



Department  
for Business  
Innovation & Skills

# NATIONAL MINIMUM WAGE and NATIONAL LIVING WAGE

Calculating the minimum wage

Updated December 2018

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# The National Minimum Wage and the National Living Wage

The National Living Wage applies to workers aged 25 and over from 1 April 2016. This new rate of pay was introduced through amendment to the National Minimum Wage Regulations 2015 to ensure that the rules that apply to the National Minimum Wage rates for workers aged under 25 also apply to workers entitled to the National Living Wage. This guidance on calculating the National Minimum Wage therefore also applies to workers entitled to the National Living Wage.

For ease of reference, the remainder of this guidance uses minimum wage as a collective term to refer to both the National Minimum Wage and National Living Wage.

## **Using this guidance**

This is general guidance designed to assist workers and employers in calculating minimum wage entitlement. It may be used to help gain and check understanding of the minimum wage rules. However it does not and cannot provide definitive answers to individual queries. It is not intended to be relied upon in any specific context or a substitute for seeking advice on your specific circumstances, as each case may be different.

Whether you are a worker or employer, if you are unsure about any aspect of minimum wage entitlement you can contact the Acas Helpline on 0300 123 1100.

# Section 1: Eligibility for the minimum wage

You must pay people who do work for you at least the minimum wage if they are a 'worker' for minimum wage purposes and a specific exemption doesn't apply to them.

Guidance on whether a person is a worker can be found at:

[www.gov.uk/employment-status/worker](http://www.gov.uk/employment-status/worker)

Guidance on who is and is not entitled to the minimum wage can be found at:

[www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage](http://www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage)

The current minimum wage rates can be found at:

[www.gov.uk/national-minimum-wage-rates](http://www.gov.uk/national-minimum-wage-rates)

## Apprentices

Since 1 October 2010, all apprentices must be paid at least the minimum wage for the time they spend training or studying as part of their apprenticeship, in addition to time they spend working.

Further information on minimum wage and age rates including the apprentice rate can be found here <https://www.gov.uk/national-minimum-wage-rates>

The apprentice rate can only be paid in the following circumstances;

- The apprentice is under the age of 19, or;
- The apprentice is aged 19 or over and within their first year of the apprenticeship. Once an apprentice aged 19 or over has completed the first year of the apprenticeship however they must be paid the relevant higher National Minimum Wage rate for their age group. See the link above for further information.

For minimum wage purposes, apprentices are either:

- those employed on certain apprenticeship schemes (see the table below)
- workers engaged under a contract of apprenticeship

All apprenticeships must incorporate structured training for the purpose of equipping an apprentice with at least one of the following:

- a skill,
- profession, or

- trade.

This can typically include work-based training, a course of study or a combination of the two. However a worker is unlikely to be considered an apprentice if the sole purpose of training is to perform a specific job.

It is important to note the start and end date of the apprenticeship will not necessarily be the same as the start and end date of a contract of employment. This may occur for example;

- when an apprentice begins the structured training significantly after taking up employment
- if the structured training comes to an end whilst a person is in continuous employment, for example when an apprentice successfully completes an accreditation, unless it can be demonstrated they are still undergoing structured training.

Country	Name of apprenticeship scheme
<b>England</b>	Apprentices employed under apprenticeship agreements, approved English apprenticeship agreements and certain other statutory apprenticeship schemes
<b>Scotland</b>	Modern Apprenticeships
<b>Wales</b>	Foundation Modern Apprenticeships; Modern Apprenticeships; Foundation Apprenticeships; or Apprenticeships
<b>Northern Ireland</b>	Apprenticeships NI; or Modern Apprenticeships

## Apprenticeship agreements

Apprenticeships falling under the apprenticeship schemes in the table above are contracts of service that will normally require an apprenticeship agreement between an employer and an apprentice. This should include:

- how long the employer intends to employ the apprentice
- the training to be provided
- the qualification(s) an apprentice is working towards

Further information on this and a template apprentice agreement can be found here:

<https://www.gov.uk/take-on-an-apprentice/apprenticeship-agreement>

## Contracts of apprenticeship

It is good practice to have a written contract of apprenticeship. Contracts of apprenticeship should include as a minimum:

- Statement of particulars setting out the rights and obligations of the employer and the apprentice;
- What training is to be provided and to what level;
- The length of the apprenticeship;
- The pay rates

In the event of a dispute it will ultimately be a matter for the courts or tribunals to decide whether or not a worker is an apprentice.

Further information on hiring apprentices can be found at <https://www.gov.uk/take-on-an-apprentice>

## Seafarers

Seafaring workers are entitled to NMW when they are working:

- in UK internal waters and ports, regardless of their nationality or the ship's flag;
- outside the UK on a UK flagged ship, unless either their employment is wholly outside the UK or they are not ordinarily resident in the UK; or
- outside the UK on non-UK flagged ships, if they ordinarily work in the UK.

More comprehensive guidance on seafarers and their right to the minimum wage can be found at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/674596/seafarers-employment-rights-minimum-wage.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/674596/seafarers-employment-rights-minimum-wage.pdf)

## Work experience and internships

The term 'work experience' generally refers to a specified period of time that a person spends with your business, during which they have an opportunity to learn directly about working life and the working environment.

Work experience can also be called a 'placement' or an 'internship'. 'Internships' are sometimes understood to be positions requiring a higher level of qualification than other forms of work experience, and are associated with gaining experience for a professional career.

However entitlement to the minimum wage does not depend on what someone is called, the type of work they do, how the work is described (such as 'unpaid' or 'expenses only') or the profession or sector they work in. What matters is whether the agreement or arrangement they have makes them a "worker" [<https://www.gov.uk/employment-status/worker>] for minimum wage purposes.

Guidance on National Minimum Wage and National Living Wage for organisations who offer work experience, including placements and internships can be found here: [www.gov.uk/guidance/national-minimum-wage-work-experience-and-internships](http://www.gov.uk/guidance/national-minimum-wage-work-experience-and-internships).

Get further advice by contacting the [Acas helpline](https://www.gov.uk/pay-and-work-rights) [<https://www.gov.uk/pay-and-work-rights>] or use the [Acas Helpline Online](http://www.acas.org.uk/index.aspx?articleid=4489) [<http://www.acas.org.uk/index.aspx?articleid=4489>].

## Government training schemes

If a person is doing work experience with you as part of a government scheme to provide training, work experience or temporary work, or to help in seeking or obtaining work, you do not have to pay the minimum wage. These schemes are specifically defined in the minimum wage regulations.

## Work experience as part of an education course

A person doing work experience which is a requirement of a higher or further education course (as defined in the minimum wage regulations) is not eligible for the minimum wage.

## EU Lifelong Learning Programmes

Participants in the following schemes are not eligible for the minimum wage:

- Leonardo da Vinci
- Youth in Action
- Erasmus
- Comenius



## Volunteers and voluntary workers

Volunteers and voluntary workers are two separate categories of people for minimum wage purposes. Volunteers aren't workers and so aren't entitled to be paid the minimum wage. Voluntary workers are workers but are exempt from the minimum wage as long as certain conditions are met.

	Characteristics	Employer	Qualifies for minimum wage?
<b>Worker</b>	Work under an employment contract or a contract to personally perform work or provide services	Any employer or organisation	Qualifies, unless a specific exemption applies
<b>Volunteer</b>	Not a worker	Any employer or organisation	Does not qualify
<b>Voluntary worker</b>	Work under an employment contract or a contract to personally perform work or provide services	Charity, voluntary organisation, associated fund raising body or statutory body	Does not qualify due to a specific exemption provided certain criteria are met

### Volunteers

#### ***Definition of volunteers for minimum wage purposes***

Volunteers don't qualify for the minimum wage because they aren't workers. They don't have any employment contract or contract to perform work or provide services.

The job title or label an individual is given is not conclusive in determining whether someone is a volunteer or a worker. A "volunteer" may in fact be a worker if the arrangements under which they provide their services amount to a contract of employment or a contract to personally perform work or services.

If a person described as a volunteer is in fact a worker, they would qualify for the minimum wage unless a specific exemption applies.

Volunteers can volunteer for anybody, not just organisations in the not-for-profit sector.

#### ***Volunteer agreements***

You may have written agreements with your volunteers or may have written to them with confirmation letters, for instance outlining:

- the ethos of your organisation
- opening hours or attendance expectations

- what is expected of the role
- your organisation's rules and procedures
- insurance indemnity provisions for them

As long as these agreements are intended to clarify the reasonable expectations of the volunteer and your organisation, and are clearly not intended to amount to an employment contract or a contract to personally perform work or services, they will not make the person a worker and entitled to be paid the minimum wage.

If a legally binding employment contract arises, the person would be entitled to the minimum wage unless a specific exemption applied.

Imposing a requirement on a person to comply with a statutory obligation such as health and safety, or providing health and safety training, would not, on its own, result in the person being classed as a worker and entitled to the minimum wage.

### ***Record keeping***

If you engage volunteers there is no obligation to keep specific records for minimum wage purposes. However, in the event of a disputed claim, you may find it useful to have basic details such as the names of volunteers, hours volunteered and any payments given to individuals (such as expenses). You should always be able to explain how you arrived at the level of any estimated expenses reimbursed.

### ***Volunteers' expenses***

An expense is an outlay of money, which an individual has had to make. In some circumstances, you may wish to reimburse expenses but there is no obligation to do so.

Reimbursement of reasonable out of pocket expenses alone is unlikely to change an individual's status from a volunteer to a worker. Each case would be considered on its individual facts.

You may prefer to reimburse only expenses actually incurred and many volunteers prefer this. If you are reimbursing estimated expenses, you must be able to explain how you arrived at the level of expenses and be able to justify why this was a reasonable estimate.

You should take care to ensure that providing expenses does not suggest that an individual is a worker. Should this happen, a worker would be entitled to the minimum wage unless a specific exemption applied, such as the voluntary worker exemption.

### ***Volunteers' gifts and other benefits in kind***

For minimum wage purposes, a benefit in kind is a non-cash benefit or facility of any kind. Typically, a benefit in kind would have some monetary value and the provision of it would incur some cost on the provider.

### ***Volunteers and honoraria, gifts and nominal recognition items***

A genuine honorarium in the form of an unexpected gift, with no obligation and of a small value is unlikely to mean they are entitled to the minimum wage. However, you should take

care to ensure this does not create a contractual relationship whereby a person is undertaking work in return for gifts or rewards.

Items of nominal value such as pins, t-shirts or baseball caps given in recognition of volunteering, for instance to mark the successful end of a task or project, would be unlikely to result in the person being regarded as a worker and entitled to the minimum wage.

### ***Uniforms and equipment***

If you provide a volunteer with clothing they can keep, and is needed for their duties, it is unlikely to result in the person being regarded as a worker for minimum wages purposes.

Any items provided must be:

- reasonable – i.e. a uniform for a volunteer helping at a golf event is reasonable, providing a set of golf clubs is not
- required for the volunteer to perform their duties – e.g. someone volunteering to usher crowds at an outdoor sporting event may need trainers, a jumper and a jacket to perform their duties

### ***Volunteers and attendance at events***

Where attendance at an event is necessary in order for the volunteer to carry out their duties this alone is unlikely to result in the person being regarded as a worker. For instance, where a volunteer sells programmes at a football match and as a consequence has free entry to the ground, watching the football match in itself is unlikely to result in the person being considered a worker for minimum wage purposes.

