

Interim guidance on underpayment for sleep in shifts and the Social Care Compliance Scheme (SCCS)

Background

Sleep-in shifts occur when a worker stays overnight and is provided with facilities to sleep, and has work responsibilities. This is a common working practice in the social care sector. UNISON has long campaigned for sleep-in shifts to be considered working time for the purposes of calculating compliance with National Minimum Wage (NMW). Over the years, many employers have paid one off payments for sleep-in shifts, usually below minimum wages rates which have sometimes had the effect of bringing pay rates for workers, across their pay reference periods, below the minimum wage. Over a period of time, case law, government guidance and HMRC enforcement have all now come to define these shifts as working time. This is a great victory for our union, but there are still employers who are not compliant. In addition, many employers owe their workers back pay and are refusing to settle.

For more bargaining and legal guidance on this issue see this factsheet.

<https://www.unison.org.uk/content/uploads/2017/07/National-Minimum-Wage.pdf>

UNISON believes that, given this situation, a responsible government should prioritise the payment of NMW to workers, including back pay, alongside the proper funding of the care sector. Instead, the current government has launched a new compliance scheme for social care providers. This guidance sets out the details of that scheme, identifies some of the many problems with it and offers guidance to regions, branches and reps to assist in communications with members.

The Social Care Compliance Scheme (SCCS)

The new scheme was launched at the start of November 2017. It followed on from a suspension of enforcement by HMRC in July 2017, whilst the Government considered its options.

Under the new scheme, social care employers can choose to opt in. If they opt in they will have up to 12 months to identify what they owe to workers and no enforcement fines will be levied if they are found to owe arrears to their workers. Those who identify arrears will then have up to three months to pay workers. They will also be exempt from being named and shamed by the Government for failing to pay the minimum wage.

Providers not entering into the SCCS will face enforcement action from Her Majesty's Revenue and Customs (HMRC), including fines and will potentially be named and shamed.

HMRC will write to social care employers who have an outstanding complaint against them for underpayment to invite them to sign up to the scheme. Employers that choose not to opt into the scheme will be subject to HMRC's usual enforcement approach.

A deadline of 31st March 2019 has been set by which employers must settle outstanding back pay, regardless of when they enter the SCCS.

For more details on the scheme, see [this note](#) from the Department of Business, Energy and Industrial Strategy.

UNISON's objections to the scheme

The key test for UNISON of any scheme is whether or not it will enable workers to be paid the full arrears as soon as possible, while protecting jobs and the sector. Therefore the following points are of serious concern to the union:

- 1. No role for workers.** It is striking that there is absolutely no role for, or accountability to, the worker who has been paid less than the NMW. Neither they, nor their union, will be able to scrutinise the figures produced by the employer during the self-review process. The worker is expected to trust an employer who admits to have broken the law. We also have concerns about the thoroughness of the assurance checks that HMRC will carry out into the figures presented to them by employers.
- 2. Gender equality.** Following on from point 1, the gender dynamic is particularly concerning. The social care workforce is predominantly female. Decisions about women and their pay will be made by employers and HMRC, without including those women in the process.
- 3. The scheme lacks transparency.** There is no public scrutiny of the process. It is unclear if the worker has any idea what happens during self-review, until they are presented with arrears agreed between HMRC and the employer. As yet, there appears to be no avenue to challenge or appeal the amount of arrears paid. The identities of employers involved in the scheme will never be publicised and it is unclear how workers would know if their employer has opted into the scheme (other than by making a complaint). Given the high levels of turnover in the care sector we are also concerned that employers will only make limited efforts to pay any arrears owed to any former workers and therefore escape making payments.
- 4. Compromising existing claims.** Workers with existing claims could be paid arrears at the end of the self-review without any knowledge that it was even taking place. This could compromise workers who have existing, unresolved claims in the tribunal system.
- 5. The message on NMW enforcement.** UNISON is highly concerned about the wider message this scheme sends regarding the enforcement of NMW. If the social care sector is to be treated as a 'special case', what is to stop other employers in other parts of the economy to claim the same?

In conclusion, UNISON believes that any scheme for the correction of underpaid wages should have the worker at its heart. This scheme gives virtually no role to the worker and potentially denies them access to a transparent process for redress. UNISON is currently reviewing the scheme in further depth with the legal team.

Advice to regions, branches and reps

Advice to members about how to secure the wages owed to them will depend on their individual situation.

Some employers have now changed their pay practices and are paying top up payments to ensure they are compliant with NMW regulations. This introduces a period of limitation on claims for

unlawful deductions of wages. The claim would need to be lodged three months less one day of the date of the last unlawful deduction.

For members where this limitation does not apply, they should seek further legal advice via their region. If an analysis of their pay shows they have a potential claim with reasonable prospects of success, they can then proceed in the normal way to seek redress via the Employment Tribunal system.

For members where limitation has expired, the member can report their employer to HMRC via the Pay and Rights helpline on 0300 123 1100. Under the new scheme, this will trigger an invitation to the employer (if they met the eligibility criteria) to join the scheme and engage in the self-correction process.

If this happens, please see details of the register UNISON will maintain, below.

A UNISON register of members who have made complaints to HMRC

UNISON wants to hold the government to account for the claims it is making for the self-review process. They say that when a complaint is made to HMRC, an employer is invited to engage in self-review and the arrears owed will be paid to workers. Consequently, we want to maintain a register of all our members who have made a complaint, including the name of the employer involved. We will later use this information to verify how the scheme has operated.

Where regions, branches and reps can confirm that a member has submitted a complaint to HMRC, we would like this to be reported to a single email contact.

Where this is the case, please send the name of the member(s), the name of the employer and any other details you wish to Gavin Edwards at G.Edwards@unison.co.uk