HOURS AND LEAVE

Introduction
This guide sets out the minimum requirements that working hours and leave arrangements must comply with to meet the Working Time Regulations, along with the bargaining issues for ensuring compliance and seeking improvements, before going on to consider the norms that provide useful benchmarks for negotiations.

Working Time Regulations

Core rights
The core rights that the Working Time Regulations provide are:

- Paid annual leave of 28 days per year;
- A 48-hour limit on the average working week;
- A continuous 11 hours rest in every 24-hour period;
- A continuous 24 hours rest in every week;
- A 20 minute rest break in every work period over six hours;
- An eight-hour limit on average working hours in a 24-hour period for night workers;
- Free health assessments for night workers

Ensuring staff receive protections
The Working Time Regulations apply to those who are legally classified as a worker, which means that the self-employed and volunteers are outside its protections.

Some very specific categories of workers are also excluded, but these groups are not usually found among the sections of the workforce that UNISON represents.

Further exclusions apply to specific parts of the regulations and these are noted below under the relevant sections.

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1 Exclusions include school aged children, domestic servants, merchant seafarers, workers on board sea-going fishing vessels, mobile workers in certain transport sectors and certain activities of the armed forces, police or other civil protection services.
In assessing whether staff working patterns are violating the Working Time Regulations it is necessary to calculate hours worked, bearing the following points in mind.

- Contracted overtime is included in the calculation but voluntary overtime is not.
- Job related training and working lunches are included.
- Time spent on standby or on-call at the workplace is included in the definition of working time. When on standby or on-call away from the workplace only time actually spent working is generally included. For more detail on this issue, see the panel below.
- For workers with a fixed or habitual place of work, time spent travelling between jobs is included as working time but time spent travelling to and from work is not. For workers who are not assigned to a fixed or habitual place of work, time spent both travelling between jobs and from home to the first and last jobs of the day count as working time. For more advice on this issue, see the panel overleaf.

**Rulings on treatment of sleeping-in / on-call time as working time**

Two European Court of Justice decisions in 2003 have shaped working time treatment of sleeping-in / on-call arrangements. The SiMAP and Jaeger cases centred on the treatment of doctors and defined working time as including time spent on-call at a place of work, even when that time is spent sleeping. These decisions have been consistently upheld by Employment Appeal Tribunals (EAT) in the UK. Key among those rulings was MacCartney v Oversley House Management [2006], where a resident manager of sheltered accommodation was required to work four days a week providing 24-hour site cover. Although her duties were largely confined to core working hours, she was obliged to be on call in the case of an emergency for the whole period. Her home was provided by the employer on the premises and she could spend leisure time in her flat and entertain guests in the evenings, but she had to be available if needed. The EAT held that the whole of the four days constituted working time and so she had not been receiving appropriate rest breaks. In holding to that position, it made no difference that Ms MacCartney was given actual living accommodation at her place of work.

Similarly, in Hughes v Graham and another t/a Graylyns Residential Home [2008], a part-time care assistant paid for eight hours a week was also required to be on-call between 9pm and 8am seven days a week to assist with any incidents at the residential home. The EAT ruled that the care assistant was entitled to be regarded as working when she was on-call, regardless of whether or not she was called out during this time.

[The Whittlestone EAT judgement in 2013 also established that —sleep-in are covered by the National Minimum Wage (NMW) regulations. Even if a worker is allowed to sleep at work, if they are required to stay at their workplace, then all their hours must be paid in accordance with NMW regulations. For UNISON’s advice on working time and the National Minimum Wage click here]
Ruling on treatment of travel time

A 2015 ruling by the European Court of Justice in Federación de Servicios Privados del sindicato Comisiones Obreras (CC.OO.) v Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA found that time spent travelling from home to the first client of the day and from the last client to home is working time for workers who are not assigned to a fixed or habitual place of work (ie peripatetic workers).

Some employers may respond by creating notional workplaces for staff. Branches should be vigilant of such practices and if there is reason to believe a workplace is a sham collect evidence to enable the union to challenge any attempt to get around the ruling and deny entitlements under the Working Time Regulations.

