



Working Time Regulations: 20 years on

Video training course notes

The Learn Centre ©

Working Time Regulations: 20 years on

Contents

Working time Regulations – 20 years on	2
Introduction	2
Why not the same legislation?	2
Overview of basic rights.....	3
What is working time?	3
Annual Leave entitlement.....	3
48 Hour Week	4
Opting Out.....	4
Enforcement	5
Audience Poll 1	5
Calculating Working Hours	5
Have the WTR had an impact?.....	6
Paid Holiday	6
Audience Poll 2	7
48 Hour week.....	7
Do you monitor hours worked for salaried staff?.....	7
Rest Breaks.....	8
What records do you keep?	8
Food for Thought	9
Case Law.....	9
Sleep ins	9
On Call Time	9
What is the difference between Sleep ins and On Call?.....	9
Rolled up holiday pay.....	9
Calculating Holiday pay.....	10
Annual leave Accrual.....	10
Summary	10
Brexit.....	11
Questions	11
Webinar slides.....	13

Working time Regulations – 20 years on

Introduction

WTR was first introduced in October 1998, almost 20 years ago, and are the UK's version on the Working Time Directive which is European legislation.

They are commonly assumed to be the same thing but are in fact 2 separate pieces of legislation which are often confused.

The regulations were introduced and designed to ensure the UK's compliance with the EU Directive which in turn had a stated aim of trying to ensure workplace Health and Safety.

The regulations have been amended multiple times over the last 20 years as you can see below, the key changes being in 2001 where the 13-week qualifying period of annual leave was removed and again in 2007 to increase the holiday provision to 5.6 weeks.

This is not to ignore or belittle the other changes such as those in 2003 where the regulations were revised to incorporate provisions from the Young Workers Directive, each amendment has credit and its own place in history:

- 1999 Record-keeping requirements for opt-outs revised to make them less burdensome
- 1999 Changes to the regulations regarding unmeasured working time
- 2001 The 13-week qualifying period for annual leave was removed
- 2003 Revised to incorporate the remaining provisions from the Young Workers Directive.
- 2004 Regulations extended to certain workers in the following sectors - road, sea, inland waterways, lake transport, railway, offshore and aviation. Later in the year, they were extended to junior doctors
- 2007 Amended to increase the minimum UK leave entitlement (in two stages) from 4 weeks to 5.6 weeks. This was intended to end the situation where some workers had to include time off for bank and public holidays against their statutory leave entitlement
- 2009 Maximum working hours for some junior doctors were increased from 48 to 51 hours
- 2013 Amended to reflect the abolition of the Agricultural Wages Board

Why not the same legislation?

Directives and regulations are two forms of laws that can be passed by the European Union.

A directive is a legislative act that sets out a goal that all EU countries must achieve, but it is up to the individual countries to decide how they will comply.

A regulation is a binding legislative act. It must be applied in its entirety across the EU. This was not an option for the Working Time Directive, especially as the UK were very resistant to certain points within it, namely the 48-hour week– hence the two different pieces of legislation.

The working time directive stipulates that too much overtime work is illegal but does not, like a lot of other legislation make a definition of what that means – in this case how much overtime is too much?

The directive also sets out minimum rest periods and a maximum number of working hours, but it was up to each country to devise its own legislation on how to implement this, this was a main sticking point for the UK, hence we have the 48 hour opt out option.

An EU directive is more of an order, which is issued to establish a policy, to assign responsibilities, define objectives and/or delegate authority.

The main use of a directive is to standardize different national rules and laws. An EU directive issued to all the Member States will ensure that all the Member States have the same guidelines while dealing with each other, especially relating to a single market, such as product safety standards.

Overview of basic rights

Over the last 20 years we have all become familiar with the basic rights of a worker under the WTR, but just to set the scene for this session I'm going to provide a brief overview.

Workers are covered, not just employees, as with NMW (National Minimum Wage) and Employment status.

There are also special rules for night workers which need to be adhered to.

Then, there is the provision for paid annual leave, this has added substantial costs to employers but has been accepted as part of employment costs.

Next, there is the average 48 hr working week and limits of hours in any 24 hour period for night workers, health assessments for night workers, rest breaks and specific limits of break, rest or compensatory rest periods – 11 hours rest in a 24 hour period and 24 hours rest per week, and not forgetting the rest break entitlement for anyone who works over 6 hours in a day.

What is working time?

What is actually 'working time', working time is when someone is working, at their employer's disposal or carrying out activities or duties. Note that time spent on standby or on-call time at the workplace is included in the definition of working time.

Time spent in accommodation supplied by the employer whilst on-call may also be working time, but only if the person is available for work. There is various piece of case law around what is and isn't working time.

Annual Leave entitlement

Initially paid holiday was for 20 days, and this could include public holidays, but through the amendments this has been increased to 5.6 week (28 days) for a 5 day a week worker, but still includes public holidays.

You should note that the rules on holiday payment, carry over of leave, buying leave etc only apply to these 5.6 weeks, if as an organisation you offer 5 weeks leave plus public holidays this, for a 5 day a week worker would equate to 33 days (25 + 8), you can apply different rules to the additional days above 28 (5 in this example) should you wish to do so.

