

**NATIONAL MINIMUM WAGE:
EMPLOYED STUDENTS AND THE
ACCOMMODATION OFFSET**

Government response to
consultation

JUNE 2011

National Minimum Wage: employed students and the accommodation offset – Government response to consultation

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National minimum wage: employed students and the accommodation offset - Government response to consultation

Executive summary

The national minimum wage (NMW) rules allow employers who provide accommodation for workers to count it as a benefit in kind towards payment of the NMW, up to a specified daily limit.

On 18 January 2011 the Government published a consultation document, *National minimum wage: employed students and the accommodation offset*, seeking views on possible changes to the NMW rules on employer-provided accommodation in relation to students who work part-time for their educational institution. The consultation closed on 12 April 2011.

There were 38 responses to the consultation. There was an overwhelming consensus supporting the principle that the Government should move to address the current unintended consequences of the accommodation offset for Higher Education Institutions, and broad agreement on the same issue for further education. The Government considers that the relationship between these institutions and their students is primarily educational and, where an institution employs a student on a part-time basis, the relationship is not akin to the circumstances which the accommodation offset rules were designed to cover.

The Government therefore intends to act swiftly to change the accommodation offset rules to provide an exemption for Higher and Further Education Institutions. Further details are set out in this document.

Consultation and responses

Background

The consultation document explained that the Government had become aware of potential problems where some Higher Education Institutions (HEIs) both employ students and provide them with accommodation, for instance as student mentors or in some other capacity. Because the accommodation offset rules cover these circumstances (although they were not specifically intended to), an underpayment of the NMW may result – which is, in effect, an unintended advantage for students. Without a change, there is potential for significant cost to HEIs.

The consultation document sought views on the extent to which HEIs provide accommodation to students and also employ them part-time. It asked whether HEIs should be excluded from the accommodation offset rules and, if so, how and in what circumstances. It also sought views relating to Further Education Colleges and asked whether they should be included in any change to the law.

Responses received

Total number of responses: 38.

Respondents:

Business representative organisation/trade body	5	13%
Charity or social enterprise	5	13%
Individual	5	13%
Legal representative	1	3%
Medium business (50 to 250 staff)	1	3%
Large business (over 250 staff)	6	16%
Trade union or staff association	4	11%
Other	11	29%

A list of those who responded can be found at Annex A. The majority of respondents were either HEIs or representatives of the HE sector.

Analysis of responses and Government response

Questions on Higher Education Institutions

Q 1 *We would welcome further evidence of the extent to which HEIs employ students to whom they are providing accommodation and any related NMW issues.*

Number of responses: 28

Summary of responses

While a number of individual HEIs provided information in response to this question, the fullest responses were provided by two representative bodies for the HE sector. One stated that most HEIs offered both accommodation and employment to students, although payroll records did not necessarily identify whether particular employees were students; this made it difficult to provide quantitative information. This respondent considered that most HEIs were likely to be breaching the accommodation offset rules. The other representative organisation also found it difficult to provide accurate numbers of students both accommodated and employed by a university, as the link between a student's employment and their accommodation circumstances is not recorded on an automatic basis.

One respondent identified three categories of student employment in HEIs: where employment and accommodation are unconnected; where employment and accommodation are connected and the student is required to live in HEI-provided accommodation (two other respondents, one in answer to Q8, also highlighted this category); and where employment is connected to the academic status of the student. The respondent urged the Government to take account of these different categories if the law is changed.

Another respondent drew similar distinctions but considered that any change to the law should affect only the first category, and stated that there was no clear case for exemption from the accommodation offset in the second category and that the law should continue to apply as at present for the third category. The same respondent added a fourth category, employees of an HEI who are provided with accommodation as part of their non-student employment and who later enrol in a part-time academic course; again, that respondent considered that the law should continue to apply as at present in such cases.

Two further respondents (one in response to Q8) argued that the law should continue to apply as at present to cases in which their employment requires students to live in HEI-provided accommodation.

Two respondents questioned the consultation document's suggestion that HEIs are generally unaware of the accommodation offset rules; one supported this assumption.

A respondent providing accommodation management services on behalf of HEIs provided extensive information about the capacities in which students were paid and their rates of pay. This respondent was particularly concerned about the position of third party providers, a point discussed under Q8 below.

