

# **A guide to the implications of the European Working Time Directive for doctors in training**

This document is the result of collaboration in general terms, between the Academy of Medical Royal Colleges – Trainee Doctors Group, NHS Employers, the English Deans, Skills for Health Workforce Projects Team, and the BMA – Junior Doctors Committee, DH Legal Advisors Team, and facilitated by the Department of Health.

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## A guide to implications of EWTD for doctors in training

This document provides clarity on the European Working Time Directive (EWTD) by giving guidance using the views of experts who have already considered most issues arising from the EWTD, implemented in the UK as the Working Time Directive Regulations 1998 / the Working Time Regulations (Northern Ireland) 1998 and subsequent amendments. Where a definition already exists by statute or regulation this is noted, but in other situations a consensus view is given.

The purpose of this document is:

- to address common themes arising
- to provide clarity around frequently asked questions (FAQs) posed by junior doctors
- to signpost to the best sources of information.

This work is the result of collaboration in general terms between the Academy of Medical Royal Colleges – Trainee Doctors Group, the English Deans, NHS Employers, Skills for Health Workforce Projects Team, and the British Medical Association (BMA) - Junior Doctors Committee and facilitated by the Department of Health. Each organisation may build upon this document to satisfy the focus of their own organisation and their specific membership needs. However, wording, detail and information may not be changed unless updated and agreed wholly by the EWTD Reference Group in whom the copyright is invested.

## The European Working Time Directive

The European Working Time Directive (EWTD) now applies to all staff with very few services securing more time (through derogation to a 52-hour average working week) to be fully compliant. Achieving compliance for the last group – doctors in training – has been challenging and needed commitment and strong clinical leadership. The working partnerships with the Academy of Medical Royal Colleges, the Medical Royal Colleges, the English Deans, NHS Employers, BMA, and Skills for Health Workforce Projects Team, have aided the progress and transition processes, as has the cooperation and teamwork between the SHAs and trusts.

The changeover on 1 August 2009 was accomplished alongside the annual changeover in staff on medical training programmes. There is still work to be done as the Directive becomes embedded. SHAs will continue to review the challenging areas and Medical Education England (MEE) is leading a review into the impact of EWTD on training in a reduced hours environment. The Department of Health is aware of the concerns of junior doctors regarding their training and has acted upon the advice of their partners.

### We need to ensure doctors in training:

- are supported, informed and understand their position regarding the working time regulations
- understand the situation regarding indemnities
- appreciate it is in their interests to check they accurately record the hours they work
- understand that opting out is an individual right and wholly voluntary
- understand that any opt-out is an agreement between them and their employer in writing.

## General information for doctors in training

### Indemnity and hours

All NHS staff, doctors in training included, are indemnified by their employing organisation for **all** contracted clinical activities undertaken on behalf of the NHS, including those in additional hours (plus any hours worked under an “opt-out” agreed between the doctor and their employer).

The NHS Litigation Authority (NHSLA) circulated a paper in November 2007. This is still relevant and the essence of it is reproduced here: **European Working Time Directive (EWTD): CNST Indemnity for clinicians working in excess of EWTD limits.**

“Any activity carried out by clinicians, which would be the subject of an indemnity if carried out during “allotted” hours, will be treated no differently under our schemes because that work was being done outside those hours.”

Note: Some doctors in training have taken out personal indemnity insurance or similar through medical defence organisations after consideration and taking appropriate advice. The BMA recommends that you are sufficiently indemnified for any work that you undertake, regardless of EWTD limits. (See Medical Defence Unions)

### Further information:

The full NHSLA circular can be seen at Annex E

### The Medical and Dental Defence Union of Scotland (MDDUS)

Mackintosh House, 120 Blythswood Street, Glasgow, G2 4EA

Website: <http://www.mddus.com>

Tel: 0845 270 2034

Email: [info@mddus.com](mailto:info@mddus.com)

### The Medical Defence Union

MDU Services Limited, 230 Blackfriars Road, London, SE1 8PJ

Website: <http://www.the-mdu.com/>

Email: [mdu@the-mdu.com](mailto:mdu@the-mdu.com)

### The Medical Protection Society

Medical Protection Society, 33 Cavendish Square, London W1G 0PS

Website: <http://www.medicalprotection.org/uk/>

Tel: 020 7399 1300

Email: [info@mps.org.uk](mailto:info@mps.org.uk)

## Doctor's contractual hours limit

The working hours for junior doctors in training are now 48-hours (or 52-hours if working on a derogated rota) averaged over 26 weeks (six months). Doctors in training also have an individual right to opt-out if they choose to do so, but they cannot opt-out of rest break or leave requirements. However, the contracts for doctors in training make clear that overall hours **must not exceed 56 hours in a week** (New Deal Contract requirements) across all their employments and any locum work they do.

### Further information:

askBMA on 0300 123 1233

[www.bma.org.uk](http://www.bma.org.uk)

[www.nhsemployers.org](http://www.nhsemployers.org)

Junior doctors contract: Part A – General guide to the new pay system; Part B –Definitions [www.dh.gov.uk/](http://www.dh.gov.uk/)

## Doctors in training working hours are averaged over six months

For doctors in training, the reference period is 26 weeks (six months) and so the 48-hour limit applies to an average of the hours over this period. This means that in some weeks it is possible, that a doctor may work more than 48-hours. However, rest requirements must be met for example, 11 hours rest in every 24-hours under EWTD. For other NHS staff, the reference period is 17 weeks, (which effectively represents the four months maximum permitted by Article 16(a) of the Directive). (See legal question on exceptional circumstances and emergencies).

An emergency might mean additional work needs to be undertaken, this could affect the average hours or mean that rest is missed. As additional hours may mean compensatory rest is due, or the doctor's pay and banding may be affected, employers will have local procedures for authorising and recording additional hours. This is usually through the HR department / medical personnel, clinical manager or supervisor.

There is no strict rule about the hours worked in one day or week under the Working Time Regulations or the New Deal Contract of employment (the national terms and conditions for trainee doctors) should a patient need a doctor's input or in the event of an emergency. Under EWTD, hours are averaged over six months. New Deal compliance is monitored twice a year, over a two-week representative period by NHS Employers.

## Calculation of hours

The 48-hour working week is calculated over 26 weeks (six months) for doctors in training and 17 weeks (four months) for other NHS staff (which effectively represents the four months maximum permitted by Article 16(a) of the Directive). Annual leave and public holidays are also taken into consideration.

The legal minimum annual leave is 28 days with eight public holidays and two statutory holidays or days off in lieu. Anything additional to this, counts within the 48 hours.

Legal minimum paid annual leave is 28 days. This consists of the 20 days plus additional annual leave provided for in Regulation 13 of the Working Time Regulations. There is no statutory right to take bank holidays off (although many contracts of employment provide for bank holidays to be additional to annual leave).

## Further information

Section 2 of the BIS guidance. This shows how to calculate the average hours over the reference period. This is based on a formula set down in regulation 4(6) of the Regulations.

