



Department
for Business
Innovation & Skills

National Minimum Wage

**Government Response to the
Consultation on the draft
Consolidated Regulations**

JANUARY 2015

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Foreword

The Government is committed to the National Minimum Wage (NMW), which offers important protection to workers and incentivises work. Ensuring compliance is a priority and we have taken a number of steps to deter employers from breaking the rules, including naming and shaming non-compliant businesses publicly and significantly increasing the penalties they face.

Ensuring employers and workers understand the rules is critical to the success of the NMW. The NMW regulations, which set out the detailed rules about how the minimum wage works, had been amended over twenty times since they were introduced in 1999 – making it more difficult for individuals to understand.

We consulted on a draft set of consolidated regulations in 2014 and I am very grateful to those who took the time to respond to that consultation. We have thoroughly considered the responses we received and this document outlines our response to the issues that were raised.

I am confident that the new regulations will help to clearly set out the rules on the NMW and will be much easier for employers to follow. Alongside this we will continue to ensure that effective enforcement is in place for those who do not follow the rules.



Jo Swinson MP

Minister for Employment Relations and Consumer Affairs

1. Introduction

Background

1. As part of the Red Tape Challenge, the Government decided in 2014 that the National Minimum Wage Regulations 1999, and subsequent amending regulations, should be consolidated in order to make the detailed rules clearer and more workable for employers and employees.
2. These regulations set out the detailed rules, such as national minimum wage rates, exemptions, what payments count towards minimum wage pay, how to determine what hours have been worked for minimum wage purposes, and what minimum wage records need to be kept. Since first coming into force in 1999, the regulations have been amended over twenty times including a number of substantial changes.
3. The Government launched a public consultation seeking views on the draft National Minimum Wage (Consolidation) Regulations to ensure that these are as accessible as possible. The draft also sought to reflect current drafting practice (such as making the provisions gender-neutral). Whilst it did not intend to re-open the policy decisions behind the detailed rules, it nonetheless invited respondents' views ahead of a possible future review of National Minimum Wage policy.
4. The consultation sought views by way of the two following questions:
 - a. Do you consider that there are any provisions which do not work or are unclear?
 - b. Are there any other areas of the detailed rules which you consider should be reviewed?
5. This document sets out a summary of the responses and the Government response.

2. Summary of Responses

Numbers of Responses Submitted and by Whom

6. A total of 22 responses were submitted in answer to the two questions put forward in the consultation.
7. 32% of these responses were submitted by care providers. The remaining 68% were responses submitted by employment law specialists (18%), government and local government (18%) employers (14%), trade unions (13.5%) and one non-Departmental Public Body (4.5%). A list of the respondents is set out at Annex 1.
8. On a general point, some typographical errors in the draft consolidated regulations were highlighted by respondents which have been corrected accordingly.

Responses to Question 1 - Do you consider that there are any provisions which do not work or are unclear?

- Yes – 82% (18 responses)
 - No – 18% (4 responses)
9. Four respondents (a business representative, care provider, a non-departmental public body (NDPB) and local Government) considered the draft consolidated regulations to be clear and requiring no further work. Two of these respondents and the Welsh Government welcomed the restructuring of the National Minimum Wage regulations and considered that it had made the rules easier to navigate and their order more logical. One further added that the Government should improve the official guidance provided on GOV.UK, rather than the regulations themselves, which most employers and workers refer to when they need information on the National Minimum Wage rules.
10. The 18 respondents which answered 'yes' to Question 1 provided more substantive comments; the main ones of which are reflected in the following themes:

Sleeping time

11. Ten respondents said that the rules on sleeping time were unclear and / or called for changes to the policy position. Nine of the ten respondents referred to case law relating to sleeping time i.e. *Mrs J Whittlestone v BJP Home Support Limited* UKEAT/0128/13/BA and *Esparon v Slavikovska* UKEAT/0127/12/DA. Three of these respondents also referred to the case *Walton v The Independent Living Organisation* (2003 EWCA CIV199) and two to ECJ judgments on *SIMAP* and *Jaeger*.
12. Four care sector representative bodies wanted the Government to clarify the legislation that workers on sleep-in shifts are not entitled to the NMW for such shifts, except for any time that they are awake and working. The Local Government Association and an employment law consultancy also sought clarification that sleep-in workers are not entitled to the national minimum wage.
13. Two union respondents sought clarification that sleep-in workers, who are legally required to be present at their place of work but allowed to sleep, must be paid the national minimum wage for all hours of the sleep-in shift regardless of whether they are awake or not. One care sector group and employment law specialist requested greater clarification on this issue.
14. The Government has closely considered the case law and respondents' comments and is of the view that the draft Consolidated National Minimum Wage Regulations correctly reflect the Government's intended policy and recent case law relating to sleeping time.
15. In response to requests for clarity whether a worker on a sleep-in shift is deemed to be working, the Government will consider these issues in greater depth in the guidance.

