

## NATIONAL MINIMUM WAGE

### Introduction

This guide sets out the current minimum wage rates that form the legal hourly minimum rate for workers across the UK. It then goes on to summarise the rules on entitlement and offer advice on ensuring compliance while seeking to spread the benefits as widely as feasible across the workforce.

### Current and forecast rates

The National Minimum Wage (NMW) rates are reviewed each year by the Low Pay Commission.

In April 2016, a new rate, labelled by the government as the “national living wage,” came into force for workers aged 25 or over at £7.20 an hour.

On 1 October 2016, new rates applicable to workers aged under 25 and apprentices came into force as follows:

- the rate for workers aged between 21 and 24 is £6.95
- the rate for workers aged between 18 and 20 is £5.55
- the rate for workers aged between 16 and 17 is £4.00
- the apprentice rate, for apprentices under 19 or those in the first year of apprenticeship who are 19 or over, stands at £3.40



Category of staff	From 1 Oct 2016
<b>Aged 25 and over</b>	£7.20
<b>Aged 21 - 24</b>	£6.95
<b>Aged 18 - 20</b>	£5.55
<b>Aged 16 - 17</b>	£4.00
<b>Apprentices</b>	£3.40

Therefore, the full set of rates now stands as shown in the table to the right.

The uprating date for all the minimum wage rates is to be aligned from April 2017. Therefore, the rates for workers aged 24 or below and apprentices will rise again, six months after the October 2016 increase. It is expected that the government’s announcement of new rates will take place around October / November each year to give time for employers to prepare for April implementation.

The government has set out the intention to raise the “national living wage” to 60% of median earnings by 2020, while handing the responsibility to the Low Pay Commission for recommending annual increases.

The Office for Budgetary Responsibility (OBR) has estimated that, by 2020, 60% of median hourly earnings will stand at £9.00 an hour<sup>1</sup>. If this forecast turns out to be correct and the Low Pay Commission follows a straight path to the 2020 target, the OBR predicts that the National Minimum Wage for workers aged 25 or over will unfold as follows:

	2016	2017	2018	2019	2020
<b>Hourly rate</b>	£7.20	£7.60	£8.05	£8.50	£9.00

Employers should be made aware of these projections and build these rates into their financial planning.

In Scotland, the National Minimum Wage rates are only applicable outside the public sector because of the Scottish government's commitment to pay the Living Wage (announced annually by the Living Wage Foundation) as a minimum to directly employed staff.

## **Bargaining to widen the benefits**

### *Eliminating age differentials*

A survey by workplace analysts XpertHR in January 2016 found that, among employers who employ staff under the age of 25 earning less than £7.20 an hour, 60% of them intended to implement the £7.20 rate regardless of age. This reflects the pattern of implementation in the public sector, with most national agreements across health, local government and education rejecting any differential by age. In general, implementation of the separate apprentice rate has been more common, though even here there have been exceptions, such as in the Scottish NHS, where apprentices are guaranteed the Living Wage.

Such results demonstrate that many employers may be open to the idea that, although the £7.20 rate does not apply to staff aged under 25 by law, different rates according to age run against a basic sense of fairness in the workplace and would have a destructive effect on staff morale.

### *Cascading up pay scales*

The OBR estimates that the new minimum rate for staff aged over 24 has benefitted 2.7 million workers directly, but a further three million will have benefitted from some uplift in pay rates as a result of the need to change pay rates above the minimum and maintain reasonable differentials between pay rates.

This highlights the need to cascade increases through the pay scale to maintain reasonable gaps between pay points that recognise the different levels of skill and experience required for different roles and offer sufficient incentives to take on greater responsibilities.

Failure to ensure pay rates are aligned with work of equal value opens up any pay scale to equal pay challenges.

<sup>1</sup> Office for Budgetary Responsibility, Economic and Fiscal Outlook, March 2016

## *Resisting wider cuts*

While branches may be seeking to widen the benefits of new minimum wage rates, employers may attempt to restrict the benefits with arguments that the cost of the new rate means that they will have to squeeze pay rises for other staff, reduce terms and conditions or even make job cuts.

