

# Front page

## **Guidance on the Road Transport (Working Time) Regulations 2005**

This booklet provides guidance on the limits on working time provided for in the Road Transport (Working Time) Regulations 2005. It gives general guidance only and should not be regarded as a complete or authoritative statement of the law.

Readers should be aware that there might be developments in new legislation or case law, which affect the rights of workers.

This guidance is subject to ongoing review in the light of practical experience and any updates will be published on the DfT website ([www.dft.gov.uk/pgr/freight/road](http://www.dft.gov.uk/pgr/freight/road)) and VOSA website ([www.vosa.gov.uk](http://www.vosa.gov.uk)).

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## **Brief overview**

The Road Transport (Working Time) Regulations 2005 (SI 2005 No. 639 - "the Regulations"), came into force on 4 April 2005. The Regulations implement European Directive 2002/15/EC, and apply to "mobile workers" (basically drivers, crew and other travelling staff) who operate on vehicles which are subject to Regulation (EC) No 561/2006 ("the European drivers' hours rules") or, in some cases, the AETR. Mobile workers are required to comply with the Regulations as well as the existing European drivers' hours rules. There is no opt-out from the Regulations.

Mobile workers who only occasionally carry out "in-scope" work are not required to comply with the working time limits under the Regulations (for this to apply, mobile workers must meet the "occasional mobile worker" criteria given in Section 1.3). "Self employed drivers" are exempt from the Regulations until March 2009 - for this exemption to apply, drivers must satisfy criteria given in Section 1.4.

The Regulations introduce limits on weekly working time (excluding breaks and periods of availability) and a limit on the amount of work that can be done within a 24 hour period, for those who operate on night shifts (see Sections 3 and 4 on limits under the Regulations). They also specify how much continuous work can be done before taking a break and introduce daily and weekly rest limits for the crew and travelling staff.

Under the Regulations, "working time" for mobile workers must not exceed:

- an average 48 hour week (normally calculated over a 4 month reference period);
- 60 hours in any single week;
- 10 hours in any 24 hour period, if working at night.

However, use has been made of two derogations contained within European Directive 2002/15/EC, which allow for employers to extend the reference period for the average 48 hour week from 4 to 6 months and allows for night shift workers to exceed the 10 hour working time limit. These provisions are both subject to a collective or workforce agreement being in place (see Section 7.1 - "relevant agreements").

This guide sets out various means for calculating the average working week (see Section 3.4 - "calculating average weekly working time").

Employers are required to monitor working time and should do what they can to ensure that the limits are not breached. Records need to be kept for 2 years. If there is no employer, the Agency, Employment Business or even the worker concerned must monitor their working time. Guidance is also provided on how the tachograph should be used to monitor working time. Further details on record keeping are provided at Section 6.

The Vehicle and Operator Services Agency (VOSA) enforce the Regulations in Great Britain. The Driver and Vehicle Agency (DVA) enforce the working time regime used in Northern Ireland.

## **Queries concerning this guidance**

If after reading this guide, you feel that you need further clarification on certain aspects of the rules, please telephone VOSA on 0870 6060 440, or email [Enquiries@vosa.gov.uk](mailto:Enquiries@vosa.gov.uk) for assistance.

# 1. Who is affected by the Road Transport (Working Time) Regulations?

## 1.1 Main Points

The Road Transport (Working Time) Regulations 2005 (SI 2005 No. 639 - "the Regulations") affect drivers and other "mobile workers" who are involved in operations subject to the European drivers' hours rules, or in some cases the AETR, including own-account drivers and agency drivers. Generally anyone in a vehicle that is required by European legislation to have a tachograph is affected.

If a worker is only occasionally undertaking activities covered by the European drivers' hours rules (see Section 1.3 - "occasional mobile workers"), they are covered by the Working Time Regulations 1998, as amended (SI 1998 No. 1833 - "the 1998 Regulations"), rather than these Regulations.

The Regulations do not affect self-employed drivers until March 2009; provided they fit the definition of self-employed (see Section 1.4 - "self-employed drivers").

## 1.2 Who is affected?

Mobile workers are covered by the Regulations if they are involved in operations subject to the European drivers' hours rules or in some cases the AETR. Generally, drivers, vehicle crew and travelling staff of goods vehicles where the maximum permissible weight exceeds 3.5 tonnes or passenger vehicles suitable for carrying more than 9 people including the driver. [1]

A worker is anyone who provides work or services under a contract, express or implied. A mobile worker is any worker forming part of the travelling staff (typically drivers and vehicle crew, but also trainees and apprentices) who is in the service of an undertaking which operates road transport services for passengers or the movement of goods. Mobile workers include drivers who work for hire and reward companies or companies with own account operations.

Typically, this means:

- drivers of vehicles with a tachograph in them (unless they have an exemption from the European drivers' hours rules), i.e. goods vehicles over 3.5 tonnes, coaches and inter-urban bus services;

- members of the vehicle crew;

- any others who form part of the travelling staff.

A number of road transport operations require attendants who must accompany the driver by law, or fulfil a function ancillary to driving (e.g. navigating or crew to accompany abnormal loads), or security staff for high value goods. Travelling staff may include a range of individuals such as porters in household removals; draymen in

brewery delivery movements; conductors on inter-urban buses. These would all be covered by the Regulations.

The Regulations do **not** apply to:

mobile workers who are not participating in road transport activities covered by the European drivers' hours rules or in some cases the AETR (e.g. employed taxi drivers, certain van drivers, chauffeurs);

any drivers, crew, travelling staff who do not come within the definition of "mobile worker" in the Regulations (e.g. a teacher who drives a PSV on a school trip, that is subject to the European drivers' hours rules);

passengers (e.g. construction workers being ferried to a building site would be passengers rather than travelling staff);

any worker who only occasionally does work which is within the scope of European drivers' hours rules (see Section 1.3);

self-employed drivers who come within the definition of "self-employed driver" in the Regulations (see Section 1.4).

### **1.3 Occasional mobile workers**

The Regulations are primarily for the benefit of the drivers and crew of vehicles participating in road transport activities under the European drivers' hours rules. Drivers and crew who only occasionally participate in such activities are exempt from the Regulations. However, the requirements of the European drivers' hours rules continue to apply, as do the requirements of the 1998 Regulations.

A mobile worker would qualify for this exemption if:

they work 10 days or less within scope of the European drivers' hours rules in a reference period that is shorter than 26 weeks;

they work 15 days or less within scope of the European drivers' hours rules in a reference period that is 26 weeks or longer. [2]

In terms of what constitutes a day for the purpose of this calculation, the Department's view is that, in this context, a "day" means a rolling 24 hour period (starting with the commencement of in-scope work). This applies regardless of the amount of work done within the course of the day. So for example, if two separate 5 hour shifts of in-scope work occurred within the rolling 24 hour period that would only count as doing work on one day. No other calculations would be required during this period, and the next 24 hour calculation would start at commencement of the next period of in-scope work. Where a period of driving overlaps two 24 hour periods the second calculation would start immediately at the end of day 1. However, this is only the Department's opinion, and ultimately, interpretation of the law remains a matter for the Courts.

Employers of occasional mobile workers may arrange individual reference periods (if a relevant agreement is in place), or use the company default reference periods - remembering, of course, that if a worker happens to exceed the above limits then they will be considered a "mobile worker" for the purposes of the Regulations, and any

calculation of working time will be retrospective (i.e. include all hours worked from the start of the reference period).

## **1.4 Self-employed drivers**

Self-employed drivers (as defined under the Regulations) are excluded from all the requirements until March 2009. However, the definition of "self-employed driver" under the Regulations has been tightly drawn. Therefore, those who might be classed as self-employed for the purpose of the Employment Rights Act 1996 or the 1998 Regulations are not necessarily classed as self-employed under these Regulations. Nor is the test the same as applied by HM Revenue and Customs.

As a consequence, only a limited number of drivers are likely to be regarded as a "self-employed driver" for the purposes of the Regulations.

*"Self-employed driver" means anyone whose main occupation is to transport passengers or goods by road for hire or reward within the meaning of Community legislation under cover of a Community licence or any other professional authorisation to carry out such transport, who is entitled to work for himself and who is not tied to an employer by an employment contract or by any other type of working hierarchical relationship, who is free to organise the relevant working activities, whose income depends directly on the profits made and who has the freedom, individually or through a co-operation between self-employed drivers, to have commercial relations with several customers" (Regulation 2 of SI 2005 No. 639)*

Key considerations are that:

- a self-employed driver must have an operator's licence;

- the amount of control that the driver has over their work is a key point, as is their reliance on profits to provide them with an income;

- if the worker is restricted (either implicitly or explicitly) from working for another client/customer, then they would be covered by all the requirements of the Regulations;

- in addition, most agency workers would not count as a self-employed driver because they are normally paid at a fixed rate. Once they accept a job, an agency worker is not free to organise their working activities.

For the purpose of the Regulations, drivers who are partners in a firm or who have limited liability will be treated no differently to sole traders. Providing they have an operator's licence and meet the other requirements under the Regulations, then they can class themselves as a self-employed driver.

