unlikely to affect us.

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

### **How is working time averaged?**

The average weekly working time is calculated by dividing the number of hours worked by the number of weeks over which the average working week is being calculated, normally 17 unless otherwise agreed. This is the reference period.

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

### **Night workers**

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

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

### **Breaks and rest periods**

The following provisions are mandatory and it is not permitted for the worker to 'opt out' of them.

#### *Daily rest*

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

#### *Weekly rest*

A worker is entitled to one whole day off, ie 24 hours, in any seven days. Days off can be

averaged over a two-week period, meaning workers can take a continuous 48 hours in a 14-day period instead of one day per week. Days off are taken in addition to paid annual leave.

Employers must make sure that workers can take their rest, and it has recently been confirmed that the employer must provide rest breaks; it is not for the worker to request them.

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

#### *Rest breaks*

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

The break should be taken during the six-hour period and not at the beginning or end of it. The exact time the breaks are taken is up to the employer to decide. Again, employers must make sure that workers can take their rest.

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

#### **Paid annual leave**

Every worker covered by these regulations is entitled to at least 5.6 weeks' paid holiday (28 days for a five-day week or pro rata for those working part time or casually). This is made up of 20 days' basic holiday, which is an EU right, and an allowance for the eight days for bank holidays in the UK. (National governments are left free to add on bank, religious and public holidays as appropriate.) This includes workers who are subject to the

Road Transport Directive. This minimum period of leave must be granted to all workers, and cannot be paid in lieu or reduced below the minimum. A recent case concluded that it was unlawful for employees to have their 28-day annual leave entitlement reduced because they were paid double for bank holidays.

A week's leave should allow workers to be away from work for a week. It should be the same amount of time as the working week: if a worker does a five-day week, they are entitled to 28 days' leave; if they do a three-day week, the entitlement is 16.8 days' leave and so on. The entitlement is to 5.6 weeks; for some workers bank holidays will be normal working days and their leave will be taken at other times, whereas for office-based workers bank holidays will normally be part of annual leave and they will be required to take them as part of their entitlement. For this reason, any pro rata calculation of leave entitlements should treat bank holidays in exactly the same way as other days. Employers are entitled to require workers to take holidays at particular times and they should give reasonable notice if, for example, there is to be a Christmas or summer shutdown. Workers must give the employer notice that they want to take leave and this is normally specified in the contract or handbook.

### **How is pay calculated?**

For salaried staff, they will continue to be paid at their normal rate throughout their holiday. Those permanent staff who work part time will have their holiday worked out pro rata on the basis of the appropriate proportion of the full-time paid holiday allowance eg 3/5 if they work three full days per week. With casual staff, holiday accumulates as hours are worked and should be paid separately as 'holiday pay'. The holiday entitlement of 5.6 weeks is equivalent to 12.07% of hours worked over a year: 5.6 weeks' holiday, divided by 46.4 weeks (52 weeks – 5.6 weeks). The 5.6 weeks are excluded from the calculation as the worker would not be at work during those 5.6 weeks in order to accrue annual leave.

It has been the practice of many employers to pay a 'rolled-up' rate to casual staff, allowing the extra percentage on the hourly rate to represent holiday entitlement. However in March 2018, the Employment Appeal Tribunal (EAT) in *Brazel v Harpur Trust* ([bit.ly/BrazelvHarpur](https://bit.ly/BrazelvHarpur)) stated that for someone who has no normal working hours, the correct approach is to apply the normal rules for casual staff and work out her normal week's pay based on the pay received in the 12-week period prior to taking annual leave.

The EAT recognised that this could produce anomalies such as to favour an employee such as Mrs Brazel who did not work throughout the year, but found that the legislation was unambiguous.

### **Holiday pay and overtime**

Historically in the UK, holiday pay was always paid at basic rate alone. There has been a long-running saga about whether or not holiday pay should include an allowance for regular overtime worked and/or commission that is an intrinsic part of pay. The reason for this is that EU law indicates that holiday pay should be a replacement for normal pay. The reasoning is that, since holiday is a health and safety measure, if workers suffer an effective deduction when they go on holiday, they will be dissuaded from taking time off. The net effect of the cases from the ECJ means that, where the employee is required to work overtime, then payment for it should be averaged and added to basic pay. This is the case whether the employer is obliged to provide the work or not, as long as the employee is obliged to work it (ie either compulsory overtime or so-called non-guaranteed overtime). The recent case of *Smith & Brett v Dudley Metropolitan District Council* ([bit.ly/brett-dudley](http://bit.ly/brett-dudley)) indicates that UK tribunals are seeking to extend this further. The EAT has held that not only voluntary overtime, but also voluntary standby and voluntary call-out payments, should be considered 'normal pay' when undertaken with 'sufficient regularity'.

