



**THE MINIMUM WAGE AND
THERAPEUTIC WORK**

Information Note

January 2007

It is important to note that the information and examples contained in this note are intended to provide general guidance.

This note should NOT be regarded or relied upon as a complete and authoritative statement of the law.

Summary of main points

The national minimum wage legislation only applies to “workers”. So the key question is whether or not any particular person is a “worker”. If not, then the minimum wage does not apply. “Worker” has a legal definition and depends on the existence of a worker’s contract.

Usually, workers have written contracts of employment so it is a straightforward matter to establish their status. But the “worker” definition says that people can count as workers if they have an oral contract or an implied contract. This leads to some ‘grey areas’ where status may be disputed.

One such grey area is the issue of people doing work (or work-like activities) for therapeutic reasons. This note explores some possible scenarios where this is an issue.

An individual’s productivity or ability is irrelevant in determining whether a worker’s contract exists.

The Government can only give general guidance and clarification of the law. Individual circumstances and arrangements vary and the existence or otherwise of a workers’ contract will depend on the facts in a particular case.

In cases of doubt, independent legal advice should be sought.

Section 1 - Introduction

Aim of the guidance note

1. This note is intended to help individuals and organisations understand how the national minimum wage applies in relation to what is often known as 'therapeutic work'. The note was initially produced in response to the findings in the second report of the Low Pay Commission (the independent statutory body which advises the Government on minimum wage issues). The Low Pay Commission found that:

".....there is confusion over which activities should be defined as work for the purposes of the national minimum wage. Some of the work designated 'therapeutic' for benefits purposes is in fact similar to that undertaken in open or supported employment. People undertaking this work are entitled to the national minimum wage. The basic principle, consistent with the provisions of the legislation, must be that an individual should be considered a 'worker' unless the employer can demonstrate otherwise." (Second Report p 67)¹.

2. The Low Pay Commission went on to recommend that

"the relevant departments and agencies work together to produce, and widely disseminate, clear guidance on what constitutes worker status for individuals undertaking therapeutic activity to ensure that they are not adversely affected by confusion about the legal position." (Second Report p 69)

3. The relevant Government departments, in response to this recommendation, had discussions with a large number of disability organisations and the initial version of this note, which represented the outcome of those discussions, was produced in December 2000 and updated in March 2003

4. This document updates the March 2003 version.

¹ *The National Minimum Wage; The Story So Far* – The Second Report of the Low Pay Commission, February 2000, available from The Stationery Office

Section 2 – Legal Position

Who is entitled to the national minimum wage?

5. A person's right to be paid at least the national minimum wage by his² employer is created in the primary legislation known as the National Minimum Wage Act 1998 (NMW Act 1998). Section 1 of that legislation says that someone qualifies for the minimum wage if he is a worker who works in the UK and has ceased to be of compulsory school age. This is the starting point of the legal entitlement to the minimum wage but the full picture can only be understood by reference to the rest of the NMW Act 1998 and the main subordinate legislation known as the National Minimum Wage Regulations 1999. This note does not attempt to provide a full analysis of those pieces of legislation. Rather, it explains which minimum wage provisions are relevant to the issues of what is often called therapeutic work and explores some difficult areas.

6. It is important to note that there is nothing in the minimum wage legislation which makes any reference to a worker's productivity, ability or effectiveness. There is no distinction between the non-disabled and disabled, and there is no reference to 'therapeutic work' or 'therapeutic workers' anywhere in the legislation. It follows that the criterion for determining whether a person with a mental or physical impairment, which effects an individual's ability to carry out day-to-day activities, is or is not entitled to the minimum wage will rest on precisely the same criterion as any other person; namely – is he a worker?

The definition of a worker

7. Section 54 of the NMW Act 1998 defines a worker as someone who is an employee (that is, someone who works under a contract of employment, including a contract of apprenticeship) or anyone else who works under some form of personal contract whether express or implied and whether oral or in writing whereby they personally provide work or services to the other party to the contract. This definition excludes the self-employed.

8. This definition of 'worker' therefore includes the traditional definition of 'employee' but goes wider than that. This was a deliberate choice, taken because the Government wanted to ensure that people such as agency workers, casual workers and workers on short term contracts would still be entitled to the minimum wage, even if their contracts were not contracts of employment.

