

Employer's guide to the National Minimum Wage and National Living Wage in social care

The different rates

There are different National Minimum Wage (NMW) rates depending on the worker's age and whether they are an apprentice. The National Living Wage (NLW) is the highest of the rates and it applies to workers aged 25 and over.

Who is responsible for paying the National Minimum Wage?

The law says that as an employer you must pay the National Minimum Wage and National Living Wage at the right rate.

Sounds simple doesn't it?

It's not as simple as it sounds as there are a number of pitfalls that social care employers often fall foul of. The penalty for underpayment is 200% of the arrears amount, which means that employers risk fines of up to £20,000 per underpaid worker and public naming and shaming by the government if they get it wrong.

It is important that you do not leave this to your accountant as it is your responsibility and it is you that will be liable.

The five most common mistakes employers make

1. Underpaying workers – this can happen when employers fail to implement annual rate increases, miss birthdays and therefore don't move workers from one age band to another or make errors in applying the apprentice rates.
2. Making deductions that take a worker's pay below NMW/NLW rates – deductions for items connected with the job such as uniforms, deductions for services provided by the employer such as meals or transport, or excessive deductions for accommodation.
3. Including payments such as shift allowances under certain circumstances or customer tips or bonuses when calculating a worker's pay for NMW/NLW purposes. Find out more at <http://goo.gl/VWTKBG>
4. Worker status errors – mistakenly treating workers as volunteers, interns or self-employed. Use the National Minimum Wage Worker Checklist to help you decide if an employee should be classed as a 'worker' and therefore is entitled to the National Minimum Wage - <https://goo.gl/GfKh5d>

5. Unpaid working time – additional hours worked but not paid. These are often regular but very short periods of time, for example time spent helping to shut up shop or clear security after a worker's shift has ended, or can be longer periods spent training or 'down time' waiting. Other errors can occur around travelling time if it's in connection with the worker's job, such as between assignments, and sleeping time. Detailed guidance can be found at <http://goo.gl/VWTKBG>

HMRC's interest in the social care sector

The social care sector is one of the sectors which is being looked at by HMRC because research shows our sector is more likely to get it wrong and underpay. HMRC has investigated more than 70,000 employers for National Minimum Wage issues since the legislation was introduced and has the right to carry out checks at any time and ask to see any relevant records.

Successful enforcement of the National Minimum Wage and National Living Wage by HMRC helps to level the playing field making sure unscrupulous employers aren't advantaged.

Non-compliance in the social care sector

HMRC regularly makes enquiries into social care employers and identifies issues of non-compliance. Published research shows that over a two year period in 2011/13, HMRC made enquiries into 183 social care employers and found issues of non-compliance in just under half (48%), identifying £338,835 arrears of pay for 2,443 workers. That's an average arrears of pay of £138 for each worker.

The most common reasons for non-compliance found by HMRC were deductions from workers' pay or payments by the worker for items deemed to be business expenses (i.e. purchased for the employers use and benefit in their business). Often deductions made for staff uniforms or equipment to do the job effectively brought workers' pay below NMW rates.

Other issues identified as causing underpayment of the National Minimum Wage to workers included:

- Unpaid training time;
- Unpaid travelling time between appointments;
- Hourly pay rates below NMW rate;
- Incorrect use of the NMW apprentice rates.
- A failure to pay workers for all working time;
- A lack of awareness of the accommodation offset rules and their effect on NMW pay calculations. Find out more about correctly applying the accommodation offset at <https://goo.gl/Y5g77E>
- Sleeping time
- Work-related travel expenses incurred by workers

Find out more at <https://www.gov.uk/government/publications/national-minimum-wage-compliance-in-the-social-care-sector>

Accommodation offset rates

Living accommodation provided by an employer can be taken into account when calculating the National Minimum Wage or National Living Wage.

No other kind of company benefit (e.g. food, a car, childcare vouchers) counts towards the minimum wage. There is a maximum daily sum employers who provide accommodation can deduct towards those costs. Examples showing the effect of the accommodation offset rate and details of what counts as accommodation charges can be found at <https://goo.gl/Y5g77E>

Accommodation offset rates change each year in April. At the time of publication the daily accommodation offset rate is £6.40.