Peripatetic workers should keep copies of their rotas to assist any challenge to an employer over violations of the regulations through failure to include travel time in the calculation of working time.

[Peripatetic workers should also be encouraged to keep records of their pay slips in the eventuality that the ruling ends up having implications for calculation of the National Minimum Wage in the future.]

Bargaining to maximise benefits

This section of the guide sets out the core features of the Working Time Regulations in greater detail, along with the bargaining points for maximising the benefits of the regulations for workers.

Maximum weekly working hours

The average working time for each seven day period must not exceed 48 hours.

In any given week, working time may vary from this limit, but averaged out over a reference period of 17 weeks it must not exceed 48 hours. The reference period can be extended by collective agreement and individuals have the right to opt out of the 48 hour limit (this is the only part of the regulations where an opt-out can apply).

Workers under the age of 18 may not be employed for more than 40 hours a week.

Employers are required to keep records to show compliance with the 48-hour limit and to retain records for two years.

Bargaining points

- Some employers may attempt to coerce workers into signing an opt-out form, while others may try to use the opt-out as a condition of employment or promotion. Branches will need to be vigilant for cases of members signing an opt-out under duress or employers imposing any kind of detriment on workers who refuse to sign. Such violations of the regulations can be pursued through an employment tribunal, as set out in the enforcement section later in this guide.
- If members choose to sign the opt-out form, negotiators should ensure that members are made aware of their right to terminate the opt-out by giving seven days’ notice. The TUC model letter for opting back in is available here.
- The requirement to retain records provides a useful tool for checking compliance.
Daily and weekly rest

A worker is entitled to a rest period of 11 consecutive hours per 24-hour period.

Workers under the age of 18 may not be employed for more than eight hours on any day.

A worker is also entitled to an uninterrupted rest period of not less than 24 hours in each seven day period.

However, this can be replaced by two uninterrupted rest periods of not less than 24 hours in each 14-day period, or one uninterrupted rest period of not less than 48 hours in each 14-day period.

Bargaining points

- Where members fall within one of the exception categories outlined on the previous page, the worker is entitled to an equivalent period of compensatory rest. Equivalent to period or part period of rest missed. Members should be actively encouraged to take their “compensatory rest” as quickly as possible (government guidelines suggest such rest should be provided within two weeks of time worked).
- Consideration should be given to challenging an employer who claims it is not possible for the rest to be taken due to “exceptional circumstances.”
- Negotiators may need to push for shift or rota patterns to be changed to allow appropriate rest periods or to build in provision for workers to take their compensatory rest.

Rest breaks

A worker is entitled to a rest break of 20 minutes where the working day is longer than six hours, but the length of the rest break can be amended by collective agreement.

Workers under the age of 18 have the right to a minimum rest break of 30 minutes in every working day lasting more than four and a half hours.

The regulations contain a further “pattern of work” provision that a worker must be given adequate rest breaks if the work pattern is deemed to be monotonous, the work rate is pre-determined or arrangements put the health and safety of a worker at risk.

Bargaining points

- The collective bargaining provision offers an opportunity to improve upon the 20 minute minimum set out in the regulations and the “pattern of work” provision can offer arguments to support additional entitlement.

A very specific set of workers whose working time is judged to be unmeasured, such as managing executives and family workers, are exempt from the main elements of the regulations - maximum working week, maximum duration of night work, daily rest periods, weekly rest periods and rest breaks.

The regulations also allow workers to be excluded from the rights to limits on night working, daily rest, weekly rest and rest breaks where they are classified as special cases.

The most relevant groups to UNISON’s membership are workers engaged in security activities or businesses that require continuity of service, such as “reception, treatment or care provided by hospitals or similar establishments and residential institutions,” as well as “gas, water and electricity production, transmission and distribution, household refuse collection and incineration.”

However, exceptions for continuity only apply to the activities of the worker, not the general business of the employer. Therefore, legal advice should be sought through your regional officer where employers attempt to apply such an exemption.

