



102 Frimley House
5 The Parade, High Street
Frimley, Surrey
GU16 7JQ

Tel: 01276 509306

Fax: 01276 761076

Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

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NATIONAL MINIMUM WAGE

Response by the Association of Labour Providers to Low Pay Commission consultation

Contacts:

Mark Boleat, Chairman

Tel: 07770 441377

E-mail: mark.boleat@btinternet.com

David Camp, Director

Tel: 07855 570007

E-mail: David@alliancehr.co.uk

Introduction

This paper sets out the views of the Association of Labour Providers (ALP) on relevant aspects of the national minimum wage. The Association was formed early in 2004 by 18 labour providers. It now has around 260 members and is recognised as the representative voice for those labour providers that serve the agriculture and food industry. (Full information about the Association and its work is available on its website: www.labourproviders.org.uk.)

Labour providers are particularly affected by the national minimum wage. They bring workers to the UK who undertake low paid work in the agriculture and food industry. Because the workers are newly arrived in Britain and many work on a temporary basis, they have particular needs in respect of transport and accommodation. Labour providers therefore have a special interest in the interaction of the National Minimum Wage and the Agricultural Minimum Wage, the accommodation offset arrangements and rules relating to deductions from pay, particularly as they apply to transport.

Executive summary

It is a symptom of the way that minimum wage legislation has evolved that the submission is not concerned with either the level of the minimum wage or with exploitation of workers but rather with a series of relatively technical issues which have nothing to do with exploitation of workers and everything to do with creating bureaucracy and unnecessary burdens on workers and businesses.

The accommodation offset arrangements have resulted in labour providers largely withdrawing from the provision of accommodation for their workers as it is impossible, in all but a very few areas, to provide accommodation within the offset limit.

Most labour providers now have no interest in providing accommodation so consideration of the offset arrangement is irrelevant to them. A small number may be willing to go back into the provision of accommodation if they were permitted to do so on the same basis as other landlords.

The Association's preferred position is that where employers provide accommodation (or any other service) as an option then they should be free to do so on the same terms as any other person and

should be subject to the same regulations as any other person. The accommodation offset arrangements would apply only to accommodation occupied as a condition of employment (the original intention) and unnecessary guidance about the meaning of “effectively provides” could be removed.

There seems to be an assumption that the minimum wage law is observed. It is not; it is widely ignored. However, this is generally done in a way that does not disadvantage workers as it is through the informal economy where it is the taxpayer and businesses operated lawfully who are disadvantaged. The Commission should study in detail the enforcement activity of HMRC, the operation of the informal economy and its interaction with the minimum wage.

The interpretation of the National Minimum Wage law is that workers are prohibited from agreeing to pay for services through deductions from pay if these deductions would take them below the minimum wage. This requires both workers and employers to use devices which achieve the desired purpose, only inefficiently. The Commission should review the justification for this patronising and work-creating approach.

Labour providers have had to deal with a specific problem in this respect on the provision of transport. A change in interpretation or in enforcement policy has resulted in labour providers being required to pay “arrears” in respect of arrangements that until 2007 were accepted as being legitimate.

ALP support for the Commission’s work

ALP members have no problem with the minimum wage generally. However, they read about government plans to ease the burden of regulation. At the same time they have had to deal with significant increases in the burden of regulation in respect of the minimum wage as a result of the actions of Employment Tribunals, the HMRC national minimum wage inspectorate and the Agricultural Wages Board. The current arrangements are unreasonably onerous for labour providers seeking to serve the food industry and to help their workers with transport and accommodation that is not obtainable in the free market.

Accommodation

In its 2006 annual report the Commission reported on the operation of the accommodation offset arrangements. The Commission accepted that there was a case in principle for distinguishing between accommodation occupied as a condition of employment and accommodation provided as an option to a worker. However, it could not see a means of devising a satisfactory distinction that would operate in practice. The Commission therefore recommended a tightening of the arrangements, which has duly been implemented through guidance.

The ALP cannot accept the reasoning of the Commission. The Commission did not ask the Association or others for its views on whether there could be any reasonable test which would allow such a distinction to be made. There are a number of areas where workers agree to opt out of or opt into arrangements without which such a practice would be unlawful. For example, a worker has to agree to opt out in writing of the 48-hour working week, and a worker has to agree in writing to any deductions from pay other than those required by law. The effect of the Commission's report is that labour providers have generally ceased to provide accommodation. This is now done only in areas of low cost accommodation, particularly on farms. There is no evidence to suggest that as a result of the policy decision that has been taken that low paid workers are now paying less for accommodation. Most of those that had the option of taking accommodation from their employer no longer have this option and have to obtain their accommodation in the open market.

Accommodation costs are a major part of living costs of low-paid workers. The Commission should conduct a study on the accommodation costs paid by low-paid workers, including particular schemes designed to help them, such as those for "key workers" and those operated by employers. This would enable a more informed debate to take place on the merits of applying restrictions on the rents that may be charged to low-paid workers by employers but not by anyone else. Such a study would also provide a good example of a joined-up approach to policy-making, rather than a very narrow approach that low paid workers only have a problem with accommodation when it is provided by their employer.

The Association's preferred position is that where employers provide accommodation (or any other service) as an option then they should be free to do so on the same terms as any other person and should be subject to the same regulations as any other person. The accommodation offset arrangements would apply only to accommodation occupied as a condition of employment (the original intention) and unnecessary guidance about the meaning of "effectively provides" could be removed.

A more detailed paper on the accommodation issue forms Appendix 1 to this submission.

Enforcement and the informal economy

Enforcement bodies tend to concentrate on easy targets, typically those operating above board in the formal economy and with records to inspect. The minimum wage enforcement team at HMRC typifies this approach. The experience of ALP members is that enforcement work occurs only where records are available to inspect, employers then being caught out by technical transgressions which may well be debatable. ALP requests for information on HMRC's approach to enforcement have been ignored. HMRC does not comply with the generally accepted principles of good regulation in respect of minimum wage enforcement.

Unless a business or an individual presents evidence to HMRC that it exists then the chances are that it will be left alone. As a general rule, HMRC does not have the tools to go after people in the informal economy. The Association made this point in its evidence to the Commission on the accommodation offset in 2005. The Commission chose to quote in large print an extract from the evidence –

"The real abuse is not by people with detailed records that can be examined but rather by people with no records, no tax returns, no accounts, no fixed premises but rather a phone, a white van and a great deal of cash."

Confirmation on the lack of enforcement appeared in the Home Affairs Select Committee Report on Human Trafficking, published on 6 May 2009 –

"We agree that existing employment law, the National Minimum Wage, regulations on rented accommodation and so on should be sufficient to prevent the sorts of abuses highlighted by the Gangmasters Licensing Authority and UCATT—but only if they are enforced. It seems to us that, outside the Gangmasters Licensing Authority's sectors, enforcement is at best patchy and at worst non-existent."

The Commission should examine the enforcement activity of HMRC, including analysing the statistics on the origin of cases it chooses to investigate and the nature of the transgression.

More importantly, the Commission should examine the interaction of the minimum wage and the informal economy which in turn partly depends of workers being in the country illegally. Estimates of the number of illegal workers range from 400,000 to one million. While technically the minimum wage law might apply to them, a worker in the country illegally is hardly going to make a complaint to an official body. It is generally considered that such workers are vulnerable to being exploited.

However, to a large extent they are not being exploited; rather they are part of those who are exploiting. A dishonest employer can employ workers in the cash economy paying them below the minimum wage but which in after-tax terms leaves them as well off if not more so than workers in the formal economy on the minimum wage.

In the case of some services, such as domestic help and the hand car washing industry, arguably the informal economy does little harm in that reputable businesses are not undercut. (There is no better example than the failure of enforcement activity in Britain than that a thriving industry can develop on high streets staffed to a significant extent by illegal workers and operating largely on a cash basis.) However, in the industry in which labour providers operate, the informal economy can make it very difficult for businesses operating lawfully to do so profitably. Labour providers properly have been put under pressure to become compliant with all laws, but naturally are aggrieved when they see in other areas the government so blatantly ignoring non-compliance. Bulgarian and Rumanian Workers are supplied to work in packhouses and in agriculture (outside of the Seasonal Agricultural Workers Scheme) as self employed workers. As self employed workers, albeit false self employment, they are outside of the scope of the NMW and are as such not subject to employers' national insurance contributions or entitled to holiday pay. Such suppliers of labour are able to undercut legitimate labour providers.

It is increasingly recognised that HMRC is ineffective in respect of enforcing the National Minimum Wage, concentrating largely on complaints and businesses that have records available to inspect. The ALP understands that this is being changed to an intelligence led approach. This is a good move both in efficiency and effectiveness, but would be further improved if the intelligence were managed centrally. The GLA already has the structure and expertise to do this and enforcement of the National Minimum Wage should be transferred from HMRC to the GLA. This can be achieved by ministerial order under an SLA to BIS and requires no change to legislation.