## **1.5 Working for employment businesses and/or via employment agencies**

Mobile workers who obtain work via an employment business or an employment agency are subject to terms and conditions under their contract with the business or agency. Workers are normally paid directly by an employment business, as part of their contractual relationship. The employment business is responsible for monitoring

their work and keeping appropriate working time records. However, some workers who obtain work via employment agencies (on a fixed or short term contract) are paid directly by and have a contract with the hirer. Under those circumstances, the hirer monitors working time and maintains adequate records. Where no written contract of employment exists, whoever directly pays the worker in respect of work undertaken will be regarded as the employer for the purposes of the Regulations.

Some workers register with, and work for, more than one employment business. The calculation of working time must include work performed for all employers who undertake road transport activities under the European drivers' hours rules, during the reference period, so the worker must inform all such employers in writing (or whoever is responsible for keeping records), of the hours worked for another employer (See Section 2.5 - "working for two or more employers or another organisation").

Time spent working for employers other than those who are transport undertakings is not counted as "working time" under the Regulations. However, both workers and employers should be aware that such work will impact on the EU drivers' hours rules. It must be recorded and cannot take place during any period relied upon as a "break" or "rest" for the purposes of the EU drivers' hours rules.

Employers and workers also have statutory duties under Health and Safety laws and a common law duty of care to ensure safe systems of working – including measures to ensure workers are not over-tired when carrying out their duties.

Agencies and employment businesses are not generally allowed to keep original tachograph charts or electronic data. If tachograph records are used to monitor working time, then the agency/business should copy the chart before returning it to the client, otherwise they will have to ask the client for a copy of the chart (or for a summary of the information on the chart). See Section 6 "Record Keeping" for full details on record keeping requirements.

### **Frequently asked questions:**

**Q: If a driver is normally deemed to be self-employed (for example for Inland Revenue purposes), but fails to meet the criteria of "self-employed driver" under the Regulations, is he/she covered by provisions under any other working time legislation (e.g. the 1998 Regulations)?**

A: A driver does not necessarily become an employee for the purposes of other employment legislation, because he/she fails to meet the definition of "self-employed driver" under the Regulations. The definition of "self-employed driver" under the Regulations does not set a precedent, in relation to other UK employment legislation.

[1] More information about Regulation (EC) No 561/2006 - who is covered, the exemptions and exceptions, can be found in DfT's drivers' hours guidebooks, under the road freight section of the DfT website at [www.dft.gov.uk](http://www.dft.gov.uk)

[2] Whilst 26 weeks is the maximum reference period under the Regulations, the 1998 Regulations allow for 12 month reference periods to be used.

## 2. What counts as working time?

### 2.1 Main Points

Working time is not necessarily all attendance or shift time. It does not include travelling between home and work (however, it should be noted, that in certain circumstances such periods may count as "other work" under the separate European drivers' hours rules), lunch breaks, other breaks, periods of availability, optional evening classes or day-release courses.

Working time includes job-related training associated with normal work and training that is part of the company's commercial transport operation.

Work carried out for another employer (who undertakes road transport activities within scope of the European drivers' hours rules) counts towards the total working time performed by the mobile worker.

Voluntary work and activities performed by mobile workers who are part-time retained fire fighters, special constables and members of the reserve forces should not be counted towards these limits.

### Employers Check

Identify activities that count as working time and those which count as periods of availability;

Ask workers to confirm any working time they have performed for another employer (who undertakes road transport activities within scope of the European drivers' hours rules).

### 2.2 What is working time?

The Regulations define working time as the time from the beginning of work, during which the mobile worker is at the workstation (typically this means the driver's cab - but see glossary for fuller definition of this and other terms) at the disposal of the employer and exercising his functions or activities - that is to say:

a) the time devoted to all road transport activities including:

driving;

loading/unloading;

training that is part of normal work and is part of the commercial operation;

assisting passengers boarding/disembarking from vehicle;

cleaning, maintenance of vehicle;

work intended to ensure safety of vehicle and its cargo and passengers (e.g. monitoring loading and unloading - including daily defect check and report);

administrative formalities or work linked to legal or regulatory obligations directly linked to the specific transport operations under way.

b) time devoted to other activities:

time during which the mobile worker cannot freely dispose of his/her time and is required to be at the workstation (typically this means the driver's cab - but see glossary for fuller definition of this and other terms) ready to take up normal work, with certain tasks associated with being on duty (e.g. working in the warehouse, or in an office or doing other activities for the employer);

waiting periods where the foreseeable duration is not known in advance by the mobile worker, either before departure or just before the start of the period in question.

Working Time does not include:

Routine travel between home and their normal place of work;

Rest and breaks when no work is done;

Periods of availability (see below);

Optional evening classes or day-release courses;

Voluntary work or time spent as a retained fire fighter, a special constable, or member of the reserve forces.

### **2.3 What is a period of availability?**

Generally speaking a period of availability (PoA) is waiting time, the duration of which is known about in advance by the mobile worker. Under the Regulations, these periods have to meet the following criteria:

a mobile worker should not be required to remain at their workstation;

(but) they must be available to answer calls to start work or resume driving on request;

the period and the foreseeable duration should be known in advance by the mobile worker, either before departure or just before the start of the period in question.

Like breaks and rest periods, a PoA can be taken at the workstation. Providing the mobile worker has a reasonable amount of freedom (e.g. they can relax and read), for a known duration, this would satisfy the requirements for a PoA. Where the mobile worker knows about a delay in advance, but it is deemed prudent that they should remain in the cab for reasons of security or safety, this should not in itself, disqualify this delay being recorded as a PoA. Typical examples might include waiting at a site that is unsafe for pedestrians or staying in a vehicle carrying high value goods or cash.

Mobile workers do not need to be formally notified about a PoA and its duration in advance. It is enough that they know about it (and the foreseeable duration), in

advance either before departure or just before the actual start of the period in question. A PoA would be deemed to be known in advance by a mobile worker if, for example:

- someone (who does not have to be their employer) has told them, or
- they have arrived too early for their allocated slot, or
- they always experience a delay at one of their regular customers.

A PoA does not apply to delays where the mobile worker has to continue working. For example, where a driver is diverted due to a road closure, he/she would still be driving. Normally, delays due to congestion would also count as working time because the driver would be stopping and starting the vehicle. If a mobile worker is monitoring a discharge from the vehicle (e.g. petrol at filling station), this time will also count as working time.

There are no requirements as to the minimum and maximum length of a PoA.

### **Examples of a PoA:**

#### ***Situations when a period of time could be recorded as a PoA (provided the "known in advance" pre-condition is met)***

Time when accompanying a vehicle being transported by boat or train.

Time spent waiting at frontiers.

Periods of waiting due to traffic prohibitions. Traffic prohibitions would include where the police have delayed the movement of an abnormal load for a set period of time, or where vehicles are banned from city centres during specified hours, and the driver has to park the vehicle and wait.

When driving or travelling as part of a team, time spent sitting next to the driver while the vehicle is in motion, unless the mobile worker is taking a break or performing any other work (e.g. navigation). This time (or a part of it) could also be counted as a break - but would need to be recorded as such. Other travelling staff may also count travelling time as a PoA, provided they are not performing any other work.

When a mobile worker experiences a delay at a regional distribution centre or depot, waiting for someone to load or unload their vehicle, if they know about the length of the delay at the start of the period (because someone has told them; because they have arrived too early for their slot; or because they always experience a delay at one of their regular customers).

If a mobile worker typically experiences a 1 hour delay at one of their regular customers, then this would count as a PoA. However, if they were to unexpectedly experience a 2 hour delay, then the second hour would count as working time. Unless the mobile worker was notified, before the end of the first hour, that a further hours delay was expected, in which case the second hour would also count as a PoA.

Where a mobile worker reports for work, is informed that they are not required to undertake any duties for a specified period (albeit, they need to remain on site to answer calls and be ready to take up work), but is free to wait in the canteen or rest facility.

If the vehicle breaks down and the mobile worker is told how long it will take to be rescued.

### ***Situations when a period of time should not be recorded as a PoA***

Where a driver is diverted due to a road closure, he/she would still be driving so the period could not be counted as a PoA.

Delays due to congestion (i.e. stuck in a traffic jam) would not count as a PoA because the driver would be stopping and starting the vehicle.

If a mobile worker is monitoring activity by others, (e.g. petrol at filling station, or the unloading of the lorry), this time would count as working time rather than a PoA.

Frequently moving up within a queue (e.g. waiting within a queue to load or unload) every other minute would not qualify as a PoA.

When the duration of the PoA is not known in advance, for example if a mobile worker was told to arrive at 9am and then leave at any time up to 1pm this would not be a PoA as the duration is not known.

## **2.4 Annual Leave**

Mobile workers subject to the Regulations are entitled to 4.8 weeks' paid statutory annual leave under the 1998 Regulations (unless they do not meet the definition of "worker" under those Regulations). The statutory entitlement will rise to 5.6 weeks on 1 April 2009, subject to a maximum of 28 days.