As far as European Court is concerned, it is now clearly established that, where commission, eg sales commission, is an intrinsic part of the pay of the employee, it should be averaged and included. This was affirmed in the widely reported decision of the Court of Appeal in *British Gas v Lock* ([bit.ly/BritishGas-Lock](http://bit.ly/BritishGas-Lock)).

In relation to the method for averaging these various uplifts, there is no clear guidance on this. In the UK, in order to calculate holidays for casual staff, a period of 12 weeks is used, and many employers are adopting this period. In relation to commission, however, many employers take the view that it is fairer to average it over 12 months. It would appear that any sensible approach to averaging is likely to be acceptable.

An unwelcome complication is that in both cases, since this is a decision made purely on the basis of EU law, the ruling applies only to the basic 20 days and no additional days allowed by national governments or by the employer in the contract. This means that the



enhanced rate, which includes allowance for commission and/or overtime, needs only to be paid for that minimum period. This is obviously a headache for payroll, which would need to calculate how many days' holiday they have already paid the employee, and at the basic or enhanced rate, in deciding whether to pay the enhanced rate. The confusion with all this, and its unpopularity with employers, may lead to the UK adopting a 'basic-pay-only' approach to holiday pay following Brexit.

### **How far back?**

When these cases were published, one major concern for employers was how far back employees might be able to go in claiming unpaid holiday. The government was also concerned and introduced the Deduction from Wages (Limitation) Regulations 2014. These regulations do two things:

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

The effect is to limit any chance employees have of bringing long-term claims for back holiday pay, either in the tribunal or civil courts. It also means that the worker must make the claim within three months of the last underpayment, otherwise the entire claim is lost.

There has also been some assistance from the courts, and the ECJ has decided that, when the employer looks back at underpaid holiday, where there is any gap of more than three months between underpayment, any back claim stops at that point. Since it is deemed that the employee takes their statutory 20 days first in any holiday year, then the additional UK holidays of eight days, and any additional leave granted by the employer, do not have to be paid at the enhanced rate and are not an underpayment. It is likely that claims in respect of the earlier part of the year will be extinguished by at least one three-

month gap later in the year, which then breaks the continuity.

The overall effect of the cases and the regulations is that it is very likely that the maximum claim for underpaid holiday that the worker is able to make will be in respect of the current holiday year.

It is very important, however, for employers to recognise the significance of the recent case of *Sash Windows v King* ([bit.ly/sash-king](http://bit.ly/sash-king)), which concerns a 'self-employed' contractor who, after 13 years of work with the company, won the argument that he should have been treated throughout as a worker. During his service, he had never been granted any paid holiday and any time he took leave, it was unpaid. The ECJ concluded that he had a claim for back holiday pay for the entire period, amounting to many thousands of pounds. For technical reasons, the regulations did not apply here, and the accrual continued to carry over, year on year, throughout the employment, with the sum due being payable as a lump sum at termination. The consequences of allocating the wrong status to those working for you have just become considerably graver. For further information please see *Technical factsheet: Employment status: workers*.

Commentators are not clear what effect this decision has on the regulations, and on back claims for underpaid, rather than unpaid holiday.

### **How 'leave years' work**

If the employee is entitled to paid leave, it will be based on a 'holiday year'. This is normally specified by the employer.

If a worker starts work part of the way through an existing leave year, their leave entitlement will be proportionate to the amount of time left during that year. If they leave their job part of the way through a leave year, the annual leave entitlement will be proportionate to the amount of the leave year that they have worked.

The entitlement to paid annual leave begins on the first day of employment but an accrual system can be used for the first year so that the worker can only take leave that they have earned so far during the year. The amount of leave which may be taken builds up monthly in advance at the rate of one-twelfth of the annual entitlement each month.

When a worker's employment ends, the employer must pay them for any annual leave due and untaken in their final pay. It is also advisable to provide in the contract of employment for the employer to claw back holiday that has been taken in excess of entitlement.

### **Unmeasured working time**

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

Generally, therefore, the regulations will apply to:

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

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

### **More on keeping records**

*What records do employers need to keep?*

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

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

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

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

### **More about enforcement**

The Health and Safety Executive (HSE), local authorities and other enforcement agencies are responsible for enforcing the limits set out in the regulations, including the 48-hour week and the provisions on night work. Where the regulations give the worker an entitlement – for example, to rest breaks or to annual leave – then the remedy is for the worker to make a complaint to an employment tribunal, which may make a declaration that the complaint is well founded and may award compensation; this can be whatever sum is just and equitable.

These regulations are very detailed and the HSE has a useful guide: [bit.ly/hse-wtr](https://bit.ly/hse-wtr).

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