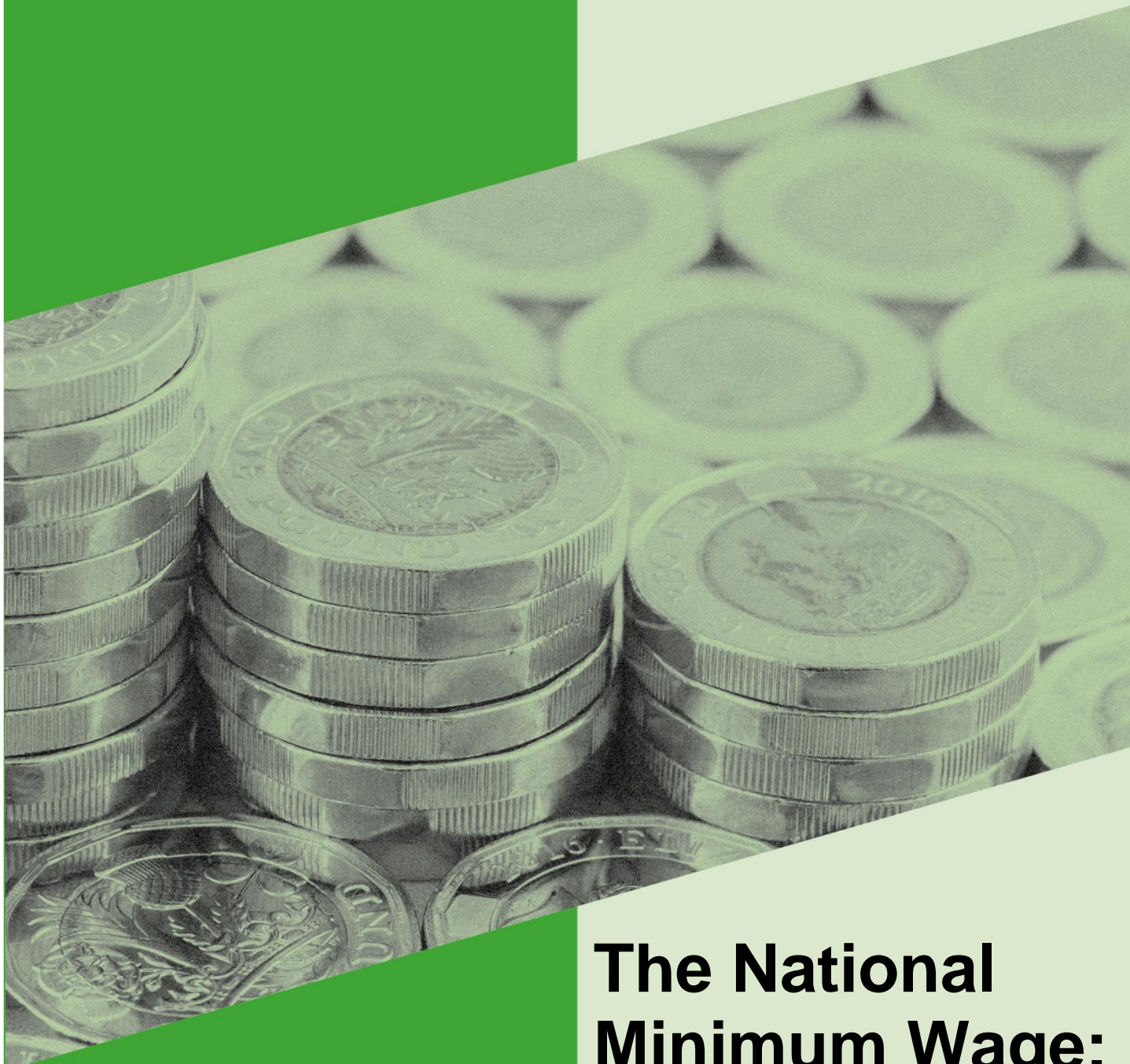


Bargaining Support Group



The National Minimum Wage:

Ensuring compliance
and bargaining for
improvements

**UNISON**
the public service union

THE NATIONAL MINIMUM WAGE: ENSURING COMPLIANCE AND BARGAINING FOR IMPROVEMENTS

How can this guide help me?

The National Minimum Wage is the legally enforceable minimum hourly rate of pay for workers across the UK. This guide seeks to provide materials that assist branches in ensuring that employers comply with the wage and adjust pay structures in a way that maximises benefits across the workforce.

