Working time

Employment law guideline: 7

This Guideline is designed to provide employers and managers with a reference document dealing with the Organisation of Working Time Act 1997. The Act sets out statutory rights for employees in respect of rest, maximum working time and holidays. In specific circumstances, certain categories of employees are excluded or exempted from all or parts of the Acts provisions. Otherwise, all employees are covered. Part III of the Act deals with public holidays and annual leave which are addressed in a separate guideline.

Scope

The Organisation of Working Time Act 1997 is a comprehensive piece of legislation and it will affect different organisations in different ways. The most important feature to bear in mind is that certain activities are expressly excluded from the provisions of the Act. Many other activities are covered by exemptions which do not exclude employees from the provisions of the legislation, but allow for the application of such provisions to be varied. The working time legislation was amended by the Workplace Relations Act 2015 to include the accrual of annual leave entitlement while absent due to illness; this was effective from 1 August 2015. It was also amended by the Employment (Miscellaneous Provisions) Act 2019 with effect from 4th March 2019.

Excluded employees

Members of the Garda Síochána and Defence Forces are totally excluded from the provisions of the Act.

A person engaged in the following activities is excluded from Part II of the Act, which governs matters relating to working time. They are still covered by Part III which regulates holiday entitlements:

- any person living with and working for their relative, where the living and working area are treated as the same location;
- a person who can determine their own working time (not including any core minimum time stipulated by the employer in an employment contract).

Exemptions

An exemption does not function in the same way as an exclusion which effectively removes individuals from coverage of the legislation. Where provided, an exemption from the Act allows an employer not to apply certain provisions of the Act subject to conditions on “compensatory rest”. The Act details a number of exemptions in relation to specific activities and circumstances. It should be noted that under certain circumstances where it is not possible to give “compensatory rest” it will be acceptable for an employer to provide the employee concerned with “other compensatory arrangements”. The Act refers to this action as “appropriate protection”.

Shift changeover/Split shift exemption

The daily rest and weekly rest provisions will not apply to a person employed in shift work each time he/she changes shift pattern, or to a person employed in an activity consisting of periods of work spread out over the day (eg, split shifts). Equivalent compensatory rest must be taken within a reasonable period of time.

Unforeseeable circumstances exemption

An employer will not be obliged to comply with the daily rest, rest break, weekly rest, night work and information on working time provisions where:

- due to exceptional circumstances or an emergency (including an accident or the imminent risk of an accident) the consequences of which could not have been avoided despite the exercise of all due care; or
- due to the occurrence of unusual and unforeseeable circumstances beyond the employer's control, it would not be practicable for the employer to have complied with the relevant provision(s) of the Act.

Exemption by Ministerial Regulation

In the Regulations establishing these exemptions it is specified that the employee will not be covered by an exemption if he/she “is not engaged wholly or mainly in carrying out or performing the duties of the activity concerned”, or if they are a “special category night worker” (ie, night workers who are engaged in work which involves specific hazards or heavy mental or physical strain).

To avail of a Ministerial exemption an organisation has to assess whether it is covered by the General Exemptions Regulations (S.I. No. 21 of 1998) outlined below. There is no need to specifically apply to the Minister or his/her Department to be covered by an exemption once an organisation or its employees are wholly or mainly involved

S.I. No. 21 - Organisation of Working time (General Exemptions) Regulations 1998

Under this Regulation certain exemptions relating to daily rest, rest and intervals at work, weekly rest and nightly working hours may apply to employees who are engaged in the following activities:

a) an activity in which the employee is regularly required by the employer to travel distances of significant length, either from his/her home to work or from one workplace to another;

b) persons involved in security and surveillance activities requiring a permanent presence in order to protect property and persons. Particularly security guards or caretakers;

c) activities of a seasonal nature or where there is a foreseeable surge in activity. Also exempt are employees who are directly involved in ensuring the continuity of production or provision of services, particularly in the following:

- services relating to the reception, treatment and/or care of persons in residential institutions, hospitals or similar establishment;
- provisions of services at a harbour or airport;
- production in the press, radio, television, cinematographic production, postal and telecommunications services;
- provision of ambulance, fire and civil protection services;
- gas, water and electricity production, transmission and distribution, household refuse collection and incineration plants;
- any industrial activity in which work cannot, by reason of considerations of a technical nature, be interrupted;
- research and development activities;
- agriculture and tourism.

