



**Recommendation to the Employment and
Social Security Committee on the issue of
Rest Day Entitlement and 'Operational Urgency'**

SECTION 1 - Introduction

The States approved the Employment (Jersey) Law 2003 on 8th July 2003 and it has been approved by Privy Council and registered in the Royal Court. The Law currently awaits an appointed day.

It is envisaged that the basic employment legislation will come into force early in 2005. This is due to the following factors;

- the subordinate legislation must be drafted,
- a political promise was made that the Employment Relations Law would be enacted on the same day as the Employment Law,
- a political promise was made to industry that a year's notice of the Minimum Wage rates would be given.

The Committee asked the Employment Forum to consult on two of the remaining areas on which subordinate legislation is required. This recommendation is based on the Forum's consideration of the responses to one of those issues; the effect of the uninterrupted rest day provisions on certain sectors and whether legislation or guidance is required to enable those sectors to continue to operate effectively and provide necessary services.

Three issues of concern have been specifically dealt with;

1. Rest periods may be averaged over two weeks, but the law does not define how the employer is to obtain the employees agreement. In the absence of clarification in the legislation, there is concern that work patterns would be difficult to organise if the employee could refuse to average their rest days over two weeks and revert at any time to their statutory entitlement to one day off per week.
2. The law states that rest days must be 'uninterrupted', but it is not specified whether time spent on-call or standby counts as uninterrupted.
3. In some organisations, employees are often required to work their rest days in order to meet operational requirements and cover for operational urgencies, not just in 'emergencies'.

SECTION 2 - The Committee's intention

As with all of the proposed employment legislation, a step-by-step approach was recommended. Complex legislation with detail such as is to be found in the UK Working Time Regulations was not the Committee's desire and it was hoped that a simple framework of provisions dealing with the issues of paid holiday and rest day entitlement could be created. Under the proposal, the onus was on both employers and employees to "make the system work" in the spirit in which it was intended. However the impact and workability of any such legislation would have to be monitored and if shown to be unsuccessful or unworkable in anyway, the provisions would have to be open to review.

The driving force behind the proposed legislation was the recognition that employees should, as a moral standard, be entitled to rest days from work. There were also other considerations which strengthened this moral approach, Health and Safety being of importance. As stated in the Report and Proposition taken by the Committee to the States (P.99/2000), no employee would work to the best of their ability if breaks from work were not permitted, which could lead to accidents. Although Jersey already has Health and Safety Legislation requiring employers to take reasonable steps to ensure the health and safety of their employees, it was felt that greater emphasis should be placed on the issue of breaks from work through the introduction of legislation establishing minimum rest day entitlement.

In contrast to the complex UK legislation, the proposal for Jersey was simply that workers should be entitled to one rest day per week and there was no intention to specify rest periods and shift breaks on a daily basis.

The Employment and Social Security Committee acknowledged that there would be a need for flexibility to accommodate part-time and shift workers and to allow for surplus of activity at peak times in the Island's different industries (e.g. Christmas and sales in the retail industry, crop picking and sowing in the agricultural sector, peak week-ends in the tourism industry and Christmas in the restaurant trade). The Committee wished to introduce legislation that was workable, as far as possible, to all employers and employees. It did not wish to introduce provisions that become meaningless by virtue of the number of exceptions or derogations.

As in the UK, it was proposed that the one day rest period should be a 24 hour period of uninterrupted rest and that this allowance might be averaged out over a two week period, so that the rest days could be taken as two 24 hour rest breaks or one 48 hour rest break in a fortnight.

The entitlement to a rest day means that employees should be given the right to a weekly day off, but are not obliged to take it. Similarly, the employer would not have to make sure that employees were taking their rest day. However, if an employer wished to ensure that an employee takes his rest day and did not work on that day for another employer, it would be up to the employer to make clear that expectation in the contract of employment, to be agreed by the employee.

