

October 2016

Member Brief No 159

Living Accommodation and the National Minimum Wage

Introduction and summary

This Brief summarises the requirements regarding the national minimum wage where an employer is providing living accommodation to workers. It updates and replaces ALP Brief 148.

Wherever an employer provides living accommodation to their workers, then the national minimum wage (NMW) accommodation offset arrangements apply. The term 'provides' is given a wide interpretation,

For workers on the NMW (which includes the national living wage) no more than a worker's offset amount, which is a maximum of £6 per day or £42 a week for pay reference periods (PRP) starting on or after 1 October 2016 where living accommodation is provided for seven full days, in respect of rent and other mandatory accommodation related charges such as for utilities and laundry can be deducted from pay for the purpose of calculating whether NMW is being paid.

ALP members providing accommodation should also refer to the [GOV.UK National minimum wage: accommodation webpage](#), the [BEIS Calculating the Minimum Wage guidance](#) and if required there is detailed technical guidance available at <http://www.hmrc.gov.uk/manuals/nmwmanual/NMWM10000.htm>.

How the NMW is enforced and penalties for non-compliance are detailed in the [BEIS Calculating the Minimum Wage guidance](#). Current government policy is to publicly name and shame NMW offenders – see <https://www.gov.uk/government/news/largest-ever-list-of-national-minimum-wage-offenders-published>.

The ALP makes annual submissions to the Low Pay Commission regarding the accommodation offset arrangements which may be viewed on the ALP website.

Please contact the ALP directly should you wish to discuss any of the points raised in this Brief.

The Accommodation Offset Arrangements

NMW legislation requires the national minimum wage to be paid in cash not in kind. The provision of living accommodation by the employer is the only benefit in kind that can count towards a worker's NMW pay. There is a limit to the amount that an employer providing living accommodation can count towards NMW pay, called the accommodation offset. Where the accommodation is provided free, the amount of a worker's accommodation offset counts towards their national minimum wage pay. Where the

employer charges the worker for accommodation, either by making a deduction from the worker's pay or accepting a payment from the worker, then any amount charged above the accommodation offset reduces national minimum wage pay. The offset rate is generally increased each year at the same time as the national minimum wage rates are increased.

In order for the accommodation offset to apply:

- The accommodation must be provided by the employer.
- The accommodation must be "living accommodation" i.e. the worker must be able to live an "independent domestic life" i.e. accommodation has to provide the worker with access to and free use of toilet / bed / washing facilities with an appropriate degree of privacy. If the accommodation is deemed not to be "living accommodation" then any deduction by the employer for rent will reduce national minimum wage pay.

If the worker is paid the national minimum wage and is provided with living accommodation by the employer for seven days each week, then the maximum that can be charged for accommodation for a worker paid NMW is £42.

Where the pay rate is higher than the national minimum wage and the rent charged is in excess of the accommodation offset, employers must carefully calculate that the deductions for rent do not take the worker below the national minimum wage. The amount that can be charged will vary each week with the number of hours worked. Examples of the calculations are provided on the [GOV.UK National minimum wage: accommodation webpage](#).

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

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

Meaning of providing accommodation

In the [BEIS Calculating the Minimum Wage guidance](#) the employer is considered to be providing accommodation whether or not the accommodation is let by the employer or a third party where:

- the accommodation is provided in connection with the worker's contract of employment
- the worker's continued employment is dependent upon occupying particular accommodation
- the worker's occupation of accommodation is dependent on remaining in a particular job

Where the provision of accommodation by you and the worker's employment are not dependent upon each other, you may be considered to be providing accommodation if one of the following applies:

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

For the purposes of the accommodation offset rules, third parties will include:

- businesses and companies, which are separate legal entities to you
- individuals including those who are family members of a director, business partner, shareholder, member or owner of the employing business
- businesses or companies with a director, shareholder, member, owner or business partner who is a family member of a director, shareholder, owner or business partner of the employing business

The accommodation offset will apply whenever you are providing accommodation, regardless of whether the worker can choose whether or not to occupy the accommodation. Even if the provision of accommodation is optional, where the worker chooses to accept the offer, the accommodation offset will apply.

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

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

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

Accommodation related charges

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

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

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

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

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

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

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

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

Agricultural Workers – Wales, Scotland, Northern Ireland

Special rules apply where agricultural workers in Wales, Scotland, and Northern Ireland are required by their contract of employment to live in accommodation. The rules can be accessed for:

- Northern Ireland Agricultural Wages - <https://www.dardni.gov.uk/articles/current-terms-and-conditions-employments-wages-etc>. Northern Irish agricultural wages queries should be addressed to FarmPolicyBranch@dardni.gov.uk or David.Millar@dardni.gov.uk or call 02890 524 477.
- Scotland - Agricultural Wages Order - <http://www.gov.scot/Publications/2016/10/7994/downloads>. Scottish agricultural wages queries should be addressed to sawb@scotland.gsi.gov.uk or 0300 244 9749.
- Wales – <http://gov.wales/topics/environmentcountryside/farmingandcountryside/agricultural-sector-wales-act-2014/interim-order/?lang=en>. The Agricultural Wages (Wales) Order 2016 came into force on 26 February 2016 as an interim measure until a new agricultural wages order is made based on the recommendations of the Agricultural Advisory Panel. Agricultural wages queries in Wales should be addressed to the Welsh Government at SLMenquiries@wales.gsi.gov.uk.

VAT Liability on Workers' Accommodation

As a general rule residential accommodation is exempt from VAT. However, when the accommodation is not considered to be the occupant's permanent residence and is likened to a hotel or similar establishment, VAT becomes chargeable. This may well be the case with temporary workers accommodation and [HMRC rules](#) should be reviewed thoroughly.

A relief is available where taxable accommodation is provided to a worker for a period exceeding four weeks. The accommodation must be supplied to the same occupant for

the duration and their stay must be continuous to qualify for the relief. After 28 days continuous occupancy relief can be given which broadly has the effect of charging VAT on 20% of the income rather than 100%.

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

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

Please note that this document is not exhaustive and is not intended to be used as a substitute for legal advice. To the fullest extent permissible by law, ALP and its advisors hereby exclude all liability for any claim, loss, demands or damages of any kind whatsoever (whether such claim, loss, demands or damages were foreseeable, known or otherwise) arising out of or in connection with the use of any of these documents and/or the information, content and/or advice included within these documents.