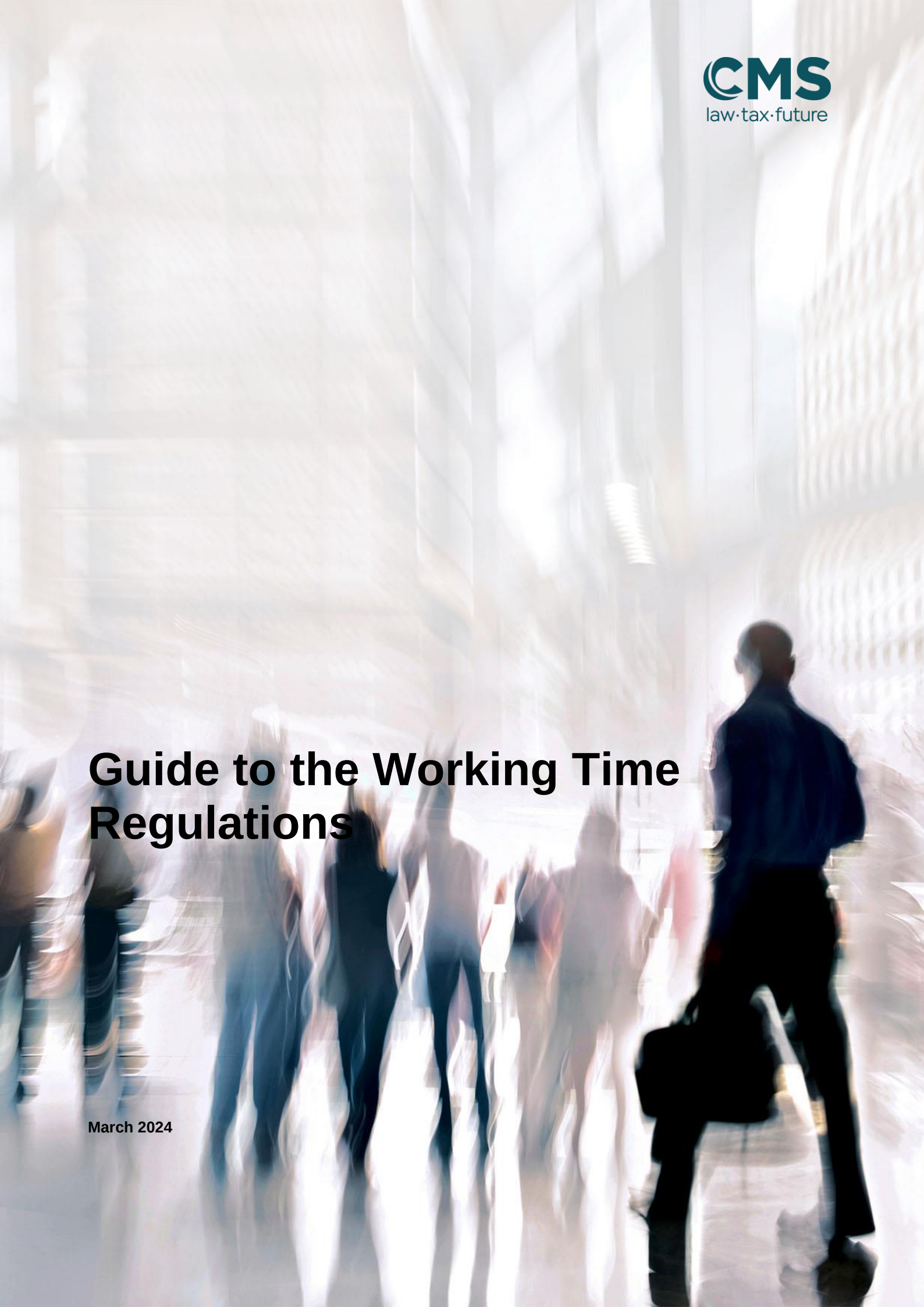

Guide to the Working Time Regulations

March 2024

Guide to the Working Time Regulations

This guide covers:

— introduction;

— who is covered by the Regulations?

