



National Minimum Wage

29 NOVEMBER 2021

This webinar will begin shortly.....

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Presenters



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Ask a question and download resources

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What happens when I raise my hand?	
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Type in your question and press send.

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NATIONAL MINIMUM WAGE

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AGENDA

- Background & legislation
- Rates and what they mean
- Worker types
- Pay and hours for NMW
- PRPs and worker calculation years
- Records and resources

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INTRODUCTION

- NMW legislation belongs to BEIS and compliance to HMRC (contracted by BEIS)
 - Compliance will move to new Single Enforcement Body (SEB) but will HMRC keep control?
- Because it is not tax legislation the Taxes Management Act does not apply to its enforcement and so there is no authority for a behaviour-based, flexible approach to enforcement and penalties. Instead the rules are applied rigidly and include the public naming of defaulters.

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LEGISLATION

- National Minimum Wage Act 1998 <https://bit.ly/3ILEU8x>
 - The National Minimum Wage Regulations 2015 <https://bit.ly/2XIVJZy>
 - The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 <https://bit.ly/3lZXkCj>
 - The National Minimum Wage (Amendment) (No. 2) Regulations 2020 <https://bit.ly/3lUln5U>
- Employment Act 2008: 200% penalties and powers amended the NMW Act 1998
 - Maximum penalty £20,000 per worker
- New compliance approach February 2020 <https://bit.ly/3ER6z0G>....

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21/22 AND 22/23 RATES

Rate/Age	21/22 per hour	22/23 per hour
NLW - 23 and over	£8.91	£9.50
21-22 years old	£8.36	£9.18
18-20 years old	£6.56	£6.83
16-17 years old	£4.62	£4.81
Apprentice rate	£4.30	£4.81
Accommodation offset	£8.36	£8.70

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HOURLY RATES

- These must be calculated for all worker types regardless of whether they are hourly paid, NMW is not about the low paid
- For example, If the CEO sacrificed all his pay into his pension in his last pay period on leaving, he will have been underpaid NMW and the employer has committed an offence in agreeing to this, it doesn't matter if he requested this
- He would have to sacrifice only down to NMW and the rest would be an AVC from net pay

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WHAT IS THE ACCOMMODATION OFFSET?

- A notional daily/weekly amount that can reduce the amount of NMW required if accommodation provided, up to a maximum of £8.36 per day or £58.52 per week. If the worker pays rent to the employer, any value up to the accommodation allowance can be disregarded in the minimum wage calculation
- Any more than this will be an issue eg if employer is a private landlord and rent is deducted from net pay (NB HMRC can go back six years)
 - University student and council tenants are not impacted if they work for Uni/Council and also live in 'employer-provided' accommodation, the payment **outside the payroll** doesn't affect NMW
 - Even a payment outside the payroll to a landlord 'connected to the employer' eg same directors can cause a breach

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WHO IS ELIGIBLE? s54 OF THE ACT

- Providing the worker has a:
 - Contract of employment *or*
 - Contract of service *or*
 - Apprenticeship
- That could be for:
 - Part time, zero-hour contracts
 - Temporary, fixed term, casual workers
 - Agency workers
 - Piece rate workers
 - Interns (unless just work shadowing) and trainees
 - Volunteers receiving more than out of pocket expenses

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AND WHO ISN'T

- Self-employed people running their own business ie sole traders
- Company Directors office holders ie not just a title
- Volunteers and voluntary workers
- Family members of the employer living in the home
- Students on work placement of less than 12 months
- Workers younger than school leaving age
- Workers on a government programme
- Members of the armed forces
- People living and working in a religious community
- Prisoners

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WORKER TYPES: THIS IS WHERE HMRC START...

- Salaried
- Time work: paid by the hour
- Output work (piece work)
- Unmeasured

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WORKER TYPES

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SALARIED WORKERS

- HMRC refer to salaried workers receiving 'pay averaging' ie the same basic each pay period regardless of the length of the pay period
- This is only permitted if
 - The employee is weekly, monthly, 4-weekly or fortnightly but NOT quarterly or annual
 - The contract or 'readily accessible document' shows the annual salary **and** an annual value of hours so that the hourly rate can be determined to be at least NMW, and
 - The employer records how many hours are worked in a PRP and cumulatively
- For example, a contract with weekly hours and an annual salary paid monthly means the annual hours can't be ascertained as there aren't 52 weeks in a year so individual must be an 'unmeasured worker' so the pay will have to vary over longer PRPs
- No set multiplier but Low Pay Commission refer to 52.18 (365.25/7) as appropriate

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THE NATIONAL MINIMUM WAGE (AMENDMENT) (NO. 2) REGULATIONS 2020

- Salary sacrifice still outlawed
- 'Salaried workers' can now be fortnightly and 4-weekly paid not just weekly or monthly
- You can be salaried and receive rates other than basic and a bonus ie overtime or shift rates (but these still aren't part of NMW pay)
- BUT to use this relaxation you have to set a new 'worker calculation year', otherwise the new definition only takes effect from the first worker calculation year that starts after **April 2022**
- What is a 'worker calculation year'?...