Abolition of the Agricultural Minimum Wage

The Association has made a case to Defra for the abolition of the separate agricultural minimum wage available on the ALP's website at www.labourproviders.org.uk/files/ALP%20submission%20on%20AMW%2011%20March%2008.pdf. The Secretary of State for Environment, Food and Rural Affairs has announced Defra's plans to begin work to abolish the Agricultural Wages Board in England and Wales.

The Agricultural Minimum Wage is not the responsibility of the Commission, but, following its abolition, agricultural workers will be within the remit of the NMW and the implications of this is now properly a matter which the Commission should investigate.

Treatment of deduction from pay

Under the NMW any deduction from pay, other than required by law, has to be deducted from pay in determining whether the minimum wage is being paid. The NMW Technical Team has described the position, specifically in relation to transport, as follows:

"Choice is not a factor when considering how deductions affect national minimum wage pay. The NMW deduction legislation would apply. 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."

Basically this means that if an employer make a "deduction" from wages (i.e. it is taken out before it gets to the worker), even if it is optional and signed for, to cover transport to work then this will take workers below the minimum wage. However, if the worker makes an optional free choice payment (i.e. it is paid by the worker separately) then this does not take workers below the minimum wage.

"For the employer's use and benefit" is regarded as meaning that it "goes into the employer's pocket".

The NMW Head of Operations confirmed the above interpretation and stated: "deduction from wages for the optional provision of transport will potentially take workers below NMW and it follows that depending on the amounts paid to workers such deductions may give rise to NMW arrears."

The logic for this approach is untenable as it implies that workers are incapable of making a rational decision to pay for a service in a certain way. As a result of this ruling labour providers have had to unscramble arrangements whereby workers voluntarily agreed to pay for their transport through deductions from pay, and as such was open to examination by enforcement bodies, to requiring workers to pay fares in cash each day or week or to sign a standing order/direct debit arrangement which means the cost of transport is paid from their bank account. This is a burden on both business and workers and serves no useful purpose.

The problem has been compounded because the view that HMRC is now taking is not the view that it took prior to 2007 nor was it the view of the Gangmasters Licensing Authority. As a result labour providers have in effect been subject to retrospective legislation. A detailed submission on this point is attached as Appendix 2.

The HMRC has also taken a position on the meaning of "deductions" and "payments" which is not as defined in the legislation.

The Commission should investigate the rationale for workers not being able to agree voluntarily to auditable pre-authorised deductions from pay to pay for services from their employer.

APPENDIX 1

THE ACCOMMODATION OFFSET ARRANGEMENTS

Introduction

This paper considers in more detail the implication of the accommodation offset arrangements. This was last considered by the Low Pay Commission for its report in 2006. The ALP submitted a detailed paper, dated 26 September 2005, for this review; much of this paper is still relevant so it is annexed. This paper concentrates on the developments over the last few years.

The Offset

Under the accommodation offset arrangements, employers who provide accommodation to their workers can count up to a specified amount (£31.57 a week after October 1 2009) as payment towards the minimum wage. The arrangements are complex, difficult to understand and capable of a number of different interpretations. These were spelled out in the Association's 2005 submission. Such was the uncertainty that the DTI had a formal consultation on new guidance on the accommodation offset arrangements. The Association did not agree with the proposed guidance, but at least there was consultation on the guidance, and employers were given adequate notice before the new interpretation was applied.

At the least, there is now no doubt in the minds of employers as to the current position, which is that employers that provide accommodation directly or indirectly to workers who are on the minimum wage cannot charge more than £31.57 a week.

Provision of Accommodation by Labour Providers - Market Issues

It is necessary to put the issue into its context. The ALP's members predominantly provide workers for unskilled work in the agriculture and food packing and processing industries. Such are market pressures in this industry that the unskilled work is either at, or very close to, national minimum wage. Labour providers operate in a very competitive market largely resulting from the downward pressure on costs exerted by the supermarkets. It follows that margins are thin, although adequate to allow viable businesses to continue.

Very few British workers are willing to work at or near minimum wage. For this reason, for many years many of the low-paid jobs in Britain have been undertaken by migrant workers, able to earn much more than they can in their home country.

Migrant workers coming to Britain for the first time face a number of challenges, of which finding work is probably one of the easier ones. Most of the workers employed by labour providers are from the Accession States of the European Union. As soon as they find a job, they are obliged to register under the Worker Registration Scheme which means losing their passport for a period which could easily be a month, and sometimes longer. They need to find themselves accommodation and to open bank accounts; neither is easy because they are often required to provide proof of identity, which they cannot do if they do not have their passport, and paradoxically they may be required to provide a utility bill indicating an address in the United Kingdom, which clearly is impossible for migrant workers.

For these reasons, many ALP members provide a service to their workers to help them settle in the UK. Prior to the new interpretation on accommodation this included, in some cases, providing accommodation as an option. Labour providers generally would prefer not to provide accommodation but recognise that in some cases it is an added attraction for workers.

Labour providers are in no position to provide a large subsidy to those of their workers occupying accommodation. They may be able to provide it at below full market cost, taking advantage of economies of scale and foregoing a profit, but they cannot provide a subsidy of, say, £20 a week as their margin does not allow them to do so.

It is impossible to provide accommodation in all but a very few parts of the country within the accommodation offset maximum of £31.57 a week. A cursory examination of the to-let columns of the local newspaper is sufficient to show this. In its submission on the new DTI guidance in September 2006, the ALP quoted figures from the local newspaper in Stamford where the lowest rent quoted was £77 a week for a one-bedroomed flat. It also noted that NHS Trusts offer accommodation to hospital staff at between £70 and £85 a week.

The context is therefore clear; the effect of the accommodation offset arrangements is that labour providers and many other employers cannot legally provide accommodation to workers at or near minimum wage. The only exception is employers providing tied accommodation where the employer obtains a direct benefit from the worker being on site.

The Effect of the New Interpretation

Following the promulgation of new guidance by DTI, almost all members of the ALP that did provide accommodation ceased to do so. This was entirely predictable, as was explained by the ALP at the time. Labour providers sold what property they owned, or where they had leased it they chose not to renew when the opportunity arose. Some labour providers may well have decided that there was more money to be made in providing accommodation than in providing labour and became landlords instead.

This does not mean that labour providers have stopped helping their workers find accommodation. Some labour providers have arrangements with commercial letting agents whose details they provide to their workers, and provided the labour provider does provide details without taking a fee, this is within the accommodation offset arrangements.

It would be naive to believe that arrangements do not exist that go further than this, with labour providers referring workers to letting agents and receiving a commission, but in such a way that there is no chance of HMRC inspectors detecting it.

Most labour providers now choose to do nothing, leaving workers to make their own arrangements. Often this works well. Typically, some workers take it upon themselves to become mini-landlords, either buying or renting a large fairly run-down property and making rooms, or even beds, available to their fellow workers. This is not unlike the arrangements which students traditionally have made. It needs to be remembered here that the vast majority of workers are single and mobile and many wish to maximise the amount they can send home or take home to their native country. They are therefore willing to save money on accommodation by sharing in many cases.

The Effect on Workers

As a result of the new guidance, the position of workers has worsened. Indeed, it is difficult to envisage that any worker has obtained any benefit at all. If the belief was that as a result of the guidance those labour providers providing accommodation would cut their rents by £20 or £30 a week, then this was incompetently naive. Previously, many workers had a choice of being able to rent a property from their landlords in addition to being able to renting on the open market or living with friends. They now have one less option, in that they cannot rent from their employers.

It is doubtful if there is significant exploitation of workers as a result; there has always been an element of exploitation, mainly by the fellow countrymen of the workers concerned and often going

back to arrangements made in the home country. However, it is not suggested that this has changed significantly as a result of the new interpretation.

To the extent that labour providers are unofficially providing accommodation, the new arrangements are no longer transparent or auditable to an inspector, whether from the GLA, HMRC or anyone else. To this extent, some of the protection of workers has been removed.

The Silo Approach to National Minimum Wage

The experience of labour providers is that most migrant workers wish to maximise their "*free income*", that is income after tax, national insurance and essential expenditure on transport and accommodation. For this reason, they are willing to work long hours and to occupy cheap accommodation.

The worker is indifferent as to whether he pays for items like transport, accommodation, food or anything else by deduction from wages or after being paid through cash or in any other means. The concern of the workers is the amount they are paying for accommodation and transport, not how they are paying.

Some workers do like the option of agreeing to payment for items like transport and accommodation through deductions, as this ensures that their bills are paid on time and is administratively convenient for them, particularly at a time when they may not have proper bank accounts.

The approach to the national minimum wage in policy terms is wholly different and reflects the silo approach that is so prevalent throughout government. The aim of policy seems to be that the worker should maximise the net of tax pay actually received and that how this is spent is of no relevance at all.

The national minimum wage approach is patronising to workers in that it assumes they are incapable of voluntarily agreeing to deductions from pay; there is no other area where Government frowns on people agreeing to paying for items through deductions and, indeed, in other areas, for example trade union subscriptions, this is positively encouraged.

The accommodation costs paid by low-paid workers should properly be a concern of Government, but Government seems not interested in this unless the accommodation is provided by the employer.

The Future

Labour providers can live with the present position whereby, in effect, they are banned from providing accommodation to their workers. From the public policy perspective, however, they are appalled at the mechanism and process that has led to the current situation as it bears no relation to the marketplace in which they operate or to the interests and wishes of their workers.

The preferred position of the ALP is that the separate accommodation offset arrangements should be abolished except in the case of tied accommodation (for which they were originally intended), but that otherwise workers should be free to agree voluntarily to deductions from their pay to meet the cost of any goods and services. This would enable large chunks of the already complex national minimum wage regulations to be removed and would free HMRC inspectors to get on with the rather more important matters of seeking to catch those employers who are deliberately and systematically under-paying their workers.

Annexure

26 September 2005

ACCOMMODATION AND THE MINIMUM WAGE

Submission to the Low Pay Commission by the Association of Labour Providers

Contact: Mark Boleat, Chairman
Tel: 07770 441377
E-mail: mark.boleat@btinternet.com

Introduction

The Low Pay Commission has been asked by the government to review and make recommendations on the operation of the accommodation offset in the minimum wage arrangements. Broadly speaking, the accommodation offset is being interpreted to mean that where an employer provides accommodation to his workers then any rent payment in excess of £26.25 a week has to be deducted from pay in calculating whether the minimum wage is being paid. The Commission is seeking evidence from interested parties by 30 September 2005.

This paper sets out the views of the Association of Labour Providers (ALP). The Association was formed early in 2004 by 18 labour providers. It now has 131 members and is recognised as the representative voice for those labour providers that serve the agriculture and food industry. (Full information about the Association and its work is available on its website: www.labourproviders.org.uk.) Labour providers are particularly affected by the offset arrangements. For the most part, they bring workers to the UK who undertake low paid work. Because the workers are newly arrived in Britain they are not easily able to make their own accommodation arrangements and their income restricts the rent that they are able to pay on the open market. The issue is therefore very important to those labour providers that provide accommodation, almost all of whom are currently doing so contrary to the new interpretation of the legal position.

Executive summary

The legal position on the accommodation offset is set out in Statutory Instrument 1999 No. 584. The Regulations are complex both in respect of the calculation of the offset and also when it applies.

There is substantial legal uncertainty about the current arrangements. There have been different interpretations within and between DTI, Defra and HMRC. A number of official publications give a different view from the legal position that is now being put forward. Particular issues of uncertainty are defining when the labour provider is the accommodation provider, whether deducting rent payments from pay is relevant to determining whether the labour provider is the accommodation provider and whether it makes any difference if the worker has a choice as to whether to occupy the accommodation.

In its reports the Low Pay Commission has treated the accommodation offset in the context of the provision of tied accommodation. It sets the offset below the cost of providing the accommodation because of the benefits the employer has through workers living in tied accommodation.

The arrangements for the accommodation offset are difficult to justify theoretically as what is seen to be a concession to employers actually results in the opposite. It is difficult to see why employers alone should be restricted in what rent they can charge to workers on low pay.

Labour providers are particularly affected by the new interpretation because of the nature of the business they are in. They bring workers to the UK to do low paid jobs. Those workers need help with their accommodation arrangements.

Most labour providers do not provide accommodation; those that do generally charge between £40 and £60 a week. Workers benefit by having the option of obtaining accommodation quickly and easily.

If labour providers do not provide accommodation then workers may have difficulty in obtaining accommodation and will be paying substantially more than £26 a week unless they are prepared to accept overcrowding.

Current regulations do not significantly affect the amount that workers pay for their housing. To the extent that the re-interpretation has had any effect, it has been to discourage labour providers from providing accommodation, not to affect the rent paid by workers.

Enforcement activity seems poorly targeted – at those in the formal economy with records to inspect.

The preferred solution is that when workers have a choice as to whether they occupy accommodation provided by the employer, a labour provider should be in the same position as any other accommodation provider. This would be in line with guidance still given by Defra and the DTI.

Legislation

The legal position is set out in Statutory Instrument 1999 No. 584 - The National Minimum Wage Regulations 1999.

Regulation 30 provides that

“The total of remuneration in a pay reference period shall be calculated by adding together” pay and a number of other items including –

“(d) where the employer has provided the worker with living accommodation during the pay reference period, but in respect of that provision is neither entitled to make any deduction from the wages of the worker nor to receive any payment from him, the amount determined in accordance with regulation 36.”

Regulation 31(i) sets out amounts that must be deducted in calculating the minimum wage –

“(i) the amount of any deduction the employer is entitled to make, or payment he is entitled to receive from the worker, in respect of the provision of living accommodation by him to the worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 37, to the extent that it exceeds the amount determined in accordance with regulation 36.”

Regulation 35 has some other relevant information on deductions –

“Payments not to be subtracted under regulation 31(1)(h)

35. The payments excepted from the operation of regulation 34(1)(c) are-

- (a) any payment in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable;
- (b) any payment on account of an advance under an agreement for a loan or an advance of wages;
- (c) any payment made to refund the employer in respect of an accidental overpayment of wages made by the employer to the worker;
- (d) any payment in respect of the purchase by the worker of any shares, other securities or share option, or of any share in a partnership;
- (e) any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the

worker's contract or any other requirement imposed on him by the employer in connection with his employment.”

Paragraphs 36 and 37 set out the substance of the regulations on the calculation of the accommodation deduction.

“Amount permitted to be taken into account where living accommodation is provided

36. - (1) The amount referred to in regulations 30(d) and 31(1)(i) is whichever is the lesser of the following-

(a) the amount resulting from multiplying the hours of work done in the pay reference period (determined in accordance with regulations 20 to 29) by 50p, and reducing that product by the proportion which the number of days (if any) in the pay reference period for which living accommodation was not provided bears to the total number of days in the pay reference period;

or
(b) the amount resulting from multiplying the number of days in the pay reference period for which living accommodation was provided by £2.85.

(2) For the purposes of paragraph (1), living accommodation is provided for a day only if it is provided for the whole of a day from midnight to midnight.

Adjusted deductions and payments in respect of living accommodation

37. - (1) Where an employer is entitled to make deductions or receive payments in respect of the provision of living accommodation to a worker and in a pay reference period -

(a) a worker is absent from work for a day or more when, but for his absence, he would be expected to perform time work (for example because he is sick or taking a holiday),

(b) during that period of absence he is paid, for the hours of time work for which he is absent, an amount not less than the amount to which he would have been entitled under these Regulations, but for his absence,

(c) the hours of time work worked by the worker in the pay reference period are, by reason of his absence, less than they would be in a pay reference period containing the same number of working days in which the worker worked for the normal number of working hours (and for no additional hours), and

(d) the amount of the deduction the employer is entitled to make or payment he is entitled to receive in respect of the provision of living accommodation to the worker during the pay reference period does not increase by reason of the worker's absence from work, the provisions of paragraph (2) shall apply.

(2) For the purposes of regulation 31(1)(i), the amount of the deduction the employer is entitled to make or payment he is entitled to receive in respect of the provision of living accommodation shall be adjusted by multiplying that amount by the number of hours of time work actually worked by the worker in the pay reference period (as determined in accordance with regulation 20) and dividing the figure so obtained by the total number of hours of time work the worker would have worked in the pay reference period (including the hours of time work actually worked) but for his absence.”

Legal uncertainty

These provisions are difficult, if not impossible, to understand; certainly the average person running a small business would not have a hope of getting to grips with them. It will be demonstrated in this section that government departments have differed, and continue to differ, in their interpretation of the provisions.

All that is certain is that there is something called the accommodation offset which is calculated on a daily basis but applied on a weekly basis and is currently a maximum of £26.25 a week (increasing to £27.30 from 1 October 2005). It is also accepted that where an employer is caught by the provisions then the amount that they charge for accommodation cannot take the employee below the minimum wage except by the amount of £26.25 a week.

The differences in interpretation relate to two expressions –

- “where the employer has provided the worker with living accommodation” (30.d). This in turn comes from section 54(4) of the National Minimum Wages Act 1998: “In this Act “employer” in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.”
- “the amount of any deduction the employer is entitled to make, or payment he is entitled to receive from the worker, in respect of the provision of living accommodation” (31.i).

The Association has taken the view that the accommodation offset is a concession to employers – the only “benefit in kind” that can be counted towards the minimum wage, is up to £26.25 a week. It will be demonstrated subsequently that the Low Pay Commission analysis of the minimum wage has been in terms of the provision of free or very cheap accommodation that is occupied as a condition of employment. Thus assuming a 40 hour week, the £26.25 figure is equal to £0.66 an hour, and therefore an employer providing free accommodation is meeting the minimum wage requirements if he pays £4.19 a week, rather than £4.85. If the employer makes a nominal charge of say £10 a week then it is entitled to pay £0.25 less than the minimum wage, that is £4.60 an hour.

The Association is reinforced in this view by 35(e): “any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the worker’s contract or any other requirement imposed on him by the employer in connection with his employment.” This means that for any good or service other than housing a worker can agree separately from the contract of employment to purchase it from the employer with the cost not being deducted for a minimum wage purposes. It is counter-intuitive to then argue that a “concession” in respect of housing actually means more restrictive rules. If the special “concession” on housing was abolished there would be no problem for ALP members as housing could then be treated in the same way as other goods and services.

