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BECAUSE RECRUITMENT MATTERS

Legal bulletin

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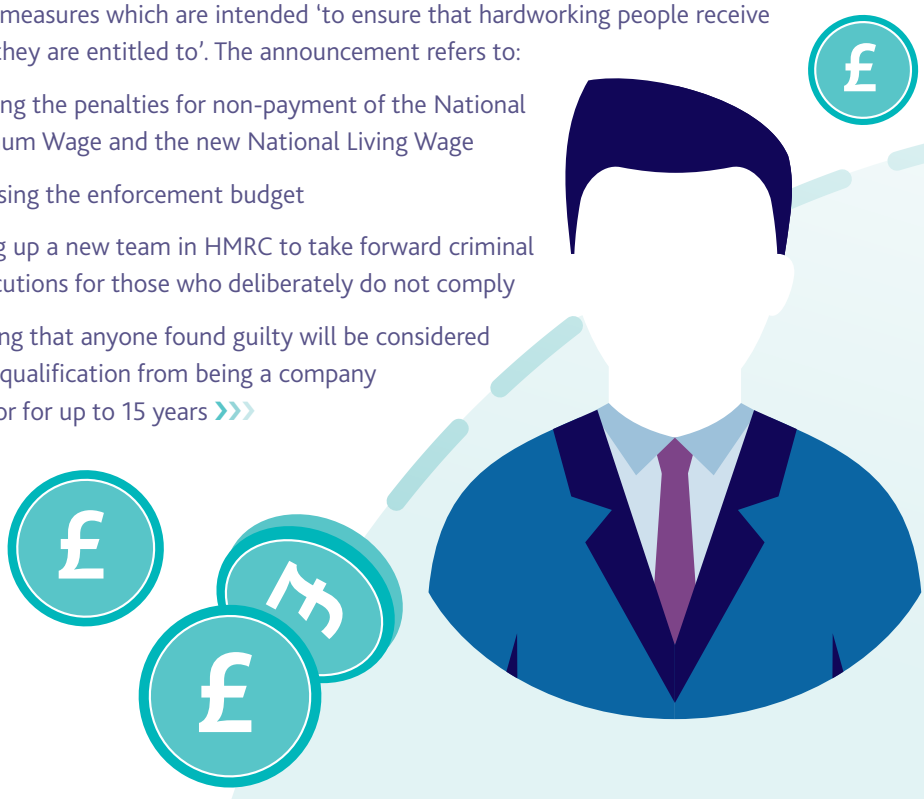
BEST ASSOCIATION NEWSLETTER AWARD

NATIONAL MINIMUM WAGE – NEW ENFORCEMENT, NEW RATES AND A NEW NATIONAL LIVING WAGE

The Department for Business, Innovation and Skills has **ANNOUNCED A RAFT OF MEASURES** aimed at strengthening the enforcement regime for the National Minimum Wage and in advance of the introduction of the new National Living Wage (NLW). The NLW comes into effect from April 2016, as announced by the Chancellor in the Budget earlier this summer. It will be a mandatory rate of £7.20 per hour for all workers aged 25 and over.

In a statement issued on 1 September, the Business Secretary Sajid Javid announced the new measures which are intended 'to ensure that hardworking people receive the pay they are entitled to'. The announcement refers to:

- doubling the penalties for non-payment of the National Minimum Wage and the new National Living Wage
- increasing the enforcement budget
- setting up a new team in HMRC to take forward criminal prosecutions for those who deliberately do not comply
- ensuring that anyone found guilty will be considered for disqualification from being a company director for up to 15 years ›››



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›››› The tougher measures will see the creation of a new team of compliance officers which will investigate the most serious failures to pay both the NMW and the new NLW, when it comes into force.

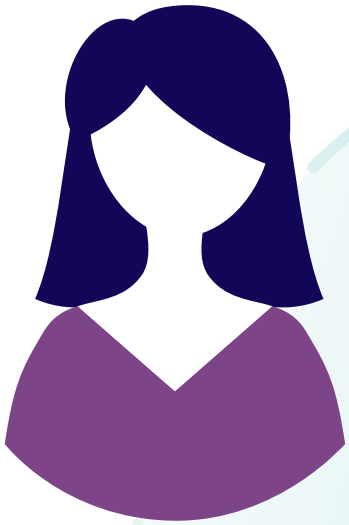
Additionally, the Employment Agency Standards Inspectorate (which is responsible for enforcing the recruitment sector legislation) and the Gangmasters Licensing Authority will be brought under the remit of a new Director of Labour Market Enforcement and Exploitation who will also be responsible for enforcing the NMW.