Four weeks of this statutory annual leave entitlement stems from the European Working Time Directive 2003/88/EC and is provided for by Regulation 13 of the 1998 Regulations. This leave must be treated as 'neutral' (i.e. treated as working time) for the purpose of calculating weekly working hours.

The additional 0.8 week's statutory annual leave entitlement (1.6 weeks from 1 April 2009) is a domestic requirement provided for by regulation 13 A of the 1998 Regulations and does not have to be considered as 'neutral'. This additional leave can be recorded as non-working time when calculating weekly working hours. This is similar to how contractual leave in excess of the statutory minimum can be treated.

It is open to any employer to provide their mobile workers with more favourable conditions than the 1998 Regulations require as a minimum, and to agree that all annual leave be counted as working time.

Employers are free to choose when to assign leave (subject to any relevant employment contracts and/or collective agreements that may be in place) as either

statutory leave under regulation 13 or 13 A of the 1998 Regulations (or contractual leave when appropriate), as long as all of the 4 weeks leave provided under regulation 13 of the 1998 Regulations is allocated in a leave year (as this cannot be carried over).

## **2.5 What is a week?**

The working week must start at 00.00 hours on Monday morning, and finish at 23.59 hours on Sunday.

## **2.6 Working for two or more employers or another organisation**

For the purposes of the Regulations, working time is restricted to work for employers for whom a mobile worker carries out any in-scope road transport activities (i.e. work covered by the European drivers' hours rules). It includes both road transport activities and any other work for such employers (for instance when a driver also works in an employer's warehouse).

Work performed for employers who are not involved in road transport activities (for instance bar work) does not count towards the limits under the Regulations. However, such work would count as part of the "daily working period" for the purposes of determining compliance with the separate European drivers' hours rules (i.e. bar work will impact on when a worker can work and how much work they can do). In addition, all time spent working in such a second job does count towards the 48 hour limit under the 1998 Working Time Regulations, but an opt out from this 48 hour limit is available.

Similarly, the Regulations do not apply to workers who work for employers who undertake some road transport activities if the worker in question is not actually involved in such activities. In such cases, the worker would be subject to the requirements of the 1998 Working Time Regulations.

If a mobile worker works for two or more employers, then the weekly working time under the Regulations is the combined total of the hours worked (excluding breaks, rest and periods of availability) for all employers who undertake road transport activities. The mobile worker must tell their employer(s) in writing, of any working time worked for another employer who undertakes road transport activities.

Time spent on voluntary activities (e.g. driving a vehicle in a carnival/gala days) does not count towards the working time limits. In addition, time spent performing activities for the emergency services or Armed Forces (such as being a retained fire fighter, special constable, and duties performed whilst being a member of the reserve forces (Territorial Army etc)) should not count towards the limits under the Regulations.

Nevertheless, employers should bear these other activities in mind when deciding how much work (and what type), can be performed. Workers should not do any work that would compromise road safety or impair their health. In addition, all the rest requirements and limits under the European drivers' hours rules still apply. It should also be noted that under the European drivers' hours rules other work for another employer, within or outside the transport sector, must be recorded for the purpose of checking compliance with that Regulation.

## **Frequently asked questions:**

**Q: Can a worker be paid for periods of availability - even if these periods do not count towards the working time limits under the Regulations?**

A: The basis for calculating the amount that a worker is paid by their employer should be determined by their terms and conditions of employment. The Regulations are simply concerned with the number of hours that workers can spend on certain activities which fall within the definition of 'working time' for the purposes of the Regulations. The Regulations do not say what a worker can or cannot be paid for.

**Q: If a worker is given some work halfway through a PoA, does any of the time count as PoA?**

A: Yes, the first part counts as PoA. For example, if a worker is told to wait for 1 hour but is subsequently told to start work after 30 minutes, the PoA should be recorded as 30 minutes.

**Q: What if my employer asks me to record a PoA for longer than I have actually taken?**

A: This is illegal and should be reported to VOSA using their confidential helpline 0870 6060 440 (See Section 7.3 - "Enforcement")

**Q: While the vehicle is in motion, travelling crew can normally count time spent travelling as a PoA. Can part of this time also count as a break?**

A: Yes, providing they are not doing other work; they comply with all the necessary requirements for a break; and record the time as a break.

## **3. Weekly working time limits (and how to calculate them)**

### **3.1 Main Points**

Workers may not exceed an average 48 hours working time a week over the reference period, nor may they exceed 60 hours working time in a single week (a week always starts at 00.00 on Monday morning).

Workers covered by the Regulations cannot opt-out from the average 48-hour weekly limit.

The average weekly working time should be calculated over 17 weeks (some methods allow 18 weeks). This can be extended to a maximum of 6 months (26 weeks) under a relevant agreement (see section 7.1 - "relevant agreements").

Enforcement will be on the basis of a fixed reference period, but companies are free to manage working time on the basis of rolling reference periods. The important thing is that where fixed periods are used, the start date is established in advance so that compliance can be monitored.

The average 48 hour weekly limit can be monitored using a rolling reference period over 17 weeks like the existing period under the 1998 Working Time Regulations, as amended - see annex E for details. A collective or workforce agreement is only required under this method if the reference period exceeds 17 weeks.

Employers and mobile workers may agree on the reference period to be used (see Section 7.1 - "relevant agreements"). In the absence of such an agreement, employers can either use option 1 (fixing dates by the calendar) or option 2 (the rolling method) - see Section 3.6 for details of the options.

Statutory annual leave entitlement provided by regulation 13 of the 1998 Regulations, sick leave, maternity, paternity, adoption or parental leave cannot be used to bring down the average weekly working time. Employers must enter 48 hours for each week and 8 hours for each day of such leave. If using the rolling reference period, such leave can be offset using the method used under the 1998 Regulations (see Annex E for details).

#### **Employers check:**

Decide on your preferred option (fixed or rolling) to monitor compliance with the average 48 hour working week;

If a longer reference period or different start/finish dates are needed, consider a collective or workforce agreement with the workers;

If an agreement is reached, make sure the reference period does not exceed 26 weeks.

## 3.2 Limits

If you are an employer, you must ensure your workers do not work more than an average 48-hour week or more than 60 hours in any single week.

Unlike under other working time legislation, mobile workers cannot opt-out from these weekly limits.

## 3.3 What is the reference period and when does it start?

Normally, the number of hours worked each week should be averaged out over a continuous 17 week period. However, the "default calendar option" referred to below, includes some 18 week periods. This is to allow 3 reference periods to be accommodated into one calendar year. In addition, this period can be extended up to 26 weeks if there is a relevant agreement in place (see section 7.1 - "relevant agreements"). This continuous 17 or 26 week period is used to calculate the average weekly working time and is known as the 'reference period'.

The working week must start at 00.00 on Monday morning and finish at 23.59 on the following Sunday. So the starting point for calculating the average 48 hour and 60 hour weekly limits should always be 00.00 on Monday morning.

## 3.4 Calculating average weekly working time

The average weekly working time is calculated by dividing the number of hours worked by the number of weeks in the reference period. It is possible to work up to 816 hours in a 17 week reference period, 864 hours in an 18 week period and up to 1248 hours in a 26 week period.

### Example 1:

A worker has a standard working week of 40 hours and does overtime of 12 hours a week for the first 10 weeks of a 17-week reference period. No leave is taken during the reference period.

The total number of hours worked is:

17 weeks of 40 hours and 10 weeks of 12 hours of overtime

$$(17 \times 40) + (10 \times 12) = 800$$

Therefore the average (total hours divided by number of weeks) is:  $800 / 17 = 47.1$

The 48 hour average and the 60 hour cap have been complied with.

## 3.5 Calculating the average when leave is taken

You cannot use the four weeks statutory annual leave provided by regulation 13 of the 1998 Regulations - sick leave, maternity, paternity, adoption or parental leave in order to reduce the average working time performed during the reference period.

## ***Annual leave***

When using a fixed reference period to calculate average weekly working time "notional" working time figures must be recorded when any of the four weeks statutory leave provided by regulation 13 of the 1998 Regulations is taken. This is to ensure that such leave is 'neutral' for the purpose of calculating weekly working time. These notional figures are 48 hours per week and 8 hours per day.

However, "notional" figures do not have to be recorded for the statutory annual leave provided by regulation 13A of the 1998 Regulations or for any additional contractual leave entitlements provided in excess of the statutory minimum (see section 2.4 for further information).

So the amount of working time that must be recorded when a mobile worker takes a day's leave depends on the type of leave being taken: if a mobile worker were to take a day's leave that was part of:

the 4 weeks statutory annual leave provided by regulation 13 of the 1998 Regulations, then 8 hours working time would have to be recorded;

the additional 0.8 weeks statutory annual leave provided by regulation 13 A of the 1998 Regulations, then zero hours working time would have to be recorded;

additional contractual leave in excess of the 4.8 weeks statutory annual leave entitlement, then zero hours working time would need to be recorded.