Government Response

The Government recognises that it is difficult to quantify the extent of the effect of the existing regulations. Essentially this is because, in the higher and further education context, the provision of accommodation to students is normally completely unconnected to any employment a student might undertake for the institution. However, respondents did provide information about the range of employment that students might undertake whilst they are studying - when the latter is the primary purpose for being at the HEI.

Q 2 Do you consider that the Government should take no action? If yes, please explain why.

Number of responses: 36

Yes 1 (3%)

No 35 (97%)

Q 3 Do you consider that the Government should amend the law? If yes, would the existing definition of higher education courses cover all the providers who need to be exempted or do you have alternative suggestions?

Number of responses: 36

Yes 35 (97%)

No 1 (3%)

Summary of responses

Some respondents who replied 'No' to Q2 added further comments, e.g. agreeing with the grounds for changing the law set out in the consultation document. The respondent who replied 'Yes' did so on the grounds that the proposal addressed unintended consequences of the accommodation offset rules in only one sector of the labour market and argued for a more comprehensive approach (this response is addressed under Q8).

Those who responded to Q3 were generally satisfied with the existing definition. However, one pointed out that some HEIs also provide FE within an HE setting. Since this is not included in the definition in Schedule 6 of the Education Reform Act 1988, the definition of HE courses in the NMW Act 1998 (which draws on the 1988 Act) might not be adequate. This respondent added that an addition which recognises the position of interns within education establishments should also be considered: an individual undertaking an internship at the institution where they were a student should be included within the exemption if the internship is within one year of graduating.

One respondent suggested that consideration might be given to exempting private providers who house and employ HEI students on full-time courses with a local HEI.

Government Response

The Government has concluded that the accommodation offset rules in the NMW Regulations should be changed. The relationship between an HEI and its students is primarily educational and where an HEI employs a student on a part-time basis the relationship is not akin to the circumstances which the accommodation offset rules were designed to cover.

The Government intends to use the definition of HEI course as set out in paragraph 6.9 of the consultation document. The wording of the exemption will make it clear that it covers further education courses provided by an HEI (or Further Education Institution).

The Government does not intend to include internships within the exemption. The term “intern” has no legal status, but periods of both paid and unpaid work experience are often described as internships. If interns are workers they must be paid at least the NMW under the NMW Act and the accommodation offset provisions should apply in the same way as they do for other workers. Interns can legally be unpaid if they are not workers or exempt in NMW legislation, and in these cases the accommodation rules would not apply.

The Government notes the comments made by respondents about third party providers, but has concluded that further changes do not need to be made in respect of third party providers. The accommodation offset was designed to ensure that employers cannot avoid paying their workers the NMW by levying excessive accommodation charges; accordingly, an employer may be considered to provide accommodation in a wide range of circumstances and not merely in situations where they own the property occupied by the worker. The exemption will apply where a HEI is providing accommodation to a student. Where accommodation is provided by a third party and the student is employed by that third party the accommodation offset rules will continue to apply in the normal way.

Q 4 Do you consider that the restriction to students who are provided with accommodation because they are undertaking a course with the HEI is appropriate, or should there be a different test?

Number of responses: 31

Summary of responses

About half of those who responded agreed with the proposed test and made no further comment, while others offered a wide range of comments.

There was some disagreement as to whether any exemption should be restricted to full-time students. Some considered that the exemption should not be restricted to full-time students or to a maximum number of hours which a student could work. However others argued that the exemption should be limited to full-time students and should not apply to roles which meet a number of criteria (such as that students need to live within the accommodation for successful completion of a role such as pastoral care provision to students within the accommodation).

A respondent considered that any amendment should include students in university or college accommodation provided through a third party when employment is offered at the university or college. Another respondent noted that, in some cases, universities provide accommodation to students who are studying in different colleges (of the university).

A number of respondents referred to the relationship between an HEI and its students. Respondents argued that the exemption should only include students whose work is not associated with their accommodation; that the accommodation offset should still apply where the primary relationship between a student and the HEI is that of an employer and employee and where a student's employment by the HEI depends on them living in the HEI's accommodation.

One respondent considered that limiting the exemption to those undertaking a course may be overly restrictive for those applying for postgraduate courses or those who have recently graduated.

Government Response

The overall consistent response was an agreement that the test for exemption from the accommodation offset rules should be based on the educational relationship that a student has with their HEI. As such, the Government will base the test for exemption on whether a worker is undertaking a course at the HEI. As we consider that the accommodation offset protections should not apply to workers whose primary relationship with the institution is as a student we will limit the exemption to full-time students.