HMRC has rejected this interpretation. In a letter dated 14 February 2005, the Head of Operations, National Minimum Wage, said:

“I do not agree with your interpretation of Regulation 35. It does not apply to payments with regard to the provision of accommodation. It can’t be applied to accommodation because, as a matter of law, “goods and services” are not usually regarded as including land or buildings. Furthermore, a payment for accommodation by way of rent is not a “purchase”.

As a matter of law this response is clearly wrong.

Furthermore, it is contradicted by the official guidance in *A detailed guide to the national minimum wage* which is still on the DTI website and therefore still applicable. Paragraphs 85 and 86 set out the general position in respect of payment for goods and services provided by the employer –

“85. A worker may want to buy goods (shoes, clothing, hi-fi) or services (for example, meals) from his own employer. If he is completely free to choose whether to buy from this employer or from somewhere else, the amount of the purchase price is not taken away from the amount that counts towards minimum wage pay. The worker cannot subsequently claim that by having bought the items from his employer, he has not been paid the minimum wage.

86. The important point, though, is that he must not be *required* to buy from the employer. If he is *required* to buy goods or services from the employer, the amount that he pays has to be taken away from the amount that counts towards the minimum wage. In effect this would be a payment in kind rather than payment in wages”.

The guidance then goes on to give a specific example relating to accommodation –

“A hotel, youth hostel or holiday centre *requires* its workers to purchase accommodation with it. Anything that the worker pays for accommodation over and above the permitted offset will not count towards minimum wage pay.

It is therefore clear that not only is the HMRC view on this position legally untenable but it is not consistent with what has been and is still official guidance.

These views have also been generally held by Defra. In a letter to Sir George Young MP, dated 14 April 2005, the Minister for Employment Relations said the offset rules “included cases where an employer has effectively provided accommodation – where for example he has arranged accommodation of behalf of his workforce, made deductions for the costs through his payroll and received commission from the landlord.” He went on to say: “I am aware that Defra, who are responsible for enforcing the agricultural minimum wage, has adopted a slightly different approach. As a result of slight differences in the agricultural and national minimum wage legislative frameworks, Defra took the view that where accommodation is provided by the employer and the worker was free to choose whether to occupy the accommodation offered, the accommodation offset did not apply. Defra have now revised their approach and accept that their interpretation could lead to a worker being paid less than the national minimum wage. Defra will be revising their future approach to enforcement accordingly.”

Interestingly, having reviewed their approach Defra then issued the following guidance, which is contrary to what is stated in the minister’s letter, –

“Q 6 Can an employee ask an employer to make deductions without affecting national minimum wage pay?”

A 6 Yes. Where a deduction is requested by the worker that is for the worker’s benefit, national minimum wage pay is not affected. Such deductions include employee pension contributions or rent collected and passed to a third party. An employer must derive no benefit from such deductions.

Q 19. What is the position in respect of living accommodation provided to an agricultural worker by a third party?

A 19. Neither the national or agricultural minimum wage legislation allows accommodation provided by a third party to count as part payment of a worker’s minimum wage entitlement. However, a worker can authorise the deduction from pay of rent paid to a third party. There is no limit on the value of rent that can be deducted in this way. For this transaction to remain outside the control of the minimum wage legislation the employer must derive no benefit from the deduction made.”

The DTI still has on its website information for migrant workers which gives information contrary to what is said in the Minister’s letter – and despite this having been pointed out to the Department. Leaflets for Lithuanian and Polish workers include the following - : “Your employer may ask you to sign a separate agreement asking you to agree to pay more for your accommodation [than the offset amount] or other things such as transport. If you are not given any choice about where you live or what services you use such deductions may be illegal.”

The implication of this is that if the worker is given a choice then it is not illegal, and indeed even if the worker is not given a choice it only “may” be illegal.

In a letter to the ALP on 14 March 2005, HMRC gave its interpretation of the position –

”On the issue of choice, our legal advice is clear that if an employer provides accommodation to a worker, then the amount that may be taken into account for NMW

purposes is limited to the amount specified in the legislation, currently a maximum of £26.25 a week. It makes no difference if the worker can choose whether or not to take the accommodation provided by the employer.

Where a third party provides accommodation to the worker the amount that may be deducted for NMW purposes will depend on the facts of each individual case. At one extreme there would be the case of workers left to find their own accommodation on the open market. In such cases the accommodation offset restrictions would likely not be in point. Towards the other end of the spectrum would be cases where the employer arranges the accommodation, makes deductions through the payroll on behalf of a third party and charges commission for arranging the accommodation. Ultimately it would be for the Employment Tribunal to take a view on the application of the law to the particular facts of a case. But our firm view (informed by legal advice and decisions in Employment Tribunals) is that the accommodation offset restriction would apply to all cases toward this end of the spectrum.”

The clear conclusion is that there is considerable legal uncertainty as to the relevance of the choice issue.

The second uncertainty is in respect of whether a labour provider is also the accommodation provider. The tests given by HMRC relate to mechanical (eg deduction from payroll) rather than substantive issues. Taking the three tests in the HMRC letter a labour provider arranging accommodation at arm's length with a commercial landlord could be caught if it receives commission and makes deductions from payroll, whereas a labour provider and a landlord that were in effect one and the same might not be caught if there were no deductions from payroll, the accommodation was arranged by a third party (for example the person introducing the workers to the labour provider) and there was no payment of commission.

Low Pay Commission

A study of Low Pay Commission reports indicates that the accommodation offset has been regarded as dealing with benefits in kind and the tied cottage position.

The First Report of the Low Pay Commission (1998) comments “in some sectors, particularly agriculture and hospitality, the provision of accommodation or lodging only as a benefit in kind is significant, and sometimes is covered by collective agreements.” The Report went on in paragraph 4.30: “if we do not allow an accommodation offset to be made against the national minimum wage, employers may transfer the accommodation charge from a benefit in kind to a cash charge to the worker, which could be particularly disadvantageous to the low paid. Hence we recommend that an offset should be allowed where accommodation is provided as a benefit in kind.” The Report went on to suggest the figure which has now become £26.25 a week.

In 1999, the Commission published a detailed report: *The National Minimum Wage Accommodation Offset*. The first chapter of the report begins with the words: “Few low paid workers are provided with benefits in kind, but the provision of accommodation or lodging is a significant feature of some sections, particularly hospitality.” The report goes on to talk about “the provision of free accommodation or lodging”. The merits of this are spelled out: “It is recognised and valued by employers and employees alike. For the employer, it is often advantageous to have staff living on or near the premises. For the worker it offers accommodation at very little cost, or in locations where alternative accommodation is not readily available.” The Commission went on to acknowledge that in deciding the level of the accommodation offset: “We did not seek to reflect the actual cost of accommodation to the worker, or the cost to the employer. We believe that it would be inappropriate and impracticable to do so. Allowing a market rate would not have recognised the benefits to the employer of providing accommodation.” The exact wording of the conclusion of the Commission merits quoting in full –

“Consequently, we recommend that, where the employer provides accommodation or lodging free of charge to the employee, an amount of up to £20 a week may count towards the national minimum wage.”

It is very clear from this that the Commission is talking about the provision of free accommodation and the concession allowed to the employer is that he can pay less than the minimum wage by the amount of the accommodation offset. This is nothing like the interpretation that is now being placed by parts of Government on the provisions.

Chapter 2 of the report refers to research providing information “about the use of tied accommodation throughout a range of industry sectors”. Appendix 3 which gives official data is all about employees living in tied accommodation, either rented or rent free. There is nothing in the research about the sort of accommodation that labour providers are currently providing.

The Third Report of the Low Pay Commission (2001) also makes it clear that the offset relates to tied accommodation. Paragraph 5.21 says: “In our First Report we said that: “For employers, the advantage of providing accommodation is that it helps ensure workers are on the premises.” The paragraph goes on to refer to the offset being allowed “where accommodation is provided as a benefit in kind”. Paragraph 5.30 comments: “The largest numbers of employees living in tied accommodation are found in public administration and defence (eg caretakers and security staff) followed by health and social work (eg nurses).” Paragraph 5.32 refers to the “generally low (and declining) incidence of employer provided tied accommodation”.

The Fourth Report of the Low Pay Commission (March 2003) has a section on the accommodation offset. It is clear from reading this that it applies to tied accommodation. Paragraph 3.98 states: “Where an employer provides accommodation for a worker, this benefit in kind may count towards national minimum wage pay up to a maximum of £22.75 a week. Amongst the low paying sectors which we examine, provision of tied accommodation is more common in the hospitality sector than in any other sector.”

The current report (February 2005) is in line with previous reports: “We continue to receive evidence about the level of the accommodation offset. In previous reports we have commented that the offset is not intended to reflect the commercial value of a property or the full cost to the employer of providing accommodation. Rather it has been set so as to strike a balance between these costs, the advantages to the employer of housing workers close to the place of work, and the desire to ensure workers a minimum level of cash wages.”

