



**Oifig an Stiúrthóra Náisiúnta, Acmhainní Daonna**

Feidhmeannacht na Seirbhísí Sláinte

Ospidéal Dr. Steevens'

Baile Átha Cliath 8

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## Memorandum

**To:** Chief Executive Officer  
Each National Director  
Each Assistant National Director HR  
Each Assistant Chief Finance Officer  
Each Hospital Group CEO  
Each Hospital Group Director of HR  
Each Chief Officer CHOs  
Each Head of HR CHOs  
Head of HR, PCRS  
Each CEO Section 38 Agencies  
Each HR Manager Section 38 Agencies  
Each Employee Relations Manager  
Each Group Director of Nursing & Midwifery  
Each Group Director of Midwifery  
Each Clinical Director  
Director National Ambulance Service

**From:** Anne Marie Hoey, National Director of Human Resources

**Date:** 18<sup>th</sup> February 2021

**Re:** Organisation of Working Time Act 1997 – compliance with rest provisions and maximum weekly working hours during COVID-19

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Dear Colleagues

As the healthcare system redoubles its efforts in response to COVID-19, health service employees have been working diligently to ensure delivery of essential services and I wish to convey my appreciation for the high level of commitment being shown during this critical period.

The safety, health and welfare at work of all employees continues to be of paramount importance during the COVID-19 pandemic and it is incumbent on employers to ensure compliance with the provisions of the Organisation of Working Time Act 1997 (the **OWT**). The OWT provides, inter alia, for minimum rest periods and maximum weekly working hours<sup>1</sup>. In

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<sup>1</sup> The OWT does not preclude employers from granting entitlements in excess of the statutory provisions.

summary, the key provisions of the OWT in relation to minimum rest and maximum working time are as follows:

- Rest breaks while at work.
- A daily rest period of 11 consecutive hours in each period of 24 hours during which the employee works for the employer.
- A weekly rest period of 24 consecutive hours in each 7-day period. This reference period can be averaged over 14 days. If the weekly rest day is preceded by a working day then the employee must first receive his/her daily rest entitlement of 11 hours consecutive rest. This effectively means that the employee concerned is entitled to 35 hours consecutive rest.
- Maximum average net weekly working time of 48 hours.

Health service employers are required to ensure that employees are granted their statutory entitlements, at a minimum, and to demonstrate compliance by maintaining accurate records that can be produced for inspection if required. The employer's obligations under the OWT apply in respect of all health service employees regardless of whether they are required to attend the work premises or are working from home (WFH) on a temporary basis during COVID-19.

## **1. Rest Provisions**

1.1 The OWT provides for daily rest periods, rest breaks at work, and weekly rest periods as set out in the summary below. Appropriate rest breaks and rest periods are vital to the health and safety of employees and are of importance in the efficient and effective operation of the workplace<sup>2</sup>. Managers should notify employees of their entitlements in relation to daily and weekly rest periods and rest breaks and the manner in which these will be granted. Payment in lieu is not permitted.

### **1.2 Daily Rest Period (section 11)**

The OWT provides that an employee is entitled to 11 consecutive hours rest in each 24 hour period during which the employee works for the employer.

### **1.3 Rests and intervals at work (section 12)<sup>3</sup>**

The OWT provides that an employee is entitled to daily breaks as follows:

- Break of at least 15 minutes duration after working for a period of more than 4 hours 30 minutes.
- Break of at least 30 minutes duration after working for a period of more than 6 hours. This break may include the 15-minute break referred to above.

Breaks must be taken during the working day/shift and not at the end of the employee's working day/shift.

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<sup>2</sup> This includes employees who are temporarily working from home during COVID-19.

<sup>3</sup> While the OWT specifies minimum rest breaks employers may stipulate longer breaks.

#### 1.4 Weekly Rest Periods (section 13)

The OWT provides that an employee is entitled to a weekly rest period of 24 consecutive hours per each seven day period. The reference period may be averaged over 14 days. A weekly rest period must follow a daily rest period of 11 hours.

Accordingly, in practical terms an employee is entitled to weekly/fortnightly rest as follows:

- 35 hours rest (11 hour rest period followed by 24 hour rest) once a week, or
- 35 hours rest (11 hour rest period followed by 24 hours rest) twice a fortnight, or
- 59 hours rest (11 hour rest period followed by 48 hours rest) once a fortnight.

#### 1.5 Exemption or variation of entitlements

The circumstances in which the rest breaks, daily and weekly rest periods set out in sections 11, 12 and 13 may be varied are set out in **Section 6(1)** and **Section 6(2)** of the OWT. The following is a brief summary.

1.6. **Section 6(1)** of the OWT applies to the following circumstances:

- The *Organisation of Working Time (General Exemptions) Regulations, 1998* exempt certain activities from the rest breaks, daily and weekly rest periods set out in sections 11, 12 and 13 of the OWT. Health service employees who are directly involved in ensuring continuity of the provision of services, particularly relating to the reception, treatment or care of persons in hospitals, other health service residential institutions and the ambulance service come within the scope of the 1998 Regulations and therefore are covered by the exemption [view here](#). An employee must be “engaged wholly or mainly in carrying on or performing the duties of the activity concerned” to come within the scope of this derogation. It is a matter for the employer relying upon the derogation to demonstrate it applies in respect of an employee<sup>4</sup>. There is no blanket exemption in respect of health service employees.
- Where collective agreements providing for a similar exemption have been concluded by the parties and approved by the Labour Court.