Breach

Breach of any contract terms in connection with rest day entitlement would bring an employer's grievance and discipline procedures into play. The services of JACS would be available to those who needed them and wished to use them. All claims arising would be heard by the Employment Tribunal.

The dismissal of an employee for refusing to work when they were entitled to a weekly rest period would be grounds for automatically unfair dismissal, as the individual would be "asserting a statutory right" in such circumstances.

It is likely that the majority of such claims would be heard by a sole Tribunal panel member in accordance with the provisions of the Employment Forum's Recommendation on Enforcement Issues. If a complaint was upheld, it was intended that the arbitrator would be able to impose a fine on the employer (as is the case with breaches of the provisions of the current Payment of Wages Law) and make an award of compensation or outstanding pay to the employee, as appropriate.

As well as contractual duties, employers are also subject to a common law "Duty of care" towards their employees, including the duty to take reasonable steps to safeguard employees' health and safety. A requirement to work such hours or periods of uninterrupted work which results in injury to an employee (physical or psychological) could give rise to a claim for damages on that basis.

SECTION 3 - OTHER JURISDICTIONS

EUROPE

Many European Directives have been adopted in the areas of employment law and health and safety. Directives are binding on the Member States, and can in some circumstances give rise to directly enforceable rights for individuals.

While it is open to an employer and employee to agree whatever contract terms they choose relating to time off, many jurisdictions provide that minimum standards must be met in these areas.

Within the European Union, all Member States are required, as a minimum, to have laws which adhere to the EC “Working Time” Directive. In addition, the European Convention on Human Rights protects a person’s “right to respect for his private and family life”. It is arguable that not allowing an employee sufficient time off to enjoy a “normal” family life could breach this fundamental principle.

The EC “Working Time” Directive

The Council of the European Union adopted the European Working Time Directive (93/104/EC), on “certain aspects of the organisation of working time”, in November 1993. This was essentially a health and safety measure aimed at protecting workers against adverse effects on their health and safety caused by long working hours, or working without adequate rest. It set down minimum standards relating to workers’ maximum weekly working hours, night work and shift work, rest breaks and rest periods and annual leave entitlement.

THE UK

Working Time Regulations

The regulations provide basic rights and protections, including;

- Limit of an average of 48 hours work per week;
- Night workers can be required to work a maximum of 8 hours, on average, in 24 hours;
- a right to 11 hours rest per day;
- a right to an in-work rest break if the working day is longer than 6 hours;
- a right to 4 weeks paid leave per year;
- a right to a day off each week.

The basic rule in the UK with regard to rest days is that workers are entitled to an uninterrupted rest period of at least 24 hours in each seven day period. However, an employer is allowed to average this over a two week period, so that workers may take off two separate 24 hour periods in a fortnight, or take a 48 hour rest break in a fortnight.

The Regulations set out detailed rules as to how the relevant 7 day or 14 day period is to be measured, including when it is deemed to begin.

The regulations have been in force since 1998. They were amended in 1999 to reflect some concerns which arose in their practical application, and further amendments are required during 2003 and 2004 because the Directive has recently been amended by the Council of the European Union.

The regulations are very broad in their coverage, in that they apply to all “workers” over the minimum school leaving age; a definition which covers not just those employed under a contract of employment, but also those who work under other forms of contract (for example, agency and temporary workers, casuals and freelancers). The genuinely self-employed, however, are not covered. Young workers, over compulsory school age, but under age 18, are subject to extra rights and protections.

The UK Working Time Regulations state that working time is when someone is "*working, at his employer's disposal and carrying out his activity or duties*". This does not include rest breaks when no work is done. On 3 October 2000, the European Court of Justice gave judgement in a case concerning the status of 'on-call' time. The judgement related to doctors employed in primary health care teams, though a similar approach may now be taken in other areas. It indicated that on-call time would be classed as “working time” when a worker is required to be at his place of work. When an on-call worker is permitted to be away from the workplace, and accordingly free to pursue leisure activities, on-call time is not classed as “working time”.

