

NMW: LATEST DEVELOPMENTS

23 August 2019

We discuss the recent developments in the National Minimum Wage arena and how they affect your organisation. Jane Fielding and Siobhan Bishop also cover the risks, enforcement and some of the tricky issues when calculating the NMW in practice.



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Transcript

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Siobhan Bishop: Hello and welcome to our podcast where we're covering the latest developments with the National Minimum Wage and how they affect your organisation.

In this podcast we're going to cover how the National Minimum Wage is enforced and

some of the tricky issues when calculating it. I'm Siobhan Bishop a Principal Associate in the Employment, Labour & Equalities Team at Gowling WLG and I'm joined today by Jane Fielding, a Partner in the Team.

Jane, before we look at enforcement, let's just set out what the National Minimum Wage is and the difference in particular between the National Minimum Wage and the Living Wage.

Jane Fielding: Yes, it can be confusing to know what the difference is but basically the National Minimum Wage is a statutory floor of earnings set each year by the government through BEIS on advice from the Low Pay Commission and it sets different rates for different age bands and there's an apprentice band and the top band - for 25 year olds and over - is currently £8.21 and, slightly confusingly, that is also called the National Living Wage, just a label for that particular band, but it is just one of the bands in the National Minimum Wage.

The confusion comes in because there's also something called the Living Wage. That's just a voluntary wage which is promoted by a charity called the Living Wage Foundation. Their position is that actually the National Minimum Wage isn't quite enough to live on in the current day and age and so they promote this voluntary slightly higher hourly rate which is £9.00 outside London currently and £10.55 in London reflecting the higher cost of living in the capital. So it's a voluntary measure that they promote but if you pay the National Minimum Wage you will be compliant with the law.

Siobhan: Okay thank you. So looking now at the National Minimum Wage and how that is enforced there are a number of methods of enforcement including both civil and criminal as well of course as enforcement by the individual workers and the so-called "naming and shaming". But first of all how does HMRC enforce the National Minimum Wage in the civil arena?

Jane: Well, currently they're having increasing success is probably the first thing to say. They have got a bigger budget each year since the National Minimum Wage came in, so their budget for this year is £27.4m and this has resulted in them being able to take on more enforcement officers and they are now collecting, on the last available statistics penalties £17m, which is compared with when they first started doing this ten years ago at least only a 100 thousand. So the number of officers and the bigger budget as well as some other measures is clearly having a big impact. How they do it is that they have very wide investigatory powers and powers to ask for information from employers. They can go in with no notice and ask for records to be produced and questions to be asked and if they think there has been a situation of arrears a failure to pay the national minimum wage properly they issue a notice of underpayment which sets out the level of arrears in respect

of each employee and the penalty for being in arrears is 200% of the underpayment, subject to a cap of £20,000 per employee, although usually they don't reach that cap it's more that because of the number of people involved the relatively low amounts although important to the individuals adds up to quite a significant, sum so a 200% penalty is quite a hefty amount. The other thing to mention is that there is a presumption that the individual is entitled to the National Minimum Wage and that there has been an underpayment so employers are immediately on the back foot, if you like, because they've got to show that either the person isn't entitled at all or that actually they have been paid the right amount so they are very strong enforcement powers and as I say HMRC is much better resourced these days to actually enforce.

Siobhan: So that's clearly very significant but not only are there civil remedies there are also criminal enforcement issues as well and there are a number of criminal offences not only for refusing or wilfully neglecting to pay the National Minimum Wage but also for other breaches relating to record-keeping and also enforcement itself. What are the risks here in the criminal arena for organisations and how can they avoid them?

Jane: Yes there are a wide range of criminal offences. Usually though the civil powers are enough as we've just discussed they're fairly strong in themselves so the criminal enforcement regime is still operated by HMRC but it's only really used for sort of persistent non-compliance or importantly in terms of what can employers do to protect themselves for a refusal to co-operate. So our advice is always to co-operate because if you co-operate in the first instance with HMRC they're much more likely to limit themselves to the civil powers rather than move on to these criminal sanctions which they obviously work with CPS to actually bring the charges.

One thing I would say is though that as you've highlighted, one of the criminal offences is refusing or wilfully neglecting to pay the National Minimum Wage so if, as many employers do, you run a national minimum wage audit and you find something that you think is a breach, then generally our advice is going to be to self-report that, obviously in a managed way, but if you go to HMRC and say we've identified a problem you're much more likely to be limited to civil enforcement than criminal.

There's also, under the criminal regime, a sort of halfway house called 'labour market enforcement orders and undertakings' and those are where HMRC wants to kind of influence and change behaviour of an employer going forward. It's obviously cheaper and quicker for them than going down a criminal prosecution route but there are criminal sanctions if one of those orders is issued and the employer breaches it, so they've got a couple of criminal options as well.

Siobhan: Okay so in addition to HMRC enforcing the National Minimum Wage and potential criminal liabilities, individuals have a number of rights and can also bring claims. What are the main risks there?