Shift workers can be excluded from the right to daily and weekly rest where there is an insufficient gap between the end and start of shifts.
Negotiators should seek to ensure that the rest breaks are treated as part of the working day and are therefore paid breaks.

Enforcement of rest breaks should be in line with regulation specifications that they take place away from the “work station.”

Paid annual leave

The statutory annual holiday entitlement is 5.6 weeks, which equates to 28 days for any worker on a five day week. The entitlement of a part-time worker is calculated on a pro-rata basis.

**Bargaining points**

- The regulations allow the inclusion of bank and public holidays in the minimum entitlement, which would squeeze basic holiday entitlement to 20 in the case of England, Wales and Scotland, and 18 for Northern Ireland. Therefore, the norms for basic leave entitlement set out later in this guide may be a useful reference point for levering this figure up.

- Workers should receive a week’s pay for each week of leave. Recent court cases outlined more fully in UNISON’s holiday pay bargaining advice have clarified that holiday pay (at least for the basic 20 days leave required by law) must also include commission and non-guaranteed overtime that would have been worked had the worker not been on leave. A further Northern Ireland judgement has widened payment to voluntary overtime.

- Even when a part-time worker’s non-working day falls on a bank or public holiday, the right to the time off on a pro-rata basis still applies.

### Bank and public holidays

**England and Wales** – Eight days - New Year’s Day, Good Friday, Easter Monday, early May bank holiday, spring bank holiday, summer bank holiday, Christmas Day, Boxing Day.

**Northern Ireland** – Ten days – Eight listed above, plus St Patrick’s Day and the Anniversary of the Battle of the Boyne

**Scotland** – Eight days - New Year’s Day, 2 January, Good Friday, early May bank holiday, spring bank holiday, summer bank holiday, Christmas Day and Boxing Day. Since 2007, St Andrews Day has been an alternative, voluntary public holiday, which can replace an existing local holiday, though some employers, such as the Scottish Government, have awarded St Andrews Day as an additional public holiday.

A copy of UNISON’s model annual leave agreement can be downloaded [here](#).

A quirk of how bank holidays fall over the April 2016 to March 2017 holiday year means that any organisation the defines holiday entitlement as 20 days plus bank holidays would be violating the Working Time Regulations. In England, Scotland and Wales, 10 bank holidays took place between April 2015 and March 2016, but consequently just six bank holidays fall between April 2016 and March 2017. Therefore, where workers’ entitlement is defined as 20 days plus bank holidays over that period, press the employer to provide two additional days in order to comply with the 28 day minimum.
Night working

A night worker’s normal working hours must not exceed an average of eight hours in each 24-hour period. Again, this can be averaged over a reference period of 17 weeks. However, an absolute limit of eight hours in any 24-hours period applies to a worker whose work involves special hazards, heavy physical or mental strain.

In general, workers aged under 18 cannot work any time between 10pm and 6am, though this can be varied to the period 11pm to 7am.

Night workers are entitled to free health assessments at regular intervals and, if health issues associated with night work are identified, they have the right to transfer to day work where a suitable role can be identified.

Employers are required to keep records to show compliance with the night working regulations limit and to retain records for two years.

Bargaining points

- A night worker is somebody who regularly\(^2\) works at least three hours during the night time, which is defined as running from 11pm to 6am. However, the night period can be amended by collective agreement as long as it lasts for seven hours and includes midnight to 5am. Therefore, this flexibility allows bargaining to achieve the most advantageous definition for classifying workers as night workers.
- All night workers need to be made aware of their right to a free regular health assessment, which is confidential and can only be released to an employer with the worker’s written consent.
- Agreements with employers should target full health assessments on an annual basis conducted by a qualified medical practitioner who is independent of the employer.
- It’s important to monitor that night workers are treated no less favourably than day workers and ensure that employers take on board the health and safety needs of night workers. This may include access to a rest room, access to training, or risk assessments.