Special cases

There are a large number of cases where the basic right to a weekly rest day (or equivalent) is excluded or modified. The right does not apply to:

- shift workers who are changing shift and cannot take the weekly rest period between the end of one shift and the start of the next;
- workers whose work is split up over the day (for example, cleaners);
- workers who work far from home, or who work at different places of work with some distance between them (so that, for example, they may want or need to work longer hours to complete the work);
- workers engaged in security and surveillance activities requiring a permanent presence to protect property or people (for example, security guards or caretakers);
- workers whose job requires continuity of service or production (including, for example, certain work in hospitals, residential institutions, prisons, docks, airports, media companies, postal services, public utilities and services, industries where work cannot be interrupted, and agriculture);
- workers subject to foreseeable surges of activity (that is, busy peak periods, such as in agriculture and tourism);
- workers' whose activities are affected by unforeseen emergencies, unavoidable exceptional events, or accidents.

In addition, employers and workers can vary or exclude the basic statutory right to rest days, via a collective or workforce agreement (which must satisfy certain criteria), the relevant terms of which must be incorporated into the individual worker's contract.

Compensatory rest

Where a worker is required by his employer to work during a period which would otherwise be a rest period or rest break, the employer must, wherever possible allow him to take an equivalent period of compensatory rest, except in exceptional circumstances. However, the employer must still afford the worker protection as may be appropriate in order to safeguard their health and safety.

The DTI's guide to the UK's provisions states that compensatory rest should be provided within a reasonable time: Two months is considered a suitable period to compensate for weekly rest periods.

Enforcement of rights

A worker who is denied entitlement to the statutory weekly rest period or paid annual leave, or who is not paid any amount due under the Regulations, may bring a complaint to an employment tribunal. In addition, a worker may complain to the employment tribunal if he or she was subjected to a detriment or dismissed for refusing to work when they were entitled to a weekly rest period, or refusing to forgo statutory annual leave. Dismissal of an employee on these grounds is treated as "automatically unfair".

If the complaint is upheld, the tribunal must make a declaration to that effect, and may award compensation or outstanding pay to be paid by the employer to the worker where appropriate.

Enforcement of the regulations is split between two bodies. The entitlement to rest periods and breaks and paid annual leave are enforced through employment tribunals, although ACAS initially try to resolve any disputes. The working time limits are enforced by the Health and Safety Executive and local authorities.

EC Directives

As a member of the European Union, the UK is required to implement the Directives adopted by the European Council.

The EC Directive was implemented by the Working Time Regulations 1998. These provisions did not, however, apply to workers employed in the transport sector (including air, rail, road and water), those working in fishing or other work at sea, and doctors in training. It was felt that these areas required specific legislation to accommodate working time measures. The Regulations also did not apply to activities of specific services, such as the armed forces, the police or civil protection services, where these "inevitably conflict" with the Regulations.

The exclusions have been reviewed at European level, and specific EC legislation covering these groups has either been adopted or is close to adoption. In their October 2002 consultation paper, the UK Government proposed to amend the Working Time Regulations to cover those sectors of the workforce that were excluded, namely road, rail,

air, sea and inland waterways transport, sea fishing, offshore work and the activities of junior doctors. It was proposed that new regulations would come into force on 1 August 2003

A new working time directive, known as the Horizontal Amending Directive (2000/34/EC), was adopted on 1 August 2003 which, together with three further sector specific directives (the Road Transportation Directive, the Aviation Directive and the Seafarers Directive), now extends working time protections to the previously excluded sectors, including doctors in training, from 1 August 2004, with the exception of the weekly working time limits which will be phased in over a further transitional period.

SECTION 4 – Employment Forum’s Consultation, 2001

Introduction

The Forum’s consultation paper, “Annual Leave and Weekly Rest Days,” was published in July 2001. The document provided a questionnaire and information on the relevant issues, which was distributed to all those on the Employment Forum’s consultation database.

