

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part Four: Enforcement of Minimum Wage Legislation

303. *Sections 44 to 47* amend the National Minimum Wage Act 1998 (“the 1998 Act”) and the Agricultural Wages Act 1948.
304. The 1998 Act has the effect that all qualifying workers are entitled to be paid at least the rate of the national minimum wage, as set by regulations made by the Secretary of State. Section 13 allows the Secretary of State to appoint enforcement officers to pursue national minimum wage cases on behalf of workers. The Secretary of State has appointed the Inland Revenue to enforce the national minimum wage, except that, in the agricultural sector, agricultural wages officers (who in England and Wales are officials of the Department of the Environment, Food and Rural Affairs) enforce the national minimum wage whilst enforcing the agricultural minimum wage. Section 14 sets out the powers of enforcement officers to obtain information, and sections 15 and 16 set out the ways in which information gathered by officers may be used. Schedule 2 to the 1998 Act amended the existing legislation relating to agricultural wages to provide, *inter alia*, that the enforcement regime for the national minimum wage was to be the enforcement regime for the agricultural minimum wage.
305. If an enforcement officer believes that a worker or workers have not been paid the minimum wage by the employer in question, an enforcement notice can be issued under section 19. If the employer fails to comply with the enforcement notice, the officers have the power to take further action. They may bring a case against the employer through the courts or tribunals (section 20) and/or issue a penalty notice (section 21). A penalty notice imposes a financial penalty on the employer, related to the period of his failure to comply with the enforcement notice, in addition to any arrears of the national minimum wage.
306. *Section 44* inserts a new section 16A into the 1998 Act. As sections 15 and 16 currently stand, restrictions apply to the use and supply of information obtained by enforcement officers. In particular, information must not, generally speaking, be supplied to any other person or body and, even where this is permitted, the authorisation of the Secretary of State is required. Because of these restrictions, it is considered that, when investigating an alleged breach of the 1998 Act, enforcement officers are unable to inform the worker what the employer or the employer’s records revealed about the worker’s claim, and similarly are unable to inform the employer about the case put forward by the worker.
307. Subsections (1) and (2) of new section 16A accordingly allow an enforcement officer to disclose information obtained by the enforcement officer (e.g. from the employer) to the worker where that information relates to such worker.
308. Similarly, subsections (3) and (4) of new section 16A enable an enforcement officer to disclose information obtained by the enforcement officer (e.g. from the worker) to the employer where that information relates to such employer.

309. Subsection (5) of new section 16A defines what the terms “agency worker”, “enforcement officer” and “the relevant legislation” mean for the purposes of this new section of the 1998 Act. The definition of “the relevant legislation” ensures that agricultural wages officers (in England and Wales and in Northern Ireland) have this new disclosure power when enforcing the agricultural minimum wage.

Enforcement notices

310. *Section 45* amends section 19 of the National Minimum Wage Act 1998. *Subsections (1) and (2)* make it clear that, while enforcement notices relating to the arrears due must cover all pay periods up to three months before the date of the notice, they need not cover more recent periods.
311. *Subsection (3)* amends section 19 of the 1998 Act, to make it absolutely clear that a single enforcement notice may relate to more than one worker irrespective of whether the employer’s failure to pay the minimum wage is a previous or ongoing failure.
312. *Subsection (4)* ensures that these amendments do not have effect in relation to the agricultural minimum wage in Scotland.

Withdrawal and replacement of enforcement notice

313. *Section 46(1)* inserts six new sections, 22A to 22F, into the National Minimum Wage Act 1998 which enable an enforcement officer to withdraw and replace an enforcement notice or a penalty notice. A short explanation of enforcement notices and penalty notices is given at paragraph 305 above.

