

EXPLANATORY MEMORANDUM TO
THE NATIONAL MINIMUM WAGE (AMENDMENT) (No.2) REGULATIONS 2010
2010 No. 3001

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

Rob Cottam at the Department for Business Innovation and Skills, Tel: 020 7215 0169 or email: rob.cottam@bis.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency:
HM Revenue and Customs

Title:
Impact Assessment of Travel & Subsistence Schemes for Low Paid Workers

Stage: Final

Version: Final

Date: July 2010

Related Publications: National Minimum Wage workers: Travel and subsistence expenses schemes – February 2010 and consultation stage Impact Assessment

Available to view or download at:

<http://www.hmrc.gov.uk>

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What is the problem under consideration? Why is government intervention necessary?

Temporary workers paid at or near the National Minimum Wage (NMW) can participate in travel and subsistence schemes, operated by some Employment Businesses and umbrella companies. These are designed to provide tax and NICs savings while complying with NMW rules. Many of these schemes are exploitative as the employer retains most of the financial benefits and the workers have little or no knowledge of how these schemes work. Also, participation may adversely affect workers' access to earnings-related social security benefits. Those businesses not wishing to operate these schemes for NMW workers suffer a competitive disadvantage, leading to market distortion. These schemes also give rise to an Exchequer loss.

What are the policy objectives and the intended effects?

The Government's objectives are to prevent exploitation, allow full access to earnings-related social security benefits, create a level playing field for businesses engaging temporary NMW workers, and protect the Exchequer. The amendment to the NMW Regulations should protect the contributory benefit position of low paid workers currently participating in these schemes and stop others being potentially prejudiced. It should also result in a fairer market as there would be competition on more equal terms. Expenses for travel to a temporary workplace would no longer count as NMW pay, so more NMW pay would be subject to tax and NICs, increasing the amount paid to the Exchequer.

What policy options have been considered? Please justify any preferred option.

The options that have been considered are:

- no change - continue with the status quo; or
- amend the NMW Regulations so that expenses paid to a worker for travel to a temporary workplace, as defined for tax and NICs purposes, will not count towards their NMW pay.

In February 2010 the Government consulted on this and in the light of the responses will proceed with option 2. This will address the issue of exploitation and the potential adverse impact on workers' access to social security benefits and will create a level playing field for Employment Businesses.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

For all policy changes, compliance costs are routinely reviewed one to three years after implementation.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:



Date: 26 July 2010

Summary: Analysis & Evidence

Policy Option: 2

Description: Amend the National Minimum Wage Regulations.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Employment Businesses and umbrella companies may have to change the control parameters in their current payroll system or revert to the standard payroll system to secure the NMW of some workers. This is estimated to be negligible.
	One-off (Transition)	Yrs	
	£ NEG		
	Average Annual Cost (excluding one-off)		
	£ 0		Total Cost (PV) £ NEG
Other key non-monetised costs by 'main affected groups' NONE			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' NONE
	One-off	Yrs	
	£ 0		
	Average Annual Benefit (excluding one-off)		
	£ 0		Total Benefit (PV) £ 0
Other key non-monetised benefits by 'main affected groups' Amending the Regulations removes a tax distortion in the labour market and increases the availability of earnings-related contributory benefits to workers receiving at or around National Minimum Wage.			

Key Assumptions/Sensitivities/Risks

This option is expected to increase the amount of tax and NICs collected by £20m in 2010-11 and £90m for 2011 onwards due to the reduction of workers using travel and subsistence schemes. This additional revenue will be collected from Employment Businesses and workers using such schemes.

