



Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

2nd November 2012

ABOLITION OF THE AGRICULTURAL MINIMUM WAGE RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS TO DEFRA CONSULTATION

Contacts

David Camp, Director, Tel: 07855 570007, E-mail: David@alliancehr.co.uk
Mark Boleat, Senior Advisor, Tel: 07803 377343, E-mail: mark.boleat@btinternet.com

Introduction

On 16 October 2012 Defra published [Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England](#). Responses are requested by 12 November.

The Association of Labour Providers (ALP) represents over 250 labour providers, all of which supply workers to the food processing industry. Some workers employed by ALP members may be subject to the Agricultural Minimum Wage (AMW) regulations some of the time and some may be subject all of the time. ALP members have had to deal with the illogicalities and complexities of the AMW for many years and therefore have a keen interest in the consultation. The Association has been heavily involved in policy discussions on the minimum wage for many years and therefore has a major interest in that part of the consultation which is concerned with the AMW.

Executive Summary

The Association has been arguing for the abolition of the AMW since 2008 on the grounds that there is no logical reason for having a separate minimum wage for agricultural workers, the arrangements work to the disadvantage of workers, the dividing line between work that is and is not covered by the AMW is blurred and arbitrary and the AMW regulations are unnecessarily complicated.

The Association agrees that agricultural workers in England and Wales should be brought within the same minimum employment terms and conditions as workers in all other sectors of the economy and that the various committees should be abolished. This should be brought into effect at the earliest possible date.

Key arguments

The Association made a submission to Defra in March 2008 calling for the AMW to be abolished. That submission is attached at Appendix 1. The arguments in that submission are still valid and are reflected in the reasons given in the consultation document for the abolition of the AMW. The summary of the ALP submission is set out below –

- There is no logical reason why there should be separate arrangements for a minimum wage in only one sector, which has no unique characteristics justifying special arrangements.

- There is no natural boundary between work subject to the AMW and the National Minimum Wage (NMW). As a result, the current arrangements cause absurdities and distort behaviour.
- The AMW is unnecessarily complicated which makes it difficult to understand and to operate, particularly when the same workers may be subject to AMW and NMW regulations in the same working period.
- The AMW is widely ignored by farmers; enforcement by Defra is complaint driven and very small scale. By contrast, labour providers licensed by the GLA are subject to compliance checks.
- There are good legal grounds for arguing that the AMW arrangements cannot be applied to most workers supplied by agencies.
- The arrangements, if applied, work to the disadvantage of many workers by denying them the opportunity to work the hours they want.
- Unifying the arrangements for minimum wage would be in line with the government's policy of rationalisation of regulation and reducing administrative burdens.

The consultation document itself usefully makes the point that the definitional issues mean that "agricultural and horticultural businesses have to operate both the agricultural minimum wage and the national minimum wage regimes, which adds to their administrative burden".

The difficulties of operating two regimes have been compounded in recent years by the decision of the Agricultural Wages Board to set the AMW at a token amount (originally 1p, now 2p) above the national minimum wage. This is a perfect illustration of the lack of joined-up government.

Answers to consultation questions

Set out below are answers to the specific questions in the consultation document.

1. Do you agree that employment legislation in the agriculture sector should be simplified? If not, please give your reasons.

Yes

2. Do you agree that agricultural workers in England and Wales should be brought within the same minimum employment terms and conditions as workers in all other sectors of the economy? If not, please give your reasons why you believe there should still be a separate regime for agriculture.

Yes

3. Do you agree with the Government's proposal to abolish the Agricultural Wages Board, Agricultural Wages Committees, Agricultural Dwelling House Advisory Committees, and the agricultural minimum wage regime? If not, please give your reason why you disagree?

Yes

4. Do you have any additional points or options you would like Ministers to consider before making their final decision?

Yes. It has taken an inordinately long time to get the consultation process. There is a danger that the process will continue to be spun out. The abolition should take place at the earliest possible date, and certainly no later than April 2013.



