National Minimum Wage and Volunteers

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The question of whether or not voluntary workers qualify for the National Minimum Wage (NMW) has proved a difficult one to answer from the outset.

At its simplest, volunteers who receive no money at all for the work they do and who are under no obligation to work for the organisation concerned are not eligible for the NMW because they are not "workers" under the legislation. People who are paid to work for charities or voluntary organisations are eligible for the NMW in just the same way as people who are paid to work for commercial or public sector organisations. However, there is a "grey area" of voluntary workers who are paid expenses or honoraria, but at a level well below the NMW. Although guidance has been issued both by the DTI and by the National Council for Voluntary Organisations (NCVO) on the application of the law to this group, it continues to cause problems.

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A. National Minimum Wage

This question will depend on whether an individual will be legally classed as a “worker” within the meaning of the legislation. This is often a tricky legal question. In general the necessary elements of mutual obligation and contract would need to exist. For example, there may be no mutual obligation if the person would be free to go at any time. Further help may be available from the National Minimum Wage Helpline: **0845 6000 678**.

The NMW applies to most workers and sets minimum hourly rates of pay. It is intended to benefit business as well by ensuring that companies compete on the basis of quality of the goods and services rather than low prices based mainly on low rates of pay. The rates are set in regulations made by the Secretary for State, with parliamentary approval, based on the recommendations of the Low Pay Commission (LPC).[1]

The main (adult) rate for workers aged 22 and over is currently:

- £5.05 (£5.35 per hour from 1 October 2006)

The development rate for workers aged 18-21 inclusive (which can also apply to workers aged 22 and above who are in their first 6 months of a new job with a new employer and who are receiving accredited training) is currently:

- £4.25 (£4.45 per hour from 1 October 2006)

With the exception of apprentices, a new minimum wage for 16 and 17 year olds at a rate of £3 per hour was introduced in October 2004 (£3.30 from 1 October 2006).

B. Volunteers’ Employment Status

The DTI provide detailed guidance on voluntary workers:

> **Voluntary workers**
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> 43. Volunteers (who provide their time and effort completely freely) need not be paid the national minimum wage because they do not have any contractual arrangement and therefore are not classed as workers. But some people who consider themselves “volunteers” could still potentially count as “workers” because they receive some sort of payment or benefit in kind. These workers need not be paid the national minimum wage if:
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> • they work for a charity, voluntary organisation, charity shop, school, hospital or similar body; and they receive only reasonable expenses, relevant training and/or subsistence (but not money for subsistence). Regular payments are likely to give the volunteer the right to the national minimum wage. However, a genuine “honorarium” in the form of a gift with no obligation and of a reasonable amount is not likely to give the volunteer the right to the national minimum wage; or

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1 *National Minimum Wage Regulations 1999, SI No.584* (as amended)

• they are placed by a charity or similar body with another charity or similar body and they also receive money for subsistence: for example, voluntary workers who have been placed with a hospital or charitable care home by a charity which specialises in such placements, and who are provided with some money to cover living expenses.

Example 2: Voluntary workers

1. A member of a charity who helps out from time to time at jumble sales for no pay and under no obligation is not entitled to the national minimum wage. He does not have any form of contract and does not count as a “worker”.

2. A worker for a community group who has set hours and is paid a wage is entitled to the national minimum wage. He fits the definition of a worker and whether the employer in such cases is a charity or voluntary organisation is irrelevant.

3. A volunteer worker in a hostel with charitable status who receives free accommodation and food as well as expenses for any travel undertaken as part of the job, but who does not receive any monetary payments, is not entitled to the national minimum wage.

4. The volunteer who works in a hostel but who receives cash payments such as a regular wage is likely to be entitled to the national minimum wage.[2]

Genuine volunteers are not meant to be covered by the requirement to pay the NMW. The *National Minimum Wage Act* achieves this partly by its definition of a “worker”. Section 1(2) states that a person qualifies for the NMW if he or she:

(a) is a worker;
(b) is working, or ordinarily works, in the United Kingdom under his contract; and
(c) has ceased to be of compulsory school age.

Section 54(3) defines a “worker”:

In this Act “worker” (except in the phrases “agency worker” and “home worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

Many volunteers would not work under a contract of employment or a contract to perform personally any work or services for another party to the contract. Those who do not have a

[2] *A detailed guide to the national minimum wage,* DTI, October 2004, pp. 18-19 http://www.dti.gov.uk/files/file11671.pdf

written contract of employment may, nevertheless, have entered into an oral agreement to perform certain services.

For a contract to exist the general rule is that there must be agreement (offer and acceptance), consideration and an intention to enter into a legal relationship. Staff who are not paid a salary have, nevertheless probably agreed to perform certain services (eg opening the mail, answering the phone, manning the office) and the “employer” has probably offered some form of “consideration” (experience, access to the market and perhaps some minor expenses).

The general working context and the elements of mutual obligation characteristic of a particular employment may show an intention to create legal relations. Ultimately, the applicability of the legislation would be a matter for the tribunal to decide.

