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Time's up : a guide on the European Working Time Directive for Junior Doctors

Junior Doctors Committee, British Medical Association

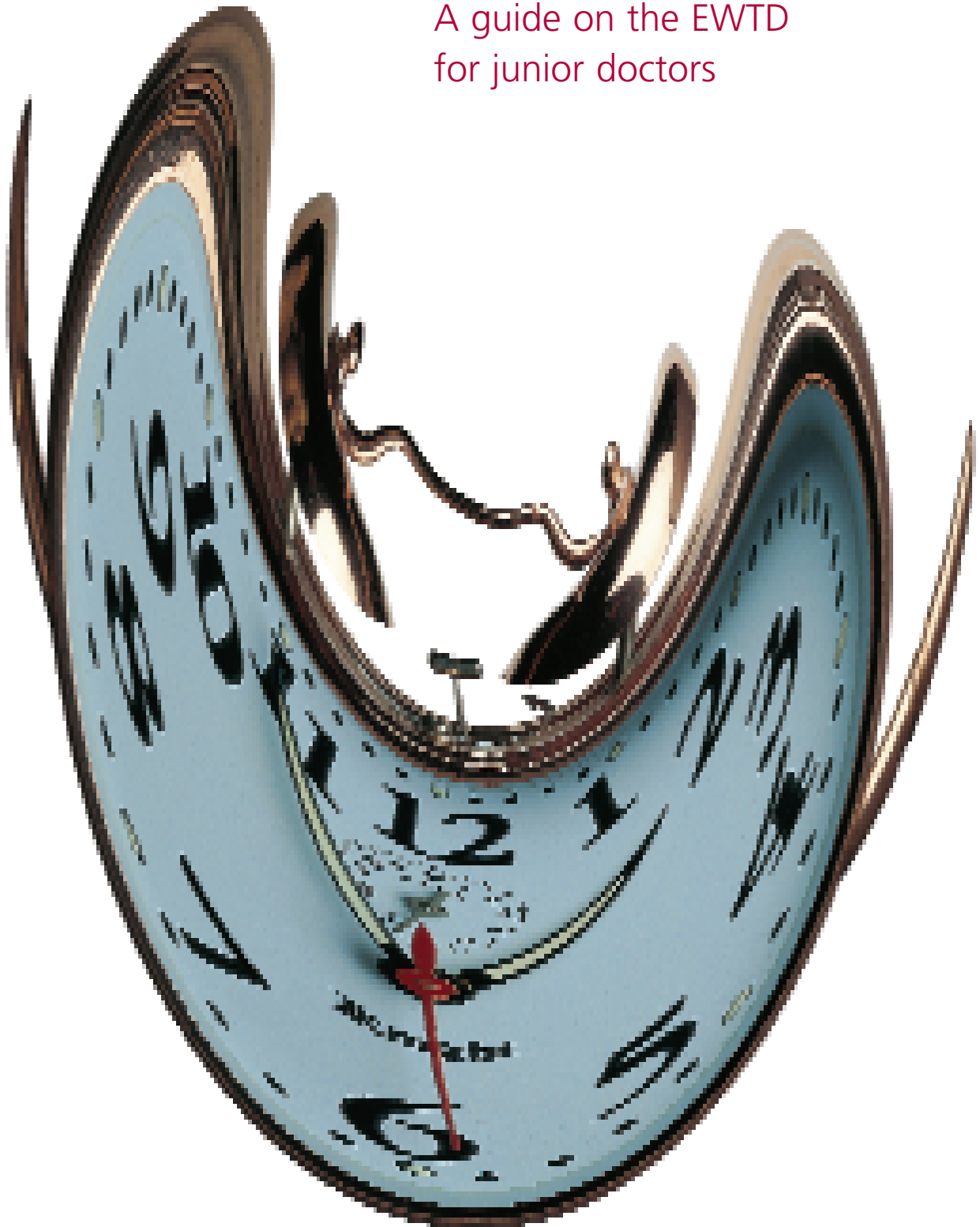
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Time's Up 1 August 2004

A guide on the EWTD
for junior doctors



Appendix II

Sample opt-out wording for junior doctors:

I, [name], agree with [name of employer] from [date] to disapply the **58-hour limit on working time as set out in Regulations 7 of the Working Time (Amendment) Regulations** and to work more than an average of **58 hours** in any seven-day period.
[Insert here alternative arrangements/limits that may apply, eg 'and my hours of work shall be ... Up to a maximum of ...']