S.I. No. 52 - Organisation of Working Time (Exemption of Civil Protection Services) Regulations 1998

Certain persons involved in the activities in the civil protection services are exempted from the application of daily rest, rest and intervals at work, weekly rest, weekly working hours and nightly working hours. These include persons employed by prisons to control or care for prisoners and persons employed by the fire authority.

S.I. No. 817 - Organisation of Working Time (Inclusion of Transport Activities) Regulations 2004

Under S.I. No. 20 of 1998 Organisation of Working Time (Exemption of Transport Activities) Regulations 1998, transport workers were exempt from the application of daily rest, rest and intervals at work, weekly rest, weekly working hours and night working hours. S.I. No. 817 revoked S.I. No. 20 and mobile transport workers are now covered by weekly working hours provision of the Organisation of Working Time Act 1997. There are certain exemptions applicable relating to daily and weekly rest periods. S.I. No.817 of 2004 covers mobile workers who are not covered by Tachograph Regulations and AETR Regulations.

Mobile transport workers covered by the Tachograph Regulations and the AETR Regulations are covered by S.I. No.36 of 2012 - European Communities (Road Transport) (Organisation of Working Time of Persons Performing Mobile Road Transport Activities) Regulations 2012.

Exemption by collective agreement

Any sector or business may be exempted from the statutory rest times by collective agreement. Collective agreements to vary the rest times may be drawn up between management and a trade union or other excepted body under the Act. Such agreements must be approved by the Labour Court. Employees covered by registered employment agreements or employment regulation orders may also be exempted. Non-unionised employments cannot conclude a collective agreement.

Compensatory rest

All exemptions are subject to equivalent compensatory rest being made available to the employee. In these circumstances, rest may be postponed temporarily and taken within a reasonable timeframe. This ensures that although employers may operate a flexible system of working, employees must not lose out on rest. In determining when to allocate compensatory rest, consideration should be given to the circumstances in the individual place of employment and the health and safety requirements for adequate rest. This includes the type of work done (manual/physical work), the location of the job (eg, in a crane/on a scaffold) and the employee’s distance from home etc.

The Department of Business, Enterprise and Innovation, through the former Labour Relations Commission, produced a “Code of Practice on Compensatory Rest” (S.I. No. 44 of 1998) which sets out guidelines on the application and requirements of this provision in the legislation. The Code of Practice is available on www.workplacerelations.ie.

Appropriate protection

If for justifiable reasons an employer cannot provide compensatory rest, the employer must make adjustments to the employees’ conditions of employment in order to compensate the employee. What exactly constitutes appropriate protection is not specified in the Act. It cannot mean:

- the granting of monetary compensation to the employee;
- the provision of any other material benefit to the employee, other than benefits or amenities that would improve the physical conditions under which the employee works. This can be taken to mean that the use of vouchers or presents will not be allowed.

Some examples (that are by no means exhaustive) of what may constitute "appropriate protection" are listed below:

- refreshment facilities, recreational and reading material;
- appropriate facilities/amenities such as television, radio and music;
- alleviating monotonous work or isolation; and
- transport to and from work.

Working time

Working time is defined as any time that the employee is,

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

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

Weekly working hours

The legislation limits the maximum average working week to 48 hours. Weekly working time can be averaged out over a four, six or up to 12 month reference period. Working time is defined as net working time i.e, exclusive of breaks, standby periods and on-call periods (that occur away from the place of work).

Reference periods

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

- any period of statutory annual leave;
- any period of sick leave;
- leave granted under the Maternity Protection Acts, the Adoptive Leave Acts, the Parental Leave Acts including *force majeure* leave.

Four month reference period

Weekly working time can be calculated over a basic reference period of four months, this applies to all activities in general.

Six month reference period

A six month reference period can be utilised if the organisation or employee is:

- involved in an activity that is exempted by Ministerial regulation under the General Exemptions (see above); or,
- where the weekly working hours may vary on a seasonal basis.

Up to 12 month reference period

The reference period may be extended up to a period of 12 months where this is specified in a registered collective agreement.

