

Whitepaper – Pay & the National Minimum Wage

Eligibility for the National Minimum Wage

The National Minimum Wage, one form of which is the National Living Wage, is payable to most workers who ordinarily work under contract in the UK and who are no longer of compulsory school age.

A worker is a person who works under any contract in terms of which he or she undertakes to perform personally any work or services for the other party to the contract, unless that other party could truly be described as a client or customer.

In addition to normal employees working under a contract of employment, "workers" include independent contractors, commission workers and other people who would not normally be treated as employees including agency workers.

Workers excluded from the National Minimum Wage include:

- Voluntary workers
- Share fishermen
- Members of the armed forces
- Cadet force adult volunteers
- Residential members of religious and similar charitable communities
- Au pairs living within the family
- Members of the family working within a family business
- attendees of a period of work experience not exceeding 12 months while undertaking a specified further education course
- Prisoners.

Rate of the National Minimum Wage

The National Minimum Wage is set as an hourly rate. There are five different rates of NMW for different categories of worker, including the National Living Wage which applies to workers aged 25 and over. The NMW rates as of April 2019 are:

- **National Living Wage:** workers aged 25 or over (there is no upper age limit) the rate is £8.21 per hour
- **Standard (adult) Rate:** workers aged between 21 and 24 inclusive, the rate is £7.70 per hour
- **Development Rate:** workers aged between 18 and 20 inclusive, the rate is £6.15 per hour.
- **Young Workers Rate:** workers aged under 18 but above the compulsory school age that are not apprentices, (aged 16 and 17) the rate is £4.35 per hour.
- **Apprentice Rate:** apprentices are those under 19 years of age or those aged 19 and over but in the first year of their apprenticeship, the rate is £3.90 per hour.

To calculate whether the minimum wage has been paid take the following steps:

- The employer should calculate how much gross remuneration the worker has been paid within the pay reference period.
- The employer should calculate how many hours of time work, salaried hours work, output work and unmeasured work the worker undertook in the pay reference period
- The employer should divide the number of hours worked by the gross remuneration paid.

Remuneration

In the context of working out the gross remuneration a daily accommodation offset can be taken into account but in areas other than accommodation employers need to be very careful. The accommodation offset can be implemented for employees who are provided with housing as part of their job. The amount is £7.55 per day or £52.85 per week as at July 2019. If the employer does not make a formal deduction from wages in respect of accommodation, for the purposes of calculating whether or not the minimum wage has been paid, the offset sum is added to the amount actually received by the worker. However, sums deducted from the pay of workers living in employer-provided accommodation to offset the cost of utility bills cannot be counted as part of their wages for the purposes of establishing if they are receiving the minimum wage. This means that further deductions from pay in respect of services such as gas and electricity cannot be treated as part of the minimum wage where the maximum daily accommodation offset has already been taken into account.

When calculating the gross payment to the employee advances of wages or loans, pension payments, payments of awards made by courts or tribunals, unless due under the contract of employment, redundancy pay, or any award under a suggestions scheme should not be included.

Payments which were made during the pay reference period in arrears for a previous payment period should be subtracted as should payments made for periods when the employee was absent from work or taking part in industrial action.

Overtime and shift premiums should also be subtracted. It is a worker's basic minimum wage before overtime enhancement or other allowances that should not fall below the statutory minimum. This applies even in situations where the employee never receives the basic rate because he or she works only at times that attract the enhanced rate.

Allowances (other than allowances attributable to the performance of the worker in carrying out his or her work), should also be subtracted.

Tips, service charges, gratuities, cover charges (regardless of whether or not these items are payable through payroll) and repayment of expenses should all be subtracted.

Deductions made by the employer in respect of the worker's conduct or other deductions which the worker is contractually liable to pay should be subtracted as should deductions which were made for the employer's own use and benefit.

A requirement for a worker to purchase a uniform, or even clothing of specific colours, reduces pay for National Minimum Wage purposes.

Pay Reference Period

If a worker is paid every month or less often (e.g. quarterly), his or her pay reference period is one month. If the worker is paid more often than once per month, for example weekly, his or her pay reference period is the amount of time between his or her pay dates

Hours Worked

The employer now needs to calculate the number of hours of time work, salaried hours work, output work and unmeasured work the worker undertook in the pay reference period.