RESPONSES

Rest Day entitlement

The questionnaire stated that the Committee proposed one rest day of 24 continuous hours per week and respondents were asked whether they envisaged any particular problems arising in their industry with regard to this. 84% of respondents said they did not and 14% felt that this proposal could cause problems. Of the 14%, comments were received suggesting that 24 hours is not sufficient rest to be safe or acceptable, a five day week is more typical, and that it should be clear in the Law that 24 hours rest is the **minimum** entitlement.

Specified time for rest days

Two thirds of respondents (67%) felt that there should not be a specified period established on which rest days should be provided or taken. 9% felt that there should be a period specified.

Various views were expressed, including that a flexible system should be put in place which manages effectively the particular needs of individuals and organisations, it should be the employees ‘normal’ day off, the provisions should not be made unnecessarily complicated and that it is important to ensure that the rest period is ‘uninterrupted’.

Averaging out rest days

58% of respondents agreed that provision should be present to “average out” rest days and 28% stated that this would not be appropriate.

Comments received on this issue included a number of concerns: expressing the need for flexibility; that it should not be complicated; that the purpose of “rest days” should not be lost; emphasizing the importance of the health and safety of employees; and that flexibility in arranging rest days would be of mutual benefit to employers and employees. It was suggested that provisions should be;

- subject to the individual industry and personal requirements
- a voluntary option through negotiations with the relevant trade unions or by agreement in contracts of employment
- averaged over no more than 2 weeks or the rest and health benefit would be lost

Exclusions for certain categories of workers

Two thirds of respondents (65%) did not feel that certain categories of workers should be excluded from rest day entitlement. However, 16% of respondents highlighted emergency and essential services as categories of workers who should be considered as “special” for the purposes of the rest day provisions. In addition, other sectors with particular needs were also mentioned, such as farm workers at certain peak times of the year.

CONCLUSIONS

The consultation on the issue of holiday entitlement and rest days did not generate a great deal of debate at the time and was seen as one of the less contentious areas of employment legislation.

There was acceptance that statutory provision should be incorporated into legislation regarding rest days and recognition of the importance of the Health and Safety of workers in relation to rest days, although some felt that provisions were necessary to provide flexibility in sectors which have unusual needs.

RECOMMENDATIONS

Having considered the results of the consultation exercise, the Forum recommended that all employees should be entitled to one statutory rest day per week, which should be a continuous period of 24 hours. A week should be defined in the terms and conditions of employment, but if the contract is silent on this issue, a week should run from Sunday to Saturday.

The majority of those who took part in the consultation exercise were of the opinion that provision should be present for the rest day to be averaged out over a two week period.

Having considered the health and safety concerns expressed by some respondents and the need for the legislation to ensure provisions are workable in all industries, the Forum recommended that the ability to average out the weekly rest day over a two week period should be present in legislation, but that nothing should remove an employers duty of care over an employee, and therefore it should not be possible to average over more than two weeks. Such a duty is subject to Common Law and includes the duty to take reasonable steps to safeguard an employee’s health and safety.

Protection should be granted to all employees over the age of 16 and there should be no upper age limit specified in the legislation. It is not envisaged that sub-contractors or self-employed workers serving several contractors or clients should be covered under this legislation, but the Forum wanted protection for those who routinely work for one particular employer and a relationship similar to a ‘master and servant’ has evolved. Voluntary workers employed by charitable organisations or fund raising bodies should be excluded from this provision.

The Forum’s recommendations now been incorporated into the Employment Law.

