

# **European Working Time Directive Implementation**

**Guidance on progressing  
EWTD compliance in Social Care**

***2<sup>nd</sup> March 2017***

## **Purpose of guidance**

This document sets out guidance on progressing compliance with the requirements of the European Working Time Directive (EWTD) for HSE and HSE-funded residential social care services and associated performance indicators. It takes account of the requirements of Labour Court Recommendation 20837 of 2015, the Organisation of Working Time Act 1997, the European Working Time Directive (EWTD) and the work of the National Social Care EWTD Implementation Group.

Where doubt exists as to the meaning of this guidance regarding legislation, reference should be made to the text of the legislation. This guidance document does not purport to be a legal interpretation of the legislation.

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## A. Performance indicators

The indicators below are to be used within each hospital / agency to assess performance in terms of EWTD implementation and compliance and will be used by the HSE at national level when evaluating agency / service performance. They represent a summary of the guidance in Sections B to F of this document.

Performance indicators		
Theme	Area	Performance indicator
<b>Engaging staff in change</b>	Local EWTD Implementation Group	An EWTD Implementation Group is in place and meets monthly
<b>Safe rostering</b>	Start and finish times and breaks	Employees work no more than 24 hours on-site on-call
		Extent of use of staggered start and finish times where employees are required to commence earlier than standard rostered hours e.g. for Handover
		The employer documents and ensures 30 minute breaks
	Staffing a 48 hour compliant roster	Extent to which rosters of 7 employees or more are EWTD compliant
<b>Supporting the provision of training</b>	Training Principles	Rostering in line with training needs
	Protected Training Time	Provision of protected training time
<b>Transparency and accountability</b>	Reporting and payment of hours worked	Publication of rosters as per agreed timeframes
		Regular review of rosters
		Participation in process to introduce time and attendance systems (if required)
	Use of Social Care EWTD compliance data as a measure of performance and related sanctions	Reporting of EWTD compliance data as required
	Handover	A formal, documented Handover process is built into 24/7 on-site on-call rosters
Staggered starts and finish times are used to support Handover		
Handover is introduced in a way that does not extend existing shift or roster periods for either employees arriving / going off-call or the employee who is rostered on-site at night		

## **B – Context**

### **1. EWTD requirements**

All Social Care staff employed in the public health service have been subject to the requirements of the European Working Time Directive (EWTD) since 1<sup>st</sup> January 1998 when the EWTD was transposed into Irish law via the Organisation of Working Time Act (OWTA).

In summary terms, the EWTD requires that Social Care staff:

- work no more than 48 hours a week on-site on-call, averaged over no more than 12 months;
- receive a break of 15 minutes for every 4 hours 30 minutes work OR a break of 30 minutes for every 6 hours work OR equivalent compensatory rest;
- receive 11 consecutive hours of rest within each 24-hour period OR equivalent compensatory rest before the employee begins his or her next period of work;
- receive 35 consecutive hours rest every 7 days, OR two periods of 35 consecutive hours rest every 14 days, OR one period of 59 consecutive hours rest every 14 days OR equivalent compensatory rest before the employee begins his or her next period of work.

### **2. Labour Court ruling**

The extent to which the work patterns of Social Care staff employed in residential care services are not compliant with the EWTD has been the subject of ongoing discussion between employers and unions for many years. The issue was referred to the Labour Court for arbitration in June 2014. Labour Court Recommendation 20837 issued on 18<sup>th</sup> September 2014 and stated:

“Time spent on sleepovers should be acknowledged as constituting working time;

Like all other workers who are encompassed by the legislative provisions on working time the maximum weekly hours worked by the claimants should not exceed 48 hours.

Like all other workers the claimants are entitled to the breaks and intervals at work prescribed by relevant legislation.

The court recommends that the parties return to conciliation and that they engage in an intensive process directed at agreeing mechanisms by which full compliance within the legislative requirements can be achieved while maintaining current levels of service provision. That process should continue for a period not exceeding nine months or such longer period as may be agreed.

The parties should report to the Court on progress in these discussions at three monthly intervals. Any disagreement or other difficulties encountered that could inhibit or delay final agreement should be referred back to the court. The Court will,

if necessary, issue further recommendations directed at assisting the parties to complete this process within the timeframe envisaged by this Recommendation.”

