

EXPLANATORY MEMORANDUM TO
THE NATIONAL MINIMUM WAGE (AMENDMENT) (No.2) REGULATIONS 2010
2010 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Business Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The National Minimum Wage (Amendment) (No. 2) Regulations 2010 (“the Regulations”) amend the National Minimum Wage Regulations 1999 and come into force on 1 January 2011.

2.2 The Regulations provide that payments by an employer for travel expenses to a temporary workplace which are eligible for tax relief do not count as pay for National Minimum Wage (NMW) purposes.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Regulations implement the Government’s decision announced on 27 July 2010 that action should be taken in relation to travel and subsistence schemes which involve NMW workers.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

Edward Davey, the Minister for Employment Relations, Consumer and Postal Affairs has made the following statement regarding Human Rights:

In my view the provisions of the National Minimum Wage (Amendment) (No. 2) Regulations 2010 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 The NMW was introduced on 1 April 1999 and creates an obligatory threshold pay level. The intention is to protect workers from unacceptably low rates of pay.

7.2 Many temporary workers, including those who are paid at or near the NMW, participate in travel and subsistence schemes operated by some employment businesses. These schemes take advantage of the tax relief and disregards that exist for National Insurance Contributions (NICs) in relation to travel from home to a temporary workplace. Workers agree that an amount of pay, which would otherwise be subject to tax and NICs, is replaced with expenses payments for travel to a temporary workplace. These schemes deliver tax and NICs savings for workers and the employment business saves employer's NICs on the pay which has been replaced with tax and NICs free expenses. Workers paid at or near the NMW are able to participate in these schemes as the expenses paid for travel to a temporary workplace can count towards NMW pay.

7.3 The Government is concerned that participation in these schemes may adversely affect low paid workers' access to earnings-related social security benefits, and that these schemes distort the market as some businesses do not wish, or are not able, to operate these schemes thereby suffering a competitive disadvantage. The Regulations provide that expenses paid to workers for travel to a temporary workplace (including associated subsistence costs) do not count for the purposes of the NMW.

7.3 The Government does not believe that the Regulations will be of public interest because it estimates that only around 90,000 low paid workers use a travel and subsistence scheme.

- *Consolidation*

7.4 The 1999 Regulations have been amended many times and the Department is aware of the need to consolidate these Regulations. The Department aims to produce a consolidated version of these Regulations in 2011, if resources permit.

8. Consultation outcome

8.1 The Government conducted a twelve week public consultation on the issue of travel and subsistence expenses schemes for NMW workers. 54 responses were received. Nearly half of these were from employment businesses which either operated these schemes or would like to in future and they were against any change to the NMW Regulations. Some employment businesses, including a few larger businesses, were in favour of the proposals. Regulatory bodies such as the Low Pay Commission, the Equalities and Human Rights Commission and the Gangmasters Licensing Authority were also supportive.

8.2 On 12 October an employment business applied for a judicial review of the Government's decision to make the changes in the Regulations.

9. Guidance

9.1 Extensive guidance on the operation of the Regulations is provided on the DirectGov and Business Link websites.

10. Impact

10.1 As a result of the changes in the Regulations, it is estimated that the amount of tax and NICs by £90 million per year collected from employment businesses and workers using such schemes will increase by £90 million per year.

10.2 The Regulations have no impact on the public sector.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small employment businesses that use travel and subsistence schemes for NMW workers.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to provide clear guidance.

11.3 Feedback from the consultation indicated that using travel and subsistence schemes for a small number of workers is not financially viable because of the costs associated with such schemes. Small businesses that do not use such schemes will benefit from increased competitiveness.

12. Monitoring & review

12.1 The Government review the effect of the changes in the Regulations one to three years after implementation.

13. Contact

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