

## **Working Time Regulations in the Police**

The following paper seeks to clarify the provisions of the Working Time Regulations 1998 with regards to Police Officers and Police Regulations.

The Working Time Regulations 1998 implemented the Working Time Directive into UK domestic law. The Directive is a European Health and Safety provision that expressly applies to Police officers and must be adhered to unless certain exemptions apply. The purpose of these Regulations is to ensure that workers (including Police officers), are sufficiently rested so that they can perform their jobs safely and to the best of their abilities. It is a statutory instrument and any deliberate deviation from the law may attract criminal or civil proceedings, including misconduct.

The WTR provide a series of legal entitlements to workers. These are listed below.

### **Legal entitlements under the Working Time Regulations include:**

1. A maximum working limit of 48hrs per week averaged over a reference period of 17 weeks unless otherwise agreed with the individual. (This is the only regulation that may be voluntarily opted out of. This opt out cannot be enforced, it must be voluntary).
2. An average limit on night workers' hours of work of 8hrs in a 24hr period (and no more than 8hrs if the work is subject to special hazards or strain).
3. 11 clear consecutive hours' of rest between shifts or compensatory rest if (and only in) 'exceptional' circumstances 11hrs rest cannot be provided.
4. At least one day off per week or two days per fortnight. These must be clear 24hr periods of rest.
5. An in-work rest break of at least 20 minutes if the working day is longer than 6hrs.
6. At least 5.6 weeks or 28 days paid leave per year (to include public holidays) and free health assessments for night workers.

There are various circumstances where these rights do not apply. In the main these relate to variations agreed in advance with the Police Federation Branch Board or in such circumstances giving rise to exigencies of duty (unforeseen events that could not be planned for in advance).

Whilst Working Time Regulations set the minimum standard of legal entitlements it should be noted that Police Regulations 2003 are more generous. Where Police Regulations provide individuals with additional entitlements, these will take precedence over Working Time Regulations, however the underlying minimum remains. WTR have been incorporated into Police Regulations and in accordance with PNB Circular 10/1, any shift pattern for police officers must meet the legal requirements of Police Regulations and Determinations 2003 (in particular Regulation 22 Annex E) and the Working Time Regulations.

Certain breaches of the WTR may constitute criminal offences. The enforcing agency is the

Health and Safety Executive. There are also other rights available before an Employment Tribunal. The time limit for a Tribunal claim is generally three months less one day from the relevant breach – subject to the obligation to go through ACAS Early Conciliation. Officers are encouraged to speak with a Federation Representative should they have any concerns.

### **What is Working Time?**

Regulation 2 of the WTR defines “working time” in relation to a worker as meaning:

- (a) Any period during which they are working, at their employer's disposal and carrying out their activity or duties, and/or
- (b) Any period during which they are receiving relevant training; and
- (c) any additional period is to be treated as working time for the purpose of these Regulations under a ‘relevant’ (e.g. a collective agreement).

The Working Time (Amendment) Regulations 2006 removed the ‘working time’ exemption in Regulation 20 of the WTR concerning those workers who have an element of their working time pre-determined; for example, by their contract of employment, but who voluntarily work longer hours which were disregarded in establishing working time. Therefore, working time may include any period when the worker is performing certain voluntary activity (Reservist/Youth & Community/Charity Work etc) or is a “vocational driver” outside their normal working or duty time.

Protected Learning Time should be considered ‘working time’ in accordance with Regulation 2 and included in the total of weekly working time limits. For the elimination of doubt, protected learning time should be paid and form part of any rostered working shift. PFEW’s Policy on Protected Learning Time provides more information on this.

### **Weekly Working Time Limit:**

The Regulations impose an average limit to working hours of 48 hours per week. This average is measured over a reference period of 17 weeks or 26 weeks where an exception in Regulation 21 applies. Police Regulations currently provide for a 40 hour standard working week. As a normal course, an officer working 8 hours overtime per week for 16 weeks, and 9 hours in the 17<sup>th</sup> week would be working in excess of the weekly working time limit.

