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STATUTORY INSTRUMENTS

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**2004 No. 369**

**EMPLOYMENT AND TRAINING**

**The Industrial Training Levy (Engineering  
Construction Board) Order 2004**

*Made* - - - - *2th February 2004*

*Coming into force* - - *19th February 2004*

Whereas the Engineering Construction Industry Training Board has submitted proposals for the raising and collection of a levy under section 11(1) of the Industrial Training Act 1982 (1) (“the 1982 Act”);

And whereas in pursuance of section 11(3) of the 1982 Act the proposals include provision for the exemption from the levy of employers who, in view of the small number of their employees, ought in the opinion of the Secretary of State to be exempted from it;

And whereas certain of the proposals are made in pursuance of section 11(4)(b) of the 1982 Act and the Secretary of State is satisfied that those proposals fall within section 11(5)(b) of that Act and that they are necessary as mentioned in the said section 11(5), and that the condition mentioned in section 11(6)(b)(i) of the 1982 Act is satisfied in the case of those relevant proposals;

And whereas the Secretary of State estimates that the amount which will be payable by virtue of the following Order by certain employers in the engineering construction industry will exceed an amount which he estimates as equal to one per cent. of relevant emoluments, but considers such amount appropriate in the circumstances, and the following Order therefore falls within section 11(7) (b) of the 1982 Act;

And whereas the Secretary of State has consulted the Scottish Ministers pursuant to section 88(2) of the Scotland Act 1998(2);

And whereas a draft of the following Order was laid before Parliament in accordance with section 12(6) of the 1982 Act and approved by resolution of each House of Parliament;

Now, therefore, the Secretary of State, in exercise of the powers conferred by sections 11(2), 12(2) (3) and (4) of the 1982 Act, hereby makes the following Order:

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(1) 1982 c. 10; sections 11 and 12 were amended by the Employment Act 1989 (c. 38), Schedule 4, paragraphs 10 and 11 respectively.  
(2) 1998 c. 46; the Engineering Construction Industry Training Board has been specified as a cross-border public authority for the purposes of section 88; see the Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999; S.I. 1999/1319.

## Citation and commencement

1. This Order may be cited as the Industrial Training Levy (Engineering Construction Board) Order 2004 and shall come into force on the seventh day after the day on which it is made.

## Interpretation

2.—(1) In this Order—

- (a) “assessment” means an assessment of an employer to the levy;
- (b) “the base period” means the period of twelve months that commenced on 6 April 2003;
- (c) “the Board” means the Engineering Construction Industry Training Board (3), formerly known as the Engineering Industry Training Board;
- (d) “business” means any activities of industry or commerce;
- (e) “emoluments” means all salaries, fees, wages, perquisites and profits whatsoever, except for pensions;
- (f) “employer” (except in article 4(4)(a)(i) below) means a person who is an employer in the engineering construction industry at any time in the levy period;
- (g) “the engineering construction industry” means any one or more of the activities which are specified in paragraph 1 of the Schedule to the industrial training order (but subject to paragraph 2 of that Schedule) as activities of the engineering construction industry;
- (h) “the industrial training order” means the Industrial Training (Engineering Board) Order 1964(4);
- (i) “labour-only agreement” means any agreement or arrangement, either written or oral, not being a contract of service or apprenticeship, made between an employer and any other person or persons, the purpose of which is wholly or mainly the provision of services (including any incidental use of tools) of such person or persons or of any other person or persons to the employer in his trade or business;
- (j) “the levy” means the levy imposed by the Board in respect of the levy period;
- (k) “the levy period” means the period commencing with the day on which this Order comes into force and ending on 31st August 2004;
- (l) “notice” means a notice in writing;
- (m) “site employee” means an employee (including a person employed under a labour-only agreement) the activities of whose employment take place wholly or mainly at a site where activities falling under paragraph 1(a) of Schedule 1 to the industrial training order are carried on, head office staff are excluded;

(2) Any reference in this Order to an establishment that commences to carry on business or that ceases to carry on business shall not be taken to apply where the location of the establishment is changed but its business is continued wholly or mainly at or from the new location, or where the suspension of activities is of a temporary or seasonal nature.

(3) For the purposes of this Order in the case of an establishment that is taken over (whether directly or indirectly) by an employer in succession to, or jointly with, another person, the person or persons carrying on the establishment on the day upon which this Order comes into force shall be treated as the employer of any person who was employed at any time in the base period at or from the establishment under a contract of service or of apprenticeship or under a labour-only agreement and that employer shall be assessed to levy in accordance with article 4 below.

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(3) The Board was re-named by S.I. 1991/1305.

(4) S.I. 1964/1086, amended by S.I. 1991/1305.

