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Getting minimum wage right

Getting minimum wage obligations right can be challenging for employers, as indicated by the findings of a recent report by the Low Pay Commission.

The report highlighted minimum wage underpayment among employers of nine or fewer workers. Hospitality, retail, cleaning, maintenance and childcare were cited as being particularly high-risk sectors. In this Briefing, we provide an overview of minimum wage, together with advice on areas where HMRC reports frequent errors.

Overview

Minimum wage is paid at an hourly rate, with payment bands depending on age. Special provisions apply to apprentices (see below). National Living Wage (NLW) is the minimum wage for those aged 25 and over. National Minimum Wage (NMW) applies to those above school leaving age and under 25. For convenience, we refer to 'minimum wage' to cover both NLW and NMW.

Current rates

Minimum Wage rate	Hourly rate from 1 April 2019
National Living Wage	£8.21
21-24 year-old rate	£7.70
18-20 year-old rate	£6.15
16-17 year-old rate	£4.35
Apprentice rate	£3.90
Accommodation Offset	£7.55 per day; £52.85 per week

Minimum wage rates usually change each April. HMRC reports frequent failures to apply the new rates. Employers may find the government minimum wage calculator useful. It can be used to check that someone is being paid minimum wage and whether there is a liability from earlier years bit.ly/2bsC9XA

Compliance and risk

Minimum wage policy is set by the Department for Business, Energy and Industrial Strategy. Compliance is enforced by HMRC, which can issue penalties for failure to pay minimum wage correctly. It can also take court action, with a maximum fine for non-payment of £20,000 per worker. Employers can be 'named' publicly for non-compliance. Company directors may be banned for up to 15 years.

Eligibility

Minimum wage is due if someone is an employee or a 'worker' for minimum wage purposes, and is not covered by a specific exemption. In employment law, the term 'worker' denotes a particular type of status. Broadly speaking, a worker is someone required, in person, to perform work or supply services to a business.

Minimum wage eligibility extends to part time; casual; and agency workers. Workers on piece rate also qualify. Others entitled to minimum wage include agricultural workers; trainees and workers on probation; foreign workers; offshore workers; seafarers; and disabled workers. Some people are not eligible for minimum wage, such as the self employed; company directors without employment contracts; and volunteers. Neither are members of an employer's family living in the employer's home; or non-family members living in the home who share work and leisure activities, but are not charged for food and accommodation. This would cover au pairs, for example.



Common areas of confusion

Types of work

There are four different types of minimum wage calculation: salaried hours work, time work, output work and unmeasured work. Each has its own rules, and the starting point is to make sure staff are put in the correct category.

Most staff are likely to be salaried workers or time workers, and HMRC reports many problems with employers getting categorisation right here, with knock-on consequences for the pay reference period. For time workers, minimum wage must be paid every pay reference period. For salaried workers, total annual hours worked are averaged over each pay reference period, and pay must be made in equal monthly or weekly instalments. If these salaried criteria are met, minimum wage compliance can be achieved even if hours worked in a month vary and - if the month is taken in isolation - pay falls below minimum wage level.

HMRC has a flowchart which can be used to check if salaried hours conditions are met bit.ly/2MiyFuu. We should be delighted to advise further here.

What counts as pay?

Not every element of pay counts for minimum wage purposes, and it is important for employers to know what and what not to include in the calculation. Including the wrong elements can mean that wages are actually being paid at below the minimum wage threshold. Incentive payments and bonus payments, for example, count as pay for minimum wage purposes. Loans, advances of wages, pension payments, and rewards under staff suggestion schemes do not. Neither do tips and gratuities, whether paid through the payroll, distributed by a tronc master or given directly to staff by customers. Where relevant, tips should be paid in addition to minimum wage.

If someone incurs expenses in connection with their employment – say, for tools or equipment – and is not reimbursed by the employer, then the expense reduces their pay for minimum wage purposes. Benefits in kind do not count towards minimum wage pay – but see below for special rules on accommodation. Care is needed where pay is sometimes at a higher rate, say for overtime, weekend or night shifts, or on bank holidays. If premium payments such as these are made, check that basic minimum pay – before enhancement – does not dip below the minimum threshold.

Problems can also arise relating pay to specific pay reference periods. Bonuses, commission and overtime for example, may require special treatment. We should be delighted to advise further here.

What counts as working time?

This is another problem area. HMRC reports errors around failure to pay travel time. Though staff do not need to be paid for home to work travel time, some periods of travel time create a minimum wage liability. These include time when required to travel in connection with work; travelling from one work assignment to another; waiting to collect goods; waiting to meet someone in connection with work. Periods when staff attend at the beginning or end of the working day can also get overlooked. This might include time opening or closing a shop, or security checks at the end of a shift. Minimum wage is due for this time. Time spent training, or downtime while someone is at the employer's disposal also count as work time.

Examples

1. Polly is employed as a care worker. She makes up to twelve visits to clients' homes a day. The travelling time from one client to the next counts as work time.
2. Padraig is employed as a groom. He has to wait at the end of the day for the farrier to finish. This counts as work time.
3. Scott is a bus driver. The bus breaks down and he has to wait to be taken back to the depot. The downtime counts as work time.

Each of these examples counts as work time for minimum wage.

Deductions from wages

This is another area where attention to detail is necessary. Deductions from pay or expenditure by a worker on job-related items, as noted above, can cause confusion. Uniforms are a prime example; and it is worth noting that minimum wage rules here do not mirror the logic of the income tax rules for employee expenses.

Examples

1. Ben Hur Equestrian requires staff to wear a polo shirt with its yard logo. These are bought from Ben Hur. Whether deducted from pay, or paid outright, the purchase reduces minimum wage pay.
2. Bella Donna Hair Salon requires workers to wear a uniform: any striped shirt and blue trousers are acceptable. The cost of these clothes reduces minimum wage pay. It does not matter where they are bought. As an employer-specific requirement, they must be factored into minimum wage calculations.

If a salary sacrifice scheme is operated, employers should look at the figure for pay after sacrifice to assess minimum wage compliance. Prudence would suggest that staff earning at or near minimum wage levels avoid joining such schemes.

Paying apprentices

HMRC reports many errors here. Check that someone qualifies as an apprentice before paying the apprentice rate: there must be an apprenticeship contract and an element of structured training. Attention to employee age is also important. Apprenticeship rate applies only if an apprentice is under 19; or over 19 and in the first year of apprenticeship. Someone 19 or over in the second year of apprenticeship, should get the appropriate age rate of minimum wage – not the apprentice rate. Continuing to pay the apprentice rate when it is no longer applicable is a common error.



Key age thresholds

Mistakes can be made when staff pass critical age thresholds (18, 21, 25), and become eligible for higher rates of minimum wage. Employers should check they hold the correct ages for staff and may need to ask for proof of age, such as birth certificate or passport. The higher rate applies from the start of the next pay period.

Accommodation

For workers provided with accommodation linked to their work, an adjustment to minimum wage may be needed. The rules allow a notional daily amount to be counted towards minimum wage pay: but only up to the 'accommodation offset rate' – currently £7.55 per day. HMRC highlights this as an area where errors are made.

Further help

General information for employers can be found on the gov.uk site bit.ly/1DMD7Vd, with more detailed guidance in HMRC's manuals bit.ly/2sCnLmM. Minimum wage is a complex area, and we have only been able to touch on key areas here. We should be only too pleased to provide any further assistance you may need.