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Member Brief No 161

National Minimum Wage – Key points for Labour Providers

Introduction

This Brief provides a general overview of the National Minimum Wage (NMW). It does not deal in detail with accommodation related NMW issues, transport related NMW issues or the Agricultural Minimum Wage, the National Living Wage and Discrimination all of which are covered in separate ALP Briefs.

[The National Minimum Wage Regulations 2015](#) is the primary legislation, with straightforward [GOV.UK guidance](#), more detailed BEIS guidance [Calculating the minimum wage](#).

The Low Pay Commission (LPC) is an independent body that advises the Government about the NMW. The LPC submits an annual report to the Government, in which it makes recommendations on the future level of the minimum wage and related matters. The ALP makes [annual submissions](#) to the LPC.

Workers who wish to ask questions about the NMW or make complaints of non-payment of NMW may contact the free and confidential Acas Helpline [online](#) or by phone on 0300 123 1100 who will, if necessary, pass the enquiry onto the relevant enforcement body.

Members may wish to contact the ALP with their NMW queries.

FUNDAMENTAL POINTS

1. For NMW purposes, the employer is generally whoever pays the worker.
2. Employers are required by law to ensure that their workers are paid an hourly rate of pay which is no less than the current NMW rate.
3. NMW rates change on 1st April each year. The hourly rate of the national minimum wage at which a worker is entitled to be remunerated as respects work, in a pay reference period, is the rate which applies to the worker on the first day of that period.”
4. Apart from accommodation provided by the employer, national minimum wage legislation does not allow payments in kind to count towards the NMW rate. Employers must keep sufficient records to prove that they are paying the NMW to their workers for the current tax year and at least 6 prior years.
5. With the exception of a scale rate for accommodation costs, any deduction from wages that in anyway benefits the employer, directly or indirectly, will reduce the pay that counts towards the NMW Rate.
6. Employers must not force or persuade any worker to agree to or accept a wage below the NMW. The law prevents workers from signing away their rights to the NMW. Contracts for payments below the minimum wage are not legally binding. The worker is still entitled to the

minimum wage.

7. A worker who believes he/she is not getting paid the NMW is entitled to request, see and make copies of relevant records which the employer must hold; if the employer fails to produce any of the relevant records to a worker on request, the worker may complain to an Employment Tribunal, which can then impose a financial penalty on the employer.
8. Employers may be required by an NMW Enforcement Officer, an Employment Tribunal or by a Civil Court to produce evidence that they have paid the NMW to their workers.
9. Workers can make a complaint of non-payment of NMW to the Acas Helpline, or take their case to an Employment Tribunal or a civil court independently. The employer will then have to defend any such claim.
10. It is against the law to dismiss or subject a worker to any form of detriment in connection with any query or challenge regarding NMW. The burden will always be on the employer to prove that the NMW has been paid.
11. The Government will publicly name all employers who have been issued with an NMW Notice of Underpayment by HMRC unless there are very exceptional circumstances.

ENFORCEMENT

The Critical GLA Licensing Standard 2.2 requires that: “A worker must be paid at least the National Minimum Wage (NMW) or, if applicable, in accordance with the appropriate Agricultural Wages Order (AWO). Sufficient records must be kept to prove payment of NMW or in accordance with the appropriate AWO.” Failure against this standard by a Labour Provider will incur a 30 point breach of its licence, which is likely to lead to their licence being revoked by the GLA without immediate effect.

HM Revenue and Customs (HMRC) enforce these Regulations through dedicated teams. Their officers have the right to carry out checks at any time and ask to see payment records.

They can also investigate employers as a result of a worker’s complaint to them and may issue “notices of underpayment” to employers where they consider an employer has not paid their workers, or former workers, the NMW according to the [Policy on HM Revenue & Customs enforcement , prosecutions and naming employers who break National Minimum Wage law](#).

If HMRC finds that an employer hasn’t been paying the correct rates, any arrears have to be paid immediately.

There will also be a financial penalty, up to a maximum of £20,000 per worker based on the value of the underpayment.

It’s the employer’s responsibility to keep records proving that they are paying the minimum wage; most employers use their payroll records as proof. All records have to be kept for 3 years but it would be prudent to keep them for at least the 6 years potential investigation span.

In the most serious cases employers can be prosecuted. There are six criminal offences arising from the NMW: refusing or wilful neglect to pay the NMW; not keeping records; keeping false records; producing false records; obstructing an enforcement officer; and refusing or neglecting to give information to an enforcement officer.

