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National Minimum Wage: draft consolidated regulations

Response from the Employment Lawyers Association

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Introduction

1. The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.

2. ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.

3. A working group was set up by the Legislative and Policy Committee under the co-chairmanship of Robert Davies and Michael Reed to consider and comment on the Government's 'National Minimum Wage: Consultation on draft Consolidated Regulations' ("the Consultation"). A full list of the members of the working group is set out in the Appendix. Our response is set out below. Please note that rather than divide the response into sections dealing exclusively with: Question 1 ("***Do you consider that there are any provisions which do not work or are unclear? If yes, please explain your reasons."***); Question 2 ("***Are there other areas of the detailed rules which you consider should be reviewed ? If yes, what are these areas and why?"***); and the provision of a separate set of general comments (directed at the consultation process as a whole) we have sought to address these points in each of Parts 1 – 7 of the draft Consolidated Regulations.

Overview

4. One of the aims of the redrafted Consolidated Regulations contained in the Consultation (which we refer to throughout either as "the Draft Regulations" or "the Consolidated Regulations") is to ensure that the "rules", as it were, which are applicable in respect of the National Minimum Wage are set out as clearly as possible. In general ELA agrees that the Draft Regulations are set out in a simpler format, which provides greater clarity and makes the Draft Regulations easier to understand. In particular, we believe that the new structure is a significant improvement, making the Consolidated Regulations much easier to understand and navigate.

5. The working group notes, however, that any regulations can only be as simple as the underlying law that they set out. The present law on the NMW is complex. There are multiple rates, depending on age and employment status. Determining the correct pay reference period is difficult; and there are many exceptions to the right. The NMW regime is therefore inherently complex and difficult to understand — for both employers and employees.

6. The situation is further complicated by the way in which the NMW law is split between the National Minimum Wage Act and the relevant Regulations (whether the current NMW Regulations or the Consolidated Regulations). To understand the regime, it is necessary to read both pieces of legislation and understand their interrelationship. As well as being challenging for users, this limits the extent of possible improvement by amending the Regulations alone.

7. While the aim of setting out the law as simply as possible is a laudable one, therefore, there are significant limits on the progress that can be made, without simplifying the underlying law.

While ELA agrees that the Consolidated Regulations are simpler and easier to understand than the current regulations we consider that it will continue to be the case that most employers and employees will still not be able to understand their obligations and rights in respect of the National Minimum Wage, without legal or HR advice.

8. ELA would also like to comment on the timing and schedule for the consultation. We note that a longer period was allowed for responding than in some recent consultations and this is welcome. However, it remains difficult to respond to consultations — especially those requiring detailed examination of draft legislation such as this — within such abbreviated timescales. ELA's responses are drafted by volunteers contributing their time pro bono. These groups need to be assembled; need time to formulate and write up their views and then these views need to be agreed within ELA. All of this takes time. It is particularly difficult when consultation periods cut across holiday periods, such as the months of July / August. Consequently we consider that a full 12 week period may have been preferable.

9. Since ELA generally agrees that the draft regulations are an improvement, the following, detailed comments relate to issues where we think further improvements could be made or where we believe there is a problem with the draft.

Part 1: General and Interpretation

10. Regulation 3 (General interpretative provision) defines pay reference period by reference to regulation 7. This is a typographical error. The pay reference period is defined in regulation 6.

Part 2: Rates of the National Minimum Wage and Pay Reference Period

11. Regulation 4(3) could be better placed as part of regulation 5, which deals specifically with the apprenticeship rate. Most of those reading regulation 4 will not be dealing with an apprenticeship relationship. At present they will need to read reg 4(3) to check that it does not apply. If it were placed in reg 5 this would not be necessary.

Part 3: Calculation of the hourly rate

12. Regulation 7 could be drafted more clearly. The phrase 'hourly rate of remuneration' is required by s2 of the Act. However, the repeated references to 'remuneration', 'hourly rate' and then 'remuneration' — each with a different meaning is potentially confusing.

13. ELA would suggest that a clearer basis to approach the point would be to make clear that a worker's hourly rate of remuneration in a pay reference period is determined by the calculation then set out in reg 7.

14. In addition, the use of the single characters 'R' and 'H' makes the section unnecessarily opaque at first glance. These could be replaced by 'Remuneration' and 'Hours'; defined in the same way just below the calculation itself. This would allow users more readily to grasp the basic idea behind the calculation immediately. It would also reduce the resemblance to algebra, which often has intimidating connotations for those not mathematically inclined, unlike more basic arithmetic (which is all the calculation requires) or perhaps does so to a lesser extent.

Part 4: Remuneration for the Purposes of the National Minimum Wage

Regulation 9

15. Although reg 9 generally provides greater clarity than the current provision, ELA notes that the term 'money payment' in the current NMW Regulations does place greater emphasis on the payments considered in these circumstances. This may usefully aid understanding of the purpose of the rule and might be usefully retained.

