

The National Minimum Wage Act 1998

Under the National Minimum Wage Act 1998 all workers in the UK are entitled to a statutory national minimum wage (NMW). This covers all sectors of the economy, and all companies regardless of their size. This guide summarises the legislation.

What employers need to know:

- who must be paid the NMW
- the rate which is applicable
- the pay reference period
- which payments are and are not included
- which hours count
- how to calculate the hourly rate of pay
- which records need to be kept
- penalties for failure to comply

Who must be paid the NMW?

The legislation covers all workers employed under a contract. The contract does not need to be a contract of employment and does not need to be in writing; it may be an implied contract or an oral contract. A worker is someone who undertakes personally to perform work or services for someone else, who is not genuinely self-employed, and who has ceased to be of compulsory school age.

It includes agency workers, homeworkers, casual labourers, part-time workers, agricultural workers*, pieceworkers, commission workers, crown servants and workers on UK registered ships unless employed wholly outside the UK or who are not ordinarily resident in the UK. It excludes share fishermen/women, genuine volunteers, residential members of a religious or charitable community, members of the family working in a family business, au pairs, members of the armed forces and prisoners.

The rate that is applicable

Age	NMW from 1 October 2010
16-17	£3.64
18-20	£4.92
21 and over	£5.93

* the provisions relating to agricultural workers are contained in the Agricultural Wages Act 1948. Currently, special rates apply to agricultural workers as specified by the Agricultural Wages Board. However it is

intended that in due course agricultural workers will fall only within the scope of the National Minimum Wage Act.

These rates generally rise on 1 October every year.

The 16-17 year old rate applies to those above the compulsory school leaving age. In England and Wales a person is no longer of compulsory school age after the last Friday of June of the school year in which their sixteenth birthday occurs. The definition is different for Northern Ireland and Scotland.

The adult rate was extended to workers aged 21 and over (previously it was for aged 22 and over) on 1 October 2010.

Since 1 October 2010, employed apprentices who are under 19 or who are in their first 12 months of employment qualify for a new apprentice minimum wage of £2.50 per hour. This applies to both those on traditional contracts of apprenticeships and employed apprentices on certain government-supported schemes. Non-employed apprentices remain exempt from the NMW.

The pay reference period

A worker does not have to be paid the NMW for each and every hour worked. However, he must be paid the NMW for the time worked averaged over a period of time. Such period of time will be the periodical pay period, as agreed between employer and worker, up to a maximum of one month and referred to as the pay reference period. Therefore those workers who are paid monthly will have a pay reference period of one month. Workers paid daily will have a pay reference period of one day. Those workers who are paid less frequently than every month, such as every three months, will still have a pay reference period of one calendar month. The notion of such a period makes it possible to average out the earnings of workers who are employed on an irregular basis or who are paid by output rather than by time. When a worker leaves his employment, only those wages paid within one month will count towards the NMW pay for the last pay reference period.

Workers may be entitled to a bonus payment or commission (annually/quarterly) as a result of work carried out over a period of time. However, when a payment is received by the worker (for the purposes of the NMW) a proportion of such sum can be calculated as being received in the previous pay reference period only. This may create difficulties in identifying whether the NMW has been paid in a current pay reference period until the end of the next pay reference period.

Example

A worker receives his annual salary in monthly instalments of £900.00 and a quarterly bonus of £300.00 for work performance in the previous three months which he receives at the end of month 3:

	Month 1	Month 2	Month 3
Salary received	£900.00	£900.00	£900.00
Bonus to be taken into consideration for NMW	Nil	£100.00	£200.00

Therefore the hourly NMW pay is the particular month's pay divided by the monthly working time. In month 1 the rate will be considerably lower than in month 3.

Which payments are included?

The NMW will apply to gross earnings and will be calculated before tax and National Insurance contributions. All money payments made in the reference period count towards NMW unless specifically excluded.

Examples of items of pay included:

- basic pay
- productivity bonuses
- profit related pay
- other forms of performance or incentive pay
- union subscriptions
- worker's pension contributions
- accommodation up to the limit of £32.27 per week

Payments excluded from gross pay

These payments which do not count as gross pay, do not count towards the national minimum wage pay:

- a loan
- an advance of wages
- a pension payment
- a lump sum on retirement
- a redundancy payment
- a reward under a staff suggestion scheme

In addition to the payments listed above other elements of pay must be deducted from gross pay before calculating the hourly rate.