In January 2011, BIS introduced a “Name & Shame” scheme. Under the scheme, BIS publishes the names of employers who break NMW law.

As a basis of their Risk Based Approach to compliance the GLA liaise regularly with HMRC on all matters including NMW enforcement.

Workers may pursue an employer through Employment Tribunals or the civil courts. The burden of proof is on the employer to show that NMW was paid.

WHO IS ENTITLED TO THE NMW

Most workers over compulsory school age working in the United Kingdom are entitled to be paid at least the current NMW rate for their age by their employer.

Some agricultural workers may be entitled to be paid more than the NMW if there is a higher agricultural minimum wage in force.

There are [different rates of NMW](#) depending on age and status as an apprentice.

Certain groups such as self-employed people running their own business, company directors and voluntary workers are outside the scope of NMW. Further [rules](#) apply to prevent abuse.

HOW THE NMW IS CALCULATED?

Compliance with the NMW regulations depends on the worker's hourly rate calculated on the basis of the **Total Remuneration** earned over the relevant **Pay Reference Period** (PRP) divided by the total number of **Hours Worked** in the PRP.

PAY REFERENCE PERIOD

The PRP is the period used for calculating hourly pay and equates to the contracted normal pay period i.e. workers paid daily will have a PRP of one day, workers paid weekly will have a PRP of one week and workers paid monthly will have a PRP of one month. The PRP cannot exceed one month.

The worker does not have to be paid the NMW for each hour worked, but must be paid the NMW on average for every hour worked in the PRP.

If a payment is made more than one PRP after the period in which it was earned then it cannot be linked back to the PRP in which the work was performed and must count in the PRP in which it was actually paid.

For example, an employer pays workers weekly and so its PRP is 1 week. At the start of week 4 the worker is paid 3 weeks in arrears. The pay received for weeks 1 and 2 will be considered against the hours worked in week 4 even though the amount of pay is based on the hours worked in week 1 and 2 (because those weeks are more than one PRP back). This would result in the worker having no payments counting towards NMW pay for weeks 1 and 2 and thus the employer has not meet their NMW obligations to the worker. The pay for week 3 will be divided by the hours worked in that week, as it is not more than 1 week in arrears. There are exceptions to this.

TOTAL REMUNERATION

Most payments paid to the worker in his capacity as a worker by the employer (before the deduction of PAYE income tax and National Insurance contributions only) initially count towards Total Remuneration when calculating NMW pay.

These include normal pay, payments for breaks, allowances consolidated into normal pay, bonus and incentive payments related to the performance of the worker in carrying out his work,

Payments by the employer that do not count towards the Total Remuneration for NMW pay include:

1. The premium element for working at a particular time, for example for working overtime, weekend or night shifts, or on Bank Holidays. To calculate the premium element, subtract

the lowest basic rate that is paid to the worker from the worker's actual rate of pay. The result - the premium - does not count towards NMW pay.

2. Special allowances over and above standard pay that are not related to the employee's performance, for such things as working in dangerous conditions; working unsocial hours; London weighting; being "on call" for work; for clothing, travel, subsistence etc.
3. Refunds to a worker which the worker has spent on something to do with his job, for example, when an employer refunds a worker for travel expenses, laundry costs or the price of tools or equipment which the worker has purchased from someone else.
4. Pension payments.
5. Tips and gratuities.

DEDUCTIONS FROM PAY AND PAYMENTS

A deduction is an amount of money which is taken by the employer directly from a worker's pay before they receive it.

Deductions by the employer that do not reduce the Total Remuneration when calculating NMW pay:

1. Tax and NI – The employer must make deductions from the worker's pay for income tax and employee's NI contributions. Such deductions do not reduce NMW pay.
2. Deduction of a penalty - If the employer deducts a sum from the worker's pay because of some event related to the conduct of the worker and they are permitted to do so under the terms of the worker's contract, the deduction do not count towards NMW pay (N.B. Though such deductions are regarded as being in breach of ethical labour standards codes).
3. Deduction for an advance of wages - If the employer has provided an advance of wages and subsequently deducts a sum for repayment of all or part of the advance, the deduction is ignored in calculating NMW pay.
4. Deduction to recover an accidental overpayment of wages - If an employer accidentally overpays a worker and then makes a deduction from the worker's pay to recover the overpayment, the deduction is ignored when calculating NMW pay.
5. Deductions (or payments) to offset the cost of providing living accommodation (the Accommodation Offset) under specific conditions. See ALP Brief "The Accommodation and The Minimum wage" for details.
6. Deductions that are not for the employer's own use or benefit - A worker may request the employer to automatically deduct from their wages and pay to a third party on their behalf for certain monies due, for example, a union subscription or the worker's pension contribution. Such deductions from wages do not reduce NMW pay, so long as they are for the exact cost, are not for expenditure connected to the employment and are not for the employer's own use or benefit. Student loan repayments or court orders may fall into this definition.

