

Home Office Circular

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This circular is about:

**THE APPLICATION OF THE WORKING
TIME REGULATIONS TO THE POLICE
SERVICE**

From:

POLICE RESOURCES UNIT

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This circular is addressed to:

Chief Officers of Police in England and Wales

Copies are being sent to:

Clerks to Police Authorities

Dear Chief Officer

1. This circular gives general guidance on the application of the Working Time Regulations 1998 (SI 1998 No 1833) and 1999 (SI 1999 No 3372) to the Police Service; It does not seek to comment on all the ramifications of the legislation but offers an interpretation on how they affect the Police Service. It follows the PNB Circular 01/2 which has been endorsed by the Home Secretary.
2. **This document in no way removes the necessity for forces to make their own assessment of the impact of the Working Time Regulations (WTR) on their staff.** All forces are subject to H&S legislation and should already have

made their own assessment of how the WTR should be applied. The Home Office can not provide a comprehensive "you must do" document because forces operate different shift patterns with different staff/staffing levels. Further, the Regulations are complex and open to interpretation; the following guidance for managers is not definitive, but is simply one interpretation. The guidance remains subject to change in the light of discussion with the staff representative bodies and through emerging case law.

3. This guidance should be read in conjunction with the Working Time Regulations 1998 (SI 1998 No 1833) and 1999 (SI 1999 No 3372) and the DTI document "A Guide to the Working Time Regulations".

APPLICATION OF THE WORKING TIME REGULATIONS (WTR) TO THE POLICE

4. The Working Time Regulations (WTR) 1998 and 1999 provided new rights for all workers to ensure that they do not have to work excessive hours. There are certain derogations under the Regulations, and certain areas where agreements can be made between the employer and worker to vary the Regulations. One of these derogations is where a duty 'inevitably conflicts' with the WTR provisions.
5. The Working Time Regulations (WTR) implement the Working Time Directive and the Young Workers Directive (in respect of adolescent workers) which are EC Directives. Regulation 41 states that for the purposes of the Regulations the holding of the office of constable shall be treated as employment. Therefore, the WTR apply to police officers unless any particular circumstances of a police operation inevitably conflict with the provisions of the Regulations. In this latter case those Regulations in respect of the average 48 hours a week limit, rest periods and breaks, as well as some of the stipulations relating to night work do not apply - Regulation 18(c) refers.

Principal requirements of the Regulations

- set a maximum average working week of 48 hours, excluding daily rest periods (Regulation 4);
- provide a rest period of not less than 11 consecutive hours in a 24-hour period (Regulation 10);
- provide an uninterrupted rest period of not less than 24 hours in a 7-day period (Regulation 11);
- set a maximum average limit of 8 hours night work in a 24-hour period (Regulation 6(7));
- entitle a worker, whose normal working time exceeds 6 hours, to a rest break (Regulation 12);
- require an employer to keep adequate records for two years to show whether the limit on the hours of the working week is being complied with (Regulation 9); and

- require an employer to complete free health assessments on night workers

6. It should be noted that Regulation 5 permits a worker to agree with their employer in writing that the 48 hour per week limit should not apply to that worker. Workers with more than one employment would need to have agreements with each employer.

Scope of the Regulations

7. For the purposes of these Regulations all police officers, special constables, civil staff (including traffic wardens and school crossing patrols) and casual staff are subject to these Regulations. The application of the Regulations to agency and contract staff is a matter for their separate employers.
8. Whilst it is intended that the limits and entitlements of WTR should apply to all workers currently within the scope, it is recognised that in some circumstances certain provisions of the Regulations cannot be applied in full because of conflicting needs. In particular regulation 18 states that certain provisions do not apply "where characteristics peculiar to certain specific services such as...the police...or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations." The HSE has interpreted this to mean that in most circumstances the duration and pattern of working time for those in the police service must still conform with the provisions of Part II (Rights and Obligations) of the Regulations (subject to modification by workforce or individual agreements). This exclusion has to be considered in the light of specific activities: it is not intended to mean that every aspect of police work inevitably conflicts and that the Regulations do not therefore apply.
9. There is no definition of inevitable conflict. The DTI guide states on page 6 that the police service should identify which activities conflict with the Regulations. The time spent on these activities would not be counted as working time. The employer should identify what characteristics peculiar to the police or specific activities inevitably conflict with the provisions of the Regulations. The HSE gives examples of the types of activities that might fall outside the scope of the Regulations as dealing with civil unrest, murder investigations, terrorism etc. Where the issue is purely related to staffing matters, (such as some, shift-based, static surveillance operations), the exclusion provided by Regulation 18 does **not** apply.
10. The exclusions provided by regulation 18 apply to those holding the office of constable, or an appointment as a police cadet and not to civilian staff.