Taking the above into account the Department of Health, HSE, Social Care employers and unions continue to participate in a conciliation process independently chaired by a Senior Conciliation Officer appointed by the Labour Relations Commission.

### **3. Challenges**

As part of this process, all stakeholders have acknowledged that there are real challenges to bringing about full compliance with the European Working Time Directive [EWTD]. Equally, there is an acceptance that different types of services will require different type of solutions. This means that an individualised plan will have to be drawn up for each provider as the same solutions for achieving full EWTD compliance are not suitable for all providers. In this regard, it should be noted that given the complexities of the service delivery system, where homes are currently staffed by a single staff member and cannot leave the home, all parties have agreed that the provision of 15 or 30 minutes breaks is on hold until all other aspects of compliance have been achieved for services.

All proposals to achieve compliance with the EWTD must be fully compliant with Government policy for persons with a disability and employment legislation.

Separately, the European Commission have been in dialogue with Ireland regarding non-compliance with the EWTD in respect of Social Care staff and that process continues.

## **C - Engaging staff in change**

### **4. National Social Care EWTD Implementation Group**

As of March 2017 a National Social Care EWTD Implementation Group is being established to support all disability agencies to develop a European Working Time Directive [EWTD] action plan which explicitly sets out actions to deliver EWTD compliant rosters and to assist agencies in the delivery of such plans.

The Implementation Group comprises representatives of the HSE, Department of Health, the National Federation of Voluntary Bodies and section 38 and 39 agencies. Representatives from the relevant health sector trade unions have been invited to participate.

The Group's key targets are that:

- All proposed rosters will be 'fit for purpose' to the needs to the individuals who are being supported
- The average normal working week for staff members, inclusive of sleepovers, does not exceed 48 hours per week averaged over a 12 month period.
- The services will develop rosters for implementation on a phased basis, which will ensure that no staff member is rostered to work any more than 24 consecutive hours inclusive of sleepovers.
- The services will develop rosters for implementation on a phased basis which will ensure that no staff member is rostered to work anymore than an average of 48 hours max inclusive of sleepovers per week
- Compensatory rest to be applied in line with legislation.
- Proposed rosters will comply with legislative provisions.
- There will be no increase in the numbers of staff exceeding the average of 48 hours per week averaged over a 12 month period

The Group is adopting the following method:

- The implementation group will develop a specimen EWTD compliant roster to cover a home that has one social care staff member on duty at a time performing sleepovers.
- The implementation group will develop and implement a standardised reporting framework with data reporting templates to ensure the continuous monitoring of compliance rates on a quarterly basis, or on any other frequency required
- The implementation group will provide advice and guidance to agencies to assist them to introduce compliant rosters.
- The implementation group will highlight any additional resource requirements to the HSE. It is the responsibility of the HSE to develop a robust business case for additional resources for the Department of Health for consideration as part of the annual Estimates process.
- The implementation group will identify those agencies who have demonstrated good progress in raising their compliance rates so that we can share good practice and innovative EWTD solutions. The implementation group should facilitate communication of innovative or creative solutions that may be possibly implemented by other agencies.
- The implementation group will provide direct support and validation to agencies in relation to development of compliance action plans.

## **5. Local EWTD Implementation Groups**

Each Service or Agency CEO / Manager is required to formally establish a local EWTD Implementation Group to examine the issue of achieving compliance within their local service / agency. This Working Group should comprise management and union representatives, committed to developing a framework which will outline options for local providers to explore in relation to achieving EWTD compliance.

The Implementation Group should adhere to the following guidelines for conducting their meeting:

- Notice to all participants of agenda, date, location and time of meeting at least 48 hours in advance
- Draft minutes of previous meeting issued at least 48 hours in advance of meeting
- Documents for discussion at the meeting to be circulated 48 hours in advance
- AOB should only relate to smaller items that cannot be included in the agenda
- Meetings should be attended by those listed below and should not proceed without appropriate representatives of each of the following Service Management and Front Line Staff;
- Suggested Membership - HR Manager / Service Manager / person responsible for rosters

The Implementation Group should give consideration to service reconfiguration, optimal utilisation of existing staff working within the sector and the requirement for and allocation of additional resources to achieve compliance with the EWTD. A separate business case for additional resources will have to be made by the HSE to the Department of Health for consideration and approval as part of the annual Estimates process. It is intended that the options for progressing the EWTD issue will be consistent with the planned reform of the residential service model as part of the implementation of the VFM recommendation and also be consistent with the regulatory requirements of the statutory agency responsible for the quality and standards of care in residential centres – Health Information and Quality Authority (HIQA).

