



Legal update — November 2018

Employment

At last, guidance from BEIS - but does it help?

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Following the Court of Appeal's ruling in the Mencap case (Focus Care Agency Ltd v Roberts, Frudd and another v The Partington Group Ltd, and Royal Mencap Society v Tomlinson-Blake) in July, the Department for Business, Energy and Industrial Strategy (BEIS) has today issued a revision to its guidance on sleep-in shifts.

Previously the guidance, 'Calculating the minimum wage' (October 2016), stated that where a person works in a care home and is required to work overnight shifts where they sleep on the premises, it is likely that they will be considered to be working for the whole of the overnight shift even when they are sleeping. The worker in this example had an employer who was required by statute to have someone on the premises for health and safety purposes. In addition, the worker would be disciplined if they left the premises at any point during the night.

Since the decision in the Mencap case does not accord with this guidance, BEIS has now amended it. In Mencap the Court of Appeal held that employees undergoing sleep-in shifts are engaged in "time work" (and are therefore entitled to the national minimum wage (NMW)) when they are awake and carrying out duties. It follows that they are not entitled to the NMW for the full duration of their sleep-in shift.

The BEIS guidance makes it clear that if an employer provides suitable facilities for sleeping, the NMW must be paid for time when the worker is required to be awake for the purposes of working, but not for the time when they are permitted to sleep. If suitable sleeping facilities are not provided the NMW must be paid for the entire shift.

A distinction is made between this position and a scenario where workers are working and not expected to sleep for all or most of a shift, even if there are occasions when they are permitted to sleep (such as when they're not busy). In this case BEIS states that it is likely that the minimum wage must be paid for the whole of the shift on the basis that the worker is in effect

working all of that time, including for the time spent asleep.

What's happening with the Supreme Court?

As you are aware Unison is currently seeking leave to appeal the Mencap decision to the Supreme Court. Leave to appeal to the Supreme Court is granted in 29% of all such applications so it remains to be seen whether the application will be successful. We will know when the leave to appeal case is likely to be heard when the Supreme Court lists the case for hearing, which is likely to be in December or January.

If permission is granted then the Supreme Court will list the appeal for a hearing. The revised BEIS guidance makes it very clear that it only reflects the law as it currently stands and that if the Supreme Court does consider the appeal "it might issue a judgment which changes the circumstances in which national minimum wage is due for sleep-in shifts". It estimates that, if the appeal is considered, judgment "is unlikely to be issued before 2019 and possibly not until 2020"; we don't disagree with that timetable.

In the meantime, the decision in Mencap represents the law as it currently stands.

No end in sight to uncertainty...

The BEIS guidance highlights the nebulous state of sleep-ins and NMW entitlements. Whilst the Mencap case has offered some certainty, the Court of Appeal's decision is not set in stone. We've heard recently of a council cutting its sleep-in payments, and of course as many commissioners consider their budgets for 2019/20, some of which are in difficult financial circumstances themselves, there is the likelihood that sleep-ins will not be funded by commissioners in some cases from April 2019. In the meantime care providers are left with a lot of unanswered questions.

As the deadline to declare outstanding NMW payments draws closer for most, we've been advising regularly on whether to stay or leave the Social Care Compliance Scheme (SCCS). The position will depend on individual circumstances and is still far from clear-cut, though

Published by
Trowers & Hamblins

Trowers & Hamblins LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

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providers who are part of the scheme can declare that their sleep-in arrears are zero.

Meanwhile back-pay and the decision as to whether to pay it, or include it as a liability in accounts will be one which individual providers will have to reach themselves. And can providers review their current payment of sleep-in payments if it is not funded in the future? If so, what will the impact be on staff relations?

With news of many care providers struggling to fund services properly the BEIS guidance does little to reassure. For now, all eyes are on the Supreme Court. We'll keep you posted.

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For more information please contact

Emma Burrows
Partner
t +44 (0)20 7423 8347
e eburrows@trowers.com

Nicola Ihnatowicz
Partner
t +44 (0)20 7423 8565
e nihnatowicz@trowers.com

Rebecca McGuirk
Partner
t +44 (0)121 214 8821
e rmcguirk@trowers.com

John Turnbull
Partner
t +44 (0)1392 612370
e jturnbull@trowers.com

Helen Cookson
Senior Associate
t +44 (0)161 838 2081
e hcookson@trowers.com