Part-time workers have the same entitlement on a pro-rata basis and workers off long-term, either through sickness or maternity still accrue entitlement through their period of absence.

The calculation of Payment for holiday pay has led to a raft of case law on what should and shouldn't be included, which will be covered later. The intention of the regulations was to ensure that a worker was not financially penalised by taking mandatory holiday, so an average of earnings makes perfect sense.

48 Hour Week

What is the 48-hour week? The Regulations stipulate that the working week should not exceed an average of 48 hours for each period of seven days (although this does not apply to people with control over their working time such as senior executives). This is averaged over the previous 17 weeks, and if one of those weeks is a 'non-working' week then an additional working week replaces it.

Workers can agree to opt out of this limit but must do so in writing and not by collective agreement. The worker has the right to bring the opt out to an end by giving notice of seven days or longer (up to three months) as agreed.

Opting Out

The UK fought long and hard for this concession to the WTD and are very keen to keep the option available.

It means that workers can voluntarily 'opt-out' of the 48 hour working week, but employers cannot insist that they do, even if they have signed an opt-out agreement, workers are entitled to opt back in to the 48 hour week as long as they give the employer the notice stipulated on the opt-out – a maximum notice period being 3 months.

Employers are not permitted to treat individuals who refuse to opt out or those that have rescinded the agreement, in any detrimental way – meaning they are not allowed to discriminate against them.

In some situations, and in some types of employment workers do not have the option to opt-out – generally this is for health and safety reasons – would you really want a pilot flying your plane who had already done 72 hours this week?

Those who can't opt out include:

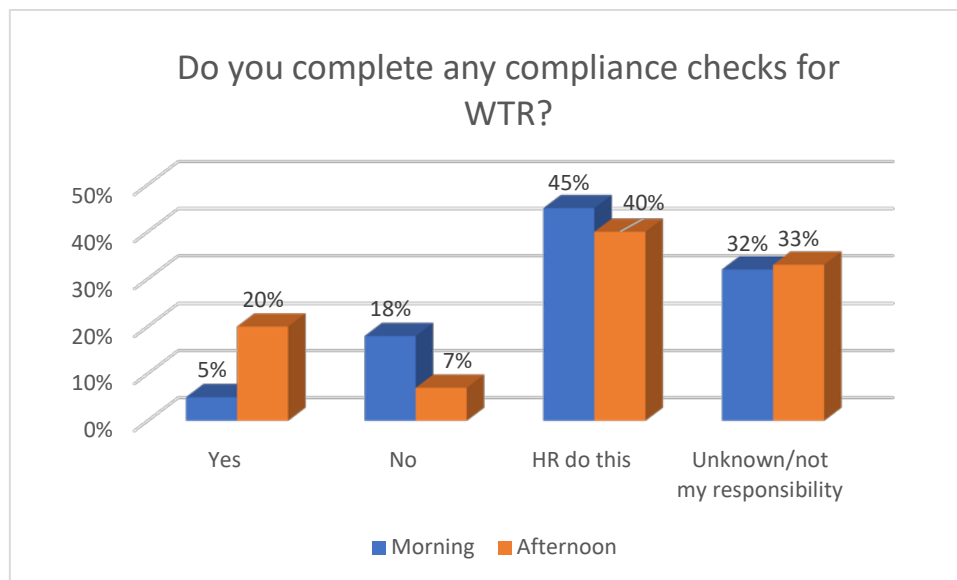
- Airline Staff
- Workers on ships/boats
- Workers in the road industry, except drivers of vehicles under 3.5 tonnes
- Staff who travel in/operate vehicles covered by EU rules on drivers' hours
- Security guards on vehicles carrying high value goods

There is a good case that long hours and tiredness reduce reflex times, hence the reason why workers in road transport equally cannot opt out – except for drivers of vehicles under 3.5 tonnes – and this is questioned on a regular basis, especially when they are involved in high profile accidents and the like.

Enforcement

The regulations were introduced on the basis of improving health and safety in the workplace, so it makes sense that the enforcement of the regulation limits falls to the H&S executive, however it would make more sense if there was enforcement of entitlements by some means other than via tribunals, and as I understand it the government are looking at alternatives for enforcement and management of this currently.

Audience Poll 1



Calculating Working Hours

This is not just a case of using contractual hours, the regulations stipulate an average over the 17-week period for most jobs.

Do you keep records of actual hours worked, especially for salaried staff or staff who are other than hourly paid?

Just in case we were ever in any doubt – these items count as working time, again, not that easy to record for average weekly hours if it's unpaid overtime or travel time as an example:

- Job related training
- Time spent travelling if you travel as part of your job i.e. sales
- Working lunches – business lunches
- Time spent working abroad
- Paid overtime
- Unpaid overtime you are asked to do
- Time spend on call at the workplace
- Any time that is treated as 'working time' under a contract
- Travel between home and work at the start and end of the day if you don't have a fixed place of work

But these don't count as working time:

- Time you spend on call away from the workplace

- Breaks when no work is done i.e. lunch breaks
- Travelling outside of normal working hours
- Unpaid overtime you've volunteered for e.g. staying late to finish something
- Paid or unpaid holiday
- Travel to and from work if you have a fixed place of work

Have the WTR had an impact?