I confirm that this consent will continue on an indefinite basis while I remain an employee of [insert name of employer] subject to my being able to give [choose a period from seven days to a maximum of three months] written notice to the employer if I wish to revoke my agreement.

Signed

Dated

c.c. BMA, Regional Junior Doctors Committee, [Address of local office, on back of membership card]

This is based on material taken from sample opt-out wording from page 58 Legal Essentials 'Working Time Regulations' by Hammonds (2003), with the permission of the publisher, the Chartered Institute of Personnel and Development, London.

Contents

Introduction	2
What are the rules?.....	2
Working time	3
Compensatory rest	4
Night workers	4
Reference period	5
What about the New Deal ?.....	5
Solutions	7
How can they change my rota?.....	7
What if I am not happy with the changes to my rota?	10
What to do to get the best rota	10
A guide to monitoring for the confused	12
What do I need to do?.....	13
I am not compliant, what can I do?.....	13
BMA members	13
Write to your employer	13
Opt out	13
Health and Safety Executive.....	14
Employment tribunal	14
Civil courts	14
Appendix I	
Sample letter to a trust asking for action to be taken to ensure EWTD compliance	15
Appendix II	
Sample opt out wording for junior doctors.....	16

A guide on the EWTD for junior doctors

Introduction

This document follows on from the *Time is running out* series which was mailed to junior doctors in summer 2003. It revisits the working time legislation and how it will apply to junior doctors and also provides guidance on what to do if you find yourself working in a post that does not meet the European Working Time Directive (EWTD) requirements.

What are the rules?

The EWTD dictates how many hours you can work and how much rest you should take. The EWTD is European legislation and is enshrined in UK law as the Working Time Regulations 1998 and Working Time (Amendment) Regulations 2003 (WTR). The WTR are not optional.

The WTR have applied in full to most workers, including all employed doctors other than those in the training grades, since 1 October 1998.

The WTR dictate a 48-hour maximum working week and also set out a number of rest requirements:

- a minimum of 11-hours' continuous rest in every 24-hour period
- a minimum rest break of 20 minutes after every six hours worked
- a minimum period of 24 hours' continuous rest in each seven day period (or 48 hours in a 14 day period)
- a minimum of four weeks' paid annual leave
- a maximum of eight hours' work in each 24 hours for night workers.

The WTR for junior doctors/doctors in training (PRHO, SHO, SpR) will be implemented in stages over five years from 1 August 2004. Although the '48-hour week' will not be introduced until August 2009 the **rest requirements will apply in full from August 2004**. The timetable for implementation of interim hours limits is detailed overleaf.

Appendix I

Sample letter to an employer asking for action to be taken to ensure EWTD compliance

Dear Sir/Madam,

I am employed as a (PRHO/SHO/SpR) working in

I believe that my current/proposed [delete as appropriate] working pattern does not comply with the Working Time Regulations as applied to doctors in training from 1 August 2004.

Please could you confirm if this is the case, or alternatively provide evidence that the working patterns are EWTD compliant.

Please could you let me know what is being done to resolve this and supply details of the employer's action plan for ensuring EWTD compliance.

Yours faithfully

c.c. BMA, Regional Junior Doctors Committee, [Address of local office, on back of membership card]

terms and conditions of service. It is not possible to opt out of the daily and weekly rest breaks and these will continue to apply. The New Deal hours limits will also still apply for all training grade doctors.

Health and Safety Executive (HSE)

The HSE is responsible for enforcing the requirements of the EWTD. If an employer fails to take reasonable steps to comply with the provisions of the WTR they may be liable to pay a fine of up to £5,000 for each breach as this is a criminal offence.

Employment tribunal

A worker may make an employment tribunal application where the employer fails to provide the rest or leave to which a worker is entitled under the EWTD. For example:

- if they do not provide adequate daily rest or equivalent compensatory rest
- if a worker is dismissed because they fail to agree to sign an opt-out, or
- if they are dismissed or suffer detriment for bringing enforcement proceedings against their employer for a breach of the EWTD.

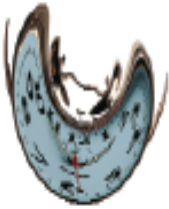
Tribunals have no jurisdiction to hear claims by individuals for breach of the weekly working time limit.

Employment tribunal proceedings have to be lodged within three months of the date of the breach which for posts not compliant on the 1 August 2004, would mean an application being lodged by 31 October 2004.

