To: Chief Executives – NHS Health Boards/Trusts
    Directors, Workforce & Organisational Development – NHS Health Boards/Trusts

Our Reference: Pay Letter AfC(W)3/2012

June 2012

Dear Colleague

**AfC: On-Call Agreement**

Further to Pay Letters AfC(W)1/2010 and AfC(W)5/2010, this pay circular informs employers of the agreement reached in Wales on the arrangements for On-Call. The agreement applies to all staff in NHS Wales covered by Agenda for Change terms and conditions of service. This agreement replaces any reference to On-Call in the NHS Terms and Conditions Handbook specifically:

- Part 2 paragraphs 2.32 – 2.51 Maintaining Round the Clock Services
- Annex X Working or Providing Emergency Cover outside normal working hours
- Annex A2 Guidance on FAQs
- Annex A3 Principles for Harmonised On-Call Arrangements

To ensure delivery, employers should put arrangements in place to pay the new rates from 1 July 2012. Employers should work in partnership with staff organisations to determine how out of hours services will be delivered in foreseeable future. Organisations will be encouraged to conclude their deliberations in relation to the implementation of any agreed changes in the way services are delivered by 30th June 2013. Employing organisations should seek to conclude any discussions well in advance of the cessation of the transitional arrangements

**Effect of this amendment**

1. Details of the changes made effective by this circular are in the attached Annex.

**Enquiries**

2. Employees must direct personal enquiries to their employer.
3. Employers should direct enquiries to: gwenda.davies@wales.gsi.gov.uk

4. Copies of this circular can be downloaded from: HOWIS

Yours sincerely

[Signature]

Dr Neil Wooding
Director
Public Service Management Wales
People, Places and Corporate Services
Welsh Government
1. Introduction and Purpose
   1.1 In order for the NHS in Wales to provide appropriate services to the population it serves, and maintain a safe and secure environment for its staff, there will be requirements for certain groups of staff to provide either an on-call service or extended service cover.

   1.2 On-call systems exist as part of arrangements to provide appropriate service cover across the NHS. A member of staff is on-call when, as part of an established arrangement with his/her employer, he/she is available outside his/her normal working hours – either at the workplace, at home or elsewhere – to work as and when required.

   1.3 The new arrangements set out in this agreement will be introduced from 1 July 2012.

   1.4 These arrangements follow the twelve guiding principles developed by the NHS Staff Council (in Annex A) and reflect the provisions of the Agenda for Change agreement as set down in the NHS Terms and Conditions of Service Handbook.

2. Scope
   2.1 These arrangements apply to all employees excluding Bank Staff, Medical and Dental Staff and Senior Executive Staff employed in the NHS in Wales.

   2.2 All on call and standby arrangements including those covered by the “interim regime” will cease to apply from 1st July 2012 and are superseded by this agreement.

3. On Call Arrangements
   3.1 Staff that have a specific roster commitment to be on-call outside the normal working hours for their service will be eligible to receive an On-Call Availability Allowance.

   3.2 Where on call arrangements, in accordance with this agreement are required as part of the local delivery of a particular service, it is expected that staff will participate in such rotas where required. This will usually be specified, e.g. in the employee’s job description. However, it is acknowledged that individuals may still request to either not be part of an on call rota or to be removed from a rota. Such requests would have to be considered, e.g. childcare. Each NHS organisation would need to consider these in the light of any legal obligation and the viability of the rota. Where there are proposed changes to on call working arrangements, staff should be consulted in accordance with local management of change policies and issues where individuals would have difficulties complying with these arrangements should be considered in accordance with good employment practice principles.

4. On Call Periods/Sessions
   4.1 The On-call period in each week will be divided into nine periods/sessions; five of these sessions will cover the weeknights (Monday to Friday inclusive). The weekends will be split into four equal 12 hour periods/sessions with the start and finish times set by the normal working hours for the service. A Public Holiday will be treated like a weekend with each public holiday split into two equal 12 hour periods/sessions.

