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September 2009

Member Brief No 66

Living Accommodation and the National Minimum Wage

Introduction and summary

This Brief summarises the requirements regarding the National Minimum Wage where an employer is providing living accommodation to workers.

Wherever an employer provides (and this term is given a wide interpretation) living accommodation then the national minimum wage (NMW) accommodation offset arrangements apply. For workers on the NMW no more than a worker's offset amount, which is a maximum of £31.57 a week for pay reference periods starting on or after 1 October 2009 where living accommodation is provided for seven full days in respect of rent, utility and other accommodation related charges can be deducted from pay for the purpose of calculating whether NMW is being paid.

The Accommodation Offset Arrangements

NMW legislation requires the national minimum wage to be paid in cash not in kind. The provision of living accommodation by the employer is the only benefit in kind that can count towards a worker's NMW pay. There is a limit to the amount that an employer providing living accommodation can count towards NMW pay, called the accommodation offset. Where the accommodation is provided free, the amount of a worker's accommodation offset counts towards their national minimum wage pay. Where the employer charges the worker for accommodation, either by making a deduction from the worker's pay or accepting a payment from the worker, then any amount charged above the worker's accommodation offset reduces national minimum wage pay. The offset rate is generally increased each year at the same time as the national minimum wage rates are increased.

In order for the accommodation offset to apply:

- The accommodation must be provided by the employer.
- The accommodation must be "living accommodation" i.e. the worker must be able to live an "independent domestic life" i.e. accommodation has toilet / bed / washing / cooking facilities. If the accommodation is deemed not to be "living accommodation" then any deduction by the employer for rent will reduce national minimum wage pay.

For workers aged 22 and over, the national minimum wage is £5.80 an hour and the accommodation offset is £4.51 a day for pay reference periods starting on or after 1 October 2009 . This means that if the worker is paid the national minimum wage and is provided with living accommodation by the employer for seven days each week, then the maximum that can be deducted from pay for accommodation costs is £31.57 a week.

It is recognised that the accommodation offset is below the cost of providing accommodation; the justification for this is that allowing a market rate would not recognise the advantages to the employer of providing accommodation. This is a simplistic argument and does not recognise the different circumstances in which an employer may provide accommodation.

Where the pay rate is higher than the national minimum wage and the rent charged is in excess of the accommodation offset employers must carefully calculate that the deductions for rent do not take the worker below the national minimum wage.

There are a number of situations with regard to the provision of work and charging for rent for which labour providers should be aware of. The pay reference period (PRP) is the frequency at which workers are paid, generally weekly for temporary workers.

- Charges for rent must be taken into account in full in the (PRP) to which they relate. Arrears cannot be carried forward into future PRPs.
- Where living accommodation is provided for seven days and the PRP is weekly, even if the worker works only one day in the week then the full seven days rent is taken into account when calculating the worker's accommodation offset rate.
- In a week in which the worker does not work no pay has been earned and so the NMW rules do not apply. Rent may be charged within that week dependent on contractual arrangements. However as there has been no pay there obviously cannot be a wages deduction and rent will need to be obtained by an alternative payment from that worker.
- Premium elements of pay rates for working at a particular time e.g. overtime, nights, weekends and bank holidays do not count towards NMW pay and so do not provide any scope for rent to be increased above the accommodation offset limit.

Meaning of providing accommodation

In the National Minimum Wage and Accommodation Offset Guidance published by the DTI in April 2007 <http://www.dti.gov.uk/files/file38769.pdf> the employer is considered to be providing accommodation whether or not the accommodation is let by the employer or a third party where –

- the accommodation is provided in connection with the worker's contract of employment; or

- a worker's continued employment is dependent upon occupying particular accommodation; or
- a worker's occupation of accommodation is dependent upon remaining in a particular job.

Where the provision of accommodation and the worker's employment are not dependent on each other i.e. in situations where the worker is free to choose whether or not to occupy the accommodation, the employer may be considered to be providing accommodation in the following circumstances where –

- the employer is the worker's landlord either because he owns the property or because he is subletting the property; or
- the employer and the landlord are part of the same group of companies or are companies trading in association;
- the employer's and the landlord's businesses have the same owner, or business partners, directors or shareholders in common; or
- the employer or an owner, business partner, shareholder or director of the employer's business receives a monetary payment and/or some other benefit from the third party acting as landlord to the workers.

The Guidance says that “when enforcing the national minimum wage, enforcement officers and tribunals will look at the facts of each individual case before determining whether an employer is providing accommodation.”

These rules do not prevent an employer from arranging accommodation for his workers or assisting the workers to find accommodation where he is not effectively providing the accommodation. This applies in situations where there is no connection between the employer and the accommodation provider and the employer derives no benefit from the arrangement.

Additionally, deduction of rent from pay is not itself evidence that the employer is providing the accommodation. Where accommodation is not regarded as being provided by the employer then at the request of the worker any amount of rent can be deducted and paid to another person and the accommodation offset does not apply. This is provided the deduction is not expenditure in connection with the worker's employment and the employer does not derive any use or benefit from the arrangement.

Accommodation related charges

Any charge the worker is obliged to pay as a condition of being provided with living accommodation by an employer must be regarded as a charge paid in respect of the provision of accommodation. This applies regardless of whether the payment is the same or less than the cost of providing the utilities or other services. This includes charges for items such as gas and electricity, laundry, internet, use of communal facilities, administration charges and provision of furniture.