(4) This Order applies to the activities of the engineering construction industry in so far as they are carried out in Great Britain or in so far as they are carried out in relation to employment to which the Employment Protection (Offshore Employment) Order 1976(5) applies.

### Meaning of “leviable establishment”

- 3.—(1) For the purposes of this Order “leviable establishment” means—
- (a) an establishment engaged during the necessary period wholly or mainly in the engineering construction industry; and
  - (b) an establishment (not falling within sub-paragraph (a)) at or from which persons were employed during the necessary period in any activities such as are mentioned in paragraph 1(c) of the Schedule to the industrial training order (related and administrative etc. activities) (but subject to paragraph 2 of that Schedule).
- (2) In this article “the necessary period” means—
- (a) unless sub-paragraph (b) applies, a period (which need not be continuous) consisting of a total of 27 or more weeks falling within the base period; or
  - (b) in the case of an establishment that started to carry on business in the base period, a period (which need not be continuous) falling within the base period consisting of a total number of weeks exceeding one half of the number of weeks in the part of the base period starting on the day on which business was commenced and ending on the last day of the base period.

### Imposition of levy

4.—(1) The levy to be imposed by the Board on employers in respect of the levy period shall be assessed in accordance with the provisions of this article.

(2) The levy shall be assessed by the Board separately in respect of each leviable establishment of an employer, but in agreement with the employer one assessment may be made in respect of any number of such establishments, in which case those establishments shall be treated for the purposes of that assessment as constituting one establishment.

(3) Subject to the exemption in article 5 the amount to be assessed by way of levy in respect of each leviable establishment shall be —

1.5 per cent. of

$(A - B - C)$  (and if  $A + B$  is less than  $C$  no levy shall be assessed)

where—

A is the total emoluments of all the persons who are site employees employed by the employer in the base period at or from the establishment;

B is the sum of all payments (including payments for the incidental use of tools) made by the employer during the base period under labour-only agreements for services rendered to him by site employees; and

C is the sum of all payments (including payments for the incidental use of tools) received by the employer during the base period under labour-only agreements for services rendered by him or on his behalf by site employees.

(4) For the purposes of paragraph (3) —

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(5) [S.I. 1976/766](#); the whole of the Industrial Training Act 1982 has been applied by the Employment Protection (Offshore Employment) Order 1976 for such purposes as are relevant to or in relation to persons in employment to which that Order applies (article 3 and Part I of the Schedule, paragraph 1); relevant amending instruments are [S.I. 1977/588](#) and [1981/208](#).

- (a) in the case of an establishment mentioned in article 3(1)(a), there shall be left out of account—
  - (i) any person undergoing a course of training as a seagoing officer or rating under an agreement in writing with an employer in the shipping industry, or with any organisation of employers in that industry or with any association of such organisations,
  - (ii) any person engaged wholly in agriculture (within the meaning of section 109(3) of the Agriculture Act 1947<sup>(6)</sup> or, as the case may be, section 85(1) of the Agricultural Holdings (Scotland) Act 1991<sup>(7)</sup>),
  - (iii) any person engaged wholly in the supply of food or drink for immediate consumption;
- (b) in the case of an establishment mentioned in article 3(1)(b), there shall be left out of account all persons who are not employed at or from the establishment wholly or mainly in any of the activities such as are mentioned in paragraph 1(c) of the Schedule to the industrial training order.
- (c) a company director remunerated solely by fees shall be left out of account but otherwise a company director (including a person occupying a position of director by whatever title he is called) shall be treated as employed.

### **Exemption from the levy**

5.—(1) An employer in whose case the aggregate of—

- (a) the total emoluments of all the persons who are site employees employed by the employer at or from the leviable establishments of the employer in the base period; and
- (b) the sum of all payments (including payments for the incidental use of tools) made by the employer during the base period under labour-only agreements for services rendered to him by site employees,

was less than £75,000, shall be exempt.

(2) A charity within the meaning of section 506 of the Income and Corporation Taxes Act 1988<sup>(8)</sup> shall be exempt from the levy.

### **Assessment notices**

6.—(1) The Board shall serve an assessment notice on every employer assessed to the levy, but one notice may comprise two or more assessments.

(2) The amount of any assessment payment under an assessment notice shall be rounded down to the nearest £1.

(3) An assessment notice shall state the amount of the levy payable by the person assessed to the levy, and that amount shall be equal to the total amount of the levy assessed by the Board under the provisions of this Order in respect of each establishment included in the notice.

(4) An assessment notice shall state the Board's address for the service of a notice of appeal or of an application for an extension of time for appealing.

(5) An assessment notice may be served on the person assessed to the levy —

- (a) by delivering it to him personally; or

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<sup>(6)</sup> 1947 c. 48.