See extensive BIS guidance in relation to annual leave:

<http://www.direct.gov.uk/en/AdvancedSearch/Searchresults/index.htm?fullText=annual+leave>  
[www.healthcareworkforce.nhs.uk](http://www.healthcareworkforce.nhs.uk)  
[www.bma.org.uk](http://www.bma.org.uk)

## Opting out

EWTD does not allow sectoral or collective opt-outs (this means that the doctor population cannot collectively opt-out as one entity).

Individuals must not be coerced into opting out. It is an individual right and wholly voluntary.

Opt-out of the average 48-hour working week (or 52-hours if on derogated rotas) must be an individual's choice. It must be agreed in writing and you cannot opt-out from EWTD rest breaks, New Deal requirements or annual leave. Further guidance and model forms can be found at [www.nhsemployers.org](http://www.nhsemployers.org) and [www.bma.org.uk](http://www.bma.org.uk)

An opt-out is for the situation where a doctor **wants** to be able to work over the EWTD 48-hour working week (or 52-hour working week in a derogated rota).

Extra hours that can be provided within EWTD limit of 48-hours (or 52-hours for derogated rotas) do not need an opt-out. For example, if a doctor is only contracted to work 40 hours, 8 hours remain that can be used within the overall working time.

## Further information

[www.bma.org.uk](http://www.bma.org.uk)  
[www.nhsemployers.org](http://www.nhsemployers.org)  
[www.healthcareworkforce.nhs.uk](http://www.healthcareworkforce.nhs.uk), Also see Annex A, B and C

## **Opting out of the 48-hour working week to support the NHS through pandemic flu**

NHS Employers and the BMA, have provided guidance for staff both medical and non-medical, who want to exercise their individual right to opt-out of the 48-hour average working week, where they are able and wishing to do so, in order to undertake additional work to support the NHS through the period of pandemic flu or any other local emergency that might emerge.

Employers must still ensure that EWTD rest breaks are adhered to (or compensatory rest offered in lieu).

Employees must not be coerced or put under pressure to sign an opt-out agreement even in these exceptional circumstances. This must be the individual's decision. Nor should employees work excessive hours that could compromise the safety of patient care.

When requesting employees to work additional hours, employers should balance local service needs and patient safety against the wellbeing of the employee.

Clinical professionals should have regard to any advice issued by their professional bodies and regulators on standards expected of them during the pandemic. Note: Advice for doctors has been provided through GMC's Good Medical Practice and from PMETB on the impact on training programmes.

In the opt-out agreement, any reference to additional hours means hours worked in excess of 48-hours per week averaged over the reference period (26 weeks for doctors in training).

Contained in Annex D of this document is an example 'opt-out' agreement, which allows NHS staff to exercise their right to opt-out of the 48-hour average working week where they are able and wish to do so in order to undertake additional work to support the NHS through the period of the pandemic or any local emergency.

### **Further information**

<http://www.nhsemployers.org/PlanningYourWorkforce/MedicalWorkforce>

An alternative form for doctors in training is available from the BMA please see Annex B  
[www.bma.org.uk](http://www.bma.org.uk)

[www.healthcareworkforce.nhs.uk](http://www.healthcareworkforce.nhs.uk)

General Medical Council – [www.gmc.org.uk](http://www.gmc.org.uk)

Good Medical Practice - [http://www.gmc-uk.org/guidance/good\\_medical\\_practice/index.asp](http://www.gmc-uk.org/guidance/good_medical_practice/index.asp)

Postgraduate Medical Education Training Board (PMETB) – [www.pmetb.org.uk](http://www.pmetb.org.uk)  
PMETB is the independent regulatory body responsible for postgraduate medical education and training.

Trainee Section - <http://www.pmetb.org.uk/index.php?id=trainees>

## **Training**

All training requirements specified by PMETB / General Medical Council approved curricula must be planned and possible within the 48-hour working week. The construction of rotas and training programmes should allow for this.

Doctors in training should not need to 'opt-out' in order to access adequate training.

The Department of Health have recognised the concerns of junior doctors about the impact of the Directive upon training. The Secretary of State for Health has asked MEE to take forward a review on the impact of EWTD on training in a reduced hours environment. Regulators PMETB are also conducting an independent review. Professor Sir John Temple will be taking this forward.

### **Further information**

[www.mee.nhs.uk/](http://www.mee.nhs.uk/)

## **Recording of hours**

Employers have a legal requirement to monitor the hours their doctors in training are working.

Trainee doctors are contractually obliged to record their hours accurately.

NHS Employers monitor this twice a year over a two-week representative period under the New Deal requirements.

If there are questions or issues around bullying, harassment or allegations of coercion arise, staff are advised to follow the HR practices of the organisation in question or seek additional guidance from the relevant union, college or deanery and report what is happening. This kind of action is not to be tolerated or condoned and will be investigated.



## **SiMAP and Jaeger court rulings**

The SiMAP (2000) and Jaeger (2003) European Court rulings meant that many employers felt that resident on call was no longer possible. Before the court ruling and the implementation of EWTD; under New Deal you could be resident on-call, sleeping on-site and be available if called; only the period from when you were called on and until you returned to bed was classed as working time. Time spent in the hospital at night sleeping was classed as rest.

However, the European Court of Justice ruling, following the case brought forward by Spanish doctors against their employer (SiMAP) and upheld by the Jaeger case, meant that if you needed to be available on-site during the out of hours period - even if you were resting - all the time you were in the hospital would be classed as working time.

### **Further information:**

[www.nhsemployers.org](http://www.nhsemployers.org)

[www.bma.org.uk](http://www.bma.org.uk)

[www.dh.gov.uk](http://www.dh.gov.uk) – see Publications

[www.healthcareworkforce.nhs.uk](http://www.healthcareworkforce.nhs.uk)

## Legal considerations on frequently asked questions

### Do the Regulations still apply if there are exceptional circumstances, including emergencies?

**Answer:**

The Directive does not provide for any derogation from the maximum 48-hour weekly working time for exceptional circumstances, including emergencies.

It does however; provide flexibility around certain requirements of the Directive relating to rest breaks, night working and the reference period for such circumstances.

Options include:

**1. Flexibility on rest breaks**

This is stipulated in regulations 21 and 24 of the Working Time Regulations 1998 (WTD 1998).

**2. Use of opt-out.**

Useful for doctors as many already work at or around 48 hours average.

Junior doctors can be employed as internal locums.

Other NHS staff work 37.5 hours and have significant potential capacity without opt-out, if flexible over reference period.

**3. Extend reference period for non-medical healthcare staff from 17 to 26 weeks.**

Enables longer time for recovery after a period of intensive working.

## What is my leave entitlement?

### Answer:

Doctors in training get five or six weeks per year: Those in foundation training or on point 1 or 2 on point 1 or 2 of StR incremental scale or in foundation training get five weeks and those above point 2 get six weeks. These leave entitlements are in addition to eight public holidays and two statutory holidays or days off in lieu.

## How do you calculate hours?

### Answer:

Doctors in training get five or six weeks per year: Those in foundation training or on point 1 or 2 of StR incremental scale get five weeks and those above point 2 get six weeks. These leave entitlements are in addition to eight public holidays and two statutory holidays or days off in lieu.