- All benefits in kind except for the provision of living accommodation must be deducted whether or not a value is attached to the other benefits. Examples of benefits in kind that do not count include medical insurance, meals and the provision of a car. If an employer provides accommodation to a worker, he can deduct an amount from the worker's pay or can charge the worker for the accommodation. However, any amount above £32.27 (£4.61 per day) does not count towards the NMW.
- A higher premium rate may be paid for a particular job or shift. If this is the case it is the premium element of the payment that does not count towards the NMW pay. The premium element is the amount in excess of the basic rate that is paid to the worker.
- Certain specified allowances over and above standard pay may be paid by an employer and do not count towards the NMW pay unless they are consolidated into standard pay. These could include allowances for working unsocial hours or working under dangerous conditions or for being 'on call'.
- All tips, service charges and gratuities are now excluded from counting towards the NMW, regardless of the way in which they are paid, following new regulations in October 2009.
- Expenses for business; cost of protective clothing or equipment; purchase of materials; purchase of tools; laundering overalls. These payments do not count towards the NMW.

Which hours count?

The regulations provide that the hourly rate that is paid to a worker in any one pay reference period will be determined by dividing the total remuneration paid to the worker in the pay reference period, as calculated in accordance with the regulations, by the total number of hours worked, or deemed to be worked, by the worker in the same period.

However, the hours for which the NMW must be paid depend on the type of work which the worker is doing and the type of work depends on the way in which the worker is paid for the work that is carried out. The rules and calculations of hours will differ for each but the number of hours for which a worker is to be paid in a specified period, not exceeding one month, must be established.

Four types of work exist:

- time work
- salaried hours work
- output work
- unmeasured work

Time work

If a worker is paid according to the number of hours he is at work, the work is treated as time work even though it might vary each day and he is not paid an annual salary. For example, if a factory worker is expected to clock in and out every day then the work he does in that time would count as time work. It is irrelevant whether he is part-time, temporary or casual. The times when a time worker is absent from work should be excluded from the calculation ie sick leave, holidays and rest breaks. However, when the worker is on stand by at or near the place of work or travelling in connection with his work during normal working hours, that time would be included in the calculation of hours for time work.

Salaried hours work

If a worker is paid under his contract for a set basic number of minimum hours in a year and is entitled under his contract to an annual salary and is paid in equal instalments the work is treated as salaried hours work. This would include most office workers and those workers who only work part of the year but are paid in equal instalments throughout the year ie workers in the leisure industry where the work is seasonal. Unlike time workers, hours of absence are counted in for a salaried-hours worker if the worker is paid his normal pay when he is absent. Holidays, lunch breaks and maternity leave are counted towards time when the NMW is payable if they form part of the worker's basic minimum hours under the contract. However, when a worker is away due to sickness and he is paid less than his normal salary then the number of hours must be subtracted from the total hours for which the NMW is payable in the pay reference period. For salaried hours workers whose annual pay is bordering on the NMW it would be advisable to keep a check on the actual hours worked in the year.

Output work

Output workers typically cover pieceworkers, commission workers and some agricultural workers who are paid according to the number of items which a worker makes or the number of sales or deals that he makes. However, if the number of hours are fixed or in any way determined by the employer this would count either as time work or as **output work** which is simply paid for by the hour.

The original option of a 'fair estimate' agreement has been replaced by **rated output work**. Under this system, the employer must test his workers to determine the "mean hourly output rate", ie the average number of pieces of the same type produced or tasks of the same type performed in an hour by his workers. There are specific rules for the way in which an employer can conduct this test.

Once the mean hourly output rate has been established, the number of hours taken by a worker in producing pieces or performing tasks during the pay reference period is treated as being 120% of the number of hours that a worker working at the mean hourly output rate would have taken to produce or perform the same number of the same type of pieces or tasks. This is then used to calculate the piece rate which, for the number of pieces or tasks per hour, must be at least equivalent to the hourly rate of the national minimum wage.

The employer must then give to the worker prior to the start of the pay reference period a notice stating that, for the purpose of securing compliance with the national minimum wage legislation, he will be treated as working for a certain period of time; that the employer has conducted a test of the mean hourly output rate; what the mean hourly output rate is; how much the worker will be paid for each single piece or task; and giving the national minimum wage helpline number. It is for the employer to keep a record of the notice given

and details of the test determining the mean hourly output rate.