\(^2\)Tribunals have generally classified one week of night work in three as being sufficient to classify someone as a night worker
Enforcement

If negotiations with the employer fail to address violations of the Working Time Regulations, options are worth exploring with your regional officer for initially pursuing a complaint through the ACAS Pay and Work Rights Helpline.

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<thead>
<tr>
<th>Acas Pay and Work Rights Helpline</th>
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<tbody>
<tr>
<td>Telephone: 0300 123 1100</td>
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<tr>
<td>Website:  Acas Helpline Online</td>
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</table>

Many members are likely to be worried about making a complaint and so union reps can contact the helpline on their behalf, presenting the case in a way that preserves the anonymity of the worker(s) affected throughout the process.

If this route fails to reach a resolution, speak to your regional officer about the possibility of submitting a collective grievance and beyond that taking an employment tribunal case. The Working Time Regulations have traditionally formed the most common type of cases going before employment tribunals.

Any claims to an employment tribunal must be brought within three months less one day of the breach complained of.

Limits on weekly working time, night working and the right to health assessments for night workers are enforced by the health and safety enforcing authorities - the Health and Safety Executive and Local Authority Environmental Health Officers. Conviction of offences on these issues in a magistrates’ court in England and Wales can result in the employer receiving an unlimited fine or imprisonment for a maximum of three months.

Where a complaint is upheld by an employment tribunal the tribunal can make an employer pay compensation to the worker. Tribunals can make an award based on what is “just and equitable in all the circumstances.”
Benchmarks for negotiations

Having looked at the minimum requirements for hours and leave by law, this section sets out
the norms for hours and leave across the economy and by sector.

Norms for the working week

Across the economy, the average contracted duration of the working week is 37 hours. The
private sector average is slightly higher at 37.5 hours, the voluntary sector average is slightly
lower at 36 hours and the public sector average is in line with the economy wide figure of 37
hours.3

<table>
<thead>
<tr>
<th></th>
<th>Whole economy</th>
<th>Private sector</th>
<th>Voluntary sector</th>
<th>Public sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average contracted</td>
<td>37 hours</td>
<td>37.5 hours</td>
<td>36 hours</td>
<td>37 hours</td>
</tr>
<tr>
<td>working week</td>
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The 37 hour working week is standard across central government departments and, since 2013,
the withdrawal of the 36 hour week that formerly prevailed in London has standardised the Civil
Service working week further.

Within the bargaining groups covering the majority of UNISON's membership, the 37 hour
working week is dominant, as reflected by the table below.

<table>
<thead>
<tr>
<th>Bargaining Group</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>NHS - Agenda for Change</td>
<td>37.5</td>
</tr>
<tr>
<td>Further Education</td>
<td>37</td>
</tr>
<tr>
<td>Local Government NJC</td>
<td>37</td>
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<tr>
<td>Local Government SJC</td>
<td>37</td>
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<tr>
<td>Police Staff - England and Wales</td>
<td>37</td>
</tr>
<tr>
<td>Probation Staff</td>
<td>37</td>
</tr>
<tr>
<td>Sixth Form Colleges</td>
<td>37</td>
</tr>
<tr>
<td>Youth &amp; Community Workers</td>
<td>37</td>
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</tbody>
</table>

However, among some sectors these hours form nationally agreed guidelines that can be
amended according to local negotiations. For example, though the local government NJC sets out
a 37 hour week, the Corporation of London employs staff on a basic 35 hour working week, while
Fife, Haringey and Surrey councils have agreed 36 hour weeks. A 35 hour week is also standard
at such universities as Liverpool John Moores, Liverpool Hope and East London.

In some sections of the community and voluntary sector, improvements on the sector’s 36 hour
average working week are commonplace. For example, housing associations Arena, Circle,
Cobalt, Leicester, Nottingham Community, One Housing, Riverside, Symphony and Three Valleys
all set the standard working week at 35 hours.

