



Department for
Business, Energy
& Industrial Strategy

National Minimum Wage

Consultation on salaried workers and salary
sacrifice schemes

Closing date: 1 March 2019



The consultation can be found on the BEIS section of GOV.UK:
www.gov.uk/government/consultations/salaried-workers-and-salary-sacrifice-schemes-changing-the-national-minimum-wage-rules



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Introduction

The government is committed to ensuring that all workers are paid at least the National Minimum Wage or National Living Wage. We take robust enforcement action against employers who underpay their staff, including financial penalties of up to 200% of the value of the underpayment, and public ‘naming’ of non-compliant employers.

The government is also committed to supporting employers to comply with National Minimum Wage legislation, so that they get it right first time without the need for enforcement action.

This consultation concerns the National Minimum Wage rules regarding salaried workers and the operation of salary sacrifice schemes.

People who perform salaried hours work are paid an annual salary in equal weekly or monthly instalments, for an annual number of hours. For example:

- monthly paid workers who receive an annual salary for working 9am-5pm, Monday to Friday;
- term-time only workers who receive equal weekly/monthly payments but only work during term time; or
- annualised hours workers who receive equal weekly/monthly payments for working 2,000 hours a year.

Legislation provides a set of rules over how compliance with the National Minimum Wage is calculated when regular salaries are paid. Certain conditions must be met in order for work to qualify as salaried hours work under the National Minimum Wage Regulations. This consultation seeks views on how effective these rules are in preventing worker exploitation.

This consultation seeks views on proposed changes to the National Minimum Wage Regulations which relate specifically to salaried hours work, including Regulations 21 and 24. In particular, the government would welcome your views on whether, and if so how, we might amend the Regulations to include additional payment cycles and fixing the definition of the calculation year for employers, without any detriment to workers.

Salary sacrifice schemes are used in some workplaces whereby a worker agrees with an employer a lower rate of gross pay in exchange for goods or services (e.g. childcare vouchers, or bicycles). National Minimum Wage regulations include provisions designed to protect workers from unfair deductions from their wages. This consultation also seeks views on the practical operation of these provisions and their effect on workers on the minimum wage.

Salaried work

Calculating the National Minimum Wage

To determine whether the National Minimum Wage has been paid by an employer, a calculation of a worker's average hourly rate of pay over a given 'pay reference period' (e.g. a month) is required. If that average is less than the relevant minimum wage rate, the employer has fallen short of paying the minimum wage. To calculate the worker's average hourly rate it is necessary, therefore, to divide the relevant remuneration received in a given pay reference period by the total number of hours treated as worked in that period, as specified by the National Minimum Wage rules. For example, a 36-year-old paid £235 per week (the pay reference period) for 30 hours work receives an hourly rate of $\text{£}235 / 30 \text{ hours} = \text{£}7.83$.

An employer may therefore have failed to comply with National Minimum Wage rules if a worker's pay falls below the minimum wage rate in a given pay reference period, regardless of whether the employer could demonstrate the average pay was higher over a longer period.

Salaried Hours Work

As a part of making this calculation, employers should identify the type of work that has been undertaken. There are four distinct categories of work identified for this purpose: namely 'time work', 'salaried hours work', 'output work' and 'unmeasured work', each with a different set of rules that govern the number of hours worked by a worker.

The focus of this consultation is upon the type of work called 'salaried hours work', and the set of rules that are used to determine whether work is salaried hours work or not.

Upon the introduction of the National Minimum Wage, employers reported that provisions to allow people to carry out salaried hours work would enable them to simplify their payroll. When working hours change regularly, salaried hours work allow the employer to pay a regular and consistent wage so long as the total number of hours worked over a year are paid the National Minimum Wage on average.

Salaried hours work, in effect, permits an employer to operate a pay averaging model over a year. It does this by allocating an equal number of the basic annual hours to each pay reference period (regardless of the exact amount performed in reality). So long as the instalments of salary for the basic hours remain the same, the fact that workers actually work more hours in some weeks or months and fewer in others does not prevent them being salaried hours workers. This allows the pay and hours a worker receives to be spread over 12 months for calculation of the National Minimum Wage.

This also has advantages for workers. Some workers would prefer to receive a salary than to be paid for each hour they work because it provides greater security of income and greater certainty of the amount they will earn each month, while also allowing the flexibility to vary the hours worked from week to week. It assists with applications for finance, and loans and gives lenders confidence that repayments can be met.

