Consultant Contract Implementation

Guidance to health service management on the implementation of LCR 20403 regarding provision of compensatory rest to Consultants on 1:3 and 1:4 on-call rotas

Volume V, 19th December 2012

Purpose of guidance

Please note that this guidance is to health service management. This document is the fifth volume of such guidance. The document dated 25th July 2008 is referred to as 'Management Guidance, Volume I'. Management Guidance Volume II issued on 15th August 2008, Management Guidance Volume III on 28th August 2008 and Management Guidance Vol IV on 14th October 2010.

This document – together with Volumes I, II, III and IV - is intended to clarify a range of issues associated with the implementation of Consultant Contract 2008 and associated agreements or Labour Court Recommendations.

This particular document focuses on the implementation of a binding Labour Court Recommendation (LCR 20403) regarding rest days for Consultants on 1:3 and 1:4 on-call rosters.

LCR 20403 places legal obligations on health service employers to ensure that in place of rest days, Consultants on 1:3 and 1:4 rosters receive compensatory rest. In this context, no Consultant should receive rest days or payment in lieu of rest days arising from a 1:3 or 1:4 rota with effect from 1st January 2013.

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1. Current arrangements for Consultants on 1:3 and 1:4 rotas

Currently, Consultants on 1:3 and 1:4 rotas receive a flat annual payment for an amount of compensation for being on call (B-factor), a payment (C-factor) in respect of each incident of call-out and rest days or payment in lieu of same.

In this context, Consultants on a 1 in 3 rota receive 26 days per annum or payment at the daily rate if rest is not taken, while Consultants on a 1 in 4 rota receive 13 rest days per annum or payment if the rest is not taken. These rest days are to compensate for the time worked while on-call / called out.

2. Labour Court Recommendation 20403

Labour Court Recommendation 20403 (LCR 20403) dealt with the provision of compensatory rest arrangements for Consultants on 1:3 and 1:4 rotas from 18th December 2012 onwards. The Court recommended that:

> "compensatory rest for this group of workers be brought into line with the standard arrangements in place for other professional grades in the public health services. This would involve the replacement of the current arrangement whereby compensatory rest is allowed at a fixed rate dependent on the "on call" roster one works with an arrangement in which compensatory rest is allowed after an actual "call out" incident. This arrangement creates a closer relationship between call out and recovery time and would allow the affected Consultant recover from the interruption to his or her daily rest period or sleep as recommended in the research studies presented to the Court."

3. Key elements of LCR 20403

A number of clauses can be identified in the Court's recommendation, as follows:

- Rest must be allowed after a call-out incident;
- Rest must be compensatory;
- There must be a closer relationship between 'call-out' and recovery time to the extent that it allows the Consultant to recover from the interruption to his or her daily rest period or sleep;
- There is no provision for any additional payment associated with compensatory rest or in lieu of compensatory rest.

4. Provisions of European Working Time Directive

a) Organisation of Working Time Act 1997

The Court's recommendation refers to two features of the European Working Time Directive (EWTD), compensatory rest and the daily rest period. For clarity, the EWTD referenced here is Directive 2008/88/EC the provisions of which supersede the Organisation of Working Time Act 1997.

The Organisation of Working Time Act 1997 transposed the EWTD (as it was at the time) into Irish Law. It provided that each Consultant is entitled to an 11 hour daily rest period or compensatory rest in lieu of same.

b) Variation or derogation from requirement for consecutive 11 hours

While the Organisation of Working Time Act 1997 contains a requirement for 11 hours consecutive rest, this may be varied in relation to either shift workers or by way of derogation

by way of administrative provisions (or other mechanisms) subject to the provision of equivalent compensatory rest.

For example, the Labour Relations Commission Code of Practice on Compensatory Rest, notes that

> "Section 6(2) of the Organisation of Working Time Act provides for circumstances:
>
> Where shift workers who change shift and cannot avail themselves of the rest period are exempted (in respect of the daily and weekly rest periods)."

In this context, Article 17 of the EWTD states that in relation to daily breaks (Article 3), daily rest (Article 4) and weekly rest (Article 5), derogations may be adopted:

> "c) in the case of activities involving the need for continuity of service or production, particularly:
>
> i) services relation to the reception, treatment and/or care provided hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons.

In the JAEGER case (Case C-151/02), the European Court of Justice was asked to rule on various aspects of the calculation of working time in relation to a hospital doctor. The Court noted that:

> "The particular characteristics of the organisation of teams of on-call services in hospitals and similar establishments are therefore recognised by Directive 93/104 inasmuch as it provides in Article 17 for possibilities of derogation in connection with them." (Paragraph 87, C-151/02, European Court of Justice)

and concluded that:

> "- in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest periods of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked;" (Paragraph 103, C-151/02, European Court of Justice)

This means that the appropriate protection intended by the EWTD is only achieved when equivalent compensatory rest is made available to the doctor prior to the next rostered period of work.

c) Consultants on-call on-site and off-site are engaged in shift work

In Case C-303/98 (SiMAP), the European Court of Justice dealt with a question referred to the European Court of Justice by the national court as to whether on-call on-site and off-site was shift work:

> "By Question 5, the national court seeks essentially to ascertain whether the work performed by doctors in primary care teams whilst on call constitutes shift work and whether such doctors are shift workers within the meaning of Directive 93/104." (Paragraph 59 of C-303/98)

In response, the European Court noted:

> "Working time spent both on call where doctors in primary care teams are required to be present at health centres and on the actual provision of primary care services when doctors are on call by having merely to be contactable at all times fulfils all the requirements of the definition of shift work in Article 2(5).

