

National Minimum Wage and sleep-ins

Organisations providing care services often require workers to spend time at the premises overnight on “sleep-in” duty. The law regarding whether these workers are entitled to be paid National Minimum Wage (NMW) for their time on sleep-in duty is complex.

Distinction between salaried hours work and time work

Workers paid by reference to the number of hours they work are deemed to be carrying out “time work” under the National Minimum Wage Act 1998. Workers paid for a fixed number of hours per year and who receive an annual salary in equal instalments are deemed to be carrying out “salaried hours work”.

It should be noted that while you may have contracts with a worker which seem to indicate that they are carrying out salaried hours work, their sleep-in duties can be argued to fall outside these hours, depending on the agreed arrangements with the worker.

Salaried hours work

Where workers are carrying out salaried hours work, in order to calculate how much a worker is paid per hour for NMW purposes an employer must average out the worker’s annual salary over all of the hours worked by the worker. There is then the question of whether to include every hour from a worker’s sleep-in duty in this calculation, or only to include the time that the worker is awake and performing tasks.

The case of *City of Edinburgh v Lauder (2011)* held that whether an employer need include all of the time the worker spends on sleep-in duties in this calculation will depend on the individual circumstances of the worker and, in particular, whether the sleep-in duties constitute a “core duty” of their work. If the sleep-ins do constitute a core duty, all of the worker’s time spent on sleep-in duty will need to be included in the calculation.

Time work

Where workers are carrying out time work, there is a question as to whether they need to be paid the NMW for every hour they spend on sleep-in duty or only for those hours that they are awake and performing tasks.

The recent case of *Esparon (t/a Middle West Residential Care Home) v Slavikovska (2014)* held that a care worker was deemed to be working throughout the entirety of her shift for NMW purposes, as her employer, the care home, was under a statutory requirement to ensure a suitable member of staff was available at the premises at all times. Whether cases where the employer is not under a statutory duty would be distinguished is unclear.

Enforcement

The NMW is enforced by HMRC and is generally initiated by the employee although third parties can also raise concerns. HMRC also have the right to investigate as part of a targeted

enforcement in a particularly low-paying sector. Where an employer is found to have failed to pay the NMW, there is no limit to the number of years that can be reclaimed in respect of arrears and no time limit on making the claims. In addition, a penalty is imposed payable to the Secretary of State set at 100% of the total underpayment of NMW (up to a maximum of £20,000).

In addition, an employee could bring a claim for unlawful deduction from wages in the Employment Tribunal. Such a claim must usually be brought within three months of the date of the deduction (that is, the failure to pay the NMW) or the last in a series of deductions. There is no limit on the length of arrears that can be claimed, provided it is all part of the same series of unlawful deductions.

Finally, an employee may bring a claim for breach of contract, either in the employment tribunal or the county court. Arrears can be claimed going back up to six years before the claim. Employment tribunals can only hear a claim for breach of contract if employment has ended and the claim is brought within three months of termination.

Summary of the issues

We believe that, where workers are carrying out sleep-in duties, there are difficulties for organisations trying to establish how much they need to pay those workers in order to satisfy the NMW requirements.

Firstly, an employer needs to establish whether a worker is carrying out salaried hours work or time work when on sleep-in duty. Secondly, an employer can face difficulties when determining whether, for NMW purposes, a worker is working throughout the entirety of their shift or only for the time that they spend actually performing tasks.

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