There are further proposals to introduce a new offence of aggravated breach of labour market legislation, but this will be subject to a consultation due to be launched this autumn.

EMPLOYERS NEED TO TAKE CARE NOT TO FALL FOUL OF DISCRIMINATION LEGISLATION BY FAVOURING YOUNGER WORKERS TO AVOID PAYING THE NLW RATE

NEW NATIONAL MINIMUM WAGE RATES FROM 1 OCTOBER 2015

	FROM 1 OCTOBER 2015	FROM 1 OCTOBER 2014
Workers aged 21 and over (minimum rate per hour)	£6.70	£6.50
Workers aged 18-20 and those aged 21 and over doing accredited training in the first six months of employment* (minimum rate per hour)	£5.30	£5.13
Workers aged under 16 and 17 (minimum rate per hour)	£3.87	£3.79
Apprentices under 19 (or aged 19 and over in the first year of their apprenticeship)	£3.30	£2.73
Accommodation offset amount	£5.35 per day	£5.08 per day



Employers need to take care not to fall foul of discrimination legislation by favouring younger workers to avoid paying the NLW rate. As reported in the **JULY/AUGUST 2015 LEGAL BULLETIN** age is a protected characteristic under the Equality Act 2010 and refusing to employ someone or provide services as a recruiter could give rise to unlawful discrimination.

While both direct and indirect age discrimination can be objectively justified where the less favourable treatment is a proportionate means of achieving a legitimate aim, case law has illustrated that an employer's desire to reduce cost will not on its own be enough to justify any discrimination. ›››

The Supreme Court has ruled that direct age discrimination can only be justified by reference to legitimate public interest objectives, rather than individual objections that are particular to an employer. A business would need to:

1. Clearly identify the legitimate social policy aim, for example increasing employment amongst young people; and
2. Establish that the social policy objective is legitimate for the business; simply relying on this public interest objective may not be enough. For example, if the public interest objective is to increase employment amongst young people, ideally the business should be able to establish that it struggles to employ individuals in that particular age group. If employing individuals in that age group is not a problem for the business, it may not be legitimate for to require all applicants to be in a particular age group; and
3. Establish that the decision to only consider applications from individuals in a particular age group is proportionate given the public interest in increasing employment amongst young people. For example, could the same result be achieved in a more proportionate way?

Decisions to provide recruitment services or offer employment based on age must be carefully considered in light of the risk of unlawful discrimination under the Equality Act 2010 where no defence applies.

DIRECT AGE DISCRIMINATION CAN ONLY BE JUSTIFIED BY REFERENCE TO LEGITIMATE PUBLIC INTEREST OBJECTIVES, RATHER THAN INDIVIDUAL OBJECTIONS

FAQs

ABENA DARKO, LEGAL ADVISER AT THE REC, BRINGS YOU A SAMPLE OF QUESTIONS POSED TO THE LEGAL HELPLINE

How do I calculate the holiday accrual rate for an agency worker on a contract for services who has qualified for equal treatment under the Agency Workers Regulations?

The Working Time Regulations 2008 (WTR) entitles all workers to at least the statutory minimum annual leave in a leave year, which is currently 5.6 weeks (28 days.)

Given that the terms and conditions of a contract of employment remain in place for the duration of the contract, the minimum statutory entitlement for those engaged under contracts of employment is spread over a 52 week leave year. Workers on contracts employment continue to accrue annual leave for the duration of their employment, including whilst they are between assignments when no work is being performed, and during periods of sickness and annual leave.

