ALWU

AOTEAROA LEGAL WORKERS' UNION

Minimum Wage Best Practice Policy

1. [Employer] will keep accurate time and wage records for all employees.[1] In particular, [Employer] will keep accurate records of all hours worked by its employees: ie, [Employer] will record all hours that an employee spends working at the workplace and outside of the workplace.

2. In order to do so, the [Employer's] time recording system for minimum wage purposes will be separate and distinct from any existing system for recording billable (and non-billable) time.

   For example, [Employer] may implement a system that requires employees to "*clock in*" when they begin working and "*clock out*" when they stop. Where relevant (for example, where an employee is working flexibly or the employee takes an extended lunch break), employees may "*clock in*" and "*clock out*" multiple times on the same day.

3. Legal workers at [Employer] fall within the "*in all other cases*" category of workers in the various successive Minimum Wage Orders (**Order**).[2] As a consequence, [Employer] will pay its employees:

   a. At least the minimum sum per fortnight required by the Order.[3]

   b. At least the minimum hourly rate required by the Order for each hour over 80 hours worked in a fortnight.[4]

   [Employer] will not average its employees' fortnightly salary payments out over the hours that they have worked in a fortnight to comply with those requirements.[5] The requirements are also unaffected by clauses in employees' contracts providing that they are, for example, required to work additional hours "*as and when required*" and / or that their salary compensates them for any additional hours worked.[6]

4. At a consistent day and time each fortnight, [Employer] will review the time and wage records of all employees. [Employer] will pay to employees at least the minimum hourly rate for every hour over 80 hours that they have worked in the preceding fortnight (**Top Up**).

5. [Employer] will ensure that it meets its obligations under the Holidays Act 2003 in respect of any Top Up payment.

6. Employees may seek a review of their time and wage records by [Employer] at any time. An employee will notify [Human Resources] if they want their time and wage records to be reviewed.

7. [Employer] will notify the manager of any employee working more than 80 hours in a fortnight, seek an explanation from the employee's manager as to why that has occurred and implement workload management strategies in respect of the employee.

8. [Employer] acknowledges that working hours in excess of 80 hours in a fortnight may have a detrimental effect on an employee that cannot be mitigated solely by a Top Up payment. As a consequence, where an employee has worked more than 80 hours in a fortnight [Employer] will take appropriate steps to ensure that it is complying with its health and safety obligations in respect of the employee.

ALWU has consulted with the Labour Inspectorate, senior employment law practitioners and employment law expert Professor Gordon Anderson (Victoria University of Wellington – Te Herenga Waka) in developing this policy.

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1 See Appendix A for the requirements in relation to keeping "*time and wage records*". In determining how to accurately record "*time*", see the definition of "*work*" in Appendix B.

2 Because they are not paid hourly, daily or weekly.

3 $1416 per fortnight under the Minimum Wage Order 2019, cl (4)(d)(i).

4 $17.70 per hour under the Minimum Wage Order 2019, cl 4(d)(ii).

5 See, for example, *Victoria Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127 and *Pretorius v Marra Construction (2014) Ltd* [2016] NZEmpC 95.

6 Minimum Wage Act 1983, s 6.

Appendix A: Time and wage records

[Employer] is required to keep accurate time and wage records for all of its employees.[7] [Employer] must ensure that their recording processes comply with the Employment Relations Act 2000 and the Holidays Act 2003.

In particular, [Employer] must keep records of all hours worked by its employees so that it is able to show that it is correctly providing them with their minimum employment entitlements, such as paying them the minimum wage for all hours worked and providing the required amount of annual leave or holiday pay.[8]

For most employees, their usual hours of work are recorded in their employment agreements (for example, 37.5 hours per week). Where an employee is only required to work those hours, that amounts to compliance with s 130(1)(g) of the Employment Relations Act, which requires employers to record the number of hours that an employee works each day in a pay period.[9]

However, salaried employees, like legal workers at [Employer], may be required to work beyond their contracted hours. To ensure that they are being provided with their minimum entitlements in respect of the additional hours that they work, s 4B(1) of the Employment Relations Act requires that any additional hours worked by an employee are recorded by [Employer]. That is the case irrespective of whether the employees contract contains clauses stating that they are required, for example, to work "*all hours as and when required*", or that their salary compensates them for any additional hours worked.[10]

Appendix B: "*Work*"

There is not a comprehensive definition of "work" in the Minimum Wage Act or Employment Relations Act. However, the Court of Appeal in *Idea Services v Ltd v Dickson* held that the following three factors can be used to determine whether an activity is work:[11]

1) The constraints placed on the freedom the employee would otherwise have to do as he or she pleases.
2) The nature and extent of responsibilities placed on the employee.
3) The benefit to the employer of having the employee perform the role.

The greater the "*degree or extent*" to which each factor applies, the more likely that the activity in question ought to be regarded as "*work*".[12] The Court specifically noted that work is *not* to be defined by reference to "*physical or mental exertion*".[13] The analysis of what constitutes work is necessarily fact specific.

Examples

- *Sleeping:* In *Idea Services Ltd*, a community service worker was required to do "*sleepovers*".[14] The worker was required to be at his workplace overnight so that he could deal with any issues that arose in that time. When the worker was not dealing with such issues, he was sleeping. However, the Court of Appeal held that sleeping constituted working. The worker was constrained as he could not leave without permission; could not drink alcohol; could not have visitors without permission; his privacy was limited; and he did not have access to the comforts and resources of his home.[15] The worker's responsibilities were significant and Idea Services Ltd derived significant benefit from the worker being on duty: if he had not been there, Idea Services Ltd

7 Employment Relations Act 2000, s 130(1)(g).
8 Employment Relations Act 2000, s 4B(1).
9 Employment Relations Act 2000, s 130(1B).
10 Employment Relations Act 2000, ss 130(1C) and (1D).
11 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [7] and [10].
12 At [8].
13 At [13].
14 See also *Victoria Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 and *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127.
15 At [10].

would have been in breach of the obligations it was required to meet in order to be eligible for funding.[16]

- *Meetings outside of contracted hours:* In *Labour Inspector of the Ministry of Business, Innovation and Employment v Smith City Group Ltd*, workers were required to attend a daily staff meeting.[17] Attendance was expected, but no wage and time records were kept. As a consequence, staff in attendance were not paid for their time. The Employment Court held that attendance at the meetings was work. The pressure put on staff by virtue of the power imbalance between them and their employer was a "*constraint on their* freedom", as was the fact that they were not entitled to be disruptive and had to listen during meetings.[18] Staff had responsibilities in the sense that they were obliged to listen to work-related information and absorb it.[19] The employer enjoyed an exclusive benefit in preparing its staff for the working day.[20]

"Working" in legal workplaces

Having regard to the above factors, the following activities are "*work*" and time and wage records must record time spent undertaking them:

- Waiting for work, including where an employee is engaged in activities like reading the news or browsing social media while doing so.
- Taking toilet or paid rest breaks.
- Assisting to organise work social events.
- Filing, email-related administration and billing.
- Attending meetings.
- Training sessions / team retreats.

Importantly, work is <u>not</u> solely billable time or "*productive*" non-billable time.

If [Employer] considers that an employee is spending an inappropriate amount of time undertaking activities that are not billable or classed as "*productive*" non-billable time, that is a performance issue that [Employer] will raise independently with the employee. It does not impact upon the employee's right to be paid for the time spent doing those activities.

16 At [69].
17 *Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd* [2018] NZEmpC 43.
18 At [65]–[66].
19 At [67].
20 At [68].