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GUIDE TO

The National Minimum Wage and National Living Wage for Recruiters



Recruitment &
Employment
Confederation

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This guide has been prepared by the Recruitment & Employment Confederation with support from HMRC to ensure recruiters understand the National Minimum Wage and National Living Wage.

The different rates

There are different National Minimum Wage (NMW) rates depending on the worker's age and whether they are an apprentice. The National Living Wage (NLW) is the highest of the rates and it applies to workers aged 25 and over.

Who is responsible for paying the National Minimum Wage?

The law says that as an employer you must pay the National Minimum Wage and National Living Wage at the right rate.

Sounds simple doesn't it?

It's not as simple as it sounds as there are a number of pitfalls for employers. The penalty for underpayment is 200% of the underpayment, which means that employers risk fines of up to £20,000 per underpaid worker and public naming and shaming by the government if they get it wrong.

It is important that you do not leave this to your accountant as it is your responsibility and you will be liable.





THE FIVE MOST COMMON MISTAKES EMPLOYERS MAKE ARE:

1 Underpaying workers

This can happen when employers fail to implement annual rate increases, miss birthdays and therefore don't move workers from one age band to another or make errors in applying the apprentice rates.

2 Making deductions that take a worker's pay below NMW/NLW rates

Deductions for items connected with the job such as uniforms, deductions for services provided by the employer such as meals or transport, or excessive deductions for accommodation.

3 Including payments

Such as shift allowances under certain circumstances or customer tips or bonuses when calculating a worker's pay for NMW/NLW purposes. Find out more [here](#).

4 Worker status errors

I.E. mistakenly treating workers as volunteers, interns or self-employed. Use the [National Minimum Wage Worker Checklist](#) to help you decide if an individual should be classed as a 'worker' and therefore is entitled to the National Minimum Wage. The HMRC '[Am I Employed or Self Employed?](#)' YouTube video covers the question of self-employment status.

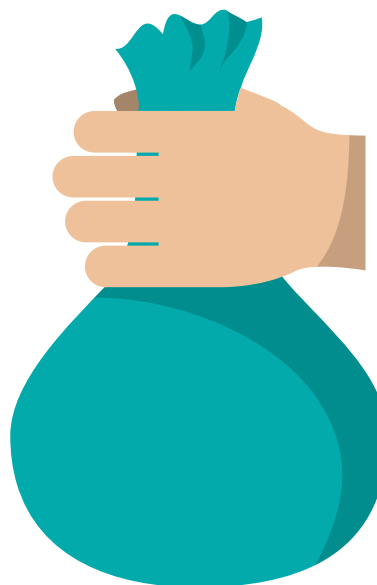
5 Unpaid working time

For additional hours worked but not paid. These are often regular but very short periods of time, for example time spent helping to shut up shop or clear security after a worker's shift has ended, or longer periods spent training or 'down time' waiting. Other errors can occur around travelling time if it's in connection with the worker's job, such as between assignments, and sleeping time. Detailed guidance can be found [here](#).

HMRC's interest in the recruitment and employment sector

The recruitment and employment sector is one of the sectors being looked at by HMRC because the supply chain can be complex and it employs many people.

HMRC has investigated more than 70,000 employers across all sectors for National Minimum Wage issues since the legislation was introduced, has the right to carry out checks at any time and ask to see any relevant records. Successful enforcement of the National Minimum Wage and National Living Wage by HMRC helps to level the playing field making sure unscrupulous employers aren't advantaged.



What are the correct National Minimum and National Living Wage rates?

As of 1st April 2017:



APPRENTICES: £3.50 (up from £3.40)

Apprentices are entitled to the apprentice rate if they're either:

- **aged under 19**
- **aged 19 or over and in the first year of their apprenticeship**

Apprentices aged over 19 who have completed the first year of their apprenticeship are entitled to the relevant age-related NMW/NLW rate for their age. In-house training programmes do not count as apprenticeships. For the apprenticeship rate to apply, there has to be a contract of apprenticeship or the worker has to be participating in a recognised government scheme.