In contrast temporary workers engaged under contracts for services are typically deemed to be "employed" during the course of an assignment. There is no ongoing contract for services between assignments. Workers on contracts for services typically do not have any fixed hours and also tend to work irregular hours therefore whilst such workers are still entitled to the statutory minimum holiday of 5.6 week's their holiday entitlement will usually be calculated using an accrual method over the hours that the worker actually works. Where this method is used, leave is often expressed as a percentage of the working year. A simple calculation showing how the accrual percentage rate has been arrived at is set out below:

- 28 day statutory minimum annual leave entitlement ÷ 5 days in a working week = 5.6 weeks leave in a leave year
- 52 weeks in a year - 5.6 weeks holidays = 46.4 weeks that a worker can accrue the full entitlement over. Workers on contracts for services typically do not accrue leave whilst absent due to annual leave
- 5.6 weeks leave ÷ 46.4 weeks worked x 100 = 12.07% (rounded up to the nearest decimal point)

Therefore the current statutory annual leave entitlement of 28 days (5.6 weeks) equates to 12.07% of every hour worked. ›››

WTR ENTITILES ALL WORKERS TO AT LEAST STATUTORY MINIMUM ANNUAL LEAVE IN A LEAVE YEAR

Additionally, under the Agency Workers Regulations 2010 (AWR) temporary agency workers who have competed a 12 week qualifying period in the same role with the same hirer are entitled to the terms and conditions relating to annual leave, amongst other things, as they would receive if recruited directly by the end hirer to do the same job. This includes the amount of leave that the client offers to its own comparable workers and often results in many temporary agency workers receiving a greater annual leave entitlement than the statutory minimum. For example, if the client provides its own workers with 33 days annual leave, then a qualified agency worker will also be entitled to 33 days annual leave.

The calculation method above can also be used to calculate the percentage accrual for agency workers who have qualified for more leave under the AWR. However, the REC legal team has produced a table showing the accrual percentage rates for various annual leave entitlements from the statutory minimum upwards which can be accessed **HERE**.

If I want to use postponement to delay when I have to automatically enrol my workers, how do I work out when a temp starts or stops working for me if they work on and off assignments?

The automatic enrolment regime requires all employers to place their eligible workers into a qualifying pension scheme. Postponement is a tool which can be used by employers to delay automatically enrolling eligible jobholders into a qualifying pension scheme for up to three months. It can be a way to mitigate some of the costs involved in pensions automatic enrolment. You can either postpone from your staging date, or from the first day of the workers employment or from the point at which they qualify for automatic enrolment.

Postponement from the start date of employment can only be used once during a worker's employment and once a worker is enrolled into a qualifying pension scheme they must remain on that scheme until their employment ceases. Removing a worker who has already been automatically enrolled from a pension scheme when they leave and postponing the same worker as when they return to work on the could leave you at risk of a fine if the worker is deemed to have been employed throughout.

In order for employers to utilise the postponement process effectively and avoid penalties for non-compliance with pensions automatic enrolment, employers will need to be able to clearly when an individual becomes their worker and when their employment ends. This can be particularly challenging for recruitment agencies, especially when it comes to temporary workers on contracts for services who work on short term, intermittent assignments from time to time.

Under various pieces of existing legislation an individual can become a worker either when they enter into a contract for services or the point at which they begin the assignment. Similarly, it can be just as difficult to establish the end date of intermittent workers once employment has begun – employment could cease at the end of an assignment or when the contract for services is terminated.

When assessing staff, The Pensions Regulator (TPR) has made it clear that the rationale for the decision should be recorded, showing the reasons for inclusion or exclusion from the worker category. Should there be reason for The Pensions Regulator to suspect non-compliance through failing to classify staff correctly; written evidence of how these decisions were reached may be required by TPR.

›››You need to take into account the terms of contract with your temps and also some of the steps that would indicate the end of an employment relationship. This can include issuing a P45, paying any outstanding holiday pay and issuing a new contract for services to the worker on their return to work. However, if a worker typically works on numerous, short term assignments, issuing a P45 at the end of each assignment and new terms when the worker starts could become burdensome. If a returning individual is to be treated as a new worker each time they start a new assignment, the recruitment agency will need to complete all the employer duties associated with the automatic enrolment process again. In some cases, it may be more cost effective in the long run to keep a worker enrolled in a qualifying pension scheme and only remove them once it is clear that they will not be returning to work: an agency does not have to make contributions if a worker does not meet the earnings threshold in a pay period if for example they are off assignment.

Unfortunately, there is no a one-size fits all approach. Agencies will need to assess each worker on a case by case basis, taking into account the length of their assignment, their previous work history and the likelihood of them working on several assignments within a short period. Agencies should adopt a consistent approach, a clear policy as to when it deems employment to start and end, and ensure that in addition to the standard record keeping requirements, it keeps hold of documents to evidence the reasons for the categorisation of a worker.

