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Minimum wage: avoid the pitfalls

HMRC regularly publishes the names of employers who don't pay correctly.

It also publishes lists of Del-Boy-style excuses for non-payment, like 'she only makes the teas and sweeps the floors'. But this can hide the real problem – which is that many businesses named and shamed are reputable employers, who genuinely think they have complied with the law.

The government pledges 'robust enforcement action against employers', and with penalties of up to 200% of any underpayment, it's expensive getting it wrong. Employers recently named and shamed included high street brands, small businesses and sole traders. Their mistakes over deductions from wages, calculating working time, and paying apprentices cost them nearly £7 million in penalties and back payments. We look at these and other high-risk areas here.

Key fact

Payment at, or just above, minimum wage leaves little room for error, and employers can be pushed into an underpayment position very quickly.

Overview: rates and enforcement

Minimum wage is the legal minimum hourly rate at which a worker should be paid. The National Living Wage (NLW) is for workers aged 23 and over. The National Minimum Wage (NMW) applies to workers who are of at least school leaving age, up to age 23. There are special provisions for apprentices. We use the term 'minimum wage' here to refer to both NLW and NMW.

New rates take effect from 1 April each year: they should be applied in the first pay reference period starting on or after this date.

Hourly rates from April 2023

23 and over	21 to 22	18 to 20	Under 18	Apprentice
£10.42	£10.18	£7.49	£5.28	£5.28

Accommodation offset: £9.10 per day: £63.70 per week.

Policy is set by the Department for Business, Energy and Industrial Strategy, and enforced by HMRC. Enforcement takes a number of forms:

- Promote: improving information available to employers and targeting mistakes due to misunderstanding.
- Prevent: altering the behaviour of employers who deliberately underpay.
- Respond: investigating worker complaints and proactively targeting business sectors or employers, where there's believed to be non-compliance.

HMRC is now also targeting employers by geographical area – looking at specific regions and postcodes. Here local employers are likely to get a nudge letter from HMRC and information to help build awareness of the rules. This is meant to enable them, where possible, to self-correct any errors.

It is important to remember that HMRC actively encourages workers to check their pay and report employers if they think they are being underpaid. There is no requirement for the question to be raised with the employer first. Complaints can be made anonymously to HMRC – even by third parties. Workers can also make a claim to enforce minimum wage in a court or employment tribunal, independently of HMRC.

Who should get minimum wage?

Minimum wage has a wide reach: it should never be assumed someone falls outside the scope. Part-time workers; casual labourers; agency workers; agricultural workers; trainees and workers on probation; disabled workers; seafarers; offshore workers and foreign workers, for example, all qualify. Depending on the exact arrangement involved, interns may also be due payment at minimum wage rates. People who are not eligible include the self-employed; company directors without employment contracts; and 'volunteers'. Note that care is needed to categorise volunteers correctly.

What can go wrong?

Underpayment can arise for many different reasons, but broadly, where underlying assumptions and calculations are adrift, employers are at risk.

1. Wrong type of work, wrong calculation

Minimum wage is worked out as an hourly rate. Not all workers are paid by the hour, however. For minimum wage purposes, there are four different categories:

- time work (workers paid by the hour)
- salaried hours work (workers paid an annual salary, under a contract for basic number of hours each year)
- output work (workers paid by the piece, such as number of things produced, or tasks completed)
- unmeasured work (workers paid in other ways).

Minimum wage applies to all eligible workers, whatever the type of work. Different rules and calculations are used for each category to produce an equivalent hourly rate, ensuring that all workers are paid at least the minimum wage. The first step for employers is therefore to look at the worker's contractual arrangements and establish what type of work is done. It's important because errors at this stage have knock-on consequences for the pay reference period. For time workers, for example, minimum wage must be paid every pay reference period. The position is more complex for salaried workers.

2. Don't assume salaried hours rules apply

Change to the rules from 2020 increased the number of workers to whom these rules apply. Employers should check:

- that they are right to classify workers as doing salaried hours work
- that minimum wage is correctly calculated in line with salaried hours rules.

To qualify, it's not enough just to receive a salary. There are four conditions, and all must be met. The worker must be:

1. paid under a contract for a set basic number of hours per year
2. entitled to an annual salary for those hours
3. not be entitled to any other payment under their contract for those hours (except for performance bonus, and/or salary premium)
4. be paid either in equal instalments (monthly, weekly, two-weekly or four-weekly, or in other equal periods between a week and month): or in varying monthly instalments, that add up to the same amount each quarter.