## **6. Rostering and service reconfiguration to promote EWTD compliance**

Service reconfiguration and alternative roster options that could be discussed by the local EWTD Working Group include:

- Offering suitably qualified staff currently working in non-residential services the opportunity to work sleepovers and reduce the frequency on existing staff to work sleepovers;
- Exploring options available in relation to the number of sleepovers that can be undertaken by part-time staff while ensuring that they do not exceed a 48 hour week;



- Develop a more holistic and wrap round service for service users, whereby all staff working in disability services would work their contracted hours over a 24/7 basis which reflects the nature of the service delivery system. The development of this type of service will enhance the implementation of *New Directions: Personal Support Services for Persons with a Disability* and *Time to Move On from Congregated Settings – A Strategy for Community Inclusion*. The central approach within these reports focuses on the core values of person-centeredness, community inclusion, active citizenship and high quality service provision. It will be underpinned by good governance, monitoring and guidance to providers. The vision contained in these reports will provide people with the personal individualised supports they require to access a whole range of community services as well as providing for their health related needs;
- All future employees in disability services will be required to undertake a sleepover and this will be reflected in their contracts of employment.
- Agreeing steps to ensure that that there will be no increase in non-compliance e.g.
  - no new rosters which are non-compliant ( except for breaks) ,
  - no increase in the number of staff whose average hours exceed 48 hours average per week
  - no increase in permanent or temporary contracts where staff are expected to work more than 48 hours average per week
- Introducing contracts and rosters in new houses where sleepovers are required and one staff works at any one time, so that the contracts are EWTD compliant
- As staff leave or retire replacing them by staff doing compliant hours through a review of the existing roster to move towards greater compliance.

## **D - Safe Rostering**

### **7. Rostering Principles**

A number of principles underpin rostering of Social Care staff to support safe service provision and exposure to appropriate training / activities that support the maintenance of professional competence. These include:

- The employee shall not be required to work for more than 24 consecutive hours on-site.
- Rosters must provide for a handover period between each shift. Handover periods must be of at least 30 minutes in duration.
- The employee may not be rostered to work a split shift<sup>1</sup>.
- A minimum notice period of 2 weeks will apply for provision of initial rosters.
- The employee shall not be required to attend on-site on a rostered day off (including leave) outside the 2 week minimum notice period where the requirement for such attendance can be reasonably anticipated by the employer.
- A minimum notice period will apply for changes to published rosters taking account of the need for shorter notice to respond to clinical need on an unplanned basis,
- Where the employee is provided with more than one rostered day off during a week, the Employer should endeavour to ensure such days are consecutive.
- Employment outside the confines of the employee's contract is not permissible if the combined working time associated with this employment taken together with any other employment exceeds the maximum average 48 hour week.

### **8. Start and finish times and breaks**

Timing of shifts and shift length are key factors influencing when employees commence or finish work. In this context, rosters should take account of the following:

- Compliance with a maximum 24-hour shift period may require that the employee rostered to work the 24 hour shift starts work later than colleagues the morning prior to the shift.
- Employee participation in educational and training activities prior to commencing clinical duties is in line with guidance regarding the provision of training time and use of protected training time as set out in Sections 7 and 8 of this document.

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<sup>1</sup> A split shift is an employment schedule where the employee's normal work day is split in to 2 or more segments. For example an employee could not be rostered to work from 9 am to 2pm and then have a break until 8pm at which point they would be rostered to return to work until midnight.

- The EWTD requires that staff benefit from a 15 minute break for every 4 hours 30 minutes worked or a 30 minute break for every 6 hours worked. Irrespective of which is provided it is understood that the nature of service activity requires that the employee take such breaks as they become available rather than in a structured manner. A priority is that the service / agency have ensured that staff receive breaks – and documented same via a signed overtime form or by other means.

## **9. Staffing a 48 hour compliant roster**

It should be noted that rotas with 7 or more staff are regarded as capable of meeting EWTD requirements while providing safe, high quality patient care.

## **10. Handover**

Effective Handover procedures are associated with high levels of patient safety. Handover has also been found to support continuity of care, good team-working and provide valuable educational opportunities.

