



# Employment Act 2008

## 2008 CHAPTER 24

### *National minimum wage etc*

#### **9 Notices of underpayment**

(1) In the National Minimum Wage Act 1998, for sections 19 to 22F there is substituted—

##### **“19 Notices of underpayment: arrears**

- (1) Subsection (2) below applies where an officer acting for the purposes of this Act is of the opinion that, on any day (“the relevant day”), a sum was due under section 17 above for any one or more pay reference periods ending before the relevant day to a worker who at any time qualified for the national minimum wage.
- (2) Where this subsection applies, the officer may, subject to this section, serve a notice requiring the employer to pay to the worker, within the 28-day period, the sum due to the worker under section 17 above for any one or more of the pay reference periods referred to in subsection (1) above.
- (3) In this Act, “notice of underpayment” means a notice under this section.
- (4) A notice of underpayment must specify, for each worker to whom it relates—
  - (a) the relevant day in relation to that worker;
  - (b) the pay reference period or periods in respect of which the employer is required to pay a sum to the worker as specified in subsection (2) above;
  - (c) the amount described in section 17(2) above in relation to the worker in respect of each such period;
  - (d) the amount described in section 17(4) above in relation to the worker in respect of each of such period;
  - (e) the sum due under section 17 above to the worker for each such period.

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- (5) Where a notice of underpayment relates to more than one worker, the notice may identify the workers by name or by description.
- (6) The reference in subsection (1) above to a pay reference period includes (subject to subsection (7) below) a pay reference period ending before the coming into force of this section.
- (7) A notice of underpayment may not relate to a pay reference period ending more than six years before the date of service of the notice.
- (8) In this section and sections 19A to 19C below “the 28-day period” means the period of 28 days beginning with the date of service of the notice of underpayment.

### **19A Notices of underpayment: financial penalty**

- (1) A notice of underpayment must, subject to this section, require the employer to pay a financial penalty specified in the notice to the Secretary of State within the 28-day period.
- (2) The Secretary of State may by directions specify circumstances in which a notice of underpayment is not to impose a requirement to pay a financial penalty.
- (3) Directions under subsection (2) may be amended or revoked by further such directions.
- (4) The amount of any financial penalty is, subject as follows, to be 50% of the total of the amounts referred to in subsection (5) below.
- (5) Those amounts are the amounts specified under section 19(4)(c) above for all workers to whom the notice relates in respect of pay reference periods specified under section 19(4)(b) above which commence after the coming into force of this section.
- (6) If a financial penalty as calculated under subsection (4) above would be less than £100, the financial penalty specified in the notice shall be that amount.
- (7) If a financial penalty as calculated under subsection (4) above would be more than £5000, the financial penalty specified in the notice shall be that amount.
- (8) The Secretary of State may by regulations—
  - (a) amend subsection (4) above so as to substitute a different percentage for the percentage at any time specified there;
  - (b) amend subsection (6) or (7) above so as to substitute a different amount for the amount at any time specified there.
- (9) A notice of underpayment must, in addition to specifying the amount of any financial penalty, state how that amount was calculated.
- (10) In a case where a notice of underpayment imposes a requirement to pay a financial penalty, if the employer on whom the notice is served, within the period of 14 days beginning with the day on which the notice was served—
  - (a) pays the amount required under section 19(2) above, and
  - (b) pays at least half the financial penalty,

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he shall be regarded as having paid the financial penalty.

- (11) A financial penalty paid to the Secretary of State pursuant to this section shall be paid by the Secretary of State into the Consolidated Fund.

### **19B Suspension of financial penalty**

- (1) This section applies in any case where it appears to the officer serving a notice of underpayment which imposes a requirement to pay a financial penalty that—
- (a) relevant proceedings have been instituted; or
  - (b) relevant proceedings may be instituted.
- (2) In this section “relevant proceedings” means proceedings against the employer for an offence under section 31(1) below in relation to a failure to remunerate any worker to whom the notice relates for any pay reference period specified under section 19(4)(b) above in relation to that worker.
- (3) The notice of underpayment may contain provision suspending the requirement to pay the financial penalty payable under the notice until a notice terminating the suspension is served on the employer.
- (4) An officer acting for the purposes of this Act may serve on the employer a notice terminating the suspension (“a penalty activation notice”) if it appears to the officer—
- (a) in a case referred to in subsection (1)(a) above, that relevant proceedings have concluded without the employer having been convicted of an offence under section 31(1) below, or
  - (b) in a case referred to in subsection (1)(b) above—
    - (i) that relevant proceedings will not be instituted; or
    - (ii) that relevant proceedings have been concluded without the employer having been convicted of an offence under section 31(1) below.
- (5) Where a penalty activation notice is served, the requirement to pay the financial penalty has effect as if the notice of underpayment had been served on the day on which the penalty activation notice was served.
- (6) An officer acting for the purposes of this Act must serve on the employer a notice withdrawing the requirement to pay the financial penalty if it appears to the officer that, pursuant to relevant proceedings, the employer has been convicted of an offence under section 31(1) below.