The Government considers that this is an appropriate approach. Students who are in full-time education are the most likely to be both in HEI accommodation and working part-time. We consider that this approach is in line with the principle behind the exemption - that the relationship is primarily one of student/education provider rather than worker/employer.

Questions on further education courses

Q 5 *Are you aware of grounds for including providers of further education courses in this measure? If yes, can you provide information about the extent of institutions and learners who would be affected, with any details of the current arrangements and likely impact?*

Number of responses: 26

Yes 9 (35%)

No 17 (65%)

Q 6 *If you believe that providers of further education courses should be included, does the existing definition of these courses cover all the providers who would need to be exempted, or do you have alternative suggestions?*

Number of responses: 5

Q 7 *If you believe that providers of further education courses should be included, do you agree with the specific proposals for exemption (see para 6.9 [of the consultation document])? If no, please explain why.*

Number of responses: 11

Yes: 9 (82%)

No: 2 (18%)

Summary of responses

The majority of those responding to the consultation were concerned with HEI rather than further education courses. Responses indicated that there were grounds for including further education, although it was noted that provision of accommodation to employed students might be relatively rare. Agricultural colleges were most likely to be affected. It was also pointed out that some HEIs offer further education courses.

In response to Q6, three respondents thought the existing definition sufficient. One commented that the definition should be carefully worded so as to ensure that the accommodation offset rules could not be avoided. Another suggested comparing the existing FE definition in the NMW regulations with the one used for council tax exemption for full-time students, since the latter also applies to FE students.

In response to Q7, one of the respondents who was against the proposal replied to a number of points made in relation to Q1 and Q4, e.g. that there was a need to differentiate between different types of role at an HEI and that the accommodation offset should apply particularly to students for whom living in HEI-provided accommodation is a requirement of their employment. No further information was provided by the other respondent who was against the proposal.

Government Response

The Government has concluded that it would be appropriate to include providers of further education course in the same way as HEIs. Although the provision of accommodation is less extensive than in the case of HEIs, the current situation provides unintended effects for providers of further education courses in the same way as for HEIs. The Government therefore considers that both should be treated in the same way.

The Government intends to use the definition set out in paragraph 6.11 of the consultation document. As noted in the response to Qs 2 and 3 above, the exemption will make it clear that it covers further education courses provided by an HEI.

The Government intends to take the same approach regarding the test for exemption from the accommodation offset rules for further education colleges as that taken for HEIs. The test for exemption will be whether a worker is undertaking a full-time further education course. The Government recognises that a lower proportion of students will be on full time-time further education courses than would be the case for higher education courses. However, we consider that those on full-time course are the most likely to be both in further education college accommodation and working part-time for the institution, and that this approach is therefore in line with the principle behind the exemption - that the relationship is primarily one of student/education provider rather than worker/employer.

Other comments on issues set out in the consultation

Q 8 Do you have any other comments on the issue set out in this consultation?

Twenty-one respondents commented on the issue. The summary of their views below also includes some more general comments made by respondents in their answers to other questions.

Summary of responses

Three respondents referred to section 44 of the National Minimum Wage Act 1998, which exempts voluntary workers working for a charity, voluntary organisation, associated fund raising body or statutory body from the NMW. Such voluntary workers can receive reasonable expenses and benefits in kind, including accommodation. Respondents suggested that this applied to students employed by HEIs, most of which are charities. One considered that the benefits allowable under section 44 should be clarified.

Three respondents were concerned about the position of students who are obliged to live in university accommodation as a condition of their employment, arguing that the accommodation offset rules should continue to apply in these circumstances.

One respondent strongly opposed the Government's proposals on the grounds that they dealt with only one sector of the labour market. The respondent argued that the accommodation offset had had unintended consequences elsewhere in the labour market and should be reviewed more generally. It also believed (as did two others) that the rate of the accommodation offset was too low.

One respondent considered that any amendment to the law should include third party providers where the students are also employed by the third party provider. The same respondent suggested that an alternative approach to the Government's proposals would be to set the accommodation offset rate 'as a proportion of the normal rental charge to other student tenants, which could still be capped at a maximum level per week'.

Two respondents called for the law to be amended with retrospective effect, i.e. so as to prevent students underpaid the NMW as a result of non-compliance with the current accommodation offset rules from seeking legal redress.

