UKHCA Factsheet

National Minimum Wage Toolkit

September 2017

Prepared for homecare providers by Anthony Collins Solicitors LLP and UKHCA Policy Director Colin Angel

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UKHCA – representing homecare providers

United Kingdom Homecare Association Ltd (UKHCA) is the professional association of homecare providers from the independent, voluntary, not-for-profit and statutory sectors. UKHCA helps organisations that provide home-based social care (also known as domiciliary care or homecare and home nursing), promoting high standards of care and providing representation with national and regional policy-makers and regulators.

The Association represents over two thousand members across the United Kingdom, in England, Wales, Scotland and Northern Ireland.

Helpline support for UKHCA members

UKHCA members are entitled to a range of member benefits, including support from our legal and human resources helplines on issues such as the National Minimum Wage, and employing staff.

If you are not a UKHCA member, and are a homecare provider, you can find out more about joining UKHCA at: www.ukhca.co.uk/memben.aspx or call 020 8661 8188, option 2.

Anthony Collins Solicitors LLP

Anthony Collins Solicitors LLP acts as an expert for many leading social care providers, helping them to navigate this highly complex legislative and regulatory environment. At Anthony Collins Solicitors our purpose is to improve lives, communities and society by working with like-minded clients who share our vision and passion.

Disclaimer

This guidance reflects the law as at June 2017. This guidance is only intended to be a summary of the law as it currently stands. Case law, particularly in this area, changes frequently. You should therefore take legal advice specific to your situation before taking or refraining from action based on the content of this guidance.
Foreword by UKHCA Policy Director, Colin Angel

Compliance with the National Minimum Wage in the homecare sector has come under increasing government and public scrutiny.

Local authorities, who purchase the majority of homecare services, have used their dominant purchasing power to drive prices for homecare services down as a result of public spending cuts. The impact on providers’ businesses, and their ability to reward social care workers sufficiently, carries serious implications for our sector. In addition, the complex working patterns required for homecare workers, particularly in relation to the payment of travel time and the use of premium payments to incentivise out-of-hours working, are not always well understood.

While there is an increasing recognition of the extremely difficult conditions that affect independent and voluntary sector homecare providers delivering services, it remains the responsibility of individual employers to comply with the National Minimum Wage Regulations. HM Revenue and Customs (HMRC) can conduct impromptu inspections of employers’ compliance with Minimum Wage at any time, and are doing so with increasing frequency in the social care sector.

This Toolkit, originally launched in November 2013, has been designed to help homecare providers ensure that they are meeting or exceeding the National Minimum Wage requirements for their workforce. It has been thoroughly revised to take into account the introduction of new regulations (the National Minimum Wage Regulations 2015 and the National Minimum Wage (Amendment) Regulations 2016), emerging case law and our understanding of how HMRC apply the regulations in practice.

The National Minimum Wage is a complex area of UK law which is often confused by conflicting case law. This Toolkit begins with a summary of what’s new in the September 2017 version and what was revised in the March 2016 and June 2015 versions. There is also a Quick Start Guide, which gives a brief overview of key issues (and is not intended as a substitute for reading the whole Toolkit).
In section one of this Toolkit, UKHCA’s recommended legal advisors, Anthony Collins Solicitors LLP, have set out the current position on the law with some practical examples of how to maintain compliance with the Minimum Wage. The second section provides a step-by-step guide to help providers assess whether an individual worker, or a sample of workers, have received at least the Minimum Wage. The third section of the Toolkit provides some suggested actions that employers can take, if they are concerned that they are at risk of underpayment of the Minimum Wage.

UKHCA would like to thank Anthony Collins Solicitors LLP for their assistance in producing this Toolkit. UKHCA will continue its extensive campaigning activity to secure a better operating environment for homecare providers that enables them to reward their workforce properly, and to secure the best outcomes for people who use homecare services.
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What’s new in the June 2017 version?

- An update on published rates for different age categories. From 1 April 2017, the National Living Wage for those of 25 years old and older rose to £7.50 per hour, and National Minimum Wage (NMW) rose to £7.05 for those aged 21 – 24 years. The youth and apprentice rates also rose. From 1 April 2017 increases in rates will take place annually in April (see paragraph 4).

- A significant and important update on case law relating to sleep-ins, on-call and live-in care, including a summary of Royal Mencap Society v Tomlinson-Blake UKEAT/0290/16/DM and comments on revised BEIS guidance (2016) on calculating the minimum wage (see Appendix 1 - Practical examples – total hours worked).
  
  - The current position is now where a worker is performing time work or salaried work, and is not working but is required by their employer to be available at or near a place of work for the purposes of working, this is treated as ‘working time’ even if the worker is simply waiting to be given work, is ‘on call’, standby or even asleep. So NMW has to be paid for all hours worked.

- Consideration of multiple arrangements, typically where a worker works on an hourly basis during the day, and an on-call or sleep-in basis overnight. HMRC appear to be saying there must be separate contracts for time work, salaried work and unmeasured work otherwise they will take a view on the overall arrangement from the one contract. Providers should enter into separate and clear contractual arrangements in respect of any unmeasured work and the Daily Average Agreements where applicable (see paragraph 82).

- More information on employers’ record-keeping obligations, and on workers’ powers to require, inspect and examine records, with penalties for employers who fail to disclose (see paragraphs 8 and 9).

- More detail on enforcement, including notices of underpayment and how they are calculated (see paragraphs 14 to 17).

- More about pay reference periods and how they operate (see paragraphs 24 to 30).
• Induction training - a recommendation that employers should consider carefully the ethical considerations of not paying recruits for their time while undergoing induction training, and take advice on options to address the issue of new recruits not finishing training or leaving shortly after finishing training (paragraph 122).

What was revised in the March 2016 version?

• From 1 April 2016, the National Living Wage will be £7.20 an hour for workers aged 25 and older. The National Minimum Wage will still apply for workers aged 24 and under. Penalties (calculated as a percentage of the amount by which the worker has been paid below the NMW) will double in respect of pay reference periods from 1 April 2016 (see paragraphs 2 and 15).

• Clarification that the “Tyco Case” does not affect the definition of “travel time” for the purposes of the National Minimum Wage Regulations (see paragraph 107).

• A summary of the recent case of Shannon v Rampersad which adds to previous case law on sleep-ins (see Appendix 1 - Practical examples – total hours worked).

What was revised in the June 2015 version?

• ACAS now provide the service previously run as the Government’s Pay and Work Rights Helpline (see paragraph 20).

• References to the National Minimum Wage Regulations 1999 have been updated to reflect the equivalent regulation in the National Minimum Wage Regulations 2015.

• The significance of the lowest rate of pay being used in calculations of compliance with the National Minimum Wage for time work has been emphasised (see paragraph 32 a).

• Caution is expressed over whether or not an employer deducting the costs of a criminal record check will be excluded from calculations of the National Minimum Wage (see paragraphs 34-36).

• Particular caution is expressed over payments received by workers engaged on a “self-employed” basis (see paragraph 48).
- A change in how the new National Minimum Wage Regulations 2015 describe time spent “available” for work at or near their place of work (i.e. “on-call” time) is included (see paragraphs 56-59 and 67-7069).

- Minor updates have been made to the arrangements for unmeasured work, including reference to daily average agreements, (see paragraphs 0-78). These are most likely to affect care workers engaged on a live-in basis.

- Clarification is included of the way that “sleep ins” are handled, following recent case-law and revised guidance from the Department of Business, Innovation and Skills (see Appendix 1 - Practical examples – total hours worked).

- Additional reference is included to recent case-law as it affects “on call” services (see Appendix 2 - Practical examples – total hours worked).

- Penalties on a ‘per worker’ basis brought in by the Small Business, Enterprise and Employment Act 2015 (see paragraph 15--).
Quick Start Guide

This section provides a brief overview of key issues of the National Minimum Wage for homecare providers (It is not a substitute for reading this toolkit in full).

- Payment of the National Minimum Wage is a legal requirement in all four nations of the United Kingdom (see paragraphs 1 to 5).

- A new rate of pay applies to the National Minimum Wage for workers of 25 and over (the National Living Wage). In this toolkit references to compliance with the National Minimum Wage include compliance with the National Living Wage.

- Employers can be fined for underpayment of National Minimum Wage and providers who underpay workers can be “named and shamed” by Government (see paragraphs 13 to 19).

- Low rates paid by local authorities or the NHS are not a defence for underpayment of the National Minimum Wage, nor is the practice of commissioners paying for care solely by reference to “contact time”.

- The way that the National Minimum Wage is calculated is affected by the type of work undertaken. Most homecare workers will undertake “time work”, many live-in careworkers undertake “unmeasured work”, while office staff are often “salaried” workers (see paragraphs 47 to 83).

- National Minimum Wage is calculated as an average pay over a reference period of not more than a month (see paragraphs 22 to 24). In simple terms, total pay (excluding enhancements) divided by total working time must be at least equal to National Minimum Wage (see paragraphs 123 to 124).

- Not all payments made to workers count towards the calculation of the National Minimum Wage. In particular, enhanced rates paid for unsocial hours working, or higher rates for short homecare visits will not count towards careworkers’ total pay (see paragraph 32).
• Most of the time careworkers spend travelling between service users’ homes, or waiting to start the visit, counts as working time. While it is not necessary to make a separate payment for careworkers’ travel time, paying workers just for the time spent delivering care must be at a rate sufficient to cover all working time, including travel time, at the National Minimum Wage or above (see paragraphs 84 to 115).

• Not reimbursing travel expenses - such as car mileage or bus and train fares – can bring workers’ average pay below the National Minimum Wage (see paragraphs 110 to 112).

• Time spent training, undergoing supervision or appraisals usually counts as working time, as do scheduled breaks during which the worker is required to work (see paragraphs 116 to 120).

• Induction training is likely to count as working time if the worker is already contracted, or has an unconditional offer of employment (see paragraphs 121 to 122).

• There are particular implications for compliance with the National Minimum Wage if you ask your careworkers to pay for uniforms (see paragraphs 37 to 41).

• There are specific arrangements if you charge any costs for accommodation from workers’ wages (see paragraphs 43 to 46).

• Recent case law has created significant questions about how the National Minimum Wage Regulations are applied to the following duties:
  
  o Sleep-ins (see Appendix 1 - Practical examples – total hours worked)
  
  o On-call arrangements (see Appendix 2 - Practical examples – total hours worked)
  
  o Live-in care (see Appendix 3 - Practical examples – total hours worked)

• There are criminal and financial penalties associated with the failure to pay the National Minimum Wage and/or to maintain appropriate pay records (see paragraphs 13 to 18). Penalties have increased sharply in recent years, to reflect Government’s intention to deter employers from underpayment of National Minimum Wage (see paragraph 15).
Non-compliance with the National Minimum Wage carries serious implications for care providers. Relying on enhanced rates of pay or underestimating careworkers’ travel time in order to appear compliant with the National Minimum Wage is ill-advised, and will not provide a defence against breaking the law. Please use this Toolkit to help you protect your business.
Section 1 – The legal position

A. What is it?

1. The National Minimum Wage is the hourly rate of pay to which most workers are entitled.

2. From 1 April 2016 a new rate of pay applies to the National Minimum Wage for workers of 25 and over (the total is known as the National Living Wage). See Regulation 3 of the National Minimum Wage (Amendment) Regulations 2016, which replaces Regulation 4 of the National Minimum Wage Regulations 2015 and includes a new Regulation 4A: www.legislation.gov.uk/uksi/2016/68/contents/made

3. The National Minimum Wage (including the premium for National Living Wage) is payable regardless of the size of your organisation.

4. The following table illustrates the published rates for different types of workers. The most up-to-date version is published each year at https://www.gov.uk/national-minimum-wage-rates
<table>
<thead>
<tr>
<th>Rate</th>
<th>25 years and over (National Living Wage)</th>
<th>21 years and over</th>
<th>18 to 20 years</th>
<th>Under 18 years</th>
<th>Apprentice</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Apr 2017 - 31 Mar 2018</td>
<td>£7.50</td>
<td>£7.05</td>
<td>£5.60</td>
<td>£4.05</td>
<td>£3.50</td>
</tr>
<tr>
<td>1 Oct 2016 - 31 Mar 2017</td>
<td>£7.20</td>
<td>£6.95</td>
<td>£5.55</td>
<td>£4.00</td>
<td>£3.40</td>
</tr>
<tr>
<td>1 Apr 2016 - 30 Sep 16</td>
<td>£7.20</td>
<td>£6.70</td>
<td>£5.30</td>
<td>£3.87</td>
<td>£3.30</td>
</tr>
<tr>
<td>1 Oct 2015 - 31 Mar 16</td>
<td>£6.70</td>
<td>£5.30</td>
<td>£3.87</td>
<td>£3.30</td>
<td></td>
</tr>
<tr>
<td>1 Oct 2014 - 30 Sep 15</td>
<td>£6.50</td>
<td>£5.13</td>
<td>£3.79</td>
<td>£2.73</td>
<td></td>
</tr>
<tr>
<td>1 Oct 2013 - 30 Sep 14</td>
<td>£6.31</td>
<td>£5.03</td>
<td>£3.72</td>
<td>£2.68</td>
<td></td>
</tr>
<tr>
<td>1 Oct 2012 - 30 Sep 13</td>
<td>£6.19</td>
<td>£4.98</td>
<td>£3.68</td>
<td>£2.65</td>
<td></td>
</tr>
<tr>
<td>1 Oct 2011 - 30 Sep 12</td>
<td>£6.08</td>
<td>£4.98</td>
<td>£3.68</td>
<td>£2.60</td>
<td></td>
</tr>
</tbody>
</table>

5. From 2017 the National Minimum Wage and the National Living Wage will increase each April. Providers should review their pay rates no later than each March to ensure that increases applying in April do not result in workers being underpaid after the increases take effect. You should also review your workers’ pay when they have a birthday and move from one NMW bracket to another.

6. Providers should note that the rate for apprentices is for those apprentices:
   - Employed under an apprenticeship agreement, contract of apprenticeship or under certain government apprenticeship schemes that are treated as contracts of apprenticeship; and
   - aged 16 to 18; or
   - 19 or over and in their first year of apprenticeship.
All other apprentices are entitled to the National Minimum Wage for their age.

**B. Record keeping**

7. The burden of proof in National Minimum Wage claims is with the employer with the effect that courts must presume that a worker has been paid at a rate **below** the National Minimum Wage unless the employer can show otherwise. Therefore, it is clearly in your best interest to keep records that will enable you to prove that you have discharged your liability to pay the National Minimum Wage. In any event, you must keep records in respect of workers who qualify for the National Minimum Wage sufficient to establish whether or not your workers are being paid appropriately. There are criminal offences associated with failure to maintain records (or falsification of records) – please see Section C. Enforcement and fines for non-compliance, for further details.

8. Records do not have to be kept in any particular format, as long as the information can show that workers have been paid at least the National Minimum Wage. HMRC requires that the records must be retained for a minimum of 3 years. It is important to note however that in England, Wales and Northern Ireland HMRC can review NMW compliance for up to 6 years, and in Scotland for up to 5 years. Providers may therefore wish to keep records for a period longer than 3 years in order to satisfy HMRC of their NMW compliance.