— what is “working time”?

— the maximum working week;

— holiday pay;

— daily and weekly rest periods and rest breaks;

— night workers;

— non-compliance with the Regulations; and

— settlement of claims.

Introduction

The Working Time Regulations 1998 came into force on 1 October 1998, implementing the EU Working Time Directive in the UK. Similar provisions were adopted by other European Union countries, who also implemented the EU Directive into national law.

In summary, a worker has the following basic rights under the Regulations:

— to work no more than an average 48-hour week;

— to 5.6 weeks’ paid holiday per year;

— to 11 hours’ rest a day;

— to a day off each week;

— to a 20-minute rest break if the working day is more than six hours;

— (for night workers) to work no more than an average eight-hour day; and

— (for night workers) to receive free health assessments.

It is worth bearing in mind that the EU Directive was brought in as a health and safety measure, with the aim of minimising the risks of accident and injury due to excessive working hours. This background has affected the way in which the EU Directive and the Regulations have been interpreted by the courts and the tribunals and will continue to do so.

Who is covered by the Regulations

The Regulations apply to all “workers”. The definition of worker under the Regulations is broad, so it is likely that most staff will be covered. It includes:

— employees;

— part-time and temporary workers;

— some consultants/freelancers; and

— agency workers.

The definition covers any individual who performs work personally for their employer. A worker may work for an organisation, business or individual. The Regulations do not, however, apply to individuals who are genuinely self-employed (also known as “independent contractors”).

There are a number of other categories of worker to whom the Regulations either do not apply at all or apply with modification. For example, mobile workers in the road transport sector are generally covered by different rules.

What is working time?

“Working time” is defined as:

— any period during which a worker is working, at their employer’s disposal and carrying out their activities or duties;

— any period during which a worker is receiving relevant training;

— any other period which is to be treated as working time for the purpose of the Regulations under an agreement with a trade union (or other industry or local agreement).

Working time will therefore include business travel time, working lunches, most business development activity (such as evening seminars etc) and time spent abroad working for the employer.

Working time does not normally include travel from home to work (although the European Court of Justice has ruled that for workers with no fixed workplace, travel between home and customers constitutes working time). Working time also excludes rest periods when no work is done.

The maximum working week

What is the maximum?

The Regulations provide that a worker’s working time must not exceed an average of 48 hours per working week, averaged over a “reference period” of 17 weeks. The reference period can be extended to 26 weeks or longer for certain workers. There is a technical method, beyond the scope of this guide, for working out actual working time.

The weekly working time limit does not apply to workers whose working time is “unmeasured” ie not measured or predetermined or determined by the worker themself, on account of the specific characteristics of their job. This would include managing directors or others with autonomous decision-making powers.

Agreement to exclude the maximum

A worker can choose to opt out of the 48-hour limit on weekly working time (for a definite or indefinite period) by signing a waiver. The waiver must give the worker the right to cancel their opt out whenever they wish to do so, although the worker has to give the employer at least seven days’ notice or (if agreed in writing) longer notice of up to three months. In practice, opt out clauses are often included in workers’ contracts as a matter of course.

It is unlawful to dismiss or victimise a worker who refuses to opt out of the weekly working time limit or who, having opted out, decides to opt back in so that the applies again.

The Regulations impose certain record-keeping requirements on employers although those provisions have been recently been amended to clarify that an employer does not need to record each worker's daily working hours if it is able to demonstrate compliance in another way.

Holiday and pay

Holiday entitlement

Under the Regulations, full-time workers are entitled to 5.6 weeks’ leave consisting of (i) four weeks’ paid holiday provided for by the EU Directive (Reg 13 leave) and (ii) an additional 8 days’ bank and public holidays in the UK (Reg 13A leave).

There is no statutory right or obligation for workers to take the additional, Reg 13A holiday entitlement on the bank holiday days themselves, so as not to unduly affect businesses which require people to work on those days.