Time Work

- "Time work" is work that is paid according to any specific period of time, such as hourly paid work or daily paid work.
- Hours that are spent doing time work should be counted. Time absent from work, for example on breaks, should be excluded from any calculation.
- Hours spent available to work, even while working from home, may be counted towards the hours worked for the purposes of calculating the National Minimum Wage. However, the National Minimum Wage regulations state that if a

worker has made arrangements whereby he or she has been provided with suitable facilities to sleep as well as times when sleep will be permitted, then the time when he or she is allowed to sleep will be counted for the purposes of the Regulations only if he or she is actually awake and working during it. The position is different where workers are working and not expected to sleep for all or most of a shift even if there are occasions where they are permitted to sleep (e.g. if they are not busy). In this case it is likely that minimum wage must be paid for the whole of the shift on the basis that the worker is in effect working all of that time.

A worker must receive National Minimum Wage for any time that is spent undergoing bag searches and security checks before or after their shift has finished and for any time when the worker is in training when the worker would otherwise be working.

Salaried Hours Work

- "Salaried hours work" is work done under a contract which requires the worker to do a certain number of hours per year for no money other than basic pay and bonus pay. For this type of work, the worker is entitled to the same remuneration however many hours he or she works, although he or she may be entitled to overtime payment.
- The number of hours for which the employee is entitled to his or her annual salary should be counted by dividing the annual number of hours by 12 (if the pay reference period is a month) or by 52 (if the pay reference period is a week). These hours are the worker's basic hours.
- Hours which the worker has spent at or near to the place of work making him- or herself available for time or salaried hours work, where he or she has done so by arrangement, should also be counted.
- If the worker was engaged in industrial action during the pay reference period, those hours should not be counted.

Output Work

- "Output work" is work which is paid for wholly by reference to output (not output per hour or per day).
- Hours which are spent doing output or unmeasured work should be counted.
- Time spent travelling for the purposes of doing output or unmeasured work (other than between home and work) should also be included.

Employers can no longer use "fair estimate" arrangements that set a rate of pay at 4/5's of the time that it takes an average worker to complete a set of piece work. Instead the employer must either pay the NMW for all the hours worked or pay a "fair piece" rate.

A fair piece rate is now 120% of the national minimum wage for the number of hours that a person working at the mean hourly output rate takes to produce/complete an agreed block of work. This increase ensures that it is not just faster workers who receive the minimum wage.

The employer must be given written notice about the rate at which he or she is expected to work and his or her hourly rate.

Unmeasured Work

Unmeasured work" is any work which does not come within the other three categories immediately above. It includes situations in which the worker is not required to work particular hours or days.

- If the worker and the employer have a "daily average" arrangement in place, then the number of hours set out in that arrangement should be counted instead.
- Hours which are spent doing output or unmeasured work should be counted. Time spent travelling for the purposes of doing output or unmeasured work (other than between home and work) should also be included.

Records

Employers must keep records that show that they are meeting their obligations under the National Minimum Wage Act 1998. Records for national minimum wage or living wage do not have to be kept in any particular format, for example, they can be kept on paper or on computer. However the records are required to be kept in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document. It is entirely possible that employers will be able to use their payroll records to show levels of pay to workers and already have systems to show time worked.

The worker is entitled to inspect the records if he or she has reasonable grounds for believing that he or she has not been paid the national minimum wage.

The records should be kept for three years after the pay reference period following the pay period that the records cover.

Enforcement

The Department for Business, Energy and Industrial Strategy (BEIS) is responsible for minimum wage compliance and enforcement policy and HM Revenue and Customs (HMRC) enforces the National Minimum Wage Act on behalf of BEIS.

Workers can complain about underpayment and seek redress by contacting HMRC or ACAS but also HMRC has various powers to obtain information including inspecting records, entering employers' premises and requiring employers to attend interviews.

Where HMRC find any non-compliance with the National Minimum Wage legislation, it will issue a notice of underpayment which must always include a penalty. The penalty is double the total underpayment (i.e. 200%) for all workers shown on the notice of underpayment. The maximum penalty per worker is £20,000. However, whilst there is a statutory cap of £20,000 per underpaid worker for each penalty notice, there is no limit on the number of penalty notices HMRC can issue in respect of each worker, as long as they are for different periods. This means employers can face multiple fines - the statutory cap of £20,000 per unpaid worker can be repeated without limit.

HMRC/BEIS have been able to name and shame employers underpaying NMW since 2011 and since 2013 have done so in a number of highly publicised instances.

**This information is provided for general reference purposes only.
If you have a specific enquiry relating to this topic please contact Wirehouse on:**

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