### **19C Notices of underpayment: appeals**

- (1) A person on whom a notice of underpayment is served may in accordance with this section appeal against any one or more of the following—
- (a) the decision to serve the notice;
  - (b) any requirement imposed by the notice to pay a sum to a worker;
  - (c) any requirement imposed by the notice to pay a financial penalty.
- (2) An appeal under this section lies to an employment tribunal.

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- (3) An appeal under this section must be made before the end of the 28-day period.
- (4) An appeal under subsection (1)(a) above must be made on the ground that no sum was due under section 17 above to any worker to whom the notice relates on the day specified under section 19(4)(a) above in relation to him in respect of any pay reference period specified under section 19(4)(b) above in relation to him.
- (5) An appeal under subsection (1)(b) above in relation to a worker must be made on either or both of the following grounds—
  - (a) that, on the day specified under section 19(4)(a) above in relation to the worker, no sum was due to the worker under section 17 above in respect of any pay reference period specified under section 19(4)(b) above in relation to him;
  - (b) that the amount specified in the notice as the sum due to the worker is incorrect.
- (6) An appeal under subsection (1)(c) above must be made on either or both of the following grounds—
  - (a) that the notice was served in circumstances specified in a direction under section 19A(2) above, or
  - (b) that the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason).
- (7) Where the employment tribunal allows an appeal under subsection (1)(a) above, it must rescind the notice.
- (8) Where, in a case where subsection (7) above does not apply, the employment tribunal allows an appeal under subsection (1)(b) or (c) above—
  - (a) the employment tribunal must rectify the notice, and
  - (b) the notice of underpayment shall have effect as rectified from the date of the employment tribunal's determination.

#### **19D Non-compliance with notice of underpayment: recovery of arrears**

- (1) If a requirement to pay a sum to a worker contained in a notice of underpayment is not complied with in whole or in part, an officer acting for the purposes of this Act may, on behalf of any worker to whom the requirement relates—
  - (a) present a complaint under section 23(1)(a) of the Employment Rights Act 1996 (deductions from worker's wages in contravention of section 13 of that Act) to an employment tribunal in respect of any sums due to the worker by virtue of section 17 above; or
  - (b) in relation to Northern Ireland, present a complaint under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996 (deductions from worker's wages in contravention of Article 45 of that Order) to an industrial tribunal in respect of any sums due to the worker by virtue of section 17 above; or
  - (c) commence other civil proceedings for the recovery, on a claim in contract, of any sums due to the worker by virtue of section 17 above.

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- (2) The powers conferred by subsection (1) above for the recovery of sums due from an employer to a worker shall not be in derogation of any right which the worker may have to recover such sums by civil proceedings.

### **19E Non-compliance with notice of underpayment: recovery of penalty**

A financial penalty payable under a notice of underpayment—

- (a) in England and Wales, is recoverable, if a county court so orders, under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of that court;
- (b) in Scotland, may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland;
- (c) in Northern Ireland, is recoverable, if the county court so orders, as if it were payable under an order of that court.

### **19F Withdrawal of notice of underpayment**

- (1) Where a notice of underpayment has been served (and not already withdrawn or rescinded) and it appears to an officer acting for the purposes of this Act that the notice incorrectly includes or omits any requirement or is incorrect in any particular, the officer may withdraw it by serving notice of the withdrawal on the employer.
- (2) Where a notice of underpayment is withdrawn and no replacement notice of underpayment is served in accordance with section 19G below—
  - (a) any sum paid by or recovered from the employer by way of financial penalty payable under the notice must be repaid to him with interest at the appropriate rate running from the date when the sum was paid or recovered;
  - (b) any appeal against the notice must be dismissed;
  - (c) after the withdrawal no complaint may be presented or other civil proceedings commenced by virtue of section 19D above in reliance on any non-compliance with the notice before it was withdrawn;
  - (d) any complaint or proceedings so commenced before the withdrawal may be proceeded with despite the withdrawal.
- (3) In a case where subsection (2) above applies, the notice of withdrawal must indicate the effect of that subsection (but a failure to do so does not make the withdrawal ineffective).
- (4) In subsection (2)(a) above, “the appropriate rate” means the rate that, on the date the sum was paid or recovered, was specified in section 17 of the Judgments Act 1838.