5. On Call Availability Allowance
   5.1 Staff will receive the same payment for availability irrespective of banding.

   5.2 Staff will be paid the same availability payment irrespective of the length of the session.

   5.3 Staff will be paid an availability rate of £18 per session for weekdays and weekends and £36 per session for public holidays.

   5.4 The rate of the availability payment will be linked to “headline” rate identified for national pay awards and increased accordingly.

6. Staff Called into Work in an On Call Period
   6.1 Staff who are called into work during a period of on-call will receive a minimum payment of 1 hour, including travelling time, for the first call out (i.e the period of “call out” commences when
an individual receives the call and an individual only claims a payment of more than one hour
where the work done is greater than one hour). For subsequent calls (outside this initial one
hour period) and within the same period of on-call, staff will be paid for the actual work and
travel time.

Examples:
Telephone call plus travel time and work done and return home completed in 50 minutes: Paid
1 hour at time and a half
Telephone call plus travel time and work done and return home completed in 60 minutes: Paid
1 hour at time and a half
Telephone call plus travel time and work done and return home completed in 90 minutes: Paid
1.5 hours at time and a half

6.2 Staff who undertake work off site (by telephone or other electronic means) will be paid a
minimum payment of 15 minutes for the first call provided the call does not exceed 15 minutes.
Thereafter, the total time spent working will be paid (rounded up in 15 minute blocks). For the
period midnight to 6am, the minimum payment for the first call would be 30 minutes all other
calls after midnight will be paid in 15 minute blocks. Where more than one call is received in
quick succession the time from the first call to the completion of the last call will be taken
together to determine payment.

6.3 Staff on bands 1 to 7 who are called out will, in line with the NHS Terms and Conditions of
Service Handbook, receive payment at time and a half, with the exception of work on general
public holidays which will be at double time; alternatively staff may choose to take time in lieu
at plain time in agreement with their line manager. Payment rates will be in accordance with
an individual’s normal rate of pay. Individuals above point 34, i.e. Bands 8a, b, c & d and 9, will
be paid at time and a half and double time on general public holidays at the salary rate for
spine point 34.

6.4 Staff may request to take time off in lieu as an alternative to payment for work done. Where for
operational reasons staff on bands 1 to 7 are unable to take time off in lieu within an agreed
period, payment should then be made at time and a half and double time for work undertaken
on general public holidays. Staff in bands 8a, b, c & d and 9 who do not take time in off in lieu
within the agreed period will be paid at time and a half and double time on general public
holidays but calculated using the salary for spine point 34.

6.5 Staff who incur travel expenses as a result of being called into work will be reimbursed in line
with NHS Terms and Conditions of Service Handbook section 17.

7. Sleeping In Arrangements

7.1 Staff who are required to sleep in as part of their employment will continue to receive payment
in line with the “Sleeping In” provisions contained in the NHS Wales Working in Partnership
Policy/Framework/Guidance on Providing Extended Service Cover which has been amended
to reflect this agreement (Annex B).

8. Working Time/Compensatory Rest

8.1 When staff are called into work, they will be entitled to compensatory rest, in line with the
guidance received by the NHS Staff Council from the Department of Health in April 2010
(Annex C), or any subsequent amendments to this guidance. The NHS Staff Council has
announced that it will be commissioning a review of Section 27 of the NHS terms and
conditions handbook.

9. Transitional Arrangements

9.1 There will be a transition period from 1 July 2012 to 30 June 2013 for staff who suffer a
financial detriment in relation to on-call payments as a result of the implementation of these
new arrangements. Staff who experience a loss in relation to total earnings from on call (or protected interim regime arrangements) as a result of this agreement will be eligible to receive a payment equating to the difference for the above period.

9.2 The above transitional protection will continue to apply for the stated period or until any of the following apply:-

- The member of staff moves through their own application to another post.
- The member of staff retires.
- The earnings from on call for the post equal to or exceed the protected on call payment.

9.3 Transitional protection will be applied from 1st July 2012 and will include staff covered by the interim regime where changes in working practice have yet to be made.

9.4 NHS organisations will work in partnership to determine how out of hours services will be delivered in foreseeable future. Organisations will be encouraged to conclude their deliberations in relation to the implementation of any agreed changes in the way services are delivered by 30th June 2013. Accordingly, NHS organisations should seek to conclude any discussions well in advance of the cessation of the transitional arrangements.

