

Update on payment for sleep-in shifts in social care August 2018

About the LGA

1. The Local Government Association is a politically-led, cross-party organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. It aims to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems.

Introduction

2. The purpose of this briefing is to update councils on latest developments regarding payment of sleep-in shifts in adult social care. Although this briefing focusses on adults, the issue is also relevant to children's services.
3. Significant confusion has arisen because of the interpretations by the tribunals of the 2015 National Minimum Wage Regulations and 2015 and 2016 Government guidance on sleep-in payments. This frustrating lack of clarity has caused uncertainty in the provider market and a great deal of anxiety for care workers and those who receive care.
4. The LGA supports care workers being paid fairly for the work they do. Since 2016, we have highlighted to Ministers the likely consequences across the system should there be no Government funding to deal with historic, current and future costs from sleep-in payments.

Royal Mencap Society Court of Appeal Case

5. The Court of Appeal has overturned the decision of the EAT in the case of *Royal Mencap Society v Tomlinson-Blake*.
6. The Court held that workers doing sleep-ins were to be characterised for the purpose of the National Minimum Wage (NMW) Regulations as available for work rather than actually working, and so fall within the exception provided by regulation 32(2). Therefore, only time when the worker is required to be awake for the purposes of working would count for the NMW.
7. The LGA successfully applied for permission to intervene in the Royal Mencap Society's appeal. We emphasised that we support fair pay for all care workers, but the financial consequences for councils could be significant if the court decided that the law required sleep-in care workers to be paid the NMW for their entire shift in view of the significant funding pressures facing social care.

Implications for councils

8. This ruling will come as a relief to care providers and councils because it potentially removes considerable uncertainty and a potential considerable unfunded burden on top of already significant financial pressures on the adult social care sector, although Unison has applied for permission to appeal to the Supreme Court.
9. Whatever the outcome of the Unison application to appeal, we still need to find a sustainable funding solution to enable care workers to be paid fairly for the work they carry out.
10. We will be doing further work to understand the implications of the ruling for councils and this briefing will be updated. The LGA's workforce team has included a full analysis of the case in their latest Advisory [Bulletin](#).
11. Should the Government wish to change the law on payments for sleep-ins, then it should honour the New Burdens Protocol and make appropriate funding available to ensure that such liabilities can be paid for without adversely affecting councils, providers and those who rely on them for essential social care services.

Next steps

12. We are pressing Government for urgent clarity on all enforcement action for back payments when the National Minimum Wage wasn't paid to ensure that no provider will face further action.
13. We await information from the Government as to what will happen in relation to HMRC's '[social care compliance scheme](#)', which was set up in November 2017 to help employers identify sleep-in back payments.
14. The need to attract and retain decent staff now and in the future means that funding pressures remain and we all need to work towards a sustainable funding solution for the social care workforce.
15. We continue to argue that Government must fully fund the £3.5 billion funding gap facing adult social care by 2025 to maintain current service levels so that providers can plan with more confidence to ensure all people can receive reliable, high quality, care and support when and where they need it.

Background

16. Our May 2018 [brief](#) highlighted the significant financial risks from sleep-in pressures. Since then, we have published updated [analysis](#) about the funding pressures facing councils. This shows that local services face a £7.8 billion funding gap by 2025, with adult social care facing a £3.5 billion funding gap by 2025. In addition to this, an immediate and annually recurring minimum of £1.44 billion is required to stabilise the provider market.
17. The LGA has always taken the view that care workers should be paid fairly for the work that they do and that all legal requirements should be fully met by councils and providers of social care. Councils have historically not

required the National Minimum Wage/National Living Wage ('NMW/NLW') to be paid for sleep-ins because that was their understanding of the legal position as set out in the National Minimum Wage Regulations. Our May 2018 [brief](#) summarised the legal context to the Royal Mencap Society appeal.