

Update on discussions for payment of sleep-in shifts in social care

3 August 2017



Government announcements 26 July 2017

- The Government will waive the financial penalties faced by employers who are found to have underpaid their workers for "sleep-in" shifts in the social care sector. *This is assumed to mean paying their workers on average less than the National Living Wage (NLW) or National Minimum Wage (NMW) for all hours worked, including sleep-in shifts, during an individual pay reference period.*
- Any employer underpaying their staff for these shifts in the social care sector in the future will be liable to pay financial penalties, in the usual way, of 200 per cent of the arrears found. *This is assumed to mean paying their workers on average less than the National Living Wage (NLW) or the National Minimum Wage (NMW) for all hours worked, including sleep-in shifts, during an individual pay reference period.*
- Has suspended HM Revenue and Customs enforcement activity in claiming up to 6-years back-pay for 'underpayment' of sleep-in shifts in the social care sector until 2 October 2017 to allow for further discussions with the sector.
- The Government recognises that written guidance published before February 2015 was potentially misleading.
- Government will work with representatives of the social care sector, during the period of that suspension, to see how it might be possible to minimise any impact on provision of social care as a result of this situation.

Summary

Recently, there has been a great deal of confusion and concern over whether 'sleep-ins' should be considered as time spent working, and as such attract the NLW/NMW.

This uncertainty is affecting hard working paid and unpaid carers, individuals who pay for their own care either privately or through personal care budgets, councils and care providers.

As a result of LGA representation to Government, alongside other sector social care representatives, Government has committed to spending the next 6-8 weeks reviewing the situation, has waived financial penalties

preceding 26 July 2017 and has suspended HMRC enforcement activity until 2 October 2017.

The LGA is seeking a solution that provides a sensible way forward that means:

- care workers are paid fairly
- individuals in need of care are not put at risk
- those paying for care directly through a personal budget or privately are not put in personal financial difficulty
- providers are not forced out of businesses
- councils are able to support vulnerable people in their communities and meet their obligations under the Care Act
- where historic and future cost burdens are identified, these are funded in full by Government with genuinely new and additional resource.

It is likely there will be further developments and announcements over the forthcoming months. This briefing aims to provide councils with current information as it is available, bearing in mind that Government are in the process of analysing the issue further and are aiming to conclude their work in the next 6-8 weeks.

This briefing does not seek to give legal advice, and councils are recommended to consult with their legal teams.

Background

The National Minimum Wage Regulations 1999 set out the original legal requirements. Regulation 15 1999 No. 584 states:

15.—(1) In addition to time when a worker is working, time work includes time when a worker is available at or near a place of work, other than his home, for the purpose of doing time work and is required to be available for such work **except that, in relation to a worker who by arrangement sleeps at or near a place of work, time during the hours he is permitted to sleep shall only be treated as being time work when the worker is awake for the purpose of working.**

This was updated in 2015 with the National Minimum Wage Regulations 2015, No. 621, Regulation 32, which states:

32.—(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home. (2) In paragraph (1), hours when a worker is “available” **only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.**

Employment tribunal decisions in 2016 were that, because a person undertaking a sleep-in shift is unable to leave their place of work without facing disciplinary action, and that the person may need to be physically present as a legislative requirement even if they are asleep, that person should be classed as working.

Subsequently, BEIS brought out [guidance](#) in February 2015 and October 2016 stating:

“A worker who is found to be working, even though they are asleep, is entitled to the national minimum or NLW for the entire time they are at work.”

On 21 April 2017, Royal Mencap Society lost an employment appeals tribunal case. The judgement found that the NLW/NMW should have been paid. The tribunal set out that the following (although not exhaustive) [factors](#) should be taken into account when answering the question of whether sleep-ins should be taken into account in the NLW/NMW calculation:

- The employer’s purpose such as having someone present due to regulatory or contractual requirements (e.g. Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Regulation 12).
- The extent to which the worker is restricted by the requirement to remain on the premises including whether disciplinary action would ensue if they were to leave.
- The degree of responsibility of the worker, contrasting a duty to simply make an emergency services call with the position of a night sleeper in the home of a disabled person with a more significant personal responsibility in relation to the night duties that might have to be performed.
- The immediacy of the need for the worker to provide services or intervene if something untoward occurs or an emergency arises.