Definition of working time

11. Working time is defined in the interpretation part of the Regulations as being that time when a worker is working, at his employer's disposal and carrying out his activities and duties. This will include any period during which a worker is

receiving relevant training. It is recognised that this definition may not be easily applied to some aspects of work e.g. driving outside work hours, and so a workforce agreement can be made to define additional periods of time as being working time for the purposes of the Regulations. DTI guidance states that time spent travelling to and from a place of work is unlikely to be working time as the worker would probably be neither working nor carrying out their duties, unless engaged in travel that is required by the job. Time when a worker is "on call", but otherwise free to pursue their own activities, would not be working time, as the worker would not be working.

12. The Working Time Regulations, as stated, include in the interpretation of 'working time' under Regulation 2(1) provision for "any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement". Workers and employer can come to an agreement on the grey areas. PNB agreement has been reached that the following periods should be included in the national definition of police officers' working time:

- (i) travel, outside of normal rostered duty hours and not currently covered by Police Regulation 32 (England and Wales) (and equivalent regulations for Scotland and Northern Ireland), to and from duty at a place other than the normal place of duty, e.g. travel to and from court;
- (ii) travel to and from training courses other than at the normal place of duty.

13. The following circumstances will also normally count as working time:

- a) on the exceptional occasions where staff are at the disposal of and are actively engaged on the Service's business during their meal breaks and rest breaks;
- b) where staff are on call and are actively working at the Service's disposal and performing their activities or duties, including travelling time when called out;
- c) where staff are travelling in the exercise of their work duties, excluding time spent travelling between home and the normal place of work. An example would be travelling to a business meeting or such occasions as an individual may be required to work at, or report to, a location other than his or her normal place of work (except as in (b));
- d) where work is performed away from the normal place of work on a basis agreed with the individual's manager and the time is properly recorded e.g. welfare visits to staff at home, drafting a document at home;
- e) where staff are required to attend work-related functions as part of their duties; or
- f) where staff are spending agreed time carrying out staff association, trade union or health and safety responsibilities.

Maximum 48 hour week

14. A worker's working time, including overtime, is limited to a maximum of 48 hours for each seven-day period. This maximum is an average, based on the number of hours worked over what may be termed a 'referencing period'. The

Regulations set the referencing period at 17 weeks, but where there are technical or objective reasons a workforce agreement can be made to reduce the reference period or extend it, up to a maximum of 52 weeks. Where a worker is employed for less than 17 weeks, the reference period will be the period worked.

15. The working time limit does not apply to workers exempted or derogated under Regulation 21; the reference period is extended to 26 weeks. Workers not exempted or derogated under the above regulations may sign personal agreements to waive their rights.

Calculation of the average working time

16. The calculation of average weekly working time must take account of periods where a worker is absent due to their annual leave entitlement, sick leave or maternity leave or any working days covered by an agreement in which the worker has agreed to work in excess of the weekly working time limit. Extra time is added to the total number of hours worked to compensate for such absences by adding the hours worked in the first working days after the reference period. *The number of working days' hours added should be the same as the number of days missed through absence.*
17. However, because the Regulations only provide for 4 weeks paid annual leave it is only the first three weeks of a worker's annual leave that will be "added on" to any calculation of average weekly working time. The definition of annual leave includes Bank Holidays, public holidays and privilege leave where they are given as paid leave. Any additional contractual annual leave over and above the first three weeks paid annual leave does not have to be added back to the reference period and therefore each day of additional holiday is effectively a credit against the maximum working time.
18. This only becomes an issue where a member of staff is likely to exceed the 48 hour limit and the calculation will not be necessary for the large majority of staff.
19. The average weekly working time is calculated by dividing the number of hours worked by the number of weeks in the reference period. Use the equation:

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

where

- A** is the total number of hours worked during the reference period
- B** is the total number of hours worked, immediately after the reference period, during the number of working days equal to the number of days missed due to i) the first three weeks of annual leave in any year or ii) sick leave or iii) maternity leave; and
- C** is the number of weeks in the reference period.

20. Extra time is added to the [17] week reference period to compensate for such absences.

Agreement to exclude the maximum

21. Regulation 5 allows an agreement to be reached, on an individual basis between a worker and his employer to exclude the maximum of 48 working hours in a seven-day period. The agreement may relate to either a specified period or apply indefinitely, but the worker must be able to terminate the agreement by giving a period of notice to his employer. The period of termination must not be less than seven days, but may be extended by agreement up to three months.

Unmeasured working time

22. Certain provisions of the Regulations do not apply to workers where, because of the work they carry out, their working time is not predetermined or measured, or where it can be decided by the worker him/herself. The HSE advises that the structure and responsibilities of police forces appear to preclude those ranks **below Assistant Chief Constable** from applying this derogation.

Rest Breaks

23. The Regulations provide for the following entitlements:

- A worker is entitled to a rest period of 11 consecutive hours between each working day (12 hours if they are under 18 years of age)
- A worker is entitled additionally to an uninterrupted rest period of not less than 24 hours in each 7 day period; although this may be averaged over a 2 week period allowing for two days rest a fortnight (in the case of workers under age 18, the rest period should be 2 days in each 7 day period and this can not be averaged.)

24. The provisions for rest periods do not apply to workers exempted/derogated under Regulations 18, 20 or 21. Adequate provisions for rest periods are included in Police Regulations and Civil Staff conditions of service.

25. In the event that these periods can not be taken due to a change in shift, as long as compensatory rest is granted, the rest periods do not apply.

26. The Regulations provide that a worker is entitled to an uninterrupted break of 20 minutes when daily working time is more than 6 hours. In the case of workers who are under 18 years of age, the rest period should be 30 minutes when daily working time is more than 4 ½ hours.

Entitlement to Daily Rest

27. Regulation 10 provides for an entitlement to "a rest period of not less than eleven consecutive hours in each 24-hour period", which is at variance with the eight hours currently conferred by Police Regulations. The PNB has therefore agreed that regulations should be amended as follows to take account of this entitlement:
28. Regulation 27(4)(a) (England and Wales) (and equivalent regulations for Scotland and Northern Ireland) - 11 hours to be substituted for the current 8 hours; and consequent amendments to Schedule 1 (Modification for part-time service);
29. Regulation 27(4) (England and Wales) (and equivalent regulations for Scotland and Northern Ireland) - after "unless the joint branch board agrees otherwise": insert "subject to an equivalent period of compensatory rest".

Annual Leave

30. The Regulations provide for a minimum of 4 weeks paid leave a year, but public holidays, bank holidays and privilege days, where appropriate, may be counted against this entitlement. They also provide for payment of untaken leave on termination and for providing notice for the taking and cancellation of leave.
31. Police Regulations and Civil Staff conditions of service make adequate provision for the annual leave requirements of the regulations, with one exception. In the case of police officers, Police Regulations do not currently provide for payment for untaken leave on termination. Forces should try to ensure that all police officers take any outstanding leave before termination, but where this is not possible PNB agreement has been reached as follows:

Compensation related to entitlement to annual leave

32. Regulation 14 of the Working Time Regulations provides that, on termination of employment during the course of a leave year, "where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave". Thus, a police officer who, on termination of service has taken less than his/her annual leave entitlement under the Working Time Regulations, is entitled to payment in lieu of the untaken days.
33. PNB has agreed that, in addition to this right, if an officer on termination of service has not been able to take his/her leave then the provisions of Regulation 14 should apply to all the officer's remaining annual leave entitlement, and is not limited to the annual leave entitlement under the Working Time Regulations.
34. The formula in Working Time Regulations 14(3) should be used to make the calculation. This states that the payment due shall be a sum equal to the amount that would be due to the worker under regulation 16 (viz. at the rate of a week's pay in respect of each week of leave calculated by reference to sections 221-224 of the Employment Rights Act 1996 as modified) with a day's pay for this purpose

comprising, for a full time member, a week's pay divided by 5 and, for a part-time member, comprising a week's pay multiplied by the appropriate factor for that member and divided by 5, in respect of a period of leave determined according to the formula –

$$(A \times B) - C$$

where-

A is the period of leave to which the worker is entitled

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

Acting up

35. Where an officer is acting up in another rank and takes annual leave, he/she should be paid at the lowest rate at the rank in which he is acting up. For example, a sergeant acting up as Inspector would be paid at the lowest Inspectorial rate for any annual leave taken during that period. Managers may wish to consider candidate's annual leave commitments when determining their suitability for acting up, particularly where very short periods are concerned. Should an officer leave the service during their period of acting-up, this should be taken in to consideration when calculating the above.

Shift workers

36. Where a shift worker changes shift and cannot take any part of the entitlements provided by the Regulations, his employer must provide him with equivalent compensatory rest for the amount of time the worker lost. Where a worker is unable to take part of their daily rest because of the changing shift pattern, the equivalent period of compensatory rest should be given within a few weeks. Where a worker is unable to take part of their weekly rest period, this time should be provided to the worker as compensatory rest within a couple of months. Only in exceptional circumstances is the employer allowed not to provide equivalent compensatory rest, but this does not absolve the employer from taking steps to ensure the health and safety of his worker is not put at risk by the hours worked.

Night Workers

37. Forces should take all reasonable steps to ensure that the 'normal' hours of their night workers do not exceed an average of 8 hours for each 24 hours over a 17-week period. Night workers should not be rostered to work more than 8 hours, though they may perform additional hours as overtime. Night workers whose duties involve special hazards or heavy physical or mental strain should not work

more than 8 hours. The above limits do not apply to workers exempted/derogated under Regulations 18, 20 or 21.

38. Forces should identify any night workers not exempted/derogated from the night work limits whose working arrangements exceed the limits. In any such cases the force must consider adjustments to the working arrangements to ensure that the limits are not breached.
39. **Night-time** is a period of at least 7 hours which includes the period from midnight to 5.00am. The period is usually taken to be 11pm to 6am although an alternative can be determined by local agreement (e.g. 12am to 7am). A **night worker** is defined in the WTR as a person who works at least three hours of their daily working time between 2300 and 0600 hours ("night-time") as a normal course. This definition was further clarified in the WTR as a person who "works as a normal course (without prejudice to the generality of that expression) if he works such hours on the majority of days on which he works." DTI guidance on this definition was confirmed and strengthened by a Northern Ireland High Court decision (*R. v. Attorney General for Northern Ireland ex parte Burns*).
40. The decision in the Burns case was that a worker on a 'standard' rotating shift system (where one in three shifts is at night) is a 'night worker' for the purposes of the Regulations (even though the night shifts do not occur on the majority of days worked). In the light of this decision the PNB has adopted the following definition of a 'night worker' for the purposes of the police service:

that a police officer who regularly works shifts which include nights, irrespective of the shift pattern actually worked, should be a 'night worker' for the purposes of the Working Time Regulations.

41. Any worker classified as a night worker must, under the terms of Regulation 7, be given the opportunity of a free health assessment before undertaking night work and be moved from night work where a doctor has advised that his or her health may be suffering. **However, the PNB has also agreed that it would be good practice for all police officers, regardless of whether they are 'night workers', to be given the opportunity of a free health assessment.**

Health assessment for night workers

42. The Regulations provide that individuals becoming night workers should be offered free health assessments and that these should be reviewed regularly thereafter. Workers should be transferred from night work where medical opinion advises that they may not be fit for such work. The health assessment may take the form of a questionnaire and completed questionnaires should be scrutinised by Occupational Health.
43. As a one-off exercise, forces should identify all night workers in their service and provide them with a questionnaire to complete. Thereafter questionnaires should be provided to all new night workers. DTI guidance suggests that in many cases

it will be appropriate to do this once a year; the department retaining these records should contact line managers where an individual should be temporarily transferred from night work.