Price Base Year 2010	Time Period Years 5	Net Benefit Range (NPV) £ NEG	NET BENEFIT (NPV Best estimate) £ NEG
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	1 January 2011
Which organisation(s) will enforce the policy?	HMRC
What is the total annual cost of enforcement for these organisations?	£ NEG
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	N/A
What is the value of the proposed offsetting measure per year?	£ 0
What is the value of changes in greenhouse gas emissions?	£ 0
Will the proposal have a significant impact on competition?	Yes
Annual cost (£-£) per organisation (excluding one-off)	Micro £0 Small £0 Medium £0 Large £0
Are any of these organisations exempt?	No No No No

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of £ 0	Decrease of £ 0	Net Impact	£ 0

Key: Annual costs and benefits: (Net) Present

Evidence Base (for summary sheets)

1. Background

Traditionally, temporary workers placed with end clients by Employment Businesses have been engaged under “agency contracts”. This means that each placement is considered to be a permanent place of employment for tax and National Insurance Contributions (NICs) purposes. As a consequence, the cost of the worker’s travel to the end client and any associated subsistence costs are not eligible for tax relief as this is home to work travel.

In recent years there has been a growth in travel and subsistence schemes operated by some Employment Businesses and umbrella companies. These schemes involve the engagement of workers under an overarching employment contract. This changes what would otherwise be home to work travel into travel to a temporary workplace. The cost of travel to a temporary workplace and associated subsistence costs are eligible for tax relief and are disregarded for NICs purposes.

Many travel and subsistence schemes use salary sacrifice arrangements. This means the worker sacrifices from his gross pay for tax purposes, a sum equivalent to, or (in many cases involving NMW workers) greater than, the travel and subsistence payments which are paid by the Employment Business or umbrella company. Providing the arrangements are implemented correctly, no PAYE and NICs are payable on the salary sacrificed, nor on the travel and subsistence expenses paid.

Workers who are paid at or around the National Minimum Wage (NMW) rates are not able to participate in salary sacrifice arrangements if the amount sacrificed would reduce their pay below NMW rates. Where a salary sacrifice arrangement is entered into, it is a matter of looking at all the payments made to, and deductions made from, the worker to consider whether the worker has been paid at least the NMW. The NMW legislation and the expenses rules for income tax and NICs treat expenses paid by the employer for travel to a temporary workplace in different ways. For NMW purposes, these expenses are treated as not being “in connection” with the worker’s employment and so are classed as pay for NMW purposes. This is in contrast to the tax and NICs position, where these travel and subsistence expenses do not count as pay for tax and NICs purposes, as they are eligible for tax relief and are disregarded for NICs.

The availability of tax relief for travel expenses (and for the expenses to be disregarded for NICs) and whether there is compliance with the NMW Regulations depends on the way that these travel and subsistence scheme arrangements are implemented. In some cases that HMRC have seen the arrangements are not fully compliant. Where non-compliance is identified, HMRC will take enforcement action.

In many cases, travel and subsistence schemes result in the NMW worker taking home only slightly more each week in his pay packet than a worker not in a scheme. This small uplift in pay, which is important to a low paid worker, is emphasised strongly to the worker by the Employment Business or umbrella company. However, it is usually the Employment Business or umbrella company which benefits the most from the scheme by retaining most of the financial benefits – a fact the worker may be unaware of. The worker is not usually advised that participation in such a scheme could impact on eligibility for earnings-related social security benefits.

In cases that HMRC has seen, workers paid at the NMW, currently £5.80 per hour for those aged 22 or more (equivalent to £232 for a 40 hour week) and using travel and subsistence schemes can be sacrificing as much as 40% of their wages in return for the payment of travel and subsistence expenses. Access to earnings-related contributory benefits is based on a worker attaining the “qualifying earnings factor” (QEF), which is equivalent to 52 times the LEL for NICs purposes (£5,044 in 2010/11), to have access to certain benefits. By participating in travel and subsistence schemes, NMW workers reduce their pay, on which NICs is paid. This,

depending on how many weeks they are able to work for, puts at risk their ability to achieve the QEF. This is most likely to affect eligibility for both basic and additional State Pension.

It is also important to note that where a worker participates in a travel and subsistence scheme, the reduction in his gross pay for tax purposes may mean that the amount of Working Tax Credits which he is entitled to claim may increase, compared to a NMW worker who does not participate in such a scheme. The Government is concerned about the unfairness that these schemes create as workers who participate artificially benefit from enhanced eligibility for Tax Credits, compared to other workers, with similar levels of income who do not or cannot participate.

