



## *Association of Surgeons of Great Britain and Ireland*

### **WITHOUT PREJUDICE**

## **COMING TO TERMS WITH THE WORKING TIME REGULATIONS**

**Web version (30.7.2009)**

### **Introduction**

The *European Working Time Directive* (EWTD) <sup>[1]</sup> has been enshrined in UK law since 1998 in the *Working Time Regulations* (WTR) <sup>[2]</sup> as part of Health and Safety Legislation. The principle was to gradually introduce a reduction in the working hours to a maximum average of 48 hours per week. By August 2004 the Working Time Directive (WTD) had been reinforced to protect the health and safety of all doctors by restricting hours worked to a maximum of 58 hours per week and imposing minimum rest periods. This was followed by a phased introduction of further restriction of the hours to 56 hours per week by August 2007. The final implementation to a 48-hour working week was effective from 1<sup>st</sup> August 2009.

Despite strong lobbying to the Secretary of State for Health by RCSEng, ASGBI, ASiT and others, and the production of the ASGBI Consensus Statement on *The Impact of EWTD on Delivery of Surgical Services*, the Working Time Regulations (WTR) finally came into force, unchanged, with effect from 1<sup>st</sup> August 2009. Regrettably, in our view, there has been an underestimate of the expected impact of the 48-hour working week on training and service delivery in surgery.

The full implementation of a 48-hour week represents a threat to the surgical profession in terms of patient care, training and quality of professional life. Recent surveys have shown that compliance across the UK and Ireland is patchy at best, and that many rotas and hospitals are not yet fully staffed to implement the legislation without gaps in service. In particular, smaller surgical units may have difficulties because of shortages of surgical staff. Many trainees are already being asked to work extra shifts which deleteriously impacts on their training opportunities and work/life balance.

ASGBI has put together the following advice which is intended to provide a guide to Fellows as to how best to manage with WTR after 1<sup>st</sup> August 2009.

1. The WTR are enshrined in EU and domestic Health and Safety legislation and apply to all employees across all sectors. Within medicine the regulations apply to all doctors including trainees, SAS doctors and consultants.

The WTR specify that working time, including overtime, should not exceed an average of 48 hours for each seven days in any 'reference period' <sup>[3]</sup>. The reference period for doctors working in the NHS is currently 26 weeks (six months) <sup>[4]</sup>.

2. The WTR impose statutory rest periods as follows:
  - \* Minimum daily rest periods of eleven consecutive hours per 24-hour period.
  - \* A minimum 24-hour, uninterrupted, rest period in every seven days (although this can be averaged to 48 hours in every 14 days) <sup>[5]</sup>. This is in addition to daily rest.
  - \* A 20-minute break, spent away from the workstation, when the working day exceeds six hours <sup>[6]</sup>.
3. Under UK law, the WTR currently permit <sup>[7]</sup> all employees to voluntarily opt-out of the 48-hour working week up to a maximum of a 56-hour working week. However, it is not possible to opt-out of the statutory rest periods. Thus, doctors may voluntarily opt-out of the 48-hour week, up to 56 hours, which is also compliant under the ‘New Deal’ requirements <sup>[8]</sup>, but the statutory rest periods cannot be altered.
4. Where possible, on-call rotas should be organised so that surgical staff, including trainees, are non-resident. Non-resident Doctors on-call need only count those hours which they are actually working.

The WTR define working time as “*any period during which [the worker] is working at his employer’s disposal and carrying out his activity or duties*”. An important legal ruling, the SiMAP judgement of the European Court of Justice <sup>[9]</sup>, confirmed that time spent on-call by doctors “... *must be regarded in its entirety as working time, ... if they are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time.*” The effect of this was that doctors who are resident on-call but sleeping are adjudged to be working, but those on-call at home are not. However, if those on-call at home are required to attend their hospital during this period, they will be considered to have been working with the associated impact on working time and rest periods.

5. Rotas should be organised around a 48-hour working week even though some of those on the rota may have opted-out up to the maximum permitted 56 hours.
6. Although the rest periods must be strictly adhered to, the hours worked per week can be averaged out over a 26 week reference period, which allows some flexibility. Rotas can be designed to take this into account.
7. Employers (including NHS Trusts) are not permitted to encourage or otherwise induce any employee (including doctors) to opt-out of the 48-hour working week, as this could be considered coercion and, potentially, bullying and harassment. We would advise, therefore, that those wishing to voluntarily work in excess of the 48 hours per week should formally opt-out, in writing, to their Trusts.

Doctors opting-out to the maximum permitted 56-hour working week should, in return, be formally contracted by their Trust to work, and be paid for, those extra hours.

