

*These notes refer to the Employment Act 2008 (c.24)
which received Royal Assent on 13 November 2008*

EMPLOYMENT ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

National Minimum Wage

42. Under NMWA 1998, all qualifying workers are entitled to be paid at least the rate of the NMW, as set by regulations made by the Secretary of State. Section 13 allows the Secretary of State to appoint officers for the purposes of NMWA 1998, including its enforcement provisions. The Secretary of State has appointed HMRC to enforce the NMW.
43. Over and above the NMW, there are minimum wage rates for agricultural workers. The relevant legislation is: for England and Wales, the Agricultural Wages Act 1948; for Scotland, the Agricultural Wages (Scotland) Act 1949; and for Northern Ireland, the Agricultural Wages (Regulation) (Northern Ireland) Order 1977. This legislation provides that the enforcement mechanisms in NMWA 1998 apply to the enforcement of the AMW under the respective statutes listed. Agricultural wages are devolved matters in respect of Scotland and Northern Ireland.

Section 8: Arrears payable in cases of non-compliance

44. **Section 8** amends section 17 of NMWA 1998. The aim of this section is to provide for increased remuneration, above that currently provided for, where arrears of the NMW have been outstanding over a period of time, to take account of the length of time that arrears have been owing.
45. *Subsections (1) to (5)* together amend section 17 NMWA 1998 so that the arrears to which a worker is entitled under that section are the higher of either: the arrears calculated in accordance with section 17(2); or the arrears calculated in accordance with the methodology set out in section 17(4). The formula in section 17(4) divides the amount of the underpayment (A) by the NMW rate applicable at the time of the underpayment (R1). The amount of the underpayment is thereby converted into a notional period of unpaid time. This notional period is then multiplied by the NMW rate applicable at the time the arrears are determined (R2). If the NMW rate at the time the arrears are determined is higher than the NMW rate in force at the time the worker was underpaid, the worker is entitled to a greater amount which takes account of the length of time he remained unremunerated.
46. **Section 17(5)** provides that where a worker is paid the full arrears he is entitled to in relation to a pay reference period, he has no further entitlement to arrears in relation to that pay reference period. Section 17(6) provides that where a worker is paid part of the arrears owed under section 17, his entitlement to arrears calculated under either section 17(2) or 17(4) (whichever is greater) shall be reduced by that sum.
47. *Subsection (6)* consequentially amends the formula above for the purposes of its application to the Agricultural Wages Act 1948 to give effect to the provisions as regards that Act.

48. *Subsection (7)* provides that none of the amendments to section 17 shall have effect in respect of the Agricultural Wages (Regulations) (Northern Ireland) Order 1977 and the Agricultural Wages (Scotland) Act 1949. Agricultural wages are devolved matters in respect of Scotland and Northern Ireland.
49. *Subsection (8)* provides that section 17 and its method of calculating arrears shall have effect notwithstanding that the worker's entitlement arose before the commencement date, where a worker has not received full additional remuneration before section 8 comes into force.

Section 9: Notices of underpayment

50. Sections 19 to 22F of NMWA 1998 contain provisions concerning the issuing of enforcement notices and penalty notices. At present, if an officer believes that a worker or workers have not been paid the national minimum wage by an employer, the officer may issue an enforcement notice requiring that the arrears be paid. If the employer fails to comply in full with the enforcement notice within 28 days of its service, the officer has the power to take further action by bringing a case against the employer through the courts or tribunals and/or issuing a penalty notice. A penalty notice imposes a financial penalty on the employer, related to the period of his failure to comply with the enforcement notice. An employer can appeal an enforcement notice and/or a penalty notice to an employment tribunal (in Northern Ireland, to an industrial tribunal).
51. *Subsection (1)* of section 9 inserts new sections 19 to 19H into NMWA 1998 to replace the existing enforcement and penalty notices with a new single notice of underpayment.

Notices of underpayment: arrears

52. New section 19 provides that where an officer is of the opinion that an employer has not paid a worker the national minimum wage, or has not fully repaid any arrears which the worker is entitled to under section 17, the officer may serve a notice of underpayment requiring the employer to pay arrears to the worker or workers named in the notice (subsections (1) and (2)). The notice may require employers to pay arrears relating to periods occurring before the coming into force of new section 19, but arrears relating to periods more than six years before the date of service of the notice may not be included in the notice (subsections (6) and (7)).