The accommodation offset – theoretical issues

The issue needs to be considered from both the theoretical and practical points of view. As the previous section explained, accommodation is the only exception to the general rule that the minimum wage must be paid in cash and not in kind. The offset is seen as being a concession to those employers who provide accommodation. However, far from being a concession it has proved to be precisely the opposite in that accommodation is now treated wholly differently from the provision of other goods and services. The general position is that an employer can offer workers goods and services and make deductions from pay to pay for them provided the employee agrees in writing. Such deductions have no influence on the calculation of the minimum wage. Thus, an employer can, for example, offer high quality meals charging a market price for them; he can offer transport to and from the place of work, and he can provide other goods and services such as the ability to purchase products, say from a farm, at reduced prices. Provided the worker consents and the deductions are made from pay, the overall result is that the cash wage payment is substantially below the minimum wage.

The second key point is that the current interpretation seems to assume that either that all workers on the minimum wage are housed by their employers or that if workers are not able to be housed by their employers then they can find accommodation in the market for a rent of under £26.25 a

week. As a subsequent section will demonstrate, neither of these applies. It is unlikely that many, if any, employers provide accommodation at under £26.25 a week unless it is a tied accommodation situation. There is of course nothing in the general law to require accommodation providers to charge rents such that pay less rent does not fall below the minimum wage. There is a housing benefits system but public policy has not attempted to link this to the minimum wage and the system is not such that those paying for private rented accommodation achieve a sufficient rebate such that in practice they are not paying more than £26.25 a week.

A third theoretical point is that the figure is simply unrealistic. It is plucked out of the air and bears no resemblance to rents in the marketplace. The Low Pay Commission makes it clear that the figure is deliberately intended to be below the cost of providing accommodation. This is realistic only if the employer is able to compensate for the low rent. This can be done in a tied accommodation situation where the employer has the benefit of workers on site and does not, for example, have to contribute towards the costs of their transport to and from their place of work.

Finally, the figure does not distinguish in any way between areas or types of accommodation. Clearly, the cost of providing accommodation in Central London is very different from the cost of providing accommodation in other parts of the Country. Also, the £26.25 is a figure that applies equally to a worker sharing a room as to one occupying of his free choice a two or three bedroomed house. The only way that labour providers can work within the current figure is by forcing workers to share rooms even if they would prefer not to do so.

The special position of labour providers

Most businesses are unaffected by the accommodation offset as employers generally do not provide accommodation and those that do generally pay above the minimum wage so that the offset does not bite in practice. The sectors where employers do provide accommodation and where workers are on low pay are hospitality, catering, agriculture and food. The hospitality industry in particular is better able to deal with the problem given that hotels are in the accommodation business and often make direct provision for their employees on site.

Labour providers such as those represented by the ALP are more than any other affected by the current interpretation that the tax authorities and the DTI are giving to the Regulations. Many of the workers they provide are doing low paid work which British people are not generally prepared to do. The going rate for this work is around the minimum wage. Indeed, in many cases, the going rate is precisely the minimum wage and increases in line with the minimum wage each year.

British workers doing low paid work do not expect to be housed by their employer mainly because most of them are living with somebody else who is paying the rent or they may benefit from State funded rent subsidies.

Foreign workers do not come into this category. They come to Britain specifically to work and do not already have accommodation when they are looking for a job. Such workers find it difficult to seek private rented accommodation independently because –

- They have come from a country in which incomes are much lower than in Britain and therefore are unlikely to have accumulated the deposit (typically one month's rent) that landlords require.
- Because they have come from abroad they cannot provide references acceptable to landlords.
- They have difficulty establishing their identity because they have no utility bills, no bank account and their passport may well be somewhere in the Home Office system as they are obliged by law to register with the Workers' Registration Scheme if they are from the Accession States of the European Union.
- They may well not have a bank account which many landlords require because it is not easy for people coming to the country to satisfy the money laundering requirements in

respect of bank accounts. Labour providers help their workers overcome this but it can take time.

- Their native language is not English.

In practice, few such workers will rent independently in the private rented sector. Many are provided with accommodation by their employers or their employers help them obtain accommodation through arrangements with landlords which, depending on the interpretation of the Regulations, may be caught by the offset arrangements.

Often workers will take advantage of their fellow nationals and an informal and sometimes expensive market exists for such accommodation.

HMRC has suggested that labour providers can deal with the issue by paying their workers more or charging them less rent. This is not feasible. A report prepared for Defra by Precision Prospecting (published in August 2005 on the Defra website) explains the economics of labour provider business. The report includes a survey of migrant workers which estimated that 64% were paid the minimum wage of £4.85 an hour. It is generally accepted that to meet all legal requirements (national insurance, holiday pay, sick pay and the cost of transport) a labour provider needs to charge £6.30 an hour. To cover management costs and to make a reasonable profit requires between £6.70 and £6.90 an hour. The fact is that labour providers struggle to get these sorts of rates. There are enough labour providers who evade tax that labour users can often get away with paying under £6.30 an hour. If it assumed that a typical market rent is £50 a week and the labour provider is only able to charge £26.25 a week then in effect the labour provider has to meet £0.60 an hour. This is simply not doable in the marketplace. If labour providers are restricted to charging £26.25 a week then the effect will simply be that they will cease to provide accommodation (or provide very poor or overcrowded accommodation). The workers will not then enjoy a rent of £26.25 a week because no one else will provide such accommodation; rather they will be paying much the same as the labour provider charges them – but with the hassle of having to arrange their own accommodation.

Although labour providers are particularly affected by the offset rules they are not unique. The Health Service is also affected, and for the same reason that low paid workers need help with accommodation. Just taking one example, King's College Hospital NHS Trust is currently offering accommodation at between £72 and £83 a week. If this is what a public agency can offer it is difficult to see how a private business can be expected to do it for less. A significant number of NHS staff are living in accommodation provided by their employers who are receiving less than the minimum wage after rent in excess of £26.25 a week is deducted.

The operation of the offset in practice

It needs very little research to establish that it is not possible to provide accommodation at a market rate in a way which satisfies the official interpretation of the offset arrangements. The Commission can no doubt do its own research on this. However, to illustrate the point, the following information has been obtained from one of the largest residential letting agencies in Stamford, an area of low accommodation prices.

The lowest rent quoted in its current listing is £335 pcm, that is £77 a week, for a one-bedroomed flat. The cheapest two-bedroomed flat was £375 pcm, that is £86 a week or £43 if shared between two people. Most two-bedroomed accommodation was in the £400-£500 range, that is £92-£110 a week. The local newspaper, The Rutland and Stamford Mercury, in its edition of 6 August 2005, had advertisements from another agent in which the lowest rent was £350 pcm for a one-bedroomed cottage, with the lowest rent for a two-bedroomed property being £450. This figure was typical of other agents. The lowest rent quoted anywhere was £300 for a studio apartment. To comply with the minimum wage Regulations, the maximum rent that can be charged would be £114 a month and not a single property came anywhere near this, even allowing for multiple occupation.

Those labour providers that do provide accommodation do not do so at £26.25 a week. Typically, the rent they charge is £40-£50 a week. Very few have until recently been conscious that this is viewed by some as being illegal and they have few complaints from their workers who generally are paying a little less or no more than they would pay on the open market.

The comments made by two members of the ALP summarise the position well. A labour provider based in London commented –

“Accommodation is provided for all overseas workers who do not have the means/contacts to accommodate themselves.

For a candidate to organise their own accommodation through an agent/landlord the following is required:-

- Deposit
- Bank Account
- Job Offer
- Financial Resources
- Employer references

[We] do not take a deposit in advance. Rent charged is inclusive of utilities and furnishings and ranges from £35.00 - £50.00 per week for two people sharing one room. Lounge and kitchen diner areas are communal.

Rents are shown on payslips and deducted from net pay.

Most workers are happy with their accommodation providing it is clean and tidy and any repairs required are actioned quickly. Even though contracts are translated into mother tongue workers do move in with friends without notice and accommodate their friends and family in rooms without landlords permission. Younger workers tend to have more parties, do not maintain gardens and therefore cause friction with neighbours.

The unscrupulous behaviour of some landlords/labour providers has not endeared our profession to letting agents and therefore finding accommodation in areas local to work is proving very difficult.

What letting agent will provide accommodation to an individual who does not have access to a bank account which in turn is difficult to get without a job offer from your employer and a utility bill.

On any new agreement the employer would need to act as a guarantee for the worker and deduct rent in the short term for the landlord while accounts are opened.

[We] would be delighted if it did not have to provide accommodation for workers, it is a legal and administration burden. Please provide me with an alternative.”

A labour provider based on the south coast commented –

“We are a working holiday/leadership training provider with an employment business element. We provide accommodation on our organic farm in our caravan park for all our employees. Accommodation is shared with maximum two per bedroom, in a mixture of one to three bedroom static caravans.

Why we provide these services:

- The Southeast and other areas in UK have full employment, which creates a shortage of workers for local manufacturing; amenity; care work and drivers. We employ young people aged 18-30 from other countries to help to meet this need. We provide training for these young people to improve their management and life skills and to provide a better skilled placement to the industry Client.
- The Southeast and other areas in UK have a shortage of affordable accommodation.