### ***Training***

If you provide training to a volunteer it will be a benefit in kind. However, it is unlikely to result in the volunteer being classed as a worker provided the training is:

- necessary for the volunteer to perform their duties
- for the sole or main purpose of improving the volunteer's ability to do the work
- necessarily acquired in the course of the volunteering

As long as training meets these criteria, any resulting qualifications are unlikely to be considered a benefit in kind. Training over and above these criteria would result in the volunteer being considered a worker and entitled to the minimum wage.

### ***Food and drink***

Reasonable provision of food and drink during the volunteering day would not suggest that the volunteer is a worker and eligible for the minimum wage.

## **Voluntary worker**

### ***Definition of voluntary worker for minimum wage purposes***

The term 'voluntary worker' has a specific meaning for minimum wage purposes.

They are a worker and have an employment contract or a contract to personally perform work or provide services - which can be written, oral or implied. However, a voluntary worker doesn't qualify for the minimum wage.

Voluntary workers must work for:

- a charity - a body of persons, or the trustees of a trust, established for charitable purposes
- a voluntary organisation - a body of persons, or the trustees of a trust, which is established only for charitable purposes but may not be a charity by definition, for example a local community group
- an associated fundraising body - a body of persons, the profits of which are applied wholly for the purposes of a charity or voluntary organisation, for example, a charity shop
- a statutory body - a body set up by an Act of Parliament to carry out given functions, such as local authorities, many schools and hospitals, and bodies such as English Heritage
- Community Amateur Sports Clubs registered with HM Revenue & Customs under the Finance Act 2002, schedule 18 are treated as being charities for the purposes of minimum wage enforcement.

Not every worker who works for one of these organisations is automatically a voluntary worker. For someone to be classed as a voluntary worker they cannot be paid more than expenses (see below). If they are paid for the work they do, the person is probably a worker and entitled to the minimum wage.

Voluntary workers may not be given this title by the organisation who engages them. There may be people who consider themselves 'volunteers' but who are in fact workers due to the arrangements under which they work.

### ***Voluntary workers' expenses***

Voluntary workers may not receive any monetary payment apart from the reimbursement of expenses incurred:

- in the performance of duties
- in order to enable them to perform their duties

In both cases you can reimburse either:

- the expenses actually incurred

- a reasonable estimate of the expenses likely to be or to have been incurred - you should be able to explain how you estimated the expenses reimbursed

***Voluntary workers and expenses incurred in the performance of duties***

Expenses incurred in the performance of duties are expenses incurred while the person is undertaking their work. They could include, for example, having to travel from one site to another while performing duties, being sent to purchase something as part of the duties, or having to pay for a hotel while performing duties at a conference.

***Voluntary workers and expenses incurred in order to enable them to perform their duties***

Expenses incurred in order to enable a voluntary worker to perform their duties are expenses which occur outside of the voluntary work, but are needed to enable the voluntary worker to undertake it. These expenses must be both necessary to undertake the voluntary work and reasonably incurred.

Examples might be:

- expenses to cover the cost of care of dependents needed to enable the voluntary worker to do the voluntary work
- expenses to cover the cost of a lunch during a break in the voluntary work - although the cost of the lunch should be reasonable and not excessive, otherwise it would not be reasonably incurred
- expenses to cover the cost of travelling to and from the voluntary work

You cannot reimburse accommodation costs, such as rent, to voluntary workers. However, you can provide voluntary workers directly with reasonable accommodation in the circumstances of their role.

***Example scenario:***

Nicola works full time for a charitable homeless shelter. She has to live at the shelter. She is not charged for her accommodation and she receives free meals from the canteen. She receives no other payments.

Receiving free meals and accommodation means that Nicola is a worker. However, the voluntary worker exemption would apply to Nicola because:

- she is working for a charity
- the accommodation she receives is reasonable in the circumstances of her employment
- the meals she receives are reasonable in the circumstances of the employment

Nicola is a worker but would not qualify for the minimum wage.

### ***Voluntary workers' benefits in kind***

For minimum wage purposes, a benefit in kind is a non-cash benefit or facility of any kind. Typically, a benefit in kind would have some monetary value and the provision of it would incur some cost on the provider.

Voluntary workers may not receive benefits in kind apart from:

- reasonable subsistence for their voluntary role
- reasonable accommodation for their voluntary role
- certain training

### ***Voluntary workers and training***

The following examples of training would not be considered a benefit in kind for minimum wage purposes:

- training necessary to perform the duties of the voluntary worker
- training for the sole or main purpose of improving the voluntary worker's ability to do the work
- training necessarily acquired in the course of the voluntary worker

As long as training meets this description, any resulting qualification would also be unlikely to be considered as a benefit in kind. Training over and above this would result in a person being considered a worker and entitled to the minimum wage.

#### ***Example scenario:***

Eileen works three shifts a week on the reception desk of a charity. In return she is receiving training on the charity's accounting and HR systems. She receives no other payments.

Eileen and the charity have entered into a relationship which is consistent with a contract. In return for the work she does, she is given training, which is not necessarily acquired in the course of her work or for the sole or main purpose of improving her ability to perform her work.

This indicates that Eileen is a worker for minimum wage purposes. Even though Eileen works for a charity, the voluntary worker exemption does not apply to Eileen because she is in receipt of training in excess of that allowed by the exemption. Eileen is entitled to the relevant minimum wage for her age.

If Eileen needed to use such training in her job, for instance if she was undertaking HR or accounting tasks using the systems she had been trained in, then Eileen's training would be considered as improving her ability to do her work, and the voluntary worker

exemption would apply. In these circumstances, she would not qualify for the minimum wage.



### ***Voluntary workers' accommodation or subsistence payments***

For minimum wage purposes subsistence is generally taken to mean things like food, drink, laundry, basic toiletries, medicine, heating, lighting or other basic day to day needs in the circumstances of the employment, or in this case, the voluntary role.

Subsistence payments must:

- be solely for the purposes of providing subsistence and not provide an income on top of subsistence
- be an appropriate amount to provide the basic day to day needs of the individual in the circumstances of the voluntary work they are doing
- not include payment for their own accommodation - you can provide voluntary workers with reasonable accommodation in the circumstances of their voluntary work, but you cannot give them money to find or pay for their own accommodation

You must be able to demonstrate how you have reached the appropriate level of subsistence for the voluntary work in question. For instance, someone living in a bed and breakfast for the duration of the voluntary work with no access to cooking facilities may need more money to cover food and drink expenses than someone who is living at home. However, they would be unlikely to need money for heating and lighting as this would be provided by the bed and breakfast.

You should also consider the other expenses and benefits in kind that the voluntary worker is receiving. For example, if breakfast is being provided to a voluntary worker then subsistence payments should not include money for breakfast.

### ***Voluntary workers engaged directly***

Where a voluntary worker is engaged directly by a charity, voluntary organisation, associated fund-raising body or statutory body, they can be provided with reasonable subsistence in the circumstances of their employment, but cannot be paid money for it. If a voluntary worker who is engaged directly is given payments for subsistence, the voluntary worker exemption will not apply and they are entitled to the minimum wage.

### ***Voluntary workers engaged through agreements***

A voluntary worker may receive monetary payment for subsistence if they are engaged as a result of arrangements made between charity acting in pursuance of its charitable objectives and another charity, voluntary organisation, associated fund raising body or statutory body. These arrangements might include, for example, recruitment, funding and brokering arrangements.

*Example scenario:*

Following her application to a coordinating charity, Nikita has been placed full time with an environmental group in the Scottish Highlands. Nikita is given a room in a shared house.

She receives subsistence payments from the organisation to pay her share of food and energy bills, her laundry and her toiletries. She receives no other payments.

The extent of payments that Nikita receives means she is a worker. However, Nikita may qualify for the voluntary worker exemption. She is working as a result of arrangements made between a charity and a voluntary organisation and in such circumstances voluntary workers may receive monetary payment for subsistence provided it is reasonable in the circumstances.

Each case would be dealt with based on its individual facts and consideration would be given to whether the level of payment was for subsistence or to provide an income on top. The payments for Nikita's subsistence are reasonable in the circumstances of her employment so she is a voluntary worker who is not entitled to the minimum wage.

## Family member exemption

Regulation 57 of the National Minimum Wage Regulations 2015 sets out the conditions for when 'work' does not include any work done by a worker in relation to an employer's family household. For this exemption to apply, certain requirements must be met.

The requirements must be all of the following:

- the worker is a member of the employer's family;
- the worker resides in the family home of the employer;
- the worker shares in the tasks and activities of the family

Or all of:

- the worker resides in the family home of the worker's employer;
- the worker is not a member of that family, but is treated as such (in regards to the provision of living accommodation, meals and the sharing of tasks and leisure activities)
- the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;
- if the work had been done by a member of the employer's family, it would not be treated as work or as performed

The Immigration Rules<sup>1</sup> set out requirements for permission to enter or stay in the UK as a domestic worker in a private household<sup>2</sup>.

Applicants must show that their employer intends to pay at least the minimum wage rate that the worker is entitled to. The employer must also provide a signed statement that the work will not fall under the exemption for work in a family household at Regulation 57 of the National Minimum Wage Regulations 2015.

The Home Office may take enforcement action for any breach of the Immigration Rules.

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<sup>1</sup> Made under the Immigration Act 1971.

<sup>2</sup> Separate requirements apply to a domestic worker who is the victim of slavery or human trafficking.

## Unpaid work trial periods

The views of the Government set out in this guidance are not binding or determinative in any case but are intended to assist employers and individuals in identifying circumstances in which at least the National Minimum or National Living Wage (NMW / NLW) must be paid. It is for HMRC enforcement officers, and ultimately for tribunals and courts, to decide whether the NMW / NLW should be paid in any particular case. Employers who do not pay at least the NMW / NLW for work trials should consider seeking professional advice on whether this would breach NMW or other employment law.

As part of a recruitment process, an individual may be asked by a prospective employer to carry out tasks, without payment, to help the employer to decide whether the individual has the skills and qualities required for the job. Often this will be a legitimate practice, but some employers may use unpaid trial work periods to obtain work or services for which at least the NMW / NLW should be paid. Current law does not define a “trial work period” or state precisely when at least the NMW / NLW must be paid.

NMW legislation provides that an individual who is “working” for minimum wage purposes must be paid at least the NMW or NLW. Most workers in the UK who are over compulsory school age and who ordinarily work in the UK are entitled to be paid at least the NMW / NLW. An individual will generally be a “worker” if they have a contract of employment or a contract to provide work or services. There may be a contract even though there is nothing in writing. Where an employer asks an individual to carry out a “trial”, “test” or “recruitment exercise”, the individual may nevertheless be a “worker” and entitled to NMW / NLW.

Whether a work trial results in a contract requiring the NMW / NLW to be paid will depend on the circumstances of the case. There are currently no definitive rules or tests; however, a court or tribunal is, in the Government’s view, likely to take account of the following factors:

- whether a “work trial” is genuinely for recruitment purposes (if it is not, it will generally be considered to be work and the individual will be eligible to be paid the NMW / NLW);
- whether the trial length exceeds the time that the employer would reasonably need to test the individual’s ability to carry out the job offered (in the Government’s view an individual conducting work in a trial lasting longer than one day is likely to be entitled to the NMW / NLW in all but very exceptional circumstances);
- the extent to which the individual is observed while carrying out the tasks;
- the nature of the tasks carried out by the individual and how closely these relate to the job offered (where the tasks are different from those which the job would involve, this may indicate that the employer is not genuinely looking to test the individual’s ability, but rather to get the tasks carried out);
- whether the tasks carried out have a value to the employer beyond testing the individual (where the tasks are carried out in a simulated rather than real

environment, this will normally indicate that they do not have such a value and that the individual is not “working”);

- whether trial periods are important (aside from recruiting) to the way the employer runs its business (for example, where trial periods are being used by the employer as a means to reduce labour costs, this is likely to indicate that the individual is “working”).