Notices of underpayment: financial penalty

53. New section 19A provides that the notice of underpayment must require the employer to pay a financial penalty to the Secretary of State within 28 days of service of the notice (subsection (1)) unless the Secretary of State has, by directions, specified circumstances in which a penalty is not to be imposed (subsection (2)). The penalty is set at 50% of the total underpayment of the national minimum wage (subsection (4)), although underpayments occurring in periods before the commencement of the provision will not be taken into account when calculating the penalty (subsection (5)). The minimum penalty is £100 and the maximum penalty is £5,000 (subsections (6) and (7)). The Secretary of State has the power to change, by regulations, the percentage used to set the penalty, the minimum and the maximum penalty (subsection (8)). If the employer complies with the notice within 14 days of its service, the financial penalty is reduced by 50% (subsection (10)). The financial penalty shall be paid into the Consolidated Fund (subsection (11)).

Suspension of financial penalty

54. New section 19B allows for the notice of underpayment to contain a provision suspending the requirement to pay a penalty where proceedings have been instituted, or may be instituted against an employer in respect of a criminal offence under section 31. Where a notice contains such a provision, an officer may serve a notice on an employer terminating the suspension where criminal proceedings have either concluded or will

not be instituted (subsection (4)). Where an employer has been convicted of an offence under section 31, an officer must serve a notice on the employer withdrawing the financial penalty (subsection (6)).

Notices of underpayment: appeals

55. New section 19C provides that an employer may appeal to an employment tribunal (an industrial tribunal in Northern Ireland) against a notice of underpayment. An employer may successfully appeal on one or more of three main grounds (subsection (1)). The first is that, at the date set out in the notice, no arrears were owing to any worker(s) named in the notice – i.e. that the employer was compliant with the Act (subsection (4)). If the employment tribunal allows an appeal under this ground it must rescind the notice (subsection (7)). The second is that any requirement in the notice to pay a sum to a worker was incorrect; either because no sum was due to that particular worker or that the sum specified in the notice was incorrect (subsection (5)). The third is that either a notice included a penalty in circumstances that have been specified in directions under section 19A(2) or that the amount of the penalty specified in the notice is incorrect (subsection (6)). If the employment tribunal allows an appeal under either the second or third ground it must rectify the notice, in which case the notice has effect as rectified by the tribunal (subsection (8)).

Non-compliance with notice of underpayment: recovery of arrears

56. New section 19D reproduces the current provisions in section 20 of NMWA 1998 which give officers the power to take civil action to recover arrears on behalf of a worker or workers.

Non-compliance with notice of underpayment: recovery of penalty

57. New section 19E reproduces the provision currently in section 21(5) of NMWA 1998.

Withdrawal of notice of underpayment

58. New section 19F allows an officer to withdraw a notice of underpayment by serving notice of withdrawal on the employer where it appears to him that the notice wrongly includes or omits any requirement or is incorrect in any particular (subsection (1)). Where a notice is withdrawn and no replacement notice is issued, any penalty which the employer has already paid in accordance with the withdrawn notice must be repaid with interest (subsections (2)(a) and (4)). Any appeal against the withdrawn notice will be dismissed and an officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice, although any proceedings started before the notice was withdrawn may be continued (subsections (2)(b), (c) and (d)).

Replacement of notice of underpayment

59. New section 19G allows an officer to issue a replacement notice at the same time that a notice is withdrawn (subsection (1)). The replacement notice cannot include workers who were not contained in the withdrawn notice (subsection (2)). Contravention of this requirement is a ground for appeal by an employer against the notice (subsection (3)). The replacement notice may include arrears incurred after service of the withdrawn notice but before service of the replacement notice (subsection (4)). When a replacement notice is issued, the six years limitation period for including arrears in new section 19(7) is calculated from the date of service of the first notice rather than the date of service of the replacement notice (subsection (5)). The replacement notice must set out the material differences from the withdrawn notice (subsection (6)). An officer will only be able to issue one replacement notice (subsection (8)).

