Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

October 2013

SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS TO LOW PAY COMMISSION CONSULTATION

Contact

David Camp, Director, Tel: 07855 570007, E-mail: David@alliancehr.co.uk

Introduction

The ALP has for several years been arguing that:

- the accommodation offset arrangements work to the disadvantage of workers by removing the option to have accommodation provided by an employer.
- The HMRC interpretation that a deduction from wages for the optional use of transport to work reduces pay for national minimum wage (NMW) purposes is at best questionable and works to the disadvantage of workers

This submission restates these cases and raises the matter of national minimum wage complexity and advice to business.

1. National Minimum Wage and the Accommodation Offset

The ALP's position remains as per its 2012 submission at Appendix 1.

The Low Pay Commission Report 2013 stated that the "supply of employer-provided accommodation has decreased". This is wholly to be expected as the Accommodation Offset rules deter employers from providing accommodation to their workforces unless business circumstances make this an imperative.

The ALP was disappointed that the Low Pay Commission Report 2013 made only the following cursory reference to seeking to find a test to distinguish between tied and free choice accommodation:

> There also remains a distinction between accommodation required to be taken and that where there is a free choice. But, as our last review found, it is not clear that there is a simple and robust test of this distinction in practice. Obtaining a signature on an employment contract or some separate agreement, for example, does not necessarily demonstrate a genuine free choice, nor that the offers of accommodation and work are really independent of each other. Any test must work in all sectors where accommodation is provided and not only in those where verification may be easier, for example those regulated by the Gangmasters Licensing Authority.

The ALP expected to see evidence of a proper exploration of the options available to make this distinction in law and practice.

The ALP itself (using previous DTI guidance) proposed that the accommodation should be considered tied whether or not the accommodation is let by the employer or a third party if:

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

These points are not that challenging to set in law, yet the LPC Report contained no exploration or consideration at all of alternatives of what might be considered a simple and robust test to distinguish between accommodation required to be taken and that where there is a free choice.

Of course this leaves the challenge of enforcement, but this is a challenge which exists for many aspects of the NMW.

To maintain the status quo, as the LPC did, is also damaging to economic growth and job creation. As stated, the ALP's position remains as per its 2012 submission but to put this issue in context below is an actual current case study that highlights the anachronism of the Accommodation Offset rules and the damaging effect that the rules have upon economic growth and accommodation for low paid and disadvantaged individuals:

Labour Provider Case Study

- A labour provider has bought a range of barns in Cambridgeshire and part converted them into Hostel accommodation.
- The aim was to help newly arrived migrant workers who were generally unable to afford the deposits and month's rent in advance normally expected for rental accommodation or commit to a six month tenancy. The idea was that when they had saved some money and found their feet they would move out into the mainstream rental accommodation market leaving room for newer arrivals to take their places.
- However, because the accommodation offset of £33.74 per week is set so far below market rates nobody ever moves out of the hostel - in fact they regularly pay several month's rent when they are going away for extended periods to keep their rooms. There is a huge waiting list of workers hoping to enjoy the artificially low rents forced by the Accommodation Offset rules.
- The Planning Permission does not restrict occupancy to the labour provider's own workers and several rooms are already let to people who used to work for the labour provider but have moved on to work directly for their clients. The labour provider charges these individuals £50 rent per week plus bills, which is still very low for the Cambridge area and with which they are quite content.

- The South Cambs Housing Department is desperately seeking accommodation for homeless people and has informed the labour provider that they will pay £86 per person per week in Housing Benefit for hostel accommodation and £120 per week for one bed units that he had intended to convert two other barns into.

- The labour provider is at a loss to understand:

    - Why should a worker who stays in their hostel be paying only £33.74 per week when another of their workers who earns the same pay standing next to him on the same grading line at work who instead rents a room in town independently of the labour provider has to pay three times as much?

    - Why it is acceptable to charge unemployed and destitute people £86 (for the 18 to 35 age group) or £120 (for the over 35s who qualify for a separate flat) out of Housing Benefit and yet only £33.74 to their own workers who have much more disposable income than the homeless tenants?

The direct consequence of leaving the "Accommodation Offset" rules as they are is:

1. **The Accommodation Offset rules are responsible for throttling much needed housing initiatives -** The low rent means that the hostel does not pay for itself and thus the labour provider has been unable to raise the finance necessary to complete the project (for which Planning Permission has been obtained) to house 50 people rather than the current 16.

2. **The Accommodation Offset rules mean that workers will be evicted -** There is no problem finding tenants at the £50 per week rates and if unable to charge own workers a reasonable rent the labour provider shall have to cease providing accommodation to their workers altogether.

3. **The Accommodation Offset prevents disadvantaged individuals from being offered work –** For the labour provider, one of the attractions of working with the Housing Department is that they would be able to offer jobs to the homeless and unemployed people. However, the moment that the labour provider gives them a job he will have to reduce the rent charged to £34. Consequently no job offers will be forthcoming and there will be an ongoing burden on taxpayers.

The ALP recommends that the Accommodation Offset rules apply only to accommodation that is tied i.e. that is required to be taken by employees and workers. The ALP requests that the LPC further considers and evaluates mechanisms for establishing whether or not a worker's accommodation is "voluntary".

2. National Minimum Wage and Transport to Work Costs

The ALP's position on this remains as per its 2012 submission at Appendix 2. namely that with the current situation:

1. The interpretation is open to question.
2. The position is perverse.
3. The current HMRC stance is causing labour providers and their workers to incur considerable additional costs.
4. The HMRC stance is making it more difficult for the poorest workers to obtain work.
5. The HMRC stance is putting the health and safety of workers at risk.
6. Differential enforcement.

At Appendix 3 is the tortuous exchange with BIS NMW Policy seeking to obtain clarity on this matter.

The Low Pay Commission has failed to consider this issue in previous years and the ALP requests that this matter is considered fully in the 2014 Report.

3. National Minimum Wage Complexity and Advice to Business

In the LPC 2013 report is printed the following Association of Labour Providers oral evidence: *"The GOV.UK guidance on the NMW is very basic. Employers need something that supports the more challenging issues they may have."*

The Commission recommended that the Government put in place, and maintain, effective, clear and accessible guidance on all aspects of the minimum wage, particularly where there was significant evidence of ignorance or infringing practice.

The ALP supports this recommendation and requests that the LPC expresses in its 2014 report to Government that business request and needs more through advice and guidance on NMW.

Particularly it is requested that:

- The detailed National Minimum Wage Guide last produced in 2008 is reinstated and made accessible via the GOV.UK website.

- The 2007 DTI Guidance on the National Minimum Wage and Accommodation Offset is reinstated and made accessible via the GOV.UK website.

- That trade associations who represent businesses employing significant numbers of NMW workers are able to have access to NMW Technical Advisors for assistance on their own sector relevant guidance and to assist with complex and challenging issues. The following are three examples of the more challenging issues faced by labour providers with regards to the NMW:

Scenario 1

When working at different sites there are certain items that hirers require a labour provider to ensure that an agency worker has and which are not provided free of charge by the hirer such as:

- *Locker Keys – to store personal items*
- *Identity Cards / Key Fobs / Swipe Cards – to gain site access*
- *Work Wear / Uniforms (N.B. Not Personal Protective Equipment)*

There are a number of models operated but what impact does each have on workers paid at NMW? Where the labour provider:

1. *Requires the worker to pay for the items as a deduction from pay.*
2. *Requires the worker to pay for the items as a payment after a work contract has been agreed.*
3. *Requires the worker to pay for the items as a payment before a work contract has been agreed.*
4. *Requires the worker to make an upfront deposit as a deduction to be withheld on the non-return of the item.*

5. *Requires the worker to make an upfront deposit as a payment to be withheld on the non-return of the item.*
6. *Provides free of charge but makes a deduction for replacement (e.g. where lost, worn out or broken) during the contract.*
7. *Provides free of charge but requires a payment for replacement (e.g. where lost, worn out or broken) during the contract.*
8. *Provides free of charge but makes a deduction from final pay for replacement (when not returned) at the end of a contract.*
9. *Provides free of charge but makes a deduction from final pay for replacement (when not returned or not returned in a usable state i.e. beyond reasonable wear and tear) at the end of a contract.*
10. *Requires the worker to purchase the items directly from the Hirer.*
11. *Requires the worker to purchase the items directly from an unconnected third party.*

Scenario 2

1. *The Hirer insists that the labour provider's agricultural field workers are transported to the fields in a minibus*
2. *The workers are paid NMW.*
3. *The labour provider contracts a third party transport company to operate the minibus*
4. *The worker is charged £5 transport per day – this is less than the actual cost of the bus service*
5. *Does it breach NMW for*

   a. *The labour provider to collect the £5 from each worker and separately pay the 3rd party transport company. There is no profit by the labour provider.*

   b. *The workers to pay the third party transport company driver directly.*

Scenario 3

In each of the different payment scenarios for poultry catchers:

A. Time work – workers are paid for hours worked clearing the shed
B. Output work – workers are paid a price per bird caught
C. Unmeasured work – workers are paid a fixed price for clearing the whole shed

Should travelling time in the following situations be included when calculating whether NMW has been met:

1. Workers are travelling to and from their home to the sheds and they must travel in the work minibus and they are collected from their home.
2. Workers are travelling to and from their home to the sheds and they must travel in the work minibus and they are collected from a meeting point
3. Workers are travelling to and from their home to the sheds in their own transport
4. Workers are given the choice to use their own transport or use the work minibus to get to and from the sheds. They choose the work minibus and are collected from and delivered to their home.
5. Workers are given the choice to use their own transport or use the work minibus to get to the sheds. They choose the work minibus and are collected from and delivered to a meeting point.
6. Time workers are travelling between sheds on a work shift. (Does any of the travel methods make a difference?)

7. After they have cleared the last shed at the end of the shift, the time spent travelling to overnight accommodation (not home) to be nearer the shed for the next day. (Does any of the travel methods make a difference?)
8. After staying in overnight accommodation, the time spent travelling to the shed for the next day. (Does any of the travel methods make a difference?)