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Camberley, Surrey
GU15 3SZ

Tel: 01276 509306

Fax: 01276 761076

Email: info@labourproviders.org.uk

Website: www.labourproviders.org.uk

11 March 2008

Contact: Mark Boleat 07770 441377 mark.boleat@btinternet.com

Proposed abolition of the separate Agricultural Minimum Wage

1. The ALP requests that Defra begins the process of abolishing the separate arrangements for the agricultural minimum wage (AMW). There are eight reasons why this should be done –

- There is no logical reason why there should be separate arrangements for a minimum wage in only one sector of the sector, which has no unique characteristics justifying special arrangements.
- There is no natural boundary between work subject to the AMW and the National Minimum Wage (NMW). As a result, the current arrangements cause absurdities and distort behaviour.
- The AMW is unnecessarily complicated which makes it difficult to understand and to operate, particularly when the same workers may be subject to AMW and NMW regulations in the same working period.
- The AMW is widely ignored by farmers; enforcement by Defra is complaint driven and very small scale. By contrast, large scale labour providers licensed by the GLA are subject to compliance checks.
- There are good legal grounds for arguing that the AMW arrangements cannot be applied to most workers supplied by agencies.
- The arrangements, if applied, work to the disadvantage of many workers by denying them the opportunity to work the hours they want.
- Unifying the arrangements for minimum wage would be in line with the government's policy of rationalisation regulation and reducing administrative burdens.

2. The rest of this paper expands on these points and provides supporting evidence.

The agricultural minimum wage arrangements in brief

3. The NMW has a single rate for adult workers and lower rates for younger workers. The AMW has separate rates for six grades and four categories of workers, additional rates for overtime payments, complex arrangements for holiday and sick pay and even a working dog allowance.

The case for separate arrangements for agricultural workers

4. Historically, separate wages councils and boards existed for a number of sectors of the economy where it was considered that workers would not be sufficiently protected by normal market forces. Most of these arrangements were abolished in 1988. In 1998 the National Minimum Wage was introduced. The reasons for retaining special arrangements

for agriculture at that time are not clear and in any event are no longer relevant. What matters is whether special arrangements can be justified in 2008.

5. The only justification for special arrangements can be that workers in agriculture “deserve” more generous arrangements than workers in other sectors. To some extent the more generous arrangements apply to all workers, in particular the longer holiday entitlement, but generally they provide for more generous arrangements for the better off, for example in respect of overtime and higher rates for particular categories of workers. The arrangements therefore do not benefit the lowest paid workers, those on the minimum wage itself, but rather benefit those earning more than the minimum wage, who by definition cannot be those most in need of protection.

6. There are other sectors that are characterised by low pay and long hours, such as office cleaning, catering and hospitality, but where the workers are entitled to the minimum wage only. These sectors are also less unionised than agriculture and therefore do not have the benefits of union protection and negotiation.

7. If the separate AMW did not exist there would be no justification whatever for introducing it; it does exist and there is no logical justification for maintaining this special arrangement for one sector.

Boundary issues and distortions

8. "Agricultural work" is not something that is easy to define. Broadly speaking the definition is all work done on a farm (itself not easy to define) in respect of produce grown on that farm. [The leaflet on the Defra website state that the Order applies to all workers in agriculture and horticulture. "However, the Order does not apply to workers in a packhouse away from a farm [or] in a packhouse on a farm when the produce being packed is not grown on that farm or enterprise." Defra has since indicated that this is incorrect; the test is whether the packhouse is owned by the farm not whether it is on the farm. This contradictory information usefully illustrates how difficult it is to construct a boundary, how complex the arrangements are and the scope for serious differences of view about what the Order means. This paper is drafted on the assumption that the wording in the leaflet is correct.] For example, picking and packing mushrooms or apples on a farm is covered. However, absurdities soon arise –

- A packhouse on a farm is likely to be used for packing produce from nearby farms. Where this is the case the work is not subject to the AMW. Therefore the same work with the same produce done by the same people in the same place is subject to two differing minimum wage regimes, depending on where the produce originated from.
- Where a farmer owns a packhouse not on his farm then workers packing his produce are not subject to the AMW. A farmer can therefore avoid the AMW by moving the produce across the road.
- There is a grey area where a farmer rents rather than owns a farm which includes a packhouse; there is a case for arguing that in this case packing produce produced on the farm does not come under the AMW arrangements.