The Standards for Safer Better published by the Health Information and Quality Authority (HIQA) outline a standard for handover:

“Standard 2.4

An identified healthcare professional has overall responsibility and accountability for a service user’s care during an episode of care.”

HIQA note that features of a service meeting this standard are likely to include:

- “2.4.1 Informing service users who their responsible healthcare professional is, and facilitating discussion about their care between the service user and that healthcare professional.
- 2.4.2 Clear documentation of the identified healthcare professional with overall responsibility and accountability for a service user’s care at all times.
- 2.4.3 Timely, formal handover of information and accountability for the overall care of a service user when they move within or between services and the responsible healthcare professional changes; keeping the service user informed of these changes and making explicit the change of healthcare professional and documenting this.
- 2.4.4 Identification of a healthcare professional who is accountable and responsible for the coordination of a service user’s care, including during an episode of care involving multiple clinical specialties.

## **E - Supporting the provision of training**

### **11. Training principles**

The following principles underpin the safe and effective delivery of training:

- The primary consideration in constructing rosters is the provision of safe care for clients;
- Rosters must be compiled to reflect staff training needs;
- Rosters should be structured to preserve the maximum possible participation in scheduled training opportunities;
- Rosters should facilitate scheduled on and off site education and training activities.

### **12. Use of Protected Training Time**

The term 'Protected Training Time' refers to periods of time the employee spends in training activities which are not interrupted by work or other requirements.

In 2015, the extent to which Protected Training Time could legally be counted as not being working time was addressed by the European Court of Justice in its judgement on Case C-87/14 regarding Ireland's compliance with the EWTD. The Court ruled that protected training time did not count as working time.

Three separate categories of training time can be identified:

- a) scheduled and protected time off-site attending training or undertaking study in line with the requirements of a training / educational course or scheme;
- b) on-site scheduled educational and training activities including for example, manual handling, health and safety, professional development activities etc.;
- c) research - including that taking place during paid time.

It is noted that the extent to which employees engage in each category of training time may vary depending on setting, location, grade, stage of career and whether they are participating in any formal education / training course or scheme.

The rostering arrangements associated with the three categories of time described are as follows:

- a) scheduled and protected time off-site attending training or undertaking study in line with the requirements of a training / educational course or scheme – is rostered within the employee's standard working week but does not count as working time;
- b) on-site scheduled educational and training activities including for example, manual handling, health and safety, professional development activities – can be readily

rostered taking account of the employee's work pattern that week. If appropriately protected – as set out below – such time does not count as working time.

c) Research, study etc. – is not rostered and may take within or outside working time.

Taking the above into account, the term on-site refers to the agency / service campus and locations operated by the employer for the purposes of providing public health services. The term off-site refers to any location which is not on-site e.g. the offices of a training provider.

The following principles apply:

- the key objective is – as working hours reduce to EWTD limits – to ensure that the employee can access protected time to support participation in and progression through training and maintain professional competence;
- category a) and b) of training time must be protected for rostering purposes;
- rostered time spent engaged in the activities described under categories a), b) and c) will be paid as per the pay rates relating to normal and overtime hours;
- rostered time engaged in training / educational activities will not be counted as working time for EWTD purposes if:
  - the employee is off-call, is not carrying a bleep or a mobile phone for the purposes of being contacted for work purposes and cannot be required to return to duty under normal circumstances prior to the end of the defined period;
  - the time is recorded as spent participating in training / educational activities;

## **F - Transparency and accountability**

### **13. Reporting and payment of hours worked**

Central to employee participation in measures to reduce hours and progress EWTd compliance is the assurance that hours worked are properly recorded and appropriately paid. Taking this into account, services / agencies should:

- publish rosters incorporating all required service hours (including hours currently unrostered) a month in advance;
- arrange for regular review / verification of rosters, particularly where changes are being made to promote EWTd compliance;
- ensure local documentation of compliance with the EWTd requirement for a 30 minute rest break for every 6 hours worked (within the existing contracted working day and working week) and of protected training time;
- participate in the introduction of time and attendance systems if required.

### **14. Measuring and recording performance**

The HSE has put in place a data collection system for EWTd compliance in the Disability Sector so that compliance levels and progress in achieving compliance across the sector can be captured.