The Government has received a number of complaints from businesses in connection with these schemes. Some of those Employment Businesses which have implemented these arrangements have used the savings to cut margins which has led to a difference in the cost of supply of workers. This results in a competitive disadvantage for those which have not implemented these schemes

2. Policy Objectives

The Government is committed to tackling the problem of NMW workers being able to participate in travel and subsistence schemes, which exploit low paid workers. The Government's objective is threefold:

- 1) To prevent exploitation and to ensure that the contributory benefit position of temporary workers paid at or near the NMW is not prejudiced by the reduction of earnings liable to Class 1 NICs;
- 2) To ensure that Employment Businesses and umbrella companies do not gain an unfair competitive advantage through the use of travel and subsistence schemes for these temporary workers: and
- 3) To protect the Exchequer.

3. The Options

Option 1: Do nothing.

Leave the existing NMW Regulations unchanged allowing temporary workers to continue to use travel and subsistence schemes not counting this expense when calculating their pay for NMW purposes.

Option 2: Amend the National Minimum Wage Regulations .

The Government has decided to proceed with this option – to amend the NMW Regulations so that expenses paid to an employee for the cost of travel from home to a temporary workplace along with associated subsistence costs will not count as pay for NMW purposes.

4. Consultation

The Government has consulted on option 2 and the consultation closed on 6 May 2010. 54 responses were received. These were split very much into two groups: those very strongly in favour of action and those very strongly opposed. Nearly half of the responses were received from Employment Businesses who had implemented or who wanted to implement a travel and subsistence scheme. The vast majority of these were against any action being taken to prevent NMW workers being able to participate in these schemes. However, other Employment Businesses, together with some representative bodies and statutory bodies wholeheartedly agreed that action should be taken.

The precise behavioural effects of option 2 have been better informed by the consultation process which has enabled stakeholders to comment in detail on the specific proposal.

5. The Risks and Expected Impacts

Option 1: Do nothing.

If the existing Regulations are left unchanged then temporary workers will continue to be paid through travel and subsistence schemes, reducing their pay for tax and NICs purposes with consequential potential prejudice to their contributory benefit entitlement.

HMRC compliance staff have been asked by Employment Businesses how they can set up their own travel and subsistence schemes and others have complained that they are being undercut by users of such schemes. HMRC continue to receive complaints from Employment Businesses that schemes are resulting in an unfair competitive advantage for scheme users. Scheme promoters emphasise the financial benefits of such schemes to prospective clients and scheme users emphasise the financial benefits to prospective workers (although not the disadvantages). There is evidence that these arrangements are exploitative. Some responses to the consultation confirmed that the Employment Business benefits significantly – by as much as 4 or 5 times as much as the worker. Also, there is evidence that workers do not understand these arrangements and in reality workers are not given a true choice as to whether to participate or not. There is no evidence that the potential effect of these schemes on the workers' contributory benefits is ever explained.

There is a risk that these schemes will become more widely used by Employment Businesses or umbrella companies to secure an unfair competitive advantage over those not using such schemes. This is achieved both by being able to entice workers away from competitors with the promise of greater take home pay and by using some of the financial savings to undercut competitors. Some respondents commented that these schemes have distorted the temporary labour market and, if no action is taken, will continue to do so.

Option 2: Amend the National Minimum Wage Regulations.

Changing the NMW Regulations will mean that those NMW workers currently participating in travel and subsistence schemes would see an increase in their gross pay and a small reduction in their weekly take home pay. The change will increase the PAYE and NICs payable to the Exchequer. It will also ensure that temporary workers' pay on which NICs is payable and which may be relevant in determining entitlement to earnings-related contributory benefit purposes, cannot be reduced below the NMW rate in return for the payment of travel expenses.

