The Care & Charity Sector White Paper March 2018







**Carl Shaw**Commercial Director

Carl is Commercial Director of Bollington Insurance, with responsibility for the Care and Charity division.

Over the years, he has built strong insurer relationships and worked with a number of organisations in various care and charity sectors, helping them to find good value insurance solutions where they had previously struggled.

#### CONTENTS

pg 3. What is the law?

pg 4. What about carers?

Pg 5. What is the latest from HMRC and the Government

pg 6. What is the future?

The care sector is under increasing pressure – and organisations are warning that this could start to have an impact on the quality and availability of care.

To add to recent pressures on finances in the care and charity sector, payment of the minimum wage (or national living wage) for workers who sleep-in as part of their job is now coming under the spotlight.

Throughout a 'sleepover' shift, workers are generally required to be on-site at a place of employment (e.g. a care home), as they may need to tend to the physical or emotional needs of those they are caring for during night-time hours.

Standard practice in the sector has been to pay workers a flat sum for each sleepin shift, only paying the national minimum wage on top of this for any time when a worker is awake and engaged in helping the person(s) they support.

However, as reported in <u>The Guardian</u>, this interpretation of the law has been shaken up in recent times – especially following a ruling that <u>Mencap must pay</u> <u>workers the minimum wage</u> for such shifts.

According to Unison, Mencap have now agreed to this in respect of employees' present and future salaries, but are appealing an employment tribunal ruling that such payments are to be backdated to cover previous underpayments, at an anticipated cost of £10.5m to the charity.

Many organisations who provide sleep-in support services in the sector will be concerned about such developments. Not only that, tens of thousands of disabled or elderly people who employ their own support workers – using money from their local council – will be alarmed at the prospect of having their care withdrawn; the independent living that they manage to achieve with this assistance is under threat if funding is not secured, and they may enter residential care instead.

With budgets already squeezed, social care is potentially facing a fresh crisis, with an estimated £200m shortfall to be made up to cover the anticipated cost of providing the national living wage to workers alone.





### What is the law?

Following the Mencap ruling, Unison general secretary Dave Prentis said: "Care workers who provide round-the-clock care for the elderly and disabled should be paid at least the legal minimum." While Mr Prentis refers to 'elderly and disabled' people, the controversy around this issue also spans children's homes, too.

The question is, what constitutes the 'legal minimum' amount that sleep-in workers should receive? While some trade unions may be quite unequivocal in the fact that 'legal minimum' is the national living wage, others might argue that the law is still open to some interpretation.

HMRC – who are responsible for enforcing pay rules – advises that where pay awards are challenged, each case is investigated on its individual merits. However, wage inspectors have more recently been taking the stance that workers are entitled to the 'minimum rate' (the national living wage) even when they sleep, where their contract specifies that they must remain on the premises.

It is here that the crux of the matter lies: if workers were not required to stay on-site to tend to those they care for, they would most likely be classed as 'on call' rather than working, and therefore would not be entitled to the 'legal minimum' (national living wage) hourly rate.

It was only two years ago that the status quo was very much that sleep-in workers were 'on call', hence the flat sum paid to them – supplemented by the minimum wage for paid work time – was adequate to meet the demands of the law.

However, the Mencap ruling highlights the shift in interpretation of the law, meaning on-site sleepovers are likely to attract a full national living wage hourly rate from now onwards – though there is still ongoing debate about back-dating payments.

There are no hard and fast rules, though many care providers will now look to pay workers the national living wage hourly rate for sleep-in work, and will need to make provisions if the HMRC decrees that they must make back payments to workers on this basis, too.

"Care workers who provide round— the—clock care for the elderly and disabled should be paid at least the legal minimum."





### What about carers?

Here's the rub. Carers do a magnificent and essential job, often in challenging circumstances. They are giving up time that they might spend with loved ones or friends, by tending to the loved ones of others. The argument is that carers deserve to be paid a decent wage for an essentially compassionate act of giving up nights in their own bed, to help people who struggle to help themselves.

Unfortunately, it is the general squeeze in funding that makes it difficult for service providers to offer higher wages in this sector. Care work is demanding and – while it has its rewards – is often not the best paid career choice which is why over 900 carers a day are leaving the sector.\*

The needs of carers need to be carefully balanced against those they care for. If care is not affordable for all, then with an aging population, there is the potential for an impending crisis in the sector. Yet the sector still needs to attract and keep good quality staff to maintain acceptable standards of care, so must pay its workers reasonably to ensure they continue their vital work.