Have the WTR had an impact in the UK?

I'd would say a resounding YES

There is evidence available which states there has been a reduction in the proportion of workers in the UK working long hours, and where long hours are worked it is usually reflecting the preference of the individual, or of course the fact that the UK has the Opt-out facility.

Paid annual leave has become more generous over the last 20 years, and the calculation of the pay for that leave has certainly kept the courts busy giving us no end of case law, but as recently as this month the TUC have issued some analysis stating that over 2 million employees are still missing out on annual leave, that is 1 in 12 of UK workers are not receiving their legal entitlement and missing out on nearly £3 billion worth of paid leave.

The implementation of the WTR and the WTD were designed to improve health and safety, but there is no evidence, in the UK, to support any claims that this is the case.

20 years on, where are we? Are the WTR just a part of everyday life? Have we adapted to incorporate the requirements into our business? Do our systems help us maintain the detailed records required to protect our business from legal challenge?

Paid Holiday

Paid holiday is now a widely accepted part of employees' entitlement – there are still some companies that don't pay because they claim workers are self-employed, this was covered in the employment status session in July, but some examples would be Uber, Hermes and Deliveroo.

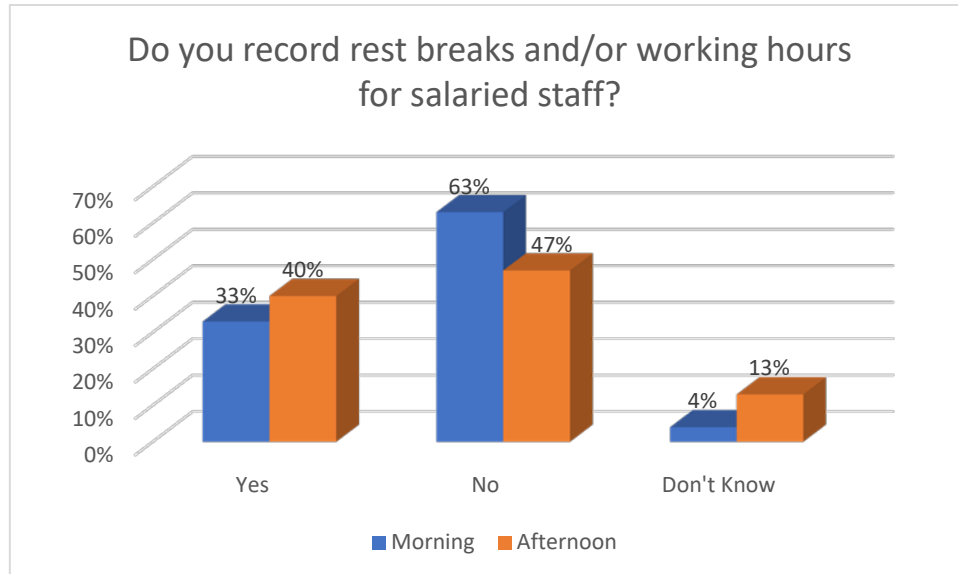
For employers who do accept that there is a requirement to pay holiday pay, the calculation of this value is still very uncertain, there is constantly changing case law regarding this, and what should and shouldn't be included in the calculation. Voluntary overtime, compulsory overtime, bonus and commission payments have all been subject to case law and are all to included. Rolled up holiday pay is only permitted in very limited circumstances – given that the worker should receive payment when they are on holiday, according to the regulations – and again there is a lot of case law around the calculation of holiday pay.

A summary, of some of the key pieces of case law is provided within this session which you can look up if you wish to do so.

The original wording and intention of the regulations was to ensure that workers, now required by law to take leave, were not at a financial loss in doing so.

Given that this was and remains the aim, it would be helpful to all if, rather than relying on case law, the calculation for Average Earnings for holiday pay was set in legislation the way it is for maternity pay – the average of the gross pay received over 12 weeks for example?

Audience Poll 2



48 Hour week

What about the 48-hour working week then? Well, again, this is mostly accepted, and where it isn't workers are often requested to sign an opt-out agreement – what most workers don't know is that they are able to refuse, and for obvious reasons, some employers don't enlighten them. All of that is ok, until you ask the question – do you monitor hours worked for salaried staff?

Those hourly paid staff are easy in terms of determining how many hours they have worked, but what about salaried staff, or those that respond to emails out of hours, where an opt-out isn't in place.

Do you monitor hours worked for salaried staff?

If organisations don't keep records how can they protect themselves?

Record keeping can be a costly and onerous task, but the penalties can be costly as well, large numbers of employers don't keep these types of records.

For hourly paid staff and shift workers it is often easy to identify worked hours, but for those who are salaried or who travel for work how do employers monitor and keep records to ensure compliance?

Not keeping adequate records leaves employers open to claims under the regulations for breach of the 48-hour rule.