The average working hours are calculated over the reference period - 26 weeks for junior doctors in training and 17 weeks for other workers. You can work more than 48-hours in one week as long as the average over 26 weeks (or 17 weeks) is less than 48-hours per week.

To calculate your average weekly working time you add up the number of hours worked in the reference period and divide that figure by the number of weeks in the reference period.

If you are away during the reference period taking paid statutory annual leave, maternity, paternity, adoption or parental leave, or you are off sick, you need to make up for this time by extending the number of days you were away, and look at the hours you worked on the days that immediately followed the 17-week period.

Every worker - part-time or full-time - is covered by these regulations and entitled to 5.6 weeks (28 days if you work a five-day week) and pro-rata for those working part-time.

One week's leave must allow workers to be away from work for a week and be the same amount of time as the working week.

Under the Working Time Regulations, leave entitlement is not additional to bank holidays. There is no statutory right to take bank holidays off (although the terms and conditions of service stipulate that a doctor in training working any part of a bank holiday is due a day in lieu).

Any additional leave entitlement above the statutory minimum is a contractual arrangement between the worker and the employee and therefore governed by the contract.

Where a post is less than four months in duration the reference period is the full duration of the post.

Current annual leave guidance refers to a **minimum** of four weeks plus eight statutory bank holidays.

The definition of a five-day week assumes an 8-hour per day working week (a 40-hour week) or a six-day working week (i.e. 48 hours/week).

**Further information**

<http://www.opsi.gov.uk/si/si1998/19981833.htm> Section 4 see Annex

[www.bma.org.uk](http://www.bma.org.uk)

[www.nhsemployers.org](http://www.nhsemployers.org)

[http://www.direct.gov.uk/en/Employment/Employees/Timeoffandholidays/DG\\_10029788](http://www.direct.gov.uk/en/Employment/Employees/Timeoffandholidays/DG_10029788)

[www.opsi.gov.uk/si/si1998/19981833.htm](http://www.opsi.gov.uk/si/si1998/19981833.htm) Section 4 (this site shows how to calculate hours see Annex 6)

**Is it likely that a rota would be non-compliant if a doctor worked over 48- or 52-hours in the first week of August?**

**Answer:**

No. The working hours should be averaged over a 26-week (six months) period for doctors in training. (The reference period can be shorter in certain circumstances). This means that doctors in training could work longer weeks in August if this was balanced with shorter weeks later in the year. In addition, the amount of annual leave and bank holiday entitlement is taken into consideration.

The requirements of the EWTD allow for a **minimum** of 20 days annual leave but the statutory minimum in the UK has been increased to 28 days.

These 28 days can include time off for bank holidays however, there is no requirement to do so.

In the UK, doctors in training get an average of 28 days annual leave and bank holidays.

**Which employer could potentially be legally liable for a locum employed by one trust and working maximum hours, but also working for another trust, consequently exceeding working hours? In addition, what is the responsibility of the trusts?**

**Answer:**

In this scenario, both Trusts would be potentially liable if they have failed to take all reasonable steps as required by regulation 4(2).

Under regulation 4(2) of the Working Time Regulations 1998 (SI 1998/1833), every employer is required to take "all reasonable steps, in keeping with the need to protect the health and safety of workers", to ensure that the Working Time Regulations are complied with in the case of each worker (subject to any opt-out). It is an offence not to comply with this requirement.

This includes making reasonable enquiries of employees to ascertain whether they have other jobs (what is reasonable will depend on what the employer knows, or ought to know). The combined number of hours worked by an employee must be taken into account. If an employee works a combined total exceeding regulations, then the employer should consider either asking the employee to sign an opt-out or to reduce the hours they work.

Once again, the hours should not exceed 48-hours averaged over 26 weeks or if opted out in agreement with employers and in writing under the New Deal Contract arrangements where there is a 56-hour maximum. You cannot opt-out of rest breaks etc.

Further information <http://www.healthcareworkforce.nhs.uk/workingtimedirective.html>

**What are the legal consequences if an individual opts out of the Working Time Regulations and works excess hours?**

**Answer:**

The maximum working hours are 48-hours per week averaged over six months. If you choose to opt-out which is your individual right then the contracts for doctors in training make clear that overall hours **must not exceed 56-hours in a week** across all their employments and any locum work they do. Any decision to opt-out must be an individual choice and voluntary. No junior doctor can be coerced. Opting out can only be done on an individual basis.

Where an individual opts out, the employer would still owe a duty to the employee to protect their health and safety. The employer should still take steps to ensure that the employee does not work hours that pose a threat to the health and safety of that individual and monitor the hours worked. Similarly, a trust would owe a duty to patients to ensure doctors do not work such hours that would pose a possible threat to the health and safety of their patients.

Employers keep records of doctors in training hours.

## **Is the New Deal Contract applicable to all doctors?**

### **Answer:**

The New Deal is applicable only to doctors in training who are in educationally approved full time or flexible training posts.

The following medical posts are excluded from New Deal Contract: • Consultants • Associate specialists • Staff grades • Trust grades (unless their individual contract adopts the Terms and Conditions of Service incorporating the New Deal rules).

### **Further information**

[http://www.healthcareworkforce.nhs.uk/working\\_time\\_directive/pilot\\_projects/junior\\_doctor\\_engagement.html](http://www.healthcareworkforce.nhs.uk/working_time_directive/pilot_projects/junior_doctor_engagement.html)

[www.nhsemployers.org](http://www.nhsemployers.org).

[www.bma.org.uk](http://www.bma.org.uk)

## **Would the doctor be able to take the legal action against the hospital if he/she was the subject of legal action by a patient?**

### **Answer:**

The doctor would normally seek to add the hospital as a co-defendant if the legal action was brought against them personally. NHS bodies are expected to accept full financial liability and not seek to recover costs from the doctor involved (for private hospitals, this depends on their own arrangements, but as the hospital would be vicariously liable, it is expected it to seek to be involved in the proceedings).

## **Would it be possible for a patient to take legal action against a doctor if that patient believed they received unsatisfactory treatment because the doctor had insufficient training after complying with the Working Time Regulations?**

### **Answer:**

All training requirements specified by PMETB/General Medical Council approved curricula must be planned and possible within the 48-hour working week (52-hours for derogated services). The construction of rotas and training programmes should allow for this.

If the patient sued for damages under clinical negligence due to ANY reason, (including poor training) then if the doctor was on a NHS contract then NHS indemnity would cover those damages. If sued personally they would require legal cover, but the claim would still be under clinical negligence. If the patient reported them to the GMC and they needed legal support, then they would need to seek personal legal defense, possibly through their defense union.

An alternative option could be, if a patient believes that the doctor treating them has not been trained appropriately or is carrying out procedures that they are not qualified to do, is to make a complaint to the doctor's professional body. A patient might also make a complaint to the NHS body.