9. These boundary issues, combined with the other factors covered in this paper, distort behaviour in three respects –

- They provide an artificial incentive for packhouses to be located off farms and therefore put farmers at a competitive disadvantage compared with off-farm packhouses.
- Where a farmer has a packhouse they encourage him to use other packhouses for his own produce and his packhouse for produce from other farms.
- To avoid a situation in which the same workers can be subject to the AMW and the NMW for doing the same work in the same place, some labour providers deliberately avoid serving packhouses on farms.

10. The differences between the AMW and NMW regimes create other problems. The accommodation offset arrangements are different between the two regimes in a significant way, which in practice makes it virtually impossible for an employer to provide accommodation to workers who may be subject to both regimes.

The complexity of the AMW

11. The AMW is unnecessarily complicated which makes it difficult to understand and to operate. This is particularly the case when the same workers may be subject to AMW and NMW regulations in the same working period or when working in the same place.

12. The AMW regulations run to 64 pages. The rates for each year are invariably decided at the last minute, if not actually after the beginning of the year to which they apply, in marked contrast to the efficient and orderly way in which changes to the NMW are made. This makes them even more

difficult to apply in practice. For example the arrangements for the year beginning 1 October 2006 were published only on 14 September.

13. To take one example of complexity, following is the definition of a Grade 4 worker-

Definition 2.7 - Grade 4 Craft Grade

"A worker is in the CRAFT GRADE if he/she:

◇ holds at least one of the following Craft Grade minimum entry requirements:

- a vocational qualification from the list specified at Appendix 4; or
- 8 certificates of competence, (including any mandatory competences) specified for Grade 4 in the relevant agricultural sector as shown in Appendix 2. One or more certificates of competence may be achieved by an equivalent qualification as specified under sub-section 2.9A. The relevant agricultural sector is the sector in which the worker is working at the time he/she becomes a Grade 4 worker in his/her current employment; or
- status as a qualified former Council Apprentice (see sub-section 2.8 below); or
- another valid qualification specified in sub-section 2.9;

and

◇ has disclosed to his/her employer as required by sub-section 2.3 that he/she holds the minimum entry requirements for entry to Grade 4;

and

◇ has:

- been working in agriculture for at least two out of the last five years (the work can have been undertaken in any part of the world and can include time under instruction or training, provided that the worker was mainly undertaking practical agricultural work); the work can have been done at any time over the previous five years including work done before obtaining the Grade 4 minimum entry requirements specified in the above list; or
- since first obtaining his/her Grade 4 minimum entry requirements specified in the above list, been continuously employed for twelve months or more by the same employer;

and

◇ is not excluded from the Craft Grade by reason of sub-section 2.10."

14. Appendix 2 runs to four pages while Appendix 4 is a more modest one page but listing 26 separate qualifications. Sub section 2.9a has some rather complex transitional arrangements.

15. Even the definition of a flexible work seems a tautology –

Definition 2.14 - Part Time Flexible Worker

"A worker is a PART TIME FLEXIBLE WORKER if he/she:

◇has entered into a written agreement (a Flexible Working Agreement) with a minimum duration of at least one year, to follow normally a pattern of flexible working; **and**

◇has, if requested, benefited from trade union representation in any discussions leading up to their signing a Flexible Working Agreement; **and**

◇is contracted to work for less than 39 Basic Hours per week; **and**

◇who has a Flexible Working Agreement that stipulates working hours and working days **and** that agreement does not allow either the employer or the worker to change the normal working hours and working days without the agreement of the other; **and**

◇who is required under the Flexible Working Agreement:

- to work their Basic Hours on 6 days a week; **or**
- to work on a Sunday (not paid at overtime rates); **or**

- to work Basic Hours of more than 8 and less than 10 on at least one day a week.”