This has been highlighted recently in a case in Ireland where an executive who was expected to deal with out of hours emails etc was awarded 7500 euros as compensation – so does this mean employers need to monitor out of hours and extended working of salaried staff more

closely so that they are able to protect themselves from such cases, or ensure that only those workers who have signed an opt-out are permitted to work this way?

What about those lovely mobile devices we have that make on the go working so easy, should employers have policies to cover their use out of hours?

Smartphones are encouraging employees to exceed the number of hours they are contracted to work and mean that many people are being exposed to longer working hours because they are more easily reachable after leaving the office.

Whether they choose to engage in extra work may be their own decision, but what about situations in which employees feel they must use their smartphones well beyond working hours to carry out their duties properly?

A case in Ireland saw a business executive of a subsidiary of meat producer Kepak being awarded €7,500 after she argued she was required to deal with out-of-hours work emails, some of which were after midnight.

In France, Rentokil was last month ordered to pay a former employee €60,000 for failing to respect his right to “switch off” from his phone and computer after work. The case was brought under the country’s new “right to disconnect” law, the so-called [El Khomri law](#) (named after a former labour minister), which came into force in January 2017, and is intended as a response to the “always-on” work culture in France.

Resistance to smartphones has been seen elsewhere in Europe before this law, Volkswagen Germany decided in 2012 to turn off emails to work phones outside working hours and Daimler has introduced the auto-deletion of emails sent during staff’s holidays.

Is it now time for employers to think about how to mitigate this risk?

For some employers, this would require a cultural shift away from expecting the 24/7 connection with employees that technology has made possible.

Rest Breaks

Another basic of the WTR and again tested repeatedly in law, usually finding in favour of the worker who has been unable to take the required breaks for whatever reason.

For time-sheeted staff breaks are often recorded, and for workers who use T&A systems to assist with flexible working main breaks are often recorded, well when workers leave the premises, but what about when workers don’t leave the premises or when salaried staff are not part of a flexible working system, or those workers who travel a lot during the working day.

What records do you keep?

As an employer do you record the rest breaks taken by your workers?

Or do you just assume that they are taken?

How are you protecting your business from legal rulings if you aren’t keeping the appropriate records?

How many employers hold records for these that would hold up in a tribunal or court if required to do so?

Food for Thought

20 years on, we know the rules, but are we compliant, and if we are, are we able to support that with evidence that is good enough to protect ourselves if the need arose?

In the last 20 years, we have all become familiar with the requirements of the WTR, but record keeping often isn't in place to help us, and where the government have failed to lay down detailed rules on the calculation of holiday pay we are reliant upon case law, and it's ever changing view.

We have come a very long way since 1998 when WTR were first introduced, but I still believe there is a long way to go, we shouldn't have to rely on case law, there should be clear guidance in place to help us as employers ensure we do what we should and leave no room for ambiguity.

Case Law

These are a few of the relevant pieces of case law that you might like to delve into further.

There are webinar sessions on some of these on The Learn Centre website, which you can access via your membership details.

Sleep ins – the [Mencap v Tomlinson-Blake & Shannon v Rampersad](#) in this case the Court of Appeal made the decision not to count sleep-in shifts as working time, but this is now subject to an appeal to Supreme Court.

On Call Time - [Landeshauptstadt Kiel v Jaeger](#) the ECJ decided that doctors on-call duty, during which they were required to be physically present in the hospital but, were permitted to sleep when they were not required, constituted working time.

[Hughes v Graham and another t/a Graylins Residential Home](#) in this case a care worker was provided with accommodation near to her workplace to allow her to be on call seven nights a week. EAT accepted that she was working when she was on call, regardless of when she was called out

What is the difference between Sleep ins and On Call?

Very similar requirements, different rulings, one still being subject to appeal

Very difficult to get it right when we are working with an ever-changing set of rules

The rulings on this are going to keep changing for some time yet and we will need to keep an eye out for the results of the appeal to the Supreme Court

Rolled up holiday pay

The regulations stipulate that holiday pay should be paid at the time the leave is taken.

Rolled-up holiday pay used to be common practise, especially in certain industries such as hospitality or for temporary workers, agency staff etc

In the UK it is still permitted to use rolled-up holiday pay if it is shown as a separate item on a payslip, but many employers now hold this value back and pay it out when holiday is taken, or at set points in the year.

For Scotland rolled up pay is banned.

Calculating Holiday pay

So, just a few of the notable cases on the calculation of holiday pay

It would be very easy to do a whole session on just the case law surrounding this, to pick out some examples

[Williams v British Airways plc](#) - any aspect of pay intrinsically linked to the performance of duties – such as allowances

[Bear Scotland Ltd and others v Fulton](#) and others – Overtime

[Hertel \(UK\) Ltd v Woods](#) and others - overtime

[Amec Group Ltd v Law](#) and others - overtime

[Patterson v Castlereagh Borough Council](#) -overtime

[Lock v British Gas Trading Ltd](#) - commission

[Dudley Metropolitan Borough Council v Willetts](#) – voluntary overtime

These cases are decisions on various types of overtime – guaranteed, irregular, regular, or additional payments such as commission (Lock) or additional payments – British Airways.