SECTION 5 - The Employment (Jersey) Law 2003

With regard to weekly rest periods, article 10 of the Employment Law states;

- (1) Subject to paragraph (2), an employee shall be entitled to an uninterrupted rest period of not less than 24 hours in each 7-day period during which he works for his employer.
- (2) If the employer and the employee so agree, an employee shall be entitled to either –
 - (a) two uninterrupted rest periods each of not less than 24 hours in each 14-day period during which he works for his employer; or
 - (b) one uninterrupted rest period of not less than 48 hours in each such 14-day period,in place of the entitlement provided for in paragraph (1).
- (3) For the purpose of paragraphs (1) and (2), a 7-day period or a 14-day period shall be taken to begin –
 - (a) at such times on such days as may be specified for the purposes of this Article in a relevant agreement; or
 - (b) where there are no provisions of a relevant agreement which apply, at the start of each week or every other week.
- (4) In a case where, in accordance with paragraph (3), 14-day periods are to be taken to begin at the start of every other week, the first such period applicable in the case of a particular employee shall be taken to begin –
 - (a) if the employee's employment began on or before the date on which this Law comes into force, on the date of its coming into force; or
 - (b) if the employee's employment begins after the date on which this Law comes into force, at the start of the week in which that employment begins.
- (5) For the purposes of paragraphs (3) and (4), a week starts at midnight between Saturday and Sunday.
- (6) The States may by Regulations amend any of the periods of time, whether expressed in hours or days, mentioned in this Article.

This part of the law is a straightforward approach to the working time directive. It sets a minimum standard but gives the employer the ability to average the rest period over a two week period. This was derived from consultation with employers, but at the same time had regard for the employer's 'duty of care' and best health and safety practice. It is 'light touch' in comparison with other jurisdictions, without any requirement regarding the hours worked on any given day.

There is no criminal offence for breaching this standard, so if an employee agrees to work on his rest days, as opposed to being required to do this, then he is unlikely to assert his statutory right. The aim of this part of the law is to put the onus on the individual to decide whether they are capable of working for long periods without uninterrupted rest. It must be emphasized that the employee has the right to take their 24 hour rest period, but is not

obliged to take it, and the employer is not obliged to ensure that the employee does so, but must make sure that employee **can** take their rest period.

With regard to 'operational urgency', the Law Draftsman has drafted a suggested amendment to the Employment Law, to be amended via the draft Employment Relations Law. The amendment would provide that Regulations may be made dealing with 'special circumstances' by substituting the current article 10(6) for;

- (6) The States may by Regulations –
 - (a) amend any of the periods of time, whether expressed in hours or days, mentioned in this Article; or
 - (b) specify circumstances in which an employee shall not be entitled to a rest period under this Article.”.

The amendment would have to be agreed by the States, as would any Regulations providing for circumstances in which an employee would not be entitled to a rest period.

SECTION 6 – Issues to consider

There are three issues of concern;

1. Although rest periods may be averaged over two weeks, the law does not define how the employer is to obtain the employees agreement – it was assumed that this would be specified in the employee’s contract. In the absence of clarification in the legislation, there is concern that work patterns would be difficult to organise if the employee could refuse to average their rest days over two weeks and revert to their statutory entitlement to one day off per week.
2. The law states that rest days must be ‘uninterrupted’, but it is not specified whether time spent on-call or standby counts as uninterrupted.
3. In some organisations, employees are required to work their rest days in order to meet operational requirements and cover for operational urgencies, not just in ‘emergencies’.

Issue 1

The Committee’s intention was to make the rest day provisions workable for all employers and employees and to make it simpler than the rest day provisions in the UK. But some sectors have indicated that it is not straightforward to apply, in that shifts are difficult to plan when the employer must obtain the employees agreement to average rest days over two weeks, as statutory rights would take precedence over agreements in a contract or collective agreement.

If the law allowed the employer to decide whether the employee is fit to work on their rest day and average their breaks over two weeks, then the employer would carry the full liability in a health and safety claim, whereas the law as currently drafted puts the greater responsibility on the employee in this matter.

If regulations or guidelines were to be drafted regarding the methods an employer may use to obtain an employees agreement to average their rest days over two weeks, additional issues would have to be considered, including;

- the maximum period for which an employee can agree that their rest days will be averaged;
- notice from either party to amend the agreement;
- whether it should only be possible for an employee to agree in their own employment contract, or if a collective agreement would be appropriate.

