

Pay Circular (AforC) 2/2009

Contractual continuity of service and working time

To: All NHS employers

Dear Colleague,

Summary

This circular informs NHS organisations of a change to the provisions on contractual continuity of service in Section 12 of the NHS Terms and Conditions of Service Handbook.

In addition this circular contains details of agreed temporary changes to the provisions in Section 27, Working time regulations, to help the NHS respond to the flu pandemic.

Action

Reckonable service

1. From 14 October 2009, when employees who have been transferred out of NHS employment to a non-NHS provider return to NHS employment, their continuous service with a new non-NHS employer providing NHS funded services will be counted as reckonable in respect of NHS agreements on sick pay, annual leave and incremental credit.

Working time

2. Currently, paragraph 9 in Section 27 in the Handbook, Working time regulations, restricts working time, in normal circumstances, to 48 hours in each seven day period, calculated over an averaging period of 17 weeks. In exceptional circumstances, for some staff and with the agreement of trades unions locally, the reference period may be extended to 26 weeks. From 14 October 2009, for the duration of the flu pandemic and subject to local agreement with trades unions, the reference period for all staff may be extended to a maximum of 52 weeks.

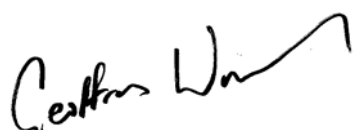
Effect of this amendment

3. This is amendment number 14 to the NHS Terms and Conditions of Service Handbook. A new paragraph 12.3 is added to Section 12 in the Handbook and the new Section 12, attached, replaces the existing Section. Paragraph 9 in Section 27, Working time regulations, is amended and the Section 27 attached to this circular temporarily replaces the existing Section 27.
4. Details of the changes made effective by this circular are in the Appendix attached.

Enquiries

5. Employees must direct personal enquiries to their employer.
6. Employers should direct enquiries to: agendaforchange@nhsemployers.org.
7. Copies of this circular can be downloaded from: www.nhsemployers.org
8. A copy of the NHS Terms and Conditions of Service Handbook can be downloaded from the NHS Employers' website at the following address:
www.nhsemployers.org/payandconditions/agendaforchange.asp
9. Prior to the establishment of NHS Employers in November 2004, responsibility to inform the NHS of changes to pay and allowances for staff on Agenda for Change contracts rested with the Department of Health. Changes were published in Advance Letters. Copies of previous Advance Letters going back to 1995 may be obtained from the Department of Health website at the following address:
www.dh.gov.uk/letters.

Issued by



Geoffrey Winnard
Head of Agenda for Change/Non-Medical Pay
NHS Employers

APPENDIX

Pay Circular (AforC) 2/2009

NHS TERMS AND CONDITIONS OF SERVICE HANDBOOK

The changes made effective by this circular are:

- **Section 12: Contractual continuity of service: reckonable service.** A new paragraph 12.3 is added as follows:

When employees who have been transferred out of NHS employment to a non-NHS provider return to NHS employment, their continuous service with a new non-NHS employer providing NHS funded services, will be counted as reckonable in respect of NHS agreements on sick pay, annual leave and incremental credit.

The existing paragraphs 12.3 and 12.4 are renumbered.

- **Section 27: Working time regulations: reference period.** Currently paragraph 9 is:

Employees will normally not be expected to work more than 48 hours per each seven-day period calculated over an averaging period of 17 weeks. In exceptional circumstances, for those health professionals involved in the need for continuous care relating to reception, treatment or care of patients, the reference period may be extended by agreement with locally recognised unions to a maximum of 26 weeks.

This paragraph is amended so that it is:

Employees will normally not be expected to work on average more than 48 hours per each seven-day period, calculated over 17 weeks. In exceptional circumstances the reference period may be extended, by agreement with locally recognised unions, to a maximum of 52 weeks.