Special cases

44. Where the employer can demonstrate that:

- (1) there is a special reason why it is necessary for individual workers to work into their rest entitlements, or
- (2) there is a need to put the limit of eight normal working hours in a 24 hour period for individual night-workers aside, this is allowed by the Regulations.

45. An example of where a special case may be necessary would be where the worker is engaged in covert or some surveillance activities. However, the employer must still provide that worker with equivalent compensatory rest for the rest periods or rest breaks the worker has been required to work through.

Record Keeping

46. Forces should keep adequate records to demonstrate that they have complied with the WTR. Records must be made and retained for 2 years on the maximum weekly working time, the length of night work and any health assessments made of a worker. These records must be adequate to highlight where excess hours are being worked.

Exemptions and Derogations from the Working Time Regulations

47. There are three regulations which apply to certain ranks/grades, roles and functions within the police service which exclude all or parts of the limits and entitlements because of the nature of the work undertaken.

48. In general, although reference should be made to the WTR where it is thought these exemptions apply;

49. Regulation 18 exempts those police duties which inevitably conflict with the limits and entitlements and disapply the provisions relating to the maximum weekly working time limit, the restrictions on the length of night work (including night work involving special hazards or strains) the need for health assessments and the entitlement to rest periods and rest breaks, and annual leave.

50. Regulation 20 derogates those duties where the duration of working time is not measured or predetermined or can be determined by the worker himself. Regulation 20 disapplies the provisions relating to the maximum weekly working time limit, the restrictions on the length of night work (including night work involving special hazards or strains) the need for health assessments and the entitlement to rest periods and rest breaks.

51. Regulation 21 derogates duties for a number of reasons including those where the worker is engaged in security or surveillance activities where there is a need for continuity of service, where there is a foreseeable surge in activity or where the workers activities are affected by unusual or unforeseen circumstances, exceptional events, or an accident or imminent risk of one. Regulation 21 disapplies the restrictions on the length of night work (including night work involving special hazards or strains) the need for health assessments and the entitlement to rest periods and rest breaks.

Workforce agreements

52. Workforce agreements may be made between the employer and individual workers or groups of workers to modify or exclude the limit of eight normal working hours in a 24 hour period for a night-worker and to modify or exclude rest period entitlements provided by the Regulations. A workforce agreement can also be made to change the reference period over which the limits on working hours are averaged (up to 52 weeks).

53. Where staff are identified as falling under the scope of the regulations but wish to derogate their rights, the individual should be asked to sign a standard agreement. Signed copies should be retained by the force.

54. If a worker does not wish to exceed working time limits, or to forgo a rest break or annual leave, or to sign a workforce agreement as provided for by the WTR, he/she may not be discriminated against. Arrangements to reduce the workers hours below the limit, or to re-assign the worker to other duties, must be made. Separate records will need to be maintained in certain circumstances.

Special Constables

55. Regulation 4(2) requires employers to take all reasonable steps to ensure that workers do not exceed an average of 48 hours of weekly working time. Such steps would include enquiring of the worker whether he was working elsewhere (or requesting that they be notified on the worker getting other work) and, if so, adjusting working arrangements accordingly.

56. Where a worker works for two or more employers, each employer should make reasonable enquiries to determine the number of hours that the worker does in **total** in a seven-day period. All the hours that the worker does are aggregated in order to determine whether the limit of 48 hours per week is being complied with. If a worker were working more than an average of 48 hours per week in total, (ie the aggregate of the hours worked for both employers), Regulation 5 permits a worker to agree with their employer in writing that the 48 hour per week limit should not apply to them. Specials will need to be advised that workers with more than one employment would need to have agreements with each employer.