NB Please note that other legislation requires that:

- The provision of work-finding services must not be conditional on the worker hiring or purchasing services or items from the labour provider or from any person with whom the labour provider is connected.

- Before the services or items are provided, the worker must be given comprehensible details explaining what they are and including costs charged and the worker must agree in writing to the charge or deduction.

Deductions by the employer that do reduce the Total Remuneration when calculating NMW pay:

1. Deductions for expenditure connected with the job - Deductions which an employer makes to cover the cost of goods or services that are necessary for the worker's job reduce NMW pay. For example, deposits for protective equipment provided or mandatory uniforms. The employer must pay the worker the NMW in addition to the cost of these.
2. Deductions for the employer's own use or benefit - If the employer makes any deduction from the worker's pay which is for the employer's own use or benefit i.e. the money goes into the employer's pocket in any way, the amount deducted will not count towards NMW pay. For example contributions towards the cost of transport to work deducted at source. This applies even if the service is optional.

Payments by the worker that do reduce Total Remuneration for NMW pay:

A payment is money paid by the worker to the employer separately to a deduction from pay such as payments in cash, by cheque or by direct debit

1. Payments for expenditure connected with the job - If the worker has to pay for goods or services from his employer in order to do his job, the employer must pay the worker the NMW in addition to the cost of the items.
2. Payments made by the worker to another person - If the worker has to pay for goods or services from another person in order to do his job and the amounts are not reimbursed by the employer, the value of the payments made have to be taken away from the amount that counts towards NMW pay.
3. Payments by the worker to the employer for the employer's own use and benefit - Payments which the worker is required to make and which the employer keeps for his own use and benefit (e.g. it reduces costs) have to be taken away from the amount that counts towards NMW pay.

Payments by the worker that do not reduce Total Remuneration for NMW pay:

1. Goods and services provided by the employer - A worker may want to buy goods or services from his own employer. If the worker is free to choose whether to buy from his employer or from somewhere else and the goods or services do not have to be bought under the terms of the worker's contract or under any other requirement imposed by the employer in connection with the employment, then the amount of the purchase price is not taken away from the worker's Total Remuneration for NMW pay. For example purchases in a staff shop or buying scheme.

HOURS WORKED IN THE PAY REFERENCE PERIOD.

The Hours Worked are based on those hours the worker performs work, or is required to be at work, excluding rest breaks.

The definition includes in Hours Worked:

1. That time in which workers turn up to work as required and who are available for work. It makes no difference whether or not work is actually provided for that time.
2. That time spent on standby or on-call at or near the place of work for the purpose of doing

time work e.g. an agency worker told to wait at a factory for when work is available. This rule is subject to certain exceptions.

3. That time in which a worker is kept at his place of work but is unable to work because for example machinery has broken down or because the picking or grading of potatoes cannot be done because of bad weather.
4. Some periods of travel time including:
 - i) Time spent travelling in connection with work during normal working hours or the normal range of hours that the worker does.
 - ii) Time spent waiting for transport
 - iii) Time travelling from one work assignment to the next
 - iv) Time spent waiting to collect goods, to meet someone in connection with his work or to start a job.
 - v) Time spent at training or induction at the employer's request or requirement, at or away from the place of work during normal working hours and for the time travelling from the place of work to the place of training during normal working hours.

The definition excludes from Hours Worked:

1. Time on standby or on-call when the worker is entitled to be at home (even if they are not) and they are not actually working or regarded as working. Special rules can apply in certain circumstances.
2. Time spent travelling to and from the place of work.
3. Any period when the worker is absent from work. Recognised lunch and other rest breaks are regarded as absences from work, even if work is done during this time. However, this does not mean that the worker cannot be paid for breaks; it means that in calculating the Hours Worked for NMW purposes, the length of the rest breaks and any payment for the absence are ignored. However, if a worker is required to work in a rest break, NMW must be paid for any time worked.
4. Periods when the worker is on holiday, sick or on maternity leave. Neither the money received for such absences from work, nor the length of the absences themselves, are counted when calculating the NMW pay. However, the normal rules governing statutory paid holidays, sick pay and maternity pay apply.