New section 22A (withdrawal of enforcement notices)

314. Subsection (1) allows officers to withdraw enforcement notices. Subsection (2)(a) provides that, if the officer does not issue a new enforcement notice, then subsection (3) takes effect. This means that no new penalty notice may be issued in connection with the withdrawn notice, that any penalty notice already issued ceases to have effect, that any fine already paid by the employer must be repaid by the Government with interest, that any appeal ongoing against the withdrawn notice ceases to have effect and that while individual workers cannot bring civil proceedings relying on a withdrawn notice after the withdrawal, they can continue with any such proceedings brought before the withdrawal
315. Subsection (2)(b) allows the officer, where he withdraws an enforcement notice and decides to issue a new enforcement notice, to decide whether to apply subsection (3); effectively this enables him to decide whether a penalty notice issued in relation to the withdrawn enforcement notice and any appeal against the notice should continue to have effect. Subsection (4) provides that the appropriate rate of interest on sums repaid shall be that specified in section 17 of the Judgments Act 1838. Subsection (5) provides that where subsection (3) is applied the notice of withdrawal must make its effect clear to the employer.

New section 22B (replacement of enforcement notices)

316. Subsection (2) provides that officers may – at the same time as withdrawing an enforcement notice – issue a new notice, which covers some, or all of the workers covered by the withdrawn notice. Subsection (3) makes it clear that the replacement notice cannot cover any new workers, although these could of course be covered by a separate enforcement notice.
317. Subsection (4) has the effect that if a replacement enforcement notice is served on an employer that, incorrectly, covers any new workers that were not covered by the first notice, then it is treated as a replacement notice that attracts the automatic consequences set out in new section 22A(3) (see above). In particular, it will not be possible to issue

any penalty notice following on from the first enforcement notice, and any penalty notice already served in respect of the first notice will cease to have effect.

318. Subsection (5) states that the replacement notice must cover all pay periods where arrears are due up to the service of the new notice; the effect is that the new notice is required to cover not only all underpayments during the period covered by the first notice but also all underpayments in the period between the service of the old and new notices except the most recent. *Subsection (6)* makes it clear that when a replacement notice is issued in respect of a first notice that covers all or nearly all of the 6 year limitation period – the maximum period for which arrears may be recovered – the replacement notice runs back from the date when the first enforcement notice was issued and not the date of issue of the replacement notice. The amendment avoids the unsatisfactory position that would result if the maximum period to which a replacement notice could apply did not extend back to the time of an underpayment covered by the first notice.
319. Subsection (7) states that the new notice must set out any differences between it and the withdrawn notice, and explain the position, under the new sections 22C and 22D described below, in relation to any penalty notices issued in relation to the withdrawn notice and any appeal against the withdrawn notice or civil proceedings brought in reliance on it.
320. Subsection (8) has the effect that if the new notice fails to contain the information required by subsection (5) it takes effect as if it were a notice to which the new section 22A(3) had been applied; this means that any penalty notices issued in relation to the old notice or appeal against it will cease to have effect. Subsection (9) provides that an officer may only issue a replacement notice once.

New section 22C (effect of replacing an enforcement notice on penalties)

321. Subsection (1) makes it clear that this new section only applies where an officer has issued a new enforcement notice which states that section 22A(3) does not apply. Subsection (2) states that the withdrawal of the old enforcement notice does not affect any penalty notice served in connection with the old notice.
322. Subsection (3) has the effect, however, that the existing penalty notice will automatically fall if it includes an amount in respect of non-compliance in respect of a worker and the amount could not validly have been included if the old enforcement notice had been as it should have been according to the new one. Subsection (4) allows officers to issue replacement penalty notices in these circumstances.

New section 22D (effect of replacement on appeals and civil proceedings where section 22A(3) not applied).