Data is recorded relating to compliance with the following:

- a maximum 24 hour shift,
- average 48 hour week,
- 30 minute rest breaks,
- 11 hour daily rest,
- 35 hour weekly / 59 hour fortnightly rest

Each service is responsible for ensuring that the data is returned to the HSE. Data should be returned to email: [ewtd.socialcare@hse.ie](mailto:ewtd.socialcare@hse.ie)

The introduction of this data collection system will enable all parties to identify those areas which are having particular difficulties in making progress in achieving EWTd compliance and those areas which are making good progress. This will sharing of examples of best practice, identify roadblocks to progress and provide increased support to those services experiencing particular difficulties.

## **G - Further Guidance**

In addition to this document and appendices and documentation referenced in this document, further background information, examples of good practice and guidance may be found in the following documents:

- National Social Care EWTD Implementation Group, Guidelines for Engagement at local service / agency level to achieve EWTD compliance;
- National Social Care EWTD Implementation Group, Terms of Reference.

## Appendix I – requirements of the EWTD and Irish legislation

### 1. EU and Irish legislation

The EWTD referred to in this document and in the legislation is Directive 2003/88/EC, which took effect on 2<sup>nd</sup> August 2004. Should information be sought on the EWTD therefore, reference should be made to Directive 2003/88/EC of the European Parliament and Council of 4<sup>th</sup> November 2003 concerning certain aspects of the organisation of working time, available at: <http://www.health.gov.ie> or on the European Commission website at <http://www.europa.eu>

This Guidance also draws on clarification issued by the European Court of Justice on how the requirements of the EWTD should be interpreted. Two of the more relevant judgements are:

- a) SIMAP, European Court of Justice case C-303/98
- b) JAEGER, European Court of Justice case C-151/02
- c) DELLAS, European Court of Justice case C-14/04
- d) Commission vs. Ireland, case C-87/14

The legislation transposing the EWTD into Irish law is the Organisation of Working Time Act 1997, available here:

<http://www.irishstatutebook.ie/eli/1997/act/20/section/15/enacted/en/html#sec15>

It should be noted that while the Labour Relations Commission (now the Workplace Relations Commission) has published guidance on the Organisation of Working Time Act, this guidance is now out of date in relation to a range of issues. Taking that into account, health service employers should rely on this document in the first instance.

### 2. Definition of ‘working time’

The legislation defines working time as “any time that the employee is - (a) at his or her place of work or at his or her employer’s disposal and; (b) carrying on or performing the activities or duties of his or her work”

This means all time spent on-site on-call counts as working time. Time spent on-site when off-call does not count as working time.

The following time does not count as working time where the employee is off-call:

- Scheduled and protected time off-site attending training,
- on-site educational and training activities,
- rostered breaks within the working period,

Time spent off-site on-call does not count as working time unless employees are also required by their employer to perform a service while they are on-call off-site. Appendix II deals with the calculation of working time under the EWTD.



#### **4. Daily breaks**

An employee cannot work for more than 4 hours 30 minutes without receiving a break of at least 15 minutes.

An employee cannot work for more than 6 hours without receiving a break of at least 30 minutes. This break may include the 15-minute break referred to above.

Breaks cannot be taken at the end of the employee's working day. Instead, they must be taken during the working day.

Alternatively, an employee may be granted compensatory rest (see below)

#### **5. Daily Rest**

Each employee is entitled to 11 consecutive hours rest every 24 hours OR compensatory rest (see below)

#### **6. Weekly / Fortnightly Rest**

Each period of weekly / fortnightly rest must follow an 11 hour rest period.

Each employee is entitled to weekly / fortnightly rest as follows:

- a) 35 hours rest (11 hour rest period followed by 24 hours rest) once a week  
OR
- b) 35 hours rest (11 hour rest period followed by 24 hours rest) twice a fortnight  
OR
- c) 59 hours rest (11 hour rest period followed by 48 hours rest) once a fortnight  
OR
- d) Compensatory rest (see below)

#### **7. Compensatory rest**

Compensatory rest must be given to an employee who has not been granted his or her daily break, daily rest or weekly/fortnightly rest.

Compensatory rest is therefore given in lieu of:

- a) A 30 minute break every 6 hours OR a 15-minute break every 4 hours 30 minutes
- b) 11 hours consecutive daily rest
- c) 35 hours continuous rest once a week or twice a fortnight OR 59 hours continuous rest once a fortnight

Compensatory rest must be equivalent to the break or rest which the employee has not had. For example, if the employee has received an 8 hour break instead of 11 hours, they require 3 hours. Such rest is not necessarily consecutive – it can be interrupted by time spent at work if the employee is on-call at the time – however it must total the required rest period.

