

NATIONAL MINIMUM WAGE

Draft guidance on proposals
to introduce Fair Piece Rates
for Output Workers, including
Homeworkers

DECEMBER 2003

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We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

Present Position

When it introduced the minimum wage in 1999, the Government wanted to apply the minimum wage for output work and homeworkers, who often had no time limits on their work and operated without employer supervision. The Government decided to enable employers and workers to enter into **'fair estimate agreements'**, under which employers must set a fair estimate of the hours needed to complete each block of work, and the minimum wage must be paid for the hours actually worked up to the limit set in the estimate. The estimate will not be 'fair' if it is less than four-fifths of the time an average worker would take to do the same amount of work in the same conditions.

If no fair estimate agreement is in place, then output workers **must** be paid the minimum wage for all hours actually worked. The current Regulations 25 and 26 of the National Minimum Wage Regulations 1999 set out the position in detail.

The Government and the Low Pay Commission have received representations from both employers and homeworker representatives arguing that these agreements were not working well. In February 2003 we therefore consulted on replacing fair estimate agreements with a system of **fair piece rates**. Responses from all sides supported a move to fair piece rates and removal of the four-fifths rule.

The Government is presently consulting on draft regulations designed to introduce the fair piece rate system; we expect to lay these before Parliament early in the New Year. The draft Regulations can be seen at www.dti.gov.uk/er/nmw or can be obtained by telephoning Mike O'Donnell on 0207 215 6231; comments must be received by the 23 January 2003.

What is output work?

For the purposes of the minimum wage 'output work' has a precise meaning which is defined in Regulation 5 of the 1999 Regulations. Briefly, it is work that is paid wholly by reference to the number of pieces made or processed by the worker, or to some other measure of output such as the number of sales made by the worker.

Output work can cover a range of tasks, from packing envelopes or cutting cloth to door-to-door newspaper distribution (where payment is by number of deliveries) and many jobs in sales or other customer services (where payment is by commission-only). Output work can also be done at the employers' premises rather than at home.

What is a homeworker?

Homeworkers are people who work for an employer but do not work at the employers' premises. They are entitled to the minimum wage, but are often paid according to a piece or output rate and in those circumstances will be output workers for the purpose of the Regulations.

The draft Regulations

The draft Regulations are attached as an Annex to these notes. This guidance summarises in simple terms how they are intended to work. The Government will ensure that final guidance is available when the Regulations are laid before Parliament (end of January/early February 2004). Naturally comments on this draft guidance would also be welcomed, by 23 January 2004.

Output Work (Regulation 24)

Regulation 24 (1) provides that output workers should be paid either according to the new fair piece rate system - called **rated output work** - or the minimum wage for all hours actually worked.

If the employer has not met **all** of the conditions attached to **rated output work**, including issuing each worker with a notice setting out their entitlement under this system, then the employer **must** pay each worker for **every hour** that they work.

Rated Output work: conditions and notice (Regulation 25)

For a system of **rated output work** to apply, a number of conditions must be met. It must be the case that:

- a) the employer does not control the hours that a worker works i.e. his starting or finishing time, or the length of time spent producing the items of work;
- b) the employer has determined the “mean hourly output” rate (**the average number of pieces that can be produced in an hour**) in accordance with the Regulations; and
- c) as stated above, the worker must have been given a written notice containing specified information before the start of the pay reference period (the period for which he or she is normally paid) in question.

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Written Notice: (Regulation 25 (2))

The notice **must**:-

- be issued before the start of the pay reference period. But if the terms of the notice have not changed, there is no need for a new notice before every pay reference period;
- state that the employer has completed a test or estimated the average speed at which the piece in question can be produced;
- state what the mean hourly output rate has been determined to be;
- state that, for the purposes of securing compliance with the national minimum wage legislation, the worker will be treated as working for the period of time that it would have taken him – working at the mean hourly rate – to produce the number of pieces made;

- state the rate or sum to be paid to the worker for the production of the piece in question; and
- give the telephone number of one of the national minimum wage helplines.

The DTI will work with employer and output workers' representatives to develop a model notice which will be included as an Annex in the final guidance.

It is important to repeat that if a worker is not provided with a written notice that complies with the conditions outlined above, the worker has to be paid for each hour they work. All homeworkers may therefore wish to record the number of hours they work, if they do not already do so.

Rated Output work: determination of hours worked (Regulation 26)

To determine whether the worker has been paid the minimum wage, you must calculate the number of hours that the worker is deemed to have worked. Regulation 26(1) provides that the employer must multiply by 120% the number of hours that a worker working at the mean hourly output rate would have taken to produce the number of items produced by the worker.