9.5 Transitional protection will end on 30th June 2013 for all staff.

9.6 Staff currently subject to a period of local protection due to changes in working practice prior to this agreement or where changes have been previously agreed and implemented will not be eligible for transitional protection.

10. Other Issues

10.1 The availability payment will be pensionable but the payment for work done will not.

11. Agreement

11.1 These on call arrangements have been endorsed by the Joint Negotiating Committee under the Welsh Partnership Forum arrangements.

11.2 This agreement will be subject to review and any amendments agreed by the Welsh Partnership Forum or any successor body.

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<tr>
<th>Signed on Behalf Management</th>
<th>Signed on Behalf of Trade Unions</th>
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<td>Jonat Holeman</td>
<td>RCL</td>
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Principles for harmonised on-call arrangements

The principles outlined in the table below have been agreed in partnership by the NHS Staff Council after consultation with the NHS. These principles provide a framework for employer negotiations. They should be read together with the implementation guidance and the report of the on-call review.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Principles</th>
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<tr>
<td>1. Definition</td>
<td>• On-call systems exist as part of arrangements to provide appropriate service cover across the NHS. A member of staff is on-call when, as part of an established arrangement with his/her employer, he/she is available outside his/her normal working hours – either at the workplace, at home or elsewhere – to work as and when required.</td>
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| 2. Equal pay                   | • The guiding principle should be that the harmonised arrangements should be consistent with the principles of equal pay for work of equal value  
  The effect of this should be that schemes agreed by local partnerships should provide consistent payments to staff at the same pay band available at the same on-call frequency.  
  • All employing organisations will need to undertake an Equality Impact Assessment (EqIA) of their proposals. |
| 3. Commitment or availability payment | • There needs to be a payment to reflect the availability for being called. There are three distinct types of on-call availability:  
  1. At home ready to be called out or to undertake work at the work place  
  2. At work ready to undertake work  
  3. Sleeping in at a work place  
  Payment for these different types of availability – options include:  
  • flat rate available for all staff  
  • flat rate by grade  
  • percentage of salary  
  This payment will reflect the frequency of commitment.  
  If the partnership decides to use a flat rate they will need to agree arrangements for uprating this payment when pay increases.  
  In setting the availability payment, local partnerships will need to take account of the commitment to work weekends and public holidays.  
  Where tiered on-call systems are required, there should be no distinction between levels of commitment when setting the availability/commitment payment. |
Reference paragraph 2.26 to 2.27 in the NHS terms and conditions of service handbook, to allow the option of prospective calculation of the payments.

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<th>4. Frequency</th>
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<tr>
<td>• That part of the week covered by on-call arrangements should be divided up into appropriate periods for the purposes of calculating the frequency of on-call availability. The Agenda for Change interim regime may provide a useful model.</td>
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<th>5. Work done</th>
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<tr>
<td>• Payment for work done, including work done at home, should be made at the appropriate hourly rate with reference to the NHS terms and conditions of service handbook.</td>
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<td>• Local partnerships may agree an appropriate minimum payment period for work done.</td>
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<th>6. Time of in Lieu (TOIL)</th>
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<tr>
<td>• Staff should have the option to take TOIL rather than payment for work done in line with paragraph 3.5 in the NHS terms and conditions of service handbook.</td>
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<th>7. Compensatory rest</th>
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<tr>
<td>• Individuals will receive compensatory rest for work done, in accordance with Section 27 of the NHS terms and conditions of service handbook.</td>
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<th>8. Travel to work</th>
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<td>• As per current arrangements. Travel time should be paid at the rate agreed for on-call work done and local partnerships will need to identify if there is a minimum and/or maximum time claim identified.</td>
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<td>• Where travelling expenses are reimbursed, Section 17 in the NHS terms and conditions of service handbook will apply.</td>
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<th>9. Public holidays (PH)</th>
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<tr>
<td>• Covering a PH will attract a day in lieu in accordance with paragraph 13.4 of the NHS terms and conditions of service handbook, irrespective of work done.</td>
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<td>Work done on public holidays would attract payment at the appropriate rates as identified in paragraph 13.4 of the NHS terms and conditions of service handbook.</td>
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<th>10. Sleeping in</th>
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<td>• A sleeping-in session will often incorporate the following elements:</td>
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<td>• hours of wakefulness</td>
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<td>• sleep</td>
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<tr>
<td>• work done</td>
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<tr>
<td>• The term “sleeping-in” does not refer to individuals who are on-call from the workplace and are able to sleep between periods of work.</td>
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<tr>
<td>• Under the Working Time Regulations if an individual is required to sleep in at a workplace this counts as working time. However, time asleep does not count for the purposes of the minimum wage.</td>
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| • If asleep, this working time does not count for the purposes of the
- 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 C of the NHS terms and conditions of service handbook.