Overtime claim forms or rosters may not necessarily be relied upon to accurately record the number of weekly hours worked. Any periods of working time must be included including any periods agreed by the Federation Branch Board in a workforce agreement. Periods of unpaid overtime under Police Regulation 28(3) should be included in any calculation, as should any travelling time treated as duty; whereas any periods paid for but not worked under Police Regulations 29(9)(f) and 28(7)(c) should not be included.

### **Exemptions and Exclusions:**

Under the Regulations, some Policing activities are exempt.

- **Regulation 5** - An individual may choose to volunteer to work more than the 48hr average weekly limit. In such cases they may sign an ‘Opt-Out’ agreement.

- **Regulation 18** – Where characteristics peculiar to certain specific services within the Police service conflict with the Regulations; individuals engaged in such services will be exempt from various aspects of the Regulations including the weekly hours limit. These services have not been fully defined but the HSE have provided examples that are likely to fall within scope, such as dealing with civil disturbances and other large unforeseen events. This exemption can only apply in extraordinary circumstances and the normal working time limit of 48hrs (subject to Opt-Out) will apply in the vast majority of cases. Reliance on the Regulation 18 exemption can only be determined by the Chief Officer.
- **Regulation 21** - The reference period of 17 weeks, for the purpose of measuring the 48hr weekly maximum, may be extended to 26 weeks in relation to ‘special case’ workers such as:
  - An individual engaged in security or surveillance activities requiring a presence to protect property and persons;
  - Where there is a need for continuity of service or production (e.g. work at docks or airports);
  - Where there is a foreseeable surge in activity or where the individual's activities are affected by unusual or unforeseen circumstances, exceptional events or an accident or imminent risk of one.

Custody Officers, Communications Officers, Protection Officers and Surveillance Officers or generally those engaged in providing a response to calls for assistance from the public, are likely to be covered by Regulation 21. This exemption would also apply when there is a need to respond to major emergencies or significant public events requiring exceptional Policing. These exemptions apply to the Police on the basis of characteristics peculiar to the service or certain specific activities which may ‘inevitably conflict’ with the provisions of the WTR. There is no definition of ‘*inevitably conflict*’ and the Government has said that ultimately, any disputed case would be a matter for the courts to determine. Whilst this is not helpful, these exclusions must not be treated as blanket exclusions. That is to say, they apply only where such characteristics or specific activities which conflict with the WTR actually occur.

### **Opting Out:**

Any officer wishing to work beyond the 48 hour maximum weekly limit should consider opting out of this element of WTR. This is the only element of WTR that can be opted out of<sup>1</sup> and not something that the PFEW would encourage as WTR exist to protect the officer from fatigue. Opting-Out is a purely ‘voluntary’ arrangement that cannot and must not be enforced as there are legal protections from victimisation for any refusal to opt-out. If an individual is unwilling to opt-out, arrangements must be made to manage the working hours so as not to exceed the permitted 48 hour weekly average.

An individual may Opt-Out of the 48 hour average limit if they wish to exceed the working limit, particularly if they undertake other employment (Business interest or voluntary work) which, when added to the cumulative hours of their employment might lead to them working longer than the 48 hour average.

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<sup>1</sup> Other elements can be modified, for example, the 17 week reference period can be agreed to be a fixed or rolling period; also, the period which is considered to be ‘night time’ can be re-defined, within certain limits.

Similarly, Special Constables Should consider an Opt-Out arrangement if their duties alongside their usual employment cause them to exceed the 48 hour weekly average.

Volunteers should also consider an Opt-Out arrangement if their volunteer duties and other employment causes them to exceed the 48 hour weekly average.

Line Managers still have a duty of care under the Health and Safety at Work Act 1974 and under common law to ensure the hours worked are not excessive or arranged in a way that would compromise either themselves, their colleagues or the public's safety. This applies even if the officer has Opted-Out. Line Managers should complete a Risk Assessment if there is any concern over the amount of hours an officer is working.