For example, if the mean hourly output rate is two pieces a hour and the worker makes twenty pieces, he will be treated as having worked for 10 hours, and this period must then be multiplied by 120%, which gives 12 hours. If for this deemed 12 hours of work the worker has been paid at least £54 (ie. the national minimum wage hourly rate of £4.50 multiplied by 12), we know that the legislation has been complied with. This will mean that the minimum piece rate for the item produced – the fair piece rate for the item in question - would have to be at least £2.70 (ie. £54 divided by 20).

As the Regulations are currently drafted, if the employer has informed the worker of the maximum number of pieces that should be produced, and the worker produces more, the maximum number set is used instead of the number of pieces produced. It is not considered appropriate that the worker should be paid for extra work that the employer had not asked the worker to do.

Rated output work; determining the mean hourly output (Regulation 27)

This Regulation deals with how the employer determines the “mean hourly output” rate i.e. the average number of pieces that a worker can produce in an hour. The Regulations allow employers to determine the mean hourly output either by carrying out a test of his workers or (under certain circumstances) by estimating the mean hourly output..

a) Conducting a satisfactory test (Regulation 27 (2))

An employer can carry out a test of all his workers making a particular piece. To calculate the mean hourly output, he then simply divides the total number of pieces produced in an hour by the total number of workers tested.

Alternatively, the employer can test a sample of his workers. In this case the sample **must** be representative in the terms of the speed at which they work. In both cases the test is only satisfactory if it is conducted in circumstances similar to those in which the workers actually work.

It is clearly vital that any sample of workers is representative. It would not be fair for an employer to choose a sample of his fastest workers or indeed a mixture of average to fast workers. If a worker were to make a complaint against a company that the average number of subject pieces that could be produced was set unfairly, or the Inland Revenue were to make a targeted inspection visit (**which they have the powers to do**), the employer would have to be able to show that the test was set fairly.

As mentioned above it is also vital that the test is conducted in circumstances similar to those in which the workers actually work. It would clearly not be fair to conduct the test, for example, with better equipment available to the workers, or with components that have already been unpacked (if unpacking them is part of the job in practice).

It is important that employers take these requirements seriously. If the matter were to end up in the Courts the onus would then be on the employer, under the provisions of the National Minimum Wage Act 1998, to prove that he has complied with his obligations to pay the minimum wage.

b) Making a satisfactory estimate (Regulation 27 (3))

The Regulations also allow an employer to estimate the mean hourly output rate in two ways. First, an estimate may be made where an employer has already tested to determine the mean hourly output (in accordance with these regulations) for another piece which is **reasonably similar** to the one in question. The employer may then make a **fair adjustment** to the mean hourly output for the other piece to take account of the increased or decreased time needed to produce the item in question. If this approach is adopted we recommend that the employer should monitor a sample of workers afterwards to validate the estimate.

An employer may also make a fair adjustment to the mean hourly output rate where this has already been tested for the same piece made **in different working circumstances**. The thinking here is that this method could be used to set the rates for a factory worker and homeworkers making the same piece. **It should go without saying that the original tests must have been conducted fairly in accordance with Regulation 27(2) and any adjustments made in making the estimates must be reasonable.**

If for example an employer wishes to compare homeworkers with factory workers, the employer should be able to show how adjustments have been made if their tools are not comparable or the homemaker does tasks which the factory worker does not, such as unpacking materials. If factory workers are paid under a different system to the homeworkers, then that may also be a factor that should be taken into account.

As mentioned above, **if the matter were to end up in the Courts the onus would be on the employer to prove that he has complied with the minimum wage, under the provisions of the National Minimum Wage Act 1998.**

Any comments on this draft guidance should be sent to Mike O'Donnell at the address below or to Mike.O'Donnell@dti.gsi.gov.uk by 23 January 2004. The guidance will be revised in February to take account of comments on it, and comments that we are receiving in parallel on the draft Regulations themselves.

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**CONSULTATION ON DRAFT REGULATIONS TO INTRODUCE FAIR
PIECE RATES FOR OUTPUT WORKERS**

Output work

24. -(1) The output work of a worker in a pay reference period relating to a type of piece produced, shall be the number of hours spent by the worker during the pay reference period in producing that type of piece, except where the output work relating to that type of piece is rated output work.

(2) Output work is rated output work if –

- (a) it satisfies the conditions in paragraph (1) of regulation 25, and
- (b) it is work in respect of which the employer has given the worker a notice that satisfies the requirements of paragraph (2) of regulation 25.

