



**APRIL COMPLETE CARE SOLUTIONS LTD
(The “Company”)**

Working Time Regulations

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GUIDE TO THE WORKING TIME REGULATIONS 1998 (as amended)

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1. INTRODUCTION

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The Working Time Regulations 1998 came into force on 1 October 1998. They have been amended in part by the Working Time Regulations 1999 and the Working Time (Amendment) Regulations 2003. Members should obtain a copy of both –the 1998, 1999 and 2003 Regulations from HM Stationery Office (see your local telephone directory for the relevant telephone number) and ensure that all managers and consultants have a good working knowledge of their provisions.

In the following pages, REC has set out some general guidance to assist members in their understanding and implementation of the Regulations. This document should only be read as a guidance document.

There are many provisions in the Regulations which give rise to widespread concern because of their lack of clarity. The fact that the Regulations are given to variations in interpretation will inevitably cause some diversity of practice in the way organisations implement them. The Government has made clear its intention to leave the interpretation of many of provisions in the Regulations to the Courts and the first court decisions on issues arising out of the application of the Regulations have already been reported. These are discussed in detail in the REC Bulletin from time to time.

These guidelines are detailed and complex in some areas and members may consider it more appropriate to pass copies of the Summary of Main Provisions of the Regulations on page 3 and the Summary Matrix on page 37 to their consultants as a general guide and to ensure that full guidelines are passed to those management staff who require a more detailed working knowledge of the provisions and implications of the Regulations. We also recommend that all members obtain copies of the DTI guidance notes on the Regulations.

Finally Members should be reminded that the Regulations set down minimum standards. There is nothing to prevent employers and employment businesses from giving workers more than the statutory minimum requirements.

2. THE WORKING TIME (AMENDMENT) REGULATIONS 2003 – EFFECTIVE ON 1 AUGUST 2003

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The new Regulations amend the original Working Time Regulations 1998 by removing the exclusion of road, rail, air, sea, inland waterways and lake transport sectors, sea fishing, offshore work and the activities of junior doctors from the scope of the Working Time Regulations. The new Regulations do not amend the rights contained in the 1998 Regulations, they just amend who these rights apply to. They will have the following effect:

- (i) All non-mobile workers in the road, sea and sea fishing sectors will be entitled to an average 48 hour working week, 4 weeks paid annual leave, 11 hours rest between working days, 1 day's rest per week, a statutory in-work rest break, imposed limits on night work and, the offer of free health assessments to night workers;

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- (ii) The full provisions of the Working Time Regulations will also apply to all workers in the rail and offshore sectors and to all workers in air who are not covered by the sector specific Aviation Directive;
- (iii) For workers who are doctors in training the weekly working time limits will be phased in over a transitional period beginning 1st August 2004. All the other provisions of the Working Time Regulations will apply in full to doctors in training from 1st August 2004;
- (iv) Mobile workers not covered by the Road Transport Directive i.e. taxi drivers, couriers will be entitled to an average 48 hour working week, 4 weeks paid annual leave, health assessments if a night worker and provision for adequate rest;
- (v) Mobile workers covered by the Road Transport Directive i.e. HGV drivers, will be entitled to 4 weeks paid annual leave and health assessments if a night worker.

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3. THE WORKING TIME REGULATIONS 1999 AMENDMENTS – EFFECTIVE ON 1 DECEMBER 1999

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The 1999 Regulations have amended the 1998 Regulations in the following way:

3.1. RECORD KEEPING FOR “OPTED OUT” WORKERS

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These amending Regulations remove the record keeping requirements imposed on employers for workers who have signed an opt-out agreement agreeing to work more than the 48-hour week. This will significantly relieve the administrative burden for employers¹. However a record of those who have signed an opt-out agreement must be kept.

The old requirement to record the hours of all workers is replaced by a requirement to record working hours only for those who have not signed an opt-out agreement

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(For further information on record keeping see paragraph 5.4 below)

3.2. “UNMEASURED WORKING TIME” DEROGATION

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The existing “unmeasured working time” derogation in Regulation 20² of the Working Time Regulations 1998 dis-applies the working time limits for workers whose working time cannot be measured or predetermined or where it can be determined by the worker himself.

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The Government now proposes to amend this derogation and extend it to many more workers by broadening its scope to hours which workers choose to work in addition to their contractual hours.

For example a worker who is contracted to work between 8.30am and 5.30pm but who usually works until 7.30pm, will now find that the additional 2 hours are covered by the extended “unmeasured working time” derogation. In other words these additional hours will not be taken into account when determining whether the worker has worked in excess of the statutory average 48-hour week.

¹ Reg 3(1) of 1999 Regs amends 3 and 4 of 1998 Regs

For further ² Regulation 4 of 1999 Regulations amends Regulation 20 of 1998 Regulations

4. SUMMARY OF MAIN PROVISIONS OF THE REGULATIONS

The Regulations implement the European Working Time Directive into UK law. They are primarily health and safety legislation and are intended to protect workers from the risks that arise out of working excessively long hours or for long periods without breaks.

The Regulations provide that all workers should be entitled to:

- a maximum average working week (inclusive of overtime) of not more than 48 hours (the averaging period to be 17 weeks or longer in some cases) [an absolute maximum of 40 hours a week in the case of young workers and a maximum working day of 8 hours in the case of young workers except where required for continuity of service or a surge in demand, or where no adult worker is available, or where it would not adversely affect a young workers education or training]
- a 20 minute rest break where the working day is longer than 6 hours [30 minutes rest in the case of young workers where the working day is longer than 4 ½ hours*];
- a minimum daily rest period of 11 consecutive hours in each 24 hour period [12 hours rest in the case of young workers];
- a minimum of 24 hours rest every 7 days (or 48 hours every 14 days) [48 hours rest in every 7 days in the case of young workers]. This rest period does not have to include a Sunday;
- a restriction of 8 hours night work in every 24 hour period, the restriction of 8 hours to be averaged except where the work involves special hazards or heavy physical or mental strain in which case it can never exceed 8 hours; and
- free health assessments [and capacities assessments in the case of young workers] prior to workers being assigned to night work and at regular intervals thereafter;
- 4 weeks’ paid annual leave Apart from the excluded sectors no opting out of the annual leave provisions, no carrying over of holiday from one annual leave year to the next and no payments in lieu except on “termination of employment”;
- protection through the Employment Tribunals from suffering detrimental treatment or dismissal by the employer for taking entitlements under the Regulations.

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- All "employers" under the Regulations are required to keep records to show that they have complied with their obligations unless workers have opted out of the 48hour weekly limit.

Note

*Young workers are workers who have reached the age of 15 but not yet attained the age of 18.

5. APPLYING THE REGULATIONS

5.1. INCLUDED WORKERS

5.1.1. The Regulations apply to all workers (except for those set out in paragraph 5.2 below). The definition of the term "worker" under the Regulations includes temporary workers working through employment businesses as well as to regular employees. The Regulations therefore have equal application to regular employees as they do to temporary, casual and part-time workers. Employment businesses are therefore "employers" for the purposes of the Working Time Regulations and are directly responsible to their temporary workers under the provisions of the Regulations.

The Regulations also include a definition of the term "agency worker" which applies when the recruitment consultancy is contracting as an agent and introducing temporary staff to a client. The worker in these circumstances will contract direct with the client but if the employment agency pays the worker they will nevertheless be responsible to the worker under the Regulations. The introduction of temporary workers where you act as Agent is less common since the implementation of the amended Conduct of Employment Agencies and Employment Businesses Regulations 2003 because it makes it unlawful to introduce workers and continue to pay their wages.

5.1.2. Employment businesses are "employers" for the purposes of the Regulations so they will be liable for any breaches in respect of their temporary workforce and that for the purposes of the Regulations, the terms "worker" and "employer" apply equally to regular employers and employees as they do to employment businesses and temporary workers.

5.1.3. Many members have asked about the application of the Regulations to limited company contractors. It is REC's view that Limited Company Contractors do not fall within the definition of "worker" and are therefore outside the Regulations' scope. However members should be aware that the Regulations are a health and safety measure and just as the Inland Revenue takes a case by case view of limited company contractors for tax purposes, it is possible that the Health and Safety Executive would follow a similar course if an individual would be an employee 'but for' their limited company.

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5.2. EXCLUDED WORKERS

5.2.1. Workers who are excluded from all Regulations

The Regulations do not apply to all workers employed in the following sectors:

- Workers covered by the "seafarers" Directive;
- Workers on board a sea-going fishing vessel;
- Workers on board a ship or hovercraft which transfers passengers or goods on inland waterway or lake transport

5.2.2. Workers who are excluded from all of the Regulations except for rest breaks and rest periods for "young workers":

- Where the activities of workers in the armed forces, police or certain civil protection services conflict with the Regulations they will not apply;

5.2.3. Workers who are excluded from all the Regulations except annual leave

- Domestic servants are excluded from the restrictions on working hours and night work only. There is no exclusion from the holiday provisions. The meaning of domestic servant remains unclear but it is likely that nannies and some care workers will fall within the definition of the term. This is specifically a reference to circumstances where the worker is supplied direct to a private household and the role includes characteristics that would be consistent with the role of a domestic servant. However the DTI is opposed to the suggestion that care workers should fall within the definition of domestic servants and it is recommended that members use this definition only where the facts clearly indicate that role. More definite is the application of the term domestic servant to nannies.
- Where working time is not pre-determined or measured because of the specific characteristics of an activity or where a worker can determine his own working time, that worker will be excluded from all the provisions of the Regulations apart from the holiday provisions. This derogation arises under Regulation 20 of The Working Time Regulations 1998 and is amended by Regulation 4 of The Working Time Regulations 1999 (which came into force on 1 December 1999). The amendment extends the derogation to more workers by broadening its scope to cover hours which workers choose to work in addition to their contractual hours. For example, a worker who is contracted to work between 8:30 a.m. to 5:30 p.m. but who usually works until 7:30 p.m. voluntarily will now find that the additional two hours are now covered by the extended

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“unmeasured working time” derogation. In other words, these additional voluntary hours will not be taken into account when determining whether the worker in question, who is otherwise covered by the 48-hour/week limit, has worked in excess of that statutory 48-hour limit.