Civil courts

Where a worker has not opted out of the average weekly hours limit, they are entitled to a declaration that they would refuse to work until their average working hours fall below the maximum. A claim would have to be filed with a civil court promptly (we advise as soon as a complete reference period has been worked so evidence can be provided that an individual is working in excess of the hours limit) in order to get a declaration making it clear that individuals are entitled to refuse to work until their average working hours come within the limit.

For advice on any of the above actions BMA members should contact their local BMA officer or *askBMA*.



Implementation timetable for junior doctors

August 2004	Interim limit of an average 58-hour maximum working week + EWTD rest requirements
August 2007	Interim limit of an average 56-hour maximum working week
August 2009*	Deadline for the average 48-hour maximum working week

* the UK government may put in a request to the European Parliament for a three year extension to this deadline to August 2012, with an interim limit of an average 52-hours maximum working week, but only if exceptional circumstances apply.

Working time

Under the WTR as they stand, the definitions of work and rest are clearly defined and there is no provision for time to be anything other than work or rest. Working time in relation to a worker is counted as:

- any period during which they are working, at their employer's disposal and carrying out their activity or duties
- any period during which they are receiving relevant training and
- any additional period which is to be treated as working time for the purpose of the Regulations under a relevant agreement.

The SiMAP judgment¹ and subsequently the Jaeger judgment² clarified the definition of working time to include the time when doctors are obliged to be present and available at the workplace with a view to providing their professional services (on-call) even if sleeping. The judgments also state that working time is mutually exclusive to rest and, therefore, any period which does not meet the requirements listed above to be classed as working time, is, by definition, rest.

These judgements mean that if you are resident on-call, all of this time is counted as work. If you are on-call from home and not called, this is rest.

1 European Court of Justice, Case C-303/98, Sindicato de Médicos de Asistencia Pública (Simap) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana

2 European Court of Justice, Case C-151/02, Landeshauptstadt Kiel and Norbert Jaeger
1 European Court of Justice, Case C-303/98, Sindicato de Médicos de Asistencia Pública (Simap) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana

Compensatory rest

In a number of specific circumstances, including services relating to the reception, treatment or care provided by hospitals or similar establishments, the EWTD allows employers to exclude the provisions in relation to length of night work, daily rest, weekly rest and rest breaks if compensatory rest is provided. The Jaeger judgment in the European Court of Justice examined the provision of compensatory rest and stated that:

'equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work.'

The requirement that the period of compensatory rest should be taken before commencing the next period of work had not previously been made by the Directive. The EWTD did not provide any specific guidance on compensatory rest and consequently, there has been prolonged discussion on the correct way to apply it. Although the Jaeger judgment specified that compensatory rest has to be taken before the next period of work, as yet no clarification has been provided on whether compensatory rest should be paid and whether it should count as working time. The European Commission is currently holding a period of consultation that may provide further clarification on this issue. The BMA website will be updated to reflect any changes or clarification resulting from the consultation.

<http://www.bma.org.uk/ewtd>

Night workers

The EWTD sets a maximum of eight hours' work in 24 for night workers. A night worker is defined in the Directive as someone who, as a normal course works at least three hours of their daily working time during night time. A person works as a normal course if he works such hours on the majority of days on which he or she works.

Junior doctors, on most rotas, are unlikely to be classified as night workers. This cannot be assumed and needs to be looked at on a case by case basis.

What do I need to do?

Compliance with the WTR is the responsibility of the employer. Employers are required to maintain sufficient records to show that the 48-hour limit on weekly working time is being complied with in respect of each worker to whom it applies. If you are unsure whether your post complies with the EWTD you need to check with the medical staffing department.

I am not compliant, what can I do?

If you are a BMA member contact your local BMA office or askBMA

As a BMA member your first step should be to contact your local BMA office or askBMA. They will be able to answer any questions you have about the EWTD and will support any BMA member who is working in a post that is not EWTD compliant. There are a number of approaches which can be used to address non compliance with the EWTD and BMA local offices will advise and assist BMA members with the most appropriate action for their particular circumstances.

Write to your employer

Write to your employer expressing your concern that your post is not EWTD compliant and asking them to take action to ensure that changes are made to implement the EWTD.

A sample letter is provided in appendix I of this document.