Travel Time

16. Two respondents raised a question regarding travel time. One care provider considered that travel time was regularly unaccounted for, resulting in staff effectively being paid less than the national minimum wage. A social enterprise commented on the difficulty in recording rest breaks where these coincide with employees' travel between assignments.
17. The Government will consider the current guidance on travel time and determine whether this can be improved. In terms of unlawful under-payment of the national minimum wage, individuals are encouraged to contact HM Revenue and Customs which will consider all such complaints.

Rest break/salary sacrifice

18. A respondent in the care sector considered the wording of new regulation 35 (which states that where a worker works through their rest break, the time counts for minimum wage purposes) to present a change from the current legislation. The respondent expressed the view that, as a result, a worker who previously had scope to participate in a salary sacrifice scheme would no longer be able to do so. The respondent therefore suggested this change was outside of the scope of the consolidation exercise and should be a matter for further consultation.
19. The Government has considered the above views with care but remains of the view that Regulation 35 of the draft Consolidated National Minimum Wage Regulations merely clarifies the drafting of regulation 15(7) of the National Minimum Wage Regulations 1999. The provision continues to accurately reflect the policy as intended.

Definitions

20. About half of the respondents either made drafting suggestions to make definitions easier to understand or requested definitions to be included, in particular output work; compulsory school age; fair estimates; benefit in kind in regulation 10(f); and the reinstatement of worker and employer.
21. Two respondents, employment law specialists, queried whether the meaning of a 'rest break' should follow that in Regulation 12 of the Working Time Regulations 1998, and if so, recommend that that link should be made explicit. Three unions sought the reinstatement of the definition of 'monetary payment' in order to retain this unambiguous clarity.
22. The Government has noted these comments and will consider these issues in greater depth in the guidance in order to provide greater clarity, or where appropriate, consider these for the possible inclusion for a wider future review.

NMW calculations

23. Seven respondents commented on various aspects for calculating the national minimum wage. Two providers of care services, expressed concern that if enhanced payments are consolidated with worker's standard pay it would make it harder to employ staff who are prepared to deliver care service at weekends and unsociable hours, and sought further clarification on how the new regulation 10(k) should be interpreted. An employment law specialist felt that regulation 10(k) failed to address unlawful practices

such as ‘rolled up’ holiday pay or payments for tools and equipment in the construction/ transportation industries.

24. Another law specialist felt that not all scenarios were covered in respect of salaried hours as some workers are paid a salary fortnightly or four weekly, thereby making it difficult for companies to monitor their compliance with the national minimum wage.
25. Clarification was also sought whether a focus on hours awake for purposes of working turn that activity into working by time under regulation 30(a) or into a measure of ‘output’ for the purposes of regulation 36. Three unions expressed concern about the wording of regulation 36 as, they felt, some employers could confuse output work with time work where piece rates or incentive bonuses are paid.
26. As most of the comments received sought further clarification to ensure the correct national minimum wage is paid in the different situations, the Government will consider these issues and endeavour to clarify these various points as far as possible in the guidance.

Guidance

27. Most respondents thought that the guidance should be revisited to improve clarity. One respondent, a NDPB, wrote that it is official guidance rather than the regulation, which most employers and workers refer to. A union expressed the importance of guidance and that it has a very important role to play in explaining rights and duties to workers and employers alike. The union further expressed concern that lack of clarity in the guidance could result in wrongly appearing to exempt some workers actually covered by the national minimum wage legislation.
28. The following main areas were identified that could benefit from improved clarity or specific guidance, as follows:
 - National minimum wage calculations to ensure consistency with HMRC enforcement practices
 - Family exemptions
 - Rest breaks, the parameters of what counts as a ‘rest break’ and methods for recording rest breaks.
 - Address ambiguity for ‘on call’ arrangements and clarity on interpretation of “near”
 - Record-keeping: in terms of travel time, rest breaks and those on education placements
 - Sleep-in time
 - Accidental or unintended overpayments
 - Hours works for the purpose of national minimum wage
 - Clarity to distinguish between actual salaried work and deemed salaried work
 - Clarity on training: ‘out of hours’ training (e.g. weekends or evening) and associated travelling time, and the meaning of ‘approved’ training.
 - Travelling: treated as hours of time work/not treated as hours of time work
 - Internships, work experience and volunteering
 - Living accommodation provisions

- Specific examples of calculations of basic hours exceeded.
- Deductions or payments for the employer's use e.g. how employers can assist their employees with paying for their uniform
- Payments and benefit in kind which do not form part of a worker remuneration
- Enhanced pay rates

29. The Government has noted these suggestions and will consider these issues in greater depth with a view to providing greater clarity in the guidance accompanying the detailed rules on the national minimum wage.