16. Reg 9(1)(b) of the Draft Regulations does not alleviate the confusion (and in the view of some of the Working Group, the potential unfairness) of this provision particularly in respect of annual bonus payments paid in respect of performance over the course of a year. The drafting of this provision requires the bonus payment to be considered as payment for NMW purposes in that pay reference period save for an allocation of part to the previous pay reference period. It is our view that this creates a loophole in respect of NMW payments.

17. In addition reg 9(1)(d) gives the opportunity for a skewing of figures in respect of payments made on termination i.e. payment in lieu of notice and payments of accrued holiday pay.

18. ELA therefore believes that further thought and clarification is required in relation to payment of bonus and commission although we note the comment at Section 2.5 of the Executive Summary of the Consultation (page 5) that "there is no intention to reopen the policy decisions behind the detailed rules", such that this may not be the exercise through which any such reflection might be applied.

19. That said, we would suggest that it is contrary to the purpose of the Consolidated Regulations ('*to try and ensure that the rules are set out as clearly as possible'*) to retain Regulation 9(2) in its current form. In the view of ELA this would appear to be better served as a subparagraph to Regulation 9(1)(c) and as such making it clear the relevant conditions for that particular provision. It may be that Regulation 9(1)(a), (b) and (c) would be better in a separate rule. Arguably, these deal with payments which plainly contribute to the National Minimum Wage in some way. The Draft Regulations therefore primarily deal with which pay reference period the payments apply to. The remaining subsections then provide clarification in relation to payments which, without a clarifying regulation, might be thought not to contribute to remuneration for the purposes of the NMW.

Regulation 10

20. Regulation 10(f) may benefit from a definition of benefit in kind for any lay readers. This would be properly placed in the interpretation regulation at reg 3.

21. Regulation 10(j) is, in the view of ELA, unclear. While this is a complex situation greater clarity is advisable to ease the understanding and application of the provision. For example, clarity is needed as to what situations the Government envisages this arising, such as shift allowances or attendance allowances. Such allowances and additions to basic wages are becoming more frequent in the employment contracts of low earners. Given the potential for dispute arising out of this issue it is ELA's view that it would be helpful for this provision to be revisited – paragraph 2.5 of the Executive Summary notwithstanding (see paragraph 18 above) - and further attention paid to the practicalities of the situation. To reiterate, we think that it would be beneficial for the Government to take the opportunity to provide more detail for employers and employees alike as to what allowances it is intended will come within the scope of this provision.

22. It is our view that Regulation 10(k) has been drafted in a more ambiguous and less clear way than the existing Regulation 31(1)(d). Reg 10(k) does not address such payments that exist in employment relationships such as 'rolled up' holiday pay which although deemed unlawful are still seen in many employment situations. Additionally no reference is made to payments for equipment and tools that are increasingly seen in the contracts of those in the construction or transportation industries. Furthermore, the increased number of agency workers and workers under 'umbrella contracts' has, in the experience of members of the working group, seen an increase in the number of additional elements which are being included on wage slips but

which are not addressed in the Draft Regulations: examples being administration fees and employer's NI which can be seen as an element of gross pay. It is our view that it may be timely to take the opportunity to address such issues in the Draft Regulations.

Regulation 12

23. Regulation 12(2)(c) presents some concerns in the use of 'accidental' and how this is to be defined – the lack of a definition or explanation of the word adds uncertainty and unpredictability to the Draft Regulations. For example, does it apply solely to an erroneous calculation or is it intended to capture a more generous application of a policy by an employer made in error in the sense that it intended to apply a less generous approach in practice, in other words when either approach would in fact have been lawful. This may be an example where Guidance might be helpful to illustrate an accidental or unintended overpayment.

Regulation 14

24. Regulation 14 is a much clearer and simpler provision and reflects a material improvement. The only comment ELA would have is whether the definitions contained in sub-paragraphs (3)-(4) would be better placed in the interpretative clauses at Regulation 3.

Part 5: Hours Worked for Purpose of the National Minimum Wage

Regulation 18

25. The interaction between regulation 18 and regulation 9(2) is not clear. It appears to mean that some payments from an employer are being excluded from the calculation, even though the hours that led to those payments are included in the calculation. Although this issue also exists in the current regulations, we suggest that the Consolidated Regulations present an opportunity to clarify the position.

26. If a record of all or part of the hours worked in a pay reference period ("PRP") is submitted late, the expectation would be that if or once the record of those hours, or those extra hours, has been accepted by the employer as an accurate record in respect of that PRP, then the reg 7 calculation would be carried out afresh.