But, to summarise UK employers should now include overtime, commission, bonus, and travel allowances when calculating average pay for holiday pay purposes.

Annual leave accrual

Another subject which has been in receipt of a raft of case law.

So we are now in a situation where case law stipulates that holiday can be accrued and carried over into following leave years, but the regulations clearly state they cannot – case law supersedes the regulations in this case so that if an employee is off long term sick they continue to accrue holiday pay during their absence and can carry it over into the following holiday year, but carrying it over, under the ruling for Plumb is restricted to a maximum of an 18 month period.

Summary

WTR were introduced to ensure Health and Safety in the workplace, there has been a decline in long hours, but where they are worked it is now in highly skilled occupations and often for short periods of time.

Annual leave entitlements have increased but the TUC are pointing out that 2 million workers are still missing out on this entitlement and losing £3billion pounds in paid leave.

Employers should keep the relevant records to protect themselves against any claims, but do they?

There are still areas which are subject to court cases – and we will be watching out for the results of these any new cases that arise, currently we are waiting on further rulings for holiday pay, on call/sleep in time and there are still disputes around the interaction of sick leave and other absence with holiday

Brexit

And finally, what will Brexit mean for WTR, given that it is based on an EU Directive? Are they so firmly established within UK legislation now that there is no turning back or is this one piece of legislation that will be repealed? We will all be watching and waiting with baited breath to see what March 2019 and beyond holds for us, in relation to WTR and a raft of other legislation as well.

Questions

Listed here are the questions which were received during the 2 live sessions. Should you have any further questions please email our helpdesk info@thelearncentre.co.uk

For each question a response is supplied:

1. **We don't keep records of the hours our salaried staff work, should we?** *There is no requirement in law to record these hours, however, if you don't hold the records how can you protect your business from any claims of a breach of the 48-hour week? For those where you hold an opt-out agreement there is probably no need, but if you aren't recording breaks you will not be able to protect yourself if called to do so in a tribunal -and employees aren't able to opt-out of rest break requirements.*
2. **We pay basic rates for holiday pay, we mostly have salaried staff, is this enough?** *Strictly speaking the answer to this is no. If a salaried employee is in receipt of regular overtime, bonus or commission, then, supported by various pieces of case law, these values should be included in the value paid for holiday. The WTR state an average of the previous 17 weeks' pay.*
3. **Should I be auditing HR records to ensure they are completing compliance checks or is this something they will take care of themselves?** *It would be sensible to ensure that the records being kept are enough to protect the business from any claims that could arise, so are HR keeping records of breaks, overtime etc.? It might be sensible to request a meeting to discuss the records held, and if payroll could do anything to help.*
4. **What constitutes a reference period?** *There are different reference periods for the 48-hour week (12 weeks) and holiday pay calculations (17 weeks), so your reference period will depend on what you are looking at.*

For Holiday pay you should be taking the last 17 weeks of paid work, if any weeks include sickness or holiday then these should be excluded, and additional weeks take from the start of the reference period.

5. What does rolled up holiday pay mean?

Rolled up Holiday pay is where an employer pays an additional amount of pay, per hour, to cover holiday pay. If an employee is being paid £10 per hour, and an employer is operating a rolled-up holiday pay system they could pay £10.50 per hour. The additional 50p per hour is either paid with normal pay, and it is assumed that the employee will keep this money separate to cover non-payment during a weeks' leave, or the employer can hold this money on account and pay out when the employee takes holiday so that the employee receives some payment for the week. Remember that if this is used the 'holiday-pay' element of pay must be shown separately on the payslip and in Scotland Rolled-up holiday pay is banned.

6. If we do not include the elements mentioned in the calculation of annual leave, what are the penalties? Is there a risk of being taken to a tribunal?

If you do not include overtime, commission and bonus, as well as other work-related allowances in your payment of holiday pay then there is a risk of you being taken to tribunal. As there is already a large amount of case law stipulating the calculation of holiday pay, it is unlikely that a tribunal would rule in your favour. The penalties can include a fine, and an order to pay the underpaid holiday pay – as well as the obvious bad publicity that this could bring to your company as tribunal rulings are a matter of public record.

7. Can you use email send and receive receipts to track the hours of salaried staff working outside normal office hours?

You could, but is it safe to do so? What if the employee is in a different time zone? What if they have scheduled emails to be sent at a different time? Is this a reliable method of monitoring time? Given the issues around different possible time stamps, it isn't the safest method to use, but it could be better than no records at all.

8. Does being on call out or standby attract holiday pay?

Still a subject for the courts, we are currently waiting on a ruling from the Supreme court in the Mencap case, but as it currently stands, sleep ins are not classed as working time, but on call at an employer's premises or premises supplied by the employer are.

All of that accepted, if you are calculating holiday pay, and using the average from the reference period, and the employee regularly received either then I would suggest that they should be included, if you look at the British Airways case it states that any payment that is intrinsically linked to the performance of normal work.

