

## **National Minimum Wage compliance in the social care sector**

An evaluation of National Minimum Wage enforcement in the social care sector over the period 1<sup>st</sup> April 2011 to 31<sup>st</sup> March 2013.

### Contents

Section		Page	
<b>Executive Summary</b>		3	
<b>Introduction</b>	Background	7	
	Scope and content of this report	7	
	Rates of NMW	7	
	Who is entitled to the national minimum wage	7	
	HMRC enforcement process	8	
	Types of work	8	
	Quantification of arrears	9	
	Civil penalties for non-compliance	9	
	NMW compliance levels found in social care from 2008-2013	10	
	<b>Findings</b>	Overview	11
		Penalty and quantification of penalty	11
		Types of work	12
		Time records	12
Analysis of arrears of wages		12	
Reasons for non-compliance		13	
Issues for the care sector		13	
	Conclusions	19	
Appendix A	Analysis of HMRC review of NMW compliance in the social care sector	21	
Appendix B	Types of work – Time work	23	
Appendix C	Working hours for national minimum wage purposes – time spent travelling on business	24	

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### Executive Summary

#### 1. Objective of HMRC's enforcement programme

The aim of HMRC's enforcement action has been to gain assurance that employers operating in the social care sector are compliant with National Minimum Wage (NMW) legislation evidenced by workers receiving at least the appropriate NMW rate of pay for their age and status. This has been achieved by the review of employers' payroll and associated records and interviews with the employer, payroll staff and workers.

#### 2. Scope of the evaluation

The scope of this evaluation is limited to employers and workers who provide residential and domiciliary care services as defined by the standard industry code division 87 (Residential care activities) and 88 (Social work activities without accommodation).

#### 3. Selection of employers

HMRC has selected care sector employers for investigation on the basis of:

- workers making allegations of underpayment of wages below NMW via the Pay and Work Rights Helpline;
- third party intelligence and research received indicating potential non-compliance ; and
- risk profiling using HMRC data sources.

HMRC investigated all complaints from care workers received via the Pay and Works Helpline regardless of location and size of employer. The risk-based targeted enforcement work was focused on a selection of 80 care providers (40 residential care and 40 domiciliary care providers) who according to HMRC records employed more than 75 workers.

#### 4. Levels of non compliance

Over the period 1<sup>st</sup> April 2011 to 31<sup>st</sup> March 2013, HMRC have made enquiries into 224 employers in the social care sector.

183 of these enquiries have been completed. HMRC found non-compliance in 88 (48%) of these enquiries identifying £338,835 arrears of pay for 2443 workers. The average arrears of pay for workers was £138.

The total value of penalties charged was £112,786.

The highest value arrears in a single enquiry (£36,026) and the highest value of arrears owed to a single worker (£11,223) were both attributable to errors by the employer related to the operation of the accommodation offset rules and the provision of accommodation to workers.

In 45 (51%) of enquiries where arrears were found the employers owed a total of over £1000 in pay to workers.

In 40 (45%) of enquiries where arrears were found the employers owed pay to 10 or fewer workers.

In 67 (76%) of enquiries where arrears were found the average arrears due to each worker was less than £250 in value.

Forty one care sector employers are currently under investigation. Emerging findings indicate non-compliance in 13 of these enquiries with estimated pay arrears of £80,000 due for over 2000 workers.

The incidence of non-compliance in this sector (referred to as strike rate) was higher in 2011/12 and 2012/13 than any year since 1<sup>st</sup> April 2008.

### 5. Reasons for non-compliance

The most common reason for non-compliance related to deductions from workers pay and payments by the worker for items deemed to be a business expenses (i.e. purchased for the employers benefit and use in their business). Such deductions and payments brought workers pay below NMW rates. Other issues identified as causing underpayment of the national minimum wage to workers included:

(a) In domiciliary care

- unpaid training time;
- unpaid travelling time between appointments;
- hourly pay rate below NMW rate; and
- incorrect use of apprentice rates.

(b) In residential care

- a failure to pay workers for all working time;
- unpaid training time;
- hourly pay rate below NMW rate;
- a lack or awareness of the accommodation offset rules and their effect on NMW pay calculations; and
- incorrect use of apprentice rates.

### 6. Record keeping issues

A wide range of methods and record keeping systems are being used across the sector to compute workers pay. More specifically, HMRC did not find a common or consistent approach to monitoring working time particularly time spent visiting care service customers, travelling time between such visits or breaks taken by carers during their working day. Workers who are engaged on a 'night shift' (for example residential care workers) are required to be on call and available throughout the entire shift. Night shifts may offer the opportunity for the worker to sleep overnight on the premises meaning that working hours vary according to the number of occasions the worker is required throughout their shift to attend to residents. Employers were found not to have the necessary records in place, including daily average agreements, to demonstrate that their workers received at least the NMW rate for all hours worked.

Many employers had failed to keep sufficient records of working time to demonstrate that workers are paid at least the national minimum wage. The absence of such records served to:

- (a) inhibit an employers' ability to self-check their compliance with NMW; and
- (b) extend the time taken by employers to provide evidence that workers' pay was in line with minimum wage requirements.

### 7. Employment practices that were found to impact on NMW compliance

(a) *Premium rates*: Some employers rewarded workers with enhanced rates of pay - for example at weekends or for performing particular duties. A fundamental principle of the National Minimum Wage is that a worker's basic rate of pay, before enhancement or other allowances, should not fall below the statutory national minimum wage in any given pay reference period. Employers need to ensure that workers receive at least the national minimum wage rate for all hours worked in any given pay reference period. Because the payment of premium rates can conceal the fact that, after premium rate elements of pay are deducted and unpaid working time

added (as required for NMW purposes), a workers actual rate of pay could be below national minimum wage rate.

(b) *Deductions from workers' pay*: Deductions from a workers pay in respect of items or expenses that (a) a worker necessarily incurs for their employment (such as staff uniforms or equipment to do the job or training) or (b) are considered to be for the employer's own use and benefit (such as for meals provided by the employer) reduce a workers pay for NMW purposes.

(c) *Training time*: Where workers undergo training (for example - employment induction or skills development) the time spent on such activities is working time for NMW purposes where a contract of employment has started or where it is a contractual requirement for the worker to attend the training. We found instances where prospective workers attend pre-employment induction events to assess their suitability for employment or as part of the job application process. In the circumstance where this activity is not undertaken as part of their terms of employment or not for any form of remuneration paid to or benefit received by those attending, the time spent is not working time for NMW purposes.

(d) *Travelling time*: In a number of enquiries at domiciliary care providers the worker was not being paid for travelling time between appointments. Furthermore the employer had failed to keep sufficient payroll records to demonstrate that workers had been paid at least the NMW rate for all hours worked including travelling time. As a consequence HMRC referred to daily time sheets and records of times of visits to service users (signed by workers) and payslips to calculate the length of the gaps between visits. This evidence was used to agree with employers and workers the daily working pattern and the length of any breaks taken by care workers; taking into account the elements of this time attributable to travelling (working time) and the elements attributable to breaks taken by the carer (not working time).

