

# NATIONAL MINIMUM WAGE INFORMATION NOTE

---

## THE MINIMUM WAGE and 'THERAPEUTIC WORK'

---

# **THE NATIONAL MINIMUM WAGE AND 'THERAPEUTIC' WORK**

## **INFORMATION NOTE**

This note has been prepared by the Department of Trade and Industry, with the assistance of other Government Departments particularly the Department for Work and Pensions

### **THE FOLLOWING ORGANISATIONS WERE CONSULTED DURING THE PREPARATION OF THIS DOCUMENT:**

CONNECT SUPPORT AND EMPLOYMENT  
DISABILITY ACTION  
DISABILITY ALLIANCE  
DUNDEE CITY COUNCIL (EMPLOYMENT DISABILITY UNIT)  
GLOUCESTERSHIRE COUNTY COUNCIL, SOCIAL SERVICES  
LEICESTERSHIRE EMPLOYMENT ACTION TODAY  
LOW PAY COMMISSION  
MAKING SPACE  
MENCAP  
NATIONAL ASSOCIATION FOR SUPPORTED EMPLOYMENT  
NATIONAL LEAGUE FOR THE BLIND AND DISABLED  
NATIONAL SCHIZOPHRENIA FELLOWSHIP SCOTLAND  
NORTHERN IRELAND SUPPORTED EMPLOYMENT  
OXFORD LEARNING DISABILITIES NHS TRUST  
SCOPE  
SCOTTISH UNION OF SUPPORTED EMPLOYMENT  
SHAW TRUST LTD  
TUC  
WELSH INITIATIVE FOR SUPPORTED EMPLOYMENT

March 2003

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 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 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 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)<sup>1</sup>.

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.

4. This document updates the December 2000 version.

---

<sup>1</sup> *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 his<sup>2</sup> employer is created in the primary legislation known as the "National Minimum Wage 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. 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 Act and the subordinate legislation known as "The National Minimum Wage Regulations 1999" and "The National Minimum Wage Regulations 1999 (Amendment) Regulations 2000". 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, for example, a disability or mental health problem 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 National Minimum Wage 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 for somebody else, and is not genuinely 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.

---

<sup>2</sup> 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 Act, which say that certain types of agency worker and homeworker will count as workers even if they do not have workers' contracts. In the case of agency workers Section 34 of the Act 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 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 National Minimum Wage 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 Act. Section 34 was never intended to apply to those who are supplied by a training organisation to business for the purpose of receiving training rather than performing work and should not be taken to do so." **Lord Sainsbury of Turville**, 14 July 2000<sup>3</sup>

## **How to recognise a worker's contract**

10. The Act specifically states that a 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 about the status of therapeutic work may not have come across the issue before. This is largely because 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 sacked, and the right not to face discrimination on the basis of sex or race).

## **The burden of proof**

11. The minimum wage legislation is unique in one way, in that it places the burden of proof on the employer to prove that the minimum wage has been

---

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

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 applies in civil cases only, and 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 and 2001 (call **0845 6000 678** for a copy or visit [www.dti.gov.uk/er/nmw](http://www.dti.gov.uk/er/nmw)). 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. Those with access to the internet can also refer to the Government's website known as "**TIGER**" (Tailored Interactive Guidance on Employment Rights) at [www.tiger.gov.uk](http://www.tiger.gov.uk) which provides decision trees and ready-reckoners which can be tailored to an individual's particular circumstances.

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 4). It follows from the legal position described in section 2 that if a person with, say, a disability or mental health problem does this activity under an arrangement that is an explicit or implied worker’s contract, then they must be paid the minimum wage for that work<sup>4</sup>.

15. The situation which causes the most difficulty is where an informal arrangement is in place, which may sometimes suit both the person and the organisation for other reasons, but which involves payments of below the minimum wage. 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 mental health problems 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?
- Briefly, section 54 of the National Minimum Wage 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 (so long as the work is not being carried out for a client of the worker’s own business).
- The minimum wage applies to a wide category of workers. This was a deliberate choice, taken because the Government wanted to ensure

---

<sup>4</sup> Except, of course, where an exemption applies, such as the one for workers under the age of 18.

that people such as agency workers, casual workers and workers on short term contracts would still be entitled to the minimum wage.

17. When Tribunals or the courts look 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 or the giving of a benefit) from the employer and no obligation placed on the individual undertaking the therapeutic activity or the work** then there would not be a contract between the two parties. The underlying point is that there has to be a mutual obligation between the individual performing the activity and the employer paying a reward in return for that activity. It might be possible to pay genuine expenses and occasional 'ex gratia' payments to the individual without creating a contract of employment, as long as no expectation of payment for the activity was created and no obligation was placed on the person carrying out the activity. (In Scots law 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 an individual,** there may still be no employment contract if there is no mutual obligation between the parties i.e. the individual 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 will be carefully scrutinised by tribunals and courts. If they are genuinely not linked to a mutual obligation between the parties then it is unlikely that a contract will be inferred and the national 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 contract between the two parties and the individual 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 expenses could be paid to those undertaking therapeutic activity. Expenses can be paid at a flat rate if they 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 individual is likely to be entitled to the minimum wage.