<sup>(7)</sup> 1991 c. 55.

<sup>(8)</sup> 1988 c. 1

- (b) by leaving it at or posting it to his last known address, place of business or registered office in the United Kingdom; or
- (c) where the person maintains an e-mail address, by sending an electronic copy of the assessment notice to that e-mail address.

### **Payment of the levy**

7.—(1) Subject to the following provisions of this Order, the amount of each assessment appearing in an assessment notice served by the Board (the date of which shall not be earlier than 31st August 2004) shall be due and payable by the employer to the Board one month after the date of the notice.

(2) The amount of an assessment shall not be recoverable by the Board until there has expired the time for appealing against the assessment allowed by article 9(1) and any further period or periods of time that the Board or an employment tribunal may have allowed for appealing under article 9(2) or (3) or, where an appeal is brought, until the appeal is decided or withdrawn.

### **Withdrawal of assessment**

8.—(1) The Board may, by a notice served on the person assessed to the levy in the same manner as an assessment notice, withdraw an assessment if that person has appealed against that assessment under the provisions of article 9 and the appeal has not been entered in the Register of Appeals kept under the appropriate regulations specified in article 9(4).

(2) The withdrawal of an assessment shall be without prejudice—

- (a) to the power of the Board to serve a further assessment notice in respect of any establishment to which that assessment related; or
- (b) to any other assessment included in the original assessment notice, and such notice shall thereupon have effect as if any assessment withdrawn by the Board had not been included therein.

### **Appeals**

9.—(1) A person assessed to the levy may appeal to an employment tribunal against the assessment within one month from the date of the service of the assessment notice or within any further period or periods of time that may be allowed by the Board or an employment tribunal under the following provisions of this article.

(2) The Board by notice may for good cause allow a person assessed to the levy to appeal to an employment tribunal against the assessment at any time within the period of four months from the date of the service of the assessment notice or within such further period or periods as the Board may allow before such time as may then be limited for appealing has expired.

(3) If the Board shall not allow an application for extension of time for appealing, an employment tribunal shall, upon application made to the tribunal by the person assessed to the levy, have the like powers as the Board under paragraph (2) above.

(4) An appeal or an application to an employment tribunal under this article shall be made in accordance with the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001<sup>(9)</sup> except where the establishment to which the relevant assessment relates is wholly or mainly in Scotland in which case the appeal or application shall be made in accordance with the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001<sup>(10)</sup>.

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<sup>(9)</sup> S.I. 2001/1171.

<sup>(10)</sup> S.I. 2001/1170.

(5) The powers of an employment tribunal under paragraph (3) above may be exercised by the President of the Employment Tribunals (England and Wales) or by the President of the Employment Tribunals (Scotland) as the case may be.

### **Cessation of business**

**10.**—(1) The provisions of this article shall apply in relation to an establishment that ceases to carry on business in the levy period.

(2) The amount of the levy imposed in respect of the establishment shall be in the same proportion to the amount that would otherwise be due under the provisions of article 4 as the number of days between the commencement of the levy period and the date of cessation of business (both dates inclusive) bears to the number of days in the levy period.

(3) Article 7(1) shall have effect as if the words in parenthesis were omitted.

### **Evidence**

**11.**—(1) Upon the discharge by a person assessed to the levy of his liability under an assessment the Board shall if so requested issue to him a certificate to that effect.

(2) The production in any proceedings of a document purporting to be certified by the Secretary of the Board or any other person, being a member, officer or servant of the Board authorised to act in that behalf, to be true copy of an assessment or other notice issued by the Board or purporting to be a certificate such as is mentioned in paragraph (1) shall, unless the contrary is proved, be sufficient evidence of the document and of the facts stated therein.

12th February 2004

*Ivan Lewis*  
Parliamentary Under Secretary of State,  
Department for Education and Skills

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order gives effect to proposals of the Engineering Construction Industry Training Board which were submitted to the Secretary of State. The proposals are for the imposition of a levy on employers in the engineering construction industry for the purpose of raising money towards meeting the expenses of the Board. The levy is raised in respect of those who carry out engineering construction work on site. No levy is raised in respect of those who run the employer's business through its head office.

The levy is to be imposed in respect of the levy period commencing on the day on which this Order comes into force and ending on 31st August 2004.

The levy will be assessed by the Board in accordance with article 4 and there is a right of appeal against an assessment to an employment tribunal.

A full regulatory assessment of the effect that this Order will have on the costs of business is available from the Department for Education and Skills, Library and information Service, Moorfoot, Sheffield, S1 4PQ or Sanctuary Buildings, Great Smith Street, London SW1P 3BT.