Further guidance on identifying the start and end dates of workers for the purpose of pensions automatic enrolment can be found in the REC legal guide **HERE**.

Can I charge a temporary worker for the cost of uniform?

Regulation 5 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) restricts the circumstances in which an employment businesses can charge temporary workers for the cost of uniform which is not classed personal protective equipment (PPE).

Firstly, in order to charge a worker for uniform, either by way of an upfront fee or by making a deduction to the worker's wages to recover the cost, the worker should be given the option to obtain the uniform from another source and not just through the employment business or a person or organisation connected to the employment business. This is because Regulation 5 of the Conduct Regulations prohibits employment agencies and employment businesses from making the provision of work-finding services conditional on the work seeker (or the person supplied to do the work if the work-seeker is a limited company) using an additional chargeable service or hiring or buying goods from the agency or employment business or from any person connected with the agency or employment business.

Charging workers an additional amount for providing the uniform e.g. an administration or processing fee could amount to an additional service. Regulation 13 of the Conduct Regulations requires employment businesses to give workers written confirmation that the additional chargeable service being provided by the employment business is not a work finding service for which the employment business is prohibited from charging a fee on the first occasion that the recruitment agency offers to provide or arranges the provision of a chargeable service to a work seeker. Recruitment agencies must also give written notification of what the worker is being charged for, for example the uniform and/ or the additional service of providing the uniform if applicable, together with details of the fee ›››

›››› including:

- the amount or method of calculation of the fee
- the identity of the person to whom the fee us or will be payable
- a description of the goods or service to which the fee relates
- any right to cancel /details of refunds if applicable or a statement stating not refundable

There are also provisions in the Employment Rights Act 1996 (ERA 1996) and the National Minimum Wage Regulations 2015 (NMW Regulations) that employment businesses must comply with. Employment businesses that have directly engaged their workers will be deemed to be employers for the purpose of these two pieces of legislation. Firstly, the cost of uniform is expenditure in connection with the worker's employment and the NMW Regulations prevent employers from either charging workers upfront or making deduction to their wages for expenditure connected with their employment if the charge or deduction will take their salary to below the National Minimum Wage in a pay reference period.

Additionally, when it comes to making deductions the ERA 1996 prohibits employers from making deductions to wages unless the deduction is permitted by statute, the workers contract or by the worker's previous written consent to the deduction being made. Making a deduction to wages to cover the cost of uniform is not authorised by statute. Therefore, if there is no provision in the worker's contract to make a deduction to their wages to cover the cost of the uniform (and the additional service if relevant), the employment business will to enter into a written agreement with the worker to allow the deduction to be made. A breach of the legislation could leave employment businesses open to the risk of an Employment Tribunal claim. HMRC could also impose sanctions and publicly 'name and shame' organisations that do not comply with the National Minimum Wage legislation which could potentially result in reputational damage.

The NMW Regulations do however outline specific situations where employers can request payments or make deductions which take the worker's salary to below the National Minimum Wage, including, for example, where the deduction or payment is in respect of a worker's conduct and the worker is contractually liable. Employment businesses can therefore make it a contractual requirement for workers to take reasonable care of the uniform and return it on termination of their assignment. A failure to return the uniform at all or in a fit and reusable condition would be a breach of contract and, the employment business could ask the worker to pay for the uniform or, provided there is a contractual agreement allowing it to do so to do so, deduct the cost of it from the worker's pay to below the National Minimum Wage.

NMW REGULATIONS OUTLINE SPECIFIC SITUATIONS WHERE EMPLOYERS CAN REQUEST PAYMENTS OF MAKE DEDUCTIONS WHICH TAKE THE WORKER'S SALARY TO BELOW THE NMW

In practice, however, it may be difficult to charge or deduct an appropriate amount that accurately reflects the value of the uniform, taking into account its age and condition, allowing for fair wear and tear. An employment business' ability to charge workers for or deduct the cost of uniform will have to be assessed on a case by case basis. If workers are receiving pay that is close to the National Minimum Wage it may be worth agreeing with the client instead who will bear the cost of the uniform. Where workers are earning significantly more than the national minimum wage then, provided the employment business complies with the Conduct Regulations, it can charge an upfront fee for the cost of the uniform and / or enter into a written agreement with the worker to make the deduction to their wages to cover the cost of the uniform.