18. It may be that a Tribunal or a court will distinguish between a contract 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, for example, may be a factor. However, Tribunals or courts are likely to decide that factors which may distinguish therapeutic activity from work are not relevant if the individual is paid money or given a benefit by the employer, over and above expenses and also owes obligations to the employer. In such a case a contract is likely to be established and the national minimum wage would be payable regardless of whether the individual 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 Tribunals and courts 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:-

(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. It provides places for people with learning or other disabilities. No monies are paid and their attendance is voluntary and there is no sanction or penalty if they do not come in;

(b) a charity runs a workshop for clients 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. The organisation does not look for or accept contracts which would depend on clients producing output to deadlines;

(c) A trust runs a facility for mental health out patients, 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. If they go along and do not want to do any activity they don't have

to. There is a production line but the speed is set by the users and if they want to they can turn it off;

(d) A charity provides vocational rehabilitation for people who have or are recovering from mental health problems. Clients are expected to follow a normal working pattern. On each day that a client is due to attend they must report on time and complete a full working day. If a client 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 client 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 client is late or misses a day.

(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. These placements are supernumerary to the requirements 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 as directed.

## **COMMENTARY**

21. Of course, a Tribunal or court would need to consider all of the relevant aspects of any case. But it seems to us, on the information available, that there would probably not be an employer/worker relationship in examples

(a) to (c) because in each case, the people concerned are not obliged to turn up and no sanctions apply if they do not turn up. Scenario (a) appears to be a voluntary situation which along with other similar voluntary situations would not be covered by the National Minimum Wage legislation. In scenario (b) 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 “ex gratia” payment or “pocket money” or by another term. Such terms are meaningless in legal terms. However, if such a payment is made and there are no obligations on the individuals 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 scenario (b) the individuals 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). The same appears to apply to scenario (c). The reference to the level of productivity in scenario (c) is not relevant for the purposes of the national 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 individual to perform in a certain way. In such circumstances the minimum wage may be payable.

22. If ex gratia payments (which are not expenses) are paid to individuals 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, then it is likely that the situation would be different. In such a case the obligation to pay the national minimum wage will apply (see commentary for example (d) below)

23. In example (d) 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 national minimum wage becomes due. Sometimes individuals who receive nothing more than expenses, are expected to attend and carry out work on a certain day and in a certain way, but they are not, nonetheless, entitled to the national minimum wage. However, if the expenses are not genuine, then it is likely that the individual may be a worker for the purposes of the national minimum wage.

24. Example (e) has a number of factors and divides into two phases, an initial phase, where individuals are supervised, and a second phase. In the second phase 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 individuals 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 at certain times and no consequences appear to follow if they fail to attend. The fact that the posts are supernumerary is not relevant for the purpose of assessing whether the minimum wage applies.

25. Once the initial phase of the placement passes, the individuals take on more responsibility and they begin to be paid more than just expenses. Importantly, there is also a requirement on them to attend 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 individuals may still have difficulties relating to their condition and the fact that they may still be supervised does not mean that the minimum wage legislation is not payable. If, however, during the second phase the individuals continue to receive either expenses and/or a small ex gratia payment but are not required to attend nor will they lose the post by failing to attend, then it is unlikely that a contract could be inferred. The national 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 client is free to come and go as they please or that no consequences will follow if they do not attend, must be genuine. If a Tribunal or court were to find that there was in fact an obligation of this type on an individual, 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 national minimum wage would be payable.

26. We are also providing a number of additional examples below, together with some analysis. The scenarios were supplied by organisations involved in therapeutic activity and demonstrate where 'grey areas' might be found.

27. 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.

## **Additional Examples**

## **Scenario 1**

**An individual 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 placement 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 is made is likely to be crucial. If the individual 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 (the right not to suffer a detriment).

## **Scenario 2**

**A client 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 1. The fact that the individual is not being paid makes it more probable that no worker's contract exists.

### **Scenario 3**

**A client is a volunteer at a local private company and not paid.**

### **Scenario 4**

**Clients 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 for transport but no payment is made to the clients. The income of the day care centre pays the directors' salaries and the Social Services Department contributes a grant.**

#### *Analysis*

The individuals in these two scenarios would almost certainly be outside the scope of the Act as they do not get paid for their work, so that it is highly unlikely that a worker's contract exists. 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 5**

**A client 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 3 and 4. The individual does paid work and unpaid ('voluntary') work for the same organisation. A tribunal 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. A tribunal might also want to know if the conditions under which the work is carried out differs in the two circumstances. If the extra hours were genuinely outside the scope of the contract and if the unpaid work was carried out without contractual

obligations, then the voluntary work would not attract the national minimum wage.