What are the correct National Minimum and National Living Wage rates?

Apprentices

£3.50

Apprentices are entitled to the apprentice rate if they're either:

- aged under 19
- aged 19 or over and in the first year of their apprenticeship

Apprentices aged over 19 who have completed the first year of their apprenticeship are entitled to the relevant age-related NMW/NLW rate for their age.

In-house training programmes don't count as an apprenticeship. For the apprenticeship rate to apply, there has to be a contract of apprenticeship or the worker is participating in a recognised Government scheme.

Under 18 years old

£4.05

18 – 20 years old

£5.60

21 – 24 years old

£7.05

25 years old and over – The National Living Wage

£7.50

These rates change every April so remember to check that you are applying the most up to date rates.

Where can I find more information?

Search the GOV.UK website for 'National Minimum Wage' for more information including an online calculator for employers to help check if you're paying the correct amount and calculating anything you might owe your workers.

View the latest rates at <https://goo.gl/enwBV>

View the online calculator for employers at <https://goo.gl/enwBV>

Where do I get expert advice?

Acas (Advisory, Conciliation and Arbitration Service) provide a free and impartial helpline for National Minimum Wage queries.

Telephone: 0300 123 1100

Monday to Friday: 8am to 8pm (until 6pm on Tuesday's)

Saturday: 9am to 1pm

www.acas.org.uk

What should I do if I'm paying at the wrong rate?

Put it right - identify any arrears you owe your workers, pay those arrears to the workers and pay the correct rates going forward. For more information on how to calculate arrears, go to <https://goo.gl/7O2x7h>. You can also find more information about how to calculate the minimum wage at <http://goo.gl/VWTKBG>.

A failure to act runs the risk that one of your employees, or ex- employees, will report you to HMRC. You will then be investigated, which can result in penalties of up to £20,000 per underpaid worker. You may also be publicly named and shamed, which could have a significant impact on the reputation of your business.

QUESTION 1 Is a worker working when they are sleeping?

Answer: Unfortunately there is no simple answer. To determine whether it is working time you must look at what the worker is actually doing and their contractual arrangements. For time work and salaried hours workers, if they are required to be on the premises and can't leave during the hours they are required to be there then it's likely they will be classed as working.

Denis is 20 years old and works in a care home on a time work basis, i.e. paid by the hour. He earns the correct rate of £5.60 an hour for his daytime work and works 30 hours per week.

For the last three months he has slept at the care home between 9pm and 7am on a Wednesday and Thursday night for which his employer has given him an extra £50 each night in his wages. He can't leave the premises between these hours as he is

required to be onsite in order to satisfy health and safety requirements. During the three months Denis has never been woken up.

The requirement to be on the premises during the night means that it is likely all the hours when Denis is at the care home should all be taken into account when calculating his National Minimum Wage entitlement.

When dividing Denis's weekly wage of £268.00 by 50 hours (30 hours during daytime plus 20 hours sleeping time) the hourly wage rate is £5.36, which is below the National Minimum Wage. Denis's employer has calculated the underpayment of National Minimum Wage and paid Denis back pay of £156 (£12 a week for 13 weeks). The employer has told HMRC that this is what they have done. There is no penalty as Denis's employer has corrected the error.

For illustrative purposes any consideration of accommodation offset (see question 9) has been excluded from this scenario.

Employers are encouraged to contact the Acas helpline for assistance in determining their individual circumstances.

QUESTION 2 How do Daily Average Agreements and the National Minimum Wage work together?

Answer: Daily Average Agreements are written agreements which set out the average number of hours that a worker is likely to spend each day doing the tasks assigned to them, in the time period they are contracted for. For example they may be expected to work on average six hours a day. As a minimum, the worker should receive the relevant National Minimum Wage/National Living Wage rate for the agreed average hours.

Sioban is a carer five days a week for Mrs Johnson during the day, typically starting the day at 8.00am and finishing at 5.00pm. Sioban is able to come and go during the day but she has some specific tasks to perform such as helping Mrs Johnson to dress, preparing her meals, helping with her medication etc. Sioban, who is 28 years old, is employed under a Daily Average Agreement and earns £240 a week for an agreed average of six hours a day. When not specifically attending to Mrs Johnson needs Sioban spends her time relaxing either reading or sewing, usually at Mrs Johnson's property.