Opt-out

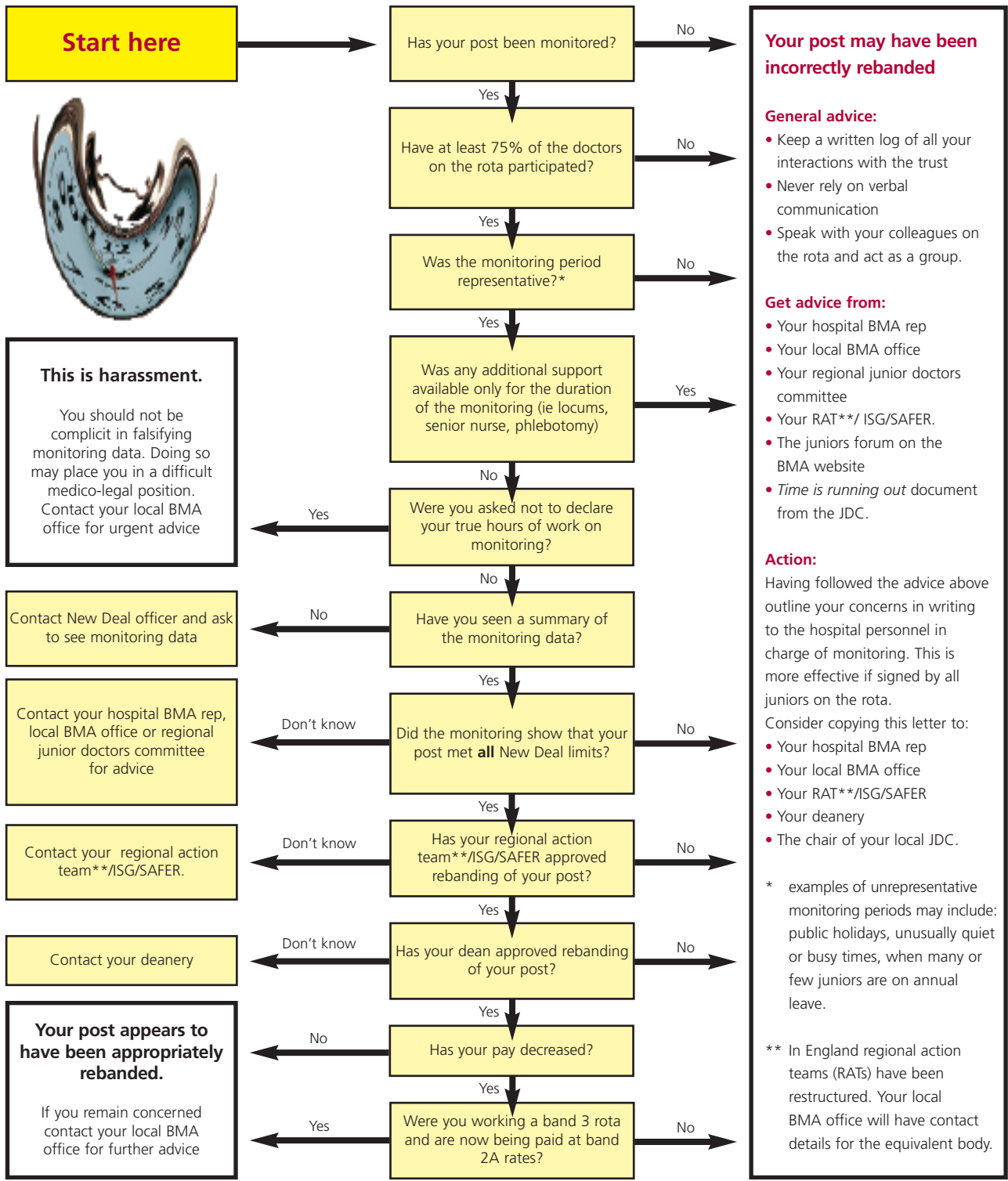
It is possible for an individual worker to choose to work more than 48 hours a week. If they choose to do so, they should sign an opt-out agreement, which they can cancel at any time. An example of an opt-out wording is available at appendix II. The employer and worker can agree how much notice is needed to cancel the agreement, which can be **up to a maximum of** three months. In the absence of an agreed notice period, the worker needs to give seven days' notice of cancellation.

In no circumstances must a worker be put under pressure or feel obligated to sign an opt-out. Being told to sign an opt-out because others on your rota have done so is unacceptable. Any opt-out agreement must be entered into voluntarily by the worker and must never be a requirement for continued employment. Workers cannot be dismissed or subjected to detriment for refusing to sign an opt-out. Employers must keep a record of all employees who have agreed to work longer hours by signing the opt-out.

