

On call working – what is working time and what remuneration should you receive?

The PDAU has received a number of queries from hospital pharmacist members regarding on call working.

The key issues raised by pharmacists have included:

1. When is on call deemed to be working time?
2. What remuneration is payable for the time spent on call?

We have produced this guidance to help pharmacists understand their legal rights when working on call.

The law

The Working Time Regulations 1998 (WTR) implemented the EC directive on the organisation of working time. Apart from opting out of the 48-hour week limit, it is not possible to opt out of the WTR.

In relation to working time, all workers are entitled to:

1. A working time limit of 48 hours per week (unless they have opted out)
2. An uninterrupted rest break of 20 minutes for any shift that exceeds six hours
3. A minimum of 11 consecutive hours' rest between the end of one shift and the beginning of the next
4. Either an uninterrupted period of 24 hours without any work each week or an uninterrupted 48 hours without any work each fortnight

Points 3 and 4 above are unlikely to apply to pharmacists on call because there is an exception to the rule if continuity of services is required (e.g. in hospital work). There are also exceptions

for shift workers (hospital staff do on-call shifts to provide 24-hour continuity of care) such that when the worker changes the times of the shift between one day/week and the next and cannot take the rest period, the entitlements do not apply. However, the employer would, wherever possible, be required to provide an equivalent period of compensatory rest (i.e. a break of the same length of time as that which has been missed) or take other steps to safeguard the pharmacist's health and safety. The cases where compensatory rest cannot be provided will be rare e.g. when the pharmacist is leaving the organisation, the inconvenience to the employer would be unlikely to count as a satisfactory reason.

What is working time?

Under the WTR, "working time" is any period during which the worker is working at his/her employer's disposal and carrying out duties. It includes overtime, working lunches and travel on the job. It also includes time whilst the worker is "on call" at or near the workplace, even if the worker can sleep during periods of inactivity.

The WTR require employers to offer people working nights a free health assessment before they start doing so and on a regular basis after they have started.

On call working – working time and rest periods

Workers have raised disputes with the following circumstances:

- Someone who needs to be contactable at all times, but is only being classed as working by the employer when actually doing the work.
- Someone who is on call, but is at home, and is being considered by the employer not to be doing the work.

Recently, there has been more clarity on what constitutes working time for workers who are on call.

In a recent case, the European Court of Justice (ECJ) stated that "stand by time" spent at home must be regarded as working time where the geographical and temporal constraints imposed by the employer significantly restrict the worker's opportunities to pursue personal and social

interests. Case law had established that where a worker is required to be physically present and available at a place determined by the employer, this must be regarded as working time. In this recent case, the worker was on standby at home and when required to respond to calls (as a firefighter) he needed to be at work within 8 minutes. He was required to live near the fire station. The ECJ therefore decided this was working time.

The situation differs where the worker is required to be permanently accessible, but not present at the workplace. In those circumstances, as the worker can manage their own time and outside interests with fewer constraints, only time linked to the actual provision of services must be equated with working time.

Further, the ECJ observed that the intensity of the work and the output do not determine what constitutes working time. The court found that the requirement to be at the place of work in 8 minutes was critical to their finding that it was working time. However, it also took into account the quality of the time and the freedom he had to pursue other activities and the quality of the time spent at home, i.e. was the firefighter able to devote himself to his own interests and family. If not, then the restrictions imposed by the employer would mean that it was more likely to be working time.

Travelling time

Any time spent travelling to and from work is ordinarily not working time, unless there is no fixed place of work. The ECJ has ruled that time spent travelling from home to the first customer and from the last customer back home counted as “working time”. Contracts for peripatetic workers will identify the travel which will be work-related. Generally, any travel required by the employer that is not to and from work, should be classed as working time.

Working examples in relation to working time

Example 1

If a hospital pharmacist was required to undertake work-related activities on behalf of the hospital during the on-call period (e.g. on the phone or attending the hospital), the time spent doing so would be classed as working time.