UNDER 18: £4.05 (up from £4.00)



18 – 20: £5.60 (up from £5.55)



21 – 24: £7.05 (up from £6.95)



25 AND OVER: £7.50 (up from £7.20) – this is the National Living Wage

These rates change every April so remember to check you are applying the most up-to-date rates.

Accommodation offset rates

Living accommodation provided by an employer can be taken into account when calculating the **National Minimum Wage or National Living Wage**.

No other kind of company benefit (e.g. food, a car, childcare vouchers) counts towards the minimum wage. There is a maximum daily sum that employers who provide

accommodation can deduct towards those costs. Examples showing the effect of the accommodation offset rate and details of what counts as accommodation charges can be found on gov.uk.

Accommodation offset rates change each year in April. From April 2017, the daily offset rate will be £6.40.



Where can I find more information?

Search the gov.uk website for '[National Minimum Wage](#)' for more information including an [online calculator for employers](#) to help check if you're paying the correct amount and calculating anything you might owe your workers.



Where do I get expert advice?

[ACAS \(the Advisory, Conciliation and Arbitration Service\)](#) provide a free and impartial helpline for National Minimum Wage queries:

Telephone: 0300 123 1100

Monday to Friday: 8am to 8pm (until 6pm on Tuesdays)

Saturday: 9am to 1pm

Members of the Recruitment & Employment Confederation can also request advice via their [legal helpline](#) or [access further information via their legal guide section](#).



What should I do if I'm paying at the wrong rate?

Put it right - identify any arrears you owe your workers, pay those arrears to the workers and pay the correct rates going forward. For more information on how to calculate arrears, click [here](#). You can also find more information about how to calculate the minimum wage [here](#).

A failure to act runs the risk that one of your workers, or ex-workers, will report you to HMRC. You will then be investigated, which can result in penalties of up to £20,000 per underpaid worker. You may also be publicly named and shamed, which could have a significant impact on the reputation of your business.

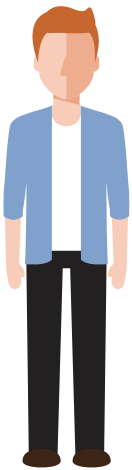
FAQs

QUESTION 1:

Is a worker working when they are sleeping?

ANSWER:

Unfortunately there is no simple answer. To determine whether it is working time you must look at what the worker is actually doing and their contractual arrangements. For time worked and salaried hours workers, if they are required to be on the premises and can't leave during the hours they are required to be there, then it's likely they will be classed as working.



Zac is 20 years old and works in a care home on a time work basis, i.e. paid by the hour. He earns the correct rate of £5.60 an hour for his daytime work and works 30 hours per week.

For the last three months he has slept at the care home between 9pm and 7am on a Wednesday and Thursday night for which his employer has given him an extra £50 each night in his wages. He can't leave the premises between these hours as he is required to be onsite in order to satisfy health and safety requirements. During the three months Zac has never been woken up.

The requirement to be on the premises during the night means that it is likely all the hours when Zac is at the care home should all be taken into account when calculating his National Minimum Wage entitlement.

When dividing Zac's weekly wage of £268 by 50 hours (30 hours during daytime plus 20 hours sleeping time) the hourly wage rate is £5.36, which is below the National Minimum Wage. Zac's employer has calculated the underpayment of National Minimum Wage and paid Zac back pay of £156 (£12 a week for 13 weeks). The employer has told HMRC that this is what they have done. There is no penalty as Zac's employer has corrected the error.

For illustrative purposes any consideration of accommodation offset (see question 9) has been excluded from this scenario.

Employers are encouraged to contact the Acas helpline or their professional body for assistance in determining their individual circumstances.

QUESTION 2:

How do Daily Average Agreements and the National Minimum Wage work together?

