

DEVON & SOMERSET FIRE & RESCUE AUTHORITY



REPORT REFERENCE NO.	HRMDC/09/9
MEETING	HUMAN RESOURCE MANAGEMENT AND DEVELOPMENT COMMITTEE
DATE OF MEETING	15 APRIL 2009
SUBJECT OF REPORT	THE WORKING TIME DIRECTIVE AND PROPOSED CHANGES TO LEGISLATION
LEAD OFFICER	Head of Human Resources Management and Development
RECOMMENDATIONS	<p><i>(a) That the Committee supports the stance taken by the LGA and that the County Councils, MPs, MEPs etc are lobbied accordingly;</i></p> <p><i>(b) That the potential impact on DSFRS of changes in the opt out clause be noted;</i></p> <p><i>(c) That the areas of forthcoming legislation as set out within Appendix A be noted.</i></p>
EXECUTIVE SUMMARY	<p>The Working Time Directive and proposed changes to legislation will potentially impact on the flexibility of Devon and Somerset Fire and Rescue Service in terms of the availability of employees on the Retained Duty System, and Wholetime employees who have secondary RDS contracts, and other employees who have secondary employment to support service delivery e.g. the Community Safety Action Team. This is largely due to the suggestion to remove the opt out clause relating to a maximum 48 hour working week, the definition of working time and compensatory rest.</p> <p>The report also highlights other changes in employment law which are forthcoming, noting opportunities and issues for the Service and its people.</p>
RESOURCE IMPLICATIONS	Resource issues are not identifiable at the moment. An electronic availability system will help provide this management information required to assist this.
EQUALITY IMPACT ASSESSMENT	None
APPENDICES	A – Areas of forthcoming legislation
LIST OF BACKGROUND PAPERS	None

1. **BACKGROUND**

- 1.1 Currently, the UK has reached a political agreement with the European Union (EU) to retain its opt-out under the Working Time Directive 1993 (WTD), which means that employees can opt-out of the average maximum working hours limit of 48 hours. The deal is subject to approval by the European Parliament and implementation into UK law, and if adopted it will benefit both employers and employees who value flexibility in working hours. There is some debate, however, as to whether or not the opt-out provision will continue to apply to organisations such as the Fire and Rescue Service, Doctors etc.
- 1.2 The most significant proposals to amend the Directive were proposed by the European Commission in 2004. Discussions are taking place now, and if there is agreement, it may or may not lead to significant amendments to the Directive. The revision is contentious and the outcome has implications for UK local government (both for Fire and Rescue Service and for staff in residential care homes). If agreed it will have to be translated into our own domestic working time legislation (The Working Time Regulations 1998). The Local Government Association (LGA) is working on behalf of local authorities and fire and rescue authorities to ensure that the implications of the Directive's revisions are understood.
- 1.3 The key impact of the proposals in relation to the WTD is as follows:
- The opt out
 - On call time
 - Compensatory rest.
- 1.4 Each of these areas is explored in more depth in this report, together with details in respect of action being taken by both EU, national and local government.

2. **THE OPT-OUT**

- 2.1 The Working Time Regulations 1998 allows the UK to retain its opt-out from the maximum 48-hour working week. Individual workers could decide to work beyond the 48 hour working week subject to other safeguards in the Directive (rest breaks, rest days, holidays etc). The maximum reference period for calculating an average weekly working hours is six months. But, where an individual has opted- out, an upper limit of a 60-hour maximum week will apply, calculated as an average over three months. This means employers must keep working time records, even for opted-out workers.
- 2.2 The Directive also encourages employers to examine requests for changes to working hours and patterns in light of business needs and the need for flexibility on the part of both the employer and the worker. But what might this mean in practice?
- 2.3 It would appear to mean that the UK should implement a legal right on the part of all workers to request flexible working. As such, that would go beyond the extension to all staff with children under the age of 16 that was recently proposed and endorsed by the UK government and due to come into effect in April 2009. Whether this right would mirror existing flexible working rights in terms of process and grounds for refusal, or whether it would be introduced as a more diluted "duty to consider" obligation, similar to requests to work beyond the normal retirement age, remains to be seen.

