



# Workers Required to Sleep In - Minimum Wage

## BACKGROUND

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Many workers are required to sleep at or near their place of work and often they are paid an allowance for doing it. However the allowance often provides an hourly rate below the National Minimum Wage level because the employee is not assumed to be “working” for the whole time of the shift.

This is particularly common practice in the care sector, security and hotel industries. For example a care worker might be required to be on premises for a 12 hour night shift, but is allowed to sleep during that time. Typically a care worker could be paid a £30 allowance for such a shift.

National Minimum Wage Regulations (NMWR) appear to allow such practices by stating that time spent sleeping on the employer’s premises did not count for the purposes of the NMWR . However, a series of Court and Tribunal decisions since 2000 have undermined that assumption, leaving open the question of whether “sleeping in” time should legally count as paid work and consequently be subject to the National Minimum Wage.

This factsheet explains the legal context for sleeping in at work, and how this relates to regulations on the National Minimum Wage regulations. This will include an assessment of how recent Employment Appeals Tribunal and Court of Appeal cases have changed the assumptions about how much people sleeping in at work are entitled to be paid.

The factsheet also reports on the results of a UNISON survey which makes clear the kind of problems our members are facing as a result of sleep-ins, gives branches practical advice for organising around this issue, and provides a practical way for branches to share best practice in the future.

## LEGAL CONTEXT

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In recent years a number of employment tribunal, Court of Appeal and European Court of Justice decisions have found in favour of employees claiming they were illegally paid below the National Minimum Wage during periods when they were “sleeping-in” at their workplace.

You might expect these decisions to set a precedent, meaning it is now illegal for employers to pay workers less than the NMW when they are sleeping in. However, the complexity of the regulations, differences between the cases and contradictions between the various judgements mean that this is not a clear cut issue. Without further legislation, cases of employers illegally paying below



the NMW in this way will continue to be enforced through the tribunal system and the National Minimum Wage Enforcement Unit.

Nonetheless, recent case history on this subject can give us an indication of which scenarios might be looked on favourably by tribunals and the courts, and those that would not. Below we give an overview of the regulations, how they apply to different types of “work” and how this has effected rulings in a number of recent cases.

### The National Minimum Wage Regulations

- **time work** — where workers are paid according to the amount of time they work
- **output work** — where workers are paid according to the amount they produce
- **salaried work** — where workers are paid a regular annual salary, even if their hours vary over the year (this includes term-time only staff on annualised pay)
- **unmeasured work** — where workers have specific tasks to be done but do not have regular hours of work, such as a hostel wardens.

So to understand how the regulations apply, it is crucial to understand which type of work is being carried out.

#### Time work

Time work is time when the worker is required to be available at or near a place of work for the purpose of doing work, whether or not work is actually provided. This includes being “on-call”, which is subject to exceptions when:-

- the worker’s home is at or near the place of work, and the worker is entitled to spend the time at home; or
- the worker is allowed to sleep at or near work, and is provided with facilities for sleeping, time counts while he or she is awake for the purposes of working.

This does not mean that a person working from home or provided with sleeping facilities is not eligible for the NMW. It does mean that a worker who is “on call” to work in these circumstances can be paid the below the NMW for that period. The difference between being “on-call” and “working” can be very difficult to define, but case history does give us a guide.

The case of *British Nursing Association v Inland Revenue* [2002] concerned workers who operated a telephone booking service for a nurse agency. During the day the service was conducted from the employer’s premises, but the night shift worked from their homes. The calls were diverted to the night “duty nurse” who would take the call and book the nurse. The workers were paid an amount per shift. The employers considered that the staff were not working when they were not actually answering the phone and therefore not entitled to the minimum wage during these periods. The court of appeal judged an employee who operated a night-time telephone service from home is doing “time work” when waiting to answer a phone at their own home (and not “on-call”). Consequently, the exceptions mentioned above did not apply because the nurses were “working” for the whole time that they were waiting for the phone to ring.

The subsequent case of *Scottbridge Construction Ltd. v Wright* [2003] re-enforced this ruling. This case concerned a man who was employed as a night watchman by a construction company. He



was permitted to sleep at the facilities provided to him on site, but he was required to be on site 7 nights a week. Like the British nursing Association case, Mr Wright was not paid the NMW level for his nightly shifts. Also, like the BNA, it was judged that Mr Wright was engaged in “time work”. The court of session (the Scottish Court of Appeal) made direct reference to the BNA case in giving its judgement. The Court agreed that exemptions only apply where a worker is not working, but is “on call” waiting to work. In this case, the employee was deemed to be working throughout his 14-hour night shift, even when he was sleeping, and so was entitled to the NMW.

The key to this is that his “work” was simply for him to be on site and react when he was called upon.