- 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.

- Local partnerships may agree a minimum payment period for work done.

11. Pensions

Local partnerships should always seek advice from the NHS Pensions on any questions relating to the NHS Pensions Scheme and on-call payments. It is the responsibility of the employer to determine which payments are pensionable, according to the criteria provided by NHS Pensions. Guidance on "pensionable pay" can be found on NHS Pensions website at [www.nhsbsa.nhs.uk/pensions](http://www.nhsbsa.nhs.uk/pensions).

12. Agenda for Change interim regime

- The arrangements in the Agenda for Change interim regime are consistent with these principles.

13. Transition

- There are currently a range of payments for on-call, which form a regular part of income for some individuals. Local partnerships will therefore need to agree transitional arrangements for the movement of staff from current to future on-call payment systems. This includes all on-call arrangements within the scope of the review of on-call.

- Such transitional arrangements could include one or more of the following elements:
  - introduction of increased payments in one or more stages over a fixed period of time
  - introduction of reduced payments in one or more stages over a fixed period of time
  - postponement of increased and/or reduced payments for a fixed period
  - movement to reduced payments over a period on a “mark time” basis
  - payment of a one-off lump sum to staff if their on-call payments are reduced.

- As an example of some of the above elements in practice, Section 2 and Annex X of the NHS terms and conditions of service handbook set out how transition was approached when new unsocial hours provisions were introduced.
- Where service changes are linked to the harmonisation of on-call payments local partnerships may also wish to consider the use of agreements reached under Annex O of the NHS Terms and Conditions of Service Handbook.
1. Introduction

Providing extended service cover is an aspect of the Agenda for Change arrangements where it is necessary to reach local agreement.

Paragraphs 2.50 and 2.51 of the Terms and Conditions Handbook outline circumstances where agreement on extended service cover is necessary. These are as follows:

(i) Where staff are required to be on the premises to provide emergency cover but are allowed to rest except for the times when they are required to carry out emergency work (Para 2.50)

(ii) Where staff, often in community services such as learning disabilities, have “sleeping in” arrangements where they sleep on work premises but are seldom required to attend an incident during the night (Para 2.51)

2. Links with On call

The definition of on-call is where a member of staff is required, as part of an established arrangement with his/her employer, to be available outside his/her normal working hours – either at the workplace, at home or elsewhere – to work as and when required.

Agreement for “Sleep Ins” are a separate arrangement and normally only apply where extended service cover is required as set out in paragraphs 2.50 and 2.51 of the Terms and Conditions Handbook.

Some parts of the service have used the term “standby” where staff more properly undertake a tier of on call and any arrangements called “standby” will cease to apply with effect from 1st July 2012 and all arrangements previously termed “standby” should be re-assessed to determine their status either as unsocial hours, on call or sleeping in arrangements.

3. Treatment of Staff who Provide Resident Emergency Cover (Para 2.50)

There are a variety of reasons why staff may be required to provide the above service. The Terms and Conditions Handbook states that these type of arrangements should be agreed locally and be “at least equivalent to on call payments”.

4. Definitions

(i) “Sleeping in”

Staff may be required to sleep in order to be immediately on hand should a situation arise that requires their attention. There is a requirement for an employee “sleeping in” to be ready for duty (when woken, if asleep) whenever the need arises during the agreed specified period. The employee will be required to be able to undertake the full range of their normal duties, along with any others that are necessary and appropriate. The normal policies and procedures will apply during any “sleep in” period.