- 2.4 Staff will not be permitted to opt-out on commencement of employment unless they are to work less than 10 weeks per year. Those on probationary periods who opt-out may withdraw their consent at any time up to six months into employment.
- 2.5 There is currently some debate that the opt-out clause might be removed. The Commission and other Member States want it removed, believing it gives the UK a more competitive advantage over those EU member states that have not made use of the opt-out and because it believes there is evidence of abuse of the opt-out clause. If this were to be the case this would have significant impact on Devon and Somerset Fire and Rescue Service (DSFRS) which has the majority of its employees operating as part time firefighters on the Retained Duty System; having primary employment outside the Fire and Rescue Service.
- 2.6 The opt -out clause currently allows individuals to work over and above an average 48 hours week, if they choose to do so thereby offering availability in terms of a secondary employment contract to DSFRS.

2.8 **The LGA supports the UK government view of retaining the opt-out.**

3. **ON-CALL TIME**

- 3.1 Definition of working time is already a complex area of law. Currently, time spent on call at a workplace should be counted as working time, irrespective of whether the worker is called upon to actually perform any duties.
- 3.2 The EU deal proposes a new distinction between 'active' and 'inactive' on-call time. 'Active' on-call time would be time during which the worker is required to be at work, but is not required to perform any duties. This would count as working time for the purpose of calculating compliance with Working Time Directive limits.
- 3.3 'Inactive' on-call time would be, for example, time spent at home during which a worker is on-call, but not performing duties. This would only count as working time if national law or a collective agreement so provided, in which case the maximum average working week for opted-out staff would rise to 65 hours over a three-month period. In the absence of such a law, inactive on-call time would be neither working time nor rest time.
- 3.4 The proposed changes imposes further administrative burdens on employers such as Fire and Rescue Services that will need to separately record active and inactive on-call time. The European Court of Justice has interpreted the definition of working time to include all on-call time spent at the workplace, even when employees are actually resting. This has potential impact on a number of local government activities e.g. fire fighting and social care.
- 3.6 **The LGA believes 'inactive' time should not be classed as working time.**

4. **COMPENSATORY REST**

- 4.1 Under the Directive, an individual's rights to a rest period (e.g. the right to 11 hours daily rest between periods of work) can be amended, subject to the individual being granted a period of compensatory rest. The European Court of Justice has held that this rest must be granted immediately.
- 4.2 **The LGA believes this provision must be more flexible to allow rest in a reasonable period, taking into account operational factors and staffing levels.**

5. **DRIVING HOURS**

5.1 The changes proposed to the Working Time Directive regarding driving hours is subject to a separate report on the agenda for this meeting.

6. **EU AGREEMENT**

6.1 For amendments to be made to the Directive there has to be agreement between the Council of Ministers (EU member state governments) and the European Parliament (EP).

6.2 Over five years, there have been numerous proposals and counter proposals on each of these issues. It has been highly contentious between employers and trade unions and between political parties and member state governments. The main views are:

6.3 The **Council of Ministers** (national governments) agreed in June 2008 to:

- Retain the opt-out (subject to tighter conditions for the protection of workers);
- Class inactive on-call time as neither working time or rest; and
- Compensatory rest should be granted within a reasonable time.

6.4 **The LGA supports the Council's position.**

The **European Parliament** proposed the following amendments in December 08:

- The 48 hour opt-out should be phased out within three years;
- On-call time in the workplace, even when inactive to be counted as working time;
- Working hours in more than one job should be considered together; and
- Compensatory rest should be taken immediately.

6.5 The Council and Parliament now enter into a formal conciliation process to reach agreement on the final text. This process lasts 6-8 weeks and may or may not lead to significant amendments to the Directive. The first meeting was on 17 March 2009. UKREP, UK government representation in Brussels, have told the LGA that there may be subsequent meetings. The Council will consider the EP amendments, then accept or reject them. It is thought that they will reject them.

6.6 If conciliation fails, either because agreement cannot be reached between the Council and the EP or because they run out of time (the EP will come to the end of its mandate in June 09 prior to the European elections), the status quo remains. This is not a lasting solution but would mean the 48 hour opt-out remains for the time being, and ECJ case law on the definition of working time and the timing of compensatory rest would also remain.

6.7 The Commission may pursue infraction proceedings against Member States if they did not make the necessary amendments to their legislation and may come forward with another proposal on the 48 hour opt-out.

