

Update on Payment for Sleep-In Shifts in Social Care

May 2018



About the LGA

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

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.

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 continuing uncertainty in the provider market and a great deal of anxiety for carer workers and those who receive care.

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.

This briefing covers:

- The significant financial risks from sleep-ins funding pressures
- The potential impact of those pressures on providers, councils and individuals □ The LGA's response
- Background, including the legal context.

1. The significant financial risks from sleep-ins funding pressures

1.1. The sleep-ins crisis not only poses a significant financial risk to providers and councils who are already operating in a fragile market because of severe funding pressures, but also individuals in receipt of direct payments and self-funders who employ a personal assistant for sleep-in shifts and are personally liable for making additional payments.

1.2. Historic liabilities

1.2.1. Providers, councils and individuals currently face the prospect of having to make back payments for underpayment of sleep-in shifts dating back six years as a result of HMRC enforcement action. The potential costs

Briefing

of sleep-in back payments are significant and the consequences will ultimately be felt by people needing services and their carers unless additional funding is made available by the Government. A survey conducted by Cordis Bright (2016) estimated that over 8,400 care settings employed staff who were not being paid the National Living Wage for sleep-in shifts.ⁱ The most conservative overall cost estimate of back-pay liability is £400 million for the learning disability sector alone.ⁱⁱ This excludes the majority of children's residential services so the actual figure is likely to be higher.

- 1.2.2. We are aware that the Government has commissioned its own research into quantifying the historic liability of sleep-in payments across all sectors. We have asked on a number of occasions to see this research so that we can have a more accurate understanding of the scale of the challenge, however this has not happened. The fact that Government has not challenged the public use of the £400 million figure suggests that it is a reasonable conservative estimate for the learning disability sector.
- 1.2.3. In November 2017, the Government published a new voluntary '[social care compliance scheme](#)' (SCCS) covering historic sleep-in liability payments. The scheme gives employers until the end of December 2018 to opt-in and identify what they owe to workers, supported by advice from HMRC. Employers who identify arrears at the end of the self-review period will have up to three months to pay workers by the end of March 2019.
- 1.2.4. The Government statement accompanying the SCCS made no real reference to how that liability will be met.ⁱⁱⁱ The Government did signal its intention to discuss with the European Commission whether any support, if deemed necessary, would be subject to EU state aid rules. While we welcome the state aid conversations, there is no guarantee that timely support would be forthcoming. We are very concerned about the financial risks to councils and providers posed by the historic liability and the potentially catastrophic impact this may have on the already fragile provider market and the people who rely on it.
- 1.2.5. Even if Government is able to secure state aid support for historic back payments, this will not resolve the back payments faced by self-funders or those in receipt of a personal budget or direct payment. These people will need an equivalent solution so they are not placed in financial difficulty and unable to pay for their care. There will be an expectation that councils step-in and help personal budget holders and those in receipt of a direct payment, but adult social care is already under enormous financial pressures. Self-funders will likely be forced to rely more on family and friends to meet their care needs.

1.3. *Current and future liabilities*

- 1.3.1. Providers, councils and individuals also face current and future funding pressures from the ongoing need to pay the National Minimum/Living Wage for sleep-in shifts, against a background of increasing demand and reduced funding. Costs will also continue to increase as the National Minimum/Living Wage rates increase.
- 1.3.2. Adult social care funding is already recognised as being at a 'tipping point' and unfunded ongoing pressures, such as those arising from the

sleep-ins crisis, cannot be met without genuinely new and sustainable funding for councils.^{iv}

- 1.3.3. The LGA estimates that local government faces an overall funding gap in excess of £5 billion by 2020. As of March 2018, our analysis shows that gap for adult social care will be £2.2 billion. This includes £900 million just to cover the unavoidable core cost pressures of demography, inflation and the National Living Wage. In addition to this, an immediate and annually recurring minimum of £1.3 billion is required to stabilise the provider market.
- 1.3.4. While the additional £2 billion for adult social care in the 2017 Spring Budget was welcome, it was not announced with sleep-in costs in mind. Government must therefore not expect this vital funding to be used to cover current and future sleep-in costs. Furthermore, the £2 billion is not sufficient to deal with all immediate and short-term pressures and the funding stops at the end of 2019/20 and reduces over time to this point. It was also followed by the introduction in July of further, more rigid and unrealistic target reductions on delayed transfers of care, and the possibility of sanctions if targets are not met.
- 1.3.5. The LGA absolutely supports the goal of paying people fairly for the work they do. 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.