(e) *Accommodation*: Significant levels of arrears arose from workers charged for employer-provided accommodation at rates above the NMW accommodation offset (October 2013 rate is £4.91 per day or £34.37 per week).

## 8. Conclusions

This report presents HMRC's evaluation of over 200 enquiries of social care employers carried out over a two-year period. This review has identified higher and increasing levels of non-compliance with NMW legislation than has been previously found in the sector in the last 5 years indicating that employers need to be much more diligent in ensuring workers' pay is compliant with NMW legislation.

HMRC are concerned that many employers had failed to keep sufficient records of working time to demonstrate that workers are being paid at least the national minimum wage; particularly given that non-payment of travelling time for workers in domiciliary care was commonplace and awareness of the impact, (for NMW purposes), of deductions from workers' pay was low. The lack of working time records served to inhibit employers' ability to self-check compliance with NMW and extended the burden on employers when required to provide evidence to HMRC that workers were receiving at least the appropriate NMW rate of pay for their age and status.

On 1<sup>st</sup> October 2013 BIS introduced new rules for publicly naming and shaming employers who fail to comply with NMW legislation. The revised scheme will remove previous restrictions so that any employer who breaks minimum wage law can be named. The new criteria for naming will apply to enquiries that HMRC begin on or after 1<sup>st</sup> October 2013. Therefore none of the employers included in this review will fall to be considered for naming under the new criteria. But it is worth noting that all of the non-compliant employers to whom HMRC have issued a Notice of

Underpayment for arrears of pay identified during this evaluation would meet the new criteria for naming had HMRCs enquiries begun on or after 1<sup>st</sup> October 2013.

Useful steps that employers can take are:

1. Keep full records of the precise hours worked by workers. Whilst it is not a requirement under NMW law to make separate payments to workers for travelling time, working time records must include details of travelling time and all time 'at work'. These records can be used to check that workers are receiving at least the appropriate NMW rate of pay for their age and status.
2. Be aware that deductions from workers pay can result in workers receiving less than NMW rates.
3. Consider the implications of paying workers 'premium' rates of pay for NMW purposes. The payment of premium rates can disguise the fact that a workers actual rate of pay is below national minimum wage rate, particularly in cases where working time has not been fully recorded and paid.
4. Remember that NMW pay rates change on 1<sup>st</sup> October and that there are different rates for different age-bands. So rates may need to change on birthdays.
5. Be aware of the amount of the Accommodation Offset and ensure that this is factored into workers pay where accommodation is provided.

HMRC take seriously every complaint about potential non-payment of NMW that is referred to them, fast tracking for enquiry those complaints that involve the most vulnerable workers - such as interns, apprentices and migrant workers - and carrying out risk-based targeted enforcement to address employer non-compliance and ensure that workers receive the wages to which they are entitled.

HMRC note the recent academic reports<sup>1</sup> and media articles highlighting concerns and issues related to the pay and employment practices in the care sector. The Low Pay Commission, Trade Unions and The Equality and Human Rights Commission have also raised concerns about the commissioning of social care services by local authorities and non-compliance with national minimum wage in the care sector.

Our aim and vision is clear – everyone who is entitled to the NMW rate should receive it. We will continue to work closely with BIS - who are responsible for the policy on NMW compliance and enforcement - and liaise with care sector representative bodies and other stakeholders to highlight the outcomes of the enforcement programme, promulgate good practice and achieve this vision.

To find out more about National Minimum Wage you can go to <https://www.gov.uk/national-minimum-wage> or telephone the Pay and Work Rights Helpline on telephone 0800 917 2368.

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<sup>1</sup> Estimating Probabilities and Numbers of Direct Care Workers Paid under the National Minimum Wage in the UK : A Bayesian Approach (Dr. Shereen Hussein Kings College London Dec 2011) / The National Minimum Wage, earnings and hours in the domiciliary care sector (University of Leeds Feb 2013) / Does it Pay to Care? (Resolution Foundation August 2013)

## Section A. Introduction

### 1. Background

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1.1 In 1998, the (then) Inland Revenue was appointed by the (then) Department of Trade and Industry (now the Department of Business, Innovation and Skills) to enforce the minimum wage on its behalf, and HMRC continues to do so today. HMRC's enforcement of employers' obligations to pay workers the NMW rate is focused on the workers' right to receive what they are entitled to.

1.2 Over the past 14 years, HMRC have identified more than £45 million which should have been paid as wages to around 200,000 workers from across a range of sectors including care workers, cleaners, shop workers, apprentices, migrant workers and hairdressers.

### 2. Scope and content of this report

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2.1 This report summarises the findings of HMRC enforcement reviews of employers in the social care sector over the period 1<sup>st</sup> April 2011 to 31<sup>st</sup> March 2013. A number of enquiries are still on-going and this report also includes an estimation of the number of workers and the value of the arrears of pay that may be due.

2.2 The employers included in this report have been identified by reference to the standard industry code division 87 (Residential care activities) and 88 (Social work activities without accommodation) and provide residential and domiciliary care services.

2.3 The report identifies the main reasons for non-compliance with NMW and includes illustrations of (a) how and why the underpayments of the NMW rates have arisen and (b) how workers' pay should be calculated for NMW purposes.

### 3. Rates of NMW

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3.1 The NMW provides a legally binding minimum hourly rate of pay for most workers over compulsory school leaving age. The rates are reviewed each year and usually increase from 1<sup>st</sup> October each year. The current rates of national minimum wage are

	Rate from 1 <sup>st</sup> October 2012	Rate from 1 <sup>st</sup> October 2013
Workers aged 21 and over	£6.19	£6.31
Workers aged 18-20	£4.98	£5.03
Workers aged 16-17	£3.68	£3.72
Apprentices aged under 19 or over 19 and in their first year of their apprenticeship	£2.65	£2.68

### 4. Who is entitled to the national minimum wage?

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4.1 The National Minimum Wage Act 1998 ("the 1998 Act") introduced a statutory right to be paid a certain amount of remuneration for work performed. Almost all workers in the UK are entitled to the National Minimum Wage (NMW). Workers are defined in Section 54 of the 1998 Act as meaning someone who has entered into or works (or worked) under a contract of employment or a contract to

perform personally work or services and is not genuinely self employed. The contract does not have to be written; it can be an implied contract or an oral (verbal) contract.

4.2 A worker is normally someone who:

- has someone tell them at any time what to do, where to carry out the work or when and how to do it
- is not undertaking a work placement as part of further or higher education
- is not a volunteer
- does not work in a way that falls under a very limited set of exemptions to the national minimum wage.

4.3 Workers who are over compulsory school leaving age must be paid at least the minimum wage for the hours they work. Foreign workers who are working legally in the UK are entitled to the NMW rates in exactly the same way as any worker, regardless of how long or short their stay may be.