Two respondents were concerned about the lack (or possible lack, unless the consultation generated it) of sufficient statistical information about the extent of the issue and suggested that further research would be needed.

One respondent was concerned that the accommodation offset is not pro-rata and therefore does not take part-time workers (the majority of those employed and accommodated by HEIs) into account.

Government Response

Section 44 provides for a special class of workers, called voluntary workers, who are exempt from the NMW. Under section 44, no monetary payment can be made to a voluntary worker apart from the reimbursement of expenses actually incurred in the performance of the worker's duties or are incurred to enable the worker to perform their duties. The Government recognises that section 44 may apply in certain situations, for example where a student is provided with free accommodation in exchange for undertaking certain duties. However, we do not believe that section 44 is sufficient to apply in all situations, as it would not cover the case where an HEI is paying a student in excess of their expenses. The Government has therefore concluded that the existence of section 44 does not remove the need for a change to the NMW Regulations.

The Government's conclusion on third party providers is set out in our response to Qs 2 and 3 above.

On suggestions that the law should be amended with retrospective effect, it is a general principle that this should not be the case unless the circumstances are exceptional – in effect, unless it is right for actions which were unlawful when undertaken to become lawful after the event (or vice-versa). The Government does not consider that the circumstances are exceptional in this case.

On wider aspects of the accommodation offset, which were outside the scope of the consultation document, the Low Pay Commission (LPC) – an independent body which advises the Government on the NMW – notes in its 2011 Report that it has continued to receive representations about the offset arrangements since undertaking a detailed review for its 2006 Report. It has nevertheless suggested maintaining the current arrangements, although it will keep the issue under review, as will the Government.

The Government has asked the LPC, as part of the remit for its 2012 report, to consider whether NMW regulations can be made even simpler and easier to administer, which might include the removal, simplification or consolidation of any elements of the NMW. The LPC has been asked to report to Government by the end of February 2012.

Next steps

The Government proposes to bring the necessary amendments to the NMW Regulations into force on 1 October 2011.

Enquiries

Enquiries can be addressed to:

Rob Cottam
Labour Market Directorate
3rd floor Abbey 2
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Tel: 0207 215 0169

Fax: 0207 215 6414

Email: Rob.Cottam@bis.gsi.gov.uk

Annex A List of respondents

Accommodation Services at the University of Exeter
AMOSSHE, the Student Services Organisation
Association of Labour Providers
Association of School and College Leaders
British Universities Finance Directors Group
Chartered Institute of Payroll Professionals
Conference of Colleges, Oxford University
Hilary Crook
Employment Lawyers Association
Sue Fryer
GuildHE
Aalok Kanwar
King's College London
London School of Economics
National Union of Students
Newcastle University Students' Union
Northumbria University
Queen's University Belfast
Royal Agricultural College
Sanctuary Management Services
Sparsholt College
Joseph Teasdale
TUC
Universities and Colleges Employers Association
Universities UK
University of Bath
University of Bristol
University of Cumbria
University of Exeter
University of Glasgow
University of Greenwich
University of Leeds Residential Services
University of Plymouth
University of Portsmouth
University of Sheffield
University of Sheffield Students' Union
University of Sussex
University of the West of England, Accommodation Services

Annex B List of questions in the consultation document

Q 1 We would welcome further evidence of the extent to which HEIs employ students to whom they are providing accommodation and any related NMW issues.

Q 2 Do you consider that the Government should take no action? If yes, please explain why.

Q 3 Do you consider that the Government should amend the law? If yes, would the existing definition of higher education courses cover all the providers who need to be exempted or do you have alternative suggestions?

Q 4 Do you consider that the restriction to students who are provided with accommodation because they are undertaking a course with the HEI is appropriate, or should there be a different test?

Q 5 Are you aware of grounds for including providers of further education courses in this measure? If yes, can you provide information about the extent of institutions and learners who would be affected, with any details of the current arrangements and likely impact?

Q 6 If you believe that providers of further education courses should be included, does the existing definition of these courses cover all the providers who would need to be exempted, or do you have alternative suggestions?

Q 7 If you believe that providers of further education courses should be included, do you agree with the specific proposals for exemption (see para 6.9 [of the consultation document])?

Q 8 Do you have any other comments on the issue set out in this consultation?

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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