Section 12: Contractual continuity of service

Reckonable service

- 12.1 An employee's continuous previous service with any NHS employer counts as reckonable service in respect of NHS agreements on redundancy, maternity, sick pay and annual leave.
- 12.2 Employers have the discretion to take into account any period or periods of employment with employers outside the NHS where these are judged to be relevant to NHS employment.
- 12.3 When employees who have been transferred out of NHS employment to a non-NHS provider return to NHS employment, their continuous service with a new non-NHS employer providing NHS funded services, will be counted as reckonable in respect of NHS agreements on sick pay, annual leave and incremental credit.

Re-appointment of previous NHS employees

- 12.4 On returning to NHS employment, a previous period or periods of NHS service will be counted towards the employee's entitlement to annual leave.
- 12.5 On returning to NHS employment, a previous period or periods of NHS service will be counted towards the employee's entitlement to sick leave where there has been a break or breaks in service of 12 months or less.

Section 27: Working time regulations

- 27.1 There is a general responsibility for employers and employees under health and safety law to protect as far as is practicable the health and safety of all employees at work. Control on working hours should be regarded as an integral element of managing health and safety at work and promoting health at work. It is, therefore, appropriate that health service employers, when organising work, should take account of the general principle of adapting work to the worker.
- 27.2 In reaching local arrangements to implement this agreement, employers or employees are expected to ensure that no arrangements are reached which discriminate against members of staff with family or other carer responsibilities.

Exceptions

- 27.3 Doctors in training are excluded from the provisions of this agreement.
- 27.4 Regulation 18 of the Working Time Regulations states:
- “Regulations 4(1) and (2), 6(1), (2) and (7), 7(1), and (6), 8, 10(1), and 11(1) and (2), 12(1), 13 and 16 do not apply ...
- (c) where characteristics peculiar to certain specified services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with provisions of these Regulations.”
- 27.5 Regulation 2 cites ambulance services within the definition of civil protection services. In the case of employees unable to benefit from the protection of the Working Time Regulations, ambulance services employers are expected to apply the principles of the Regulations and this agreement as far as the exigencies of the service permit.

Protection

- 27.6 Employees must suffer no detriment because they have exercised any of their entitlements under the Regulations. The provisions of the Working Time Regulations are not maximum standards and conditions which are currently in place and more favourable to staff should not be worsened.

Records

- 27.7 Employers must keep records, which will be available to locally recognised unions, which are adequate to ensure that the limits specified in paragraph 27.9 (maximum working weekly time), paragraph 27.15 (rest breaks), paragraph 27.17 (daily rest), paragraph 27.19 (weekly rest periods), and paragraph 27.20 (night work) are complied with and that where there is an entitlement to compensatory rest this is provided for.

Maximum weekly working time

- 27.8 Working time may or may not happen to coincide with the time for which a worker receives pay or with the time during which he/she may be required to work under a contract of employment. Working time will include time taken for training purposes, civic and public duties, health and safety and trades union duties.
- 27.9 Employees will normally not be expected to work on average more than 48 hours per each seven-day period, calculated over 17 weeks. In exceptional circumstances the reference period may be extended, by agreement with locally recognised unions, to a maximum of 52 weeks.
- 27.10 Unless it is agreed with locally recognised unions to the contrary, the averaging reference period (as per paragraph 27.9) is the 17 weeks immediately preceding each day in the course of a worker's employment.
- 27.11 Working time will be calculated exclusive of meal breaks except where individuals are required to work during meals, in which case such time should be counted as working time.

Individual option to work more than 48 hours a week

- 27.12 Individuals may choose to agree to work more than the 48 hours average weekly limit if they agree with their employer in writing. A decision to exercise this option is an individual, voluntary one and no pressure should be placed on an employee to take this option. Such an individual agreement may either relate to a specified period or apply indefinitely. To end any agreement a worker must give written notice to his/her employer. This can take the form of a previously specified notice period of up to three months written in any agreement or, if no notice period is specified, only seven days notice would be required. Records of such agreements must be kept and be made available to locally recognised unions.

