



**ADULTS AND COMMUNITIES OVERVIEW AND SCRUTINY COMMITTEE**  
**14 NOVEMBER 2017**

**IMPACT ON ADULT SOCIAL CARE OF THE NATIONAL LIVING WAGE**  
**AND PAYMENTS TO STAFF FOR SLEEP-IN AND LIVE-IN CARE**

**REPORT OF THE DIRECTOR OF ADULTS AND COMMUNITIES**

**Purpose of Report**

1. The purpose of this report is to advise the Committee of the implications of recent developments in how the National Living Wage (NLW) and the former National Minimum Wage (NMW) applies to staff salaries for sleep-in and live-in duties.

**Policy Framework and Previous Decisions**

2. All Councils are required, by statutory Care Act Guidance, to satisfy themselves that the price providers are paid for care is sufficient to meet the actual costs of providing that care. This includes ensuring that the rates paid are sufficient for employers to meet their obligations to pay the NLW.

**Background**

3. In recent years there has been a level of uncertainty nationally over whether 'sleep-ins' for staff delivering care services should be considered as working time, and as such attract the NLW/NMW.
4. On 21 April 2017, Royal Mencap Society lost an employment appeals tribunal case. The judgement found that the NLW/NMW should have been paid and Mencap have lodged an appeal hearing due for March 2018. HMRC were due to commence an action for back pay (currently up to six years) with additional penalties applied of up to 200 per cent on 1 September 2017. This has been put on hold by the Government until November 2017.
5. Social care providers have lobbied the Government heavily regarding the implications of potential payment of back pay and potential HMRC fines impacting on their financial viability.
6. Historically, most staff have not been paid an hourly rate for sleep-ins, but instead were paid a block sum to cover the night time period, typically less than the equivalent hourly rate for other daytime duties. If, however, staff were woken during the night and required to attend to the needs of service users there were usually arrangements to make additional payments for work undertaken.

7. There is no definitive picture of the numbers of staff undertaking sleep-in duties nationally, but it is clear that the practice is concentrated in parts of the care sector, mostly in supported living and residential services for adults with learning disabilities.
8. The position locally reflects the national picture. There are currently 35 independent sector residential care homes within the County that make regular use of sleep-in staff. Most of these are smaller homes for people with learning disabilities where the sleeping staff member will be the only member of staff on duty, but other homes do also use sleep-in staff to supplement waking night staff.
9. The Council currently commissions 332 sleep-in sessions per week in supported living services delivered for people living in 46 properties (mostly for people with learning disabilities).

### **Implications for the Council for directly employed staff**

10. All employers are required to ensure that staff receive at least NLW for the hours worked. Staff can be paid at a lower rate for sleep-in duties as long as the average hourly average rate across the working week is above NLW.
11. Currently there are four directly provided services for people with learning disabilities where staff undertake a total of 35 sleep-in sessions each week, for which they receive a standard payment of £34.68 per night. All the staff undertaking these duties are paid an hourly rate significantly higher than NLW for their daytime work, and are therefore paid above NLW across the working week. The Council will ensure that this position is monitored carefully to ensure ongoing full compliance with NLW requirements.

### **Implications for other employers of care staff**

12. The Council has contacted local 24 hour care service employers to remind them of their responsibilities to pay NLW. There has been a mixed level of awareness of the issues in the sector, with the majority of larger providers having appropriate plans in place, but some smaller providers being less advanced in their planning. There is significant concern about the financial implications (both ongoing and in relation to back pay).
13. Some individuals receiving a personal budget via a direct payment (and people who are independently arranging and funding their own care) will be directly employing personal assistants who may be undertaking sleep-in duties and in some cases providing live-in care. These must also meet NLW obligations to their employees and may also be personally liable for back pay if they have been paying less than the NLW/NMW for sleep-in shifts or "live-in" duties.
14. The Council has contacted the direct payment service users likely to be directly employing staff to advise them of their NLW obligations. Where an individual's direct payment is insufficient to pay NLW an individual review of the support plan will be undertaken to ensure an appropriate outcome.

### **Commissioning implications for the Council**

15. The use of staff for sleep-in duties has been declining for some time and the Council's strategy is to reduce the number of sleep-in sessions still further. It is now

possible to use new technologies to monitor and reassure service users more effectively. Waking night staff can cover a number of locations more effectively using, for example, movement sensors or closed circuit TV. This provides more independence for service users and can be significantly more cost effective.

16. The Council's new framework for supported living services requires that all providers must pay NLW for working hours. The rates the Council pays for care have been evaluated to ensure they are sufficient to ensure that appropriate hourly rates can be paid to staff.
17. There have been a number of issues in transitioning existing service users from the former supported living framework due to concerns about the implications of backdated claims for NLW for sleep-ins. Where this has happened, local solutions have been developed to ensure service continuity for service users and compliance with ongoing payments of NLW to staff.
18. The Council does not make specific payments for night time care for residential care services, but pays a weekly fee based on the individual's needs. This is reviewed annually to take into account any new cost pressures, including the NLW.
19. The Council commissions very little domiciliary care for sleep-in or live in care. Where this does take place the rate paid will be sufficient to pay staff NLW.
20. One of the key commissioning concerns is the impact of any backdated salary claims or HMRC fines on the viability of care providers, and therefore the stability of a significant part of the care market. This is a national issue and one where the Government needs to take a leading role in identifying how the sector can remain financially sustainable given the likely cost. The Council will monitor the viability of local providers and take any appropriate action to address potential provider failure.

### **Resource Implications**

21. According to a national survey conducted by Cordis Bright (2016), 8,000 care settings for learning disabilities employ staff that are not being paid the NLW for sleep-in shifts, and their most conservative overall cost estimate of back-pay liability in the sector is £400 million. The national annual cost to the learning disability sector is estimated by providers to be £200m a year.
22. An assessment of local supported living providers indicated that the cost to employers within the Leicestershire area could potentially be £315,000 per annum.
23. It is not possible, at this time, to determine the cost to employers within the residential care sector as shift patterns, staffing rotas and pay are decided locally by each provider, but it is expected that these costs will be identified through the annual fee setting process.
24. Directly employed staff within the Council who undertake sleep-in duties are paid an average hourly rate above the NLW over the working week.
25. Work is underway to identify the potential impact and cost to direct payment recipients. Whilst the number of recipients employing sleep-in staff is small, the financial consequence could be larger because the Council may be required to meet the pay costs and backdated payments for people with personal budgets.

26. The Director of Corporate Resources and Director of Law and Governance have been consulted on the content of this report.

### **Conclusions**

27. Recent clarification on the law relating to payment of NLW has significant implications for the commissioning and delivery of care and support services. Some of these will require a national Government response, but the Council has, as far as it can, taken appropriate action to manage the situation locally to ensure NLW compliance and market stability.

### **Officer to Contact**

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### **Relevant Impact Assessments**

#### **Equality and Human Rights Implications**

28. The Council should ensure that appropriate care and support is available for all people in a way that ensures human rights are met and services are delivered in a fair and consistent way for people with protected characteristics.
29. As an employer the Council must ensure that the human and equality rights of its staff are respected.
30. The actions outlined in this report are designed to ensure that these responsibilities are met.