The NMW, Sleep-in shifts & the Social Care Compliance Scheme (SCCS)

January 2018
EMPLOYMENT LAW UPDATE 2018
### New Statutory rates – April 2018/19

<table>
<thead>
<tr>
<th></th>
<th>2017/18</th>
<th>2018/19</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower Earnings Limit (LEL)</td>
<td>£113</td>
<td>£116</td>
</tr>
<tr>
<td>National Living Wage</td>
<td>£7.50 p/h</td>
<td>£7.83 p/h</td>
</tr>
<tr>
<td>Stat mat/pat/adoption/ShP Pay</td>
<td>£140.98</td>
<td>£145.18</td>
</tr>
<tr>
<td>Statutory Sick Pay (SSP)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Earnings threshold</td>
<td>£113</td>
<td>£116</td>
</tr>
<tr>
<td>Standard rate</td>
<td>£89.34</td>
<td>£92.05</td>
</tr>
</tbody>
</table>
Paying the Recommended Living Wage is not a legal requirement. The figure is recommended by the Living Wage Foundation based on the cost of living.

<table>
<thead>
<tr>
<th>Year</th>
<th>London</th>
<th>Rest of UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov 2017</td>
<td>£10.20</td>
<td>£8.75</td>
</tr>
<tr>
<td>Nov 2016</td>
<td>£9.75</td>
<td>£8.45</td>
</tr>
<tr>
<td>Nov 2015</td>
<td>£9.40</td>
<td>£8.25</td>
</tr>
<tr>
<td>Nov 2014</td>
<td>£9.15</td>
<td>£7.85</td>
</tr>
<tr>
<td>Nov 2013</td>
<td>£8.80</td>
<td>£7.65</td>
</tr>
</tbody>
</table>

[www.livingwage.org.uk](http://www.livingwage.org.uk)
True or False

Employment tribunal fees were ruled to be unlawful and discriminatory by the Supreme Court in 2017?
Employment tribunal fees – True or False

TRUE

Fees for those bringing employment tribunal claims were ruled unlawful by the Supreme Court as a result of a 4 year legal challenge by UNISON.
Supreme Court allowed the appeal by Unison, holding that the Employment Tribunals and the Employment Appeal Tribunals Fees Order 2013 (which led to a 70% reduction in claims) was unlawful and should be quashed.

The effect of this judgement is that the fees (ranging from £390 - £1200) were unlawful from the time they were introduced and must be refunded.

**£32m -** The scheme to refund tribunal fees is now open

There has been a 64% increase in employment tribunal claims (from single claimants) since this ruling.
Employment law update

Other things to look out for in 2018;

• **GDPR** – General Data Protection Regulations will apply from 25\textsuperscript{th} May 2018. Employers should consider what personal data is held, where, by whom and why it is being processed. Also review consent procedures.

• **Employment Status** - Government discussion paper on clarifying the employment status tests for employment rights (i.e. whether someone is an employee, worker or self-employed) and for tax (i.e. whether someone is taxed as an employee or self-employed).

• More cases, including the Pimlico Plumbers and Uber appeals.
Application of the NMW to Sleep-in shifts & the Social Care Compliance Scheme (SCCS)
To pay staff the Statutory Minimum Wage or above?

### Legal Obligation

#### 21 and over
- “National Living Wage”
- £7.50
- £7.83 April 2018

#### 18 to 20
- £7.05
- £7.38 - 2018

#### Under 18
- £5.60
- £5.90 - 2018

#### Apprentice
- £4.05
- £4.20 - 2018

- £3.50
- £3.70 - 2018
Once upon a time, workers on a sleep in shift were paid a flat rate per shift (usually less than the National Minimum Wage per hour). This was ok because time spent asleep was not considered working time.

As a result of successful challenges to this assumption, time spent sleeping is now generally considered working time (Whittlestone v BJP Support)

To prevent an underpayment, a workers average wage during the reference period* must not fall below the National Minimum Wage.

*The reference period refers to the frequency with which they are paid, i.e. weekly/monthly/4 weekly, etc.
**Case Law - The “Fish and Chips” law**

*Whittlestone v BJP Home Support Ltd (2014)*

A care worker successfully argued she had been underpaid in respect of sleep-in shifts.

Key factors were that she was required by her contract to sleep-over. An express term of her contract stated that **failure to do so would result in disciplinary action** and there was evidence that she could not, as the judge put it, 'slip out for a late night movie or for fish and chips'.
Overnight Case

A 39 year old PA works 15 hours plus 2 sleep-in shifts per week and is paid weekly? Is the PA being paid enough?

Sleep over rate = £56 (11pm-7am = 8hrs)
Hourly rate = £9.50

15 x 9.50 = £142.50 + £112 = £254.50 per week
£254.50/31 (hours worked in weekly pay reference period) = £8.21 per hour

Yes – Average hourly rate is above the NLW for workers aged 25 and over
Overnight Case (2)

A 24 year old PA works 8 hours, plus 3 sleep-in shifts per week and is paid weekly? Are they being paid enough?

Sleep over rate = £50 (11pm-7am = 8hrs)
Hourly rate = £8.58

8 x 8.58 = £68.64 + £150 = £218.64 per week
£218.64/32 = £6.83 per hour

No – Average hourly wage is below the NMW for workers age 21 and older
Potential risk / Solution

If an employee has been paid lower than the Statutory Minimum Wage they can take their employer to tribunal and demand the underpayments which would be back dated.

To avoid this employers should do the following 2 things;

1. **Amend the contract to ensure the right wage is being paid.**

2. **Note the date!** The employee has 3 months from this date to claim back any underpayment.
Early 2017 Govt. reaffirmed its expectation that all employers pay their workers according to the law, including for sleep-in shifts, as set out in guidance entitled ‘Calculating the National Minimum Wage’.

However on 26th July the government announced it will:

• **waive historic financial penalties owed by employers who have underpaid their workers for overnight sleep-in shifts before 26 July 2017**

• **temporarily suspend HMRC enforcement activity concerning payment of sleep-in shifts until 2 October 2017 – was ultimately put back to 01/11/17**
A multifactorial evaluation is required. No single factor is determinative and the relevance and weight of particular factors will vary with and depend on the context and circumstances of the particular case – similar to an employment status assessment.

But reiterated - The fact that a worker has little or nothing to do during certain hours does not mean she is not working; ‘work’ is not equated with any particular level of activity and can include merely being present to deal with something untoward that might arise.
New sleep-in shift pay compliance scheme launched

Direct Payment employers can now opt into the new Social Care Compliance Scheme (SCCS), giving them up to a year to identify what they owe to workers, supported by advice from HM Revenue and Customs (HMRC).

Employers who identify arrears at the end of the self-review period will have up to three months to pay workers.

- Government announcement [here](#)
- Further guidance [here](#)
Mencap et al are awaiting a Court of Appeal hearing seeking further clarification that time awake should be classed as working time for the purpose of paying the NMW.

Focus Care appeal is listed for March 2018 with an anticipated judgement in June 2018. If Mencap win it would directly reverse the EAT case law upon which the current HMRC position is based.

The possibility of a further appeal to the Supreme Court remains.....
MSL
24hr Legal and Employment Advice Line

0161 603 2167
or email premiercare@msl.co.uk

This advice line may only be used if you hold a valid Premier Care Home Employment policy.
Any Questions?