If an officer wishes to terminate an Opt-Out arrangement they should give 3 months' notice and not be penalized for doing so.

### **Compensatory Rest**

Under WTR, workers (including Police Officers) are entitled to have at least 11 clear hours of rest between shifts. Any shortfall in these hours should, wherever possible, be given back to the officer as Compensatory Rest or, where that is not possible, shall offer the officer such protection as may be appropriate in order to safeguard the officer's health and safety.

There has been much confusion surrounding the notion of 'Compensatory Rest'. In short, this term relates to the hours owed to an officer if they are not permitted to take their entitlement of 11hrs between shifts. In other words, if an officer only has 8hrs between shifts then they are owed 3hrs in Compensatory Rest. These hours should be taken as soon as possible to allow for sufficient rest, and with prior approval of a line manager, so as to not impede on critical Policing requirements.

Compensatory Rest should generally be taken prior to commencement of the following shift or as soon as possible afterwards. These are hours owed to the officer and there is no requirement for the hours to be made up in a subsequent shift, nor should an officer suffer any detriment for taking hours that are owed to them.

By way of example, if an officer is rostered to work 2pm to 10pm followed by a 10am to 7pm shift the next day and they are retained on duty until 2am; they are owed 3hrs in Compensatory Rest to make up for only having 8hrs rest between shifts. Despite being rostered to work the next day at 10am, they should (subject to permission), start work at 1pm thus affording the 11hrs break required by law. They should still finish at 7pm as there is no requirement to make up the hours as they are owed to the officer.

Compensatory Rest should be taken within a reasonable time period and generally prior to the next rostered rest day, thus permitting time for suitable rest and recuperation. It is not something that can be saved up or 'banked'. It should be noted that Compensatory Rest can be delayed in exceptional circumstances more commonly referred to as exigencies of duty.

### **Exigencies of Duty**

The term "exigencies of duty" is described in PNB circular 86/9 as "*relating to situations where a pressing demand, need or requirement is perceived that is not reasonably avoidable and necessitates a change of roster or extension in working hours. Such pressing demand, need*

*or requirement should not have been reasonably foreseeable at the time a roster was published*".

The term "exigencies of duty" is not otherwise defined in statute or case law and is a phrase that only appears in the context of policing. The Courts are generally happy to accept that it is the role of Chief Constables, who are better qualified and better placed, to decide what amounts to an exigency of duty; on that basis, the Courts will rarely interfere with such a determination.

Although it appears on a number of occasions in Police Regulations and Determinations (2003) and is used in the context of hours of duty and expense claims, it is always open to a degree of interpretation. The most frequent reference to the term however is in relation to the drawing up of duty rosters and subsequent changes thereto.

## **Fatigue**

Managers should be reminded of their obligations under Health and Safety legislation, most notably the common law 'duty of care' and legislative provisions including the Health and Safety at Work Act 1974 where they might be personally liable for any injury arising from fatigue if they have refused to permit an officer a suitable period of rest. The HSWA states that the employer owes a duty of care to anyone whom it can reasonably foresee would be likely to be injured by things it does or omits to do. The HSWA imposes a general duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees.

*In accordance with PNB Circular 10/1, any shift pattern needs to best meet the health and safety requirements of those expected to work it, in order to ensure sufficient officers are able to respond to duty effectively. This would normally be achieved by recognising accepted good practice and research.*

Consideration of the impact of fatigue should be specific to the actual officers affected rather than generic. The impact of fatigue will vary between officers, but particularly some disabled officers, some older officers, and pregnant officers may be more likely to be affected. The "duty of care" is for the individual not their specific role.

## **Night Work Limits:**

Subject to any modification by a collective or workforce agreement (see below), a night worker is defined in the WTR as a person who works at least three hours of their daily working time between 2300 and 0600 hours on the majority of their shifts<sup>2</sup> or who does so as a 'normal course'<sup>3</sup>. This includes periods of night work undertaken as part of a shift system.