ANSWER:

When working out the National Minimum Wage for unmeasured work an employer should either record every hour worked or make a Daily Average Agreement, these are written agreements which set out the average number of hours that a worker is likely to spend each day doing the tasks assigned to them, in the time period they are contracted for. For example they may be expected to work on average six hours a day. As a minimum, the worker should receive the relevant National Minimum Wage/National Living Wage rate for the agreed average hours.



Layla is a carer five days a week for Mrs Johnson during the day, typically starting the day at 8.00am and finishing at 5.00pm. Layla is able to come and go during the day but she has some specific tasks to perform such as helping Mrs Johnson to dress, preparing her meals, helping with her medication, etc. Layla, who is 28 years old, is employed under a Daily Average Agreement and earns £240 a week for an agreed average of six hours a day. When not specifically attending to Mrs Johnson's needs, Layla spends her time relaxing either reading or sewing, usually at Mrs Johnson's property.

Layla is being paid above the £225 a week she is entitled to as a minimum for the averaged 30 hours

a week she has agreed to as part of her Daily Average Agreement (at £7.50 an hour). The Daily Average Agreement must be in writing and signed by both the employer and worker before the employment starts. Such agreements must be a realistic reflection of the actual hours worked.

Daily Average Agreements only apply where it is unmeasured work. Details on different types of work for National Minimum Wage purposes are on gov.uk.

QUESTION 3:

Is a worker entitled to the National Minimum Wage when on-call?

ANSWER:

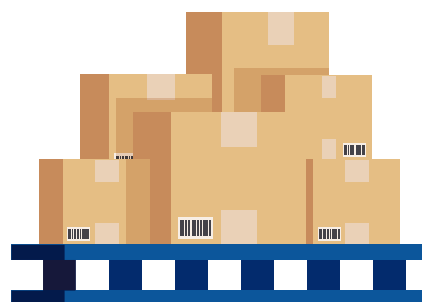
Answer: No, not ordinarily. Only in instances where a worker is required to remain at or near the workplace and be available for work will this be classed as working-time.



David, 43 years old, works as a security officer and is on-call during the weekend. Sometimes, he gets a call to go to the industrial park where he is employed and he gets paid for the time he spends there.

David is paid £25 for each day he is on-call over the weekend. He likes to go shopping with his wife on Saturdays and Sundays are spent relaxing and catching up with the Sunday papers. He keeps his mobile on both days in readiness for any call outs. A friend has suggested to David that he should be paid £7.50 per hour for all the weekend hours he is on-call, irrespective of whether he is called out to the industrial park or not.

David is not considered to be working during the days he is on call as he can decide what to do and where he goes on those days. He is only classed as working once he receives a call out.



QUESTION 4:

Is a worker entitled to the National Minimum Wage for travel time between carer visits?

ANSWER:

Yes, employers normally have to pay workers for time spent travelling in connection with their job but this does not include travelling between their home and the place of work.



Mica is engaged by an employment business and is supplied to the employment business's client, a local authority, to provide care for people in their own homes. On his current assignment he sees five clients a day (five days a week) travelling around his local area in his car. He spends an hour with each client and travels half an hour between each appointment. His first appointment starts at 8.30am and the last finishes at 4.30pm (he has a one hour lunch break). His employer is paying him for 25 hours a week at the NMW rate of £7.50 or £187.50 per week, plus petrol expenses. Mica, who is 35 years old, is not sure if this is correct.

Travel from home to work, and back home is not taken into account as working time for National Minimum Wage calculations. Mica works seven hours a day (eight hours less his lunch break), his day starts when he arrives at his first appointment and ends when he leaves his last. Travel within these hours is working time and when calculating

his hourly rate, should be taken into account. Dividing his weekly wages of £187.50 by 35 hours gives an hourly rate of £5.36 which means that Mica has not been paid what he is entitled to. His employer cannot use any petrol expenses paid to Mica in the calculation.