Specifically, the guide provides:

- The current rates against which organisational rates should be checked;
- Planned and forecast increases in the rate which should be considered as part of pay negotiations;
- Factors to incorporate into annual revisions of pay structures that widen the benefits beyond the strict legal requirements;
- The process for checking compliance with rates and taking action against employers;
- The latest legal position on sleep-in payments, the process for checking compliance and the steps for taking action over failure to comply;
- The latest legal position on payment for travelling time, alongside the implications for detecting and pursuing cases.



Contents

1. Current and forecast rates	4
2. Bargaining to widen the benefits	5
2.1 Eliminating age differentials	5
2.2 Eliminating apprentice differentials	6
2.3 Cascading up pay scales	7
2.4 Resisting wider cuts	7
2.5 Living Wage campaigning	8
3. Ensuring entitled staff are paid	9
4. Ensuring pay rate meets regulations	10
4.1 The pay calculation	10
4.2 The hours calculation	12
5. Taking action against the employer	14
6. Payment for sleep-ins	15
6.1 Responding to the latest legal ruling	15
6.2 Targeting employers	17
6.3 Speaking with commissioners	18
7. Payment for travelling time	19

1. Current and forecast rates

The National Minimum Wage (NMW) rates are reviewed each year by the Low Pay Commission (LPC). Its recommendations go to the government, which then usually announces in November the rates to come into force the following April.

The current rates for the five tiers of minimum wage levels are as below.

Category of staff	Aged 25 and over	Aged 21 - 24	Aged 18 - 20	Aged 16 - 17	Apprentices
Rate from April 2020	£8.72	£8.20	£6.45	£4.55	£4.15
% increase on 2019	6.2%	6.5%	4.9%	4.6%	6.4%

The rates to come into force from April 2021 are as below.

Category of staff	Aged 23 and over	Aged 21 - 22	Aged 18 - 20	Aged 16 - 17	Apprentices
Rate from April 2021	£8.91	£8.36	£6.56	£4.62	£4.30
% increase on 2020	2.2%	2%	1.7%	1.5%	3.6%

The rate for staff aged 25 and over is the rate that has been labelled by the government as the “national living wage.”

The apprentice rate is applicable to all apprentices under 19 and those in the first year of apprenticeship who are 19 or over.

The 2020 rate took the highest tier of the wage to the target set back in 2016 of achieving 60% of median hourly earnings.

The government has now set a new target of two-thirds of average earnings by 2024, with the age eligibility for the highest tier dropping to 23 in 2021 and then 21 by 2024 (thereby eliminating a separate rate for 21-24-year-olds).

However, the dramatic impact of the Covid-19 pandemic on the economy led to the Low Pay Commission recommending an increase in the 2021 rate below the expected level to remain on course for the 2024 target. Nonetheless, the commission has expressed the intention to catch up over subsequent years to reach two-thirds of median earnings.

The Office for Budgetary Responsibility’s forecast of how the highest tier of the minimum wage will rise over the coming years is subject to a great deal of uncertainty dependent on changing economic conditions, but currently stands as follows.

	2022	2023	2024	2025
Forecast rate	£9.28	£9.71	£10.09	£10.45

2. Bargaining to widen the benefits

2.1 Eliminating age differentials

A survey by workplace analysts XpertHR in 2017 found that 54% of employers pay the highest minimum wage rate to all staff regardless of age. This reflects the pattern of implementation in the public sector, with almost all national agreements across health, local government and education rejecting any differential by age.

Such results demonstrate that many employers in the private and community sector may also be open to the idea that, although the top minimum wage 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.

The comments set out below in research by the New Policy Institute¹ reflect widespread views in the public sector and also draw out employer concerns that the turnover costs of enforcing age differentials outweigh the expense of applying the highest minimum wage rate uniformly.

The employers we spoke to stressed the need to reward individual performance, rather than age. They believed this allowed them to get the best out of all of their employees:

“A young person performing well should progress at the same rate as an older person progressing well. Age shouldn’t play into it. If you’re being paid less because of your age, you may feel undervalued, which may have a negative impact on productivity.

“In some sectors, where managers spend half their time recruiting because turnover is so high, if you can halve turnover that is a real financial saving.”

Spokesperson for Local Government Employers

“As an organisation with many different roles, why would we differentiate by age at the bottom of the pay scale when we don’t higher up? We would never differentiate senior manager pay by age, so why would you do it for a cleaner or a nursery nurse? If the way wages are set is not consistent and transparent, it may lead to conflict in the workplace.”