The Police Negotiating Board definition of a night worker in Circular 01/2 is a '*police officer who regularly works shifts which include nights, irrespective of the shift pattern actually worked, should be a 'night worker' for the purposes of the Working Time Regulations.*'

Night work must be limited to no more than 8 actual (as opposed to average) hours in a 24-hour period for those workers whose duties involve special hazards or heavy physical or

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<sup>2</sup> Case law suggests that anyone who works a night shift on one in three shifts or more, will be a night worker.

<sup>3</sup> The phrase "as a normal course" has been held to mean "as a regular feature" of a shift pattern.

mental strain *as identified in a risk assessment for a particular role or activity*. For other night workers not engaged in such higher risk activities, there is a more flexible limit of an average of 8 daily working hours over a 17 week reference period. This means that such a night worker can work over 8 hours in any 24 hour period as long as the average over 17 weeks is no higher than 8 hours.

- **Exemptions:** The above limits to night work do not apply to those exempted under Regulations 18 and 21 or where a shift pattern has been agreed through the Police Federation Branch Board

### **Night Workers and Health Assessments:**

Regulation 7 of the WTR provides that individuals becoming night workers must be offered free health assessments before they commence night work and that these should be offered annually thereafter. The health assessment will take the form of a questionnaire. Completed questionnaires will be scrutinised by Occupational Health (OH) and managers will only have the right to know if an individual is able to do night work.

Subject to any duty to made reasonable adjustments for disability under the Equality Act 2010, workers are entitled, wherever possible, to be transferred from night work where medical opinion advises that they have health problems associated with performing night work. Any action that may be taken will depend on a thorough OH assessment, which may require a referral and consent to access the GP for a report. If OH advises that an individual should be taken off night duty, this may only be temporary, for example, until they are used to new medication/treatment. Where an individual is permanently removed from night work, due to a significant health condition, this will have been verified and advised by a Medical Officer or OH practitioner.

When a health questionnaire is offered, line managers should retain a record locally. An audit trail is needed to provide evidence that the assessment was at least offered. If an individual chooses to complete the form, this should be sent to Occupational Health and retained. A response should be provided back to managers about any fitness to continue.

Managers should encourage those officers or staff working regularly at night to raise any concerns that they may have about the effect of the night work on their health.

As stated above, a health assessment to determine a worker's fitness to be a night worker or to work during the restricted period should not be disclosed to any other person other than the worker to whom it relates.

This is unless:

- The worker has given their consent in writing to the disclosure.
- The disclosure is confined to a statement that the assessment shows the worker is fit to be a night worker, or continue to be a night worker, or to work during the restricted period, or to continue to work during the restricted period.

### **Annual Leave:**

The WTR provide for a minimum of 5.6 weeks paid leave a year which is equivalent to 28 days for individuals who work five days a week. Public Holidays & Bank Holidays, where appropriate, may be counted against this entitlement. Annual Leave, Bank/Public Holiday provisions, and shift rostering arrangements, for officers and staff are already compliant. The Regulations also provide for payment of accrued but untaken leave on termination of employment.

The annual leave entitlements (expressed in 8 hour days) for federated ranks are found in Regulation 33 and Annex O of Police Regulations 2003:

Years of relevant service	Days of Annual Leave
Less than 2	22
2 or more	25
5 or more	25
10 or more	27
15 or more	28
20 or more	30

It may seem that Regulation 33 of the Police Regulations 2003 are less generous than WTR however Public Holidays and Bank Holidays are NOT counted against this entitlement thus rendering the total amount of days off per year more generous for Police Officers.

#### **Rest Periods (Daily and Weekly):**

Police Regulations Annex E Determinations for Regulation 22 concerning duty rosters at Paragraph 3, sections (e), (f) and (g), set out entitlements to rest periods and these are supported by WTR:

- A worker is entitled to a period of 11 consecutive hours of uninterrupted rest between each 24hr period during which they work i.e. each work day.
- A worker is entitled *additionally* to an uninterrupted rest period of not less than 24 hours in each 7 day period although this may be averaged over a two week period allowing for two days' rest a fortnight.
- The right to rest periods and breaks is an entitlement. Those who take their entitlements must not be subjected to any detriment for doing so.