4. General Matters

Abolition of the Agricultural Wages Board – England – The ALP has supported its members in the transition from the Agricultural Wages regime in England to the national employment law framework. ALP members have sought advice as to how to manage this change correctly and compliantly but have not reported any difficulties in the transition.

It is to be noted that pay and terms for temporary agency workers are set by the client, not the labour provider. Some members have sought advice on amending Assignment Details to move away from the time and a half arrangement for overtime working that existed in the Agricultural Wages Order.

Abolition of the Seasonal Agricultural Workers Scheme - Minister of State for Immigration, Mark Harper, has decided that there will be no replacement for the Seasonal Agricultural Workers Scheme (SAWS) which closes at the end of 2013 when nationals from Bulgaria and Romania gain free access to the European labour market. SAWS currently permits 21,250 Bulgarian and Romanians to work in the UK but the Immigration Minister concluded that another non-EEA migration scheme to replace SAWS was not the answer and that there should be sufficient workers from within the UK and EU labour markets to meet the needs of the sector.

Defra has invited the Association of Labour Providers and other parties to discuss what the horticultural industry needs to help it adapt to a post-SAWS environment. The aims of the working group are to:

1) Enable all parties to share intelligence about labour flows;

2) Act as a forum to discuss specific barriers and solutions to the recruitment of seasonal labour, in the light of experience for the 2014 growing season and ongoing welfare reforms in the UK.

ALP labour provider members supply the majority of seasonal workers into the UK food and agricultural sectors. It is essential that every horticultural business which relies upon seasonal workers makes early plans to secure its labour supply in 2014 and beyond.

At this stage it is too early to determine the impact on pay and terms of the abolition of the Seasonal Agricultural Workers Scheme. The availability of seasonal workers against demand will be an influencing factor.

Pensions Auto-Enrolment – The ALP prepares Charge Rate Guidance for the industry (see Appendix 4). This is to highlight a “mark in the sand” rate below which can only be achieved either through worker exploitation or tax evasion or both.

Pension auto-enrolment commenced in October 2012 with staging dates depending on headcount. Initially a minimum of 1 per cent of qualifying earnings must come from the employer which rises over time to 3 per cent in 2018.

No account has been taken in the ALP Charge Rate Guidance figures for these employer pension contributions. However as a statutory charge factor they should be built in to a charging structure once they become due from the labour provider.

The ALP has had numerous contacts from members of clients being reluctant to accept a reasonable additional cost to cover this statutory payment. However it is fair to say that with awareness comes a greater acceptance of direct costs – but often not of the associated set up and administration costs incurred by the labour provider.

The on-cost to employers of meeting Pensions Auto-Enrolment costs should be a factor to be taken into consideration by the Commission.

Appendix 1

Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

September 2012

NATIONAL MINIMUM WAGE AND THE ACCOMMODATION OFFSET

RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS TO LOW PAY COMMISSION CONSULTATION

Contacts

Mark Boleat, Chairman, Tel: 07803 840498, E-mail: mark.boleat@btinternet.com
David Camp, Director, Tel: 07855 570007, E-mail: David@alliancehr.co.uk

Introduction

The ALP has for several years been arguing that the accommodation offset arrangements work to the disadvantage of workers by removing the option to have accommodation provided by an employer.

The current effect of the regulations is to make it very difficult, if not impossible, for most labour providers to provide accommodation for their workers. The effect of new interpretations and enforcement practices over the last few years has been that labour providers have generally ceased to provide accommodation. However, the workers still need accommodation. They now obtain these in the open market, in some cases through the informal economy. There is no evidence to suggest that workers are any more vulnerable to exploitation when services are provided by their employers, when at least they can be audited, rather than when they are provided by third parties.

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

The Offset

Under the accommodation offset arrangements, employers who provide accommodation to their workers can count up to a specified amount (£33.11 a week after October 1 2011) as payment towards the minimum wage. The arrangements are complex, difficult to understand and capable of a number of different interpretations. These were spelled out in the Association's 2005 submission. Such was the uncertainty that the DTI had a formal consultation on new guidance on the accommodation offset arrangements.

At the least, there is now no doubt in the minds of employers as to the current position, which is that employers that provide accommodation directly or indirectly to workers who are on the minimum wage cannot charge more than £33.11 a week.

Provision of Accommodation by Labour Providers - Market Issues

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

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

Migrant workers coming to Britain for the first time face a number of challenges, of which finding work and accommodation are key priorities. Prior to the current interpretation on accommodation many ALP members provided a service to their workers to help them settle in the UK which included, in some cases, providing accommodation as an option. Labour providers generally would prefer not to provide accommodation but recognise that in some cases it is an added attraction for workers.

Labour providers are in no position to provide a subsidy to those of their workers occupying accommodation. Their margin does not allow them to do so.

It is impossible to provide accommodation in all but a very few parts of the country within the accommodation offset maximum of £33.11 a week. A cursory examination of the to-let columns of the local newspaper is sufficient to show this. In its submission on the new DTI guidance in September 2006, the ALP quoted figures from the local newspaper in Stamford where the lowest rent quoted was £77 a week for a one-bedroomed flat. It also noted that NHS Trusts offer accommodation to hospital staff at between £70 and £85 a week.

The context is therefore clear; the effect of the accommodation offset arrangements is that labour providers and many other employers cannot legally provide accommodation to their own workers at or near minimum wage.

The only exceptions to this within the agriculture and food packing and processing industries are:

- growers providing accommodation where there is a direct benefit from the worker being on or close to site.
- growers or labour providers who have invested in purpose built hostel style accommodation with six to eight workers to a room.
- employers or labour providers who house multiple workers in caravans or mobile homes.

The Effect of the New Interpretation

Following the promulgation of new guidance by DTI leading up to April 2007, almost all members of the ALP that did provide accommodation ceased to do so. This was entirely predictable, as was explained by the ALP at the time. Labour providers sold what property they owned, or where they had leased it they chose not to renew when the opportunity arose. Some labour providers may well have decided that there was more money to be made in providing accommodation than in providing labour and became landlords instead.

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

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

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

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

The Effect on Workers

As a result of the new guidance, the position of workers has worsened. Indeed, it is difficult to envisage that any worker has obtained any benefit at all. If the belief was that as a result of the guidance those labour providers providing accommodation would cut their rents by £20 or £30 a week, then this was naive.

Previously, many workers had a choice of being able to rent a property from their landlords in addition to being able to rent on the open market or living with friends. They now have one less option, in that they cannot rent from their employers.

It is relevant to note that through separate agency worker legislation (The Gangmasters (Licensing Conditions) Rules 2009 and The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2007) workers supplied accommodation by the labour provider have an added protection. These pieces of legislation require that workers must be able to cancel or withdraw from any services provided at any time without incurring any detriment or penalty, subject to the worker giving a maximum of 10 working days' notice for services relating to providing accommodation. In other words the maximum notice period that can be built into a tenancy or service agreement between a labour provider and a worker is 10 working days. In the sector serviced by ALP members this is regulated by the Gangmasters Licensing Authority as part of licensing standard 7.1.

There has been a reported increase in exploitation of workers as a result, mainly by the fellow countrymen of the workers concerned and often going back to arrangements made in the home country. However, whilst an increase in this type of exploitation is a natural consequence of the new market opportunity that was created it is not suggested that this has changed significantly as a result of the new interpretation. However such exploitation is hard to detect and is one of the characteristics identified in a toolkit prepared by the ALP, "Uncovering Hidden Migrant Worker Maltreatment" which is attached to this response.

The Future

Labour providers can live with the present position whereby, in effect, they are banned from providing accommodation to their workers.

From the public policy perspective, however, they can see no justification for the current situation as it bears no relation to the marketplace in which they operate or to the interests and wishes of their workers.

The preferred position of the ALP is that the separate accommodation offset arrangements should be abolished except in the case of tied accommodation (for which they were originally intended).

The accommodation should be considered tied whether or not the accommodation is let by the employer or a third party if:

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

Where accommodation is provided by employers on an optional basis, workers should be free to agree voluntarily to deductions from their pay to meet the cost of accommodation.

Such an approach would:

- Be consistent with current government policy of lighter touch regulation.
- Open opportunities for employers to enter the rental accommodation sector and stimulate regeneration and growth.
- Provide workers with an additional option to source accommodation.
- Retain necessary protections for workers with regard to tied accommodation.
- Be auditable by HMRC, GLA and others.

Annexure

26 September 2005

ACCOMMODATION AND THE MINIMUM WAGE

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

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

Introduction

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

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

Executive summary

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

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

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

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

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

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

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

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

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

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

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

Regulation 30 provides that

> "The total of remuneration in a pay reference period shall be calculated by adding together" pay and a number of other items including –
> "(d) where the employer has provided the worker with living accommodation during the pay reference period, but in respect of that provision is neither entitled to make any deduction from the wages of the worker nor to receive any payment from him, the amount determined in accordance with regulation 36."

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

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

Regulation 35 has some other relevant information on deductions –

> ***"Payments not to be subtracted under regulation 31(1)(h)***
> **35.** The payments excepted from the operation of regulation 34(1)(c) are-
> (a) any payment in respect of conduct of the worker, or any other event, in respect of which he (whether together with any other workers or not) is contractually liable;
> (b) any payment on account of an advance under an agreement for a loan or an advance of wages;
> (c) any payment made to refund the employer in respect of an accidental overpayment of wages made by the employer to the worker;
> (d) any payment in respect of the purchase by the worker of any shares, other securities or share option, or of any share in a partnership;
> (e) any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment."

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

"Amount permitted to be taken into account where living accommodation is provided
36. - (1) The amount referred to in regulations 30(d) and 31(1)(i) is whichever is the lesser of the following-
(a) the amount resulting from multiplying the hours of work done in the pay reference period (determined in accordance with regulations 20 to 29) by 50p, and reducing that product by the proportion which the number of days (if any) in the pay reference period for which living accommodation was not provided bears to the total number of days in the pay reference period; or
(b) the amount resulting from multiplying the number of days in the pay reference period for which living accommodation was provided by £2.85.