Effect of replacement notice of underpayment

60. New section 19H sets out the effects of issuing a replacement notice. Where a replacement notice is issued, any appeal against the withdrawn notice continues to have effect as if it were against the replacement notice. If an employer appeals against the replacement notice he must withdraw any appeal against the withdrawn notice (subsection (2)). An officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice but any proceedings started before the notice was withdrawn may be continued (subsection (3)). Any sums already paid by the employer as a penalty in relation to the withdrawn notice is taken into account when assessing compliance with the penalty contained in the replacement notice (subsection (4)(a)). If the penalty which has already been paid by the employer is greater than the penalty in the replacement notice, the balance must be repaid to the employer with interest (subsections (4)(b) and (5)).
61. *Subsection (2)* contains a transitional provision in respect of the amendments contained in new section 19E(a) to NMWA 1998. The section in NMWA 1998 which section 19E replaces has been prospectively amended by TCEA 2007, the relevant provisions of which are not yet in force. This transitional provision allows the current wording to operate until the relevant provisions of TCEA 2007 come into force, upon which time the new wording as provided by TCEA 2007 will operate.
62. *Subsection (3)* amends section 51 of NMWA 1998 to provide that regulations under new section 19A(6) are subject to the affirmative resolution procedure.
63. *Subsection (4)* consequentially amends section 4(3)(cd) of ETA 1996, so that the provision that a Chairman alone shall hear an appeal against an enforcement or a penalty notice under section 19 and 22 of NMWA 1998 respectively, is applied instead to an appeal against a notice of underpayment.
64. Section 44 of the Commissioners for Revenue and Customs Act 2005 provides that the Commissioners shall pay money received in the exercise of their functions into the Consolidated Fund, subject to certain exceptions. One exception, in subsection (2)(f), relates to penalties under section 21 NMWA 1998. *Subsection (5)* repeals subsection (2) (f) to allow the Commissioners for Revenue and Customs to pay financial penalties obtained under new section 19A into the Consolidated Fund.
65. *Subsection (6)* provides for consequential amendments to the Agricultural Wages Act 1948.
66. *Subsection (7)* provides that the amendments in section 9 do not have effect in relation to the enforcement of the AMW in Scotland and Northern Ireland.

Section 10: Powers of officers to take copies of records

67. **Section 10** provides that officers have the power to remove records required to be kept or preserved under NMWA 1998 in order to take copies of those records.
68. *Subsection (2)* enables an officer to copy a complete record without having first to determine whether all of the record is material.
69. *Subsection (3)* provides that, where records are produced, an officer has the power to remove them for the purpose of making copies. Where an officer removes records for this purpose, they must be returned as soon as reasonably practicable.
70. *Subsection (4)* provides that the amendments in section 10 do not have effect in relation to the AMW in Scotland and Northern Ireland.

Section 11: Offences: mode of trial and penalties

71. *Subsection (1)* of section 11 provides that offences under section 31 of NMWA 1998 may be triable as indictable offences. At present, these offences are only triable as

summary offences; in future they will be triable either way. *Subsection (2)* contains consequential repeals.

72. *Subsection (3)* provides that the amendments in section 11 do not have effect in relation to the AMW in Scotland and Northern Ireland.

Section 12: Powers to investigate criminal offences

73. **Section 12** applies investigation powers, and their accompanying safeguards, to investigations by HMRC of criminal offences under NMWA 1998.
74. *Subsection (1)* applies provisions of the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989 to investigations conducted by HMRC in relation to criminal offences under section 31 of NMWA 1998. These provisions will allow HMRC officers, for example, to apply for production orders and search warrants or to arrest a person suspected of committing an offence, in the same circumstances as these powers would be used in investigating other offences for which HMRC is the responsible investigating body.
75. *Subsection (2)* applies HMRC's normal Scottish criminal investigation powers to investigations of NMW criminal offences in Scotland.

Section 13: Cadet Force Adult Volunteers

76. **Section 13** explicitly excludes CFAVs from qualifying for the NMW.
77. A CFAV is a member of the Cadet Forces who is assisting in the delivery of the Ministry of Defence sponsored cadet force programme. The section does not apply to those performing work for the Cadet Forces in the course of Crown employment, including employment by a Reserve Forces and Cadet Association set up under the Reserve Forces Act 1996. It does not affect any entitlement CFAVs may have to the NMW outside of their voluntary activities as a CFAV.
78. The Cadet Forces comprise of the Combined Cadet Force, Sea Cadet Corps, Army Cadet Force and Air Training Corps. Each is a separate national youth organisation supported by its own charity.
79. The Cadet Forces do not form part of the Armed Forces or the Reserve Forces, although some CFAVs may be serving members of the Armed Forces or the Reserve Forces.

Section 14: Voluntary workers

80. Voluntary workers are a special class of workers who are exempt from the NMW. Section 14 amends section 44 of NMWA 1998 to broaden the type of expenses which can be paid to voluntary workers without triggering entitlement to the NMW to include expenses which are incurred in order to enable the voluntary worker to perform his duties and are reasonably so incurred.
81. As with expenses incurred in the performance of duties, both expenses which have actually been incurred or expenses which have been reasonably estimated as likely to be or to have been so incurred can be paid to voluntary workers without triggering entitlement to the NMW.
82. New subsection (1A)(c) provides that accommodation expenses cannot be paid to voluntary workers. The effect of this amendment is to maintain the existing treatment of accommodation expenses under NMWA 1998. Whilst accommodation expenses cannot be paid, under 44(1)(b) of NMWA 1998 such accommodation as is reasonable in the circumstances of the employment can be provided directly to voluntary workers without triggering entitlement to the NMW.