### **19G Replacement notice of underpayment**

- (1) Where an officer acting for the purposes of this Act serves a notice of withdrawal under section 19F above and is of the opinion referred to in section 19(1) above in relation to any worker specified in the notice which is

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being withdrawn (“the original notice”), he may at the same time serve another notice under section 19 above (“the replacement notice”).

- (2) The replacement notice may not relate to any worker to whom the original notice did not relate.
- (3) If the replacement notice contravenes subsection (2) above, that fact shall be an additional ground of appeal for the purposes of section 19C above.
- (4) The replacement notice may relate to a pay reference period ending after the date of service of the original notice.
- (5) Section 19(7) above applies in relation to the replacement notice as if the reference to six years before the date of service of the notice were a reference to six years before the date of service of the original notice.
- (6) The replacement notice must—
  - (a) indicate the differences between it and the original notice that it is reasonable for the officer to consider are material; and
  - (b) indicate the effect of section 19H below.
- (7) Failure to comply with subsection (6) above does not make the replacement notice ineffective.
- (8) Where a replacement notice is withdrawn under section 19F above, no further replacement notice may be served under subsection (1) above pursuant to the withdrawal.
- (9) Nothing in this section affects any power that arises apart from this section to serve a notice of underpayment in relation to any worker.

#### **19H Effect of replacement notice of underpayment**

- (1) This section applies where a notice of underpayment is withdrawn under section 19F above and a replacement notice is served in accordance with section 19G above.
- (2) If an appeal has been made under section 19C above against the original notice and the appeal has not been withdrawn or finally determined before the time when that notice is withdrawn—
  - (a) that appeal (“the earlier appeal”) shall have effect after that time as if it were against the replacement notice; and
  - (b) the employer may exercise his right of appeal under section 19C above against the replacement notice only if he withdraws the earlier appeal.
- (3) After the withdrawal no complaint may be presented or other civil proceedings commenced by virtue of section 19D above in reliance on any non-compliance with the notice before it was withdrawn; but any complaint or proceedings so commenced before the withdrawal may be proceeded with despite the withdrawal.
- (4) If a sum was paid by or recovered from the employer by way of financial penalty under the original notice—

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- (a) an amount equal to that sum (or, if more than one, the total of those sums) shall be treated as having been paid in respect of the replacement notice; and
  - (b) any amount by which that sum (or total) exceeds the amount payable under the replacement notice must be repaid to the employer with interest at the appropriate rate running from the date when the sum (or, if more than one, the first of them) was paid or recovered.
- (5) In subsection (4)(b) above “the appropriate rate” means the rate that, on the date mentioned in that provision, was specified in section 17 of the Judgments Act 1838.”
- (2) In any period after the coming into force of subsection (1) above and before the coming into force of section 62 of the Tribunals, Courts and Enforcement Act 2007 (c. 15), section 19E(a) of the National Minimum Wage Act 1998 (c. 39), as substituted by subsection (1) above, shall have effect as if for “under section 85 of the County Courts Act 1984” there were substituted “ by execution issued from the county court ”.
- (3) In the National Minimum Wage Act 1998, in section 51 (regulations and orders), in subsections (6) and (7)(a), the words “21 or” are repealed.
- (4) In the Employment Tribunals Act 1996 (c. 17), in section 4 (composition of employment tribunal), in subsection (3)(cd), for “section 19 or 22” there is substituted “ section 19C ”.
- (5) In the Commissioners for Revenue and Customs Act 2005 (c. 11), in section 44 (payment into Consolidated Fund), subsection (2)(f) is repealed.
- <sup>F1</sup>(6) .....
- (7) Nothing in this section (or Part 2 of the Schedule) affects any provision of the National Minimum Wage Act 1998 as that provision has effect for the purposes of—
- (a) the Agricultural Wages (Scotland) Act 1949 (c. 30), or
  - (b) the Agricultural Wages (Regulation) (Northern Ireland) Order 1977 (SI 1977/2151) (N.I.22).

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**Textual Amendments**

- F1** S. 9(6) repealed (1.10.2013) by [Enterprise and Regulatory Reform Act 2013 \(c. 24\), s. 103\(3\), Sch. 20 para. 2](#); [S.I. 2013/1455, art. 3\(b\), Sch. 2 \(with art. 4\(2\)\(4\)\)](#) (as amended (7.9.2013) by [S.I. 2013/2271, art. 2](#))

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**Commencement Information**

- I1** S. 9 in force at 6.4.2009 by [S.I. 2009/603, art. 2 \(with art. 3, Sch.\)](#)

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