The cost issues will vary for every employer, but the general background to these changes is that the private sector has been awarded a host of cuts in business taxes to accompany introduction of higher minimum wage rates and the cost to employers is frequently exaggerated. The OBR estimates that, on average, the “national living wage” rate has cost employers £11 extra per week for each employee affected. In the public sector, UNISON is campaigning for employers to receive full departmental funding to meet the cost of the “national living wage” under the [new burdens doctrine](#)

[If you require details of profits for any private or community / voluntary sector organisation to counter employer arguments, contact Bargaining Support on [bsg@unison.co.uk](mailto:bsg@unison.co.uk) ]

## *Living wage campaigning*

The labelling of the minimum wage that came into effect in April 2016 as a “national living wage” should not be allowed to create confusion among staff or employers and diminish campaigning towards the real Living Wage announced annually by the Living Wage Foundation. Click [here](#) for an explanation of why the government’s “national living wage” is not a genuine Living Wage and [here](#) for the Living Wage bargaining guide. The current Living Wage is set at £9.40 an hour in London and £8.25 an hour across the rest of the UK.



## **Ensuring entitled staff are paid**

Almost all workers in the UK over compulsory school leaving age are entitled to be paid the minimum wage. Workers covered include those on part-time, agency, homeworker, piece worker, temporary, casual, zero hours, fixed-term or freelance contracts.

There is no qualifying period, workers are entitled to the minimum wage from the start of their employment. There are no variations or exclusions based on region, size of employer, industrial sector or occupation. Workers cannot be excluded on the basis of their hours of work, employment pattern, length of service or contract status.

There are some categories of workers who are excluded from the minimum wage. These include:

- workers who are genuinely self-employed;
- workers who are under school leaving age (see box below for definition);
- workers who live in the their employer’s home, such as au pairs;
- voluntary workers who are paid only expenses;
- members of the employer’s family;
- workers on work experience who are not trainees with a contract of employment;

- some trainees on government-funded training schemes, such as the Work Programme;
- members of the armed services;
- people who normally work outside the UK;
- prisoners.

These are the only exclusions allowed under the National Minimum Wage Act and National Minimum Wage Regulations.

## Ensuring pay rate meets regulations

### *The pay calculation*

The calculation of the minimum wage can be complicated. If you are not sure whether you are being paid the correct amount, please ask your steward or regional officer for help<sup>2</sup>. The GovUK website provides an interactive guide to calculating the minimum wage [here](#) and advice can be obtained from the ACAS helpline at 0300 123 1100.

The general principles for calculating pay for the purposes of the minimum wage are as follows.

### *Types of pay that are included*

The minimum wage is based on gross pay, before tax and national insurance are deducted. When calculating gross pay for minimum wage purposes, the employer can include:

- incentive, merit or performance-related pay;
- bonus payments;
- income tax and employee's National Insurance contributions;
- money the employer has deducted from the worker's pay (or the worker has paid directly to the employer) as a penalty for misconduct, repayment of a loan, repayment of an advance of wages, payment for shares or securities in the firm, or accidental over-payment of wages;
- voluntary deductions, such as union subscriptions;
- worker's pension contribution;
- payment by the worker to the employer for goods and services (only if the worker is not forced to buy from the employer);

### **Compulsory School Leaving Age**

- In England and Wales, a person is no longer of compulsory school age after the last Friday of June of the school year in which their 16th birthday occurs.
- In Northern Ireland, a person is no longer of compulsory school age after the 30th June of the school year in which their 16th birthday occurs.
- In Scotland, pupils whose 16th birthday falls between 1st March and 30th September may not leave before the 31st May of that year. Pupils aged 16 on or between 1st October and the last day of February may not leave until the start of the Christmas holidays in that school year.

<sup>2</sup> If you are unsure of these details, contact UNISON Direct on 0800 0857857

- the value of accommodation at a maximum rate of £6.00 a day (£42 a week). Where accommodation is provided for less than a full week, the offset should be correspondingly reduced;
- tips which go through the employer's payroll (which often happens when a service charge is automatically added to restaurant bills) count towards calculating whether the employee has been paid the minimum wage. However, tips paid directly from customers to staff (such as waiters or hairdressers) do not count as wages for the purpose of the minimum wage;

### *Types of pay that are not included*

The employer cannot count the following payments towards gross pay for the purposes of the National Minimum Wage:

- a loan;
- an advance of wages;
- a pension payment;
- a lump sum on retirement;
- a redundancy payment;
- a reward under a staff suggestion scheme;
- payment of expenses or allowances for clothing, travel, subsistence, removals, etc;
- a car;
- refund of money a worker spends on something to do with the job, such as tools, laundry or materials;
- benefits in kind (other than accommodation—see above) such as meals, or transport to work;
- benefits such as luncheon vouchers, stamps or anything a worker could exchange for money, goods or services;
- medical insurance;
- a deduction the employer makes for goods or services (for example, meals in a staff canteen, transport to work) where the worker is forced to buy from the employer

In general, only pay for “standard work” is taken into account for the purposes of calculating the minimum wage. Premium rates and unconsolidated allowances for work over and above what is normally required, do not count towards the minimum wage.

These include:

- overtime and shift premia (basic rate pay for overtime hours does count)
- special allowances for working in dangerous conditions, working unsocial hours, working in particular areas (for example, London Weighting), being “on call” for work, attendance allowances<sup>3</sup> and call out payments.

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<sup>3</sup> In the case of Aviation and Airport Services Limited -v- Bellfield it was held that a weekly attendance allowance, paid to employees subject to their full attendance at the workplace, did not count towards the NMW. The regulations specifically exclude any allowance other than an allowance attributable to the performance of a worker being taken into account in determining remuneration for the purposes of the NMW.

When allowances are consolidated into basic pay, they do count towards the National Minimum Wage.

### *The hours calculation*

Once pay has been established, the number of hours worked must be calculated to arrive at the pay rate. The National Minimum Wage Regulations define four different types of work:

- **time work** - where workers are paid according to the amount of time they work;
- **output work** - where workers are paid according to the amount they produce;
- **salaried work** - where workers are paid a regular annual salary, even if their hours vary over the year (this includes term-time only staff on annualised pay);
- **unmeasured work** - where workers have specific tasks to be done but do not have regular hours of work, such as a hostel wardens.

The calculation of what hours count towards the minimum wage varies for each of these categories of work. In general, however, the following applies:

### *Types of hours that are included*

A worker is considered to be working when they are:

- at work and required to be at work
- on standby or on call at or near their place of work (for the latest advice on sleep-ins see appendix 1)
- kept at work but unable to work because of machine breakdown
- travelling on business during normal working hours
- training or travelling to training during normal working hours

### *Types of hours that are not included*

- time spent on standby or on call when the worker is at home (exceptions to this rule have been made where an employee spends their entire shift at home, but not when the shift is an addition to basic hours)
- time spent absent from work, including holidays, sick leave and maternity leave, rest and lunch breaks (This applies to time workers only. Salaried workers would normally have these hours included in their contract, which means they would qualify for the minimum wage.)

### Hourly rate based on pay reference period

The minimum wage is set at an hourly rate but it does not mean that workers need to be paid exactly that amount for each hour worked. Pay is calculated over the pay reference period, which is the worker's normal pay period. This can be hourly, daily, weekly, four weekly, monthly, or any other pay period as long as it not longer than a month.

If, for example, a worker aged over 24 was paid weekly and worked a 38 hour week, they would have to earn a gross salary of at least £264.10 on average over the week to ensure

that they were earning the minimum wage applicable from October 2016. It would not matter if they earned more for certain hours than others, as long as the average met the requirements over the pay reference period.

## **Taking action against the employer**

Workers who think they are not being paid the National Minimum Wage have a right to examine their employer's records. Employers are required to keep adequate records to prove that they are paying the minimum wage. Requests to see employer's records must be made in writing, and employers must make the records available within 14 days. A worker has the right to be accompanied by a person of his choice when inspecting the records.

If an employer refuses or fails to make the records available, workers can complain to an employment tribunal and, if the tribunal finds against them, heavily fined.

If agreement cannot be reached with the employer on minimum wage payment, a [confidential helpline](#) is available through ACAS at 0300 123 1100 through which an investigation can be initiated.

Both current and former employees have the right to claim back pay entitlement under National Minimum Wage legislation. This not only means that former employees can claim their entitlement but HM Revenue & Customs, the enforcing authority, also has the right to enforce action in past cases involving former workers.

If enforcement officers find that an employer is underpaying they can:

- try to resolve the matter informally;
- issue an official enforcement notice;
- take action through employment tribunal or the courts to recover the money owed to the underpaid workers.

