

March 2016

Member Brief No. 153

National Living Wage Discrimination Considerations

Introduction

The concept of the “Living Wage” has been in existence since the start of the century, and was initially a movement to increase pay for workers in London who struggled to make ends meet on the National Minimum Wage (NMW). Over the course of the following decade the movement has grown nationally calling for employers to raise levels to meet those published by [The Living Wage Foundation](#) to more accurately reflect costs of living. Further guidance on paying a living wage is also available on the Ethical Trading Initiative [website](#).

On 8 July 2015 in the government’s Summer budget, George Osborne announced the introduction of a new National Living Wage (NLW) to come into effect from April 2016. This is, in practice, a significant increase in the NMW but only for workers aged 25 or over.

While there will continue to be annual increases to the NMW each October for workers under the age of 25 it is likely that between 2016 and 2020 a significant gap in pay may develop between workers aged 25 and over and those under the age of 25, even where they carry out the same job.

The National Living Wage raises questions about whether these new rates of pay could create issues of potential age discrimination and these are dealt with in this Brief. This Brief updates and replaces Brief 145.

1. Is it lawful to pay workers under 25 less than workers who will receive the National Living Wage?

For several years employee groups and trade unions have called on the Low Pay Commission to end different National Minimum Wage rates arguing that this difference in pay based on age is discriminatory. The introduction of the new pay bracket for over 25’s is likely to further highlight this difference in pay between workers of different ages who carry out similar jobs.

Current discrimination legislation, the Equality Act 2010, protects workers from discrimination, harassment and victimisation on the grounds of an individual’s age, or for reasons related to an individual’s age. So from April 2016 under the new National Living Wage would it be discriminatory to pay a 25 year old £7.20 per hour but a 24 year old who does the same job (and may have been employed for longer) only £6.70 per hour?

The Equality Act 2010 contains a specific exemption to the usual rules on age discrimination in relation to payments in keeping with the National Minimum Wage and this allows employers to lawfully base their pay structures for young workers on the National Minimum Wage pay bands and pay workers different rates. This is likely to remain the same when the National Living Wage is introduced in 2016.

This exemption allows employers to use exactly the same age brackets and national minimum rates provided that they are paid less than the over 25’s rate. For example, it would not be discriminatory to pay only the minimum rates set out in the table below. Alternatively, it is also possible for employers to pay enhanced higher rates of pay if they wish to, provided that these are linked to the same age bands and are lower than the over 25’s rate, for example:

- Those under 18 - £4.00
- 18 -20 - £5.50
- 21-24 - £7.00
- 25 and over - £7.20

In these circumstances paying different rates will be lawful and not discriminatory.

2. Will it be possible not to recruit workers over 25 years old or to terminate workers when they become more expensive at 25?

Whilst the National Living Wage is set to increase each year (with the rate expected to rise to £9.00 per hour by 2020) it remains to be seen how much the National Minimum Wage rates will increase in line for workers under the age of 25. It appears inevitable that the greater the difference between the rates for younger workers and those over 25 the greater the reluctance will be for employers and clients of labour providers to take on or to retain a worker over the age of 25 who will cost significantly more than a 22 year old with similar experience.

This will potentially pose a problem for employers and labour providers who look to recruit younger workers and terminate workers over the age of 25.

Whilst it is acceptable to pay different rates of pay in accordance with the National Minimum Wage brackets there is no exemption to the discrimination rules in the Equality Act 2010 to terminate a workers contract, to stop providing assignments or to refuse to take on workers because they are 25 or over, and this could expose both labour providers and clients to claims of age discrimination.

For Labour Providers

There are special provisions in the Equality Act 2010 relating to labour providers which carries similar obligations to that of an employer. A labour provider must not discriminate against a worker:

- In the arrangements that it makes for selecting who to offer labour providing services to;
- By the terms offered to them;
- By not offering the labour providing service to them;
- By terminating the labour providing service to them;
- By subjecting them to a detriment.