On-call staff

- 27.13 Staff who are on-call, i.e. available to work if called upon, will be regarded as working from the time they are required to undertake any work-related activity. Where staff are on-call but otherwise free to use the time as their own, this will not count towards working time. This method of calculating working time will not affect on-call payments (see also paragraph 27.8 and Section 2).
- 27.14 Where staff are required to 'sleep in' on NHS premises for the duration of a specified period, local agreements should be made for compensatory rest.

Rest breaks

- 27.15 Where the working day is longer than six hours, all staff are entitled to take a break of at least 20 minutes. Rest breaks must be taken during the period of work and should not be taken either at the start or the end of a period of working time. Employees should be able to take this rest break away from their work station. In exceptional circumstances and by agreement with the worker, where a rest break cannot be taken the unused entitlement should be claimed

as a period of equivalent compensatory rest. Line managers should ensure that provision is made to allow compensatory rest to be taken. Existing local arrangements which already provide for breaks of more than 20 minutes (e.g. lunch breaks) will meet the requirements of this provision and no further action will be needed.

- 27.16 In circumstances where work is repetitive, continuous or requiring exceptional concentration employers must ensure the provision of adequate rest breaks as an integral part of their duty to protect the health and safety of their employee. In such circumstances the advice of local occupational health services should be sought.

Minimum daily rest periods

- 27.17 Employees should normally have a rest period of not less than 11 hours in each 24 hour period. In exceptional circumstances where this is not practicable because of the contingencies of the service, daily rest may be less than 11 hours. In these circumstances records should be kept by the employer which will be available to locally recognised unions. Local arrangements should be agreed to ensure that a period of equivalent compensatory rest is provided. Any proposed regular amendment to the minimum daily rest period must be agreed with locally recognised unions. It is recognised that in some emergency situations compensatory rest may not always be possible.
- 27.18 Where full daily rest cannot be taken because a worker is changing shifts the employer should make arrangements to allow equivalent compensatory rest.

Weekly rest periods

- 27.19 All employees should receive an uninterrupted weekly rest period of 35 hours (including the eleven hours of daily rest) in each seven day period for which they work for their employer. Where this is not possible they should receive equivalent rest over a 14 day period, either as one 70 hour period or two 35 hour periods.

Night work

- 27.20 Night-time is a period of at least seven hours which includes the period from midnight to 5 am. A night worker is someone who is classed as working for at least three hours daily during night-time hours as a "normal course." Employers should ensure that the "normal hours" of their night workers does not exceed an average of eight hours over a 17 week period.
- 27.21 "Normal hours" are those which are regularly worked and/or fixed by contract of employment. The calculation is not affected by absence from work, as a worker's normal hours of work would remain the same regardless of the "actual" hours worked. Time worked as overtime is not normal work unless an employee's contract fixes a minimum number of hours.

Special hazards or heavy physical or mental strain

- 27.22 Employers must identify special hazards faced by night workers by identifying them in risk assessments as involving a significant risk to health and safety undertaken in accordance with the Management of Health and Safety at Work Regulations 1992.
- 27.23 Employers should ensure that night workers, whose work does involve special hazards or heavy physical or mental strain, do not actually work for more than eight hours in any 24 hour period during which the night worker performs night work.

Health assessment for night workers/transfer to day work

- 27.24 All night workers are entitled to a regular free and confidential occupational health assessment and additionally when a work-related problem is identified to determine whether the worker is fit to undertake the night work to which he/she is assigned. The format and content of the health assessment should be agreed by locally recognised unions in accordance with the advice on occupational health services issued by NHS Employers and the Health and Safety Commission's Health Services Advisory Committee.¹ Paid time off should be given to employees to attend occupational health assessments.
- 27.25 Employees identified by a medical practitioner as having health problems related to night work should be offered, wherever possible, the option of transfer to suitable day work with appropriate pay and conditions of service.

¹ *The management of health, safety and welfare issues for NHS staff* (NHS Employers, 2005) and *The management of occupational health services for healthcare staff* (Health Services Advisory Committee, 1993).