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

Adjusted deductions and payments in respect of living accommodation
37. - (1) Where an employer is entitled to make deductions or receive payments in respect of the provision of living accommodation to a worker and in a pay reference period -
(a) a worker is absent from work for a day or more when, but for his absence, he would be expected to perform time work (for example because he is sick or taking a holiday),
(b) during that period of absence he is paid, for the hours of time work for which he is absent, an amount not less than the amount to which he would have been entitled under these Regulations, but for his absence,
(c) the hours of time work worked by the worker in the pay reference period are, by reason of his absence, less than they would be in a pay reference period containing the same number of working days in which the worker worked for the normal number of working hours (and for no additional hours), and
(d) the amount of the deduction the employer is entitled to make or payment he is entitled to receive in respect of the provision of living accommodation to the worker during the pay reference period does not increase by reason of the worker's absence from work, the provisions of paragraph (2) shall apply.

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

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

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

The differences in interpretation relate to two expressions –

- "where the employer has provided the worker with living accommodation" (30.d). This in turn comes from section 54(4) of the National Minimum Wages Act 1998: "In this Act "employer" in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed."

- “the amount of any deduction the employer is entitled to make, or payment he is entitled to receive from the worker, in respect of the provision of living accommodation” (31.i).

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

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

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

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

As a matter of law this response is clearly wrong.

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

> “85. A worker may want to buy goods (shoes, clothing, hi-fi) or services (for example, meals) from his own employer. If he is completely free to choose whether to buy from this employer or from somewhere else, the amount of the purchase price is not taken away from the amount that counts towards minimum wage pay. The worker cannot subsequently claim that by having bought the items from his employer, he has not been paid the minimum wage.
>
> 86. The important point, though, is that he must not be *required* to buy from the employer. If he is *required* to buy goods or services from the employer, the amount that he pays has to be taken away from the amount that counts towards the minimum wage. In effect this would be a payment in kind rather than payment in wages”.

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

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

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

These views have also been generally held by Defra. In a letter to Sir George Young MP, dated 14 April 2005, the Minister for Employment Relations said the offset rules “included cases where an employer has effectively provided accommodation – where for example he has arranged

accommodation of behalf of his workforce, made deductions for the costs through his payroll and received commission from the landlord." He went on to say: "I am aware that Defra, who are responsible for enforcing the agricultural minimum wage, has adopted a slightly different approach. As a result of slight differences in the agricultural and national minimum wage legislative frameworks, Defra took the view that where accommodation is provided by the employer and the worker was free to choose whether to occupy the accommodation offered, the accommodation offset did not apply. Defra have now revised their approach and accept that their interpretation could lead to a worker being paid less than the national minimum wage. Defra will be revising their future approach to enforcement accordingly."

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

> **"Q 6Can an employee ask an employer to make deductions without affecting national minimum wage pay?**
> A 6 Yes. Where a deduction is requested by the worker that is for the worker's benefit, national minimum wage pay is not affected. Such deductions include employee pension contributions or rent collected and passed to a third party. An employer must derive no benefit from such deductions.
>
> Q 19. What is the position in respect of living accommodation provided to an agricultural worker by a third party?
>
> A 19. Neither the national or agricultural minimum wage legislation allows accommodation provided by a third party to count as part payment of a worker's minimum wage entitlement. However, a worker can authorise the deduction from pay of rent paid to a third party. There is no limit on the value of rent that can be deducted in this way. For this transaction to remain outside the control of the minimum wage legislation the employer must derive no benefit from the deduction made."

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

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

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

> "On the issue of choice, our legal advice is clear that if an employer provides accommodation to a worker, then the amount that may be taken into account for NMW purposes is limited to the amount specified in the legislation, currently a maximum of £26.25 a week. It makes no difference if the worker can choose whether or not to take the accommodation provided by the employer.
>
> Where a third party provides accommodation to the worker the amount that may be deducted for NMW purposes will depend on the facts of each individual case. At one extreme there would be the case of workers left to find their own accommodation on the open market. In such cases the accommodation offset restrictions would likely not be in point. Towards the other end of the spectrum would be cases where the employer arranges the accommodation, makes deductions through the payroll on behalf of a third party and charges commission for arranging the accommodation. Ultimately it would be for the Employment Tribunal to take a view on the application of the law to the particular facts

> of a case. But our firm view (informed by legal advice and decisions in Employment Tribunals) is that the accommodation offset restriction would apply to all cases toward this end of the spectrum."

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

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

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

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

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

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

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

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

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

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

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

The accommodation offset – theoretical issues

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

The second key point is that the current interpretation seems to assume that either that all workers on the minimum wage are housed by their employers or that if workers are not able to be housed by their employers then they can find accommodation in the market for a rent of under £26.25 a week. As a subsequent section will demonstrate, neither of these applies. It is unlikely that many, if any, employers provide accommodation at under £26.25 a week unless it is a tied accommodation situation. There is of course nothing in the general law to require accommodation providers to charge rents such that pay less rent does not fall below the minimum wage. There is a housing benefits system but public policy has not attempted to link this to the minimum wage and the system is not such that those paying for private rented accommodation achieve a sufficient rebate such that in practice they are not paying more than £26.25 a week.

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

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

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

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

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

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

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

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

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

HMRC has suggested that labour providers can deal with the issue by paying their workers more or charging them less rent. This is not feasible. A report prepared for Defra by Precision Prospecting (published in August 2005 on the Defra website) explains the economics of labour provider business. The report includes a survey of migrant workers which estimated that 64% were paid the minimum wage of £4.85 an hour. It is generally accepted that to meet all legal requirements (national insurance, holiday pay, sick pay and the cost of transport) a labour provider

needs to charge £6.30 an hour. To cover management costs and to make a reasonable profit requires between £6.70 and £6.90 an hour. The fact is that labour providers struggle to get these sorts of rates. There are enough labour providers who evade tax that labour users can often get away with paying under £6.30 an hour. If it assumed that a typical market rent is £50 a week and the labour provider is only able to charge £26.25 a week then in effect the labour provider has to meet £0.60 an hour. This is simply not doable in the marketplace. If labour providers are restricted to charging £26.25 a week then the effect will simply be that they will cease to provide accommodation (or provide very poor or overcrowded accommodation). The workers will not then enjoy a rent of £26.25 a week because no one else will provide such accommodation; rather they will be paying much the same as the labour provider charges them – but with the hassle of having to arrange their own accommodation.

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

The operation of the offset in practice

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

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

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

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

> "Accommodation is provided for all overseas workers who do not have the means/contacts to accommodate themselves.
>
> For a candidate to organise their own accommodation through an agent/landlord the following is required:-
>
> - Deposit
> - Bank Account
> - Job Offer
> - Financial Resources
> - Employer references

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

Rents are shown on payslips and deducted from net pay.

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

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

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

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

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

A labour provider based on the south coast commented –

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

Why we provide these services:

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

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

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

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

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

The majority of workers would not be able to set themselves up with work and accommodation to allow them to stay for their work visa period/on arrival from a foreign country. They would be open to abuse from bad employers/landlords. Placements who join our programme and choose to move on often contact us to come back when they are

disappointed with work/accommodation they find for themselves. We have a waiting list to join the programme. We provide an accurate description of the programme to ensure they know what to expect, not 5 star but comfortable! "

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

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

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

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

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

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

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

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

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

> "In July I received a phone call from a chap in England asking if I needed any workers as he had 4 Polish students looking for work. I replied that I had plenty of work but sadly no accommodation. Two days later he called back to say they would find their own accommodation and I told them to come. They duly arrived and I sent them to a job, but did not see them again for a couple of days when I met with them to get their details. When I asked them where they were staying they told me they were sleeping in their car (a fact made more incredible when you consider it was a Ford fiesta and they were well-built lads.) I then discovered an old tent we had so I offered this to them and they set it up on a local camp site for which they were charged £224 per week! Now for me to have arranged for them to rent a 2 bedroom flat locally would have cost approximately £160.00 per week inclusive of council Tax - £40 each or £13.80 above the maximum I would be allowed to charge. So staying in a tent costs them £16 a week more than it would have to stayed in a good flat which complied with HMO regulations. This summer Edinburgh has been totally saturated with young people from mostly Poland. They have no jobs to come to and end up staying in over crowded flats for which they are being totally ripped off. I know of one instance in Edinburgh where 20 people are living in a 4 bedroom flat which only has 1 WC and are charged £45 per head. We own a 5 bedroomed flat in central Edinburgh which is licensed for 9 people resulting in a total rental income of £943 per week. There is an identical flat upstairs rented out to 5 students for £1,700 per month. This means that I have an opportunity cost of over £7,500 per month. All of the above illustrates the fact that far from protecting workers the current rules are often driving them into the hands unscrupulous landlords who are only too willing to exploit them."

The overall effect

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

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

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

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

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

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

This case led the ALP to advise its members that they could avoid such an absurd result by charging a nominally much higher rent but with provisions that the actual rent paid in each week would not be more than the amount allowed under the National Minimum Wage Regulations and that the average rent over say a 13 week period should be no more than the figure the labour provider began with. The worker would therefore be paying a variable rent according to his earnings. Instead of being expressed as "a rent of £50 a week" it would be expressed along the following lines: "The rent payable shall be £100 a week, except that in any week where this would result in less than the national minimum wage being paid the rent shall be reduced to the level sufficient to ensure that the national minimum wage is paid. At the end of each 13 week period any rent paid in excess of £650 shall be used to meet the rent payable in the following quarter." This is a complex and unnecessary device but was needed to deal with what seemed like an over zealous interpretation of the law.

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

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

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

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

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

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

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

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

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

Appendix 2

Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

September 2012

NATIONAL MINIMUM WAGE AND TRANSPORT TO WORK COSTS

RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS TO LOW PAY COMMISSION CONSULTATION

Contacts

Mark Boleat, Chairman, Tel: 07803 377343, E-mail: mark.boleat@btinternet.com
David Camp, Director, Tel: 07855 570007, E-mail: David@alliancehr.co.uk

Introduction

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

This paper argues that the HMRC interpretation is at best questionable, and that it is in the interest of workers, business and good regulatory policy for BIS and HMRC to reconsider this interpretation.