Opting out will enable employees to work for more than 48 hours in any week (or 58 until August 2007 in the case of doctors in training), subject to any maximum set by their

2B or not 2B?

A guide to monitoring for the confused



Please note that BMA regional offices are only able to offer advice and provide assistance to members of the BMA. If you are not a member you can join the BMA by returning the enclosed postcard.

Reference period

For the purposes of calculating whether the weekly working time is within the maximum set by the legislation, the average weekly working time is calculated over a reference period of up to six months (26 weeks). The average working time is calculated using the formula below:

$$\frac{A + B}{C}$$

where :-

- A** is the total number of hours worked during the course of the reference period
- B** is the number of hours worked in the period after the end of the reference period equal to the number of days excluded during the reference period due to annual leave, sick leave, maternity leave etc; and
- C** is the number of weeks in the reference period.

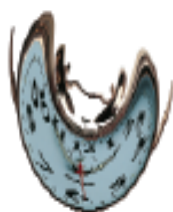
What about the New Deal ?

For junior doctors the New Deal will continue to apply. The New Deal is an agreement between the government, the royal colleges and the BMA made in 1991 responding to health and safety concerns over long hours. Like the EWTD, the New Deal governs working hours and rest and it became a contractual requirement for all junior doctors in August 2003 (for PRHOs in August 2001).

The New Deal weekly requirements are:

- a maximum 56 hours of 'actual work' (ie 'on your feet' treating patients, etc)
- 72 hours maximum duty (including resident and non resident duty).

New Deal summary



	Maximum duty hours	Maximum actual weekly hours	Maximum continuous duty hours	Minimum time off between duties (h)	Minimum off duty (h)	Rest
on call rota	72	56	32 (56 at w/e)	12	48+62 every 21 days	8h/32, 5h continuous at night
24 hour partial shift	64	56	24	8	48+62 every 28 days	6h/24 4h continuous at night
partial shift	64	56	16	8	48+62 every 28 days	4h or 1/4 of OOH period
full shift	56	56	14	8	48+62 every 28 days	Only breaks

OOH means out-of-hours, defined as all time outside 8am to 7pm Monday to Friday.

All patterns of work are entitled to a 30 minute break for each period of four hours worked

There are differences between the New Deal and the EWTD. These can come into conflict, and ensuring you are compliant with both can appear daunting, however, to ensure compliance with both Regulations follow that which requires the least hours and the most rest.

The Department of Health has produced a useful comparison of the New Deal and the EWTD, which sets out in detail the requirements under both the New Deal and the EWTD.

<http://www.dh.gov.uk/assetRoot/04/07/55/54/04075554.pdf>

Medical Royal Colleges agree long-term sustainable rotas need 10 or more people. For further details go to chapter 4 of the Academy of Medical Royal Colleges' EWTD position paper, available on the web at:

<http://www.aomrc.org.uk/pdfs/ewtd-acad-6.pdf>

It is important to note that as the EWTD requirements are law it would be inappropriate to refuse changes to your working pattern that moves it from being non compliant to being compliant. However, it often pays to offer to help in designing new working patterns as this can result in a rota that is much better for you and your colleagues.

What if I am not happy with the changes to my rota?

Rotas are being changed up and down the country. When done well, trainees, consultants and managers are happy that the best balance has been struck between training, quality of life and service need. At its worst there seems to be no training, no one sees their friends or family and yet the hospital complains they can never find the right doctor when they want them.

At the same time, many junior doctors have had their posts rebanded incorrectly either through ignorance or a deliberate attempt to circumvent the terms and conditions of service.

What to do to get the best rota:

- juniors must be part of the team devising their own rota. Imposed rotas always lead to unhappiness
- all sides must be realistic
- New Deal and EWTD will mean there are fewer junior doctor 'hours' available. Something will have to give
- training should be protected – it is what trainees are meant to be there for.
- if no one is getting rest it will have to be a full-shift rota. Look at monitoring data/diary cards or word of mouth.
- do you need all the tiers of cover you have (ie PRHO, SHO and SpR)? Could you merge one or more tiers?
- can other staff take some of the load? – nurse practitioners, physicians assistants etc
- **the BMA believes full-shift rotas need at least eight people.** Full-shift rotas with fewer people risk collapse as they do not integrate the flexibility needed to deal adequately with requirements for training; annual, sick and study leave or they rely heavily on the unpredictable availability of locums. The BMA and the Academy of

Solutions

There are a number of workable solutions for the implementation of the EWTD. Rotas enabling successful working within the Regulations, while still providing good training, have already been implemented in some areas. The Hospital at Night, backed by the BMA, offers a solution for many. Further details of the Hospital at Night scheme and other possible solutions are detailed in a compendium issued jointly by the BMA, the Department of Health, the NHS Confederation and the Academy of Medical Royal Colleges which is available at:

<http://www.dh.gov.uk/assetRoot/04/08/26/35/04082635.pdf>

How can they change my rota?

