



Department for
Business, Energy
& Industrial Strategy

Salaried hours work and salary sacrifice consultation

Government response

February 2020



OGL

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Executive summary

The government's ambition is for the UK to be the best place to work and grow a business - this includes boosting earning power across the country and putting an end to low pay. To achieve this, it has set out an ambitious programme of intervention and reform to ensure that the UK labour market works for everyone.

The National Minimum Wage and National Living Wage (NMW) represents a cornerstone of this ambition. In April this year, inflation-beating increases in the NMW will benefit over 2 million people directly. Since 2015, the lowest paid have seen their wages grow by 11 percent above inflation, faster than any other point in the pay distribution.

The law is clear that everyone entitled to the NMW must receive it. Since the introduction of the NMW in 1999, the government has ordered employers to repay over £118 million to 835,000 workers, issued over £40 million in financial penalties and completed over 78,000 investigations. The budget for NMW enforcement and compliance stands at its highest level ever.

We have already committed to the introduction of a new Single Enforcement Body to help workers understand and enforce their rights, and support businesses to comply with the law. To further support compliance with the NMW rules, we will ensure that the full system of regulations, guidance and enforcement reflect modern working practices.

NMW Regulations

The government's objective has always been for the NMW rules to ensure fairness in the labour market while minimising the burdens placed on employers.

Through the consultation on salaried hours work and salary sacrifice schemes, we have gathered evidence on elements of the NMW rules that could be improved whilst maintaining existing worker protections.

The consultation opened on 17 December 2018 and closed on 1 March 2019. Following our consideration of over 100 responses, and discussions with a wide range of stakeholders, the government will make three substantive changes to the NMW rules relating to salaried hours workers:

1. The government will amend the NMW Regulations to allow salaried hours workers to be paid in additional equal instalments, such as fortnightly or four-weekly;
2. The government will amend the NMW Regulations to provide employers with the discretion to choose a calculation year for their workers; and
3. The government will amend the NMW Regulations to allow employers to make premium payments to their salaried hours workers in respect of basic hours, and to allow salaried hours workers' contracts to specify these premium pay arrangements. These payments will not form part of the workers' remuneration for calculating NMW pay.

We have found some evidence, through the consultation, that salary sacrifice and pay deduction arrangements are being withdrawn by employers, in some cases due to concern over non-compliance with the NMW rules.

However, evidence also made clear that allowing workers and employers to agree rates of pay below the legal minimum would undermine the integrity of the NMW rules and present risks to the lowest-paid workers. The government will therefore not amend the NMW Regulations relating to these arrangements.

Compliance and enforcement

To further support these measures the government will additionally implement a range of non-legislative measures to help employers comply with the NMW rules, particularly in areas that commonly give rise to compliance issues. We will also ensure that the government's enforcement approach is proportionate and supports compliance by educating employers and workers. The government will:

4. Improve NMW guidance available through GOV.UK, making it more accessible and easier to navigate. This includes new thematic guides on specific compliance issues, such as pay deductions and uniform policy. We have convened a 'Guidance Readership Panel', comprising both business and worker representatives, to review these products.
5. Waive financial penalties for employers for certain breaches of rules relating to salary sacrifice and pay deductions (subject to eligibility criteria). Under these limited circumstances, employers will also be exempt from the NMW Naming Scheme.
6. Resume the NMW Naming Scheme, providing contextual information and a quarterly bulletin to better educate employers and workers on common compliance issues. We will name employers more frequently and most employers will only be considered where HMRC identifies arrears over £500.
7. Proactively support to new, small businesses. HMRC will visit selected new, small businesses to educate them on the National Minimum Wage and support those businesses in getting their practices right from the start.
8. Provide more support via a helpline for employers who operate deduction or salary sacrifice schemes. Employers will be able to access support and information directly from HMRC.

Background to the consultation

The government is clear that all those entitled to receive the National Minimum Wage (NMW) should receive it. We are committed to enforcing this employment right, and it is the responsibility of all employers to understand the NMW rules and pay their staff correctly.