57. In addition to the maximum of 48 hours per week, the WTR provide entitlements to certain rest periods and breaks. These must be made available to special

constables (subject to the provisions of the WTR), but a special constable may choose to waive those entitlements by agreement.

58. A special constable should not be encouraged to exceed the 48 hours limit unless they wish to do so and the force is satisfied that the health and safety of the officer is not adversely affected. In exercising their duty of care, a force may consider it appropriate to restrict the number of hours duty performed by a special if it is believed that the special may endanger the health and wellbeing of either the individual or others who may be affected by their actions.
59. It should be noted that an employer has no right to try to restrict the number of hours a worker works for the other employer (or performs duty for the police in the case of a special constable) in order to restrict the aggregated hours to an average of 48 per week. Furthermore, the WTR do not restrict the activities of a worker during those breaks. For example, during a rest period from employment of not less than 11 consecutive hours in a 24-hour period, a special constable may perform police duty and vice versa.
60. It is recommended that specials be advised to notify their employers of their voluntary work for the police service and the number of hours performed per week. This will assist an employer to discharge its duty of care towards its employees.
61. Although the WTR states that records should be kept of the duty hours performed for a minimum of two years, it is recommended that records for specials are kept for six years, because a civil claim can be made up to three years after the effect of the symptoms alleged in the claim become apparent.
62. (An example waiver agreement is annexed to this circular at C.)

Young Persons

63. Adolescent workers are entitled to free health and capacity assessments for night work, 12 hours rest in a day, 2 days off a week and an in-work rest break where the working day is longer than 4½ hours. The Health and Safety (Young Persons) Regulations of 1997 also require risk assessments to be made for young workers.

Next Steps

64. Chief Officers (or their delegated authority) must consider whether their workers are within the scope of the regulations. This will involve assessing individual posts and their regular duties, as well as determining which staff are affected by which assessment.
65. Forces should identify from local records all workers who are not exempted/derogated under Regulations 18 and 20, and who exceed an average

of 48 hours working time a week. In the case of those workers derogated under Regulation 21, the average should be measured over 26 weeks.

Enforcement of the Regulations

66. The Health and Safety Executive is responsible for the enforcement of the limits set out in the Regulations and fines may be imposed on organisations in breach of the Regulations. Where the Regulations confer entitlements the remedy is by way of individual complaint to an Employment Tribunal.

Yours sincerely

JOHN USHER

Annex A

Calculating average weekly working time

Worked example:

A worker has a standard working week of 36 hours net and does overtime of 20 hours per week for the first 10 weeks of the 17-week period. The first five days of his 30 days annual leave entitlement is also taken during the reference period. The **total hours worked in the reference period** is 16 weeks (of 36 hours per week) and 20 hours overtime for 10 weeks:

$$(16 \times 36) + (10 \times 20) = 776 \text{ hours}$$

To this, must be **added** the five days of his **annual leave entitlement** (i.e. by adding the first five working days after the reference period). If the worker does no overtime, 36 hours must be added to the total, making a grand total of 812 hours. Therefore the **average is the total number of hours divided by the number of weeks**:

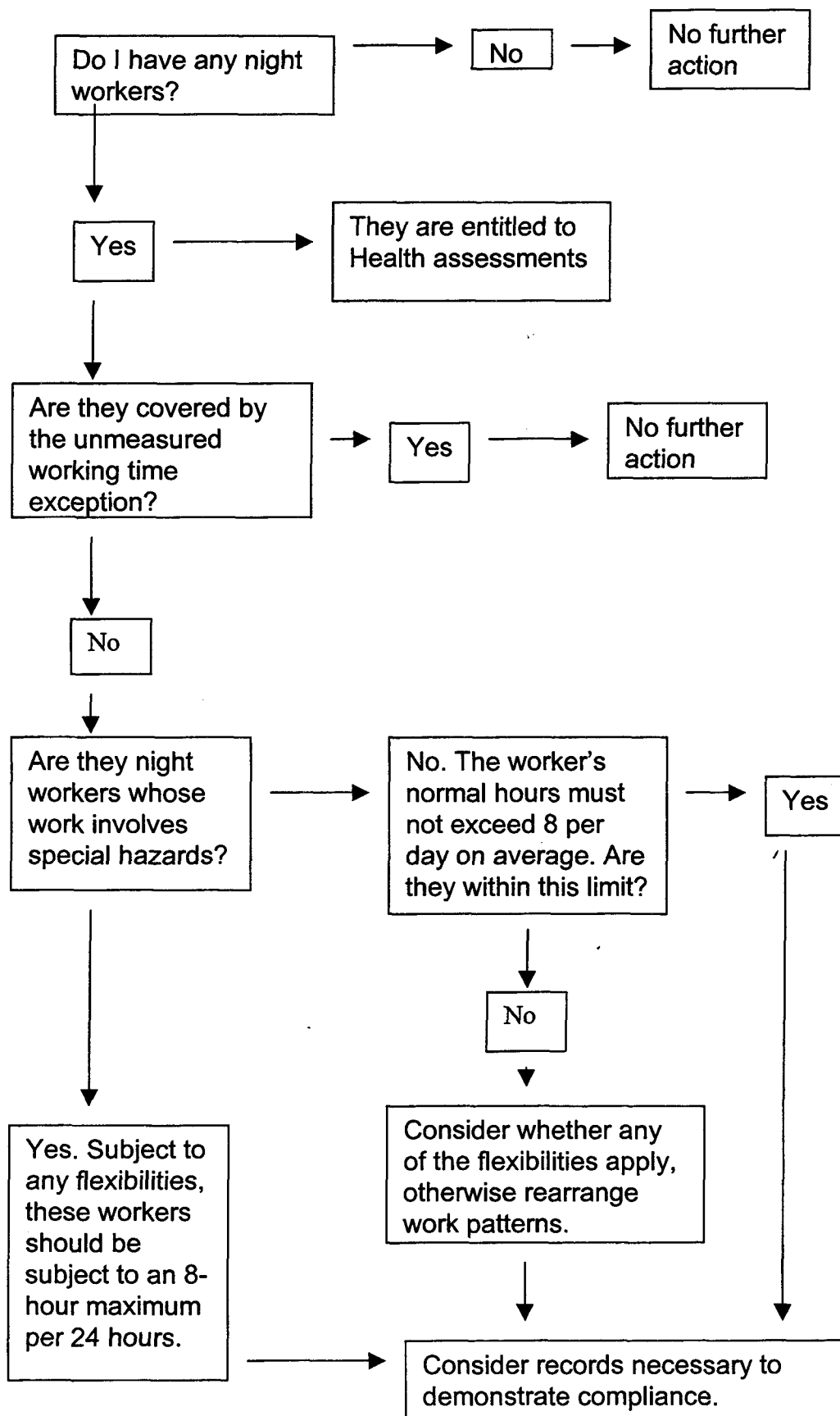
$$\frac{812}{17} = 47.77 \text{ hours and the average of 48 hours has not been exceeded.}$$

OR

If the first five days **annual leave** did **not** have to be **added** because the individual's statutory annual leave entitlement (including Bank holidays and privilege days) was exhausted, the calculation would have been:

$$\frac{776}{17} = 45.65 \text{ hours and the average of 48 hours has not been exceeded.}$$

Annex B



Annex C

EXAMPLE WAIVER FORM

..... **POLICE / CONSTABULARY**

I hereby agree that the 48 hour limit on average weekly working time shall not apply in my case.

I understand that this agreement:

(* delete as appropriate)

* is for an indefinite period

* will end on

Date:

but I can terminate it after giving 7 days' notice of my intention to do so or such other period of notice as I may agree with my line manager.

I also agree to ensure that:

- my holding the office of special constable will in no way adversely affect my ability to perform in my normal occupation to the standard required by my employer.
- I will not jeopardise the safety of myself, my colleagues in the police service, or the public by reporting for duty when not in a fit state owing to an inadequate period of rest prior to the commencement of that duty.

Signed

Name

Grade

Number

Date

Copies of this agreement and any subsequent amendments should be retained by the officer and their line manager (a copy should be retained on the officer's personal file).