**Exemptions:** Regulations 18 and 21 are relevant. Where Regulation 21 applies, the force must under Regulation 24 'wherever possible' allow the officer to take "*an equivalent period of compensatory rest*" where the normal rest periods have not been made available. Police Regulations and police staff conditions of service already set out entitlements to rest periods. Where they provide individuals with additional entitlements over and above the WTR these will take precedence over WTR.

The entitlement to an 11hr daily rest period is not applied where a shift pattern is employed which entails "quick changeovers" between shifts, as a result of Regulation 22. However, as a matter of good practice, the rostering of shifts should, where possible, be arranged to avoid breaks between consecutive shifts lasting less than 11 hours in duration. Under the Police Regulations, breaks of less than 11 hours in duration between shifts need to be agreed by the Police Federation Branch Board in the case of Police Officers, save where, owing to exigencies of duty, it is necessary to alter a duty roster. Managers should ensure that the entitlements to daily and weekly rest should, so far as is consistent with operational

requirements of the Service, be complied with irrespective of whether or not an exemption from the statutory entitlements may apply.

### **Rest Periods (In Work Rest Breaks):**

The WTR provide that a worker is entitled to an uninterrupted break of 20 minutes away from his or her workstation, when daily working time is more than 6 hours. It is potentially arguable that, this break of 20 minutes should be applied in respect of each 6 hours worked. Therefore, in instances where workers are working for a period of 12 hours, an uninterrupted break of 40 minutes could be argued for. This rationale could be applied on a pro-rata basis so that if a worker works for 9 hours, they should take a break of 30 minutes.

An in-work rest break must be a break in working time rather than be taken at the start or end of a working day. The break should also not overlap with the daily rest period. In other words, workers should not be able to forego breaks in order to leave work early. Lunch breaks count as in-work rest breaks for the purposes of the Regulations. The WTR do not prescribe when during the working day the break must be taken but ideally it should be around the middle of the working day. Managers must be aware that breaks provided for under a contract of employment or Police Regulations may be more generous than the minimum quoted under the WTR.

It is the responsibility of individual members of staff *and* their line management to ensure that they can take rest breaks they are entitled to and a culture of taking such breaks should be encouraged. The consent of the individuals concerned must be obtained if it is intended to hold meetings or conduct work-related discussions during refreshment/meal breaks. In exceptional circumstances, for instance, where there is an emergency or the need to ensure continuity of service, officers may work during a period, which would otherwise be a rest break. In these circumstances, the member of staff and his/her line management should, wherever possible, allow him/her to take an equivalent period of compensatory rest.

Police Regulations legislate for the following rest periods:

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|---|------------------------|
| • Less than 6 hours worked                | 30 minutes rest break. |
| • 6 hours or more, but less than 7 hours  | 35 minutes rest break. |
| • 7 hours or more, but less than 8 hours  | 40 minutes rest break. |
| • 8 hours or more, but less than 9 hours  | 45 minutes rest break. |
| • 9 hours or more, but less than 10 hours | 50 minutes rest break. |
| • 10 hours or more                        | 60 minutes rest break. |

The provisions of the WTR are a **minimum requirement** intended to ensure the protection of health & safety. A failure by an individual to take an in-work rest break (or by a line manager in not permitting a break or being aware that a break is not being taken) is likely to be relevant in any stress at work claim and / or a claim for breach against the WTR. Line managers can require an individual to take a break by way of an instruction to the individual. A risk assessment may assist when considering individuals who regularly fail to take appropriate "in work" rest breaks especially when instructed to do so and Line Managers should seek advice as to whether discipline action should be implemented. Individuals themselves cannot opt-out of rest breaks.



Pregnant officers are entitled to additional rest periods under Health and Safety legislation and HSE guidance. The force is required to provide suitable areas for them to rest at work. Any additional rest period is specific to the circumstances of each officer and should be based on their pregnancy risk assessment or medical advice and may change during the course of their pregnancy.