Over 2017/18, the government received views from stakeholders expressing concern over how the NMW legislation works in practice. Some employers, particularly in the retail sector, told us that some aspects of the NMW rules can be overly complex and too difficult to comply with.

We listened to these views. On 17 December 2018, through the 'Good Work Plan' which represented the largest upgrade in workplace rights in a generation, we published the 'Consultation on Salaried Hours Work and Salary Sacrifice Schemes'.

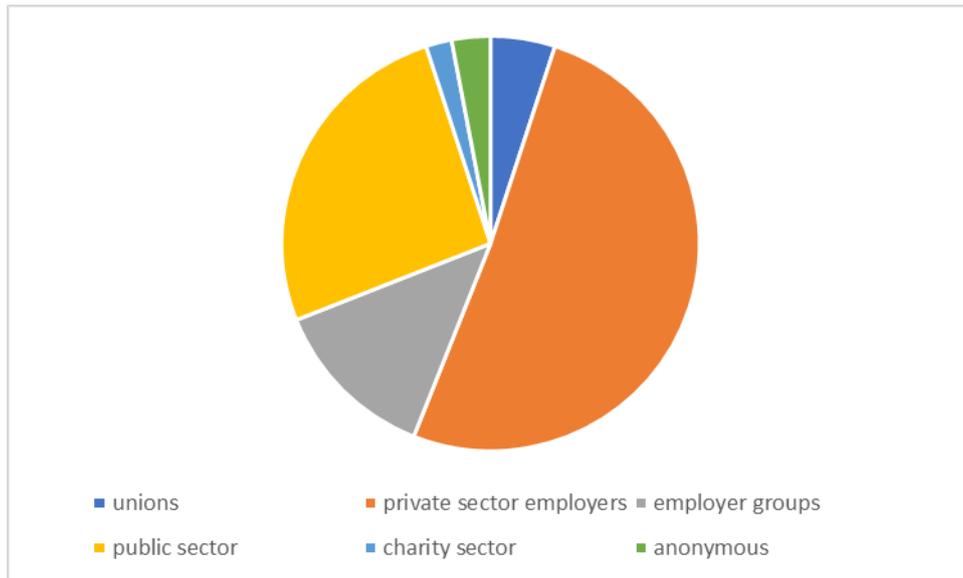
Through the consultation, we have sought views on a limited number of instances where the government heard that employers risk being penalised for NMW non-compliance where there has been no apparent detriment to workers.

The government agreed to consider changes to the NMW legal framework if evidence from the consultation showed that the rules unnecessarily penalise and burden employers, and that changing them will not reduce the protection and benefits offered to low-paid workers.

Summary of respondents

We received 101 responses (80 unique responses plus 21 identical campaign responses on salary sacrifice and pay deductions only). The majority were from employers, employer organisations and the public sector, with 5 percent of responses from unions.

Figure 1: Type of respondents



Of the respondents, 51 percent were private sector employers; 13 percent were employer groups; 26 percent were public; 5 percent were unions; 5 percent chose to remain anonymous; and 1 percent of respondents were in the charity sector.

Summary of responses

Salaries work and payment cycles

Context

Under Regulation 21(5) of the National Minimum Wage legislation, in order to be classified as 'salaried', the worker must be entitled under their contract to be paid in equal weekly or monthly instalments (excluding overtime payments and a performance bonus) regardless of the number of hours worked.

We received feedback from employers that, through legacy arrangements, other payments cycles such as 'fortnightly' or 'four-weekly' are sometimes used and preferred. Through the consultation, we sought views on whether the government should amend the Regulations to include additional payment cycles and whether doing so would remove benefit or protection to workers.

Consultation questions

- Q1. Should the government amend Regulation 21 (5) to allow other payment cycles?
- Q2. If you answered yes to the question above, what payment cycles should be permitted in the regulations?
- Q3. Would the inclusion of additional payment cycles assist employers to comply?
- Q4. Would the inclusion of additional payment cycles cause any detriment to workers?
- Q5. Do any of the other conditions for salaried hours work listed overleaf lead to unintended consequences?

