

Legal update — April 2017

## Employment

# Sleep ins and minimum wage - where are we?



**Sleep-ins have been a topic of controversy for some time now, but 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 (NMW) for sleep-ins.**

Recently an independent survey was carried out by VODG, Agenda Consulting and Trowers & Hamblins LLP which provides the most comprehensive overview yet of the likely effect on the sector of the application of the NMW to sleep-ins. The snap general election and slowdown of government activity is a good opportunity for us to round up developments on where care providers stand at present.

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, 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 NMW (which can be the National Living Wage) for every hour that they are working. 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. 66% of those who responded to the survey do not pay the NMW for sleep-ins and only 32% of those plan to start paying sleep-ins at the NMW. Out of the 66% who do not pay the NMW, 14% have had objections and concerns raised by the unions, 32% have received grievances from staff about their rate of pay, and 10% have had tribunal or breach of contract claims in relation to sleep-in pay.

The survey revealed that half of all support staff undertake sleep-ins with nearly 80% of care providers paying at or above NMW rates if a sleep-in shift is disturbed.

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, and many care providers are now having to dig deep to try and finance payment of substantial arrears as a result of HMRC's change in tack.

### HMRC audits and inconsistencies

In the survey 84% of those audited specifically in relation to sleep-ins had audits which took place in 2016 or 2017. 35% received a notice of underpayment. A quarter of the 35% were only asked to make a single year of back payments, but another quarter were asked to cover 5.3 years on average.



Source: Fotolia

### Just how often are sleep-ins disturbed?

The survey revealed that 99.7% of sleep-ins are spent asleep. Only 5% of all sleep-in shifts are disturbed, with 95% undisturbed. The average disturbance lasts a maximum of 30 minutes and the median percentage of all sleep-in shift hours that are disturbed is a tiny 0.29%, with the percentage rising to 0.87% in the top quartile of responses.

### Implications for existing contracts

Commissioners have only agreed to fund 14% of services at NMW rates according to the joint survey results. The survey also shows that for 67% of services, commissioners have either refused to pay or refused to even engage with the issue.

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The survey asked those providers who do not pay the NMW for sleep-ins what the impact will be if they have to pay the NMW for these periods and they do not receive extra funding from commissioners. The results show that 25% of the services currently being provided would have to be handed back to commissioners. Based on the 101 organisations who responded to the survey this equates to 13,410 vulnerable adults potentially requiring services to be recommissioned or relying on NHS provision.

So much for the effect on care providers' contracts, but what about the impact on the care providers themselves? For those not paying NMW rates 61% would need to make redundancies if they met the additional expense of paying the NMW. Based on the survey sample this could amount to as many as 23,144 redundancies. 77% of these providers would have the viability of their organisation threatened if the shortfall was not met by commissioners. This percentage rises to 89% if HMRC required these providers to back date payments to staff for 6 years.

### An April case

In the meantime, we have recently had the decision in the Mencap case, which involved three conjoined appeals concerning the question of how time spent asleep during a 'sleep-in' shift should be treated under the National Minimum Wage Regulations (NMWR). The central issue considered by the EAT was whether employees who sleep-in in order to carry out duties if required, engage in "time work" for the full duration of the sleep-in shift or whether they are working for NMW payment purposes only when they are awake to carry out any relevant duties.

The EAT confirmed that a "multi-factorial evaluation" should be applied to establish whether or not the individual is working, and that the weight to be given to any individual factor will depend on the circumstances. The factors will include a consideration of the work being carried out, whether there is a contractual or statutory requirement to be present, and the immediacy of the requirement to respond to an unusual event.

The EAT concluded that it was only when it was decided that the individual was not working while present for the whole of a sleep-in, that Regulation 32 kicked in. Regulation 32 says that "when a worker is available, and required to be available, at or near a place of work for the purposes of working", such time will not be counted if it is time during which the worker is permitted to sleep at or near the place of work and suitable facilities for sleeping are provided.

While the EAT's decision clarifies the approach to be taken when considering whether sleep-in shifts will amount to "time work", it does nothing to alleviate the considerable costs being faced by care providers who

will now be in little doubt that sleep-ins will qualify for payment of the NMW. Mencap intends to appeal the decision.

### Working Time Regulations issues

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. We expect this to escalate.



Source: Fotolia

### 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/NLW and take the pain. Some care providers are doing this to limit their risk. This approach is increasingly common; 53% of those responding to the survey introduced the NMW in 2016/17;
- 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 (but see below).

### The difficulties with an unmeasured time argument

Arguing that sleep-ins are on-call shifts and are in fact unmeasured time is potentially problematic. The cases that have shaped the law on sleep-ins have looked at whether the time spent sleeping is time during which the individual is "available" for work or actually "working". As a result it is likely that, in the majority of cases, sleep-ins will be deemed to be "time work". The existing case law is not helpful for those who want to argue that sleep-ins are unmeasured time.

### 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 (where he was not required to be all the time). 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.

This case has been appealed and is due to be heard by the Court of Appeal in June.

We are still assisting VODG in their approach to central government to seek solutions, 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. Unfortunately, due to the announcement that a general election will be held on 8 June, the impetus on this initiative will temporarily stall until a new government is up and running post-election.

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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