The facilities provided for the weekly service charge of £55 include:

- Accommodation- food service of continental breakfast
- Recreation- trips and services; regular shopping trips to local towns
- Administration service- with bank account set up, NI number obtained, medical appointments arranged, assistance with visas.

Rent for a single room in a shared house ranges from £50 – 85 per week for room alone with energy costs additional to this.

The cost of accommodation is deducted from their weekly salary. If a worker has not earned enough to cover the rent we have a discretionary system in place to reduce the charge. (How many landlords would reduce the rent due to lack of funds!?)

The majority of workers would not be able to set themselves up with work and accommodation to allow them to stay for their work visa period/on arrival from a foreign country. They would be open to abuse from bad employers/landlords. Placements who join our programme and choose to move on often contact us to come back when they are disappointed with work/accommodation they find for themselves. We have a waiting list to join the programme. We provide an accurate description of the programme to ensure they know what to expect, not 5 star but comfortable! “

There is now some harder evidence as a result of the research conducted for Defra by Precision Prospecting. Set out below is the relevant extract from its report *Temporary workers in UK agriculture and horticulture* -

“Accommodation

In the labour providers’ survey sample, 18% of respondents said they provided accommodation. Under minimum wage legislation (both agricultural and national), employers are not generally able to count benefits as part of the minimum wage. For example, an employer cannot deduct say 30p an hour for meals, transport and insurance. The only exception is for accommodation. Here, however, there is a very strict maximum related to the number of hours worked with an overall maximum of £26.25 a week. That is, if an employer requires his staff to live in accommodation provided by him and assuming say a 50-hour week, then 52.5p an hour can be deducted from the wage actually paid as payment for the accommodation.

The view expressed by the labour providers was that a constantly shifting migrant workforce is in need of easily available and affordable accommodation that is up to standard. The problem for all migrant workers is that letting agencies and landlords require proof of identity and ability to pay, including a deposit. Proof required is usually in the form of a utility bill and a bank account. Workers in this sector of the economy, both UK nationals and foreign nationals, have difficulty meeting these criteria. It has been shown that accommodation is a key source of profits for criminal labour providers through charging excessive rents and taking advantage of workers’ lack of choice. (Labour users expressed the same difficulties in providing accommodation in Section 4). Of the five labour providers interviewed, all had at some time provided accommodation. In one case a labour provider owned residential properties to house new arrivals let through a letting agency - not the business. New workers can rent the property without a deposit for a maximum of three months. If, at the end of this period, they have regularly paid their rent and utility bills and

been good tenants, the letting agency will take them on and they move into permanent accommodation not owned by the labour provider. In general, labour providers saw providing accommodation as 'more trouble than it was worth'.

A second report by Precision Prospecting (*Secondary processing in food manufacture and use of gang labour*), also published in August 2005 on the Defra website, was more detailed and covered secondary processing. It included the results of a survey of 970 temporary workers. 23% of the workers said they used labour provider accommodation, 58% said they did not and 19% did not comment. The proportion using labour provider accommodation was highest in the sectors for poultry (57%), meat (36%), dairy industry (25%) and fruit and vegetables (23%).

Of the 224 workers who were provided with accommodation only 10% said they paid under £30 a week. 37% paid in the £50 - £60 range and 17% paid more than this. Interestingly 28% did not know what they paid. Of the 224 workers 27% said that rent was deducted from pay, 35% said it was not and 39% would not say. The report concluded that broadly speaking labour providers charge the market rent for the accommodation.

The research by Precision Prospecting for Defra has shown that most labour providers do not in fact provide accommodation. It is not clear from the research whether having arrangements with landlords constituted providing accommodation for the purposes of the particular question. Some labour providers do have arrangements with landlords which they negotiate on a case by case basis. In some cases, deductions from pay will be made with the payment going straight to the landlord. Ideally, labour providers prefer to avoid this as it can involve them in landlord/tenant disputes. However, a landlord might insist on it, particularly in the absence of a bank account. Sometimes the arrangements for deductions from pay may apply for a few months until the worker can be expected to have his own bank account.

Some labour providers recruit foreign workers who are already in Britain and hence generally have little need to provide accommodation. Others recruit through their existing employees who may be well settled in Britain and it is sometimes the workers themselves who help with accommodation either by simply making a room available for a limited period of time or in some cases by running accommodation businesses themselves.

The Association has not been in a position to conduct any detailed research on this. However it seems fairly clear that those workers who are not housed by their employers are not living in good quality accommodation paying £26.25 a week for their accommodation.

The following comment from a labour provider based in Scotland amply demonstrates this –

"In July I received a phone call from a chap in England asking if I needed any workers as he had 4 Polish students looking for work. I replied that I had plenty of work but sadly no accommodation. Two days later he called back to say they would find their own accommodation and I told them to come. They duly arrived and I sent them to a job, but did not see them again for a couple of days when I met with them to get their details. When I asked them where they were staying they told me they were sleeping in their car (a fact made more incredible when you consider it was a Ford fiesta and they were well-built lads.) I then discovered an old tent we had so I offered this to them and they set it up on a local camp site for which they were charged £224 per week! Now for me to have arranged for them to rent a 2 bedroom flat locally would have cost approximately £160.00 per week inclusive of council Tax - £40 each or £13.80 above the maximum I would be allowed to charge. So staying in a tent costs them £16 a week more than it would have to stayed in a good flat which complied with HMO regulations. This summer Edinburgh has been totally saturated with young people from mostly Poland. They have no jobs to come to and end up staying in over crowded flats for which they are being totally ripped off. I know of one instance in Edinburgh where 20 people are living in a 4 bedroom flat which only has 1 WC and are charged £45 per head. We own a 5 bedroomed flat in central Edinburgh which is

licensed for 9 people resulting in a total rental income of £943 per week. There is an identical flat upstairs rented out to 5 students for £1,700 per month. This means that I have an opportunity cost of over £7,500 per month. All of the above illustrates the fact that far from protecting workers the current rules are often driving them into the hands unscrupulous landlords who are only too willing to exploit them.”

The overall effect

The overall effect of the current arrangements in the market place is probably minimal. Until recently, labour providers were not aware that they could be acting illegally in providing accommodation at a market rent. Enforcement activity was virtually non-existent as it is reliant on complaints and few workers are likely to complain about arrangements that are to their advantage. The issue came to light only because of very zealous enforcement activity by HMRC which prompted the ALP to raise the issue and for the review to be commissioned.

If it is the intention of the legislation that all workers should receive at least £4.85 a week after paying for their accommodation, less an allowance for that accommodation of £26.25 a week, then the policy is failing dismally. Very few workers will be in this situation. In the vast majority of cases, the workers are not provided with accommodation by their employer but rather have to find accommodation in the open market and this is simply not available anywhere for £26.25 a week unless an unreasonable amount of overcrowding is accepted.

Most labour providers consider that providing accommodation is more trouble than it is worth. The recent activity in respect of enforcement of the minimum wage Regulations has probably encouraged this view and to the extent that the regulations have had any effect it has been to reduce the willingness of employers to provide accommodation.

It is difficult to find any evidence, either practical or theoretical, that the operation of the accommodation offset has led to workers employed by labour providers who are on the minimum wage paying less for their accommodation than they would otherwise do.

A specific issue – variable pay

The Association would also like the rather technical point about the offset being calculated on a weekly basis to be addressed. This can lead to some quite absurd results of a worker earning say £500 a week one week and £100 the next week but then having a reduced rent in the second week without any allowance being made for what was earned in the first week.

This is well illustrated in a case which HMRC pursued against a labour provider with very detailed examination of their records. In successive weeks in 2003, a worker earned £391, £366, £376, £323 and £365. All these figures were well above the minimum wage. In the following week earnings fell to £142. This led HMRC to do a detailed calculation that the worker had paid £18.34 too much for their accommodation which accordingly had to be refunded to the worker. The same calculation was then done for the remainder of the year with in some weeks the worker earning well above the minimum wage level while in other weeks he earned below and was therefore entitled to a refund of part of his rent. In one week the total pay was just £0.50 below the calculated national minimum wage pay and therefore arrears of £0.50 had to be paid to the worker. If the whole of the period had been averaged out the worker would have been paid well above the national minimum wage even allowing for the actual rent paid.

This case led the ALP to advise its members that they could avoid such an absurd result by charging a nominally much higher rent but with provisions that the actual rent paid in each week would not be more than the amount allowed under the National Minimum Wage Regulations and that the average rent over say a 13 week period should be no more than the figure the labour provider began with. The worker would therefore be paying a variable rent according to his earnings. Instead of being expressed as “a rent of £50 a week” it would be expressed along the following lines: “The rent payable shall be £100 a week, except that in any week where this would

result in less than the national minimum wage being paid the rent shall be reduced to the level sufficient to ensure that the national minimum wage is paid. At the end of each 13 week period any rent paid in excess of £650 shall be used to meet the rent payable in the following quarter.” This is a complex and unnecessary device but was needed to deal with what seemed like an over zealous interpretation of the law.