Summary of responses

Around two-thirds of respondents (64) thought that Regulation 21(5) should be amended and very few (3) respondents did not believe the government should amend regulation 21(5). The rest did not answer.

Many of the 64 respondents chose more than one answer to Q2. The most popular answer was 'any other equal payment cycle of one month or less'.

Around two-thirds of respondents stated that the inclusion of additional payment cycles would aid compliance. Another third did not answer the question. Around 3 percent of respondents said including additional cycles would not aid compliance. Of the respondents that agreed adding cycles would aid compliance, 19 respondents suggested that more workers would be classified as salaried if there were additional allowable payment cycles. 21 respondents thought that additional payment cycles would help make it easier for employers to calculate NMW.

Few respondents (4 percent) thought that additional payment cycles would cause detriment to workers, whilst almost two-thirds felt there would be no detriment.

Government response

The government will:

- 1. Amend the NMW Regulations to allow salaried hours workers to be paid in additional equal instalments, such as fortnightly or four-weekly.**

Providing additional flexibility to employers, relating to the frequency for which they can make equal payments to salaried workers, will help align the NMW rules with existing business practices. Increasing flexibility in this way should reduce instances of employers being found non-compliant with the NMW rules as a result of wrongly classifying their workers as 'salaried hours workers', without removing any benefit or protection to workers.

Salaried work and the 'calculation year'

Context

The calculation year is 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 NMW Regulations. Under existing rules, many employers and their payroll administrators have different calculation years for each of their workers who perform salaried hours work, based upon the day each individual worker joined the organisation. Stakeholders told us that this can make it difficult to monitor NMW compliance, particularly across large organisations.

Through the consultation, the government wanted to seek views on allowing employers to set a standardised calculation year for workers. In particular, to gather views on whether this would support compliance by creating a simpler arrangement for employers and workers to calculate annual basic hours and identify when workers have exceeded these hours and risk being underpaid.

Consultation questions

- Q6. Would the calculation of salaried hours work be easier (for employers, and workers) if regulations set a single 'calculation year' (i.e. the same calculation year for all workers of an employer)?
- Q7. If you answered yes to the question above, should the single uniform calculation year be:
- a) The calendar year (1 January to 31 December)?
 - b) The tax year (6 April to 5 April of the following year)?
 - c) At the discretion of the employer (but uniform across the whole workforce)?

Summary of responses

Over half of all respondents agreed that a single calculation year would make calculations easier for employers. Nearly 40 percent of all respondents did not answer this question.

Giving reasons for their answers, respondents thought that setting a calculation year would reduce the administrative burden on employers and the risk of non-compliance - 31 of the 54 positive respondents for Q6 gave this as a reason. 6 respondents advised a pro rata arrangement for workers who start or leave employment during the year.

The most popular option for Q7 was 'setting the calculation year at the discretion of the employer, but consistent across the whole workforce', with increased flexibility and simplification cited as reasons for selecting this option in 38 percent of responses.

Responses showed significant support to set the calculation year in line with the tax year, to align with common payroll practices; or with the calendar year to mirror annual cycles for benefits and annual leave. However, respondents were clear that no single calculation year would work for all employers.

A number of responses also included that setting an alternative calculation year should not be limited to a consistent change across entire workforces. Particularly for large businesses, we heard that there may be different groups of workers, within a workforce, requiring different calculation years to reflect the specific nature of their work. Respondents told us that, without additional flexibility, employers may be dissuaded from setting an alternative calculation year altogether.

Government response

The government will:

2. Amend the NMW Regulations to provide employers with the discretion to choose a calculation year for their workers.

We are determined to help employers pay their staff correctly without the need for enforcement. Allowing employers to move salaried hours workers onto a common calculation year will help them, and their workers, to monitor the number of annual basic hours worked and, therefore, identify any instances when they should make payments over and above a worker's annual salary. The change will also allow employers to choose different calculation years for different workers.