## **5. HMRC enforcement process**

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5.1 HMRC has selected care sector employers for investigation on the basis of:

- workers making allegations of underpayment of wages below NMW via the Pay and Work Rights Helpline;
- third-party intelligence and research received indicating potential non-compliance ; and
- risk profiling using HMRC data sources.

5.2 HMRC investigated all complaints from care workers received via the Pay and Works Helpline regardless of location and size of employer. The risk-based targeted enforcement work was focused on a selection of 80 care providers (40 residential care and 40 domiciliary care providers) who according to HMRC records employed more than 75 workers.

5.3 The purpose of HMRC investigation was to determine whether or not an employer had complied with the requirement to pay workers the NMW rate. In practice this involved a review of an employer's payroll and associated records and interviews with the employer, payroll staff and workers to gather evidence that workers were receiving at least the appropriate NMW rate of pay for their age and status.

5.4 On conclusion of an investigation, if HMRC established that the NMW rate had not been paid to a worker or group of workers they issued a Notice of Underpayment (NOU). This notice set out the arrears of NMW to be paid by the employer together with the penalty for non-compliance with the requirement to pay workers the NMW rate. The employer had the right to appeal to an employment tribunal against the NOU and must have lodged its notice of appeal with the Tribunals Service within 28 days of the date of service of the NOU.

## **6. Types of work**

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6.1 The hours for which the NMW rate must be paid depends on the type of work the worker is doing. For NMW purposes there are four different types of work. They are:

- Salaried hours work
- Time work
- Output work
- Unmeasured work

6.2 For NMW purposes, there are different rules and calculations for each type of work.

6.3 HMRC establish the type of work being done before it determines whether the NMW rate has been paid. When deciding the type of work being performed HMRC consider the contractual arrangements and examine the way the worker is paid. The type of work is not dependent on other factors, such as the worker's occupation or the way the work is described by either the employer or the worker.

6.4 For NMW purposes, it is not possible to be performing more than one type of work at the same time under the same contract. However, if a worker has more than one contract then HMRC will consider the type of work being performed under each contract separately.

### **7. Quantification of arrears**

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7.1 A Notice of Underpayment (NOU) requires an employer to repay to the worker or workers the amount of arrears outstanding as a result of underpayment of the NMW rate for the pay reference periods ending before the "relevant day" which are specified in the notice.

7.2 The "relevant day" is defined as the day after the end of the last pay reference period for which the employer has paid the worker at a rate below the applicable NMW rate. Where more than one worker is named on the NOU, the relevant day may be different for each worker.

7.3 One of the Government's main policy aims for the legislative changes which came into effect from 6 April 2009 is to ensure that, where a worker has been underpaid the NMW rate, the arrears that are repaid to the worker take account of the length of time that has elapsed since the time that the underpayment occurred.

7.4 Arrears are the difference between the remuneration received by the worker and the NMW rate which applied at the time they were underpaid. However, from 6 April 2009, where the current rate of NMW is higher than the rate that applied at the time of the underpayment, the arrears are calculated by reference to the current rate.

7.5 Where a worker changes age bands, the current rate of NMW to be used in the calculation of arrears should be the current rate for the band that applied to the worker at the time the arrears accrued. So, for example, arrears incurred when the worker was aged 16-17 would be calculated by reference to the current 16-17 rate, not by reference to the current adult rate (even if the worker is now 21 or over).

### **8. Civil penalties for non-compliance**

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8.1 The penalty is calculated as 50% of the total underpayment for all the workers specified in the NOU in pay reference periods that commence on or after 6 April 2009 (the date on which the legislation which provides for the current penalty regime came into force). Where the amount of the penalty is less than £100, the minimum penalty of £100 has been applied. Where the amount of the penalty is more than £5,000, the maximum penalty of £5,000 has been applied.

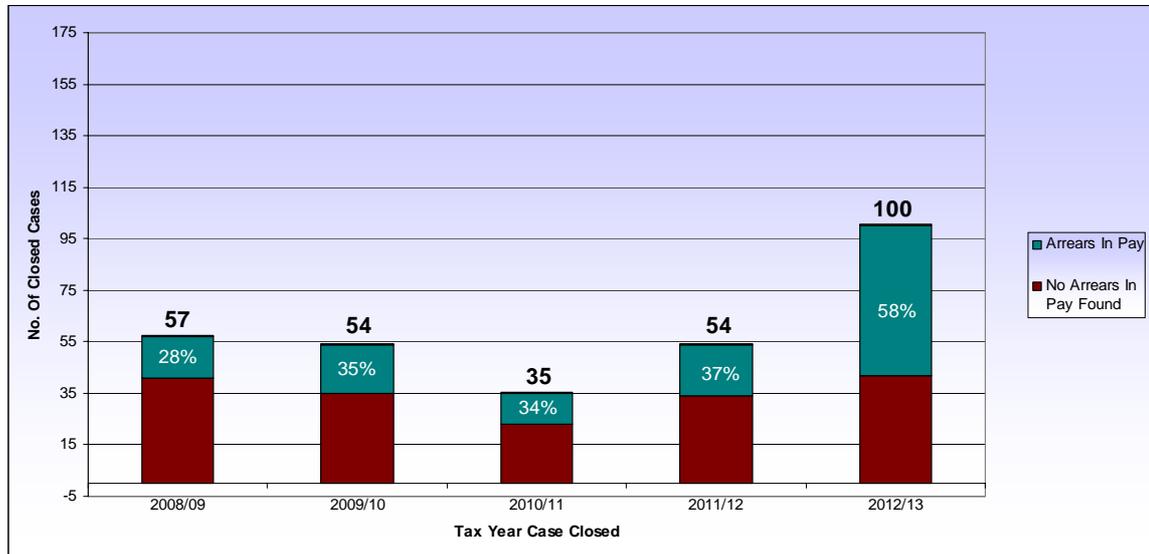
8.2 In addition to the amount of NMW arrears that the employer must pay, the NOU sets out the amount of the penalty that the employer must pay within 14 days of the date on which the NOU is served. But the NOU informs the employer that the penalty will be regarded as paid if, within those 14 days, it pays:

- all the arrears to all the workers named on the NOU; and
- half the amount of the penalty.

## 9. NMW Compliance levels found in social care enquiries from 2008 to 2013

9.1 The chart below shows the results of completed HMRC enquiries on employers in these sectors in the period from April 2008 to March 2013.

Chart 1.1 Chart showing numbers and percentage of enquiries found with arrears closed in each year.



9.2 This analysis shows there was a consistent pattern of non-compliance for NMW up to 31<sup>st</sup> March 2012. We note a marked increase in rates of non-compliance identified in 2012-13. Overall, the incidence of non-compliance (referred to as strike rate) was higher in 2011/12 and 2012/13 than in any other year commencing 1<sup>st</sup> April 2008.

## Section B : Findings

### 10. Overview

10.1 The principle aim of an NMW enforcement enquiry is to gain assurance that the employer's payroll systems and practices are compliant with NMW legislation, evidenced by workers receiving at least the appropriate NMW rate of pay for their age and status.