9. If a worker reasonably believes that the provider paid them less than the National Minimum Wage, they can require it to produce any relevant records and inspect and examine those records. This right can be exercised by the worker giving the provider a “production notice”, and you must produce the records to the worker before the end of 14 days following the date of receipt of the production notice. Where complaint of NMW underpayment is well-founded, and the provider has failed to disclose any such records requested, a court will make an award to pay the worker a sum equal to 80 times the hourly amount of National Minimum Wage.
10. As the issue of travel time is so pertinent to compliance with National Minimum Wage in homecare services, employers should consider how they record careworkers’ travel time, either on paper-based timesheets, or by use of electronic monitoring equipment. HMRC have advised UKHCA that this is one of the factors which can have a significant bearing on the amount of time that their investigations of providers’ compliance with NMW take to conduct. For further information on travel time see Section E. Travel time below.

11. Where providers are operating daily average agreements, supporting documentation will need to be provided to demonstrate that they are realistic.

12. When investigating compliance HMRC may also require to speak to workers to verify the information provided by the provider. Where HMRC request access to the employees’ personal data, such as their personal addresses or telephone numbers, providers must ensure that such requests are processed in accordance with the Data protection principles.

C. Enforcement and fines for non-compliance

13. HMRC is the enforcement agency for the purposes of the National Minimum Wage. It has various powers, including powers to inspect records, enter premises and interview the employer and its workers. Where, on conclusion of an investigation, a compliance officer believes that a worker who qualifies for the National Minimum Wage has not been remunerated at a rate at least equal to the National Minimum Wage, the officer may issue a notice of underpayment, setting out the arrears of the National Minimum Wage to be paid by the employer together with a financial penalty for non-compliance.

14. The provider’s reasons for underpaying the National Minimum Wage will not be taken into account by HMRC when determining whether to issue a notice.

15. In England, Wales and Northern Ireland a notice of underpayment must be issued by HMRC. It can be issued for any pay reference period that ends less than 6 years before the date on which the notice is served. In Scotland a notice of underpayment must not show any pay reference period that ends more than 5 years before the date on which the notice is served.
16. For each pay reference period where HMRC finds that the worker has been paid below national minimum wage rates, their underpayment will be calculated either:

   a. the difference between the amount they should have been paid if they had been paid at National Minimum Wage rates on time, and the amount they were actually paid for the pay reference period (if the rate of NMW pay remains the same); or

   b. the amount calculated using the following formula (where the rate of NMW pay has increased): amount due = (total amount underpaid x current NMW rate)/original NMW rate.

17. In addition, a notice of underpayment will include a penalty. Financial penalties have increased substantially over the last few years and recently changed to a ‘per worker’ basis.

   - Where the notice of underpayment relates to pay reference periods between 6 April 2009 and 6 March 2014, the financial penalty for non-compliance is calculated as 50% of the total underpayment for all the workers specified in the notice, with a minimum penalty of £100 and a maximum penalty of £5000.

   - For pay reference periods between 7 March 2014 and 25 May 2015, the financial penalty for non-compliance is calculated as 100% of the total underpayment for all workers specified in the notice, with a minimum penalty of £100, and for pay reference periods before 26 May 2015, a maximum penalty of £20,000.

   - For pay reference periods between 26 May 2015 and 31 March 2016, the financial penalty for non-compliance is calculated as 100% of the underpayment owed to each worker up to a maximum of £20,000 per worker.

   - For pay reference periods beginning on or after 1 April 2016, the ‘relevant percentage’ (100%) doubles to 200% in respect of the underpayment owed to each worker up to a maximum of £20,000 per worker.

   - Penalties on a ‘per worker’ basis were brought in by The Small Business, Enterprise and Employment Act 2015 (Commencement No. 1) Regulations 2015, and the change to the ‘relevant percentage’ from 1 April 2016 was included in The National Minimum Wage (Amendment) Regulations 2016.
Summary of penalty calculation:

<table>
<thead>
<tr>
<th>Pay Reference Periods</th>
<th>Penalty calculation on a Notice of Underpayment (NoU)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Before 6 April 2009</td>
<td>No penalty to be included on a NoU.</td>
</tr>
<tr>
<td>2. 6 April 2009 to 6 March 2014</td>
<td>50% of total underpayment&lt;br&gt;Minimum £100 for the NoU&lt;br&gt;Maximum £5,000 for the NoU</td>
</tr>
<tr>
<td>3. 7 March 2014 to 25 May 2015</td>
<td>100% of total underpayment&lt;br&gt;Minimum £100 per NoU&lt;br&gt;Maximum £20,000 per NoU</td>
</tr>
<tr>
<td>4. 26 May 2015 to 31 March 2016</td>
<td>100% of total underpayment&lt;br&gt;Minimum £100 per NoU&lt;br&gt;Maximum £20,000 per worker</td>
</tr>
<tr>
<td>5. After 1 April 2016</td>
<td>200% of total underpayment&lt;br&gt;Minimum £100 per NoU&lt;br&gt;Maximum £20,000 per worker</td>
</tr>
</tbody>
</table>

18. There are criminal offences associated with:

- Failing to maintain records;
- Keeping or providing false records;
- Refusing or wilfully neglecting to pay the National Minimum Wage;
- Intentionally obstructing or delaying an enforcement officer; and
- Refusing or neglecting to answer questions or provide information to an enforcement officer.

All the above offences are subject to unlimited fines.
19. From 1 October 2013 employers who receive a Notice of Underpayment from HMRC can be publically “named and shamed”. The possibility of this happening may be particularly damaging for providers, who may face adverse publicity in national and local media, and may also have to declare this while tendering for contracts with local authorities and the NHS. Those “named and shamed” are listed on the Gov.uk website from time to time and more continue to be added.

20. A worker who believes they are not paid the National Minimum Wage may contact the ACAS helpline (see: www.acas.org.uk/helplineonline), who may transfer calls relating to non-payment of National Minimum Wage to HMRC. Workers can also bring a claim themselves for unauthorised deduction from wages before an employment tribunal or in civil court.

21. The Government announced plans for tougher penalties for National Minimum Wage non-compliance, and National Living Wage non-compliance when it came into effect in April 2016. The new package of measures included doubling penalties (see above), increasing the enforcement budget, setting up a new team of criminal enforcement specialists, and ensuring company director disqualification for up to 15 years for those found guilty: www.gov.uk/government/news/measures-to-ensure-people-receive-fair-pay-announced

D. How is it calculated?

22. It is important to note that the obligation to pay the National Minimum Wage (this term includes the National Living Wage) is not to ensure that the National Minimum Wage is paid for each hour worked, but to ensure that the average hourly rate is at least the National Minimum Wage over a pay reference period. The National Minimum Wage is calculated by dividing the total eligible earnings earned in a pay reference period by the number of hours worked during that period. In order therefore to determine whether a worker is being paid the National Minimum Wage, it is necessary to determine:

   a. the pay reference period (see paragraph 24 below);

   b. the total pay received in the relevant pay reference period (see paragraphs 28 – 44 below); and
c. the total number of hours worked during that period (see paragraphs 47 – 78 below).

23. To calculate whether you are compliant, go to Section 2 – Step by Step Assessment.

**The pay reference period**

24. A pay reference period is the period for which a worker is paid.

25. A pay reference period is either:
   a. a month; or
   b. the worker’s pay period if shorter, for example weekly if a worker is paid weekly.

26. A pay reference period cannot be longer than one calendar month.

27. When determining the pay reference period, providers need to consider the period the payment covers, and not when the payment of wages is actually made.

**Total earnings earned in the pay reference period**

**What counts?**

28. National Minimum Wage pay is calculated by determining the worker’s total remuneration in a pay reference period, including:
   a. All eligible payments received in the pay reference period in respect of that pay reference period; and
   b. Any eligible payments received in respect of the pay reference period, but paid in the following pay reference period.

29. If payment is made in any later pay reference period than one pay reference period to the period in which it was earned, then it cannot be linked back to the pay reference period in which it was earned and must count in the pay reference period in which it was actually paid. The only exemption to this would be if the worker fails to submit their time sheets which results in the delay in pay.
30. The worker’s eligible remuneration is not **solely** determined by payments received by the worker as wages, but by adding up payments received by the worker which satisfy the conditions under the National Minimum Wage as **eligible earnings**.

31. Not all payments received as wages count towards eligible earnings for the National Minimum Wage purposes. This is a summary of some of the points you will need to be aware of.

32. **Examples of pay and benefits that do not count as eligible earnings towards the National Minimum Wage and therefore have to be subtracted from the total pay received before compliance is calculated:**

   a. Any enhancements, premiums or increased hourly rates paid in respect of time work (Regulation 10 of the National Minimum Wage Regulations 2015, previously Regulation 31 of the National Minimum Wage Regulations 1999) – the amount that exceeds the lowest rate that would be payable under the contract in respect of work involving particular duties is not taken into account.

   Employers should therefore be extremely careful not to rely on enhanced rates paid for working during unsocial hours, weekends and public holidays or higher rates for short homecare visits, in order maintain compliance with the National Minimum Wage.

   Employers should also be extremely careful when paying different hourly rates for some elements of the work (including travel time or training), as the lowest rate paid may be used to calculate compliance with National Minimum Wage. HMRC consider travel time an integral part of delivering of homecare and do not accept it to be work involving different duties.

   **Example 1:** If the care worker aged 28 usually receives £7.70 per hour in respect of work involving particular duties but receives £8.00 per hour for any overtime or weekend working involving the same duties, only £7.70 per hour is taken into account in respect of all shifts worked for the purposes of calculating National Minimum Wage.
- **Basic contact hours**: 10 at the rate of £7.70 per hour = £77.00
- **Antisocial contact hours**: 5 at the rate of £8.00 per hour = £40.00
- **Overall Travel time**: 2 hours with no extra pay
- **Total pay** = £117.00
- **Total pay for NMW purposes**: £117 – (5 x £0.30) = £115.50
- **NMW amount due to worker**: £7.50 x 17 = £127.50
- In this example there has been **NMW underpayment** of £12 (£115.50 - £127.50)

**Example 2**: If the care worker aged 28 is engaged on a zero-hours contract and usually receives £7.70 per hour in respect of work involving particular duties but receives £8.00 per hour for out of hours working involving those duties, again only £7.70 per hour is taken into account in respect of all shifts worked for the purposes of calculating National Minimum Wage.

**Example 3**: If the care worker aged 28 usually receives £7.70 per hour in respect of work involving service user A, but receives £9.00 per hour in respect of work involving service user B as they are a more complicated client and therefore the duties are different, relevant pay rates can be taken into account in respect of all shifts worked for the purposes of calculating the National Minimum Wage.

- **Basic hours worked in respect of service user A**: 10 at the rate of £7.70 per hour = £77.00
- **Basic hours worked in respect of service user B**: 10 at the rate of £9.00 per hour = £90.00
- **Overall Travel time**: 2 hours with no extra pay
- **Total pay** = £167.00
- **Total pay for NMW purposes** = £167.00
- **NMW amount due to worker**: £7.50 x 22 = £165.00
- In this example there has been **no NMW underpayment** (£167 - £165)
**Example 4**: If the care worker aged 28 usually receives £7.70 per hour in respect of direct contact involving service users, but receives £3.00 per hour in respect of their travel time, there is a significant risk that only £3.00 per hour will be taken into account in respect of all time worked for the purposes of calculating National Minimum Wage. In this example there could be significant **NMW underpayment**.

b. Any allowances or payments that are not attributable to the employee’s performance, for example London weighting, an on call allowance, or travel time allowance. However, if these payments are consolidated into standard pay or are attributable to the performance of the worker in carrying out the work (for example a performance bonus), they will count towards the National Minimum Wage. From the Freedom of Information Act response Anthony Collins Solicitors LLP received from HMRC in March 2017, it appears that “sleeping allowance” will count as eligible pay if it “forms part of the pay arrangements”.

c. Expenses or allowances, including the repayment of money spent in connection with the job – for example to cover the cost of uniforms. It is unlawful to make deductions or to require money to be paid back for such expenses if this will reduce the amount of pay below the level required to meet the National Minimum Wage. Employers should therefore think carefully before allowing workers to re-pay uniform costs through deductions from pay, unless this practice will not impact on NMW compliance (see paragraph 37–41 below).

d. Benefits in kind, whether or not they have a monetary value – e.g. vouchers;

e. Loans by the employer;

f. Employer Pension contributions;

g. Redundancy payments;

h. Holiday, sickness or maternity pay etc; and

i. Settlement and compensation payments or court awards.

33. **Examples of deductions that do not affect the calculation of the National Minimum Wage pay**:
a. Deductions (or payments made by the worker) under an agreement for a loan or advance of wages;

b. Deductions (or payments made by the worker) because of an accidental overpayment of wages;

c. Deductions or payments that are not for expenditure connected to the worker’s employment, or for the employer’s own use or benefit - for example pension contributions and union subscriptions. Any deduction made from worker’s pay to pay for criminal record (DBS, Disclosure Scotland or Access NI) checks (see below) on his behalf will not reduce the National Minimum Wage pay since it is paid over by you to meet the liability of the worker; and

d. Deductions for tax and national insurance.

34. **Criminal record checks and checks against adults’ and children’s barred lists (DBS, Disclosure Scotland checks and AccessNI Disclosures)**

35. HMRC’s own internal guidance indicates that the responsibility for the cost of checks against criminal records and adults’ and children’s barring lists (including those undertaken by the Disclosure and Barring Service in England and Wales (formerly CRB), Disclosure Scotland and AccessNI) sits with the individual upon whom that check is being undertaken, rather than the employer, even though you may decide to pay for the necessary disclosure checks on behalf of your workers. Any deduction therefore made from the worker’s pay to pay for this check on his behalf will not reduce the National Minimum Wage pay if it is paid over by you to a third party to meet the liability of the worker. This guidance is of course subject to change and we are not confident that the courts would reach the same view if an individual employee took enforcement action.

36. If you impose an administrative charge for handling the application, however, then the amount of the administrative charge will reduce the worker’s National Minimum Wage pay.

37. **Uniforms**
38. If you require workers to wear specific uniforms and staff are required to purchase those, then any deductions made from pay or payments made to you by the worker in respect of such uniforms **will reduce** the National Minimum Wage pay. If the worker makes payment to a third party for the required uniforms, those payments **will also reduce** the National Minimum Wage pay since it would be seen by HMRC as expenditure incurred in connection with the worker’s employment.

39. If you provide a uniform free of charge, any charge by you made for ordinary wear and tear to that uniform **will reduce** the worker’s National Minimum Wage pay. However, if the worker damages the uniform, loses it or does not return it at the end of their employment where contractually required to do so, the charge made by you **will not reduce** the National Minimum Wage pay providing you are contractually entitled to make the charge (ie. the contract of employment confirms this).

40. If, however, uniforms are not required and the worker freely chooses to pay for additional items of uniform, any payment to you or a third party **will not reduce** the National Minimum Wage pay.

**UNIFORMS: useful tip**

41. If you require workers to wear specific uniforms, you may want to ask staff to pay a deposit for the uniform rather than paying for it. Providing the arrangement is structured appropriately, it is **arguable** that the taking of such a deposit will not reduce the National Minimum Wage pay providing the monies held by you is simply as security for those uniforms, held on trust for your workers and not for your use or benefit. The deposit will need to be returned to staff on termination of their employment unless the worker damages the uniform, loses it or does not return it at the end of their employment. However, any charge by you made for ordinary wear and tear to that uniform **will reduce** the worker’s National Minimum Wage pay. If you are wanting to rely on this we would suggest that you seek specific advice as HMRC guidance is contrary to this approach.