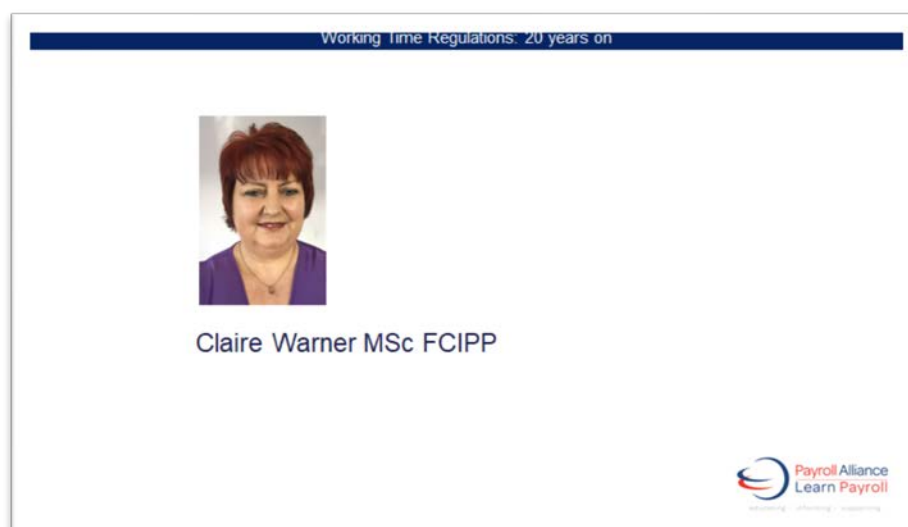
9. Should an employee be entitled to any paid breaks during the working week?

Any employee who works more than 6 hours per day is entitled to a break, and this should not be at the end of the shift (so going home 15 minutes early), but there is no requirement in legislation to pay breaks.

10. How should we manage working time for colleagues driving sales vans who don't clock in or out?

It is an employer's responsibility to ensure compliance, therefore you should be keeping some form of records to protect your business – what would happen if they were involved in an accident and you couldn't prove that they hadn't been working/driving excessive hours? I would suggest that timesheets of some sort are completed and signed by the employee to confirm the hours are accurate would provide some protection for your business.

Webinar slides



Working Time Regulations: 20 years on

Introduction

- Working Time Regulations were first introduced in the UK in 1998 (Oct)
- Designed to ensure the UK was compliant with the European Working Time Directive
- Has the stated aim of ensuring workplace health & safety
- Regulations have been amended multiple times

Working Time Regulations: 20 years on

Why not the same Legislation?

- Firstly a directive is deemed to be a legislative act that sets out a goal that all EU countries must achieve
- A regulation is a binding legislative act which must be applied in its entirety across the EU
- So the EU set a Directive and member countries have individual regulations
- The Directive stipulates that too much overtime is illegal and also sets out minimum rest periods and a maximum number of working hours
- It is then up to each country to devise its own laws on how to implement this – hence the WTR
- There are some, not so, subtle differences between the 2 pieces of legislation which include the UK's hard fought for right to opt-out of the 48 hour week

Working Time Regulations: 20 years on

Amendments history

- 1999 Record-keeping requirements for opt-outs revised to make them less burdensome
- 1999 Changes to the regulations regarding unmeasured working time
- 2001 The 13 week qualifying period for annual leave was removed
- 2003 Revised to incorporate the remaining provisions from the Young Workers Directive.
- 2004 Regulations extended to certain workers in the following sectors - road, sea, inland waterways, lake transport, railway, offshore and aviation. Later in the year, they were extended to junior doctors
- 2007 Amended to increase the minimum UK leave entitlement (in two stages) from 4 weeks to 5.6 weeks. This was intended to end the situation where some workers had to include time off for bank and public holidays against their statutory leave entitlement
- 2009 Maximum working hours for some junior doctors were increased from 48 to 51 hours
- 2013 Amended to reflect the abolition of the Agricultural Wages Board

Working Time Regulations: 20 years on

Overview of basic rights

- Who? – Workers
- Special rules for night workers
- Paid annual leave
- An average of 48 hour working week limit
- Limit of 8 hours (average) work in any 24 hour period for night workers
- Free health assessments for night workers
- 11 hours rest in a 24 hour period
- 24 hours rest per week
- Rest breaks for those who work more than 6 hours

Working Time Regulations: 20 years on

What is working time?

- The regulations state that 'working time' is when someone is
 - Working
 - At their employers disposal
 - Carrying out activities or duties
- Note that time spent on
 - Standby or on-call time at the workplace is included in the definition of working time
 - In accommodation supplied by the employer whilst on-call may be working time, but only if the person is available for work
- There is case law on this which we will cover later in this session

Working Time Regulations: 20 years on

Annual leave entitlement

- Workers are entitled to 5.6 weeks paid leave every year
 - This includes bank holidays
- Most employers all full-time workers 4 weeks annual leave and 8 days public holidays
 - Part-time workers have the same rights on a pro-rata basis
- Workers on long-term sick are entitled to paid holiday under the regulations
- Payment for leave is calculated using a workers normal weeks pay
 - This can include overtime and commission

