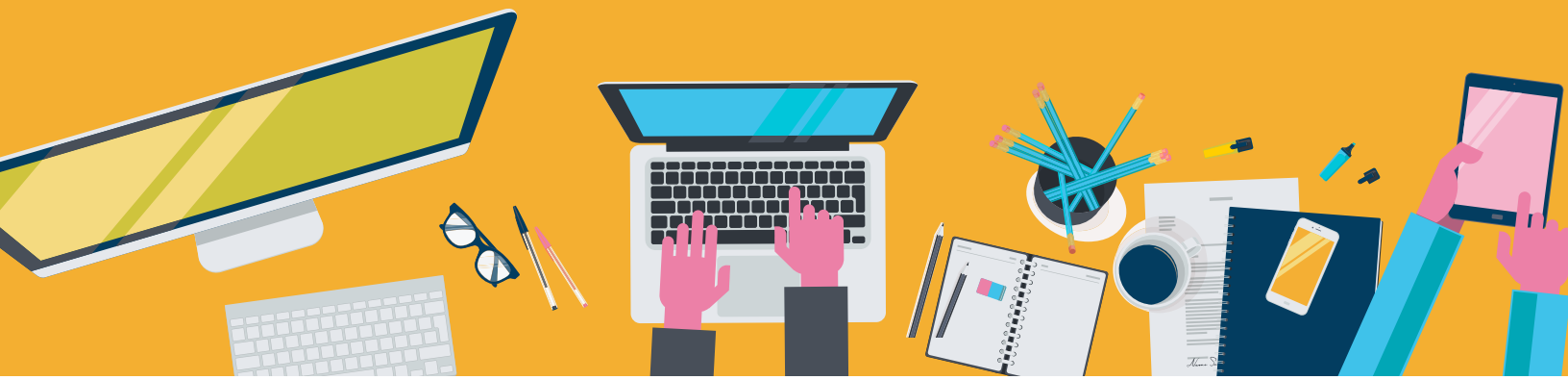
ESSENTIAL CARE SECTOR UPDATE
ON NATIONAL MINIMUM WAGE COMPLIANCE



A flurry of recent court rulings on compliance with the National Minimum Wage ("NMW") highlight the complexity of this area of law and the need for care providers to check their pay arrangements are compliant.

1. Deductions for rent

If you provide both employment and accommodation to your care staff, you need to comply with the accommodation offset rules under the National Minimum Wage Regulations 2015 ("the Regulations"). These rules limit the amount that you can deduct from wages for rent (currently £8.20 per day / £57.40 per week) without the deduction affecting your NMW calculation. If you deduct a greater amount, it will reduce pay and could result in the employee's pay falling below the NMW.

In the recent case of Commissioners for HM Revenue and Customs v Ant Marketing Ltd, the employer argued that the rules did not apply because the rent was payable to a separate company as landlord, rather than the employer (even though the directors and shareholders of both companies were the same).

The EAT found that the landlord could not be construed as the "employer" under the Regulations and the rent payments did not amount to deductions for NMW purposes. There was no breach of the NMW.

On the face of it this appears helpful for employers; but it is not as helpful as it might seem. In this case the claim was pursued on the basis that the rules applied because the landlord was the employer, which the EAT found that it was not. However, the rules also apply where the employer is the provider of accommodation. If the case had been pursued on this ground, the outcome would have been different and the employer would have breached the Regulations.

Ultimately, if you are connected to the landlord in some way, you are likely to face scrutiny as to whether you are in fact responsible for providing the accommodation and therefore caught by the rules.

2. Deductions for training costs

It is common for providers to include terms in employment contracts requiring staff to repay training course fees if they leave within a specified period after having completed training (usually 12 months).

The Ant Marketing Ltd case mentioned above considered how deductions from the employee's final pay to recover the cost of mandatory training course fees should be treated under the Regulations.

The EAT found that because the training was mandatory, the costs were expenditure in connection with their employment (in the same way as uniform and tools for the job) and so amounted to a deduction for the purposes of the Regulations.

To avoid deductions for training course fees breaching NMW rules:

- Mandatory training: check whether making the deduction will take the employee below the NMW in that pay reference period. If so, don't make the deduction. If not, you can make the deduction.
- Non-mandatory training: check you have a contractual right to make the deduction. If so, you can make the deduction without it affecting your NMW calculation. If not, it will amount to a deduction for NMW purposes and is likely to also be an unlawful deduction of wages.

3. Gaps between domiciliary care assignments

In an Employment Tribunal case this month against two care providers (*Ms E Harris & Others v Kaamil Education Limited and Diligent Care Services Limited*), consideration was given to whether gaps between assignments for domiciliary care workers counted as working time under the Regulations. The ruling does not set a precedent and is not binding on other courts, but it provides some interesting guidance.

The Regulations do not specify how long a gap between assignments should be to avoid the time being treated as working time and subject to the NMW. This will depend on the extent of any obligations on the employee during the gap and whether they have time to go home with a meaningful opportunity to rest and relax if they so wished.

In this case, the Tribunal accepted the Claimant's case that gaps of less than 60 minutes between assignments were working time and subject to the NMW. However, it is notable that no counter argument was put forward by Peninsula Business Services acting for the Respondents, so a different view could be taken in other cases depending on the facts.

FOR SPECIALIST ADVICE ON NATIONAL MINIMUM WAGE COMPLIANCE OR AN AUDIT OF YOUR PAY ARRANGEMENTS PLEASE CONTACT JAMES SAGE:

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