If employers do not specify an alternative calculation year, the existing definition of a worker's calculation year, set out in the NMW Regulations (24), will apply by default.

Salaried work and pay premia

Context

Many employers reward their staff with premium pay for working on particular days, such as Bank Holidays. Premium payments can also be made for working particular hours or for other specific working arrangements. However, under Regulation 21(4), salaried workers are only entitled to be paid an annual salary, or an annual salary and performance bonus, for their basic hours. Pay premia, or contractual entitlement to these payments, is not allowed for the basic hours under the existing salaried hours rules.

Stakeholders told us that the complexity of the existing rules is either causing employers to misunderstand them, resulting in NMW non-compliance, or to restrict premium pay arrangements for their workers.

Consultation questions

- Q8a. Do salaried hours work rules cause difficulty for employers while making overtime and premia payments to workers?
- Q8b. Should salaried hours work rules be amended to include overtime and premia payments?
- Q8c. 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?

Summary of responses

Of the 60 respondents to Q8a, 43 agreed that rules regarding salaried hours work caused difficulty when making premium payments. Of these 43, 23 respondents suggested that salaried hours rules make NMW calculations complex and increase the risk non-compliance. A further 9 told us there is confusion over what counts as qualifying NMW pay. 8 respondents thought that complexity of the rules prevents employers from providing premium payments.

Of the 62 respondents that answered Q8b, 47 agreed that salaried hours work rules should be amended to include overtime and premia payments. 20 of the 47 who responded positively to the above question included ease of compliance as a reason for their answer and 12 included the financial benefit to employees.

Respondents were split when asked whether the proposed amendment to the rules would affect employers' policy towards offering pay premia.

Government response

The government will:

- 3. Amend the NMW Regulations to allow employers to make premium payments to their salaried hours workers in respect of basic hours, and to allow salaried hours workers' contracts to specify these premium pay arrangements. These payments will not form part of the workers' remuneration for calculating NMW pay.**

The government encourages employers to pay over the legal minimum wage where they can afford to do so. By amending the rules around premium pay we will ensure that salaried hours workers can receive these enhanced rates of pay, or additional payments for their basic hours (including overtime premia), without falling outside of salaried hours work.

Under these new rules, we would expect fewer instances of employers failing to pay the NMW as a result of wrongly classifying their workers as salaried hours workers. We would also expect fewer employers to be deterred from providing premium pay arrangements to low-paid workers.

As is currently the case with time and output work in respect of the NMW, the enhanced or additional element of pay will not form part of the worker's remuneration for calculating NMW pay.

Salary sacrifice, pay deductions and compliance

Context

Some employers offer their workers 'salary sacrifice' schemes whereby the worker and employer agree a lower rate of pay in exchange for non-cash benefits, such as bicycles. Some employers also agree deductions from pay with their workers in return for goods or services.

Some stakeholders reported to us that salary sacrifice and pay deduction arrangements are being withdrawn because they risk reducing workers' pay to below NMW. In some cases, reports of these restrictions were limited to those on, or just above, NMW rates of pay.

The government wanted to find out how widespread withdrawal or limitation of these schemes are; why workers may opt into these schemes; and whether these schemes pose any detriment to workers.

Consultation questions

- Q9. 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?
- Q10. What do you regard as the main reasons that workers opt into salary sacrifice schemes?
- Q11. What, if any, risks to workers' pay do you think are presented by salary sacrifice schemes?
- Q12. Are there any other National Minimum Wage rules which penalise employers without protecting workers from detriment?

Summary of responses

Of all respondents, 55 percent indicated that salary sacrifice schemes are being withdrawn or restricted as result of NMW requirements. Cited as among the most commonly withdrawn schemes were childcare (24 respondents); pension benefits (by 27 respondents); and travel-related schemes (19 respondents). Nearly 40 percent of total respondents to the consultation did not answer the question.

Tax efficiency for workers and employers was overwhelmingly the most frequently referenced reason for these schemes to be used, with 74 respondents citing this reason. More than half of respondents told us that they provided an easier way to purchase benefits.

