



Legal update — November 2017

Employment Sleep-ins – the latest



The Government announced on 1 November that the "pause" of HMRC enforcement activity concerning payment of sleep-in shifts by social care providers will come to an end with immediate effect.

This pause (in place since 26 July 2017) was to allow the Government to consider how best to address the tricky issue of how best to pay for sleep-ins.

To re-cap, in 2016 HMRC changed its approach to its current view that the National Minimum Wage (NMW) is payable for every hour worked of a sleep-in and has carried out audits of NMW compliance since then of social care providers. HMRC has the discretion to consider underpayments going back six years; to levy fines and require employers to pay back pay of outstanding salary going back up to six years. In addition, employees can bring claims in the Employment Tribunal for back pay of up to six years.

Providers have spent time explaining to Government the pressure that this puts on the social care system and sought a satisfactory solution to two problems:

- 1 that the cost of paying NMW for sleep-ins is not, generally, covered in full by payments from commissioners; and
- 2 that each social care provider may owe up to six years of back pay to employees and have to pay fines for non- payment to HMRC.

The Government's announcements do not provide a solution to either of these issues. Instead, the Government is exploring options to minimise any impact on the sector.

On the issue of funding, the Government has written to local authorities stating that they must "ensure that their current and future contracts recognise providers' obligations to pay NMW for sleep-in shifts". It does not require local authorities to pay providers for those obligations although it has reminded local authorities of the additional £9.25 billion funding dedicated to social care over the next 3 years.

Introduction of Social Care Compliance Scheme

The announcement of a pause did not address the issue of back pay. Instead, the Government has announced the introduction of HMRC's social care compliance scheme. Providers, and individuals providing care, can join the scheme, to avoid being subject to orders for back pay and fines of up to 200% (or £20,000) of back pay for non-compliance after 26 July 2017.

The compliance scheme requires providers to: declare any underpayment for sleep-in shifts to HMRC by 31 December 2018; review the amount paid to workers with HMRC; and then pay the underpayment at the latest by 31 March 2019.



Source: Shutterstock

While the scheme doesn't mention back pay of 6 years, it does state that providers "must pay workers at least the National Minimum Wage for time worked during sleep-in shifts from the point you discover you've underpaid". Tax and NI contributions also have to be paid and providers must commit to paying sleep-ins in the future.

Those that have been assessed by HMRC and are waiting to hear (and we know of many in this position) will now be asked by HMRC to join the scheme or will be asked to undertake a bespoke financial assessment which will consider the employer's viability.

This does not appear to be available to providers that have not been assessed by HMRC to date, but may possibly be available to those who are put in a difficult financial position by joining the Compliance Scheme.

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Should care providers join the scheme?

Clearly care providers will now consider joining the scheme as HMRC has made it clear that they will be subject to other action if they do not. There are some issues that it would be sensible to consider:

First, whether it is in their interests now, or will be before 31 December 2018. The current position is that back pay only becomes due if it appears payable on an HMRC inspection or if an individual employee brings a complaint. From the results of our joint survey carried out with Agenda Consulting and VODG earlier this year, the median back pay providers had been ordered to be paid was 2 years together with a fine. Joining the voluntary scheme would of course result in larger payments falling due than may be payable under the current system.

Second, the legal analysis underpinning the obligation to make payments is subject to review by the Court of Appeal who will hear conjoined cases on sleep-ins in March 2018. Where liability for back pay is large there is business sense in delaying a decision to declare until after decisions in those cases.

Third, it may be that financial support will be available from the Government at some point in the future, although it isn't clear when. A delay in joining the scheme may be sensible to accommodate any financial assistance if it becomes available.

Finally, the impact of assessing the back pay for each social care provider and its effect on the financial position of the provider, needs to be carefully considered. It is sensible for all social care providers to assess the value of back pay that may be due. This gives rise to a number of issues for social care providers which may affect their decisions on provision of care in the future:

- the assessment of back pay is, at least for some care providers, an enormous undertaking as they need both details of time worked and payments made to employees over a six year period; the resourcing of this assessment will need to be budgeted for;
- some employees will not have been employed by those social care providers for the entire six years but will have transferred to them under TUPE without such information available, sometimes from providers that are no longer in business;
- once back pay has been assessed a further problem arises, in that the payment is no longer a contingent liability in accounts, but would have to be shown as an actual liability in the accounts. This may mean negative funds for some charities but they would not be insolvent as long as they could continue to meet liabilities as they became due.

Enforcement

There are a number of practical issues that arise from the voluntary scheme, one of which is enforcement.

Enforcement becomes more difficult when the workforce is international, and sometimes transient. A question has arisen elsewhere as to what steps it is reasonable for a social care provider to take to locate ex-employees as part of this exercise. How far should you go? The answer to this is likely to be a matter of governance for charity clients.

Emma Burrows says, "The value of back pay for sleep-ins for social care has been assessed as being £400 million, and the Government has not indicated that any help for this liability will be forthcoming. It is likely that this liability will lead to social care providers considering giving some services back to commissioners; possibly facing insolvency issues and certainly being more risk averse in strategic decisions about the care they provide in future."

Chris Harris of MHA MacIntyre Hudson says, "While the National Minimum Wage rules have not changed, how they are applied to sleep in situations has been subject to debate. This new scheme provides some clarity going forward but has not addressed the impact of how the £400m bill will be paid.

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