42. **Accommodation**

43. Although this will not be relevant to all homecare providers, those who provide accommodation to their staff should note that if a person lives in accommodation provided by their employer and they either:
a. have the rent for that accommodation deducted from their earnings; or

b. they are paid their earnings and give some of that money back to their employer in respect of their rent

Only some of this money can be taken into account when calculating the total earnings in the pay reference period.

44. There is an accommodation offset allowance that determines how much of the money paid in respect of rent can be taken into account for the purposes of the National Minimum Wage. This amount is currently £6.40 (it was £6.00 prior to 1 April 2017) per day that the accommodation has been provided during the pay reference period.

45. In a similar way, if the accommodation is provided free of charge, the same allowance can be added to the total pay for the pay reference period.

46. The reasoning for this is that the policy behind the National Minimum Wage is that workers should receive pay in the form of cash, rather than benefits in kind. Accommodation is the only non-cash benefit that has an allowance that can be taken into account which is used to value the accommodation provided. Other benefits in kind such as vouchers will not count at all.

**What does this mean in practice?**

*Example 1*

An employee is provided with free accommodation. They are paid every 28 days and have resided in the accommodation for all 28 days. When the employer is calculating the total earnings for the pay reference period they can add £179.20 (28 x £6.40) to the total wages received.

*Example 2*

An employee pays their employer discounted rent for their accommodation. They are paid every 28 days and have resided in the accommodation for all 28 days. They are paid £600 every 28 days. They pay £250 rent every 28 days.
When the employer is calculating the total earnings for the pay reference period they need to subtract the rental payment that is not covered by the accommodation offset allowance (£70.80). This makes their total pay for the pay reference period £529.20.

**Number of hours worked during the pay reference period**

47. The total number of hours worked that you will need to take into account will depend on the type of work the worker is engaged in. There are different rules which apply to different categories of work for National Minimum Wage calculation purposes.

48. In order to calculate whether a worker is receiving the National Minimum Wage you will therefore need to identify the type of work they are undertaking.

**Please read the following four sections carefully, to ensure that you have correctly assessed the type of work being performed.**

**WARNING:** We would recommend that providers who engage workers on a self-employed basis should take appropriate legal advice to ensure that their arrangements are properly documented and a true reflection of the arrangements in place. Our experience is that a number of providers believe their workers are self-employed, when this is not the case. For further information please refer to UKHCA Factsheet: Employment status of careworkers, available to members at: www.ukhca.co.uk/downloads.aspx?ID=455

**Time work**

49. This is work paid for according to the amount of time the worker spends working, for example, a worker who is paid an hourly rate.

50. **It is likely that most of your careworkers (and possibly your supervisors) will be engaged under this type of working arrangement. However, careworkers providing live-in care services or undertaking sleep-ins may be undertaking unmeasured work (please see paragraphs 0–77).**

**Total of hours worked for time workers?**
51. In relation to time work, in theory, the formula is quite straightforward. You must simply add up the total number of hours of time work done by the worker in the pay reference period including time spent working by the worker (i.e.”contact time”); and time treated as worked (e.g. time spent training, travelling, waiting to work, and/or time on-call). It seems obvious but what time counts as time worked or treated as worked can be complicated, as set out below.

52. In relation to time work, time spent absent from work (for example sickness absence, annual leave and maternity leave) will not count. The time spent on such absences and the money received during these absences should not be taken into account.

53. Rest breaks such as a lunch hour will not count, even if the worker works voluntarily during that time. However, if they are instructed or required to work during a break, the time will count.

54. Any time spent engaged in industrial action will not count as time spent working (any pay received during this period will not count either).

55. Travel time and time spent training generally count towards calculation of National Minimum Wage and are dealt with later in this toolkit under E. Travel time below. Please read these sections carefully.
56. **There is much confusion over the legal requirements to ensure that time workers are being paid the appropriate wage for on-call and or sleep-ins.**

The current position is that, where a person is performing ‘time work’, but:

a. is not working, and

b. is required by their employer to be available at or near a place of work for the purposes of working

The time spent is still ‘working time’, even if:

a. the worker is simply waiting to be given work, or

b. is “on call”, or

c. is on “stand by” or,

d. is asleep.

57. **The previous regulations (i.e. the National Minimum Wage Regulations 1999) stated at regulations 15(1) and 15(1A) that time when the worker is available at or near their place of work for the purpose of doing work and is required to be available for such work will count unless:**

a. The worker’s home is at or near their place of work and during that time they are allowed to spend it at home; or (case law suggests this should read “and”)

b. The worker sleeps at or near a place of work and is provided with suitable facilities for sleeping and they are asleep or not working (i.e. only time spent awake for the purpose of working will count).

58. **The new regulations (The National Minimum Wage Regulations 2015) state at regulation 32:**

(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.
(2) In paragraph (1), hours when a worker is “available” only include hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.

59. There is quite a lot of case law on what this actually means in practice, but as confirmed above the current position in relation to time work is that where the careworker is required by their employer to be available at or near a place of work for the purposes of working this counts as working time. Please refer to the Scenario in Appendix 2 - Practical examples – total hours worked for a detailed analysis of the current position and Anthony Collins Solicitors’ view on the current position.

Salaried work

60. This is where a worker is paid a set amount to work a set number of hours per year and is paid their annual salary in equal weekly or monthly instalments or in variable amounts which add up to the same each quarter.

61. Please note that the fact that your staff are paid on annual salary basis does not in itself automatically mean that they would fall within the salaried work definition.

62. Providers should note that a contract which describes hours to be worked on a weekly basis (such as 37 hours a week) might not contain sufficient information to determine the basic hours for workers who work varied hours because a weekly calculation would not cover a full calendar year.

63. You are likely to have this type of working arrangement with your office based staff and managers, and possibly with your supervisors and senior careworkers.
Total of hours worked for salaried workers?

64. In order to ascertain the number of salaried hours worked in a relevant pay reference period, the first step is to calculate the worker’s total basic annual hours and divide them by the pay reference period, for example for a monthly pay reference period:

1950 annual hours divided by 12 months = 162.5 hours per month.

The second step is to determine the number of hours worked in the relevant pay reference period outside the basic hours in respect of which the worker has no entitlement to extra pay.

65. Again, time spent actually working will count excluding when the worker is paid less than normal pay (for example during maternity leave, annual leave or sickness absence) and also excluding time participating in industrial action.

66. Travel time and time spent training generally count towards calculation of National Minimum Wage and are dealt with later in this toolkit in sections E. Travel time and section F. Training time and costs, including individual and group supervision below. Please read these sections carefully.

67. As with time work, there is much confusion over the legal requirements to ensure that salaried workers are being paid the appropriate wage for on-call and or sleep-ins. The current position is that time where a worker performing salaried work is not working but is required by their employer to be available at or near a place of work for the purposes of working this is treated as working time, even if the worker is simply waiting to be given work, is “on call”, “stand by” or even asleep.

68. The previous regulations (i.e. the National Minimum Wage Regulations 1999) stated at regulations 16(1) and 16(1A) that time when the worker is available at or near their place of work for the purpose of doing work and is required to be available for such work will count unless:

a. The worker’s home is at or near their place of work and during that time they are allowed to spend it at home; or (case law suggests this should read “and”)

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b. The worker sleeps at or near a place of work and is provided with suitable facilities for sleeping and they are asleep or not working (i.e. only time spent awake for the purpose of working will count).

69. This legislation has now been replaced by regulations 27(1)(b) and 27(2) of the National Minimum Wage Regulations 2015:

27(1)(b) hours a worker is available at or near a place of work for the purposes of working, unless the worker is at home.

27(2) In paragraph 1(b), hours when a worker is available only includes hours when the worker is awake for the purposes of working, even if a worker is required to sleep at or near a place of work and the employer provides suitable facilities for sleeping.

70. There is quite a lot of case law on what this actually means in practice, but as confirmed above the current position in relation to salaried work is that where the careworker is required by their employer to be available at or near a place of work for the purposes of working this counts as working time. Please refer to the Scenario in Appendix 2 - Practical examples – total hours worked for a detailed analysis of the current position and Anthony Collins Solicitors’ view on the current position.

Output work

71. This is where a worker is paid according to how productive they are; for example; creating a product and they are paid according to the number of products they produce. However, if the worker is required to work a set number of hours each day or is set a minimum or maximum number of hours or is told the amount of time to be spent on each product, this will count as time work (see paragraphs 49 – 55 above).

72. This guide does not cover output work as it is difficult to see how social care could be carried out on an output basis. You are unlikely to have any staff engaged on this type of working arrangement.
Unmeasured work

73. This is effectively a catch all category which includes any work that does not fall into the other three categories. It will generally be workers who do not receive a salary or be paid at an hourly rate or according to what they produce. Unmeasured work includes work in respect of which there are no specified hours and the worker is required to work when needed. For example, this may be where a worker is paid a set amount of money to complete a particular task, regardless of how long it takes. Careworkers who undertake unmeasured work will be paid by reference to something other than time, for example, the market rate, complexity of a task or the needs of the service user they are caring for.

74. **You may have this type of working arrangement with care staff who provide live-in care and/or where workers are paid a set daily fee regardless of how many hours they work on a given day.**

75. **NOTE:** We are aware that many providers have complicated employment arrangements with live-in careworkers who may be employed by another agency, the service users themselves or are self-employed. We would recommend that if any of these arrangements apply to your organisation, you take legal advice to ensure that your arrangements are properly documented and that the legal paperwork reflects the reality of the arrangements in place. As a starting point we would recommend you read the HMRC guidance on the same at [http://www.hmrc.gov.uk/calcs/esi.htm](http://www.hmrc.gov.uk/calcs/esi.htm)

Total of hours worked for unmeasured workers?

76. Unmeasured work is described as “any other work that is not time work, salaried hours work or output work.”

The hours of unmeasured work which count as the number of hours worked in each pay reference period are, “…the total number of hours which are worked... by the worker in that period or which the worker is treated as working under a daily average agreement in that period.”

77. You should therefore ensure that you have in place arrangements that enable you to determine the hours that are to be taken into account for **unmeasured work**. There are two ways of doing this:
a. To record every hour worked and therefore calculate the actual hours worked during the pay reference period; or

b. Agree what is referred to as a “daily average agreement” (explored further in Section 2 – Step by Step Assessment) which sets out in a written agreement, between you and the worker, the average hours which the worker is likely to spend carrying out duties each day. A daily average agreement could however be held to be invalid if the average number of hours agreed is not realistic.

(Please note: You have a duty to keep records in respect of workers who qualify for the National Minimum Wage sufficient to establish what your workers are being paid. For unmeasured work purposes this includes evidence that the average number of hours agreed is not realistic. For further details go to B. Record keeping above).

78. As with time work and salaried work a worker will not be treated as doing unmeasured work while taking part in industrial action or when they are absent from work (for example sickness absence, annual leave and maternity leave).

79. Travel time and time spent training for the purposes of unmeasured work will be treated as time spent doing unmeasured work.

80. For the purposes of calculating the hours that are to be taken into account for unmeasured work, it is arguable that an entire shift spent on call (including in a live-in care arrangement) or sleeping-in counts as carrying out contractual duties as it is a contractual requirement to be there, in particular where there is no daily average agreement in place. The risk of the whole of a live-in care day being treated as time worked is currently low where there is a valid daily average agreement in place, based on a Court of Appeal case on this point, Walton v Independent Living Organisation Ltd (2003). We would also apply this logic to on call shifts and a sleep-in but the argument is untested.

In this case Miss Walton was a careworker who looked after aged or disabled people in their own homes. She was required to carry out various tasks such as the client’s washing, ironing, shopping, preparing meals for her and her medication. Miss Walton was required to remain in the client’s home 24 hours per day in case she was required to give assistance to her client – occasionally she was called upon to do this, sometimes this happened during the night. Miss Walton worked for 3 days per week for a flat rate of £31.40 per day.

Miss Walton argued that her hourly rate should be ascertained by dividing her payment by 24. Miss Walton had agreed with her employer that she spent on average 6 hours 50 minutes completing her contractual duties each day. Her employer therefore argued that her payment should be divided by 6 hours and 50 minutes, giving her a wage per hour of £4.60 which was above the National Minimum Wage of £3.60 per hour, at that time.

The Employment Tribunal and Court of Appeal held that the Employer was correct and that Miss Walton was carrying out unmeasured work as she was not paid by reference to time spent, rather her daily rate varied according to the complexity of the needs of the client she was looking after and was related to the nature of the tasks she would be carrying out. There was a written agreement in place which specified a realistic assessment of the time it would take her to carry out the required duties.

The Court of Appeal upheld this view and did not accept that because the applicant was required to stay at the client’s home 24 hours a day, she spent 24 hours a day in carrying out her contractual duties. When not performing her specified duties she was not required to give the client her full attention. In those circumstances, it could not be said that she was continuously performing her contractual duties for 24 hours each day for the purposes of her daily average agreement. This is in contrast to the view reached in a time work case which found that you can be working when asleep. This is covered in detail at Appendix 1 of this guide.
82. **POINT TO NOTE: Multiple arrangements** - It is our view that workers can work under more than one type of payment arrangement. To give an example, a worker could be paid a salary for their usual hours worked during the day and a separate payment for any on call shifts that they undertake which could be a flat rate payment on an unmeasured basis. HMRC appear to take the view that there must be separate contracts for time work, salaried work, and unmeasured work in order for a multiple work arrangement to exist. Where there is only one contract in place HMRC states that “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”. **Providers should therefore enter into separate and clear contractual arrangements in respect of any unmeasured work.**

83. **For practical examples of scenarios which are typical of common arrangements in the social care sector and their impact on calculating the total of hours worked, please go to Appendix 1 - Practical examples – total hours worked.**

**E. Travel time**

*General Principles*

84. Generally, travel time for the purposes of calculating hours worked when determining the National Minimum Wage will fall within one of the two categories:

a. Time spent travelling between home and a worker's normal place of work and back, which **will not count** as time worked when determining whether the National Minimum Wage has been paid; and

b. Time spent travelling on business, which **will count** as time worked when determining whether the National Minimum Wage has been paid.
85. Time spent travelling on business includes time when the worker is:

a. required to travel in connection with their work by a mode of transport or is making a journey on foot the legislation and the government guidance are unclear on whether any rest breaks taken during the time the worker is travelling will count as time worked (for example a lunch break on board a train). Providers that however are able to document that a break was taken during the time spent travelling may be able to show that this time does not count as working time;

b. waiting at the place of departure to begin the journey or waiting for the journey to recommence (for example waiting for a train or a bus to arrive or awaiting a connecting train/bus);

c. travelling from one place of work/work assignment to another (except when a worker is taking a rest break);

d. waiting at the end of a journey (for example to meet someone in connection with work or start a job); and

e. travelling from work to training venues (travel between the worker’s home and the training venue does not count).

86. PLEASE NOTE: Despite the practice of the majority of Local Authorities purchasing homecare by reference to “contact time” only it is extremely important to understand that the above types of travel time are included for the purposes of National Minimum Wage compliance.