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3 Figures based on averages from the Labour Research Department’s Payline database
Norms for annual leave entitlement

Across the economy, the average leave entitlement in the first year of employment (excluding bank and public holidays) is 25.5 days, rising to 28.5 days after five years of service. In the public sector, entitlement is higher at 27.5 days in the first year, rising to 29.5 after five. Similarly, the averages for the voluntary sector are 26.5 days rising to 30. The private sector is slightly below the economy wide figures, starting at 24 days and rising to 26.4

<table>
<thead>
<tr>
<th>Average annual leave entitlement</th>
<th>Whole economy</th>
<th>Private sector</th>
<th>Voluntary sector</th>
<th>Public sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>In first year of employment</td>
<td>25.5 days</td>
<td>24 days</td>
<td>26.5 days</td>
<td>27.5 days</td>
</tr>
<tr>
<td>After five years of employment</td>
<td>28.5 days</td>
<td>26 days</td>
<td>30 days</td>
<td>29.5 days</td>
</tr>
</tbody>
</table>

Within the bargaining groups covering the majority of UNISON’s membership, leave entitlements vary markedly and are summarised below.

<table>
<thead>
<tr>
<th>Bargaining Group</th>
<th>Basic leave</th>
<th>Service related additions</th>
</tr>
</thead>
<tbody>
<tr>
<td>NHS - Agenda for Change</td>
<td>27 days</td>
<td>29 days after 5 years</td>
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<tr>
<td></td>
<td></td>
<td>33 days after 10 years</td>
</tr>
<tr>
<td>Further Education</td>
<td>No national agreement</td>
<td>No national agreement</td>
</tr>
<tr>
<td>Local Government Single Status</td>
<td>21 days</td>
<td>25 days after 5 years</td>
</tr>
<tr>
<td>Police Staff - England and Wales</td>
<td>22 days</td>
<td>27 days after 5 years</td>
</tr>
<tr>
<td>Probation Staff</td>
<td>Basic 25 days + 2 service days</td>
<td>Basic 30 days after 5 years + 3 service days after 7 years</td>
</tr>
<tr>
<td>Scottish Local Government Single Status</td>
<td>20 days</td>
<td>25 days after 5 years</td>
</tr>
<tr>
<td>Sixth Form Colleges</td>
<td>Basic 20 days + 2 extra statutory days</td>
<td>Basic 22 days after 2 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Basic 25 days after 5 years</td>
</tr>
<tr>
<td>Youth &amp; Community Workers</td>
<td>30 days</td>
<td>35 days after 5 years</td>
</tr>
</tbody>
</table>

Once again, local agreements have established many notable improvements on national agreements. For instance, Glasgow City Council applies basic leave of 28 days, Milton Keynes and Coventry City councils peg their arrangements to 27 days and Metropolitan Police staff are on 28 days.

Within central government, many departments have seen cuts to 25 days annual leave for new starters since 2013.

[If you would like details of hours or leave entitlements for a more specific sector, please contact the Bargaining Support Group on bsg@unison.co.uk ]

*Figures based on averages from the Labour Research Department’s Payline database*
False private / public comparisons

Crude comparisons between the private and public sector are sometimes used to argue that public sector workers enjoy unjustified advantages over private sector workers in their hours and leave. These comparisons paint a false picture because they fail to take account of differences in types of occupation and types of employer. Most notably, comparisons are affected by the following factors:

- Manual workers tend to be employed on longer basic hours and shorter leave entitlements and these workers are more commonly found in the private sector;

- The private sector covers a multitude of small employers. Therefore, the more reasonable comparison lies between large private sector employers and the public sector. When this is accounted for, the differential between public and private sector leave entitlement narrows considerably;

- The strength of trade unions in comparison to the private sector also offers some explanation for differentials since Xperthr found in its 2011 survey that holiday entitlement among employers that recognise a trade union was 27 days compared to 25 among those that don’t.

UNISON has access to the Labour Research Department Payline database, which contains details of hours and leave agreements for employers across the economy. For details of how to access Payline contact the Bargaining Support Group on bsg@unison.co.uk

The UNISON agreements library contains a wide variety of leave agreements with employers across the public service. UNISON staff have access to this database and if branches wish to check for the availability of a particular agreement, please contact the Bargaining Support Group on bsg@unison.co.uk