2. Potential impact of sleep-ins funding pressures

2.1. Providers

- 2.1.1. The current unfunded requirement on providers to make retrospective sleep-in payments by March 2019 is highly likely to further destabilise the provider market, inevitably leading to a reduction in support for people who use services. Providers of all sizes are unlikely to have sufficient reserves to make the significant historic back payments. Some providers are already increasing the charge to councils to pay for these additional costs, while others are contemplating administration and bankruptcy.
- 2.1.2. Allied Healthcare, one of the UK's biggest providers of home care visits, cited the £11 million back pay owed to sleep-in care workers as one of the reasons for its current significant financial difficulties which have led to the need to seek a CVA.
- 2.1.3. Councils are used to providers exiting the market and have strong contingency plans in place for such circumstances. However, the sleep-ins issue risks increasing the complexity of successfully implementing contingency plans because it will be difficult for councils and CCGs to pass on such contracts to other providers, as they will be at risk of acquiring the liability for any underpayments in the past, and also any future liabilities. Providers will be forced to seek indemnities from commissioners, but as already highlighted in this briefing, councils will struggle to pay for such indemnities without additional Government funding.

2.1.4. The public social care market is already very fragile. According to a 2017 ADASS survey, 69 per cent of councils reported failure of a provider during the six months preceding April 2017 when the survey was sent out, with providers either closing or handing back contracts, affecting thousands of people.^v This disruption significantly impacts on wellbeing and is thought to impact on mortality when it involves someone moving home in an unplanned way.

2.1.5. The state aid process is often long and complex, but in order to avoid further destabilising the already fragile provider market, providers need to know whether or not funding will be forthcoming well ahead of the March 2019 SCCS deadline. We will push for an update on the Government's European Commission state aid conversations and for confirmation that a contingency plan is being developed in the event the state aid route is not pursued.

2.2. *Individuals*

2.2.1. Staff working sleep-in shifts play a valuable role enabling people, often with complex multiple needs, to live independent and fulfilling lives in the community with family and friends. This is not only better for those individual's health and wellbeing outcomes but also better value for money for the public purse than costly residential care. The uncertainty around sleep-in payments created by the change to the Government's guidance has made the situation even more worrying for care workers, the people they care for and their families.

2.2.2. Of particular concern is that individuals receiving personal budgets, particularly direct payments, are personally liable for back pay if they paid a personal assistant or carer less than the NMW/NLW for sleepin shifts. It is unacceptable that individuals may be subject to HMRC enforcement action and be placed into severe financial hardship as a result of a change in the way the law is understood.

2.2.3. While we do not know the exact numbers of people affected, based on a 2016 National Audit Office report on personalised commissioning in adult social care, 500,000 individuals with a care need, and 100,000 carers with a support need, paid for services via a personal budget allocated to them by their local council.^{vi} According to a 2014 ADASS personalisation survey, 24 per cent of these personal budgets were allocated as a direct payment for the individual or carer to organise and pay for their own care or support.^{vii} In a 2015 sample, the most common way for people to use their budget was on care and support services (59.6 per cent), followed by personal assistants (48.3 per cent). This suggests that tens of thousands of individuals who need care and support may be employing personal assistants, even before taking self-funders into account.

2.2.4. The Government is currently consulting on extending the right to have a personal health budget or integrated personal budget, but the sleepins crisis risks undermining the Government's personalisation agenda. People will understandably be very wary of holding a personal budget or receiving a direct payment if there is a possibility of personal financial liability due to a change in Government policy.

3. LGA Response

- 3.1 The LGA is seeking a solution that provides a sensible way forward that means:
- 3.1.1 care workers are paid fairly
 - 3.1.2 individuals in need of care are not put at risk
 - 3.1.3 those paying for care directly through a personal budget or privately are not put in personal financial difficulty
 - 3.1.4 providers are not forced out of businesses
 - 3.1.5 councils are able to continue supporting vulnerable people in their communities and meet their obligations under the Care Act
 - 3.1.6 where historic and future cost burdens are identified, these are funded in full by Government with genuinely new and additional resource.
- 3.2 The LGA has consistently made the case to Ministers for genuinely new funding to help councils meet the historic, ongoing and future costs arising from sleep-in payments. We are arguing for the forthcoming social care green paper to set out a sustainable long-term funding solution for adult social care that enables councils to meet all funding pressures, and for an immediate injection of funding to stabilise the here and now.
- 3.3 The LGA successfully applied for permission to intervene in the Royal Mencap Society's appeal against an earlier EAT decision on the law relating to payment of the NMW for sleep-ins. We emphasised that we support fair pay for all care workers, but the financial consequences for councils could be significant if the court decides that the law requires sleep-in carers to be paid the NMW for their entire shift. The appeal hearing was considered by the Court of Appeal on 20 March 2018 and we are awaiting the outcome.

