

National Minimum and Living Wage (Lecture P1247 – 17.30 minutes)

Introduction

The National Minimum Wage (NMW) and National Living Wage (NLW) must be paid to all workers who are eligible to receive it. Note that this is about workers, not employees, and this is a big issue currently due to the decision in the Uber case in the Supreme Court. There has also recently been a key decision relating to care workers.

NMW is paid to workers in the United Kingdom aged 16 – 24 and NLW is paid to workers of 25 and above although the point at which NLW applies is going down to 23 from 1 April 2021.

It is an issue because HMRC are becoming more aggressive in the way they address NMW and NLW failures and it is important to remember that HMRC can go back up to 6 years to address underpayments. Employers who fail to comply can be named and shamed and there are significant financial penalties.

The notes will now refer to NLW but it applies to both, unless otherwise noted.

Rates of NLW/NMW

	Workers aged 23+ (25+ prior to 1 April 2021)	Workers aged at least 21 but under 23 (25)	Workers aged at least 18 but under 21	Workers aged under 18	Apprentices under 19 or in first year
From 1 April 2021	£8.91	£8.36	£6.56	£4.62	£4.30
From 1 April 2020	£8.72	£8.20	£6.45	£4.55	£4.15

How is this calculated?

The NLW legislation considers the worker's average wage over their pay reference period which looks at how much they have earned and divides it by the number of hours they have worked. Various factors can affect the calculation and how the calculation works depends on the type of worker that someone is. It is the responsibility of the employer to keep sufficient records to show that they are paying the NLW.

As noted above, NLW is paid to workers. Employees will fall within this definition and it is now clear from the Uber decision that many persons working within the gig economy will actually be workers too which is a major headache for many engagers within that sector of the business community. Any person with a right to work in the UK who is providing a service for reward on a contractual basis is likely to be a worker.

NMW applies to apprentices. An apprentice for NMW purposes is someone employed under an approved apprentice scheme or engaged under a contract of apprenticeship. This is an important point as the apprenticeship rate is lower.

There are some anomalies. For example, members of the armed forces are not entitled to receive NLW. Volunteers are unlikely to be workers so do not fall within these provisions but then if they receive cash or non-cash rewards you need to be careful that they do not become workers. Company directors are not entitled to NLW unless they have an employment contract. Someone doing work experience may not be a worker but it will depend on what they are actually doing as 'work experience' covers a lot of different experiences in reality. HMRC have been looking very closely at some intern schemes.

What is included a pay?

We look at the pay reference period and this is the period that each payment covers – so could be weekly, monthly, four-weekly etc.

The amounts included are:

- Basic pay;
- Incentives;
- Bonuses;
- Commission.

The amounts not included are:

- Overtime premiums;
- Shift premiums;
- Tips;
- Regional or unsociable allowances;
- Benefits.

There is also the accommodation offset which is where accommodation is provided or rented out by the employer and comes with the job. There is an accommodation offset rate which is £8.36 (daily rate) or £58.52 (weekly rate) from 1 April 2021 with the equivalent figures in the previous year being £8.20 and £57.40. The impact is as follows:

- if accommodation is provided free, the offset rate is added to wages;
- if accommodation is charged at less than offset rate, no offset rate applies and the charge does not affect the pay;
- if accommodation is charged above the offset rate, the excess is deducted from wages.

Apart from the accommodation offset, what else is deducted in calculating the pay?

You have to deduct amount paid by workers for items connected with their job but not where the items are private or for the worker's benefit. This is another significant grey area.

What is included in working hours?

This can be a difficult area and some of the recent failures have been around this point. You must include time working, travelling between appointments, time on call at work or onsite but unable to work. You do not include breaks, private commuting, rest periods, industrial action and leave. We will discuss some of the key issues on this below.

Calculating the wage

There are four types of workers for the purposes of calculating the wage under the NLW regulations:

- paid by the hour (known as time work);
- paid an annual salary under a contract for a basic number of hours each year (salaried hours);
- paid by the piece (output work);
- paid in other ways (unmeasured work).

Time work

This is probably the easiest one to consider as the worker is paid for the number of hours they work so as long as the average hourly rate is more than the NLW then the employer is compliant. You look at each pay period.

Example

Workers in a call centre are paid for the number of hours they work each month. Geoff works in the call centre. He is 22 and is not an apprentice. He works a total of 140 hours during the month of January. How much should he be paid?

The NMW for a worker aged 22 in January 2021 is £8.20 so he should be paid £1,148.

