

ANNEX A

Internships and work experience – minimum wage issues

1. Position under minimum wage law

1.1 There is no definition of an internship/work experience in minimum wage legislation. Interns are considered in the same way as everyone else with regards to whether the minimum wage is due.

1.2 The key issue is whether or not they are a worker as defined by minimum wage legislation. If they are, then they are eligible for the minimum wage unless a specific exemption applies. Volunteers are not workers and are not eligible for the minimum wage.

1.3 Whether or not an intern is a worker depends on the contract or arrangement they have with the employer. A worker is someone who works under a contract of employment or any other kind of contract (express or implied) whereby they undertake to do work personally for someone else (and they are not genuinely self-employed).

1.4 A contract does not have to be written and can be oral or implied. Key elements in establishing whether someone has a worker's contract include:

- whether there is an obligation on the individual to perform the work and an obligation on the employer to provide the work, and
- whether the individual is rewarded, or entitled to be rewarded, for the work by money or benefits.

1.5 Each case has to be considered on its individual facts.

1.6 It is legitimate for employers to offer unpaid or 'expenses-only' opportunities where the individual is acting as a volunteer. The term "volunteer" is not defined in legislation because it is sufficient that an individual is not a worker. There is extensive case law considering the statutory definition of "worker" in the context of specific factual scenarios, including where the individual is found to be a volunteer.

1.7 In general, a volunteer is someone who gives their services free of charge. They are not paid or given benefits in kind and only given training to do their job. Volunteers have no employment contract relationship with the employer; they are not required to provide their services and the employer has not committed to provide work. Volunteers can be reimbursed out-of-pocket expenses, provided training to undertake their role and can be given small unexpected gifts to thank them for volunteering.

2. Circumstances under which an internship can be unpaid

2.1 Considering whether certain characteristics of a job could be used to mark a transition from unpaid to paid interns misses the central element of an unpaid internship – that the individual must undertake the activity voluntarily without a contractual entitlement to pay as a worker. It is the intention of the parties which determines whether there is a worker contract or not.

2.2 In an employment context there is often an inequality of bargaining power and the express terms do not always reflect what the parties are actually entitled to. Courts and tribunals have found that it is sometimes necessary to disregard written terms where those terms do not give effect to the reality of the situation between the parties.

2.3 The risk of this happening may be higher for employers where an individual is doing a longer internship, where the tasks/work is integral to the business, or where they have similar responsibilities to employees.

3. Next steps if changing the law to allow short-term work placements

3.1 The minimum wage is a high profile and fundamental right for almost all UK workers. Exemptions are controversial and need to be justified in Parliament with a clear rationale for taking action.

3.2 Preliminary issues we would need to clarify include:

- the scope/scale of the problem the exemption addresses; why it is needed now; how it would serve government policy; what would be the effect of not granting it.
- whether the exemption is necessary, i.e. that the interns for whom exemption is sought are, or are likely to be, workers to whom the minimum wage is payable.
- Whether internships/work experience placements can be defined in legislation to successfully achieve the policy (especially in diverse factual scenarios). Whether there are any unintended consequences of such an exemption – whether it could be used as a loophole by unscrupulous employers and/or whether it could restrict the use of internships (by limiting the scope and flexibility of unpaid internships or volunteer activities in general).

3.3 The need for such an exemption would need to be agreed with BIS Ministers for responsibility for the minimum wage (Jo Swinson) and internships (David Willetts). The Deputy Prime Minister's Office also has a key interest due to the implications for social mobility.

ANNEX A: NATIONAL MINIMUM WAGE – WORKER CHECKLIST

If all of the following apply you are a 'worker' who is entitled to the National Minimum Wage (NMW).

- You have a **contract** or **other arrangement with the organisation which entitles you to a reward**. The contract does not have to be written: it may be implied (ie reflecting what happens in practice in the workplace) or oral (ie a spoken agreement of work in exchange for rewards).
- The reward is a **monetary payment** (ie cash or other form of financial payment) **or benefit in kind** and is not simply the reimbursement of genuine 'out-of-pocket' expenses.

Whilst a reward would typically involve your employer incurring a cost, the promise of a contract or future work could be considered a benefit in kind.

- You have **to turn up** for work even if you don't wish to.

In deciding if someone had to turn up for work a tribunal would look at factors such as whether the organisation can impose sanctions on you for failing to work, the organisation's grievance and disciplinary procedures, and whether you or the organisation are able to terminate the contract or arrangement by giving notice.

- Your employer has **to provide work** for you to do for the duration of the contract or arrangement (this would be the case even if you were doing 'casual work' or if you had a 'zero hours' contract).
- You have **to perform the work or services personally** and only have a limited right to send a substitute. Note: being allowed and able to delegate to another member of staff does not amount to substitution or subcontracting out the work for NMW purposes.