

Pay Circular (AforC) 1/2005

20 April 2005

To: All NHS managers with responsibility for staff
Department of Health

Dear colleague,

Agenda for Change: NHS Terms and Conditions of Service Handbook Amendment to Section 27: Working Time Regulations

This is the first amendment to the NHS Terms and Conditions of Service Handbook.

In compiling the new NHS Terms and Conditions of Service Handbook the Agenda for Change partners decided that certain sections of the old GWC Handbook should be carried forward, unaltered, into the new Handbook. This was to help produce a work plan which was consistent with the timescale and resources available. In doing so, the partners agreed that the NHS Staff Council and its executive would consider the possible need for review of some of these sections at a later date.

Section 27, Working Time Regulations, was carried forward unaltered from the GWC Handbook. The Agenda for Change partners have received feedback from employers that early action is needed to bring this into line with recent judgements of the European Court of Justice (ECJ) including the 'Jaeger' judgement and with the Regulations relating to 'compensatory rest'. The amended Section 27 (attached) contains changes designed to bring the section in line with the relevant legislation and judgements. These changes are agreed by the Agenda for Change partners. The annex to this letter details all the changes.

A reference to health and safety guidance has also been updated.

Action

These amendments are effective immediately. Employers are required to comply with these provisions for staff on Agenda for Change terms and conditions.

Further copies

Copies of this letter can be downloaded from: www.nhsemployers.org

Enquiries

Employees should direct personal enquiries to their employer.

Employers should direct enquiries to: agendaforchange@nhsemployers.org

Yours faithfully

A handwritten signature in black ink that reads "G Bellord". The letter "G" is large and stylized, followed by the name "Bellord" in a cursive script.

Gill Bellord
Head of Pay and Negotiations
NHS Employers

ANNEX

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NHS Terms and Conditions of Service Handbook Section 27: Working time regulations

The changes made effective by this circular are:

Paragraph 27.14: last line: the words “**taking account of intensity of work**” are deleted.

Paragraph 27.15: lines 9 and 10: the words “**normally within two weeks**” are deleted.

Paragraph 27.17: lines 7, 8 and 9: the sentence “**Compensatory rest should be provided within a reasonable time from when the entitlement to rest was modified, usually within two weeks**” is deleted.

Paragraph 27.18: line 3: the words “**as soon as is practicable**” are deleted.

Paragraph 27.24: line 7: the words “the **Department of Health**” are deleted and the new words “**NHS Employers**” are inserted.

The footnote on the page containing paragraph 27.25 (footnote number 7): in lines 1 and 2 the words “**The Effective Management of Occupational Health and Safety Services in the NHS (Department of Health 2001)**” are deleted and the new words “***The management of health, safety and welfare issues for NHS staff (NHS Employers 2005)***” are inserted.

See the new Section 27 attached.

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 that 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, that 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 trade union duties.

- 27.9 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.
- 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 (for example, 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 that 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 11 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 that includes the period from midnight to 5am. 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 do 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.⁷ 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.