323. Subsection (2) makes it clear that any appeal made by the employer against the old enforcement notice will continue to stand against the new notice, but allows the employer to substitute a new appeal against the new notice if he wishes.
324. Subsection (3) provides that if an appeal is made against a new enforcement notice when the effect of a penalty notice served in respect of the old enforcement notice has been preserved or a new penalty notice has been served in reliance on the old enforcement notice, the authority of the tribunal to rectify the penalty notice applies and so do the provisions governing the effects on a penalty notice of an appeal against the enforcement notice it is based on.
325. Subsection (4) provides that a compliance officer cannot start proceedings to recover minimum wage underpayments on behalf of a worker in reliance on an enforcement notice that has been withdrawn, but that if proceedings have already been brought by a compliance officer on behalf of a worker before the withdrawal of an enforcement notice, they may continue despite its withdrawal.

New section 22E (withdrawal of penalty notices)

326. Subsection (1) allows an officer to withdraw a penalty notice if new evidence has come to light which means it should not have been issued or that the amount of the fine is incorrect. This new section may be used either when an enforcement notice is withdrawn and replaced (as covered by the new sections already described) in a way that undermines the old penalty notice or in cases where the enforcement notice is not withdrawn, but the officer believes that the penalty notice is incorrect for some reason.
327. Subsection (3) provides that if a penalty notice is withdrawn and not replaced then any fines already paid by the employer in connection with it must be repaid by the Government with interest, and any appeal ongoing against the notice falls. Subsection (4) states that the appropriate rate of interest to be applied is that specified in section 17 of the Judgments Act 1838.

Section 22F (replacement of penalty notice)

328. Subsection (2) makes it clear that any new penalty notice must be issued at the same time as the old one is withdrawn, and that the amount of any new penalty must be less than the old one. Subsection (3) states that the new penalty notice must make the differences between the old and new penalty notices clear and indicate the effects of subsections (4) to (7).
329. Subsection (4) provides that if the penalty stated in a withdrawn penalty notice has already been paid when a new penalty notice is served, the excess above the amount specified in the new notice must be returned to the employer with interest; subsection (5) states that the rate of interest applying is that specified in the section 17 of the Judgments Act 1838. Subsections (6) and (7) have the effect that any appeal made by the employer against the old penalty notice will continue to stand against the new notice, but allow the employer to substitute a new appeal against the new notice if he wishes. Subsection (8) makes it clear that an officer may only issue a replacement penalty notice once. Subsection (9) makes it clear that the right of officers to issue two or more penalty notices in connection with the same enforcement notice is unaffected.
330. *Subsection (2)* of section 46 has the effect that where an enforcement notice is appealed against the tribunal is not permitted to rectify the amount specified in the notice upwards; it also makes clear that an appeal can be made if the notice covered a pay reference period ending more than six years before the notice was served. *Subsection (4)* ensures that these amendments do not have effect in relation to the agricultural minimum wage in Scotland (since agricultural wages are a devolved matter). *Subsection (5)* has the effect that the new provisions allowing for the withdrawal and replacement of enforcement and penalty notices will apply to the enforcement of the agricultural minimum wage in England, Wales and Northern Ireland, as well as the national minimum wage.

Enforcement officers for the agricultural wages legislation

331. **Section 47(1)** inserts a new section 11A into the Agricultural Wages Act 1948. Subsections (1) and (2) of new section 11A, as well as continuing to allow the appointment of officials from the Department of the Environment, Food and Rural Affairs, permit officials from other government departments, bodies or ministries to act as agricultural wages officers in England and Wales. Subsection (3) of new section 11A provides that agricultural wages officers must be able to produce a formal document showing that they have the authority to act as officers. Subsection (4) of new section 11A obliges agricultural wages officers to identify themselves as such in certain circumstances.
332. **Section 47(2)** makes consequential amendments to section 12 of the 1948 Act, removing or substituting wording that would otherwise contradict or duplicate the requirements of new section 11A.

*These notes refer to the Employment Relations Act 2004
(c.24) which received Royal Assent on 16 September 2004*

333. *Subsection (3)* preserves the validity of appointments of agricultural wages officers made prior to the coming into force of the new section 11A. It deems the appointment of officers under the old provisions to have been made under the new section 11A.