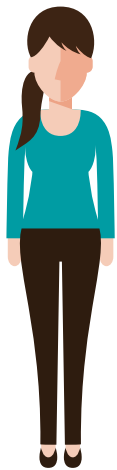
Mica is entitled to an additional £74.90 per week and back pay on earlier periods going back all the way to when he started the job. He should speak to his employer regarding his entitlement first. If the matter remains unresolved, he can contact the Acas helpline and if the employment business is a member of the REC, you can make a complaint to them.

QUESTION 5:

Can employers make wage deductions for items such as uniforms?

ANSWER:

Employment businesses must always remember their obligations under the Conduct of Employment Agencies and Employment Businesses Regulations 2003. These restrict recruiters from requiring their workers to use (pay for) additional services in order to obtain other work-finding services. Therefore, recruiters CANNOT charge workers for things like uniform or equipment, even by way of refundable deposit. There are also potential Health & Safety legislation breaches for employers to consider if making charges for health & safety equipment. For all other employers, any deductions must not result in a worker's pay falling below the National Minimum Wage.



Jenny (age 22) is registered with an employment business. She has just received details of her new assignment working as a care assistant. She will be working 40 hours a week and earning the National Minimum Wage rate of £7.05 per hour. Her employment business has told her that she must wear a plain tunic by way of a uniform which they can provide to her or she is free to provide her own. If the employment business provides this to her they explain that they will deduct £30 from her first pay check for her uniform, an amount which is refundable when she leaves providing she hands the uniform back.

Whilst it appears that Jenny will be paid at the correct National Minimum Wage rate for her age,

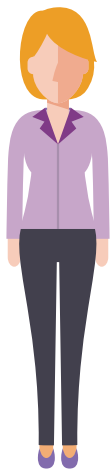
the initial uniform deduction will take her below the minimum rate she is entitled to and could also be construed as a fee charged by the agency to access work-finding services. Jenny should speak to her employer about being paid back the £30 that is owed or contact the Acas helpline if the matter remains unresolved.

QUESTION 6:

Should employers be paying for a worker's time spent training?

ANSWER:

Yes, employers have to pay for time spent training.



Maria (age 26) has been placed on a two month assignment at a children's nursery and she will be paid £225 per week for a 30 hour week (£7.50 per hour). The nursery requires all staff working at the nursery to attend a health and safety training session and Maria is required to attend. This will be held at the nursery for two hours. In the week of the training, Maria only receives payment for 28 hours work. Her employment business insists that the two hours training do not count as working time as Maria is not working.

Maria is not being paid what she is entitled to. Her employer (the employment business in this case) should include the time spent training and if the training was not on the client's site, she would

also be entitled to receive at least NLW when she is travelling to and from her place of work. Maria would be entitled to an additional £45 per week (an additional six hours pay) and back pay on earlier periods when she was on the training course. She should speak to her employer regarding her entitlement first, or contact the Acas helpline if the matter remains unresolved.

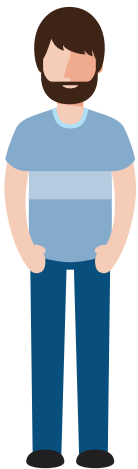
WAREHOUSE

QUESTION 7:

Who is responsible for paying the National Minimum Wage when an employment business supplies a worker to a third party?

ANSWER:

Although the third party may set the worker's hours and working conditions, it is still the agency's responsibility to ensure the worker receives the National Minimum Wage because it is the agency that actually pays the worker.



Tom signs a contract with an employment business who in turn places him on an assignment as a steward for a large football club. Tom must report to a manager employed directly by the club and he is required to adhere to the same policies as workers directly employed by the club. Tom records his hours worked at the club using their clock card system. The agency sends the club an invoice for Tom's work and the club pays the agency. It is the agency who pay Tom his wages.