The Regulations provide a non-exhaustive list of such workers as guidance and suggest that managing executives, family workers and church officials are examples of independent workers who are either in control of their own working hours or unable to measure their working time with any precision. It should be noted that several employees of differing levels of seniority may carry the title “Manager”. Many middle ranking staff who carry the title “manager” will not however be in control of their working hours despite their title and will be able to measure those hours. Such “managers” will not fall within this exclusion and care should be taken to treat them as being within the 48 hour week rule. The new Regulation 4 in the 1999 Regulations however means that additional hours worked voluntarily by such workers do not count towards the 48-hour week. Care should be taken in circumstances such as these.

5.2.4. Workers excluded from **daily and weekly** rest periods and night work provisions if equivalent compensatory rest is given

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i. Workers in the following sectors **where their work involves maintaining a continuity of service** are excluded from the rest periods and rest breaks and night work provisions of the Regulations provided that compensatory time off is given:

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- where the worker’s home and place of work are distant from each other e.g. oil rig workers, sales representatives;

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- where the work involves security or surveillance or where a permanent presence is required

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- where continuity of services is required e.g. security guards, care takers, hospital staff, **doctors in training**, residential institution staff, domiciliary care-workers, prison, airport or dock staff and workers concerned with the carriage of passengers on regular urban services;

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- various media and telecommunications services;

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- ambulance, fire and other civil protection services, GPs may also be included in this;

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- civil utilities such as refuse collectors;

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- workers working in industries where work cannot be interrupted on technical grounds e.g. assembly lines;

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- research and development activities;
- activities where there is a seasonal surge of activity (e.g. agriculture, tourism, postal service) or where activities are affected by unforeseeable or unusual circumstances beyond the control of the employer or accident or imminent risk of accident.
- workers in the railway sector who spend most of their time on board trains; whose activities are intermittent or whose activities are linked to transport timetables.

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5.2.5. Workers excluded from daily and weekly rest periods if equivalent compensatory rest is given

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- Shift workers where a shift worker cannot take daily rest between the end of one shift and the start of another; and
- workers performing work that is split up over the day for example cleaning staff.

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5.2.6. Mobile Workers

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Mobile workers who are not excluded from the whole of the Regulations i.e. those who are not covered by other EU legislation such as the Aviation Directive, the Seafarers Directive and EU drivers hours, are excluded from night work, daily and weekly rest periods and rest breaks. This is however subject to them being entitled to "adequate rest". Examples of those who fall into this section include taxi drivers and couriers.

Adequate rest is defined as regular rest periods, expressed in units of time, sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, the worker does not cause injury to himself, fellow workers, or others or does not damage health.

Mobile workers are not however entitled to adequate rest where their activities are affected by:

- Unusual/unforeseeable circumstances
- Exceptional events
- An accident/imminent risk of an accident

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5.3. "ENTITLEMENTS" AND "OBLIGATIONS"

It is important to distinguish between an "entitlement" under the Regulations and a mandatory "obligation".

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5.3.1. Entitlements

- Examples of entitlements include:

the right to rest breaks; and
the right to paid annual leave.

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These are rights that are given to workers. An "employer" is not obliged to ensure that a worker exercises his right to take them. However an employer may not prevent a worker from exercising an entitlement under the Regulations. In such cases a worker can make a complaint against the employer in the Employment Tribunal. However the Health and Safety Executive has no power to require that the entitlement is taken if the worker does not wish to take it or to take any sanction against an employer in those circumstances.

5.3.2. Mandatory obligations

- Examples of mandatory obligations include:

limits on working time, i.e. the 48 hour week and the 8 hour night shift; and

the requirement to keep records.

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Members are under a duty to observe and comply with the Regulations that impose mandatory obligations. If they fail to do so they will be guilty of an offence. In the first instance the Health and Safety Executive is likely to issue employers/employment businesses with advice and a warning but if this warning is ignored it will, in all likelihood, result in legal proceedings and a fine. Workers may also make complaints to the Employment Tribunals.

5.4. RECORD KEEPING

- i. The record keeping requirements are one of the most onerous provisions of the Regulations. Where workers have not signed an agreement opting out of the 48-hour work week limit, employers are required to keep records of those workers' working hours adequate to show where the limits are being exceeded. These and all records required under the Regulations must be available for inspection on request by the enforcing authority which will either be the Local Authority or the Health and Safety Executive.

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- ii. Under Regulation 9 employers must keep records to show whether the 48-hour working week and the 8-hour night work limits have been complied with.
- iii. Employers must also keep records relating to health assessments, capacities checks and paid annual leave.
- iv. All records must be kept for 2 years. This may mean that employers must ensure that their software or manual office systems can deal with the record keeping requirements. However the records relating to weekly working time will be relatively easy for employment businesses to compile because of the existing time sheet procedures.

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5.5. COLLECTIVE, WORKFORCE & RELEVANT AGREEMENTS

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5.5.1. Collective agreements

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- i. A number of provisions in the Regulations can be varied by collective agreement. This is any agreement or arrangement made by one or more trade union and an employer relating to, amongst other things, conditions of employment. The areas which can be varied in this way are:

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- rest breaks and rest break periods;
- night work hours; and
- reference periods for averaging weekly working time and night work (provided that compensatory rest is given or appropriate protection where compensatory rest is impossible.)

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Collective agreements can be national, regional or restricted to use by a particular company or industry.

5.5.2. Workforce agreement

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Workforce agreements are a new category of agreement introduced by the Regulations. In order to be valid they must be:

- i. in writing;
- ii. effective for a specified period of not more than 5 years;
- iii. apply to relevant members of the workforce only;
- iv. signed by the workforce representatives or by the majority of the affected employees (whichever is applicable) before the commencement date; and
- v. all affected employees should have a copy of the signed agreement.

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Such an agreement can be used to govern the same provisions as those governed by a collective agreement.

5.5.3. Relevant agreement

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A relevant agreement in relation to a worker is either any provision of a collective agreement which forms part of a contract between that individual and his/her employer or a workforce agreement, or any other agreement in writing which is legally enforceable as between the worker and his employer, such as the Terms of Engagement of temporary workers or Contracts of Employment for employees.

“Working time” may be clarified in a relevant agreement as may certain provisions relating to annual leave.

As outlined below an individual written agreement can be used to opt-out of the maximum 48-hour week.

5.6. THE AVERAGE WORKING WEEK LIMIT

5.6.1. Maximum average working week– Regulations 4 & 5

- **48 hours**
The maximum average working week of any worker should not exceed 48 hours unless the worker agrees in writing to work over that limit (except for doctors in training see below).

48 hours equates to 9.6 hours a day, 5 days a week. If a worker routinely works Monday to Friday, 8 am to 6.30 p.m., with half an hour for lunch, their average working week will inevitably exceed 48 hours.

- **Doctors in training are subject to a different maximum working week limit.**
The limits are being phased in for workers as follows:
 - Average 58 hours per week from 1.8.04
 - Average 56 hours per week from 1.8.07
 - Average 48 hours per week from 1.8.09

5.6.2. Averaging periods

- **17 weeks – 48 hours limit**
The averaging period for the 48 hours working week is 17 weeks or whatever period the worker actually works if less than 17 weeks.

The Regulations provide that this averaging period will either start either:

- from the date prescribed in a relevant agreement (such as the contract of employment or contract for services); or if not
- any 17 week period in the course of the worker's employment. In other words the 17 week reference period is a rolling period.

If the worker is absent from the workplace during a particular 17 week period that time should not be counted when averaging weekly working hours.

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Instead a period equal to the period of absence should be added on to the end of the 17 weeks before the averaging calculation is done. For example if a worker takes 5 days' annual leave during a particular 17 week averaging period an additional 5 days work must be added to the end of the 17 week period before the average weekly working time can be calculated.

26 weeks - For Workers listed under paragraph 5.2.4 above "Workers entitled to Compensatory Rest"

The averaging period will be 26 weeks for the purposes of calculating the working week. **In most cases the average must not exceed 48 hours except for doctors in training whose average hours must not exceed 58 hours.** This may be applicable in the case of nursing staff or any other staff where continuity of service is required by the nature of the work.

Where workforce/union representatives have reached a collective agreement with an employer, it is possible for averaging period to be 52 weeks. This is not likely to apply to the case of temporary workers unless they are working on long term assignments in a workplace where the client's permanent employees are under workforce or collective agreements and the temporary workers are expected to work to the same pattern.

Offshore workers (oil and gas explorations and production) 48 hour weekly working time limit can be averaged over 17 weeks or one to be agreed between workers and members.

5.6.3. Opt-out agreements

As stated above, Regulation 4 requires that a worker's average working time must not exceed 48 hours per week unless the worker agrees in writing to exceed the limit.

Members will need this agreement if either temporary workers or their own employees, are to lawfully work more than 48 hours. The agreement should include a period of notice (not less than 7 days or more than 3 months) to be given in writing by the worker if s/he decides s/he is no longer willing to exceed the limit. The agreement will also need to provide a date on which the 17 week (or other) averaging periods will start to run (see above).

The requirement for such an agreement may seem an anomaly in the case of temporary workers engaged under contracts for services because they are generally able to determine their own working hours. However if a temporary worker works more than an average 48-hour week without such an agreement, the employment businesses in question would be in breach of its obligations under the Regulations. Gaining the agreement of clients to provide information in advance if this is likely to happen is important.