### **Would it be also be possible to take legal action against the hospital at the same time?**

**Answer:**

Yes. The hospital/trust, as employer, would be vicariously liable for the acts or omissions of the doctor they employed. It would be usual to bring a legal claim against the hospital, rather than the individual doctor, as a result of this liability (also because the hospital is likely to be better able to pay any award of damages). If the action was brought against the doctor alone, it would be normal for the hospital to be joined as a co-defendant in the proceedings.

### **What is the legal position on individual opting-out?**

**Answer:**

If you are 18 or over and wish to work more than 48 hours a week, you can choose to opt-out of the 48-hour limit. This must be voluntary and in writing. It cannot be an agreement with the whole workforce and you must not be dismissed or unfairly treated (for example refused promotion or overtime) for refusing to sign an opt-out.

If you sign an opt-out, you have the right to cancel the agreement at any time by giving between one week and three months' notice. You can agree the notice period with your employer when you sign the opt-out. If no notice period is agreed then you only need to give one week's notice of cancellation. You can cancel your opt-out even if it is part of the contract you have signed.

### **If I choose to opt-out, do I have to continuously monitor my hours?**

**Answer:**

You will need to monitor through the New Deal when asked to this is usually twice a year.

Note: NHS employers monitor this twice a year over a two week representative period under the New Deal Contract requirements..

**What happens if a derogated service working to 52-hours does not need it, but the doctor complains they are only working 48 hours but had a legitimate expectation to work and be paid for 52 hours? Should such a situation need to be explicit in contracts i.e. specifying the individual may or may not be required to work the extra hours?**

**Answer:**

This is governed by the contract of employment.

If the position is unclear under the terms and conditions of the contract the doctor and the employer need to consider how best to clarify the position.

You should seek to settle any dispute with your employer by mutual agreement – perhaps through the employer’s own grievance or appeals procedure, where one exists.

**Is it legal for me to work anywhere else other than the trust I am in?**

**Answer:**

Yes. However, you should disclose to both employers that you are working for another trust. You risk being in breach of your contractual duty of breach of confidence if, as a result of working for two trusts:

- If you work excessive hours
- If you have not disclosed this to either employer
- If you have not signed an opt-out form (**both employers should ask you to sign an opt-out**). This could be a disciplinary matter.

All NHS staff, doctors in training included, are indemnified by their employing organisation for **all** contracted clinical activities undertaken on behalf of the NHS, including those in additional hours (plus any hours worked under an “opt-out” agreed between the doctor and their employer).



## What is the legal situation for working as an internal locum? Am I breaking EU law if I help the hospital where I work by working as an internal locum?

### Answer:

No. The working hours for junior doctors in training are 48-hours averaged over 26 weeks (six months) or 52-hours averaged on a derogated rota. Your hours should NOT exceed this unless you exercise your individual right to opt-out and agree to do so, in writing, with your employer.

If your combined total exceeds the limit, your employer should either ask you to sign an opt-out or reduce the number of hours you work. However, the contracts for junior doctors in training make clear that overall hours **must not exceed 56-hours in a week** (New Deal requirement) across all their employments and any locum work they do.

In terms of indemnity all NHS staff, doctors in training included, are indemnified by their employing organisation for *all* contracted clinical activities undertaken on behalf of the NHS, including those in additional hours (including any hours worked under an “opt-out” agreed between the doctor and their employer).

### Further information

[www.bma.org.uk](http://www.bma.org.uk)

[www.nhsemployers.org](http://www.nhsemployers.org)

## What is the situation if my trust forces me to opt-out?

### Answer:

Workers must not be coerced to work more than the relevant limit on working hours laid down in the Working Time Regulations 1998. This is an individual right and decision for the individual to take. Opting out should be agreed with the employer and placed in writing.

You can cancel the opt-out agreement whenever you wish, but you must give your employer at least seven days' notice. Section 45A of the Employment Rights Act 1996 gives workers a statutory right not to be subjected to any detriment by their employer based on the grounds that they refused to forgo a right conferred on them by the Working Time Regulations.

This right may be enforced by an employment tribunal, but any dispute with your employer should initially aim to be settled by mutual agreement – perhaps through the employer's own grievance or appeals procedure. It would be helpful for juniors to specify a limited opt-out time to establish a clearly defined end point for opting out.

If there is a case where the trainee is bullied, harassed or coerced then the policies and procedures of the employer should be followed to rectify the situation or advice sought from your college or deanery, the BMA, or any other recognised union. All such cases will be investigated. These behaviours should not be tolerated.

### Further information

[www.bma.org.uk](http://www.bma.org.uk)

[www.nhsemployers.org](http://www.nhsemployers.org)

## All training should be delivered within the 48-hour week shouldn't it? What do I do if my hours exceed this?

### Answer:

All training required must be planned within the 48-hour working week. The construction of rotas and training programmes should allow for this.

Doctors should not need to 'opt-out' in order to access adequate training.

For junior doctors in training, the average working week is calculated over a 26-week (six months) reference period. The legal limit for doctors in training is 48-hours (or 52-hours if a rota is derogated). If the relevant limit has been exceeded in a particular week, but the average working week does not exceed this limit over this 26-week period, there is no breach of the Working Time Regulations.

If the average working week exceeds the relevant limit over this 26-week period, the employer should ask you to sign an opt-out or reduce your hours of work. You should seek to settle any dispute with your employer by mutual agreement or perhaps through the employer's own grievance or appeals procedure, where one exists. You may obtain confidential help and advice from the Pay and Rights Helpline, a Government funded advice service.

The role of the college tutor and educational supervisor needs to be considered as the educational value of the working pattern may need to be reassessed.

### Further Information

askBMA on 0300 123 123 3

[www.bma.org.uk](http://www.bma.org.uk)

Pay and Rights helpline:

Phone number: 0800 917 2368

Text phone: 0800 121 4042

Website: <https://payandworkrights.direct.gov.uk>

## How does the 48-hour working week affect agency locums?

### Answer:

Agency locums are covered under the scope of the Working Time Regulations and have a right to all the health and safety entitlements that the Working Time Regulations provides for. However, the responsibility for these staff is likely to lie with the agency, who will be recognised as the employer under the Regulations.

NHS Trusts, as employers, will need to satisfy themselves that such provisions are adequately provided for in any contract to supply agency staff. All NHS staff, doctors in training included, are indemnified by their employing organisation for *all* contracted clinical activities undertaken on behalf of the NHS, including those in additional hours (including any hours worked under an “opt-out” agreed between the doctor and their employer).

Locums working in the NHS will be covered under NHS indemnity. That is, the NHS body that the locum is working for will pick up the liability for any claims arising from treatment provided by the locum. Claims would not be made against the agency.

The NHSLA circulated a paper in November 2007 offering advice. This is still relevant and the essence of it is reproduced for you.

**European Working Time directive (EWTD): CNST Indemnity for clinicians working in excess of EWTD limits.**

“Any activity carried out by clinicians, which would be the subject of an indemnity if carried out during “allotted” hours, will be treated no differently under our schemes because that work was being done outside those hours.”

### Further information:

See Annex E

## What are the actual penalties for Trusts who do not comply and how does that affect staff working for them?

### Answer:

Individual Trusts have the responsibility to ensure that doctors in training work in compliance with EWTD requirements.