Examples of such charges, and this list is not exhaustive, include:

- Prepayment meters for gas, electricity where money paid goes to the employer and the employer pays the utility company.
- Utilities where the contract with the utility company is with the employer and the employer deducts this or otherwise receives a payment from the worker.
- Payment meters for showers
- Refills for gas bottles for cooking/heating where the worker must obtain the refill from the employer at a cost.
- Deposits – as this is a charge that must be paid to occupy the accommodation.

If the worker is not obliged to pay a charge as a condition of being provided with living accommodation by the employer this does not apply and the charge is not taken into account when calculating the accommodation offset. Instead, the normal NMW payment and deduction rules apply. So in these circumstances, where the worker makes arrangements for the provision of goods and service independently from his employer, such as when a contract for utilities is between the worker(s) and the utility company and utility payments are paid directly to or through a prepayment meter directly to a utility company, the amount will not be taken into account when calculating the charge for the accommodation.

There may also be items and services where the worker is not obliged to pay the charge in order to live in the accommodation but can freely opt to make a payment to buy the goods/services from the employer or elsewhere, such as:

- Refills for gas bottles for cooking/heating where the worker has the option to obtain the refill from the employer or elsewhere and the employer charges this at cost or at profit.
- Provision of an optional internet; communal facility; entertainment service; shopping transport service etc

For such items and services, provided the charge is not expenditure in connection with the worker's employment and there is genuinely no requirement imposed on the worker to pay the charge, it will not be taken into account as part of the cost of the accommodation for accommodation offset purposes. However, the charge must still be taken into account for NMW purposes using the normal deduction and payment rules. Therefore where the worker is freely choosing to purchase goods and/or services from the employer by making a payment, and is under no contractual obligation to do so and the charge is not imposed in connection with the employment, then the amounts paid by the worker will not reduce the worker's national minimum wage pay. However, in these circumstances, if the charge is deducted by the employer from the worker's pay it will always reduce national minimum wage pay.

Labour Providers should ensure that the way they are specifically applying any rent or accommodation related charges does not breach NMW rules and should contact the Association to discuss their particular circumstance.

Agricultural minimum wage

Where a worker is subject to the agricultural minimum wage and is required by their contract of employment to live in a whole house or self-contained accommodation (but not a caravan, mobile home) then the deduction which the employer is allowed to make from the worker's minimum wage shall not exceed £1.50 a week.

Where a worker is subject to the agricultural minimum wage and is required by their contract of employment to live in accommodation other than a House, which is fit for human habitation, is safe and secure, provides a bed for the sole use of each individual worker, and provides wholesome drinking water, suitable and sufficient sanitary conveniences and washing facilities in readily accessible places then an employer may deduct from the worker's minimum wage the sum of £4.46 for each day the accommodation is provided, as long as that worker has worked a minimum of 15 hours that week, subject to the consideration of holidays in the calculation.

Where occupying accommodation is not a condition of the contract of employment but is a matter of choice for the worker the NMW and accommodation offset arrangements apply.

VAT Liability on Workers' Accommodation

As a general rule residential accommodation is exempt from VAT. However, when the accommodation is not considered to be the occupant's permanent residence and is likened to a hotel or similar establishment, VAT becomes chargeable. This may well be the case with temporary workers accommodation.

However, a relief is available where taxable accommodation is provided to a worker for a period exceeding four weeks. The accommodation must be supplied to the same occupant for the duration and their stay must be continuous to qualify for the relief. After 28 days continuous occupancy relief can be given which broadly has the effect of charging VAT on 20% of the income rather than 100%.

If accommodation is provided under a shorthold tenancy agreement it would normally be exempt from VAT. Where rooms are rented on a daily, weekly or monthly basis the income would fall within the scope of VAT and therefore in order to minimise the tax burden it would be advantageous to ensure that each stay is in excess of 28 days.

Any VAT that may be chargeable does not increase the amount that can be charged to a worker which is set at the accommodation offset limit.

National Minimum Wage Arrears Enforcement

Arrears are due when an employer has not paid national minimum wage as a result of a failure to properly apply the accommodation offset. Where an employer has not paid the NMW or AMW, HMRC or Defra will require the minimum wage 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. Certain arrears, where relevant, as set out in the two bullet points at paragraph 2.3 of the “National Minimum Wage and Accommodation Offset” guidance, will only be enforced for pay reference periods starting on or after 1 April 2007.

From 6 April 2009 arrears must be paid with reference to the current rate of NMW. Guidance about this can be found [here](#).

Policy issues

The ALP believes that the accommodation offset limit cannot be justified on rational grounds. These points have been forcefully made to the Low Pay Commission. The Commission was not unsympathetic to the points made by the Association when it considered the issue in 2006, but could not see a practical way of addressing the problems.

However the Department for Business, Innovation and Skills (formerly BERR/DTI) has made no attempt to justify the policy other than by reference to legal interpretation. It has no problem with workers on the minimum wage paying accommodation costs of £70 a week to a third party but is determined to crack down on employers providing accommodation at say £40 a week.

The Low Pay Commission is currently undertaking a further review of the policy and the Association will make a full contribution to this.