Example 2

If an on-call hospital pharmacist DID NOT have to undertake work-related activities on behalf of the hospital during the on-call period (e.g. on the phone or attending the hospital), the time spent on call may still be classed as working time, but it would depend on the circumstances. These would include:

- Has the employer specified that the pharmacist is obliged to remain at a location, within a set distance of a location or that he/she must be able to attend the hospital or set off within a certain period of time?
- Could the time that the pharmacist is on call be considered his/her own e.g. can he/she spend the time at home, is the pharmacist restricted in the personal and social interests he/she can or cannot pursue?
- The employer's purpose in having the pharmacist on-call? For example, if there was a regulatory requirement to have the pharmacist on-call this may suggest the pharmacist is working for the duration of the period he or she is on-call.

Payment for on-call work and minimum wage

In relation to remuneration the EU member states are able to lay down their own laws on the remuneration of a worker in respect of working time (in the UK the National Minimum Wage Regulations 2015). The UK laws on remuneration and the National Minimum Wage are different to the laws around what constitutes working time for the purposes of rest period entitlements (set out under the WTR).

What counts as paid work will either be in the contract of employment or the handbook. In the absence of any contractual term, the minimum wage will apply.

If someone is required to be at his or her employer's premises and to carry out duties if required, but may otherwise be asleep, are they entitled to pay?

The National Minimum Wage Act 1998 introduced a minimum hourly rate for workers aged 21 and over. Regulation 16(1) of the National Minimum Wage Regulations 1999 contains a specific exception for workers who sleep at or near a place of work, and are provided with facilities for sleeping. In this case, those workers are only entitled to the National Minimum Wage when they are awake 'for the purpose of working', and not for the periods they are asleep.

On the whole, time that qualifies for payment at the National Minimum Wage has been given broad interpretation by the employment tribunals, but periods where workers are 'on call' in different circumstances have been problematic from the outset: particularly the question of where to draw the line between those who are working 'simply by being present' - for example whilst they are waiting for a phone call to come in and those who are 'just doing nothing' until called upon to do something.

Various 'on-call' scenarios have formed the basis of challenges in Employment Tribunals. Nurses available throughout a shift to answer telephone calls were entitled to the NMW for the whole shift, not just when actually answering telephone calls; so was a night watchman who was permitted to sleep, watch TV or read while on his shift.

The cases which fall on the other side of the line, where the workers were not entitled to the NMW for the whole of their shift and only for those periods during the shift when they were actually working, include:

- a temporary pub manager required to reside and sleep on premises in free accommodation who was only entitled to the NMW when responding to emergencies
- a housekeeper and deputy housekeeper provided with sleeping accommodation in sheltered accommodation for the purposes of being 'on call'

A recent case at the Court of Appeal involved a night care assistant, who was required to be at his employer's premises and carry out duties if required in support of the 'night care worker' on duty. If not required, he was able to sleep in accommodation provided by the employer on the premises. After a period where the accommodation was provided free of charge, and he received a payment of £50 per week, the arrangement changed so that he entered into a tenancy agreement to rent the accommodation, and his weekly wage was raised to cover the cost of the rent. After the care home was taken over by new owners, he was dismissed, and he brought a claim for the National Minimum Wage in relation to his 'sleep in' shifts.

The Court Appeal determined that he was only entitled to payment for the time when he was awake for the purposes of working, and not for the time he was asleep (there are specific provisions in law relating to sleeping-in arrangements). The judge determined that even if his presence was required to satisfy his employer's regulatory obligations to provide appropriate staffing levels at the care home, it did not assist the question of whether he was actually working or available for work during the times he was asleep.

The outcome of this appeal will likely have an impact on other on call cases.

NHS Agenda for change arrangements

The NHS Agenda for Change (AfC) handbook provides information to NHS about on-call arrangements and entitlements to pay.

The handbook states: "Under the Working Time Regulations if an individual is required to sleep in at a work place this counts as working time. However, time asleep does not count for the purposes of the minimum wage... Under the Minimum Wage Regulations, the availability payment should be at least the same as a calculation for (hours of expected wakefulness x minimum wage). Local partnerships will need to consider if it is more appropriate to base this

calculation on the bottom point of the Agenda for Change pay scales, as described in Annex 2.” We may argue that there are certain situations where a pharmacist could be said to be on call throughout the night including the hours when asleep, if for example he held a local contract which stipulated that the hours are working hours and not part of his overall remuneration; in practice, this is unlikely to apply to many hospital pharmacists.