The Regulations do not state how a ½ day's statutory annual leave provided by regulation 13 of the 1998 Regulations should be recorded. The Department would consider it reasonable that in these situations a "notional" figure of 4 hours for the ½ days leave be recorded plus the actual amount of working time for that day.

## ***Sick leave, maternity, paternity, adoption or parental leave***

The "notional" figures also have to be included for any period of sick leave, maternity, paternity, adoption or parental leave taken by the mobile worker.

So if someone takes 1 week off on leave and takes 2 days additional days leave, all of which are part of the 4 weeks annual leave provide by regulation 13 of the 1998 Regulations, over a 17 week reference period, then you add a notional 48 hours + 16 hours to bring the total working time up to the equivalent of 17 weeks. The total working time is then divided by 17 to find the average.

## **Example 2:**

During a 26 week reference period a driver works 35 hours for 13 weeks and 60 hours for 10 weeks + 1 day (for 9 hours). The remaining period, (2 weeks 5 days) is taken as part of the 4 weeks annual leave provided by regulation 13 of the 1998 Regulations leave during this period.

The total hours worked in the reference period is:

$$(35 \times 13) + (60 \times 10) + (1 \times 9) = 1064 \text{ hours worked in 23 weeks + 1 day}$$

Add 2 x 48 hours for the 2 weeks leave and add 8 hours per day to bring the time worked up to 26 weeks.

$$2 \text{ weeks} \times 48 = 96$$

$$5 \text{ (days)} \times 8 = 40$$

$$1064 + 96 + 40 = 1200$$

Therefore the average (total hours divided by number of weeks) is:  $1200 / 26 = 46$  hours

The 48 hour average and the 60 hour cap have been complied with.

**Note:** You should only input 48 hours for one week of leave that starts / finishes 00.00 on Monday morning. Any other period of 7 consecutive days (e.g. Wednesday to Tuesday) should be worked out on a daily basis).

### **3.6 Who decides what reference period should be used?**

The employer and worker may agree, in advance, what reference period should be used. But if no agreement is reached, then the Regulations will require that the employer uses either the first or second option (see below).

#### **The Options:**

Whichever method is in place, the employer and worker must know in advance how working time is being monitored and when the reference period starts and when it ends.

There are several methods you can use to calculate and monitor compliance with the weekly average. The first two options (basic fixed calendar and the rolling reference period) can be used without the need for a relevant agreement. However, employers will still need to tell their workers about which method they are going to use; in particular they must give written notice if they choose Option 2, the rolling reference period. The third option provides employers with extra flexibility and does require a collective or workforce agreement (section 7.1 - "relevant agreements").

#### **Option 1: Basic fixed calendar**

Companies looking for an off-the-shelf approach to complying with the Regulations may like to use this option. It will, in any case, be one of the two approaches open to an employer if no workforce or collective agreement is in place.

Default reference periods will begin at 00.00 on the nearest Monday morning on or after 1 April, 1 August and 1 December each year.

At least one of the reference periods each year will contain 18 weeks. When this occurs, the average 48 hour week should be divided by 18 weeks, rather than 17 weeks.

## **Option 2: Rolling reference period**

This is the normal method used under regulation 4(6) of the 1998 Regulations, for monitoring working time.

If an employer decides to use a 17 week rolling reference period they must inform their mobile workers of this in writing. Employers do not need to inform their mobile workers of this on a continuous basis, mobile workers only need to be notified once (unless the employer keeps switching between methods). If an employer is moving from a fixed reference period to a rolling reference period one approach would be to notify existing workers of this fact in a letter. Employers may wish to consult workers beforehand or to take advice as to whether any change in practice constitutes a variation in the terms of employment, which a worker could object to. Thereafter, for new staff this requirement could be set out in the contract of employment or a workforce or collective agreement.

Under a rolling average, the consecutive reference periods should not result in an average working week in excess of 48 hours. For a 17 week reference period for example, this would mean that in addition to the period from say 3 April - 30 July not exceeding the 48 hour average, the period from 10 April - 6 August should not exceed the average - and so on. Nor indeed should any other consecutive 17 - 26 week period in the weekly record exceed the average 48 hour working week (see Annex E for details).

The method of compensating for leave is different under the 1998 Regulations. Actual working time from outside the reference period is used to offset the statutory leave taken inside the reference period. So if 1 week + 2 days leave is taken within the 17 week reference period, the actual working time from the 18th week + 2 days from week 19 is used to offset this leave. For mobile workers within scope of these Regulations, employers using Option 2 can choose to offset statutory leave with either method. That is, by using actual working time, or by using the notional figures of 48 hours/8 hours described above.

## **Option 3: Reference period settled by agreement**

This offers additional flexibility for employers and workers via a relevant agreement to have:

Different start and finish dates for the reference period, and

Longer reference periods (up to 26 weeks).

For example, three reference periods starting on the nearest Monday on or after 1 May; 1 September and 1 January, could be chosen, or two 26 week reference periods may be agreed. However, whatever start date is agreed, the reference period must begin at the start of the week; from 00.00 on Monday morning (see option 3 - Annex C).

A relevant agreement does not have to apply to all the workers in a company. For example:

Different agreements can be agreed between different groups of workers in the same company (so the start dates and the length of the reference period can vary within the same organisation).

An agreement may allow different reference periods to apply to certain individuals. For example, it might be better if drivers who work for two employers to have their own reference period.

### **3.7 Which method should I use?**

That depends on your circumstances:

Option 1: Fixing the reference period could simplify the monitoring and enforcement of compliance. It also gives employers more flexibility; e.g. the worker could work above average hours for the second half of the first period and the first half of the second period, without breaching the 48 hour limit.

Option 2: Companies, who are happy using a rolling reference period for existing non-mobile workers, may want to apply the same method for their mobile workers. However, this gives least flexibility for employers.

Option 3: Workers, who work for two or more employers, may prefer a rolling period or have their own unique fixed reference period.

If an occasional mobile worker exceeds the limit in the definition (see Section 1.3 - "occasional mobile worker"), the simplest method would be to use option 3. Over the reference period that is agreed with the employer, the individual should not exceed an average working time of 48 hours a week, nor exceed the 60 hour limit on working time for any single week during this period.

For those who already use the rolling reference period under the main working time rules, employers may find it easier to continue using this for such workers - rather than change the system they currently work with.

### **3.8 Other points to note**

If a mobile worker works for two or more employers, then the weekly working time - (i.e. work, excluding breaks, rest and periods of availability) is the working time performed for all employers.

Employers must ask the mobile worker concerned in writing for an account of time worked for another employer and a written record needs to be kept by the employer of any time spent working elsewhere. The mobile worker must declare this information in writing. This requirement (for a mobile worker to disclose work for another employer) could be set out in a contract of employment, or under a collective or workforce agreement. Moreover, if a mobile worker fails to disclose time worked for another road transport undertaking, following a request, that worker commits an offence.

If a worker has been working for an employer for less than the full reference period (e.g. 12 weeks), then the average is worked out over the total time since the start of his or her employment. If a mobile worker moves from one

employer to another on a series of fixed short term contracts that are less than 17 weeks - the 48 hour weekly average must be complied with over the length of each contract.

### **Frequently asked questions:**

**Q: Can an employer use 2 methods (e.g. the default option for some workers (option 1) and fixed by agreement for another group of workers (option 3))?**

A: Yes, as long as mobile workers know which method is being used to monitor their own working time.

**Q: Can an employer switch methods?**

A: Yes, providing his workers agree. If the switch is from one fixed reference period, to another fixed period, care needs to be taken to ensure that working time does not exceed an average 48 hours per week.

**Q: Can I use annual leave and sick leave to reduce my average working time?**

A: When calculating average working time during a fixed reference period under the Regulations, mobile workers are required to include notional "working time" figures for any statutory annual leave under regulation 13 of the 1998 Regulations sick leave, maternity, paternity, adoption or parental leave that they take. These notional figures are 8 hours per day and 48 hours per week. This means that such leave cannot be used to offset hours actually worked.

**Q: Why are we required to add in notional figures for any statutory annual leave that is taken under regulation 13 of the 1998 Regulations?**

A: This arrangement reflects a requirement under the main European Working Time Directive (2003/88/EC) that annual leave should remain neutral for the purposes of calculating any weekly average. This element of the main Directive also applies to mobile workers. It is up to Member States to decide how best to implement this provision in their respective territories. A 48-hour notional figure for a week reflects the maximum average weekly working time allowed. By using this figure, the effect of a week's leave is therefore neutral for the purposes of calculating average working time across a reference period.

**Q: If during a 26 week reference period I work maximum 60 hour weeks for 12 weeks, then take the rest of the reference period off as sick, my average working time will exceed 48 hours. What should I or my employer do in this situation?**

A: In these circumstances, the employer should keep a full explanation of the reasons for the excess average, with the mobile worker's records.