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Doctors in training may opt out of the 58-hour average working week but if working in the NHS will be bound by contract to do no more than 56 hours actual work.

5.6.4. No opt-out agreement

Some workers may not be willing to work more than 48 hours a week, although there may be some weeks in a 17 week period when a worker, who has not agreed to work more than 48 hours per week, does so. This will not mean that the “employer” is in breach of its obligations provided that the average number of hours worked over the 17 weeks does not exceed 48.

However the Regulations also provide that where fewer than 17 weeks are worked, the average working time is to be calculated with regard to the actual weeks worked. Thus, if an individual works, say, 55 hours per week during the first 4 weeks of his employment and the employment contract or temporary assignment is then terminated at the end of those 4 weeks, for whatever reason, the average working time over those 4 weeks will exceed 48 and the employer will be in breach of the Regulations.

In addition there will be workers to whom the 48-hour week restriction does not apply. Such workers are listed in point 2 (page 5) under the heading “Workers who are excluded from all the Regulations except annual leave.

5.6.5. Definition of Working Time

In order to determine whether a worker’s hours will exceed 48, the starting point is to consider what constitutes “working time”. “Working time” is defined in the Regulations primarily as any period during which the worker is working at the employer’s disposal and carrying out his activities or receiving training.

In some circumstances it may be difficult to determine what circumstances fall within the definition of “working time”. Specific examples of such circumstances are time spent travelling to and from assignments and time spent in training. This issue is dealt with in more detail in the National Minimum Wage Act 1998 and Regulations 1999. Under the National Minimum Wage Regulations, training which the worker has to take part in, in order to secure a temporary assignment, and any time spent travelling between back to back assignments during the same working day, is likely to be counted as working time for national minimum wage purposes. This should provide a good indication of what will constitute working time under the Working Time Regulations.

The Regulations however allow for workers and employers to deal with “any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement”. In other words it is possible to enter into an agreement with a worker to clarify what constitutes working time and rest periods.

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For employees the definition of working time may be more complex depending upon the requirements of the individual business. For example, recruitment consultants may be on call outside office hours and may receive and make business calls during that time. Employment businesses will need to clarify in the employees' contracts what constitutes working time during on call time. To a great extent employers will have to rely on employees' honesty and their submissions of details of itemised telephone calls during "on call" hours and any other proof of work done during on call hours. [In October 2000 the European Court of Justice ruled that "on-call" time will be working time when a worker is required to be at their place of work. When they are on call but none the less free to pursue their own leisure activities this will not constitute working time. However it is sensible to clarify this in the contract.](#)

5.6.6. Records

There is no need to keep a record of working hours for workers who have signed an agreement opting out of the 48 hour week limit. However "employers" must keep a record of which workers have signed such an agreement.

Where workers have not signed an opt-out agreement, records of all their working hours must be kept and made available for inspection by the relevant authorities (Health and Safety Executive) at any time.

All records required to be kept under the Regulations, must be kept for 2 years.

5.6.7. Formula for calculating weekly working time

The Regulations provide a formula for calculating average weekly working hours.

The reference period will be 17 weeks unless the area of work is one of those where the 26 week reference period can be used or there is a collective agreement in force agreeing a 52 week averaging period.

The formula itself is:

$A + B \div C = \text{average weekly working time}$

- where A is the total number of hours worked in the averaging period;
- B is the total hours worked in any additional period added on to the end of the averaging period (for example where the worker has taken annual leave during the averaging period); and
- C is the averaging period.

Example

During the 17 week averaging period Worker X works:

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- two 50 hour weeks (100 hours);
- one 60 hour week (60 hours);
- ten 48 hour weeks (480 hours);
- three 44 hour weeks (132 hours); and
- has taken one week off as paid annual leave (0 hours).

The total number of hours worked over the 17 week period is therefore 772.

- He then works 44 hours during the course of the week following the end of the 17-week period which is used in the averaging calculation to account for the period of annual leave he took (44 hours).

Using the formula, $A = 772$, $B = 44$ and $C = 17$: $772 + 44 = 816 \div 17 = 48$. The worker has therefore worked the regulatory 48 hours/week in the relevant reference period.

5.6.8. Multiple employments

Multiple employment is common amongst temporary workers in the recruitment industry.

The Regulations do not deal with this issue but the DTI has indicated in its guidance that there is an obligation on “employers” to take a worker’s other employments into account when discharging its duties under the Regulations. In many circumstances it is accepted that this will be difficult, since the activities of workers while not working through an employer will not be known to that employer. However there are some sectors, such as the nursing, where members will know what a worker is doing during periods he is not performing temporary work. Many nurses do temporary nursing assignments on their days off in the same hospitals where they are normally employed. Special care should be taken in these circumstances to ensure that the nurses have signed 48 hour opt out agreements and that their hours of work do not create a health and safety hazard either to them or their patients. If the nurses have not signed 48 hour opt out agreements members must take steps to make sure that they are not working in excess of this time.

In any event it should be noted that “employers” dealing with workers who are also working elsewhere should make enquiries about any such working time. Employers are required to take reasonable steps to ensure that workers do not exceed the 48-hour limit if they have not agreed to do so. Work done elsewhere that the employer knows about should therefore be taken into account and the workers working time adjusted accordingly if no 48-hour opt-out agreement has been signed. Employment businesses should also ask whether a worker has signed a 48-hour opt-out agreement with other “employers”.

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5.7. NIGHT WORK AND HEALTH ASSESSMENTS–REGULATIONS 6 & 7

5.7.1. Night work

5.7.1.1. Adult Night Workers

Regulation 6 provides that adult night workers (aged 18 and over) must not do more than an average 8 hours night work in each 24 hour period. Again the averaging period is 17 weeks (or longer within the industries mentioned above or where there is agreement between the parties) and should sensibly run in parallel with an organisation's 48 hour week averaging periods. In other words there may be some nights during a 17 week period where in excess of 8 hours night work is undertaken so long as the average over 17 weeks does not exceed 8 hours/night.

One important point to remember is that where night work involves special hazards or heavy physical or mental strain the averaging provisions do not apply and night work can never exceed 8 hours in every 24. What constitutes heavy mental and physical strain is not defined but the Regulations provide that employers may identify what constitutes such strains or hazards in a collective or workforce agreement or can identify them through risk assessments. Common sense therefore applies, where temporary workers are put on night assignments, members would require information on this issue.

Unlike the 48 hour week provisions there is no scope in the Regulations for workers to agree to opt out of the 8 hour night work provisions.

The Regulations provide that night work is work performed during night time. "Night time" in the Regulations is defined as a minimum 7 hour period which includes the period between the hours of midnight and 5 am. This period can either be determined by agreement between workers and employers or, if no agreement exists, it will be the period between 11 p.m. and 6 am. A night worker is an individual who performs at least 3 hours of his daily working time during the night work hours in the normal course of his working pattern. In other words, provided 3 hours of a worker's 8 hour shift fall during night time that worker will be a night worker and subject to the 8 hour rule and the need for health assessments.

5.7.1.2. Example of night work calculation

As already stated, the Regulations allow for agreement on what hours constitute night work, provided that they include the hours midnight to 5 am. For example a barman in a night club who habitually works between the hours of 6 p.m. to 2 am, performs 3 hours of his work during the

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default night time period (11 p.m. to 6 am) provided for in the Regulations. Traditionally however, bar work is not regarded as night work. The solution in this scenario would be for the employer to agree with the barman that the night time hours for the purposes of night work were between 12 p.m. and 7 am. That way the barman will only perform 2 hours of his work during night time and will not fall within the definition of a night worker.

In addition there may be workers, such as nurses, who generally perform 12-hour shifts at night. Provided that the work involved is not subject to the absolute 8 hour cap on account of its hazardous or strenuous nature, the nurse should still be able to perform 12 hour night shifts so long as the average night work over 17 weeks (or the relevant averaging period) does not exceed 8. Generally this will be the case with nurses because they tend to perform a series of night shifts followed by a series of day shifts with compensatory rest breaks.

The Regulations provide a formula for calculating the average number of night work hours:

$$A \div B - C = \text{average number of night work hours}$$

- where A is the number of hours during the reference period which are normal for the worker (maximum $17 \times 48 = 816$ or 6×8 hour night work shifts per week);
- B is the number of 24 hour periods in the reference period (there are a maximum of 119 24 hour periods in a 17 week period: $7 \times 17 = 119$); and
- C is the number of 24 hour rest periods required under the Regulations during the reference period (i.e. 17).

$$\begin{array}{r} 816 \\ \hline 119 - 17 \end{array} = 8$$

For example:

Worker X works a 12 hour night shift 6 days a week every other week ($12 \times 6 \times 8.5 = 612$).

$$\begin{array}{r} 612 \\ \hline 119 - 17 \end{array} = 6$$

Worker X has therefore worked an average of 6 hours/night over the 17 week reference period.

5.7.1.3. Young Night Workers

Since 6th April 2003 young workers (those under the age of 18) may not ordinarily work at night between 10pm and 6am, or 11pm and 7am if their contract provides for work after 10pm except if they are employed in

- Hospitals or similar establishments;

Or in any of the following activities:

- Cultural
- Artistic
- Sporting
- Advertising

Young workers may work between 10 or 11pm until midnight and between 4am to 6 or 7am if they are employed in the following types of establishment:

- Agriculture
- Retail trading
- Postal or newspaper deliveries
- A catering business
- A hotel, public house, restaurant, bar or similar establishment
- A bakery.

However the only circumstances in which they may work during these hours is if it is necessary to either maintain continuity of service or production; or to respond to a surge in demand for service or product. In addition there must be no adult available to perform the task; the employer must also ensure that the training needs of the young worker are not adversely affected; and the young worker must be allowed an equivalent period of compensatory rest.