> The work of doctors in primary care teams is organised in such a way that workers are assigned successively to the same work posts on a rotational basis, which makes it necessary for them to perform work at different hours over a given period of days or weeks.
>
> As regards the latter condition in particular, it must be noted that, notwithstanding the fact that duty on call is performed at regular intervals, the doctors concerned are called upon to perform their work at different times over a given period of days or weeks." (Paragraphs 61-63 of C-303/98)

and concluded:

> "The answer to the fifth question is therefore that work performed by doctors in primary health care teams whilst on call constitutes shift work and that such doctors are shift workers within the meaning of Article 2(5) and (6) of Directive 93/104." (Paragraph 64 of C-303/98)

Taking the European Court of Justice Judgement in SiMAP into account, Consultants are regarded as shift workers as a result of their participation in on-site and off-site on-call work patterns which provide for the successive assignment of individual doctors to the same work post on a rotational basis to provide on-call services. While time spent on-site on-call (referred to as 'on-call' in the Court's ruling) counts as working time, time spent off-site on-call (referred to as 'standby' in the Court's ruling) is not regarded as working time.

5. Principles for provision of compensatory rest

Taking this into account, compensatory rest should be provided to Consultants based on the following principles:

a) Compensatory rest arises when the Consultant on a 1:3 / 1:4 rota does not benefit from their 11 hour daily rest period by reason of a call-out;

b) Compensatory rest must be equivalent to the reduction in the 11 hour daily rest period arising from the call-out. For example, a Consultant who attends on-site resulting in only a 9 hour rest period must receive a 2 hour period of rest prior to return to work.

c) To ensure adequate provision of compensatory rest, time spent engaged in call-outs must be recorded;

d) Given time spent engaged in call-outs triggers compensatory rest when it means that the Consultant does not benefit from their 11 hour daily rest period, it will be necessary to record Consultants' daily start and finish times;

e) Pending full introduction of time-recording systems, management will ensure that Consultants benefit from compensatory rest based on current or notional daily start and finish times. In this regard, management note that Consultants working Monday to Friday rosters or 5/7 rosters may be rostered to deliver their 37/33 hours no earlier than 8am and no later than 8pm.

f) Assuming a standard daily start time of 8am and noting that Consultants cannot be obliged to work more than 8 hours in any one day, structured as a single continuous episode, it is proposed – to ensure Consultants benefit from 11 hours rest - that:

    i. for Consultants who finish at 4pm, only time worked on-site in excess of 5 additional hours between 4pm and 8am should result in equivalent compensatory rest, to be taken prior to the Consultant's attendance on-site the following morning.

ii. for Consultants who finish at 5pm, only time worked on-site in excess of 4 hours between 5pm and 8am should result in equivalent compensatory rest, to be taken prior to the Consultant's attendance on-site the following morning.
iii. for Consultants who finish at 6pm, only time worked on-site in excess of 3 hours between 6pm and 8am should result in equivalent compensatory rest, to be taken prior to the Consultant's attendance on-site the following morning.
iv. for Consultants who finish at 7pm, only time worked on-site in excess of 2 hours between 7pm and 8am should result in equivalent compensatory rest, to be taken prior to the Consultant's attendance on-site the following morning.
v. for Consultants who finish at 8pm, only time worked on-site in excess of 1 hour between 8pm and 8am should result in equivalent compensatory rest, to be taken prior to the Consultant's attendance on-site the following morning.

g) In some circumstances, a Consultant may finish at 9pm. Should this occur, any time worked on-site between 9pm and 8am should result in equivalent compensatory rest, to be taken prior to the Consultant's attendance on-site the following morning.

h) Pending full introduction of time-recording systems, existing systems for recording call-outs and Consultant attendance on-site will be used, to be supplemented by hospital agency protocol detailing how scheduled services are to be delivered the following morning taking account of the above.

i) Hospital / Agency protocols regarding provision of scheduled services by Consultants on-call on 1:3 or 1:4 rosters will be developed by Clinical Directors / Employers in consultation with Consultants. Protocols must provide to the greatest extent possible for continued delivery of scheduled services in the event a Consultant is unavailable by reason of compensatory rest.

In this regard, hospitals / agencies may decide that as a matter of routine that the Consultant on-call would not be eligible for provision of scheduled services prior to 10am. This would mean, for example, that a Consultant finishing at 8pm would have to work in excess of 3 hours on-site between 8pm and 8am before scheduled services would be disrupted.

Such protocols must be in place by 1st January 2013.

The potential period of time which could be spent on-site without resulting in disruption of scheduled services would increase for Consultants finishing at earlier times.

6. Implementation

The principles at 5) above are to be implemented with effect from 1st January 2013.

It should be noted that LCR 20403 places legal obligations on health service employers to ensure that in place of rest days, Consultants on 1:3 and 1:4 rosters receive compensatory rest. In this context, no Consultant should receive rest days or payment in lieu of rest days arising from a 1:3 or 1:4 rota with effect from 1st January 2013.

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