10.2 This report summarises enquiries where HMRC have identified workers that have not received the appropriate NMW pay rate. The report does not reflect the incidence where HMRC have found the computation of workers pay to be incorrect for NMW purposes, but the workers pay was still found to be at or above NMW rates by virtue of the relatively high hourly rate being paid by the employer.

10.3 Table 1.1 below summarises the outcome of NMW enforcement enquiries including the expected arrears from all social care sector enquiries opened on or after 1<sup>st</sup> April 2011.

Table 1.1 Results in completed enquiries in the review period

Total enquiries	With arrears	% Strike rate <sup>1</sup>	Total arrears	Workers affected	Average per worker	Total penalties charged
183	88	48%	£338,835	2443	£138.70	£112,786

1. meaning incidence of non-compliance

Table 1.2 below summarises the emerging findings of working enquiries (meaning enquiries opened in the review period ending 31<sup>st</sup> March 2013 but not yet closed).

Table 1.2 emerging findings in open enquiries as of August 2013

Total enquiries	With expected arrears	Predicted % strike rate	Estimated arrears	Estimated workers affected
41	13	32%	£82,753	2021

Further analysis of the outcomes of HMRC enquiries into NMW compliance in the social care sector is contained in Appendix A.

### 11. Penalty and quantification of penalty

11.1 A penalty is calculated as 50% of the total underpayment for all the workers specified in the Notice of Underpayment in pay reference periods that commence on or after 6 April 2009 (the date on which the legislation which provides for the current penalty regime came into force). Where this amount is less than £100, the minimum penalty of £100 has been applied. Where this amount is more than £5,000, the maximum penalty of £5,000 has been applied.

11.2 Table 1.3 provides further details of the penalties charged to employers for failures to pay workers at least NMW rates.

Table 1.3 Breakdown of Penalties Charged

Values of penalty charged	Number of penalties	Total amount of penalties collected
£100	28	£2,800
£101 - £500	20	£6,047
£501 - £1000	13	£9,281
£1001 - £4999	19	£44,758
£5000+	8	£40,000
Totals	88	£112,786

### 12. Types of work

12.1 In general, HMRC consider care workers to be time workers as they are paid in relation to set hours or times when they are expected to work (Regulation 3(a) of the National Minimum Wage Regulations 1999 – ‘the 1999 Regulations’ - refers). An impact of undertaking time work is that the worker’s pay is also adjusted to exclude any premium rates payable in a pay reference period (as set out in Regulation 31(1)(c)(i) of the 1999 Regulations). The impact of this legal requirement for NMW purposes is covered later in the report in the section ‘Issues for the care sector’.

12.2 A more detailed description of time work and the relevant NMW legislation is set out in Appendix B.

### 13. Time records

13.1 Worker time recording systems need to be able to correctly identify all working time for NMW purposes. Overall HMRC found no consistency in the standard, scope and use of electronic systems to record working time by employers. It was commonplace to find pay records that did not include details of working time spent with care service users, travel time between visits, time spent on training and time spent awake during sleeping nights.

### 14. Analysis of arrears of wages

#### *Highest value arrears in a single enquiry*

14.1 The highest amount of NMW identified as underpaid by a single employer was £36,026. This involved a residential care employer and stemmed from a complaint by a worker to the Pay and Work Rights Helpline. Twenty three workers were found to have been underpaid an average of NMW arrears of £1,566 each. The arrears were caused by the employer imposing charges for accommodation that reduced the workers pay below NMW rates.

#### *Highest value arrears for a single worker*

14.2 The highest amount of NMW identified for a single worker was £11,223. This was the only worker identified in the enquiry in question. This employer was a residential care provider, who was selected for review as part of the risk based targeted enforcement programme. The arrears were caused by the employer imposing charges for accommodation that reduced the worker’s pay below NMW rates.

#### *Average arrears per worker*

14.3 In the majority of enquiries (67 out of 88) covered by this study the value of arrears per worker in both residential and domiciliary care sub-sectors was £250 or less. However, reviews of residential care employers have identified a greater incidence of high value arrears per worker. 10 enquiries (15%) in this sector identified average arrears of £1000 or more per worker, compared to just 1 enquiry in domiciliary care.

Table 1.4 Range of arrears value per worker

Arrears per worker	All enquiries <sup>1</sup>		Residential Care <sup>1</sup>		Domiciliary Care <sup>1</sup>	
£1 to £250	67	37%	47	39%	20	32%
£251 to £500	5	3%	4	3%	1	2%
£501 to £1000	5	3%	4	3%	1	2%
£1001 to £5000	9	5%	8	7%	1	2%
£5001+	2	1%	2	2%	0	0%
Total number of completed enquiries with arrears	88		65		23	

1. Percentages shown are of all enquiries (including those enquiries where no arrears were found)

14.4 HMRC are not able to apportion arrears between reasons for non-compliance where there has been more than one reason identified. However data does show that errors in the application of the accommodation offset rules can give rise to high value arrears of pay to residential care workers.

### 15. Reasons for non-compliance

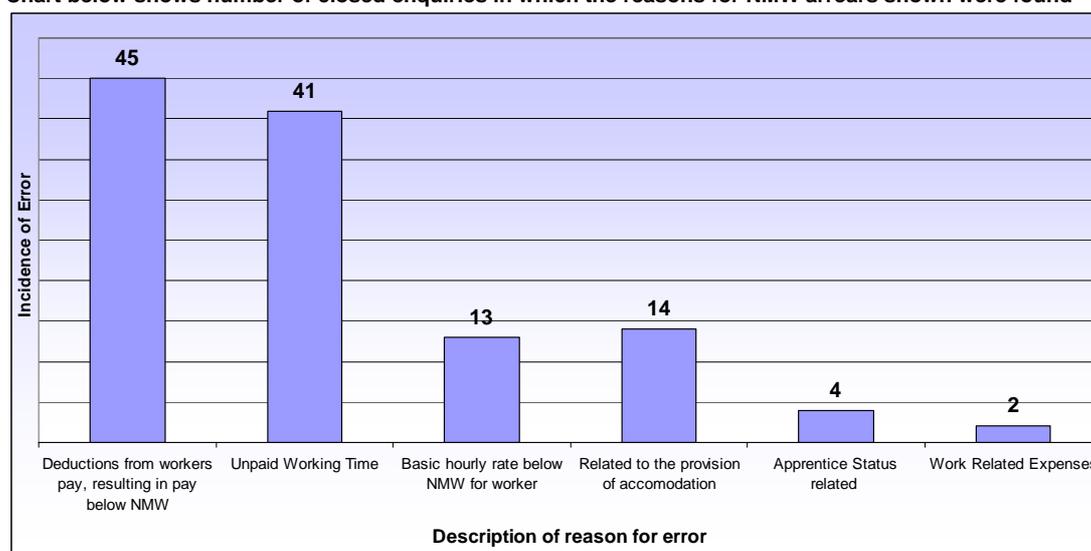
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15.1 The most frequent reason for a worker being underpaid NMW was deductions from pay which had the affect of bringing pay below NMW rates. The most common type of deduction that resulted in arrears of pay was for the costs of uniforms provided to care staff.

