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Charging for Transport to Work - Updated

Introduction

This Brief replaces Brief 60 and provides updated advice, particularly on cash advances, based on guidance received from HMRC NMW Technical Team.

There are many labour providers for whom transporting workers to work is an essential and integral part of their business.

Under current HMRC implementation of national minimum wage (NMW) legislation, deductions from wages for optional transport to work reduce national minimum wage pay. Many labour providers are currently facing large retrospective arrears payment demands by HMRC following compliance inspections.

The alternatives to deducting from wages are less than perfect and add a further burden onto labour providers and work contrary to the interests of workers. The Association is seeking to convince BERR to amend its interpretation on this matter. The arguments are summarised in the ALP paper "NMW and Transport Costs - 29 May 2009" which can be downloaded from http://www.labourproviders.org.uk/Policy_and_research_papers.aspx.

The Gangmasters Licensing Authority has advised that from April 2009 where it is found during inspections that transport deductions take pay below NMW that this will be regarded as a critical non-compliance potentially leading to licence revocation.

This Brief provides background and guidance on this matter to enable labour providers to avoid breaching NMW rules and to implement systems to collect transport charges that do not reduce pay below NMW levels.

HM Revenue & Customs (HMRC) Advice

With regard to deductions from wages for the optional provision of transport, HMRC advise that choice is not a factor when considering how deductions affect national minimum wage pay. The NMW deduction legislation applies. So where the employer is providing transport to work and a worker is earning exactly NMW rates, any deduction that is made by the employer either:

- a. In respect of the worker's expenditure in connection with their employment or
- b. for the employer's use and benefit

will reduce the worker's pay below NMW.

However, where the worker is making a payment to purchase goods or services from their employer after they have received their wages, the amount would not reduce NMW pay provided the worker was making the payment by free choice and the payment was not made in order to comply with a requirement in the worker's contract or imposed on the worker in connection with his employment.

NMW arrears will be due to all workers in the past 6 years for whom the deduction for transport has taken pay below the NMW. HMRC state that if employers have made deductions of this nature which have taken workers' pay below NMW, they should repay the workers their arrears immediately.

The Legal Position

Key legislation on this is the National Minimum Wage Regulations 1999:

31. - (1) The total of reductions required to be subtracted from the total of remuneration shall be calculated by adding together-

(g) any deduction falling within regulation 32;

32. - (1) The deductions required to be subtracted from the total of remuneration by regulation 31(1)(g) are-

(a) any deduction in respect of the worker's expenditure in connection with his employment;

(b) any deduction made by the employer for his own use and benefit (and accordingly not attributable to any amount paid or payable by the employer to any other person on behalf of the worker), except one specified in regulation 33.

(2) To the extent that any deduction is required to be subtracted by virtue of both sub-paragraphs of paragraph (1), it shall be subtracted only once.

Previous BERR guidance has defined deductions that go into the employer's pocket as deductions for the employer's "own use and benefit".

HMRC NMW Compliance Inspections

Where an employer has not paid the NMW, HMRC will require NMW to be paid immediately along with any arrears. Arrears on a notice of underpayment are limited to pay reference periods ending within the 6-year period prior to the service date of the notice of underpayment.

From 6 April 2009 employers may face a penalty if HMRC discover they have failed to pay the national minimum wage and workers will be entitled to have arrears of wages repaid based on current rates. These changes were brought in by the Employment Act 2008. The Act also gives HMRC compliance officers new inspection powers and strengthens the criminal regime for national minimum wage offences.

The penalty is set at 50 per cent of the total underpayment but there is a minimum penalty of £100 and a maximum penalty of £5,000. Employers who comply fully with the notice of underpayment within 14 days of service will receive a discount of 50 per cent of the penalty. The penalty will only be charged in respect of underpayments of the national minimum wage occurring in pay reference periods starting on or after 6 April 2009 (i.e. underpayments occurring before this date will not be taken into account when calculating the penalty).