7. **UK GOVERNMENT**

- 7.1 For the UK, BERR has overall responsibility for dealing with the Directive and Communities for Local Government (CLG) and Department of Health are also involved. The UK Government's absolute priority is to maintain the opt-out, which is what the LGA Group has always supported.
- 7.2 In the past, the UK government has been on its own in supporting the retention of the opt-out as initially it was the only state using it. However, a significant development has been that around 15 other EU countries have now used the opt-out in some form, so the Council's position on retaining the opt-out is likely to look much stronger.
- 7.3 The UK government has also strongly supported the LGA line on the definition of working time and compensatory rest provisions. However, to maintain and build support for the retention of the opt-out, it could be that the UK government concedes on other elements of the Directive such as the definition of on-call time.
- 7.4 If this is the case, the LGA and UK government viewpoints would diverge, as its implications (on-call time and compensatory rest) could be significant for the local government workforce. Also, the UK government has been strongly supported on all of these issues by a number of other member states who may now find it difficult to maintain their agreed positions.

8. **LOCAL GOVERNMENT ACTIVITY**

- 8.1 The LGA has been lobbying on the Directive since 2004. Policy expertise is provided by Local Government Employers (LGE) who represent UK local government at the Employers Platform, a European network of local government employment experts.
- 8.2 This is part of CEMR (pan European LGA) and is the main local government lobbying mechanism on the Directive at EU level. It also works through CEEP, the European public sector employers body. The LGA European team has assisted the LGE with the provision of information and in its lobbying activity in the process.
- 8.3 A significant problem is that there is much misunderstanding of the impact of the Directive and proposals for change because:
- Even within the proposed amendments there is still scope for different interpretations of the impact;
 - All of the issues are interrelated which means that a change in one aspect can have a knock-on effect on another; and
 - The actual impact will depend on the working arrangements of different employers.
- 8.4 This makes it almost impossible to quantify the effects. CLG is in contact with the LGA Group to assess the impact of the EP's amendments on fire authorities (implications in terms of continuing to provide operational cover, including an idea of cost). It will use this in its communications to other national governments /MEPs.

8.6 Changes to the opt-out system or the calculation of on-call time could pose severe difficulties for UK fire and rescue services, because the fire service is not only staffed by full-time staff but also by “retained firefighters”. As Members are aware these are people with a fulltime day job who also work part-time as a firefighter. Some fire and rescue authorities have been in contact with the LGA Group and one has reported that it has made permanent some of its retained staff and that it knows of other authorities undertaking cost benefit analyses if the opt-out were deleted.

8.7 The LGA issued a briefing for MPs which was cited during the Adjournment Debate on the European Working Time Directive on 11 February. The briefing set out the implications of the loss of the opt-out for fire and rescue authorities and can be accessed at: <http://www.lga.gov.uk/lga/core/page.do?pagelid=1645875>

9. **KEY POINTS**

9.1 The UK currently still has the right to opt out of the maximum 48-hour working week, but this is subject to change and could impact on availability of staff who have secondary employment contracts with DSFRS.

9.2 Flexible working is encouraged, but isn't a legal right for all.

9.3 Correctly classifying 'on-call' time will be important as the law in this area is complicated.

9.4 The proposal is subject to scrutiny by the European Parliament and is unlikely to come into force until 2010.

10. **CONCLUSIONS AND NEXT STEPS**

10.1 The recent change in the EU presidency (from Slovenia to France) on 1 July 2008, and the fact that these proposals remain subject to the approval of the European Parliament, mean that their adoption is by no means a foregone conclusion. The UK has some flexibility in terms of how the changes are implemented, and will have a two-year window to do so. Therefore, any changes are unlikely to take effect before 2010.

10.2 DSFRS is currently assessing the impact of the changes in the legislation to the service, so that it can anticipate the likely effect in terms of cost and resourcing and identify solutions.