Enforcement

The Association has little evidence on the nature of HMRC’s enforcement activity and requests for a breakdown of how cases arise has not led to any response. It is to be hoped that the Commission will analyse the HMRC’s enforcement workload in detail, in particular identifying how it plans its enforcement activities. In practice, it is understood that the process is entirely reactive and that there are only two ways in which an investigation will begin –

- A routine inspection of payroll.
- A complaint. The complaint does not have to be by a worker but can be by anyone. It is understood that in some cases the complaints have been from competitors.

Enforcement on the basis of complaints is no way to run any sort of regulatory system. This is particularly so for HMRC which is at its best going through masses of records and papers identifying technical breaches of legislation. It was noted earlier that HMRC regards deductions from pay as evidence that a labour provider is the employer and therefore subject to the offset arrangements. Perhaps the reason for this is that only if there are deductions from pay is HMRC able to deal with the case because all the information is neatly in front of it. The real abuse is not by people with detailed records that can be examined but rather by people with no records, no tax returns, no accounts, no fixed premises but rather a phone, a white van and a great deal of cash.

There is no doubt a great deal of abuse with workers being paid less than the minimum wage and in some cases being charged excessive amounts for accommodation, although generally not by a labour provider but rather by an agency in their country of origin.

The task of the enforcement authority should surely be to identify where there is the greatest detriment and then to deal with it rather than adopting a very reactive approach of waiting for cases to come in front it and then taking the easy ones where all the information is available.

The preferred way forward

The Association’s preferred position accords with the advice which Defra has given and which is still in the official guidance on the minimum wage and in literature currently on the DTI website. That is, where an employer offers workers accommodation then the employer is at liberty to charge rent in the same way as any other accommodation provider. If the rent is deducted from pay then there must be written consent as this is already a separate requirement in employment legislation. If this is not the conclusion of the current review then the likely effect is that more labour providers will cease to provide accommodation as the perceived risk of enforcement action will be greater.

At the minimum it is essential to recognise the special position of those employers who bring people into the Country to work in low paid jobs from countries where living standards are very much lower. These workers are not in a position to provide their own accommodation and for employers to help in this respect should be regarded as evidence of being a good employer not something that should be classified as illegal. If the Association’s preferred way forward is not accepted then it might be appropriate to provide an exemption in the case of workers who have been in Britain for, say, less than twelve months. This would produce its own problems at the end of the twelve month period when a labour provider might be forced to evict good workers who have been good tenants who might then find themselves paying more in the open market. Generally, however, the experience of labour providers already is that after several months those workers who wish to stay in Britain for a reasonable period of time would prefer to make their own accommodation arrangements and in other cases a few friends may get together to rent property in much the same way as students have done so for many years.

At the least, there must be clarification of when the employer is deemed also to be the accommodation provider. This cannot be left to individual HMRC officers making their decision and then simply telling the unfortunate labour provider that if they don't like it they have to bear the costs of going to a tribunal.

There is one point on which the Association would like absolute clarity and that is the current HMRC view that deductions from pay are evidence that the employer is providing accommodation even if the employer and the accommodation provider are totally different parties. There seems no rational or legal explanation for this view. Employers make deductions for all sorts of purposes paid to third parties, such as contributions to trades unions, contributions to pensions and even contributions to sports clubs. Perhaps HMRC has mistaken deductions from salary with deductions from salary that go straight into the pocket of the employer. The Defra interpretation on this seems appropriate, referring to situations in which the employer derives no benefit from the payment. Given the difficulty that workers now have in opening bank accounts, particularly if they are from abroad, it would be very useful for many labour providers who have arrangements with accommodation providers to have direct payment of rent, at least for a limited period of time.

APPENDIX 2

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NATIONAL MINIMUM WAGE AND DEDUCTIONS TO MEET TRANSPORT COSTS ALP position paper

Contacts:

Mark Boleat mark.boleat@btinternet.com 07770 441377

David Camp: david@alliancehr.co.uk 078555 70007

Introduction

Many labour providers provide transport which their workers can choose to use to get to and from their places of work. Historically, workers have been charged through agreed deductions from pay. Since 2007 HMRC has deemed this to be unlawful where the charge takes workers below the minimum wage, and labour providers are being faced with considerable bills to meet “arrears” of pay.

This paper argues that the HMRC interpretation is at best questionable, and that it is inappropriate for a change in interpretation or enforcement policy to be introduced at no notice and with retroactive effect.

History

Labour providers are in the business of providing large numbers of workers to a range of businesses, particularly those that require relatively low skilled workers for processes such as cleaning, picking and packing food. Most of the factories where this work is done are not in town centres but rather on industrial estates or in the countryside. Agricultural work naturally is also carried out in rural areas. There is no public transport. Labour providers therefore typically provide transport for their workers. This is always optional and labour providers would prefer not to have to provide such transport as it is expensive, requiring them to have PSV licences for their vehicles, and requiring drivers with the appropriate licences. It is also complex to administer.

Most labour providers have no choice but to charge their workers for transport as their margins do not allow them to absorb what would otherwise be a considerable cost. It is a cost competitive market and labour users do not offer charge rates that allow for this – to do so would add typically 50-75p on to hourly charge rates.

It is also equitable between workers as those workers who choose not to use the transport provided by their employers have to meet their own transport costs. In all industry sectors it is the norm for workers to meet their own cost of getting to and from work.

The normal practice has been for workers to agree in writing prior to using the service to a deduction for transport costs from their wages. This agreement has made clear that the service is optional. This is administratively convenient for the worker and for the labour provider.

Labour providers had every reason to believe that this was legitimate within the Regulations governing the National Minimum Wage. Regulation 32 deals with deductions that have to be subtracted from pay for the purpose of calculating whether the minimum wage has been paid. This includes -

- (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.

It is accepted by HMRC that optional transport to work is not "in connection with his employment". However there is no legal definition of "own use and benefit", so it is open to interpretation. The guidance produced by BERR, widely reproduced by others but now removed, is that the expression "Own use and benefit" should be interpreted as meaning that "Any money goes into the employer's pocket". This in itself is fairly meaningless as it could be interpreted as meaning profit or simply income. However, it is accepted that there is scope for differing interpretations. The point is that until 2007 the interpretation as it was applied by HMRC Compliance Inspectors was that a deduction agreed by the worker for an optional service that was not a requirement of the job did not mean that the amount had to be deducted from wages for purposes of calculating whether the national minimum wage had been paid.

Labour providers were reinforced in this view by the "Code of Practice for labour providers to agriculture and the fresh produce trade" produced by the Ethical Trading Initiative and subsequently by the GLA's Licensing Standards, both as they were written and as they were applied. These standards, produced after extensive consultation within government, including with HMRC and BERR, said on this specific point: "Where deductions from wages, other than those legally required, are made eg for transport, there is evidence on file of workers' written consent". The issue was covered in an email from Stephen Moorcroft (Defra minimum wage expert) to his colleague Sean Collins on 1 December 2004. Although the comment was in the context of accommodation it is clear that it was the principle of deductions that was the issue –

"The limits in the NMWA & AWO set the maximum that an employer can deduct from pay for accommodation without the consent of the worker. An employer may charge more than the maximum amount, especially where additional services are included such as laundry or the preparation of food, or where electricity etc is charged for in the rent. The difference between the two amounts can be collected in cash from the worker after he or she has been paid, or the parties can enter into a separate contract to deduct the additional sum from pay as provided for in s13-15 of the Employment Rights Act 1996."

The Current Position

Labour providers have noticed that there has been a change in the stance of HMRC since 2007. HMRC inspectors have now decided that all deductions from pay to meet transport costs that take the worker below the minimum wage are unlawful, and have required labour providers to make substantial payments to workers of "arrears", something which must be regarded as a bonus by the workers. The amounts that are required to be repaid are so great as to threaten the continued viability of some labour providers.

Why the Position is Unsatisfactory

There are a number of grounds for arguing that the current stance of HMRC is unreasonable in the circumstances.

1. The interpretation is open to question. While HMRC's current interpretation is understood, it is not accepted. The ALP does not accept that a payment to cover transport costs to an employer or to a service provider retained by an employer counts as a "deduction made by the employer for his own use and benefit". At various times HMRC has given other interpretations - covered subsequently.

2. The position is perverse. The purpose of the National Minimum Wage is to prevent exploitation of workers through them being paid too little. This issue has nothing to do with the exploitation of workers, and is purely a process issue, that is the question of how workers pay for transport, not whether they pay for it. HMRC's current interpretation regards manageable, auditable deductions from pay as unlawful but separate payments by workers which are not transparent and not auditable as lawful.