Working Time Regulations: 20 years on

48 hour week

- Regulations stipulate that the working week should not exceed an average of 48 hours for each 7 day period
- This is averaged over the previous 17 weeks
- Workers can agree to 'opt-out' of this limit
- Opt-outs must be done individually and in writing
- Workers can end 'opt-outs' with notice of seven days (or longer if agreed)

Working Time Regulations: 20 years on

Opting Out

- Can 'opt-out' of the 48 hour average week if you are over 18
 - Employers can ask you to opt-out
 - Can't be dismissed or treated unfairly for refusing
- 'Opt-outs' can be
 - For a fixed period
 - Indefinitely
- Must be voluntary and in writing
- Can be cancelled whenever the employee wishes, by giving notice of at least 7 days, or whatever your opt-out states (max 3 months)
- Employers cannot force you to cancel opt-out

Working Time Regulations: 20 years on

Who can't opt-out

Some types of workers can't opt-out:

- Airline staff
- Worker on ships / boats
- Worker in the road transport industry
 - Except drivers of vehicles under 3.5 tonnes
- Staff who travel in / operate vehicles covered by EU rules on drivers hours
- Security guard on vehicle carrying high value goods

Working Time Regulations: 20 years on

Enforcement

The regulations are split into entitlements and limits

- Entitlements can be enforced via Employment Tribunals
 - Breaks
 - Daily and weekly rest
 - Annual leave
 - Compensatory rest
- Limits are enforced by the Health & Safety Executive or civil claims
 - Maximum weekly working time
 - Length of night work
 - Health assessments for night workers
- Claims must be brought within 3 months of the breach of regulations

Working Time Regulations: 20 years on

Calculating working hours

- Average working hours are calculated over a 'reference' period, normally 17 weeks
 - Your working hours can't be averaged out if you're under 18
 - You can't work more than 40 hours in any one week

Exceptions:

- Some jobs have different reference periods, e.g.:
 - trainee doctors have a 26-week reference period
 - the offshore oil and gas sector has a 52-week reference period

Working Time Regulations: 20 years on

What counts as work?

A working week includes:

- Job related training
- Time spent travelling if you travel as part of your job, e.g. sales rep
- Working lunches, e.g. business lunches
- Time spent working abroad
- Paid overtime
- Unpaid overtime you're asked to do
- Time spent on call at the workplace
- Any time that is treated as 'working time' under a contract
- Travel between home and work at the start and end of the working day (if you don't have a fixed place of work)

Working Time Regulations: 20 years on

What doesn't count as work?

A working week doesn't include:

- Time you spend on call away from the workplace
- Breaks when no work is done, e.g. lunch breaks
- Travelling outside of normal working hours
- Unpaid overtime you've volunteered for, e.g. staying late to finish something off
- Paid or unpaid holiday
- Travel to and from work (if you have a fixed place of work)

Working Time Regulations: 20 years on

Has the WTR had an impact?

- A reduction in the proportion of workers in UK working long hours
- Retaining the opt-out is important
- Most long-hours working reflects the preference of the individual
- Paid annual leave has become more generous
 - Recent TUC analysis states that more than 2 million employees still miss out on paid annual leave
- Increase in employer costs due to rulings around holiday pay
- No evidence that H&S has improved

Working Time Regulations: 20 years on

20 years on

- Are the WTR just a part of everyday life?
- Have we adapted to incorporate their requirements?
- Do our systems help us maintain records and the details required?

Working Time Regulations: 20 years on

Paid Holiday

- Widely accepted as a requirement

However

- The calculation of the value of that holiday pay is still very uncertain
- There is a constantly changing raft of case law regarding this
- Voluntary overtime, overtime, bonus and commission payments have all been subject to case law, and are all to be included
- Rolled-up holiday is only permitted in very limited circumstances

Working Time Regulations: 20 years on

More on Holiday

- If we look at the original wording and intention of the WTR
- The aim was that workers had paid time away from work and were not financially disadvantaged for doing so
- Given that this was the aim it would be helpful to all if, rather than relying on case law, the calculation for average earnings for holiday pay was set in legislation the way it is for maternity pay calculations

Working Time Regulations: 20 years on

48 Hr Week

- Widely accepted, and where it isn't workers are often requested to sign an opt-out agreement
- Most workers don't know that they are able to refuse this, and often employers don't enlighten them
- For staff that are hourly paid shift workers, or where they participate in flexible working patterns keeping track of hours worked is relatively easy
- But what about those salaried staff – who might travel for work, or work out of hours responding to emails etc.?
- Where an opt-out isn't signed do you record the actual hours worked by salaried staff?

Working Time Regulations: 20 years on

48 hour week – warning

- If we don't keep the relevant records how can we protect ourselves?
- How can we provide evidence that the rules haven't been breached if we don't have the records?
- This can be a costly and onerous task
- In a recent case in Ireland an executive was awarded €7,500 as compensation for dealing with out of hours emails etc.
- Should employers monitor out of hours work more closely?
- Many people have mobile devices which allow this type of activity, how many of us have policies regarding this?

