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To: Secretaries of Local Government Branches with Social Care Members
Regional Heads of Local Government
Registered Professional/Sectional Bodies – for information
Homecare Forum Members
Social Care Forum Members

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Travel Time and the National Minimum Wage Guidance

UNISON has developed the attached guidance for branches over the failure of some employers to pay for travel time to their Homecare Staff meaning that their pay drops below the National Minimum Wage.

Branches are asked to raise awareness amongst members about the official Government complaints and enforcement procedures that are available and organise around the issue by circulating the report.

We also urge branches to send in copies of any contracts or payslips where employers are not paying workers for their travel time.

An increasing number of members and workers, predominantly homecare workers in the field of social care, have found their wages dropping below the National Minimum Wage because they are not paid for travelling time between their work visits.

We are sending out this guidance because the practice is increasing in social care where cuts have led to worsening terms and conditions and because it applies mainly to private sector workers who can often be isolated from the main workings of a branch.

We ask that branches investigate to see whether their members, especially homecare workers, are not paid for their travel time between jobs. If they find this is the case and it means their pay drops below the national minimum wage then encourage them to contact UNISON and our legal team and ask them to put in a complaint to HM Revenues and Customs. There is also the potential to organise around the issue so that improvements can be brought about.

Where members are not paid for travel time we also ask that branches ask for copies of their contracts and pay slips and send them to their RO and to the UNISON Centre for attention of Matthew Egan in the Local Government team. We need examples of these contracts and payslips (which are often complicated and confusing) as they may potentially be open to legal challenge and they will help compliment our work around improving the commissioning of social care services by local authorities.

Best wishes

Heather Wakefield
National Secretary
Local Government Service Group

Enclosures:

1. Report National Minimum Wage and Travel Time Guidance.
2. Appendix - The Legal Position.



National Minimum Wage and Travel Time Guidance

An increasing number of homecare members, particularly private sector homecare workers are finding themselves being paid below the National Minimum Wage (NMW) because they are not paid for travel time between their work visits.

We are particularly highlighting this issue because some branches may not be aware of how much a problem this is for members and potential members who are employed by Private Contractors, as we know that private sector members are both hard to organise and are often isolated.

The issue is tied in with the increase in zero hour contracts whereby employers stop guaranteeing a set amount of hours per week for workers but allocate them as and when they see fit.

A major problem with zero hours contracts, apart from the uncertainty of whether workers will be given enough hours week to week, is that they are being used as a threat against some workers who complain when they are not paid for their travel time. Workers have sometimes found that they are subsequently given far fewer hours if they complain.

It can often be hard to prove that the employer is targeting them in these instances and subsequently difficult to make out a claim of victimisation in an Employment Tribunal. Nevertheless we must organise and work together to stamp out these practices to ensure that workers' rights are respected.

Government Guidance

There is clear Government Guidance on the issue of being paid for work related travel time. It can be found in full on this website

<http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1096712966&type=RESOURCES>

Unless they are ⁽¹⁾ genuinely self-employed then workers in most circumstances should be paid at least the national minimum wage when travelling directly from one work assignment to another.

- (1) Genuinely self-employed –whether someone is genuinely self employed is a legal question. Workers may be considered to be genuinely self-employed if they have freedom to work for others, can refuse work; set their own hours, incur their own expenses and deal with their own losses.

Time spent travelling on business must be included in their calculation of hours worked. For instance if you are a homecare worker and you spend a total of 20 hours a week working with clients and a total of 5 hours a week travelling straight from visit to visit then you must be paid at least the national minimum wage for 25 hours a week. Please find the legal guidance attached as an appendix.

What to do if you believe if members are not being paid the national minimum wage for their travel time?

If members are not being paid the minimum wage then they can bring a claim in the Employment Tribunal or a civil court in order to recover the amounts owed (see <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1096714721&type=RESOURCES>). Please seek legal advice through the normal channels if you consider a member may have a claim.

They should also phone the Pay and Work Rights Helpline on 0800 917 2368 or complete the online form via <https://payandworkrights.direct.gov.uk/complaints/>. All complaints are treated as confidential and HM Revenue and Customs will investigate where it appears that a worker or former worker may have been underpaid. A worker can choose to remain anonymous throughout the whole process if they so wish. This is important to stress to members as many of them will be fearful of making a complaint but bear in mind that the more detail that can be provided then the likelier HMRC will be to launch an investigation.

The Pay and Work Rights Helpline is open 08.00 - 20.00 Monday to Friday and 09.00 - 13.00 on Saturday. Calls from a landline are free but charges may vary from mobile phones. The Helpline can take calls in over 100 languages.

You can also get advice or find out more about the NMW by contacting the Pay and Work Rights Helpline on Tel 0800 917 2368 or completing the online enquiry form on the Directgov website:

<https://payandworkrights.direct.gov.uk/>
<http://www.tuc.org.uk/extras/payandworkrights.pdf>

Union reps can call on behalf of both workers and their members. We know that many members will be worried about complaining so it may be more suitable for a union rep to make the call on their behalf.

It can be very hard to find members to make complaints so there needs to be support in place for them

Enforcement action can be hard to bring about and should not be treated as the only method to resolve a problem. Ultimately branches and regions need to be geared up to work on securing recognition agreements with the employer and changing their attitude so that better working practices can be negotiated and the issue can be resolved.

Employers who use loopholes to avoid paying for travel time

There are a number of employers who construct contracts and/or working schedules for their workers in order to get around paying at least the National Minimum Wage for Travel Time.