If the “volunteer” is under an obligation to work, then they are, in fact, a “worker” and entitled to the NMW. Common sense would suggest that if someone is doing a “job” with set hours and tasks they are under an obligation to work. If they fail to turn up or to carry out their allotted duties, the employer would need to find someone else to do the work. Perhaps if the “volunteer” were genuinely supernumerary and the employer did not care whether he came in or not, there would be no obligation to work and, therefore, no obligation to pay the NMW.

Section 44 of the Act deals specifically with voluntary workers. It excludes from the scope of the NMW any worker “employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body” if he or she receives:

> (a) no monetary payments of any description, or no monetary payments except in respect of expenses
> (i) actually incurred in the performance of his duties; or
> (ii) reasonably estimated as likely to be or to have been so incurred; and
> (b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.

The DTI issued a Consultation Document on *Draft National Minimum Wage Regulations* in September 1998. Annex 4 of the Consultation Document explains who is and who is not covered by the NMW and indicates that the provisions are tightly drawn. On the question of voluntary workers it had this to say:

> **Volunteers and voluntary workers**
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> 16. Most volunteers will automatically be excluded from the Act because they are not covered by the definition of "worker", due to the absence of any intention to enter into legal relations and the resulting absence of any contract.
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> 17. However, some volunteers who receive expenses, benefits in kind, and/or subsistence payments might in certain circumstances be regarded as workers under a contract making them "workers". Section 44 of the Act provides an exit for such "voluntary workers" so that if they receive a very limited range of expenses, benefits in kind, and/or subsistence payments they will be excluded from the NMW, provided that certain conditions are met. Workers who are working on a voluntary basis for a charity, a voluntary organisation, an associated fund-raising body (e.g. a charity shop)

> or a statutory body (e.g. a school or hospital) do not qualify for the NMW if they do not receive:
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> any payment other than a payment in respect of expenses actually incurred in their voluntary work, or expenses reasonably estimated as likely to be incurred or to have been incurred; and
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> any benefits in kind other than the provision of reasonable subsistence or accommodation (this would cover, for example, food and accommodation provided for those voluntary workers helping at youth hostels); and
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> a monetary payment of subsistence, except where the voluntary worker has been placed with the host employer by a charity, and the host is itself a charity, voluntary organisation, associated fund-raising body or statutory body. (This would cover e.g. voluntary workers placed by a central volunteering organisation with schools, hospitals and voluntary organisations, often away from home.)

A similar indication of the restricted application of the volunteer exemption comes from the Hansard debates on the NMW. Ian McCartney, the Minister responsible for the NMW legislation, explained the purpose of this provision during the debate at report stage:[3]

> The main point is that the Bill will apply only to workers, and that none of its clauses will apply to volunteers. Our judgment is that the vast majority who do volunteering work of one sort or another will not be affected in any way by the Bill, because they are not workers. That is what we want to achieve.
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> We are conscious, however, that there is a grey area. The definition of "worker" in clause 52 is quite wide, although no wider than the definition used for the purposes of provisions on unauthorised deductions in the Employment Rights Act 1996, which originated in the Wages Act 1986. Because of that, some genuine volunteers--although, we think, only a small proportion--might work under arrangements that would amount to a worker's contract. It is precisely those people--the Bill calls them "voluntary workers"--who are included accidentally, and whom we want to exclude through the "exit" of clause 42.
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> Let me briefly explain the main effects of new clause 1, and how it differs from the original clause 42. The overall effect is to broaden slightly the definition of "voluntary worker" to reflect the reality of volunteering. Subsection (1) broadens the range of bodies for which a voluntary worker may work while still falling within the exemption from the national minimum wage. It will now include not only charities and voluntary organisations, as before, but any "associated fund-raising body"--that is, a body separate from a charity or voluntary organisation but whose profits go to that organisation, such as a body running a charity's shops--and any "statutory body". Therefore, volunteers who work for charity shops, schools and hospitals, as well as for charities and voluntary organisations, and who happen to be workers, will be exempted from the national minimum wage.
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> Broadly speaking, the range of bodies covers volunteering in the whole statutory sector, but it does not cover volunteering in non-charitable commercial enterprises. To include that would undermine the Bill, and would go against the principle that

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[3] HC Deb 9 March 1998, cc 23-24

volunteering should be for social good rather than being a form of cheap labour for commercial profit.

C. Low Pay Commission

In its second report on *The National Minimum Wage The story so far*, published in February 2000, the Low Pay Commission outlined some of the difficulties that voluntary organisations were having in applying the law:

Voluntary Workers

In its consultation document on the draft National Minimum Wage Regulations (DTI 1998), the Government set out clearly the position of volunteers, stating that 'most volunteers will automatically be excluded from the Act, because they are not covered by the definition "worker", due to the absence of any intention to enter into legal relations and the resulting absence of a contract'. Thus genuine volunteers are not entitled to the minimum wage. In common usage, the distinction between a volunteer and a worker is clear. But the introduction in the legislation of two types of voluntary worker – the first entitled to the minimum wage, and the second (who receives only expenses or subsistence) exempt – has created confusion.