10.3 DSFRS is currently involved in a procurement process for a Retained Duty availability system, which will provide improved management information about availability of individuals, stations and areas and impact on resourcing and crewing levels. The intention is that this system will interface with the new Regional Control Centre. An update on the Retained Duty System project was given at the previous meeting of the HRMD Committee on the 22 January 2009

10.5 The LGA will continue to work on behalf of UK local authorities to support the retention of the UK opt-out by contributing to decision making processes both in Whitehall and Brussels. Specifically they will:

- Lobby UK Government departments on local government views to inform their EU level negotiations;
- Lobby MEP's on the conciliation committee (list of MEPs on the committee is available) and encourage the pan European network to do the same;

- Carry out some cost benefit analyses On Fire and Rescue Services (and care homes);
- Continue to keep local authorities informed about what the LGA Group is doing on our behalf; and;
- Develop media awareness

10.6 The Chief Fire Officers' Association will be supporting the stance of the LGA as indicated above. The Committee will be updated at future meetings as more information becomes available.

10.7 Key contacts are as follows:

Kelvin Scorer Local Government Employers **kelvin.scorer@lg-employers.gov.uk**
Jasbir Jhas, LGA European and International unit **jasbir.jhas@lga.gov.uk**
Jennifer Crisp, LGA Brussels office **Jennife.crisp@lga.gov.uk**

11. **OTHER FORTHCOMING LEGISLATION**

11.1 Appendix A sets out areas of forthcoming legislation, together with indicative timescales, for information.

JANE SHERLOCK
Head of Human Resource and Management Development

NEW EMPLOYMENT LAW AND LEGAL TIMETABLE

For interest what follows is a brief spotlight on recent and future changes to employment legislation and opportunities and issues for Devon and Somerset Fire and Rescue Service.

Minimum statutory holiday entitlement increases to 28 days

1 April 2009

The statutory entitlement to paid holiday increases from 24 days to 28 days. This includes public holidays. This does not have an impact on holiday entitlement for Devon and Somerset Fire and Rescue Staff in terms of any uplift, as our contractual holiday entitlement is above this minimum and has been for some time, but does give freedoms around directing when some holiday should be taken.

A recent NJC ruling in March 2009, has stipulated that in line with the Working Time Directive, employees on long term sick are entitled to carry over any leave untaken into the next financial year. Our Attendance and Sickness Absence Management policy will be updated to reflect this, but also give guidance on how the organisation will expect accrual of annual leave to be managed without minimum disruption to business continuity.

Trade union membership rules are amended

6 April 2009

Section 19 of the Employment Act 2008 allows a trade union to expel or exclude an individual on the basis of his or her membership or former membership of a political party. The changes to the rules on trade union membership arise from a ruling of the European Court of Human Rights that a trade union could expel a member of the British National Party. This is entirely consistent with DSFRS's Core Values and echoes the Chief Fire Officers Association stance on this particular issue.

Repeal of the dispute resolution procedures

6 April 2009

The Employment Act 2008 brings into force sections 1 to 7 and schedule 1, part 1 of the Employment Act 2008. These parts of the Act repeal the statutory dispute resolution procedures, returning the law on unfair dismissal to the position prior to the dispute resolution procedures coming into force in October 2004. This should simplify the Grievance and Disciplinary process. These policies were already under review in terms of harmonising due to combination but they will be amended to reflect the changes of the legislation also.

Revised ACAS Discipline and Grievance Code of Practice comes into force

6 April 2009

The revised statutory ACAS Code of Practice on disciplinary and grievance procedures is introduced. Where there is a breach of the Code of Practice, a tribunal can increase or decrease any award made by up to 25%. The service continues to train its managers in the investigation of sensitive issues, has regional and local forum that monitors casework and shares best practice and is currently drafting Investigation Guidelines to improve the quality and consistency of processes and procedures and report writing so that there are improved outcomes for the service and the employee. This was an issue raised in the recent staff survey

Right to request flexible working is extended

April 2009

The right to request flexible working is extended to parents of children up to the age of 16. Our suite of family friendly policies, include the right to request flexible working, Flexi-time, Carers and Dependants leave, Maternity, Paternity and Adoption Leave. We also have a policy which supports staff in undertaking Public Appointments. They are currently being reviewed, and will be publicised to all staff on a more frequent basis, using staff forums, notice boards, the intranet site and "Your Shout" magazine. They all result in improving work-life balance and can be seen as a benefit to staff, contributing to Goal 2 in our Corporate Plan, being "An employer of choice".