It's worth noting that Mr Wright was not in receipt of a flat-rate payment for a specific time allocated to sleeping, which is particularly common practice in the social care field. An interesting addition to the reasoning behind this judgement was on the grounds that no specific time was allocated to Mr Wright's sleeping period. The ruling stated that exemptions do not apply:

*“because we would interpret that Regulation as a specific time allocation for sleep because it involves a permission... In our opinion what that Regulation is designed to deal with is a situation where the employer specifically says to the employee something to the effect that, during the relevant working time period, the employee is entitled to take so many hours off for sleep.”*

#### Amendments to the Regulations

To complicate matters further, since these judgements have been made the exemptions on time work have been amended. These changes appear to make extremely minor changes to the language of the exemptions. Although opinion is split, it is argued that these amendments would have made no material difference to the application of the regulations in the cases above. However, this has yet to be tested in court.

#### **Salaried Hours Work**

“Salaried hours work” applies where a worker is paid under contract for a fixed number of hours a year and is paid an annual salary in instalments. The regulations are more straightforward in this situation than under time work. Essentially, any worker who is carrying out salaried hours work is entitled to receive the NMW for the entire time that they are contracted to work. The case of *MacCartney v Oversley House Management [2006]* provides us with a good example of how the definition of salaried hours work can be applied.

Mrs MacCartney was employed as a resident manager at a community of privately owned homes for elderly residents. She was employed by the residents' association, Oversley House Management, and lived rent free in one of the flats on the site, which also contained her office. Her salary was paid monthly. She was able to do most of her duties between 8am and 6pm. However, she remained on call for the entire 24 hours, during which time she carried a mobile phone, which was connected to each resident's emergency pull cord, and was required to remain on site, or within a three-minute radius of it, to deal with both emergency and non-emergency calls. While on call, Mrs MacCartney could receive visitors in her flat and undertake other activities such as listening to music and sleeping. Mrs MacCartney brought claims against the employer partly on the grounds that she had not received the National Minimum Wage for the time she was working.



The Employment Appeals Tribunal judged that Mrs MacCartney was undertaking “salaried hours work”. Salaried hours work must be paid at a rate which is above the NMW for the hours which a person is contracted to work. Accordingly, the EAT held that the whole 96-hour shift period that Mrs MacCartney was on duty should be treated as salaried hours of work and on this basis, she had received less than the national minimum wage.

### **Output work**

Output work is “piecework”, or work that is paid for by reference to the amount that the worker produces or “commission work”, paid for according to the number or value of sales or business that the worker makes. Output workers might include travelling sales people or fruit and vegetable pickers who often work without set hours.

The employee must be given written notice about the rate at which he or she is expected to work and his or her hourly rate. That rate must be either the national minimum wage for all the hours worked or a ‘fair piece’ rate (calculated at 120% of the NMW for the average time to produce an agreed unit of work)

Unfortunately there is no case law on how sleeping in applies to output work and so at this stage it is not possible to provide guidance on how sleeping in arrangements applies to output work.

### **Unmeasured work**

Unmeasured work provides a residual category for types of work that are not included in the other three categories. An example of the type of work that might be covered by this would be a home carer who works in a clients home for a period of days, before having a break. Obviously some period of this time will be spent sleeping.

Unmeasured work over a particular period is the total of the number of hours spent by them in carrying out the contractual duties. However that is unless a “Daily Average Agreement” has been reached between the worker and his employer, determining the average daily number of hours the worker is likely to spend in carrying out their duties. The case of *Walton v Independent Living Organisation Ltd* [2003] gives us a good illustration of how the daily average agreement comes into play.

Ms Walton worked for Independent Living Organisation who provide carers for the elderly and disabled who need assistance in remaining in their own homes. Ms Walton was allocated to a client who suffered from epilepsy and had fits on a regular basis. She worked “three days on, four days off”. The court of appeal ruled that carrying out “unmeasured work” rather than “time work” because of particular documents she had signed. In particular she had signed a written assessment form prepared by the Inland Revenue National Minimum Wage Compliance Team stating that the carer’s specific duties took approximately six hours and 50 minutes per day. This constituted a “daily average” agreement for unmeasured work within the Regulations.

The Court of Appeal decided that Mrs Walton was entitled to be paid for the six hours and 50 minutes per day when she carried out specific caring duties for the client, but not for the rest of her time spent on the client’s premises, during which she was free to carry out her own activities.



## UNISON SURVEY

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In order to find out more about pay and conditions for workers who sleep in at work, UNISON has carried out a survey of its members.

Over 400 responses to the survey from the employees of 43 different employers mainly, although not exclusively, from the social care sector. The results provide us with a useful insight into this area of work.

