ICAEW
REPRESENTATION 28/19

NATIONAL MINIMUM WAGE: SALARIED WORKERS AND SALARY SACRIFICE SCHEMES

Issued 1 March 2019

ICAEW welcomes the opportunity to respond to the National minimum wage: consultation on salaried workers and salary sacrifice schemes consultation published by the Department for Business, Energy & Industrial Strategy (BEIS) on 17 December 2018.

NMW policy is not correctly applied because NMW legislation 'belongs' to BEIS but is being enforced by HMRC without regard to policy intent

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KEY POINT SUMMARY

1. We welcome this consultation and set out our recommendations to help resolve the issues raised but feel that bigger steps are needed to create a sustainable regime for the long term.

2. As to points raised in the consultation, on salaried hours worked we recommend that:

   - In the interests of flexibility, any payment cycle should be allowed, rather than, as at present, only weekly and monthly;

   - In the interests of business efficiency and to obviate employer confusion, commissions, overtime, allowances, unsociable hours premia, etc., should all be counted for national minimum wage;

   - The calculation year should be abolished, failing which aligned with the tax year, subject to being able to be adjusted where necessary, eg, where remuneration is paid in an earlier tax year because the normal payday is on a non-banking day in the following tax year.

3. Salary sacrifice benefits lower paid workers comparatively more than higher paid workers because it helps them to access goods and services, frequently from their employer at discounted rates, and to make pension contributions that they otherwise may not be able to afford. NMW rules need to be changed so as not to discourage employers from allowing such workers to participate in salary sacrifice and other optional remuneration arrangements (OpRA).

4. Compliance problems for employers arise from how HMRC applies the rules, in particular around payments for the benefit of the employer in reg 12 NMW Regulations 2015, study time, pre-apprenticeship employment, uniform and dress codes.

5. Either enforcement should be removed from HMRC or NMW law should incorporate management powers to ensure that HMRC when enforcing compliance can adopt an approach that achieves NMW policy intentions without penalising employers for technical breaches which actually benefit employees.

6. To create a sustainable regime in the longer term, NMW law, guidance and enforcement need a comprehensive review to ensure that:

   - they achieve their objective of protecting vulnerable workers from exploitative pay practices and permit rather than outlaw pay practices that are beneficial to both employees and employers, including allowing any pay frequencies and reasonable contractual arrangements that are commonly present in 21st century business;

   - the guidance includes practical real-life case studies and covers inter alia pensions and how to remedy a NMW compliance failure from a PAYE perspective; and

   - the policing of NMW is undertaken by an agency under the direct control of BEIS so that the law is enforced in accordance with the policy intent.

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GENERAL COMMENTS

Towards a sustainable regime for the longer term

7. We welcome this consultation but believe that it is missing an important issue regarding the enforcement of the national minimum wage (NMW). This is that the legislation 'belongs' to BEIS, but enforcement is performed by HMRC.

8. The split between the Department which makes the law, ie BEIS, and the Department which enforces it, ie HMRC, has an unfortunate consequence, namely, that HMRC says that it has no power over how it enforces the regulations and, therefore, applies a very dogmatic and inflexible approach.

9. This contrasts with HMRC's approach to, for example, tax investigations where their officers use management powers to smooth rough edges of legislation.

10. We believe that if enforcement is not removed from HMRC, management provisions similar to those available to HMRC for tax need to be given to HMRC for NMW so that HMRC can take a similar approach to NMW enforcement as their officers do for tax purposes.

11. The reason for our recommendation is that in meetings that our representatives have held with HMRC NMW technical staff to try to understand their approach, we have concerns that they are reading into the legislation requirements and prohibitions that are not there and were not the intention of Parliament.

12. This is of particular concern in terms of Regulation 12 of The National Minimum Wage Regulations 2015 (SI 2015 no.621) (NMWR 2015) 'Deductions or payments for the employers own use and benefit'. Members have experience of employers who have been told that they cannot permit voluntary deductions from net pay for items such as goods sold at a discount to staff and employer-provided services as these are 'for the benefit of the employer'. Clearly they are for the benefit of the employee, and HMRC's approach actually denies low paid and vulnerable workers access to benefits and services provided to them by their employer at a discount.

13. The following actual example serves to illustrates the point:

    An employer employed three ex-convicts who were unable to rent private accommodation due to their criminal record. The employer offered to rent them one of his flats above the workplace and the employees asked that the rent be deducted from net pay to ensure that it was paid before they had access to the money. The employer was subject to an HMRC NMW audit and was named and shamed as non-compliant as the rent caused pay to fall below NMW. There appeared to be no solution to this so those employees were made homeless as even payment of rent outside the payroll is seen as an NMW breach.

14. This approach adopted by HMRC both penalises vulnerable workers, which is not what the legislation set out to do, and interferes in the day-to-day commercial transactions of business. The legislation permits social landlords, eg housing associations, to rent properties to their own employees and not be in breach of NMW legislation, but does not offer the same easement to any other employer who is also a private landlord. This is particularly problematic for the higher and further education sector where properties are let to students who are also staff – a strict reading of the legislation does not permit a student to pay for their student accommodation if also employed by the university or college, eg doing bar work, as this would breach NMW.

15. We would suggest that there needs to be a root and branch review of the NMW legislation that takes the following as its terms of reference:

a) Is the legislation as currently written delivering on the objectives to protect vulnerable workers from exploitative pay practices?

b) Does the legislation permit, rather than outlaw, pay practices that are beneficial to both parties in:

   i. the changing nature of work,
   ii. reflecting benefit in kind provision,
   iii. remote and flexible working, and
   iv. lifelong learning to enhance skills, and

c) Does the legislation accommodate all pay frequencies and contractual arrangements present in 21st century businesses?

16. To focus on small technical changes as this consultation does is welcome as far as it goes but will not address the fundamental issues which are:

    a) The policing of NMW needs to be removed from HMRC to an agency under the direct control of BEIS, as proposed by the government's Good Work Plan.

    The Labour Market Enforcement Strategy 2018-19 report by Sir David Metcalf highlights the challenge of three different agencies, sponsored by different government departments, carrying out enforcement work. HMRC has by far the largest team at 399 and in 2016/17 opened over 5,500 cases of which half are still open. The fact that 50% are still unresolved indicates that many cases are challenged by employers and their advisers in the interpretation of the law. The time taken to resolve issues is having a serious impact on UK plc's productivity, as the cost impact of an outstanding NMW case can run to millions of pounds.

    By way of example, we would draw attention to the sleep-in case *Royal Mencap Society v Tomlinson-Blake [2018]* EWCA Civ 1641 for evidence of the financial impact for the care sector. Employers in this sector were subjected to guidance that kept changing and even before the legal process concluded were asked by HMRC to sign up to a disclosure scheme that offered no penalties if arrears were settled. The Court of Appeal decision indicates that HMRC acted prematurely in collecting any arrears.

    b) The guidance suffers from lack of clarity. This was noted in the Metcalf report referred to above with a recommendation that this needs to be rectified.
    The guidance needs to be rewritten in conjunction with all interested departments and stakeholders showing practical real-life case studies.

    The guidance should also address how to remedy an NMW compliance failure from a PAYE perspective, and pensions too as the Pensions Regulator considers that auto-enrolment obligations arise on the arrears.

17. This we believe would make enforcement more efficient and enable HMRC to concentrate on deliberate evaders rather than spending time on technical breaches even where the employer and employee both believe they have acted lawfully, for example, where a timing error has caused a technical breach but the employer has paid the correct total remuneration, albeit not necessarily in the correct basis period.

18. We note that HMRC has been reported following the recent Middlesborough Football Club season ticket case as saying that NMW legislation is protective legislation and that no worker can agree to receive less than the relevant NMW rate, that 'the legislation does not draw a distinction between breaches arising from uncertainty or mistake and deliberate underpayment which means HMRC has no discretion to make these distinctions ... Employers are either compliant and pay their workers correctly, or they do not.' and 'HMRC is unapologetic in its enforcement of national minimum wage for workers, and will ensure that we do everything we can to get people the money that they are legally due…'.

19. However we consider that this approach is neither in accordance with the policy nor within the spirit of the NMW legislation, which is intended to protect employees from exploitation.

20. In particular, we believe that where an employee has agreed voluntarily to or has requested a deduction from net pay to pay for an employer-provided benefit, such as a holiday or Christmas savings fund, or goods or services (eg food, white goods, a football season ticket) that the employer sells to employees, often at a discount or a specially-negotiated price with the payments frequently taken in instalments to make them more affordable to employees, these payments should be ignored when calculating whether the employee has received NMW. This would make the treatment of such deductions consistent with payroll deductions in favour of third parties, such as pension contributions and medical insurance payments.

ANSWERS TO CONSULTATION QUESTIONS

Salaried work

Salaried hours work

Question 1 Should the Government amend Regulation 21 (5) to allow other payment cycles?

21. Yes, the government should allow other all payment cycles as allowed for in tax and NIC compliance in order to reflect the reality of how people are paid.

Question 2 If you answered yes to the question above, what payment cycles should be permitted in the regulations?

(a) Fortnightly?

22. Yes.

(b) Four weekly?

23. Yes.

(c) Any equal and regular period of one month or less?

24. Yes.

(d) Any other payment cycles? (please give details)

25. We can see no objection to any regular cycle that is being used to pay the employee.

26. HMRC currently does not accept that any pay cycle other than weekly or monthly is compliant and yet have not undertaken any work on this basis within sectors that routinely pay on different frequencies such as higher education where quarterly and termly payments are the norm.

Question 3 Would the inclusion of additional payment cycles assist employers to comply? (please give details)

27. Yes, because they would match the normal payroll cycle.

28. The starting point of this question should be that employers will always need to pay people in a variety of pay frequencies and cannot simply change them based on a legislative requirement.

29. The legislation needs to be framed in such a way that compliance with NMW requirements can be ascertained easily by the employer and the enforcement agency for any pay frequency. Failing a change to the law to enable any commonly-used and reasonable pay frequency to be NMW compliant, we believe that, as explained above, a more common-sense approach to enforcement is needed with HMRC having management powers.

Question 4 Would the inclusion of additional payment cycles cause any detriment to workers? (please give details)

30. No. We can think of no instance in which it would cause detriment to workers. On the contrary, it would make it easier for employers to comply and better align with intended NMW policy.

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Question 5 Do any of the other conditions for salaried hours work listed overleaf lead to unintended consequences? (please explain why)

31. Yes. We are not aware of any employers who have compliant salaried hours contracts; no one shows annual hours on the face of a contract for a salaried worker, nor anywhere else. Salaried workers are paid on the basis of a weekly number of hours and an annual salary. Employers are mystified when HMRC says these are non-compliant contracts and then insists that all employees earning around £20,000 or under will be the focus of a check to determine exactly how many hours are worked each month and that this will lead to arrears and naming and shaming.
32. HMRC has also misinterpreted phrases in contracts such as ‘may be required to undertake additional hours as requested by the employer’. HMRC says that these phrases mean that the workers are unmeasured workers, not salaried workers, so must have every hour recorded and paid at NMW. However, in the workplace, these phrases are standard contractual clauses for salaried workers that are not seen as exploitative by the employer nor the worker but are recognition that work pressures may occasionally require additional time to be worked. Employers and employees manage between themselves freely to negotiate whether these should lead to overtime payments, time off in lieu or other recompense, and we are not aware of any tribunal cases as a result of salaried workers feeling exploited as a result of this phraseology.
33. We question why the legislation allows for only a bonus to be permitted to be paid in addition to the annual salary and not other annual amounts such a first aid or fire warden retainer and recommend that this should be rectified.

The calculation year

Question 6 Would the calculation of salaried hours work be easier (for employers, and workers) if regulations set a single uniform ‘calculation year’ (i.e. the same calculation year for all workers of an employer)? (please give reasons for your answer)

34. No, because no employer understands the concept of a calculation year, let alone a year which aligns with the date on which an employee first started. Employers therefore do not police it and records are not kept in HR or payroll systems to allow this to happen. If an employee is engaged on a salaried basis that is the end of the matter for an employer. As they do not realise they have to calculate annual hours – only weekly – then it follows they do not know when those annual hours have been breached.
35. If the government persists in the requirement for salaried workers to have annual hours then there will be to be major redesigning of HR, payroll and time and attendance (T&A) systems to record and police when that annual figure is breached. If that is the policy intention, then it makes sense to align this calculation to the tax year, but we question what it sets out to achieve.
36. If the calculation year were to be kept and aligned with the tax year, allowance would need to be made for when the first contractual pay day of the following tax year is a non-banking day and consequently the income is paid early and in the prior tax year (as will happen on 6 April 2019). This change should not be regarded as an NMW underpayment just because the funds were paid in a different year. For consistency the payment should be viewed as having been paid in the second year. We do not want a repeat of the issues currently arising with universal credit (UC) due to the problems with aligning remuneration payment dates and UC assessment periods, which had to be resolved in *Johnson & Others v Secretary of State for Work & Pensions* [2019] EWHC 23 (Admin).
37. Having a calculation year based on an employee’s start date needs to be abolished.