² For reasons of space and readability, this note uses *he* to refer to both genders throughout

9. The definition is further extended by Sections 34 and 35 of the NMW Act 1998, which say that certain types of agency worker and homeworker will count as workers even if they do not have workers' contracts or are required to do the work personally or otherwise. In the case of agency workers Section 34 of the NMW Act 1998 says that anyone who is supplied by an agent to do work for another person will count as a worker even if they do not work under a worker's contract, as long as they are not genuinely self-employed. Because this is potentially quite a wide-reaching provision, the Government took the opportunity in July 2000 to explain the sort of situations it was intended to apply to.

"It will help if I clarify for the House the purpose of Section 34 of the NMW Act 1998, which entitles agency workers to the minimum wage. The reason we needed the section was because some people who are supplied by agencies to do work for others sometimes do so under peculiar and often deliberately obscure arrangements such that they would not have counted as workers under the standard definition in Section 54 of the NMW Act 1998." **Lord Sainsbury of Turville**, 14 July 2000³

How to recognise a worker's contract

10. The NMW Act 1998 specifically states that a worker's contract can be express (either oral or written) or implied. It is important to emphasise, therefore, that a worker may have a contract without having it in writing. The difficulty of establishing the existence or otherwise of verbal and implied contracts is long-standing. It is an inevitable result of the many and varied forms of working arrangements that exist in the UK's lightly regulated and flexible labour market. Much of the case law in the field of employment law and indeed contract law more generally has centred on this difficult question. While the problem is therefore by no means unique to the minimum wage, many of the organisations concerned with the status of therapeutic work may not have come across the issue before. However, the right to be paid at least the minimum wage is a right which is more likely to impact directly on their arrangements (and one which workers themselves are more likely to enquire about) than some of the other employment rights which may already apply but tend to have an impact only occasionally (such as the right not to be unfairly dismissed, and the right not to face discrimination on the basis of sex or race).

³ ref Hansard: *National Minimum Wage Regulations 1999 (Amendment) Regulations 2000 debate*, House of Lords, 14 July 2000, col. 524.

The burden of proof

11. The minimum wage legislation places the burden of proof on the employer to prove that the minimum wage has been paid, rather than placing the burden on the worker to prove that it has not. Similarly, in the case of establishing worker status, the assumption will be that the person is a worker, and the burden is on the alleged employer to show that he is not. This reversal of the burden of proof is intended to ensure that an employer cannot avoid his obligation to pay the minimum wage by being non-co-operative or pleading an absence of documentation.

Existing advice on the worker definition

12. The '**Detailed Guide to the National Minimum Wage**' was issued in early 1999 and updated in 2000, 2001 and 2004 (call **0845 6000 678** for a copy or visit <http://www.dti.gov.uk/employment/pay/national-minimum-wage/index.html>). The original version explained the application and coverage of the minimum wage, but did not deal specifically with the issue of therapeutic activity. The Department of Trade and Industry then produced a short piece of guidance on the difficulty of establishing whether or not a worker's contract exists where informal arrangements are in place. This was particularly aimed at organisations involved in providing therapeutic activity. The guidance pointed out that there will always be a difficulty in establishing the employment position of people who are not in the general labour market, or who are being introduced gradually to it.

13. The Government has now built on the original pieces of guidance and the document which you are now reading supersedes it. It is important to appreciate, however, that the law itself has not changed in any relevant regard since the earlier guidance. The Government's advice remains the same. Our aim is to dispel, through the use of examples and questions and answers, some of the doubt and uncertainty surrounding the issue of therapeutic activity.

Section 3 – ‘Therapeutic work’ and the National Minimum Wage

Why is ‘therapeutic work’ a particular problem?

14. ‘Therapeutic work’ is not a legal term. It is used to describe a number of arrangements whereby people who have problems functioning in the normal labour market are nonetheless given the opportunity to undertake some form of work-like activity, for which they may receive payment (they are often in receipt of state benefits as well – see section 5). It follows from the legal position described in section 2 that if a person with a mental or physical impairment, which effects their ability to carry out day-to-day activities, does these activity under an arrangement that is an explicit or implied worker’s contract, then they must be paid the minimum wage for that work.

15. The situation which causes the most difficulty is where an informal arrangement is in place, which involves payments of below the minimum wage but which may sometimes have other benefits for the person undertaking the activity. In such cases there may or may not be an implied contract in place which would make the person a worker entitled to the minimum wage. If such a contract exists, payment of a wage below the minimum rate would be unlawful.