Alternative options for charging for transport that do not reduce NMW pay

There are a number of alternative methods that a worker can choose to pay for home to work transport that do not reduce pay for NMW purposes. In all the options shown in this section:

- The expenditure must not be made in connection with the employment i.e. home to work transport is not in connection with the employment but transport at work e.g. between jobs is in connection with employment, and
- The purchase of the service must not be a contractual requirement nor a requirement imposed by the employer in connection with the employment, and
- The service must be provided by the employer, and
- The use of the transport to work service is optional for the worker, and
- Before the transport service is used by the worker, the employer provides the worker with comprehensive details explaining the service and the cost. This specifies in writing that the transport service is optional (and in reality this is so) and the option to use the transport is the worker's free choice, and
- All arrangements for payment should be clear and comprehensible, and
- The employer keeps accurate records of when the worker uses the transport and charges correctly in accordance with this, and
- The worker must make a payment to purchase the service.

The following methods have been confirmed with HMRC as not reducing pay for NMW purposes:

Option 1 - The worker pays by cash, cheque in advance or arrears to cover transport charges. Alternatively a payment from the worker's bank account such as via a direct debit can be made.

Option 2 - The worker pays bus fare in cash to the driver for each journey.

Option 3 - The worker pays for bus tickets or tokens in advance.

Option 4 - The worker chooses to request and is given an advance of pay which he can use as he wishes. The worker freely chooses to use the transport service and makes a payment to the employer to cover transport charges. The employer later deducts the appropriate advance of pay from wages to cover the transport. If the employer has provided an advance of wages and subsequently deducts a sum for repayment of all or part of the advance of wages, the deduction does not reduce NMW pay provided:

- the worker's expenditure is not expenditure in connection with his employment (e.g. it is genuine home to work transport) nor is it made as a result of a contractual requirement;
- there is no obligation placed on the worker to request a cash advance from the employer;
- the cash advance must be paid by the employer to the worker prior to the worker choosing to use and pay for the service;
- the worker can freely do as he wishes with the cash advance and does not have to use the money to pay for the transport;
- the employer reflects the advance and the deduction for repayment correctly in his payroll records.

HMRC advise that where this type of arrangement is used, it is likely that NMW Compliance Teams will want to look carefully at the circumstances to determine the effect on NMW pay.

N.B. In all cases in order to be absolutely certain labour providers should seek individual written confirmation that the solution implemented is NMW compliant. This should be obtained from the HMRC Compliance Officer known to the labour provider or to send an email by going to https://online.hmrc.gov.uk/shortforms/form/NMW_Enquiry?dept-name=NMW&sub-dept-name=Enquiry&location=25&origin=http://www.hmrc.gov.uk However labour providers may understandably not wish to alert the HMRC where there may previously have been an issue.

Obtaining Payments from Bank Accounts

Information on setting up a direct debit scheme can be found at <http://www.bacs.co.uk/Bacs/Businesses/DirectDebit/Collecting/Pages/default.aspx>

Alternatively you may wish to offer to your workers to be paid by prepaid card such as www.firstthere.org. There is facility to arrange for payments to be made from these cards. Labour providers should ensure that the nature of the service, the circumstances in which it is provided and the way the charges are made do not lead to the amounts involved reducing NMW pay.

Use of 3rd Party Transport Companies

In a situation where an employer contracts with a 3rd party bus company to provide a transport to work service and the employer deducts a transport charge from the worker this will always reduce the worker's pay for NMW purposes.

This is because it is regarded as a deduction for the employer's own use and benefit - even if the employer is making a loss by providing the service.

VAT rating on Workers' fares.

VAT zero rating is allowed for public passenger transport in any vehicle designed or adapted to carry not less than 10 passengers. For vehicles designed or adapted to carry less than 10 passengers VAT is at standard rate. This means that if you charge workers for transport to work in a vehicle designed or adapted to carry less than 10 passengers then you must pay VAT on the charge.

The rules on VAT for Passenger Transport are contained in [Public Notice 744](#).

Contact us for more information

Labour providers who wish to explore alternative methods of collecting charges for transport that do not reduce pay for NMW purposes are invited to contact the Association for further discussion.

Labour providers who are subject to a forthcoming HMRC compliance inspection or have received claims for NMW arrears following an inspection should contact the Association for advice and guidance. It may be appropriate to refer you for specific legal or taxation advice to our trusted experts.