The penalties for non-compliance are:

- Orders for compliance, for example from the Health and Safety Executive, in respect of night worker health assessments
- Possible Employment Tribunal proceedings
- Fines
- The Department of Health may also be at risk of enforcement proceedings by the European Commission.
- European Commission infraction proceedings
- Trust Chief Executive Imprisonment

## Can doctors in training opt-out en masse? What is the legal position?

### Answer:

No. The European Working Time Directive does not legislate for sectoral or collective opt-outs. That is the legal position.

Opt-out is the right of the individual and only if you choose to do so. This should be agreed in writing with your employer. You cannot be coerced into opting out. It is your choice and wholly voluntary.

### Further information

[www.bma](http://www.bma)

[www.nhsemployers](http://www.nhsemployers)

[www.healthcareworkforce.uk](http://www.healthcareworkforce.uk)

## Who do I go to if I am told the rota I am working is compliant, but I am actually working over 48 hours?

### Answer:

The first step must be to draw the matter to the attention of your employer, the clinical lead, or medical director, who must then take appropriate action to comply with the Working Time Regulations.

Any such situation or dispute in terms of hours should be discussed with your employer, and rectified by mutual agreement. If it still continues then you can exercise the employer's own grievance procedure. You may want to contact the HR department or speak with your union representative, college or deanery.

In addition, you may request monitoring of your hours as you might normally do under the New Deal.

If this is not feasible, you can obtain confidential help and advice from the Pay and Rights Helpline, a Government-funded advice service.

### Further information

askBMA on 0300 123 123 3

[www.bma.org.uk](http://www.bma.org.uk).

Pay and Rights helpline:

Phone number: 0800 917 2368

Text phone: 0800 121 4042

Website: <https://payandworkrights.direct.gov.uk>

## **Non-resident on-call - how is this legally defined?**

### **Answer:**

There is no legal definition of “non-resident on-call”.

In its relevant judgments (see Case C-303/93 SiMAP, at paragraphs 47 to 50 and Case C-151/02 Jaeger, at paragraphs 48 to 51) the European Court of Justice has drawn a distinction between:

- (1) when doctors are obliged to be present and available at the workplace with a view to providing their professional services, and
- (2) when they are on call by being contactable at all time without having to be present at the workplace.

In the first situation, doctors are considered to be performing their duties and such time spent on call is to be treated in its entirety as ‘working time’. In the second situation, it was considered that the doctors concerned may manage their time with fewer constraints and pursue their own interests, so that only time linked to the actual provision of their services must be regarded as ‘working time’.

## **Does living in accommodation on site count as work time?**

### **Answer:**

Living in accommodation on site, as a home/residence, does not in itself count as ‘working time’.

## **Am I able to assist another hospital having finished a shift in my own?**

### **Answer:**

Yes. You will have to consider your working hours and not exceed 48-hours or 52-hours on a derogated rota, or if you have opted out 56-hours under the New Deal contract, in written agreement with your employer. Anything over and above, would be construed as not complying with the Working Time Regulations.

You should also disclose to both employers (assuming they are different) the fact that you are working for another hospital. This is not intended to deter trainees from helping other affiliated trusts – potentially exacerbating problems with rota gaps or compromising patient safety. Some effort is required to ensure trainees fully understand what to do and who to go to in the initial instance if they are interested or able to cover rota gaps.

## **If an individual decides to opt-out how will this affect rotas?**

### **Answer:**

It will have no effect on the rota as these still need to be created as 48-hour compliant rotas or 52-hours on a derogated rota. Any additional work carried out under an opt-out should be reimbursed separately and appropriately. Whilst doctors can opt-out the total number of hours worked, they cannot opt-out of the rest requirements stipulated by the Working Time Regulations.

## **Are trainees allowed to return to hospital for training experiences on trust premises? What would be the legal position be?**

### **Answer:**

Job-related training will count as working time. The definition of “working time” in the Working Time Regulations 1989 includes any period of “relevant training”. This is defined as follows:

"relevant training" means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training -

- (a) the immediate provider of which is an educational institution or a person whose main business is the provision of training, and
- (b) which is provided on a course run by that institution or person”.

The SiMAP ruling definition says, “all time at work is work”.

**If experiencing a training opportunity on site – e.g. watching a heart transplant for example and I am asked to participate, what is my legal situation?**

**Answer:**

All training required must be planned and possible within the 48-hours working week (52-hours for derogated services). The construction of rotas and training programmes should allow for this

Time spent experiencing a training opportunity (including participation), such as watching a heart transplant, will count as “working time” if you are there at your employer’s disposal and are carrying out your activity or duties, i.e. receiving “relevant training”.

Doctors should not need to ‘opt-out’ in order to access adequate training.

The SiMAP ruling definition says, “all time at work is work”.



## What happens in the case of national emergencies can we suspend the Directive?

### Answer:

No. The Working Time Regulations do not allow for suspension.

The Working Time Directive will not prevent doctors, nurses and other healthcare staff meeting their professional responsibilities and working the hours they need to during any pandemic. The regulations include the flexibility to cope with an emergency. The 48-hour week is averaged over a six-month period so doctors can reduce hours at a later date.

The 48-hour average working week for doctors (or 52-hour if working a derogated rota) limit will still apply in the case of local emergencies.

If a doctor works hours exceeding the relevant limit (48-hours or 52-hours) in a week that a, emergency occurs, his or her working hours need to be reduced over the remainder of the reference period to ensure the average limit is not breached. This assumes the doctor has not chosen to opt-out.

If an individual decides to opt-out to help in an emergency situation under the New Deal Contract they can only work up to maximum of 56 hours but cannot opt-out of rest break or leave requirements.

Regulation 21 of the Working Time Regulations provides for certain other provisions if necessary to ensure the continuity of treatment or care. Those provisions relate to the length of night work, daily rest, weekly rest period, and rest breaks. (Please refer to the first question).

Where a service needs additional hours of cover individual doctors can voluntarily 'opt-out' of the 48-hour limit to provide this. It is anticipated that some workers will opt-out of the Directive if they are needed to deal with escalating problems caused by the swine flu pandemic.

We expect that if called upon to do so in response to the flu pandemic, or any other local difficulty, as professionals they will be willing to do so if they can.

NHS organisations have been advised to discuss use of the opt-out with key staff where it might be needed as part of flu pandemic preparations.

It remains appropriate that outside of exceptional or emergency circumstances doctors, like other health professionals, and their patients, should be protected by the reasonable controls on working hours set out in the Working Time Regulations. There are special provisions and flexibility within the regulations around rest breaks and night working for emergency situations.

Medical Directors have plans in place to ensure NHS organisations are able meet the needs of patients and that the hours doctors and other healthcare staff work are balanced over the given periods.

## And finally, some EWTD myths busted

### **The European Working Time Directive means we won't be able to cope in the swine flu pandemic:**

There is no reason to stop doctors, nurses and other healthcare staff meeting their professional responsibilities and working hours needed during a pandemic. The regulations include the flexibility to cope with an emergency. The 48-hour week is averaged over a six-month period so doctors can reduce their hours at a later date. Where a service needs additional hours of cover, individual doctors can voluntarily 'opt-out' of the 48-hour limit to provide this. We expect that if they are called upon to do so in response to the flu pandemic, or any other local difficulty, as professionals they will be willing to do so if they can.