Young workers must be adequately supervised where that is necessary for their protection

However, a more onerous health assessment is required including a consideration of whether the young worker has the physical and psychological ability to do the work.

5.7.2. Health assessments

Regulation 7 provides that night workers have a right to regular, free health assessments before being assigned to night work and at regular intervals thereafter. The health assessment must be carried out at no cost to the worker and comply with medical confidentiality (although employers and health

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assessors are allowed to make statements as to a worker's fitness for night work). There is also a right to:

- transfer to day work where it is available and night-work related health problems arise; and
- appropriate health and safety protection.

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Health and safety protection is already in place under the Health and Safety at Work Act 1974 and The Management of Health and Safety (Protection of Employment) Regulations 1992.

There is also a requirement to carry out a more onerous health assessment or capacities checks on young workers doing night work including consideration of whether the worker has the physical and psychological ability to do the work. Again what constitutes a capacities check will be subject to the common sense approach.

There will be little difference in the way employment businesses deal with temporary workers and the way employees assigned to night work are dealt with under Regulations 6 and 7. In REC's view however where an employment business wishes to place a worker in a night work assignment and that worker does not complete a satisfactory health assessment questionnaire, the employment business does not have an obligation to pursue the night-work route for that worker but can take the view that the worker in question is not suitable for night work and assign him to day time work only.

The Regulation in question is aimed at situations where employers might require employees to perform night work where they are not fit to do it. In such circumstances the Regulation would prevent such a requirement being imposed on a worker until the necessary checks and assessments had been carried out. If, after the employee failed to complete a satisfactory health assessment questionnaire, and the employer still wished that employee to carry out a night work shift, the employer would need to pay for that employee to be examined by a medical practitioner. Such examination would need to be carried out at the employer's expense. In the case of temporary workers and employment businesses however, it is not necessarily incumbent on the employment business to pay for medical examinations if the employment business is prepared to put the worker forward for day work only. In most cases, where a temporary worker fills out a health questionnaire unsatisfactorily, the employment business will not wish to put them forward for night work and no further medical examination will be required.

5.7.3. Suggested action in relation to health assessments

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REC suggests the following course of action in relation to temporary workers carrying out night work although the same principles will apply to any workers who normally carry out night work:

- i. Devise a health questionnaire (with the help of a medical practitioner or in accordance with the questionnaires used by your clients or the HSE) which is aimed at assessing a worker's suitability for night work. Ideally, this questionnaire should be completed by all workers upon registration so that there is immediate and easy reference to the suitability of a particular worker for night work as client demands arise;
- ii. Provided workers' answers to the questionnaire are positive they will pass the health assessment and can be put forward for night work without the need for a further medical examination. If, however, they give unsatisfactory responses and Members wish to consider them further for night work they will need to have those workers examined by a medical practitioner at the Members' own expense - it is important that workers incur no expense, including the loss of wages, when attending a health assessment. If Members do not wish to consider a worker for night work on account of a poor health assessment, then they will need to make it clear that they will be searching for suitable day work for them wherever possible.
- iii. In the case of young workers (workers who have reached 15 but not yet attained the age of 18) members will need to carry out capacities checks. A capacities check should involve verifying the particular skills, knowledge and experience needed for the task in hand and determining the suitability of the young worker in terms of his age, experience, skills and qualifications in the light of those requirements.
- iv. Implement a system for updating health assessment questionnaires, say annually or more frequently if necessary (or every six months for workers over 40) for workers who carry out night work assignments on a regular and ongoing basis.
- v. REC recognises that it is sometimes difficult for members to maintain control over the movements of temporary workers while on assignment and that a worker may agree with the client to change from a day work assignment to a night work assignment without informing the employment business that he is doing so. In order to avoid this happening members should ensure that their clients understand the obligations arising out of the Regulations and the necessity to be informed should there be any change in the temporary worker's working pattern. In addition it is important in relation to a night work assignment that employment businesses make enquiries of their clients as to the nature of a night work assignment in order to know whether it is one that must be restricted to the 8 hour maximum on account of its hazardous or strenuous nature. A system should be put in place to enable consultants to easily decide whether a night work assignment involves such hazards or strains. Members will then need to inform the client in writing of their findings so that the 8 hour cap on that particular assignment is clear.

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- vi. In the case of young workers Members will need to make specific enquiries of their clients so that they are informed of the knowledge, skills and experience required for a specific assignment and can properly carry out the capacities check.

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5.8. REST PERIODS - REGULATIONS 10, 11 AND 12

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As already stated, the Working Time Directive and the Regulations are primarily a piece of health and safety legislation. It is not surprising therefore that many of the provisions relate to rest periods. It should be noted that these are "entitlements" under the Regulations (see page 7). If a worker chooses to forego his rest breaks the employer is under no mandatory obligation to ensure that he takes them unless the worker works over the 48 hour week without having signed an opt-out agreement with you. It is important to remember, however, that the Regulations are concerned with health and safety. If members consider that the number of hours a worker is working or rest breaks the worker is foregoing puts that worker or is likely to put that worker at risk, this fact should be raised directly with the worker.

5.8.1. Rest breaks during the working day

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Under Regulation 12, where a worker works longer than 6 hours there should be an uninterrupted rest break of 20 minutes, preferably away from that worker's work station [30 minutes for young workers working more than 4 ½ hours.] However rest periods can be determined by agreement between the parties. The minimum 20-minute break provision is therefore a default option for circumstances where no agreement as to rest periods has been reached. In addition, there can be derogations from the rest period altogether where the work involved is not measured or predetermined provided that compensatory rest is given.

A question which will need to be addressed in relation to both employees and temporary workers is whether lunch and other breaks will constitute working time. If a business is counting maximum hours worked to arrive at an average working time, the inclusion or otherwise of rest breaks, may make a difference. Whether rest breaks, both daily and weekly, constitute working time should therefore be clarified in the contract of employment and terms of engagement. This point is dealt with in clause 3.4 of the REC model contract of employment. The REC model terms of engagement for temporary workers deal with this point at clause 4.2 although if members wish to clarify this point further they could amend clause 4.2 as follows:

"Subject to any statutory entitlement under the relevant legislation, the Temporary worker is not entitled to receive payment from the Employment Business or Clients for time not spend on Assignment, whether in respect of rest breaks, holidays, illness or absence for any other reason unless otherwise agreed."

5.8.2. Daily and weekly rest

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Under Regulation 10 every worker should have a minimum daily rest period of 11 consecutive hours in every 24 hour period (12 hours for young workers). Again there may be derogations where work is not measured or predetermined or where there is an agreement between the parties provided that compensatory rest is given. In addition under Regulation 11 there must be either one break of 24 hours in every seven days or one break of 48 hours in every 14 days (48 hours every 7 days for young workers). Each week there should therefore be a break of 11 hours plus a break of a total 24 hours making a minimum uninterrupted break of 35 hours unless objective technical or work organisation conditions would justify the daily rest period being incorporated into the weekly rest period. Of course if the 48 hour weekly rest break is being used the total break, taken together with the 11 hour daily rest break, will last for 59 hours.

In the case of monotonous work the worker is entitled to adequate rest breaks. These terms are not defined and common sense therefore applies. However an example might be a data input worker who is likely, due to the monotonous nature of the task, to require shorter and more frequent breaks than other workers.

As the employers, under the Regulations, employment businesses are responsible for ensuring that a worker's entitlements are upheld and it is the employment businesses that will be liable for any breaches.

However when a worker is provided to a client he is under the supervision and control of that client. Members include in their terms with their clients a general provision to the effect that the client agrees to treat temporary workers, for the purposes of the Regulations, as if those workers were its own employees.

It is important that the client understands that it can no more require Member's temporary workers to work outside the scope of the Regulations than it can its own employees. This is not to say that clients are responsible to temporary workers under the Regulations but that in order for employment businesses to ensure that their clients do not act in such a way to place them in breach of the Regulations, employment businesses should monitor the clients treatment of workers as closely as possible. Members will therefore need to pay particular attention to the rest break requirements to ensure that non excluded workers are not being pressurised into working long days or weeks, or into completing monotonous tasks without rest breaks. It should be noted that any contractual provision in your terms of business with your clients would not discharge members' statutory obligations under the Regulations.

5.9. PAID ANNUAL LEAVE - REGULATIONS 13, 14, 15, 15A AND 16

5.9.1. The difference between employees and temporary workers

Most permanent employees have a holiday entitlement written into their contracts of employment. Since the introduction of statutory leave all workers (subject to certain exceptions – see 4.1 and 4.2 above) have been entitled to 4 weeks paid leave per leave year.

It is relatively easy to calculate paid annual leave for permanent employees because they have a fixed annual salary, which is paid monthly. Also their contracts will be terminated on notice, enabling an employer to work out any adjustment either due to or from the employee in respect of his paid holiday entitlement. The administration of annual leave for the majority of permanent employees is therefore not a complex issue.

However in the case of the temporary workforce, calculating paid annual leave entitlement can be complex. Therefore most of the following paragraphs under this heading will concentrate on the application of the annual leave provisions to temporary workers. There are however some important points made in relation to employees with standard contracts of employment, which are dealt with separately under 4.9.12 below.

The Regulations allow workers to take as much of their 4 weeks leave at any one time during the course of the leave year as they choose, subject only to the consent of their employer. Difficulties arise in relation to the temporary workforce because a temporary worker's pattern of work will not be known in advance and there is no certainty with temporary workers that they will work for a fixed period of time. Temporary workers can terminate an assignment without notice at any time and have no obligation to return to a particular employment business at the end of a period of annual leave for which they may have been paid. So it is necessary to ensure that a temporary worker is never paid for more leave than they are entitled to in relation to the proportion of the leave year that they have worked.