Royal Mencap Society have lodged an appeal hearing for March 2018.

HMRC had begun action for back-pay against social care providers, primarily learning disability care providers. This has been put on hold until 2 October 2017.

Impact

- The possible implications of any decision to commission and not commission providers to pay for sleep-in shifts at or above the NLW rate are:
 - If a council has determined to commission providers to pay at or above the NLW/NMW rate for all sleep-in shifts, the Royal Mencap Society appeal hearing in March 2018 may determine that the current legislation excludes sleep-in shifts from attracting

this rate.

- If a council has determined not to commission providers to pay at or above the NLW for any sleep-in shifts, there may be an HMRC-led claim for back-pay (currently put at up to 6 years) and from 26 July 2017, penalties applied of up to 200 per cent from your providers. This may impact on their ability to continue to provide care and could result in them seeking additional funds to cover these costs.
- According to a survey conducted by Cordis Bright (2016), 8,000 care settings for learning disabilities employ staff that are not being paid the NLW for sleep-in shifts, and their most conservative overall cost estimate of **back-pay liability in the sector is £400 million**.
- Going forwards, the annual cost to the learning disability sector is estimated by providers to be **£200m a year**, when the NLW is applied to sleep-in shifts.
- LGA Combined Health Improvement Programme support on provider failure and service interruption is available here:
<https://www.local.gov.uk/our-support/our-improvement-offer/care-and-health-improvement/care-and-support-reform/implementation/general-duties/managing-provider-failure>
- Individuals receiving a **personal budget**, particularly those receiving **direct payments**, may be personally liable for back-pay if they have been paying any personal assistant or carer less than the NLW/NMW for sleep-in shifts. From 26 July this could include HMRC levied penalties.
- Based on the 2016 NAO report on personalised commissioning in adult social care, 500,000 individuals with a care need and 100,000 carers with a support need paid for services via a personal budget allocated to them by their local council.
- According to the 2014 ADASS personalisation survey, 24 per cent of these personal budgets were allocated as a direct payment for the individual or carer to organise and pay for their own care or support.
- In a 2015 sample the most common way for people to use their budget was on care and support services (59.6 per cent), followed by personal assistants (48.3 per cent), community and leisure services (26.8 per cent) and equipment (25.2 per cent).
- The implication for councils as the allocators of personal budgets and direct payments, as well as the personal, financial and wellbeing impact on people in need of care and unpaid carers, is being explored with Government.
- There may also be an impact on councils in terms of back-pay and possible penalties from 26 July 2017 where councils have or are employing their own care workers.

- According to the ECJ judgement in Jaeger in 2003, a sleep-in at the workplace would count towards the maximum number of working hours allowed under the Working Time Regulations. This issue is also being discussed with Government.

Key issues for consideration

The LGA is engaging with Government on these key issues:

- That any policy and legislative decisions need to be fair to workers, employers, commissioners and individuals who receive care, including those who directly pay for care themselves either through a council-funded personal budget or through private means.
- As this situation has arisen as a result of “misleading” guidance, Government needs to provide funding to enable the back-pay to be met without jeopardising the provision of care to vulnerable people.
- Additional and genuinely new funding must be made available to councils so they can ensure that providers and individuals in receipt of direct payments have the means to pay wages going forwards.
- The £2bn the Government recently allocated to councils for social care was not provided with funding this back-pay in mind. It cannot be expected to stretch to cover this as well.
- The impact on those with personal budgets and making direct payments for personal assistants and home care. Any solution going forward needs to work for individuals with care needs. As well as those receiving personal budgets, there are also self-funders to consider, who would similarly be affected.
- Government needs to develop much clearer guidelines *with* providers and commissioners, and that this should be reflected in clearer legislation. The original policy intention behind the legislation should also be revisited in association with the Low Pay Commission.
- The provision of social care to the most vulnerable in our communities is a market already widely recognised as being fragile and unstable, and this will make the situation even more uncertain and worrying for care workers, the people they care for and their families.
- We must also protect individuals paying for their own care who will simply not have the resources to withstand action being taken against them by HMRC.
- Hard working families will need protections so that any benefits they have received over the past 6 years will not be affected.

For further information please contact:

