

Managing working time in live-in care

A UKHCA position statement



Position statement

UKHCA believes that homecare workers providing “live-in” care services undertake their role on an “unmeasured work” basis for the purposes of the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999.

The Association is aware that a minority of personal injury solicitors argue that live-in care should be treated in the same way as shift work in residential settings.

UKHCA believes that such an approach misinterprets the Regulations. Were this approach to be followed, it could make live-in care prohibitively expensive for the vast majority of self-funding service users and restrict both choice and capacity in the sector.

Summary of recommendations

Live-in care services should be categorised as “unmeasured work”, managed with a “daily average hours” agreement. This interpretation should be clarified by Government and enforced by the courts.

Introduction to live-in care

The “live-in” model of care is highly valued for the independence, flexibility and control that it offers to people who use services. Live-in care takes a number of forms but the essence of the model is that a careworker takes up residence in the private home of an individual service user for a given period. Such workers may be:

- i. employed, controlled and directed by a domiciliary care agency who provide a homecare service acting as a *direct service provider*;¹
- ii. introduced to a service user by a provider acting as an *employment agency*,² the

worker being employed and paid directly by the service user.

- iii. employed and paid directly by a service user for a fixed or indefinite term, having been recruited by the service user themselves, an informal carer, or an advocate etc. These workers are often referred to as *personal assistants*.

Reflecting the degree of choice and control which any individual expects to have over life in their own home, work tasks and durations are usually agreed on a daily or hourly basis. The service user’s need for support and assistance can be highly variable and will often include tasks that take just a few minutes at any one time. While not working, the careworker is entitled to rest and sleep and engage in other normal activities of their own life.

In addition to flexibility of agreed work, service users benefit from reassurance that

¹ *The Domiciliary Care Agency Regulations 2001*, Regulation 2(1).

² See definition of an “employment agency” in section 121(1) of *The Care Standards Act 2000*; *The Employment Agencies Act 1973* and *The Domiciliary Care Regulations 2002*, Regulation 2(1)(b).

there is another person in the house who will be able to assist them, in case of unforeseen need or emergency. This resource may never (or only rarely) be called upon, but the reassurance is often a key factor in giving service users the confidence to live in their own home, rather than need to move into a residential care home.

A key benefit of live-in care is the capacity to be flexible over activities and is a more responsive service compared to those commissioned on a routine, preplanned basis, where careworkers are contracted to visit the service user's home periodically, typically to provide assistance at the start of the day, at meal times and bedtime.

Measured or "unmeasured" time?

While important components of care (such as assistance with medication) can be predicted and recorded, the majority of live-in care work is agreed on a day-by-day or hour-by-hour basis and is subject to frequent change. It is not predetermined and it is often impractical to measure or record such highly variable and 'short burst' activities. It is therefore the opinion of UKHCA that Live-in care meets the criteria of "unmeasured" time for the purposes of the Working Time Regulations 1998 (see Figure 1) and the National Minimum Wage Regulations 1999 (see Figure 2).

A minority of personal injury solicitors, in claims for compensation, interpret Working Time and National Minimum Wage Regulations such that application to live-in care is treated in the same way as shift work in residential settings. To maintain the 24-hour cover implicit in live-in care services,

this interpretation forces a more complex and costly care package based on teams of visiting care workers on a rotating shift pattern.

Figure 1: Unmeasured working time

"20. Regulations 4(1) and (2), 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker where, on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself..."

[Working Time Regulations 1998]

Figure 2: Definition of "unmeasured work"

"6. In these Regulations 'unmeasured work' means any other work that is not time work, salaried hours work or output work including, in particular, work in respect of which there are no specified hours and the worker is required to work when needed or when work is available."

[National Minimum Wage Regulations 1999]

UKHCA does not accept the interpretation that live-in care should be treated in the same way as shift work, and believes that live-in care should continue to be regarded as "unmeasured work" for the purposes of both National Minimum Wage and Working Time Regulations.

It is obviously in the interests of solicitors to push for the highest awards or out-of-court settlements for the injured people they represent. However, the impact of a shift-work system on the service user would be highly intrusive, with successive careworkers entering the home on a daily basis. Management of the team would become extremely complex, and the demands on scarce labour may become unsustainable.

Recipients of compensation are thought to be a relatively small proportion of the total population using live-in care services. If live-in care were to cease to be "unmeasured work", the costs of an equivalent

care service would be up to four times higher than at present,³ making live-in care impossibly expensive for the majority of users and commissioners.

Local authorities, whether Social Services or local Primary Care Trusts, who fund many care packages, would not be able to absorb the increase in costs and would

³ A minimum of 4 people would be required to cover a week (168 hours) if the exemptions for "unmeasured time" were not available.

seek to reduce the number of hours support given to individuals. This would remove the possibility of 'live-in' care for many, leaving them isolated in their homes for long periods. In some cases it would force many, more dependant individuals, towards institutional care.