Therefore the only method of administering paid annual leave for temporary workers, which ensures that an employment business does not end up out of pocket and seeking to recover over-payments of holiday pay is to pay in arrears only for holiday already accrued. This method of operating paid annual leave came under attack in the case of Wellcome v Kelly Services (UK) Ltd 1999 in which the Tribunal Chairman ruled that the Working Time Regulations required companies to pay for as much annual leave entitlement as requested and reclaim any over-payment on termination. This decision was however only a Tribunal decision and is not therefore binding on other Tribunals or higher courts. In any event it was appealed and the EAT returned the case to the Employment Tribunal for a rehearing because the original decision was wrong for technical legal reasons. It is unlikely to be reheard by the Employment Tribunal.

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5.9.2. Temporary workers

i. Continuous 13 week period

The Working Time Regulations 1998 introduced a qualifying period for paid annual leave entitlement. Workers had to have worked for a continuous period of 13 weeks. This was abolished for all workers with effect from 25th October 2001. As at 25th October any current workers became immediately entitled to take leave that they had already accrued whether or not they had completed 13 weeks by that date.

However this does not necessarily mean that temporary workers may demand and be paid for as much of their 4 weeks leave as they may choose because entitlement to take leave may be restricted in two ways:

- a) By inserting an express provision in the contract stating when workers may take leave (see paragraph 4.9.3ii at page 23 below)
- b) By refusing a request for leave by serving a counter-notice (see paragraph 4.9.8ii at page 31 below)

For workers who commenced employment on or after the 26th October 2001 their entitlement to take leave during the first year of employment is in any event limited to one-twelfth of their annual entitlement in each month (further details of this are given at paragraph 4.9.5 at page 25 below).

ii. Minimum hours

The Regulations do not require a minimum number of hours to be worked per week for someone to become entitled to leave. Therefore if a worker works for 1 hour per week s/he will be eligible to 4 weeks' leave pro rata. In other words their total annual entitlement in terms of payment will be equal to 4 hours pay. The rate paid for holiday is calculated as an average of a worker's hourly rates during the 12-weeks actually worked (or the total number of weeks worked, if less than 12) prior to any leave being taken.

5.9.3. Administration of paid annual leave for temporary workers

i. The Principle of Accrual for Holiday Pay

Temporary workers are not obliged to provide their services to any one employment business and are under no obligation to return to the paying business at the end of their leave. There is therefore a real risk that if an employment business was to grant a worker 4 weeks' paid annual leave at any time before s/he had accrued it, that the worker would take the leave and fail to return. This would inevitably lead to employment businesses resorting to the

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Courts to recover overpayments of holiday pay. Therefore it is custom and practice in the industry to only pay for such annual leave as a worker has accrued by the time the leave is taken. Clearly the accrual method prevents the need for recovery of overpayments of holiday pay.

REC has adopted the accrual method in its model terms of engagement as acknowledgement of the nature and pattern of temporary work. The model terms include provision that temporary workers may only take such proportion of their statutory paid annual leave as they have accrued on the date they wish their leave to start.

However it is important to note that the Regulations only provide for the entitlement to take leave to be restricted to periods accrued in the first year of employment (see paragraph ii below) and, in relation to payment for leave, on termination of the contract. This means that the accrual method in the second and subsequent years could be challenged as being contrary to the spirit of the Regulations. This is effectively what happened in the case of Wellicome v Kelly Services UK Limited 1999 (see paragraph 4.9.1 above) and the Tribunal decided that the accrual method for calculating leave other than on termination was contrary to the Working Time Regulations.

ii. Restricting when leave may be taken

Regulation 15 enables employers to restrict the taking of leave by inserting a provision in their contracts with workers requiring leave to be taken during periods agreed with and prescribed by the employer, such as a Christmas shutdown or Bank Holidays, or for limited periods only such as one week per quarter. This will restrict the amount of holiday you will have to pay for in the same way as the accrual method.

In any event if you adopt the REC model terms of engagement you will only pay the worker for such time off as is proportional to the amount of time the worker has worked in his/her leave year as at that date.

One important point is that any method of calculating entitlement to paid leave should recognise that in order to accrue and take 4 weeks leave the accrual period must be 48 weeks rather than 52, or one week accrued for every 12 weeks worked rather than every 13 weeks.

The Regulations prohibit annual leave entitlement from being carried over from one leave year to the next. This is to prevent employers from pressurising workers into working without holiday breaks on the promise that the un-taken holiday can be carried over.

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If a worker comes to the end of the leave year and has accrued 3 week's entitlement but there are only two weeks of the current leave year left in which to take it, it is possible to make a retrospective payment provided the worker has taken a week's unpaid leave earlier in the year at a time when s/he had not accrued entitlement to be paid.

5.9.4. Amount of leave

i. 4 weeks

As stated earlier a worker is entitled to 4 weeks paid annual leave in any leave year.

A week's leave should be equivalent to the time a worker would work in a week. It is misleading to provide for a worker's annual leave entitlement in terms of 20 days since not all workers work 5 days a week. A worker who normally works 5 days per week will have a corresponding 4 weeks paid annual leave entitlement of 20 days. However a worker who normally works 2 days a week will only have a corresponding paid annual leave entitlement of 8 days. A worker's leave entitlement should therefore be expressed in terms of weeks.

ii. Bank Holidays

It is a common misunderstanding that all workers have the right to take Bank Holidays as paid leave. That is not the case. An employer can require someone (except for bank employees) to work on those days and unless otherwise agreed need only pay their usual rate of pay for that day.

Some employment businesses seeking to have workers available for as many days as possible provide that the 4 weeks annual leave entitlement includes the 8 statutory Bank Holidays where these fall during the course of an assignment. If this is the case a worker must be paid for that day.

5.9.5. Holiday Entitlement in the First Year of Employment

From the 25th October 2001 Regulation 15A of the Working Time (Amendment) Regulations 2001 permits all workers to be entitled to take their annual leave entitlement without completing a 13 week qualifying period. However in an attempt to ensure that workers do not take all their leave at once during the first year of employment the Government restricted the right of workers who commence employment on or after the 26th October 2001 to take leave to no more than one-twelfth of their annual entitlement for each month in which they work. This system is optional for employers so although such workers may only

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request one-twelfth of their total entitlement for each month worked, employers may allow workers to take more leave than they have accrued.

The Regulations state that entitlement to take leave in the first year of employment will be limited to one-twelfth of a worker's total entitlement which shall accrue on the first day of each month. Fractions of a day, other than a half-day shall be rounded up to a half-day if the fraction is less than a half-day, or a whole day if the fraction is more than a half-day.

For example, a worker who started work after the 26th October 2001 and has completed 5 days of work could request paid holiday of 1.67 days (which must be rounded up to 2 days) by giving 4 days notice.

If you use the REC model terms of engagement, this does not mean that a worker has to be paid for the full one-twelfth of their holiday if they have not worked a full month when they wish to take leave. The REC model terms of engagement make it clear that the worker will only be entitled to be paid the sum, which they have accrued to date.

In the example above you would actually only be required to pay an amount equivalent to 0.42 days (1 divided by 48 times 20). If he returns to work after the leave he will continue to accrue holiday and on termination of the contract will be paid any balance owing to him. In this way you avoid the possibility of overpaying workers who then do not return to work for you. This is acceptable provided that workers have the opportunity to take their full entitlement and be paid for it at some time during the leave year.

This system is useful for limiting the amount of paid holiday given at any one time during the first year of employment but is generally inappropriate in the case of temporary workers because if they are engaged on contracts for services they will have the right not to work whenever they choose. It is important to note that this statutory accrual of entitlement to take leave only applies to the first year of employment. A worker could therefore request 4 weeks paid annual leave entitlement at the beginning of the second leave year. However, the employer is entitled to restrict when leave may be taken either in the contract or by serving counter-notice.

In order to avoid a worker taking leave the moment he starts working for you, you may restrict a worker's right to take holiday, by putting a clause in the contract saying they may only take holiday once they have worked at least one month. Alternatively when they request leave you may serve a counter-notice indicating that it is not convenient to take leave at this time if, say your client does not wish the worker to take leave.

The problem in dealing with temporary workers is that if an employment business refuses a worker holiday, it is likely that the worker will be able to argue that the employment business is obliging that worker to work during that period. This is

risky in the case of temporary workers because it may give rise to arguments about mutuality of obligation and employee status.

5.9.6. Calculating the Amount of Holiday Entitlement

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For those employment businesses who pay for accrued annual leave at the time it is taken it is necessary to determine how much holiday pay the worker will be entitled to. This does not affect the amount of time they may take as they are free to choose not to work whenever they like under a contract for services.

Regulation 15A (3) provides that during the first year of employment fractions of a day, other than a half-day shall be rounded up to a half-day if the fraction is less than a half-day, or a whole day if the fraction is more than a half-day.

There are two methods of calculating entitlement:

- As a proportion of the leave year worked; or
- As a percentage of the hours worked

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1) Holiday Entitlement as a Proportion of the Leave Year Worked

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The following formula shows how to calculate entitlement for a temporary worker who does not work continuously or for a set number of days or hours each week:

$$(A \times B) - C$$

- A is the 4 weeks leave
- B is the proportion of the leave year which has actually been worked before the start date of the leave requested (the whole year being 48 weeks as opposed to 52 for the reasons set out in paragraph 4.9.3 (ii) above); and
- C is the amount of leave the worker has actually taken by the leave date.

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Examples:

- a. Worker X works 5 days a week for a continuous period of 18 weeks and requests some paid leave. He will be entitled to:

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$$(A \times B) - C$$

$$(4 \text{ weeks} \times \frac{18}{48}) = 1.5 \text{ weeks ie } 7 \frac{1}{2} \text{ days}$$

Therefore X is entitled to 7 ½ days leave

- b. Worker Y has worked for 11 weeks but has worked different days on different weeks. The first step is to calculate an average number of days worked per week. This is done by adding all the days worked and dividing by the number of weeks. For example:

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Y works 3 days a week for 6 weeks, 2 days a week for 3 weeks and 4 days a week for 2 weeks. The total number of days worked is 32 and the total number of weeks is 11.