Sioban is being paid above the £225 a week she is entitled to as a minimum for the averaged 30 hours a week she has agreed to as part of her Daily Average Agreement (at £7.50 an hour). The Daily Average Agreement must be in writing and signed by both the employer and worker before the employment starts. Such agreements must be a realistic reflection of the actual hours worked.

Daily Average Agreements only apply where it is unmeasured work. Details on different types of work for National Minimum Wage purposes can be found at <https://goo.gl/GGWSHn>.

QUESTION 3 Is a worker entitled to National Minimum Wage when on-call?

Answer: No, not ordinarily. Only in instances where a worker is required to remain at or near the workplace and be available for work will this be classed as working-time.

Mary, 43 years old, is on-call during the weekend. Sometimes, she gets a call to go to the care home where she is employed and she gets paid for the time she spends there.

Mary is paid £25 for each day she is on-call over the weekend. She usually takes her mother shopping on Saturdays and Sundays are spent catching up with housework. She keeps her mobile on both days in readiness for any call outs. A friend has suggested to Mary that she should be paid £7.50 per hour for all the weekend hours she is on-call irrespective of whether she has to attend the care home or not.

Mary is not considered to be working during the days she is on call as she can decide what to do and where she goes on those days. She is only classed as working once she receives a call out.

QUESTION 4 Is a worker entitled to National Minimum Wage for travel time between carer visits?

Answer: Yes, employers normally have to pay workers for time spent travelling in connection with their job but this does not include travelling between their home and the place of work.

Sean cares for people in their own homes and sees five clients a day (five days a week) travelling around his local area in his car. He spends an hour with each client and travels half an hour between each appointment. His first appointment starts at 8.30am and the last finishes at 4.30pm (he has a one hour lunch break). His employer is paying him for 25 hours a week at the NMW rate of £7.50 or £187.50 per week, plus petrol expenses. Sean, who is 35 years old, is not sure if this is correct.

Travel from home to work, and back home is not taken into account as working time for National Minimum Wage calculations. Sean works seven hours a day (eight hours less his lunch break), his day starts when he arrives at his first appointment and ends when he leaves his last. Travel within these hours is working time and when calculating his hourly rate should be taken into account. Dividing his weekly wages of £187.50 by 35 hours gives an hourly rate of £5.36 which means that Sean has not been paid what he is entitled to. His employer cannot use any petrol expenses paid to Sean in the calculation.

Sean is entitled to an additional £75 per week and back pay on earlier periods going back all the way since he started the job. He should speak to his employer regarding his entitlement first or contact the Acas helpline if the matter remains unresolved.

QUESTION 5 - Can employers make wage deductions for items such as uniforms?

Answer: Not if the deductions or payments take pay below the National Minimum Wage and are for items connected with the job e.g. uniforms, tools, safety clothing, or for services provided by the employer that are connected with the job e.g. transport or meals.

Jenny (age 22) works 40 hours a week and earns the National Minimum Wage rate of £7.05 per hour. Jenny's employer insists that all employees in the residential rehabilitation centre where she works must wear a uniform. Her employer deducted £30 from her first pay check for her uniform, an amount which is refundable when she leaves providing she hands the uniform back.

Whilst Jenny appears to be paid at the correct National Minimum Wage rate for her age, the initial uniform deduction is taking her below the minimum rate she is entitled to. Jenny should speak to her employer about being paid back the £30 that is owed or contact the Acas helpline if the matter remains unresolved.

QUESTION 6 – Should employers be paying for a worker's time spent training?

Answer: Yes, employers have to pay for time spent training.

Maria (age 26) has been working within a Residential Care Home for three years and is paid £225 per week for a 30 hour week (£7.50 per hour). Every Wednesday Maria goes to the local college for a course that her employer has asked her to attend as part of her training and development. She travels to the college from her place of employment and returns there after finishing college. Her travel and attendance at

college takes six hours. Her employer insists that these six hours do not count as working time as Maria is training and not working.