16. The following text is intended to help individuals and organisations to understand how the minimum wage applies in relation to what is often known as ‘therapeutic work’. To recap:-

- There is no reference in the minimum wage legislation to a worker’s productivity, ability or effectiveness.
- The legislation also makes no distinction between disabled and non-disabled people, or between people with a mental or physical impairment, which effects their ability to carry out day-to-day activities and other people, and contains no reference to ‘therapeutic work’.
- The key criterion for determining whether anyone is entitled to the minimum wage is simply - is he a worker?
- Section 54 of the NMW Act 1998 defines a worker as someone who works under a contract of employment or other contract, under which they undertake work for another party in a personal capacity (other than the self-employed).
- The minimum wage applies to a wide category of workers. This was a deliberate choice, taken because the Government wanted to ensure that people such as agency workers, casual workers, home workers and workers on short term contracts would still be entitled to the minimum wage.

17. When an employment tribunal or county court⁴ looks at whether the minimum wage applies we would expect them to have the following points in mind:-

(a) If there is no consideration (usually the payment of money, other than expenses or the giving of a benefit) from the employer and no obligation placed on the participant undertaking the therapeutic activity or the work then there would not be a workers' contract between the two parties. The underlying point is that there has to be a mutual obligation between the participant performing the activity and the employer paying a reward in return for that activity. It might be possible to pay genuine expenses and make occasional 'ex gratia' payments to the participant without creating a worker's contract, as long as no expectation of payment for the activity was created and no obligation was placed on the person to carry out the activity. (In Scotland the position is different as Scottish law does not require consideration before a contractual obligation is enforceable. However, a contract in Scotland does require an intention to create legal obligations, and for the sort of contract we are discussing, some patrimonial interest, namely some material gain or loss between the parties, which is similar if not the same as the requirement for consideration).

(b) If money is paid by the employer to a participant, there may still be no worker's contract if there is no mutual obligation between the parties i.e. the participant is genuinely not obliged to perform duties and the employer is genuinely not obliged to provide the activity or pay the individual. However a payment is often indicative of a contractual relationship and any payments made over and above genuine expenses will be carefully scrutinised by an employment tribunal or county court. If they are genuinely not linked to a mutual obligation between the parties then it is unlikely that a worker's contract will be inferred and the minimum wage will not be payable.

(c) If the two factors are combined, so that the individual is paid money or given a benefit by the employer over and above expenses and is obliged to perform an activity in accordance with the employer's instructions, then there will almost certainly be a workers' contract between the two parties and the participant will be a worker. In such circumstances, the minimum wage will be payable, even where the activity has genuine therapeutic value. Organisations should be aware that payment of genuine expenses to those undertaking therapeutic activity **will not itself imply a worker's contract and lead to an obligation to pay the minimum wage. Expenses can also be paid at a flat rate if they**

⁴ A claim for underpayment of NMW may be brought in an employment tribunal or county court. For reasons of space and readability we have used "court" throughout.

represent a fair and reasonable estimate of out of pocket expenses (including travel and subsistence) where it would be otherwise administratively cumbersome for the provider of the therapeutic activity to calculate individual expenses. Therefore a figure which represents genuine average expenses for a group of people undertaking therapeutic activity would be acceptable. But if a person is paid more than expenses and is obliged to perform an activity in accordance with the employer's instructions, the participant is likely to be entitled to the minimum wage.

18. It may be that an employment tribunal or county court will distinguish between an agreement entered into to provide therapy and a contract entered into to perform work. The existence of, and adherence to, a clearly defined therapy care plan may be a factor which could lead a tribunal or a court to conclude that there is not a worker's contract in place. However, an employment tribunal or county court are likely to decide that factors which may distinguish therapeutic activity from work are not relevant if the participant is paid money or given a benefit by the employer, over and above expenses and also owes obligations to the employer to perform work. In such a case a worker's contract is likely to be established and the minimum wage would be payable regardless of whether the participant was deriving therapeutic benefit from the therapeutic activity. We cannot, unfortunately, provide any more certainty in this area.

19. The facts of different cases will vary and an employment tribunal or county court will have to consider those facts as well as the case law. In cases of doubt, independent legal advice should always be sought.

20. It may be helpful to provide some examples that may help you decide if the minimum wage applies to your situation. Of course, an employment tribunal or county court would need to consider all the relevant aspects of a case. Some of the following examples were supplied by organisations involved in therapeutic activity and demonstrate where 'grey areas' might be found.

21. It is important to appreciate that all decisions on worker status and applicability of the minimum wage need to be taken on a case-by-case basis, depending on the particular facts in that case. It is not therefore feasible, nor would it be helpful, to give definitive answers to these scenarios.

