

National Minimum Wage Rises – Why You Should Pay Heed

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- HMRC released the top 10 worst reasons for paying below NMW:
 - The employee wasn't a good worker and so I didn't think they deserved to be paid the NMW
 - It's part of the UK culture not to pay young workers for the first 3 months as they have to prove their worth first
 - I thought it was OK to pay foreign workers below the NMW as they aren't British and therefore don't have the right to be paid it
 - She doesn't deserve the NMW because she only makes the teas and sweeps the floors
 - I've got an agreement with my workers that I won't pay them the NMW; they understand and have signed a contract to this effect

Why are we talking about this?

- HMRC are taking a much more active role in the enforcement of National Minimum Wage breaches
- HMRC campaign/Text Messages
- Few Employment Tribunal claims – HMRC enforcement is the biggest concern



Why are we talking about this?

- It is not as straightforward as asking yourself:

“Do you pay the relevant age-related NMW rate per hour that an employee works?”

- Even if the answer is “yes” you can be in breach.



- The National Living Wage was introduced from 1st April 2016
- From April 2018 the rate rose to £7.83 per hour for workers age 25+.

| Age range | NMW rate 2017 | NMW rate 2018 |
|-------------|---------------|---------------|
| 25 and over | £7.50 | £7.83 |
| 21 to 24 | £7.05 | £7.38 |
| 18 to 20 | £5.60 | £5.90 |
| Under 18 | £4.05 | £4.20 |
| Apprentice | £3.50 | £3.70 |



- Whether someone receives at least the NMW or not depends on if they receive, on average, at least the relevant rate of NMW.
- Calculated based on total pay divided by number of hours worked in a relevant period
- What the period will be depends on what type of worker they are under the NMW Regulations:
 - Time worker or unmeasured worker: pay reference period – i.e weekly or monthly
 - Salaried hours worker: spread over the full year
- Not all remuneration will count towards NMW pay



- Pay that counts towards NMW:
 - Salary;
 - Incentive pay- if they relate solely to the performance of a worker and are made as part of an incentive, sales commission, merit or any performance-related pay scheme.
 - Bonuses.

- Pay that doesn't count towards NMW:
 - Overtime and shift premium
 - Tips and gratuities
 - Allowances
 - Benefits in kind
 - Advances of wages or loans
 - Pensions payments



- NMW pay is also reduced by certain deductions made from pay:
 - Deductions for the employer's own use or benefit – e.g. a deduction for meals or transport provided by an employer.
 - Payments to another person for expenditure connected with the job- e.g. safety clothing, uniforms, tools or other equipment needed for the job.
 - Certain deductions or payments by the worker for accommodation

- Not all deductions/payments reduce NMW, including:
 - Deductions under the contract because of the worker's conduct or any other event, in respect of which the worker is contractually liable
 - Deductions under an agreement for a loan or advance of wages
 - Deductions because of an accidental overpayment of wages
 - Deductions in relation to the purchase of shares, securities, share options or a partnership by the employee

- Clocking in/out systems which calculate deductions in 15 minute instalments
- Working through unpaid breaks
- “On call” time
- Time off in lieu



- Travelling time
- Time attending training
- Additional time at the beginning or end of a shift e.g. to attend team briefings, change into PPE, open and close facilities etc....



Uniform vs Dress Code

- Uniform

If you require workers to wear a uniform, the cost of compliance with this will reduce National Minimum Wage pay.

- Dress Code

If you require workers to comply with a dress code, the cost to the worker of compliance with this will not reduce National Minimum Wage pay.



Uniform vs Dress Code

Uniform – Example 1

A hairdresser requires workers to wear a t-shirt with the shop's logo on it which are purchased from the employer.

The purchase (either by payment to the employer or deduction from the worker's pay) will reduce National Minimum Wage pay.

Uniform vs Dress Code

Uniform – Example 2

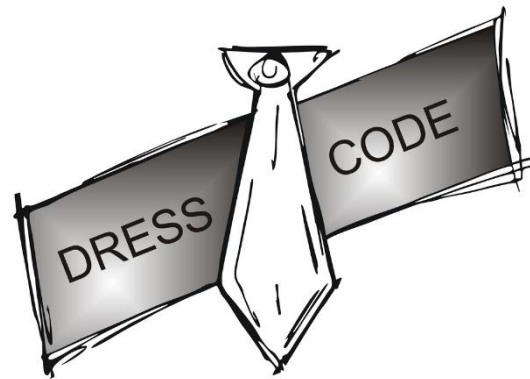
A hairdresser requires workers to wear a uniform consisting of any black trousers and any white t-shirt. Workers can purchase these from any shop.