In order to comply with the EWTD most rotas will require some changes. As outlined above, the SiMAP judgment stated that all time spent compulsory resident at the place of work counts as working time. This means that in most cases traditional resident on-call working patterns are no longer viable and alternative working patterns have to be implemented.

The JDC is aware of many recent instances where juniors have been told that their rotas will change and that they will be paid less as a result, often with little or no notice. It is not only best practice for the employer to work with you to devise and implement changes to working patterns but failure to do so is actually not allowed under your terms and conditions of service.

There are very specific rules about how a post can be rebanded. These are contained in the *rebanding protocol* available from the Department of Health website

<http://www.dh.gov.uk/assetRoot/04/05/38/78/04053878.pdf>

This applies in England and Wales.

There is a different *rebanding protocol* in Scotland, this is available on the NHS Scotland website

http://www.show.scot.nhs.uk/sehd/mels/HDL2002_33.pdf

In Northern Ireland the *rebanding protocol* is set out in the guidance on working patterns for junior doctors

http://www.dhsspsni.gov.uk/hss/HRD/documents/guidance_on_working_patterns.pdf

A summary, taken directly from the proforma is included overleaf. The full proforma must be signed off by all parties to indicate all steps have been followed. If not, then the post has **not** been rebanded properly and the salary should remain at the previous level. Even if the pay band changes while you are in post or during your rotation you have the right to pay protection as detailed in the terms and conditions of service.

In England the regional action teams (often known as task forces or RATs) were disbanded in April 2003, and their function incorporated into the strategic health authorities via the Workforce Development Confederations. Your local BMA office should be able to put you in touch with the relevant personnel (who should still approve changes).

Please note: 'you must approve the changes', does not allow you to demand to stay in band 3 but does allow you to ensure the rota is workable and agreed by those concerned. 'Incoming post-holders' means anyone who knows they will be rotating into that post.

The BMA's regional or national offices can give additional information or clarification to BMA members if required.

The stages necessary to reband a training post



Stage	Evidence required	Documentation
1a. Consult post-holders on proposed changes and obtain agreement of the majority participating in the working arrangements.	Approval of majority of current/incoming post-holders	Template signed by Trust junior doctor representative confirming agreement of majority of current/incoming post-holders
1b. Submit details of the new working arrangements to the action team for information and invited comment.	Full details of proposed working arrangements and/or rota summary (eg from ND2000 software)	Letter signed by action team chair or delegated authority confirming theoretical compliance of working arrangements
1c. Obtain agreement from Clinical Tutor for education purposes.	Full details of proposed working arrangements Comments of action team	Letter signed by dean or delegated authority confirming educational acceptability of working arrangements
<p>If exceptionally and because of the impracticality of full implementation of new working arrangements a Trust wishes to offer future posts at an expected banding in advance of actual monitoring, approval must be sought from the regional action team (or its equivalent) in advance of making any such offer. Any offer made in these circumstances will be strictly provisional, and must be confirmed by monitoring following the implementation of new working arrangements</p>		
2. Submit request for provisional approval of working arrangements to Action Team	Signed letter from Trust giving reasons for inability to fully monitor before rebanding. Evidence of full or partial testing/monitoring of proposed arrangements	Letter signed by action team chair or delegated authority authorising an offer of provisional banding.
3. Monitoring of working pattern and confirmation of banding	Completed monitoring returns from 75% of doctors on rota over full 2 week period	Summary of monitoring results This signed template [Meaning whole profoma]

The rebanding protocol proforma for Scotland is available
http://www.show.scot.nhs.uk/sehd/mels/HDL2002_33.pdf

For Northern Ireland
http://www.dhsspsni.gov.uk/hss/HRD/documents/guidance_on_working_patterns.pdf

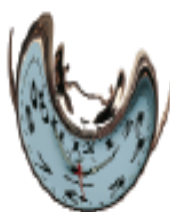
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