There are reports of some unpaid trial work periods extending across more than one full shift or several days. Unpaid trials of this sort of length in a real (not simulated) work environment are likely to create an entitlement to NMW / NLW in all but very exceptional circumstances - especially in sectors where workers are paid at or close to the NMW / NLW. This is because what is done by the individual would almost certainly have substantial value to the employer rather than testing the individual’s ability. This could mean that there is a contract under which the individual would be a worker entitled to the NMW / NLW.

However, in some cases an unpaid trial work period lasting a few hours may be reasonable and not create an entitlement to NMW / NLW. This is because the main purpose would likely be to test the individual, and what is done would probably have little or no other value to the employer: the substance of the arrangement would therefore concern recruitment rather than providing work. The individual would therefore probably not be entitled to the NMW / NLW.

A key consideration is that the longer a trial period continues, the more likely it is that it results in a contract to provide work and that the NMW / NLW becomes due.

Ultimately, work trials have to be assessed on a case-by-case basis by HMRC enforcement officers and where necessary by courts and tribunals, taking account of the precise detail of the arrangements, including the duration and also what the worker is being asked to do. HMRC officers consider every complaint they receive and will take enforcement action where they consider workers are being exploited under the cover of recruitment.

NMW legislation permits a very limited number of exceptions for particular schemes which permit unpaid work trials. These include the Government’s Work Trial scheme, which aims to help disadvantaged benefits claimants try work in a risk-free environment and which provides a job guarantee if both the jobseeker and the employer are satisfied following the trial.

### **Unpaid trial work periods – example scenarios**

*The following hypothetical examples are intended to illustrate some of the factors outlined above and how, in the Government’s view, these might be taken into account in particular circumstances. The facts of real cases will naturally be more complex. It is for HMRC*

*enforcement officers, and ultimately for tribunals and courts, to decide whether the NMW / NLW should be paid in any particular case.*

### **Example 1: Likely to be a worker entitled to NMW / NLW**

An individual is invited to undertake a trial work period in a new bar which has just opened along with seven other members of bar staff, the majority of whom are also undertaking a trial work period. The bar has informed him and the other trial staff that they will work across shifts over a one-week period whilst management decide who is suitable to be offered a permanent role. Management do not yet know how many members of staff they are going to hire at the end of the one-week period.

This scenario is likely to entitle the individual to the NMW / NLW. The one-week period appears an excessive amount of time to test the skills which that person requires to perform the role. The work undertaken by him and other trial workers is clearly beneficial to the employer and cannot easily be distinguished from work undertaken by a paid member of staff. It is unclear how the trial period fits into the bar's recruitment process given that the bar does not have a set number of positions to fill at the end of the process, but instead is still determining how many members of staff it will require.

### **Example 2: Likely not to be a worker entitled to NMW / NLW**

An individual has responded to an advert in the window of a local café seeking an additional waiter to work on Saturdays. He is interviewed by the owner of the café during the week but before being offered the job, he is asked to come back on the Saturday and work for a trial period of two hours, during which the owner will keep an eye on how he interacts with customers and see how he gets on with the rest of the team, guiding him as necessary.

This scenario is unlikely to entitle the individual to the NMW / NLW, assuming that the advert is genuine. A period of two hours is proportionate to the job on offer and to the owner's need to check how that person will deal with different customers and carry out other tasks. Although the working environment is real and what he does may have some other value to the owner, this is balanced by the need to observe him and the likelihood that it will take him a little time to settle in to the role. The main purpose appears to be to check that he has the ability to carry out the role.

### **Example 3: Likely to be a worker entitled to NMW / NLW**

An individual has applied for a job as a warehouse operative in a supermarket warehouse. Before being considered for interview, he is asked to carry out a trial work shift of eight hours, during which he is asked to move boxes of produce from shelving to the warehouse exit, for dispatch to nearby stores. He is left to carry out this task on his own, although the warehouse foreman returns at the end of the shift to check the amount of produce that he has moved.

This scenario is likely to entitle the individual to the NMW / NLW. Although perhaps a test of stamina, the length of the trial appears both excessive in time and too narrow in scope to check that person's ability to carry out the role and, especially as he is not observed, the

main purpose appears to be to help the supermarket dispatch its produce from the warehouse. The fact that he is asked to carry out this task before being considered for interview may also indicate that this is not a genuine recruitment process, but rather that the supermarket's main aim is to benefit from free labour.

**Example 4: Likely not to be a worker entitled to NMW / NLW**

An individual has applied for a position as a Biology teacher at a school and is invited to an assessment day. The assessment day involves two short interviews in the morning and a written test. In the afternoon, he and another applicant are invited to teach two real classes in the school whilst being observed by a current member of staff. He and the other applicant are scored on their teaching in the afternoon which is tallied up with previous scores from the morning assessments to determine who should be hired.

This scenario is unlikely to entitle the individual to the NMW / NLW. Although the teaching undertaken by that person is in a real class room environment, it is not for an excessive amount of time, but instead is for an amount of time which is proportionate to the need to test his teaching ability. There is limited benefit to the employer in the work undertaken by the individual, as the member of staff who he has covered and who would usually be teaching is instead observing and involved in the assessment process. The trial period is clearly part of the overall assessment process in an open and transparent manner.

**Example 5: Likely to be a worker entitled to NMW / NLW**

An individual has applied for a job as a trainee chef in a kitchen. No prior experience is necessary, but the job would envisage that person developing a wide range of skills and, after three years, becoming the restaurant's deputy head chef. He is asked to attend for a trial period between 12 noon and 12 midnight one Saturday. He is told that the trial needs to be on the restaurant's busiest day as this will provide the best test of his ability to withstand the stresses and strains of kitchen work and his appetite to work unsocial hours. During the trial he is asked to chop and carry out simple preparation of vegetables, until 8.00 pm when he is asked to load crockery into dishwashers. One of the chefs directs him and keeps an eye on his preparation of vegetables, but is not too concerned if the results are not up to scratch as they can always be used in the next day's soup. At the end of the 12 hour trial he is invited to return for a formal interview on Monday.

This scenario is likely to entitle the individual to the NMW / NLW. Although the invitation to an interview appears to indicate that the recruitment is genuine and there is a degree of observation of his ability to carry out simple kitchen tasks, there is a limited relationship between the tasks that that person is asked to carry out and the much wider range of aptitudes and skills which he will need if offered the job. The length of the trial appears disproportionate and there are a number of indicators that the restaurant is using the trial period to cover what might otherwise be a labour shortage on its busiest day of the week.



### **Example 6: Likely not to be a worker entitled to NMW / NLW**

An individual has applied for a job as a head chef in a kitchen. He is asked to attend an assessment day with four other applicants. The assessment day takes place in a kitchen and involves all applicants cooking a range of dishes to be tried by the interviewing panel. The dishes are all meals which are served in the restaurant, but they are used for tasting purposes only rather than being served to paying customers.

This scenario is unlikely to entitle the individual to the NMW / NLW. A simulated environment which is only for a short amount of time is unlikely to attract the NMW / NLW, as the employer will not be gaining any tangible benefit other than being able to test the applicant's skills. The individual is not providing "work". It will usually be clear that simulated environments are part of a recruitment process.

## Section 2: Calculating the minimum wage

### Pay counted during a pay reference period for the purposes of the minimum wage

The National Living Wage came into force on 1 April 2016. The National Living Wage rate applies to any pay allocated on a monthly reference period starting on 1 April 2018. If a pay reference period starts and ends either side of 1 April 2018, employers will need to look at the rate that applied at the start of the pay reference period and pay that rate for the relevant period.

For example, if the pay reference period starts on 19 April, the allocated pay between 1 April and 18 April 2018 will be based on the April 2017 rate for the minimum wage rates of pay. Allocated pay from the 19 April 2018 onwards should be based on the April 2018 rates, which will apply from 1 April 2018, for the minimum wage rate.

For minimum wage purposes, the pay allocated to a pay reference period is any pay:

- received during that period
- earned in that period but not received until the next pay reference period

For example, if a worker earns commission towards the end of the current pay reference period it may not be possible to calculate their earnings in time to be included in their pay for that period. If you pay the commission to them in the next pay reference period the amount will still count towards the period they earned it in.

However, if you delay payment by more than one pay reference period you can't usually count the amount towards the period the worker earned it in. Instead it counts towards the period in which it is paid.

Where payment is not made in the period in which it is earned, you will not be able to calculate the worker's minimum wage rate for the original pay reference period until the end of the next pay reference period. Any pay counted in the pay reference period the worker earned it in, rather than the period when it was paid, can't also be included in the pay reference period when the worker received it as well, because this would be double counting.

### Allocating annual bonuses

Most of an annual bonus received in a pay reference period will count towards the minimum wage only in that period. However, a proportion of the bonus can count towards pay received in the previous pay reference period.

For example, if you pay an annual bonus in December and the pay reference period is one month, you can count one twelfth of the bonus towards minimum wage pay in November. The rest of the bonus counts towards minimum wage pay in December.

*Example calculation - allocating an annual bonus to a pay reference period:*

You pay a 23 year-old worker £1,080 who works 152 hours each month. You pay them a bonus in December of £500 for work performance in the 12 months ending on 31 December.

None of the annual bonus can count towards the January to October periods, their hourly rate calculation remains as:

$£1,080 \div 152 \text{ hours} = £7.11 \text{ per hour.}$

For the November pay reference period you can use a twelfth of the bonus towards minimum wage pay. The proportion is that which relates to that pay reference period:  $£500 \div 12 \text{ months} = £41.67$ . The worker's total minimum wage payment for November is:  $£1,080 + £41.67 = £1,121.67$ . The hourly payment for November is:  $£1,121.67 \div 152 \text{ hours} = £7.38$ .

For the December pay reference period you can include the remaining total of the bonus:  $£500 - £41.67 = £458.33$ . The total minimum wage pay is  $£1,080 + £458.33 = £1,538.33$ . The hourly pay for December is:  $£1,538.33 \div 152 \text{ hours} = £10.12$ .

## Allocating pay based on timesheets

Some workers, typically agency workers, record the time they have worked during a pay reference period on timesheets.

Generally, hours recorded on a timesheet will count towards the minimum wage for the pay reference period in which the worker worked the hours. However, for this to apply you must pay the worker for the hours in that pay reference period or the next pay reference period.

If a worker submits their timesheet within four working days before the end of the pay reference period after they did the work a special rule applies. In these circumstances, you have until the end of the next pay reference period to pay the worker. If you do this, you can count the hours in the pay reference period they were worked when calculating the worker's minimum wage pay.

For example, you pay a worker with a monthly pay reference period at the end of each month. To be able to count pay towards the hours recorded on their time sheet as worked in May then you must pay the worker for them in either May or June.

However, if the worker gives you their timesheet two days before the end of June, then to be able to count the pay towards the hours recorded on their May time sheet in that pay reference period you should pay the worker for them in either June or July.