The extract from Working Time Regulations in Figure 1 refers to the concept of Unmeasured Working Time and indicates that such work is exempt from a number of provisions in the Regulations,⁴ including:

- The 48-hour maximum weekly limit [Reg 4(1)];
- The 8-hour maximum working period for night workers [Reg 6(1)];
- The 11-hour minimum daily rest breaks [Reg 10(1)];
- The 24-hour minimum weekly rest breaks [Reg 11(1)].

The extract from the National Minimum Wage Regulations 1999 in Figure 2 defines "unmeasured work" in similar terms.⁵ The Department of Trade and Industry's publication "A detailed guide to the National Minimum Wage" describes workers who may work unmeasured time:

"They could be domestic staff without set hours or an annual salary" and goes on to describe use of 'daily average' agreements to cover unmeasured work.⁶

⁴ Working Time Regulations 1998, Regulation 20. URL: www.opsi.gov.uk/si/si1998/19981833.htm#20.

⁵ National Minimum Wage Regulations 1999, Regulation 6. URL: www.opsi.gov.uk/si/si1999/19990584.htm#6.

⁶ Department of Trade and Industry. A Detailed Guide To The National Minimum Wage, Revised October 2004, paragraphs 184-196.

Suggested management of "unmeasured work" in live-in care

i. Staff employed by Direct Service Providers

"The current model of live-in care enables many people to maintain fulfilled lives with independence and autonomy. It offers a genuine, cost-effective, alternative to those who would otherwise require long-term residential care."

Lucianne Sawyer CBE
UKHCA President

"A pattern of successive care workers entering the home will have a negative effect on flexibility, choice and independence. For some, it will present an unacceptable intrusion into family and social life. It will inhibit integration with the community, return to work or education. In effect, 'live-in' care could become 'stay-in' care as service users become prisoners of the very care packages intended to enhance their lives."

John Borthwick, Vice-Chair
Spinal Injuries Association and
live-in care service user for 12 years

In order to establish appropriate expectations on all sides it is normal practice for direct service providers to agree the average amount of care work that can reasonably be expected in any 24 hour period; A common expectation is around ten hours; It may be specified that nine are during waking hours and that one is in case of night calls.

For the service user, these expectations are usually set out in written Terms of Business. For the worker, they may be contained in contracts of employment, but UKHCA recommends use of a separate document – a 'daily average hours agreement' – which ensures that the worker explicitly understands and agrees this element of their working conditions.

Pay to the worker is generally at a daily or weekly rate calculated on the basis of the 'daily average hours' per day. Arrangements are also usually set out to resolve

circumstances where working time exceeds the expectations agreed in advance. This may involve additional payments for one-off or short term occurrences or reassessment of the care package, if need appears longer term.

ii. Careworkers introduced by an employment agency

A domiciliary care agency acting as an employment agency should introduce workers on the basis that the offer of fixed term employment by the service user is for an expected number of hours, and should recommend to the service user and worker the use of an 'daily average hours agreement'. For convenience, the agency may supply a model agreement for the service user to adapt.

iii. Staff employed directly by service users

UKHCA recommends that all individual service users directly employing careworkers should set in place 'daily average hours agreements'. This is a precautionary measure; a Government statement suggests that such workers may be domestic servants and so outside protection of Health and Safety at work legislation.⁷ If this is the case, rights under National Minimum Wage and Working Time Regulations may also be restricted or negated.

⁷ Paragraph 120 of Government's response to the DWP Committee's *Health and Safety report 2004*.

About UKHCA

UKHCA is the representative association for organisations that provide domiciliary care, home nursing and allied services.

The Association's primary aims are to promote the highest standards of care through training, information sharing and membership services, which include:

- Recognition of quality throughout the social care sector.
- UKHCA Code of Practice to show commitment to excellence.
- Telephone helpline for legal, HR and Practice-based advice.
- Conferences and workshops run throughout the UK.

Recommendations

Live-in care providers and agencies introducing workers to be employed by service users should make clear in advance that all live-in care work is expected to be "unmeasured" and subject to an appropriate "daily average" agreement. This should be specified in terms of business between the agency and the service user and/or in the worker's contract of employment, according to the contractual relationships that exist.

Individual service users employing personal assistants directly for live-in care should consider the use of "daily average" agreements.

Government should issue clear guidance that live-in care work is "unmeasured", seeking clarification from European Union authorities where necessary.

The courts should resist unfounded arguments and inflated care cost estimates based on misinterpretation of the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999.

Bill McClimont, UKHCA Vice-President

- NVQ qualifications, assessors and assessor training.
- Home Care Workers' Handbook for careworker training.
- Insurance cover designed specifically for UKHCA members.
- UKHCA Disclosure Service registered with CRB and SCRO.
- Homecarer magazine, published 6 times a year.
- E-mail alerts with breaking news from the social care sector and members-only website.

More information about membership and application forms are available from www.ukhca.co.uk/howtojoin.aspx or 020 8288 5291.

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