Jane: In fact a very common option for individuals wanting to enforce their rights is actually to report the employer either anonymously or otherwise to HMRC on the basis that it's easier, cheaper, not necessarily quicker, but certainly cheaper to get HMRC to do the work for you so we do see that happen quite often. If however they are going to take individual legal action and they do have a number of alternatives available. So the first is they could claim an unauthorised deduction from wages in the Employment Tribunal and they can do that while they're employed or within the time limit after they've left. Or they could run it as a breach of contract claim, which gives them the option to go in the Civil Courts or in the Tribunal if it's an amount outstanding on termination only; they can't do that while they're employed. Now there are different time limits, there are different recovery options in terms of unlawful deduction, for example, they can only go back two years so that would limit the amount they could recover but there are a number of options available and of course the Tribunal at the moment is free again, the fee regime having been removed.

Siobhan: And there's also reputational risk here as well - brand credibility - because there is the risk of being named and shamed for failing to pay the National Minimum Wage and we have seen that that seems to be less of a priority at the moment but it's not something to take lightly.

Jane: No it isn't at all and HMRC and the government refer to this naming and shaming regime as a powerful corrective. The shining a light on these defaults, you know, obviously there's a lot of press coverage of those sorts of things and brands with a very strong employer brand otherwise can find themselves being bracketed with employers that none of us would want to see our friends or family working for, so it doesn't distinguish between the reason behind the default or the level of awareness and deliberate default by the employer. So there has been a lot of sort of push back saying it's a very blunt tool and it doesn't distinguish between, as I say, cynical defaults through exploitative practices and where people have fallen foul of the regime while trying to do the best thing for their employees. So, for example, Christmas saving schemes, salary sacrifice, for example, but HMRC's position is well there's no such thing as a technical breach. It doesn't say that in the legislation, a breach is a breach and that's what the naming and shaming is meant to highlight. So a month or so ago now it was flushed out in Parliamentary questions that actually the naming and shaming regime has been put on hold at the moment by the government while they look at whether or not the naming and

shaming regime is actually operating as it needs to so we're expecting the outcome of that review fairly shortly and it may be, I don't think it's going to go away completely, but it may be that they start to make some sort of distinction between deliberate and accidental breaches if you like.

Siobhan: That reflects into the fact that it's quite easy to make errors and inadvertently fall foul of the National Minimum Wage regime because there are difficulties and tricky areas around what you can and cannot include when calculating what the National Minimum Wage is. So let's look at two of those. You've mentioned one already, which was the salary sacrifice scheme. So let's look at that but also living accommodation.

Jane: Sure, so on the salary sacrifice scheme it's obviously very common for a lot of employers to operate salary sacrifice schemes for benefits such as childcare vouchers, cycle to work, that sort of thing, increased pension contributions but HMRC's consistent position and the law says that the salary that's being sacrificed can't be taken into account to calculate the National Minimum Wage and for some people that therefore drops them below the National Minimum Wage threshold and that causes a breach for employers. So, in turn, some employers have stopped offering the schemes at all or in some cases stopped offering them to that band of employees who are earning an amount that might put them at risk, so rather than have to calculate it for each person they've just stopped offering them which sort of cuts across the policy aims of the salary sacrifice schemes in the first place. There is a government review ongoing in salary sacrifice schemes as well. They did a consultation which ended in March and we're waiting to see what happens there so that's definitely one to watch.

And on living accommodation as you say, there's lots of complexity in the National Minimum Wage regime what can count towards the levels; what can't. The living accommodation one is actually one of the more straightforward ones because it is the only benefit in kind that can count towards the National Minimum Wage. So when you're looking to see if you're compliant you look at what somebody's actually paid and then you add on a notional amount for the benefit in kind of the living accommodation and that can count towards the National Minimum Wage calculation. It's called the accommodation offset and there's two conditions which allow it to apply. One is that the accommodation is provided by the employer and importantly the accommodation has to be suitable to be considered living accommodation. So it wouldn't cover the sort of you know 15 grown men in a house designed for you now a normal four person family or something like that. It's got to be suitable for accommodation to count.

Siobhan: Many thanks Jane for the update on the latest developments and also what's

coming down the track so we need to watch out quite carefully for those consultations and we'll let you know when we hear about those and also some of the steps that your organisation can take to comply with the National Minimum Wage obligations.

Thank you for listening today and if you do have any questions please do contact Jane or your normal contact in the Team. Thank you.

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Related Employment, Labour & Equalities

Author(s)

Jane Fielding

Partner - Head of Employment, Labour & Equalities, Birmingham

 Email

jane.fielding@gowlingwlg.com

 Phone

+44 (0)370 733 0624

 vCard

Jane Fielding

Siobhan Bishop

PSL Principal Associate - Birmingham

 Email

siobhan.bishop@gowlingwlg.com

 Phone

+44 (0)121 393 0071

 vCard

Siobhan Bishop

