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European Working Time Directive (EUWTD):

The Working Time Regulations (WTR) Statutory instrument 1998 No. 1833 and their effect on Mortuary on call services.

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3. Executive summary.

a) Purpose.

The general interpretation of the Working time regulations is that it severely restricts the ability of organisations such as NHS and Public Mortuary services, to provide adequate technical cover out of the agreed daily working hours.

This document sets out to explain the parameters of the **Working Time Regulations (WTR)** which are the regulations for Great Britain affected by the **European Working Time Directive (EUWTD)**. The document contains the pertinent sections of the WTR used for the justification for and against the provision of an on call service.

This document does not provide a basis for justification of types and styles of Mortuary on call services. Tasks requiring the attendance of APT staff out side of normal Mortuary operating hours, should be decided on a local basis. This document only describes two perceivable sides of the regulations and the authors interpretation of the regulations themselves and is intended as a guidance tool for them only.

b) Findings.

The European working time directive has shaped the working time regulations that govern Great Britain to ensure the health and safety of and prevent the abuse of, staff working in all forms of establishment within Great Britain. They limit the amount of hours an individual can work within a seven day period to an average of 48 hours per week, in a reference period of 17 weeks.

The regulations are not as rigid as popularly thought as there are a number of ways to mould them around differing working circumstances. The most obvious of these, is the ability to change the reference period used in the **WTR** formula for average hours, from the default 17weeks to 26 or anything up to and including 52 weeks.

It is possible by means of a structured workforce agreement to “opt out” of the regulations, negating the need for any complex calculations of average hours and or limits to individual hours worked. This, however, must be an agreement signed by all parties without coercion and can be annulled, in writing, with a period of seven days notice by any individual covered under that agreement.

c) Conclusions.

The WTR was brought in to protect individual workers from being coerced or forced into working more hours than is safe to do so. It also ensures that the health and safety of all persons working within or receiving help from a service is maintained.

The WTR do not prevent the provision of a 24 hour service.

In the context of Mortuary services, the on-call requirements of that service must be identified as necessary if the worker is to be required to work over the average 48

hours per week over a 17 week period. For example, it may be decided by an employer that the APT is not required to be present at the delivery of deceased from the community by Coroner's contracted Funeral Directors. This may sufficiently reduce the amount of out of hours work accrued by an individual or team therefore bringing them into line with the requirements of the WTR. This would ensure that the relatives of deceased would still be receiving a quality service from the qualified and experienced staff of that service. However this would have to be justified by the employer as not being necessary.

The provision of an unhindered 24 hour on call service from Mortuary departments is possible if a workforce agreement is put into place at the behest of all those involved in the delivery of that service.

The time worked outside of normal hours when under a workforce or collective agreement or working in circumstances illustrated in regulation 21 may be taken as lieu time in the future. This does not have to be taken on the next working day as has been suggested in some areas.

4. The regulations:

“Part II

Rights and obligations concerning working time.”

Regulation 4, Weekly working time,

“(1) Subject to regulation 5, a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.

(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies.

(3) Subject to paragraphs (4) and (5) and any agreement under regulation 23 (b), the reference periods which apply in the case of a worker are –

- (a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or
- (b) in any other case, any period of 17 weeks in the course of his employment.

(4) Where a worker has worked for his employer for less than 17 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer.

(5) Paragraphs (3) and (4) shall apply to a worker who is excluded from the scope of certain provisions of these regulations by regulation 21 as if for each reference to 17 weeks there were substituted a reference to 26 weeks.

(6) For the purposes of this regulation, a worker's average working time for each seven days during the reference period shall be determined according to the formula –

$$\frac{A + B}{C}$$

where –

A is the aggregate number of hours comprised in the worker's working time during the course of the reference period;

B is the aggregate number of hours comprised in his working time during the course of the period beginning immediately after the end of the reference period and ending when the number of days in that subsequent period on which he has worked equals the number of excluded days during the reference period; and

C is the number of weeks in the reference period.

(7) In paragraph (6), "excluded days" means days comprised in –

- (a) any period of annual leave taken by the worker in exercise of his entitlement under regulation 13;
- (b) any period of sick leave taken by the worker; and
- (c) any period of maternity leave taken by the worker; and
- (d) any period in respect of which the limit specified in paragraph (1) did not apply in relation to the worker by virtue of regulation 5."