## What counts as pay for minimum wage purposes

A worker's pay for minimum wage purposes must be calculated in a particular way. Some elements of pay do not count for minimum wage purposes. Wrongly including an element of pay that doesn't count – for example an extra premium for overtime – can result in it appearing that the minimum wage is being paid when in fact it is not.

The starting point is the worker's total pay in a pay reference period, that is, the total pay before the deduction of income tax and National Insurance contributions.

### Incentive pay

Incentive payments count towards minimum wage pay if they relate solely to the performance of a worker and are made as part of an incentive, sales commission, merit or any performance-related pay scheme.

### Bonuses

Bonus payments count towards minimum wage pay (see above: [Allocating annual bonuses](#)).

## What does not count as pay for minimum wage purposes

The following payments made by an employer do not count as minimum wage pay:

- loans
- advances of wages
- pension payments
- lump sums on retirement
- redundancy payments
- rewards under staff suggestions schemes

There are also other elements of a worker's pay that do not count towards minimum wage pay.

### Tips, gratuities, service charges and cover charges from customers

Tips, gratuities, service charges and cover charges do not count towards minimum wage pay. This is regardless of whether they are paid through your payroll or are given direct to workers by customers or a tronc master.

## Overtime and shift premia

You may pay a worker at a higher rate than their standard pay rate for some of the work they do – for example for working:

- overtime, weekend or night shifts,
- on bank holidays
- longer than a certain number of hours

If you do, the premium element of pay – that is, the amount the higher pay rate exceeds the worker's basic rate – does not count towards minimum wage pay<sup>3</sup>.

To calculate the premium element where the same basic rate applies to all the work done by a worker in a pay reference period:

- Step 1: assume that all the hours worked in the period have been paid for at only the basic rate.
- Step 2: multiply the number of hours worked by the basic rate.
- Step 3: subtract the resulting total from the total of pay actually received for the hours worked.

The remainder does not count towards minimum wage pay.

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<sup>3</sup> Note this only applies to hours of time work or output work.

### *Example 1:*

A 25-year old worker works 20 hours per week and receives total pay of £155. This implies that on average they are paid £7.75 per hour ( $£155/20 = £7.75$ ). However they work 10 hours per week Monday to Friday at their basic rate, and the remaining 10 hours they work on Saturday and Sunday attracts a shift premium of £0.90 per hour.

Their minimum wage pay is calculated as follows:

- Step 1: Work out the amount they have been paid above their basic rate.
  - £0.90 (shift premium per hour) x 10 = £9.00 premium for the Saturday and Sunday work
- Step 2: work out the minimum wage pay by taking away the premium element from the total pay.
  - £155 (total pay) - £9.00 (the premium element) = £146 (total minimum wage pay)  
This is an average hourly rate of £7.30 ( $£146/20 = £7.30$ ). This is below the national living wage rate of £7.83 an hour and so is non-compliant.

### *Example 2:*

A 30-year old worker works 40 hours in a week and is paid £292.00 basic pay (equivalent to £7.30 an hour), but also works 8 hours overtime paid at £7.83 an hour. Their total pay for the week is £354.64.

To calculate minimum wage pay:

- Step 1: Work out the amount the worker has been paid above their basic rate (the premium element).  $£7.83 - £7.30 = £0.53 \times 8 \text{ hours} = £4.24$ .
- Step 2: Find the minimum wage pay by taking away the premium element from the total pay.  $£354.64 - £4.24 = £350.40$ .
- Step 3: Divide the minimum wage pay by the hours worked.  $£350.40 \div 48 = £7.30$ .

This does not comply with the minimum wage as the worker is entitled to the national living wage rate of £7.83 an hour. So you must pay the worker more.

## **Different pay rates for different jobs**

If you pay a worker different basic rates for different jobs or different duties - rather than premium rates for the same job – then the whole of each rate can be included in the calculation of minimum wage pay.

For example, a worker works part of the day doing semi-skilled work on a machine and is paid £7.00 an hour but helps clean the factory for another part of the day and is paid £6.70 an hour. There is no premium to subtract in this case.

## **Allowances**

Some employers pay workers special allowances over and above standard pay. For example, if the worker:

- works in dangerous conditions
- works unsocial hours
- works in a particular area, for example, London Weighting
- performs special duties over and above a worker's normal duties
- is on call for work

These allowances don't count towards minimum wage pay unless you consolidate them into the worker's standard pay or they relate to the worker's performance.

## **Payments by an employer to reimburse a worker's expenses**

If a worker spends money on something connected with their employment – for example, tools or equipment – and is not repaid by you then that amount will reduce their pay for minimum wage purposes (see below: [Deductions from pay and payments by workers that reduce minimum wage pay](#)).

If you reimburse a worker for money which the worker has spent on something to do with their job, the reimbursement does not count as minimum wage pay. The refund is a reimbursement of the payment made by the worker and therefore there is no overall effect on minimum wage pay.

## **Benefits in kind**

Benefits in kind do not count towards minimum wage pay, even if they have a monetary value. However, there are special rules where you provide a worker with accommodation (see below: [Benefits in kind and accommodation](#))

## **Deductions from pay and payments by workers that reduce minimum wage pay**

Certain deductions made by you from a worker's pay, or payments made by the worker, reduce pay for minimum wage purposes. Certain other deductions or payments do not reduce minimum wage pay.

The following deductions by you or payments by a worker will reduce a worker's pay for minimum wage purposes.

## **Deductions or payments by a worker for expenditure connected with the job**

Deductions which you make from a worker's pay, or payments made by a worker to you, for items or expenses that are connected with the job reduce pay for minimum wage purposes. This could include, for example, safety clothing, uniforms, tools or other equipment needed for the job.

### **Deductions for the employer's own use or benefit**

If you make any deduction from the worker's pay which is for your own use and benefit – for example, a deduction for meals or transport provided by you – the amount deducted will reduce pay for minimum wage purposes. It does not matter whether the worker can choose to buy the goods or services.

You do not have to make a profit from such deductions for them to be for your own use and benefit. For example, if you provide transport at a loss, any deductions you make from wages for providing it help to reduce your loss. The amount you gain by making the deductions is for your own use and benefit.

### **Payments to another person for expenditure connected with the job**

Payments made by a worker to another person for items or expenses that are connected with the job reduce pay for minimum wage purposes. This could include, for example, safety clothing, uniforms, tools or other equipment needed for the job.

### **Certain deductions or payments by the worker for accommodation**

If you provide accommodation to a worker there may be an effect on minimum wage pay if the amount you charge for the accommodation is over a certain level (see below: [Benefits in kind and accommodation](#)).



## Deductions from pay and payments by workers that do not reduce minimum wage pay

The following deductions by you or payments by a worker will not reduce a worker's pay for minimum wage purposes:

- deductions for income tax and National Insurance contributions
- deductions from pay allowed under the worker's contract which relate to specific misconduct or payment by the worker of a specific penalty
- deductions from pay or payment by the worker because of an advance of wages or on account of an advance under an agreement for a loan
- deductions from pay or payment by the worker for the purchase of shares, other securities or share option, or any share in a partnership
- deduction from pay or payment by the worker to recover an accidental overpayment of wages
- deductions from pay that are not for expenditure connected to the worker's employment or for your own use or benefit (see below)
- voluntary payments by the worker for the purchase of goods and services from you – for example payments for meals the worker has freely chosen to buy in the staff canteen (however, if you deduct money from the worker's pay in these circumstances this will reduce minimum wage pay)
- certain deductions from pay and payments by the worker for accommodation if the charge for the accommodation is at or below a certain level (see below: Benefits in kind and accommodation).

## Deductions from pay which are not connected to a worker's employment or for the employer's own benefit

A worker may want you to deduct money from their pay that they are liable to pay to other people – for example, their trade union subscription or pension contribution.

These deductions do not reduce minimum wage pay provided the amounts are not expenditure required in connection with the worker's employment or for your own use or benefit (see above: [Deductions from pay and payments by workers that reduce minimum wage pay](#)).

## Benefits in kind and accommodation

### Treatment of benefits in kind

Benefits in kind, except accommodation, do not count towards minimum wage pay. It makes no difference whether the benefits have a monetary value. Neither does it make any difference whether the benefit is taxable or not.

If you offer such benefits to the worker, the value or notional value of the benefits can't be counted towards minimum wage pay.

Examples of benefits in kind that do not count towards minimum wage pay include:

- meals
- fuel
- car
- employer's contribution to the worker's pension fund
- assistance with removals
- medical insurance
- luncheon vouchers
- child care vouchers

### Accommodation

Accommodation provided by you to the worker is the only benefit in kind that can count towards a worker's minimum wage pay. You may:

- deduct rent from the worker's pay;
- charge a specific amount once the worker has received their pay; or
- provide accommodation on an uncharged basis as part of a package

In all these cases, the rules allow a notional daily amount called the accommodation offset to count towards minimum wage pay ([www.gov.uk/national-minimum-wage-accommodation](http://www.gov.uk/national-minimum-wage-accommodation)).

Where you charge the worker for the accommodation, either by making a deduction from the worker's pay or by accepting a payment from the worker, the worker's minimum wage pay will only be affected if you charge more than the amount of the accommodation offset. The amount of the charge over and above the level of the offset will reduce the worker's pay for minimum wage purposes.

### ***Reasons for the accommodation offset***

The accommodation offset is intended to discourage employers from recouping the minimum wage paid to a worker by levying excessive accommodation charges.

The accommodation offset rate doesn't seek to reflect the actual cost to you or the actual value of renting accommodation for the worker. Allowing a market rate would not recognise the advantages to you of providing accommodation. Also, the standard and types of accommodation and, consequently, the market value of accommodation can vary considerably.

### ***Additional charges***

Any charges the worker is obliged to pay as a condition of being provided with accommodation, including amounts for gas, electricity, water and provision of furniture, must be regarded as a charge paid in respect of the provision of accommodation.

Such charges should be taken into account when determining the total charge for accommodation, and when calculating the minimum wage under the accommodation offset rules.

### ***When is accommodation provided by the employer?***

The accommodation offset provisions apply whenever you provide accommodation to a worker. You may provide accommodation in a wide range of circumstances, not merely where you own the property occupied by the worker.

You will be considered as providing accommodation in the following circumstances, whether or not the accommodation is provided by you or a third party:

- the accommodation is provided in connection with the worker's contract of employment
- the worker's continued employment is dependent upon occupying particular accommodation
- the worker's occupation of accommodation is dependent on remaining in a particular job

Where the provision of accommodation by you and the worker's employment are not dependent upon each other, you may be considered to be providing accommodation if one of the following applies:

- you are the worker's landlord either because you own the property or because you are subletting the property
- you and the landlord are part of the same group of companies or are companies trading in association
- yours and the landlord's businesses have the same owner, or business partners, directors or shareholders in common
- you or an owner, business partner, member, shareholder or director of your business receives a monetary payment and/or some other benefit from the third party acting as landlord to the workers

For the purposes of the accommodation offset rules, third parties will include:

- businesses and companies, which are separate legal entities to you
- individuals including those who are family members of a director, business partner, shareholder, member or owner of the employing business
- businesses or companies with a director, shareholder, member, owner or business partner who is a family member of a director, shareholder, owner or business partner of the employing business

The accommodation offset will apply whenever you are providing accommodation, regardless of whether the worker can choose whether or not to occupy the accommodation. Even if the provision of accommodation is optional, where the worker chooses to accept the offer, the accommodation offset will apply.