In response to Q11, the most frequently referenced risk was instances where schemes are either compulsory; if the worker feels they are compulsory; and/or if the worker doesn't feel free to opt out - 20 respondents cited this. Furthermore, 15 respondents told us that salary sacrifice may affect workers' entitlement to various other contributory benefits. Around a third of responses either felt there was no risk to workers presented by these schemes, or that it was minimal provided employees are made aware of the pros and cons in advance, or if there checks and balances in place.

Just over half of respondents answered positively to Q12, agreeing that there were other aspects of the NMW regulations which penalise employers without protecting workers from detriment, around 20 percent of respondents told us that there were no other rules which did

so. Of those that answered affirmatively, a number of responses included specific references to improving clarity of the rules relating to uniform policy; pay deductions; accommodation provision; flexible working; and the definition of work and working time.

Government response

The government will support employers to increase understanding of the NMW rules and drive compliance. In particular:

- 1. Improve NMW guidance available through GOV.UK, making it more accessible and easier to navigate. This includes new thematic guides on specific compliance issues, such as pay deductions and uniform policy. We have convened a Guidance Readership Panel, comprising both business and worker representatives, to review these products.**
- 2. Waive financial penalties for employers for certain breaches of rules relating to salary sacrifice and pay deductions (subject to eligibility criteria). Under these limited circumstances, employers will also be exempt from the NMW Naming Scheme.**
- 3. Resume the NMW Naming Scheme, providing contextual information and a quarterly bulletin to better educate employers and workers on common compliance issues. We will name employers more frequently and most employers will only be considered where HMRC identifies arrears over £500.**
- 4. Proactively support to new, small businesses. HMRC will visit selected new, small businesses to educate them on the National Minimum Wage and support those businesses in getting their practices right from the start.**
- 5. Provide more support via a helpline for employers who operate deduction or salary sacrifice schemes. Employers will be able to access support and information directly from HMRC.**

To maintain the integrity of the NMW rules, and to protect workers from accepting pay below the NMW, the government will not amend the Regulations relating to pay deductions and salary sacrifice. Several responses to the consultation told us that amending the rules in such a way would present a great risk to the lowest-paid workers, due to the subjectivity of the value of some benefits and pressure over worker participation.

Employers are already free to offer salary sacrifice and pay deduction arrangements, so long as they remain compliant with the NMW rules. For example, it is possible to offer pension benefits through arrangements which do not reduce pay for NMW purposes (see [section 2 of the 'Calculating the minimum wage' guidance on GOV.UK](#)). However, we recognise that in some limited instances employers may be penalised for offering benefits to workers through salary sacrifice and pay deduction arrangements. Frequently, this is a result of employers misunderstanding the rules.

Guidance

The government's intention is to improve understanding of the rules so that employers can remain compliant without the need for enforcement. That is why we will improve the available guidance offer through GOV.UK relating to salary sacrifice and pay deductions, but also for wider NMW compliance issues.

This will include three ‘tiers’ of guidance detail to ensure that information is accessible for all employers, while providing enough detail and information on specific compliance themes when required. The three tiers of guidance will cover:

- Accessible overview guidance to help any employer understand the most relevant NMW rules for their business.
- A series of digestible thematic guides covering specific NMW compliance issues, including pay deductions and uniform policy.
- Detailed and comprehensive NMW guidance for all employers.

To ensure that this suite of NMW guidance products is accessible and useful for ensuring employers are compliant with the rules, we have convened a ‘Guidance Readership Panel’ of employer groups, unions and NMW experts to review our draft products.

Approach to enforcement

The government will waive financial penalties for employers in breach of rules relating to salary sacrifice and pay deductions (subject to strict eligibility criteria). In instances where an employer does fall foul of these rules, under specific circumstances, only repayment of arrears will be required, and the employer will be exempt from financial penalties and the NMW Naming Scheme.