Reference 1: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

a) Example 1:

A Mortuary department with 1500 deaths per year with 3 APT staff, runs a 24hr on call service resulting in a 1 week in 3 rota for the individual APT's. The on call extends to viewings, identifications and emergencies only.

The reference period dictated by WTR is 17 weeks.

In these 17 weeks, 1 APT covers 5 on call weeks and has 6 call outs per week. These calls last 2 hours each totalling 12 hours extra each week.

Two of the weeks during the reference period, the APT takes as annual leave.

The standard working week is 37.5 hours in duration.

Therefore according to the formula,

$$\begin{aligned} \mathbf{A} &= 17 \times 37.5 \text{ (standard working hours)} \\ &+ 60 \quad \text{(12 hours of calls per week. At 5 weeks)} \\ &= 697.5 \text{ Hours.} \end{aligned}$$

Minus the 2 weeks of annual leave which are excluded days at 75 hours
= 622.5 hours.

$$\begin{aligned} \mathbf{B} &= 2 \text{ weeks at } 37.5 \text{ hours} \\ &= 75 \end{aligned}$$

$\mathbf{C} = 17$ weeks.

The resulting average weekly hours would then be:

$$\frac{\mathbf{A} \text{ 622.5 hours} + \mathbf{B} \text{ 75 hours}}{\mathbf{C} \text{ 17 weeks}} = 41.1 \text{ Hours.}$$

The 41.1 hours is the average weekly hours worked by the APT. This means that they are in line with the WTR despite 5 of those weeks working 49.5 hours.

Although this example is less complicated than some real life examples of hours worked, it shows that an on call service can be provided without contravening the WTR.

b) Example 2:

A Mortuary department with 2500 deaths per year with 4 APT staff, runs a 24hr on call service resulting in a 1 week in 4 rota for the individual APT's. The on call extends to viewings, identifications, forensic examinations and receiving deceased from a community source.

The reference period dictated by WTR is 17 weeks.

In these 17 weeks, 1 APT covers 5 on call weeks and is called out on 73 occasions.

These calls consist of:

3 forensic examinations at 8 hours each,
50 deceased admissions amounting to 100 hours,
20 deceased viewings amounting to 90 hours.

The standard working week is 37.5 hours in duration.

Therefore according to the formula,

$$\begin{aligned} \mathbf{A} &= 17 \times 37.5 \text{ (standard working hours)} \\ &+ 214 \quad \text{(Break down above).} \\ &= 851.5 \text{ Hours.} \end{aligned}$$

B = 0 as the APT's hours do not include any excluded days.

C = 17 weeks.

The resulting average weekly hours would then be:

$$\frac{\mathbf{A} \text{ 851.5 hours} + \mathbf{B} \text{ 0}}{\mathbf{C} \text{ 17 weeks}} = 50.1 \text{ Hours.}$$

The 50.1 hours is the average weekly hours worked by the APT. This means that they are not in line with the WTR and the service will need to be re-assessed to ensure that the APT staff do not remain in contravention of the WTR.

5. The Opt – out:

Regulation 5, Agreement to exclude the maximum states,

“(1) The limit specified in regulation 4(1) shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case, provided that the employer complies with the requirements of paragraph (4).

(2) An agreement for the purposes of paragraph (1) –

- (a) may either relate to a specified period or apply indefinitely; and
- (b) subject to any provision in the agreement for a different period of notice, shall be terminable by the worker by giving not less than seven days' notice to his employer in writing.

(3) Where an agreement for the purposes of paragraph (1) makes provision for the termination of the agreement after a period of notice, the notice period provided for shall not exceed three months.

(4) The requirements referred to in paragraph (1) are that the employer –

- (a) Maintains up-to-date records which –
 - (i) identify each of the workers whom he employs who has agreed that the limit specified in regulation 4(1) should not apply in his case;
 - (ii) set out any terms on which the worker agreed that the limit should not apply; and
 - (iii) specify the number of hours worked by him for the employer during each reference period since the agreement came into effect (excluding any period which ended more than two years before the most recent entry in the records);
- (b) permits any inspector appointed by the Health and Safety Executive or any other authority which is responsible under regulation 28 for the enforcement of these regulations to inspect those on request; and
- (c) provides any such inspector with such information as he may request regarding any case in which a worker has agreed that the limit specified in regulation 4(1) should not apply in his case.”

Reference 2: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

This regulation provides any organisation or individual worker with the ability to opt out of the WTR if there is a written workforce agreement to do so and this agreement is entered into without coercion by all who sign it. The employer is then responsible for ensuring they keep record of this and the hours worked by each individual.