However, we also need to be sensible and remember this is health and safety legislation designed to eliminate the problems of excessively tired doctors and nurses who would be neither healthy nor safe. It remains appropriate that outside of exceptional or emergency circumstances doctors and their patients should be protected by the reasonable controls on working hours set out in the Working Time Regulations.

### **There aren't enough doctors:**

Like any large organisation – the NHS is the largest single organisation in the UK – our health service always has vacancies as staff move around, retire, suffer ill health themselves or take time off for maternity leave. On a positive note, we now have more doctors working in the NHS than ever before and recruitment this year has been particularly successful with around 95% of vacancies filled. The NHS Census shows there are 2,395 more doctors in training and 1,236 more consultants.

### **Doctors think this is a bad idea:**

The BMA supports the Directive and sits on the EWTD Reference Group along with regional Strategic Health Authorities and the Academy and medical Royal Colleges, NHS employers, deaneries and Skills for Health. The Working Time Directive will improve doctors' work-life balance and, subsequently, the quality of care they can give patients. GPs, consultants and nurses are already compliant. It is however, recognised that many trainees have concerns about the preservation of the quality of training in a reduced hours environment. This is why the Secretary of State for Health has requested a review on the impact of EWTD on training in a reduced hours environment. MEE will be undertaking this. We need ensure we have high quality consultant and GP delivered services in the future.

### **This is bad news for patients:**

The Working Time Directive will improve patient safety and the quality of their care. We know tired doctors are not safe doctors. We also know doctors with a good work-life balance provide higher quality care and treatment. This is why the EWTD is a necessity.

### **There will be no time for training:**

Junior doctor's hours have gradually fallen since 2004 and there is no evidence that training has become any less effective. It is important to recognise that the quality of training and supervision is more important than the quantity of hours completed. We acknowledge that doctors in training do have some concerns about training and that is why the Secretary of State asked MEE to review the quality of training in the light of the directive. The recent PMETB Survey of Trainees for 2009 also indicates the absence of evidence to show that training is being compromised because of EWTD.

Doctors also now have the chance to learn many skills on a range of hi-tech simulators where they have the opportunity to rehearse procedures and the management of rare or serious clinical events in a way that does not put real patients at risk if errors are made.

### **Doctors will down tools when their 48-hours is up:**

Professionals will continue to meet their professional responsibilities and the needs of their patients.

Doctors will not "down tools" or leave any patient on an operating table because their time is up. The Working Time Directive has sufficient flexibility to allow doctors to respond to patient care within an average of 48-hours a week over a six-month period or 52-hours in the case of a derogated service. Weekly hours can fluctuate, although working for longer than 48-hours should be the exception. Doctors have the individual right to opt-out of the Directive and can work for up to 56-hours, the New Deal contract maximum.

## ANNEX A – reproduced with kind permission of BMA

### The individual opt-out – Guidance for Junior Doctors

There are two things that limit Junior Doctors hours: the UK Working Time Regulations 1998 (WTR, the UK version of the EWTD) and the Junior Doctors contract (New Deal limits). Article 5 of the (WTR) states that a worker may agree with their employer not to apply the limit of 48 hours per week to that worker. This also requires the employer to keep a list of which workers have opted out, of how long they have opted out for and how many hours they are working. This does not exempt the worker from the rest requirements in the legislation or in their contract, nor does it exempt them from the hours limits in their contract. There are many differences between the New Deal Contract and the WTR legislation – the differences in rest requirements are described below.

#### ***Rest requirements – a comparison between the WTR and the New Deal Contract***

	<b>WTR (EWTD)</b>	<b>New Deal Contract</b>
Uninterrupted rest per day	11 hours	8 hours between full shifts
Natural breaks	20 mins every 6 hours	30 mins every 4 hours
Uninterrupted rest per week	24 hours in 7 days or 48 hours in 14 days	24 hours in 7 days or 48 hours in 14 days
Duty hours limits	None	On call rotas -72 hours/week, Partial shift – 64 hours/week, Full shift – 56 hours/week.
Hours of work limits	48 hours/week – unless opted out	Should not work more than 56 hours of actual work/week.

The rest per day, natural breaks and uninterrupted rest per week limits within the WTR cannot be opted out of. Similarly, none of the New Deal limits can be opted out of.

#### ***Using the opt-out***

Where an individual has signed an opt-out, they may agree with their employer to work in excess of 48 hours per week on average. They may do this in one of two ways; where there is a predictable increase in hours (e.g. evening clinics, extra sessions or early starts), this can be addressed via monitoring and pay assessment via banding, and where it is unpredictable (e.g. covering rota gaps at weekends), then this can be assessed either by monitoring over a longer period of time OR via payment at internal locum rates – the method to be used should be agreed locally at the Local Negotiating Committee.

Where an individual's work pattern differs from their counterparts then it is no longer appropriate for them to be monitored with their colleagues over a 2 week period as recommended in the [DH monitoring guidance](#), or devolved equivalent (such as HDL 2000 17 Corrig in Scotland) and so we suggest that these individuals should be monitored over a single rota cycle in order to gain an accurate representation of their working pattern. We do not advise covering clinical areas that you do not ordinarily work in or would not normally be deemed competent to do so.

### ***How to opt-out***

There is no nationally agreed system for junior doctors to opt-out of the hours limits of the WTR, a sample agreement letter is attached as appendix 1. We recommend keeping copies of this letter and renewing your opt-out every year if you wish.

### ***What the opt-out does not allow you to do***

The opt-out does not exempt an individual from either the rest requirements within the WTR or any of the limits within the New Deal (see above). These must still be achieved for individuals who have opted out – therefore the combination of the WTR requirement for 11 hours rest in 24 hours and requirements around compensatory rest mean that working after a ‘night’ shift or the day after a 24-hour partial shift is problematic.

Therefore, those who have opted out will find it easier to do additional work either after 5pm OR at weekends when otherwise not rostered for work.

It is also worth bearing in mind that Para 111b of the Terms and Conditions of Service states “Practitioners in the training grades shall not undertake locum medical or dental work for any other employer where such work would cause their contracted hours to breach the controls set out in paragraph 20” – paragraph 20 refers to limits on hours of duty noted above.

### ***What if I do not want to opt-out?***

The WTR is health and safety legislation and represents legal protection for you. If any pressure is applied to you to opt-out, contact askBMA. Such pressure may represent bullying and/or harassment. Your employer should not present you with an opt-out as a requirement for employment, nor place one within your contract, nor make it a requirement for your training or for a specific placement.

However, the BMA believes that the individual opt-out is not an appropriate mechanism to solve problems with WTR/EWTD implementation, especially those to do with training. We have a variety of concerns including:

- Juniors may not be appropriately remunerated for additional work
- A differential training system could develop for those who have opted out and those who haven't
- Decreasing the incentives on employers to solve problems with training and staffing issues

Whilst the option to utilise the individual opt-out remains a legal right the BMA will fully support any doctor who feels put under pressure to opt-out when they do not wish to.

