

SLEEP-IN ANNOUNCEMENT 1 NOVEMBER 2017

THE KEY QUESTIONS



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So should you self-review?

We consider providers will want to await answers to some of the many questions posed in this note before committing to a self-review. All arrears have to be paid by a long-stop date of March 2019 regardless of the opt-in date, so the opportunity to self-review may not be lost unless it is expressly declined by a provider. We currently see little benefit in participating in the SCCS scheme, for the reasons explained below.

What about the Mencap appeal in March 2018?

It is clear that the Government's approach is influenced by the decision in *Mencap v Tomlinson-Blake* and others taken by the EAT earlier this year. That case is on appeal. It would seem clear to us that no provider would want to commit to complete the very significant administrative work of carrying out a self-review before publication of the decision in the Mencap appeal.

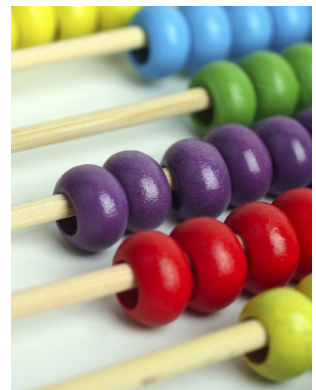
On what basis would arrears be expected to be calculated?

The HMRC guidance published yesterday (see [here](#)) includes what we consider to be a confused section intended to help Employers, and those individuals who require support who may engage personal assistants directly, to determine whether every hour of a sleep-in counts. Does this guidance in itself indicate that HMRC is still open to the possibility of not every sleep-in hour counting? On the one hand, the Guidance states that wherever there is a requirement to be present, a worker is treated as working throughout a sleep-in. However, it also provides:

"Your worker is likely to be on-call and not working throughout a sleep-in shift if all the following apply:

- their contract sets out:
 - their working time
 - any period that they are permitted to sleep during a night shift
- you provide suitable sleeping facilities."

We are not clear if this is a clumsy attempt to reference the situation where a daily average agreement (a written agreement between the employer and the employee that sets out the average hours that the worker is expected to work whilst on-call) has been agreed in relation to sleep-in and/or live-in care. The Guidance doesn't appear to directly replicate any specific part of the NMW legislation or case law, but our view is that this section does seek to try to identify an exemption where sleep-in time would not count. In any event, it is not clear if this exclusion is considered to be irrelevant if the worker is required to be present throughout the night.



On what basis would arrears be expected to be calculated?

Over what period should you assess arrears?

It would appear that the Government are expecting the self-review to be done looking back over a period of six years although yesterday's announcement does not actually confirm this. However, can providers really be expected to assess over a period of six years when historically the approach was that only the hours awake count?

Firstly, the initial case that the Government and HMRC rely on to suggest that all hours count was not decided until November 2013, and so can HMRC really expect providers to go beyond that point?

Secondly, the updated enforcement guidance from the Government ([here](#)) accepts that: "Government guidance has been updated following developments in the law, but for a period before February 2015 was potentially misleading on this issue." So what does that mean? That guidance was clear that time spent asleep didn't count in a typical sleep-in setting.

In light of this, will HMRC still enforce for arrears before those dates and expect any self-review to do so as well? It appears that is the intention.

Our view is that it would be unreasonable for them to do so. However, the announcement leaves providers having to decide whether to seek to persuade HMRC of that through an inspection or self-review process and potentially to challenge them through the courts if ultimately a Notice of Underpayment is served relating to a period before February 2015. The enforcement guidance also conveniently fails to mention that HMRC's own internal guidance provided that time spent asleep would only be working time in exceptional circumstances until March 2016.

Some providers have already successfully navigated inspections post-summer 2016 that did not require them to address arrears before February 2015. Are those providers now expected to self-review too?

HMRC needs to take a consistent position to all providers in the sector and explain how they are ensuring consistency across the sector and the basis they consider it reasonable to require arrears to be paid in respect of periods before February 2015 or March 2016.

Six years back from when?

If a provider delays opting to self-review until December 2018, does it count back six years from that date? It would appear to be beneficial for providers in that category to start any self-review as late as possible.



Over what period should you assess areas?

What if we had been signed off by HMRC as compliant previously?

Providers in this category will want to review the strength of their argument that they had a legitimate expectation from HMRC's approach that their arrangements were compliant. We consider it would be better not to engage in a self-review in these circumstances (or at least regarding any period before a successful HMRC inspection).

What if you are already under investigation?