History

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

Most labour providers have no choice but to charge their workers for transport as their margins do not allow them to absorb what would otherwise be a considerable cost. It is a cost competitive market and labour users do not offer charge rates that allow for this – to do so would add typically 80p-£1.10 on to hourly charge rates. Analysis of how these costs are built up is provided in ALP Brief 104 contained at Appendix A.

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

The normal practice was for workers to agree in writing prior to using the service to a deduction for transport costs from their wages. This agreement made clear that the

service was optional. This is administratively convenient for the worker and for the labour provider. It is auditable as the deduction for transport must, by law, appear on the payslip.

Labour providers had every reason to believe that this was legitimate within the Regulations governing the National Minimum Wage.

- Labour providers that deducted transport costs from pay had HMRC inspections prior to 2007 without the issue being raised; the ALP is not aware of any labour provider that faced enforcement action on this point prior to 2007.

- A compliance inspection report for a labour provider dated October 2003 in which the HMRC Compliance Officer stated under the heading Deduction for Transport. "The deduction appears to count towards National Minimum Wage as it is optional whether the worker uses his own method of transport or the buses provided by the Company. However if at any point this deduction becomes compulsory or workers are required to use your transport, then this deduction will not count towards national minimum wage."

Until 2007 the interpretation as it was applied by HMRC Compliance Inspectors was that a payment from wages agreed by the worker for an optional service that was not a requirement of the job did not mean that the amount had to be deducted from wages for purposes of calculating whether the national minimum wage had been paid.

The Current Position

There was a clear change in enforcement activity since 2007 on an issue where there is legitimate doubt as to the meaning of the provisions.

A letter received by an ALP member from a National Minimum Wage Compliance Officer included the following: "My understanding of travel and accident cover deductions changed when I received a memoranda dated 12 March 2007. I have been advised that due to confidentiality I cannot provide you with internal memoranda."

Since 2007 HMRC inspectors have decided that all payments from wages to meet transport costs that take the worker below the minimum wage are unlawful.

They have required labour providers to make substantial payments to workers of "arrears". In some cases the amounts required to be repaid were so great as to threaten the continued viability of the labour providers. However in all cases of which the ALP is aware, substantially reduced settlements were agreed or the case was dropped by the HMRC.

Why the Position is Unsatisfactory

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

1. The interpretation is open to question.

Current Business Link guidance on this matter states:

"Deductions you make which are for your own use or benefit - for example a deduction for meals or transport you are providing - will reduce national minimum wage pay. It does not matter whether the worker can choose to buy the goods or services.

You do not have to make a profit from such deductions for them to be for your own use and benefit. For example, if you provide transport at a loss any deductions you make from wages for providing it help to reduce your loss. The amount you gain by making the deductions is for your own use and benefit."

While HMRC's current interpretation is understood, it is not accepted. The ALP does not accept that a payment to cover transport costs to an employer or to a service provider retained by an employer counts as a "deduction made by the employer for his own use and benefit".

Further examination of legal arguments is provided at Appendix B.

2. The position is perverse.

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

It is for example quite legitimate for a labour provider to recover transport costs through a variable direct debit from the worker's bank account, or by making the worker an advance of pay and then recovering it from wages, or by seeking cash payments in advance for transport costs.

It makes no difference at all to a worker whether he pays for transport costs from his wages or by taking it from his bank account. Workers prefer to pay from their wages than to go to the inconvenience of paying by cash.

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

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

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

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

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

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

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

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

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

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

Further examples of the impact on labour providers is provided at Appendix D.

6. Differential enforcement.

As HMRC is provided with information by the GLA there is disproportionate enforcement against labour providers. It is worth here quoting the House of Commons Home Affairs Select Committee Report on human trafficking –

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

When the issue came to light, the GLA made it clear that it did not regard this issue as exploitation of workers and would make no attempt to regard deductions from pay as a non-compliance with its licensing standards, which require the national minimum wage to be paid taking account of permissible deductions. The minutes of the GLA's Labour Provider Group Meeting on 27 June 2007 include the following on this point: "DD/NC [GLA officers] confirmed that GLA will not currently enforce LS2.8 in relation to transport deductions." The GLA, as it is obliged to, has since April 2009 adopted the HMRC position on this matter.

Proposed solutions

The ALP's proposal is for the substantive issue to be revisited by BIS and HMRC. The ALP believes that the Regulations are open to interpretation and should be interpreted as they were prior to 2007.

Payment for optional transport services with prior written consent, where the payment is made as an authorised payment from wages should not be interpreted as reducing pay for NMW purposes.I

Appendix A

Camberley House
1 Portesbery Road
Camberley GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

May 2012

Member Brief No 104
The Cost of Transporting Workers

Introduction

This Brief updates and replaces ALP Brief 73 and provides indicative examples of the cost of providing transport to work and guidance on calculating costs.

The cost of transporting workers has risen significantly in recent years due to fuel prices and regulations such as licensing, tachographs and drivers' hours rules.

Transport to work is most often an optional service offered by labour providers, providing a cost effective and convenient solution for workers. Workers are of course free to make their own arrangements for travel to work.

Transport Cost Breakdown Example

LABOUR PROVIDER - OVERHEAD AND TRANSPORT COST ANALYSIS - MAY 2012

N.B. These are example costings. To obtain an accurate cost analysis each labour provider will need to calculate their own actual cost of providing transport in each individual case.

Example 1: 9 seater mini bus (8 passengers); driver works with team; 1 trip per day:

Description	Cost	Per	Per Annum
1. Annual Lease (9 seater)	£ 300	month	£ 3,600
2. Insurance & Tax		year	£ 2,250
3. Maintenance		year	£ 3,500
4. Fuel (average 80 mile round trip; 25 miles/gallon; £1.47 litre)			£ 5,990
6. Driver's wage (2 hours driving day)	£ 17	day	£ 4,335
7. Total			£ 19,675
8. Average 7 passengers + driver; 5.5 days per week; 51 weeks; single shift 8 hours	17,952	hours	
9. Cost to labour provider per day per worker for transport			£ 8.77
10. Cost per hour per worker for transport where provided free of charge			£ 1.10
11. Cost per hour per worker for transport where each worker is charged £6 per day			£ 0.35

Example 2: 17 seater mini bus; dedicated PCV drivers; 2 trips per day:

Description	Cost	Per	Per Annum
1. Annual Lease (17 seater)	£ 380	month	£ 4,560
2. Insurance & Tax		year	£ 2,750
3. Maintenance		year	£ 5,000
4. Fuel (average 2 x 80 mile trips; 20 miles/gallon; £1.47 litre)			£ 14,976
5. PSV/O/PCV Licences and Transport management			£ 2,500
6. Driver's wage (8 hours day - driver does not work with team)	£ 84	day	£ 25,410
7. Total			£ 55,196
8. Average 13 passengers; 5.5 days per week; 51 weeks; two shifts 8 hours	58,344	hours	
9. Cost per day (exc driver) per worker for transport			£ 7.57
10. Cost per hour per worker for transport where provided free of charge			£ 0.95
11. Cost per hour per worker for transport where each worker is charged £6 per day			£ 0.20

Definitions and Explanations

N.B. The numbering below refers to the numbers in the rates tables on the previous page:

1. The Annual Lease cost will vary in each individual case dependent on the price and terms agreed for the vehicle in question. Where vehicles are owned this cost will need to be replaced with depreciation cost.

2. Insurance and Tax will vary with the terms agreed in each individual case.

3. Maintenance cost will vary dependent on cost of garage services, damage sustained, frequency of servicing, age and type of vehicle and other variables.

4. Fuel cost will vary dependent on fuel efficiency of vehicles, number of trips per day, cost of diesel and length of journeys.

5. This is an estimated figure for the cost per vehicle of obtaining the various licences required including: Operator’s Licence; Vehicle PSV Licences; Driver PSV Licences and CPC training. Also included is a cost for the management time in obtaining these licences and route planning and managing driver’s hours and tachographs. Each labour provider will need to calculate their own costs for these services.

6. Driver’s wages will depend on whether the driver works as part of the team or is a dedicated driver, whether a PCV licence is required and the actual rate paid.

7. This is the total annual cost to supply and maintain that vehicle and driver fully licensed.

8. This is the number of chargeable hours across which you can spread the cost of the vehicle. The more utilised the vehicle is, the lower the cost. It goes without saying that a half full bus will cost twice as much per worker than a full bus.

   Vehicles not operating at full passenger capacity impacts hugely on the cost.

9. This is the cost per day per worker transported.

10. This is the cost per hour per worker for transport where the transport is provided free of charge.

11. This is the cost per hour per worker for transport where each worker is charged £6 per day for transport.

Appendix B

Optional use of Employer provided Transport

Authorised Deduction from Pay and the Minimum Wage

1. A labour provider operates a voluntary system in regard to the provision of a transport facility for workers, should they choose to use it.

    a. The employer makes no profit from the transport service it provides; and

    b. The workers are wholly free to choose to use or not; and

    c. If the workers do choose to use this service, they would pay, for illustrative purposes, £5 a day.

    d. The charge, with the prior signed authority of the workers, is deducted from workers' pay in the week following that in which the transport is used.

2. Since 2007 HMRC has been of the view that the above system did not fall within regulation 35(e) of the National Minimum Wage Regulations 1999 (the Regulations) and, as a result, payment deducted in the following week did stand to be deducted from the calculation of the NMW. However, HMRC does accept that, if the workers were paid their remuneration and then charged in cash, or by way of direct debit, for the (optional) transport charge, the sums would not stand to be deducted for the purposes of calculating the NMW.

3. It is asserted that HMRC's current position is an incorrect interpretation of the National Minimum Wage Regulations 1999 (the Regulations).

4. The relevant provisions the Regulations are 31(1)(h), 34(1)(c) and 35(e):

Reductions from payments to be taken into account
31. - (1) The total of reductions required to be subtracted from the total of remuneration shall be calculated by adding together- (h) any payment made by or due from the worker in the pay reference period falling within regulation 34;

Payments made by or due from a worker to be subtracted under regulation 31(1)(h)
34. - (1) The payments made by or due from the worker required to be subtracted from the total of remuneration by regulation 31(1)(h) are- c) any other payment due from the worker to the employer in the pay reference period that the employer retains or is entitled to retain for his own use and benefit except for a payment required to be left out of account by regulation 35.