It is for example quite legitimate for a labour provider to recover transport costs through a variable direct debit from the worker's bank account, or by making the worker an advance of pay and then recovering it from wages, or by seeking cash payments in advance for transport costs. It makes no difference at all to a worker whether he meets transport costs out of a deduction from pay or by taking it from his bank account or by paying cash. This point was seemingly accepted by Joanne Aldridge in an email dated 21 April 2009 –

“The main purpose of the national minimum wage legislation is to provide a minimum standard of pay to workers and to protect those who are particularly vulnerable. I understand that the rules concerning deductions from minimum wage pay are frustrating for the majority of employers who treat their workers reasonably and fairly, however the law on making deductions which takes a workers pay below the minimum wage was designed to protect workers from being exploited by employers who could take unreasonable deductions without providing a choice to the worker. This is the overriding objective of the legislation and while decent employers view these rules as an inconvenience, the protection of those workers who could be exploited by an employer is a high priority for Government.”

It will be noted that this email refers to deductions “without providing a choice to the worker”, in contrast to the HMRC position that choice is irrelevant – a worker is not permitted to choose to have deductions.

3. The new HMRC stance is causing labour providers and their workers to incur considerable additional costs.

Deductions from pay are the simplest and most cost effective method of securing payment, and moreover are auditable by HMRC or indeed anyone else. Most labour providers have now implemented alternative methods of collecting transport to work fares. Some have moved to a cash system which requires drivers now also to be responsible for collecting and handing over fares. This leads to some wastage and probably also gives more scope to exploit workers either by employers or by their fellow workers. Other alternatives include installing ticket machines. There are even arrangements whereby labour providers advance to the worker at the beginning of a pay period a notional amount to cover transport costs, and then deduct the same amount from wages at the end of the period to meet the transport costs. Some have implemented direct debits to collect transport fares but have noted a high level, up to 25%, of failed recovery. (These devices are explained more fully in the ALP Brief which is appended.)

These are purely devices which impose significant costs on labour providers. Labour providers have, to some extent, passed these additional costs on to their workers. The impact of the HMRC's interpretation has been to reduce the take home pay of the lowest paid workers.

Alternatively, workers having to find their own way to and from places of work through other workers providing an unofficial taxi service are at risk out of necessity of making a payment that is not transparent and may well exceed the charge the labour provider would make.

4. The new HMRC stance is making it more difficult for the poorest workers to obtain work.

The administrative burden of collecting fares imposed by the new HMRC interpretation is such that some labour providers have opted out of providing transport at all, leaving workers to find their own way to and from places of work. Most labour providers are now actively favouring those workers who can make their own way to work.

Those workers who have no alternative means of finding their way to work are therefore at a significant disadvantage.

5. The new HMRC stance is putting the health and safety of workers at risk.

Workers increasingly have to find their own way to and from places of work. This is frequently done by some other workers providing an unofficial taxi service to their fellow workers. So instead of workers being transported in a minibus with a qualified driver and a PSV licence the workers are at risk of being transported in vehicles that may well not be properly maintained or insured.

Most legitimate labour providers have worked hard to remove cash from their businesses in recent years. The new HMRC interpretation has led to labour providers implementing a cash collection system for daily fares or payment of wages in part cash to facilitate collection of weekly fares. This re-introduction of cash increases the risk of attacks on drivers and administrative staff to steal this money. One case has already been reported.

6. In effect labour providers have been subject to retrospective legislation. This has been done with no consultation, no notice, and no ability to put in place new arrangements without being penalised.

The approach taken by HMRC is in sharp contrast with the approach of the regulator of labour providers, the GLA. When the issue came to light, the GLA made it clear that it did not regard this issue as exploitation of workers and would make no attempt to regard deductions from pay as a non-compliance with its licensing standards, which require the national minimum wage to be paid taking account of permissible deductions. (The minutes of the GLA's Labour Provider Group Meeting on 27 June 2007 include the following on this point: "DD/NC [GLA officers] confirmed that GLA will not currently enforce LS2.8 in relation to transport deductions.") However, the GLA, as it is obliged to, has passed on cases where it has found deductions to HMRC, which in some cases is then vigorously taken enforcement action.

7. Differential enforcement. The ALP has requested information from HMRC on the balance of its enforcement activities on this matter between GLA authorised and other businesses. However, the clear suspicion is that because HMRC is handed the information on a plate by the GLA that there is disproportionate enforcement against labour providers. It is worth here quoting the House of Commons Home Affairs Select Committee Report on human trafficking –

"Neither the Minister nor Anti-Slavery International thought there was a need for more legislation to tackle the problem of forced labour. We agree that existing employment law, the National Minimum Wage, regulations on rented accommodation and so on should be sufficient to prevent the sorts of abuses highlighted by the Gangmasters Licensing Authority and UCATT—but only if they are enforced. It seems to us that, outside the Gangmasters Licensing Authority's sectors, enforcement is at best patchy and at worst non-existent."

HMRC argue that there has been no recent change in interpretation on this matter. This is not the point. What matters is enforcement action not interpretation. It would be of no consequence if HMRC held to its present interpretation provided it did not enforce retroactively. The issue is that there has been a clear change in enforcement activity on an issue where there is legitimate doubt as to the meaning of the provisions with no warning. This is in sharp contrast to the way that a similar issue - charging for accommodation – was handled. There was a formal consultation on guidance, six months notice before the new guidance was applied and an assurance that arrears

would not be enforced relating to the period prior to the introduction of the new guidance in respect of the area covered by the guidance. This gave labour providers the chance to give notice to their workers and dispose of the properties they owned.

The ALP has requested copies of relevant documents from HMRC and will be able to update this report if these are received. However, for the moment the ALP can put forward the following evidence for a change of stance on interpretation or enforcement by HMRC –

- Labour providers that deducted transport costs from pay had HMRC inspections prior to 2007 without the issue being raised; the ALP is not aware of any labour provider that faced enforcement action on this point prior to 2007.
- A compliance inspection report for a labour provider dated October 2003 in which the HMRC Compliance Officer stated under the heading Deduction for Transport. “The deduction appears to count towards National Minimum Wage as it is optional whether the worker uses his own method of transport or the buses provided by the Company. However if at any point this deduction becomes compulsory or workers are required to use your transport, then this deduction will not count towards national minimum wage.”
- A letter received by an ALP member earlier this year from a National Minimum Wage Compliance Officer included the following: “My understanding of travel and accident cover deductions changed when I received a memoranda dated 12 March 2007. I have been advised that due to confidentiality I cannot provide you with internal memoranda.”
- In May 2006 Leicester City Council Employment Support Unit formed a steering group whose main purpose was to protect vulnerable workers from exploitation. This was going to be achieved by raising workers’ awareness of low pay issues. The Employment Agencies Inspectorate, HMRC and the GLA were all represented on this group. The publication that the group agreed included the following on the issue of deductions from pay –

“ **Deductions from the Minimum Wage**

Employers can only make deductions from your wages if:

- you have agreed in writing beforehand to the deductions being made
- your contract with your employer allows the employer to make the deductions
- the deductions are required by law.

You can expect your employer to make the following deductions:

- Tax and National Insurance: - In most cases your employer will deduct money from your wages for tax and national insurance contributions
- Accommodation: - If accommodation is provided for you, the maximum that can be taken from your pay is £4.15 per day or £29.05 per week. This doesn’t mean that you can’t be charged more, but this amount only, can be taken off your pay before working out whether you are getting the minimum wage. Any increase will be made in October.
- Payments for Goods and Services: - If you choose to use any goods like meals or transport, which is provided from the agency then deductions can be made from your wages. If, however, you are not given a choice, the deductions made cannot result in your hourly rate of pay falling below the rate of minimum wage”.

The labour provider member of this steering group is now being pursued by HMRC for arrears of minimum wage in direct contradiction of the point made in the previous sentence.

There is also evidence of a completely different - and an even more restrictive interpretation - by a compliance officer. Diane Wilson, NMW Helpline Manager, recently provided the following information in an email to an ALP member -

“Thank you for contacting the NMW Helpline. Further to our recent conversations I have spoken with a number of agencies including the HMRC NMW Compliance, Employment Agency Standards and Gangmaster Licensing about the scenario you have described.

It is the agreed opinion that either taking cash from the workers to pay for transport (on the bus or by selling bus tickets) or using a loan scheme to pay for the transport to the place of work could both be considered as **'illegal deductions from wages'** under the current minimum wage legislation (assuming that the deduction brings the workers wages below the minimum wage level). As the agency, and therefore the employer of the workers, if either of these practices were to be implemented and then investigated by the HMRC they would likely result in the agency being found non-compliant with minimum wage and liable for repaying arrears of wages to the workers and the subsequent penalty to HMRC. It should be noted that in NMW cases of investigation that arrears of wages can be awarded by HMRC dating back up to 6 years."

This email put the labour provider in an impossible position and directly contradicts what HMRC has previously said.

Proposed solutions

The ALP's immediate concern is to deal with the current enforcement activity. The ALP believes that there has been sufficient uncertainty on this issue (exemplified by the stance that the GLA has taken and the evidence cited in the previous section) for it to be subject to the same procedure as for accommodation, that is proper notice of an agreed interpretation – say to come into effect on the next common implementation date – and no requirement to pay arrears in respect of periods before that date.

The second proposal is for the substantive issue to be revisited. The ALP believes that the regulations are capable of being interpreted in a way that would allow deductions with consent, if necessary with a cap of an amount per mile based on public transport costs. This would be in line with Joanne Aldridge's email of 21 April.