A non unionised employment cannot average over a period greater than four months, unless covered by an exemption listed in the General Exemptions, when it then may avail of a six month averaging period. The 12 month averaging period cannot be applied by non-unionised employments.

Daily rest

Under the legislation an employee is entitled to 11 hours consecutive rest in each 24 hour period. This effectively means that having completed a day's work an employee cannot report back to work until 11 consecutive hours have elapsed.

Time spent by an employee on "standby" or "on call" are not generally considered working time. However, an employee who is "called-out" to perform his/her duties would be considered as working. Such "call-outs" will therefore break consecutive rest if the employee has not had 11 consecutive hours rest before the call-out, or if he/she cannot avail of the 11 consecutive hours after the call-out period.

Where employees are on call and considered to be at work, this period qualifies as working time. Individual employment contracts may address this issue specifically, for advice please call your Ibec ER executive. For avoidance of doubt, all employment rights and statutory minimum terms apply to working time.

The Code of Practice on Compensatory Rest (S.I. No. 44 of 1998) allows exemptions to be made in the case of split-shift patterns, standby and call-out arrangements. Where applicable, the employer may add together non-consecutive rest periods in a 24 hour period to make up the 11 hours daily rest for an employee, whilst always having regard for the employee's overall health and safety.

There are specific provisions in the Act that relate to varying rest times. This can also occur through the formation of legally binding collective agreements made under the Act and approved by the Labour Court, or through Registered Employment Agreements/Employment Regulation Orders.

Rest breaks at work

An employer must not require an employee to work for more than 4.5 hours without a break of 15 minutes. If the hours of work are greater than six hours, an employee's total rest break entitlement is 30 minutes which can include the 15 minute break already referred to. Rest breaks must not be given at the end of the day. There is no requirement for paid rest breaks and such breaks are not considered as "working time".

Rest breaks for shop workers

There are special provisions governing the daily rest breaks of retail workers which have been authorised by Ministerial Regulation (S.I. No. 57 of 1998). SI 57 covers any retail trade or business (not including hotels) involved in the preparation of food, including catering operations and licensed premises. For any shop employee whose working time includes the period from 11.30 am to 2.30 pm in totality, and who works more than six hours, the minimum duration of the break must be one hour. The one-hour break must commence between the hours mentioned and cannot be granted at the end of the working day.

Weekly rest period

An employee is entitled to a period of 24 hours consecutive rest in each seven-day period. This reference period can be averaged over 14 days. If the weekly rest day is preceded by a working day then the employee concerned must first receive his/her daily rest entitlement of 11 hours consecutive rest. This effectively means that such an employee is entitled to 35 hours consecutive rest. The 35 hours rest may be shortened in specific circumstances to 24 hours for objective technical reasons relating to the work concerned.

Unless otherwise provided in a contract of employment an employee will be entitled to have Sunday off as his/her weekly rest period. If weekly rest is averaged over 14 days, at least one rest day must be a Sunday.

These are just the minimum weekly rest periods legislated for, and of course there is nothing to prevent employers providing longer weekly breaks.

For employees involved in activities covered by an exemption the rest breaks can be varied subject to granting compensatory rest.

Sunday working

Section 14 of the Organisation of Working Time Act 1997 sets out statutory rights for employees in respect of Sunday working. Any employee who is required to work on a Sunday without this requirement being taken account of in the determination of pay, shall be compensated as follows:

- by the payment to the employee of a reasonable allowance having regard to all the circumstances; or
- by increasing the employee's rate of pay by a reasonable amount having regard to all the circumstances; or
- by granting the employee reasonable paid time off from work, having regard to all the circumstances; or
- by a combination of two or more of the above means.

Where the minimum value of compensation to be given to an employee for working on Sunday is not specified in a collective agreement, then an Adjudication Officer can hear a dispute in relation to non-compliance. The amount of premium will depend on what is paid in comparable employments. These comparable employments have not been specified but according to the Department of Jobs, Enterprise and Innovation, it will "be equivalent to the closest applicable collective agreement which applies to the same or similar employment and which provides for a Sunday premium".

The Department of Business, Enterprise and Innovation through the former Labour Relations Commission produced a "Code of Practice on Sunday Working in the Retail Trade and Related Matters" (S.I. No. 444 of 1998); it is available on www.workplacerelations.ie.