Regulation 10, Daily rest

“(1) An adult worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.....”

Reference 3: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Regulation 10 (1) only comes into effect if there is no workforce agreement in place, or when regulation 21 (the pertinent aspects of which are listed on page 8 of this document) is not applicable to the type or style of work undertaken by the individual. To put this into the context of an on call APT, the work that is performed outside of hours is not determinable, nor is the length of time taken to perform each task when called in.

Regulation 11, Weekly rest period

“(1) Subject to paragraph (2), an adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.

(2) If his employer so determines, an adult worker shall be entitled to either –

- (a) two uninterrupted rest periods each not less than 24 hours in each 14-day period during which he works for his employer; or
- (b) one uninterrupted rest period of not less than 48 hours in each such 14-day period, in place of the entitlement provided for in paragraph (1).....

(4) For the purpose of paragraphs (1) to (3), a seven-day period or (as the case may be) 14-day period shall be taken to begin –

- (a) at such times on such days as may be provided for the purposes of this regulation in a relevant agreement; or
- (b) where there are no provisions of a relevant agreement which apply, at the start of each week or (as the case may be) every other week.....

.....(7) The minimum rest period to which an adult is entitled under paragraph (1) or (2) shall not include any part of a rest period to which the worker is entitled under regulation 10(1), except where this is justified by objective or technical reasons or reasons concerning the organization of work.”

Reference 4: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

To avoid contravening this regulation when providing a 24 hour service, there only needs to be a calculated staff rota that ensures that an individual is not on call for more than 7 days per rotation. A standard on call service covered by a worker would commence at the end of the working day on a Friday and would cease at the beginning of the working day on the following Friday. In this way the individual will always receive the required amount of rest period under the WTR.

In some cases it is stated that when an individual is on call they are working continuously. This is not in fact the case and the only time that is considered to be

accrued, is that time actually spent working. For example, when an APT is called in to provide a viewing, they would only be considered as working when at the Mortuary or travelling to and from.

The Health and Safety Executive issued the document “The Working Time Regulations 1998: Guidance on the legislation” on 22nd July 2008. This document sets out a definition of on call as follows

“On-call workers

On 3 October 2000, the European Court of Justice (ECJ) passed judgement in a case commonly known as the SIMAP judgement concerning the status of ‘on-call’ time (Case C-303/98). The judgement related to doctors employed in primary health care teams although a similar approach is extended to other sectors where “on-call” is a feature of working practice. It indicated that “on-call” time would amount to working time when a worker is required to be in his place of work during that “on-call” time. When a worker is permitted to be away from the workplace when “on-call” and accordingly free to pursue leisure activities, “on-call” time does not amount to ‘working time’ until they are called upon by the employer.

A further ECJ judgement about on-call time, commonly known as the Jaeger judgement (Case C-151/02) indicated that periods of on-call duty carried out by a doctor in a place stipulated by the employer i.e. hospital, constitute in their entirety working time. This also applies even if the doctor is provided with a bed during that “on-call” time and is able to sleep during periods of inactivity. This judgement will also apply to workers in other sectors.”

Reference 5: ” The Working Time Regulations 1998: Guidance on the legislation”, FOD Legal and Enforcement, HSE 22 July 2008.

6. Exceptions to restrictions of working hours:

Within this document it is mentioned that there are exceptions to the regulations restricting the worker’s hours. The WTR stipulates what these exceptions are and the pertinent sections of these are below. These stated exceptions would involve the type and style of Mortuary work whether in or out of normal working hours.

“Part III

Exceptions.”

Regulation 20, Unmeasured working time.

“Regulations 4(1) and (2), 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker where, on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself.....”

Reference 6: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Regulation 21, Other special cases.

“Regulations 4(1) and (2), 6(1),(2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker-

.....(c) where the worker’s activities involve the need for continuity of service or production, as may be the case in relation to –

- (i) services relating to the reception, treatment or care provided by hospitals or similar establishments, residential institutions and prisons.....

(d) where there is a foreseeable surge of activity, as may be the case in relation to...

(e) Where the worker's activities are affected by_

- (i) an occurrence due to unusual and unforeseeable circumstances, beyond the control of the worker's employer
- (ii) exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer; or
- (iii) an accident or the imminent risk of an accident."