**Exemptions:** Regulations 18 and 21 are relevant. Police Regulations and police staff conditions of service already set out entitlements to rest periods. Where they provide individuals with additional entitlements these will take precedence over Working Time Regulations.

### **Record Keeping and Monitoring:**

The WTR requires employers to keep records of work and retain those records for two years (from the date the record was made) to show that the limits relating to working time, night work and hazardous duties performed at night and the requirements for health assessments are being complied with.

A record of workers who have agreed to work more than 48 hours a week (the opt-out) should be recorded and retained for six years.

Records of work need to be kept in every instance. Officers who have signed an Opt-Out agreement are not exempted from this provision. If an individual is working excessive hours, as above there remains a duty of care towards them and such steps as referring them for a risk assessment is recommended.

### **Duty Rosters**

Under Police Regulations all rosters must set out an officers' rest days, free days, public holidays on which they are required to work and specific start and finish times of scheduled periods of duty for at least three months from when it comes into effect and must be published at least one month before they commence. Subject to exigencies of duty, any changes should be notified to officers at least one month in advance.

Any changes to rosters should only be made after full consideration of operational, welfare and practical circumstances, including any financial impact. A new roster should be subject to an Equality Impact Assessment (EIA) as part of the Force's duty to promote equality.

A shift pattern needs to recognise that demand will be higher on certain days and times in the week and the need to have officers available to meet that demand is an over-arching principle. The determination of properly identified local demand rests with management, and the rostering of any duty must be in accordance with that demand and due consideration to safe systems of work. Any shift pattern must be seen as a part of an overall resource management package which includes the use of flexible and part-time working and the management of overtime.

When designing such patterns, or in circumstances where such shift patterns are inappropriate and others are required, the design of a particular shift pattern must take into account the following principles

- Shift lengths and start and finish times should be determined by local operational demands
- A shift should ideally be between 8 and 10 hours in length. 12 hour shifts, whilst popular with some, are not recommended on the grounds of operational efficiency, service provision and health and welfare.
- Where possible, and PFEW would recommend that, rest days are rostered no less than two together.
- Where possible, rosters should follow the sequence of earlies, lates and nights, unless there are sound reasons for not doing so.
- There should be no more than four consecutive nights
- Where possible, overtime should be avoided at the end of a night shift.
- Rest days shall be planned to allow for recovery following night shifts.
- There should be no more than 6 consecutive shifts before a rest day.
- Regular shortfalls should be accommodated through the intelligent use of flexible working opportunities to fill areas of peak demand.

It must be recognised that, due to the nature of police work, published rostered shifts may have to be changed subject to the exigencies of duty; however, adherence to these principles should minimise such occurrences.

**It is the PFEW position that WTR's are covered within the 2003 Police Regulations which states at Annex E, Determination for Regulation 22 at 3, (e)(f)(g).**

e) Subject to paragraph (f), a duty roster shall make provision for:

- i) an interval of not less than 11 hours between the ending of each of a member's daily periods of duty (or in the case of a part-time member or a member working in accordance with variable shift arrangements, his shifts) and the beginning of the next; and
- ii) an interval between each of his rostered rest days not exceeding 7 days, unless in the case of a part-time member, a longer interval has been agreed between the member and the chief officer;

unless the Joint Branch Board agrees otherwise, such agreement providing for an equivalent period of compensatory rest.

f) Where, owing to the exigencies of duty, it is necessary to alter a duty roster, the officer responsible for making the alteration shall endeavor, so far as practicable, to avoid thereby requiring a member to do an additional daily period of duty or, in the case of a part-time

member or a member working in accordance with variable shift arrangements, a shift, in circumstances where the conditions in sub-paragraph (e)(i) and (ii) would not be satisfied in relation thereto.

g) Where a duty roster is altered in accordance with sub-paragraph f) and a member is required to do an additional daily period of duty or a shift in circumstances where the conditions in sub-paragraph (e)(i) and (ii) are not satisfied in relation thereto, that member shall be entitled to an equivalent period of compensatory rest.