Spokesperson for Sixth Form College Employers

Where employers do enforce age differentials, branches need to be vigilant that no pattern emerges of employers terminating contracts when staff reach 25 in order to replace them with younger staff, who act as a continual source of cheaper labour.

Gathering information on factors such as turnover rates and staff morale by age can assist in making the case to an employer. It may only be possible to gain reliable turnover figures through the employer, but indicators of such dimensions as morale can be gathered through a union survey. An amendable staff survey is available as part of UNISON’s pay claim guide on this web page <https://www.unison.org.uk/bargaining-guides/>

¹ New Policy Institute, Young Adults and the Minimum Wage, June 2017

2.2 Eliminating apprentice differentials

While implementation of reduced minimum wage rates for young workers is extremely rare among the public sector's directly employed workforce, use of the apprentice minimum wage rate is more common.

Nonetheless, UNISON surveys have found that public sector employers on average pay around 50% above the apprentice minimum wage and among some employers, such as the Scottish NHS, apprentices are guaranteed the Living Wage.

UNISON recommends taking up the issue of apprentices' terms and conditions by persuading an employer to adopt the [apprenticeship charter](#), which includes a commitment to pay apprentices the rate for the job.

However, again simply achieving parity with the highest minimum wage can be argued on the basis of fairness in the workplace and avoiding a destructive effect on staff morale. A study of the apprentice rate by the New Policy Institute² found evidence that paying the higher rate improved apprenticeship completion rates and argued that the apprentice rate is so low that it acts as a barrier to women, disabled workers and ethnic minority workers in taking up apprenticeships because they simply cannot afford to live on the wage.

The importance of paying a higher rate in attracting high quality candidates was also emphasised in interviews with employers, as reflected in the quote below from the report.

'If we go to an event to recruit apprentices in engineering, business admin, plumbing, we have competition for people [from the private sector] and [if] someone beside me is paying the national minimum apprentice rate, [who] are parents going to bring their children [to]? Pay is a big attraction to young people. You can see their eyes popping out of their head.'

NHS recruitment specialist

Vigilance is once again needed to detect any tendency of an employer to terminate contracts when an employee moves off the apprentice rate and onto one of the higher minimum wage rates. The use of apprentices as a cheap labour source instead of staff on full terms and conditions has also been uncovered by a UNISON survey of public sector employers which found that one in ten acknowledged reducing staff recruitment on standard contracts or failing to replace staff to meet apprentice targets.

² New Policy Institute, Apprentices and the minimum wage: The case for narrowing differentials, May 2018

2.3 Cascading up pay scales

The OBR estimated that the introduction of the new minimum rate for staff aged over 24 benefitted 2.7 million workers directly, but a further three million benefitted from some uplift in pay rates further up the pay scale as a result of the need to maintain reasonable differentials between pay rates.

This highlights the need to respond to any increase in minimums by cascading increases through the pay scale. This knock-on effect is needed 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.

Analysing the difference between pay points and arguing that the gaps should be evenly spaced will push pay rates up through the scale, while job evaluation scores for roles at different points on the scale will also give ammunition for maintaining appropriate differentials (UNISON's job evaluation guide can be found at <https://www.unison.org.uk/bargaining-guides/>)

However, care should be taken about the use of supplements to selectively raise salaries for specific jobs further up the scale. Responding to minimum wage rises in this way can leave a scale vulnerable to violating equal pay law, whereby work of equal value has to be paid at an equal rate.

2.4 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.

However, alongside the extra cost of the minimum wage can be laid a host of reductions in organisational costs, most notably:

- For the private sector, corporation tax has seen a dramatic reduction from 28% in 2010 to 19% by 2020³;
- Since April 2016 employers have not had to pay employer National Insurance Contributions (NICs) on earnings of apprentices aged under 25 up to the upper earnings limit (£43,000 annually at the time it was introduced);
- Since April 2015, NICs have not been payable for all employees aged under 21 regardless of whether they are apprentices.
- Since April 2014, an annual allowance of £3,000 has applied to employer NICs.
- From April 2017, exemptions and discounts for small business rate relief increased markedly

For an outline of the state aid to organisations resulting from the Covid-19 pandemic and fuller advice on utilising organisational accounts to make a case for resisting wider cuts, see UNISON's pay claim guidance at

<https://www.unison.org.uk/bargaining-guides/>

³ Corporation tax is only applicable to firms making in excess of £300,000 profit in a year and a discount is applied to profits between £300,000 and £1.5m.