**Q: How does time taken off for jury leave, union duties, disciplinary suspension etc affect the "working time" calculation?**

A: The requirement to add-in notional "working time" figures only applies to statutory annual leave provided by regulation 13 of the 1998 Regulations, sick leave, maternity, paternity, adoption or parental leave (as mentioned in Section 3.6). The prescribed

notional figures do not have to be included for time off for any other reasons (such as jury leave, union duties, or disciplinary suspension).

**Q. Can any annual leave above the 4 week statutory annual leave entitlement provided by regulation 13 of the 1998 Regulations be used to reduce the hours worked in a week?**

A: The requirement to add-in notional figures for annual leave only applies to the four weeks statutory annual leave entitlement provided by regulation 13 of the 1998 Regulations. Any leave periods in excess of these four weeks (for instance the additional leave provided by regulation 13 A of the 1998 Regulations or additional contractual entitlements) are not treated in this way.

**Q. Are Bank Holidays included in the statutory paid leave entitlement?**

A: Whether bank and public holidays are counted as part of the statutory annual leave entitlement will depend on the contract of employment between employer and mobile worker.

## **4. Working at Night**

### **4.1 Main Points**

Night time is between midnight and 4am for goods vehicles and 1am and 5am for passenger vehicles.

If night work is performed, the daily working time should not exceed 10 hours in the 24 hour period in question.

If a mobile worker does any work during the night time period, he/she will be subject to the night work limit.

The night work limit can only be exceeded where this is permitted by a relevant agreement (see Section 7.1 - "relevant agreements").

### **Employer's Check:**

Identify the mobile workers who are likely to be affected by the limits on night work.

If more than ten hours working time is normally performed (during a 24 hour period) consider whether the number of hours can be reduced.

If necessary, consult your workforce about the possibility of working longer hours under a relevant agreement (see Section 7.1 - "relevant agreements")

### **4.2 What is night time?**

Night time is the period between 00.00 and 04.00 for drivers and other mobile workers on goods vehicles and 0100 and 0500 for those on passenger services. Employers and workers cannot choose a different period.

If a mobile worker does any work during the night time period, they will be subject to the night work limit. The night work limit can only be exceeded where this is permitted in a relevant agreement - (see Section 7.1 - "relevant agreements").

### **4.3 What is the working time limit for night work?**

Unless you have a relevant agreement, workers are limited to 10 hours work (i.e. working time) over the 24 hour period. As with the other working time limits under this legislation, breaks and periods of availability are not included in the 10 hour limit.

The 24 hour period is very important, and should not be confused with 10 hours night work per shift. The 10 hours should be calculated on a rolling basis therefore when carrying out night work on consecutive shifts a mobile worker's start time could be dictated by how much working time they completed in the previous shift.



#### **4.4 Working longer than 10 hours**

More than 10 hours work at night can only be performed, if there is a relevant agreement in place. The amount of working time that can be performed is still restricted by the minimum rest requirements under European drivers' hours rules.

#### **Frequently asked questions:**

**Q: Does the limit apply to you if you only occasionally work at night?**

A: Yes, unless:

you are an occasional mobile worker (see Section 1.3 - "occasional mobile worker"); or

there is a relevant agreement that allows you to work longer than 10 hours in the 24 hour period.

**Q: If I am a night worker under the Regulations, am I entitled to a health check under the 1998 Regulations?**

A: In most cases the answer will be 'yes', but the right to health checks for night workers is governed by the 1998 Regulations, not these Regulations. The 1998 Regulations define: 'night time' as a period between 11pm and 6am - although this definition may be varied by a relevant agreement as long as the period is still 7 hours long and includes midnight to 5am; and a 'night worker' as someone who works for at least three hours during the night time period on the majority of their working days. This definition can also be varied by a relevant agreement. Further information on health checks for night workers can be found on the Department for Business, Enterprise and Regulatory Reform website at: <http://www.berr.gov.uk>.

## **5. Rest and Breaks**

### **5.1 Main Points**

Minimum daily and weekly rest provisions under the existing European drivers' hours rules will continue to apply to drivers.

The Regulations apply those same daily/weekly rest requirements to other mobile workers, trainees and apprentices when travelling in a vehicle within scope of the European drivers' hour rules.

All mobile workers are subject to rest provisions under the European drivers' hours rules when travelling in in-scope vehicles.

Break requirements under the Regulations, are in addition to those under the European drivers' hours rules.

The European drivers' hours rules break requirements take precedence when driving.

### **Employers check:**

That all mobile workers can take the rest and breaks they are obliged to take.

That mixing driving with other work does not lead to a breach in the break requirements under the Regulations (see examples below).

### **5.2 Daily Rest**

Drivers already have minimum daily rest requirements under the European drivers' hours rules. For any time spent driving a vehicle within scope of these rules, drivers are required to take 11 consecutive hours rest within the 24 hour period in question (calculated from the moment the driver commences work). This may be reduced to 9 consecutive hours up to 3 times a week. Alternatively a split daily rest period can be taken in two periods. The first period must be at least 3 hours, and the second at least 9 hours.

Under the Regulations, identical daily rest requirements will also apply to other members of the travelling staff (e.g. crew, trainees and apprentices).

### **5.3 Weekly Rest**

The European drivers' hours rules require that in any two consecutive weeks, a driver shall take at least two regular weekly rest periods, or one regular weekly rest period and one reduced weekly rest period of at least 24 hours. However, the reduction shall be compensated by an equivalent period of rest taken en bloc before the end of the third week following the week in question.

A weekly rest period should start no later than at the end of six 24-hour periods from the end of the previous weekly rest period.

These same weekly rest requirements also apply to any crew and travelling staff, travelling on in-scope vehicles.

Rest requirements are additional to any paid annual leave entitlement that mobile workers are entitled to under the 1998 Regulations.

## 5.4 Breaks

The European drivers' hours rules require that after 4½ hours driving, a driver must take a break of at least 45 minutes. This break may be replaced by a break of at least 15 minutes followed by a break of at least 30 minutes each distributed over the period.

The break requirements under the Regulations will affect workers who do a mixture of driving and non-driving work. The rules on breaks will also apply on days when the mobile worker is not travelling.

Where mainly driving work is undertaken it is possible that working time breaks may be satisfied by breaks from driving taken under the European drivers' hours rules, therefore break requirements under the working time Regulations may be more likely to affect workers who do a mixture of driving and non-driving work.

The Regulations require that:

mobile workers must not work more than 6 consecutive hours without taking a break,

if your working hours total between 6 and 9 hours, working time should be interrupted by a break or breaks totalling at least 30 minutes,

if your working hours total more than 9 hours, working time should be interrupted by a break or breaks totalling at least 45 minutes,

breaks should be of at least 15 minutes duration.

In the interest of safety, and as a matter of good practice, it is strongly recommended that breaks should be distributed evenly throughout the day.

When taking a break, drivers may not perform anything that might be regarded as "other work" during this period. Breaks taken under these Regulations may be taken at the workstation (typically this means the driver's cab - but see glossary for fuller definition of this and other terms).

### Examples of Breaks [3]:

1) ½ hour other work + 4½ hour driving triggers a 45 minute break under European drivers' hours rules. Another 4½ hours driving triggers another 45 minute break under European drivers' hours rules. 9½ hours of working under the Regulations would normally require 45 minutes break, but this has already been covered by the breaks taken under the European drivers' hours rules. Total break time = 90 minutes.

½ hr	4 ½ hours	¾ hour	4 ½ hours	¾ hour	1 hr
other work	driving	break	driving	break	other work

2) 4 hours other work + 2 hours driving triggers a break (30 minutes in this example) under the Regulations. Another 3 hours work (9 hours in total) and another 15 minute break is needed under the Regulations. There is no requirement to take any breaks under the European drivers' hours rules as total driving time has not reached 4 ½ hours. Total daily break time = 45 minutes.

4 hours	2 hours	½ hour	3 hours	¼ hour	1 hour
other work	driving	break	other work	break	other work

3) 3 hours driving + 2 hours other work + 1 hour driving will trigger a break (30 minutes in this example) under the Regulations. Another ½ hour of driving = 4½ hours driving, requiring another 30 minute break under the European drivers' hours rules. This is because the second half of a split break taken under the European drivers' hours rules (which always takes precedent) must be at least 30 minutes long. Daily break time = 60 minutes.

3 hours	2 hours	1 hr	½ hr	½ hr	½ hr	3 hours
driving	other work	driving	break	driving	break	driving

4) 3 hours driving + 2 hours period of availability + 3 hour other work triggers a break requirement under the Regulations (30 minutes in this example). Another 1½ hours of driving = 4½ hours driving, requiring a 30 minute break under the European drivers' hours rules. Again, this is because the second half of a split break taken under the European drivers' hours rules (which always takes precedent) must be at least 30 minutes long. Daily break = 60 minutes. NB If all the conditions for a break are met, then a driver could take his mandatory break during the PoA.

3 hours	2 hours	3 hours	½ hr	1 ½ hours	½ hr	2 hrs
driving	POA	other work	break	driving	break	driving

5) The examples below shows two mobile workers A and B both working for 9 hours which means that their working time must be interrupted by a break or breaks totalling 30 minutes. The first example complies with the break requirements under the Regulations, the second does not.