The key findings from the survey were that:

- The most common total shift length is 24-28 hours (48%)
- The most common length of sleeping in period is 8-12 hours (53%)
- 86% of employers pay below the national minimum wage for sleeping in periods.
- But 56% of employers pay between £8-12 an hour for “active” working periods
- The average flat rate payment for a sleeping in period is £29.20
- 63% of employers would commence disciplinary proceedings (including possible dismissal) if a worker were to leave their place of work during the sleeping in period
- 23% of workers receive no extra payment if they are called upon to work during their sleeping in period
- 72% of employers do not pay sick pay for the sleeping-in time that employees miss due to illness<sup>1</sup>

To see a full set of results from the survey contact Bargaining Support at [bsg@unison.co.uk](mailto:bsg@unison.co.uk)

### Analysis

Our survey did find that a small number of workers are being paid below the national minimum wage when their pay is calculated according to the entire length of their shift, including sleeping in period. This reflects the circumstances of the British Nursing Association v Inland Revenue.

However, overwhelmingly the most common practice is to pay a flat rate of £29-32 for an 8 hour sleeping in period and then pay £8-12 an hour for the rest of the shift. This means the flat rate payment and the “working” payment usually averages out as more than the national minimum wage over the entire period of a shift.

Nevertheless, from a bargaining point of view, these findings are significant. We can see that it is common practice for employers to assume that periods of sleeping in are worth a rate of pay of just £3-4 an hour, well below the national minimum wage (which is £5.35 an hour rising to £5.52 an hour on 1<sup>st</sup> October 2007). Employers are widely treating this period as “on-call” time, which is exempt from the NMW regulations.

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<sup>1</sup>The survey was carried out in July/August 2007. The results were calculated to give an overall view of each individual employer. So if we received 12 responses from the employees of one organisation, the most common answer to each question was then allocated to that employer. This avoids the result of the survey being skewed towards organisations whose employees gave more responses.



However, the survey shows us that 23% of workers receive no extra payment if they are called upon to work during their sleeping in period. Also, 63% of employers would commence disciplinary proceedings (including possible dismissal) if a worker were to leave their place of work during the sleeping in period. The question arises, are these employees really “on-call” or are they “working”?

As the legal briefing above reflects, a growing number of tribunal and court decisions are finding that workers once assumed to be “on call”, are in fact “working” during their sleeping in periods, by virtue of the fact that their work requires them to be in a particular place at a particular time and to be ready to react when a particular situation arises. Workers who are “working” should, at the very least, be receiving the NMW rate for their time.

There is a strong argument that workers are entitled to be paid at least the national minimum wage for their sleeping in periods, without an accompanying fall in the contractual payments they receive for the “active” parts of their shift. Those bargaining new pay deals for workers who are sleeping in might want to take a close look at the very low flat rate payments that are being paid – despite the fact that workers are at their employers’ beck and call for the whole period. If workers were to receive the NMW for an 8 hour sleeping in period they would be receiving £42.80 instead of £29.

## ORGANISING

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The enthusiastic response to the UNISON survey on sleeping-in arrangements shows that this is a very live issue at the moment. Organising a campaign to get better pay and conditions for workers sleeping in at work is an excellent way of involving members in the work of the union.

An important first step for organisers and activists to take on this issue is to calculate whether or not the combined payments to a worker sleeping in average out as above the National Minimum Wage. That means adding together a single flat-rate payment for sleeping in to any other daily wages received and then dividing the total by the number of hours spent at work. Armed with this information you can then go to make the case for an improved deal.

Have you considered doing your own survey of local members to see what they think of sleeping in conditions in your workplace? By developing projects like this you can draw more members into becoming involved in the union, possibly to be stewards or branch officers. Your branch could set up a working group to develop new proposals on how to improve pay and conditions for those sleeping in at work.

Negotiations with employers on these issues can be used as a focus for recruiting and organising for branches. It’s not only a matter of getting an improved agreement with the employer but of raising the profile of the union and showing members that UNISON is listening; of encouraging non-members to join; and of getting existing members more involved.

For more information about organising and campaigning in your workplace take a look at the Activists Zone on the UNISON website at: <http://www.unison.org.uk/activists/index.asp>



## WORKING TOGETHER

By sharing information your branch can help the union to spread best practice, identify obstructive employers and monitor the implementation of employment rights.

The way to do this is to fill out the Bargaining Information System (BIS) questionnaire below and return it to Bargaining Support at the following address. This information will then be entered on to the system to help provide a more detailed picture of conditions in the workplace.

The address for the Bargaining Support Group is: 1, Mabledon Place, London, WC1H 9AJ, or e-mail [bsg@unison.co.uk](mailto:bsg@unison.co.uk).

What flat rate allowance do you receive for sleeping in at work?	£ _____
Or do you receive one of the following?	
<input type="checkbox"/> None	<input type="checkbox"/> Double time
<input type="checkbox"/> Single time	<input type="checkbox"/> Time and a quarter
<input type="checkbox"/> Time and a half	<input type="checkbox"/> Other (give details below)
Please give further details below:	