For the purpose of this document, “sleeping in” is defined as

“Circumstances where the employer identifies an essential service requirement to provide resident overnight cover at a workplace, where staff are expected to spend periods of time asleep during the time when they are resident.”
This is different from arrangements where staff may choose to stay at a place of work for reasons of travel time, geography, or likelihood of being recalled to work. If these arrangements exist and staff are required to be available as part of a rota, then they are not to be classified as on call and these rota arrangements must be considered under the unsocial hours arrangements for the service.

If during existing on call arrangement there is a high likelihood of a recall/several recalls to work, consideration should be given locally in partnership to consider how service redesign would better meet the needs of patients, clients and staff.

5. Payment for “Sleeping In”

The agreed payments to staff required to sleep in are two parts. These are designed to compensate staff for;

(i) The disruption to the employees’ home life that is incurred in having to be away from their own home.
(ii) Work undertaken as a result of having to respond immediately to situations that arise that require their attention.

Payment will be as follows;

(i) A flat rate of £30.99 will be paid to a member of staff required to sleep in on site. This figure will be increased annually in line with the national pay awards.

(ii) For work undertaken during the period of the sleep in, the member of staff’s appropriate hourly rate, including unsocial hours supplements, should be paid. As an alternative, time back may be agreed locally at flat rate on an hour for hour basis.

If the time back is agreed and cannot be given within a 3 month period, the time owing is to be paid at overtime rates, as per section 3 of the Terms and Conditions Handbook.

The payment for sleeping in occurs when a member of staff is rostered to attend for work and sleep in for a given period. This is in addition to any time back/overtime arrangement arising from work that is required during the shift concerned.

6. Auditability

To ensure auditability of the above arrangements, staff will be expected to keep records in line with local policy to demonstrate such things as;

Time of call
Duration of call
Reason for call
Patient/Client/resident involved
Outcome
Agenda for Change
On-call sub-group

The Joint Secretaries of the NHS Staff Council have received the information which is attached from the Department of Health. This is in response to the sub-group’s request for advice on how employment law relates to on-call.

Secretariat March 2010
Distributed to all members of the on-call sub-group on 1 April 2010.
Working Time Regulations/Working Time Directive

1. Working time is defined by reg.2 WTR as follows:

   ““working time” in relation to a worker, means-
   (a) any period during which he is working, at his employer’s disposal and carrying out his activity or duties,
   (b) any period during which he is receiving relevant training, and
   (c) any additional period which is to be treated as working time for the purposes of these Regulations under a relevant agreement.”

2. There are a number of cases which have considered issues relating to what constitutes working time and the following general principles can be extracted from them.

3. First, workers who are required to be at their place of work, or at a particular place other than their home, while on call will be entitled to count the whole of any such period, including periods of inactivity or sleep, as “working time” for the purposes of the WTR/WTD.

4. Secondly, workers who are only required while on call to be at a location at which they can be contacted and from which they can promptly reach their workplace if necessary will only be entitled to count as “working time” those periods when they are actually at work.

5. Thirdly, more difficult and case specific issues may arise where workers are not required to be at work, but are required to be at home (for example, to answer emails or give telephone advice). Employees who are required to remain at home while on call will inevitably suffer some restriction on their freedom to pursue other activities. On the other hand, they are not required to remain apart from their family or social environment, and are not subject to the type of constraints inherent in attendance at a workplace. Case law suggests that these features would on the whole take time spent at home outside the definition of “working time” in the WTD, provided that home is not also “the working environment”. This is because the ECJ held that in order to rest effectively, a worker must be able to remove himself from the working environment. Whether this is the case will very much depend upon the individual circumstances.

6. At one end of the scale, where the home is also the workplace, it is clear that workers whose home was their workplace were at work while on call, since they could not “remove themselves from the working environment”. However, home would probably not be the “working environment” for workers who were required to be at home during on-call periods, but who were only on call occasionally, and contacted only occasionally whilst on call. In between these two situations, there will be others where the considerations are more finely balanced and would need to be looked at carefully on a case by case basis.