Question 7 If you answered yes to the question above, should the single uniform calculation year be:

(a) The calendar year (1 January to 31 December)? (please give reasons for your answer)

38. No, because the calendar year is not consistent with the PAYE regulations.

(b) The tax year (6 April to 5 April of the following year)? (please give reasons for your answer)

39. If calculation year is retained, then yes, the tax year would be most appropriate to be consistent with the PAYE regulations. See our reply to Q6.

(c) At the discretion of the employer (but uniform across the whole workforce)? (please give reasons for your answer)

40. No, because we see little benefit when an employer may have multiple payrolls and different employees paid at different frequency.

Overtime and pay premia

Question 8(a) Do salaried hours work rules cause difficulty for employers while making overtime and premia payments to workers? (please give reasons for your answer)

41. Yes, the fact that overtime and premia payments are not included causes widespread difficulties because common sense would predicate that these payments would be included. The distinction for NMW purposes between the basic rate for a role and any additional payments is not understood by most employers and appears to have no purpose.
42. Where a payment is described as a premium, such as, for example, an extra payment for working unsociable hours, one would expect it to count towards the NMW because the employer is paying an additional amount. One would not expect to have to ignore it. For example, an employer who pays a lower basic rate is considered non-compliant even if that rate is supplemented by an overtime or shift premium payment, but, in contrast, if an employee has two different roles on separate rates, if rate 1 is a lower basic rate it can be offset by a higher rate for role 2 even when on the face of it rate 1 is non NMW-compliant.
43. Also, the time of payment may not be in the normal payroll run if timesheets or other ways of claiming the premium are made late. The employee may decide to claim overtime in such a way as to receive one large payment rather than make a number of smaller claims. If this is the case and it is the employee's choice it should not result in the employer being penalised. We therefore recommend that the regulations be amended to consider the amounts paid and the hours that generated the payment in the pay reference period (PRP) that payment was made, not when they were worked as this adds unnecessary complexity. There should be no issue of some hours being carried forward or back, and not 1/12 of a bonus counting in the PRP before it is paid. The rules need to work as PAYE does so that it is when the hours are paid that is assessed for NMW. The only time that hours paid should be by reference to a different PRP is for April PRPs, if the NMW rates have increased, where hours worked in March should be remunerated at the NMW rate in force when they were worked rather than when they were paid.
44. For example, in higher education (HE), all hours worked in a term can be paid at the end of the term. This has been the case for decades, yet HMRC says this is non-compliant but have not made such HE institutions aware that this is an issue.

Question 8(b) Should salaried hours work rules be amended to include overtime and premia payments? (please give reasons for your answer)

45. Yes, but not just these pay elements. Commission is also a form of bonus and there are various allowances rather than premia that are paid on an ongoing basis; examples include retainers for being a first aider, or shift or 'standby' allowances in recognition of being available to work unsocial hours. All should be included, because all the different elements together comprise the total pay that the employee is receiving.
46. We question why it matters how that pay is constructed. If the concept of total gross pay works for tax and NI, we feel that it should work for NMW.

Question 8(c) Do you think an employer's policy towards offering pay premia would be affected by amending the current rules to allow overtime and premia payments to fall within salaried hours work? (please give reasons for your answer)

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47. No, because the primary driver for such payments are business reasons including the offer of such payments by competitors and the need to motivate employees to work extra or unsociable hours etc.
48. Many businesses are not aware of the complex NMW rules and so they do not figure in the design of reward policies which are simply a commercial decision and in the current economic climate can affect the survival of the business. To get around the current problem businesses could consolidate premia into basic pay to make the base rate NMW compliant and easily compared to a competitor's base rate. However, consolidating premia into basic pay can act as a disincentive and thereby make it harder for those businesses to hire workers willing to work overtime or unsocial hours.

Salary sacrifice schemes

Question 9 Do you have any evidence that the salary sacrifice offer has been withdrawn or restricted in the last 12 months as a result of National Minimum Wage requirements?

49. Yes, employers apply restrictions in respect of lower paid workers because employers do not wish to be NMW non-compliant.
50. It is a considerable admin burden to assess if an employee can join a sacrifice in the first instance and then this has to be monitored every pay period so that the deduction is moved to net pay rather than gross where NMW non-compliance would occur. However, this does not necessarily solve the problem as HMRC will often contend that this net pay deduction is 'for the benefit of the employer' so the employer is still non-compliant even if the employee has contractually agreed to the non-cash benefit.
51. The current rules deny benefits such as childcare vouchers and pension contributions being offered by salary sacrifice to those lower paid employees who would benefit from them most because they could otherwise least afford these outlays, which we assume was not the policy intention.

