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Legal update ——— March 2017

Employment
Sleep-ins: another time bomb for social care

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Sleep-ins have been a topic of controversy for some time now, and the issue has become more pressing recently with escalating costs in the sector, coupled with a new approach by HMRC to enforce payment of the national minimum wage for sleep-ins. Earlier this month, we carried out a survey into how care providers are dealing this issue, and the results highlight how unsatisfactory the situation is.

So what are the current issues of concern, and what measures should you be considering to protect yourself against future risk?

The basic legal position

Following case law the legal position is clearer and a worker who is required to be on the premises and who would be disciplined if they left the workplace will be deemed to be working for the whole of their overnight shift even if they are sleeping during some, or all, of this time. This means that they are entitled to be paid the National Minimum Wage (NMW) for every hour that they are working, which can of course be the National Living Wage. This legal line is set out in the BEIS guidance.

The risks

As a result of this some care providers are unable to meet the costs of paying the NMW for sleep-ins and are living with the risks of not doing so (70% of respondents in our recent survey stated that they do not pay the NMW for sleep-ins, and only 38% intend to do so).

The risks of not paying are that both workers and HMRC may have claims for back pay against those care providers that do not pay. Indeed there are a number of cases where those claims have been put forward by workers. Many care providers are now having to dig deep to try and finance the payment of substantial arrears as a result of HMRC's change in tack.

88% of those responding to our survey have been audited by HMRC and have had their sleep-in arrangements looked at. Of those surveyed 31% received notices of underpayment, fines and penalties following their HMRC audit. Of those who had been audited and responded to the survey 25% had been asked to provide up to 6 years of data for the workers concerned.

The care sector is also seeing a rise in the number of challenges from unions, who are not only raising NMW issues, but are also looking at employers' potential liability under the Working Time Regulations (WTR), in relation to rest periods and rest breaks. There are also escalating challenges from staff too. There are a number of legal cases testing the basic legal position, and we can expect further challenges from staff and unions who will have been made more aware of the issue by the publicity these cases attract.

Source: Fotolia

Many of you will employ workers to work a shift, then carry out a sleep-in, and then to carry out another shift. Often there will be no disturbance during the sleep-in and, even if there is, it will generally be minimal. The problem with this arrangement is that it's also potentially in contravention of the WTR. Under Regulation 10, workers are entitled to a rest break of not less than 11 consecutive hours in each 24 hours period. On the face of it the working arrangement described above will fall foul of the WTR.

It may be possible to argue that an exemption applies, or that the worker is in fact carrying out unmeasured time. However, any worker working under such an

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arrangement can potentially bring a complaint to the Employment Tribunal and, where such a complaint is well-founded, the Tribunal must make a declaration to that effect and may make an award of compensation.

The long term risks for care providers are greater of course and we are advising a number of care providers on terminating existing contracts with commissioners and reorganising their businesses so that they do not provide sleep-ins in future.

What can you do to protect yourself against the risks?
Clearly something needs to be done to reduce your risk, so what measures can you implement to help yourself?

- Pay the NMW and take the pain. Some care providers are now doing this to limit their risk. This approach is more usual now; 33% of our respondents who pay NMW have introduced this in 2017;
- Ask the commissioners to pay for sleep-ins. 58% of our respondents had approached commissioners but 42% had not. Most respondents had had a positive response from at least one commissioner so it is worth asking the question;
- Restructure the business to ensure that existing workers aren't doing sleep-ins;
- In certain circumstances, argue that staff are on-call rather than sleeping in, so that the time is unmeasured and can be covered by a workplace agreement.

Watch this space…
Since the Employment Appeal Tribunal's (EAT's) decision in *Shannon v Rampersad (t/a Clifton House Residential Home)* it seems that there will be times when on-call time will only be paid when an individual is awake for the purposes of working. Here a night care assistant in a residential care home was not "working" for the purpose of calculating the NMW simply by being "on-call" in his flat on the premises. In practice, he was very rarely asked to assist. The EAT held that only those hours when he was "awake for the purpose of working" counted towards the NMW.

In coming to its decision, the EAT was of the opinion that the cases dealing with whether on-call time counted for the purposes of the NMW could be divided into those where night workers were held to be "working" throughout their shift even if they were entitled to sleep, and those where the worker was simply "on-call".

As this case has recently been given permission to appeal to the Court of Appeal it's evident that the legal position on sleep-ins is far from set in stone. There are also other cases testing different facts that are coming to the EAT from March 2017 and we will keep you abreast of any developments.

We are still assisting VODG in their approach to central government to provide for payment of a new rate for sleep-ins, which acknowledges that because of the social care crisis the cost of paying the NMW for sleep-ins will cause yet more financial concern to providers.

In addition, a group of VODG members are seeking to challenge the approach by HMRC by taking preliminary steps to judicially review their change in approach to care providers.

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