**Mobile worker A**

6 hours	¼ hr	2 hours	¼ hr	1 hour	End of shift
other work	break	other work	break	other work	

6 hours consecutive other work triggers the break requirement under the Regulations. A break of at least 15 minutes must be taken. Mobile worker A then does another 2 hours other work, takes a break for 15 minutes and then completes another hour of other work before ending their shift. This complies with the Regulations as their working time is interrupted by breaks totalling 30 minutes.

## Mobile worker B

6 hours other work	¼ hr break	3 hours other work	¼ hr break - this is not legal the second break cannot be taken at the end of the shift
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6 hours consecutive other work triggers the break requirement under the Regulations. A break of at least 15 minutes must be taken. Mobile worker B then does another 3 hours other work before taking his second 15 minute break at the end of their shift. This does not comply with the Regulations as their working time has not been interrupted by breaks totalling 30 minutes. It has only been interrupted by a break of 15 minutes.

If the mobile workers were to work longer than 9 hours than total breaks for the day would be 45 minutes.

## Frequently asked questions:

**Q: Do these breaks count towards the working time of mobile workers.**

A: No. Whether paid or unpaid, breaks do not count towards any of the limits under the Regulations.

**Q: How are breaks calculated when a driver has also taken a period of availability?**

A: Breaks requirements under the Regulations are triggered by the amount of working time that is performed, rather than the length of shift or attendance time (see example 4). In addition, there is nothing to prevent a mobile worker taking a break in the middle of a period of availability, as long as they meet all the appropriate requirements for taking a break, and that breaks are recorded separately for enforcement purposes.

**Q: Can I take one of my breaks at the end of my shift?**

A: No. The Regulations require that working time must be "interrupted" by your breaks. In effect, this means that you must resume work after any breaks have been taken.

[3] Note: If "other work" consists of driving under UK Drivers' Hours rules, then additional break requirements may apply.

## **6. Record keeping**

### **6.1 Main Points**

Records need to be kept for 2 years after the end of the period in question.

Records must be kept regardless of whether or not the operation works close to the average 48 hour weekly working time limit.

The employer is responsible for keeping working time records, making the records available for inspection and informing workers of their responsibilities. Mobile workers must see details of any relevant agreement in advance.

Employment agencies/employment businesses should keep working time records if the mobile worker is paid by (or via) them.

Mobile workers are responsible for notifying an employer (in writing) of work performed for another employer.

Owner drivers who do not meet the criteria for a self-employed driver under the Regulations should keep a record of their own working time.

### **Employers check:**

Inform mobile workers of their rights under the Regulations, together with details of any relevant agreements.

Notify mobile workers that they must provide (in writing) an account of any working time they have performed for another employer.

Decide which records/systems you are going to use to record working time.

If tachograph records are used:

a separate record of working time will be required if the mobile worker is not travelling that day.

(where necessary) Check that the agency or employment business has had the opportunity to copy the tachograph chart, so they can keep a record of working time performed by their drivers.

### **6.2 Who keeps a record of working time?**

The employer keeps records of working time and other relevant information, such as a copy of any relevant agreement. Where a driver is paid directly by an agency or employment business rather than by one or more employers, the agency or employment business should keep a record of the working time.

Under the Transport Act 1968 tachograph records go to employers rather than agencies. If tachograph records are going to be used to monitor working time, then the

agency or employment business should obtain a copy of the chart from the driver before returning it to the client.

Drivers and other workers who do not meet the criteria of a "self-employed driver" under the Regulations, but are not employed, nor do they work via an agency, will need to keep their own record of working time. These records need to be kept for 2 years and should demonstrate that the worker is complying with both sets of weekly limits, the 10 hour night work limit and the minimum break and rest requirements.

### **6.3 Main requirements for employers**

In brief, they must:

Inform mobile workers of requirements under the Regulations and details of any collective or workforce agreements. One approach would be to inform mobile workers of the requirements and any workforce or collective agreement when they join the company. If there was a change to the details of a collective or workforce agreement this would need to be notified at that time (for example a workforce agreement can only last for 5 years so any change in the details of a new agreement would need to be notified once agreed).

Inform mobile workers that they must provide (in writing) an account of the time worked for another employer and keep any records provided. Existing workers should already be aware of this. New staff joining the company could be made aware of this requirement through their employment contract, or under a collective or workforce agreement.

Keep working time records for 2 years after the period covered regardless of whether the operation works close to the average weekly working time limit.

Provide (on request), a record of the working time performed by the mobile worker for:

the worker concerned, and

the enforcement officer.

In the event of a dispute, provide documentary evidence for inspectors to enable them to investigate without recourse to a full court hearing.

Be able to show they are complying with the Regulations.

### **6.4 Main requirements for Mobile Workers**

Employers must ask the mobile worker concerned in writing for an account of time worked for another employer. The mobile worker must declare this information in writing and the employer should keep this information.

Although most of the requirements for monitoring and keeping records lie with the employer, both the mobile worker and employer share the responsibility for complying with the Regulations. Both employer and mobile worker are potentially liable for prosecution if the rules are systematically broken.

## 6.5 What records need to be kept?

The Regulations do not specify which records should be kept - so it will be up to the employer to decide which system is most appropriate.

However, the records will need to show that weekly working time and night work limits are being complied with. It is for you to determine what records need to be kept for this purpose. There is no requirement that the records kept be used solely for recording working time. You may be able to use existing records maintained for other purposes, such as pay or tachograph sheets or you may need to make new arrangements.

You need only make occasional checks of workers who do standard hours and who are unlikely to reach the average 48-hour limit (although records must be kept). However, workers who work near to the maximum working time limits should be monitored more closely. You must keep a record of any relevant agreement with your mobile workers (or group of workers).

## 6.6 Using the tachograph to record working time

Some employers may decide to use data from tachograph records to monitor the working time of their mobile workers. Under the European tachographs rules "other work" must be recorded under the crossed-hammers mode. The box symbol can only be used to record "periods of availability".

	Crossed-hammers mode for other work (any activity other than driving as defined in article 3(a) of Directive 2002/15/EC).
	Periods of availability known about in advance (as defined in article 3(b) of Directive 2002/15/EC).

On this basis, tachograph records may be sufficient to record the working time of drivers. However, employers will need other records for those mobile workers who, for example, do not use a tachograph on one or more days or if there are other mobile workers who are subject to the Regulations (e.g. crew).

## 6.7 Other points to note

Under the European drivers' hours rules, tachograph records only need to be kept for a year. If tachograph charts are being used to monitor working time, then they must be kept for 2 years after the end of the period covered.

### Frequently asked questions:

**Q: Can we use planning/scheduling software to monitor working time?**

A: Whatever method is used, employers must be able to demonstrate compliance (not simply their intention to comply). It is unlikely therefore, that scheduling records by themselves will be enough to demonstrate that the limits have been adhered to.

## 7. More about the application of the Regulations

### 7.1 Relevant Agreements

These can be either a collective agreement or work force agreement.

In general, employers and workers can agree to extend the reference period for the average 48 hour working time limit up to a maximum of 26 weeks and agree whether this will be monitored using a fixed or rolling method (see Section 3.7 - "who decides what reference period should be used"). Agreements can also be used to exceed the 10 hour limit for night work (see Section 4.4 - "working longer than 10 hours").

These agreements can be made by 'collective agreement' (between the employer and an independent trade union) or a 'workforce agreement'. If a worker has any part of their conditions determined by a collective agreement they cannot be subject to a workforce agreement.

Whether a collective agreement entered into by trade union representatives with a particular employer will apply to all the workers, union and non-union doing the relevant work, depends on the arrangements at that individual workplace and the terms of the workers' contracts.

A workforce agreement is made with elected representatives of the workforce in most cases (see below). A workforce agreement can apply to the whole workforce or to a group of workers. The conditions relating to a workforce agreement are as follows:

- an election must be conducted and those voting must be able to do so in secret;

- the votes must be fairly and accurately counted;

- candidates for election must be relevant members of the workforce or in the case of a group of workers they must be members of the group;

- workers must be able to vote for as many candidates as there are representatives to be elected; and

- the number of representatives to be elected is to be determined by the employer.

To be valid, a workforce agreement:

- must be in writing and have effect for a specific period (not exceeding 5 years);

- have been circulated in draft to all workers to whom it applies together with the guidance to assist their understanding of it;

- be signed before it comes into effect either:

- by all the representatives of the members of the workforce or group of workers, or

- if there are 20 workers or fewer employed by a company, either by all representatives of a workforce or by a majority of the workforce.

**Example of a Workforce Agreement**

Sample Workforce Agreement for Mobile Workers

*This Workforce Agreement is between [name of the company] "The Company" and [the workers as specified below] "The Employees" in accordance with the provisions of the Road Transport (Working Time) Regulations 2005 [SI 2005/639 - "the Regulations"], which came into force on 4 April 2005 and will apply to those mobile workers subject to the provisions of the Regulations.*

*The Agreement will apply to all [members of the Company/please specify group] within the Company [except those who are bound by existing collective agreements.]*

*It is agreed that the Company and the Employees will adopt the flexibility permitted by the Regulations as set out below. This Agreement will remain in force for a period of [not more than 5 years after the commencement date] when it will cease to have effect.*

*Reference Period: the reference period for the calculation of average weekly hours shall be as follows:*

*- extended to 26 weeks*

*and/or will have the following start and finish dates e.g. 1 January to 30 June and 1 July to 31 December; or 1 April to 30 September and 1 October to 31 March annually;*

*or will be a rolling reference period.*

*Night Work: a nightworker's normal hours of work may exceed the limit of 10 hours in each 24 hour period.*

*Dated and signed by Company:*

.....

*Dated and signed by Elected Representatives of the Employees or by the majority of the Workforce:*

.....

**7.2 Emergencies**

Employers must schedule work in such a way that workers are able to comply with the Regulations. However, provided road safety is not jeopardised, and to enable the worker to reach a suitable stopping place, the mobile worker may depart from these rules to the extent necessary to ensure the safety of persons, the vehicle or of its load. This provision only applies in cases where it unexpectedly becomes impossible to comply with the Regulations.

It is for the mobile worker to decide whether it is necessary to depart from the working time rules (taking account of ensuring road safety in the process, and any instruction that may be given by an enforcement officer (for example under Police Escort)). The driver (or mobile worker) should record all the reasons for doing so. Repeated and regular occurrences however might indicate that employers were not in fact scheduling work to enable compliance with the Regulations.

### **7.3 Enforcement**

The Vehicle and Operator Services Agency (VOSA) - enforce the Regulations in Great Britain. The Driver and Vehicle Agency (DVA) enforce the working time regime used in Northern Ireland.

As with the main working time legislation, VOSA and DVA will normally enforce in response to any complaints they receive. However, Traffic Examiners will also establish an operator's awareness of the Regulations and the existence of adequate recording systems when operator visits are made for other enforcement reasons (i.e. for European drivers' hours rules visits, general follow-ups and new operator visits).

Whilst a detailed examination of working time records will normally only be carried out when investigating specific complaints, Traffic Examiners have the right to look at working time records. Examples of when they are particularly likely to do so are: in response to a licensing issue, as part of an investigation into a breach of the European drivers' hours rules or following a road accident or other serious incident.

VOSA will take a proportionate approach to enforcement, with formal enforcement action taken against persistent and/or serious offenders. VOSA will also report breaches of working time rules by operators to the relevant Traffic Commissioner for consideration as part of an operator's good repute under the Operator licensing system.

If you are a worker and you feel you are being forced to break the Regulations, we suggest you take one or more of the following steps:

Talk to your manager; you may be able to settle the matter straight away.

Contact a trade union (if you have one). They will be able to advise you what to do.

If you cannot resolve the matter, you should contact VOSA on 0870 6060 440; or DVA on 028 9025 4100. Any information provided will be treated in the strictest of confidence.

Mobile workers also have a responsibility for complying with the Regulations. If a mobile worker knowingly breaks the rules (e.g. neglects to inform his employer about other work, or knowingly makes a false record), then he/she may be liable for prosecution.

### **7.4 Penalties**

VOSA will take a proportionate approach to enforcement. However, if formal action is required against persistent and/or serious offenders VOSA will use:

improvement notices - to notify the employer of a likely breach of the Regulations and to set out the changes that need to be made in a given timescale; and

prohibition notices - requiring the employer to stop a dangerous activity, or to start complying with the Regulations.

The Courts have a system of fines and custodial sentences that can be applied to anyone who persistently contravenes the Regulations.

For example:

failure to comply with any of the relevant requirements of the Regulations could lead to fine of up to £5,000 (the current maximum) in a Magistrates Court; or a fine at the Judge's discretion in a Crown Court;

contravention of an improvement or prohibition notice served under the Regulations could lead to imprisonment for up to three months or a fine of up to £5,000 (the current maximum) in a Magistrates Court; or imprisonment for up to two years and/or a fine at the Judge's discretion in a Crown Court.

Similar penalties apply in Northern Ireland - see the Road Transport (Working Time) Regulations (Northern Ireland) 2005.

## **7.5 Driving Abroad**

In theory, it would be possible to enforce the 10 hour and 60 hour working time limits at the roadside. However, the enforcement of working time limits across Europe is expected to be carried out at the employer's premises, rather than at the roadside.

Nevertheless, we would advise that night workers take a copy of their collective or workforce agreement with them, if they plan to exceed the 10 hour night work limit when travelling abroad.

## Glossary of Terms:

**The/these Regulations:** the Road Transport (Working Time) Regulations 2005 (SI. 2005 No. 639).

**The 1998 Regulations:** means the Working Time Regulations 1998 (SI. 1998 No. 1833 - as amended).

**AETR:** The European Agreement Concerning the Work of Crews of Vehicles Engaged in International Transport.

**Derogations:** Provisions in the European legislation that allow Member States to introduce some added flexibility. In this case, extending the reference period up to 26 weeks for calculating the average working week and allowing workers to exceed the 10 hour limit for night work.

**European drivers' hours rules:** Regulation (EC) No 561/2006

**Employer:** in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed.

**Employment:** in relation to a worker, means employment under his/her contract, and "employed" shall be construed accordingly.

**Mobile Worker:** a mobile worker is any worker forming part of the travelling staff (typically drivers and crew, but also trainees and apprentices) who is in the service of an undertaking which operates road transport services for passengers or the movement of goods. Mobile workers include drivers who work for hire or reward companies or companies with own account operations.

**Night time:** Is defined as a period between 00.00 and 04.00 hours for drivers and crew of goods vehicles and between 01.00 and 05.00 hours for drivers and crew of passenger vehicles.

**Night work:** under the Regulations the working time of a mobile worker who performs night work in any 24 hour period must not exceed 10 hours during that period. Any worker who carries out work during the night time period is subject to the 10 hour limit. The 10 hour limit can be dis-applied by a relevant agreement.

**Periods of Availability:** loosely speaking, covers waiting time whose duration is known about in advance by the mobile worker (See section 2.3 - "what is a period of availability").

**Reference Period:** is the period of time over which working time is averaged. The number of hours worked each week should normally be averaged out over 17 weeks. The reference period can be extended up to 26 weeks by a relevant agreement.

**Relevant Agreement:** there are 2 types agreement covered by this term. There is a 'collective agreement' between the employer and an independent trade union or a 'workforce agreement' which is between the employer and group of mobile workers (see Section 7.1 - "relevant agreements"). If any worker has their conditions determined by a collective agreement they cannot be subject to a workforce agreement.

**Rest (daily/weekly):** the Regulations extend the daily and weekly rest requirements set out in the European drivers' hours rules to all mobile workers.

**Self-employed driver:** as defined in the Regulations is tightly drawn and is not the same definition as that used by the Inland Revenue (see Section 1.4 - "self-employed drivers").

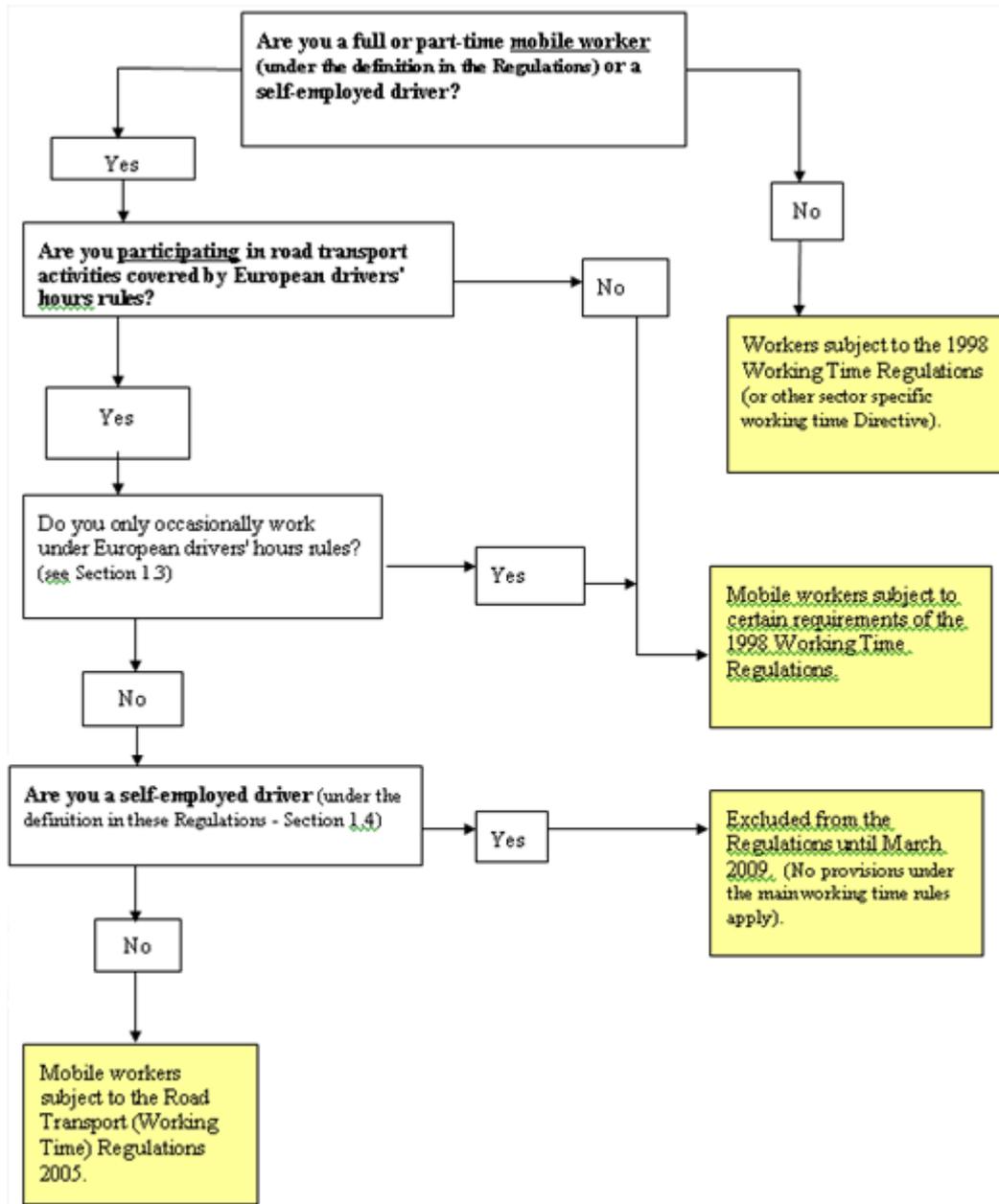
**Week:** is defined as the period between 00.00 hours Monday and 24.00 hours on the following Sunday.

**Worker:** a worker is anyone who provides work or services under a contract, express or implied.

**Working Time:** loosely speaking, covers driving and other duties normally associated with working. It does not include breaks or periods of availability (see Section 2.2 - "what is working time").

**Workstation:** loosely speaking, refers to in and around the vehicle, the employer's premises, and other places where the mobile worker might work (e.g. at the customer's site). See regulation 2 of the Regulations for exact definition.

## Annex A -Who is covered by the Road Transport (Working Time) Regulations?



## Annex B - Comparison with the European drivers' hours rules

Type of Duty	Road Transport (Working Time) Regulations 2005	European drivers hours Rules HGV & PSV
Maximum working week/attendance time	No limit on attendance/shift time as such, but an average weekly working time limit of 48 hrs will apply. 60 hours working time can be performed in a single week, if the average 48 hour week is not exceeded.	Weekly driving limit of 56 hours.
Maximum working day/duty time	None specified	None specified, but daily rest requirement effectively limits the length of the working day.
Maximum work performed at night	There is a 10 hour working time limit for night work for each 24 hour period.	None.
Cumulative or continuous driving	None specified	4 ½ hrs maximum
Daily driving	None specified	9 hrs (but this can be increased to 10 hours twice a week).
Fortnightly driving	None specified	90 hrs maximum in any two consecutive weeks
Breaks	<p>If driving, the break periods under European drivers' hours rules take precedence.</p> <p>Mobile workers must not work more than 6 consecutive hours without taking a break,</p> <p>if your working hours total between 6 and 9 hours, working time should be interrupted by a break or breaks totalling at least 30 minutes,</p> <p>if your working hours total more than 9 hours, working time should be interrupted by a break or breaks totalling at least 45 minutes,</p>	45 minutes (either continuous or 2 breaks the first of which must be at least 15 minutes, and the second must be at least 30 minutes).

	<p>breaks should be of at least 15 minutes duration.</p> <p>For examples on the impact of mixed working - see section 5.</p>	
Daily Rest	<p>For drivers and other mobile workers the daily rest periods under the European drivers' hours rules.</p>	<p>11 consecutive hrs, (reducible to 9 hrs 3 times between any two weekly rest periods).</p>
Weekly Rest	<p>For drivers and other mobile workers the weekly rest periods under European drivers' hours rules.</p>	<p>Within six 24 hour periods from the end of the last weekly rest period, a driver will extend a daily rest period into either: a regular weekly rest period of at least 45 hours, or a reduced weekly rest of less than 45 hours, but at least 24 hours (any reductions must be compensated for).</p> <p>In any two consecutive weeks, a driver shall take at least two weekly rest periods, or one regular weekly rest period of at least 24 hours.</p>

# Annex C - Reference periods for calculating average weekly working time

Examples of each option (set out in Section 3.7) for setting reference periods

Week Commencing	Option 1: Basic fixed calendar	Option 2: Rolling reference period		Option 3: reference period settled by agreement
	Compliance is required over the default calendar period (solid arrows). Compliance is <u>not</u> required over other periods (broken arrow)	In order to comply, every continuous (17 or 26 week) period must not exceed the 48 hour average		
		17 Week	26 Week	
2-Apr				
9-Apr				
16-Apr				
23-Apr				
30-Apr				
7-May				
14-May				
21-May				
28-May				
4-Jun				
11-Jun				
18-Jun				
25-Jun				
2-Jul				
9-Jul				
16-Jul				
23-Jul				
30-Jul				
6-Aug				
13-Aug				
20-Aug				
27-Aug				
3-Sep				
10-Sep				
17-Sep				
24-Sep				
1-Oct				
8-Oct				
15-Oct				
22-Oct				
29-Oct				
5-Nov				
12-Nov				
19-Nov				
26-Nov				
3-Dec				
10-Dec				
17-Dec				
24-Dec				

## **Annex D - Employers Checklist**

### **What counts as working time?**

Identify activities that count as working time and those which count as periods of availability.

Ask workers to confirm any working time they have performed for another employer.

### **Calculating working time:**

Decide on your preferred option (fixed or rolling), to monitor compliance with the average 48 hour working week.

If a longer reference period or different start/finish dates are needed, consider a collective or workforce agreement with the workers.

If an agreement is reached, make sure the reference period does not exceed 26 weeks.

### **Night workers:**

Identify the mobile workers who are likely to be affected by the limits on night work.

If more than ten hours working time is normally performed (during a 24 hour period) consider whether the number of hours can be reduced.

If necessary, consult your workforce about the possibility of working longer hours under a relevant agreement (see section 7.1).

### **Rest/Breaks:**

That all mobile workers can take the rest and breaks they are obliged to take.

That mixing driving with other work does not lead to a breach in the break requirements under these Regulations.

### **Record keeping:**

Inform mobile workers of their rights under the regulations, details of any relevant agreement.

Notify mobile workers that they must provide (in writing) an account of any working time they have performed for another employer.

Decide which records/systems you are going to use to record working time.

If tachograph records are used:

a separate record of working time will be required if the mobile worker is not travelling that day.

(where necessary) Check that the agency or employment business has had the opportunity to copy the tachograph chart, so they can keep a record of working time performed by their drivers.

## **Annex E - Calculating working time under the 1998 Regulations**

The number of hours worked each week should be averaged out over 17 weeks. This period of time is called the 'reference period'.

Workers and employers can agree to calculate the average weekly working time over a period of up to 52 weeks under a workforce or collective agreement.

The average weekly working time is calculated by dividing the number of hours worked by the number of weeks over which the average working week is being calculated, for example 17. When calculating the average weekly working time, if the worker is away during the reference period because he or she is taking paid annual leave, maternity, paternity, adoption or parental leave, or is off sick you will need to make up for this time in your calculation. Do this by adding the hours worked during the days which immediately followed the 17 week period - use the same number of days as those when work was missed.

### *Example 1:*

A worker has a standard working week of 40 hours and does overtime of 12 hours a week for the first 10 weeks of the 17- week reference period. No leave is taken during the reference period.

The total hours worked is:

17 weeks of 40 hours and 10 weeks of 12 hours of overtime

$$(17 \times 40) + (10 \times 12) = 800$$

Therefore their average (total hours divided by number of weeks):

$$800 \text{ divided by } 17 = 47.1 \text{ hours a week}$$

The average limit of 48 hours has been complied with.

### *Example 2:*

A worker has a standard working week of 40 hours (8 hours a day) and does overtime of 8 hours a week for the first 12 weeks of the 17week reference period. 4 days' leave are also taken during the reference period.

The total hours worked in the reference period is:

16 weeks and 1 day (40 hours a week and 8 hours a day) and 12 weeks of 8 hours of overtime

$$(16 \times 40) + (1 \times 8) + (12 \times 8) = 744$$

Add the time worked to compensate for the 4 day leave, taken from the first 4 working days after the reference period. The worker does no overtime, so 4 days of 8 hours ( $4 \times 8 = 32$ ) should be added to the total.

Therefore their average is (total hours divided by number of weeks):

$(744 + 32)$  divided by 17 = 45.6 hours per week

The average limit of 48 hours has been complied with.