Holiday entitlement is calculated on a pro rata basis for part-time employees. This means that a part-time worker who works three days per week would be entitled to 16.8 days’ holiday a year (5.6 weeks of three working days). However, statutory holiday entitlement will not exceed 28 days even where an employee works more than five days a week.

Holiday pay

For employees with normal working hours whose pay does not vary with the amount of work done, the rate of pay for a week’s holiday is their normal contractual rate of pay. Where an employee’s pay does vary with the amount of work done or number of hours worked, or where they have no normal working hours, the calculation of a week’s pay can be more complicated and their holiday pay may vary depending on when the holiday is taken.

EU and UK case law has complicated this area even further, confirming that certain overtime and commission payments must also be included in the calculation of holiday pay. In response, the UK Government introduced legislation on 1 July 2015 which limits the period in relation to which a worker can claim back-dated holiday pay to two years ending on the date the claim is brought.

Since then, and following Brexit, the UK Government has consulted on proposed reforms to working time and holiday and published amending legislation, The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 (ER Regulations), that came into force on 1 January 2024. One of

the proposed reforms was to consolidate the two types of holiday entitlement – Reg 13 and Reg 13A leave – and although this proposal was not taken forward, the Regulations are intended to clarify what should be included in holiday pay for the purposes of Reg 13 leave.

Irregular hours and part-year workers

The ER Regulations set out a new system of holiday accrual for irregular hours and part-year workers (which includes, for example, casual workers and term-time workers).

For leave years starting on or after 1 April 2024, these workers' holiday entitlements will be calculated in hours rather than weeks, and will accrue on the last day of each pay period, at the rate of 12.07% of the actual hours worked in that pay period.

Employers may now choose to pay rolled-up holiday pay (which was previously ruled unlawful) as an uplift of 12.07% to the worker's remuneration for work done in each pay period. Such workers must be allowed to take their holiday, but will not be paid at the time they take it.

Payment in lieu of holiday

Under the Regulations, employers can distinguish between workers' statutory entitlement of 5.6 weeks' paid holiday (for which payment in lieu can only be made on termination of employment) and any additional contractual entitlement (which can be paid in lieu at any time if permitted by the terms of the contract).

Carrying forward holiday entitlement

Under the Regulations, at least four weeks' holiday (the basic entitlement under the EU Directive) must be taken in the holiday year in which it accrues and cannot be carried over into the next holiday year (the "use it or lose it" principle) other than in certain limited circumstances. Those circumstances include where they have been absent from work due to a period of family-related leave and sickness (see Holiday and sick leave below). The additional element (ie the extra 1.6 weeks' holiday) can be carried forward until the next holiday year if this is provided for in a relevant agreement, for example a contract of employment. Any further contractual entitlement may be carried over as agreed between the employer and worker.

Employers commonly allow for unused holiday to be carried over from one holiday year to the next, although limit this in certain ways (e.g. by the number of days permitted to be carried over and/or the period in which carried over holiday must be used) in order to manage cover requirements effectively and to encourage workers to take their full entitlement.

For health and safety reasons, an employer should do all they can to ensure workers actually take their holiday. An employer will be liable for a breach of the Regulations if a worker can prove that they were denied the right to take annual leave by their employer or that their employer failed to ensure they had a reasonable opportunity to take it.

Holiday and sick leave

From 1 January 2024, the ER Regulations introduce a statutory right for a worker to carry over Reg 13 leave if they have been unable to take it: (i) due to taking a period of statutory leave (eg maternity leave and other family-related leave); and (ii) as a result of taking a period of sick leave where the carried over leave must be taken within 18 months of the end of the leave year to which it relates.

An employee can opt to take holiday during a period of sickness absence (which may be to their benefit where, for example, they have exhausted their right to statutory and/or contractual sick pay). While an employer can give notice to a worker under the Regulations specifying dates on which statutory holiday must be taken (for example, to avoid them taking holiday once they have returned to work), doing so while an employee is on sick leave would be contrary to the health and safety objective of the working time legislation

and could amount to a breach of trust and confidence leading to a claim for constructive dismissal and/or a disability-related discrimination.