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 about the costs of minimum wage rises, contact Bargaining Support on bsg@unison.co.uk

2.5 Living Wage campaigning

The labelling of the minimum wage for staff aged 25 or over 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 on this link <https://www.unison.org.uk/bargaining-guides/> for the Living Wage bargaining guide, which includes an explanation of why the government’s “national living wage” is not a genuine Living Wage. At £10.85 an hour in London and £9.50 an hour across the rest of the UK, the lowest Living Wage rate translates into a salary worth over £1,000 more than the highest NMW rate for a 37-hour week.

However, if forecasts for the NMW are correct and the Living Wage maintains its current growth path, the rates could head toward convergence, reaching similar levels by 2024.

3. 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 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.

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.

4. Ensuring pay rate meets regulations

4.1 The pay calculation

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);
- The value of accommodation at a maximum rate of £8.20 a day (£57.40 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 (such as 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;
- Advance of wages;
- Pension payment;
- Lump sum on retirement;
- Redundancy payment;
- Reward under a staff suggestion scheme;
- Payment of expenses or allowances for clothing, travel, subsistence, removals;
- 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;
- Deductions 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 allowances⁴ and call out payments.

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

⁴ 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.

4.2 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 warden.

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 section six of this guide);
- Kept at work but unable to work because of machine breakdown;
- Travelling on business during normal working hours (for the latest advice on payment for travelling time see section seven of this guide);
- Training or travelling to training during normal working hours.

Types of hours that are not included

A worker is not considered to be working when they are:

- 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);
- 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).

Reference period used for calculation

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 is not longer than a month.

If, for example, a worker aged over 24 was paid weekly and worked a 37-hour week, they would have to earn a gross salary of at least £322.64 on average over the week to ensure that they were earning the minimum wage applicable from April 2020. 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.

The calculation of the minimum wage can be complicated, so if you remain unsure whether a worker is being paid the correct amount, please ask your steward or regional officer for help⁵.

The GovUK website provides an interactive guide to calculating the minimum wage at <https://www.gov.uk/am-i-getting-minimum-wage>

ACAS provides an advice helpline at 0300 123 1100

⁵ If you are unsure of these details, contact UNISON Direct on 0800 0857857

5. 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 their 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 compensation is payable.

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 shaming⁶” 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.

⁶ The latest listing of organisations that have been named and shamed for failing to pay the National Minimum wage is available at <https://www.gov.uk/government/news/nearly-200-employers-named-and-shamed-for-underpaying-thousands-of-minimum-wage-workers>

Greater detail concerning the procedure for pursuing a complaint through the HMRC or an employment tribunal, along with arrangements for protecting anonymity, can be found in the TUC guide [Enforcing the National Minimum Wage](#). However, it is worth remembering that UNISON has highlighted concerns with how HMRC enforce minimum wage compliance, particularly given issues related to the poor quality of minimum wage records that some employers maintain.

6. Payment for sleep-ins

6.1 Responding to the latest legal ruling

In March 2021, the Supreme Court backed a 2018 Appeal Court ruling, which had overturned previous legal decisions to find that workers engaged on “sleep-in” shifts are to be treated as being “available for work” as opposed to working time.

[National Minimum Wage](#) guidance issued by the government in the wake of the Appeal Court ruling has stated that “if the employer provides suitable facilities for sleeping, minimum wage must be paid for time when the worker is required to be awake for the purpose of working, but not for time the worker is permitted to sleep.”

Therefore, there is clearly a risk that some employers will seek to take advantage of the ruling by imposing payments that only meet the new bare minimum legal requirement.

Branches should seek to resist any such downgrading of payments by highlighting:

- The outrage with which the workforce will view reducing the income of the organisation’s lowest paid workers and the hardship it will impose on those workers. Staff know that the reality of sleep-ins is far from a normal night at home in a comfortable bed - they are away from home, family and friends, they cannot leave work without facing disciplinary action, and they are often carrying significant responsibilities, such as being on hand for vulnerable people, which could arise at any moment.
- The reputational damage that can arise from publicity exposing the organisation’s treatment of its lowest paid workers;
- The potential damage to turnover rates - in the case of adult social care, where much public service sleep-in work is concentrated, turnover rates for home care workers is 44% - among one of the highest occupational turnover rates in the UK.
- The cost that higher turnover imposes in terms of additional recruitment costs – according to the Chartered Institute of Personnel and Development, average recruitment costs currently stand at £2,000 per job, when in-house resourcing time, advertising, agency and search fees or all taken into account⁷.
- The cost that higher turnover imposes in terms of reduced quality of service, which again has a knock-on effect for the organisation’s reputation and ultimately revenue.