By not allowing salary sacrifice arrangements for travel expenses to count towards NMW, this preserves simplicity in the NMW rules, which has been effective as a wage floor. In this way, workers will be clear as to what they are entitled to, employers and engagers are easily able to show that they have met their legal obligations and HMRC is able to enforce NMW effectively.

Workers may have reduced entitlement to Tax Credits and other benefits such as housing benefit, as the reduction in gross pay for tax purposes which occurs as a result of participation in these schemes increases eligibility for these benefits. However, the Government believes that this option restores fairness amongst workers – those with the same gross pay have the same access to benefits.

This will ensure that, generally speaking, workers participating in travel schemes will be treated in the same way as those engaged by Employment Businesses not using such schemes. The Government believes that this is equitable, and that equal treatment of workers will restore the level playing field in the market place ensuring Employment Businesses tendering for work are doing so broadly on the same terms. Where workers are incurring travel and subsistence costs in attending work, it will be for individual Employment Businesses to determine how such costs are addressed when agreeing terms with workers.

Employment Businesses currently paying workers through travel and subsistence schemes may behave in a number of different ways as a result of changes to NMW Regulations. The Government believes the following scenarios are the two most likely:

- Some may revert to engaging workers through agency contracts meaning that any travelling costs to the client's premises and associated subsistence costs would not be eligible for tax relief;
- Some may continue to engage workers through overarching employment contracts and may pay tax free expenses in addition to NMW pay.

It should be emphasised that that the proposed change is unlikely to result in a uniform reaction across all scheme users because of the nature of temporary labour provision. Different supply and demand issues in different sectors will influence responses, as will the size and underlying business plans of scheme users.

6. Costs and Benefits

Option 1: Do nothing.

Costs & Administrative Burdens

None for businesses directly. It is possible that cognisant of reputational damage, end clients will not wish to be associated with Employment Businesses using travel and subsistence schemes which exploit low paid workers. HMRC may need to deploy more compliance resources to address the growth in the schemes.

Benefits

None

Revenue Effects

The expected growth in travel and subsistence schemes available to temporary workers will lead to a reduction in the amount of tax and NICs payable to HMRC. The Government estimates that this will result in an erosion of Exchequer receipts.

Option 2: Amend the National Minimum Wage Regulations.

Costs & Administrative Burdens

Employment Businesses and umbrella companies involved directly or indirectly in placing low-paid temporary workers across all sectors will be affected by this option. HMRC has received, and continues to receive, complaints from a number of Employment Businesses not using travel and subsistence schemes that competitors using such schemes are undercutting them.

As a result, it is possible that in some instances this option will increase costs to end clients. However, since many Employment Businesses and temporary workers are currently operating without the financial advantages of such schemes, it is unlikely to have a profound affect on the average cost of labour to end users.

Some of the responses to the consultation have indicated that the impact of the measure could be greater than those workers paid at or near the NMW, suggesting that it could impact workers paid up to £9 per hour. The Government agrees that workers paid more than NMW will be affected, depending on the level of expenses which the worker incurs in travelling to his workplace. However, in order to be affected by the measure, a worker earning £9 per hour would have to sacrifice in excess of £3.20 per hour, i.e. more than one-third of his gross pay. Although the expenses paid to the worker are likely to be less than the amount of the salary sacrifice, it does not seem credible that many workers earning £9 per hour would be spending such a significant proportion of their earnings in getting to work.

Where Employment Businesses and umbrella companies specialise in the low paid labour market, it may not be viable to continue with their current business model due to a reduction in their profit margin. This may result in either a change of business model or in a few cases for these businesses to cease trading. Despite this, the Government does not believe that this

option will affect labour supply, as many Employment Businesses do not currently operate these schemes.