### ***Accommodation - treatment of absences and time work***

If a worker is paid solely according to the number of hours they are at work, the work is time work. When a time worker is absent from work, the time they are absent and the pay they receive for that absence are excluded when calculating whether they have been paid the minimum wage.

Normally, when you provide accommodation to a worker and charge for that accommodation, the amount of the charge which exceeds the accommodation offset will reduce the worker's minimum wage pay. However, special rules apply when a time worker has been absent from work and the following all apply:

- you are charging for accommodation by making a deduction from the worker's pay or accepting payment from the worker
- the time worker has been absent from work for a day or more in a pay reference period, for example because they have been sick or taken holiday
- the worker has been paid at least the minimum wage for the hours for which they have been absent
- the hours the worker actually works are less than they would normally be in the pay reference period because of the absence
- the deduction or charge you make for accommodation does not increase because of the worker's absence from work

If the above conditions apply, the deduction or payment for accommodation has to be adjusted before applying the accommodation offset by:

- multiplying the deduction or payment by the number of hours the worker actually worked
- dividing that total by the total number of hours the worker would have worked, including any hours they actually worked, if they had not been absent

Only the amount of the adjusted deduction or payment, which exceeds the accommodation offset will reduce the worker's minimum wage pay.

*Worked example on accommodation for a time worker who has been absent:*

A 26 year old time worker is entitled to be paid at the national living wage rate (£7.83 per hour). You pay them £385 a week (£9.63 an hour for a 40 hour week). You provide accommodation five days a week and deduct £100 per week from their wages for rent.

To calculate their minimum wage pay:

- Identify the applicable offset:  $£7.00 \times 5 = £35.00$
- Subtract the amount charged for accommodation in excess of the accommodation offset ( $£100 - £35.00 = £65.00$ ) for the worker's total pay to calculate their minimum wage pay in a normal week:  $£385 - £65.00 = £320.00$ .
- The worker's hourly rate in a normal week is:  $£320.00 \div 40 = £8.00$ . The worker is paid more than the national living wage rate of £7.83 an hour.

*Absence with no reduction in pay*

If the time worker is absent for two days because they are sick and are still paid £385 for the week special rules apply.

- Number of hours normally worked: 40 hours. Number of hours actually worked: 24 hours.
- Weekly pay remains: £385. Worker's pay for the time he actually worked is:  $24 \times £9.63 = £231.12$
- Rent charged remains: £100. The applicable offset remains:  $£35.00 (£7.00 \times 5)$

The amount charged for accommodation in excess of the accommodation offset does not remain as £65.00. The following adjustment needs to be made:

- Multiply the rent charged by the number of hours the time worker actually worked and divide this by the number of hours they would have worked had they not been absent:  $(£100 \times 24) \div 40 = £60$ . This adjusted figure is used in place of the rent actually charged to calculate the amount charged for accommodation in excess of the accommodation offset:  $£60 - £35.00 = £25.00$

To calculate the minimum wage pay:

- A time worker's pay for minimum wage purposes does not include pay they have received for the time when they have been absent from work. The worker's pay for the time they actually worked is £231.12.
- Subtract the adjusted figure in excess of the accommodation offset from pay for the time actually worked to calculate minimum wage pay in that week:  $£231.12 - £25.00 = £206.12$
- The worker's hourly rate in the week they have been absent is:  $£206.12 \div 24 = £8.59$ .

The worker is paid more than the national living wage rate of £7.83 an hour.

### *Absence with a reduction in pay*

If the worker is not paid for the two days they are absent the special rules to adjust the amount of the accommodation charge will not apply.

In these circumstances, the weekly pay is:  $\text{£}9.63 \times 24 = \text{£}231.12$  and the rent charged is:  $\text{£}100$ .

To calculate the worker's minimum wage pay:

- Identify the applicable offset:  $\text{£}7.00 \times 5 = \text{£}35.00$
- Subtract the amount charged for accommodation in excess of the accommodation offset ( $\text{£}100 - \text{£}35.00 = \text{£}65.00$ ) from the worker's pay:  $\text{£}231.12 - \text{£}65.00 = \text{£}166.12$
- The worker's hourly rate for the week is:  $\text{£}166.12 \div 24 = \text{£}6.92$ .

For minimum wage purposes the worker's hourly rate is  $\text{£}6.92$  per hour despite the worker actually being paid  $\text{£}9.63$  per hour. The rent charged in excess of the accommodation offset brings his pay below the national living wage rate of  $\text{£}7.83$  an hour. You must pay the worker more.

# Section 3: Working hours for which the minimum wage must be paid

## Summary

The hours you must pay a worker the minimum wage for depends on the type of work they do. For minimum wage purposes, there are four different types of work: time work, salaried hours work, output work and unmeasured work.

If a worker does different types of work for you or for different employers the rules and calculation of hours apply differently for each type of work that the worker does.

The hours of work that count for minimum wage purposes for time and salaried work includes any time when a worker is:

- at the workplace working:
- For time work this will exclude the length of the rest breaks they take and any payment for these
- For salaried work, rest breaks may count for minimum wage purposes if provided for by the worker's contract
- For both time and salaried work, time spent working may include time when the worker is asleep (but see below: Sleep in shifts)
- at the workplace working (which in some circumstances, may include time spent sleeping (but see below: Sleep in shifts)
- at work and required to be available for work – it makes no difference whether or not you actually provide work for that time
- required to be available for work either on standby or on-call at or near their workplace - however there is an exception if the worker is permitted to sleep during this time and is provided with suitable sleeping facilities(see below: Sleep – in shifts)
- time spent travelling on business (see below: Time spent travelling on business)

The hours of work that count for minimum wage purposes for output work includes any:

- time spent travelling on business (see below: Time spent travelling on business)
- if the worker works from home, time travelling from home to other work premises

The hours of work that count for minimum wage purposes for unmeasured work includes:



- time spent travelling on business (see below: Time spent travelling on business)
- hours specified in 'daily average' agreement or time actually worked
- if the worker works from home, time travelling from home to other work premises

*Example scenario:*

You call a time worker into your factory to help with an urgent order, but the delivery is delayed. While the worker is at the factory and required to be available for work you must pay them at least the minimum wage rate for the time - even though they cannot do any work.

However, if the worker is at home waiting for you to call them into work you do not have to pay them the minimum wage for the time they are at home. They would only be entitled after they have arrived at work and while they are working.

## “Sleep-in” shifts

In some sectors – including, but not only, the care sector – workers are required to stay at or near their workplace on the basis that they are expected to sleep for all or most of the period, but may be woken when required to undertake work. Such shifts normally occur at night, but could occur during the day. 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. However, if suitable sleeping facilities are not provided then minimum wage must be paid for the entire shift.

The position is different where workers are working and not expected to sleep for all or most of a shift, even if there are occasions when they are permitted to sleep (such as when not busy). In this case it is likely minimum wage must be paid for the whole of the shift on the basis that the worker is in effect working all of that time, including for the time spent asleep.

Each case may be different depending on all of its individual circumstances, including what the contract provides and what is happening in practice. If you are unsure about the arrangements you have in relation to the National Minimum Wage you can contact the Acas Helpline on 0300 123 1100.

## The Supreme Court

This guidance reflects the law as it currently stands, in particular as determined by the Court of Appeal’s judgment in the joined cases of *Mencap v Tomlinson-Blake* and *Shannon v Rampersad* ([2018] EWCA Civ 1641). If the Supreme Court considers the appeal being made, it might issue a judgment which changes the circumstances in which national minimum wage is due for sleep-in shifts. Any judgment is unlikely to be issued before 2019 and possibly not until 2020.

Whilst any challenge in the Supreme Court is ongoing, employers must continue to comply with the law as it currently stands.

## Time spent travelling on business

Time spent travelling between home and someone's normal place of work and back again does not count as time when the minimum wage is payable.

However, there are some periods of travelling time when the minimum wage must be paid to a time or salaried hours worker. These include time when the worker is:

- required to travel in connection with their work - any rest breaks taken during the time the worker is travelling count as time worked - for example lunch on board a train
- waiting for a train or changing trains or other form of transport - except during rest breaks
- travelling from one work assignment to another - except for rest breaks
- waiting to either collect goods, meet someone in connection with work or start a job
- travelling from work to training venues - travel between their home and the training venue does not count time spent training for their work - either at the workplace or somewhere else – this also applies to workers required to undertake training before starting to work for you.

## Time work

### What is time work for minimum wage purposes?

If you pay a worker according to the number of hours they are at work, the work is time work. It may be four hours one day, six hours the next, four hours the following day, or eight hours every day.

Alternatively, the worker may be on a contract for a week or a month to do a particular job and they are paid for the hours done each week or month. That is also time work. Generally, anybody whose pay goes up or down depending on the number of hours they work is likely to be a time worker.

The time work rules also apply when you pay a person according to the level of their output but you expect them to work for a set number of hours per day.

For example, you employ a 27-year-old worker to work 40 hours over a five day working week in a factory and pay them each week. They make garments at a piece rate of £3.00 per garment. Normally, they can produce three items an hour and earn £9.00.

Their work counts as time work because they are expected to work a set number of hours per week. You must pay them at least the minimum wage for every hour they work in a pay reference period.

## Time workers - calculating minimum wage entitlement

The basic minimum wage calculation for each pay reference for a time worker is:

- Step 1: Calculate the worker's minimum wage pay for the pay reference period - see our guide on calculating minimum wage pay (see above: [Pay counted during a pay reference period for minimum wage purposes](#))
- Step 2: Work out their total working hours that count for minimum wage purposes during the pay reference period.
- Step 3: Divide the worker's minimum wage pay by the hours worked.

The total from Step 3 will give you the worker's hourly rate. You should then check that this is equal to or above the relevant minimum living wage rate that the worker is entitled to.

## Time workers - working hours for minimum wage purposes

For minimum wage purposes a time worker is generally regarded as working if they are either:

- at work and required to be at work
- on standby or on-call at or near their place of work (unless they are at home and entitled to be there)
- kept at their place of work but cannot work because of machine breakdown
- travelling on business or training
- training

For time workers, the time that does not count as working time for minimum wage purposes includes any time spent:

- travelling between home and work – regardless of whether the worker has a fixed place of work<sup>4</sup>
- away from work – even if you pay them for that time – including rest breaks, holidays, sick leave, maternity/paternity/adoption leave, industrial action

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<sup>4</sup> The Court of Justice of the European Union (CJEU) ruled in the case of *Federación de Servicios* that journeys made by workers without a fixed or habitual place of work between their homes and the first and last customer of the day constitute working time. The Working Time Directive is concerned with the organisation of working time. Pay is a separate issue and is governed by the contract and NMW rules. Employers are not required under NMW legislation to pay workers the minimum wage for this time.

## Absences from work

When a time worker is absent from work neither the pay (for example, holiday pay, or pay for sick leave or maternity leave) nor the hours of absence count for minimum wage purposes.

## Output work

This section describes how you should calculate the hours worked by workers doing output work for minimum wage purposes. 'Piece work' or 'commission work' may sometimes be output work for minimum wage purposes.

### What is output work for minimum wage purposes?

Output work is work that is paid only according to the number of things that a worker makes or tasks they perform.

For example, if you pay a worker per garment finished at home they would be an output worker:

- if you do not set any hours of work
- the worker is free to start and finish work whenever they wish

However, if the worker is paid according to how much they produce and you fix the hours of work, this is time work for minimum wage purposes - even if you also pay the worker according to how much they produce. For more information (see above: [Time work](#)).