15.2 Other common reasons for arrears were :

- unpaid working time - examples include training time, travelling time between appointments for domiciliary care providers, and inaccurate working time records;
- using rates of pay below the NMW rate due to that worker - such as not applying October rate changes or adjusting young workers pay when they have a birthday;
- elements of the provision of the accommodation (rent, utilities etc) included as pay above the allowable accommodation offset rate.

Chart below shows number of closed enquiries in which the reasons for NMW arrears shown were found



Note : more than one reason for error may be recorded in a single enquiry

Appendix A provides further information and analysis of the outcome of the HMRC enquiries.

### 16. Issues for the care sector

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16.1 In this section we report on the issues brought to light during the programme of enquiries. Using various scenarios, we endeavour to explain the relevant NMW legislation and how it applies in practice.

#### Scenario 1 : Care workers have not been paid for all working hours including travelling time

[Working Time – what the law says](#)

The time considered to be working time for NMW purposes depend on the type of work being performed and whether it is salaried hours, time, output or unmeasured.

In simple terms, Regulation 3 of the 1999 Regulations states that time work is work that is:

- not salaried hours work , and
- paid for by reference to the time for which a worker works.

Regulation 15 of the Regulations 1999 states that:

Based on the documents and information seen during enquiries, HMRC consider that the care workers at the employers reviewed have been time workers (see Appendix B for more information about time work).

The hours of work that count for NMW purposes for time work includes any time when a worker is:

- at the workplace working - excluding the length of their rest breaks
- at work and required to be available for work - it makes no difference whether or not the employer actually provides work for that time
- required to be available for work either on standby or on-call at or near their workplace. However:
  - if there are arrangements in place for the worker to sleep at or near the place of work; and
  - the worker is provided with suitable facilities for sleeping,then the worker is only entitled to the NMW when they are awake and required to work
- travelling in connection with their work. This includes time spent:
  - travelling between appointments (but not rest breaks)
  - travelling from work to a training venue

But the time spent travelling from home to the place of work and back again does not count as time for which the NMW rate is payable.

16.2 In a number of HMRC enquiries at domiciliary care providers the employer had failed to keep sufficient payroll records to demonstrate that workers have been paid at least the NMW rate for all hours worked including travelling time. As a consequence HMRC have referred to daily time sheets and records of times of visits to service users (signed by workers) and payslips to calculate the length of the gaps between visits. HMRC have used this evidence to agree with employers and workers the daily working pattern and the length of any breaks taken by care workers; taking into account the elements of this time attributable to travelling (working time) and the elements attributable to breaks taken by the carer (not working time).

16.3 As a general rule, workers who receive lower pay rates per hour are more at risk of being underpaid when additional working time is factored into the NMW pay calculation. The examples below relate specifically to unpaid travelling time. HMRC reviews of pay records have identified discrepancies between the recorded “contact time” and the amounts used by the employer for pay calculations. This difference is treated in the same way as above and is considered additional working time for NMW purposes.

16.4 Examples (based on October 2013 rates) of the impact of travelling time on NMW calculations are shown below:-

### Example 1

Domiciliary care worker A is paid **£6.35 per hour** and is paid weekly.

The employer has paid the worker **£190.50 for 30 hours** worked.

Time records show the worker spent a total of 45 minutes that week travelling between clients

that had not been recorded as working time.

### How to check compliance with NMW legislation

The minimum amount paid to the worker should be **£6.31 x 30.75 hours = £194.03**

The worker was paid £190.50 so therefore has been underpaid the NMW by £3.53 that week (£194.03 minus £190.50).

### **Example 2**

Domiciliary worker B is paid **£7.50 per hour** and is paid weekly.

The employer has paid the worker **£225 for 30 hours** worked (30 x £7.50)

Time records show the worker spent 2 hours that week travelling between clients that had not been recorded as working time.

### How to check compliance with NMW legislation

The minimum amount paid to the worker should be **£6.31 x 32 hours = £201.92**

As the worker was paid above £201.92 (i.e. above the NMW amount) no arrears are due even after taking account of the additional 2 hours working time spent travelling.

More examples of travelling time and NMW are contained in Appendix C.

## **Scenario 2 : An employer has failed to ensure time workers are paid NMW rate in the pay reference period after deducting premium rates of pay**

### Pay reference periods – what the law says

Regulation 10 of the 1999 Regulations states that :

(1)The pay reference period is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

NMW pay calculations are made by reference to the number of hours worked and the pay received in each pay reference period.

### Enhanced rates of pay - what the law says

Regulation 31 (1) (c) (i) of the 1999 Regulations states that :

- (1) The total of reductions required to be subtracted from the total of remuneration shall be calculated by adding together –
  - c) any money payments paid by the employer to the worker in respect of –
    - (i) time work worked in the pay reference period involving particular duties that is paid for at a higher rate per hour than the lowest rate per hour payable to the worker in respect of time work worked involving those duties during the pay reference period, to the extent that the total of those payments exceeds the total of the money payments that would have been payable in respect of the work if that lowest rate per hour had been applicable to the work.

16.6 Care workers receive different rates of pay depending on the length of the visit or type of duties that they undertake or for working at periods of customer peak demand such as getting up or going to bed times. Multiple rates of pay and multiple pay reference periods for carers working for the same employer as a result of TUPE arrangements were also in evidence. HMRC have identified a lack of awareness among employers regarding the application of NMW legislation to workers

who are in receipt of premium rates of pay. In example 3 below we show how the deduction of premium rates to pay to calculate a workers pay for NMW purposes (as required under the law) can identify non-compliance with NMW where working time has not been fully recorded and paid for.

### Example 3

Worker C is paid £6.42 per hour and is paid weekly. The worker is also paid an additional £1 per hour for unsocial hours on a weekend. The worker has been paid for 30 hours worked including 8 hours at a weekend.

Basic pay £6.42 x 22 = £141.24

Unsocial Hours pay £7.42 x 8 = £59.36

**Total pay = £200.60**

Time records show the worker spent 1.5 hours that week travelling between clients which was unpaid.

#### How to check compliance with NMW legislation

The minimum amount paid to the worker should be **£6.31 x 31.5 = £198.76**

The worker has been paid £200.60 by the employer so any NMW arrears may not be immediately identified. However the additional unsocial hours payment of £8.00 (being the difference between basic pay rate of £6.42 and unsocial hours pay rate of £7.42 paid for 8 hours work at the weekend) cannot be included in the calculation of the worker's pay for NMW purposes.

For NMW purposes therefore the worker's pay was **£192.60** (£200.60 minus £8.00 unsocial hours premium).

As £198.76 is due for the hours actually worked for NMW purposes, the worker has been underpaid the NMW by £6.16 (£198.76 minus £192.60).

