

WELCOME TO THE SUMMER 2019 EDITION OF

# Deliver



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## Welcome to the summer edition of *Deliver*, our transport and logistics newsletter.



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Welcome to the latest edition of *Deliver*.

Dare we mention...Brexit remains unclear and times continue to be difficult and unpredictable for the transport and logistics sector. However, this edition of *Deliver* should provide you with some useful information on matters concerning the industry at the moment. [Sonya O'Reilly](#) from our [Employment Team](#) tackles driver's working time and how the Working Time Directive may apply to you, [Philippa Dyer](#) considers both brake testing and provides a useful reminder on director duties in operator licensing. Finally [Francesca Reason](#) looks at the driver shortage.

I hope that you enjoy this edition and, as ever, any feedback or suggestions for our next edition would be gratefully received.

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## Employment Law Conference 2019

*Tuesday 15 October 2019*

*Rowley Mile Conference Centre, Newmarket*

Register to attend Birketts' Employment Law Conference by clicking the box above or by visiting <https://www.birketts.co.uk/events>



# Drivers' working time: how do the Working Time Regulations apply to you?



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## Background

The Working Time Regulations 1998 (SI 1998/1833) ('WTR') govern working time for workers in the UK. However, the working time of certain Mobile Road Transport workers is governed by EU legislation and these rules are implemented in the UK by the Road Transport (Working Time) Regulations 2005 (RTR). The RTR governs the activities of drivers of goods vehicles where the maximum permissible weight exceeds 3.5 tonnes or drivers of passenger vehicles suitable for carrying more than nine people (including the driver).

However, there are two provisions in the WTR which do apply to Mobile Road Transport workers and this article outlines your obligations under this legislation.

## What you have to do under the WTR with regard to holiday pay?

There have been some recent updates on the law in this area. Following on from the [guidance](#) that we published in our previous issue of Deliver on 23 November 2017 entitled '*Working overtime in the transport sector*', the Court of Appeal has now made a decision in *East of England Ambulance Services NHS Trust v Neil Flowers and others 2019* which clarifies that voluntary overtime is capable of forming part of normal remuneration for the purposes of calculating holiday pay for drivers.

Top tips for calculating holiday pay – always include:

- All contractual pay which is ordinarily received
- Result-based commission which is regularly received
- Payments which are intrinsically linked to an individual's performance (such as productivity bonuses)
- Voluntary and non-guaranteed overtime which is regular and settled.

Please note that the requirement to include these payments in holiday pay only apply to the first four weeks of holiday.

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*...voluntary overtime is capable of forming part of normal remuneration for the purposes of calculating holiday pay for drivers.*

Do not include:

Payments to cover ancillary costs incurred by the worker, such as expenses.

Points to note:

- **A week's pay should be calculated using gross figures** (Secretary of State for Employment v John Woodrow & Sons (Builders) (1983))
- **From April 2020, the reference period for calculating an average week's pay will increase from 12 weeks to 52 weeks.** As you are reviewing your holiday pay calculations you may wish to make this change now (Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018).

## What you have to do under the WTR with regard to health checks?

All employers must offer a free health assessment to any worker who is, or is intended to become, a night worker (regulation 7). The obligation here is on the employer to offer the health check: the worker is not required to accept this offer.

Top tips for health assessments:

- You must ensure that you offer workers a health assessment before they commence night work
- You must ensure that your night time workers are offered health checks at regular intervals and schedule your workers in for this on an annual basis
- You should ensure that the assessment is written by a qualified health professional
- If the initial assessments suggest that the individual may not be fit for night work, they should be referred to a qualified health professional for further assessment
- If the health professional advises that the worker is suffering from health problems connected with night work, the night worker is entitled to be transferred, wherever possible, to suitable work during the day
- You must keep confidential records of the health assessments (which should be kept for two years) and the dates when assessments were offered (if a worker didn't want one).

If you have any questions arising from this article, please contact [Sonya O'Reilly](#).

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## Driver shortage



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*Only 2% of employed drivers are under the age of 25, so a retiring workforce is one challenge that the industry faces.*

*According to the Freight Transport Association (FTA), the logistics industry delivers a staggering 165 million tea bags every day.*

So as a nation of unapologetic tea drinkers how many of us have really considered how the reported driver shortage will impact our lives beyond our afternoon cup of Earl Grey?

Various industry bodies have reported a significant drop in talent in recent years. The Recruitment & Employment Confederation for example report that 98% of transport agencies are currently experiencing a shortage of drivers. So what has caused this drastic downturn in logistics labour? The current political climate might have us reaching for Brexit as the primary influencer in this instance, however, key industry trade associations such as the FTA and the Road Haulage Association (RHA) might suggest that we take a more inward-looking view.

Only 2% of employed drivers are under the age of 25, so a retiring workforce is one challenge that the industry faces. Clearly, attracting new drivers is something that the industry needs to focus on and this requirement has not gone unnoticed. The FTA is currently campaigning for reforms to the failing Apprenticeship Levy with demands to make it a Training Levy, arguably a crucial step in convincing young people that there is longevity in a logistics career.

Furthermore, the introduction of the Driver Certificate of Professional Competence has been a considerable setback from the standpoint of not only enticing new drivers but also retaining existing talent. The steep £3,000 training bill faced by new drivers is a further hurdle accompanying the certification fee.