The average days worked per week is as follows:

$$32 \div 11 = 2.91 \text{ days per week}$$

Then you use the formula above to work out the current holiday entitlement:

$$(A \times B) - C \quad (4 \times \frac{11}{48}) = 4 \times 0.23 = 0.92 \text{ weeks}$$

0.92 weeks for worker Y who averages 2.91 days per week =
 $0.92 \times 2.91 = 2.6$ days holiday entitlement

Once you have the holiday entitlement you then use the rules in paragraph 4.9.7 (iii) below to calculate a week's pay:

If Y was paid £4 for every hour worked and she works 7 hours a day

$$7 \times 32 \times 4 = £896 \div 11 = £81.45 \text{ average pay per week}$$

Y should therefore be allowed a week's leave and be paid £81.45

2) Holiday Entitlement as a Percentage of Hours Worked

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A simpler method is to express 4 weeks leave as a percentage of the total number of hours worked. This is calculated as follows:

$$\frac{4}{48} \times \frac{100}{1} = 8.33\%$$

Example:

X works 6 hours per week for 26 weeks

$$26 \times 6 = 156 \text{ hours}$$

$$156 \times 8.33\% = 13 \text{ hours}$$

X is entitled to 13 hours leave after working 156 hours

5.9.7. Paying annual leave – which method?

There are various methods of administering paid annual leave. Some businesses pay it on an on-going basis as a top-up to the hourly rate. Others pay holiday pay as and when leave is taken.

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i. Top-up to the hourly rate

REC recommends that this method be avoided. Taking the top-up method first, this is, in effect, an advance payment of holiday pay. The top-up must of course be a genuine addition to his hourly rate. Employment businesses using this method are less likely to run into difficulties over the accrual issue since the payment of holiday pay is a matter that is clearly settled on an on-going basis.

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It is important that the advance payment is understood as such and not as a payment in lieu of holiday since the latter would be unlawful under the Regulations. In order for this to be the case it is recommended that employment businesses regularly notify their temporary workers in writing how much holiday they have been paid in advance for and advise that they take it. For example it should be stated clearly in the contract (see clause 5.3 in the Model Terms of Engagement) and shown separately on the pay slip. Many employment businesses operating this method work to a 48 week year so that if a worker receiving holiday pay as a top up to the hourly rate reaches the end of the 47th week and has not taken any leave, no further work will be given to that worker for the remainder of the holiday year. Paid annual leave is the right of the worker and employers are under no obligation to require workers to take leave. However by ensuring that workers do not work for 4 weeks in the leave year those employment businesses that apply this method avoid any suggestion that a payment in lieu has been made.

The amount of any holiday pay top-up should be at least 8.33% of the usual hourly rate. [This is calculated by dividing the 4 weeks by the 48 week accrual period and expressing this as a percentage.]

If holiday is paid as a top-up, this should be made clear on pay slips so that workers can see the amount that is paid in relation to holiday pay as distinct from their hourly rate. Members that pay holiday pay as a top-up are also advised to read the case law section in paragraph 5 below.

ii. Including holiday pay in the hourly rate

Some employment businesses in the past have “included” holiday pay in the hourly rate. Unless the rate is a genuinely enhanced rate and has always been expressly inclusive of an amount in respect of holiday pay, this is a dangerous method to apply in relation to existing workers and may well amount to a

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deduction from wages and/or give rise to a claim that the worker has suffered a detriment under the Regulations.

REC recommends that this method be avoided.

One common difficulty experienced by employment businesses in relation to holiday pay is clients' refusal to pay any more than the rate currently being charged. It is vital that employment businesses understand that this does not have any impact on their obligation to account to workers for their proper paid annual leave entitlement. If a client refuses a rate increase such that the employment business cannot afford to supply to that client and honour its statutory obligation to pay holiday pay at the same time, it still owes a statutory obligation to its workers.

iii. Paying for holiday at the time it is taken

This involves calculating the amount of leave to which a worker is entitled as set out in 4.9.6 above and then working out an average week's pay multiplied by the number of days leave.

There are two ways of calculating the holiday pay to which workers are entitled:

- Calculating an average week's pay from the total paid over the previous 12 weeks actually worked; or
 - Adding the total pay received from the beginning of their first assignment or since the last period of paid leave and multiplying this by the percentage 8.33% (i.e. 4 weeks divided by the 48 week accrual period).
- a) Calculating an average week's pay over the previous 12 weeks worked

The Working Time Regulations 1998 refer to the method for calculating a week's pay set out in the provisions of sections 221-224 of the Employment Rights Act 1996 to determine holiday pay.

Sections 221-224 of the Employment Rights Act 1996 say that a normal weeks' pay will be:

- a. What a worker would earn in a normal working week if s/he works regular hours each week;
- b. If a worker's normal working hours vary from week to week, the average hourly rate of pay multiplied by the average of their normal working hours over the previous 12 weeks;
- c. If a worker has no normal working hours it will be the average pay received over the previous 12 weeks.

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It should be noted that “normal working hours” are those fixed by the contract. Overtime will not normally be included unless the contract provides for a fixed or minimum number of overtime hours. However the contracts for services issued to temporary workers rarely specifies any particular hours.

REC strongly recommends, in cases where temporary workers are engaged under contracts for services, that paid annual leave is calculated in accordance with actual hours worked and that the method of calculating it in accordance with a client’s standard or normal hours is only used for those circumstances where temporary workers are actually employed on contracts of employment. There is currently provision in the REC model terms of engagement enabling employment businesses to calculate paid annual leave on prescribed standard hours. However, as is explained in the footnotes to that provision, “standard hours” implies that there are a standard number of hours that a worker can expect to work and be paid. This could therefore result in a mutuality of obligation arising between the parties such as to establish an employee/employer relationship. The reality is that genuine temporary workers being supplied on temporary assignments do not have normal or standard working hours and their paid annual leave entitlement should therefore be calculated in accordance with their actual hours worked.

The Employment Rights Act provisions however can create injustice because they require that only the previous 12 weeks are taken into account when working out the average time worked and the average rates. It is likely that different averages will arise at different times of the leave year depending on the pattern of work in the previous 12 weeks. This could be prejudicial to either the worker or the employment business depending on the circumstances.

b) Calculating holiday pay as a percentage of rates earned

A simpler method of calculating paid annual leave entitlement is to express holiday entitlement as a percentage of the annual leave year.

In order to take 4 weeks paid annual leave a worker may only work for 48 weeks of the leave year. Therefore the percentage is calculated over a 48 week period as follows:

4 weeks as a percentage of 48 weeks to 8.33%

$$\frac{4}{48} \times \frac{100}{1} = 8.33\%$$

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Worker X works for employment business C for 17 weeks. His rate varies between £12/hour and £15/hour and his holiday pay is paid as a top-up to his hourly rate.

For weeks 1-9 inclusive he works 8 hours/day, 5 days/week at £12/hour = 360 hours and £4,320 total earnings.

For weeks 10-17 inclusive he works 8 hours/day, 5 days/week at £15/hour = 320 hours and £4,800 total earnings.

In weeks 1-9 the top-up to the hourly rate will be $8.33\% \times £12 = £1$ (rounded up)

In weeks 10-17 the top-up to the hourly rate will be $8.33\% \times £15 = £1.25$

At the end of the 17 week period X will have accumulated $(4,320 + 4,800 = £9,120 \times 8.33\% = £760$ or $£1 \times 360 + £1.25 \times 320 = £760$ as advance holiday pay. This is equivalent to $360 + 320 = 680$ hours $\times 8.33\% = 57$ hours or 7 days' holiday.

5.9.8. Notice and Counter - Notice

i. Periods of Notice

When a worker wishes to take paid annual leave the Regulations provide that s/he must give the employer notice of his/her intention to take leave that is at least twice as long as the period of leave which s/he wishes to take. In other words if the worker wants to take 3 days paid annual leave s/he must give at least 6 days' notice.

ii. Refusing a Request for Leave

If it is not convenient for a worker to take leave at the time s/he wishes to take it the Regulations provide that employers may give counter notice by notifying the worker in writing stating leave cannot be taken on the dates requested and prescribing periods when leave may be taken. There are merits to this approach when dealing with employees. However the risk when dealing with temporary workers is that if an employment business refuses a worker holiday it is likely that the worker will be able to argue that the employment business is obliging that worker to work during that period. This is dangerous in the case of temporary workers because it may give rise to arguments about mutuality of obligation and therefore that they are employees. Many employment businesses do not therefore rely on the counter notice provisions and will not object to temporary workers taking as much time off as they choose. The issue with employment businesses is payment for that time off and generally they will pay in proportion to the amount of work already done.

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5.9.9. Annual leave year

It is necessary to decide which dates the annual leave year will run between. The Regulations provide scope for “employers” to define the annual leave year in their contracts with workers. Many worker’s annual leave years now commence on 1 October because the Regulations came into force on 1 October 1998. Many however have an annual leave year that runs from the date on which their first assignment with the employment business in question commenced. Experience has shown that this is the most efficient way of setting annual leave years when dealing with temporary workers.

Many employment businesses have however defined a fixed annual leave year. For temporary workers this can present problems towards the end of the fixed leave year where a significant number of the temporary workforce has not taken leave and then wishes to do so. A shortage of temporary workers and cash flow problems are two likely consequences of this approach.