Domiciliary care – sector specific issues

87. In many cases domiciliary care will be provided in short visits lasting under an hour. Typically careworkers will cover a number of these appointments and will travel to a number of appointments during their working day. Effective rostering of careworkers may well mean that there is little gap between appointments, so that there is just sufficient time for a careworker to travel on to their next appointment from the last appointment. However, there may also be situations where the careworker has significantly more time between appointments than is needed in order to travel between appointments.
88. Determining how, and when, travelling and waiting time counts for the purposes of calculating whether the National Minimum Wage has been paid can therefore be very difficult in the sector and there is no one size fits all approach.

89. We have therefore identified the following scenarios which in our experience are typical of travelling time arrangements in the domiciliary care sector to assist you with deciding how to account for any travel time.

**Typical Scenarios**

90. *What is the key issue?* - The key issue is to properly assess the travel time that counts towards the calculation of the National Minimum Wage.

91. *What time counts?*

The position is as follows:

92. **Scenario 1:** A care worker is rostered to carry out visits throughout the day and travels to their first appointment from home and then from one appointment to another. The gap between appointments is calculated to ensure that the careworker has sufficient time to travel between appointments, but no more. Following their last appointment the careworker will travel back to their home.

93. When calculating the number of hours worked for the purposes of the National Minimum Wage:

   a. Time spent travelling to an appointment from home or from an appointment to home is not to be included;

   b. Time actually spent carrying out the appointment will obviously count; and

   c. Time travelling between appointments will also count (whether driving, getting public transport or walking.)
94. Scenario 2: The scenario is the same as the situation set out in Scenario 1 above with the exception that the gap between some or all of the appointments is more than the amount of time needed to travel between appointments. The careworker is therefore waiting to start their next appointment, is not working during this time, but also the worker does not have sufficient time to travel home or take a proper rest break.

95. When calculating the number of hours worked for the purposes of the National Minimum Wage:

   a. Again time spent travelling to and from home will not count towards the number of hours worked for the purposes of the National Minimum Wage;

   b. Again time actually spent in carrying out the appointment will count;

   c. Travel time between appointments will also count including waiting to travel (for example at a bus or train station);

   d. Regulation 20 of the National Minimum Wage Regulations 2015 states: “travelling” includes hours when the worker is [...] waiting at the end of a journey for the purpose of carrying out duties, or to receive training, except for any time the worker spends taking a rest break. Therefore, time spent between appointments where the careworker is not working but is waiting to start work, will count towards hours of work for the purposes of the National Minimum Wage. If the worker is waiting to work but is on a contractual rest break, the rest break will not count towards hours of work for the purposes of the National Minimum Wage. In order to count as a contractual rest break, the time needs to be properly rota’d on the worker’s timesheet/schedule.
Where there is a gap between appointments where the careworker is not otherwise required to be working and is not simply waiting to start work, it is arguable that this time will not count towards hours of work for the purposes of the National Minimum Wage. Providers should consider scheduling this time as a break on the rota or having other systems of recording time (for example timesheets) to evidence that the time was taken as a break. We do not consider that allocating time retrospectively as a break would achieve compliance unless timesheet records are kept confirming the same.

Providers should be aware that HMRC guidance to its inspectors suggests that it is for the Inspecting Officer to gather the facts from both the employer and the worker and form an opinion on the length of any permitted breaks. We understand that a break between appointments of less than 30 minutes is likely to be classed as working time by HMRC. We would recommend that any gaps where the worker is not required to be working are therefore scheduled as a rest break or records of any rest breaks taken are recorded by careworkers using timesheets.

96. Scenario 3: This is the same as the scenario set out in Scenario 2 above but the gaps between some or all appointments are longer and the careworker carries out paperwork whilst they are waiting for their next appointment.

97. When calculating the number of hours worked for the purposes of the National Minimum Wage:

a. Again time spent travelling to and from home will not count towards the number of hours worked for the purposes of the minimum wage;

b. Again time actually spent in carrying out the appointment will count;

c. Travel time between appointments will also count;

d. Time between appointments spent doing the paperwork will count;
e. However, time spent waiting between appointments where the careworker is not working, waiting to travel or waiting to work and is not otherwise required to be working will not count (see paragraph 95 d. above and Scenario 4 below).

98. Scenario 4: The careworker has a smaller number of appointments scattered throughout the day with significant gaps in between (much more than the amount of time needed to travel between appointments). The careworker therefore goes home between appointments and travels to and from their home for each appointment.

99. When calculating the number of hours worked for the purposes of the National Minimum Wage where the careworker travels to each appointment from their home (or another personal appointment) and then back to their home after the appointment, no travelling time will count. It is important to note that it is what actually happens in practice, rather than whether the worker could travel home which counts.

100. Scenario 5: The careworker carries out a number of appointments throughout the day, some of which only have the minimum amount of time required to travel, some which have more time than is required for travelling and some where the careworker has sufficient time to go home between appointments (and does in fact do so).

101. When calculating the number of hours worked for the purposes of the National Minimum Wage this case is essentially a mix of the other scenarios and in this situation, each journey needs to be analysed separately in order to assess whether the time counts and if so how much of the time counts, using the principles outlined above.

102. **NOTE:** We have assumed that careworkers working in the scenarios outlined above will be paid either a salary or by reference to the amount of time work. For treatment of travel time where careworker are working unmeasured work go to paragraph 76 above Unmeasured Work.

**TRAVEL TIME - Important reminder: What does this mean in practice?**
103. In many cases contracting authorities and domiciliary care providers will only pay for the time spent in the service user’s home (we refer to this as “contact time”) but not pay for travel time between visits. This in itself is not a problem, as the law does not require that all time at work must be paid at the rate of the National Minimum Wage or higher. However, the law requires that a worker is paid the National Minimum Wage on average based on the total of hours worked over a pay reference period.

104. Compliance with the National Minimum Wage is therefore worked out by calculating the total amount of eligible pay received during a pay reference period (which depends on how frequently the workers are paid and cannot be any longer than a month) and dividing this by the total number of hours which count for National Minimum Wage purposes during that pay reference period.

105. Domiciliary care providers could therefore satisfy the law by:

a. paying the National Minimum Wage (or higher) for all the time that counts (including the travel and waiting time); or

b. Paying “contact time” at a higher rate than National Minimum Wage, so long as, on average, at least the National Minimum Wage is paid for all working time (including travel and waiting time). This is possibly the most commonly occurring method of payment in the homecare sector, but carries a particular risk of non-compliance with National Minimum Wage. It is difficult to be sure that the rate paid for “contact time” is always high enough to meet compliance, particularly for workers where travel time makes up a significant proportion of working time or there are only short gaps between appointments.

106. Providers who pay different rates of pay for travel time and contact time should be aware of the rules on using the lowest rate for time work as set out in paragraph 32 a. above and therefore be extremely careful not to rely on enhanced, or different rates paid when calculating the National Minimum Wage compliance. As explained above, HMRC’s view is that travel time is an integral part of delivering of homecare and they do not accept it to be work involving different duties. This means that HMRC may use a low travel time rate as the lowest hourly rate for homecare too and assess compliance based on this.
Is there a new ruling which means that providers now have to pay careworkers for any journeys from their homes to their place of work and vice versa?

107. In the Tyco case (Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another (c-266/14)) the European Court of Justice ruled that for workers who have no fixed or habitual place of work, time spent travelling from home to their first appointment and from their last appointment back home does count as working time under the Working Time Regulations, which cover issues such as:

   a. Limit on the average working week;

   b. Holiday accrual and pay; and

   c. Rest breaks.

108. Pay is an entirely separate issue, which is governed by the National Minimum Wage legislation and the contract of employment. Therefore, this case does not automatically mean that workers with no fixed place of work are entitled to be paid for time spent travelling between their home and client’s homes.

109. As this travelling time (between home and a place of work) is currently unpaid for careworkers undertaking time work and salaried work, it is unlikely that this decision will create any new right to be paid. However, ambiguous wording in a contract, especially where careworkers are paid on an hourly rate basis, could be exploited to create a basis of payment or to argue that travel time uses up normal hours of work. Providers may wish to review their contracts on this point and consider implementing a travel time policy to clarify the position.

Travel expenses
110. Providers should note that if travel expenses are not paid, then these expenses incurred by a worker would be deducted from pay for National Minimum Wage purposes. Where workers are using their own cars to travel to appointments, this is probably limited to petrol expenses rather than including any contribution towards wear and tear or other vehicle related expenses. However, the rules on this aren’t very clear.

111. Where workers are using public transport and are not refunded their travelling expenses, including ticket fares, then these expenses incurred by a worker would be deducted from pay for National Minimum Wage purposes.

112. Providers should note however that where travel expenses are paid, these payments do not count towards pay for National Minimum Wage purposes.

Worked example

113. A careworker works from 8 a.m. to 4 p.m. seeing service users. The careworker drives from home at 7.45 a.m. to start her first appointment at 8 a.m. The careworker has two 15 minute appointment each hour and spends the other 30 minutes in each hour travelling to the appointments. At 12 p.m., having travelled to her next appointment, the careworker takes a lunch break in her car until 1 p.m. She doesn’t carry out any work. She then continues to work in the same pattern with her last appointment finishing at 4 p.m. She then drives home arriving home at 4.15 p.m.

114. The careworker (who is paid weekly) receives £3 for each 15 minute visit but is not paid anything for travel time or her lunch break. The careworker is therefore paid £42 for the day’s work. For National Minimum Wage purposes:

a. the 15 minutes on each appointment counts;
b. the time travelling between appointments counts;

c. the lunch break of 1 hour does not count;

d. the 15 minutes travelling to and from her home at the beginning and end of the day does not count.

115. On this basis, 7 hours would count for National Minimum Wage purposes. The rate of pay for the day is therefore £6 per hour. Assuming this pattern of work and pay is replicated for the rest of the week and the worker is at least 21, the employer will have underpaid the worker by 70 pence every hour (based on the October 2015 rate of the National Minimum Wage).

F. Training time and costs, including individual and group supervision

General Principles

116. Any training that has been approved by the employer will generally count as time work and should be included in the “number of hours worked” part of the calculation when calculating if the National Minimum Wage has been received over the pay reference period. The same logic applies to workers attending supervisory sessions or appraisals. This will include:

a. A member of staff attending training or supervision during normal working hours at a place other than their normal place of work for the purpose of receiving training approved by the employer.

b. Travelling during normal working hours from the staff member’s workplace to and from the place where the training or supervision is provided (but not from home to the training venue or from the training venue to home).

c. Receiving supervision or training (approved by the employer) at the workplace.
Therefore, where a worker who normally does time work, salaried hours work or unmeasured work attends any of the above training, it will count as time worked and the hours spent should be counted for the National Minimum Wage purposes.

**Salaried hours work – point to note:** If the staff member is paid by way of a salary any training that is connected to their work and meets any of the criteria in the bullet points above will also count as working time. This means that if this time is outside of their normal contracted working hours, the additional hours will need to be taken into account when calculating if the National Minimum Wage has been paid.

**How about distance learning training?**

As technology advances it is possible for some training to be undertaken via distance learning (for example over the internet or completing assignments etc.). If care workers are doing such courses (which are approved by their employer) when they are not working (for example at home) it is possible that the time they spend on this will need to be taken into account when calculating if the National Minimum Wage has been received over the pay reference period.

**How does this affect zero hours workers or those working irregular hours?**

As a zero hours worker, the term, “normal working hours,” in the legislation could mean any hours a zero hours worker can be called upon to work at any time. Therefore with zero hours workers the time of day they do the training is irrelevant but where they do it is relevant, as if it is at a normal place work (which they are being paid in relation to that time already) they won’t be entitled to any extra payment, but, if they are attending somewhere other than their usual places of work, they will be entitled to the National Minimum Wage.

**Induction training costs**
121. If a staff member is classed as a worker or employee during the time they carry out their induction training, they will be entitled to have that time taken into account when calculating if the National Minimum Wage has been paid. Any money the staff member pays to the organisation in respect of the training (so if they are charged to attend) will be taken off the money that they receive as wages for the purposes of calculating whether they have received the National Minimum Wage.

**TRAINING: useful tip**

122. Some organisations are reluctant to pay for induction training as the staff may attend the training, enjoy the benefit of it and leave before completing any shifts. There are two potential ways to address this concern:

a. **Option 1 – Claiming back training costs if the worker leaves**

Pay the member of staff for attending the course but have a claw-back clause in the contract which means that if they leave within a set period of time they will be required to repay a sum which covers your expenses in putting on this course. This should be a stepped payment which decreases in correlation to the length of time the staff member has stayed with the organisation, for example, 100% of the course costs will be paid back if the employee leaves within 3 months, 75% if they leave within 6 months etc. This option would not enable you to recoup the payment for the time they have spent attending the course.

It would be wise to take legal advice on any such clauses as whether they could be enforced will depend on how much benefit the organisation has had from the member of staff attending the course by the time they leave.

The organisation would still need to ensure that the member of staff had received the minimum wage in respect of the hours that they had worked for the organisation after the deduction or repayment has been made.

b. **Option 2 – Completing induction training before employment begins**

If the potential staff member has a contract they will be classed as a worker and be entitled to the induction hours being taken into account when calculating over the pay reference period if they have received the National Minimum Wage. In order to ensure the potential staff member is not a worker at the point of induction, we suggest the following.
When making a job offer to potential new members of staff this should be subject to satisfactory completion of:

- induction training;
- Criminal Record Checks (through DBS, Disclosure Scotland or Access NI, as the case may be);
- reference checks;
- (any other reasonable conditions the organisation usually imposes).

They can be provided with a sample contract that they will be required to sign if they meet the conditions. It should be explained to the candidate that should they successfully complete the training and pass the other requirements they will be paid "X" amount (for attending the training) after working "X" number of hours. The number of hours will depend on how long the organisation thinks it will take to cover the costs of the training. The new member of staff should not be offered any hours or given their own contract before the induction is completed.

This would mean that time spent attending the induction training would not be paid for unless the staff member completes a set number of hours after they have completed the training phase.

Please note: If payment is made following the commencement of employment for time spent at induction training, if the arrangements are not properly formalised, the payment can fall within the definition of loyalty bonus and therefore be an allowance, and will not count towards the National Minimum Wage pay.

Please also note: If the careworker is not an employee when they undertake their induction training, there is no legal obligation to make a payment for this time, although your organisation may wish to consider whether this is an ethical practice. If you would like to operate in this way, we would suggest that you seek advice to ensure that you set up the arrangements properly.

G. Calculating workers’ hourly rate

123. Having determined the pay received by the worker and number of hours worked in the pay reference period, you will be able to determine the worker’s hourly rate of pay. This is to be determined as follows:
a. Total gross eligible pay received by the worker for time work, salaried hours worker, and unmeasured work worked by the worker in the pay reference period;

**Divided by**

b. Total number of hours of time work, salaried work and unmeasured work worked by the worker in the pay reference period.

124. The result is the worker’s hourly rate of pay that should be equal, at least, to the applicable National Minimum Wage rate.

**To calculate whether you are compliant, go to** Section 2 – Step by Step Assessment.
Appendix 1 - Practical examples – total hours worked

Scenario 1, sleep ins

A careworker undertakes day time work for which they are paid an hourly rate of pay above the National Minimum Wage. This careworker also occasionally sleeps in at the service. Typically, the careworker is awake and working at the beginning and end of the duty and a room and bed are provided which the careworker may use to sleep. The careworker may, however, be called upon by the client at any point during the night to provide care. Typically, the careworker is paid a flat rate for the sleep-in.