This example shows how NMW arrears may arise after making the necessary deduction for premium elements of pay which should not be included in the calculation of worker pay for NMW purposes. Although the total amount actually paid to the worker is above NMW rates, when premium elements are deducted, pay is below NMW rates. The example demonstrates the risk of non-compliance with NMW for employers where the record and payment of working time (e.g. travelling time) is incomplete.

### Scenario 3 : Deductions from care workers' pay

#### Deductions from Pay – what the law says

Regulation 31(1)(g) of the Regulations 1999 states that :

- (1) The total of reductions required to be subtracted from the total of remuneration shall be calculated by adding together-
- (g) any deduction falling within regulation 32.

Regulation 32(1) states that the deductions required to be subtracted from the total of remuneration by Regulation 31(1)(g) are -

- (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.

16.7 Deductions an employer makes from a worker's pay will reduce NMW pay if they are:

- in respect of a worker's expenditure in connection with the employment or
- made for the employer's own use and/or benefit and are not a liability owed by the worker and paid on his behalf to a third party

16.8 A deduction is made for the employer's own use or benefit where the deduction is made by the employer and the employer is free to use that money in any way they wish. It does not matter

- whether the employer makes a profit from the transaction or not,
- if the deduction is made from gross or net pay,
- if the deduction is made under an agreement entered into with the worker,
- whether or not the worker benefits from the arrangement.

### Example 4

Worker A is paid £7.00 per hour for 40 hours per week worked as a care home worker. The worker is paid **£7.00 x 40 = £280** per week before deductions for the provision of a uniform.

How to check compliance with NMW legislation

The minimum amount paid to the worker should be : **£6.31 x 40 = £252.40**

The amount paid (£280) appears to be above NMW rates. But the employer has not identified the amount of the deductions for uniform costs which was £35 in the pay reference period.

Therefore after deduction the worker received £280 minus £35 = £245.

We can see that for NMW purposes the worker has been underpaid by **£7.40** that week (£252.40 minus £245).

Deductions which an employer makes to cover the costs of items or expenses that are necessary for the workers job do not count towards NMW. The employer must pay the worker at least the NMW rate in addition to the costs of the uniform.

### Scenario 4 : Accommodation provided to a worker and the rules on accommodation offset

#### What the law says

Regulations 9, 30, 31(1)(i), 36, 36A & 37 of the Regulations 1999 refer.

Living accommodation provided by the employer is the only benefit in kind that counts towards a worker's NMW pay. Legislation allows a notional amount, called the accommodation offset, to count towards NMW pay. From 1 October 2013 the accommodation offset is £4.91 for each day that the employer makes the accommodation available to the worker. The maximum weekly amount is £34.37.

16.9 The accommodation offset only applies when the accommodation is both:

- regarded as provided by the employer to the worker and
- suitable to be considered "living accommodation"

When both these conditions are satisfied NMW pay should be calculated using the accommodation offset.

16.10 A summary of how an employer should consider accommodation costs for a worker are shown overleaf.

<b>Amount employer charges for the accommodation</b>	<b>To calculate national minimum wage pay:</b>
Nil	The worker's pay is increased by the notional amount of the accommodation offset
At or below the accommodation offset rate	The worker's pay is not affected by the amount charged for the accommodation.
Above the accommodation offset rate	The worker's pay is reduced by the amount the employer charges <b>in excess</b> of the accommodation offset.

16.11 Any charge the worker is obliged to pay as a precondition of being provided with accommodation by an employer (including charges for gas and electricity, laundry and provision of furniture) is regarded as a charge paid in respect of the accommodation. These charges must be taken into account when determining the total charge for accommodation and when calculating NMW pay taking into account the accommodation offset rules.

16.12 An employer is providing accommodation if any of these apply:

- the accommodation comes with the job;
- a worker's continued employment is dependent upon occupying particular accommodation
- a worker's occupation of accommodation is dependent on remaining in a particular job.

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

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

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

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

16.15 Accommodation offset rules apply even if the worker doesn't have to use the accommodation to do the job. If the accommodation is optional, it only counts as employer-provided accommodation when it is provided to the worker.

16.16 In the residential care sector errors in the application of the accommodation offset gave rise to the highest levels of arrears in monetary value per worker. In the example below a residential care home provider was found to owe £36,026 arrears for 6 workers arising from errors in the application of the accommodation offset. The employer was actually found to be part of larger group of four care homes and accommodation from the employer's own property portfolio was provided to the workers. It was found that the employer was deducting between £300 to £400 per month from the workers' pay.

### Example 5

Worker A is paid £7.00 per hour for 40 hours per week worked as a care home worker. The employer owns accommodation and lets it to the worker for £85 per week payable directly to the employer via direct debit.

The worker is paid  $\text{£}7.00 \times 40 = \text{£}280$  per week before payment of rent.

How to check compliance with NMW legislation

The minimum amount paid to the worker should be :  $\text{£}6.31 \times 40 = \text{£}252.40$

The worker's pay appears to be above NMW rates. But as it is providing accommodation the employer must take into account the amount of the accommodation offset in order to determine whether it has paid the worker at least the NMW.

Under the accommodation offset rules the employer is only allowed to consider £34.37 per week as pay for NMW purposes (1<sup>st</sup> October 2013 rate).

The actual charge to the worker for living accommodation is £85. Therefore £50.63 (£85 minus the offset of £34.37) is reduced from the worker's pay to calculate the rate of pay for NMW purposes, which is :

$\text{£}280 \text{ minus } \text{£}50.63 = \text{£}229.37.$

In this example we can see that the worker has actually been underpaid the NMW by **£23.03** (£252.40 minus £229.37) that week.

## 17. Conclusions

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17.1 This report presents HMRC's evaluation of over 200 enquiries of social care employers carried out over a two-year period. This review has identified higher and increasing levels of non-compliance with NMW legislation than has been previously found in the sector indicating that employers need to be much more diligent in ensuring workers' pay is compliant with NMW legislation.

17.2 HMRC are concerned that many employers had failed to keep sufficient records of working time to demonstrate that workers are being paid at least the national minimum wage; particularly given that non-payment of travelling time for workers in domiciliary care was commonplace and awareness of the impact on NMW compliance of making deductions from worker pay was low. The lack of working time records served to inhibit employers' ability to self-check compliance with NMW and extended the time required by employers to provide evidence to HMRC that workers' were receiving at least the appropriate NMW rate of pay for their age and status.

17.3 On 1<sup>st</sup> October 2013 BIS introduced new rules for publicly naming and shaming employers who fail to comply with NMW legislation. Under the original scheme, employers had to meet one of seven criteria before they could be named. The minimum amount of NMW owed to workers had to be at least £2000 and the average per worker at least £500 before an employer could be referred to BIS from HMRC for naming. The revised scheme will remove these restrictions so that any

employer who breaks minimum wage law and is issued with a NOU by HMRC can be named. The new criteria for naming will be applied to enquiries that HMRC begin on or after 1<sup>st</sup> October 2013. Therefore none of the employers included in this review will fall to be considered for naming under the new criteria. But it is worth noting that all of the non-compliant employers who were issued with a NOU by HMRC during this evaluation would qualify to be named and shamed under the new criteria had HMRC's enquiries begun on or after 1<sup>st</sup> October 2013.