Night work

For the purposes of this Act, night time is defined as the period between midnight and 7.00am. Night work is taken to mean any work carried out during the defined night-time hours.

Night worker

A night worker for the purposes of this Act is defined as an employee:

- who normally works at least 3 hours of his/her daily working time during night time; and
- the number of hours worked by the employee concerned during night time in each year equals or exceeds 50% of the total number of hours worked by him/her during that year.

Night work restrictions

An employer cannot allow an employee who is a night worker to work more than an average of 8 hours per 24 hour period calculated over a reference period of two months.

Special category night worker

An employer cannot allow an employee who is a special category night worker to work more than 8 hours in each period of 24 hours. This is an absolute limit of eight hours with no averaging possible. A "special category night worker" is defined as an employee to whom an assessment carried out by his/her employer, in relation to the risks associated with the work that he/she is employed to do, and that assessment indicates the work involves special hazards or a heavy physical or mental strain.

Safety regulations

Health and safety regulations place obligations on employers employing night workers to carry out a risk assessment, taking account of:

- the specific effects and hazards of night work; and
- the risks to the safety and health of the employee concerned that relate to the work that a night worker is employed to do.

The assessment should determine whether that work involves special hazards or a heavy physical or mental strain. Before employing a person to work nights an employer should ensure that a health assessment is carried out. A health assessment should also be carried out at regular intervals during the period the person continues to be a night worker.

The assessment must be made available free of charge (employees who may be entitled to free treatment under State schemes should be facilitated). It must be carried out by a registered medical practitioner.

If an employee who is employed to do night work becomes ill and the illness is connected with the fact that they carry out night work then the employer shall, wherever possible, assign the employee to suitable work that does not involve night work. Examples of such ailments that may be caused or exacerbated by night working include chronic depression, insomnia and diabetes.

Notification of working time

The provision of information on working time applies where neither:

- the contract of employment; or
- employment regulation order/registered employment agreement; or
- collective agreement;

specifies the normal or regular starting and finishing times of work of an employee.

Under such circumstances the employer must notify the employee, at least 24 hours in advance of the first or only day in each week on which the employer requires the employee to work, of the times at which the employee will normally be required to start and finish work on each day and the day(s) required in each week.

If the hours for which an employee is required to work for his/her employer include such hours as the employer may from time to time decide, notification of additional hours (ie, overtime, change to a roster) must be given at least 24 hours in advance of the first or only day of work in that week. The employee must be informed on a day he/she works.

If during a period of 24 hours before the first or only day of work an employee has not been required to work, eg, an employee works on Friday and does not work on Saturday or Sunday, then notification for work on Monday must be given on Friday. Where unforeseeable circumstances justify a change in the notified times, an employer may alter the starting and finishing times, or the timing of additional hours. The provision on advance notification does not affect the employer's right to require the employee to work different hours other than those notified, if circumstances which could not have been reasonably foreseen arise.

Communication of changes

In general an employee may be notified of working hours or changes to working hours (such as overtime) by the placing of a notice in a conspicuous position in the employee's place of employment.

Additional requirements

Under the Employment (Miscellaneous Provisions) Act 2018 and the Terms of Employment (Information) Acts 1994 to 2014 employees are entitled to a written statement of their terms and conditions of employment. According to SI. No. 49. Terms of Employment (Additional Information) Order 1998, this statement must include the employees terms and conditions relating to rest intervals including the times and duration of such breaks. This includes details on the daily rest period, rest breaks at work and weekly rest periods.

The Employment (Miscellaneous Provisions) Act 2018 requires that the number of weekly working hours in a contract of employment be greater than zero but continues to facilitate low hours contracts. Employers are unable to use zero hours working practises unless they relate to:

- work of a casual nature
- work done in an emergency circumstances
- short-term relief work to cover routine absences

The above terms are not defined in the Act and we await further clarification as to how these exemptions will operate in practice.

A provision applies to employees whose contract of employment operates on the basis that the employee is required to make themselves available to work for an employer in a week:

- a certain number of hours (contract hours); or,
- as and when the employer requires him/her to do so; or,
- a combination of the both of the above.

This provision states that an employee may not be subjected to zero hours contracts without compensation.