27. However, when carrying out a fresh reg 7 calculation, the effect of reg 9(2) is that even if an employer has paid the worker for the hours or extra hours, if that payment is itself late, it will not count.

28. Reg 9(1)(c) provides that where reg 9(2) is satisfied, payments made later than the PRP at issue count towards payments made by the employer in respect of that PRP. However, in practice this is confined by reg 9(2) to payments made in either the PRP in which the record of hours was actually given to the employer, or in the next PRP.

29. Reg 8 requires remuneration to be determined in accordance with Chapter 1 of Part 4. Consequently there is no scope to count a free-standing actual payment as being remuneration in respect of the PRP at issue. Reg 9(1), although a deeming provision, thus excludes actual payments towards the PRP counting unless they satisfy reg 9(2).

30. That means that any payment in respect of a late submission of a record of hours does not count towards NMW remuneration for the PRP at issue if the payment is made later than the end of the PRP after the late record was submitted to the employer.

31. A dispute over a record of extra hours could well take longer than two PRPs to resolve. A PRP is a maximum of one month. For weekly paid workers, it is one week.

Regulation 20

32. A ‘rest break’ is not defined. As such it could embrace the time taken for having a snack in a station café while waiting for a train, cutting short the waiting time for reg 20(c) purposes. Or, for reg 20(d) purposes, visiting the toilet facilities on arrival at the work or training venue at the end of the journey.

33. The parameters of what would count as a ‘rest break’ and its period are unclear and further clarity would be preferable in the Consolidated Regulations and Guidance.

34. Methods of recording such rest breaks are also unclear. The information is within the worker’s knowledge, yet the onus is on the employer to keep a record.

35. We assume that it is intended that the meaning of a ‘rest break’ should follow that in Regulation 12 of the Working Time Regulations 1998, and if so, we recommend that that link should be made explicit. (If, however, a different meaning is intended, we consider that that should be consulted upon and defined.) A similar difficulty occurs with regulation 35(3) and (4) in connection with hours not treated as time work.

Regulation 25

36. In Regulation 25(3), the use of the term ‘proportion’ appears odd, suggesting something different from the ‘number’ of hours before and after a variation to basic hours.

37. ‘Proportion’ is used in regulation 22(b)(ii) of the 1999 Regulations, but in that context the (admittedly more cumbersome) drafting does make it more straightforward to understand why ‘proportion’ is being used. Having shed the former implicit explanation for the use of ‘proportion’, there is no need to retain use of the word. Indeed, the formula’s definition of ‘D’ uses ‘number’.

38. The formula in reg 25(5) defines the number of days before and after any variation, converting them to a standard 365 day year. The use of ‘may’ in reg 25(5) suggests discretion over use of this formula. But there is no discretion in the 1999 Regulations: that version was intended to treat all years as consisting of 365 days (hence the use of the term ‘proportion’).

39. We suggest that it would be simpler to dispense with the use of ‘proportion’ and revise reg 25(3) to clarify that “the basic hours” in question are determined in accordance with the formula in paragraph (5).

40. A similar difficulty occurs in Regulation 28 and Regulation 29 in connection with salaried hours work. In contrast, in Regulation 50(b) ‘proportion’ is used appropriately.

Regulation 26

41. Regulation 26(c) appears to have omitted a word. We believe it should read ‘hours *worked* which do not form part of the basic hours…’.

Regulation 21 and 27

42. The re-drafting does not immediately come across as being as clear in distinguishing between actual salaried hours work and deemed salaried hours work as the equivalent in the 1999 Regulations. As such, even with the suggested insertion at reg 26(c), we consider that the proposed draft may invite challenges in the form of litigation.

43. This issue is particularly important when dealing with night work. In contrast, in the context of time work, the drafting of the relationship between reg 30 and reg 32 maintains clearly that which exists between reg 3 and reg 15(1) and (1A) of the 1999 Regulations. Consequently it appears that current “night work“ case law is just as applicable to the proposed time work provisions. On the current provisions, if a worker is required to be present at work during a set period at night, the purpose of his or her mere presence may be sufficient to satisfy the

proposed reg 30(a) (and the current reg 3(a)) as a matter of fact and irrespective of whether s/he is called upon. That leaves no room for consideration of the deeming provisions found in the proposed reg 32 and in the current reg 15(1) and (1A).

44. The Consultation note does not offer help in relation to salaried hours work as Paragraph 6.37 does not appear to recognise how the 1999 Regulations actually work. It is however reassuring that the intention is that the salaried hours rules be consistent with those for time work.

Regulation 27

45. Reg 27 – Reg 27(2) reflects the equivalent deeming provision in the1999 Regulations, that is, reg 16(1A). As such, it retains the same difficulty described below.