17.4 Useful steps that employers can take are :

(1) Keep full records of the precise hours worked by workers. Whilst it is not a requirement under NMW law to make separate payments to workers for travelling time, working time records must include details of travelling time and all time 'at work'. These records can be used to check that workers are receiving at least the appropriate NMW rate of pay for their age and status.

(2) Be aware that deductions from workers pay can result in workers receiving less than NMW rates.

(3) Consider the implications of paying workers 'premium' rates of pay for NMW purposes. The payment of premium rates can conceal the fact that a time or output workers actual rate of pay is below national minimum wage rate, particularly in cases where working time has not been fully recorded and paid.

(4) Remember that NMW pay rates change on 1<sup>st</sup> October and that there are different rates for different age-bands so rates may need to change on workers' birthdays.

(5) Be aware of the amount of the Accommodation Offset and ensure that this is factored into workers pay where accommodation is provided.

17.5 HMRC take seriously every complaint about potential non-payment of NMW rates that is referred to us, fast tracking for investigation those complaints that involve the most vulnerable workers - such as interns, apprentices and migrant workers - and carrying out risk-based targeted enforcement to address employer non-compliance and ensure that workers receive the wages to which they are entitled.

17.6 HMRC note the recent academic reports<sup>2</sup> and media articles highlighting concerns and issues related to the pay and employment practices in the care sector. The Low Pay Commission, Trade Unions and The Equality and Human Rights Commission have also raised concerns about the commissioning of social care services by local authorities and non-compliance with national minimum wage in the care sector.

17.7 Our aim and vision is clear – everyone who is entitled to the NMW should receive it. We will continue to work closely with BIS - who are responsible for the policy on NMW compliance and enforcement - and liaise with care sector representative bodies and other stakeholders to highlight the outcomes of the enforcement programme and achieve this vision.

17.8 To find out more about National Minimum Wage you can go to <https://www.gov.uk/national-minimum-wage> or telephone the Pay and Work Rights Helpline on telephone 0800 917 2368.

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<sup>2</sup> Estimating Probabilities and Numbers of Direct Care Workers Paid under the National Minimum Wage in the UK : A Bayesian Approach (Dr. Shereen Hussein Kings College London Dec 2011) / The National Minimum Wage, earnings and hours in the domiciliary care sector (University of Leeds Feb 2013) / Does it Pay to Care? (Resolution Foundation August 2013)

**Appendix A : Analysis of HMRC review of NMW compliance in the social care sector**

**Table A : Results from enforcement action – including estimated arrears from open enquiries.**

Type of employer	Total number of HMRC enquiries	Number of enquiries with arrears	% Strike rate	Total arrears identified	Workers affected	Average arrears per worker	Total penalties charged
Residential	141	74	52%	£309,325.00	2024	£152.83	£86,558
Domiciliary	83	27	33%	£29,510.00	420	£70.26	£16,328

**Table B : Value of arrears identified per employer**

Value of arrears per employer	Incidence of total arrears identified in each value band					
	Total		Residential Care		Domiciliary Care	
£1 to £250	26	29%	14	22%	12	52%
£251 to £500	4	5%	4	6%	0	0%
£501 to £1000	13	15%	8	12%	5	22%
£1001 to £5000	30	34%	26	40%	4	17%
£5001+	15	17%	13	20%	2	9%
<b>Total</b>	<b>88</b>		<b>65</b>		<b>23</b>	

For example : 26 employers were found to owe total arrears of between £1 and £250

**Table C : Numbers of workers found with arrears per employer**

Number of underpaid workers	Number of employers found to owe NMW arrears					
	Total		Residential Care		Domiciliary Care	
1 to 10 workers	40	45%	26	40%	14	61%
11 to 20	11	12%	9	14%	2	9%
21 to 50	21	24%	18	28%	3	13%
51 to 100	12	14%	8	12%	4	17%
100+	4	5%	4	6%	0	0%
<b>Total</b>	<b>88</b>		<b>65</b>		<b>23</b>	

For example : 40 employers were found to owe arrears to between 1 and 10 workers

**Table D : Average arrears identified per employer**

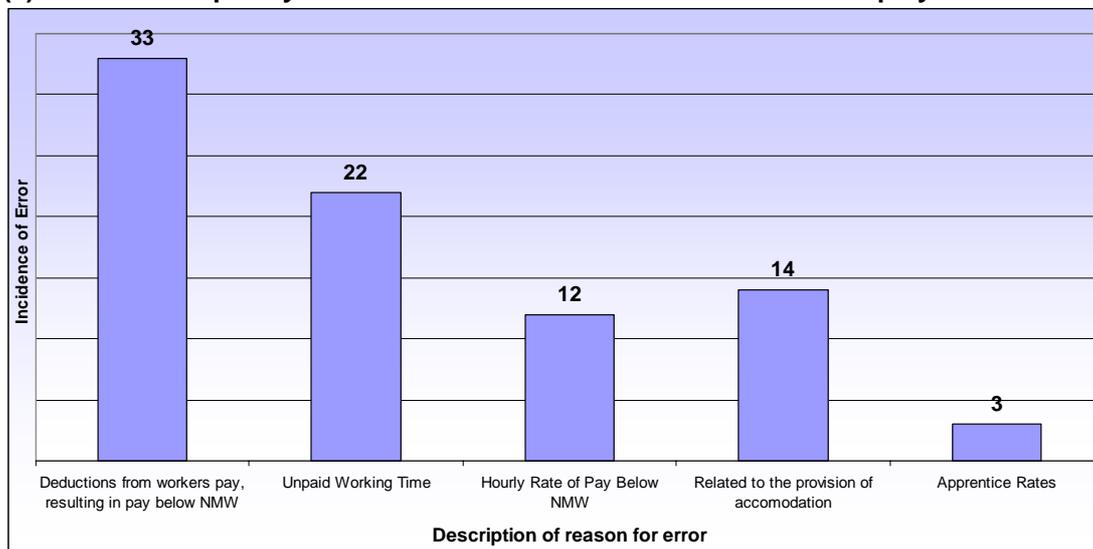
Avg arrears per worker	Number of employers found to owe NMW arrears					
	Total		Residential Care		Domiciliary Care	
£1 to £250	67	76%	47	73%	20	88%
£251 to £500	5	6%	4	6%	1	4 %
£501 to £1000	5	6%	4	6%	1	4 %
£1001 to £5000	9	10%	8	12%	1	4 %
£5001+	2	2%	2	3%	0	0%
<b>Total</b>	<b>88</b>		<b>65</b>		<b>23</b>	

For example : 67 employers were found to owe each worker average arrears of between £1 and £250