Scenario (a) *A farm aims to increase participants' prospects of obtaining employment by helping them develop social and other skills through involvement in agriculture, horticulture, caring for animals and training. No monies are paid and their attendance is voluntary. There is no sanction or penalty if they do not come in.*

Analysis

It seems to us, on the information available, that there would probably not be an employer/worker relationship in this scenario because the people concerned are not obliged to attend and perform the activity and no sanctions apply if they do not turn up. It appears to be a voluntary situation which along with other similar voluntary situations would not be covered by minimum wage legislation.

Scenario (b) A charity runs a workshop for participants with mental health problems. The scheme pays clients £4 per day if they attend. If they do not attend, the only result is that they do not receive the attendance allowance. If they go along and do not want to do any activity they don't have to. The organisation does not ask participants to produce any set output or meet specific deadlines.

Analysis

In this scenario a small ex gratia payment is paid. There is always a risk that a contract may be inferred if a payment is made, regardless of whether it is described as an "attendance allowance" or "pocket money" or by another term. Such terms are meaningless from a legal perspective. However, if such a payment is made and there are no obligations on the participants who attend to carry out the activity, and they do not lose their place if they do not attend then a contract is unlikely to be inferred. In this scenario the participants simply do not receive the attendance allowance if they do not attend. In such a situation there does not appear to be any mutual obligation on the parties and the national minimum wage would not apply (see paragraph 17(b) and (c) above).

Scenario (c) A trust runs a facility for people with mental health problems, who do various activities such as packing and assembly. They are paid varying amounts up to £20 per week. If they do not attend there are no sanctions. There is a production line but the speed is set by the users and if they want to they can turn it off.

Analysis

The references to the level of productivity in this scenario and scenario (b) are not relevant for the purposes of the minimum wage. However, if the person is required to achieve a certain level of productivity, and if that level of productivity were to affect the pay they receive, then a contract may be inferred. That is because there appears to be an obligation on the participant to perform in a certain way. In such circumstances the minimum wage may be payable.

If ex gratia payments (which are not expenses) are paid to participants who are obliged to attend and perform the activity in a certain way or who, for example, might lose their place as a result of failing to attend and perform the work, then it is likely that the situation would be different. In such a case the obligation to pay the minimum wage will apply

Scenario (d) A charity provides vocational rehabilitation for people who have or are recovering from mental health problems. Participants are expected to follow a normal working pattern. On each day that a participant is due to attend they must report on time and complete a full working day. If a participant is persistently late, does not attend or does not take part in the work provided, they may be asked to leave the scheme. The scheme pays each participant a small amount of money, which depends on the number of days they have worked in the scheme that week. The amount is reduced if the participant is late or misses a day.

Analysis

In this scenario there does appear to be a mutuality of obligation, because those carrying out the activity are expected to attend, they must not be late and they must carry out the activity, otherwise they might lose their place on the scheme. In this situation a contract can be inferred and therefore the minimum wage becomes due.

Scenario (e) An organisation works with disabled people with severe learning difficulties. It organises placements with employers. These employers offer places to people who have not yet acquired work skills and who may display behaviour which challenges society, often to the detriment of their businesses. Employers pay expenses to the disabled people who take on the placements and there are no obligations on the individuals to attend the workplace at certain times, nor are there any consequences if they do not attend. Further, non-disabled people from the organisation that arranged the placement accompany the disabled individuals on assignments. As the disabled people are trained, they work more independently, and are accompanied only on some assignments. They begin to receive a payment which exceeds the expenses payment. They are also expected to attend the workplace at certain times and may lose their post if they fail to attend and carry out the work as directed.

Analysis

This scenario has a number of factors and divides into two phases, an initial phase, where participants are supervised, and a second phase where they carry out the activity in a more unsupervised way, receive more than expenses and take on added responsibilities. The initial

situation appears not to attract the minimum wage. The participants carry out the activity for the employer for no payment or benefit. They simply receive expenses and there are no obligations on them to attend and perform the activity at certain times and no consequences appear to follow if they fail to do so.

As the participants on the scheme become trained, they take on more responsibility and begin to be paid more than just expenses. Importantly, there is also a requirement on them to attend the workplace and work in exchange, effectively for the additional monies they are paid. They therefore move into a second phase where a contract is likely to be inferred. In such a situation, the minimum wage would apply. The fact that the participants may still have difficulties relating to their condition and the fact that they may still be supervised does not mean that the minimum wage is not payable. If, however, during the second phase the participants were to continue to receive either expenses and/or a small ex gratia payment but were not required to attend and do the work nor would they lose the post by failing to attend and work, then it is unlikely that a worker's contract would be inferred. The minimum wage would not be due. This would be similar to the situation described in paragraph 17 (b) and to scenarios (b) and (c) above. The crucial point is that a payment in itself might not infer a contract if the individual owes no obligation to the employer or indeed anyone else for that payment.