Background

The legal context

The LGA has always taken the view that carers 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.

The updated National Minimum Wage Regulations 2015 state:

“(1) Time work [time that counts for NMW/NLW purposes] includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

(2) In paragraph (1), hours when a worker is “available” **only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.**”

Substantively the same provision was in the earlier 1999 NMW Regulations.

Employment tribunal and subsequent appeal decisions in recent years have held that where a person is undertaking a sleep-in shift, the time when they are asleep may count for NMW/NLW purposes. This may be the case for example where they are unable to leave their place of work without facing disciplinary action, and/or that the person needs be physically present as a legislative requirement. Subsequently, the Department for Business, Energy and Industrial Strategy (BEIS) brought out

guidance in February 2015 and October 2016 stating: “A worker who is found to be working, even though they are asleep, is entitled to the national minimum or NLW for the entire time they are at work.”

In April 2017, Royal Mencap Society made an unsuccessful appeal to the employment appeals tribunal against an employment tribunal finding that the whole period of the Claimant’s sleep-in shifts at the Respondent’s premises constituted “time work” within the meaning of Regulation 30 of the 2015 Regulations.

The tribunal set out that the following (although not exhaustive) factors should be taken into account when answering the question of whether sleep-in times should be taken into account in the NLW/NMW calculation:

- The employer’s purpose such as having someone present due to regulatory or contractual requirements (e.g. Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Regulation 12).
- The extent to which the worker is restricted by the requirement to remain on the premises including whether disciplinary action would ensue if they were to leave.
- The degree of responsibility of the worker, contrasting a duty to simply make an emergency services call with the position of a night sleeper in the home of a disabled person with a more significant personal responsibility in relation to the night duties that might have to be performed.
- The immediacy of the need for the worker to provide services or intervene if something untoward occurs or an emergency arises.

Royal Mencap Society challenged the EAT decision on the law relating to payment of the NMW/NLW for “sleep ins”. The appeal was heard by the Court of Appeal on 20 March 2018 and we are awaiting the outcome.

Social Care Compliance Scheme

HMRC had begun action for back-pay against social care providers, primarily learning disability care providers. The Government then waived further penalties for sleep-in shifts underpayment arising before 26 July 2017. This was in response to concerns over the combined impact which financial penalties and arrears of wages could have on the stability and long-term viability of social care providers. Enforcement action for sleep-in shifts in the social care sector was temporarily suspended between 26 July and 1 November 2017.

The Government has made clear its expectation that all care workers should be paid the NMW/NLW.

On 1 November 2017, the Department of Health, HM Revenue and Customs (HMRC) and the Department for Business, Energy & Industrial Strategy published a new voluntary ‘[social care compliance scheme](#)’ (SCCS) covering historic sleepin liability payments. The scheme gives employers until the end of December 2018 to opt-in and identify what they owe to workers, supported by advice from HMRC. Employers who identify arrears at the end of the self-review period will have up to three months to pay workers by the end of March 2019.

ⁱ Cordis Bright Survey, 2016

ⁱⁱ Mencap press release, ‘Mencap dismay by Government indecision on funding for sleep-ins’ <https://www.mencap.org.uk/press-release/mencap-dismayed-government-indecision-funding-sleep-ins>, published 1 November 2017 ⁱⁱⁱ New sleep-in shift pay compliance scheme launched,

<https://www.gov.uk/government/news/new-sleep-in-shiftpay-compliance-scheme-launched-to-support-social-care-sector-and-identify-back-pay-for-workers>, published 1 November 2017

^{iv} CQC report 'The state of health and adult social care in England 2016/17'
http://www.cqc.org.uk/sites/default/files/20171123_stateofcare1617_report.pdf

^v ADASS Budget Survey 2017, <https://www.adass.org.uk/media/5994/adass-budget-survey-report-2017.pdf> ^{vi} NAO report, 'Personalised commissioning in adult social care'
<https://www.nao.org.uk/report/personalisedcommissioning-in-adult-social-care/>, published March 2016

^{vii} ADASS Personalisation Survey Report 2014, <https://www.adass.org.uk/personalisationsurvey2014/report>,