Where a worker becomes sick during a period of holiday, they can postpone their holiday and take it at a later date.

Daily and weekly rest periods and rest breaks

The Regulations provide for the following daily and weekly rest periods and rest breaks subject to certain limited exceptions.

Daily rest

Adult workers are normally entitled to a rest period of at least 11 consecutive hours in each 24-hour working period.

Weekly rest period

Adult workers are normally entitled to an uninterrupted rest period of at least 24 hours in each seven-day working period. There are special rules that govern how this period may be arranged and combined with other rest periods.

Rest breaks

Where a worker's daily working time is more than six hours, they are entitled to a rest break. Unless there is an appropriate trade union or work agreement that provides otherwise, the default position is that the break must be for an uninterrupted period of 20 minutes. A worker is only entitled to one rest break, regardless of how long they work in excess of six hours. The worker must be able to take this break away from their workstation.

Workers with unmeasured working time

Workers whose working time is unmeasured (see What is the maximum? above) are not covered by the right to daily or weekly rest periods or rest breaks.

Compensatory rest

Different rules apply in certain special cases and to shift workers. Where a special case or shift worker is unable to take a daily or weekly rest period (and for a special case worker, a rest break) their employer must allow them to take an equivalent period of compensatory rest wherever possible. Where it is not possible to provide compensatory rest, an employer must afford them such protection as necessary to safeguard their health and safety.

Night workers

Night time under the Regulations means a period of not less than seven hours which includes the period between midnight and 5 am. A night worker is someone who normally works at least three hours of their daily working time during the night time.

Maximum duration of night work

Employers must ensure that night workers do not work more than an average of eight hours in each 24 hours during a 17-week reference period. There are special rules, beyond the scope of this guide, for calculating working hours.

Special hazards

If a night worker's work involves special hazards or heavy physical or mental strain, working hours cannot be averaged under the above provisions and a strict limit of 8 hours in any 24-hour period applies.

Health assessments

Employers must offer night workers a free health assessment before assigning them to night work. A full medical examination may also be advisable.

Transfer to day work

If a night worker's doctor advises the employer that the worker is suffering from health problems which are connected to night working, the employer must transfer the worker off night work, to work to which the worker is suited where it is possible to do so.

Non-compliance with the Regulations

Enforcement by the Health and Safety Executive and local authorities

Non-compliance with the Regulations can potentially be very serious. Working time limits are enforced by local authorities and the UK workplace health and safety regulator, the Health and Safety Executive. These bodies may enforce such limits on their own initiative.

Failure by an employer to comply with certain requirements of the Regulations is a criminal offence. While criminal prosecutions are extremely rare, they cannot be ruled out.

Claims by workers

A worker can bring a claim in the employment tribunals where their employer has deprived them of the right to the following:

— daily and weekly rest;

— rest breaks;

— annual leave;

— payments in respect of annual leave; and

— accrued holiday pay on termination.

Compensation is technically unlimited as it is awarded on the basis of what the tribunal considers “just and equitable” in all the circumstances, having regard to the extent of the employer’s breach of the Regulations and any loss sustained by the worker.

A claim by a worker must generally be presented within three months of the date on which the right should have been permitted or the payment made, although the employment tribunals have a discretion to extend this time limit. The time limit may also be extended through participation in the Acas early conciliation scheme.

A worker can also bring a claim if they are dismissed or suffer a detriment because they enforced or sought to enforce their rights under the Regulations.

Settlement of claims

Claims by workers under the Regulations can only be settled by a settlement agreement or through an Acas conciliation officer.

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Further resources

Government guidance on working time: https://www.gov.uk/maximum-weekly-working-hours

Guidance from the Health and Safety Executive on working time: The Working Time Regulations (hse.gov.uk)