

## National Minimum Wage (NMW)

A number of trainers had HMRC in 2019 focusing on checking compliance with the National Minimum Wage – out of the conversations we had with trainers the following points should be noted:

### **Deductions from wages – National Minimum Wage**

Deductions that are made from wages can affect whether or not the NMW is being paid. Some deductions do affect the NMW, others do not. For example, tax and NI do not affect the NMW.

Any deduction made from a worker will reduce the pay for NMW purposes unless it is:

- a deduction or payment in respect of the worker's conduct
- a deduction or payment on account of an advance under an agreement for a loan or advance of wages
- a deduction of payment as respects an accidental overpayment of wages made by the employer to the worker
- a payment as respect the purchase by the worker for goods or services from the employer, unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker's employment

As such, if making a deduction from wages (other than tax, NI, Child Maintenance or Court Order), then you need first to have written authority from the employee and secondly to check if it falls into one of the above categories. If it does not, then you need to ensure it will not bring the wage below the NMW. For example:

An employee has asked you to purchase something for them as you get a good discount at the local saddlers and they are going to pay you back. The item cost £70.00. The employee is aged 23 and is paid £450 a week for a 40 hour week. This is an hourly rate of £11.25. The NMW for a 23 year old worker is £10.42 and the employee is therefore earning well above the NMW. The deduction, though, needs to be made at a rate which does not reduce the pay below the NMW:

If employee agreed to two deductions at £35 a time:

Pay is  $£450.00 - £35.00 = £415.00 / 40 \text{ hours worked} = £10.37$  per hour. This would mean the employee is being paid less than the NMW of £10.42

However, if the deduction was made over a period of three weeks of £23.33, the employee would still be being paid the NMW:

Pay  $£450.00 - £23.33 = £426.67 / 40 \text{ hours worked} = £10.66$  per hour so above the £10.42 NMW.

Alternatively, you could ask the employee to pay you after they have been paid, rather than by making a deduction.

Particular care should be taken with employees on Scales 1 – 4 as those rates are close to the National Minimum Wage and so leave little scope for deductions which reduce it.

One of the HMRC inspectors looked at the effect of RIABS deductions and whether this brought an employee below the NMW. With input from the NTF explaining the scheme and the BHA rules relating to it, it was accepted that it was not a deduction for NMW purposes as it is not a requirement by the employer but a liability upon the worker – as such the RIABS deduction did not bring the employee below the NMW.

### **Salaried employees**

If your employee is on a salary, then you need to be aware that the payment of a bonus could mean that they are not a salaried employee for NMW purposes.

Some bonuses can be paid and the employee still be salaried – this is where the bonus is discretionary and paid on the quality of work or amount of work done and accrues in the course of more than one reference period – for example a discretionary Christmas bonus based on performance.

However, if the bonus is paid as a result of a contractual entitlement the bonus then forms part of their basic remuneration meaning they are an unmeasured worker not a salaried worker. For example, an automatic bonus for winners where that is paid at a set amount or formula regardless of the individual's quality of work.

Each case will turn on its own facts. If the person is an unmeasured worker, it is essential that the time worked is recorded so that you can show that they have been paid the NMW (or higher) for each hour worked.

Pool money does not affect the salary status as it is not a payment from the employer.

### **Accommodation**

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

If the employer charges for the accommodation and charges more than the offset rate (currently £63.70 per week), the difference is taken off the employee's pay for NMW purposes – so the higher the accommodation charge the lower an employee's pay when calculating the minimum wage. There is advice at

<https://www.gov.uk/national-minimum-wage-accommodation/effect-on-the-minimum-wage>

and on the NTF website.

It is very important that calculations are done to ensure that the employee is not being paid under the NMW when any accommodation deductions are taken into account.

## **Pay slips**

We asked HMRC for guidance upon pay slips where a consolidated wage is operated and HMRC advised that where an employee works one weekend on and the next weekend on, the pay does vary as the weekend on is paid at an overtime rate and the number of hours relating to pay at the overtime rate should be shown on the payslip.

HMRC did go on to say that the position could be different depending upon the wording of the employment contract relating to pay.

## **Simplification and Pay Reference period**

Much of what comes out of the discussions with HMRC inspectors with regard to time sheets and the pay slip requirements indicates that the simplest way to have transparency if operating a “consolidated” wage system is to pay in a reference period the same as the consolidated pattern, so pay fortnightly or three weekly depending on the work pattern. The clearest and simplest is to pay weekly paying any overtime be that regular or ad hoc in the week worked.

That said, as far as we are aware trainers who have had HMRC inspections have been able to satisfy the inspectors with regard to hours worked and time paid where operating the consolidated pattern.

We asked HMRC if we could seek to reach an agreement upon interpretation of the consolidated wage but that was not possible with HMRC preferring to look at each case individually.

If thinking of changing the pay frequency, say from weekly to fortnightly, then that would be a change of contract terms so it should be agreed with the employees before it is implemented. That would be through consultation to reach agreement on the change itself and the way it will be implanted. It may be appropriate for the employer to agree that, for a temporary period following the change, employees who might otherwise experience hardship may apply (within limits) for an advance on their pay. An employer that makes such a change without agreement will be acting in breach of contract, a course of action which could lead to resignations followed by claims of constructive dismissal.