Although time records are held locally by the club and all direction was provided by them, it is still the responsibility of the agency to ensure that Tom

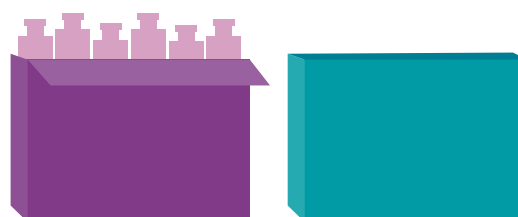
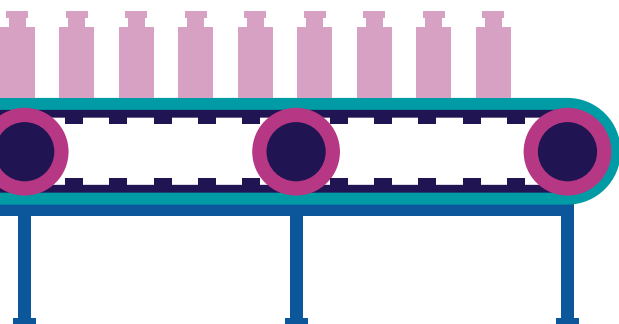
receives at least the National Minimum Wage for all work undertaken. In this scenario, if there were a dispute around non-payment of the National Minimum Wage, HMRC would consider investigating the agency rather than the football club.

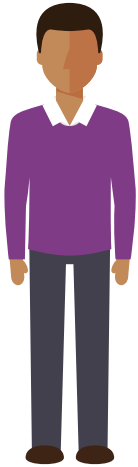
QUESTION 8:

How does self-employed status affect the National Minimum Wage?

ANSWER:

Whilst those who are genuinely and independently self-employed are not entitled to the National Minimum Wage, simply calling an individual 'self-employed' does not automatically exempt them from NMW entitlement, what matters is what actually occurs 'on the ground'.





Chris has joined an employment business as a security guard. Before his first deployment he is contacted by a payroll agency and told that in order to be paid for any work that comes through via the employment business he must be willing to be treated as self-employed and sign up to be paid by the payroll agency. As Chris does not want to be without work he accepts this offer. Chris is then assigned work to perform as a security guard at various events. The agency assigns him to the events and the payroll agency pays his wages. Chris is provided with all his equipment and uniform to perform his role as a security guard, he is told when his shifts start and finish, and is not allowed to send a replacement in his place. In this scenario, it is likely that Chris would be considered to be a worker for NMW purposes.

A person is generally classed as a 'worker' if:

- *they have a contract or other arrangement to do work or services personally for a reward (your contract doesn't have to be written).*
- *their reward is for money or a benefit in kind, for example the promise of a contract or future work.*
- *they only have a limited right to send someone else to do the work (subcontract).*
- *they have to turn up for work even if they don't want to.*
- *their employer has to have work for them to do as long as the contract or arrangement lasts.*
- *they aren't doing the work as part of their own limited company in an arrangement where the 'employer' is actually a customer or client.*

QUESTION 9:

Can accommodation provided by an employer be taken into account when calculating the National Minimum Wage?

ANSWER:

Yes.



Neela lives in a flat tied to the factory complex owned by her employer. Her employer, Lance, makes a monthly deduction from Neela's pay for the provision of this accommodation.

Living accommodation is the only benefit in kind that can count towards the National Minimum Wage a worker receives. Lance can count some of the value of the accommodation provided towards the National Minimum Wage pay, called the accommodation offset. The maximum offset rate for accommodation charges is £6.40 from April 2017. If Lance charges Neela the offset rate, or less, then there is no impact on Neela's National Minimum Wage pay. If he charges her more, the excess charge has the effect of reducing Neela's pay for National Minimum Wage calculation purposes, potentially taking her below the prescribed minimum rate.

Further information on what counts as accommodation charges and their effect on the National Minimum Wage can be found [here](#).

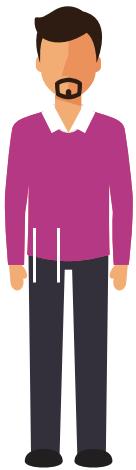


QUESTION 10:

Should overtime and shift premiums be included in a worker's total remuneration when calculating the National Minimum Wage?

ANSWER:

No.