It is however crucial that a clause in a contract stating that a participant is free to come and go as they please or that no consequences will follow if they do not attend and carry out the work, must be genuine. If an employment tribunal or court were to find that there was in fact an obligation of this type on a participant, regardless of what the provider of the activity said the situation was and if the individual were paid anything in excess of a genuine expenses payment, then it is likely that a contract would be inferred and the minimum wage would be payable.

Scenario (f) A local centre for people with learning difficulties provides work-related activities to help people acquire the skills which may help them enter the labour market. Those taken on by the centre receive no pay or other benefit for the activities undertaken but are offered expenses including costs of travel to and from their home. On occasions they will be told they will be required to attend the centre for certain periods of time and that work will have to be carried out in a certain way.

Analysis

In this scenario participants are offered out of pocket expenses. Payment of genuine expenses will not of itself imply a worker's contract even if clients are expected to attend the centre and carry out work. The

safest option is to reimburse expenses once receipts are submitted. A flat rate representing an amount as near as possible to the average out of pocket expenses incurred by the group would probably also be acceptable. However labelling money as expenses cannot disguise the payment of consideration. Where participants are expected to attend and carry out work and a participant is paid more than a fair and reasonable estimate of out of pocket expenses a worker's contract is likely to have been created. HMRC, who enforce the minimum wage on behalf of the DTI, may investigate such a scenario to confirm status.

Scenario (g) A participant has undertaken 'work experience' for two years 'working' a few hours per week. To be able to cope with the work environment and achieve an acceptable level of productivity, he needs a supporter to be present the whole time. If the minimum wage were to be required, the work experience would be terminated.

Analysis

It is certainly possible for someone to be on a work placement or to be doing work experience without having a contract which makes him a worker in the eyes of the law. That may be the case in this situation. Alternatively, the fact that the scenario identifies an acceptable level of productivity might indicate the existence of a contractual relationship with rights and obligations on both sides. The question of whether any payment or other form of consideration and the type of control exercised over the participant is likely to be crucial. If the participant is a worker, then termination of the contract because of the worker's entitlement to the minimum wage would fall foul of section 23 of the NMW Act 1998 (the right not to suffer a detriment) and may be an automatic unfair dismissal under Section 104A of the Employment Rights Act 1996.

Scenario (h) A participant carries out a 10 week 'work experience' for two days a week and is not paid since the company regards it as a work experience placement not employment.

Analysis

This is similar to scenario (g). The fact that the participant is not being paid makes it more probable that no worker's contract exists. However if there are obligations placed upon a participant then they are likely to be a worker and should be paid the minimum wage.

Scenario (i) A participant is a volunteer at a local private company and not paid.

Scenario (j) Participants attend a day care facility, which takes the form of a workshop environment, for three or four days a week. There is a £1 per day charge to the participants for transport but no payment is made

to them.

Analysis

The participants in these two scenarios would almost certainly be outside the scope of the NMW Act 1998 as they would appear to be genuine volunteers giving their time and effort for free, provided there is no obligation to attend. The only question to pursue would be whether any other form of consideration (other than monetary payment) namely benefits in kind is received which could imply a contractual relationship.

Scenario (k) A participant undertakes four hours voluntary work, in addition to paid work in the organisation. He works the additional hours voluntarily and could go home if he chose.

Analysis

This is less clear-cut than scenarios (i) and (j). The participant does paid work and unpaid ('voluntary') work for the same organisation. An employment tribunal or county court would need to determine whether the extra hours were genuinely outside the contract, or whether there was some expectation of this extra work from the employer and that this was simply a device to minimise the hours to count when calculating the minimum wage. An employment tribunal or county court might also want to know if the conditions under which the work is carried out differs in the two circumstances. If the extra hours are genuinely outside the scope of the contract and if the unpaid work is carried out without contractual obligations, then the voluntary work will not attract the minimum wage.

Scenario (l) A company operates as part of the Social Services day care provision. The participant works in the company up to three days a week. Participants are paid a token monthly amount as pocket money.

Analysis

In this scenario there is a regular payment but it is very small. It is unlikely to be viewed by the participant or company as a 'wage' in the normally understood meaning of the word. But 'pocket money' or 'token payments' in this context are meaningless terms in law. The question for an employment tribunal or county court would be whether the work was being done under a worker's contract, and the issue of whether the payment was made in return for an obligation to carry out the work done would be seen as crucial. The payment of small amounts (often described as 'pocket money', 'regular honoraria', 'top-ups' and so on), over and above expenses, in return for an obligation to carry out work, will always carry an element of risk since it may be taken as evidence

that an implied worker's contract has been created (entitling the worker to the minimum wage). However, if such a payment is made and there are no obligations on the individual to attend to carry out an activity or for example, if the individual does not lose their place if they fail to attend, then a contract is unlikely to be inferred and the minimum wage will not be payable.