### Rated output work/fair piece rates

On October 2004 the previous system of 'fair estimate' agreements for output work was replaced by a new system known as 'rated output work'. The effect of this is to provide for fair piece rates.

You can choose between two ways of paying output workers. You must either:

- pay the minimum wage for every hour they work
- pay them at least a 'fair' piece rate for each piece produced or task performed (rated output work).

When output workers are 'rated output workers' for minimum wage purposes, you must pay them at least a fair piece rate for each piece produced or task performed. To be able to pay fair piece rates you must ensure:

- the work is rated output work
- you give a written notice to the worker

If both of these conditions are not satisfied, you must pay your output workers at least the minimum or wage for every hour they work.

## **Travel time for output workers**

You must pay an output worker at least the minimum or wage for time spent travelling in connection with their job. For example, the time spent by a commission salesman travelling from one appointment to the next.

This does not include time spent travelling between home and their workplace. However, if they are a homeworker it does include time spent travelling from home to the premises they report at.

## **Absences from work**

If an output worker is away from work - for example on holiday, on sick leave or on maternity, paternity or adoption leave - the hours away from work do not count as hours worked.

If you pay them for the absence, and you can identify the payment for those absences (for example, if you pay them on a lower rate during sick leave you can identify the specific payment for that absence) the payment for those absences will need to be subtracted from their minimum wage pay.

## **Rated output work - the mean hourly output rate**

To calculate the fair piece rate for an output worker you need to know the mean hourly output rate for the work. The mean hourly output rate for a particular piece or task is the average number of pieces or tasks your workers doing that work produce/perform per hour. This can include fractions.

To calculate the mean hourly output rate you can either:

- carry out a test of all your workers making the particular piece or performing the particular task, then divide the total number of pieces produced per hour or such tasks performed per hour by the total number of workers tested; or
- test a sample of your workers, e.g. 10 per cent, making the particular piece or performing the particular task. The sample workers must be representative in terms of work speed - it would not be fair to choose a sample of your fastest workers or a mixture of average to fast workers

In both cases, the test is only satisfactory if you conduct it in circumstances similar to those in which the all your workers actually work. You should aim to rerun the tests from time to time, particularly if there is a change in the work that needs to be done to make the piece or perform the task. It is your responsibility to prove that you have complied with your obligations to pay the minimum wage.

## **Estimating fair piece rates**

You can estimate the average number of pieces produced or tasks performed instead of carrying out a test in two situations. These are:

- where you have already tested to determine the mean hourly output rate for another piece that is reasonably similar to the one in question
- where a test has already been carried out and the mean hourly output rate established in relation to the same piece made/task performed but in different working circumstances

In these situations you can make a fair adjustment to the rate that has already been determined through testing for the increased or decreased time needed to produce the item or complete the task.

For example, you may want to take a rate reached from testing factory workers and adjust it in relation to homeworkers producing the same piece.

### **Rated output work - fair piece rates for minimum wage purposes**

To set a fair piece rate for workers in line with the minimum wage you should follow the steps in the example below.

*Example calculation:*

A test has established that the mean average hourly rate for making a particular piece is ten pieces in an hour.

22-Year Old Worker:

- Step 1: Take the mean hourly output rate for the piece or task: 10 items per hour.
- Step 2: Determine the fair piece rate for that piece of work by dividing the mean hourly output rate by 1.2, i.e.  $10 \div 1.2 = 8.33$  items.
- Step 3: Divide the worker's minimum wage rate by the number of assessed items per hour to get the fair piece rate:  $\pounds 7.38 \div 8.33 \text{ items} = 89\text{p}$  fair piece rate.

26-Year Old Worker

- Step 1: Take the mean hourly output rate for the piece or task: 10 items per hour.
- Step 2: Determine the fair piece rate for that piece of work by dividing the mean hourly output rate by 1.2, i.e.  $10 \div 1.2 = 8.33$  items.
- Step 3: Divide the worker's minimum wage rate by the number of assessed items per hour to get the fair piece rate:  $\pounds 7.83 \div 8.33 \text{ items} = 94\text{p}$  fair piece rate.

You will have to recalculate the fair piece rate every time the minimum wage rates change  
Going forward all rates will change on 1 April.. -

### **Rated output work - requirement to give each worker a written notice**

You cannot pay the minimum wage by paying a fair piece rate unless you have given your rated output workers a notice explaining the position to them.

If you do not provide a worker with a written notice that complies with the conditions outlined below you will have to pay the worker for each hour they work.



The notice must:

- be issued before the start of the pay reference period you intend to pay them by a fair piece rate - if the terms of the notice have not changed, there is no need for a new notice before every pay reference period
- explain that for the purposes of compliance with minimum wage law, the worker will be treated as working for a certain period of time to produce a piece or perform a task
- state that for the purposes of determining this period of time, you have conducted a test or made an estimate of the average speed at which the piece/task in question is produced/performed – the mean hourly output rate
- state what the mean hourly output rate for the piece or task is
- state the rate or sum to be paid to the worker for the production of the piece or performance of the task in question
- give the telephone number of the Acas Helpline on Tel 0300 123 1100

## Salaried-hours work

This section describes how you should calculate the hours worked by workers doing salaried hours work for minimum wage purposes.

### What is salaried-hours work for minimum wage purposes?

Salaried-hours work can exist in any sector or occupation. Many office workers, public-sector workers and workers with large companies are paid on the basis of a salaried-hours contract.

If you employ someone to work only during some parts of the year but you pay them an annual salary in instalments throughout the year then they are a salaried-hours worker. For example, school cleaning, catering or caretaking staff are often paid a regular weekly or monthly amount throughout the year, although they work in term time only.

Salaried-hours work is where all the following apply to a worker:

- they are under a contract to do salaried-hours work
- they are paid under their contract for a set basic number of hours in a year
- they are entitled under their contract to an annual salary for those hours
- they are paid in equal weekly or monthly instalments – e.g. 12 monthly or 52 weekly instalments

So long as the instalments remain the same, the fact that workers actually work more hours in some weeks or months and less in others does not prevent them being salaried-hours workers.

Some variations in the weekly or monthly instalments are ignored for this purpose, for example if the variation results from:

- payment of a performance bonus
- a pay increase
- pay for working hours in excess of the basic hours or overtime payments
- the worker leaving part-way through the week or month

### **What is a salaried-hours contract?**

To be a salaried-hours contract, the contract between you and the worker should set out:

- a basic number of hours for which the worker is to be paid (for example 2,000 hours)
- that the worker is entitled to an annual salary

You do not have to show the total basic hours for a complete year but it is better to do so. However, it must be possible to precisely calculate what the total basic annual number of hours is in relation to the full year.

For example, if a contract sets out a monthly number of hours it is possible to work out the annual total by multiplying by 12. However, if a contract sets out the weekly number of hours, the hours for the whole year can't be determined by multiplying by the number of weeks in a year because the days in a year cannot be divided by 52. But this doesn't mean that the work is not salaried hours work as salaried hours work is about the payment of an annual salary for an ascertainable number of basic hours in a year.

By way of further example, some employees may undertake flexible working patterns which mean that their actual working hours vary from week to week. In these cases it should still be possible to calculate their basic hours in which case if they are paid an annual amount they will be doing salaried hours work.

### **Salaried-hours workers - hours that count for minimum wage purposes**

Generally, a salaried-hours worker is regarded as working for minimum wage purposes if they are:

- at work and required to be at work
- on standby or on-call at or near their place of work
- kept at their place of work but cannot work e.g. because of machine breakdown
- travelling on business
- training or travelling to training

For more information on what counts as working hours for minimum wage purposes see above: [Section 3 - Working hours for which the minimum wage must be paid](#)).

## Absences from work

If you pay a salaried worker their normal salary while they are absent from work and this forms a part of their employment contract, the time of the absence counts towards the worker's time worked for minimum wage purposes. For example during rest breaks, lunch breaks, holidays, sickness absence or maternity/paternity/adoption leave.

If you have not included pay for these absences as part of the worker's basic hours under their employment contract, you do not have to take them into account for minimum wage purposes.

For example, a worker is contractually entitled to their full pay of £7.83 an hour for the first six weeks of sick leave and after six weeks they are entitled to be paid half-pay of £3.92 an hour.

The hours of absence paid at their full pay rate count as part of their basic contractual hours because you are treating them the same as if they are at work. Once you pay them half-pay for the absence you do not count the time paid at the reduced rate as work time and when calculating the minimum wage pay of the salaried-hours worker you ignore both the absence and the payment.

## Time that does not count for minimum wage purposes

The only hours that do not count as working time for a salaried-hours worker are:

- hours not worked and paid at less than normal pay - for example - if during sick leave you pay them a proportion of their normal salary, Statutory Sick Pay only or nothing
- during unpaid leave - because this time is not part of their basic annual hours in their employment contract
- hours they are taking industrial action - it makes no difference whether the action is a strike, go-slow or work-to-rule, or whether the worker remains entitled to full or partial pay under their employment contract
- periods the worker is not working but available for work at or near the workplace when they are allowed to sleep (and a suitable place to sleep is provided) (see above: Sleep – in shifts).
- travelling between home and work - regardless of whether the worker has a fixed place of work.<sup>5</sup>

## Calculating salaried workers' hours - basic annual hours

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<sup>5</sup> The Court of Justice of the European Union (CJEU) ruled in the case of *Federación de Servicios* that journeys made by workers without a fixed or habitual place of work between their homes and the first and last customer of the day constitute working time. The Working Time Directive is concerned with the organisation of working time. Pay is a separate issue and is governed by the contract and NMW rules. Employers are not required under NMW legislation to pay workers the minimum wage for this time.

If a worker only works up to their basic annual hours calculating the number of hours they have worked is straightforward. You need to calculate the number of salaried hours to be paid for each pay reference period by dividing the worker's basic annual hours by the frequency of payments.

For more information where a worker works excess hours or leaves the employment, see below.

*Example 1 – monthly pay reference periods*

You pay a 23 year old worker £15,540 pay a year in regular monthly instalments of £1,295. They have an annual contract to work 2,100 hours in the year (including breaks).

- Step 1: Identify their basic annual hours: 2,100.
- Step 2: Identify the notional hours in each pay reference period to be paid minimum wage:  $2,100 \div 12 = 175$  hours - you should assume these hours are worked even in months with a longer or shorter number of working days and hours.
- Step 3: Calculate whether you have paid them at least the minimum wage rate by dividing their monthly pay by the notional hours:  $£1,295 \div 175 = £7.40$

You are paying them at least the minimum wage rate.

*Example 2 – weekly pay reference periods*

You pay a 23 year old worker £10,337.08 a year in regular weekly instalments of £198.79. Although they work term time only you pay them each week whether they are working or not. They have an annual contract to work 1,400 hours in the year by working 35 weeks of the year for 40 hours.

- Step 1: Identify annual hours: 40 hours x 35 weeks = 1,400 hours.
- Step 2: Identify the notional hours in pay reference period:  $1,400 \div 52 = 26.9$  hours - you should assume they have worked this both when the worker has done 40 hours during term time and no hours during the holiday.
- Step 3: Calculate whether you are paying them at least the minimum wage by dividing their pay by the notional hours in the pay reference period:  $£198.00 \div 26.9$  hours = £7.39 an hour.

You are paying them at least the minimum wage rate.

## Calculating salaried-workers' hours - excess hours worked

Once a salaried-hours worker who is not paid for extra hours has worked for more than their basic annual hours in the calculation year then it is necessary to check that all the excess hours are taken into account when checking that at least the minimum wage rates have been paid.