Compensatory rest must be taken before the employee begins his or her next period of rostered work.

## **8. Maximum weekly working time**

An employer may not allow an employee to work for more than 48 hours a week, averaged over the reference period described below.

## **9. Reference periods for average weekly working hours**

A 'Reference Period' is a period of time over which an employee's weekly working hours may be averaged.

The reference period includes all time for which the employee has been paid, with the exception of:

- a) Annual leave
- b) Maternity leave
- c) Adoptive leave
- d) Sick leave
- e) Parental leave
- f) Carer's Leave
- g) Force majeure leave

In relation to a) above, Annual Leave, it should be noted that Article 7 of the EWTD provides for Member States to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks.

The EWTD then states, at Article 16, Reference Periods, b), that:

“The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average;

Taking this into account, the EWTD provides for the non-inclusion of all periods of annual leave granted in accordance with Article 7 - not just the minimum 4 weeks - in the reference period.

The reference period currently in use is a period of 13 weeks , or the employee’s term of employment – whichever is the shorter. It is intended to seek agreement with relevant health sector trade unions to extend the reference period as permitted by the legislation.

A reference period may begin when the contract begins. The reference period must also end when the contract ends or is terminated by the employer or 13 weeks have elapsed. There is no minimum reference period.

## **10. Night work and night workers**

The legislation defines “Night time” as the period between midnight and 7a.m. on the following day; “night work” as work carried out during night time and a “night worker” as an employee:

- a) who normally works at least 3 hours of his or her daily working time during night time,
- AND
- b) the number of hours worked by whom during night time, in each year, equals or exceeds 50 per cent. of the total number of hours worked by him or her during that year;

Should an employee be designated as a night worker, he or she may not work more than 8 hours in 24, averaged over a reference period of:

- a) 2 months
- OR
- b) a period of time specified by a collective agreement approved by the Labour Court.

The reference period should be composed of consecutive days or months, subject to the following categories of time not being included:

- a) Hours in excess of 24 hours in a weekly rest period
- b) Annual leave, unless it exceeds the minimum specified in the Organisation of Working Time Act, 1997.
- c) parental leave, *force majeure* leave or carer’s leave,

- d) Maternity, adoptive, or sick leave

“Special category night workers” are night workers who have undergone an assessment by their employer which has concluded that their work involves special hazards or a heavy physical or mental strain.

Employees designated as special category night-workers may not work more than 8 hours in any 24-hour period.

## **11. Shift work and shift workers**

The legislation defines “shift work” as any method of organising work in shifts whereby employees succeed each other at the same work stations according to a certain pattern. The shift pattern may be continuous or discontinuous and require need for employees to work at different times over a given period of days or weeks.

A ‘shift worker’ is any employee whose work schedule is part of shift work.

Shift workers are afforded protection similar to that afforded to other workers. Any employee who is considered to be a shift workers is entitled to equivalent compensatory rest (as set out in 4.8 above) when he or she changes shift and cannot take a daily rest period between the end of one shift and the start of the next one; or when he or she changes shift and cannot take a weekly rest period between the end of one shift and the start of the next one.

## **12. Records**

Employers must maintain on-site a record of each employee’s normal schedule of work and actual:

- a) Daily hours of work and rest
- b) Rest breaks,
- c) Hours of night work
- d) Weekly hours of work and rest
- e) Hours on-call on-site
- f) Hours on-call off-site
- g) Periods of release from the activities or duties of his or her work, to engage in training, study leave or examination leave.
- h) Specialty and stage of training
- i) Annual leave and payment in respect of such leave
- j) Any additional day’s pay

Records must take the form required by the legislation, be readily understandable and:

- a) be retained for at least 3 years
- b) be made available, on request, to the employee
- c) be made available, on request, to the Minister for Health and Children

### **13. Refusal by an employee to co-operate with a breach of legislation**

An employer cannot penalise an employee for opposing, in good faith and by lawful means, an act which contravenes the legislation or the Organisation of Working Time Act, 1997.