Payments not to be subtracted under regulation 31(1)(h)
35. The payments excepted from the operation of regulation 34(1)(c) are- (e) any payment in respect of the purchase by the worker of any goods or services from the employer, unless the purchase is made in order to comply with a requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment.

5. It is asserted that the payment made by a worker for optional transport to work services by his employer is in fact that, a payment. It is a payment by the worker for a service. The fact that the worker requests that this payment be taken from his wage does not per se convert this payment to a deduction. What is a "payment" and what is a "deduction" is not defined in the Regulations.

6. It is asserted that the system described at paragraph 1 above does not result in any basis for deducting the sum of £5 per day from remuneration for the purposes of the NMW. The reasons are as follows:

   a. Regulation 34(1)(c) provides that any payment due from the worker to the employer during the pay reference period which the employer is entitled to retain for its own use and benefit stands to be deducted from NMW. However, the terms of regulation 34(1)(c) make clear that its provisions do not apply to payments referred to within regulation 35. Regulation 35(e) exempts from regulation 34(1)(c) any payment in respect of the optional purchase by the worker of any goods or services from the employer.

   b. Regulation 34(1)(c) exempts from NMW "payments due" from the worker to the employer for the employer's use and benefit. The provisions of regulation 35(e) should be understood to refer to "payments due" from workers and shall be read in conjunction with regulation 34(1)(c)

7. It follows from the above that the crucial question is whether the relevant sum in connection with travel is a sum due in the week of travel. On balance, the better view is that it is, and the charge for the travel becomes "due" from when it was first incurred. The fact is that optional payments from employees to their employers for transport are indeed to be included within the NMW and do not stand to be deducted from calculation the NMW.

8. Additionally, HMRC accepts that, if the workers were paid their remuneration and then charged in cash, or by way of direct debit, for the (optional) transport charge, the sums would not stand to be deducted for the purposes of calculating the NMW. HMRC are here interpreting the term "any payment" in regulation 35(e) as excluding the worker being able to agree to pay for the transport through a prior signed authority to a deduction from pay in the following pay reference period (a week in most cases) to that in which the transport is used. This (in our view) is a perverse interpretation. The method of payment is not the crucial factor; it is that the goods or service are optional i.e. they are not "a requirement in the worker's contract or any other requirement imposed on him by the employer in connection with his employment." The term "any payment" should rightfully include a prior signed authority to a deduction from pay.

9. Hence, on balance, a Court or Tribunal would likely accept that those sums do count towards the NMW, even if deducted from the pay of the worker in the following week.

Appendix C

Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 7JQ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

August 2012

Member Brief No 106

Charging for Transport to Work

Introduction

There are many labour providers for whom transporting workers to work is an essential and integral part of their business.

This Brief updates and replaces Brief 63 and provides guidance to enable labour providers to avoid breaching national minimum wage (NMW) rules and to implement systems to collect transport charges that do not reduce pay below NMW levels.

Under current HMRC implementation of NMW legislation, deductions from wages for optional transport to work reduce national minimum wage pay.

The Gangmasters Licensing Authority has, since April 2009, regarded transport deductions that take pay below NMW as a critical non-compliance potentially leading to licence revocation.

The alternatives to deducting from wages are less than perfect and add a further burden onto labour providers and work contrary to the interests of workers.

The Association is seeking to persuade BIS and HMRC to amend the interpretation on this matter. The arguments are summarised in the ALP position paper "National Minimum Wage and Transport to Work Costs".

HM Revenue & Customs (HMRC) Advice

With regard to deductions from wages for the optional provision of transport, HMRC advise that choice is not a factor when considering how deductions affect national minimum wage pay. The NMW deduction legislation applies. So where the employer is providing transport to work and a worker is earning exactly NMW rates, any deduction that is made by the employer either:

a. In respect of the worker's expenditure in connection with their employment or
b. for the employer's use and benefit

will reduce the worker's pay below NMW.

However, where the worker is making a payment to purchase goods or services from their employer after they have received their wages, the amount would not reduce NMW pay provided the worker was making the payment by free choice and the payment was not made in order to comply with a requirement in the worker's contract or imposed on the worker in connection with his employment.

NMW arrears will be due to all workers in the past 6 years for whom a deduction for transport has taken pay below the NMW. HMRC state that if employers have made

deductions of this nature which have taken workers' pay below NMW, they should repay the workers their arrears immediately.

Current Business Link guidance on this matter states:

"Deductions you make which are for your own use or benefit - for example a deduction for meals or transport you are providing - will reduce national minimum wage pay. It does not matter whether the worker can choose to buy the goods or services.

You do not have to make a profit from such deductions for them to be for your own use and benefit. For example, if you provide transport at a loss any deductions you make from wages for providing it help to reduce your loss. The amount you gain by making the deductions is for your own use and benefit."

Where an employer has not paid the NMW, HMRC will require NMW to be paid immediately along with any arrears. Arrears on a notice of underpayment are limited to pay reference periods ending within the 6-year period prior to the service date of the notice of underpayment.

Alternative options for charging for transport that do not reduce NMW pay

There are a number of alternative methods that a worker can choose to pay for home to work transport that do not reduce pay for NMW purposes. In all the options shown in this section:

- The expenditure must not be made in connection with the employment i.e. home to work transport is not in connection with the employment but transport at work e.g. between jobs is in connection with employment, and
- The purchase of the service must not be a contractual requirement nor a requirement imposed by the employer in connection with the employment, and
- The service must be provided by the employer, and
- The use of the transport to work service is optional for the worker, and
- Before the transport service is used by the worker, the employer provides the worker with comprehensive details explaining the service and the cost. This specifies in writing that the transport service is optional (and in reality this is so) and the option to use the transport is the worker's free choice, and
- All arrangements for payment should be clear and comprehensible, and
- The employer keeps accurate records of when the worker uses the transport and charges correctly in accordance with this, and
- The worker must make a payment to purchase the service.

The following methods have been confirmed with HMRC as not reducing pay for NMW purposes:

Option 1 - The worker pays by cash, cheque in advance or arrears to cover employer provided transport charges. Alternatively a payment from the worker's bank account such as via a direct debit can be made.

Option 2 - The worker pays their bus fare in cash to the driver for each journey.

Option 3 - The worker pays for bus tickets or tokens in advance.

Option 4 - The worker chooses to request and is given a monetary advance of pay which he can use as he wishes. The worker freely chooses to use the transport service and makes a payment to the employer to cover transport charges. The employer later deducts the appropriate advance of pay from wages to cover the transport charges. If the employer has provided an advance of wages and subsequently deducts a sum for

repayment of all, or part of the advance of wages, the deduction does not reduce NMW pay provided:

- the worker's expenditure is not expenditure in connection with his employment (e.g. it is genuine home to work transport) nor is it made as a result of a contractual or other requirement imposed upon the worker;
- there is no obligation placed on the worker to request a cash advance from the employer;
- the cash advance must be paid by the employer to the worker prior to the worker choosing to use and pay for the service;
- the worker can freely do as he wishes with the cash advance and does not have to use the money to pay for the transport;
- the employer reflects the advance and the deduction for repayment correctly in his payroll records.

HMRC advise that where this type of arrangement is used, it is likely that NMW Compliance Teams will want to look carefully at the circumstances to determine the effect on NMW pay.

N.B. To be absolutely certain that any solution implemented is NMW compliant, labour providers may wish to seek confirmation from an HMRC Compliance Officer known to them or by email to the National Minimum Wage query online service

Use of 3rd Party Transport Companies

In a situation where an employer contracts with a 3rd party bus company to provide a transport to work service and the employer deducts a transport charge from the worker this will always reduce the worker's pay for NMW purposes. This is because it is regarded as a deduction for the employer's own use and benefit - even if the employer is making a loss by providing the service.

VAT rating on Workers' fares.

VAT zero rating is allowed for public passenger transport in any vehicle designed or adapted to carry not less than 10 passengers. For vehicles designed or adapted to carry less than 10 passengers VAT is at standard rate. This means that if you charge workers for transport to work in a vehicle designed or adapted to carry less than 10 passengers then you must pay VAT on the charge. The rules on VAT for Passenger Transport are contained in Public Notice 744.

Contact us for more information

Labour providers who wish to explore alternative methods of collecting charges for transport that do not reduce pay for NMW purposes are invited to contact the Association for further discussion.

Labour providers who are subject to a forthcoming HMRC compliance inspection or have received claims for NMW arrears following an inspection should contact the Association for advice and guidance. It may be appropriate to refer you for specific legal or taxation advice to our trusted experts.

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.

Appendix D

Submission by: Lionel Sheffield, Director, Rapid Recruitment Ltd, Wisbech, Cambs

RE. -DEDUCTIONS FOR TRANSPORT FROM WORKERS PAY.

I am the director of an employment agency, that supplies workers to a number of factories in the Cambridgeshire / Norfolk area. Like many agencies, we have traditionally supplied transport by minibus for many of our staff. Work is often in rural areas and the majority of workers do not have their own cars.

The 5 minibuses that we have are registered Public Service Vehicles and are driven by drivers with PSV licenses. Workers get to work safely and securely. We charge between £3.50 and £5.50 for a 2 way journey, depending on where they are going. The distances travelled range from 10 to 40 miles. Running the transport operation of the business costs us £5k - £10k p.a.

However, there is a problem. The HMRC have ruled that employers cannot deduct the workers' transport charges from their wages. The HMRC argue that this is because deductions would take workers' pay below the national minimum wage. Instead, we now have to collect the money as cash from the workers and this has become increasingly burdensome. Large amounts of our office staff's time and resources were spent organising and collecting transport charges. It is an example of red tape bureaucracy at its worst.

It is also tiresome for our temps. to have to trek to our offices every week to pay. Inevitably, some transport charges are never paid.

We would rather not provide transport. But, many of our clients are in rural locations and 95% of staff and candidates do not have their own transport. If we were to have stopped providing transport, some staff would probably find a way of getting to work, but probably in old cars, which will be expensive to run, some may be uninsured and driven often by people inexperienced of driving in this country. Whereas with us, they get to work in an insured minibus, driven by an experienced PSV driver, at a cost much cheaper than running their own car; also, there are emissions from only one vehicle as opposed to the 5 or 6 vehicles used to get 15 people to work. Our transport is voluntary and the deductions from wages are clear and transparent for all to see.