Unmeasured work

If the work fits into any of the categories above it is not unmeasured work. Where there are certain tasks to be done but no specified hours or times when they must be done it would be unmeasured work. In effect, it would cover the situation where the employer requires the worker to work when needed or when work is available. This category would cover those workers without set hours or annual salary.

Once again, the employer has the option of either paying the worker for every hour worked or ensuring an agreement is in place before the start of the pay reference period that it covers setting out the daily average number of hours which the worker is to work (a '**daily average agreement**'). However, the daily average number of hours agreed must be realistic and the agreement must be in writing. If the number of hours is challenged it is for the employer to show that the number of hours is realistic. Unless a 'daily average' agreement is reached between the employer and the worker, the employer must pay the worker the NMW for every hour worked and therefore it is essential that proper records are kept.

Calculation of the hourly rate of pay

Once the gross earnings have been calculated in accordance with the above guidelines the employer needs to divide it by the number of hours for which the NMW must be paid and compare the result with the appropriate rate of the national minimum wage.

Which records need to be kept?

All employers must keep sufficient records, including copies of certain agreements, for at least three years. The records do not have to be kept in any particular form but must be able to be produced in a single document on request by the worker or enforcement agency. The records must be sufficient for NMW purposes and also for agricultural minimum wage purposes, as the case may be ie sufficient to establish that the worker is being remunerated at a rate at least equal to the NMW. If there is a dispute, the burden is on the employer to prove that he has paid the NMW to the worker. An enforcement officer may also visit a company and ask to inspect the employer's NMW records or require them to be produced on reasonable notice.

Informing workers about the NMW

There is no requirement to state the NMW pay separately on pay statements. It would be prudent to ensure all staff know the fundamental points of the NMW which can be communicated as the employer chooses. It is suggested that a brief statement is given to all employees or the information displayed prominently primarily to prevent confusion or disputes arising.

What happens if you do not comply?

Under the National Minimum Wage Act 1998 enforcement officers have powers to:

- require the production of NMW records, inspect, examine and copy them
- ask for explanations of the records and for further information
- enter business premises
- remove NMW records from a business for photocopying (this would normally be returned within 7 days)
- require persons to attend before them

- serve notices of underpayment which combine an order for the payment of arrears as well as a financial penalty – see below

If the employer does not comply with the notice of underpayment, the officer may present a complaint to:

- an employment tribunal (for deductions from wages) or
- the civil courts (for recovery on a claim in contract)

on behalf of the worker.

A notice of underpayment will normally be issued for employers found not to be paying the NMW at the time when an enforcement body (such as HMRC) starts its investigation into underpayment of the NMW. The start of the investigation is defined by HMRC as when the compliance officer first contacts the employer, whether in writing or by telephone. The notice of underpayment will require the arrears to be paid to workers and also a penalty to the Secretary of State, except in certain circumstances. This means that employers who are underpaying are liable to a penalty immediately, in contrast to the previous regime where a penalty was only payable if the employer failed to comply with an enforcement notice. The penalty is 50% of the total underpayment but there is a minimum penalty of £100 and a maximum penalty of £5,000. Employers may appeal against a notice of underpayment to an employment tribunal. Employers who fully comply with the notice of underpayment within 14 days of service will receive a discount of 50% on the penalty.

Under new provisions from April 2009, arrears of NMW are now calculated at the current NMW rates rather than the rates that applied when the worker was underpaid.

In a complaint of unlawful deduction there will be a presumption that the worker has not been paid the NMW thus placing the burden on the employer to prove otherwise.

Criminal offences

Under the Act there are six criminal offences:

- refusal or wilful neglect to pay NMW
- failure to keep NMW records
- knowingly falsifying NMW records
- knowingly furnishing false records or information
- intentionally delaying or obstructing an enforcement officer; and
- refusing or neglecting to co-operate with an enforcement officer

These offences may now be tried in the Crown Court where the fine is potentially unlimited.

Claims by workers before tribunals and courts

A worker can bring a claim before an employment tribunal to recover any money which he believes he is owed as a result of not receiving the NMW. Alternately, a worker can go to a civil court to recover the money due to him.

Workers are protected against victimisation or unfair dismissal (without any qualifying period) for assertion of a statutory right. The protection also extends to selection for redundancy on NMW related grounds.

The burden of proof rests with the employer to prove that he has paid the NMW to the worker.

Contact

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