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WORKER CALCULATION YEAR

- It is used to check that the employee hasn't worked more than the annual hours specified in their contract
- It is based on the start date of the worker's employment
 - An employee who began work on 1st March has a worker calculation year of 1st March – 28th/29th February.
 - In this example the employer would not be able to move the employee to be legally treated as salaried until 1st March 2023 as first year after April 2022 starts 1st March 2023
- Avoid this by setting new calculation year by setting a business wide date after 3 months notice

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HOW TO CALCULATE NMW

- Step 1 NMW pay regs 9-16
 - Which payments count?
 - What amounts must be deducted from that pay that has gone through payroll?
 - What amounts must be deducted from pay as a failure to reimburse?
 - What counts when?
- Step 2 NMW hours
- Step 3 NMW PRP

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STEP 1:WHAT IS NMW PAY?

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WHAT IS NMW PAY?

- Salary/wages
- Bonus
- Commission
- Incentive payments
- Merit or any performance related pay scheme

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AND WHAT ISN'T PAY?

- Arrears of pay to correct an earlier NMW underpayment
- Loans
- Advances of wages
- Pension payments from a pension payroll
- Lump sums on retirement
- Redundancy payments
- Rewards under staff suggestion schemes
- Tips, gratuities, service charges and cover charges from customers (new consultation)
- Reimbursement of expenses
- Overtime and shift premia... The premium amount which is higher than their normal standard rate, does not count towards minimum wage

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ALLOWANCES, BENEFITS IN KIND & UNREIMBURSED EXPENSES

- Allowances don't count towards NMW pay unless consolidated into the worker's standard pay or they relate to the worker's performance e.g. productivity bonus
- If a worker spends money on something which is connected to their employment (tools, equipment, travel expenses), and is not reimbursed, the amount they paid will reduce their NMW pay
- Expenses must be reimbursed and promptly regardless of whether authorisation rules have been met!

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THESE DEDUCTIONS/PAYMENTS DON'T REDUCE PAY

NB deductions and payments aren't the same thing

- Tax, NIC, Student Loans, Court Orders (but not the admin fee)
- Recovery of salary advance, loan, overpayments of wages
- Contractual specific misconduct or specific penalty e.g. failure to return uniform or locker key [NMWMI1060](#)
- Payment to local housing authority, registered social landlord, university or FE college for living accommodation
- Shares, securities, share options and partnership shares
- Voluntary payments outside payroll: food purchased from canteen, staff discount [NMWMI1130](#)
- Third party deduction: pension (not salary sacrifice), medical insurance, gym subscription
 - Monies must be paid over promptly to be treated as a third party deduction

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SAVINGS SCHEMES

- For example, Christmas Club
- Even if bank account is ringfenced and there is no intention for employer to use the monies it is still a deduction that reduces pay for NMW as employer could access it (then become insolvent and take the money)
- The bank account must not be employer-controlled at all
- To rectify position
 - Move to new control arrangement for example a Trust (without directorial involvement)
 - For historic NMW exposure: calculate arrears and repay, simply repaying the savings is not enough
 - The savings are still the employees' so a double whammy for the employer

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TIME OFF IN LIEU (TOIL)

- No concept of this in NMW legislation
- You must be paid for hours worked in the PRP it's irrelevant if you might take time later
- When TOIL is taken those hours are not NMW hours

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DEDUCTIONS, REDUCTIONS & PAYMENTS THAT DO REDUCE NMW PAY REG 12 'FOR THE BENEFIT'

Deductions from net pay that reduce gross	Notes
Meals at work/Bar tabs in hospitality	Payment needs to be made outside the payroll
Parking fees & travel costs provided by employer	e.g. works bus
Equipment for work Uniforms/dress code	Not being reimbursed ie self-funded is classed as a deduction Making a payment to the employer to buy work equipment/clothes is classed as a deduction Being able to keep the uniform/equipment makes no difference to NMW
Court order fees	
Training costs	But not if this is in contract? <i>Lorne Stewart</i> EAT case https://bit.ly/3u2vwwT v <i>Ant Marketing Ltd</i> EAT 2020 https://bit.ly/3ELzNxL where training was mandatory
Childcare	For employer's workplace nursery
Christmas club/savings schemes	Iceland case
Rent in excess of accommodation offset	If employer is also the landlord or connected business
Staff discount/purchase	Middlesbrough FC & season tickets EAT https://bit.ly/3u0aAe9 it must be a payment outside the payroll
Salary sacrifice	You can switch to net pay if needs be if it then becomes a 3 rd party deduction

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STEP 2: WHAT ARE NMW HOURS

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WHAT ARE NMW HOURS?

