

Did you spot the legal trap in the JD contract, which puts both patients and doctors at risk?

Does this contract set up junior doctors to become so tired that they are liable to harm patients?

This major threat to patients and their doctors appears to be created by the interaction of a combination of elements in this proposed contract:

- Schedule 3 (sections 38 to 42) of the contract **permits junior doctors to opt out of the protection of the European Working Time Directive which would otherwise limit their weekly hours to 48**. 48 hours is a fairly long working week by most people's standards, which would already put some doctors at risk of over-tiredness (it's a 5-day week of nearly 10 hours a day, or a routine six-day week of 8 hours each day).

Here's the section covering opting out from Schedule 3:

Sch 3 Opting out of the Working Time Regulations (WTR)

38. A doctor may voluntarily choose to opt out of the WTR average weekly limit of 48 hours, subject to prior agreement in writing with the employer. A decision to exercise this option is individual, voluntary and no pressure may be placed on the doctor to take this option.

39. Under these TCS, where a doctor has opted out of the WTR average weekly working hours, overall hours are restricted to a maximum average of 56 hours per week, across all or any organisations with whom the doctor is contracted to work or otherwise chooses to work. This must be calculated over the reference period defined in the WTR. Additionally, the maximum of 72 hours worked in any period of seven consecutive days applies, as described in paragraph 8 above.

40. Under these TCS, a doctor opting out of the WTR weekly hours limit is still bound by all of the other limits set out in the WTR and in these TCS.

41. A doctor's agreement to opt out may apply either to a specified period or indefinitely. To end any such agreement, a doctor must give written notice to the employer. The notice period shall be seven days, or a period up to a maximum of three months specified in the agreement, whichever is the longer.

42. Records of such agreements must be kept and be made available to relevant recognised unions and appropriate regulators on request.

In Schedule 14 section 30 this is reinforced:

Sch 14 s30. Doctors working on patterns described in Annex B that require more than 48 hours of average weekly work must have opted out of the WTR29, as set out in Schedule 3 of these TCS. Doctors not wishing to opt out can only be contracted on rotas of no more than an average of 48 hours' actual work per week.

Doctors that don't opt out formally can be rostered for the EU maximum hours of an average 56-hour working week under this proposed contract. In other words, some weeks will involve even longer hours for junior doctors.

There is a situation of chronic understaffing in 2016's privatising NHS, so while according to the wording of the contract, "*no pressure may be placed on the doctor to take this option*", there will likely be some degree of psychological pressure to do so, especially if other doctors are doing so because of the short-staffing which is now a chronic problem for the mid-privatisation NHS.

- **Schedules 3 and 4 set up the rules under which junior doctors can be worked to the legal maximum of an average of 56 hours a week.**
- **Schedule 1 section 3 explains what will happen if doctors are worked in excess of these limits: they will be given Time Off In Lieu or additional pay at a small premium over normal rates,** and Schedule 2 Section 64 provides more detail of other responsibilities that could take doctors' working hours above the legal maxima:

Sch 1 s3. Doctors will be expected to be flexible and to cooperate with reasonable requests to cover for their colleagues' absences where the doctor is competent to do so, and where it is safe and practicable for the doctor to do so. Where doctors carry out work in accordance with this paragraph and such work takes place outside of their contracted hours, they will receive either an equivalent off-duty period in lieu or appropriate remuneration at the rates described in Schedule 2.

Sch 2 s64. Such compensation should be by additional payment (at the basic pay rate as described in paragraph 4 above, uplifted by any enhancement that may apply at the time that the unscheduled work takes place, as described in paragraphs 14-15 above), or by time off in lieu, or by a combination of the two. Where safe working hours are threatened by such an extension of working hours, time off in lieu will be the preferred option. If the additional hours of work have caused a breach of rest requirements, the time off in lieu must be taken within 24 hours unless the doctor self declares as fit for work and the manager agrees, in which case it can be accrued. Time off in lieu arising from breaches of hours but not rest can be accrued. Accrued time off in lieu should normally be taken within three calendar months of accrual. Where time off in lieu cannot be taken, payment will be made in lieu, at the rate described above.

- **Schedule 1 section 1e states the doctor's individual legal responsibility for their patients**

Sch 1 s1 It is the duty of a doctor:e. to protect patients and colleagues from any risk posed by their own health or fitness to work.

- **Schedule 7 (Private Professional and Fee Paying Work) sets out the lack of any absolute ban on private practice (which would be appropriate for anyone on a base contract of an average of 48 hours a week, let alone 56) and states the doctor's individual legal responsibility for not doing so much private practice that they become too tired to keep patients safe, and his/her responsibility for reporting all his/her private work to "the employer".**

Sch 7 Principles

1. The doctor is responsible for ensuring that the employer is advised of any regular commitments the doctor has in relation to the provision of any private professional work.

2. The doctor is responsible for ensuring any private professional work undertaken by the doctor does not result in any detriment to NHS patients or services.