As a business, the burden of having to monitor the collection of transport charges, paid by cash, is too great. We don't want to stop providing transport, but we may have to.
We wouldn't stop though if we were allowed to simply collect the wages from deducting the charge from the staff's wages. Travelling in our minibuses is voluntary and by deducting from wages, payment is transparent and clearly shown on workers' payslips.

As they stand, the regulations are bureaucratic, illogical and have unintended consequences. The rule is there because the HMRC argue that deductions take workers' wages below the NMW. Yet, they still have to pay for their transport, but with the current rules, they can only do so once they have received their wages. If they travel in their own car, that costs them money even before they have received their wages. It is nonsensical. They would prefer to have the charge deducted from the wages; it is clearer and more simple. For the business, it is much less bureaucratic and efficient.

Submission by: Kevin McCormick FIRP, KHS Personnel Ltd Bridge Recruitment Ltd, City House Stanford St Nottingham NG1 7BQ

RE. -DEDUCTIONS FOR TRANSPORT FROM WORKERS PAY.

Report on the Ramifications of the HMRC and NMW Restrictions on the Deductions of Travel from the Wages of Temporary Staff

Along with many agencies, KHS provided various forms of transport sometimes based on in-house travel arrangements with mini buses and latterly PSV vehicles, for a nominal and always lesser charge than would have been possible for temporary staff using public transport. Records were maintained and deductions for travel were made from wages at point of payment, thus ensuring that returns due to KHS (although these never covered the costs) were met in full and that there was no inconvenience to temporary members of staff.

Following the HMRC and NMW guidelines, we struggled to find a convenient way of getting staff to contracts and out of consideration for our clients wishes and our own desire to manage our business effectively, we decided to continue hiring contractors to transport staff, so that they provided the PCV, PSV licensing, but this necessitated devising a system for payment.

We know that there are a number of systems utilised by labour providers to effect this, including tickets, notional loans etc. but decided that the only effective way was to continue monitoring the number of trips and to charge the travellers weekly in arrears, in cash. I am sure you can imagine the problems that this creates.

When introducing this process, we had to accept a highly more labour intensive operation and the costs inherent in that. What we failed to appreciate, were the losses through unpaid travel. The methodology that we have adopted is as follows:

1. **Travel lists are made up, people are told to report to bus collection points, checked on the bus, taken to the client, checked off at the client site, so there can be no doubt as to who has travelled.**
2. **From this process we get a list of who has travelled when and how many days travel they owe in each week.**
3. **Payment is made to the temps by BACS, weekly in arrears, as has always been done. Deductions are not made from these payments, at this stage.**
4. **Whilst it would be better for temps to call in at the office to make payment, due to the work schedule, a great many find that difficult and we would end up dealing with travel expenses throughout every day of every week. Therefore, on Friday of each week, we have to attend various sites and rely on the integrity of the temps to attend, so that they can pay whatever is owing. I should say that the majority of temps are very good in meeting their obligations.**
5. **There are many reasons why payment isn’t made on time, ranging from having had no time to draw out cash, to having had to buy an extra flagon of beer, tax a car, or pay rent.**
6. **In view of the above, we give extended time, but after two weeks failure to pay, we tend to make payment by way of cash, which is available from the office, or taken to site and at the point of receipt we then ask if they will please make payment for their travel.**
7. **The problem arises when somebody works one week and doesn’t return, or works two or three weeks with repeated excuses and doesn’t return, having already received wages paid by BACS into their account. There is no way we can reclaim this money at that stage of the proceedings and frequently we can end up being owed travel expenses for 3,4 or 5 weeks.**

That is the nuts and bolts of the situation. What we failed to appreciate when embarking on this, out of necessity, certainly not choice, was the almost universal objections that were raised by the temps we employ. They could not understand why we weren’t deducting travel from their wages as we had done, as it made so much more sense. All temps are aware that they have a choice of using our transport or not. We prefer them to use it, because it gives us greater control, but we cannot enforce it. Fortunately our client appreciates that.

That said, temps also appreciate that by utilising travel provided by us, they are saving money on their potential travel costs if done individually and that generally, buses are there to take them to work and to collect them, shortly after the end of the shift, without having to travel to a bus stop “out in the middle of nowhere and wait for rural services”.

Nor did we appreciate the hidden cost. Whilst deductions made from travelling temporary staff have never covered the costs of travel, it used to be easier in the days when we ran our own fleet of mini buses for there was a below the line cost, which also created a benefit and enabled us to recoup some cash upon selling older vehicles. Unfortunately, having to use contractors means that there is no below the line cost, it is all above the line, as indeed are the losses which therefore have a marked impact upon profitability.

In conclusion, I would say that in my opinion, HMRC and the NMW have failed to put a realistic evaluation on the travel implications of temporary staff and have simply put in a restriction, which I believe is meant to assist the GLA in weeding out those disreputable Gangmasters and Labour Providers, who have historically overcharged workers for anything and everything that they could provide, by way of PPE, accommodation and transport. This has been done to the detriment of the industry as a whole and all those registered GLA "stakeholders", who are trying to run their businesses effectively.

Everybody knows that however little you earn, there is a cost in going to work, be it in shoe leather, bus fares or petrol. Nobody gets a free ride. Therefore any company paying the minimum wage, should if what has been imposed upon agencies is logical, be making a contribution or covering the travel costs of their employees. This is obviously not practical, but this is actually what is being imposed upon honest, labour providers.

Appendix 3

CORRESPONDENCE WITH BIS

From: Cottam Rob (Labour Market) [mailto:Rob.Cottam@bis.gsi.gov.uk]
Sent: 01 August 2013 14:52
To: David Camp
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

David

thanks for your e-mail - sorry for the delay in responding. Both Shelley (Gurpreet) and I got your first e-mail of the 23rd and one of us will get back to you on this.

Best wishes

Rob

From: David Camp [mailto:David@alliancehr.co.uk]
Sent: 23 July 2013 14:03
To: Cottam Rob (Labour Market)
Subject: FW: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

Rob
Please can you advise who it is best to address my issue to.
Thanks
David
From: Chopra Natasha (Labour Market) [mailto:Natasha.Chopra@bis.gsi.gov.uk]
Sent: 23 July 2013 13:53
To: David Camp
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]
Hi David

Just a quick email to let you know that I've just left the NMW policy team and moved to another policy area within BIS. There is no team leader of the NMW policy team at the moment, so you may wish to address further questions to Bill Wells, who is now the deputy director with responsibility for NMW policy (rather than Gaynor). Shelley and Rob are still in the team and I'm sure one of them will be in touch.

Best wishes

Natasha

Natasha Chopra | BIS/DfE Apprenticeships Unit | Vocational Education Directorate | Department for Business, Innovation & Skills | Natasha.Chopra@bis.gsi.gov.uk | 2ORCHARD1, 1 Victoria Street, London SW1H 0ET | 020 7215 1106 | www.bis.gov.uk

---

From: David Camp [mailto:David@alliancehr.co.uk]
Sent: 23 July 2013 13:28
To: Chana Gurpreet (Labour Market)
Cc: Ithell Gaynor (Labour Market); Cottam Rob (Labour Market); Jackson Debbi (Labour Market); Chopra Natasha (Labour Market); dave.baker@hmrc.gsi.gov.uk
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

Hi Chana
Thanks for this which has been my understanding on BIS/HMRC interpretation on the matter.
I have a query with regard to the following:
2) How purchase made
If a free choice purchase ***is paid for via a payment from the worker*** *to the employer, the payment will not reduce national minimum wage pay.*
However, if the same purchase is paid for via a deduction made by the employer, then the deduction will reduce national minimum wage pay, even if the worker freely chooses to make the purchase and/or signs their agreement to the purchase.
With regard to a free choice purchase:

1. I cannot see a legislative definition of the difference between a payment and a deduction – please can you advise where this is to be found.
2. Where workers freely choose to pay for a purchase and ask for the payment to be taken from their wages does this reduce national minimum wage pay?

Thanks you for your assistance on this.
Regards
David

David Camp ¦ Association of Labour Providers
T 01276 509306 ¦ F 01276 761076 ¦ M 07855 570007 ¦ E info@labourproviders.org.uk ¦ W www.labourproviders.org.uk
Camberley House, 1 Portesbery Road, Camberley, Surrey GU15 3SZ

From: Chana Gurpreet (Labour Market) [mailto:Gurpreet.Chana@bis.gsi.gov.uk]
Sent: 27 March 2013 15:46
To: David Camp
Cc: Ithell Gaynor (Labour Market); Cottam Rob (Labour Market); Jackson Debbi (Labour Market); Chopra Natasha (Labour Market); dave.baker@hmrc.gsi.gov.uk; Chana Gurpreet (Labour Market)
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]
David,

Thank you for re-phrasing your question regarding whether a deduction for the optional use of transport reduces pay for national minimum wage purposes.

The simple answer is “yes” the national minimum wage pay will be reduced in the scenario you describe. This is because deductions made from a worker’s pay will always reduce national minimum wage pay if they are;

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

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.

However a deduction will not reduce national minimum wage pay if it is a:

- contractual deduction relating to misconduct and discipline
- deduction to repay a loan or advance of wages
- deduction to recover an overpayment of wages
- deduction to purchase shares, other securities or share options or to purchase any share in a partnership
- deductions made by an employer who is a local housing authority or registered social landlord for the provision of living accommodation and the accommodation offset does not apply.

So whilst NMW legislation does not prevent workers purchasing goods or services, such as employer provided transport, from their employer, the national minimum wage pay will be affected by:
1) the **nature of the purchase**, and
2) **how the purchase is made**, i.e. is it a payment by the worker to the employer or a deduction made by the employer from the worker?

1) Nature of purchase
If the purchase is in respect of an expense or a requirement imposed on the worker by the employer, contractual or otherwise, then national minimum wage pay will be reduced, regardless of whether the transaction is a payment or a deduction.