The criteria for which the government will consider exemptions from penalties and naming include that:

- the deduction is not made as respects the worker’s expenditure in connection with the employment;
- the worker has consented to the reduction or deduction.; and
- the worker has received the relevant goods, services or benefits in full compliance with the relevant arrangements.

We are clear that employers must still abide by the current rules relating to these arrangements. For salary sacrifice this means employers and workers cannot agree to a rate of pay below the NMW. Deductions an employer makes from a worker’s pay will always reduce NMW pay if they are in respect of a worker’s expenditure in connection with the employment; or made for the employer’s own use and benefit and do not fall within any of the exceptions, such as deductions to repay an advance of wages (see regulation 12(2)).

HMRC will continue to use their standard enforcement tools for other instances of NMW underpayment, including levying financial penalties of up to 200 percent of arrears. HMRC will also consider pursuing Labour Market Undertakings and Orders or criminal prosecutions, wherever appropriate.

NMW Naming Scheme

The government has undertaken a review of the NMW Naming Scheme in response to recommendations made by the Director of Labour Market Enforcement. This review is now complete, and the government will resume naming employers shortly. The government has considered that changes to the scheme were necessary to ensure that the deterrence effect of the scheme remained balanced with the need to educate employers and support them to comply before enforcement action becomes necessary.

To achieve this, future naming rounds will be supported by a quarterly educational bulletin to highlight details of common compliance issues, including anonymised case studies demonstrating how employers can become compliant. To better contextualise the relative severity of breaches we will publish additional information wherever possible.

The government will aim to reduce the delay between case closure and consideration for naming by naming employers more frequently. And for most employers, only breaches over £500 will be considered for naming. Those previously subject to a Notice of Underpayment in the last six years, or also subject to a Labour Market Enforcement Undertaking or Order, will continue to be considered for naming where arrears are over £100.

Full details of changes to the government's enforcement approach and NMW Naming Scheme can be found at: www.gov.uk/government/publications/enforcing-national-minimum-wage-law.

'New, Small Businesses' campaign

The government wants to make it as easy as possible for businesses to comply with NMW legislation. The 'New, Small Business Project' aims to promote, support and educate new small businesses on National Minimum Wage. This is a national pilot, targeting businesses that are approximately 12-24 months old and employ fewer than 20 workers.

By taking this approach we will ensure that workers receive the wages they are entitled to and prevent new businesses from accumulating large NMW debts. Early intervention, in the form of this project, will reduce these risks.

As well as conducting over 300 educational visits to date, HMRC have written to around 15,000 new, small businesses. These letters aim to raise awareness of NMW obligations and signpost to guidance.

This pilot is due to be evaluated later in 2020 and, following which, decisions will be taken about how, and to what extent, this approach will be adopted as part of 'business as usual.'

Support for employers who operate deduction or salary sacrifice schemes

The government will put together a new package of support to help employers understand the effect of deductions on NMW. From today, employers will be able to call ACAS on 0300 123 1190, who will direct calls on salary sacrifice and deductions to HMRC. Following the ACAS referral, HMRC will provide support to employers via a telephone appointment. This will be supplemented with online support, e.g. guidance and webinars.

Next steps

The government will prepare secondary legislation to bring forward amendments to the NMW Regulations set out in this response. The Statutory Instrument will be laid in Parliament and existing rules will continue to apply to all employers until any legislative change has been approved by Parliament, and the new law has come into force.

The government will make changes to the NMW guidance offer on GOV.UK. The new and improved guidance products to support employer compliance will be published in due course

The government's approach to NMW enforcement of non-compliance related to pay deductions will begin today. The NMW Naming Scheme will resume shortly. You can find full details of changes to the government's approach to enforcement and the NMW Naming Scheme in the NMW Enforcement Policy Document, at:

www.gov.uk/government/publications/enforcing-national-minimum-wage-law.

Territorial extent

The regulatory measures set out in this response will apply to England, Wales, Scotland and Northern Ireland.

Contact details

Any enquiries regarding this publication should be sent to salariedworkers.consultation@beis.gov.uk

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

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