7. Finally, for employees who are not required to be at their workplace unless called out, time spent travelling to their workplace will not be “working time”, just as ordinary commuting does not constitute “working time”.

National Minimum Wage

8. Under s.1 National Minimum Wage 1998 (“NMWA”), a worker who qualifies for the national minimum wage must be paid in respect of his work in any pay reference period at a rate which is not less than the national minimum wage per hour. The “pay reference period” is one month (reg.10, National Minimum Wage Regulations 1999, “NMWR”).

9. The NMWA does not contain a basic general definition of “work”. However, the NMWR categorises work for the purpose of the national minimum wage as being of four types: time work (reg.3 NMWR), salaried hours work (reg.4), output work (reg.5) and unmeasured work (reg.6). Salaried hours work is, broadly speaking, work for which a worker is entitled to no
payment in addition to his annual salary; i.e. it would apply where a worker was required to be “on call” as part of his job, but was entitled to no payment beyond his salary.

10. The following general principles concerning time on call under the NMWA/NMWA can be drawn from a number of cases:

11. Just as under the WTR/WTD, it is wise to assume that all time spent on call at the employer’s premises will amount to “work” for the purposes of the NMWR. In most cases employees on call will be engaged on time work or salaried work, and therefore, even if they are not actually working throughout their shifts, the deeming provisions in regs. 15 and 16 NMWR will apply to render their time on call “work”. The very existence of the deeming provisions is a strong pointer to the likelihood of a tribunal concluding that all on-call time spent at work is “work”, either by virtue of the deeming provisions themselves or because attendance at the employer’s premises is part of the essence of the work.

12. Where a worker is required only to remain contactable and reasonably close to the employer’s premises, ready to work if the need arises, time on call is highly unlikely to be “work” for the purposes of the NMWA/NMWR, unless the worker is actually engaged on activities. The deeming provisions in reg.15 and 16 NMWR strongly support this conclusion.

13. Again, as with the WTR/WTD, more complex issues may arise where a worker is required to work from home while on call (e.g. by answering calls). Employers will need carefully to look at the facts of each case. In most situations, however, it is likely that a worker will be engaged on “work” only when actually engaged in activities, rather than throughout the on-call period. That is because in most situations there will be a sharp distinction between what a worker does during their “normal” working hours, when they are engaged continuously on some activity at their employer’s premises, and what they do during “on-call” periods, when they stay at home ready to respond to occasional calls on their time. If that distinction can be maintained, it is likely that a tribunal would consider the “work” to be the relevant activity itself, not simply readiness to undertake the activity when required. This approach is strongly supported by the deeming provisions in regs 15/16 NMWR, since time spent at home on call (if not otherwise “work”) is not deemed to be time work or unmeasured work.

14. If only the time spent on activities is “work” for the purposes of the NMWA/NMWR, then travel time from home to work premises or an assignment is not “work”: see regs 15(2)(b), 16(2)(b) NMWR.

Compensatory Rest

15. Article 17(2) WTD permits derogation from the rights in the WTD to daily rest of 11 consecutive hours in each 24 hour period (art.3), rest breaks where the working day is more than 6 hours (art.4) and a weekly rest period of 24 hours plus 11 hours’ daily rest (art 5) in the specific circumstances set out in Article 17(3), 17(4) and 17(5), provided that compensatory rest is offered.

16. Regulation 21 (of WTR) indicates that (subject to compensatory rest) the rights to a daily rest period, weekly rest, and rest breaks under reg. 12, do not apply in certain circumstances. Those include where the worker’s activities are such that his place of work and place of residence are distant from one another; where the worker is engaged in security and surveillance services requiring a permanent presence to protect property and persons; and importantly, under reg.21(c)(i):

“where the worker’s activities involve the need for continuity of service or production, as may be the case in relation to (i) services relating to the reception, treatment or care provided by hospitals or similar establishments including the activities of doctors in training, residential institutions and prisons”.