What is the key issue?

The key issue in this particular scenario is:

• Does the National Minimum Wage need to be paid for times when the careworker is simply present at the place of work, even if asleep and not actually working?

The law in this area (and indeed government guidance) is complicated.

The first thing that needs to be considered is what type of work is the careworker performing whilst undertaking a sleep-in?

Because a flat fee is paid and the careworker is not paid by reference to time or by a salary, it is arguable that they are performing unmeasured work.

Although we do not agree with this, we understand that HMRC take the view that there must be separate contracts for time/salaried work, and unmeasured work. Where there is only one contract in place HMRC states that “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”. There is therefore a risk that the sleep-ins would be considered to constitute time work.
Scenario 1 - Does the National Minimum Wage need to be paid for times when the careworker working *Time worked or salary* is simply present at the place of work, even if asleep and not actually working?

Where a careworker is considered to be working time work or salaried work, the Regulations and guidance from the Department for Business, Innovation and Skills used to indicate that where a worker is sleeping at or near a place of work (during time in which they are permitted to sleep), then those hours will not count towards the calculation of the National Minimum Wage. The Department for Business, Innovation and Skills’ guide to calculating the minimum wage (published in October 2013\(^1\)) stated in respect of time work:

"You may allow workers who are performing time work to sleep at or near their place of work and provide them with sleeping facilities. They are not entitled to the minimum wage while they are on standby or on call and are asleep or entitled to sleep. However, you must pay them the minimum wage for any time during which they are awake for working.

*Time when a worker can sleep and is not working is not time for which you have to pay them the minimum wage. However, if they have to get up and work, the time spent awake when they are getting ready for work and working is time for which the minimum wage. (sic)"

However, a revised guide, ‘Calculating the Minimum Wage’, published by the Department for Business, Innovation and Skills in February 2015 (and most recently updated in April 2016) states:

"The hours of work that count for minimum wage purposes for *time and salaried work* includes any time when a worker is:....

- At the workplace working (which in some circumstances may include time spent sleeping...)

\(^1\) There was a revised guide issued by BIS in October 2014 but the wording was similar.
• **Required to be available for work either on standby or on-call at or near their workplace – however there is an exception if the worker is permitted to sleep during this time and is provided with suitable sleeping facilities...**”

Subsequently under the section “Sleeping between duties” the guide states:

“**Employers must ascertain whether a worker is still subject to certain work-related responsibilities whilst asleep, to the extent that they could be deemed to be ‘working.’**

A worker, who is found to be working, even though they are asleep, is entitled to the NMW for the entire time they are at work. Workers may be found to be “working” whilst asleep if, for example, there is a statutory requirement for them to be present or they would face disciplinary action if they left the workplace. They would then be entitled to the NMW.

There can be situations, however, where a worker is only available for work and is permitted to sleep and suitable sleeping facilities are provided at the workplace. In those cases, the individual will not be “working” and the NMW will not be payable. However, the individual must be paid NMW for any time they are awake for the purpose of working.

**Under these situations it will depend on the nature of the work-related obligations to which the worker is subject whilst they are asleep. We have provided two examples that illustrate where the NMW is likely to apply and where it is not.”**

The guide then gives two examples:

**“Example 1 – where the NMW is likely to apply**

A person works in a care home and is required to work overnight shifts where they sleep on the premises. The person’s employer is required by statute to have someone on premises for health and safety purposes. The person would be disciplined if they left the premises at any stage during the night.

*It is likely that the person would be considered to be ‘working’ for the whole of the overnight shift even when they are sleeping.”*

**Example 2 – where the NMW is unlikely to apply**
A person works in a pub and lives in a flat above the pub. The employer requires the person to sleep there. However the person can come and go as they please during the night as long as they do sleep there. There are no specific responsibilities during the evening rather the person sleeps there so the flat is occupied i.e. to reduce the likelihood of the premises being burgled.

The person is likely only to be entitled to the NMW when they are awake and dealing with any emergencies in the night.”

We consider that the revised version of the Guide is more in line with the most recent case law as set out below.

Case law decisions on this point have varied and have developed as follows:

**MacCartney v Oversley House Management – 2006**

Elizabeth MacCartney was employed as a resident manager at Oversley House (a development of privately owned homes and communal areas for people over 60.) She was paid an annual salary of £8,750 and had working hours of 4 days per week of 24 hours on site cover. She was also provided with rent free accommodation. An important part of her duties was to respond to emergencies, along with visiting residents, liaising with their careworkers etc., organising activities for the residents and dealing with external contractors.

The Employment Appeal Tribunal held that all of her working hours were working time for the purposes of the National Minimum Wage and that she had therefore been paid less than the National Minimum Wage.

**City of Edinburgh Council v Lauder and others - 2012**

The Claimants in this case were employed as Sheltered Housing Wardens and worked Monday to Friday 8.30pm - 5.30pm. They were provided with rent free accommodation on site and did not have to pay council tax. Their job descriptions described their main role as facilitating independent living for tenants and offering support where necessary. They were also required to provide an emergency response whilst on duty at night. If they were called upon during the night, they were able to claim time off in lieu or overtime payments in respect of that time.
The Employment Appeal Tribunal here drew a distinction between cases where an employee is working merely by being present at their employer’s premises and indeed that is their core duty (for example security guards) and cases where the employee is on call in addition to their core duties. This distinction had been drawn in an earlier case in 2011 called *South Manchester Abbeyfield Society Ltd v Hopkins and another*.

The Employment Appeal Tribunal held that as the Claimants had core working hours, their main job was separate to the on call periods. Because the Claimants were required to be available near to their place of work, were provided with suitable facilities for sleeping and were not required to be awake unless called upon, only the time they spent awake actually working would count for the purposes of calculating if they had received the National Minimum Wage.

*British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team) (2002)* is an earlier case on this point. The British Nursing Association provides bank nurses for emergency cover in nursing homes and other care institutions. A telephone booking service operates 24 hours per day. They had office staff operating the telephone bookings during the day and employed staff to respond to calls from home during the night.

The Court of Appeal held that the employees answering the calls at night should be paid for every hour they were on call. Although they were in their own home (near to work) and were available for the purpose of work they were working throughout the period of their shift and not on call waiting to work.

This is perhaps another example of where the nature of the work was a core duty (as with security guards). It was described in the employees’ job descriptions as, “to work as part of the BNA team, providing a continuing service to BNA clients and members after the branch offices have closed and over the weekend...to enhance BNA’s reputation and maximise the business in a flexible caring manner.” The judge commented that, “no one would say that an employee sitting at the employer’s premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone.”
Our view is that the case law (until the *Whittlestone* case explained below was decided) seemed to consider the nature of the core duty when deciding whether all of the time should be working time. So for example, in British Nursing Association, the whole job, night and day was to man a helpline (in the same way as a security guard’s duty may be to be present). In contrast, a careworker who cares for a person during the day and is then on call waiting to respond to an emergency at night does not sit around waiting for a call during the day. They will be caring for the person they are looking after and carrying out various tasks. We consider that this could be distinguished from the sleep-in duty or on call shift. We consider that this line is blurred and, as with a lot of areas of law, the cases are very fact specific.

The previous case law decisions therefore indicated that if...

- The work is salaried hours or time work;
- The on call time is not the careworker’s core duty/main job; and
- The careworker sleeps at or near the place of work and is provided with suitable facilities for sleeping

...only time the careworker is awake for the purposes of working will count.

However, an Employment Appeal Tribunal decision has strongly contradicted this view:

*Mrs J Whittlestone v BJP Home Support Limited - 2014*

Mrs Whittlestone was employed as a careworker and was paid £6.35 per hour for time she actually spent providing care at the home of a service user.

She was also required to undertake “sleepovers” where she stayed at a service user’s house from 11pm to 7am. She was there to provide physical care, if required, during the night for three young adults who suffered from Down’s Syndrome. There was no evidence that she ever woke up from her sleep in order to provide any specific care. Mrs Whittlestone was paid £40 per week for any eight hour “sleepovers” that she undertook. Amongst other things, Mrs Whittlestone claimed that she should be paid at the rate of the National Minimum Wage for the eight hour sleepover.
The Employment Tribunal dismissed Mrs Whittlestone’s claim, however this decision was overturned by the Employment Appeal Tribunal who held that all hours of the “sleepover” should be counted for minimum wage purposes.

In this case the parties agreed that Mrs Whittlestone was undertaking time work (and the “unmeasured work” argument was not pursued at all”). This was therefore not looked into any further by the Employment Appeal Tribunal.

The Employment Appeal Tribunal found that Mrs Whittlestone was working throughout the whole period she was present, regardless of whether she was asleep or not.

You would think that in this situation regulation 15(1A) (now 32(2) in the National Minimum Wage Regulations 2015 - which essentially provided that if sleeping facilities are provided at or near the place of work and the worker is permitted to sleep then only time spent awake for the purposes of working will count – as explained above at paragraphs 57 and 58) would apply and mean that she was only entitled to payment when she was awake and working. However, the Employment Appeal Tribunal disagreed. They held that the whole period was time work and was therefore working time to be counted.

This was because, “there had been an agreement between the employer and the Claimant that she would work; she would have been disciplined if she had not been present throughout this period of time; she could not for instance slip out for a late night movie or for fish and chips.”

The Employment Tribunal also stated that regulation 15(1A) was only an exclusion to section 15(1) and that section 15(1) was not engaged as this only comes into play for work that would not otherwise count as time work. As the judge had already found that all of the time was time work, there was no need to consider regulation 15 at all. This view is also supported in a previous case, Burrow Down Support Services Ltd v Mr E Rossiter, in which it was stated, “Regulation 15 only arises in a case where a worker is not in fact working but is on call waiting to work.”

The Honourable Mr Justice Langstaff (President of the Employment Appeal Tribunal) also expressed concern at the “danger” of the expression “core hours.” He felt the first question is if work is being done at all, not if it is part of core hours or not.
This brings the issue back to whether when a careworker is asleep and waiting to work, they are in fact working by being there. As case law currently stands, the answer to this is yes. However, the recent case of Shannon v Rampersad and others [2015 IRLR 982] has given providers hope that this may not always be the case (please see further below).

Another EAT case, Esparon T/A Middle West Residential Care Home v Miss Slavikovski has come to a similar decision to the Whittlestone case.

*Esparon T/A Middle West Residential Care Home v Miss Slavikovski - 2014*

Miss Slavikovski was employed as a care worker at the Middle West Residential Care Home (“Middle West.”). Her contract stated under “On-Call Duty,” that:

“To comply with the regulatory requirements you are required to provide back-up in emergency situations.”

Miss Slavikovski therefore worked night shifts from 9pm – 7am for a flat sum of £25. Miss Slavikovski stated that during this time she was required to undertake a variety of duties including:

- Checking on residents every 40 minutes-1 hour, depending on their needs;
- Ironing;
- Changing incontinence pads; and
- Training new staff at night.

Middle West’s case was that this was not true and, although she might work during the hours 9-10pm and 7-9am, she was paid by the hour for this and between 10pm and 7am she was able to sleep on site but had to be available for emergencies. The Employment Tribunal did not accept that she received hourly pay for any of the hours of the night shift because a night shift (for which she received £25) was stated to be from 9pm – 7am.

Miss Slavikovski brought her case on 2 grounds:

1. She was required to work during her sleep-in shift; and
2. She was entitled to be paid simply for being present at the Respondent’s premises.
The Employment Tribunal decided that Miss Slavikovski was working time work throughout her night shift and therefore the employer had failed to pay the National Minimum Wage. They found that Miss Slavikovski was not on call during the night shift but was actually carrying out time work, particularly referring to the need to check on residents every 40 minutes - 1 hour. Again, however the “unmeasured work” argument was not put forward on behalf of the employer. Further, Miss Slavikovski’s evidence was accepted that she was not allowed to sleep on duty. The Employment Tribunal therefore did not consider the case law on whether employees were allowed to sleep or not whilst on call.

Middle West appealed this decision. The Employment Appeal Tribunal rejected their appeal.

The Employment Appeal Tribunal considered the relevant legislation on time work (at that time regulation 3 of the National Minimum Wage Act 1998) and the exemption that if a person is engaged on time work and they sleep at their place of work and are provided with facilities to do this, only the time when they are awake for the purposes of working will count for the purposes of the National Minimum Wage (at that time regulation 15.) The Employment Appeal Tribunal also considered many of the cases in this area and acknowledged that they are both fact sensitive and difficult to reconcile. The key difficulty highlighted was the difference between cases where:

- An employee is paid simply to be somewhere and is entitled to pay throughout the shift e.g. a night watchman; or

- An employee is present to be “on-call”, is provided with sleeping accommodation and not working the whole time and therefore paid only for when they are actually working.

They suggested that an important consideration in making this distinction is the reason why the employer requires the member of staff to be on the premises (see point 2 below).

The Employment Appeal Tribunal concluded that:

1. Miss Slavikovski was actually carrying out work during the night (as opposed to being deemed to be) by checking on the residents etc. and that she was required to do this.
2. Miss Slavikovski was entitled to be paid for simply being on the premises, regardless of whether she worked or not and regardless of whether she was carrying out her usual (core) duties. The Employment Appeal Tribunal attached a lot of weight to the fact that the reason Middle West required Miss Slavikovski to undertake night shifts was because of the statutory regulations concerning staffing in care homes. They referred to the following extracts from the Care Homes Regulations 2001 (now replaced) (number 18):

"The Registered person shall, having regard to the size of the care home, the statement of purpose and the number and needs of service users –

a) Ensure that at all times, suitably qualified, competent and experienced persons are working (Employment Appeal Tribunal’s emphasis) at the care home in such numbers as are appropriate for the health and welfare of service users..."

and at regulation 22:

"In order to safeguard the health, safety and welfare of the service users, the registered person must take appropriate steps to ensure that, at all times, there are sufficient numbers of suitably qualified, skilled and experienced persons employed for the purposes of carrying on the regulated activity."

Shannon v Rampersad and others [2015 IRLR 982].

Mr Shannon was employed as an on-call night care assistant at a registered residential care home. He was provided with free accommodation and required to be present at his accommodation from 10pm-7am but was able to sleep during those hours. He was required to provide assistance to the night care worker on duty at the home but in practice he was rarely called upon and disturbed. Mr Shannon was paid £90 per week plus a sum that was equivalent to the rent that was later introduced in relation to his accommodation.
When the home was taken over by new owners, Mr Shannon had many difficulties with them and was eventually dismissed. Mr Shannon, amongst other claims, brought a claim for £239,490, being the sum of the National Minimum Wage since the date it came into force and in relation to all of the hours he had spent during his nightly on-call hours. The tribunal did not uphold this claim and found that Mr Shannon had only been working on the rare occasions when he was called upon for assistance by the night care worker and that he had been paid the national minimum wage for those occasions.

Mr Shannon appealed to the Employment Appeal Tribunal (“EAT”). It was accepted in this case that Mr Shannon was a salaried worker. The focus was therefore on the provision at section 16 of the previous National Minimum Wage Regulations 1999 (now replaced by section 27 of the National Minimum Wage Regulations 2015) which provided that,

16(1) “…time when a worker is available at or near a place of work for the purposes of doing salaried hours work and is required to be available for such work will be treated as being working hours… except where –

(a) the worker’s home is at or near the place of work; and

(b) the time is time the worker is entitled to spend at home.