Maria is not being paid what she is entitled to. Her employer should include the time spent training and in this instance travelling as she is travelling to and from her place of work. Maria would be entitled to an additional £45.00 per week (an additional six hours pay) and back pay on earlier periods since her attendance at the training course started. She should speak to her employer regarding her entitlement first or contact the Acas helpline if the matter remains unresolved.

QUESTION 7 – I pay all my apprentices at the apprentice rate, is that correct?

Answer: Not necessarily as apprentices are entitled to the apprentice rate only if they're either aged under 19 or aged 19 or over and in the first year of their apprenticeship. An apprentice aged 22 in the second year of their apprenticeship, for example is entitled to the higher minimum hourly rate for their age band.

Having decided on a change of career, Kylie aged 28 is new to the social care sector and has just started the first year of her apprenticeship. She receives £3.50 per hour and this is correct for NMW purposes. In the second year of her apprenticeship however she will be entitled to the NLW rate for her age which is £7.50.

Abigail (aged 16) started her apprenticeship at the same time as Kylie. Abigail receives the same apprentice rate in her first year and will continue to do so in her second year as she will only be 17 years old.

Second, third and fourth year apprentices aged 19 years or over are entitled to the relevant age related NMW/NLW rate of pay.

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Text box...

Apprentices who are at the highest risk of not being paid correctly include:

- Those with no written contract
- Those employed just for the training period rather than on a permanent contract
- Those in their second or later year of training
- Those asked to work unpaid overtime
- Those aged 16-18

- Those who have not worked for their employer before starting their apprenticeship
 - Those with no set contracted weekly hours.
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QUESTION 8 - Do in house training programmes count as an apprenticeship?

Answer: Not necessarily. For NMW purposes apprentices are either those employed on certain government funded apprenticeship schemes or workers engaged under a contract of apprenticeship.

Sharon, aged 18, is employed by Beryl at a residential care home. Beryl's existing staff are very experienced and have established an "in house" training programme which Sharon is currently progressing through. Beryl has been paying Sharon the £3.50 apprentice rate but Sharon has queried this rate of pay. Beryl is adamant that as Sharon is training her current rate of pay is correct.

Sharon is not getting what she is entitled to, she is neither employed under a contract of apprenticeship nor is her training government funded. Sharon is entitled to the age related pay of £5.60 per hour and Beryl should correct the payment and make good the arrears. Beryl can check with the Acas helpline if she is unsure of the correct rates of pay an employee is entitled to.

For an apprenticeship rate to apply, there would need to be either a contract of apprenticeship or the worker participating on a Government arrangement. As neither of these apply and Sharon is simply undertaking in-house training, then the apprenticeship rate is incorrect. In Scotland and Northern Ireland, Deeds of Apprenticeships must be used. Although still valid in England and Wales, Deeds of Apprenticeships have largely been replaced by Apprenticeship Agreements.

The government has announced its intention to protect the term apprenticeship by law and to take action if the term is misused.

Question 9 – Can accommodation provided by an employer be taken into account when calculating National Minimum Wage?

Answer: Yes.

Rita lives in a flat tied to the nursing home owned by her employer. Her employer, Lance, makes a monthly deduction from Rita's pay for the provision of this accommodation.

Living accommodation is the only benefit in kind that can count towards the National Minimum Wage a worker receives. Lance can count some of the value of the accommodation provided towards the National Minimum Wage pay, called the accommodation offset. The maximum offset rate for accommodation charges is currently £6.40 per day. If Lance charges Rita the offset rate, or less, then there is no impact on Rita's National Minimum Wage pay. If he charges her more, the excess charge has the effect of reducing Rita's pay for National Minimum Wage calculation purposes, potentially taking her below the prescribed minimum rate.

Further information on what counts as accommodation charges and their effect on the National Minimum Wage can be found here <https://www.gov.uk/national-minimum-wage-accommodation/accommodation-charges>.

Next steps

Check it

Check you are paying all your workers the right amount. This shouldn't take long and the tools you need are free. Don't leave it to your accountant as it is you that is liable. Call Acas on 0300 123 1100 for confidential and impartial expert advice.

Fix it

Fix anything you've been doing wrong. Work out the amount you have underpaid and put it right to avoid the risks of a future HMRC investigation.

This document has been produced for guidance purposes only and should not be used as a substitute for taking independent legal advice on specific issues or individual cases.