**Appendix A**

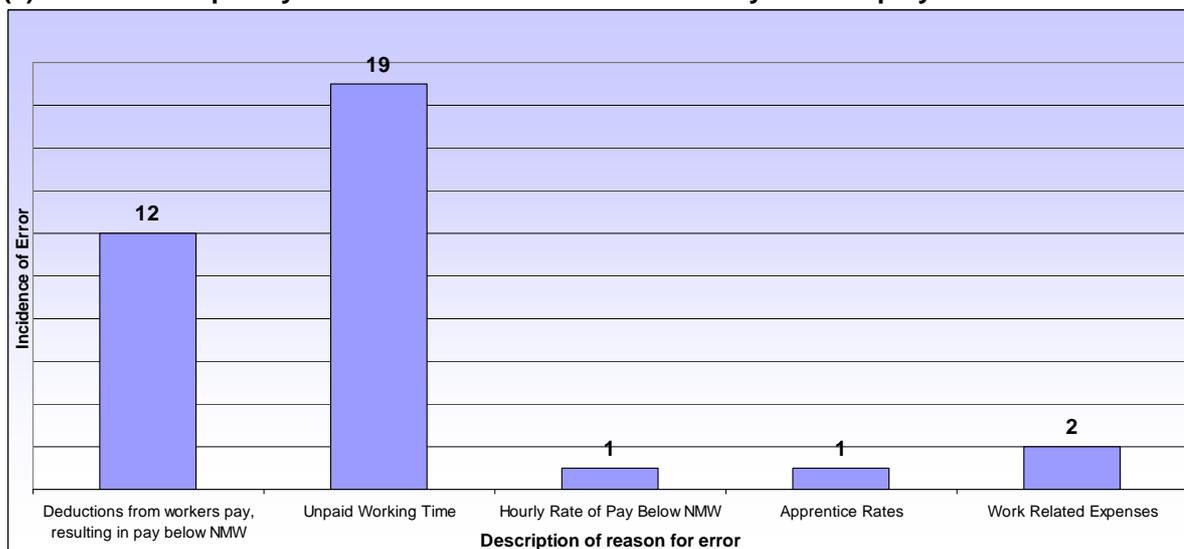
**Analysis of HMRC review of NMW compliance in the social care sector – continued**

**(1) Table E : Frequency of reasons for arrears in Residential Care employers**



Notes : (1) more than one reason for error may be recorded in a single enquiry (2) the chart shows the number of closed enquiries in which the reasons for arrears shown were found e.g. there were 33 enquiries where deductions from workers pay resulted in arrears of NMW.

**(2) Table F : Frequency of reasons for arrears in Domiciliary Care employers**



Notes : (1) more than one reason for error may be recorded in a single enquiry (2) the chart shows the number of closed enquiries in which the reasons for arrears shown were found e.g. there were 12 enquiries where deductions from workers pay resulted in arrears of NMW.

**(3) Analysis of unpaid working time shown in Charts E and F above**

Total number of enquiries where unpaid working time resulted in arrears of NMW = 41 (22 in residential care plus 19 in domiciliary care). The following table provides further analysis of the nature of the unpaid working time identified in these enquiries :

Reason for arrears of NMW	Number of enquiries where this reason resulted in NMW arrears
Unpaid training time	22
Unpaid working time (not defined)	10
Unpaid travelling time	8
Unpaid trial period	1

### Appendix B

#### Types of work – Time work

##### 1. The law: National Minimum Wage Regulations 1999, Regulation 3

In simple terms time work is work that is:

- not salaried hours work , and
- is paid for in relation to the time worked (based on the time spent doing the work).

##### 2. Applying the law in practice

Time work may exist in any trade sector and in any occupation. A worker will be regarded as doing time work if:

- they are paid an annual salary at a set amount for a stipulated number of hours, but do not satisfy all the conditions to be regarded as a salaried worker for national minimum wage purposes.
- they do piecework according to set hours
- they work on a commission-only basis according to set hours
- they are paid in relation to set hours or times when they are expected to work.

If a worker is paid according to the number of hours they are at work, they are doing time work – so anybody whose pay goes up or down depending on the actual hours they work is likely to be doing time work. This includes workers who are paid piece rates but have to be at a factory for a set numbers of hours a day to produce their work.

Time workers must be paid the NMW rate for hours spent:

- at work and required to be working or on standby near your workplace (but not on rest breaks)
- when kept at the workplace but unable to work because of machine breakdown
- travelling on business during normal working hours
- training or travelling to training during normal working hours
- awake and working, during ‘sleeping time’

Sleeping time means any time when you are allowed to sleep if your employer arranges for you to sleep at or near where you work and provides you with suitable facilities for doing so.

Time workers don't need to be paid the NMW rate for hours spent:

- travelling between home and work
- away from work on rest breaks, holidays, sick leave or maternity leave
- away from work because of industrial action
- asleep, or awake but not working, during ‘sleeping time.’

### Appendix C

#### Working hours for national minimum wage purposes - time spent travelling on business

Time spent travelling between home and someone's normal place of work and back again does not count as time when the national minimum wage (NMW) is payable. However, there are some periods of travelling time when the NMW must be paid to a time or salaried hours worker. These include time when the worker is:

- travelling in connection with their work - any rest breaks taken during the time the worker is travelling count as time worked - for example lunch on board a train
- waiting for a train or changing trains or other form of transport - except during rest breaks
- travelling from one work assignment to another - except for rest breaks
- waiting to either collect goods, meet someone in connection with work or start a job
- travelling from work to training venues during normal working hours - travel between their home and the training venue does not count
- time spent training for their work - either at the workplace or somewhere else – this also applies to workers required to undertake training before starting to work for you where a contract has been entered into.

#### Scenarios on travel time

##### *Example 1*

A care worker starts work at 9.30am when he visits his first client. That appointment lasts for half an hour until 10.00am. He then travels for one-and-a-half hours without any break to his second appointment, which is at 11.30am. The period that he travels between appointments, as well as for the period when he is working with his clients, is time work for NMW calculation purposes.

##### *Example 2*

A care worker has an assignment at 9.00am followed by a half-hour assignment at 9.30am to which he travels direct. He must be paid the national minimum wage from 9.00am to 10.00am. After the second appointment he has a further appointment at noon, but returns home in the meantime. He does not have to be paid the NMW rate for the time spent travelling from his second appointment to his home; or from his home to his third appointment.

If the care worker in the above example travels direct to the noon appointment from his second appointment and takes a rest break on the way, the period when he was travelling is time work for NMW calculation purposes, but the rest break and any payment for that rest break can be excluded.

##### *Example 3*

A care worker has an assignment at 10.00am followed by a half-hour assignment at 11.00am to which she travels direct. She must be paid the NMW rate from 10.00am to 11.30am. After the second appointment she has a further appointment at 3:00pm, and in the meantime goes to the office. During the time in the office, she takes a half-an-hour rest break. She has to be paid the NMW rate for the time spent travelling from her second appointment to the office and for travelling to the appointment at 3:00pm. For the time in the office, she must be paid NMW rate for the time spent working, but the 30 minutes' rest break and any payment for the rest break can be excluded.