Will this reduce NMW pay?

Uniform vs Dress Code

Dress Code

- E.g. Smart Casual
- The more prescriptive, the more likely it is to be a uniform requirement



- If an employer provides a uniform, any charge the employer makes for ordinary wear and tear to that uniform will reduce National Minimum Wage pay.
- However, if a worker damages a uniform item, loses it or fails to return it at the end of their employment, any charge in respect of this will not reduce National Minimum Wage pay so long as:
 - ❑ The damage, loss or non return is a result of the worker's misconduct; and
 - ❑ The charge is the result of a contractual requirement.



- Any deduction could be a risk;
- Examples
 - Deposits e.g. Lockers
 - Administrative charges e.g. payslips, attachment of earnings orders
 - Purchase of goods/services from employer e.g. retail/hospitality
 - Colleague lottery
 - Colleague social clubs



- Where a salary sacrifice is in place, the amount of the salary sacrifice does not count toward a worker's National Minimum Wage pay.
- This is because, under a salary sacrifice arrangement, the worker no longer has entitlement to that amount of pay under their contract.
- This is counter-intuitive, since salary sacrifice arrangements are popular with workers as they provide benefits to a worker in a tax efficient way.



An example...

- An employee enters into a salary sacrifice arrangement for the receipt of childcare vouchers.
- The vouchers received do not form part of the employee's remuneration.

By way of contrast...

- An employee has childcare costs deducted from their pay.
- These are paid by the employer directly to a third part (i.e. the Nursery).
- This will not reduce the worker's National Minimum Wage pay, provided that it is the worker's liability to make the payment.

Another example...

- An employee requests to contribute 100% of their earnings into their pension as employee pension contributions.
- This does not effect their pay for National Minimum Wage purposes.

By way of contrast...

- If the payment is made as part of a salary sacrifice arrangement, then the contractual pay received by the employee is zero and the employee would not have received the National Minimum Wage.

Employers can:

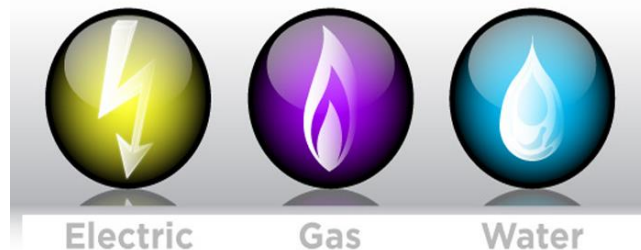
- Deduct rent from the workers pay;
- Charge a specific amount once the worker has received their pay; or
- Provide accommodation on an uncharged basis as part of a package.



- Accommodation provided by employers to workers is the only benefit in kind that can count towards a worker's National Minimum Wage rate of pay – i.e. where living accommodation is provided free of charge, a notional amount is added to a worker's pay.
- The value of accommodation is set at a maximum rate of £6.40 a day (£44.80 a week). Where accommodation is provided for less than a full week, the offset should be pro-rated accordingly.
- If the accommodation charge is at or below the offset rate, it doesn't have an effect on the worker's pay.
- If an employer charges more than the offset rate, the difference does reduce a worker's National Minimum Wage pay.

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- The accommodation offset is intended to discourage employers from recouping the National Minimum Wage paid to the worker by levying excessive accommodation charges.
 - The accommodation offset rate doesn't seek to reflect the actual cost to the employer or the actual value of rent accommodation for the worker. Allowing a market rate would not recognise the advantages to the employer of providing accommodation. Also, the standard and types of accommodation and, consequently, the market value of accommodation can vary considerably.

- Additional Charges
- Any charges the worker is obliged to pay as a condition of being provided with accommodation, including amounts for gas, electricity, water and provision of furniture, will reduce that worker's National Minimum Wage pay.