Working Time Regulations: 20 years on

48 hour week – switching off

Smart-phones and work

- Recent Cases
 - Kepak – in Ireland
 - Rentokil – in France
- New Rules in France
 - El Khomri law
 - Companies of more than 50 employees to have a charter of good contact outlining the hours when staff should neither send or respond to emails
- Elsewhere in Europe
 - Volkswagen in Germany in 2012 decided to turn off emails to work phones outside working hours
 - Daimler has introduced auto-deletion of emails sent during staffs holiday

Working Time Regulations: 20 years on

Rest breaks

- Another basic of the WTR
- Tested again and again in case law
- Usually finding in favour of the worker who has been unable to take the required breaks for whatever reason
- For staff using timesheets, breaks are often recorded
- When you use T&A systems main breaks are often recorded – at least when workers leave site – what about when they don't?
- What about those salaried staff or Workers that are mobile / travel?

Working Time Regulations: 20 years on

Rest breaks - records

- Do you record the rest breaks taken by your workers?
- Do you just assume that they were taken?
- How are you protecting your business?
- Do you hold sufficient records to support your business if it was taken to tribunal?

Working Time Regulations: 20 years on

Food for thought

- 20 years on we know the rules but are we compliant?
- If we are compliant can we prove, to a tribunal or court, that we are?
- We have all become familiar with the requirements of the WTR but is the record keeping in place to help us?
- Government have failed to lay down clear rules on the calculation of holiday pay, choosing to be reliant on case law which is ever changing. Should we be looking to the Government for clarity?

Working Time Regulations: 20 years on

Case law

Working Time Regulations: 20 years on

Sleepins and on call

Sleep Ins

- Mencap v Tomlinson-Blake & Shannon v Rampersad
- Decision made by COA was not to count sleep-in shifts as working time
- Subject to an appeal to Supreme Court

On Call Time

- Landeshauptstadt Kiel v Jaeger (9 September 2003)
- ECJ decided that doctors' on-call duty, during which they were required to be physically present in the hospital but were permitted to sleep when they were not required, constituted working time
- Hughes v Graham and another t/a Graylins Residential Home
- Care worker provided with accommodation near her workplace to allow her to be on call seven nights a week
- EAT accepted that she was working when she was on call, regardless of when she was called out

Working Time Regulations: 20 years on

Rolled-up holiday pay

Rolled-up holiday pay unlawful

- Robinson-Steele v RD Retail Services Ltd and other cases (16 March 2006)
 - "Rolling up" holiday pay was once commonplace
 - The ECJ decision in Robinson-Steele was that rolling up holiday pay into wages was unlawful and that workers must receive their normal pay throughout the period of leave

Working Time Regulations: 20 years on

Calculating holiday pay

- UK employers must now include commission, overtime (both voluntary and compulsory) and travel allowances in workers' paid annual leave
 - Williams v British Airways plc
 - Bear Scotland Ltd and others v Fulton and others
 - Hertel (UK) Ltd v Woods and others
 - Amec Group Ltd v Law and others
 - Patterson v Castlereagh Borough Council
 - Lock v British Gas Trading Ltd
 - Dudley Metropolitan Borough Council v Willetts

Working Time Regulations: 20 years on

Annual leave accrual

Annual leave accrual continues during long-term sick leave

- Stringer and others v HM Revenue and Customs sub nom Commissioners of Inland Revenue v Ainsworth and others;
 - In Stringer, ECJ held that the right to paid holiday continues to accrue during sick leave
 - The Court also said that on the termination of the employment relationship, a worker who had been on sick leave and unable to take paid annual leave was entitled to a payment in lieu

A glut of further case law on this followed, including cases in which UK courts and tribunals attempted to apply this ruling to the Working Time Regulations 1998

- Plumb v Duncan Print Group Ltd
 - EAT suggested that an employee who does not take statutory annual leave during sick leave should be able to carry forward the untaken annual leave for up to 18 months from the end of the leave year in which the leave arises

Working Time Regulations: 20 years on

Summary

- Introduced to ensure workplace health & safety
- Decline in long-hours, but difficulty to attribute solely to WTR
- Long hours working more prevalent in high income, highly skilled occupations
- Evidence suggests many working long hours do so short-term
- Retaining opt-out is important to UK business and employees
- Evidence suggests that majority of workers currently working above 48hrs wouldn't want to reduce hours if it meant less money
- Annual leave entitlements have increased, but still many miss out
- Record keeping to prove compliance is often lacking
- Principal concerns around court judgements on
 - Holiday pay
 - On-call time
 - Interaction of sick leave / annual and other forms of leave

Working Time Regulations: 20 years on

Brexit

- What will Brexit mean for the WTR given that it is based on an EU directive?
- Is it now so firmly established within UK legislation that there is no turning back?
- Or will this be repealed, and if so all of it or parts of it?
- What other regulations and rulings will be repealed – such as Alabaster which is ultimately case law, ruled on by an EU court
- We can only wait and see



The next video training webinar will be held on Tuesday 25th September 2018, please keep an eye on your emails for registration.

[View all the video training webinars in your membership area of the website.](#)