SHEPHERD+ WEDDERBURN

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Hospitality Sector Employment Update:

National Living Wage and Tipping



As part of the Government's efforts to change the UK into a "high wage, low tax, low welfare" society, and to reduce reliance on state benefits, it has introduced changes to minimum wages for those aged 25 and over. We look at the issues arising from the introduction of the National Living Wage (NLW), and consider them in light of the recent government call for evidence on tipping practices.

New living wage to be introduced in Spring 2016

The NLW is due to come into force in April 2016. It will apply to those aged 25 and over, and will be set at an initial rate of £7.20. The National Minimum Wage (NMW) will continue to apply as before, with the NLW acting as a "top up" for those aged 25 and over.

The Low Pay Commission will provide the Government with recommendations on the level of upward travel of the NLW hourly rate going forward, in the same way as it currently does for the NMW. The Government's aim is to reach the level of £9 per hour by 2020 – which would be 60% of the average wage across the UK.

Impact on employers

A recent survey by the Resolution Foundation found that the mandatory wage increase will have their greatest impact in retail (79%) and hospitality (77%) sectors, with over three-quarters of employers saying their wage bill will be affected. The most common ways in which employers are planning to mitigate these higher costs are by improving efficiency; taking lower profits; reducing overtime and bonuses; raising prices; and reducing the number of employees. It is not just employees currently on NMW who are expected to be affected, with some employers planning to increase wages of supervisors/managers to maintain the pay differentials between staff.

Crackdown on non-compliance

On 1 September 2015, the Department for Business and Innovation announced a package of measures they will use to ensure compliance with the NMW and NLW, including doubled penalties for non-payment (now 200% of arrears); a new dedicated HMRC team who will pursue and prosecute the most serious cases of deliberate underpayment; and director disqualification for up to 15 years.

Next steps for employers

For employers, it is worth reviewing salaries and ensuring your payroll teams are up-to-speed with the new rates and age brackets well in advance. Typical problem areas include those who receive a salary rather than an hourly rate and who work irregular shift patterns, work overtime or do 'sleepover' shifts. Employers may wish to re-visit their calculations for their lowest paid workers in light of the new rates for any employees aged 25 and over to ensure they are ready for the change.

Tipping and wages

Currently, both cash tips handed directly to workers, and payments made by the employer or troncmaster which represent service charges, tips, gratuities or cover charges, do not form part of a worker's remuneration for NMW purposes. There is nothing to suggest that the

Government intends to change the current position and to allow tips to be taken into account when calculating NLW.

Government investigation

Reports in the press this year have highlighted disparities in the tipping policies of different restaurant chains, with some employers deducting a disproportionate administration charge from tips passed on to staff; others still retaining all of any mandatory service charge; and in one high-profile case, an employer retaining all service charges but using it to increase workers' hourly rate (above NMW). Public opinion suggests that consumers believe that all tips should be passed to staff, and the employers named in these news stories have attracted negative publicity.

In the midst of these press reports, in August 2015 the Government set up a call for evidence, to decide whether or not government intervention in the area of tipping is necessary. Publicised possible outcomes include the development of the current voluntary code of practice, the imposition of a limit on the amount or percentage of tips that are withheld from staff, or publishing the names of chains who do not pass on tips. The Government is currently analysing the feedback received, and will be publishing a response in due course.

Holiday Pay

Recent European case law has led to a broadening of the definition of 'remuneration', and payments such as commission may now have to be taken into account when calculating holiday pay, where this represents part of the employee's normal pay. In certain cases, it could potentially be argued that service charges, tips or gratuities form part of an employee's 'normal pay', and that to only pay an employee his or her basic salary when on annual leave may disincentivise staff from taking holidays. To date, this issue has not come before the courts. In the meantime, you may wish to consult our *At-a-glance guide to holiday pay*.

Going forward

There is currently no concrete proposal from the Government in relation to tipping procedure. However, employers in the food and hospitality industry should keep their current tipping policy under review, taking into consideration legal requirements, staff retention, and customer expectations.

Key contacts

If you require advice or further information on any of the matters raised in this update, please get in touch with either of our lawyers listed below, or your usual Shepherd and Wedderburn contact.

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