

National Minimum Wage (“NMW”)

Is your organisation inadvertently breaching NMW?



NMW continues to be a key focus for government. Increased enforcement budgets and resource, coupled with HMRC’s strict application of the extremely complex NMW regulations means that any employers with workers paid at, or even higher than NMW are at risk of underpayments, penalties and naming and shaming.

Overview



- Although the vast majority of employers pay their workers at or above the headline NMW rates, there are a number of ways a worker’s pay can fall below NMW.
- In circumstances where a worker’s pay is found to be below NMW, the employer must make good these “arrears” at the current day’s NMW rates.
- In addition to paying back arrears, BEIS will impose up to 200% penalties (100% in practice) of any underpayments identified, as well as publicly ‘naming and shaming’ a non-compliant employer.
- Non-compliance with NMW can therefore have a significant financial cost and cause reputational damage in addition to taking up a significant amount of management time.
- BEIS and HMRC announced a number of changes to the NMW rules and to its NMW enforcement policy. Although these changes at first glance suggest some easements, in practice they lead to additional complexity and it may also indicate that HMRC will increase its focus on certain aspects in the future.

NMW work type



For NMW purposes, there are four types of worker – salaried, time, output and unmeasured. Unmeasured workers are a ‘catch all’ category, meaning that a worker who is not salaried, time or output will be deemed as unmeasured.

The NMW worker type impacts on how NMW is calculated:

- Salaried workers –
 - Pay and hours are deemed to be averaged over the individual’s NMW calculation year.
 - Where hours actually worked in the year exceed the contracted/ascertainable hours these hours may need to be paid in the final months of the individual’s calculation year.
- Unmeasured workers –
 - Pay and hours are assessed on a pay period by pay period basis and all working time must be paid in that pay period or the next immediate pay period.

In practice many employers have incorrectly considered their workers to meet the salaried worker conditions where in fact HMRC consider them to be unmeasured - this has led to inadvertent underpayments.

Examples of common NMW pitfalls



Working time

Employers must ensure all ‘working time’ is taken into account and paid at NMW or higher. For workers paid at NMW, any amount of unpaid working time will reduce pay below NMW.

HMRC’s interpretation of working time includes where an employer requires a worker to be at the workplace, such as:

- Team meetings / briefings;
- Training (including online);
- Hand cleaning / temperature checks;
- Security checks;
- Rounding in T&A systems – for turning up late, not being paid for early start;
- Preparation / changing time;
- Walking time / travel time; and
- Logging on to computer / telephone (e.g. in call centers).

Paid breaks are not counted as qualifying pay and cannot be used to offset against this time.

Deductions and reductions

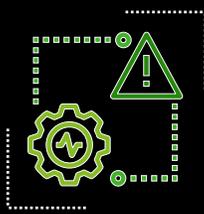
- Salary sacrifice – cars, pensions, childcare – reductions to gross pay reduce pay for NMW purposes (even where a worker has voluntarily agreed to the deduction).
- Net pay deductions – For example, Christmas savings club, fuel card reimbursements, and private mileage usage contributions may reduce pay for NMW purposes (even where voluntary and they are for the benefit of the worker (e.g. helping the worker pay for Xmas)). Whether it does reduce pay will depend on the specific nature and facts of the deduction.
- Deemed reductions (outside of payroll) – prescriptive clothing policies, uniforms or tools which are not provided for free – a reasonable cost for items is deemed to reduce pay in the pay reference period which they are deemed to be needed for purchase. (e.g. £20 for a pair of black shoes twice a year).

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How Deloitte can help

- **Understand** – facilitating a workshop with key stakeholders to ensure the rules and risks around NMW are understood by relevant personnel. This can be a general understanding of NMW or a more specific workshop covering more technical aspects of the rules e.g. work type.
- **Identify** – Undertaking a legal and / or non-legal review of contracts, policies, pay elements, systems and processes and identify any areas of NMW risk.
- **Calculate** – Assessing and calculating any potential historical cost impact and future potential cost of being compliant with NMW.
- **Systems and processes** – Updating systems, processes and policies to be robust and improve compliance with NMW.
- **HMRC reviews** – HMRC NMW reviews can time consuming for the business and key personnel. We can help manage these reviews, dealing with HMRC directly to ease resourcing issues and ensure HMRC are enforcing the NMW rules correctly and fairly, in line with other businesses in your specific sector where relevant.
- **Ongoing compliance** – Undertaking periodic reviews to ensure systems are working appropriately and general compliance with NMW.
- **Legal advice** – We can provide legal advice in many of the areas mentioned above, with certain advice being provided under legal privilege.



Key risk areas

- Not meeting the conditions of salaried work – automatically deemed as unmeasured which can cause underpayments in itself.
- Gross and net deductions/reductions from pay – even where a worker has voluntarily agreed to the deduction.
- Deemed reductions in pay – typically where a worker is required to purchase items to fulfill their role e.g. clothing, tools.
- Accurate recording of time – minutes and seconds (not hours).



Salaried work conditions and risk of not meeting the salaried worker conditions

There are four strict conditions that needed to met in order to be salaried for NMW purposes (updated by BEIS in April 2020 – see our separate flyer):

- Entitled under contract to be paid an annual salary or an annual salary and performance bonus (commissions prevent this condition being met, and prior to April 2020 entitlement to any premiums would prevent the worker type being met);
- Having ascertainable annual hours;
- Not being entitled to a payment in respect of basic hours, other than an annual salary or salary and performance bonus; and
- Pay frequency (prior to April 2020 only weekly and monthly pay frequencies would satisfy this fourth condition, whereas from April 2020, two-weekly and four-weekly pay frequencies will also satisfy this condition).

Where a worker does not meet all of these conditions, the worker is deemed an unmeasured worker, not a salaried worker. For unmeasured workers the pay they receive each pay period and the actual hours they work each pay period need to be considered in the NMW calculation; they cannot be “smoothed” over a year. This has regularly led to unintended underpayments. Employers should therefore consider how their contracts and terms and conditions are drafted as these will influence worker types, in addition to the elements of pay that workers are entitled to.



Contacts

Partners

Helen Kaye
hkaye@deloitte.co.uk
+44 113 292 1316

Harvey Smith
hasmith@deloitte.co.uk
+44 121 696 8773

John Lewis
jlewis@deloitte.co.uk
+44 118 322 2658

Michael Nicolaides
mnicolaides@deloitte.co.uk
+44 20 7303 8874

James Warwick
jwarwick@deloitte.co.uk
+44 20 7007 1461

Hayley McKelvey
hmckelvey@deloitte.co.uk
+44 20 7303 3940

Kathryn Dooks
kdooks@deloitte.co.uk
+44 20 7303 2894

Director – Legal

Amy Douthwaite
adouthwaite@deloitte.co.uk
+44 20 7303 3486

Director – Fair Pay

Christopher Robson
christopherrobson@deloitte.co.uk
+44 121 695 5958



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