LEGAL ROUND UP

LORRAINE LARYEA, SOLICITOR AND COMMERCIAL ADVISER, REC

CASE LAW: Coles v Ministry of Defence

Are agency workers entitled to be given the right to apply for a job with the hirer or get preferential treatment compared to the hirer's own employees?

This case, taken to the Employment Appeal Tribunal is concerned with the provisions of the Agency Workers Regulations 2010 (AWR) under which an agency worker has the 'right to be informed by the hirer of any relevant vacant posts with the hirer, to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.' This is a right afforded to agency workers from the first day of an assignment and it is the client rather than the agency that is responsible for compliance with this requirement. The AWR implement the European Agency Workers Directive.

Mr Cole had been working as an agency worker for the Ministry of Defence (MOD) for about 8 years. He had registered with the online system used by the MOD to advertise vacancies. He found out from a colleague that his position was being advertised as a permanent role (although he could have discovered the same had he used the online vacancy system). The role was ultimately awarded to a directly engaged member of MOD staff who had been placed in a pool for redeployment as a result of a restructuring exercise. As such she had priority over other candidates. Mr Cole complained that his rights under the AWR had been breached. His original claim was previously rejected by an employment tribunal last year.

The Employment Appeal Tribunal has now also rejected his appeal, finding that his rights under the AWR and the AWD were to be provided with information about vacancies but not to be considered for the vacancies on equal terms as the hirers own staff.

Where are we with employment tribunal fees?

Fees were introduced to the employment tribunal (ET) system for the first time in England, Wales and Scotland from 29 July 2013 against a background of protest. Since then, the number of ET claims being issued has reduced.

The introduction of the fees has not been taken lying down. UNISON has previously sought to challenge the fees, unsuccessfully, by way of a Judicial Review. An appeal by UNISON to the Court of Appeal (CA) was dismissed last month. The CA stated that the decline in ET claims was not in itself enough to reverse the earlier decision.

Meanwhile, across the border… The Scottish Government has announced plans to abolish ET fees for the Scottish ET system, which is separate to the system in England and Wales.

The plans are set out on its *A Stronger Scotland: The Government's Programme for Scotland 2015-16*.

AN UPDATE ON NEW GUIDANCE FROM THE PENSIONS REGULATOR FOR SMALL AND MICRO BUSINESSES YET TO START AUTOMATIC ENROLMENT AND NEW GUIDANCE FOR EMPLOYERS OF SEASONAL WORKERS

NEW GUIDE TO HELP YOU CHOOSE A PENSION SCHEME

The Pensions Regulator made it easier for small and micro employers to choose a pension scheme with the publication of a new quick guide on what to look out for when picking the right scheme for your staff. They have also published a list of master trust pension schemes who are prepared to accept business from employers of all sizes, and that have been independently reviewed to show they are administered to a high standard.

You can also find links on their website to NEST, the pension scheme set up by government that has a public service obligation to accept all employers, and to lists from the Association of British Insurers and the National Association of Pension Funds.

CLICK HERE for more information on selecting a pension scheme for automatic enrolment.

AUTOMATIC ENROLMENT AND WHAT YOU NEED TO KNOW ABOUT SEASONAL STAFF

If you employ short-term staff, such as fruit pickers, you'll need to make sure you're up to speed with how they need to be treated for automatic enrolment purposes. This can be a more complex task if you employ a lot of people on a variety of contracts, and have high staff turnover. One option you may wish to explore is postponement, which offers additional flexibility by enabling you to delay assessing staff for up to three months. **CLICK HERE** to visit the 'checking who to enrol' page on The Pensions Regulator's website, where you'll find information on how to assess your staff and the options available to you.

CLICK HERE to find out more information about postponement.

And finally…
Your thoughts on the REC legal service

Every September/October the REC starts work on future business planning. This is when we look at the legal service we have provided in the previous year and think about how we might improve or enhance the service in the coming year. We made a number of improvements in 2015 so far – we have extended the helpline hours, introduced Legal bitesize, recorded 10 new webinars, produced 10 new factsheets and reviewed 16 model contracts. We are currently working on an improved search function. We would like to hear from members what you think about the legal service and any ideas you might have to help us improve even further. Please send your comments to **lewina.farrell@rec.uk.com**.

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