In the event that an employer fails to require an employee to work 25% of the time the employee is contracted to make himself or herself available for, the employee will be entitled to payment for 25% of the contract hours or 15 hours, whichever is the lesser amount. The Employment (Miscellaneous Provisions) Act 2018 introduced the requirement in these circumstance of a minimum payment of 3 times the national minimum wage as prescribed by the National Minimum Wage Acts 2000 and 2015 or 3 times the hourly rate of pay of an employment regulation order that may be in force, on each occasion this occurs.

This compensation is not payable when an employee is on call, sick, on short-time or lay off, or in the event of an emergency.

Variable Hours

While such contracts continue to be a valid form of employment, the Employment (Miscellaneous Provisions) Act 2018 provides where an employee's contract of employment or statement of terms of employment does not reflect the number of hours worked per week by an employee over a 12-month reference period, the employee shall be entitled to request to be placed in a band of weekly working hours specified in a table as set out overleaf. The request from the employee is to be in writing and the employee is entitled to be placed by the employer in a band of weekly working hours from a date that is not greater than 4 weeks from the date the employee made the request

An employer may refuse to place an employee on a requested band where:

a) there is no evidence to support the claim
b) exceptional, unusual or unforeseeable circumstances arise
c) there has been a significant adverse change impacting on the business during or after the reference period
d) the average hours worked during the reference period by the employee were due to a temporary situation that no longer exists

The Weekly Band of Hours

The band of hours the employee must be placed in for a period of not less than 12 months following that placement are as follows:

Band	From	To
A	3 hours	6 hours
B	6 hours	11 hours
C	11 hours	16 hours
D	16 hours	21 hours
E	21 hours	26 hours
F	26 hours	31 hours
G	31 hours	36 hours
H	36 hours and over	

For the avoidance of doubt, it remains possible to employ workers on a seasonal basis and the legislation specifically states that employers are not required to offer hours of work in a week where the employee was not expected to work or where the employer's profession, occupation or trade is not being carried out. However, this does not exempt seasonal workers from being able to request placement on a band of hours provided they meet the criteria.

Failure to place an employee on a requested band/penalisation

Failure to place an employee on a requested band of weekly hours may result in a complaint being made to the Workplace Relations Commission. There may be defences available to the employer facing a request, as outlined earlier e.g. where there is no evidence to support the request for placement on a band. An adjudication officer will have a range of powers available to them when determining a complaint under the legislation, namely:

- to declare that the complaint is or is not well-founded
- where the complaint is well-founded, to require the employer to comply with the relevant provision and place the employee on the requested band

An adjudication officer does not have the power to award compensation when addressing a complaint of failure to assign an employee to a requested band under the Act. However, the Employment (Miscellaneous Provisions) Act 2018 amends the penalisation provisions in section 26 of the Organisation of Working Time Act 1997 which provide for compensation (of up to 2 years' remuneration) where an employer has been found to have penalised an employee. The new penalisation provisions prohibit any acts or omission by an employer which would operate to the detriment of an employee as a result of invoking any right conferred by the Employment (Miscellaneous Provisions) Act 2018 or giving evidence in related proceedings. Examples of penalisation for the purpose of the legislation include transfer of duties, suspension, lay-off or dismissal, demotion, change in working hours or in location of work.

Collective agreements banded hours

The Employment (Miscellaneous Provisions) Act 2018 provides an exemption from the new statutory band arrangements for employers who operate a collective agreement with a trade union which provides for banded hours. The exemption appears to be a narrow one and applies to collective agreements providing for banded hours only.

Collective agreements

The Labour Court may, subject to the following provisions, approve a collective agreement. The Labour Court must consult such representatives of employers and employees, as it considers appropriate and shall not approve of a collective agreement unless:

a) in the case of a collective agreement relating to exemptions or the extension of reference periods for averaging, the Labour Court must be satisfied that the agreement is appropriate to the Directive;

b) the agreement has been concluded in a manner usually used in determining the pay or other conditions of employees in the employment concerned;

c) the body which negotiated the agreement on behalf of the employees is a holder of a license under the Trade Union Act 1941, or is an excepted body within the meaning of that Act which is sufficiently representative of the employees concerned; and

d) the agreement is in suitable form.

