



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

On 20 May 2008 the Low Pay Commission began a consultation on the terms of reference for the report it is required to prepare by the end of February 2009. Comments are sought by 3 October 2008.

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 around 200 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. For the most part, 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 particular 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.

Executive summary

The Commission should investigate the accommodation costs that low-paid workers, including migrant workers, have to meet and how this impacts on their standard of living. This would then enable a more informed debate to take place on whether uniquely restrictive arrangements should apply to accommodation provided by employers. Labour providers are willing to provide accommodation to their workers as an option but currently, except in a few areas, are unable to do so as accommodation cannot be provided for the accommodation offset amount.

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.

There are significant differences between the National Minimum Wage and the Agricultural Minimum Wage arrangements even where workers are doing the same job in the same place. The interaction between the two arrangements causes problems for both workers and labour providers. The Commission should study the effects of this interaction as a first step in the introduction of joined-up policy.

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 patronizing and work-creating approach.

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.

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 only done 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, 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. Indeed, newly arrived workers can be open to exploitation from landlords who are free to charge whatever rent they like.

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 covering accommodation provided by employers and assuming that all other low paid workers do not have a problem in meeting accommodation costs.

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. In respect of income tax matters generally, HMRC staff are at their best in going through detailed records, often finding minor errors or issues on which the toss can be argued. A modest sum is suggested to cover tax that should have been paid, the HMRC targets are hit and the taxpayer feels aggrieved but simply does not have the energy to fight the issue.

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."

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. Estimates of the number of illegal workers in the country 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 increasingly they do not see why they should do so when the government so blatantly ignores tax evasion. Some labour providers feel they have little choice but to join those evading tax or go out of business. The government has failed to maintain the rule of law in this important area and must accept responsibility for the consequences.

The Commission should study the interaction of the informal economy and the minimum wage, including whether successive increases in the minimum wage above increases in average pay have contributed to a growth in informal economy activity. The study should examine in particular the extent to which businesses seeking to comply with minimum wage and other laws are increasingly finding it difficult to do so because of competition from the informal economy.

Interaction of the National Minimum Wage and the Agricultural Minimum Wage

The Agricultural Minimum Wage applies to workers who are employed in agriculture, which is broadly defined as including processing and packing of produce on the farm or enterprise where it is grown. However, it does not apply to workers in a packhouse away from a farm or to workers in a packhouse on a farm when the produce being packed is not grown on that farm. Where workers undertake a mixture of agricultural and non-agricultural work the Agricultural Wages Order applies to every hour of agricultural work.

There are significant difference between the National Minimum Wage arrangements, which are comparatively simple, and the Agricultural Minimum Wage arrangements, which are very complicated and generally more generous. It is difficult to see any logical reason why workers in a packhouse on a farm packing produce produced on that farm should be subject to a completely different minimum wage regime compared with the same workers in the same packhouse packing produce produced on another farm. Obviously, the different regimes give an artificial incentive for packhouses to be located away from farms.

The anomalies have been compounded by the decision last year of the Agricultural Wages Board to add eight days public holiday to all workers' holiday entitlement irrespective of whether they work one or seven days per week. This has the effect that an agricultural worker working 1 day per week now has the benefit of 14 weeks holiday per year, a worker working 2 days per week has the equivalent of 9 weeks holiday per year, whereas a 5 day per week worker sees no change remaining at 6.2 weeks paid holiday per year. In other words the number of weeks holiday a worker is entitled to vary dependent on the number of days a week they work. For those workers who have no fixed days of work, i.e. most agency workers, it is now impossible to charge a holiday rate to the labour user that can be assured meets legal requirements. Another consequence of this is that any day contract workers (who are taken on and paid for one day at a time) must now have a holiday premium of 27% of their wage added to cover holidays, making them the most expensive labour in the sector.

Many labour providers provide workers to both on-farm and off-farm packhouses. Neither they nor their workers can understand the justification for the different rules or even the rules themselves. This situation requires all records to differentiate between work that is subject to NMW and work that is subject to the AMW, and the labour provider may be liable to two different inspections working on very different bases. This is an appalling example of lack of joined-up government that causes significant problems for business.

The AMW is not the responsibility of the Commission, but the interaction between it and the NMW is properly a matter which it should investigate.

The Association has made a case to Defra for the abolition of the separate agricultural minimum wage. This includes more detailed evidence of the practical problems that are caused by having the two separate regimes. The Association's paper is accessible at - http://www.labourproviders.org.uk/Policy_and_research_papers.aspx.

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. Following an issue raised by a member clarification was sought by the ALP from the HMRC National Minimum Wage unit with regard to deductions from wages for the optional provision of transport. The NMW Technical Team stated:

"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.

In the booklet "A Detailed Guide to the National Minimum Wage" paragraphs 82 and 83 refer to deductions and 85 and 86 to payments. "For the employer's use and benefit" is explained in paragraph 82 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.

As a result of a Tribunal ruling a similar situation applies to the cost of utilities where accommodation is provided.

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

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 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 simply not obtainable in the free market.

ALP members would be very willing to spend time with the Commission illustrating the difficulties that present arrangements cause. Much of these do nothing to ensure that workers receive reasonable pay but rather complicate life for both workers and employers through legal niceties and bureaucratic arrangements, compounded by a inspection regime which concentrates on these rather than real abuse of workers.