Issue 2

Concerns have been expressed by various organisations about the provision for 'uninterrupted' rest days. It is considered that this could pose serious problems for call-out and standby arrangements, which guarantee uninterrupted provision of service and emergency services in various organisations, and also the employers' right to require emergency overtime in crisis situations.

The Working Time Directive in the UK contains a more complicated test than the Employment Law to establish whether a rest period is uninterrupted. There have however been recent decisions in the UK which indicate that, in interpreting the Working Time Directive, a period of time when a person is on-call at home would not be deemed to interrupt the rest period in question. Given that the UK law applies a different test though, a Jersey Tribunal may not consider the UK position as persuasive authority in interpreting our law. It may therefore be preferable to clarify this point in Regulations or guidance.

Issue 3

The Forum is concerned that these issues were not strongly represented during the consultation. However, it is recognized that there may be occasions when "operational urgency" will require an employee to work during their normal rest periods, although it is expected that such occasions would be exceptional rather than regular.

It is considered that the *Special Circumstances*, in the UK Working Time Regulations might provide a reasonable basis for operational urgency exemptions from the Jersey Law. In such periods of operational urgency the rest periods would be suspended, although they should be provided for at a later date.

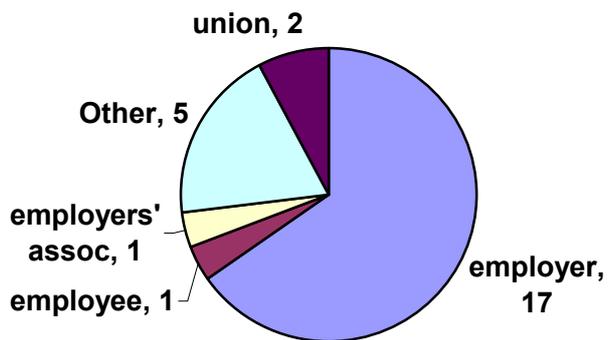
It is necessary to consider what type of business requirements should be included in the definition of 'operational urgency' in relation to different industries in Jersey as it is different to the UK in many respects, for example, emergency services staff cannot be 'borrowed' from equivalent nearby services to cover in a crisis.

It has been pointed out that the rest day provisions conflict with provisions in some employees contracts, which specify that staff can be required to work overtime hours to meet operational requirements, such as the Prison Officers Regulations. It is likely that other employers will also be in this situation, such as the emergency services, whose contracts would specifically cover crisis or emergency situations.

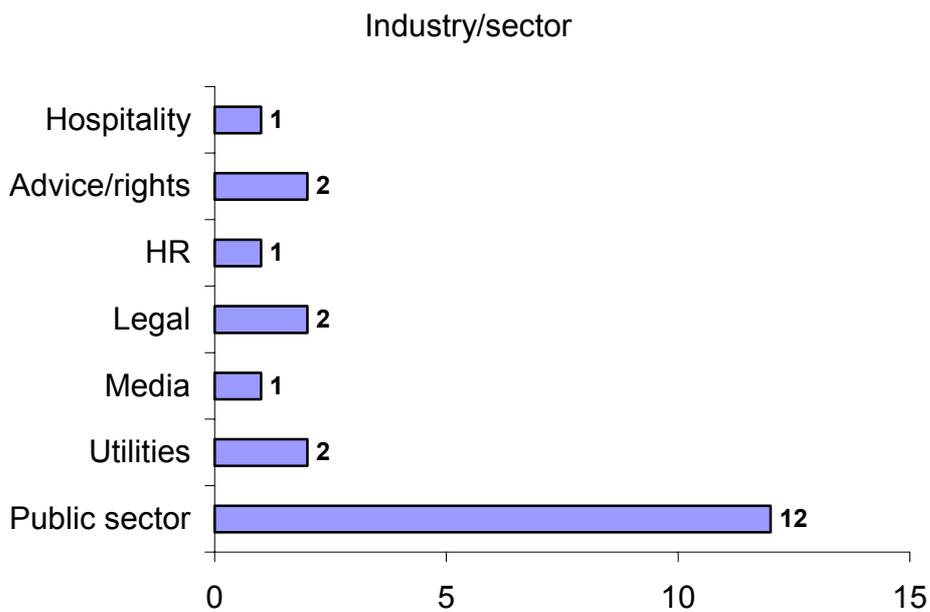
SECTION 7 – Consultation responses

A summary of the responses is provided below;