The handbook continues: *“In those situations where a sleeping-in session includes what the National Minimum Wage Regulations would classify as work, or when the individual is woken during a sleeping-in duty, this should be paid as work done at the appropriate hourly rate.”* We interpret this to mean that where you’re sleeping during your on call duty, you would be paid at an hourly rate which is normal for the role.

Scenarios

Scenario 1

An on-call hospital pharmacist is awoken by a phone call at 2am asking for support with a clinical query. The pharmacist spends 2 hours dealing with the query, then goes back to sleep. She is due to be at work at 10am in the morning to start a normal shift:

- The pharmacist would only have 6 hours between dealing with the call (which finishes at 4am) and starting her normal shift at 10am.
- Because of the requirement for continuity of the hospital pharmacy service, the 11-hour daily rest period between shifts is unlikely to apply
- The hospital should provide an equivalent period of compensatory rest. The ECJ has determined that this must be taken during a period that would otherwise be working time, and follow on immediately from the working time the rest is supposed to counteract, in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work. This is important for the health and wellbeing of the pharmacist as well as for patient safety, since the pharmacist is working in a safety-critical role. We would advise the pharmacist to

discuss the situation with the hospital with a view to starting at 12pm or later instead of 10am, or swapping her shift to a different day.

Scenario 2

A pharmacist works on call for five consecutive nights, whilst also working his full-time shift during the days. During his on-call time, he has to stay within a certain distance of the hospital because he might be expected to return to it. On the weeks where he is not on call, he goes indoor skiing, but cannot do that during his on-call time as the venue is 35 miles away from the hospital.

- During on-call work, the pharmacist is confined to a certain distance from the hospital and he is not free to pursue the activities of his choosing in his personal life
- Our view is that the on-call period would be classed as working time under the working time regulations (for the purposes of rest periods)
- As to whether the pharmacist would be paid and the amount, this would depend (for example) on his contract of employment, how many hours he spent working during the on-call shift and the nature of the on-call work. The law in this area is complex and would need to be judged on the details, on a case-by-case basis.
- Because of the requirement for continuity of the hospital pharmacy service, the 11-hour daily rest period between shifts is unlikely to apply
- The hospital should be providing an equivalent period of compensatory rest. If it was found that the entire time on call constituted working time, then the pharmacist would, it seems, be entitled to take a period of 11 hours' compensatory rest immediately after his on-call shift. This could mean he would wish to discuss the situation with the hospital, either by changing his shift patterns or establishing some other way of working which reduced or removed the limitations placed on his personal life and freedom to pursue activities of his choosing during his time on-call.

Scenario 3

A hospital pharmacist is invited to a concert by a friend, but the concert is 3 hours away from the hospital. Because she is on call, she cannot attend the concert. Whilst working on call, she

is called out to the hospital to deal with an emergency and is then able to return home later that evening.

- As with scenario two, the pharmacist is not free to pursue the activities of her choosing in her personal life on the day of the concert
- Whether she was free to pursue other activities on other days would depend on her own personal circumstances and any conditions imposed by the hospital on her on call work
- We would make the same arguments as for Scenario 2, in respect of the pharmacist's entitlement to pay and rest breaks
- The pharmacist's contract of employment may set out that travel time is to be classed as working time, and details of the agreed rate of pay. In the absence of such a provision in the contract, we would argue that the time spent travelling should be classed as working time in this case, because it was a necessary part of the response to the emergency. This would need to be discussed with the hospital.

We appreciate that there are significant variations in on-call arrangements between different hospitals and dependent on what on-call role the pharmacist carries out. The purpose of this guidance is to provide generic advice on employment law which is not intended to address every unique type of on-call situation members may experience. In addition, the law may change over time as it is shaped by the outcomes of legal judgements in employment cases. Members who are concerned about their on-call arrangements including their entitlement to rest periods and pay should contact the PDA for discrete advice.

The PDA

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