Section 44 of the National Minimum Wage Act, which was drafted in consultation with voluntary organisations, created exemptions to the coverage of voluntary workers. While DTI produced guidance specifically on this issue, our evidence shows that some uncertainty remains over status: as the National Council for Voluntary Organisations stated in its evidence, 'grey areas remain around definitions of worker, voluntary worker and volunteer'. The National Centre for Volunteering summarised these concerns in its evidence:

Although the Minimum Wage Act is not intended to affect volunteers, the voluntary workers exemption clause (clause 44) is causing confusion in the voluntary sector and for lawyers in voluntary organisations.

This results from uncertainties about:

- *what constitutes an employment contract;*
- *what constitutes a contract between an organisation and its volunteers;*
- *what expenses may be reimbursed; and*
- *what benefits-in-kind are allowable.*

Typical of the problems raised is that of the sporting associations which cited the person who 'volunteers' to act as an official at a sporting event and receives some form of benefit, such as free tickets for a future event. The associations were concerned that such benefits might be interpreted as conferring worker status, and thus entitlement to the National Minimum Wage, on the individual. The British Red Cross Society was also concerned that the National Minimum Wage meant that 'we are now extremely limited in what we can offer to attract, reward and retain the volunteers that are vital to the service we provide'. Age Concern England mentioned that for many years it had paid its key volunteers, such as day centre organisers, honoraria of about £10–15 per week. The charity claimed that changes in the

> treatment of these honoraria required by the National Minimum Wage legislation had adversely affected the relationship between the organisation and its volunteers.
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> Because of the continuing confusion there remains the danger that in some cases genuine workers in voluntary organisations who are entitled to the minimum wage may not be receiving it. While we would not wish those voluntary workers who are exempt under Section 44 to be deterred from volunteering, we are concerned that organisations should not seek to use Section 44 as a loophole to avoid compliance.
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> Given the significant degree of confusion which continues to exist in the voluntary sector, we recommend that the Government should issue further detailed guidance on the definition of worker which is geared specifically to the needs of the voluntary sector. Where possible, the two more familiar terms should be used: 'volunteer' to include those who are not covered by the minimum wage, even though they may receive payments to reimburse expenses, and 'worker for a voluntary organisation' to cover those who are entitled to it. The guidance should help organisations and workers to distinguish not only between the status of genuine volunteers and workers for voluntary organisations, but also whether payments made, or benefits provided, to volunteers confer entitlement to the minimum wage.[4]

The Government accepted this recommendation.

D. Pupillages and Internships

Internees are generally under no obligation to perform work or provide services nor are they employed under a contract of apprenticeship, which is covered by the definition of contract of employment in section 54(3) (a) and, as such, are unlikely to be considered as "workers" under the Act.

The case of *Edmunds V Lawson QC [2000]* considered the definition of worker under the Act. The applicant was a pupil at the defendant's chambers. The Court of Appeal held that the pupillage arrangement between the applicant and the chambers had the essential characteristics of an intention to create legal relations and accordingly that there was a legally binding contract between the applicant and the chambers. However, it was held that the contract was not a contract of apprenticeship because such a contract contains mutual covenants under which the master undertakes to educate and train the pupil in the skills needed to practice a skilled trade or learned profession, and the apprentice binds himself to service and work for the master and to comply with all reasonable directions. In this case however, there was no duty on the pupil barrister to do anything not conducive her own training and development and, as such, the contract did not fall within section 54(3)(a). In relation to section 54(3)(b) the Court of Appeal held that the pupil did not undertake to perform work or services for members of the chambers and that in any event any work for which she was paid, the person for whom the work was done, was the pupils professional client and, as such, section 54(3)(b) did not apply.

There may be a similar lack of mutuality of obligation in the relationship between internees and those who engage them such that they would not be defined as "workers" under the Act.

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4 Cm 4571, February 2000, paras 5.3-5.7. The report is available on the Low Pay Commission's website, http://www.lowpay.gov.uk/lowpay/report2/complete.pdf

Internees often request an internship to spending some time in their sponsor's office and to accompany them on their duties for reasons purely in their own self interest. These reasons include learning about the work of the sponsor, networking in the sponsor's professional environment, gaining a valuable reference for his/her CV, using his/her time with them for their CV as evidence of work experience etc. Thus, the internee's main purpose for entering into the arrangement are often educational and purely personal rather than to provide services to another; and the sponsor will often not be entering into the arrangement for the purpose of being provided with services, rather to assist the internee in his/her educational and personal development. Indeed, when considered objectively, there may be very little that the sponsor gains from the relationship. The internee would be a volunteer in the truest sense if they do not expect to be paid and the sponsor does not expect to pay them. These factors may be evidence that neither party enters into a contract to perform work or provide services in return for a payment of wages and hence the interne is not a "worker" under the Act and also that no mutuality of obligation exists in these circumstances.

However, care must be taken that internees are not treated by the sponsor as if they were a worker because then the Act may be taken to apply. To avoid this, a sponsor may take care that the internee is not subject to any obligation to perform work or provide services and that regular payments are not made to the internee, given that such factors may give the intern the right to the minimum wage. A court would look at the circumstances of the case to find out what the "true" relationship between the parties was to discover whether the necessary mutuality of obligation existed.