If an employer, notwithstanding the requirement not to penalise an employee in such circumstances, dismisses an employee as a penalty; that employee cannot obtain relief under both the legislation and the Unfair Dismissals Act.

### **14. Complaints to Rights Commissioner**

An employee or a trade union with the consent of the employee concerned, may present a complaint to a Rights Commissioner that the employee's employer has contravened one or more of the following provisions: compensatory rest, daily rest, breaks, weekly rest, maximum weekly working time, nightly working hours.

When this happens, the Rights Commissioner will give each party an opportunity to be heard by the Commissioner and to present any evidence relevant to the complaint. The Commissioner will then issue a written decision to the parties.

The Rights Commissioner may declare that the complaint or case was or was not well founded; require the employer to comply with the relevant provision; and/or require the employer to pay to the employee compensation not exceeding 2 years remuneration,

The Rights Commissioner will give a copy of the decision to the Labour Court.

Complaints will not normally be considered by a Rights Commissioner unless they are made within 6 months of the alleged contravention of the legislation. However, a Rights Commissioner may consider a complaint made up to 12 months after the alleged contravention if he or she is satisfied that the failure to present the complaint within that period was due to reasonable cause.

Complaints must be presented in writing and in a form specified by the DOHC.

A copy of the complaint as presented must be given to the employer by the Rights Commissioner.

Proceedings will not be conducted in public.

## **15. Appeals and enforcement of Rights Commissioner's decisions**

Either party may appeal the decision of a Rights Commissioner to the Labour Court. When this happens, the Labour Court will give the parties an opportunity to be heard and present evidence. The Court will then issue a written decision in writing to the relevant parties.

Appeals to the Labour Court must be initiated within 6 weeks of the decision being made and must be in written form. Appeals must be in line with the requirements for appeals specified by the Labour Court.

Once the Labour Court receives an appeal, it will notify the other party to the complaint of the appeal.

The Labour Court will determine the procedures to be followed, including the times places of appeals and the representation of each party.

Decisions of the Labour Court may be appealed to the High Court on a point of law. The decision of the High Court will be final and conclusive.

If a decision of a Rights Commissioner has not been carried out by the employer and if no appeal has been made within the allotted time, an employee may, no more than 6 weeks later after the end of the allotted time, send a written complaint to the Labour Court for decision.

## **16. Enforcement of Labour Court decisions**

If an employer fails to carry out a decision of the Labour Court in relation to a complaint within 6 weeks of it being issued by the Labour Court; the Circuit Court may, on receipt of an application from the employee concerned or their trade union and without hearing the employer or any evidence, make an order directing the employer to carry out the decision.

The Circuit Court may direct the employer concerned to pay to the employee concerned interest on any compensation in respect of the period beginning 6 weeks after the date on which the decision of the Labour Court was communicated to the parties and ending on the date of the order.

Applications to the Circuit Court should be made to a judge of the Court for the circuit in which the employer is located.

A document signed by the chairman or the registrar of the Labour Court stating that a named person was required to attend before the Labour Court at a specified time and place to give evidence or produce a document; that a sitting of the Labour Court was held at that time and place; and that the person did not attend before the Labour Court or having attended, refused to give evidence or refused or failed to produce the document, will be accepted as evidence without further proof.

## 17. Inspectors

The Minister for Jobs, Enterprise and Innovation may appoint inspectors to evaluate compliance with the legislation. Each inspector will have a Certificate of Appointment and should, if requested, produce the certificate or a copy of it. An inspector may:

- a) Enter premises – other than private dwellings
- b) Make relevant enquiries
- c) Require that records are produced
- d) Require current and former employees to provide information
- e) Require that employers or employees provide answers to questions
- f) Be accompanied by a member of the Gardai

## 18. Offences

### Obstruction of an inspector

A person who obstructs or impedes an inspector, refuses to produce a record, produces false or misleading records, gives false or misleading information in any material respect knowing it to be so false or misleading, or fails or refuses to comply with any lawful requirement of an inspector, is guilty of an offence.

### Failure to maintain records

Employers who fail to maintain records are guilty of an offence.

### Double employment

Employees who are simultaneously employed by more than one employer (whether public or private) may not be required to work, in total, longer hours over the course of

- 24 hours,
- 7 days, or
- 12 months

than the legislation permits for those employees who have only one employer.