Reference 7: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Sections (a), (b), (c) regulation 20, sections (a), (b), (c) (ii), (iii), (iv), (v), (vi), (vii) (d) (i), (ii) and (iii) of regulation 10 and sections (3), (5), (6) and (8) of regulation 11 are excluded from this document as they are not pertinent to its purpose. This is the same for regulations 6, Length of night work, 7, Health assessment and transfer of night workers to day work and 12 Rest breaks mentioned in regulation 20.

Throughout this document it is stated that the completion of a written workforce agreement would be sufficient to ensure that the individual and organisation are able to work for longer periods of time than the stipulated average of 48 hours in 17 weeks. However, these agreements must be created in accordance with the WTR. The specifics of these regulations are as follows:

"Collective and workforce agreements

23. A collective agreement or a workforce agreement may –

- (a) modify or exclude the application of regulations 6(1) to (3) and (7), 10 (1), 11(1) and(2) and 12 (1), and
- (b) for objective or technical reasons or reasons concerning the organization of work, modify the application of regulation 4(3) and (4) by the substitution, for each reference to 17 weeks, of a different period, being a period not exceeding 52 weeks, in relation to particular workers or groups of workers.

Reference 8: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Compensatory rest

24. Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break –

- (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
- (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.

Reference 9: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

7. Conclusions:

The WTR was brought in to protect individual workers from being coerced or forced into working more hours than is safe to do so. It also ensures that the health and safety of all persons working within or receiving help from a service is maintained.

The WTR do not prevent the provision of a 24 hour service.

In the context of Mortuary services, the on-call requirements of that service must be identified as necessary if the worker is to be required to work over the average 48 hours per week over a 17 week period. For example, it may be decided by an employer that the APT is not required to be present at the delivery of deceased from the community by Coroner's contracted Funeral Directors. This may sufficiently reduce the amount of out of hours work accrued by an individual or team therefore bringing them into line with the requirements of the WTR. This would ensure that the relatives of deceased would still be receiving a quality service from the qualified and experienced staff of that service. However this would have to be justified by the employer as not being necessary.

The provision of an unhindered 24 hour on call service from Mortuary departments is possible if a workforce agreement is put into place at the behest of all those involved in the delivery of that service.

The time worked outside of normal hours when under a workforce or collective agreement or working in circumstances illustrated in regulation 21 may be taken as lieu time in the future. This does not have to be taken on the next working day as has been suggested in some areas.

The NHS has produced a format for these agreements that is specifically for the Flu pandemic preparations and this format may well be used as an agreement for other reasons for opting out of the WTR. A copy of this is on the next page.

a)

Example WTR 48 hour 'opt-out' agreement for supporting the NHS through pandemic flu

In this agreement, 'You' means the employer – [insert employer name] and 'I' means the employee [insert name of employee]

1. I understand that the Working Time Regulations serve to limit the average number of hours I work each week to 48 hours, measured over a reference period of 17 or 26 weeks (the length of this reference period may be extended by collective agreement with NHS trade unions)*.
2. In order to support the NHS and delivery of patient care over the period of the current flu pandemic I agree to work for more than an average of 48 hours a week, if requested to do so. If I no longer wish to work beyond 48 hours a week I will give you [*up to three months*] notice in writing to end this agreement.
3. Payment for any such additional hours will be separately agreed.
4. I understand that the additional hours that I work for you will be covered by your normal NHS indemnity arrangements.

5. I understand that it is my decision whether I sign this agreement.

Employee name: [Insert]

Employee signature:

Date: [Insert]

Employer signature:

*Arrangements for implementation of the WTR in the NHS were set out in HSC 1998/204 and attached GWC agreements. Employers will have local agreements reflecting these arrangements, including details of locally agreed reference periods .

Reference 10: Working time regulation opt-out agreement, available from www.nhsemployers.org/PlanningYourWorkforce/Pandemic-influenza/Pages/Working-time-regulation-opt-out-agreement.aspx

8. References:

Reference 1: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 2: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 3: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 4: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 5: " The Working Time Regulations 1998: Guidance on the legislation", FOD Legal and Enforcement, HSE 22 July 2008.

Reference 6: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 7: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 8: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 9: Statutory Instrument 1998 No. 1833 available from www.opsi.gov.uk

Reference 10: Working time regulation opt-out agreement, available from www.nhsemployers.org/PlanningYourWorkforce/Pandemic-influenza/Pages/Working-time-regulation-opt-out-agreement.aspx