However, if the worker makes the purchase as a free choice, the affect it will have on national minimum wage pay will depend on the method of payment.

2) How purchase made
If a free choice purchase **is paid for via a payment from the worker** to the employer, the payment will not reduce national minimum wage pay.

However, if the same purchase is paid for via a deduction made by the employer, then the deduction will reduce national minimum wage pay, even if the worker freely chooses to make the purchase and/or signs their agreement to the purchase.

I hope you find this helpful.

Kind regards

Gurpreet

From: David Camp [mailto:David@alliancehr.co.uk]
Sent: 01 March 2013 17:34
To: Chana Gurpreet (Labour Market)
Cc: Ithell Gaynor (Labour Market); Cottam Rob (Labour Market); Jackson Debbi (Labour Market); Chopra Natasha (Labour Market); dave.baker@hmrc.gsi.gov.uk
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

Dear Chana
Thank you for your email below though you have answered a question that I did not seek an answer to. I already know that, contrary to what actually happened in practice in 2007, HMRC maintain that they did not change their enforcement policy. This is of no consequence.
It may be helpful if I rephrase my question.

Having reviewed the attached ALP paper can BIS/HMRC please confirm their current position whether the following reduces pay below NMW: "A labour provider offers its workers, paid at NMW, the optional use of transport to and from work at £5 day. The workers agree in advance to have the transport to work charge deducted from their following week's pay."
The attached position ALP paper argues that it is in the interest of workers, business and good regulatory policy for BIS and HMRC to interpret that it does not take pay below NMW and it is possible for the Regulations to be interpreted in this way.
I look forward to hearing from you.
Regards
David
From: Chana Gurpreet (Labour Market) [mailto:Gurpreet.Chana@bis.gsi.gov.uk]
Sent: 21 February 2013 16:58
To: David Camp
Cc: Ithell Gaynor (Labour Market); Cottam Rob (Labour Market); Jackson Debbi (Labour Market); Chopra Natasha (Labour Market); dave.baker@hmrc.gsi.gov.uk
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]
David
Thank you for sharing the paper with us and apologies for the delay in getting back to you. We have liaised with HMRC colleagues who have also seen this paper. We can confirm that there was no change in 2007 regarding any enforcement activity relating to payments and deductions, and that no technical memoranda, guidance or policy statements on this matter were issued by HMRC at that time. There has been no change to any enforcement policy relating to pursuing arrears of NMW.
Kind regards,
Gurpreet

From: Jackson Debbi (Labour Market)
Sent: 15 February 2013 09:13
To: David@alliancehr.co.uk; Chopra Natasha (Labour Market); dave.baker@hmrc.gsi.gov.uk; Chana Gurpreet (Labour Market)
Cc: Ithell Gaynor (Labour Market); Cottam Rob (Labour Market)
Subject: Re: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

David,

Apologises for the delay. Natasha is now on secondment to Cabinet Office.

We will look into this immediately and come back to you early next week.

Best regards

Debbi

From: David Camp [mailto:David@alliancehr.co.uk]
Sent: Friday, February 15, 2013 08:08 AM
To: Chopra Natasha (Labour Market)
Cc: Jackson Debbi (Labour Market); Ithell Gaynor (Labour Market)
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

Hi Natasha
Do you have an update for me on this please?
My understanding is that HMRC enforcement policy has changed to no longer pursue this.
I would appreciate clarity for the industry.
Regards
David

David Camp ¦ Association of Labour Providers
T 01276 509306 ¦ F 01276 761076 ¦ M 07855 570007 ¦ E info@labourproviders.org.uk ¦ W www.labourproviders.org.uk
Camberley House, 1 Portesbery Road, Camberley, Surrey GU15 3SZ

From: Chopra Natasha (Labour Market) [mailto:Natasha.Chopra@bis.gsi.gov.uk]
Sent: 12 October 2012 09:38
To: David Camp; Ithell Gaynor (Labour Market)
Cc: Jackson Debbi (Labour Market)
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

David

My apologies for the delay in responding. We will come back to you shortly.

Best wishes

Natasha

Natasha Chopra | Team leader | National Minimum Wage policy & Low Pay Commission sponsorship | Labour Market Directorate| Department for Business, Innovation & Skills | Natasha.Chopra@bis.gsi.gov.uk | 3ABB1, 1 Victoria Street, London SW1H 0ET | 020 7215 1106 | www.bis.gov.uk

---

From: David Camp [mailto:David@alliancehr.co.uk]
Sent: 12 October 2012 09:16
To: Ithell Gaynor (Labour Market); Chopra Natasha (Labour Market)
Cc: Jackson Debbi (Labour Market)
Subject: RE: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

Dear Gaynor

Just a follow up to see whether there was any response on this.

Kind regards

David

David Camp ¦ Association of Labour Providers
T 01276 509306 ¦ F 01276 761076 ¦ M 07855 570007 ¦ E info@labourproviders.org.uk ¦ W www.labourproviders.org.uk
Camberley House, 1 Portesbery Road, Camberley, Surrey GU15 3SZ

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, you are requested to contact the sender and delete this entire communication immediately and are notified that any disclosure, copying or distribution of or taking any action based on this information is prohibited. Whilst we have taken reasonable precaution to minimise the risk of software viruses you should carry out your own virus checks on this e-mail and any attachments before opening them. We cannot accept liability for any damage sustained as a result of any software viruses

From: Ithell Gaynor (LM) [mailto:gaynor.ithell@bis.gsi.gov.uk]
Sent: 31 July 2012 17:35
To: Chopra Natasha (LM); David Camp
Cc: Jackson Debbi (LM)
Subject: FW: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

David,

It was good to meet you. Thank you for this paper. I have passed it to our policy lead for her view.

Gaynor

Gaynor Ithell | Deputy Director, Strategy and Operations, Labour Market Directorate | Department of Business Innovation and Skills, 3rd Floor Abbey 1, 1 Victoria Street, London SW1H 0ET | gaynor.ithell@bis.gsi.gov.uk | T:+44 207 215 5584 www.bis.gov.uk

The Department for Business Innovation and Skills (BIS) is making a difference by supporting sustained growth and higher skills across the economy. BIS: Working together for growth

---

From: David Camp [mailto:David@alliancehr.co.uk]
Sent: 31 July 2012 15:10
To: Ithell Gaynor (LM)
Subject: FW: ALP Position Paper - NMW and Transport to Work Costs [Protective Marking: PROTECT]

Dear Gaynor
It was nice to meet you at the recent GLA Board Meeting. You advised that in your current role you have responsibility for NMW policy at BIS.
In this capacity I would be grateful if you could consider the attached paper.
Many labour providers provide transport that their workers can choose to use to get to and from their places of work. Prior to 2007, workers were charged through agreed deductions from pay. Since 2007 HMRC has deemed this to be unlawful where the charge takes workers below the minimum wage, and some labour providers have been faced with considerable bills to meet "arrears" of pay.
The attached position paper argues that the HMRC interpretation is at best questionable, and that it is in the interest of workers, business and good regulatory policy for BIS and HMRC to reconsider this interpretation.
I would be more than happy to discuss this in more detail.
Many thanks
David

David Camp ¦ Association of Labour Providers
T 01276 509306 ¦ F 01276 761076 ¦ M 07855 570007 ¦ E info@labourproviders.org.uk ¦ W www.labourproviders.org.uk
Camberley House, 1 Portesbery Road, Camberley, Surrey GU15 3SZ

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, you are requested

Appendix 3

Camberley House,
1 Portesbery Road
Camberley GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

September 2013

Member Brief No 117
Charge Rate Guidance – October 2013

Introduction

These rates, effective from October 2013, have been prepared by the ALP and replace ALP Brief 115. They will be posted on the GLA website. The guidance takes account of the increased national minimum wage and Scottish agricultural wage levels. From October 1st national minimum wage rates apply to agricultural workers in England. Wales has introduced emergency legislation which has the effect for now of maintaining the 2012 Agricultural Wages Order, but the Welsh Assemblies power to enact this legislation is to be ruled upon by the Supreme Court.

The rate paid by labour users is a key variable that the GLA monitors. Labour users that pay unrealistically low rates are knowingly or recklessly conniving in illegality as these rates can only be achieved either through worker exploitation or tax evasion or both. A number of labour users have suffered reputation damaging publicity when this has been exposed.

Labour providers are encouraged to report confidentially to the GLA any labour users that are currently paying rates which indicate that legal responsibilities to workers cannot be met. Members may choose to discuss this information with the ALP beforehand.

Supermarkets and other wholesale purchasers of food have an ethical responsibility to ensure fair and legal rates are paid to labour providers throughout their supply chain.

ALP labour provider members may provide this brief and the tables to current or prospective labour user clients to facilitate discussions towards agreement of fair and legal charge rates.

What the figures mean

Statutory Charge Factors - This includes the appropriate Minimum Wage, employer's national insurance plus statutory holiday entitlement. N.B. Pension auto-enrolment commenced in October 2012 with staging dates (http://www.thepensionsregulator.gov.uk/employers/staging-date-timeline.aspx) depending on headcount. Initially a minimum of 1 per cent of qualifying earnings must come from the employer which rises over time to 3 per cent in 2018. No account has been taken in the Charge Rate Guidance figures for these pension employer contributions. However as a statutory charge factor they should be built in to a charging structure once they become due from the labour provider.

Labour Provider Overhead and Service Charge Costs – Defra analysis conducted in 2003 estimated labour provider overhead costs as 30% on top of the National Minimum Wage. In reaching this figure Defra state that the result is not intended to be a realistic description of the costs of any particular labour provider business (e.g. it makes no attempt to allow for the costs of rent / interest charges on office accommodation, which may vary widely from one business to another). It also states that this figure is likely to understate the actual costs for almost all businesses as well as making no allowance for management costs or profit. Rather this is intended to be an illustration of the minimum unavoidable costs that flow from observing the law on basic employment matters such as the minimum wage, national insurance, employers' liability insurance, and maintaining and insuring roadworthy vehicles.

