



HR Bulletin

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Sleep-over shifts

There are some jobs that you really can do in your sleep. And this fact lies at the heart of a very tricky issue when it comes to calculating working hours for the purposes of the National Minimum Wage. Think of a care worker who works a 'sleep-over' shift.

He or she may work a normal shift during the day and then stay over, ready to be woken if needed, but otherwise allowed to sleep through the night. We have known for some time that for the purposes of the Working Time Regulations, all of the time spent 'on call' at the worker's place of work will count as working time (this raises the interesting prospect of having to wake someone up when it is time for their rest break) but the position is much less straightforward when it comes to the minimum wage.

At first sight the National Minimum Wage Regulations 2015 seem to have it covered. Regulation 32 says that time spent by a worker 'on call' at or near his or her place of work will count as working time unless the worker is provided with suitable 'facilities' for sleeping, in which case the time spent asleep will not count. This led most people to assume that provided an employee is given a proper place to sleep, time spent actually sleeping will not count for the purposes of the minimum wage. But this is not what the case law suggests. A recent decision of the EAT in three joined cases *Focus Care Agency Ltd v Roberts; Frudd v The Partington Group Ltd and Royal Mencap Society v Tomlinson-Blake* (EAT, 21 April 2017) says that a range of factors have to be weighed up when considering whether time spent sleeping counts as working time.

The central problem is that Regulation 32 only applies to time that would not otherwise count as working time. Being 'on call' suggests that the worker isn't doing any work at the moment – but may be asked to do some at short notice. But if it is part of the employee's job to sleep over on the premises then that might not be seen as being 'on call' at all; being present in the workplace is part of the employee's job. And if it is, then why would it matter whether the employee is allowed to go to sleep for all or part of that time? As the EAT put it in *Whittlestone v BJP Home Support Ltd* [2014] IRLR 176: 'work is not to be equated to any particular level of activity'.

Of the factors identified by the EAT in the Focus Care cases, the most important is probably whether the employer has a regulatory requirement to ensure that a certain number of staff are on the premises at all times. In such cases it is easy to see the value that the employee provides to the employer simply by being present – conscious or otherwise. Other factors likely to be important include whether the employee is free to leave the premises during the shift or is obliged to remain throughout and the degree of responsibility that the employee has.

It may be, for instance that if the premises are staffed through the night by employees working a night shift, then workers who are sleeping on the premises just in case they are needed are less likely to be viewed as working in their sleep.

These cases are likely to go to the Court of Appeal - permission has already been granted – but in the meantime the position is that anyone who works a sleep-over shift because the employer needs to provide a certain level of cover during the night would probably be held to be working. That does not mean, of course, that they need to get paid the full minimum wage of £7.50 per hour for each hour of their sleep-over shift. The minimum wage does not apply on an hour-by-hour basis but is averaged over the course of each pay reference period.

For a monthly paid employee, you need to take the amount that the employee is paid over the course of a particular month (or week for weekly paid workers) and divide that by the number of hours worked. It is that average hourly rate that needs to be at least equivalent to the rate of National Minimum Wage. This means that if the worker's normal hourly pay is in excess of the minimum wage, then that creates a 'buffer zone' that can absorb some of the shortfall in the payment for sleep-over shifts. Of course part-time care workers will, inevitably, have less of a buffer zone because they are working fewer hours at a rate above the minimum wage. Their work may need to be monitored carefully because if they also take a significant number of sleepover shifts their overall pay could well fall below the legal minimum.

For the future, the most significant factor is that the minimum wage is on the rise. Gone are the days when the rate was set cautiously by the Low pay Commission with the key aim of not adversely affecting employment levels. Labour proposes a £10 rate by 2020 – and would also abolish the lower rates applying for younger workers.

Under a (perhaps more likely) Conservative Government, the rate will rise to 60 per cent of median earnings by 2020 and then continue to rise in line with those earnings. Combine this rise with continuing pay restraint in the public sector and any buffer zone local authorities might have had will soon be a thing of the past.

The cost of social care is a key issue whoever emerges victorious from the general election campaign. One hidden cost is that increases in the minimum wage will have a bigger effect on the pay of care workers than may currently be realised.

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