## **Scenario 6**

**A company operates as part of the Social Services day care provision. The client works in the company up to three days a week. Clients 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 client 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. The question for a tribunal would be whether the work was being done under 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 (making the worker entitled to the minimum wage among other things). 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 national minimum wage will not be payable.

## **Section 4 – The Benefits System**

### **Background**

28. 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.

29. 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.

30. 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.

31. As part of our commitment to remove barriers to work for those with an illness or disability who want to work, we replaced the therapeutic rules with new more flexible work rules from 8 April 2002. These are known as the permitted work rules.

32. 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 new permitted work rules**

33. From April 2002, someone receiving an incapacity benefit can work for less than 16 hours a week, on average, for up to and including £67.50 a week for a 26 week fixed period. This can be extended for another 26 weeks if a Job Broker, a Disability Employment Adviser or a Personal Adviser agrees that another 26 weeks of work is likely to improve their capacity to move into full-time work.

34. A person can work and earn up to and including £67.50 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 £67.50 a week.

35. The new 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 £67.50 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 for people receiving the Disability Premium as part of their Income Support.

37. General guidance on permitted work can be found in Jobcentre Plus leaflets WK1 and WK4 which can be obtained from local offices of Jobcentre Plus. Customers receiving benefit who are considering work should discuss the matter with Jobcentre Plus before starting work.

## **Section 5 – 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 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 240 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. Disabled people may only enter the programme if they have been confirmed as eligible by a Disability Employment Adviser (DEA) or by providers authorised by a variation to their contract.

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:

- 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 - helps 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;
- 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).
- Following the success of the New Deal for Disabled People Pilots which helped over 8,200 people into work, New Deal for Disabled People (NDDP) was extended nationally from 2 July 2001.

43. The nationally extended New Deal for Disabled People includes:

- a voluntary gateway run by Jobcentre Plus to engage those new to incapacity benefits;
- a network of Job Brokers from the public, private and voluntary sectors, funded through outcome payments for placing people into work and sustaining them in employment for 6 months plus.

44. Involvement in NDDP is voluntary and is available to customers on qualifying health or disability related benefits. 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.

45. New Deal for Disabled People Job Brokers also give support to employers including supporting the employee for the first six months of starting 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 6 – Other points regarding minimum wage rules**

### **Types of work for minimum wage purposes**

46. 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 or commission (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.

47. For **output work** and for **unmeasured work** there are special provisions in the rules allowing an employer and worker to come to an 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. This may be of particular relevance in some situations involving therapeutic work, but it is a good idea to refer to the Detailed Guide or the National Minimum Wage Regulations themselves for more information before any such agreements are put in place. The Minimum Wage Helpline number for enquiries and to order the Guide is **0845 6000 678**.

48. The Government is currently consulting on replacing the fair estimate agreement system for output workers with a system of fair piece rates, designed to ensure that an average or ordinary worker would earn the minimum wage. Comments on the proposal need to be made by Friday 9 May 2003. A copy of the document can be obtained by phoning 020 7215 6231 or from [www.dti.gov.uk/er/nmw](http://www.dti.gov.uk/er/nmw)

### **Voluntary workers**

49. 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 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, 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. Readers may also wish to be know that the National Council for Voluntary Organisations (NCVO) and the National Centre for Volunteering have produced special guidance for the voluntary sector, which was produced with the assistance of the DTI. The NCVO can be contacted on 020 7713 6161.

## **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 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.

This is the second edition of the note on the National Minimum Wage and Therapeutic Work. The Department of Trade and Industry would welcome any feedback in the form of comments, suggestions and further scenarios that might be included. Letters should be addressed to:

**The Minimum Wage Team, UG129, 1 Victoria St, London SW1H 0ET**  
or you can send your comments by email to: [Team.NMW@dti.gov.uk](mailto:Team.NMW@dti.gov.uk)

This **information note** is also available in large type, audio cassette and braille. Contact the DTI publications orderline,  
tel: 0870 1502 500  
fax: 0870 1502 333  
email: [dtipubs@eclogistics.co.uk](mailto:dtipubs@eclogistics.co.uk)

# PL 508 (Rev 1)



Printed in the UK.

December 2000. Department of Trade and Industry. <http://www.dti.gov.uk/> © Crown Copyright.  
This publication is Crown Copyright but may be reproduced without formal permission or charge for personal or non-commercial use subject to the source being acknowledged.

URN 03/747