

EMPLOYMENT ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

National Minimum Wage

Section 9: Notices of underpayment

50. Sections 19 to 22F of NMWA 1998 contain provisions concerning the issuing of enforcement notices and penalty notices. At present, if an officer believes that a worker or workers have not been paid the national minimum wage by an employer, the officer may issue an enforcement notice requiring that the arrears be paid. If the employer fails to comply in full with the enforcement notice within 28 days of its service, the officer has the power to take further action by bringing a case against the employer through the courts or tribunals and/or issuing a penalty notice. A penalty notice imposes a financial penalty on the employer, related to the period of his failure to comply with the enforcement notice. An employer can appeal an enforcement notice and/or a penalty notice to an employment tribunal (in Northern Ireland, to an industrial tribunal).
51. *Subsection (1)* of section 9 inserts new sections 19 to 19H into NMWA 1998 to replace the existing enforcement and penalty notices with a new single notice of underpayment.

Notices of underpayment: arrears

52. New section 19 provides that where an officer is of the opinion that an employer has not paid a worker the national minimum wage, or has not fully repaid any arrears which the worker is entitled to under section 17, the officer may serve a notice of underpayment requiring the employer to pay arrears to the worker or workers named in the notice (subsections (1) and (2)). The notice may require employers to pay arrears relating to periods occurring before the coming into force of new section 19, but arrears relating to periods more than six years before the date of service of the notice may not be included in the notice (subsections (6) and (7)).

Notices of underpayment: financial penalty

53. New section 19A provides that the notice of underpayment must require the employer to pay a financial penalty to the Secretary of State within 28 days of service of the notice (subsection (1)) unless the Secretary of State has, by directions, specified circumstances in which a penalty is not to be imposed (subsection (2)). The penalty is set at 50% of the total underpayment of the national minimum wage (subsection (4)), although underpayments occurring in periods before the commencement of the provision will not be taken into account when calculating the penalty (subsection (5)). The minimum penalty is £100 and the maximum penalty is £5,000 (subsections (6) and (7)). The Secretary of State has the power to change, by regulations, the percentage used to set the penalty, the minimum and the maximum penalty (subsection (8)). If the employer complies with the notice within 14 days of its service, the financial penalty is reduced by 50% (subsection (10)). The financial penalty shall be paid into the Consolidated Fund (subsection (11)).

Suspension of financial penalty

54. New section 19B allows for the notice of underpayment to contain a provision suspending the requirement to pay a penalty where proceedings have been instituted, or may be instituted against an employer in respect of a criminal offence under section 31. Where a notice contains such a provision, an officer may serve a notice on an employer terminating the suspension where criminal proceedings have either concluded or will not be instituted (subsection (4)). Where an employer has been convicted of an offence under section 31, an officer must serve a notice on the employer withdrawing the financial penalty (subsection (6)).

Notices of underpayment: appeals

55. New section 19C provides that an employer may appeal to an employment tribunal (an industrial tribunal in Northern Ireland) against a notice of underpayment. An employer may successfully appeal on one or more of three main grounds (subsection (1)). The first is that, at the date set out in the notice, no arrears were owing to any worker(s) named in the notice – i.e. that the employer was compliant with the Act (subsection (4)). If the employment tribunal allows an appeal under this ground it must rescind the notice (subsection (7)). The second is that any requirement in the notice to pay a sum to a worker was incorrect; either because no sum was due to that particular worker or that the sum specified in the notice was incorrect (subsection (5)). The third is that either a notice included a penalty in circumstances that have been specified in directions under section 19A(2) or that the amount of the penalty specified in the notice is incorrect (subsection (6)). If the employment tribunal allows an appeal under either the second or third ground it must rectify the notice, in which case the notice has effect as rectified by the tribunal (subsection (8)).

Non-compliance with notice of underpayment: recovery of arrears

56. New section 19D reproduces the current provisions in section 20 of NMWA 1998 which give officers the power to take civil action to recover arrears on behalf of a worker or workers.

Non-compliance with notice of underpayment: recovery of penalty

57. New section 19E reproduces the provision currently in section 21(5) of NMWA 1998.

Withdrawal of notice of underpayment

58. New section 19F allows an officer to withdraw a notice of underpayment by serving notice of withdrawal on the employer where it appears to him that the notice wrongly includes or omits any requirement or is incorrect in any particular (subsection (1)). Where a notice is withdrawn and no replacement notice is issued, any penalty which the employer has already paid in accordance with the withdrawn notice must be repaid with interest (subsections (2)(a) and (4)). Any appeal against the withdrawn notice will be dismissed and an officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice, although any proceedings started before the notice was withdrawn may be continued (subsections (2)(b), (c) and (d)).

Replacement of notice of underpayment

59. New section 19G allows an officer to issue a replacement notice at the same time that a notice is withdrawn (subsection (1)). The replacement notice cannot include workers who were not contained in the withdrawn notice (subsection (2)). Contravention of this requirement is a ground for appeal by an employer against the notice (subsection (3)). The replacement notice may include arrears incurred after service of the withdrawn notice but before service of the replacement notice (subsection (4)). When a replacement notice is issued, the six years limitation period for including arrears

in new section 19(7) is calculated from the date of service of the first notice rather than the date of service of the replacement notice (subsection (5)). The replacement notice must set out the material differences from the withdrawn notice (subsection (6)). An officer will only be able to issue one replacement notice (subsection (8)).

Effect of replacement notice of underpayment

60. New section 19H sets out the effects of issuing a replacement notice. Where a replacement notice is issued, any appeal against the withdrawn notice continues to have effect as if it were against the replacement notice. If an employer appeals against the replacement notice he must withdraw any appeal against the withdrawn notice (subsection (2)). An officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice but any proceedings started before the notice was withdrawn may be continued (subsection (3)). Any sums already paid by the employer as a penalty in relation to the withdrawn notice is taken into account when assessing compliance with the penalty contained in the replacement notice (subsection (4)(a)). If the penalty which has already been paid by the employer is greater than the penalty in the replacement notice, the balance must be repaid to the employer with interest (subsections (4)(b) and (5)).
61. *Subsection (2)* contains a transitional provision in respect of the amendments contained in new section 19E(a) to NMWA 1998. The section in NMWA 1998 which section 19E replaces has been prospectively amended by TCEA 2007, the relevant provisions of which are not yet in force. This transitional provision allows the current wording to operate until the relevant provisions of TCEA 2007 come into force, upon which time the new wording as provided by TCEA 2007 will operate.
62. *Subsection (3)* amends section 51 of NMWA 1998 to provide that regulations under new section 19A(6) are subject to the affirmative resolution procedure.
63. *Subsection (4)* consequentially amends section 4(3)(cd) of ETA 1996, so that the provision that a Chairman alone shall hear an appeal against an enforcement or a penalty notice under section 19 and 22 of NMWA 1998 respectively, is applied instead to an appeal against a notice of underpayment.
64. Section 44 of the Commissioners for Revenue and Customs Act 2005 provides that the Commissioners shall pay money received in the exercise of their functions into the Consolidated Fund, subject to certain exceptions. One exception, in subsection (2)(f), relates to penalties under section 21 NMWA 1998. *Subsection (5)* repeals subsection (2) (f) to allow the Commissioners for Revenue and Customs to pay financial penalties obtained under new section 19A into the Consolidated Fund.
65. *Subsection (6)* provides for consequential amendments to the Agricultural Wages Act 1948.
66. *Subsection (7)* provides that the amendments in section 9 do not have effect in relation to the enforcement of the AMW in Scotland and Northern Ireland.