To start with, you need to work out whether the worker has worked more than their basic hours in the calculation year.

For example, if their contract is to work 2,040 basic hours a year and they do not work any more hours then you don't need to do any further calculations.

However, once those 2,040 hours have been worked (including any hours that count as basic hours when the worker is absent), the extra unpaid hours will be the basis of the minimum wage calculation to ensure that the worker is not paid less than the minimum wage for the pay reference periods in the remainder of the year.

You must exclude any hours when the worker is engaged in industrial action.

*Example:*

A 19 year old worker earns the 18-20 year old NMW rate of £5.90 per hour. The worker's calculation year is 1 April to 31 March and their contract specifies basic annual hours of 2,040 for which they are paid £12,036.00 per annum (£1003.00 per month).

The worker exceeded their annual contracted hours part-way through the February pay reference period. For February and March, the worker remains entitled to receive the £1003.00 per month, which was the basis of the original contract.

However, in addition, you need to pay them at least the minimum wage for any additional hours worked over and above the contractual hours. Please note that the individual calculations to identify the hours to be paid the minimum wage in each pay reference period may not result in exactly the same figure as the total worked in the year. This is caused by a rounding effect due to the variation in the number of days in each calendar month.

- Step 1: Identify the actual day when the basic hours are exceeded. In this example the worker reached 2040 basic hours for the calculation year on 15 February when they had worked 110 hours in February.
- Step 2: For the 14 days before the basic hours were exceeded, calculate the hours as follows:
  - (a) divide 365 days in a full year by 14 days in the pay reference period-include non-working days:  $365 \div 14 = 26.07$
  - (b) divide the annual basic hours (2,040) by the answer in (a):  $2,040 \div 26.07 = 78.25$  hours
- Step 3: Repeat Step 2 for the remaining days in the pay reference period after the basic hours were exceeded (in this example 14 days, as it is not a leap year), resulting in  $2040 \div 26.07 = 78.25$  hours
- Step 4: Identify the actual hours worked after the basic hours were exceeded - in this example, 70 hours.
- Step 5: Add together these three sets of hours  $78.25 + 78.25 + 70 = 226.50$  hours. This is the total number of hours the worker must be paid for February. Therefore, February's pay for a worker aged 19 and over must not be less than:  $226.50 \times £5.90$  (18-20 rate) = £1,336.35

Step 6: For all subsequent pay reference periods, once the annual contractual hours have been exceeded (March, in the above case), the worker remains entitled to receive their salary payment of £1003.00 per month, which was the basis of the original contract. In

addition you need to make sure that you pay them at least the minimum wage for the additional hours worked over and above the contracted hours.

To do this, add the 180 excess hours worked in March to the hours already calculated to be paid in the pay reference period. In this case the total hours to be paid for minimum wage will be  $180 + 170 = 350$  hours.

Therefore March's pay for a worker aged 19 and over must not be less than  $£5.90 \times 350 = £2,065.00$ . The worker is already being paid £1003.00 for the month so will be entitled to at least a further £1,062.00.

## Calculating salaried workers' hours - hours worked over basic annual hours

Sometimes a worker may work all their basic hours under their annual contract before the end of the calculation year and then work extra hours. If the worker's contract doesn't entitle them to additional pay for the extra hours

– e.g. overtime pay - your minimum wage calculation for the remaining pay reference periods in the calculation year must include those extra hours.

You must pay the worker at least the minimum wage for the unpaid excess hours. You must pay the minimum wage for both the pay reference period when the worker first goes into the extra hours and for any remaining pay reference periods in the calculation year.

For example - a worker has an annual contract for 2,040 hours (12 months x 170 hours), with a calculation year running from April to March. They normally work no more than 170 hours a month.

In February they work an extra 20 hours. Anticipating that this will take them above their contractual hours by the end of March, you pay them the 20 extra hours - in addition to their normal monthly pay. In these circumstances, you don't need to make any further calculation.

However, if you didn't pay them for the extra 20 hours in February because you were not sure if the hours would take them above their contractual hours in the calculation year you would need to include the hours in the remaining pay reference periods.

## Calculation year

The approach to identify the calculation year depends on whether the worker is paid monthly or weekly. For example, with monthly paid workers:

- if they start on the first day of a month, say 1 May, their calculation year will be 1 May to 30 April in the following year while continuing in the same job
- if they start part way through a month, say 15 May, their calculation year will be 15 May to 31 May of the following year and then starting on 1 June and ending on 31 May each subsequent year while continuing in the same job

With weekly paid workers - for example - if they start on 22 May their calculation year will be 22 May in year one until 21 May the following year. It will then start on 22 May each subsequent year while continuing in the same job.

## Calculating salaried workers hours - contract changes

If you reduce or increase a salaried worker's contractual hours at some point in the calculation year, this will affect whether and when the worker does more than their basic hours. There are two methods for calculating the worker's hours in this situation. Which of them applies depends on the circumstances.

The first method applies when you want to identify what the basic hours are before the contract is changed. In this case, the basic hours are the same as the hours that were fixed before the change takes place.

For example, an annual contract of 2,040 hours runs from April to March. You reduce the contract's hours to 1,900 hours from 1 November. If you calculate the basic hours any time before November the number is 2,040.

The second method applies when you want to identify what the basic hours are after the contract is changed.

### *Example calculation to identify basic hours after a contract is changed:*

An annual contract of 2,040 hours runs from April to March. You then reduce the contract hours to 1,900 from 1 November. If you need to identify the basic hours from 1 November onwards, you need to get the right proportion of annual hours in the right part of the year.

To do this:

- Step 1: Calculate the number of days from the date of the change to the end of the contract year, e.g. from 1 November there are 151 days remaining of the contract year.
- Step 2: Divide that number by 365 and multiply by the new contract hours (1,900):  $151 \div 365 \times 1,900 = 786$  hours.
- Step 3: Calculate how many days there were from the start of the contract year to the day before the contract was changed:  $365 - 151 = 214$ .
- Step 4: Divide the figure from step 3 by 365 and multiply by the previous contract hours (2,040):  $214 \div 365 \times 2,040 = 1,196$  hours.

From 1 November onwards, the basic hours are:  $786$  (step 2) +  $1,196$  (step 4) =  $1,982$  hours.

If the contract hours are changed more than once during the year, the same method is used to get the right proportion of hours in the right part of the year.



*Example calculation to identify basic hours after a contract is changed twice:*

An annual contract of 2,040 hours runs from April to March. The contract hours are reduced to 1,900 hours from 1 November and to 1,800 hours from 1 February. To identify the basic hours at any time on or after 1 February it is necessary to get the right proportion of annual hours in the right part of the year.

- Step 1: Work out how many days there are to the end of the contract year from the last time the contract was changed: 59.
- Step 2: Divide them by 365 and multiply by the new contract hours (1,800):  $(59 \div 365) \times 1,800 = 291$  hours.
- Step 3: Work out how many days there were from the first time the contract was changed to the second (and last) time it was changed: 92.
- Step 4: Divide them by 365 and multiply by the contract hours for that period (1,900):  $(92 \div 365) \times 1,900 = 479$  hours.
- Step 5: Work out how many days there were from the start of the contract year to the day before the contract was first changed:  $365 - 59 - 92 = 214$ .
- Step 6: Divide them by 365 and multiply by the previous contract hours (2,040):  $(214 \div 365) \times 2,040 = 1,196$  hours.

## Calculating salaried workers hours - workers leaving

If a salaried-hours worker leaves before the end of the year, you may find they have worked more hours than the basic minimum hours for the part of the year you employed them. You must pay them at least the minimum wage for the excess hours. You should treat the excess hours as having been worked in the worker's final pay reference period and should be paid for when the worker is paid for that period.

For example, you have an annual contract with a 29-year old worker to work 2,040 hours a year - 170 hours per month ( $2,040 \div 12$ ). They leave after six months having worked 1,150 hours.

- Step 1: Work out how many hours the worker should have worked under their contract:  $6 \text{ months} \times 170 \text{ hours} = 1,020$  hours.
- Step 2: Calculate their excess hours:  $1,150 - 1,020 = 130$  hours.
- Step 3: Determine the hours for which the minimum wage is payable in the worker's final pay packet by adding together their basic hours and the excess hours:  $170 + 130 = 300$  hours.
- Step 4: Multiply the hours worked by the minimum wage rate to calculate the minimum amount for the worker's final pay packet:  $\text{£}7.83 \times 300 = \text{£}2,349$

If a worker leaves after a pay reference period of less than a week you will need to calculate the minimum wage at the hours actually worked on those days.

## Unmeasured work

This section describes how you should calculate the hours worked by workers doing unmeasured work for minimum wage purposes.

### What is unmeasured work?

Work is unmeasured work if it is not time work, salaried hours work or output work. Unmeasured work could include, for example, work where there are certain tasks to be done but no specified hours or times when these tasks must be done, or work where you require the worker to work when needed or when work is available.

You have two options for identifying the hours of unmeasured work that count for minimum wage purposes:

- recording every hours worked; or
- coming to a 'daily average' agreement of hours to be worked.

### Unmeasured work – 'daily average' agreements

The daily average agreement must:

- be agreed between you and the worker
- be made before the start of the pay reference period it covers
- be in writing
- set out the daily average number of hours which the worker is likely to work to fulfil the duties required by the contract
- be a realistic daily average number of hours

One agreement can cover a number of pay reference periods if there is no change in the likely daily average number of hours. If challenged, it is for you to prove that the number of hours is indeed realistic.

### Calculating the hours of unmeasured work under a 'daily average' agreement

To calculate the number of hours of unmeasured work done in the pay reference period - for example one week - when there is a daily average agreement, you should:

- confirm the agreed daily average number of hours per day - say five hours a day - and the number of hours the worker is required to be available for work on a full working day, say 12 hours
- multiply the agreed daily average hours by the number of days when the worker was in fact available for work for the full number of hours contemplated by the contract - say four days: 5 hours x 4 days = 20 hours

If a worker is available for only part of a day, you should work out what fraction the part is of the time they are normally required to be available and calculate their hours of work for

that day proportionately. For example, if a worker is estimated to average 5 hours of work in a day when they are available for 12 hours - if they were only available for 6 hours on one day they are treated as working for 2.5 hours on that day.

### **Travel time for people doing unmeasured work**

You must pay an unmeasured worker at least the minimum wage for time spent travelling in connection with their job.

This does not include time spent travelling between home and their workplace. However, if they are a homemaker it does include time spent travelling from home to the premises they report at.

### **Absences from work**

If an unmeasured worker is away from work - for example on holiday, on sick leave or on maternity, paternity or adoption leave - the hours away from work do not count as hours worked.

However, if you pay them for the absence – for example, at a lower rate during sick leave - and can identify the payment related to the absence, you should not include this payment in their minimum wage pay.

## Section 4: Enforcing the minimum wage

You must pay the minimum wage to workers if it is due. If you discover that you have paid workers below the minimum wage, you must pay any arrears to the workers (see below: [Calculating minimum wage arrears](#)).

The minimum wage can be enforced by HM Revenue & Customs compliance officers, or by a worker making a claim in an employment tribunal or court.

### Minimum wage complaints

If someone suspects that a worker is being paid less than the minimum wage rate they are entitled to, they can call the Acas Helpline on Tel 0300 123 1100.