- Allows employers to calculate NMW based on average hours and pay over the year
- Does not capture everyone receiving a ‘salary’.
- Only salaried hours contract where:
 - Hours required to work during the year are ascertainable
 - Only paid salary (with some exceptions)
 - Paid in equal weekly or monthly installments

WARNING 1 – Ascertainable Hours

Salaried hours contracts must contain an ascertainable number of hours per year. Otherwise, workers will not be deemed to be working salaried hours work.

Some contracts express the number of hours as a number of weekly hours. HMRC do not consider that this enables workers to ascertain their annual number of hours, since it is not a straightforward calculation (there are 52.2 weeks in a year).

Ensure, therefore, to either (i) state the exact number of hours to be worked in the year; or (ii) express the number of hours as a number of monthly hours.

WARNING 2 – Overtime Hours

- Where a salaried hours contract states that a worker is contracted to work Monday to Friday, any hours worked at the weekend will be overtime hours.
- Any such overtime hours will not be salaried hours worked and so an employee will need to be paid the national living wage (at least) for each hour worked.



WARNING 2 – Overtime Hours

- At the end of the salary year, it might be that a worker works hours over and above the number of hours provided for in their salaried hours contract.
- These hours will be overtime hours.
- In any month that a worker works overtime hours, the number of hours worked by a worker are deemed as (i) 1/12th of the hours under their annualised hours contract, plus (ii) overtime hours.
- The worker must be paid enough so that they receive the national living wage for each hour worked.

WARNING 3 – Interplay between ascertainable and overtime hours

- A contract will not be a salaried hours contract if it specifies a minimum number of hours to be worked and provides that further hours must be worked as necessary or when required.
- This is because, in that instance it is not possible to ascertain the exact number of basic hours to be worked for the annual salary.
- The safest option is for the contract to stay silent on the question of overtime, or to state that the worker will be paid a basic rate for any overtime worked. Any payment in this respect will need to be paid in the pay reference period in which the overtime is worked, or at the latest in the following pay reference period.

Consequences for a failure to comply with the National Living Wage

- Arrears Payment (to employee)
 - Can go back as far as 6 years
 - Covers both current and former employees



- Penalty Payment (to HMRC)
(penalty reduced by 50% if arrears and penalty paid within 14 days)
 - £100 minimum penalty
 - Current maximum penalty is 200% of the underpayment but is capped at £20,000 per worker

1. Potential Criminal Charges

- E.g. for persistent non-compliance or refusal to co-operate with HMRC compliance officers
- Unlimited fine if found guilty

2. Naming and Shaming

- HMRC refer case to BEIS
- “Named and Shamed” on Government Website
- Negative publicity

3. Employment Tribunal Claim

When are businesses audited?

- Either arise following a complaint or if it's your 'turn'
- Certain sectors being targeted – retail & leisure, hospitality, care, manufacturing

What will audit look like?

- Initial meeting with HMRC Officer assigned to case
- HMRC review of policies and procedures
- Interview of employees
- Report back findings and any identified breaches
- Fine & penalty v self-correction



HM Revenue
& Customs

How to prepare?

- Undertake an internal review of pay and practices to identify areas of risk
- Where areas of risk are identified, can you mitigate that risk?
- Identify documents HMRC likely to want to see
- Have the right people attending the meeting and make sure properly briefed

BUT...

- Recommend undertaking this audit before HMRC contact you

- Report prepared for the Government

It recommends:

- Higher financial penalties for non-compliance – potentially in line with a company's annual turnover;
- Enforcement fees charged to non-compliant employers;
- Greater use of naming and shaming and more detail of breaches;
- Absence of or failure to keep records is now a standalone offence; and
- Companies to bear joint responsibility for non-compliance further down the supply chain.

Recommendation



- The remaining list of top 10 worst reasons for non payment of NMW:
 - My accountant and I speak a different language – he doesn't understand me and that's why he doesn't pay my workers the correct wages.
 - My workers like to think of themselves as being self-employed and the National Minimum Wage doesn't apply to people who work for themselves.
 - My workers are often just on standby when there are no customers in the shop; I only pay them for when they're actually serving someone.
 - My employee is still learning so they aren't entitled to the National
 - The National Minimum Wage doesn't apply to my business



Questions?

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Global Coverage

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■ Office locations

■ Regional desks and strategic alliances