The announcement highlights that there are a limited number of HMRC investigations at an advanced stage that were paused in July 2017 and suggests "a bespoke financial assessment may be undertaken to establish the impact of repaying liabilities upon that employer's viability. Enforcement action may be delayed for these providers, allowing additional time for the repayment of sleeping time arrears, if the financial assessment establishes that such time is required to avoid threatening the loss of existing care workers' employment and/or the interests of vulnerable service users." So how long for and could that go beyond March 2019? It would appear that the self-review won't be offered to these providers, but we consider it would be difficult to say that certain providers, who happen to have an inspection before July 2017, should be given less time to address their arrears and therefore such an approach could be open to challenge on consistency grounds.



What if you are already under investigation?

What about the unmeasured work argument?

In our view, there is a clear contrast between the approach HMRC is now taking to sleep-ins and the approach taken to those workers who sleep in as part of a live-in care assignment which is supported by case law from the Court of Appeal. We don't believe there is a clear legal justification for this difference. In a live-in care scenario, a live-in carer would need to be present throughout the night, satisfying the Government's latest test in respect of sleep-ins. In theory, this should lead to the conclusion that every hour a live-in carer spends asleep where they are required to be present in a service user's home should count for NMW purposes. However, that is not HMRC's approach. They still appear to maintain the view that a live-in carer, paid a flat rate, is working unmeasured work and that it is the time spent carrying out duties that counts for NMW purposes. We believe that is the right approach for live-in care and should be applied in respect of sleep-ins. If HMRC were to change their current approach to live-in care, they would destroy the live-in care market overnight. In the many challenges we have with HMRC they have failed to give a reasoned explanation as to why being asleep is work for a sleep-in and not for live-in care.

We consider the question as to why a sleep-in is not also regarded as unmeasured work, with only time spent performing duties counting must be addressed directly and coherently by HMRC before any self-review is carried out on the basis currently expected.

Is the Government going to fund any arrears?

They are still exploring whether this is possible taking into account rules on State Aid. Our view is that they will not fund any arrears as it would be too costly and too difficult to implement in a fair way. Providers who had taken a hit themselves to change their approach a number of years ago would rightly feel that it would be unfair that peer organisations are funded by the Government for these arrears. However, the announcement does suggest that providers who are currently under HMRC inspection may be offered some preferential treatment although no details have been provided. Again, this appears unfair.

Given the deadline for payment in self-review cases ties in with the Brexit date, March 2019, is the State Aid argument just a convenient excuse?

Will our commissioners foot the bill?

Most contracts with commissioners will be absolutely clear that compliance with the law is the provider's responsibility, so the main fall-back argument would be around the responsibilities under the Care Act for market shaping. In some local authority areas, the impact on service provision of the requirement to back pay over six years could be huge. Sadly, few commissioners will have the resources to assist regardless of these duties, although we are aware that some Local Authorities have assisted with backdated payments for a limited period and a number of Local Authorities are now paying sleep-ins at increased rates. Providers should be challenging commissioners where this is not the case.



Is the Government going to fund any arrears?

What is the benefit of the self-review?

Most providers have taken into account every hour of a sleep-in into account when calculating sleep in compliance from at least 26 July 2017. Given that no penalties are going to be imposed for NMW shortfalls before that date whether a self-review is carried out or not the real question is will the assessment of arrears under a self-review be more beneficial than allowing HMRC to take their "normal" approach to enforcement and will you have more time to make the payment under the self-review option.

What does normal enforcement mean?

The announcement provides that Employers that choose not to opt into the scheme will be subject to HMRC's "normal" enforcement approach. What is normal in this context? The sector is well aware that the normal approach up until summer 2016 was that only time spent awake and working counted and many providers navigated HMRC inspections before that date and were found to be compliant. In our experience in dealing with HMRC, the enforcement process can take many months and therefore the timescale for repayment may not differ substantially compared with the SCCS scheme.

What should you do next?

We consider providers will need to take a strategic decision whether to challenge HMRC through their normal inspection process or accept the need to self-review. At this moment in time, we see no real incentive for providers to undertake a self-review, certainly before the questions posed in this note are addressed.

Providers who don't take account of every hour of a sleep-in need to review their arrangements to see whether they remain confident in their current risk-management strategy.

For individuals who employ personal assistants directly, our private client team will be preparing an easy read guide to help them understand their situation and the possible options.

FURTHER INFORMATION

For further advice and support on this issue, please contact:



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