Scenario (m) A trust provides the opportunity for people, suffering from mental health problems and living in the community, to take part in activities, which includes the packing of goods for local firms. This activity is monitored and supervised by trust staff. It enables people to build confidence, social skills and work-related competences. There are no output levels attached to the activity. The attendees work at their own pace and there are no sanctions for poor or zero productivity. The only consequence if clients do not attend is that they do not receive a payment for attendance.

Payment for attendance varies and is made at an hourly rate. One group of participants is paid 50 pence per hour up to a maximum of £15.00 per week for a maximum of 27 hours attendance. This group also receives the same rate for up to 4 weeks absence per year. A second group of participants are paid £1.00 per hour for attendance, up to a maximum of 15 hours per week. They receive no payments for absence. The attendees are in the main in receipt of appropriate state benefits. Everyone who attends the service does so voluntarily as part of a Care Plan, which is agreed, monitored and regularly reviewed with them.

Analysis

This scenario involves two groups of participants. Both groups receive a payment for attendance. There is always a risk that a payment might lead to a worker's contract being inferred. The key question an employment tribunal or county court would consider is whether there is an expectation that payments will be made in return for carrying out the work.

In this scenario, participants receive payment for attendance even if they produce zero output. The minimum wage legislation does not make reference to productivity but an employment tribunal or county court would be more ready to infer a worker's contract if the level of productivity were to affect the pay that participants receive.

As attendance is voluntary and participants face no consequence other than not receiving their payment if they do not attend and carry out the work, the risk of an employment tribunal or county court finding that the minimum wage applies is reduced. There appears to be no mutuality of obligations between the trust and the participants.

The existence of a care plan may lead an employment tribunal or county court to infer an agreement to provide therapy rather than a worker's contract. However the existence of a care plan is unlikely to be relevant if clients are paid and owe obligations to the trust to attend and work.

One group of participants is paid for up to four weeks absence per year. Even though paid leave is a feature of many workers' contracts, this feature alone should not lead an employment tribunal or county court to conclude that the trust and the clients are in an employer-worker relationship. The crucial point is whether there is an obligation on the participants involved to attend and carry out work in return for payment. Both groups of participants are in receipt of appropriate benefits. The Permitted Work Rules allow people to work and earn up to and including £20 a week for an unlimited period if they are claiming incapacity benefit. Individuals participating in this scheme would not be in breach of the Permitted Work Rules as they only earn up to a maximum of £15.

Section 4 – Other points regarding minimum wage rules

Types of work for minimum wage purposes

23. Once organisations come to the view that a particular individual does count as a worker for national minimum wage purposes, then they will need to identify how to calculate the hourly rate. In the Regulations, there are four types of work: **time work**; **salaried-hours work**; **output work** and **unmeasured work**. The rules and calculation of hours differ for each. While the calculation is relatively straightforward in most cases, especially where there is a simple wage paid for hours worked, it can be more complicated if payment is measured some other way, such as by piece-rate (output work) rather than by hours (time work). The type of work depends on the way in which the worker is paid for the work that he does, not on what sort of job he has.

24. For **output work** from 1 October 2004 employers had the choice of either having to pay their workers the minimum wage for every hour they work or pay a fair piece rate that allowed an average worker to earn the minimum wage. From 6 April 2005 the fair piece has to be multiplied-up by 1.2. For further information, visit <http://www.dti.gov.uk/employment/pay/national-minimum-wage/index.html>

25. For **unmeasured work** there are special provisions in the rules allowing an employer and worker to come to a written agreement over a sensible estimate of the hours to be spent on the work. Provided this estimate can be shown to be fair and realistic, then it means that the minimum wage is only required to be paid for the hours in the agreement, rather than those actually worked.

Voluntary workers

26. People who do work which is purely voluntary (that is, with no expectation of a reward of any kind, monetary or otherwise) are not workers, and so have no entitlement to the national minimum wage. However, some people who consider themselves 'volunteers' may in fact be working under implied or explicit workers' contracts because of the nature of their work and the rewards they receive for it. Section 44 of the NMW Act 1998 exempts some of these 'voluntary workers' from the Act, provided that the only reward they receive is actual or reasonably estimated expenses, or benefits (not cash) relating to subsistence or of such accommodation as is reasonable in the circumstances of the employment, and providing that the work they do is for a charity, voluntary organisation or statutory body. Again, the Act itself and the Detailed Guide should be referred to for more information.

