

National Minimum Wage: Tips and traps for the unwary

Penalties, naming and shaming and even prison sentences exist to protect workers from the most egregious employer, but those same rules and penalties can equally be applied to the good employer who is simply unaware or ill prepared.

Incorrect Pay Reference Periods (PRPs) used for salaried hours work

For a worker to be considered as a salaried hour worker the employer must ensure that:

- They are under a contract to do salaried-hours work
- They are paid under their contract for a set basic number of hours in a year
They are entitled under their contract to an annual salary for those hours
- They are paid in equal weekly or monthly instalments i.e. 12 month or 52 week instalments

Although they remain the two most commonly used pay reference periods, the strict application of the limit of PRPs that can be used for salaried hours work to exist i.e. weekly and monthly only, has caused employers to be non-compliant.

Many other PRPs exist, two weekly and four weekly are particularly common in the retail industry where the workers appreciate the reliability of being paid a regular and equal amount throughout the year.

Employers quite often believe that because there is wide use of different PRPs applied for PAYE income tax, NIC and automatic enrolment calculations, that this flexibility also exists for salaried hours work calculations – it is not. We are optimistic that this will be addressed by the consultation carried out by BEIS which closed on 1 March 2019.

£1 deduction for pay attachments

Deductions made for the employer's use or benefit will reduce the worker's pay for minimum wage purposes, this remains a common area of error for employers.

The National Minimum Wage regulations unfortunately do not always mirror other areas of law. The deduction that employers are permitted to take for administering a pay attachment, i.e. for fines or unpaid council tax, is a good example of such conflict.

It is important not to be fooled by the authorisation that is granted that allows the employer to make the £1 deduction. This merely ensures that the employer is not making an illegal deduction from pay, but it cannot be taken if it brings pay below the minimum wage.

Salary Sacrifice

Pay cannot be sacrificed if it takes the worker's pay below the minimum wage rates.

A common problem occurs when employers believe that they can sacrifice payments that do not qualify for minimum wage purpose such as overtime and shift premia as well as some allowances (where the allowance isn't incorporated into standard pay).

Change of rate

Whether it is due to the annual increase of rates which come in for pay reference periods that begin on or after 1 April or whether its due to the worker celebrating a birthday that takes them in to a higher band rate this is a key error area for employers.

Ensure that processes are in place to monitor when rates increase – payroll software is an excellent tool for providing reminders and alerts for birthdays and annual increases however this only works when coupled with awareness by the payroll operator.

Apprentices

Employers who run apprenticeship programmes have been found to make the following mistakes which will result in them being found to be non-compliant with the NMW Regulations:

- Continuing to pay the apprentice minimum wage rate after the apprentice reaches their 19th birthday after the first year of the apprenticeship
- Continuing to apply the apprentice minimum wage rate when the apprenticeship programme has finished
- Applying the apprentice minimum wage rate before the apprenticeship programme begins
- Applying the apprentice minimum wage rate when the worker is not on a valid apprenticeship programme

Living Accommodation

Living accommodation is the only benefit in kind that can count for minimum wage purpose, but the value is calculated using the limit of a daily rate.

Employers may however be found to be providing living accommodation in a wide range of circumstances, not merely where they directly own the property that is occupied by the worker of where it is provided as part of the employment contract.

Very few exemptions exist for employers who may own and rent property and so, except where the living accommodation is provided to the worker in connection with the worker's employment, they only include local housing authorities and registered social landlords.

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