

NATIONAL MINIMUM WAGE BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the National Minimum Wage Bill as introduced in the House of Commons on 5 February 2020 (Bill 15).

- These Explanatory Notes have been produced by the Public Bill Office on behalf of Paula Barker MP in order to assist the reader of the Bill. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes are intended to be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The purpose of this Bill is to provide a basis for more effective and extensive enforcement of payment of the National Minimum Wage by requiring employers to record more specific details in the National Minimum Wage records they are required to keep for each relevant employee.
- 2 The Bill also makes provision about the role of Local Authorities in England in making sure that service providers from whom Local Authorities procure health and social care services are paying their employees the National Minimum Wage.

Legal background

- 3 Most employees in the UK who are at least school leaving age are entitled to be paid a minimum hourly rate known as the National Minimum Wage (NMW).¹ The rate of the NMW varies according to age and whether the employee is an apprentice.² The employer is obliged to pay the NMW and there are no exceptions for small employers.

¹ For further information on who is entitled to the National Minimum Wage and who is not entitled, see <https://www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage>.

² For further information on current National Minimum Wage rates, see <https://www.gov.uk/national-minimum-wage-rates>.

- 4 Part 3 of the National Minimum Wage Regulations 2015 (the “2015 Regulations”) sets out the formula for calculating the hourly rate for the NMW. The calculation is expressed as a function of remuneration in the pay reference period, divided by the hours of work in the pay reference period. Part 4 of the 2015 Regulations sets out how to calculate the remuneration in the pay reference period; and Part 5 sets out how to calculate the hours worked in the pay reference period.
- 5 Part 5 of the 2015 Regulations is explicit that, for the purposes of calculating the NMW, travel time and waiting time for the purposes of the job (not including commuting from home) must be counted as “hours worked”.
- 6 Regulation 59 of the 2015 Regulations states that the employer of a worker who qualifies for the MNW must keep “records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage”. In addition, the records must be in a form which enables the information kept in respect of a worker’s pay reference period to be produced in a single document. These are, however, the only requirements relating to the form of the records.

Policy background

- 7 A series of recent cases have demonstrated that some employers have not been paying health and social care workers for the time that they have spent travelling between work appointments or waiting for appointments when working in the community. This is in breach of the provisions of the 2015 Regulations which make clear that travel time and waiting time for work purposes (not commuting time) is time which counts towards the “hours worked” calculation. The result was that, when “hours worked” was calculated to include travel and waiting time, the employees were receiving less than the NMW.³
- 8 In July 2019, the Director of Labour Market Enforcement (“DLME”) published his Strategy for 2019/20, which included recommendations to improve state-led enforcement of employment rights. In his report, the DLME noted that:
- “...it has become apparent that there are inherent barriers within the NMW regulations that prescribe record-keeping requirements which may be preventing [Her Majesty's Revenue and Customs National Minimum and Living Wage enforcement team] officers from assiduously enforcing against record-keeping offences. ...Concerns have been raised that

³ Ms E Harris and 8 others v Kaamil Education Ltd and Diligent Care Services Ltd: 1302183/2016 and others.

these regulations are not detailed enough and as a result cannot be reinforced.”⁴

9 The DLME concluded that the NMW regulations prescribing the form and manner in which employers have a duty to keep records should be clear and detailed, providing “a clear and consistent standard against which to enforce, while also providing clarity for business on what good record-keeping looks like”.⁵ He recommended a review of the regulations on records to be kept by an employer to set out the minimum requirements needed to keep sufficient records; and an extension of the time period for which employer records must be kept, to align with the period of liability under the National Minimum Wage Act 1998.

10 In its response to the DLME’s 2019/20 Strategy report, the Government partially accepted this recommendation, agreeing to amend the regulations to extend the time period for which employer records must be kept to six years to align with the period of liability under the National Minimum Wage Act 1988. The Government declined to accept the recommendation to set out in the regulations

⁴ United Kingdom Labour Market Enforcement Strategy 2019/20, Director of Labour Market Enforcement, David Metcalf, July 2019, p87
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819014/UK_Labour_Market_Enforcement_Strategy_2019_to_2020-full_report.pdf

⁵ Ibid. p88

minimum requirements for details to be set out in employer records.⁶

Territorial extent and application

11 “Extent” means the jurisdictions in which the Bill would form part of the law. “Application” means where the provisions of the Bill would produce a practical effect. The Bill both extends and applies to England and Wales, Scotland and Northern Ireland, with the exception of Clause 2, which extends to England and Wales and applies to England.

Commentary on provisions of Bill

Clause 1: Requirements for National Minimum Wage records kept by employers

12 Clause 1 requires the Secretary of State to bring forward regulations within six months of the Act coming into force to amend regulation 59 (records to be kept by an employer) of 2015 Regulations in order to set out the minimum requirements needed to keep sufficient records for the purposes of regulation 59.

13 Subsection 2 requires that, in drawing up the regulations, the Secretary of State must consult

⁶ UK Labour Market Enforcement Strategy 2019/20 Government Response, October 2020, p 17
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925523/director-labour-market-enforcement-strategy-2019-2020-govt-response.pdf

the Director of Labour Market Enforcement, the Employment Agency Standards Inspectorate, Her Majesty's Revenue and Customs National Minimum and Living Wage enforcement team, and the Gangmasters and Labour Abuse Authority.

14 Subsection 3 sets out the minimum requirements which the regulations must prescribe, which must include the employee's name and employment details; the time period covered by the records; the total working time for each day worked, calculated in accordance with Part 5 of the 2015 Regulations; work start times and finish times; the length of any breaks taken; the total working time for each pay reference period; and the hourly rate calculated in accordance with regulation 7 of the 2015 Regulations.

15 The regulations may set out other requirements (subsection 4).

Clause 2: Duties of Local Authorities in England to ensure social care contractors pay National Minimum Wage

16 Clause 2 requires the Secretary of State to bring forward regulations within six months of the Act coming into force governing the contractual relationship between a Local Authority in England and a service provider from whom the Local

Authority procures health care services, social care services, or both.

17 Subsection 2 provides that “health care” and “social care” are to be interpreted in accordance with Section 9 of the Health and Social Care Act 2008.

18 Subsection 3 provides that the regulations must prescribe mandatory contract terms to be inserted into any contract for services between a Local Authority in England and a service provider. These mandatory contract terms must require that the service provider provide the Local Authority with evidence that it pays the NMW to all relevant employees. The evidence must be in the form of the NMW record that the employer is required to keep under regulation 59 of the 2015 Regulations. If the service provider fails to produce that record, or if the record produced does not provide evidence of payment of the NMW to all relevant employees, the Local Authority must issue a notice requiring the service provider, within 28 days, to remedy any shortfall in payment to relevant employees and to produce the updated NMW record as evidence. If the service provider fails to comply with the notice within 28 days, the Local Authority must terminate the contract for services.

19 The regulations may set out other requirements (subsection 4).

Clause 3: Regulations

20 Clause 3 provides that the power to make regulations is exercisable by statutory instrument; that these regulations may make different provision for different purposes; and that they may make supplementary, incidental, consequential, transitional or saving provision.

21 Subsection 3 provides that a statutory instrument containing regulations will be subject to the affirmative procedure, requiring the instrument to be laid before and approved by a resolution of each House of Parliament.

Commencement

22 The provisions of the Bill come into force on the day the Bill is given Royal Assent (Clause 4(3)).

Financial implications

23 The Bill does not require a Money or Ways and Means Resolution because it does not create any new charges on the public purse or the people respectively.

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