Regulation 16(1A) went on to state that, “in relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, time during the hours he is permitted to use those facilities for the purpose of sleeping shall only be treated as being salaried hours work when the worker is awake for the purposes of working.”

The EAT acknowledged that there were cases that had upheld reliance on section 16 concerning similar situations and cases that had held that it did not apply. The EAT agreed with the Employment Tribunal that Regulation 16 applied in these circumstances. The EAT decided that this case was different to those where regulation 16 had been found not to apply as this was not a case where he was working simply by being present (unlike a night watchman or telephone operator). Although not expressly stated, it may have been in the EAT’s mind that Mr Shannon was employed as a driver during the day so they may have viewed driving as his core duty.
As explained above, in the *Esparon t/a Middle West Residential Care Home v Slavikovska UKEAT/0217/12* case, the EAT found that Miss Slavikovski was entitled to be paid simply for being on the premises, regardless of whether she worked or not and regardless of whether she was carrying out her usual (core) duties. The EAT attached a lot of weight to the fact that the reason Middle West required Miss Slavikovski to undertake night shifts was because of the statutory regulations concerning staffing in care homes, which referred to ensuring appropriate numbers of suitably qualified, competent and experienced staff were present as appropriate to the health and welfare of the service users.

It appears to be key in the Shannon case that there was also a (waking) night worker on duty as it was held that it was not the case that Mr Shannon’s attendance for work throughout the night shift was necessary in order to meet its statutory obligation. This obligation was met, according to the Care Quality Commission report, by having a waking member of staff and a sleeping-in member of staff (Mr Shannon) employed during the night. Therefore, this case may be of limited application due to its unique facts.

*Royal Mencap Society v Tomlinson-Blake UKEAT/0290/16/DM*

Royal Mencap Society ("Mencap") contracted with East Riding Yorkshire Council ("the Council") to provide support and care to vulnerable adults including those with learning difficulties.

The Claimant (employed by Mencap since 2004) was a care support worker. She provided care and support to two men, at two different privately owned premises, both of whom have autism and substantial learning disabilities making them vulnerable adults within the Council’s responsibility. The Council carried out a care and needs assessment for them, and their care plans, directed at enabling them to lead as independent a life as possible, required 24-hour support. The support was provided by a 24-hour team of care support workers in their home at all times. The workers worked either a day shift or a sleep-in shift.
The Claimant's usual work pattern involved working a dayshift at the men's house either from 10am to 10pm or 3pm to 10pm. She would then work the following morning shift, either from 7am to 10am or from 7am to 4pm. Those hours were part of her salaried hours and she received appropriate remuneration in relation to them. In addition, the Claimant was required to carry out a sleeping shift between 10pm and 7am for which she received a flat rate of £22.35 together with one hour's pay of £6.70 making a total payment for that nine hour sleep-in, of £29.05.

No specific tasks were allocated to the Claimant to perform during the night, but the Tribunal found that she was obliged to remain at the house throughout this shift and to keep “a listening ear out” during the night in case her support was needed. The Tribunal also accepted that the Claimant was expected to intervene where necessary to deal with incidents that might require her intervention (for example if one of the men was unwell or distressed) or to respond to requests for help; and she was expected to respond to and deal with emergencies that might arise.

The Tribunal found that the need to intervene was real but infrequent - there were only six occasions over the preceding 16 months when the Claimant had to get up to intervene during the sleep-in hours. If nothing needed to be done during her sleep-in shift, the Claimant was entitled to sleep throughout. She was provided with her own bedroom, together with shared bathing and washing facilities.

The Claimant's case was that she worked simply by being present in the house throughout her sleep-in shift whether or not she was awake. She argued that the whole sleep-in shift should had been treated as "time work" and accordingly she had not received the pay required by the Regulations.

Mencap contended that the obligation on the Claimant during her sleep-in shift was to be "available" at her place of work for the purposes of working and that, as a result of Regulation 32(2) time spent asleep did not count as time work. The unmeasured work argument was not pursued.

The Tribunal accepted the Claimant's case, and concluded that the Claimant’s sleep-in hours counted towards the National Minimum Wage calculations.
Mencap appealed to the Employment Appeal Tribunal (EAT). The question at the heart of the Mencap appeal was whether employees who sleep-in, in order to carry out duties if required, engage in ‘time work’ (under Regulation 30) for the full duration of the sleep-in shift or whether they are working only when they are awake to carry out any relevant duties. The case did not consider the argument as to whether the sleep-in shift, which was paid for as a flat-rate payment, should be considered ‘time work’ in the first place or whether it should be categorised as ‘unmeasured work’.

Based on the facts and the legal arguments adopted by Mrs Tomlinson-Blake and Mencap, the EAT concluded that the Tribunal was entitled to reach their conclusion, namely that all hours of the sleep-in should count as time worked for National Minimum Wage (NMW) purposes.

The most important part of the EAT’s judgment, was its conclusion that a multi-factorial evaluation is required to determine if sleep-in hours do count. The EAT highlighted however that no single factor is determinative and each case will depend on the circumstances of the particular situation. The fact that a worker has little or nothing to do during certain hours does not mean they are not working and work can include merely being present to deal with something untoward that might arise. The EAT set out the following factors to consider when determining whether a person is 'working' in time work arrangements simply by being present:

- the employer’s particular purpose in engaging the worker, e.g. if there is a regulatory or contractual requirement to have someone present.

- the extent to which the worker’s activities are restricted by the requirement to be present and be at the disposal of the employer, including whether the worker would be subjected to disciplinary sanction for leaving the premises.

- the degree of responsibility undertaken by the worker during the period. For example, a requirement to sleep-in and to call the emergency services in the case of break in or fire compared and contrasted with a requirement to respond to any problems experienced by a resident in the night.
• the immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. For example, whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.

The EAT highlighted that in this case:

• Mencap had a regulatory obligation to have someone on the premises;

• it had an obligation to have someone present at a service user’s residence in order to fulfil its own contract with the council;

• there was the responsibility on Mrs Tomlinson-Blake both to be and remain present throughout the sleeping shift, to keep a listening ear and exercise her professional judgment to determine whether or not to intervene;

• the employment tribunal was amply entitled to conclude that Mrs Tomlinson-Blake was performing the role of a carer during the sleep-in shift, whether asleep or not, and therefore find that she was working.

We are of the view that the current case law, and approach taken in the BEIS Guidance, does not reflect the intention of parliament when introducing the National Minimum Wage Regulations. We believe these Regulations were included in order to cover circumstances such as sleep in shifts in the social care sector. However, the current interpretation of the legislation in relation to time work (and presumably salaried work) is that time spent asleep at a place of work where a person can be called on to perform duties is working time for which they should receive the National Minimum Wage. The case of Shannon v Rampersad and others [2015 IRLR 982] explained above gives only a little hope of argument to providers in particular circumstances. If you are wanting to rely on the Shannon case, we would suggest that you seek specific advice.
Scenario 1 - Does the National Minimum Wage need to be paid for times when the careworker working unmeasured work is simply present at the place of work, even if asleep and not actually working?

As set out above, careworkers who are not paid a salary for on-call work or by reference to time worked could arguably be regarded as carrying out “unmeasured work”.

Typically this arrangement will involve a flat rate, one-off payment for the whole sleep-in/on-call duty which has not been calculated on the basis of the time worked. This is frequently based on the market rate for sleep-ins. In some cases it can be based on the complexity of the needs of the client (the more complex the needs the higher the rate that is paid).

Where it is accepted that workers are carrying out unmeasured work it could potentially be argued that only a realistic average of the hours likely to be spent in carrying out duties whilst performing a sleep-in will count towards calculation of the National Minimum Wage. The realistic average of the hours likely to be spent working would need to be agreed using what is referred to as a “daily average agreement.” The agreement would effectively specify that although the worker may be present for, for example a 12 hour period, they will actually only be required to work, i.e. carry out duties for the client, for an agreed number of hours per night.

To give an example, the daily average agreement could be used to agree that even though the worker is on call for 11 hours (9pm – 8am), on average they will only be required to work for 3 hours of that time and therefore only the 3 hours would count for the purposes of calculating whether the National Minimum Wage has been paid.

The average number of hours must be realistic and employers should revisit these agreements periodically to assess if the average number of hours agreed remains an accurate reflection of what happens in practice.

This would rely on the Court of Appeal decision in Walton v Independent Living Organisation, which deals with live in care, and approved of the daily average agreement arrangement.
Unfortunately, Whittlestone v BJP Home Support Limited (EAT 2014); Esparon v Slavikovska (EAT 2014); and Tomlinson-Blake v Royal Mencap Society (EAT April 2017) did not consider an argument that the Claimants were carrying out unmeasured work as it was agreed that the “sleepover” was time work. Therefore, it was never argued that the “sleepover” was unmeasured work. In addition, the BEIS Guidance also provides no commentary on the possibility of using a daily average agreement in relation to sleep-in shifts. The argument is therefore untested in relation to sleep-ins and therefore relying on the work being unmeasured, with only the time spent working delivering care counting, is of a significant risk at the moment.

Scenario 1 - What are the potential solutions?

The safe options

1. Pay for every hour

The safest option is of course to pay at least the National Minimum Wage for every hour of the sleep in, or to increase the flat “sleep-in allowance” to ensure that the National Minimum Wage is paid on average during the pay reference period when including all hours of the sleep in.

We appreciate that these options are not likely to be financially viable for a majority of the providers.

2. Top up arrangements

It is important to remember (as explained above) that the obligation to pay the National Minimum Wage is not to pay at least the National Minimum Wage for each hour worked but to pay the National Minimum Wage on average for hours worked in any pay reference period (a pay period or a month whichever is the shorter).

It is therefore perfectly legal to pay under the National Minimum Wage for some hours and over for other hours (being mindful of the information at paragraph 32 a. above), so long as at least the National Minimum Wage is paid on average.

The safest option therefore after paying the National Minimum Wage for every hour of a sleep-in, is to ensure that the National Minimum Wage is paid on average during the pay reference period when including all hours of the sleep in.
This could be achieved by providers though introducing top up payments – i.e. paying an hourly rate for normal shifts, a flat rate for sleep-in shifts, then doing a calculation for every pay reference period dividing total pay by total hours (including all hours of a sleep-in shift) and then paying for any short fall below NMW in the next pay reference period as a top up payment.

When introducing top-up arrangements, providers will need to give careful consideration to the following:

- How the introduction of the top-up arrangements will be communicated to staff. Staff will need to understand why top-ups are being introduced, who will be affected and how top-ups will be calculated to ensure compliance (and fairness amongst colleagues). Providers will also need to be careful that the introduction of top-ups does not trigger historic complaints and requests for back pay.

- How the top-up payments will be displayed on pay slips to ensure that staff understand the payments they are receiving and HMRC are satisfied that the payments do count as part of eligible pay used to calculate compliance.

- What systems and resources are needed to enable providers to calculate top-up payments for their staff. Providers should be alert to the fact that to calculate top-up payments you need to identify eligible earnings earned in a pay reference period. Providers will need to ensure that you exclude from eligible pay payments that do not count under Regulation 10 of the National Minimum Wage Regulations 2015 including:
  - Any enhancements, premiums or increased hourly rates paid in respect of time work – the amount that exceeds the lowest rate that would be payable under the contract in respect of work involving particular duties;
  - Any allowances or payments that are not attributable to the employee’s performance, for example London weighting, an on call allowance, or travel time allowance.
  - Expenses, including the repayment of money spent in connection with the job – for example to cover the cost of uniforms or petrol spent travelling between appointments.
When the payments are going to be made to staff to ensure that they count towards the desired pay reference period. Regulation 9 of the National Minimum Wage Regulations confirms what payments count towards what pay reference period and providers will need to generally pay any short fall below NMW in the same or the next pay reference period as a top up payment to make it count towards the pay reference period in which the shortfall occurred.

**Options with risk attached**

1. **Treat the sleep-in as unmeasured work and enter into a Daily Average Agreement**

As explained above, care workers who are not paid a salary for on-call work or by reference to time worked could arguably be regarded as carrying out “unmeasured work”. As also explained above, it may be possible to agree with workers who carry out “unmeasured work”, for which they are paid a flat fee which has not been calculated on the basis of the time worked, that only a realistic average of the hours likely to be spent in carrying out duties whilst on-call will count towards calculation of the minimum wage. This can be agreed using what is referred to as a “daily average agreement.” As explained above however, the approach is untested and therefore risky.

Our view is that to have any prospect of succeeding with the argument that a sleep in shift is unmeasured work, and only the hours awake count, providers must ensure:

- the way in which the careworker is paid for that sleep-in duty is not by reference to time or by a salary (so, for example, is paid a flat rate for the on call duty that is calculated according to factors other than time and receives no other payment in respect of that work - an “unmeasured” arrangement).

- you enter into a separate and clear contractual arrangements, a daily average agreement, to agree the realistic daily average of hours spent carrying out duties whilst on the sleep-in duty. A specimen daily average agreement and guidance on its use is available to UKHCA members at: [www.ukhca.co.uk/downloads.aspx?ID=435](http://www.ukhca.co.uk/downloads.aspx?ID=435)

- you pay at least the National Minimum Wage on average over a pay reference period when these hours are taken into account
• your payslips show a flat fee payment and don’t break the payment up into hours.

As set out above, the unmeasured work argument is untested in relation to sleep ins and therefore relying on the work being unmeasured, with only the time spent working delivering care counting, even where you have a daily average agreement in place, is a significant risk at the moment.

Our view is that there is a slightly higher risk of a judge holding that a sleep-in is not unmeasured work in comparison to a live in arrangement because with a live-in arrangement, the careworker has more autonomy to decide when they would like to carry out the tasks required of them. Further, there is a risk that a judge could take the view that all of the shift is work in any event (regardless of the daily average agreement), even when the worker is asleep. A provider still may end up having to take the matter through the appeal courts to get a supportive decision.

If providers adopt this method they should be aware that any additional payments (in addition to the flat rate payment) they make to their staff (for example if they are woken to work) may not count when calculating if the National Minimum Wage has been paid. This is because this could be classed as an allowance that is not attributable to the worker’s performance because the careworkers are already being paid in respect of this time. There is also a risk that it will cause confusion over whether the sleep in is in fact unmeasured work or time work (as daily average agreements are only permitted where there is unmeasured work). It might be possible to run an argument that unmeasured work and time work can be separated out during a sleep in but any agreement that seeks to do this would need to be very carefully drafted and wouldn’t be without risk.

As explained above, it is important that the average hours figure in the daily average agreement is realistic. Providers should therefore ensure that the average is tested regularly.

3. Try to change the law –

There are two other options open to providers, but in our opinion both options carry a significant risk:

Option 1 – treat the sleep in as unmeasured work and don’t implement a daily average agreement.
Option 2 - treat the sleep in as time work or salaried work and rely on the exemptions in the legislation (currently regulations 15(1) and 15(1A) (now s32(1) and s32(2)), and 16(1) and 16(1A) (now s27(1) and 27(2)), – unsuccessfully argued in Whittlestone v BJP Home Support Limited (EAT 2014); Esparon v Slavikovska (EAT 2014); and Tomlinson-Blake v Royal Mencap Society (ET August 2016).