A more alarming consequence however was illustrated by the decision in the case of Wellcome v Kelly Services (UK) Ltd 1999. In that case Kelly Services defined a fixed leave year that ran from January to January and the Chairman’s decision was that because the Regulations provided for an entitlement to 3 weeks’ paid leave in any leave year and do not make provision for holiday to accrue, and because Kelly’s contracts provided for 3 weeks leave in any holiday year, the worker was entitled to three weeks’ paid leave in the defined leave year despite the fact that s/he only started working through the employment business part of the way through that year. Although having a leave year set by the worker does not solve the accrual problem, it does at least ensure that a worker’s entitlement arises during the course of a full year easing the administration of paid annual leave and making it easier for the employment business to maintain control over the amount paid.

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5.9.10. Carrying holiday forward

Carrying holiday forward from the holiday year in which it arises to the next holiday year is not permitted under the Regulations. It should only be agreed to in very rare circumstances as this legislation is designed to encourage workers to take holiday for their health and safety.

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5.9.11. Payments in Lieu of Holiday on Termination

The Regulations do not allow a worker to be paid instead of taking holiday to which he is entitled. However there is one circumstance in which payments in lieu of untaken holiday may be made and this is when the contract comes to an end and a P45 is issued.

Termination of employment is the only time that a payment in lieu of untaken holiday can be made. The Regulations provide a formula for calculating the holiday balance due on termination:

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(A x B) - C = balance due to employer/worker on termination

- where A is the 4 weeks leave (i.e. 20 days if worker works full 5 day week);
- B is the proportion of the leave year which has expired on the date of termination; and
- C is the amount of leave the worker has actually taken by the leave date.

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Examples:

- a. Worker X works 5 days a week for a continuous 8-month period and only takes 5 days paid annual leave before termination:

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8 months = 0.66 of the working year

(20 x 0.66) - 5 = 8.2 days (is the balance due to Worker X for which payment in lieu is made).

- b. Worker Y works 3 hours a week for a continuous 6-month period and takes 1 week's (equal to 3 hours) paid annual leave before "termination":

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(12 hours x 0.5) - 3 = 3 hours (balance due to worker).

- c. Worker Z works 1 day a week for a continuous 10-month period and takes 5 days holiday before leaving:

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(4 days x 0.80) - 5 = -1.8

Z owes the employer payment for 1.8 days holiday taken for which he had not accrued entitlement. The balance is to be deducted from Z's last payment. (Deduction is lawful as it is an overpayment).

Currently there is no provision in the REC model terms addressing recouping overpayments of holiday from a worker's final pay packet because it is anticipated under the accrual method that the worker will not have been paid for any more holiday than he has accrued an entitlement to. However if you do not use the accrual method you will need to ensure that there is a term in your terms of engagement with the workers allowing you to make an adjustment from final pay in these circumstances. The most common circumstances for temporary workers on termination is that the worker is entitled to payment for holiday that he has accrued but not taken.

5.9.12. Employees

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i. Annual leave year

Contracts of employment should specify the leave year which applies. Employers may stipulate their own leave year e.g. 1 January to 31 December. If none is contractually provided for the annual leave year will either run from 1 October to

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30 September (if the worker began work on or before 1 October 1998) or, if an employee starts work after 1 October 1998 the annual leave year for that employee will start on the date on which s/he starts work.

ii. Probationary periods

The qualifying period for entitlement to take annual leave was removed with effect from 25th October 2001. However the entitlement of an employee who commences work on or after 26th October 2001 will be limited in the first year of employment to one-twelfth his annual entitlement for each month during the first year. The contract may still restrict workers as to when holiday may be taken or employers may disregard this system of accrual. For example where the standard contract of employment provides that no holiday may be taken during a probationary period. Such provisions will still be enforceable but a worker who leaves before the end of his probationary period will be entitled to a payment in lieu for the proportion of the leave year that has been worked.

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iii. Notice

If a contract of employment is silent as to when holiday can be taken, the provisions for requiring employees to give notice of an entitlement to take paid leave under Regulation 15 will apply. Regulation 15 provides that an employee must give notice in writing of the dates on which leave is to be taken and that the notice must be at least twice as long as the period of intended leave.

An employer on the other hand may specify in a contract of employment the dates on which leave must be taken e.g. bank holidays or may prescribe how much holiday can be taken at any one time. Equally an employer who receives notice of the employee's intention to take leave may require that employee not to take the leave requested by giving counter notice which is at least as long as the period of intended leave. Employers may wish to incorporate these provisions into their contracts of employment or indeed may wish to expressly waive such provisions.

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iv. Carrying holiday forward and payments in lieu

As the Regulations give workers the "entitlement" to 4 weeks paid annual leave an employer must not do anything to deny the entitlement. The Regulations prohibit the employer from making a payment in lieu of un-taken holiday except upon termination. Although an employee is not compelled to take his/her annual leave, if s/he does not take it there can be no payment in lieu. In addition, employees may not carry statutory holiday over into the next leave year. They can of course carry any additional contractual leave over. It should be remembered that although most employees will take their holiday, employers are required to ensure that there is no risk to the employee's health or safety. This implies that where a risk to health and safety may exist and the employee has not taken holiday the employer should encourage the employee to do so.

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If an employee's contract is terminated, the Regulations provide that an employer should make a payment in lieu of un-taken leave. This is the only time that a payment in lieu can be made. The Regulations are silent as to whether a payment in lieu must be made when a contract has been terminated for, say, gross misconduct, but equally they do not allow the employer to exercise its discretion in making a payment in lieu in these circumstances, and it therefore seems likely that payment in lieu of un-taken leave must be made on termination in all circumstances. It may be possible to insert a clause in the employment contract allowing payment on termination of any holiday in excess of the statutory amount to be made at the employer's discretion. However if employers do this they will also have to stipulate that the first 4 weeks of a worker's holiday is statutory and any remaining holiday is contractual so that arguments about whether holiday remaining on termination is in respect of statutory or contractual entitlements are prevented.

5.9.13. Paid annual leave and clients – cost implications

- i. The annual leave provisions have significant cost implications for the temporary work industry, and in the majority of cases these need to be passed on to the client.
- ii. There will be temporary workers whose full entitlement never falls due in respect of any one assignment and it may be that clients will object to a global increase to rates on those grounds.

However the administrative burden of calculating annual leave entitlements on individual contracts makes it unlikely to be a practicable solution and it is anticipated that all employment businesses will need to take a global view and alter their charges accordingly;

- iii. For obvious reasons REC cannot give guidance on any increase in charges across the board as costs will vary from organisation to organisation. However, employment businesses must ensure that if increases in charges are required, they are passed on to clients and not accounted for as reductions in pay to temporary staff.
- iv. Some employment businesses have found clients unwilling to accept increases in charges as a result of paid holiday entitlements. Employment businesses should keep in mind that their paramount responsibility is to their temporary workers and if a client's refusal to accept an increase in charges makes it impossible for the employment business to supply to that client and account to the temporary workers for their holiday pay, it is the service to the client that should be compromised and not the employment business's obligation to the workers.

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5.10. Enforcement

There are two main enforcement mechanisms. Individual rights will be pursued through Employment Tribunals and health and safety rights through the Health and Safety Executive and Local Authorities.

Tribunals will deal with claims for entitlements such as holiday, pay, detriment, consultation rules, workforce agreements etc and award compensation accordingly.

The Health and Safety Executive will deal with weekly limits, night-workers, health assessments, record keeping and individual agreements. Normal Health and Safety Executive enforcement powers, fines and imprisonment will be applicable.

Under the Working Time (Amendments) Regulations 2003 Inspectors have been extensive powers of examination and investigation, including inspecting records and questioning any person who may have information. They may also serve improvements and prohibition notices.

6. CASES ON HOLIDAY PAY

6.1. Blackburn & ors –v- Gridquest Ltd (t/a Select Employment) & ors Court of Appeal, July 2002

Topped-up rates not unlawful but worker must be aware the pay rate includes an element of holiday pay

This case concerned an appeal to the Court of Appeal by a number of workers against the decision of the Employment Appeal Tribunal that an employer's liability to pay holiday pay could be discharged by payments said to be inclusive within their hourly rate. The Employment Appeal Tribunal had previously held that if the hourly rate paid to a worker included an element of holiday pay, that pay had to be taken into account in deciding whether any further holiday pay was due either when holiday was taken or on termination of the contract.

In view of the conflicting decisions at EAT level (see paragraph 5.2 below), it was hoped that when this matter finally came before the Court of Appeal, the Court would take the opportunity to clarify the law on annual leave payments. However, the Court chose to confine its decision to the facts of this case alone.

The Court of Appeal reached their decision on 23rd July 2002 and agreed with the workers that their employer had failed to pay the workers the holiday pay to which they were entitled under the Regulations. This was because the workers in question were unaware that their rate included an element of holiday pay. The Court stated that an employer must agree with a worker that their contractual pay will include an element for holiday pay under the Working Time Regulations and, in the absence of such agreement, the employer could not claim credit for any payments supposedly paid through the rate.

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Despite being requested by Counsel for the workers to go beyond this decision and declare that payment of holiday pay as part of a “rolled-up” rate would be unlawful in all circumstances, the Court declined to do so. This means that, for now, it is still lawful to pay holiday pay as a top-up or rolled-up payment with the rate provided that the worker agrees that this be so. The onus will clearly be on the employer to prove that the worker has agreed to receive holiday pay in this way rather than the other way round.

In the REC model terms of engagement (see chapter 12A of the Legal Reference Guide), the clauses referring to holiday pay give the option for stating that holiday pay will be added as a top-up to the rate. If a worker accepts work under such terms even if they have not signed them this will probably be sufficient to imply their agreement. However we advise that this clause be pointed out to all workers when handing them terms of engagement and that members ask the worker to sign the terms and return a copy to them whenever possible. Also as an extra safeguard the holiday pay should be shown as a separate element on their pay slip. This will mean there can be no argument that a worker has not agreed to it if they have received terms and pay slips where it has been clearly brought to their attention and they have raised no objection. A final precaution is to ensure that the workers do actually take time off otherwise members would fall foul of the Regulation prohibiting a payment in lieu of holiday, except on termination. Members’ attention is also drawn to paragraph 4.9.7 above for more information on the top-up method.

