

Avoiding common pitfalls in the UK national minimum wage regulations

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The government recently released its latest "name and shame" list of 202 companies which have failed to pay the correct wage to their workers. Employers were ordered to repay workers and pay fines of nearly £7 million, highlighting the importance of properly understanding the law around wage issues such as apprenticeship pay, salary sacrifice and deductions for uniform. Of the employers named on the list, 39% wrongly deducted pay from workers' wages, 39% failed to pay workers for the correct number of hours worked, and 21% did not pay the correct apprenticeship rate.

Calculating the national living and national minimum wages

Whether the national living or national minimum wage has been paid is based on the total remuneration within the pay reference period, which is one month unless the worker is paid by reference to a period which is shorter than a month (for example, a week, in which case the pay reference period is that period). Total remuneration is the gross amount paid to the worker in that pay reference period less any relevant deductions.

What payments are taken into account?

Not all payments made to the worker count towards the total remuneration. The following payments are taken into account:

- gross basic salary before any deductions for PAYE, national insurance or pension contributions;
- bonus, commission and any other incentive payments based on performance (excluding premiums for overtime and shift work);
- piecework payments; and
- any accommodation offset, subject to specific rules.
- However, the following are not counted towards total remuneration:
 - benefits in kind, such as childcare vouchers;
 - medical insurance and employer pension contributions;
 - any loans made by the employer to the worker; and
 - any advance of wages, lump sum payments (such as payments on retirement or redundancy) and any settlement

payments.

What deductions are taken into account?

- The following deductions from workers' pay will reduce the total remuneration:
- workers' expenditure in connection with employment or engagement, such as payment for purchase or cleaning of uniforms, or the purchase of equipment;
- deductions from workers' earnings or payments made by workers for the employer's use or benefit (for example, for meals or discount of goods purchased from the employer); and
- an administrative charge of £1 for attachment of earnings orders.

However, other deductions are not taken into account, such as:

- deductions for which the worker is liable, such as shop workers who are contractually obliged to make up any shortfall on their till;
- repayments of loans or advances of wages; and
- deductions in relation to the purchase of shares or share options.

Salary sacrifice or exchange

Salary sacrifice involves a worker giving up part of their salary in exchange for non-cash benefits, which can be fully or partially exempt from income tax and national insurance. Examples of these benefits include childcare vouchers or loans of bikes as part of a cycle to work scheme.

As the worker is no longer entitled to the whole of their salary, the sum sacrificed is not included within remuneration for the purposes of national minimum wage calculations. This has resulted in some employers mistakenly underpaying workers or preventing workers paid at national minimum wage from benefiting from such schemes.

Following consultation, the government announced that it will not be changing the national minimum wage rules around salary sacrifice, but will put in place measures to help employers with compliance, such as improved guidance. In addition, there will be a waiver of financial penalties for employers where the provision of salary sacrifice schemes means that a worker's payment goes below the national minimum wage, provided that strict criteria are met, including that the worker has consented to the scheme. It is important to note that deductions through salary sacrifice for items such as uniforms and those connected to the worker's engagement will not attract the waiver. Employers will still be required to make payment of any deficit to the worker. Where the penalties are waived, employers would also be exempt from the NMW Naming Scheme.

The law on apprentices' salaries

In 2010, the government introduced a national minimum wage for apprentices. The current rate is £5.28 for those apprentices aged 16 to 18. Apprentices aged 19 or over are also paid £5.28 per hour unless they have completed a year's work, in which case they are entitled to the national minimum wage for their age.

Unpaid working time

The most common reason employers were found to have paid incorrect wages in the most recent round of naming was due to unpaid working time. Paying a worker for their contracted hours may be insufficient as consideration must be made for the time that the worker is required to be at or available for work. For instance, additional working time should be paid where a worker is required to be in work before the start or after the end of their shift and, although this may be for a short time each day, it can have a more substantial cumulative effect. Employees who round paid time to the nearest hour are also at risk of paying below the national minimum wage.

Some examples of unpaid working time for which employers have been caught out include time spent travelling between work sites (not time travelling to and from work), time spent training and sleep-in shifts.

Implications for businesses and key takeaways

With increasing consequences for businesses failing to properly calculate the national minimum wage, it is important for employers to understand exactly how much employees must be paid. This includes proper recording of working time to avoid any underpayments and understanding that this may mean employees being paid for more than their contracted hours. In addition, employers must draft their contracts so that any possible deductions are agreed by employees, with the contracts serving as clear evidence of such agreements.

We have recently discussed the upcoming changes to the Working Time Regulations in our [blog](#). The changes are expected to affect how employers are required to record employees' working hours.

A minimum wage calculator is also available [here](#).

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