26 responses were received from the following;



The industry type or sector of respondents was;



ISSUE 1

- 13 respondents said that they could envisage problems arising regarding the provision of one uninterrupted rest day of 24 continuous hours in each 7 day period. 10 respondents did not envisage problems.
- 9 respondents said that they could envisage problems arising regarding the provision to provide rest periods averaged out over 2 weeks (i.e. providing either 1 period of 48 hours or 2 periods of 24 hours). 11 respondents did not envisage such problems.
- 14 respondents said that they could envisage problems arising regarding the requirement for the employer to obtain the employees consent in order to average the rest period over 14 days. 10 respondents did not envisage such problems.
- When asked what method would be preferred for the employer to obtain the employee's consent to average their rest days over 14 days, 4 respondents said that agreement should be only be through the individual employment contract, and 16 stated that agreement should be obtained via either the individual employment contract or a collective agreement.
- 13 respondents said that it should it be possible for the employer to require the employee to accept rest days averaged over 2 weeks without having to obtain their consent, 8 respondents did not agree that this should be possible.

ISSUE 2

- 15 respondents said that there may be problems for the operation of their business if being on call or standby always interrupts a rest day, even if the employee is not called out to work during that time. 7 respondents said that it would not cause problems.
- 13 respondents said that there may be problems for the operation of their business if being on call or standby only interrupts a rest day if the employee is called out to work during that time. 9 respondents said that it would not cause problems.
- 13 respondents said that there may be problems for the operation of their business if being on call or standby only interrupts a rest day if the employee is called out to work during that time, or is required to remain at or near the place of work (away from home) during that time. 9 respondents said that it would not cause problems.

ISSUE 3

- 14 respondents stated that a temporary suspension of the provisions for operational urgency, along the lines of the UK, would provide enough leeway to alleviate their concerns regarding 'operational urgency'. 5 respondents did not agree.

Respondents were asked what should be included in the definition of ‘operational urgency’;

- 9 wanted to include when a worker works far away from where he or she lives, or he or she constantly has to work in different places making it difficult to work to a set pattern.
- 14 wanted to include when the work involves security or surveillance to protect property or individuals.
- 20 wanted to include when the job requires round-the-clock staffing as in hospitals, residential institutions, prisons, production companies, public utilities transport services or in industries where work cannot be interrupted on technical grounds.
- 19 wanted to include when there are busy peak periods, such as may apply seasonally in agriculture, retail, tourism and postal services.
- 22 wanted to include when an emergency occurs or something unusual and unforeseen happens.
- 15 respondents agreed that the law should require employers to provide compensatory rest wherever possible after the employee has worked a rest period. 7 respondents did not agree.

Respondents were asked what details should be included if Regulations were developed on the provision of compensatory rest;

- 12 respondents said that there should be a time limit within which compensatory rest must be provided.
- 13 respondents said that compensatory pay may be provided instead
- 19 respondents said that the employer and employee should agree on the conditions for compensatory rest or pay.

A selection of other general comments

The provisions should not be complicated, be clear as to the minimum entitlement and take into account any health and safety issues.

Unless there is more flexibility...there will be increased inconvenience and disruption to employees rest days, which is contrary to the objective of the law.

The provisions must recognise the limitations of a small jurisdiction in providing adequate employee resources for a 24 hour service.

SECTION 8 – Forum’s recommendation

The Forum has considered the responses received to the consultation paper on ‘rest days’ and the following recommendations are presented on each of the three issues.