Rated output work: conditions and notice

25. -(1) The conditions referred to in regulation 24(2)(a) are –

- (a) that the output work relating to the type of piece in question (“the subject piece”) is work in respect of which the worker’s contract does not set any normal, minimum or maximum working hours;
- (b) that the employer does not in practice determine or control the hours worked by the worker in relation to the subject piece; and
- (c) that the employer has determined the mean hourly output for the subject piece as defined in paragraph (2) of regulation 26.

(2) A notice satisfies the requirements of this paragraph if –

- (a) it was given in writing to the worker at any time before the beginning of the pay reference period (whether or not it was given before the beginning of, and had effect in relation to, any earlier pay reference periods), and
- (b) it contains the following -
 - (i) a statement that it is being given to inform the worker that, for the purpose of securing compliance with the national minimum wage legislation, he will be treated, in respect of his production of the subject piece during the pay reference period, as working for a certain period of time,

- (ii) a statement that for the purpose of determining the period of time the worker will be treated as working, the employer has conducted a test or, where applicable, made an estimate of the average speed at which workers employed by the employer produce the subject piece;
- (iii) a statement of the mean hourly output for the subject piece and of the rate to be paid to the worker for the production of a single subject piece,

and gives the telephone number of one of the national minimum wage helplines, identifying the number as a national minimum wage helpline number.

Rated output work: determination of hours worked

26. (1) Where output work is rated output work, the number of hours of output work spent by the worker in producing subject pieces during the pay reference period shall be treated as being [120 per cent.] of the number of hours that a worker producing the mean hourly output would have taken to produce the number of subject pieces produced by the worker in the pay reference period.

(2) In this regulation and regulation 25 “mean hourly output” means the average number (including any fraction) of subject pieces, or fraction of a piece, produced in an hour by workers of the employer producing the subject piece as determined in accordance with regulation 27.

(3) If the employer has informed the worker in writing before the beginning of the pay reference period of the maximum number of subject pieces that the worker is required to produce in that pay reference period and the worker produces a greater number, the number of subject pieces produced by the worker in the pay reference period shall be treated, for the purpose of paragraph (1), as being the maximum number set by the employer.

Rated output work; determining the mean hourly output

27. –(1) To determine the mean hourly output for a subject piece, the employer must –

- (a) conduct a satisfactory test, in accordance with paragraph (2), of the speed at which every worker in one of the groups specified in that paragraph produces the subject piece and divide the total number of subject pieces (or the fraction of a piece) produced in an hour by all of the workers by the number of workers tested, or
- (b) make a satisfactory estimate, in accordance with paragraph (3), of the average speed, in terms of pieces per hour, at which the workers producing the subject piece are likely to produce that piece.

(2) The permitted groups for the purposes of the test mentioned in paragraph (1)(a) are –

- (a) all his workers who produce the subject piece, or
- (b) a sample of those workers that, in respect of the speed at which the workers in the sample work, is representative of all those workers,

and a test is satisfactory only if all the workers in the group are tested in working circumstances similar to those in which the worker is or will be producing the subject piece.

(3) An estimate is only satisfactory for the purposes of paragraph (1)(b) if the employer has –

- (a) tested the average speed, in terms of pieces per hour, at which a sample of workers working in similar working circumstances to the worker produce a piece that is reasonably similar to the subject piece and, in making the estimate, has fairly adjusted that average speed to take account of the increased or decreased time that the production of the subject piece involves; or
- (b) tested the average speed, in terms of pieces per hour, at which a sample workers working in different working circumstances from the worker produce the subject piece and, in making the estimate, has fairly adjusted that average speed to take account of the increased or decreased time that production of the subject piece in the same working circumstances as the worker involves;

and if the sample of workers tested is, so far as reasonably practicable, representative, in respect of the speed at which they work, of the speed at which the workers who produce the subject piece work.

(4) Where the subject piece is a variation in the design of a subject piece in respect of which a satisfactory test has already been conducted or a satisfactory estimate has already been made, the employer, instead of conducting a further satisfactory test or making a further satisfactory estimate, may make an adjustment, where necessary, to the mean hourly output that fairly reflects the increased or decreased time taken, as a consequence of the variation, to produce one of the subject pieces.

(5) Where such a satisfactory test has been conducted or satisfactory estimate has been made, subsequent changes in the number or identity of the workers of the employer who produce the subject piece do not require the employer to conduct a further satisfactory test or make a further satisfactory estimate unless the employer has reason to believe that the changes materially affect the mean hourly output.

Deadline for responses

All responses to this paper must be sent to Mike O'Donnell at the address above by 23 January 2004.

A downloadable version of this consultation document (as well as the earlier consultation issued in February 2003) is available by following the links at

<http://www.dti.gov.uk/er/nmw>

National Minimum Wage Acts and Regulations are available at

<http://www.dti.gov.uk/er/nmw/nmwlaw.htm>