Whilst Brexit can't carry all of the blame for the prophylactic effect on young-driver enthusiasm, the statistics do make for sombre reading. A 'no-deal' Brexit will mean that physical checks have to be carried out on certain food items leading to projected bottle necking. Imperial College London estimate that the congestion from Brexit will lead to tail backs of up to 29 miles.

These figures make for, not only bleak reading but also excellent tabloid fodder. Never has it been more crucial that the industry needs to educate, inform and inspire if it is to withstand the negative impact of the press, the ageing workforce and the climbing entry costs for new drivers.

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*The steep £3000 training bill faced by new drivers is a further hurdle accompanying the certification fee.*

Our hope is that the All-Parliamentary Group on Freight and Logistics will support the industry's efforts to attract new talent but our advice for now is that there's no requirement to start stock piling the tea bags just yet.

If you would like to discuss any of the matters raised above in more detail, please contact [Philippa Dyer](#) or a member of our [Regulatory and Corporate Defence team](#).

## Brake testing – what should we be doing?



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*This is an issue frequently raised with the DVSA and at public inquiry before the Traffic Commissioner. Going back to basics, we all know the importance of frequent and effective brake testing; road safety should be paramount in all you do as an operator.*

So, what is the guidance on brake testing? The guidance can be found in general terms in the [Guide to maintaining roadworthiness](#) and more specifically in the [Heavy vehicle brake test: best practice](#). The highlights are:

1. Every safety inspection must assess braking performance of the vehicle or trailer
2. It is **strongly advised** that a calibrated roller brake tester (RBT) is used at every safety inspection
3. RBTs should be conducted with the vehicle or trailer **laden**
4. It is acceptable to use an approved and calibrated decelerometer for vehicles without trailers
5. The RBT or decelerometer printout should be attached to the safety inspection record
6. It is acceptable for a brake test to be carried out in the same week as the safety inspection
7. Where it is impractical to obtain a brake efficiency test or measure safety performance at the safety inspection then braking performance **must** still be checked.

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*It is strongly advised that a calibrated roller brake tester (RBT) is used at every safety inspection*

So, in practice, we advise that you carry out a laden RBT at every preventative maintenance inspection (PMI) and that the printout is attached to the PMI sheet. Where something is ‘strongly advised’ it is prudent to follow this. Importantly, you should also check the printouts; did the vehicle or trailer really pass the test or was it a ‘false pass’? In order to assess this you need to check that it was sufficiently laden and that it meets the required percentages. The fact that it says ‘Pass’ in the bottom left hand corner of the RBT printout should not necessarily provide comfort if the vehicle was insufficiently laden.

As an Operator or Transport Manager it is your job to make sure brake testing is carried out properly and to analyse the results you get back; it’s certainly something a Traffic Commissioner would do if you were called to Public Inquiry.

If you would like to discuss any of the matters raised above in more detail, please contact [Philippa Dyer](#) or a member of our [Regulatory and Corporate Defence team](#).

## Operator licensing – director responsibilities



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*When an operator licence is applied for, a declaration of understanding is signed on behalf of the applicant, undertaking to meet various requirements on the grant of that licence. Where the operator licence holder is a company, it is the directors who must ensure that these undertakings are being met.*

By signing an undertaking the operator promises to (for example):

1. Observe laws relating to driving and operation of vehicles
2. Observe drivers’ hours rules and to keep proper records
3. Ensure vehicles and trailers are not overloaded



*Fitness is an essential element of an operator's repute meaning the ability to meet the requirements on the operator's licence.*

4. Ensure vehicles operate within speed limits
5. Ensure that motor vehicles and trailers (including those hired) are kept fit and serviceable
6. Report promptly any defects or symptoms or defects that could prevent the safe operation of vehicles/trailers.

## But who checks?

Traffic Commissioners are responsible for the licensing and regulation of those who operate heavy goods vehicles, buses and coaches as well as the registration of local bus services, they are able to take regulatory action against operator licences. As well as granting licences they have the power to revoke or suspend a licence if they feel it is appropriate.

If a company is called to public inquiry the Traffic Commissioner will consider their fitness to hold a licence - this includes the fitness of the directors of that company.

## What is fitness?

Fitness is an essential element of an operator's repute meaning the ability to meet the requirements on the operator's licence. The Upper Tribunal, the appeal court for transport cases, said in one case "*... it does not matter whether an operator's licence is held by an owner operator, a partnership or a limited company because in each case the person or persons responsible for managing the business bear the ultimate responsibility for ensuring that the road transport aspect of the business operates in compliance with the regulatory regime. That means that they cannot plead ignorance or put the blame on the transport manager because they are required to have sufficient knowledge of the regulatory regime to ensure compliance in general and the proper performance of the transport manager's duties in particular (emphasis added)*".



*All directors are responsible for transport in the business even if your title suggests that you are not ....*

## Does it affect directors that much?

Yes. Traffic Commissioners can disqualify directors from holding an operator licence in the future if a Traffic Commissioner makes a finding that the undertakings you gave have not been met.

All directors are responsible for transport in the business even if your title suggests that you are not and your fitness (repute) is relevant to whether the licence can be held.

If you would like to discuss any of the matters raised above in more detail, please contact [Philippa Dyer](#) or a member of our [Regulatory and Corporate Defence team](#).