

## Changes to the National minimum wage (Lecture P1422 – 10.39 minutes)

### *Background*

Businesses are generally obliged to pay at least the national minimum wage (NMW) to their workers. Most workers in the UK who are over compulsory school age and who ordinarily work in the UK are entitled to be paid at least the NMW. If an employer should have paid the NMW but has failed to do so, HMRC can take various action, including issuing a notice to pay arrears for up to six years previously, fines of up to £20,000 per worker, legal action including criminal legal proceedings, and 'naming and shaming' offenders.

### *Definitions for NMW purposes*

The general definition of 'worker' is an individual who has entered into a contract of employment, or who works under a contract of employment. That also extends to any other contract, which can be an express written or oral contract, or even an implied contract, whereby the individual personally performs work or provides services for the other party to the agreement, and that other party is not a client or customer of any business or profession carried on by the individual (NMWA 1998, s 54(3)).

This general definition of 'worker' is modified when it comes to home workers. In determining whether a home worker is a worker for NMW purposes, it is not necessary for the individual to do the work or perform the services personally; so for example, the worker could pass some of their work to a family member.

The meaning of 'home worker' in this context is an individual who contracts for the purposes of another person's business for the work to be done somewhere not under that person's control or management (NMWA 1998, s 35). The work is often done in the individual's own home, but it could also be done elsewhere.

### *Family households*

The rules on work relating to family households (SI 2015/621, reg 57) broadly provide that 'work' for NMW purposes does not include work done by a worker in relation to an employer's family household if certain conditions are all met:

- the worker is a member of the employer's family;
- the worker resides in the employer's family home; and
- the worker shares the tasks and activities of the family.

For periods prior to 1 April 2024, there is another exclusion from the NMW in household situations, where certain conditions are all met.

Those conditions are:

- the worker lives in their employer's family home;
- the worker is not a member of that family, but is treated as such in terms of being provided with living accommodation and meals and sharing in family tasks and leisure activities;

- there are no deductions or payments for the worker's living accommodation or meals; and
- if the work had been done by a family member of the employer, it would not be treated as work or performed under a contract where the requirements for the family member exclusion (see above) would be met.

However, following a change in the NMW rules from 1 April 2024 (in SI 2024/75, reg 2), this latter exclusion is removed from the NMW rules. Hence, any work that meets those requirements will be included in 'work' and the worker must be paid at least the NMW in respect of it. This will potentially benefit workers such as nannies or au pairs who live with the families they work for.

### *Family businesses*

A 'family business' in this context can be operated through a company, or by a sole trader or partnership. The NMW rules state that work does not include any work done by a worker in relation to an employer's family business if the worker is a member of the employer's family, lives in the employer's family home, and participates in the running of the family business (SI 2015/621, reg 58).

#### *(a) Directors*

As a limited company is a separate legal entity a company isn't considered to have a family, or to be a family member, or to own a family home in the context of the NMW.

In a family company, an individual may be an office holder, an employee, or both. Company directors who assume the rights and obligations of a director are office holders, but not necessarily workers. For a director to also be a worker for NMW purposes, there would generally need to be an extra arrangement between the parties to that effect. HMRC accepts that the NMW does not apply to company directors unless they have contracts that make them 'workers' (NMWM05140).

Payments to a company director normally arise by way of remuneration as an office holder in accordance with the company's articles of association. In that case, the director is an office holder and not a worker for NMW purposes. The difference between the rights and duties of an office holder and a worker are broadly that the office holder's rights and duties are defined by the office held and exist independently of the person who fills it. A director can be voted out of office by the company's shareholders. On the other hand, a worker's rights and duties are determined by the contract between them and the employer; that contractual relationship means that the worker can only be dismissed if the contract is terminated.

It follows that if a person is a director, but doesn't have an explicit employment contract, they are highly unlikely to be subject to the NMW legislation. Such activities can be done in their capacity as an office holder (director) rather than as a worker. However, if a director has an employment contract, they will be within the NMW in respect of earnings under that contract, as they and the company will then have chosen to create a worker and employer relationship, alongside the director and company one.

#### *(b) Other workers*

In relation to family members who are not office holders, a company employee will always be a worker and entitled to the NMW. A formal written contract is unlikely, particularly in small family companies; however, that does not necessarily mean that no contract exists. HMRC might contend that an implied contract exists, which could result in family members who work in the business needing to be paid the NMW.

For unincorporated businesses, family members of a sole trader or (say) a husband and wife partnership can be excluded from payment of the NMW in certain circumstances. As mentioned earlier, those conditions are broadly that the worker is a member of the employer's family, lives in the employer's family home, and participates in the running of the family business. HMRC's guidance (at NMWM05160) confirms that the work carried out by the family member in those circumstances falls outside the NMW provisions.

*Contributed by Mark McLaughlin*