Annual salary

This applies where someone is paid an annual salary in equal weekly or monthly amounts with agreement to work a set number of hours each year under the contract. You work out the wage by finding the hours to be worked per year, dividing this by the number of times they get paid in a year and divide this by the amount they get in each pay package.

Example

Nikki's contract says she must work 2,040 hours each year. She is 25 and not an apprentice. She gets paid monthly on the last day of the month. What does she need to be paid in order for the employer to be compliant with NLW?

Each pay packet covers an average of 170 hours (being 2,040/12) and so she must be paid at least £1,514.70 each month from 1 April 2021.

Although it seems like the most likely option, it is important to note that HMRC will rarely accept that workers are salaried. Here is an example. Lindsey is a class assistant at her local primary school and her basic hours are 35 hours per week but sometimes she works more hours if the teachers need more assistance. The school tries to allow her time off if this happens but this is not a formal process and it is agreed that she almost inevitably works more time than she is contracted to. In this case, HMRC might argue that she is not really working set hours.

Piece workers

If workers are paid per task or piece of work they do, they are classed as doing output work. Output work is usually only applicable in limited situations where the employer does not know the hours worked, such as where they are working from home. A time worker must be paid at the least the minimum wage for every hour worked or on the basis of a fair rate for each task or piece of work they do.

The fair rate is the amount that allows an average worker to be paid the minimum wage per hour if they work at an average rate. There is a way to work out the fair rate per piece of work done which employers must follow.

- Find out the average rate of work per hour (tasks or pieces completed). This must be done by testing some or all of the workers – if a group is tested it must be typical of the whole workforce. This must be redone if the work changes significantly.
- Divide it by 1.2 (this means new workers won't be disadvantaged if they're not as fast as the others yet).
- Divide the relevant minimum wage rate by that number to work out the fair rate for each piece of work completed.

Example

Workers are paid for each shirt they make. A fair rate test shows that workers can produce on average 12 shirts per hour. Felicity is 25 and is not an apprentice. How much must she be paid per shirt to meet NMW requirements?

The average rate of 12 is divided by 1.2 to make 10. The rate of NLW for Felicity is £8.91 from 1 April 2021. She must be paid at least 89p for each shirt she makes (£8.91/10)

Unmeasured work

This is work that is not covered by any other calculation. You have to record every hour worked and make sure the NLW is paid for every hour worked. You can agree a typical number of hours per day but this must be agreed in writing and be a realistic assessment of the hours worked.

Example

Frank is paid weekly and is 31. His agreed daily average number of hours is 6. In a particular week he works 3 days. How much should he be paid in order to meet NLW requirements?

He should be paid $3 \times 6 \times £8.91 = £160.38$.

Problem areas recently seen with HMRC compliance

1. Accommodation offset

As noted above, there is an accommodation offset where the employer provides the accommodation as part of the job. The regulations clearly state that the accommodation offset relates to payment the employer is entitled to receive. The writer is currently dealing with a case involving a hotel where the shareholders/directors of the company have private flats which they rent out to staff in the hotel which is reported as private rental income by those individuals. The HMRC officer is arguing this is treated as provided by the employer as they are connected and whilst it states that in the HMRC guidance, it is unclear where it states this in the actual legislation. There is also no reference to provision of accommodation in the employment contract. However, HMRC are still arguing that the accommodation offset applies.

2. Software not identifying when workers moved to 16

In the same case above, there are some workers who do a few shifts but are aged under 16 where the software did not check the point at which they reached that age and therefore fell within the NMW.

3. Hours worked eg security checks, compulsory meetings

There have been a number of well-publicised cases recently where staff have been treated as working where they were not paid for that time. Sports Direct insist on security checks for all staff on entering and leaving the distribution hub and this was shown to take around 20 minutes a day – it should have been paid as work. Argos has a staff meeting one a week for 30 minutes which was previously unpaid but should not have been. For businesses such as these where staff are likely to be at minimum wage levels in the first place, this makes a big difference.

4. Sleep in shifts

The Supreme Court have just published a decision involving Mencap relating to the NLW implications of sleep in shifts where an individual is expected to be asleep for most of a shift although they might be woken up and have to perform duties. They found that it is only the time when the individual is awake and performing duties that count for NLW purposes. This is a huge decision as the care sector would have been significantly hit if this had been found against them. This only covers those who are woken only occasionally and not those for whom there is an expectation that they will be awake for much of the night.

5. Deductions for uniform etc

Wagamama was recently hit in relation to uniform costs. Front-of-house staff are required to wear black jeans or skirt with a branded Wagamama top. The top was provided but other items had to be purchased and it was decided this represented purchase of a uniform so it should be deducted from wages for NLW purposes.

Contributed by Ros Martin