46. A core practical difficulty is to distinguish between those "at-work" cases, where the employee is paid simply to be there "just in case", and those "on-call" cases where he is required to be there on call and is not deemed to be working the whole time. This is the question posed by HHJ Serota in **Esparon t/a Middle West Residential Care Home v Slavikovska EAT/217/12 @ [52].** The former are entitled to the NMW for the entirety of their shift; the latter rely on the deeming provisions so as to be paid when they are awake and working. Colloquially, both may be called work "on-call". In **Slavikovska**, the EAT found that the Claimant was entitled to the NMW throughout the night, irrespective of whether she was actually called upon to get up. The EAT relied on the purpose of her presence "just in case": it complied with the employer's statutory obligations in operating a residential care home.

47. These Draft Regulations do nothing to assist in distinguishing between the two situations. In that respect, they reflect the 1999 Regulations but we consider that the Consultation may be a timely opportunity to clarify what is required .

48. For the 'deeming' on call cases, retaining the current drafting perpetuates the difficulties in determining the actual hours awake and working. One area of dispute is what counts as being for 'the purposes of working'. (This links back to the consideration of the interaction between reg 18 and reg 9 and to the meaning of 'rest break' in reg 20 referred to above, see paragraphs 32 – 35).

49. The employer is required to keep a record of hours worked. The definition of 'hours' in reg 3 means that any 'fraction of an hour', for example one minute, or 1/60th of an hour, is defined as one 1 hour in the NMW calculations. This appears to be new. There was no definition of 'hours' in reg 2 of the 1999 Regulations, as is suggested by the Transposition schedule in the Consultation note. Although rounding up is helpful, this does raise the possibility of abuse and increases the likelihood of challenges.

50. Minutiae count. Waking up to carry out a one minute check clocks up one hour of pay. Returning to sleep and waking up again in order to work for another few minutes clocks up an additional hour of pay.

51. The worker alone has the knowledge of the number of times and periods for which s/he was awake for the purposes of working. Thus record keeping of night work is likely to depend on the worker's own record.

52. A further difficulty is how to deal with what is incidental to work. Case law in the context of industrial accidents, shows that the parameters of what is incidental to work are wide. Going to the toilet, having a permitted snack, or other permitted break, have all been accepted as being incidental to work.

53. Consider the case of a worker who wakes up, uses the toilet facilities and then does a work check. If the work takes 1 hour 1 minute, is the initial use of the toilet facilities included or

excluded? What about incidental breaks during the work check which have the effect of taking the quantum into a second hour?

54. How far does the requirement to be “awake for the purposes of working” limit the time that counts towards the NMW and that which is excluded? Is, or should there be, any distinction between demand-led work (an alarm sounding) and proactive work (carrying out a routine check)?

55. If the worker wakes up naturally and then carries out a work check, is that sufficient to count towards the NMW? Or are we expected to distinguish between work that is essential or ordered specifically (which counts) and work that is within scope of the job description but which does not count because the employer says there is no need to do it at night?

56. A further aspect is how this relates to the identification of the type of work, whether salaried hours work, time work, output work or unmeasured work. Does having to focus on hours awake for purposes of working turn that activity into working by time under regulation 30(a) or into a measure of ‘output’ for the purposes of regulation 36? Some simplification and certainty for those in ‘on call’ work settings, such as for care home providers and workers, is essential.

57. A similar difficulty occurs in regulation 32(2) in connection with time work.

Part 7: Records

58. The duty to keep records is on the employer only. Frequently disputes between the parties may revolve around the number of hours worked. When it comes to enforcement in an hours worked relationship there is then only one record. Workers regularly fail to appreciate the importance of making such a contemporaneous record. The absence of such a record can make the prospect of resolving the dispute in the workers’ favour much more difficult. For this reason, one member of the working group suggested that the duty to maintain records might be usefully extended to the employee. Other members of the group were doubtful about this approach. They feared that, although some employees could keep adequate records, many would find the obligation onerous or impossible.

59. Another means of remedying such a potential difficulty for workers (and possibly the HMRC enforcement officers) would be by introducing a regulation pursuant to that reserved in Section 12 of the National Minimum Wage Act 1998. This would require the employer to provide to the worker a National Minimum Wage (NMW) statement. Such a statement could enable workers to understand from the outset how the NMW was calculated and might avoid the need for potential disputes. It may also lead to greater awareness of the legislation. Although as far as we are aware there are no official data that indicate reliably the level of non-compliance with the NMW, the Annual Survey of Hours and Earnings low pay estimates for April 2012 show that there were then 287,000 jobs held by people aged 16 and over which were paid below the adult rate of the NMW. This constitutes about 1% of all employee jobs in the UK labour market or 6% of the bottom decile of adult earners. In 2012/13 HMRC carried out 1696 investigations, clearly there is a need to increase the level of compliance with the NMW regulations and these suggestions are made with that aim in mind.

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