The figure for Overhead and Service Charge Costs is indicative only and will vary with each contract depending on the efficiency of a labour provider and the particular circumstances of the client and site to which labour is supplied. For example, contracts where the labour provider is required to provide workwear, where there is volatility of supply, where transport or supervision costs are high, where invoices are factored and so on will all incur a greater overhead cost.

The actual rate charged is ultimately a commercial agreement between the labour provider and user. Any agreed rate should take into account the particular costs of supply. However, charge rates lower than those in the rates tables **plus a sustainable net margin** may indicate illegal activity - unless there is a legitimate and demonstrable explanation.

CHARGE RATE GUIDANCE - EFFECTIVE OCTOBER 2013

2013/14 NATIONAL MINIMUM WAGE	Age 16-17	Age 18-20	Age 21 plus
1. Minimum wage	£ 3.72	£ 5.03	£ 6.31
2. Employers' NI Contributions	£ 0.00	£ 0.18	£ 0.36
3. Annual Holiday Pay (5.6 weeks entitlement)	£ 0.45	£ 0.63	£ 0.81
4. Total Wage Costs	£ 4.17	£ 5.84	£ 7.48
5. Guideline Statutory Sick/Maternity Pay cost	£ 0.11	£ 0.11	£ 0.11
6. Guideline Minimum Labour Provider Overhead & Service Cost	£ 0.60	£ 0.60	£ 0.60
7. Hourly Cost of Supply (not including Labour Provider Margin)	**£ 4.88**	**£ 6.55**	**£ 8.19**

WALES AGRICULTURAL EMPLOYEES (AT LEAST UNTIL SUPREME COURT RULING)	Grade 1 Workers < 52 weeks	Grade 1 Workers > 52 weeks	Non Compulsory Overtime
1. Minimum wage	£ 6.31	£ 6.31	£ 9.32
2. Employers' NI Contributions	£ 0.35	£ 0.35	£ 1.29
3. Annual Holiday Pay	£ 0.90	£ 0.90	
4. Total Wage Costs	£ 7.56	£ 7.56	£ 10.61
5. Guideline Statutory Sick/Maternity Pay cost	£ 0.11	£ 0.28	
6. Guideline Minimum Labour Provider Overhead & Service Cost	£ 0.60	£ 0.60	£ 0.60
7. Hourly Cost of Supply (not including Labour Provider Margin)	**£ 8.27**	**£ 8.44**	**£ 11.21**

SCOTLAND AGRICULTURAL EMPLOYEES (OTHER THAN OF SCHOOL AGE)*	< 26 weeks service	> 26 weeks service	< 26 weeks Non Compulsory Overtime	> 26 weeks Non Compulsory Overtime
1. Minimum wage	£ 6.32	£ 6.99	£ 9.48	£ 10.49
2. Employers' NI Contributions	£ 0.35	£ 0.44	£ 1.31	£ 1.45
3. Annual Holiday Pay	£ 0.80	£ 0.90		
3a. Special Holiday Pay	£ 0.06	£ 0.06		
4. Total Wage Costs	£ 7.53	£ 8.39	£ 10.79	£ 11.93
5. Guideline Statutory Sick/Maternity Pay cost	£ 0.11	£ 0.11		
6. Guideline Minimum Labour Provider Overhead & Service Cost	£ 0.60	£ 0.60	£ 0.60	£ 0.60
7. Hourly Cost of Supply (not including Labour Provider Margin)	**£ 8.24**	**£ 9.10**	**£ 11.39**	**£ 12.53**

* In addition to the above minimum hourly rates workers who have been with the same employer for more than 26 weeks and who hold a relevant qualification are entitled to be paid an additional sum of at least £1.06 per hour.

AGRICULTURAL EMPLOYEES (NORTHERN IRELAND – AGE 19+) UNTIL MARCH 2014	<40 weeks Service	<40 weeks Non Compulsory Overtime	> 40 weeks Service	> 52 weeks Service
1. Minimum wage	£ 6.35	£ 9.53	£ 6.65	£ 6.65
2. Employers' NI Contributions	£ 0.35	£ 1.32	£ 0.39	£ 0.39
3. Annual Holiday Pay	£ 0.81		£ 0.85	£ 0.88
4. Total Wage Costs	£ 7.51	£ 10.85	£ 7.89	£ 7.93
5. Guideline Statutory Sick/Maternity Pay cost	£ 0.11		£ 0.11	£ 0.11
6. Guideline Minimum Labour Provider Overhead & Service Cost	£ 0.60	£ 0.60	£ 0.60	£ 0.60
7. Hourly Cost of Supply (not including Labour Provider Margin)	**£ 8.22**	**£ 11.45**	**£ 8.60**	**£ 8.64**

N.B. The NIAMW is £6.35 however when the National Minimum Wage becomes higher then this shall become the minimum rate.

- **Charge items nos 1-4 shown in red cover statutory legal requirements**
- **Labour Provider Overhead Costs** – DEFRA analysis has estimated overhead costs as 30% on top of the National Minimum Wage, but state that this figure is likely to understate the **actual** costs of almost all businesses as well as making **no** allowance for management costs or profit.

  In reaching this figure of 30% Defra state that the result is not intended to be a realistic description of the costs of any particular labour provider business (e.g. it makes no attempt to allow for the costs of rent/interest charges on office accommodation, which may vary widely from one business to another). **It also makes no allowance for any management cost or business profit.** Rather this is intended to be an illustration of the minimum unavoidable costs that flow from observing the law on basic employment matters such as the minimum wage, national insurance, employers' liability insurance, and maintaining and insuring roadworthy vehicles.
- The Charge Rates tables should be read in conjunction with the Definitions and Explanations detailed on the following page.

Definitions and Explanations

N.B. The numbering below refers to the numbered charge elements in the rates tables:

1. The hourly minimum rate represents the National Minimum Wage or the Agricultural Minimum Wage for Grade 1 workers. This rate increases in Scotland after 26 weeks service and in N. Ireland after 40 weeks service.

   Workers employed in agriculture have a statutory entitlement to overtime in accordance with the appropriate Agricultural Wages Order.

2. Employer's NI must be paid at 13.8% on earnings above £148 per week. The first £148 is NI free. The figure for non-overtime rates is based on 40 hours worked in non-agriculture and 39 hours in agriculture.

   For temporary agricultural employees on overtime, the £148 NI free amount will generally already have been used so employer's NI has been calculated at the full 13.8%.

3. Holiday Pay

   a. Calculations of holiday pay to be charged are based on the hourly rate plus Employers' NI as when holiday pay is paid to the worker, employers' NI is paid on this and therefore must be accrued from the charge rate.

   b. Non Agricultural Workers - are entitled to 5.6 weeks holiday (calculated pro rata as 12.07% of the hourly rate and NI = 5.6 weeks / (52 weeks-5.6 weeks).

      Agricultural Employees in Wales - Workers are entitled under the AWO to a variable amount of "total annual holiday entitlement" depending on how many days per week they have retrospectively worked. Based on a 5 day week workers are entitled to 31 days paid annual holiday from the first day of work equivalent to 13.54% of the relevant hourly rate and NI. This is the figure shown.

      Agricultural Employees in Scotland - are entitled to 5.6 weeks holiday plus 2 special days per year. A week is equivalent to the number of days that an employee would be expected to work in the course of a regular working week. This is equivalent to 13.04% of the relevant hourly rate and NI.

      Agricultural Employees in Northern Ireland are entitled under the NIAWO to 5.6 weeks equivalent to 12.07% of the hourly rate and NI. After the completion of 12 months continuous employment with the same employer the annual holiday entitlement increases to 5.8 weeks paid annual holiday equivalent to 12.55% of the relevant hourly rate and NI.

   c. How holiday pay should be calculated varies dependent on workers contracts and working patterns.

      i. Where remuneration for normal working hours does not vary i.e. workers on a fixed wage or salary - holiday pay is based on contractual pay i.e. basic hours plus guaranteed overtime.

      ii. Where a worker's working hours are not specified by the contract and that worker works irregular hours and is not entitled to overtime pay when employed for more than a fixed number of hours in a week he is deemed not to have "normal working hours".

      In such cases holiday pay is calculated by reference to the worker's average remuneration over the previous 12 weeks (replacing weeks in which no pay was received with previous weeks) for all hours worked including any bonus linked to performance.

      iii. Where a worker's working hours are not specified by the contract and that worker works irregular hours, he is deemed to have "normal working hours" if he is entitled to receive overtime pay after a fixed number of hours (such as workers working under the provisions of the Agricultural Wages Order).

      In such cases holiday pay is based on the average hourly rate excluding non compulsory overtime over the previous 12 weeks (replacing weeks in which no pay was received with previous weeks) but including any bonus linked to performance

4. This figure shows the actual <u>minimum</u> unavoidable Total Wage Costs to meet minimum legal requirements. No account has yet been taken for pension employer contributions. However as a statutory charge factor they should be built in to a charging structure once they become due from the labour provider.

5. Provision for statutory sick pay leave, in line with the Defra estimate, of 2 weeks is assumed at £86.70 per week.
   This is accrued on normal time only, not on overtime.
   This figure also covers the 8% of statutory maternity pay that must be met by the labour provider.

   Agricultural wages sick pay is payable in Wales after 52 weeks employment. In Scotland agricultural employees continuously employed by the same employer for at least 52 weeks are entitled to sick pay at normal rates for normal hours worked for a period of 13 weeks after which SSP applies.

6. Guideline Minimum Labour Provider Overhead & Service Cost - Indicative figure.

   2003 DEFRA analysis has estimated overhead costs as 30% on top of the National Minimum Wage, but state that this figure is likely to understate the actual costs of almost all businesses as well as making no allowance for management costs or profit.

   In reaching this figure of 30% Defra state that the result is not intended to be a realistic description of the costs of any particular labour provider business (e.g. it makes no attempt to allow for the costs of rent/interest charges on office accommodation, which may vary widely from one business to another). It also makes no allowance for any management cost or business profit. Rather this is intended to be an illustration of the minimum unavoidable costs that flow from observing the law on basic employment matters such as the minimum wage, national insurance, employers' liability insurance, and maintaining and insuring roadworthy vehicles.

7. This is the total hourly cost of supply but **does not include any margin to cover labour provider profit.**