17. Other potentially relevant exceptions are provided by regs. 21(d) and 21 (e), which apply:
“(d) where there is a foreseeable surge of activity, as may be the case in relation to-
   i. agriculture;
   ii. tourism; and
   iii. postal services;
(e) where the worker’s activities are affected by-
   i. an occurrence due to unusual and unforeseeable circumstances, beyond the control of the worker’s employer;
   ii. exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer; or
   iii. an accident or the imminent risk of an accident”.

18. Reg. 22 WTR provides that (again, subject to compensatory rest) the rights to a daily rest period and weekly rest do not apply in relation to shift workers who cannot take a daily rest or weekly rest period between the end of one shift and the start of another. Nor do they apply to “workers engaged in activities involving periods of work split up over the day, as may be the case for cleaning staff”.

19. Under reg.23 WTR, the rights to daily rest, weekly rest, and rest breaks may be modified or excluded by a collective agreement or a workforce agreement, subject again to compensatory rest.

20. Reg. 24 (compensatory rest) provides as follows:
   "Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break-
   (d) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
   (e) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker’s health and safety."

21. Two decisions of the domestic courts have important implications for (i) when an employer is permitted to provide compensatory rest instead of weekly rest, daily rest or rest breaks; and (ii) what compensatory rest involves.

22. The effect of the Court of Appeal’s judgment in Gallaher v Alpha Catering Services Ltd [2005] is as follows:

   (a) The “activities” referred to within reg.21(c) WTR are those of the worker, not the employer. The activities of the workers, therefore, must be such as not to permit rest breaks. Otherwise, the employer could bring a worker within reg.21(c) simply by failing to provide sufficient employees to cover the work. So, for example, in the hospital context, an operation would fall within reg.21(c) WTR, meaning that compensatory rest rather than a rest break could be provided where appropriate. However, the need for 24-hour hospital reception cover would not fall within reg. 21(c), because the same worker would not be required to provide reception cover throughout any particular period.

   (b) In the context of reg.21(d) WTR, a “surge” only occurs when there is an exceptional level of activity, beyond the fluctuations experienced during the working day or working week. An obvious example of this sort of foreseeable “surge” would be the level of extra post at Christmas time. Reg. 21(d) WTR, of course, specifically refers to agriculture, tourism and postal services: but it is not necessarily limited to those industries. I am not
aware whether there are any circumstances in which reg. 21(d) WTR might apply to the NHS.

(c) “Downtime” is not a rest break: the essence of a rest break is that it is the employee’s own time, which he can use as he pleases, and in which he may not be summoned at any time.

23. The claimant in The Corps of Commissionaires Management Ltd v Hughes [Employment Appeal Tribunal 2009] was employed as a security officer and was required by his employer to work during the periods in which he would otherwise have taken his rest breaks, instead taking his rest between shifts. He complained that he had been denied either (1) rest breaks or at any rate (2) a period of compensatory rest pursuant to reg.24 WTR. The effect of the decision as regards compensatory rest is as follows:

(a) Reg. 21(b) WTR (worker is engaged in security and surveillance activities requiring a permanent presence) applies where a permanent presence required of somebody, not necessarily the particular worker. So if, for example, 24-hour surveillance were required, it could be divided up into shifts of 8 hours without a rest break, provided that after each shift the worker concerned was permitted compensatory rest.

(b) The term “compensatory rest” means something over and above the rest to which a worker is otherwise entitled between shifts. Merely allowing a worker to take pre-arranged rest periods after shifts would not be “compensatory”. Compensatory rest involves giving more rights to the worker than he previously enjoyed. The effect of this, seems to be, that if compensatory rest is to be given, it should specifically be labelled as such. So, if compensatory rest is regularly given to a particular worker, it would probably be a good idea for periods of compensatory leave to be explicitly identified in the contract. It also follows, of course, that compensatory leave could not be included in the 11-hour minimum daily rest under reg. 10 WTR, or the minimum weekly rest period under reg.11, or 20-minute rest breaks under reg.12.