Annual leave entitlement under the Working Time Regulations will remain in doubt until another case comes before the Court of Appeal to lay down a precedent for the tribunals to follow. Members who pay holiday pay as a top up to the normal rate may continue to do so but it remains to be seen for how much longer it will be lawful.

6.2. MPB Structure Ltd V Munro, EAT - March 2002

The EAT in Scotland decide that rolled up payments are unlawful

There is no provision in the Working Time Regulations 1998 (‘the WTR’) that states that holiday pay must be paid at the same time as when the holiday is taken. However, many commentators believe that the ‘top up’ method is contrary to the ‘spirit’ of the Regulations. It would seem that the appeal judges in the MPB Structure case agreed with this view.

In this case, the EAT decided that the ‘top up’ method was unlawful, placing as it does an onus on the workers to have the funds available when they actually take the holiday. In the EAT’s view, ‘top up’ pay was unlawful due to Regulation 35 of the WTR because it had the effect of excluding or limiting the WTR.

This decision appears to be based on an employee’s affordability of holiday – not a factor that has ever been of relevance before. This decision is therefore an unusual one and it is strange that the EAT failed to mention the previous EAT decisions which upheld the ‘top up’ method. However, this case should be considered in the light of the later decision by the Court of Appeal (see paragraph 5.1 above).

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6.3. List Design Group v Catley, EAT 2001
Claim for backdated holiday pay upheld

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Catley worked for List Design over several different periods of time, including the period in question that was 29 May 1998 to 29 September 2000. When the WTR came into force in October 1998, List Design had written to Catley stating that:

“As you will be aware from your existing contract, your rate currently includes an allowance to cover the provision of holidays. Accordingly you should set aside 8.33 % of your pay for holiday funds.”

The Tribunal found that Catley's hourly rate did not include an element to cover holiday pay and that List Design's letter seemed to be an attempt to circumvent the WTR.

Catley used up most of his holiday entitlement during the two holiday years but he did not receive any holiday pay. His last day of unpaid holiday was 1 September 2000. Catley did not make his claim for holiday pay until 8 November 2000 but the EAT allowed him to recover non-payments for the holiday years 1998-1999 and 1999-2000 since his claim was within three months of 1 September 2000. Even more controversially, the EAT allowed Catley to recover his maximum entitlement of 15 days for the leave year up to October 1999 despite the fact that he had only taken 11 out of the 15 days available.

Catley's claim was inventive because a worker only has three months to bring a claim under WTR. Catley's representative argued that Catley could make claims further back in time by claiming the money as unpaid wages (a claim where the time limit for bringing a case in the Tribunal is three months from the last “deduction”).

This decision is all the more astonishing since the EAT is stating that the entitlement to be paid annual leave is an absolute right in that the employer has to pay even where the leave was not taken.

In the light of this case, members are advised to encourage all workers to take their full entitlement to leave. In practice this can best be achieved by issuing a memo reminding all workers that the leave year is about to expire and they will lose their unused holiday entitlement if they fail to use it before the end of the leave year.

6.4. Kigass Aero Components Ltd V Brown & other cases, 2002
Workers entitled to accrue holiday pay whilst on sick leave

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The Employment Appeal Tribunal in three consolidated appeals - Kigass Aero Components Ltd v Brown; Bold Transmission Parts Ltd v Taree; and Macredie v Thrapston Garage held that, under the Working Time Regulations 1998, workers on long term sickness continue to accrue entitlement to paid holiday even where they have been absent for the duration of the leave year.

The appeals

In the first appeal, the employee B was employed under a contract of employment with company K. In January 1997 he was involved in a road traffic accident and went on long term sick leave but he continued to remain employed by K. In January 1999 his entitlement to statutory sick pay expired. In August 1999 B applied to an Employment Tribunal (ET) claiming 15 days holiday that he had been entitled to take in 1999 under the Working Time Regulations. B's claim succeeded and subsequently K appealed to the EAT.

In the second appeal, T (an employee employed under a contract of employment) suffered an injury at work and went on long-term sick leave for over 12 months. In late 1999 he requested holiday pay from his employer BTP. Upon receiving no response from BTP he applied to the ET who upheld his claim for four weeks holiday pay. BTP appealed to the EAT.

In the third appeal, the employee M's employment with the company TG had ended in November 2000, however, upon checking the amount of holiday paid by TG, he found that he had not been paid holiday pay for a period of sick leave when he had not worked. M lodged a claim for failure to pay holiday pay but the ET dismissed his claim. They stated that the correct interpretation of the Regulations meant that the entitlement to payment in respect of unused holiday can only accrue while a worker is serving a period of "working time"; that is while a worker is at his or her employer's disposal and can carry out his or her duties. M appealed to the EAT.

EAT decision

The EAT examined the Regulations and made the following points:

- under Regulation 13 there is no reference to a 'worker' having to serve a period of 'working time' if he or she is to become entitled to leave;
- there is nothing in Regulation 2 to suggest that in order to be a 'worker' a person needs to have served a period of 'working time';
- a worker must give notice in accordance with Regulation 15 if he or she wishes to take paid annual leave even while they are absent, say on sick leave.

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The EAT then applied their construction of the Regulations to the facts of each case before them.

The EAT held that B had fulfilled the only requirements which he needed in order to be paid for annual leave taken; he had duly given notice under Regulation 15 and therefore was entitled to leave and to be paid for it. His absence from the workplace and his failure to put in any working time did not prevent his right to bring a claim. Further there was no detectable error of law in the ET's decision in the case of T, the second appeal. In respect of M's appeal the EAT held that the payment he had received in respect of unused holiday entitlement should have been calculated on the basis that he had been a 'worker' for the entire proportion of the year that had expired even though he had been on sickness leave.

Conclusion

The controversial ruling in this case could have a tremendous impact on employers and recruitment consultancies engaging workers whether under a 'contract of employment' or 'contract for services'.

The decision means that employees on sick leave can give their employers notice that they wish to take a period of annual leave even if they know that they will continue to be sick during this period and they have exhausted any entitlement to sick pay. Equally, where employment relationships are terminated, employees can claim a payment in lieu of unused statutory annual accrued leave even though they might have been off work sick for long periods during the leave year.

It should be noted that in all these cases the 'workers' were employed under contracts of employment, which continue even when the worker is unable to work. Whereas a contract for services does not exist between assignments, except arguably where a temporary worker is eligible to receive and does receive statutory sick pay from an employment business.

Therefore temporary workers engaged under a 'contract for services' or 'of services' who fall sick during the course of an assignment and are eligible to receive statutory sick pay from the employment business may as a result of this ruling continue to accrue holiday pay until the contract is terminated. It is important to note that liability for statutory sick pay (SSP) is only applicable whilst there is a contract in existence between the worker and employment business. The worker's contract cannot be terminated in order to avoid SSP but it can be terminated for sound commercial reasons. For example, if the client ends the assignment or no longer wishes to use the services of that particular worker so that the work is no longer available for the absent worker. Termination should be notified to the worker by telephone and/or in writing and takes effect immediately upon receipt by the worker. For further guidance, please see Chapter 2B of the Legal Reference Guide.

SUMMARY	MATRIX			
	MAXIMUM 48 HOUR WEEK	NIGHT WORK HEALTH ASSESSMENTS	REST BREAKS	PAID ANNUAL LEAVE
TEMPORARY WORKERS	<ul style="list-style-type: none"> 48 hour week applies; averaging period 17 weeks or longer in specified sectors; individuals can opt out by separate agreement; record keeping for all workers' hours except if opted out (2 years); employment business liable for any breaches - Employment Tribunal & HSE enforcement. 	<ul style="list-style-type: none"> 8 hour night work cap applies; absolute 8 hour cap if work hazardous; averaging period 17 weeks or longer in specified sectors; entitled to free health assessments prior to night work assignments and regularly thereafter record keeping for night work and health assessments (2 years); employment business liable for any breaches. 	<ul style="list-style-type: none"> rest breaks apply subject to derogations; employment business must agree with workers what constitutes "working time" e.g. daily lunch break? employment business should enquire about secondary employments if worker has more than one employer; employment business liable for any breaches. Employment Tribunal complaint only. 	<ul style="list-style-type: none"> entitlement to 4 weeks paid annual leave no payment in lieu of un-taken holiday except on termination; no entitlement to carry over un-taken leave; workers entitled to take leave or not. Employment business not to prevent workers from taking paid leave; additional provisions required in worker's contracts; record keeping (2 years); employment business liable for any breaches. Employment Tribunal complaint only
PERMANENT EMPLOYEES	<ul style="list-style-type: none"> as above (replace "emp. business" with "employer") 	<ul style="list-style-type: none"> as above (replace "emp. business" with "employer") 	<ul style="list-style-type: none"> as above (replace "emp. business" with "employer") 	<ul style="list-style-type: none"> as above (replace "emp. business" with "employer")
CLIENTS (These are recommendations for dealing with clients)	<ul style="list-style-type: none"> workers under supervision and control of client; client to be informed which workers have and have not opted out of 48 hour week; client to be contractually obliged not to require workers to work over 48 hours where there is no agreement to do so. 	<ul style="list-style-type: none"> workers under supervision and control of client; ensure with client absolute 8 hour cap enforced when work hazardous; client to be informed which workers have/have not passed health assessment for night work; client to be contractually obliged not to require worker to perform night work without referring to employment business first. 	<ul style="list-style-type: none"> workers under supervision and control of client; client contractually required to treat all temporary workers as it would its own employees. 	<ul style="list-style-type: none"> employment business to inform client when workers intend to take annual leave in advance of leave; potential cost implications for clients in rates

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