The Helpline is open 08.00 - 20.00 Monday, Wednesday and Thursday and 08:00 – 18:00 Tuesday and Friday. Calls cost no more than calling 01 or 02 number and will be included in any free minutes allowance. The Helpline can take calls in over 100 languages. All complaints are treated as confidential.

As well as the minimum wage, the Helpline also covers:

- the agricultural minimum wage
- employment agency standards
- working time
- working conditions relating to gangmaster licensing standards

### Enforcement by HM Revenue & Customs

HM Revenue & Customs (HMRC) enforces the minimum wage. HMRC compliance officers may carry out inspections of employers at any time. There is no requirement to provide reasons for an inspection.

Officers will act in response to complaints that an employer is not paying the minimum wage - whether the complaint is by workers or others. They will also investigate where there may be a risk of non-payment.

Officers must show an identity document on request. They have various powers to obtain information. They can, for example:

- require you or people working for you to produce and explain records about minimum wage pay
- require you or people working for you to supply further explanations as necessary to determine whether the legislation has been complied with

- enter, at any reasonable time, your premises in order to interview you
- require you to attend for interview at a place of the officer's choosing
- remove minimum wage records from your premises for copying - HMRC must return the records to you within a reasonable period

It is a criminal offence to obstruct a compliance officer or refuse or wilfully neglect to give information or produce documents to a compliance officer.

If a compliance officer believes that you have failed to pay at least the minimum wage to a worker, they can serve you with a notice of underpayment.

## Notice of underpayment

If a compliance officer believes that you have failed to pay at least the minimum wage to a worker, the officer may serve a notice of underpayment on you. This may require you to:

- repay arrears of the minimum wage to each worker named on the notice; and
- pay a penalty to the Secretary of State. The government has increased the financial penalty percentage that employers pay for breaking minimum wage law from 100 per cent to 200 per cent up to a maximum penalty £20,000 per worker. The increase came into effect on 1 April 2016.

The penalty will be reduced by 50 per cent if you fully comply with all the terms of the notice of underpayment within 14 days of service of the notice. You may appeal against the notice of underpayment within 28 days of service of the notice. An appeal must be made to the employment tribunal (or industrial tribunal in Northern Ireland).

If you do not comply with the notice of underpayment, HMRC can:

- take a case to a tribunal or County Court (or Scottish equivalent) on behalf of the worker
- prosecute you - deliberate refusal to pay the minimum wage is a criminal offence

Further details about the Notice of Underpayment can be found in section 3 of the [Policy on enforcement of the national minimum and national living wage](#).

## Criminal offences

There are six criminal offences relating to the minimum wage:

- refusing or wilfully neglecting to pay the minimum wage
- failing to keep or preserve minimum wage records
- causing or allowing a false entry to be made in minimum wage records

- producing or furnishing false records or information
- intentionally delaying or obstructing a compliance officer
- refusing or neglecting to answer questions, give information or produce documents to a compliance officer

The fine on conviction for each offence is up to £5,000 where tried in the magistrates' court (or the Scottish equivalent). The most serious criminal cases are triable in the Crown Court (or Scottish equivalent). This means that employers who deliberately fail to pay the minimum wage may face a potentially unlimited fine.

Since 6 April 2009, HMRC has been able to use the search and seize powers in the Police and Criminal Evidence Act 1984 when investigating criminal offences under the National Minimum Wage Act 1998.

## Employment tribunal claims

A worker can bring a claim to an employment tribunal (or an industrial tribunal in Northern Ireland) to recover any money which they believe they are owed as a result of not receiving the minimum wage. Alternatively, a worker can go to a civil court to recover the money due to them.

In civil cases, the burden is on you to prove that you have paid the minimum wage to the worker, rather than for the worker to prove that they have not received the minimum wage.

## Unfair dismissal and the minimum wage

A worker may also bring a claim to an employment tribunal (or industrial tribunal in Northern Ireland) for unfair dismissal or victimisation if you dismiss them or take some other action against them for either:

- trying to ensure that they are paid the minimum wage; or
- becoming eligible for the national minimum wage or a higher minimum wage rate.

If you find out the identity of a worker making a complaint about the minimum wage - for example through another worker - and you dismiss the worker, this would be unfair dismissal if the worker can show the reason for their dismissal was the fact that they had complained.

## Calculating minimum wage arrears

If you did not pay a worker the correct minimum wage rate when they were entitled to it, they are entitled to have any arrears repaid. Arrears are calculated according to a formula using current minimum wage rates.

This means workers will be due more arrears than they were originally underpaid if current rates are higher than the rates that applied at the time of the underpayment. If current

rates are lower than the rates that applied at the time of the underpayment, the worker will be entitled to the amount they were actually underpaid.

The 'current minimum wage rate' is the rate for the age band that applied to the worker at the time of the underpayment. For example, a worker who was eligible for the 16 to 17-year-old rate at the time of the underpayment will now be entitled to be repaid arrears using the current 16 to 17-year-old rate - even if they are now aged 19.



If you need to calculate and pay arrears, you should use the following formula:

- work out the amount of the original underpayment in the pay reference period
- divide the underpayment by the relevant minimum wage rate which applied at the time of the underpayment
- multiply this figure by the current minimum wage rate

If minimum wage rate increases between the date the arrears are calculated and the date that a worker is repaid the arrears, the worker will be entitled to further arrears based on the rates that are currently in force.

## Calculating arrears with the change of age band

On 1 April 2016 the age bands for the minimum wage rates changed. Workers aged 25 and over became entitled to the National Living Wage. Where arrears are being calculated for a pay reference period starting on or after 1 April 2016 for someone aged 25 or over, the current minimum wage rate which should be used is the National Living Wage rate for workers aged 25 and over.

### *Example calculation for minimum wage arrears:*

A 45-year-old worker was paid £220 for 35 hours worked in the pay reference period 1 December 2017 to 8 December 2017. The arrears are calculated in April 2018.

The minimum wage rates for the relevant periods are:

- £7.50 for the pay reference period 1 December 2016 to 8 December 2016
- £7.50 for April 2017

Step 1: work out the minimum amount the worker should have been paid in the pay reference period and identify the size of the underpayment.

- Multiply the correct rate during the period of the underpayment by the hours worked:  
 $£7.50 \times 35 = £262.50$ .
- Deduct the amount the worker was paid:  $£262.50 - £220 = £42.50$  underpayment.

Step 2: divide the underpayment by the minimum wage rate which applied at the time of the underpayment

$$£42.50 \div £7.50 \times £7.83 = £44.37$$

The worker is entitled to £44.37 in arrears.

## Minimum wage record keeping

You are legally required to keep sufficient records to show you are meeting minimum wage requirements.

For many employers there will be no need to maintain separate records - existing payroll and business records will be sufficient. For example, the pay records you keep for PAYE (Pay As You Earn) and National Insurance contributions may be enough to show you are paying at least the minimum wage to your workers.

Your records will be used in the event of a dispute - it is your responsibility to prove you are meeting minimum wage requirements. It is a criminal offence to fail to keep sufficient records.

This guide explains the record keeping requirements and the rights of access to the records that your workers and HM Revenue & Customs compliance officers have.

### Compliance officers' access to minimum wage records

HM Revenue & Customs (HMRC) minimum wage compliance officers can ask to see your records to check whether you're paying the minimum wage. HMRC can also remove minimum wage records from your premises in order to copy them, but must return them within a reasonable period. When required, you must explain your minimum wage records to compliance officers, answer questions about them and provide any further information necessary to determine if the minimum wage has been paid. HMRC officers have the power to enter any premises used to carry out an employer's business, or which the employer uses in connection with his business, including the premises of businesses which place and employ agency workers.

You may be subject to criminal prosecution if you either:

- fail to keep or preserve records
- make, or knowingly cause or allow a false entry to be made in records
- produce, or knowingly cause or allow false records or information to be produced
- refuse or prevent an enforcement officer from seeing these records
- refuse or neglect to answer any questions, give information or produce any documents to an enforcement officer when required to do so.

You will also be vulnerable in any civil dispute about whether the minimum wage has been paid, since the burden of proving this rests on you.

### Keeping and storing minimum wage records

Minimum wage records do not have to be kept in any particular form. They can be kept on paper or on computer, for example. But you must be able to produce the records for an individual pay reference period for an individual worker in a single document on request.

You also have legal duties under the Data Protection Act 1998 around how you keep staff records and what you do with them.

You must keep records for a minimum of three years after the end of the pay reference period following the one that the records cover.

For example, if a person is paid each calendar month, their records for the month of May 2011 would have to be kept until the beginning of July 2014.

It is a criminal offence not to keep records for the required period.

Although you aren't required to keep records for any longer than three years, you should be aware that a civil case can be brought before a court for up to six years. In such a case, it would still be for you to prove that you had paid the minimum wage, and so you may wish to consider retaining your records for six years.

### **Minimum wage records you should keep**

By law, you are required to keep sufficient records to show that you are paying your workers at least the minimum wage. There is no definition of what counts as 'sufficient' records. The situation will vary from employer to employer and from worker to worker. It is left to your own judgment for each worker. Generally, if you are keeping full payroll records this should be sufficient for minimum wage purposes. It is for you to judge when, for any particular worker, you should keep more detailed or specific records to show you are paying at least the minimum wage.

If a worker brings a claim for unpaid minimum wage to a tribunal or court, the burden will be on you to prove that the minimum wage has been paid. You will need to have records to enable you to provide this proof.

The records you should consider keeping include records which show:

- total pay paid to workers
- the hours they have worked
- overtime, shifts or other circumstances when there are increased rates of pay
- details of any allowances paid to the workers
- any deduction or payment for living accommodation provided by the employer to the workers
- amounts representing tips, service charges, gratuities or cover charges paid to the worker - when paid through the payroll these only counted towards minimum wage pay up to 1 October 2009
- any absences - for example - rest breaks, sick leave, holidays
- any travel or training undertaken by the workers during work hours
- bank statements or other commercial documentation
- contracts and agreements between you and your workers
- workers' dates of birth

- payments and deductions for expenditure incurred by the worker in connection with the employment
- payments for travelling to a temporary workplace (and any associated subsistence and accommodation) which are allowed as deductions from earnings under section 338 of the Income Tax (Earnings and Pensions) Act 2003
- documents to show why a worker is exempt from the minimum wage

The above is not intended to be a definitive or comprehensive list. The details of records to be kept may differ from case to case and also according to the type of work being done.

If you have a 'daily average' agreement with a worker, you must also keep a copy of that agreement (for more information, see above: [Unmeasured work](#)).

If you are employing rated output workers and paying fair piece rates, you must keep a copy of the written notices served on your workers and a copy of the data showing how you arrived at the 'mean hourly output rate' for all relevant pieces/tasks (see above: [Output work](#)).

If you are unsure if you are keeping sufficient records, you may wish to contact the Acas Helpline on Tel 0300 123 1100.

## Workers' access to minimum wage records

If a worker has reasonable grounds to believe that they have not been paid the minimum wage, they have the right to see your records relating to them.

To do so, they must make a written request to you. You must produce the records within 14 days of receiving the request - or within a time period you agree with the worker.

A worker may inspect and examine the records and copy any part of them, and when doing so may be accompanied by someone else. If they wish to be accompanied they must have told you in their written request. The records must be produced at the place of work, or at a place the worker can reasonably attend or is mutually agreed.

If you refuse to let the worker see the records or fail to produce the records the worker can take a complaint to an employment tribunal. If the employment tribunal upholds the complaint they can award the worker 80 times the hourly rate of the minimum wage.



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