This includes discriminating against workers because of their age.

By way of example, a labour provider having a policy of only offering to take on workers under the age of 25 would be likely be discriminatory as an arrangement for selecting who to provide labour providing services to. In this example the labour provider is choosing not to provide their services to workers aged 25 or over because of their age.

Alternatively, if a labour provider failed to put forward workers who were over the age of 25 because it was believed that the cost would be unattractive to the client, this would also almost certainly be discriminatory as these workers would be treated less favourably, because they would not be offered the same opportunity as a younger worker, because of their age.

Where a labour provider does treat a worker or prospective worker less favourably because of their age this will normally be an act of discrimination under the Equality Act 2010, and there are only very limited circumstances where some age-based rules and practices are seen as justifiable. This defence to a discrimination claim can only be relied on where the treatment of the worker is a “proportionate means of achieving a legitimate aim” - and this can be a difficult legal threshold to meet. The fact that workers under the age of 25 are likely to be cheaper, and hence more attractive to clients, is unlikely to be considered a valid reason for the less favourable treatment.

Labour providers will therefore need to carefully consider any rules or policies which may treat workers over the age of 25 less favourably than younger workers – including the recruitment of new workers or when offering workers to clients to avoid risk.

On the Request of a Client

It is highly likely that should workers over the age of 25 become more expensive than younger workers that clients and hirers will request that labour providers only supply workers under the age of 25 or stop supplying over 25's.

Hirers and clients are also subject to the Equality Act and will also need to be careful in refusing to accept an assignment for a worker or in terminating an assignment because of the worker's age without having a valid objective justification. As for labour providers, the additional cost of a worker aged 25 or above is unlikely to be a sufficient justification on its own.

There are limited steps a labour provider can take to influence a decision made by a client, but care should still be taken. Whilst the client's actions may be discriminatory under the Equality Act 2010 if it treats a worker less favourably because of their age – labour providers can in some circumstances also be liable for the actions of the client by acting as the client's "agent".

By way of example, a client may contact a labour provider and explain that they will refuse to consider any workers over 25 years old because of the cost. If the labour provider agrees to the client's request and agrees not to put forward workers over the age of 25 the labour provider could also be subject to a claim of discrimination brought by a disgruntled worker who has not been put forward for work because of his age as an "agent" of the client. In these circumstances it would be advisable for the labour provider to explain to the client that it cannot discriminate based on age in the workers it hires or offers to clients.

For the reasons set out above, care should be taken if a client requests that a worker's assignment is terminated because they have turned 25. In these circumstances it would be advisable for a labour provider to express concern to the client that its cancellation of the contract because of age may be discriminatory.

The National Living Wage is likely to make the recruitment and engagement of workers over the age of 25 more expensive for employers and hirers. However, labour providers, clients and other employers should be mindful of, and avoid, blanket policies restricting the recruitment or assignment of workers based primarily on their age.

3. Practical Examples

There are a number of circumstances where problems may innocently arise. A number of these potential issues arise out of the importance of being aware of the relevant pay bands, and the significance of these in the context of discrimination claims. From April 2016 the NLW rates are:

AGE	MINIMUM RATE OF PAY (PER HOUR)
25 and over	£7.20
21 - 24	£6.70
18 - 20	£5.30
Under 18	£3.87
Apprentices aged 16 - 18	£3.30

In order to rely on the Equality Act exemption on paying workers different rates of pay based on their age it is important for labour providers to think about:

1. the **total** hourly rate the worker will receive – so overtime rates and hourly premiums are included, and
2. the pay brackets in the table above.

Provided the hourly pay is **less** than the minimum rate for the age bracket above, this will fall within the exemption. For example, workers aged 21-24 can be paid less than workers who are 25 and over **provided** this is **less** than £7.20 per hour.