3. The doctor should be aware of the relationship between the hours of work undertaken under this schedule and the principles underlying the restrictions on total hours that the doctor can work under these terms and conditions of service as set out in Schedule 3.

4. A doctor must not earn fees during salaried time. In effect a doctor must not be paid twice for the same period of time.

- Schedule 3 section 33 sets out **the responsibility of the doctor him/herself to declare him/herself too tired to work** if on-call tasks have been very demanding:

Sch 3 s33. If, as a result of actual hours worked during the on-call period, a doctor's rest has been significantly disrupted, as defined in paragraph 30 above, the default assumption is that the doctor may be unsafe to undertake work because of tiredness, and if this is the case, the doctor must inform the employer that the doctor will not be attending work as rostered, other than to ensure safe handover of patients. No detriment to pay will result from the doctor making such a declaration. Arrangements for dealing with this issue must be agreed locally.

Together, these elements of the proposed contract seem to set **up an extremely risky situation for both patients and junior doctors**, which does not appear to have drawn any public attention, although junior doctors are about to vote to accept or reject it.

If a patient of a doctor on one of these contracts unexpectedly dies or becomes seriously disabled under his or her care, in the patient's family may try to sue the hospital on the grounds of negligence. Where a doctor who has been required to work long hours over a long period, this junior doctor contract would assist the hospital which is sued to mount a successful defence blaming the doctor, on the grounds that a doctor should have signed themselves off as too tired if that was the case, as the harm to the patient may suggest to have been so in hindsight. **Clearly it should be the management's role not the doctors' to ensure that staff are not working inappropriately long hours, given the symptoms of over-tiredness:** <http://archive.ahrq.gov/clinic/ptsafety/chap46a.htm>

Note also that **in the UK it would be illegal to allow a lorry driver to work these hours:** for them, shifts in excess of ten hours are considered unsafe for the public and are thus illegal. But this junior doctor contract defines a "long shift" on page 6 as "any shift that exceeds 10 hours in duration", with such extended shifts to be routinely rostered for our doctors!

One might think that a public sector employer is not likely to want to mistreat its staff in this way. Despite the pressures on the public sector NHS these days, that faith may be reasonable. However **what seems not to have been appreciated by the public, or even by the doctors who are being pressurised to sign this, but this contract would be between "the doctor" and "the employer", and the latter is any organisation that sells services to NHS commissioners, whether a public sector unit, a cut-price outsourcer (e.g. CareUK, Serco or Virgin), or an healthcare industry giant from overseas.** The responsibility of private sector providers is first and foremost to profit generation for investors, thus their incentives will be to work staff as "efficiently" as they can, maximising their hours and minimising their pay. Doctors, and even more so patients, need protection as their care is passed over from the public sector NHS to commercial suppliers whose staff are forced by company law to put profit maximisation before all other considerations.

If the junior doctor has been doing private work also and followed the requirement of Schedule 7 section 1 to report all private work to his/her employer, the hospital also may have the ability to produce, from their own files, evidence to support arguments in court that the reason for the medical error was the doctor's over-tiredness resulting from taking on private work in addition to the heavy hours they signed up to through the junior doctors' contract. That could result in the hospital escaping blame and punishment for injury to patients from over-working doctors due to this unsafe contract, which it might otherwise be held responsible for under the principle of "vicarious liability". **If "the employer" is successful in using the arguments set up for them by this contract to evade legal blame, the doctor could be found personally liable to pay damages to NHS patients harmed by an excessive workload forced on their doctors by this contract.** Those damages could run into millions where a previously healthy young patient is badly harmed by a too-tired doctor.

In summary

The conditions the doctors on this contract would be working under are very excessive, with weekends on call added on top of the very maximum of hours that the EU will permit. **It is clear from the wording of this proposed contract that doctors' interests have not been adequately protected in its drafting.**

If the final contract for junior doctors does not remove this legal trap, **any doctor who waives their Working Time Directive rights under this contract will be well advised to avoid taking on any private work at all, as lack of any work outside the NHS would definitely help protect them from legal attack by their for-profit employer in the NHS, in the event that a harmed patient's family sues the hospital for compensation.**

Another way for doctors to protect themselves from this mistreatment is, of course, to refuse to opt out of the EU Working Time Directive maxima: a protective 48-hour maximum working week would then apply. **If doctors do not agree to opt out of this legal protection, any accidents to patients would be both less likely to occur and, if they do still happen, less likely to result in the bankruptcy of individual doctors since it would be far harder for "the employer" to establish that they were over-tired.**

If our junior doctors do not take effective action to protect themselves from the use of this contract against them, it seems likely that accidents to patients may within a short while have blackened the formerly excellent reputation of NHS doctors to the point that they will be happy to accept the doctor-light integrated care systems now being set up under the "STP" plans which derive from UnitedHealth's/Simon Stevens' Five-Year View for the NHS.