If the Labour Court is not satisfied that the conditions mentioned in (a) or (d) above are fulfilled, it may request the parties to vary the agreement appropriately. If a collective agreement is approved by the Labour Court and subsequently the parties to the agreement wish to make variations to that agreement, this may be done subject to the approval of the Labour Court. The Labour Court may withdraw its approval where it is satisfied that there are substantial grounds for doing so.

The Labour Court has issued procedural guidelines to be observed when applying for an exemption by collective agreement. Forms which can be used to apply for a collective agreement are available on www.workplacerelations.ie.

Disputes

A complaint or a dispute in relation to an employee's entitlement under the Act may be referred in writing, to the Director General of the Workplace Relations Commission (WRC). The decision of an Adjudication Officer shall do one of the following:

- declare that the complaint was or was not well-founded; or
- require the employer to comply with the relevant provision; or
- require the employer to pay to the employee compensation of such an amount as is just and equitable having regard to all the circumstances, but not exceeding two years' remuneration.

In general, an Adjudication Officer will only consider a complaint or dispute if it is presented to the Director General within six months of the date of the alleged contravention.

This time limit may be extended by a further six months if there was a reasonable cause for the delay.

Appeals and Enforcement

The Act empowers the Minister to refer a working time matter to an Adjudication Officer. Appeals against decisions of an Adjudication Officer may be made to the Labour Court. Such appeals must generally be made within 42 days after the date upon which it was communicated to the party. The Minister may, at the request of the Labour Court, refer a question of law to the High Court.

Where a decision of an Adjudication Officer has not been carried out by an employer and the time for bringing an appeal has expired, then an employee may bring a complaint before the Labour Court. Determinations of the Labour Court will be enforceable through the District Court.

Double employment

An employer will be guilty of an offence under this legislation if he/she employs an employee to work on any day/week on which such employee has done work for another employer, where the aggregate of the periods exceeds the terms of the legislation.

Both the employer and the employee shall be guilty of an offence. If the employer is prosecuted for an offence under this section it will be considered a good defence for him/her to prove that he/she neither knew nor could by reasonable enquiry have known that the employee concerned had done work for another employer, the cumulative effect of which would have exceeded the limitations laid down under this legislation.

Records

The Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations 2001 (SI. No. 473 of 2001) stipulates the manner in which these records should be documented and maintained. The Regulations require an employer to keep a record of:

- the name and address of each employee, his/her PPS number, and a brief statement of his/her duties (which can be a reference to a job description or classification);
- a copy of the statement of terms and conditions of employment which was given to each employee under the Terms of Employment (Information) Acts 1994 to 2014 (commonly referred to as the ‘contract of employment’) - that contains:

i. details of the days and total hours worked in each week by each employee;
ii. leave taken by the employee by way of annual leave and public holidays, and the payment received in respect of that leave;
iii. any “additional days’ pay” paid to an employee in respect of a public holiday entitlement;
iv. a copy of any notice given to an employee under Section 17 of the Act (information about starting and finishing times and notice of additional working hours) eg, rosters.

Inspections

The Act empowers the Minister to appoint inspectors who may enter a premises and carry out all or any of the following activities:

- examine or enquire as necessary whether the legislation is being complied with;
- require the employer concerned to produce records;
- require an employee, former employee or employer to furnish information;
- examine an employer, former employer, employee, former employee in relation to matters under the legislation and require such individuals to answers questions - other than incriminating questions - and to sign a declaration as to the truth of the answers.

The Act lists a number of criteria upon which it will be an offence not to co-operate with an inspector. An inspector, where necessary, may be accompanied by a member of the Garda Síochána when exercising powers under incriminating questions and to sign a declaration as to the truth of the answers.

Compliance and Penalties

The Workplace Relations Act 2015 which was commenced on 1 August 2015 and provides for the serving of compliance notices. This notice specifies how a contravention of the Act against the employer may appeal the compliance notice to the Labour Court within 42 days.

A person found guilty of an offence under the legislation will be liable on summary conviction to a fine not exceeding €2,500. If the contravention is continued after the conviction the person will be guilty of a further offence on every day and for each such offence the person shall be liable on summary conviction to a fine not exceeding €1,000.

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