Responses to Question 2 - Are there other areas of the detailed rules which you consider should be reviewed?

30. Responses were as follows:

- Yes – 50% (11 responses)
- No – 50% (11 responses)

31. Suggestions received are presented in the following themes:

Recoupment of training costs

32. One respondent in the care sector felt that, due to high staff turnover, consideration needed to be given to allow the recoupment of reasonable training costs within the first 12 months of employment, without the deduction reducing remuneration counted for minimum wage purposes.

Salary sacrifice

33. One care provider suggested that for genuine salary sacrifice schemes, the original salary/hourly rate should be treated as the amount to be taken into account for national minimum wage purposes to allow for innovative schemes to help low paid staff e.g. a scheme for purchasing bicycles.

Enforcement

34. Five respondents expressed views about enforcement. Three respondents in the care sector felt that the national minimum wage should be more actively enforced and not down to the worker to report. Two unions proposed amendments to the National Minimum Wage Act for increased fines in cases of prosecution and repeat offenders, particularly for keeping false records and obstructing investigations.

Record keeping

35. An employment law specialist suggested a remedy to the potential disputes between parties around the number of hours worked, by requiring the employer to provide to the worker a statement to ensure that all parties are clear from the outset how the national minimum wage is calculated.

Family member exemption

36. Three unions recommend that the exemption for domestic workers who are said to live as part of the family should be abolished in light of concern that migrant domestic workers are denied the national minimum wage. A business representative commented that whilst clarifications on exemptions to the national minimum wage would be welcome, a change in the law relating to family members would impact negatively on independent retailers.

Seafarers

37. Two unions stated that the national minimum wage should protect as many seafarers as possible as they are routinely paid below the national minimum wage.

38. Whilst, due to its international nature, jurisdictions and applications of minimum wage legislation in the maritime industry are complex, the Government is committed to looking at recruitment and pay practices in the maritime industry following concerns raised by members of the RMT Parliamentary Group and other trade union representatives. The Government will consider the findings of that work and whether any changes to Government guidance or policy are necessary in this area.

Fair Piece Rates

39. One union commented that many of the piece rates for cleaning rooms in the hotel industry have been set at unattainable levels, making it impossible for workers to achieve the national minimum wage. The union recommends the removal of the fair piece rate option from the hotel sector in the view that hotel room cleaning does not constitute “output work” under the national minimum wage regulations.

False self-employment

40. One respondent, a trade union, recommended that the Government introduce legislation to stop bogus self-employment through employment agencies supplying labour to the hotel sector.

3. Conclusion

41. There is general support for the Government's intention to consolidate the National Minimum Wage Regulations 1999 and subsequent amending regulations, and that this has resulted in making the detailed rules clearer and more workable.
42. Most respondents expressed that even further clarity would be welcome, particularly in the guidance and that this should also provide more practical examples.
43. The Government is committed to a review of the guidance in order to improve the information available to individuals and employers on the detailed rules relating to the national minimum wage. The Government will consider the various suggestions raised by respondents, taking account of any recent case law, and revisit the guidance accordingly during the course of 2015.
44. It is also important that the detailed rules on the national minimum wage remain appropriate and fit for purpose. The Government therefore welcomed views where the regulations can be improved to better reflect practices on the ground. About half of respondents made suggestions which would require changes to the legal framework relating to the national minimum wage.
45. These proposals will be considered for inclusion during a possible future review which would require a further public consultation.

Annex 1:

List of respondents to the consultation:

Association of Convenience Stores
Birmingham Law Society
Care provider
Carers Trust
Coalition of Care and Support Providers in Scotland
Cordant Group
Cross roads Care North West
Employment Lawyers Association
Fiveways Playcentre
Hull City Council
KLC Employment Law Consultants LLP
Local Government Association
Low Pay Commission
National Care Forum
PricewaterhouseCoopers Legal LLP
RMT
Salford City Council
TUC
Unite
United Kingdom Homecare Association
Voluntary Organisations Disability Group
Welsh Government

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