⁷ CIPD, Resourcing and Talent Planning Survey 2020

- The potential contrast between the cost savings of cutting sleep-in payments and the profitability of the organisation – if you need assistance in obtaining or interpreting an organisation's accounts, contact Bargaining Support on bsg@unison.co.uk

Where employers nonetheless move to downgrade payments, the practice of paying a nominal lump sum for a sleep-in is a common arrangement. Care should be taken to ensure that the total value of payments over the pay reference period equate to at least the minimum wage in these circumstances. The example below shows how these arrangements can lead to hourly wages dipping below the legal minimum.

Example

Helen is a care worker and her pay reference period is a month. She works 8 hour shifts during the day from 2pm-10pm at a rate of £9.00 an hour. She also does sleep-in shifts on occasion lasting 10 hours from 10pm-8am at a rate of £30 per shift.

In her last pay reference period, she worked 20 shifts during the day. This equates to 160 hours (8hrs x 20 = 160 hours). Her rate of pay for this part of her work is £1,440 (£9.00 x 160).

She also worked 5 sleep-in shifts. During this time, she was required to be awake for the purpose of working for 5 hours each shift (5hrs x 5 = 25 hours). Her rate of pay for this part of her work is £150 (£30 x 5 shifts).

In total over the pay reference period she is deemed to have worked 185 hours for £1,590, giving her an hourly rate of £8.59 (£1,590 divided by 185). The fact that her hourly pay rate for her normal hours is only slightly above the current level of the minimum wage means that her average pay rate drops below that rate when the hours she spends awake for sleep-in shifts are taken into account.

Where there appears to be a group of workers affected, rather than an individual member, it may be advisable to consider raising a collective grievance. For instance, UNISON have previously proactively carried out an online survey of members in a particular employer to try and establish if any of them were being paid below the minimum wage and raised a collective grievance as a consequence. However, you should always be mindful of any tribunal deadlines which relate to individual members.

To help establish whether members have a case, please ensure that you get the following information:

1. A completed case form;
2. A copy of the contract of employment;
3. Payslips from the past 6 months;
4. Examples of relevant rotas;
5. Their employer's policy on sleep-ins and allowances/payments for sleep-ins.

The case form (available [here](#)⁸) asks them to record key information and gives you space to show how they have been affected by their employer's approach to sleep-ins. Some members may struggle to provide this information, but it is really helpful to see the following evidence in order to help get a sense of whether they have been paid properly:

- How long they have worked for their employer;
- How many hours a week they work;
- How many rota'd sleep-ins they have worked in a pay reference period;
- How many hours they have been required to be awake for the purpose of working during sleep-ins in the pay reference period;
- What overtime hours they have worked and at what rate of pay;
- Their normal rate of pay.

This information will allow you to calculate how many hours they have worked across a pay reference period. Then you divide the pay they have received during their pay reference period by the total numbers of hours they have worked during that period. If the hourly rate falls below the current minimum wage rate (whatever rate is applicable) then they have been underpaid.

6.2 Targeting employers

As well as dealing with queries from existing members we would encourage branches to actively try and recruit and organise around this issue.

National officers can provide you with mapping information, useful information about various employers and help you ensure that any targeting of private employers is done in a strategic way.

For enquiries about Social Care generally, email care@unison.co.uk. For enquiries relating to charities and not for profit sector, email cvsector@unison.co.uk.

For further guidance on this issue, you can also contact Andrew Dobbie on a.dobbie@unison.co.uk (CVS Sector) or Matt Egan on m.egan@unison.co.uk (Local Government).

⁸ <https://www.unison.org.uk/get-involved/in-your-workplace/key-documents-tools-activists/case-form/>

6.3 Speaking with commissioners

Part of the reason why so many care workers who do sleep-in shifts are paid below the minimum wage can be traced back to how care services are commissioned by local councils. Some councils have commissioned care employers to provide services at rates which do not allow them to pay staff properly (often due to the major budgetary pressures they are experiencing). Some councils commission these services at a rate which should allow care providers to pay staff properly but they do not ensure that their providers are subsequently paying their staff properly.