Again, if you have any difficulties, contact askBMA.

### ***Opting out and rota gaps***

Individuals who have opted out may be able to perform additional work to cover rota gaps. However, this should be separate to their ‘normal’ work and should occur outside your ‘normal’ working hours.

**Remuneration**

If you are performing additional hours of work then these should be paid. This can occur in one of two ways; either through being paid at hourly rates (which should be no less than the internal locum rates), or via the monitoring and banding system. This should be organised through negotiation with your employer, either directly and on an individual basis, or collectively via your LNC. If you have any difficulties, contact askBMA.

**Implications for your employer**

Your employer will have to agree to employ you for additional hours outside WTR limits and must not pressure you to do so. Your employer will still have to provide monitoring as previously and in addition will have to keep a record of any and all additional hours you are doing. They will have to assess your work with all the separate restrictions on working patterns in the WTR and in the contract.

**Medico-legal implications**

If you are working in your normal position with a duty of care to your patients for an NHS body then you would be covered by NHS indemnity (as per [HSG 96/48](#)) for costs arising from clinical negligence claims. If you plan on working routinely with an opt-out then we advise you contact your medical defence organisation so that they are aware of the situation and can advise you accordingly.

**As of November 2009**

## ANNEX B – by kind permission of the BMA

### Example Letter

Dear Sir/Madam,

Re: Opting out of the Working Time Regulations

I am writing to you to exercise my right under article 5 of the Working Time Regulations 1998 to opt-out of the hours limits set by it from the date I have signed this letter for 1 year. I understand that this does not exempt me from the rest requirements within this or the hours limits or rest requirements in the national terms and conditions of service for UK junior doctors. In addition, I understand that you must keep my details, how long I have opted out for and the details of any additional hours worked and I give you permission to do so.

Please sign this document to confirm receipt, and return a signed copy to me and keep one for your files. I will take your signature to mean that my employer agrees to pay me for any additional hours I may perform under my opt-out until such a time as a review is necessary, or instituted by either party.

If you wish to employ me for any additional hours we should meet to agree this and payment for these. I understand that I retain the right to cancel this agreement at any time, and that there will be no undue pressure for me to undertake additional work.

Yours Sincerely,

Signature of Junior Doctor

Date signed

Signature of Medical Staffing Representative

Date signed

**The BMA says that the principles of any opt-out letter should state clearly:**

- The duration of the opt-out
- That it is a voluntary agreement and has been an individual choice and you have not been coerced
- That the junior doctor will only be able to work the maximum 56 hours per week
- That whilst the doctor has opted out of total hours, they must still adhere to rest requirements and shift lengths as stipulated by the regulations
- That it is an agreement between employee and employer
- That it will be reviewed every 6 months
- That it can be reversed by either party
- That all time at work is work, in keeping with the WTR, and should be paid
- Remuneration should be clarified within the letter.

**As of November 2009**



## ANNEX C – reproduced with kind permission of BMA

### Rota Gaps: Guidance for Junior Doctors

JDC are increasingly hearing about problems arising from an inability to fill posts on rotas, a problem which may be exacerbated by the implementation of EWTD compliant rotas. Any change in working pattern must occur in accordance with your contract (Terms and Conditions of Service), the [guidance](#) issued by the Department of Health, and requires the agreement and involvement of junior doctors locally. If this is not the case, please contact askBMA.

Implications of rota gaps include:

1. An increased intensity in workload for junior doctors in post
2. Gaps in the delivery of patient care both in the daytime AND for “on call duties”
3. A potential reduction in training opportunities

This guide has been written to advise you of what your employer may ask you to do, within the terms of your employment, and what they may not do. In particular, it considers cover for emergencies, short term and long term cover, as well as potential implications on training, pay and what to do if you are being forced into working extra hours.

If your situation is not covered here, please consider contacting askBMA on 0300 123 123 3 for advice.

#### Cover for emergencies

You should not be asked by your employer to cover for absent colleagues on a long-term basis. However, there are specific circumstances where you may legitimately be asked to cover the “occasional brief absence of colleagues” (as well as in exceptional emergency scenarios) and that “sick colleagues will normally be covered only for short periods of absence”, and we interpret this short period to be 48 hours in length. This would not apply to foreseeable short or long term rota gaps.

Such emergency cover should be recognised with either compensatory time off in lieu or with pay (see below).

Lastly, academic trainees can be a special case as they may have additional commitments within the university or department and these should be protected and respected. This could also be the case with sessional doctors or doctors with multiple employers.

#### Cover for ‘Normal’ activities

Where 9 to 5 activities are left uncovered by a rota gap (such as inability to fill a post OR the post holder is filling another, vacant role) this should be raised with the responsible consultant and/or the clinical director at the earliest opportunity.

The delivery of clinical care and distribution of duties should be discussed initially at Departmental level and if necessary at Directorate or Board level. You may be asked to cover some duties, although you are not obliged to work outside your job description or where you think patient safety may be jeopardised. If you are asked to do so and you feel competent to do so and where it will improve patient care, this would be advisable. However, doing so should not impair your ability to care for the patients already under your care and your existing duties.

Intensity of workload is not easily measurable, nor defined within the junior doctors contract. However, whatever the intensity of your workload, you should still receive “natural breaks”, defined as being a 30-minute uninterrupted break on average every 4 hours. Failure to receive these on >75% of occasions should be assessed at monitoring and would lead to the working pattern being ‘non-compliant’ with the New Deal and to Band 3 payments.

Where gaps in the rota are long standing, different ways of delivering service that do not rely on the absent doctors may be needed.

If at any time you feel patient care is being compromised, you must inform your consultant or Clinical Director as a matter of urgency, in keeping with paragraph 6 of **Good Medical Practice**, which states *“If you have good reason to think that patient safety is or may be seriously compromised by inadequate premises, equipment, or other resources, policies or systems, you should put the matter right if that is possible. In all other cases, you should draw the matter to the attention of your employing or contracting body. If they do not take adequate action, you should take independent advice on how to take the matter further. You must record your concerns and the steps you have taken to try to resolve them”*.

In addition, the GMC guidance [“Management for Doctors”](#) also states, *“You must be satisfied that suitable arrangements are in place for patient care when staff you manage are off duty, and that effective handover procedures are followed”*.

### **Cover for ‘On Call’ duties**

It is important to be alert to potential changes in rota patterns or duties on rotation changeover dates. If your working pattern is altered you may have to work additional hours as a result (for example, if the number of doctors working on a rota was reduced from eight to seven doctors), or the work that you are routinely doing has changed, you should ask for advice from askBMA in the first instance. If your employer wishes to introduce a change to your working pattern, which would increase the number of hours worked, they must get the agreement of the majority of the post-holders even if the band of the post does not change. Furthermore, the [Approval to Change Band Protocol](#) should be completed prior to any change in band that is proposed to take place.

### **Short-term gaps**

Short-term gaps may arise from sickness, late starts or early termination of contract. In these cases, juniors may be asked to cover additional shifts within the New Deal and EEWTD hours and rest requirements and these should be paid (see below), although time off in lieu can be granted.