For providers wishing to take the risk and continue to pay low sleep-in rates, we would suggest moving forward you keep money in reserve equivalent to the potential top ups you would need to pay if every hour counted. It would also be prudent to maintain a reserve in relation to any historic underpayments if financially possible until the risks have reduced or crystallised.

If providers conduct their sleep ins in the same way as the Shannon case above, where there is also a waking night member of staff present during a sleep in, it is more likely that this argument would be successful.
Appendix 2 - Practical examples – total hours worked

Scenario 2, on call

An individual (usually a member of the management team) provides an “on call” service from a mobile telephone for an agreed fixed flat fee. In some cases they may be required to be at or within a certain distance of a particular location, in others they won’t. In the same way in some cases the on call workers will be required personally to attend any unplanned or emergency situations and in other cases they will be expected just to deal with any calls over the phone.

What is the key issue?

Again, the key issue in this particular scenario is:

- Does time when the manager is “on call”, perhaps even asleep and not actually actively responding to calls count towards calculation of the National Minimum Wage?

Again, the first thing that needs to be considered is what type of work is the worker performing whilst providing an “on call” service?

Because a flat fee is paid and the manager is not paid by reference to time or by a salary, it is arguable that they are performing unmeasured work. As above however, we understand that HMRC generally take the view that unless there is a separate contract for the different types of work, “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”.

Scenario 2 - Does the National Minimum Wage need to be paid for times when the manager working on a Time worked or salary basis is on-call?

Any time a worker responding to the calls or undertaking any actual work during a period of being “on call” is treated as working time for the National Minimum Wage purposes.

With regards to the on-call/stand-by time, for the National Minimum Wage purposes, the actual arrangements need to be considered in detail to determine whether the worker is performing work during “on call” periods.
The most important factor to consider in any on-call arrangements will be the contractual restrictions and level of burden imposed on the worker. HMRC guidance suggests that the main thing that HMRC will consider is whether a worker is restricted to a place specified by the employer or whether the worker is required to perform any duties whilst “on call”. HMRC imply however that restrictions regarding alcohol during a period of on call, will not necessarily mean that the worker is working during such periods.

Where they are required to be on call at a designated location

If the manager is required to be at a specific location (in particular if it’s not their home), the position is similar to Scenario One.

Where they are required to be on call near a designated location

The HMRC guidance suggests that a worker who is free to be at home, or any place of their choosing, and simply ensure that they are able to be contacted if needed, may not be working during the time they are not responding to their employer/work.

Although, if there is a restriction on the employee to remain within a certain area, because of the degree of flexibility there is a slightly stronger argument here that the National Minimum Wage legislation, and the HMRC guidance, could be relied on to enable the provider to argue that only time spent responding to calls would count. This is because the worker is just required to be near their place of work, and to use the example given in the Whittlestone case, they would arguably still be able to go to a late night movie or have fish and chips (as long as they were able to take calls).

As this scenario still restricts the worker to some extent however, in that they are required to remain within a certain area, there is still a risk that HMRC could take the view that time where a worker is required to be available near a place of work, is working time for the National Minimum Wage purposes. The provider is requiring the presence of the worker at a restricted location and time of their choosing for the purposes of working and the worker has to comply with that requirement.

The actual arrangements will need to be considered on a case by case basis, in order to determine what time may count for the purposes of the National Minimum Wage compliance.

Where they are not required to be at a designated location
The position has not been tested in the courts, in respect of situations where the worker is on call, but is not required to be on call at or near a particular location. Our view is that the courts and HMRC, take the view that as the worker has no substantial restrictions on their freedom, they cannot reasonably be considered to be working. The position will be stronger here if the worker was able to deal with the calls by phone and was not required to attend to and respond to calls. This is because if they are required to attend somewhere, arguably they must stay within travelling distance of that place.

**Scenario 2 - Does the National Minimum Wage need to be paid for times when the manager working on an unmeasured basis is on-call?**

As explained above, where a flat fee is paid and the worker is not paid by reference to time or by a salary, it is arguable that they are performing unmeasured work. For example, where a manager is paid a salary or an hourly rate (time work) for their core duties (for example 9am-5pm) and is then paid a flat rate to work on call during the evening, the provider could set it up as an unmeasured work arrangement.

As with sleep-ins, if it was accepted that workers are carrying out unmeasured work, it could potentially be argued that only a realistic average of the hours likely to be spent in carrying out duties whilst on call will count towards calculation of the National Minimum Wage. The realistic average of the hours likely to be spent working would need to be agreed using what is referred to as a “daily average agreement.”

The average number of hours would again have to be realistic and providers should revisit these agreements periodically to assess if the average number of hours agreed remains an accurate reflection of what happens in practice.

If providers were keen to make an additional payment when a call is dealt with effectively, we would advise against making an hourly rate payment, because as explained above this could lead HMRC to conclude that the worker is performing time work. If an additional payment was to be made, it could potentially be set up as a “performance bonus payment” for when calls are dealt with appropriately (this would not be paid if calls are not dealt with effectively.)

**Scenario 2 - What are the potential solutions?**

*The safe option*
1. **Pay for every hour**

The safest option is of course to pay at least the National Minimum Wage for every hour of the on call, to increase the flat rate on call payment to ensure that the National Minimum Wage is paid on average during the pay reference period when including all hours (including the on call hours), or to introduce another pay structure that would ensure that on average across the total hours in a pay reference period, including all hours of any on call shifts worked, the National Minimum Wage is paid.

These options are not likely to be financially viable for a majority of the providers.

2. **Top up arrangements**

The safest option after introducing pay arrangements that ensure the National Minimum Wage is paid for every hour of an on call, is to introduce top up payments for any short fall below the National Minimum Wage – please see Scenario One above for further details.

**Options with risk attached**

Unless providers are prepared to pay the National Minimum Wage on average for all hours of an on call duty the following options are available

1. **Treat the on-call as unmeasured work and implement a daily average agreement.**

Please see Scenario One above for further details.

To have any prospect of succeeding with the argument that an on call is unmeasured work, and only the hours actually worked count, providers must again ensure:

- the way in which the worker is paid for that on call duty is not by reference to time or by a salary (so, for example, is paid a flat rate for the on call duty that is calculated according to factors other than time and receives no other payment in respect of that work - an “unmeasured” arrangement).

- you enter into a separate and clear contractual arrangements, a daily average agreement, to agree the realistic daily average of hours spent carrying out duties whilst on call. A specimen daily average agreement and guidance on its use is available to UKHCA members at: [www.ukhca.co.uk/downloads.aspx?ID=435](http://www.ukhca.co.uk/downloads.aspx?ID=435)
• you pay at least the National Minimum Wage on average over a pay reference period when these hours are taken into account

• your payslips show a flat fee payment and don’t break the payment up into hours.

Be aware that if the worker is paid at their hourly rate for any time spent awake in addition to their flat rate payment, this may confuse the arrangement and result in the on call duty being found to constitute *time work* – see above.

2. Rely on limited restrictions argument

There are two other options open to providers:

*Option 1* - treat on-call as time work or salaried work and rely on the exemptions in the legislation (currently regulations 15(1) and 15(1A) (now s32(1) and s32(2)), and 16(1) and 16(1A) (now s27(1) and 27(2)), and the argument that you are not requiring the presence of the worker at a specified location and time of your choosing, and therefore to use the example given in the Whittlestone case, they are still be able to go to a late night movie or have fish and chips (the limited restrictions argument).

*Option 2* – treat the on call as unmeasured work, don’t implement a daily average agreement.

If providers decide to rely on either of the above options, you should ensure that the level of restriction is clarified and agreed during an on call duty

You will still need to ensure that the National Minimum Wage is being paid over the pay reference period when time spent responding to calls is included.

Obviously the more restrictions there are on the workers, the higher the risk of the whole shift being deemed as time work or salaried work.
Appendix 3 - Practical examples – total hours worked

Scenario 3, live-in care services

A careworker provides a “live-in” service involving the careworker living at the client’s house for a period of time, usually between 1 and 2 weeks, during which the careworker will be expected to provide certain services such as assistance with meals, shopping and personal care. For the remainder of the time, the careworker will be “on-call”.

Scenario 3: Live-In Care

What is the issue?

Again, the key issue in this particular scenario is:

• Does time when the careworker is simply present at the client’s premises, perhaps even asleep and not actually actively carrying out duties count towards calculation of the National Minimum Wage?

The first thing again that needs to be considered is what type of work is the worker performing whilst providing an “on call” service?

Scenario 3 - Does the National Minimum Wage need to be paid for times when the live-in care is set up as Time work or salary work?

If the careworker is paid for the majority of their time by reference to time or by a salary, case law currently indicates that time spent sleeping whilst on call (and so whilst sleeping during providing live-in care) will count as working time. Please see Scenario 1 above for further details.

Scenario 3 - Does the National Minimum Wage need to be paid for times when the worker working on an unmeasured basis is on-call?

Where a flat fee is paid for live-in care assignments and the worker is not paid by reference to time or by a salary, it is currently accepted by the courts and HMRC that they are performing unmeasured work.
Where a properly set up "daily average agreement" is in place, only a realistic average of the hours likely to be spent in carrying out duties whilst providing live-in care will count towards calculation of the National Minimum Wage. The average number of hours will have to be realistic and providers should revisit these agreements periodically to assess if the average number of hours agreed remains an accurate reflection of what happens in practice.

**Scenario 3 - What are the potential solutions?**

1. **Pay for every hour**

   The safest option is of course to pay at least the National Minimum Wage for every hour of a live-in care assignment.

   This option is not likely to be financially viable for a majority of the providers.

2. **Treat the on-call as unmeasured work and implement a daily average agreement.**

   Where a flat fee is paid for live-in care assignments and the worker is not paid by reference to time or by a salary, it is currently accepted that they are performing unmeasured work. To succeed in the argument that only a limited number of live-in care hours count for the National Minimum Wage purposes, providers must again ensure:

   - the way in which the worker is paid for live-in care assignments is not by reference to time or by a salary (so, for example, is paid a flat rate for the on call duty that is calculated according to factors other than time and receives no other payment in respect of that work - an "unmeasured" arrangement).

   - you enter into a separate and clear contractual arrangements, a daily average agreement, to agree the realistic daily average of hours spent carrying out duties whilst on call. A specimen daily average agreement and guidance on its use is available to UKHCA members at: [www.ukhca.co.uk/downloads.aspx?ID=435](http://www.ukhca.co.uk/downloads.aspx?ID=435)

   - you pay at least the National Minimum Wage on average over a pay reference period when these hours are taken into account

   - your payslips show a flat fee payment and don’t break the payment up into hours.
2. Treat the live-in care as unmeasured work and don’t implement a daily average agreement.

This option is very risky.

Where there is no daily average agreement in place, the following hours would count as working hours even where a flat fee is paid:

- Time spent actually delivering care;
- Time treated as worked including any time spent waiting.

HMRC Guidance suggests however that any time where a provider requires a worker performing unmeasured work to be available at or near a place of work for the purposes of working, which does not fall under a daily average agreement, is likely to be working time for the National Minimum Wage purposes and therefore there is a significant risk that the entire 24 hour period would count.
Appendix 4 - Practical examples – total hours worked

Scenario 4, waking night

A careworker works a “waking night” shift and is awake and working for the entire night shift.

What is the issue?

As the careworker is awake at all times all hours will count for the purposes of calculating whether they have received the National Minimum Wage over the pay reference period.

What are the potential solutions?

Although all hours of the waking night shift count for the National Minimum Wage purposes, it is important to remember that the obligation is to ensure that the National Minimum Wage is met on average over the pay reference period. Providers will therefore simply need to ensure that the National Minimum Wage is paid on average for all hours worked in the pay reference period including all hours of the “waking night “shift.
Section 2 – Step by Step Assessment

Providers must ensure that each and every worker they engage is paid the National Minimum Wage/the National Living Wage. Ideally therefore, every single worker’s pay should be assessed for compliance on a regular basis.

You can be fined if you are unable to provide evidence to HMRC that each and every worker has been paid the National Minimum Wage.

We appreciate that to carry out a National Minimum Wage assessment on every worker in every pay reference period will be practically very difficult for the majority of homecare providers and we recognise that the administrative burden in doing this would be enormous.

In order to satisfy yourself that the National Minimum Wage has been paid, we suggest that providers carry out the assessment set out below, randomly, on different workers, in different pay reference periods.

*How often should the National Minimum Wage assessment be carried out?*

While no hard and fast rule can be applied, providers should ensure that the assessment is carried out often enough to provide them with a reassurance that they continue to be compliant with the National Minimum Wage rules.

A more regular assessment should be carried out where there is a significant variation in the workers’ hours, shift patterns and pay from one pay reference period to another. Less regular assessment can be carried out where workers’ arrangements do not change significantly between different pay reference periods.

Where your previous assessments suggest that there is a significant number of workers that are close to the National Minimum Wage limit, we would recommend repeating the assessment on a more regular basis to ensure that you continue to meet your National Minimum Wage obligations. This may mean making a commitment to assess a sample of workers on a rolling programme, until confidence that compliance with National Minimum Wage has been achieved, and then reassessing compliance annually, for example when the National Minimum Wage is due to increase each April, or if there is a significant change in working patterns of your workforce.
Who should be assessed?

It would be advisable that the workers selected for assessment should represent different types of workers within your workforce. If regular National Minimum Wage compliance assessments are carried out on different workers, who are a representative reflection of your workforce, this may be accepted by HMRC as evidence of overall National Minimum Wage compliance; although we cannot guarantee this, and liability for under-payment of National Minimum Wage (including back-payments, fines and “naming and shaming”) is still likely to be imposed by HMRC.

When selecting your workers for compliance assessment, you should ensure that you include workers who you are concerned may not be receiving the National Minimum Wage. In fact, we would recommend that those workers are selected, so that any non-compliance is identified and, if necessary, changes are made to ensure compliance. We would suggest that during your assessment you consider including workers who:

- may have a large amount of travel time, relative to “contact time”;
- have very short visits during their working week;
- have big gaps between visits;
- are on the lowest hourly pay rates;
- receive premium rates/allowances for out-of-hours working;
- have had a recent birthday which moves them into a higher rate of National Minimum Wage (for example, they have turned 25 and are entitled to the National Living Wage from 1 April 2016);
- need to use public transport or walk between service users’ homes;
- receive accommodation supplied by you and pay you rent;
- undertake on call or sleep in shifts; and
- have recently started work.

We would recommend that if the outcome of your assessment suggests that there are a significant number of workers in a specific category that are close to the National Minimum Wage limit, you should consider extending your assessment in that particular category to a larger sample of workers to ensure that you are definitely compliant.
How many workers should be selected for an assessment?

Again, there is no hard and fast rule that can be applied here. What you ought to do is ensure that the workers selected for the assessment are a true representation of your workforce and the numbers assessed give you confidence that you are compliant.

What next?

If you discover that you are not compliant, immediately rectify this so that you are not subject to any future fines from HMRC, criminal charges or court judgments (see C. Enforcement and fines for non-compliance above). A range of suggested actions for employers to consider is provided in Section 3 - Possible actions to achieve compliance with National Minimum Wage.