Controversy arises over the fact that sleep-in staff are most often not called upon to do any actual work – i.e. they literally just sleep a large majority of the time. While care providers know that having somebody on-site is necessary to ensure the wellbeing of those under their care, must they really be paid when they are sleeping?

Then again, without the availability of such workers, there would potentially be a big gap in the care offering for vulnerable people. While few would argue that care workers, unable to leave premises and needing to be available throughout the night, should receive appropriate recompense, the debate may continue over what 'appropriate recompense' means to carers, their employers, and the government of the day.

"...the sector still needs to attract and keep good quality staff to maintain acceptable standards of care, so must pay its workers reasonably to ensure they continue their vital work."



\*Social care system 'beginning to collapse' as 900 carers quit every day. Source: BBC – http://www.bbc.co.uk/news/uk-england-39507859



# What is the latest from HMRC and the Government?

As of 1st November 2017, the government has made available a new Social Care Compliance Scheme (SCCS). For employers in the social care sector who believe they may have paid their shift workers less than the National Minimum Wage (or Living Wage), there is the possibility to opt-in to the new SCCS scheme.

Employers who opt-in to the scheme will need to conduct their own review to advise HMRC where employees may have been underpaid. They will be given up to a year to ascertain whether they have underpaid sleep-in employees, then a further three months after returning their declaration to make payments that may be owed as a result.

Any organisation that complies with the rules of the scheme will not be subject to further financial penalties or 'naming and shaming', the government has confirmed

In cases where a complaint has been made already by an employee, HMRC will contact the employer and encourage them to opt-in to the scheme. Employers can also opt-into the scheme here.

For those yet to be reported to the <u>HMRC</u>, there may be a reluctance to take part in SCCS, particularly as this would appear to be an acknowledgement that their workers may have been underpaid, despite little clarity or guidance on the matter in the past that correlates to the current enforcement rules in place.

However, with the alternative being HMRC enforcement, this scheme could buy some more time for employers in the sector to set aside appropriate funds to make back payments. It may be necessary to take legal advice in this regard, to see whether opting in to the scheme would be a sensible move or not.

Deciding not to opt-in to the scheme could also be costly. Employers who choose not to opt-in will receive no further concessions and remain subject to HMRC investigation, with potential financial penalties of 200% of the amount owed up to £20,000 per worker, prosecution and reputational damage, too.

While the government advises it is looking to minimise the impact on the social care sector and is liaising with the European Commission to see if financial assistance would be subject to state aid rules should it be offered, there is still no conclusion as to if or when any funding assistance may be available.

"Deciding not to opt—in to the scheme could also be costly."



## What is the future?

The social care sector is already being squeezed through increased scrutiny – from regulators including the Care Quality Commission, as well as the media – and big cuts in funding, with  $\pounds 5.5$ bn cited as having been slashed from council spending in England since 2010.

With the added weight of meeting the cost of the national living wage for sleep-in workers – and potential back payments required to meet previous minimum wage requirements – it is understandable that organisations in the sector are worried about their very existence.

Perhaps the question here is: will there even be a future for many homes and service providers in the sector, given such a difficult environment?

There are politics at play here. What does the government propose to do to fund social care going forward? At the very time social care is under threat, demand for beds in care homes continues to rise, yet providers are struggling to cope financially. Is it inevitable that something must give? Should care workers accept lower payments for sleepover shifts if the alternative is that they don't have a job in the sector?

It is a very difficult problem to address successfully – if the public want an effective social care strategy for the future, might there be a need to pay for it through taxation, for example? There could be some unpopular – yet necessary – choices to be made for the government to meet such issues head-on.

All is not lost. Technology may come to aid of cash-strapped care providers, for example. Acoustic monitoring and sensory equipment can potentially be used to alert care providers who can be 'on call' for more than one location, allowing them to tend to the needs of a resident who has woken at night, for example, without a member of staff having to be permanently on-site.

This could allow workers to sleep at home and respond only when needed – hence negating the need to keep them on-site and pay them the national living wage at all times, and possibly reducing staff levels needed as a result.

It's clear that care providers need to innovate to make the most out of what they have. This includes making sure that general costs are kept to a minimum, while ensuring that sufficient insurance cover is in place for any events that may occur to cover the costs of claims made.

Bollington's care and charity team can help to keep the costs of insurance down and your payments manageable. We are also happy to offer advice relating to managing your risks, with a specialist risk management team that can give you access to legal and HR advice if required.

Please contact us on 01625 348029 to discuss your needs, visit the care and charity section of our website, or email care@bollington.com.