On the available evidence, HMRC does not expect there to be any significant impacts, either in terms of one-off transitional costs, administrative burdens or other compliance costs to businesses. The related costs depend on precisely how Employment Businesses and umbrella companies respond to the amended Regulations. There will be some one-off costs for business, as they may have to re-structure their employment contracts. Current travel and subsistence schemes are administered through the scheme user's payroll. Both the salary sacrifice which the worker enters into to reduce his gross pay, and the expenses that are paid in addition to net pay for travel to a temporary workplace, are processed as payroll adjustments. The change in the Regulations would mean that these adjustments would no longer be required. The full amount of NMW pay would simply be processed as gross pay for tax and NICs, as would be the case if the worker did not participate in a travel and subsistence scheme.

Benefits

The Labour Force Survey (LFS) estimates 1.3million temporary workers during 2009 and the Government estimates that this will rise to 1.4million in October 2010. Further analysis of the LFS data indicates that about 350,000 (25%) of temporary workers are paid at or near the National Minimum Wage. The Government then estimates that of this number, 90,000 will be paid using a travel and subsistence scheme.

Amending the NMW Regulations helps to protect the contributory benefit position of those 90,000 workers, particularly in relation to basic and additional State Pension and stops others being potentially prejudiced. It preserves simplicity in the NMW rules and ensures that the NMW operates effectively as a wage floor.

This option creates a level playing field, and results in a fairer marketplace where Employment Businesses are subject to the same levels of taxation. This is because a well functioning market, free from the distortionary impact of these schemes, underpins greater and fairer competition between firms which promotes better resource allocation. However, it is difficult to quantify the value of these benefits.

This option potentially reduces the risk of reputational damage to end user clients, as there will be less scope for Employment Businesses to prejudice workers' contributory benefit, and artificially distort the labour market.

Revenue Effects

This option also increases the amount of income subject to tax and NICs. In practical terms this would mean that a worker working 40 hours per week at the adult NMW rate would need to be paid any travel and subsistence expenses *in addition* to the £232 NMW pay.

The Government estimates that on average, a temporary worker earning the National Minimum Wage works 27 hours per week. It is assumed that approximately 33% of their pay is sacrificed to the travel and subsistence scheme. This, along with workers reduced entitlement to working tax credits, results in an expected Exchequer yield of £20m in 2010-11 and £90m for 2011 onwards. This is based on a proposed implementation date of 1 January 2011 and that all businesses will comply with the change of Regulations.

It is standard practice for all tax measures that revenue effects or changes in tax yield are not incorporated into the main cost/benefit analysis. This is primarily due to the fact that they are pure transfers and, as they are generally much larger than the other costs and benefits, tend to distort the cost/benefit ratio. This could give a misleading picture of the balance between the costs and benefits of the measure. As a consequence, any quantified revenue effects are shown on the summary sheet within the 'Key Assumptions/Sensitivities/Risks' box, which is outside the main appraisal of the costs and benefits.

7. Impact Tests

A main source of evidence for the specific impact tests is the 2008 report by the Department for Business Innovation and Skills (BIS) on the scope of 'agency' working¹. The study concluded that the best estimate for the number of agency workers in the UK was between 1.1 and 1.5 million with a mid-point of 1.3 million. This estimate was compiled using the LFS alongside 2006 and 2007 data from the BIS Survey of Recruitment Agencies (SORA) and the Recruitment and Employment Confederation's (REC) 'census'.

To consider the specific impact on workers at or near the NMW, four quarters of the LFS from October 2008 to September 2009 have been used. These benefit from larger sample sizes than single quarters. It is important to note once the LFS sample is filtered for agency workers earning at or near the NMW, the remaining sample size becomes small which limits the information that can be found for some impact tests. Focusing on those agency workers who were aged 18 or over at the preceding 31 August, who earned a wage lower than £8.55 per hour (the rate at which 33% salary sacrifice reduces basic pay to the NMW) further reduces the sample. The impact tests using LFS 08/09 data are therefore based on a total of 508 respondents.

Other bodies have conducted surveys aimed specifically at the agency, temporary or migrant-intensive sectors. The LFS however remains the preferred source of data because of its National Statistic status and, even after extensive filtering, still produces larger sample sizes than other surveys we have seen. Details of other data sources are, however, provided where relevant below because they may benefit from specifically targeting low-paid agency workers.