For instance, workers can be given schedules with four different 15 minute visits within an hour with no time for travel built in to the schedule. The workers are paid just for each 15 minute slot and so find themselves either having to leave their clients early to get to the next visit or they find themselves going over their slots and effectively left travelling in their own time.

Others can be given schedules with long gaps between visits and so have to go home in the meantime before their next visit. This means they are not paid as they keep travelling from home to work and back.

There are also people who are made to work on call from home and have working patterns where again they go from home to a visit and back home again, which also gets employers out of paying for travel time.

How to react to employers using loopholes

Please send in any examples of these sorts of contracts and payslips to your regional officer. Please also send a copy through to the Local Government team at the UNISON Centre, or email them to localgovernment@unison.co.uk. It may be the case they will be open to legal challenge.

You can also consider alerting the HMRC if you believe the contract to be suspect. Knowing that the HMRC is scrutinising their contractual arrangements for NMW compliance can sometimes prompt the employer into changing their ways .

Norfolk UNISON branch used this technique to help bring about improvements to the terms and conditions of their homecare workers after they became aware that these workers were not being paid for travel time between visits to clients.

The Branch worked with UNISON Centre and sought advice from the National Minimum Wage Compliance Unit at the HMRC. As workers were not getting paid travel time, their hourly rate was often below the national minimum wage.

Following a formal complaint to the HMRC Enforcement Agency UNISON reached a collective agreement with the employer to deal with the problem and won an agreement to double the mileage rate from 20p to 40p and to pay for travel time. The branch also secured a trade union recognition agreement with the employer. Contacting the HMRC in cases where travel time is not being paid and organising so that meaningful workplace negotiations are possible was an approach that really paid dividends in Norfolk.

For workers who are not paid for travel time but still get above the NMW

We know there are also cases where workers are not paid for their travel time when they are travelling directly from one work assignment to another but have their average pay is above that of the NMW because they are paid higher rates for their actual contracted hours.

If a worker receives above the NMW on average for their time then HMRC's enforcement team cannot intervene as their remit only covers those receiving less than the NMW. We know that paying just above the NMW is legal but poor practice because the NMW is very hard to get by on, particularly for those working in the South East and good quality care goes hand in hand with good terms and conditions.

Please send any examples of contracts where this practice occurs to your regional officer in the first instance but also to the Local Government team at UNISON Centre and use it as an issue to organise around. The threat of a complaint to the HMRC can again be used as part of an approach to prompt negotiations with the employer to improve terms and conditions.

It is important that we deal with the problem of low pay for homecare workers, even when they are being paid the NMW or just above it. A number of UNISON branches have organised and campaigned to ensure that their employers now pay the Living Wage as a minimum for their workers (£8.30 an hour in London & £7.20 outside of London).

The Living Wage campaign is now a priority for UNISON. A UNISON Factsheet is available at

<http://www.unison.org.uk/file/Living%20Wage%20Factsheet%202012.pdf>

We encourage you to get involved in the campaign.

Talking to your local council

A great deal of responsibility for ensuring that workers are paid for their travel time and receive other good terms and conditions rests with your local council in many cases. Many private homecare employers derive their business from local councils. The councils are responsible for the commissioning of homecare workers to private employers who in some cases have refused to pay workers for travel time and undermined other of their terms and conditions.

It is therefore important that you make contact with the people at your local council who are responsible for commissioning services

You need to confront them (particularly the elected councillors who are potentially very strong allies) with the evidence of any refusal by private employers to pay for travel time payment and/or any other poor practices. The local council may not be aware of this and might be in a position to bring about a change.

If their hands are tied in this instance then you can work with them to put pressure on the employer to improve its ways. Also the next time they come to commission homecare to a private employer in future you can work to ensure that the Council insists that any organisation who wins the contract pays for travel time and improves other working conditions to help improve the standard of care.

It is also worthwhile contacting your local MP to see if they will support your call for better terms and conditions.

UNISON will be soon contacting branches with more detailed guidance and advice on how to influence the commissioning of homecare services.

Please note the Government is planning to close down the above National Minimum Wage Web Pages by October 2012. We will circulate the new addresses when their replacements are launched.



Appendix

The Legal Position

Generally, when a worker is travelling for the purpose of duties carried out in the course of his or her work, the worker will be required to be paid the minimum wage (excluding any travel to or from the worker's home). This is outlined in the National Minimum Wage Regulations 1999, Regulations 15 to 18. In summary, 'Travelling' is defined in Regulation 7 as:

- (a) In the course of a journey by mode of transport or on foot;
- (b) Waiting at a place of departure to begin a journey by mode of transport;
- (c) Where the journey is broken, waiting at a place of departure for the journey to recommence; and
- (d) Waiting at the end of a journey for the purpose of carrying out duties (excluding any time spent –if any - on a rest break).

Workers who are paid not by time worked, but by their output (e.g. by the number of pieces of work processed) are not usually entitled to receive the minimum wage for travel time.

In some situations, workers are also entitled to be paid for travel time if it is part of the job (excluding time worked outside normal working hours) if the time is considered to be 'working time' under the Working Time Regulations 1998. The benefit of proving that travel time is 'working time' is that this time should be paid at a worker's normal contractual hourly rate (which in many cases will be above the minimum wage).

A claim for unlawful deduction of wages can be brought in the Employment Tribunal within 3 months less one day of the deduction or the last deduction in a series of deductions.