Issue 1

For employers who envisage potential problems in providing their employees with one day off in seven, or two days off in fourteen, it appears that the problems will be alleviated if there is clarity in the law regarding how the employer is to obtain the employees agreement to average their rest days.

The Forum therefore recommends an amendment to the Employment Law specifying that the employer and employee may agree to average rest days over 14 days via a ‘relevant agreement’, i.e. a collective agreement or individual contract. Article 10(2), which provides the averaging mechanism, would therefore be amended to read *‘if the employer and employee so agree in a relevant agreement, an employee shall be entitled to either...’*

The Employment Law already defines ‘relevant agreement’ which *‘in relation to an employee, means any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the employer and his employee.’* It will be necessary to confirm with the Law Draftsman whether such an amendment to the primary legislation is appropriate, or whether a code of practice could sufficiently determine how the employees’ agreement is to be obtained.

Issue 2

For employers who envisage potential problems with providing weekly or fortnightly rest days, and for those who are concerned about their ability to meet operational urgency through shifts and standby, it appears that concerns may be alleviated if there is clarity in the Employment Law regarding the definition of ‘uninterrupted’.

The Forum therefore recommends that a definition of ‘uninterrupted’ is provided.

A suitable definition might be; a rest period should be considered to have been interrupted if, either contractually, or due to business requirements, the employee is **required** by the employer to do one of the following on their rest day;

- take a work related action, either at home or on the telephone, or
- attend the workplace, or
- be at or near the place of work.

The Forum also recommends that, if the employee’s rest day is interrupted, compensatory rest must be made available within 14 days of the rest days that were interrupted. If a rest day is not interrupted, it counts as a ‘rest day’ and no compensatory rest would be required. The Forum considers that a 14 day period is reasonable so that compensatory rest is provided within the immediately proceeding 14 day period, i.e. at the earliest opportunity, rather than extending into subsequent 14 day

periods. This is mainly for health and safety reasons to ensure that benefit of rest breaks is not lost.

It is recommended that these provisions are introduced via a code of practice rather than legislation, as this is quite a complex issue and would not easily be incorporated into the existing Employment Law, although advice should be obtained.

Issue 3

The Forum agreed that there should be some facility within the law for 'operational urgency', however there was concern regarding how to define any exception and to what extent it should apply.

It was noted from the type of respondents that this issue mainly appears to be a Public Sector problem, particularly in certain States departments (e.g. Public Services, Health, emergency services). However, some private sector organisations and other types of work were specified as potentially experiencing difficulties if there are no provisions within the law for operational urgency (e.g. utilities, agriculture and hospitality).

The Forum considered the inevitable problems faced for a small jurisdiction in not being able to borrow resources from other areas as would be possible in the UK. The Forum therefore recommends that there is a definition of 'operational urgency' so that in defined circumstances an employer may override the rest day provisions if they provide compensatory rest at another time.

The Forum also recommends that the provision should include compensatory rest for any rest days worked, which should be agreed via a relevant agreement (collective or individual).

The Forum recommends that the compensatory rest must be provided within a period of 14 days following the conclusion of the 'operational urgency', by mutual agreement.

The Forum recommends that there should be a definition of 'operational urgency', covering the following situations that may arise in any type of industry;

1. An emergency occurs
2. Work cannot be interrupted on technical, or health and safety grounds
3. Something unusual **and** unforeseen happens. (e.g. requiring cover for sickness might be 'unforeseen', but would not necessarily be 'unusual', although it would depend on the circumstances).

Provided that workers are afforded equivalent periods of rest within 14 days of the end of the 'operational urgency' situation, derogations may be made.

The Law Draftsman's advice has been obtained regarding the insertion of a paragraph into the primary law allowing circumstances to be specified by Regulation. The Forum recommends that in addition to Regulations detailing the definition of 'operational urgency' and compensatory rest, a code of practice should also provide guidance for employers and employees in interpreting the Regulations and avoiding abuse.