Question 10 What do you regard as the main reasons that workers opt in to salary sacrifice schemes?

Tax efficiency/ Easier way to purchase benefits/ None/ Another (please specify)

52. There are various reasons that vary depending on the circumstances of the worker.
53. In some cases, they enable lower paid workers to buy, for example, white goods and spread the cost rather than having to resort to third party loans and suffer the interest charges.
54. They also facilitate improved pensions saving as the employer may well share the employer NIC saving with the employee as an additional pension contribution; that is denied to the low paid who cannot participate.
55. In some cases, salary sacrifice has been used to reduce the impact of other decisions, for example the imposition of car parking charges, by making the provision more tax efficient and therefore more affordable for employees.
56. Salary sacrifice is also used to encourage well-being initiatives such as cycle-to-work and for employers to meet corporate social responsibility (CSR) objectives.

Question 11 What, if any, risks to workers' pay do you think are presented by salary sacrifice schemes? (please use examples if you can).

57. The employee could end up worse off by not participating in a scheme because they have to pay more tax and national insurance contributions so the total of their take-home cash and benefits may be less than if they participated in the scheme.
58. Given the optional remuneration arrangement (OpRA) tax changes brought in in 2017, an employee can be penalised by the employer's need to fund a benefit in a certain way. For example, an employer can offer a workplace parking space on top of salary (they cover the full costs of maintenance) and the employee receives this benefit tax-free. If the employer offers the

same space under salary sacrifice the employee is taxed on the total amount of the sacrifice so there is no benefit to them other than the employee NIC saving. In such cases, the only way for the employer to recoup the cost of providing the benefit is to offer it as either a net pay deduction or salary sacrifice, both of which impact the employees' take home pay and total tax liability.

Compliance

Question 12 Are there any other National Minimum Wage rules which penalise employers without protecting workers from detriment?

59. Yes. We set out below examples of where the HMRC's interpretation of the NMW rules penalises employers without protecting workers from detriment:
    a) The whole concept of 'deductions or payments for the employers own use and benefit', colloquially known as 'for the benefit of the employer', in Reg 12 NMWR 2015, which is not at all clear except to HMRC, and that for the wrong reasons, leads to detriment to employees where facilities provided by their employer are paid for by the employee out of net pay. Examples include paying for items sold at a staff discount, paying for a works bus, buying uniform and paying for staff catering.
    b) Voluntary savings schemes, such as holiday and Christmas funds, where the savings are ring fenced and the employees can withdraw their contributions at any time should not breach the rules. Whilst it is difficult to comment on specific cases without knowing all the facts, it does appear from press results that the Iceland case is an example where the regulations are counterproductive if HMRC's reported interpretation is correct.
    c) Other examples include employers that enable employees to pay for goods and services in instalments by deducting from pay:
        i. a football club which sells season tickets to its employees at a discount; and
        ii. a pottery which provides its potters with safety boots and gives them the option of better boots in return for payment.
    d) HMRC says that an apprentice is not an apprentice until the training agreement is in place and functioning, so where the prospective apprentice is employed in the business before term starts at college then the full NMW rate must be paid. If employers have to pay the full NMW rate for periods worked before term time and during holidays, they are less likely to take on apprentices, thereby making it more difficult for the government to meet its apprenticeship target (which is already struggling as employers do not have the resources to fund apprentice posts).
    e) HMRC asserts that study time for a qualification counts for NMW. This type of enforcement means that employers are less likely to support employees studying for qualifications that would help reduce the skills gap in UK plc.
    f) The need to dumb down dress codes to meet HMRC's view that this constitutes a uniform (even though it does not for tax) could affect the safety of employees in the workplace as some dress codes are prescribed by employers for good reason. For example, HMRC's has said that if non-slip shoes are prescribed, the shoes are a uniform and need to be funded by the employer. As these are not a uniform for tax purposes this funding can only be achieved by grossing up the value of the shoes required and paying this as additional cash which imposes significant extra cost on the employer.
    g) HMRC's interpretation of 'salaried worker' which does not accord with the legislation.

60. Please also see our General Comments above.