Other payment schemes

- b) Piece rate workers, paid by the number of things they produce or pick rather than the number of hours they work, must be paid at least the NMW or a fair piece rate. There are special rules for working out a fair piece rate. Employers must keep records of all hours worked and all work performed and correlate this to demonstrate that piece rate workers earn at least the NMW in the PRP.
- c) Some workers are paid entirely or partly on the basis of sales made or deals completed. These "commission workers" must also be paid at least the NMW.

See [NMW - Different types of work](#) for details

Charging workers for items needed to do their job

Often Labour Users require the Labour Provider to ensure that a worker has specified items which have a cost which the Labour User or Provider does not wish to bear. These necessary costs

should be included in the commercial negotiation between Provider and User, bearing in mind the impact of the NMW regulations above.

- a) Personal Protective Equipment - PPE must always be provided to the worker free of any charge, without a deposit. It must be maintained in proper condition and replaced when faulty. It is permissible to reclaim the cost of items not returned or damaged provided there is an agreement to do so prior to its issue. See below.
- b) Locker Keys – to store personal items, Identity Cards / Key Fobs / Swipe Cards – to gain site access, Work Wear / Uniforms.

Any deduction from wages for such items, or requirement to purchase from an employer or from a third party, will reduce the Total Remuneration in the PRP and could place workers at or near NMW pay rates below the rate, causing an offence. This is because such deductions or payments are necessary to do the job and/or the payment/deduction is to the benefit of the Labour Provider i.e. reducing costs.

Charging workers a refundable deposit

A Labour Provider may charge the worker a refundable deposit, to be retained if the item is not returned at the end of the assignment in a reasonable condition, barring fair wear and tear. This will require a written agreement and must not be operated as “a fee to a worker for any work-finding services”. The amount of the deposit will reduce NMW pay in the pay reference period in which it is charged, regardless of whether it is charged by a deduction or payment.

Deductions from pay

The Labour Provider may make a deduction from wages (but not holiday pay) if the item is not returned at the end of the assignment in a reasonable condition, barring fair wear and tear.

If the worker fails to return an item issued to them or does not return it in acceptable condition, then the deduction of a specified amount relating to the actual cost of this item net of VAT from wages will not reduce NMW pay, provided the details of the arrangement have been clearly set out and agreed previously in the worker’s contract or other document.

EXAMPLES

The following payments **DO** reduce the NMW:

- Requiring that the worker pays the labour provider £5 in cash for keys for a locker at the Labour User’s site.
- Making a deduction from the worker’s pay of £5 for a set of locker keys at the Labour user’s site, to be withheld on the non-return of those keys.
- Demanding an up-front cheque payment of £60 for the provision of work wear/uniform before work is commenced.
- Deducting £100 from a worker’s pay for the provision of work wear / uniform (non PPE).
- Asking the worker to pay £15 for a new work t-shirt due to the old one being damaged.
- Stating that the worker must buy and pay the Labour User for work wear / uniform.
- Telling the worker that they have to go to buy their non-PPE and uniform from a shop in the local town centre.
- Taking £10 per week out of the worker’s pay for food purchased by him from the Labour User’s canteen or barring the worker from leaving the work premises during working time to purchase food or to bring food onto the work premises site and so in effect require the worker to purchase food from the site canteen.

- Deducting £20 from a worker's pay through payroll for the cost of a waterproof jacket.
- Deducting £5 per week from a worker's pay through payroll for the use of metal capped boots when the worker is on site.
- Deducting £65 at the end of a worker's contract for the cost of replacement of damaged work wear / uniform, where the worker has already been charged for this item.
- Deducting 50p per day worked from the worker's pay as a contribution to the cost of transport to site.

The following payments **DO NOT** reduce the NMW:

- The worker repays a £100 loan made to him by the employer. It will depend on the facts whether HMRC considers payments described as a loan by the employer or third party to be a loan within its interpretation of that word.
- The worker is overpaid £50 one week. He pays that back in cash to the employer;
- The worker decides to buy his lunch from the end user client.

Please contact the ALP if you would like to discuss any of the points raised in this Brief.

Please note that this document is not exhaustive and provides a general overview concerning the regulations relating to the National Minimum Wage. It is not intended to be used as a substitute for legal advice. To the fullest extent permissible by law, ALP and its advisors hereby exclude all liability for any claim, loss, demands or damages of any kind whatsoever (whether such claim, loss, demands or damages were foreseeable, known or otherwise) arising out of or in connection with the use of any of these documents and/or the information, content and/or advice included within these documents.