This means, for example, that an employee who is employed by more than one employer, cannot work, in total, more than an average of 48 hours per week on-call on-site over the course of a reference period. Total hours worked are a sum of the hours worked for each employer.

An employee who breaches this requirement is guilty of an offence

An employer who knowingly breaches this requirement is guilty of an offence unless they can prove they did not know or could not have found out that they were in breach.

#### Corporate offences

If an offence is committed by an employer and

a) is proved to have been committed with the consent or connivance of a director, manager, secretary or other officer of that body corporate, or a person who was purporting to act in that capacity,

OR

b) can be attributed to neglect on the part of on the part of a director, manager, secretary or other officer of that body corporate, or a person who was purporting to act in that capacity,

that individual shall also be guilty of the offence and be liable to be proceeded against and punished.



## **Appendix II – How to calculate ‘working time’ under the EWTD**

### **1. Summary**

- a) Identify the periods of time for which the employee has been paid that can be included in the ‘reference period’. The reference period shall not exceed 12 months and is determined by the employee’s term of employment.
- b) Identify the periods of time within the reference period that count as ‘working time’
- c) Calculate the total hours of ‘working time’ and divide by the number of reference period weeks to obtain the weekly average.

### **2. The Reference Period**

The reference period is limited by contract. The maximum reference period is 1 year. There is no minimum. The reference period includes all time for which the employee has been paid, with the exception of:

- a) Annual leave
- b) Maternity leave
- c) Adoptive leave
- d) Sick leave
- e) Parental leave
- f) Carer’s leave
- g) Force majeure leave

*Hint:* List all time for which the employee has been paid. Highlight the 7 categories above. They cannot be counted as part of the reference period. Once they are eliminated, calculate whether there are sufficient weeks of time paid to form a complete reference period.

### **3. What is Working Time?**

All time spent on-site on-call counts as working time. Time spent on-site when off-call does not count as working time. It should be noted that an employee who is on-site off-call and is required to resume the duties of work is regarded as reverting to on-call and such time is counted as working time. Time spent off-site on-call does not count as working time unless the employee is also required by their employer to perform a service while they are on-call off-site (e.g. telephone advice). Study leave does not count as working time. In addition, time that cannot be included in the reference period (see above) does not count as working time.

**For example:** Take the weeks of time identified as part of the reference period. Highlight those periods of time that do not count as working time. Calculate the total working hours remaining. Divide by the number of weeks in the reference period being used.

<b>Calculating the reference period</b>			
<b>Time</b>	<b>Paid Hours</b>	<b>Reference Period</b>	<b>Working Time</b>
<b>Source</b>	<b>Employment contract</b>	<b>Legislation</b>	
On-site on-call	Yes	Yes	Yes
On-site off-call (rostered off-call or bleep free)	No	Yes	No - unless required to resume work by employer
Off-site on-call	Yes	Yes	No
Required by employer to attend training	Yes in certain circumstances	Yes	Yes
Annual Leave	Yes	No	No
Sick Leave	Yes	No	No
Maternity Leave	Yes	No	No
Adoptive Leave	Yes	No	No
Carer's Leave	No	Yes	No
Jury Leave	Yes	Yes	No
Marriage Leave	Yes	Yes	No
Parental Leave	Yes	No	No
Paternity Leave	Yes	No	No
Study / Educational / Training Leave	Yes	Yes	No
Reserve Defence Forces Leave	Yes	Yes	No
Force Majeure Leave	Yes	No	No
Compassionate Leave	Yes	Yes	No

<b>Working time and training activities</b>			
<b>Time</b>	<b>Paid Hours</b>	<b>Reference Period</b>	<b>Working Time</b>
<b>Source</b>	Employment contract	Legislation	
<b>Unpaid Hours</b>			
On-site on-call		Yes	Yes
All unpaid hours spent training / studying etc	No	No	No
<b>Paid Hours</b>			
On-site on-call	Yes	Yes	Yes
On-site off-call (rostered off-call or bleep free)	No	Yes	No - unless required to resume work by employer
Required <i>by employer</i> to attend training at a specific location (whether on-site or off-site)	Yes	Yes	Yes
<b>Off-site on-call</b>			
Off-site on-call	No	Yes	No
From time bleeped / called and requested to return to work while off-site on-call	Yes	Yes	Yes
<b>Paid Leave</b>			
Paid Leave of any type	Yes	Yes	No (0 hrs for EWTD purposes)