### **Long-term gaps**

Where absences are predictable, for example, where a post has not been filled during the recruitment process, and likely to be long-standing, it is your employer’s responsibility to engage internal or external locums to provide cover. If you are asked to provide cover in these circumstances, you may wish to consider contacting askBMA for advice on how best to proceed.

Para 110e of the Terms & Conditions of Service states:

*“In circumstances other than those in b. to d. above, eg. where cover is required for a practitioner on maternity leave or for a temporarily vacant post, the employing authority (and not the practitioner) shall be responsible for the engagement of a locum to undertake work which in their view must be carried out, but the practitioner shall have the responsibility of bringing the need to their notice. The employing authority shall assess the number of hours required.”*

Where long-term gaps cannot be filled by external locums it is the employing authority’s responsibility to find a solution. The post holders can agree to help in two ways to cover ‘on call’/‘out of hours’ commitments:

- they can agree to increase their hours to cover this (and the rota should be rewritten to incorporate this) and remonitor to assess the appropriate pay banding immediately after it is changed. This must follow the agreed process for changes to working practice and will require the post holders approval as well as educational approval from the Clinical Tutor.

Or

- the post holders can agree to self-roster to cover absences as internal locums.

If you feel you are being pressurised into covering additional hours where the need for a locum has been raised then contact askBMA.

### **Impact on training**

If you feel that you may not be able to achieve your educational objectives within the post due to changes in the working pattern, contact your educational or clinical supervisor initially, but you may also need to notify your programme director, or postgraduate dean, and this is best done as soon as possible.

### **Locum pay**

The standard national internal locum rates are in the latest pay circulars (page 19/annex 7 of [Pay Circular \(M&D\) 1/2009 for England & Wales, p17 PCS\(DD\)2009/03 in Scotland, and HSS TC8 1/2009 in Northern Ireland](#)). However, in England and Wales improved rates can be agreed locally where gaps remain a problem. Payments made via external locum agencies are not subject to the internal locum rates.

### **Medicolegal aspects**

If you are working in your normal position with a duty of care to your patients for an NHS body then you would be covered by NHS indemnity (as per [HSG 96/48](#)) for costs arising from clinical negligence claims. If you are performing additional work as an internal or external locum routinely then you should check with your medical defence organisation that they cover you for these periods.

### **Bullying and harassment**

The uncertainty caused by rota gaps may cause stress for staff of all grades and this stress can be compounded when there are gaps on rotas. If you feel that you are being bullied or harassed, for example, to provide extra cover in inappropriate circumstances, help is available. You can call askBMA for advice.

Likewise, please look out for your junior colleagues, particularly those who have not been appointed to training posts this year, or who are applying for further posts having secured a time-limited post last year. Many of them are under a lot of stress, and a significant number have indicated in mental health surveys that they have depressive thoughts and even thoughts of self harm. Your support over the coming months for them will be invaluable, even if that only extends to looking out for those who are not coping well with the stress of the transition process.

The BMA's Doctors for Doctors Unit provides one-to-one confidential counselling with a doctor, and can be contacted via the BMA Counselling Service on 08459 200169, 24 hours a day, 7 days per week.

### **As of November 2009**

## Annex D – reproduced with kind permission of NHS Employers

### Example Working Time Regulations 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 (WTR) 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

To: Chief Executives and Finance Directors  
All NHS Bodies

November 2007

Circular No: 07/01

Dear Colleagues

**European Working Time Directive (EWTID)  
CNST Indemnity for clinicians working in excess of EWTID limits**

We have been asked by one of the Royal Colleges to spell out the position relating to CNST indemnity where colleagues work beyond the limits of the Directive.

Naturally we would not wish to encourage our scheme members to ignore the requirements of the Directive, but we are acutely conscious that the practical realities of Trust activity make this a common circumstance of working life for our members and it is frequently impossible to abide by the precise letter of the Directive.

That being the case, the purpose of this circular is to restate the view formally expressed some three years ago namely:

"Any activity carried out by clinicians which would be the subject of an indemnity if carried out during "allotted" hours will be treated no differently under our schemes because that work was being done outside those hours."

I understand that concerns have been expressed on this topic and I hope that this assurance about how the CNST, or indeed the Risk Pooling Schemes for Trusts, would be applied will give you and your colleagues the reassurance they need.

Can you please ensure that all of your staff who need this reassurance are given access to a copy of this circular. It has also been put on our website, [www.nhsa.com](http://www.nhsa.com), should you simply wish to refer colleagues to that.



**Stephen Walker CBE**  
Chief Executive

## ANNEX F

### Schedule 4 / section 4

#### Maximum weekly working time

4. - (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 a reference period shall be determined according to the formula -

**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 / her 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;

(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.

## Helpful Websites

Academy of Medical Royal Colleges	<a href="http://www.aomrc.org.uk">www.aomrc.org.uk</a>	020 7486 0067
British Medical Association	<a href="http://www.bma.org.uk">www.bma.org.uk</a>	020 7387 4499
askBMA BMA Counselling Service - 24 hours a day, 7 days per week		0300 123 1233 08459 200169
Department of Health	Junior doctors contract: Part A – General guide to the new pay system; Part B – Definitions <a href="http://www.dh.gov.uk/">www.dh.gov.uk/</a>	
NHS Confederation of Employers	<a href="http://www.nhsemployers.org">www.nhsemployers.org</a>	020 7074 3200
Royal College of Physicians:	<a href="http://www.rcplondon.ac.uk">www.rcplondon.ac.uk</a>	020 7224 1539
Royal College of Surgeons of England:	<a href="http://www.rcseng.ac.uk">www.rcseng.ac.uk</a>	020 7074 3200
Royal College of Anaesthetists	<a href="http://www.rcoa.ac.uk">www.rcoa.ac.uk</a>	020 7092 1500
Royal College of Obstetricians and Gynaecologists	<a href="http://www.rcog.org.uk">www.rcog.org.uk</a>	020 7772 6200.
Skills for Health-Workforce Projects Team	<a href="http://www.healthcareworkforce.nhs.uk">www.healthcareworkforce.nhs.uk</a> EWTD Best Practice	0161 266 2300



Statutory Instrument	<a href="http://www.opsi.gov.uk">www.opsi.gov.uk</a> <a href="http://www.opsi.gov.uk/si/si1998/19981833.htm">www.opsi.gov.uk/si/si1998/19981833.htm</a>	
Statements on indemnity	<a href="http://www.bma.org.uk/employmentandcontracts/working_arrangements/hours/ewtdnhsindemnity.jsp">http://www.bma.org.uk/employmentandcontracts/working_arrangements/hours/ewtdnhsindemnity.jsp</a> <a href="http://www.medicalprotection.org/uk/response-document/Indemnity-under-ewtd">http://www.medicalprotection.org/uk/response-document/Indemnity-under-ewtd</a>	

This is not an exhaustive listing. Other sources of information may be found via the Deaneries and the individual Medical Royal Colleges' websites and those of the specialty associations.