Undertaking the step-by step assessment

The objective of the step-by-step assessment is to check whether a worker has been paid at a rate equal to, or above, the National Minimum Wage/National Living Wage during the pay reference period.

Familiarise yourself with the definitions of time work (see paragraphs 49 – 56 above), salaried work (see paragraphs 60 – 67 above) and unmeasured work (see paragraphs 730 – 78 above) before proceeding.

We recommend that you keep a record of each check that you do on individual workers, showing your calculations. This can provide evidence to HMRC that you are acting as a responsible employer seeking to ensure that you maintain voluntary compliance with National Minimum Wage.

THE ASSESSMENT

For each worker, complete steps 1 and 2 in section A, below. Then go to sections B, C or D as indicated, and complete steps 3 to 6. Repeat steps 1 to 6 for each worker.

Remember that from April 2016 workers aged 25 and above are entitled to the National Living Wage.
A. ESTABLISH INITIAL INFORMATION TO ENABLE YOU TO CALCULATE NMW COMPLIANCE

Step 1: Identify the worker for who you wish to calculate hourly rate of pay.

Step 2: Establish the type of work the worker is carrying out:
- Time work? (Section B below)
- Salaried work? (Section C below)
- Unmeasured work? (Section D below)

REMEMBER - Workers can work under more than one type of payment arrangement. However, where there is only one contract in place HMRC states that “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”. Therefore, although we do not agree with this, HMRC take the view that there must be separate contracts for workers to be considered to work under more than one type of payment arrangement.

If a worker is working under more than one type of payment arrangement you will need to carry out the calculations below in respect of each payment arrangement relevant during the pay reference period.

B. CALCULATION FOR Time Work (Please refer to paragraphs 47 – 55 above)

Step 3: Establish the pay reference period during which you want to calculate the worker’s hourly rate.

Step 4: Establish TOTAL PAY RECEIVED by the worker during the pay reference period identified at Step 2.

\[
\text{Figure A} \ - \ \text{Total Monies Paid to the worker}
\]

LESS any of the following which are included in Figure A (Please refer to paragraph 32 above):

- any loan payments made by you to the worker during the pay reference period;
- any employer pensions contributions;
- any difference in pay between the lower rate payable under the contract in respect of work involving particular duties and the enhancements paid for overtime or shift work in respect of those duties (i.e. you need to reduce all hourly rates of pay to the lowest rate at which the worker gets paid)
- any allowances or expenses (London allowance, car allowance, petrol or hospitality expenses) unless these are consolidated into standard pay or are an allowance attributable to the performance of the worker in carrying out their work
- payments in respect of time off (e.g. holiday, sickness, maternity pay)
- any rent paid to you or deducted from earnings that is in excess of the accommodation offset allowance (currently £6.40 per day for each day of the pay reference period that accommodation is provided.)

**PLUS** *(Please refer to paragraph 33 above)*:
- any monies deducted from the worker’s wages to pay-back a loan made to them by you and any deductions made for accidental overpayments made in previous pay reference periods
- any deductions or payments that are not for expenditure connected to the worker’s employment, or for the employer’s own use or benefit - for example employee pension contributions and union subscriptions
- any deductions for criminal records and barring list checks (with DBS, Disclosure Scotland or Access NI).
- any deductions for tax and national insurance

**PLUS** *(Please refer to paragraph 42 above)*:
- If you provide free accommodation to the worker add £6.40 per day that accommodation has been provided in the pay reference period
Step 5: Establish **TOTAL NUMBER OF HOURS WORKED** during the pay reference period by adding up the following time (*Please refer to paragraphs 49 – 56 above)*:

- Total time actually spent carrying out duties during the pay reference period (i.e. time spent carrying out appointments)

PLUS

- Total of hours spent travelling between appointments during the pay reference period (see E. Travel time above)

PLUS

- Total time between appointments spent working (E. Travel Time above)

PLUS

- Total time spent waiting to start work (E. Travel Time above)

PLUS

- Total time spent attending training or undertaking long distance travelling (E. Travel Time above)

PLUS

- Total time spent travelling during normal working hours to attend training (E. Travel Time above)

**REMEMBER!**

- Time spent travelling to and from home will not count
- Any rest breaks that the worker takes in between the appointments will not count
- Time spent training prior to an individual becoming your worker will not count

Step 6: Establish **THE AVERAGE HOURLY RATE** by dividing the total earnings in the pay reference period by total time worked.
C. **CALCULATION FOR Salaried work** *(Please refer to section paragraphs 60 - 70)*

**Step 3:** Establish the pay reference period during which you want to calculate the worker’s hourly rate.

**Step 4:** Establish **TOTAL PAY RECEIVED** by the worker during the pay reference period identified at Step 2.

*Figure A - Total Monies Paid to the worker*

**LESS** any of the following which are included in *Figure A (Please refer to paragraph 32 above):*

- any loan payments made by you to the worker during the pay reference period;
- any employer pensions contributions;
- any allowances or expenses (London allowance, car allowance, petrol or hospitality expenses) unless these are consolidated into standard pay or are an allowance attributable to the performance of the worker in carrying out their work
- payments in respect of time off unless paid at full pay (e.g. sickness, maternity pay)
- any rent paid to you or deducted from earnings that is in excess of the accommodation offset allowance (currently £6.40 per day for each day of the pay reference period that accommodation is provided.)

**PLUS** *(Please refer to paragraph 33 above):*

- any monies deducted from the worker’s wages to pay-back a loan made to them by you and any deductions made for accidental overpayments made in previous pay reference periods
- any deductions or payments that are not for expenditure connected to the worker’s employment, or for the employer’s own use or benefit - for example employee pension contributions and union subscriptions
- any deductions for criminal record and barring list checks (with DBS, Disclosure Scotland and Access NI)
- any deductions for tax and national insurance

PLUS (Please refer to paragraph 42 above):

- If you provide free accommodation to the worker add £6.40 per day that accommodation has been provided in the pay reference period.

**Step 5:** Establish **TOTAL NUMBER OF HOURS WORKED** during the pay reference period by adding up the following time (Please refer to sections 60 – 70 above):

The number of basic hours worked in the pay reference period. This is calculated by dividing the number of annual contractual hours by the number of the pay reference periods in the year (e.g. 1950 hours divided by 12 months if paid monthly or 52 if paid weekly).

**LESS**

Establish the number of hours in the pay preference period when the worker was absent from work (annual leave, sickness where not paid at full pay)

**PLUS**

Establish the number of additional hours worked in the pay reference period for which no additional payment has been received (including any additional business travel time or training time).

**Step 6:** Establish **THE AVERAGE HOURLY RATE** by dividing the total earnings in the pay reference period by total time worked.

**D. CALCULATION FOR Unmeasured Work (Please refer to sections 0 – 78 above)**

**Step 3:** Establish the pay reference period during which you want to calculate the worker’s hourly rate.

**Step 4:** Establish **TOTAL PAY RECEIVED** by the worker during the pay reference period identified at Step 2.
**Figure A - Total Monies Paid to the worker**

**LESS** any of the following which are included in Figure A *(Please refer to paragraph 32 above):*

- any loan payments made by you to the worker during the pay reference period;
- any employer pensions contributions;
- any allowances or expenses (London allowance, car allowance, petrol or hospitality expenses) unless these are consolidated into basic pay or are an allowance attributable to the performance of the worker in carrying out their work
- payments in respect of time off (e.g. sickness, maternity pay)
- any rent paid to you or deducted from earnings that is in excess of the accommodation offset allowance (currently £6.40 per day for each day of the pay reference period that accommodation is provided.)

**PLUS** *(Please refer to paragraph 33 above):*

- any monies deducted from the worker’s wages to pay-back a loan made to them by you and any deductions made for accidental overpayments made in previous pay reference periods
- any deductions or payments that are not for expenditure connected to the worker’s employment, or for the employer’s own use or benefit - for example employee pension contributions and union subscriptions
- any deductions for criminal record and barring list checks (with DBS, Disclosure Scotland or Access NI)
- any deductions for tax and national insurance

**PLUS** *(Please refer to paragraph 42 above):*

- If you provide free accommodation to the worker add £6.40 per day that accommodation has been provided in the pay reference period
Step 5: Establish **TOTAL NUMBER OF HOURS WORKED** during the pay reference period by adding up the following time (Please refer to paragraphs 0–78 above):

Option 1: Time agreed as agreed average hours in the Daily Average Agreement

Option 2: Time treated as worked (including time recorded as worked; time spent waiting; travelling and training - add up all hours worked by the worker during the relevant pay reference period

**PLUS**

Add any additional and out of ordinary hours worked over and above agreed average hours (e.g. if additional and lengthy training out of normal working hours)

Step 6: Establish **THE AVERAGE HOURLY RATE** by dividing the total earnings in the pay reference period by total time worked.
Section 3 - Possible actions to achieve compliance with National Minimum Wage

The following suggestions include actions which homecare providers should consider taking if sampling of workers described in Section 2 – Step by Step Assessment suggests actual, or borderline, non-compliance with the National Minimum Wage.

Please note that these suggestions are by no means exhaustive. Some are relatively straight-forward to implement, while others are potentially complex and will require more time and effort to implement. Deciding which, if any, of these actions are appropriate for your organisation must be made on a case-by-case basis, balancing:

- the likelihood of successfully achieving compliance with the National Minimum Wage;
- the cost-effectiveness of implementing the changes considered;
- the financial resources of the organisation;
- the ability to implement the proposed action, including consulting with staff where a change in terms and conditions of employment may occur.

**Good employee relations**

- Staff may approach you with concerns that you are not paying them at least the National Minimum Wage. Take their concerns seriously, and consider investigating. If you are confident that you are compliant with the National Minimum Wage, a helpful, supportive approach, which may include re-explaining how their pay is calculated, may resolve matters, and may reassure the employees that there is no need for them to refer their concerns to the ACAS Helpline, which could trigger an investigation from HMRC (see paragraph 20). Make sure you explain any top-up payments you make to staff, and how these are calculated.
Ensure that managers and supervisors are able to explain to careworkers which parts of their travel time do and do not count towards the National Minimum Wage. At the very least, ensure staff know who to refer these questions to in the case of doubt (This entire guide will help, but see paragraphs 84 to 85 in particular.)

**Travel time and travel costs**

- Remind your care coordinators of the significant impact that long travel time has on compliance with the National Minimum Wage, encouraging them to roster careworkers with the minimum travel time necessary, while resisting the practice of “call cramming”.

- Where workers’ travel time is a considerable proportion of “contact time”, consider investing in rostering software with route-optimisation software.

- Where paying homecare workers solely by reference to “contact time” consider whether the time you assume your workers need to travel accurately reflects the time it really takes them. It may be necessary to audit a group of workers’ travel records, for example asking them to complete an accurate log of their travel times.

- Consider whether you should amend timesheets so that careworkers record their actual travel time, as well as their “contact time”. For this to be effective, you must also have a system in place to record this information systematically. While this is likely to be a significant investment, it will provide you with more accurate information to calculate pay rates, and provide evidence to HMRC of the actual travel time your workers undertake. (See paragraphs 7 and 8).

- Review rates currently paid for mileage travelled (see paragraph 110). Where you make no contribution to travel expenses, consider introducing them.

- Consider reimbursing careworkers’ travel by public transport, on production of receipts, if this is not already your current practice (see paragraph 111).
• Employers who are not already doing so, should consider making payments for travel time. If adopting this action, consider how this will be implemented into your existing pay structures and payroll systems.

Payment for induction, training and supervision

• If you currently require workers to complete induction training on an unpaid basis (see note in paragraph 122 about the ethical considerations of this practice), consider putting arrangements in place to ensure that you remain compliant with the National Minimum Wage (See paragraph 121).

• Ensure that post-induction training and supervisory sessions are paid, as these both count as working time (See paragraph 116).

Changes to rates of pay

• Consider increasing the basic rate of pay, concentrating on raising the lowest applicable rate (usually the weekday, daytime rate), which is the rate that HMRC will use when checking compliance with National Minimum Wage (see paragraph 32 a).

• Consider adopting a flat-rate of pay, reducing enhanced rates of pay for anti-social hours and working to increase the basic rate of pay. This is probably a strategy of last resort, if other measures will not achieve compliance. Careful thought should be given before adopting this action, as it may impact on your ability to cover out-of-hours working and is likely to require formal consultation with staff on the proposed changes.

Changing terms and conditions
If you are thinking about changing terms and conditions as part of your response to the ongoing increases to the National Minimum Wage/National Living Wage, you must follow a fair process that includes consultation with staff and in most cases staff representatives. This is particularly important if you find you are forced to reduce some terms and conditions to meet the increased costs (for example, reducing weekend rates to fund an increase in basic pay to above National Living Wage level). You should seek appropriate legal and human resources advice at the outset to reassure yourself that the proposed changes to contract terms are lawful and that the planned process to be undertaken is compliant.

**Arrangements for “sleep-ins”, “on-call”, “waking nights” and “live-in” care**

Ensure you have consulted the appropriate appendices of this guide for suggestions on how to manage staff undertaking “sleep-ins” (Appendix 1 - Practical examples – total hours worked); “on-call” duties (Appendix 2 - Practical examples – total hours worked); “live-in” care (Appendix 3 - Practical examples – total hours worked) or “waking nights” (Appendix 4 - Practical examples – total hours worked). Consider the case-law, options available and any risks that attach to individual options.

**Other staff terms and conditions**

Ensure that you have understood whether each worker is undertaking Time work, Salaried work or Unmeasured work. It may be worth confirming this in future statements of main terms and conditions of employment issued to new workers (See paragraphs 47 – 80).
• If you believe that your workers are self-employed, take appropriate legal advice to ensure that your arrangements are properly documented. In our view, a number of employers believe their workers are self-employed, when this is not the case. (See paragraph 48).

• Check that staff undertaking unmeasured work (usually live-in careworkers or staff working ‘on-call’) have a suitable “daily average agreement” in place (see paragraph 77).

• Consider how and whether you should charge staff for uniforms. While this practice may be lawful, allowing staff to pay-back the cost of uniforms in instalments may affect compliance with the National Minimum Wage (See paragraphs 37-39).

• Where staff are provided with accommodation for which rent is deducted from their earnings etc, make sure that the “Accommodation Offset” is correctly applied to calculations of their wages (see paragraph 42).

Contracts with statutory sector commissioners (councils and the NHS)

• Use UKHCA’s free on-line costing model to understand the costs of care, particularly where bidding for new contracts. The model can also be used to enter into discussion with your statutory sector commissioners about the actual costs of care in your local area. (See: www.ukhca.co.uk/CostingModel and UKHCA paper ‘A Minimum Price for Homecare’: www.ukhca.co.uk/downloads.aspx?ID=434.)

• Assess whether individual packages of care (or entire contracts) are economically viable. Be prepared to decline packages of care, or (in extreme cases) consider terminating entire contracts, which could lead to non-compliance with the National Minimum Wage, including National Living Wage from April 2016.

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November 2013, updated June 2015 to reflect the introduction of the National Minimum Wage Regulations 2015, in March 2016 to reflect the National Minimum Wage (Amendment) Regulations 2016, in June 2017 for a general update.

If you have particular needs which make it difficult for you to read this document, please contact 020 8661 8188 or accessibility@ukhca.co.uk and we will try to find a more suitable format for you.

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