

## Pay for sleep-in and on-call shifts

What hours count towards the calculation of national minimum wage (NMW) when staff sleep overnight in the workplace? What about staff who are at home and on-call? These are big concerns for many employers, particularly charities operating in sectors where budgets are already stretched to their limit.

Historically, it was common practice to pay a flat rate for sleep-in or on-call shifts, with an hourly rate for waking time spent attending to duties. This approach was called into question following a number of cases, many of which were brought by care workers.

Last month the Employment Appeal Tribunal (EAT) handed down its decision in three appeals, which all concerned the calculation of pay for overnight work.

### What does this new case tell us?

The EAT recognised the difficulty that employers face but concluded that there is no bright line or single key with which to unlock every case. Instead, employers need to conduct a 'multifactorial evaluation'.

Frustrating as this will be for charities deciding how best to allocate limited resources, the judgment does highlight some potentially relevant issues which will apply to many common situations:

- **the reason for engaging the worker** – if an employer needs someone to be on-site at all times in order to comply with a regulatory or contractual obligation it is more likely that the individual will be classed as working throughout their whole shift, even if they are asleep or have nothing to do
- **restrictions on the worker's activities** – a worker who is required to remain on the premises throughout their shift and who would be disciplined for leaving is more likely to be working for NMW purposes just by being present than someone who is able to come and go as they please
- **level of responsibility** – a care worker who must keep a listening ear throughout their shift and act if required is more likely to be working for their whole shift than someone who is on-call from their own home and is only required to respond to an alarm pager for emergency call-outs
- **the immediacy of the requirement to provide services** – this is not just about the speed with which a worker is required to act, it is also connected to the level of responsibility they have. The EAT compared a worker who must decide whether to intervene and then deal with the issues, with a worker who is woken by another member of staff who has immediate responsibility for intervening

There will be borderline cases that are difficult to call and the EAT's decision reflects the fact that this remains a tricky area of the law. However, it is one that's important to get right and organisations should urgently review their arrangements to ensure they are not unwittingly in breach.

Failure to comply with NMW legislation can result in claims for up to six years' back-pay per employee, enforcement action by HMRC and criminal sanctions in the most serious cases, not to mention potential reputational damage.

Contact our [charity and social business team](#) if you have concerns or if you need help and advice on NMW issues.

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