- Are hours collected correctly on timesheets/T&A systems: T&A system not calibrated accurately or collected at all for salaried staff as longer hours now everyone homeworking
- Study time even if at home
- Not working because of machine breakdown, but kept at the workplace
- Waiting to collect goods, meet someone for work or start a job collect tools, locker/bag checks
- Travelling in connection with work, including travelling from one work assignment to another but not to first/from last appointment
- Training or travelling to training from home
- At work and required to be working, or on standby near the workplace (but do not include rest breaks that are taken)
 - Guidance on sleep ins after *Mencap* case is here: <https://bit.ly/2W5HLAi>
 - If workers are permitted to sleep (and suitable sleeping facilities are provided), NMW is **not** payable;
 - If workers are expected to perform activities for all or most of a shift, with occasional periods of sleep, it is likely that NMW is payable for the whole shift

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WHAT AREN'T NMW HOURS?

- Travelling between home and work
- Away from work on rest breaks, holidays, sick leave or family-related leave, furlough, TOIL
- On strike
- Not working but at the workplace or available for work at or near the workplace during a time when workers are allowed to sleep (and you provide a place to sleep)

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STEP 3: PAY REFERENCE PERIOD

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PAY REFERENCE PERIOD (PRP): MAXIMUM 31 DAYS

- The pay reference period is used to identify *the minimum wage pay* received in that period and the *minimum wage hours* worked in that period
 - What is their age on first day of PRP?
 - What NMW hours did they work in that PRP?
 - How much NMW pay did they receive in the PRP?
- The minimum wage pay to allocate to the pay reference period, for the purposes of the minimum wage calculation, is the pay that is either:
 - Received during the pay reference period *or*
 - Earned during the pay reference period but received in the following pay reference period

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RECORDS

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SO WHAT RECORDS DO CLIENTS NEED?

- For all workers, not just time workers
- **NMW Hours**
 - ie not just worked or paid for hours in the PRP
 - Homeworkers, what does email tell HMRC??
 - What do building security systems indicate?
- **NMW Pay**
 - ie not a definition for we use elsewhere as it's gross taxable pay minus
 - Some net pay deductions
 - Some unreimbursed job-related expenses such as uniform (which payroll software can't know!)
- Accurate age records
- Accurate qualification records for apprentices
- Any audit trail of self-correction of arrears

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PAYSLIPS APRIL 2019

- Guidance: <https://bit.ly/3IWKAN6>
- Need to show hours if 'pay varies by hours worked'
- Applies to all workers: not just time workers so salaried too
- E.g. Basic pay no hours needed but overtime must have units shown
- As a single total of all such hours in the pay period, or they can be broken down into separate figures for different types of work or different rates of pay. It should be clear which pay period they were worked in.
- Not needed if unpaid leave, sick leave, starters and leavers: 'pay has varied in this month because of a departure from his normal working and pay arrangements'

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CLIENT PRACTICALITIES

- How do they monitor and manage the rate increases?
 - First pay day on or after 1st April
- Relevant birthdays; 18, 21 and 23 (AE is not aligned and is 22)
 - The age of the worker is based on the first day of the pay reference period
- Apprentices
 - Age, relevant qualification, end of apprenticeship (and NI issue too)
- Do HR realise that even senior employees can't sacrifice below NMW?
- Have clients set up 'access to earned wages schemes' these may well be an NMW issue- especially the fees - HMRC haven't decided

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CLIENT FAQS

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CLIENT FAQs

- If I have underpaid NMW what about pensions?
 - You need to consider what it would mean if they had been paid the arrears at the time ie reassess if not scheme member; recalculate contributions plus actuarial revaluation
 - Guidance: <https://bit.ly/3zXEUr9>
- What happens if an employee complains to HMRC?
 - They have to investigate in 7 days
 - They can interview employees with no one present
- When do you increase the rate for a birthday?
 - The age they are on the first day of the PRP dictates the rate for that PRP

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CLIENT FAQs

- Is a second job rate classed as premium pay?
 - No, as long as it's clear in the contract, take all NMW pay and divide by NMW hours
- Is it OK to recover an amount on leaving for unreturned uniform/equipment?
 - Yes, as long as it's in the contract and is proportionate
- I understand about uniform but is it the same if they want to buy extra uniform over what we provide?
 - Additional uniform can be purchased from the employer but not deducted from net pay as this would still reduce pay for NMW

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RESOURCES

- HMRC
 - NMW manual: <https://bit.ly/3ALNP09>
 - Uniforms and PPE: <https://bit.ly/3kz8G0S>
- BEIS guidance
 - Who is a worker: <https://bit.ly/3u7z6dp>
 - Main guidance: <https://bit.ly/3u4NqmN>
 - NMW and interns: <https://bit.ly/3m9tV9h> and <https://bit.ly/2XNbOgN>
 - NMW and living accommodation: <https://bit.ly/3EJO2ml>
 - NMW and Covid-19: <https://bit.ly/3o2dP3O>
 - NMW enforcement: <https://bit.ly/3ILzEs>
 - Payslips from April 2019: <https://bit.ly/3IWKAN6>

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? **<** ***Any questions?***

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Ask a question

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