Employers face criminal prosecution, fines of up to £20,000 and possible public "naming and shaming" if they:

- refuse or wilfully neglect to pay the National Minimum Wage;
- fail to keep National Minimum Wage records;
- keep or produce false records or information;
- intentionally obstruct an enforcement officer;
- refuse or neglect to give information to an enforcement officer.

Enforcement officers can act on complaints of workers or others that an employer is not paying the minimum wage. They can also inspect an employer at any time. The burden of proof is on employers to show that they have complied with the requirements of National Minimum Wage legislation.

It is against the law to dismiss or victimise someone because they are eligible for the National Minimum Wage. This prevents employers from replacing workers who are entitled to the minimum wage, with those who qualify for a lower rate or are excluded altogether.

## Appendix 1 – Sleep-ins and the National Minimum Wage

### The issue

The Whittlestone EAT judgement has established that “sleep-ins” are covered by the National Minimum Wage (NMW) regulations. So even if a worker is allowed to sleep at work, if they are required to stay at their workplace, then all their hours are covered by NMW regulations.

This means if any worker is paid - on average – less than the NMW over their pay reference period<sup>4</sup>, they will be entitled to a pay rise to ensure NMW compliance. They may also be able to pursue a claim for back pay. However, because working patterns vary enormously between individuals, this will need to be considered on a case-by-case basis.

UNISON is aware that the introduction of the NMW Regulations 2015 led some employers to think that this meant that they now did not have to pay for sleep-ins (reversing the Whittlestone EAT judgment), however this is not the case. This briefing sets out the legal approach for negotiators and organisers when working with employers that are not paying their employees for “sleep-ins” and are therefore in breach of the NMW legislation.

### The legal approach

The NMW Regulations 2015 are consolidating regulations and therefore the legal position from the Whittlestone EAT judgement remains unchanged and “sleep-ins” continue to be covered by the NMW.

Each case will need to be looked at on an individual basis, however the starting point is to look at the nature of the work being undertaken by the member. Does the worker have an obligation to be physically present at their workplace? For example, what would happen if they left - would the worker be disciplined? If they would be disciplined or they are otherwise prevented from leaving then case law suggests that the time spent at work, whether awake or asleep, is subject to NMW compliance. This is because being present is work in itself.

It may be that the worker is able to sleep (as Ms. Whittlestone was able to) for most of the night but the relevant issue is that the worker could not simply be absent for one night or part of a night and that her physical presence is required.

The sections which appear to be causing concern for employers (reg. 27 (2) and reg. 32(2)) only come into play where it can be shown that the worker is available for work (but not actually working) and qualify the situations in which payment must be made (i.e. when the worker is woken and carries out duties).

These would be circumstances where the individual was genuinely “on-call”. For example if a worker was required to sleep on the premises, but could come and go as they pleased (they are under no obligation to be physically present), this would be categorised as “on-call”. Our experience suggests that this would be an unlikely scenario in the care sector. It is more likely to be relevant in the service industry where people may live above a pub for example.

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<sup>4</sup> The pay reference period is the time over which the worker is usually paid - usually monthly or weekly.



UNISON's position is that someone who is required to be present (awake or asleep), and who is not permitted to leave the premises during their shift or sleep in is working rather than available for work so the qualifications in reg. 27(2) and reg. 32(2) do not apply.

The law is a useful tool in pushing employers to change current arrangements, and potentially for back pay claims. We will support individual members' legal cases where they are assessed as having reasonable chances of success. It should be noted that no-win no-fee lawyers may see this as an opportunity to pursue claims. Unlike many no win no fee lawyers UNISON never deducts fees from compensation in successful claims.

Where there may be an individual case, a case form must be completed and evidence attached including copies of pay slips and rotas. All legal cases should be referred to UNISON Legal Services. The contacts for this, and further legal guidance on this issue, are:

**Kate Ewing (for England / Wales / N. Ireland) [k.ewing@unison.co.uk](mailto:k.ewing@unison.co.uk).**

**Suzanne Craig / Peter Hunter (for Scotland only) [s.craig@unison.co.uk](mailto:s.craig@unison.co.uk) / [p.hunter@unison.co.uk](mailto:p.hunter@unison.co.uk)**