If you have evidence that a care provider in your area is not paying staff the minimum wage over the sleep-in issue (or any issue for that matter) then please raise the matter with your local council (the head of adult social care services and/or the lead member for adult social care services). Depending on the circumstances, you may wish to ask that the council increases the amount of money it spends on the contract to help ensure that all the workers are paid at least the minimum wage. In cases like this the employer in question may also want to work with you to lobby the council for an increase in the contracted rate.

If you are dealing with an intransigent employer then you may want to discuss the matter with the council with evidence of non-compliance and use it as a vehicle for encouraging the council to adopt the Ethical or Residential Care Charters. The status of the workers is often very vulnerable and discussions with the council need to be progressed with this in mind, so the 'solution' isn't simply for a contract to be ended and for the workers to be left without employment. This can be very complex and if you require more information please contact colleagues at the UNISON Centre named above.

You can also ask your council to carry out an audit to determine whether all their contracted care providers that use sleep-ins shifts are compliant with the minimum wage. Ask them to identify which care providers still pay their workers lump sums. Where care workers are still paid lump sums ask the council to determine whether the provider is compliant with the minimum wage.

For the care providers they commission which pay workers an hourly rate rather than a lump sum for sleep-ins, make sure that is for every hour of the shift and not just when they are required to wake up/work.

For enquiries about Social Care generally, email care@unison.co.uk. For enquiries relating to charities and not for profit sector, email cvsector@unison.co.uk.

For further guidance on this issue, you can also contact Andrew Dobbie on a.dobbie@unison.co.uk (CVS Sector) or Matt Egan on m.egan@unison.co.uk (Local Government).

7. Payment for travelling time

In September 2020, an employment tribunal ruling resulted in home care workers for contractors commissioned by Haringey Council in London receiving average awards of around £10,000 each as a result of failure to pay the minimum wage for travelling time.

One member of staff was driving between up to 15 clients in a day that could start at 7am and end at 9pm, while another on a similarly busy schedule would travel by bus or walk to reach the people under her care, yet none were receiving payment for their travelling time.

Importantly, the judgment records how their travelling time awards were calculated; travelling and waiting time of up to 60 minutes between appointments was treated as working time.

If a branch has grounds to believe that, as in the case of Haringey, staff are not being paid for travelling time, the following steps may be considered:

- Ask staff to record their working hours over their typical payment period. In the case of care workers, it may be useful to split this into contact time with clients and travelling time between clients;
- Collect records of staff schedules over the payment period;
- On the basis of evidence collected, set out the minimum payment that should have been received over the pay period by multiplying the applicable minimum wage by the number of hours, provided all factors outlined in section 4 of this guide have been applied;.
- This figure can be compared against the actual payment made to the worker over the pay period;
- Since 2019, payslip regulations have changed to demand that where wages or salary varies by reference to time worked, the itemised payslip must show the total number of hours worked in respect of variable amount of wages or salary either as a single aggregate figure or as separate figures for different types of work or different rates of pay. Since the wage or salary of care workers usually does vary by the number of hours worked, this can also offer a useful check of the number of hours that the employer is classifying as working hours compared to the experience of staff themselves;
- This means of checking payment can be made even more valuable by pressing the employer to go beyond the basic legal requirement and explicitly set out a more detailed breakdown of hours and payment on payslips. For example, care employers could show the contact and travelling time that forms the basis for their calculation.

- Where investigation suggests that there may be grounds to believe that staff are not being paid the minimum wage because of omission of travelling time, seek regional assistance to check the strength of the case and take the suitable next steps. It may be possible to present evidence to the employer and reach agreement on payment of all shortfalls. However, the region will also be in a position to consult and escalate action against the employer in line with the options set out on page 5 of this guide if necessary.
- Building a campaign to accompany efforts to achieve payment. UNISON's broad [organising](#) and [campaigning](#) guidance provides advice on rallying support among staff and outside the workplace. In the context of payment for travelling time, campaign work may seek to influence commissioning bodies, service users, local community groups, the media, local elected officials and public authorities with responsibilities for overview and scrutiny of delivering of services.

In the case of care staff, the [accompanying guidance for the Care Act 2014](#) provides a particularly useful reference point in applying pressure on commissioning bodies, since it states:

“When commissioning services, local authorities should assure themselves and have evidence that service providers deliver services through staff remunerated so as to retain an effective workforce. Remuneration must be at least sufficient to comply with the national minimum wage legislation for hourly pay or equivalent salary. This will include appropriate remuneration for any time spent travelling between appointments.”

The HMRC has produced a webinar to explain the rules that apply to payment of the National Minimum Wage for travel time and breaks in the social care sector, which is available on this [link](#)