Section 5 – The Benefits System

27. Incapacity benefits such as Incapacity Benefit, Severe Disablement Allowance and Income Support awarded on the basis of illness or disability are intended for people who are incapacitated by the effects of their condition. As such benefits cannot normally be paid to people who work because this basic entitlement condition is not satisfied.

28. It is recognised, however, that allowing a limited amount of work can help improve a person's condition, increase their chances of returning to the labour market and help them achieve lasting paid employment.

29. Previous rules allowed benefit to continue if work was undertaken on the advice of the claimant's GP and it was confirmed that the work would help improve, or prevent or delay deterioration in the condition that entitled the person to benefit. This was often referred to as therapeutic work.

30. As part of the Government's commitment to remove barriers to work for those with an illness or disability who want to work, they replaced the therapeutic rules with new more flexible work rules from April 2002. These are known as the Permitted Work Rules.

31. Now any person receiving incapacity benefits can try some work as a stepping stone to full-time employment without the fear of losing their benefit.

The Permitted Work Rules

32. From October 2006, someone receiving an incapacity benefit can work for less than 16 hours a week, on average, for up to and including £86.00 a week for up to 52 weeks within these hours and earnings limits.

33. A person can work and earn up to and including £86.00 a week indefinitely where their work is supervised by someone who is employed by a public or local authority, or a voluntary organisation whose job it is to arrange work for people with disabilities. This supported permitted work includes work done in the community or in a sheltered workshop. Similarly, anyone who is doing work under medical supervision as part of a hospital treatment programme, either as an in-patient or a regular outpatient of a hospital or similar institution, can work for an unlimited period with earnings of up to and including £86.00 a week. Since April 2006 people who are accepted as being incapable of work without a medical assessment because they are in one of the Personal Capability Assessment exemption categories can also work and earn up to and including £86.00 a week.

34. Because of the regular nature of monetary payments that are allowed under permitted work rules, and the obligations imposed, it is likely that

people who fall under these arrangements will be workers and the national minimum wage will be due.

35. The rules also allow people to work and earn up to and including £20 a week for an unlimited period. This will enable many people to do small amounts of work for social inclusion purposes without the fear of losing benefit.

36. Although earnings below the £86.00 limit do not affect the payment of Incapacity Benefit and Severe Disablement Benefit, the payable amount of income related benefits (Income Support, Housing Benefit and Council Tax Benefit) will be affected if earnings exceed the appropriate earnings disregard. This is £20.00 for people receiving the Disability Premium as part of their Income Support.

37. General guidance on permitted work can be found in Jobcentre Plus leaflet IB1 which can be obtained from local offices of Jobcentre Plus and the Jobcentre Plus web site. Claimants receiving benefit who are considering work should discuss the matter with Jobcentre Plus before starting work.

Section 6 – Types of Support Available

38. Social Services Departments and some voluntary sector organisations provide ‘supported employment’, and a worker on such a scheme is covered by the minimum wage legislation in the same way as any other worker. Jobcentre Plus is responsible for delivering WORKSTEP, the Government’s supported employment programme. It is a requirement of WORKSTEP that participants are paid at least the national minimum wage.

39. WORKSTEP provides job support to over 21,500 people with disabilities who face complex barriers to getting or keeping a job, but who can work effectively with the right support. It provides opportunities for disabled people to work in a supportive environment in jobs on the same terms and conditions as their colleagues, and where possible to progress to unsupported employment. Referrals to WORKSTEP are made through Disability Employment Advisers (DEAs), who are usually based in Jobcentres and Jobcentre Plus offices or by providers authorised by a variation to their contract.

40. WORKSTEP is managed by Jobcentre Plus, who contract with around 180 local authorities, private sector, voluntary organisations and Remploy Ltd. WORKSTEP provides a wide range of supported work opportunities that meet the differing needs of disabled people and reflect the demand of the local labour market. Supported employees work in jobs in mainstream employment or in supported factories and businesses.

41. The aim of WORKSTEP is to move away from the typical wage subsidy model of previous years and focus on appropriate job support and development opportunities. The programme places emphasis on helping people to progress to unsupported employment where this is the right option for them. Longer term support continues to be available for those who need it and is a major element of the programme. WORKSTEP participants will have a written contract of employment and receive at least the national minimum wage.