It must be noted all sources only act as a proxy for the population of interest – workers in travel and subsistence schemes paid at or near the NMW. The impact tests refer to the pool of employees who would be affected if they were taking place in such schemes at the assumed level of salary sacrifice.

Gender Equality

The 2008 BIS report concluded that the proportion of all agency workers who are female is lower than the proportion of all employees who are female. The estimates of the proportion of agency workers who were female varied by source but the two with the largest sample sizes, SORA and LFS, indicated it was around 43 - 44% (the other, the REC census, suggested 58%).

More recent evidence from the LFS between October 2008 and September 2009 indicates females now account for 50% of agency workers. However those earning at or near the NMW are slightly more likely to be male.

	% male	% female
All agency workers	50	50
At or near the NMW	53	47
All employees	51	49

Source: LFS. Sample size for smallest group: 508

¹ 'Agency working in the UK: A review of the evidence', Employment Relations research series No. 93
<http://www.berr.gov.uk/files/file48720.pdf>

Race Equality

Ethnicity

The REC and LFS were also the main sources used for examining the proportion of agency workers who were from ethnic minorities. These results were better matched than for some of the other statistics, with both implying that agency workers are around twice as likely to be from an ethnic minority compared to all employees.

The 2008/09 LFS data indicates ethnic minorities are still more likely to be in agency work than employees as a whole.

Migrant workers²

Data from the LFS between October 2008 and September 2009 indicates that around 8% of all employees are non-UK nationals, roughly equally split between those from the European Economic Area (EEA) and other countries. The LFS suggests that non-UK nationals are more heavily represented in agency work, at around 23%.

Amongst those at or near the NMW, the concentration of migrant employees is greater still than for all agency workers – in the LFS figures around 29% are estimated to be foreign nationals. The main cause of this difference is a higher proportion of EEA nationals amongst the lower paid group.

	% UK nationality	% EEA	% Non-EEA
All agency workers	76	13	10
At or near the NMW	71	18	11
All employees	92	4	4

Source: LFS. Sample size for smallest group: 508.

Some other sources of evidence on agency work have indicated higher proportions of migrant workers in some sectors. The Equalities and Human Rights Commission (EHRC) in their report on the Inquiry into recruitment and employment in the meat and poultry processing sector stated that 70% of the agency workers in this particular sector are migrants.

However, for migrant workers as a whole, the LFS is still regarded as the best source of information on nationality within a population. In the case of agency workers near the NMW, the sample size is still substantial compared to many surveys and sources of anecdotal evidence and covers all sectors rather than a subset. For these reasons, the LFS figures are used for the impact tests with the caveat that, since travel and subsistence scheme participants are not observable, then the sample used is a proxy. If migrant workers were systematically more likely than native employees to take part in salary sacrifice schemes then the proportion of migrants affected would likely be larger, and vice versa.

In summary, ethnic minorities and migrants are more likely to be engaged in temporary agency work and be paid at or near the NMW compared to both the whole population of agency workers and all employees. One of the policy objectives is to prevent exploitation of workers. Ethnic minorities and migrant workers are likely to be amongst the most vulnerable and accordingly more susceptible to exploitation. For example, English may not be the first language of many migrant workers. The report of the EHRC, as referred to above, stated that more than one-third of migrant workers interviewed did not understand the documentation that their Employment Business had given them but felt under pressure to sign up to it. The Government's decision to amend the NMW Regulations will ensure that temporary workers paid at or near the NMW, which include a high proportion of ethnic minorities and migrants, will not be subject to exploitation.

² Migrant workers are here defined as being of non-UK nationality.

Age

The BIS report provided data on the age distribution of all agency workers from REC and the LFS in 2007. The REC figures implied a similar distribution to all employees whereas the LFS implied agency workers were disproportionately young. With the much larger sample size the LFS figures were given greater weighting leading to the conclusion that more agency workers were aged under 35 compared with all those who are employees.

