

Article by **Chris Weaver**, Employment solicitor at **Payne Hicks Beach** first published on 4 December 2013 at SMEWEB online

http://www.smeweb.com/index.php?option=com_content&view=article&id=4575:legal-issues-to-consider-when-employing-an-intern-in-your-sme&catid=61:features&Itemid=106



[Legal issues to consider when employing an intern in your SME](#)

Written by **Chris Weaver**, a solicitor in the employment team at Payne Hicks Beach solicitors
Wednesday, 04 December 2013 11:04

Failure to comply with national minimum wage legislation can have serious consequences.



Internships have become commonplace in many small and medium sized businesses. It is important that businesses are aware of interns' legal rights and, in particular, whether they should be paid the national minimum wage (NMW) since a failure to comply with NMW legislation can have serious consequences.

The Government recently announced that it will be 'cracking down' on unpaid internships. This includes HM Revenue & Customs (HMRC) taking a more aggressive approach to enforcement action, including targeted checks, against businesses which use interns.

The rights an intern has depend on their legal status under employment law. An intern is entitled to the NMW if they are a "worker" and no specific exemption from the NMW applies to them. By contrast, an individual who is a genuine volunteer or who is "work shadowing", rather than performing actual work, will not qualify for the NMW.

A "worker" is an individual who works under a contract of employment or any other contract where they agree to personally perform any work or services. The contract does not have to be written and may be implied.

The key factors for determining worker status are the requirement for personal service (rather than being able to send a substitute) and the mutual obligations on the employer to provide work and the worker to do the work provided.

Enforcement action

HMRC is responsible for taking enforcement action against employers who breach NMW legislation. Enforcement action may be initiated by a complaint or as a consequence of risk profiling and targeted checks.

Article by Chris Weaver, Employment solicitor at Payne Hicks Beach first published on 4 December 2013 at SMEWEB online

http://www.smeweb.com/index.php?option=com_content&view=article&id=4575:legal-issues-to-consider-when-employing-an-intern-in-your-sme&catid=61:features&Itemid=106

Officers can carry out inspections at any time, without providing a reason, and can require employers to produce records and information to determine whether workers are receiving the NMW.

Civil prosecution

Where HMRC concludes that the NMW has not been paid, it will issue a notice of underpayment. This requires the arrears of the NMW to be repaid and the employer to pay a financial penalty within 28 days.

The penalty is set at 50 per cent of the total underpayment of NMW; the minimum penalty is £100 and the maximum penalty is £5,000. Failure to comply with an underpayment notice can result in further enforcement action by HMRC and criminal prosecution.

Criminal prosecution

Employers who are persistently non-compliant or who refuse to co-operate are likely to face criminal investigation and penalties.

It is not only an offence to refuse or to wilfully neglect to pay the NMW, but also if an employer fails to keep records, provides false records or obstructs enforcement officers.

The fine on conviction for each offence is up to £5,000 where tried in the magistrates' court. Serious offences are triable in the Crown Court where employers can face a potentially unlimited fine.

If the offence is committed by a company with the consent, connivance or neglect of a director then that director may also be guilty of the offence.

Naming employers

The Government will now also automatically name employers who are issued with an underpayment notice by HMRC, unless the employer successfully appeals against the notice or there are exceptional circumstances.

Enforcement by the worker

A worker can bring a claim for unlawful deduction from wages in an Employment Tribunal if they have not been paid the NMW. The claim must usually be brought within three months of the date of the deduction or the last in a series of deductions. There is no limit on the length of arrears that can be claimed, provided it is all part of the same series of unlawful deductions.

Alternatively, a worker can bring a claim for breach of contract in the civil courts to recover arrears of NMW. Such claims can be brought up to six years after the breach.

A worker may claim unfair dismissal or a detriment claim in an Employment Tribunal if they are dismissed or suffer other detriment for seeking payment of the NMW, for becoming eligible to receive the NMW or the NMW at a higher rate.

Other rights

In addition to the right to be paid the NMW, an intern who is a worker will have other rights such as to paid holiday, rest breaks and a maximum 48-hour working week.