Extension of right to time off for public duties

April 2009

The right to time off for employees serving in a wider range of civic roles is extended. It is proposed that the right to time off for public duties under s.50 of the Employment Rights Act 1996 should be extended to cover roles such as members of probation boards; members of court boards; and youth offender panel members. It is also proposed that roles in the housing sector, such as board members of registered social landlords and tenant management organisations, should be covered by time off entitlements. DSFRS already allows time off for public duties such as Governors in an Educational establishment, Justice of the Peace amongst others. We are currently reviewing this policy as it is another benefit to staff in terms of Flexible Working, allowing an individual to pursue an interest outside of the service. The Service benefits from the increased skills that the individual can bring back into their primary employment contract with us, along with increased networking skills and forging partnership working.

Right to request time off for training is introduced

(time to be introduced not available)

A right to request time off to undertake training, modelled on the right to request flexible working, is introduced. Employers will be obliged to consider seriously requests that they receive, but will be able to refuse a request where there is a good business reason for doing so. Employers will not be obliged to meet the salary or training costs to enable a request for time off to train to be met.

Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2008 comes into force

(time to be introduced not available)

The Order amends the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. It updates definitions related to child care to bring these into line with recent legislation, it extends the definition of conviction to include cautions, reprimands and final warnings, and it expands the list of sensitive positions which qualify for disclosure of spent conviction information.

Centralised vetting system for people working with children and vulnerable adults comes into force

12 October 2009

The Safeguarding Vulnerable Groups Act will introduce a centralised vetting system for people banned from working with children and vulnerable adults. Employers will be able to make checks online, with information updated straight away when any individual is added to the list. DSFRS has a number of roles which require enhanced disclosure.

Employers will be informed where possible if an individual becomes barred. There will be fines of up to £5,000 for employers that knowingly employ individuals on the list or fail to make the relevant checks.

Maternity pay is extended to 12 months

April 2010

The Government intends to extend paid maternity leave to 12 months. This follows an extension to nine months from April 2007. The **Work** and Families Act will bring this provision into force. The Head of HRMD will continue to monitor trends and allocate adequate budgetary provision to accommodate this. Maternity and linked welfare policies are currently being reviewed to ensure that we support individuals in their workplace, in terms of risk assessments, appropriate Personal Protective Equipment and offer return to work “keeping in touch days”, to encourage and support parents who wish to return to work after the birth of a child.

Paternity leave and pay is extended

April 2010

The Government intends to allow fathers to benefit from up to 26 weeks' paid additional paternity leave if the mother of the child returns to work before the end of the maternity leave period to which she is entitled. The **Work** and Families Act will bring this provision into force. The Head of HRMD will continue to monitor trends and allocate adequate budgetary provision to accommodate this. Paternity and linked welfare policies are currently being reviewed.

Number of years' contribution required to achieve a full basic state pension reduced

6 April 2010

The number of years' contribution required to achieve a full basic state pension reduces to 30 years for both men and women.

Agency workers directive must be implemented

5 December 2011

The Temporary Agency Workers Directive ensures that temporary agency workers receive the same basic employment and working conditions as if they had been employed directly by the end user.

Personal Accounts scheme starts up under Pensions Act 2008

2012

The Pensions Act provides that from 2012 all eligible workers, who are not already in a workplace pension scheme, are to be automatically enrolled into either their employers' pension scheme or a new savings vehicle, known as a personal account scheme. To encourage participation, employees' pension contributions will be supplemented by contributions from employers and tax relief.

Discrimination law review -Single Equality Bill

Autumn 2009

Bringing together equality and human rights into a single Commission marks an important shift in the way we think about equality. The consultation document published in 2007 looking at the proposals surrounding a review of discrimination law is to be enshrined in the Employment Bill. The aim of the bill is to simplify and harmonise forty years of differing pieces of equality legislation. It looks at proposals to promote compliance, and good practice, simplify definitions, tests (of direct and indirect discrimination) and exceptions. It covers, goods, services facilities and public functions, codes of practice, public sector equality duties, and extends good practice to the private sector. It also will assist dispute resolution in both employment and non-employment fields. The aim of the bill is to make more effective law and tools to tackle disadvantage.

DSFRS is about to publish a Single Equality Scheme "Making the Connections", a document which sets out how we will work with the impact of difference in both employment and service delivery. It takes into account changes in the Equality Bill and embraces the change of focus around human rights. Our draft Scheme is outlined to Members as a separate item on the Agenda with the proposal to go to Full Fire Authority on the 6th May for approval