More recent evidence from the LFS corroborates this finding. Limiting the sample to those earning at or near the NMW strengthens the conclusion further – i.e. agency workers under 35 are more likely to be paid at or near the NMW than their elder counterparts.

	% 18-24	% 25-34	% 35-44	% 45-54	% 55-64
All agency workers	30.5	26.9	16.9	15.5	10.1
At or near the NMW	34.5	28.2	14.7	15.3	7.3
All employees	16.0	22.7	25.6	22.7	13.0

Source: LFS. Sample size for smallest group: 508

Disability equality

Both the REC census and the LFS figures in the 2008 BIS study implied there were fewer people with disabilities in agency work compared with employees as a whole (7% and 11% respectively compared with 13% of all employees).

More recent LFS evidence confirms this conclusion still holds true, including for agency workers at or near the NMW. Given the sample sizes, there is no evidence that disabled employees are more likely to be affected by the proposal in this impact assessment.

	% with disability	% not disabled
All agency workers	11	89
At or near the NMW	11	89
All employees	12	88

Source: LFS. Sample size for smallest group: 508. Includes current and work-limiting disability

Human Rights

The Government considers that the proposal in option 2 to amend the NMW Regulations is compatible with EU law and the Human Rights Act.

Competition Assessment

Employment Businesses and umbrella companies using travel and subsistence schemes for NMW workers are likely to find their competitiveness against Employment Businesses using other business models is reduced. Depending on the proportion of their profit margin that is made up of the tax relief they were accessing through these arrangements, some may find that their business model is no longer viable. This may reduce the number of businesses providing lower income temporary workers. However, those larger Employment Businesses operating these schemes are likely to be better placed to be able to adjust their business model to reflect the legislative change.

The Government does not consider this to be an anti-competitive effect of this proposal. Employment Businesses and umbrella companies that are using salary sacrifice to reduce their costs and potentially reduce pay below the minimum wage use their business structure to obtain

an unfair advantage over Employment Businesses and umbrella companies who are unwilling to do the same.

The proposed solution that travel and subsistence expenses would not count as pay for NMW purposes ensures that all Employment Businesses providing temporary workers are competing equally.

Small firms

Data from the SORA and the REC 'census' indicates that there are approximately 16,000 agencies across the UK and these employ a combined workforce of approximately 225,000 people. Of the 16,000 recruitment sites, 54% are thought to be single-site agency establishments with one branch/office. The rest are workplaces belonging to a larger organisation. Around 57% of sites employ between one and five people with another 21 per cent employing between six and ten people.

There is no evidence to suggest that small businesses are more or less likely than average to participate in travel and subsistence schemes. Although there has been some feedback that engaging low-paid workers under an overarching employment contract is not financially viable where only small numbers of workers are concerned, because of the costs associated with implementation and maintaining processes.

As the estimation of costs and benefits showed, following the change, employment businesses that participate in travel and subsistence schemes are likely to be required to pay higher NICs. However, employment businesses that do not participate will benefit from increased competitiveness. Small businesses would therefore face costs or benefits depending on their degree of salary sacrifice arrangement rather than on their size.

Rural proofing

The LFS provides an estimate of whether respondents live in urban or rural areas. The variable does not refer to the location where the individual works (or to where the employment business is located) but provides the most appropriate proxy to assess the effect on rural areas.

The table below shows the resident location of all agency workers, those earning at or near the NMW and all employees as a comparator. Both agency workers as a whole and the subset earning around the NMW are estimated to be slightly less likely to live in rural locations than employees as a whole. Therefore, although work locations are not visible, it seems unlikely on the basis of the available evidence that the proposal will affect rural areas disproportionately.

	% live in urban location	% live in rural location
All agency workers	86	14
At or near the NMW	87	13
All employees	79	21

Source: LFS using variable 'URIND'. Sample size for smallest group: 508.

Other Specific Impact Tests

The Government has considered the remaining impact tests and does not think that the options will impact on legal aid, sustainable development, carbon assessment, other environment or health.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No