16. The holiday arrangements are so complex that the Order includes formulae.

17. The complexity of the arrangements produces some absurd results. For example –

- A typical contract is a “nil hours” contract where no work is guaranteed – for the good reason that no work can be guaranteed. This is readily accepted in the marketplace. Under the AMW any hours worked must be at overtime rates, ie at 50% above the NMW.

- In the Regulations coming into effect in October 2007 Defra have provided that all workers receive an additional 10 days holiday entitlement. Thus a worker who works one day a week is entitled to 19 days paid holiday a year; ie he works for 33 days and then has 19 days paid holiday.

Enforcement is minimal

18. The practical experience of labour providers is that enforcement of the NMW is virtually non-existent outside the agency sector. This is not surprising. The nature of agricultural work is such that it is largely below the radar of enforcement agencies, and also it lends itself to cash payments which benefit both workers and agricultural businesses at the expense of the rest of the community. Labour providers are large businesses in the formal economy, licensed by the Gangmasters Licensing Authority, with records that can be easily expected, which makes them the prime target for compliance action.

19. This means that labour providers are at a competitive disadvantage compared with agricultural businesses, which are more able to conceal cash payments.

20. It is also the experience of labour providers that in practice many directly employed workers do not receive what they are entitled to under the AMW.

Doubtful legality of the application of the AMW

21. The AMW applies to employees on contracts of employment (unlike the NMW which also applies to workers engaged on a contract for services). Most labour providers engage workers on a contract for services, and the ALP believes that this means that they are not subject to the AMW.

22. However, Defra (and consequently the GLA) has taken the view that it deems these workers to be employed on a contract of employment and therefore subject to the AMW. It is not for Defra or the GLA to imply or impose a different employment status to that in place and contractually agreed between the labour provider and the worker. The ALP considers that Defra and the GLA are acting ultra vires in doing so.

23. The Court of Appeal judgment on 6 February 2008 in *James v Greenwich Borough Council* decided that it is for an employment tribunal to imply a contractual relationship between agency worker and end-user only where it is necessary to make sense of the relationship and as a question of fact. As a question of fact, it should not be reviewed by an appellate court unless a clear error of law exists. This confirms the line that the ALP has been taken.

The arrangements disadvantage workers

24. There seems to be an assumption that the more generous the arrangements the better. This is not the case. It is generally accepted that if a minimum wage is too high then some people would be priced out of a job. For this reason the Low Pay Commission does extensive research on the impact of the minimum wage and in making its recommendations is conscious of the need to balance protecting jobs and paying more to lower paid workers. The NMW is not distortionary. With the exception of lower rates for younger workers there is a single rate applying across the board. Employers are free to offer more than the minimum wage, either in basic rates or through overtime, holiday entitlement or other benefits, that is the same factors that apply elsewhere in the economy. In agriculture and food production in particular employers find it difficult to pay more than the minimum wage because the market power of the supermarkets holds down the price that they can get for their produce.

24. By contrast the AMW results in serious distortions that work to the disbenefit of workers. The major one is the requirement that overtime must be paid after eight hours a day and 39 hours a week. The minimum overtime rate is 50% more than the basic rate. Many agricultural businesses

simply could not recover from their customers labour costs that are 50% above the minimum wage. The result is that most agricultural businesses that take labour from labour providers stipulate that workers can work no more than eight hours a day and 39 hours a week. Many, if not most, agricultural workers want to work longer hours than these and have no expectation of being able to be paid 50% more than the minimum wage. They are denied the opportunity of working longer hours and earning more money. In reality this gives further encouragement to the “informal economy”, as if workers want to work 60 hours a week they will do so; if they are subject to the AMW then 39 hours will be at the AMW and 21 hours will be at whatever is on offer in the thriving cash economy.

Reducing administrative burdens

25. The government is committed to reducing the administrative burdens on business. The AME arrangements are in themselves a huge administrative burden. For labour providers, and to a lesser extent agricultural businesses, this burden is accentuated because they are subject to both AMW and NMW rules often for the same workers doing the same job in the same place. It would be a welcome simplification of a complex regulatory regime to have a single set of minimum wage rules for all workers.