Below are a number of typical examples members may face, in particular when applying overtime:

Example 1

Basic Rate of Pay: Under 25's paid £6.70, over 25's £7.20.

This is **not** discriminatory. These rates are in keeping with the NLW pay bands.

- (a) Overtime - both under and over 25's are paid a 50p per hour premium

This **is** potentially discriminatory and exposes a risk of a discrimination claim. The effect of the overtime premium is that the pay rates are £7.20 for the under 25's and £7.70 for the over 25's. As the rate for the under 25's is not less than the NLW rate for over 25's it does not fall within the discrimination exemption (see point 1 above) – so the difference in pay could be discriminatory towards under 25's.

- (b) Overtime – both under 25's and over 25's are paid £7.70 per hour.

This is **not** discriminatory. The basic rate of pay is in keeping with the NLW exemption and the overtime pay does not discriminate between an under 25 year old worker and over 25 year old worker. The fact that the overtime rate is proportionately greater to basic pay for the under 25's would not in itself give rise to a claim by the over 25's.

Example 2

Basic Rate of Pay: Under 25's paid £7.00, over 25's £7.50.

This is **not** discriminatory. While the under 25's rate is more than the minimum requirement, this is less than the over 25's minimum rate – and is within the Equality Act 2010 exemption.

- (a) Overtime - both under and over 25's are paid a 50p per hour premium

As with *Example 1* above, this **is** potentially discriminatory and exposes a risk of a discrimination claim for the same reasons.

- (b) Overtime – both under 25's and over 25's are paid £8.00 per hour.

As with *Example 1* above, this is **not** discriminatory for the same reasons.

Example 3

Basic Rate of Pay: Both under 25's and over 25's paid £7.20.

This is **not** discriminatory. There is no requirement to pay the under 25's and over 25's a different rate of pay. Although this is more beneficial to under 25's when compared to their minimum entitlement, applying the same rate of pay to both does not distinguish or discriminate against the worker because of their age.

Example 4

Basic Rate of Pay: Under 25's paid £6.70, over 25's £8.00.

This is **not** discriminatory. The difference in pay does not need to be equally in line with the NLW levels. While the over 25's rate is more than the minimum requirement, the fact that the under 25's rate is only the minimum should not give rise to a claim (but could lead to an unhappy workforce).

Example 5

Basic Rate of Pay: Under 25's paid £7.30, over 25's £7.80.

Whilst in this example both the under 25's and the over 25's are paid 60p per hour over the minimum rates (and this might appear fair) as the under 25's rate is not less than the minimum rate for over 25's it does not fall within the Equality Act exemption and this **is** potentially discriminatory and exposes a risk of a discrimination claim.

It may be possible to objectively justify the difference in pay between the age groups but the reality is that this is likely to be a difficult threshold to meet and is likely to be discriminatory.

The introduction by the government of a new pay band for over 25's is likely to have a greater impact on employers and hirers than under the existing NMW scheme where all workers over the age of 21 have the same minimum entitlement. These examples above highlight the need to consider base rates for workers and the impact that overtime and other premiums can have on discrimination issues.

4. Frequently Asked Questions and Issues

Q. Do I have to pay under 25's less than the £7.20 National Living Wage?

A. No. If you wish to pay your workers who are less than 25 the same rate this is fine (See *Example 3* above).

Q. If I want to pay the same rate to under 25's as to the workers over the age of 25 do I have to show this as a basic rate of £6.70 and add a 50p premium?

A. No. This can be shown as an equal flat rate of £7.20 per hour. The fact that this is the minimum rate for over 25's but more than the minimum for under 25's will not lead to this being discriminatory.

Q. Even if I do not terminate workers over the age of 25 would it be discriminatory to focus recruitment on workers under the age of 25?

A. This is likely to be discriminatory. A labour provider must not discriminate against a worker:

- In the arrangements that it makes for selecting who to offer labour providing services to;
- By not offering the labour providing service to them;

Focussing recruitment on workers under the age of 25 is likely to be considered an "arrangement" and it may be very difficult to establish an objective justification for this arrangement.

