



# health

## AND SOCIAL CARE

NEWS AND ADVICE FOR HEALTHCARE PROFESSIONALS  
FROM BIRKETT LONG

Birkett Long's specialist health and social care team understands that the legislative and regulatory environment is complex, with a continued shift towards greater public scrutiny.

Our comprehensive understanding of these key issues means that we can provide you with prompt, concise and relevant advice, whatever your area of practice or business.

We act for a range of clients, including a number of established high profile healthcare companies, as well as newer entrants to the sector. We specialise in working with care homes, GP partnerships, dental practices, pharmacists and veterinary surgeons, while offering the full range of legal services relating to business.

### **GDPR: Special category data**

Are you up to speed with sensitive personal data?

### **Should a worker be entitled to be paid for all hours whilst "on call"?**

The European Court has recently brought this issue back into the news.

### **Who makes the decisions on behalf of a resident that has become unwell or lost mental capacity?**

The importance of a lasting power of attorney (LPA) for care homes.

# GDPR - special category (sensitive) data

As 25 May 2018 fast approaches, and the EU General Data Protection Regulation (GDPR) comes into force, the GDPR has expanded data protection and refers to special category data, which the regulation says is sensitive personal data that needs more protection.

GP surgeries and other care providers, such as care homes, will collect and process special category data.

In order to lawfully process special category data you must identify both a lawful basis and a separate condition for processing such data.

In the context of the health sector, the GDPR provides a wide definition of health data at Recital 35. This definition will help health professionals to determine whether the data they collect falls into this category of special data so they can

ensure they have identified the correct basis and condition for processing.

Lawful bases are set out in Article 6 and include;

- Consent;
- That the processing is necessary for the performance of a contract with the data subject;
- Compliance with a legal obligation;
- To protect the vital interests of a data subject or another person;
- Performance of a task carried out in the public interest; or
- For the purposes of the legitimate

interests pursued by the data controller or a third party (except where such interests are overridden by the interests of the data subject).

## What are the GDPR exceptions to health data?

The processing of special category data is prohibited by Article 9(1) unless one of the conditions in Article 9(2) applies. The relevant conditions that provide exceptions to this general prohibition in relation to health data include its use for preventative or occupational medicine, medical diagnosis, the provision of health or social care, treatment or the management of health or social care systems and services, or for reasons in the public interest in connection with public health.

To rely on some of these conditions, the personal data must be processed by or under the responsibility of a professional

**A recent decision of the European Court has brought this issue back into the news. The court decided that “on call” stand-by time spent at home, but within 8 minutes travel of a workplace, was in fact ‘working time’.**

## Is a worker entitled to be paid for all hours whilst “on call”?

The question of whether a worker should be paid the National Minimum Wage (NMW) for the whole shift or just the time they perform work duties when on call can be difficult. If the employer gets it wrong the repercussions can be serious.

The NMW regulations state that if a worker is on call i.e. required to be

available for the purposes of working, but not actually working at or near a place of work, and is provided with suitable facilities for sleeping, time during the hours they are permitted to use those facilities for the purpose of sleeping shall be treated as working time but only when the worker is “awake for the purposes of working”.

subject to professional secrecy or rules established by national competent bodies.

The GDPR makes provision for Member States to introduce further conditions with regard to processing data concerning health (as well as genetic data and biometric data) and the Data Protection Bill 2018 (“Bill”) confirms that the condition to override the prohibition against processing special category data relating to health or social care set out in the GDPR is met if the processing is necessary for those purposes. The Bill confirms the meaning of “health or social care purposes”.

### **What special category condition under GDPR must you apply?**

The Information Commissioner’s Office points out that your choice of lawful basis under Article 6 does not dictate which special category condition you must apply, and vice versa. For example, if you use consent as your lawful basis, you are not restricted to using explicit consent for special category processing under Article 9. You should choose whichever special category condition is the most appropriate in the circumstances – although in many

cases there may well be an obvious link between the two. For example, if your lawful basis is vital interests, it is highly likely that the Article 9 condition for vital interests will also be appropriate.

If you have any questions about this article or would like assistance with understanding your GDPR obligations please contact Tracey Dickens.

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At first glance it appears that time sleeping or awake for purposes other than work, is not treated as work. It is important to remember that this rule only applies when deciding whether a worker who is merely available for work should be treated as working. Where the person is actually working, all of the working time must be counted and they must be paid at least the NMW for the full shift.

Deciding whether a person is actually working during the whole shift can be difficult where the employee sleeps overnight at the workplace or their home. In 2016 the Employment Appeal Tribunal (EAT) said that there is no single test that can be applied to determine the issue; a “multifactorial” test must be applied including:

- What is the employer’s particular purpose in engaging the worker? Is

there a regulatory requirement to have someone present at all times that might indicate that the worker is working simply by being present?

- Are the worker’s activities restricted by the requirement to be present and at the disposal of the employer? For example, could the worker be disciplined if they left their post during a shift?
- What degree of responsibility does the worker have and what types of activities could they be called upon to perform?
- How urgent is the requirement to provide the service if something untoward or an emergency occurs?

#### **The risk to employers**

The NMW is enforced by HMRC who can ask the employer to produce records to determine entitlement to the NMW and what was paid to the workers. It will presume that a worker has not been

paid the NMW unless the employer can prove it has. The reverse burden of proof applies and it is for the employer to prove that the workers were not entitled to the NMW. HMRC can issue a notice of underpayment requiring the employer to pay the arrears at the current NMW rate, impose a penalty, name and shame employers and commence criminal proceedings.



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# LPA's are important for care homes too

Running a care home can be stressful - managing budgets, keeping residents and their families happy and ensuring consistent ongoing care. This burden increases when a resident has an accident, becomes unwell or loses mental capacity. If that happens, who steps in to make decisions on behalf of that resident? Who can you, as the managers and/or owners of the care home, turn to when this problem arises?

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## How does a LPA benefit a care home?

If the resident has a lasting power of attorney (LPA), life will be so much easier for everyone involved, including you, the care home provider. A LPA allows a person to decide who they would like to look after their property and financial affairs if they do not have the mental capacity to do so. The LPA can also be used before a person loses mental capacity. Residents of care homes can ask their attorneys to manage their finances for them. This means that their care fees can be paid by the attorneys dealing with matters on the resident's behalf.

This is such a valuable arrangement and it is surprising, perhaps, that more care homes do not encourage or even require residents to enter into a LPA. Once in place and registered, a care provider is able to deal directly with the resident's chosen attorneys, ensuring that delays are avoided when immediate decisions need to be made and providing continuity of care.

## What could happen if a resident doesn't have a LPA in place?

Without a LPA the care provider could be caught in financial limbo whilst the resident's family applies to the Court of Protection to appoint someone to

manage the resident's financial affairs. If the family is unable to pay the fees in the meantime, the care home may be placed in a difficult situation. This can of course lead to a lengthy delay in payment of fees which could place a heavy burden on cash flow and viability.

Care home owners are recommended to broach the subject of LPAs with care home residents and their families so that they are encouraged to consider these vital issues long before any urgency arises.

A very important point to consider is that the person entering into a LPA must do so before they lose mental capacity. If a resident has been diagnosed with early onset dementia or Alzheimer's they could still enter into a LPA, but a doctor may need to confirm that they have capacity to do so.

Birkett Long will visit your care home and give a free presentation on the benefit of LPAs for your staff, residents and their families. For this service, or for further information, contact Liz Jones.

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