Nigel (age 52) works 40 hours in a week as a forklift driver in a warehouse. He is paid £284 basic pay (equivalent to £7.10 an hour), but also works 8 hours overtime paid at £7.75 an hour taking his total pay for the week to £346.

To calculate if Nigel is being paid the National Minimum Wage, first work out the amount paid above his basic rate (the premium element). $£7.75 - £7.10 = £0.65 \times 8 \text{ hours} = £5.20$. Then find the minimum wage pay by taking away the

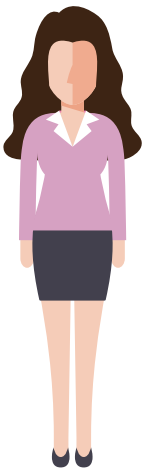
premium element from the total pay. $£346 - £5.20 = £340.80$. Finally divide the minimum wage pay by the hours worked. $£340.80 \div 48 = £7.10$. In this case Nigel is not getting his full minimum wage entitlement of £7.50 an hour.

QUESTION 11:

Is a worker entitled to be paid for all hours worked, including time spent preparing to start work?

ANSWER:

Yes. Workers are entitled to be paid for the entire period that they are carrying out work.



Xena (aged 22) works via an employment business and is supplied to a school as a teaching assistant. The employment business has provided her with written confirmation of the details of her current assignment which state that her hours of work will be Monday to Friday, from 9.00 a.m. until 3.30 p.m. with a one hour (unpaid) break, but that she must be in the classroom by 8.30 a.m. to set up before lessons begin. She is paid an hourly rate for the work she does of £7.05, which is the correct NMW rate for her age.

She receives a weekly payment of £193.88 which is her hourly rate x 27.5 hours per week. This takes into account her hours from 9 a.m. – 3.30 p.m. excluding the one hour lunch break and also

excluding the daily half an hour that she spends setting up the classroom.

While Xena is not entitled to receive pay for her break time, she should be paid at least NMW for all the time that she is working, including the time spent setting up the classroom. Her pay should therefore be based on a 30 hour week. She is therefore entitled to an additional £17.63 pay per week moving forward plus back pay to cover the shortfall for the previous weeks worked on that assignment.

QUESTION 12:

Are workers entitled to be paid for the time that they are contractually required to remain on site for security checks?

ANSWER:

Yes, they are entitled to be paid for the time they are on site for security checks.



Shaun works for an employment business. He is currently on an assignment which sees him supplied to work at a distribution centre which is the client of the employment business. Shaun's pay is based on an hourly rate. As part of his assignment he is required to work set hours packing items in the distribution centre and he is also required to go through a security process at the end of the day before leaving site. Sometimes there are large queues of workers and it can take up to half an hour from when he completes work on the shop floor to being able to leave the site.

The following information explains why Shaun is entitled to pay during this time:

- *For pay reference periods before 6 April 2015, it is the National Minimum Wage Regulations 1999, regulations 15(1) & 15(1A) NMWM08260*
- What do these regulations mean in practice?**
Time where a worker is not working but is required by their employer to be available at or near a place of work for the purposes of working is treated as working time for national minimum wage purposes, even if the worker is simply waiting to be given work.
- More specifically, as in this case, it means it does not matter whether during such time the employer provides any work for the worker to do, or whether the worker actually performs work. The relevant factors are the employer requiring the presence of the worker at a specified location and time of their choosing and the worker complying with that requirement.*
- *For pay reference periods commencing on or after 6 April 2015, you should refer to the National Minimum Wage Regulations 2015, regulation 32*

Next steps



Check it

Check you are paying all your workers the right amount. This shouldn't take long and the tools you need are free. Don't leave it to your accountant as it is you that is liable. Call Acas on 0300 123 1100 for confidential and impartial expert advice.



Fix it

Fix anything you've been doing wrong. Work out the amount you have underpaid and put it right to avoid the risks of a future HMRC investigation.

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We are absolutely passionate and totally committed in this pursuit for recruiters, employers, and the people they hire.

Find out more about the Recruitment & Employment Confederation at www.rec.uk.com

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