As hours are reduced the issue of indemnity for clinicians spending time additional to their contracted hours in their hospitals needs clear resolution<sup>[10]</sup>. In 2007 the NHS Litigation Authority wrote to all NHS bodies confirming that doctors working for employers that are members of the Clinical Negligence Scheme for Trusts are fully indemnified against actions for negligence if they work in excess of the EWTD limits whether they have formally opted-out and have a contract to reflect this or not. However, rest periods cannot be ignored.

8. As long as they comply with the statutory daily and weekly rest periods, doctors are able, on an ad-hoc basis, to stay in their hospital to work beyond their contracted 48 hours, as their average working week will be calculated over a rolling six month reference period. There are various software programmes available, including one called *RotaGeek*, which may be helpful in this respect<sup>[11]</sup>.
9. It is strongly advised that any hours worked in excess of 48 hours per week (or in excess of 56 hours per week, for those who have opted-out) are recorded, together with the reasons for staying on duty. There are various Trainee and Consultant Logbooks available to assist with this process. Such data should be regularly reviewed to ensure WTR compliance over the rolling reference period.
10. Any problems encountered with regard to patient safety, quality of care, service delivery or training as a result of the final implementation of WTR should be formally reported according to local Hospital/Trust Policy.
11. The WTR only apply to hours worked under a contract of employment. Thus, there is currently no legal constraint upon Consultants undertaking activities outside their primary NHS Trust contract.
12. Consultant contracts should not normally exceed a maximum of 12 PA's per week. Consultants with contracts of 12 or more PAs may confront problems in the future if they engage in private practice.
13. Trainees are strongly encouraged to use their full Study Leave entitlement to maximise their training opportunities, and to log this time accordingly.

ASGBI has a Professional Partnership with Bircham Dyson Bell LLP (BDB), a firm of solicitors based in central London. As a membership benefit to Fellows of the Association, BDB can provide up to 20 minutes of free legal advice on these and other matters and can be contacted on 0207 783 3545.

**Michael Horrocks**  
**President, ASGBI**

## REFERENCES

- [1] **European Working Time Directive**  
Council of the European Union  
Council Directive No 93/104/EC (23<sup>rd</sup> November 1993)
- [2] **The Working Time Regulations 1998**  
(Statutory Instrument 1998 No. 1833)  
HMSO
- [3] Within the WTR, the reference period is usually a period of 17 weeks, although in certain circumstances (as in surgery) it may be 26 weeks or even as long as 52 weeks [**Regulations 4(1), (3) and 95) and 23**].
- [4] For the purposes of calculating whether the weekly working time is within the maximum set by the legislation, the average weekly working time is calculated over a reference period of up to six months (26 weeks). The average working time is calculated using the formula below:  
$$\frac{A + B}{C}$$
  
Where:  
**A** is the total number of hours worked during the course of the reference period.  
**B** is the number of hours worked in the period after the end of the reference period equal to the number of days excluded during the reference period due to annual leave, sick leave, maternity leave, etc.  
**C** is the number of weeks in the reference period.
- [BMA: *Time's Up 1 August 2004 – A guide on the EWTD for junior doctors* (2003)]
- [5] [**Regulation 11**].
- [6] [**Regulation 12**].
- [7] Individual workers can opt out of the 48-hour limit [**Regulation 5**]. This derogation was included in the original Directive at the behest of the then UK Government, but only for seven years in the first instance. The current UK Government still supports opt-out. European Commission proposals to phase it out over a period of years were rejected by the Council of Ministers in June 2006. Thus, for the foreseeable future, the opt-out remains.  
[Pitt, G: *Employment Law*, Sweet & Maxwell Ltd, London (2007)]
- [8] The 'New Deal' is an agreement between the Government, the Royal Colleges and the BMA made in 1991 responding to health and safety concerns over long hours. Like EWTD, the New Deal governs working hours and rest and it became a contractual requirement for PRHOs in August 2001 and for all junior doctors in August 2003. The New Deal requirements are a maximum of 56 hours of 'actual work' (ie, treating patients, etc) and 72 hours maximum duty (including resident and non-resident duty).  
[BMA: *Time's Up 1 August 2004 – A guide on the EWTD for junior doctors* (2003)]
- [9] **Sindicato de Médicos de Asistencia Pública (SiMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana**  
European Court of Justice, 03.10.2000, C-303/98  
[2000] ECR I-7963; [2000] All ER (EC) 609; [2001] 3 CMLR 932; [2001] ICR 1116; [2000] IRLR 845; [2000] All ER (D) 1236
- [10] **Royal College of Surgeons of England:**  
[http://www.rcseng.ac.uk/service\\_delivery/working-time-directive/trust-indemnity](http://www.rcseng.ac.uk/service_delivery/working-time-directive/trust-indemnity)
- [11] [www.rotageek.com](http://www.rotageek.com)