42. In addition to WORKSTEP, DEAs can advise on the range of other programmes for people with disabilities including:

Work Preparation – this is an individually tailored, work-focused programme that enables people to address barriers associated with their disability and prepare to access a labour market with the confidence necessary to achieve and sustain their job goal. It can also be used to help people who are at risk of losing their job because of their disability by helping them to overcome difficulties that are affecting their work. Work Preparation is delivered through contracted providers from the

private, voluntary and public sectors. Some of these providers also deliver Workstep and other Jobcentre Plus programmes. They are paid by Jobcentre Plus to arrange individually tailored programmes aimed at achieving goals that have been agreed by Disability Employment Advisers and their customers. The majority of Work Preparation programmes take the form of short unpaid work placements."

Job Introduction Scheme - allows client to try out a job for a trial period while Jobcentre Plus helps the employer with the wages;

Access to Work – may be able to help to tackle some of the practical obstacles facing disabled people at work i.e. providing a support worker, special equipment help towards the cost of getting to work if the client cannot use public transport; for some support the employer is expected to make a contribution. Applications are made through specialist Access to Work Business Centres within Jobcentre Plus either direct or through the Disability Employment Adviser.

New Deal (mainstream) – disabled people in receipt of Job Seekers Allowance are eligible for all mainstream New Deal programmes i.e. New Deal for Young People, New Deal 25 plus, New Deal for Lone Parents, New Deal for Partners of Unemployed people as appropriate (often without the eligibility criteria afforded to non-disabled people).

43. New Deal for Disabled People pilots ran from September 1998 to June 2001 and helped over 8,000 people into work. Based on this success, and building on the best practice from those pilots, New Deal for Disabled People (NDDP) was extended from July 2001 across England, Scotland and Wales. NDDP has since been extended to March 2007

44. A voluntary NDDP gateway offers customers on a qualifying benefit an interview with an adviser which signposts them to Job Brokers. NDDP information is issued to customers as part of the initial mandatory work focused interview. Customers can also contact the NDDP Helpline or visit the New Deal website for information and approach Job Brokers directly.

45. Job Brokers are made up of private, voluntary and public sector organisations, including Jobcentre Plus, or combinations of these in partnership. They work closely with individuals to help them prepare for, find or return to work and sustain employment.

46. Involvement in NDDP is entirely voluntary. Job Brokers are working to identify new and innovative ways of supporting people with health conditions and disabilities in receipt of qualifying health related benefits. Job Brokers have not been prescribed how to deliver NDDP and therefore each individual Job Broker operates differently. However services can include support with completing application forms and

writing CVs, interview preparation and advice on vacancies available locally. They also work closely with providers of training and other provision where the customers need additional help.

47. New Deal for Disabled People Job Brokers also give support to employers including supporting the employee for the first six months in work and through advice on areas such as work placement adjustments. Once again there are no specific ways in which Job Brokers work with employers in the delivery of NDDP. Participation in New Deal for Disabled People does not affect entitlement to benefits as long as a person satisfies their normal benefit conditions.

Section 7 – Frequently asked questions

Q: Why can't the Government give a definite yes or no answer in specific cases of therapeutic work?

A: Only courts and tribunals can decide legal cases, and they do so on the basis of all the facts in the case and having heard the arguments from both sides. Neither Government Ministers nor officials can make legal decisions on real cases. Our advice is intended to help clarify what the law means, and we have suggested the sorts of questions that need to be asked to establish whether the minimum wage applies in particular cases. But ultimately there is no substitute for independent legal advice.

Q: Can disabled or other workers with very low productivity waive their rights to the national minimum wage?

A: No. Section 49 of the Act prevents workers from contracting out of their entitlement.

Q: Does the national minimum wage apply to work experience/short term tasters?

A: It may do. It will depend on whether the individual has been employed under a contract (if he gets paid for the work, is given set hours, and can be disciplined for failing to turn up, for example, he may well be working under a workers' contract). Some individuals will be free to come and go as they wish and will receive no payment for their work, in which case the minimum wage will not apply, as they will not count as workers.

Q: Does the national minimum wage need to be paid to individuals who, perhaps because of their disabilities or illness, are not productive?

A: An individual's productivity is irrelevant. The question is simply whether or not that individual is working under a worker's contract. If he is working under such a contract he must get paid the minimum wage. Of course if he is off work due to illness, the minimum wage does not apply and other statutory provisions become relevant.

Q: Do workers' co-operatives have to pay the national minimum wage to their members?

A: A member of a co-operative may also be employed by that co-operative. It depends whether or not the work is done under contract and how the work is rewarded.

Printed in the UK.
First published in January 2007. Department of Trade and Industry.
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URN 07/593