Problem under consideration

In order for work to be classified as salaried hours work, the following four conditions must be satisfied:

1. the worker must be entitled under his/her contract to an annual salary (Regulation 21(2));
2. the worker must be entitled under his/her contract to be paid that salary in respect of a specific number of hours in a year and those hours must be specified in or ascertained in accordance with their contract (Regulation 21 (2));
3. the worker must not be entitled under his/her contract to a payment in respect of basic hours other than an annual salary or an annual salary and performance bonus (Regulation 21 (4)); and
4. the worker must be entitled under his/her contract to be paid in equal weekly / monthly instalments (excluding overtime payments and a performance bonus) regardless of the number of hours actually worked (Regulation 21 (5)).

Feedback from businesses, particularly in the hospitality and retail sectors, suggests that some of these conditions are complex, restrictive and make complying with the legislation difficult. In particular, a number of employers have stated that condition 4 (under regulation 21(5)) does not reflect common business practice. The two permissible payment cycles, weekly and monthly, do not currently give employers the flexibility they need: in the retail and hospitality sectors some staff are often paid fortnightly or four weekly.

Consultation questions

Question 1

Should the government amend Regulation 21 (5) to allow other payment cycles?

Yes / No

Question 2

If you answered yes to the question above, what payment cycles should be permitted in the regulations?

a) Fortnightly?

Yes/No

b) Four weekly?

Yes/No

c) Any equal and regular period of one month or less?

Yes/No

d) Any other payment cycles? (please give details)

Question 3

Would the inclusion of additional payment cycles assist employers to comply? (please give details)

Yes/No

Question 4

Would the inclusion of additional payment cycles cause any detriment to workers? (please give details)

Yes/No

Question 5

Do any of the other conditions for salaried hours work listed overleaf lead to unintended consequences? (please explain why)

The calculation year

Key to the operation of these provisions is the concept of the 'calculation year'. Under salaried hours work rules, the employer may average the pay of a worker over the course of this year. The calculation year is also the reference point to identify the day in any calculation year upon which basic hours are exceeded. Where the worker exceeds their basic hours, the employer must pay the worker at least the minimum wage for each additional hour worked.

The calculation year has the meaning given in regulation 24 of the Regulations. For most workers, the first calculation year begins on the first day of employment, and each subsequent calculation year begins on the anniversary of the employment. However, for those paid monthly but who commenced employment on any other day than the first day of the month, the calculation year is (i) the period beginning with that day and ending with the day before the first anniversary of the first day of the next month; (ii) in each subsequent year, a year beginning on an anniversary of the first day of that month.

Consequently, many employers, and their payroll administrators, may well have different calculation years for each of their workers who perform salaried hours work. Across large organisations, in particular, feedback from some stakeholders has suggested that this is hard to administer and it becomes difficult to monitor National Minimum Wage compliance.

Question 6

Would the calculation of salaried hours work be easier (for employers, and workers) if regulations set a single uniform 'calculation year' (i.e. the same calculation year for all workers of an employer)? (please give reasons for your answer)

Yes/No

Question 7

If you answered yes to the question above, should the single uniform calculation year be:

a) The calendar year (1 January to 31 December)? (please give reasons for your answer)

Yes/No

b) The tax year (6 April to 5 April of the following year)? (please give reasons for your answer)

Yes/No

c) At the discretion of the employer (but uniform across the whole workforce)? (please give reasons for your answer)

Yes/No

Overtime and pay premia

Salaried hours work provisions allow flexibility for employers to vary workers' hours while paying a consistent weekly or monthly salary for working a certain number of hours in a year, referred to as the 'basic hours' in National Minimum Wage legislation. There are several rules in place to ensure workers are protected under these arrangements, including limits on the degree to which those consistent payments can be varied. Specifically, pay for the basic hours can only include the salary and any performance bonus (regulation 21(3)). Overtime or premium payments made to staff, such as for hours worked on Bank Holidays, cannot be made for the basic hours, and must fall outside of salaried hours work for the calculation of National Minimum Wage compliance. For example, the hours worked for these payments could instead fall within 'time work' depending on the contractual arrangements on pay for those hours. Feedback from businesses has suggested that this provision creates difficulty in complying with the National Minimum Wage Regulations and in establishing attractive pay premia arrangements for workers.

Question 8

a) Do salaried hours work rules cause difficulty for employers while making overtime and premia payments to workers? (please give reasons for your answer)

Yes / No

b) Should salaried hours work rules be amended to include overtime and premia payments? (please give reasons for your answer)

Yes / No

c) Do you think an employer's policy towards offering pay premia would be affected by amending the current rules to allow overtime and premia payments to fall within salaried hours work? (please give reasons for your answer)

Yes / No

Salary sacrifice schemes

Introduction

Some employers offer their workers ‘salary sacrifice’ schemes whereby the worker and employer agree a lower rate of gross pay in exchange for a non-cash benefits such as childcare vouchers. Some employers also agree deductions from pay with their workers in return for goods or services where the worker has agreed to the deduction in writing or through a contract.

National Minimum Wage rules restrict employers from agreeing a lower rate of gross pay than the minimum wage or making certain types of deductions from their workers’ pay that take the worker’s pay below the minimum wage. Deductions from pay that will reduce a workers’ pay for the purposes of calculating National Minimum Wage include:

- deductions or payments by a worker for expenditure connected with the job
- deductions for the employer’s own use or benefit (with some specific exceptions, such as deductions for an accidental overpayment of wages)
- payments to another person for expenditure connected with the job
- certain deductions or payments by the worker for accommodation, which are not covered by ‘accommodation offset’ rules.

If any such deductions reduce a workers’ pay below the National Minimum Wage rate, then the employer has underpaid the worker.

Some employers and their representatives report to us that salary sacrifice schemes, or similar arrangements whereby pay deductions are offered in return for goods or services, are being withdrawn to avoid noncompliance with these rules, and underpayment of the National Minimum Wage. There is an exemption in the National Minimum Wage rules for the voluntary purchase of goods or services from an employer (regulation 12(2)(e)). Nevertheless, we have had reports that in some cases, this has resulted in workers on low pay not being offered the same arrangements as those earning well above National Minimum Wage.

Consultation questions

Question 9

Do you have any evidence that the salary sacrifice offer has been withdrawn or restricted in the last 12 months as a result of National Minimum Wage requirements?

Question 10

What do you regard as the main reasons that workers opt in to salary sacrifice schemes?

Tax efficiency/ Easier way to purchase benefits/ None/ Another (please specify)

Question 11

What, if any, risks to workers’ pay do you think are presented by salary sacrifice schemes? (please use examples if you can).

Compliance

Introduction

Through this consultation we would also like to identify any other aspects of National Minimum Wage Regulations where employers are finding difficulty in complying. In particular, whether there are any parts of the Regulations where noncompliance would not generate any worker detriment.

The National Minimum Wage regulations are in place to ensure fairness, protecting workers from excessively low pay. Aside from setting a statutory wage floor (i.e. the minimum wage rate an employer must pay), the Regulations also establish rules about how minimum wage compliance is to be calculated in the different scenarios found in the labour market. For example, the regulations set out eligibility for the National Minimum Wage, and how different types of work and deductions from staff pay should be taken into account when checking for National Minimum Wage compliance.

These rules are explained in the government guidance entitled 'Calculating the National Minimum Wage', which is available to download from GOV.UK. The purpose of the rules is to protect workers from potential exploitation and not to unnecessarily penalise or burden employers.

The government would like to identify any cases where employers feel National Minimum Wage rules unfairly penalise them, without generating any benefit or protection for workers.

Consultation question

Question 12

Are there any other National Minimum Wage rules which penalise employers without protecting workers from detriment?

Yes / No (please specify and give reasons for your answer)

General information

How to respond

Issued: Monday 17 December 2018

Respond by: Friday 1 March 2019

Enquiries to:

Labour Market Consultations
Department for Business, Energy and Industrial Strategy
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1 Victoria Street
London
SW1H 0ET

Tel: 020 7125 5000

Email: salariedworkers.consultation@beis.gov.uk

Consultation reference: Salaried hours work and salary sacrifice schemes

Your response will most useful it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Additional copies:

You may make copies of this document without seeking permission. An electronic version can be found at: www.gov.uk/government/consultations/salaried-workers-and-salary-sacrifice-schemes-changing-the-national-minimum-wage-rules

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK website](#). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the [government's consultation principles](#).

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to: beis.bru@beis.gov.uk.

This consultation is available from: www.gov.uk/government/consultations/salaried-workers-and-salary-sacrifice-schemes-changing-the-national-minimum-wage-rules

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