(c) The importance of providing compensatory rest where the right to rest breaks does not apply is underscored by the preamble to the WTD, which states that “all workers should have adequate rest periods”. So the exclusion of the right to compensatory rest in “exceptional cases in which it is not possible, for objective reasons, to grant such a period” under reg. 24 WTR will be construed very narrowly. Reasons of mere economy are highly unlikely to justify classifying a case as “exceptional”. The preamble to the WTD at (4), states: “The improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations”.

(d) Where the right to compensatory rest genuinely does not apply for objective reasons in an exceptional case, the employer must consider carefully what other steps should be taken to protect the worker’s health and safety, and it will not be appropriate to conclude that no steps could be taken.

(e) It is for the employer and employee to agree between themselves whether or not compensatory leave should be paid. However, the EAT also indicated that they would generally expect compensatory leave to be paid, because otherwise it would be difficult to see what meaning should be attributed to the words “compensatory” or “protection” in reg.24 WTR. Certainly, if a worker would normally receive pay during rest breaks, then one would expect him to receive pay for compensatory rest, because otherwise he would not be properly “compensated” for his inability to take rest breaks. The position might be different if rest breaks were unpaid.

24. The EAT in Hughes did not deal with the issue of when compensatory rest should be taken. Clearly, the health and safety principles underlying the WTD and WTR suggest that it should be taken as soon as possible after the relevant period of rest missed. For example, the
guidance to employees on “Directgov” states that compensatory rest is “ideally taken during the same or following working day”.

**Tax Treatment of Travelling Expenses**

25. The tax treatment of travelling expenses paid by the employer is covered by the provisions of the Income Tax, Earnings and Pensions Act 2003 (“ITEPA”). The basic rule under ITEPA is that sums paid by the employer to the employee in respect of expenses are treated as earnings, thus subject to tax in the usual way (s.72 ITEPA). Deductions from earnings are permitted for certain travel expenses under ss.337-342 ITEPA, but they do not include ordinary commuting, defined as travel between (a) the employee’s home and a permanent workplace, or (b) a place that is not a workplace and a permanent workplace (see s.338(3) ITEPA).

26. The general position, therefore, is that an employer’s reimbursement of the costs of attending on-call emergencies will be taxable as ordinary income.

27. Paragraphs 3.40 and 3.41 of the guidance in HMRC 490 (Employee Travel) reiterate that there is generally no scope for deducting the cost of travelling from home when on call.

28. Part 4 ITEPA, which contains a list of exemptions preventing liability to tax arising on certain earnings, contains only one rather narrow exemption that is potentially relevant to the reimbursement of expenses incurred by employees attending on-call emergencies from home. This is contained in s.248 ITEPA.

29. Section 248 ITEPA could cover the cost of a taxi home from the employer’s workplace after 9 pm on up to 60 occasions per year for an on-call worker. It should be noted that it does not cover the cost of a taxi from home to the employer’s workplace. (Of course, the cost of journeys from one assignment to another during an on-call period would be deductible from earnings in the usual way, as expenses necessarily incurred on travelling in the performance of the duties of the employment (see s.337 ITEPA).

30. However, the HMRC’s guidance (480/2009 “Expenses and Benefits”) makes clear how narrow this exemption is. It states:

“If someone works later than usual and until later than 9 pm this must be irregular. Irregular means not following a regular or established pattern. An employee who works later than usual and until at least 9 pm every Friday, or on the last Friday or each month, is not working later than usual irregularly. Even if an employee works later than usual and until 9 pm on one day each week, but on no particular day, this is not irregular.

It is a matter of fact whether public transport is still available. If an employee’s journey home requires taking two or more forms of public transport and one of those has stopped by the time of the journey home, the third condition is satisfied for the whole journey. An employer may consider various factors when deciding whether it is reasonable to expect an employee to use public transport but because the journey frequency is reduced and/or must be completed in the dark, or the employee has had a long day and is tired, or has a heavy case to carry, or is travelling to an unmanned station, are not in isolation sufficient reasons to satisfy the second part of the third late night working condition. The extent to which a journey from work to home after 9 pm on public transport is significantly different from a journey earlier in the day, so that it is reasonable for an employer not to expect an employee to undertake that journey, depends on the facts in each case.”