Q. Would there be an issue in recruiting a low-skilled under 25 over a higher-skilled over 25 year old, for a low-skilled job?

A. This would depend on the reason for selecting the lower skilled worker. It could reasonably lead to challenge from the higher skilled over 25 year old as to the reasons for the decision. In the event that the sole, or principle, reason for selecting the younger worker was their age then this is highly likely to be discriminatory.

Q. Is it possible to pay under 25's different rates when working at different clients? For example £6.70 at client A and £7.00 at Client B?

A. This will depend on the labour provider's terms with the worker, however, provided the rates meet the minimum rates (and subject to the Equality Act exemption rules) this should not be discriminatory.

Q. What does "objectively justified as a proportionate means of achieving a legitimate aim" mean?

A. The scope of "legitimate aims" is potentially unlimited, although they must correspond to a "real business need". What constitutes a legitimate aim will almost always depend on the individual circumstance of a business. However, cost alone is **not** a legitimate aim which can justify discrimination.

To show that its actions were proportionate, an employer needs to show that the measures taken were "reasonably necessary" in order to achieve the legitimate aim.

It is recommended that labour providers take legal advice in these circumstances.

Q. If an employer has never differentiated in age when applying the NMW previously, would it be discriminatory to do so now NLW is in place?

- A. If the employer has always paid £6.70 per hour to all workers, it would not be discriminatory to pay over 25's £7.20 per hour from April 2016 but to keep the under 25's at £6.70 per hour.

If, for example, all workers were paid £8.00 per hour and the employer changed to £6.70 and £7.20 per hour for under 25's and over 25's this would potentially not be discriminatory – but it may be difficult to reduce pay under the contract.

- Q. *Our nightshift workers receive an hourly rate of pay above that of the NLW but this is a basic rate (which is currently below the £7.20 NLW) and a nightshift premium which takes this above £7.20. Will we need to increase the basic rate?***

- A. For over 25's the NLW will be treated in the same way as NMW is currently assessed. Under the current NMW rules shift premiums/allowances (such as this example) do **not** count towards NMW pay, the basic rate will need to meet the £7.20 NLW minimum. In this example, if the workers only work night shifts then it may be more appropriate simply to state the rate of pay to be the blended rate – and not to distinguish between basic pay and the premiums.

- Q. *How do overtime rates affect potential discrimination issues? For example, is it discriminatory to pay 125% overtime to under 25's and over 25's?***

- A. Whilst this appears a fair way of applying overtime, if the employer pays the minimum NLW rates for under 25's and over 25's (£6.70 and £7.20 respectively) then this would potentially be discriminatory. The effect of the overtime rate would be to pay under 25's £8.38 per hour (125% of £6.70) and over 25's £9.00 per hour (125% of £7.20). As in *Example 2* above, this would lead to different rates of pay between the over and under 25's and the rate of pay falls outside of the Equality Act exemption. In these circumstances it would be necessary to identify the different rates of pay as being objectively justified as a proportionate means of achieving a legitimate aim.

Ethical Trading Considerations

The Ethical Trading Initiative (ETI) has made it clear that companies paying the NLW will not be complying with the [ETI Base Code](#) on living wage [saying](#) the NLW “is not in fact a living wage. UK employers wishing to pay their staff a living wage should use the figures provided by the [Living Wage Foundation](#).”

The ETI position on paying under 25 year olds less than the NLW as older workers for the same work is “Although it will be legal to pay workers different amounts for the same work when the new rate comes in, this would constitute discrimination according to the ETI Base Code.”

Further Advice

Members are invited to contact the ALP if they have any other questions with regard to this matter. Alternatively, our Legal Partners, Brabners LLP can assist. Paul Chamberlain at Brabners may be contacted on 0161 836 8864 or paul.chamberlain@brabners.com.

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