Where either of the above circumstances exempt the employer from the obligation to provide statutory rest periods as regards a particular employee, the employer **must ensure** that *equivalent compensatory rest* is made available to the employee.

1.7 **Section 6(2)** of the OWT applies to the following circumstances:

- Where shift workers who change shifts and cannot avail themselves of the rest period are exempted in respect of daily (section 11) and weekly (section 13) rest periods as provided for in section 4(1) of the OWT;

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<sup>4</sup> The Labour Court considered the application of this provision in Determination No. DWT1917: “The Court applies to the word ‘mainly’ the normal meaning of the word being ‘chiefly’ or ‘principally’ or ‘for the most part’. At the very least, to meet the definition requires that these activities constitute more than 50% of the work concerned. The burden of establishing that this is the case falls to the employer. If an employer cannot establish that an employee’s work consists of more than 50% of an exempted activity then, logically, the employee is entitled to the protections of the Act.” [view here](#).

- Where persons employed in activities consisting of periods of work spread out over the day are exempted e.g. split shifts in respect of the daily (section 11) and weekly (section 13) rest periods as provided for in section 4(2) of the OWT;
- Where employers are exempted from the obligation to provide daily and weekly rest periods and breaks as provided for in sections 11, 12 and 13 of the OWT due to exceptional circumstances or an emergency, including an accident or the imminent risk of an accident, or otherwise the occurrence of unusual and unforeseeable circumstances beyond the employer's control as provided for in section 5 of the OWT.

Where any of the above three circumstances exempt the employer from the obligation to provide statutory rest periods as regards a particular employee, the employer **must ensure** that the employee is afforded:

- (i) Equivalent compensatory rest, **or**
- (ii) Where, for objective reasons, (i) is not possible, appropriate protection.

## 1.8 Compensatory Rest Periods

Please refer to the Workplace Relations Commission (WRC) **Code of Practice on Compensatory Rest Periods** [at this link](#). This Code sets out the general principles of and arrangements for equivalent compensatory rest and appropriate protection and contains some examples. An employer is obliged to inform employees of the process to follow if they miss out on their statutory rest break or rest period e.g. inform their line manager. *The onus is on the employer to ensure that employees avail of their equivalent rest break or rest period.* It is not sufficient to show that employees were told what they could take. There is a positive duty on managers to ensure that employees take their compensatory rest in order to ensure that the employer is compliant with the OWT. Exempt employees who miss out on their statutory rest entitlements should receive equivalent compensatory rest **as soon as possible after the statutory rest period has been missed out on.**

1.9 The WRC Code of Practice provides that exempt employees, as provided for in section 6(1) and section 6(2) of the OWT, who miss out on their statutory rest entitlements should receive **equivalent compensatory rest** as soon as possible after the statutory rest has been missed out on and gives examples. The Code states that it is most important for employers to make rest time available to employees to allow them to recuperate from long periods of work without adequate rest. The OWT does not specify any timeframes within which compensatory rest must be made available. However, when determining when compensatory rest is to be given, an employer should always have regard to the circumstances pertaining in the individual place of employment and to the health and safety requirements for adequate rest. In this context, it is important that the compensatory rest for rest breaks at work and for daily rest periods, in particular, be provided as soon as possible and, generally, in an adjacent time frame. The employer should be in a position to demonstrate that the equivalent compensatory rest period can reasonably be regarded as equivalent.

1.8 In the case of employees who fall under any of the three exempt categories under Section 6(2) of the OWT, as outlined in section 1.7 above, the following provision also applies. If for reasons that can be objectively justified, it is not possible for an employer to ensure that an employee has available to himself or herself the equivalent rest period or break, the employer

must make such arrangements as respects the employee's conditions of employment as will compensate the employee – otherwise referred to as “**appropriate protection**”. The WRC Code of Practice states that while neither “arrangements as respects the employee's conditions of employment as will compensate the employee” nor “appropriate protection” are defined, the Act specifies that these concepts do not include:

- i) the granting of monetary compensation to the employee, or
- ii) the provision of any other material benefit to the employee, other than the provision of such a benefit as will improve the physical conditions under which the employee works or the amenities or services available to the employee while he or she is at work.

The WRC Code of Practice provides that a common sense approach should be adopted by employers and employees in such situations which takes account of the circumstances existing in the employment and has regard to the safety, health and well-being of employees. While it is not feasible to define such appropriate protection/conditions of employment measures, the concept might include measures which, in addition to normal health and safety requirements, provide for enhanced environmental conditions to accommodate regular long periods of attendance at work, refreshment facilities, appropriate facilities/amenities and other measures. These examples are not exhaustive and other measures may be considered by an employer as relevant to the particular circumstances. *An employee cannot be paid in lieu of statutory compensatory rest*<sup>5</sup>.

