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Legal update ——— September 2018

Employment
Sleep-ins following Mencap: an evolving situation

We held a recent briefing discussion with over 40 care providers on this subject. It was a welcome catch-up and provided a useful insight into how things are going following the Court of Appeal's decision in the Mencap case.

Uncertainty continues in the light of Unison's application for leave to appeal the decision to the Supreme Court and, until we know whether the application is successful, we will not know whether the decision in Mencap that employees are only entitled to the national minimum wage (NMW) when they are awake and carrying out duties will remain good law.

In the meantime, here's a summary of the discussion:

Leave to appeal
We should know by November whether leave to appeal will be granted but if it is, the case probably won't be heard until towards the end of 2019.

Do I stay or do I go?
Those providers currently in the Social Care Compliance Scheme (SCCS) find themselves in limbo. HMRC has informed those in the scheme that the scheme will continue to operate, and that all the requirements and timeframes are still in place. A failure to comply with these requirements, or a withdrawal from the scheme may lead to HMRC opening an investigation into an organisation's pay practices. The scheme falls within HMRC's low pay unit and so is intended to sweep up other arrears, not just those relating to sleep-ins. Any NMW non-compliance (excluding sleep-ins) should still be reported to HMRC.

Given the Court of Appeal's decision, providers who are part of the scheme should now ensure that they declare that their sleep-in arrears are zero.

It was agreed that the decision whether to remain within the scheme or to come out of it was down to each individual provider. The risk of staying in the scheme occurs if the Supreme Court gives leave to appeal, hears the case and overturns the Court of Appeal's decision. If HMRC then takes action will it be easier if a provider is still in the scheme, and could HMRC then rely on the date it went into the scheme as the date from which 6 years' back pay is calculated?

The answer is that we do not know. If a provider comes out of the scheme and HMRC subsequently takes enforcement action, the trigger point for back-pay liability will be when HMRC issues a notice of underpayment.

Declaring contingent liabilities
Chris Harris from Macintyre Hudson helpfully set out his views on declaring contingent liabilities. It was agreed that the back pay issue was a conundrum facing providers at the moment, and that the decision as to whether or not to include the liability in their accounts will be one which individual providers will have to reach themselves. There are a number of options;

- First, to declare the back pay as a liability. This could affect the going concern status of the provider. Some providers have already declared on this basis, and there is nothing further to do, apart from deciding whether such a level of provision no longer needs to be shown, which under the current law it does not.

- Second, to declare the back-pay liability as a contingent liability. This was agreed to be a useful tack to take if a provider did not want to raise an expectation that back-pay would be paid to staff. It was agreed that there are currently good grounds for keeping a contingent liability until the legal position has been sorted out once and for all.

For those currently calculating what their liability is, it will be a judgment call as to whether or not to continue with such a time-consuming exercise. Providers will only need to know their liability if the legal position changes, but auditors, who must act prudently, may well advise that the liability should be calculated and put down as a liability in the accounts.

You can view the article by Chris Harris on the financial reporting impact of the Appeal Court decision **here**.

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The view of commissioners
The general consensus is that at the moment commissioners are quiet. They are not raising the issue with providers; a "wait and see approach" prevails. Providers interpret this as meaning that commissioners will continue funding sleep-ins in this financial year. However, in view of the financial pressures on local authorities, it is felt that this will become an issue when budgets are discussed for 2019/20.

There had been a few reports of commissioners refusing to fund further sleep–ins and those tendering for work being asked by commissioners to propose the pricing for sleep-ins.

Providers are continuing to take a proactive approach and approaching commissioners to see if services can be reconfigured or reviewed to reduce the number of sleep-ins carried out.

The effect of the case on providers
The issue of whether those who had been paying staff for sleep-ins could now review this payment was raised. The ease with which such a review can take place will depend very much on what staff have been told. It's possible that they may now have a contractual right to receive the higher amount in which case their terms and conditions will have to be changed.

Aside from the obvious uncertainty, the case is having an impact on staff relations. No-one in the discussion who currently pays the NMW for sleep-ins has stopped as yet. Some staff still continue to claim back pay for sleep-ins despite the change in law.

A few providers are still using unmeasured time agreements, though it is thought that these will now be ineffective following the Court of Appeal's decision in Mencap.

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