If all the salaried criteria are met, broadly speaking, it's the average pay over the year that matters. This means minimum wage compliance can be achieved even if hours worked in a particular week, month or other period vary. School cleaning, catering and other staff, for example, may only work for part of the year, but if they get an annual salary in instalments throughout the year, still qualify as salaried hours workers.

Check what's in the contract of employment: for minimum wage purposes, workers are only salaried hours workers if their annual hours are ascertainable from their contracts. In some cases, this will be clear. The contract may specify a total number of basic hours – say 2,000 a year. Where, for example, the contract wording requires someone to work from Monday to Friday, from nine to five, with an hour for lunch, it should also be possible to identify a figure for basic annual hours. But HMRC will need more convincing where the contract uses wording like 'at least 40 hours per week', or gives a minimum number of hours 'plus further hours as necessary, or when required'. Where employers can't satisfy HMRC on this point, HMRC is not likely to hold that the worker is performing salaried hours work.

3. Watch deductions from wages

This is a particularly high-risk area. Deductions or payments from workers for items or expenses that are connected with the job, such as tools or equipment, can create minimum wage underpayment. With only limited exceptions, such deductions and payments reduce minimum wage pay. The pay is reduced in the pay period in which the deduction is made: and if workers then fall below the minimum wage in that period, underpayment arises. Deductions for personal protective equipment, meals, employer-provided transport, and training costs are all areas where care is needed. Deductions for employer-provided accommodation are a subject in their own right.

Employers can also inadvertently fall foul of the rules where they require staff to wear a uniform, such as a shirt with a corporate logo, or enforce a dress code, like a white shirt and black trousers. Deductions for these (or payments to a third party) reduce minimum wage pay and should be factored into calculations. Note that minimum wage rules here are not the same as the income tax rules for employee expenses.

Deductions made for the 'employer's own use and benefit' also reduce pay for minimum wage purposes. The minimum wage definition of own use and benefit can easily cause confusion. Deductions are held to be for the employer's own use and benefit where employers are 'free to use the money in any way they wish', regardless of whether:

- the employer makes any profit from the transaction
- the deduction is from gross or net pay
- the worker agrees to the arrangement
- the worker benefits from the arrangement.

Employers offering voluntary savings arrangements, like Christmas clubs, for example, have been penalised here in the past.

4. Salary sacrifice can cause problems

Salary sacrifice arrangements, where workers give up part of their salary for a non-cash benefit like pension contributions, childcare vouchers, and cycle to work schemes, are common. In the case of pension contributions especially, they can be very tax efficient. But take care to check how the sacrifice interacts with minimum wage rules. It's the figure for pay after the sacrifice that HMRC takes account of.

5. Check the rules for apprentices

It's not enough to call someone an apprentice: there has to be a contract of apprenticeship or recognised apprenticeship scheme in place to satisfy minimum wage requirements, and apprenticeships must include structured training. It is essential that employers check that arrangements in their workplace meet the criteria.

Check, too, that payroll systems can cope with change when it comes. The apprentice rate applies only to an apprentice who is under 19; or 19 and over and in the first year of their apprenticeship. Once an apprentice over 19 has completed the first year, they are due the appropriate minimum wage for their age. Underpayment can build up quite rapidly if pay isn't uplifted from the £5.28 hourly apprentice rate. Note that apprentice training or study time is working time and should be paid accordingly.

6. Record working time accurately

Underpayment often arises through mistakes over what constitutes working time: and error can creep in as easily as having a recording system that rounds time down. HMRC highlights failures paying for travelling time, and time spent training, as well as:

- not paying for additional time added to shifts, eg team handovers, and security checks on entry and exit
- not paying for time during a shift when someone is at the workplace and required to be available for work – even if no work is provided at that time
- miscalculating working time on shifts where workers may spend some time asleep.

We can help

Getting minimum wage right first time matters. Dealing with minimum wage problems after they have happened is likely to be more expensive - because underpayments must be made good to workers at current rates, and penalties are worked out as a percentage of arrears.

We can help you check compliance and flag up areas of potential risk. Please don't hesitate to get in touch.