## 2. Maximum weekly working time

2.1 Section 15 of the OWT provides that an employer shall not permit an employee to work for more than 48 hours (net) per week calculated over a period of time (the “reference period”). The 48-hour net maximum working week can be averaged according to the following rules:

- For health service employees generally – a reference period of **4 months**.
- For health service employees where employees are directly involved in ensuring continuity of service particularly relating to the reception, treatment or care of persons in hospitals, other health service residential institutions and the ambulance service <sup>6</sup> - a reference period of **6 months**

Managers should identify the appropriate averaging period for an employee's weekly working hours based on the nature of the work performed and ensure that the 48-hour limit is not exceeded.

2.2 In the case of **NCHDs**, the HSE's guidance document on EWTD compliance provides that the reference period for average weekly working hours may be extended up to the doctor's term of employment or 12 months – whichever is the shorter. Please refer to *HSE HR Circular*

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<sup>5</sup> Consultant Contracts include specific provisions regarding compensatory rest and the circumstances and timeframes within which rest days may be availed of or claimed as payment in lieu. Specific provisions for Consultants regarding compensatory rest accruing to a Consultant arising from the provision of service while on-call and circumstances where payment may apply are set out in the document titled '*Provision of compensatory rest for Consultants*' (16 April 2014).

<sup>6</sup> Employees who come within the scope of Section 15(1)(b)(i) of the Organisation of Working Time Act 1997 as amended.

28/2017 Reporting of extent of compliance with the requirements of the European Working Time Directive in relation to Non-Consultant Hospital Doctors and Social Care staff [here](#).

2.3 A "reference period" is a consecutive period of time that does not include the following:

- (i) Any period of statutory annual leave
- (ii) Any period of sick leave
- (iii) Any period of statutory leave granted under the following:
  - Maternity Protection Act, 1994
  - Adoptive Leave Act, 1995
  - Parental Leave Act 1998
  - Carer's Leave Act 2001
  - Paternity Leave and Benefit Act 2016
  - Parent's Leave and Benefit Act 2019

### 3. Definition of Working Time

3.1 The OWT defines working time as any time that the employee is

- a) at his or her place of work or at his or her employer's disposal and
- b) is carrying on or performing the activities or duties of his or her work.

The Act defines a rest period as any time that is not working time.

Working time is defined as net working time i.e. exclusive of rest breaks, standby periods and on-call periods (that occur away from the work premises).

**Note:** Please refer to HSE HR Circular 28/2017 for specific guidance in relation to **NCHDs** and **Social Care Staff** [view here](#).

### 4. Records

4.1 Health service employers are obliged to keep records to show compliance with the OWT and to demonstrate that employees have received their statutory entitlements. The employer's obligations to maintain records applies regardless of whether an employee is required to attend the work premises or is working from home on a temporary basis during COVID-19.

4.2 Records required to be kept by the employer are prescribed by **S.I. No. 473 of 2001 - Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations, 2001**. The Regulations incorporate statutory form OWT1 [view here](#). Records must be retained by the employer for at least 3 years.

4.3 If there is no method of electronically recording employees' hours of work (e.g. flexi-time or clocking-in facilities, designated IT systems), the employer must record the days and hours worked each week using an OWT1 Form or a similar paper format<sup>7</sup>.

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<sup>7</sup> In accordance with European Court of Justice case law, employers are required to put in place an "objective, reliable and accessible system enabling the duration of working time worked each day by each worker to be measured" [view here](#).

4.4 The WRC Inspections Service may carry out inspections at employers' workplaces to check compliance with the OWT. These records must be readily available for inspection by the WRC if required.

4.5 Records relating to NCHDs are not required to be in the form described in 4.2 above. They must meet the standard prescribed by *S.I. 494 of 2004 – European Communities (Organisation of Working Time) (Activities of Doctors in Training) Regulations 2004* [here](#). The details to be made available to a WRC Inspector are as per Regulation 11.

These records must be held for a period of at least three years from the date of their making. A copy of these records must be made available to an NCHD who requests such records or to the Minister for Health.

Please ensure that this memorandum is brought to the attention of managers within your area of responsibility and that appropriate steps are being taken to ensure compliance with the statutory rest breaks and rest periods and maximum weekly working hours (48-hour limit) provisions. Please ensure also that proper recording-keeping is being maintained in respect of all employees in line with the OWT.

#### **Queries**

Queries from individual employees or managers should be referred to local HR/Employee Relations Departments. Please note that the National HR Helpdesk is also available to take queries from employees Tel: 1850 444 925 E: [ask.hr@hse.ie](mailto:ask.hr@hse.ie)

Queries from HR/Employee Relations Departments on this memorandum may be referred to Anna Killilea, Corporate Employee Relations, HR Directorate, 63-64 Adelaide Road, Dublin 2 Tel: 01 6626966 E: [anna.killilea@hse.ie](mailto:anna.killilea@hse.ie)

Yours sincerely



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