National Minimum Wage/Living Wage

Employment Tax | Tax voice

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Lesley Fidler observes that there are so many ways to get it wrong!

It is tempting to think of the minimum wage legislation as not being a problem for any business paying more than the following hourly rates, or equivalent annual salaries, to its employees.

	National Living Wage	National Minimum Wage

	Aged 25 and over	Aged 21 to 24	Aged 18 to 20	Aged under 18	Apprentice (see note below)
From 1 April 2019	£8.21	£7.70	£6.15	£4.35	£3.90
From 1 April 2018	£7.83	£7.38	£5.90	£4.20	£3.70

Note: First year of apprenticeship only. After that, the appropriate age-related minimum wage rate applies. See GOV.UK.

No longer! This simplistic view might have been correct 20 years ago when the National Minimum Wage (NMW) Act 1998 took effect on 1 April 1999, but since then the Employment Act 2008 and the National Minimum Wage Regulations 2015 (SI 2015/621) and other legislation have significantly altered the rules so that those rules are now complex and full of traps that catch innocent and well-intentioned employers.

Penalties for non-compliance, whether deliberate or not, can now be up to 200% of the arrears of pay (the figure was ‘only’ 50% up to 2014) and in 2016 HMRC set up a dedicated team ‘focused on tackling the most serious cases of non-compliance’. 2016 also saw the introduction of the National Living Wage (NLW) for workers aged 25 and over. I shall refer to both NMW and NLW as ‘minimum wage’.

The current minimum wage legislation is ‘owned’ by the Department for Business Energy and Industrial Strategy (BEIS) and enforced by HMRC. Because it is not tax legislation the Taxes Management Act does not apply to its enforcement and so there is no authority for a behaviour-based, flexible approach to enforcement and penalties. Instead the rules are applied rigidly and include the public naming of defaulters. In May 2017, Employee Benefits carried the headline: ‘John Lewis Partnership puts aside £36m for National Minimum Wage compliance’. This is little comfort to other employers who are found to be non-compliant, but shows that the rules can be misunderstood by even a large and conscientious employer.

There is plenty of online information about how the minimum wage rules are structured. The BEIS booklet ‘Calculating the minimum wage’ (updated 3 December 2018) is a starting point. The index to HMRC’s NMW Manual provides detailed guidance in identifying the workers to whom the rules apply, the pay reference periods that affect the calculation and the amounts that can and cannot be taken into account in that calculation. So, instead of repeating what is already available, let’s look at some examples of where employers can go wrong (Section 9 of HMRC’s Employer Bulletin 75, December 2018, contains a short article listing the top ten 10 ways in which minimum wage rules are breached by employers).

Working time

Particularly in retail businesses, but also in call centres and other customer-facing roles, employees are expected to be at their work stations ready to start for a fixed time. The same applies in many manufacturing roles. Minimum wage inspectors will look at how long it takes to get from the entrance to a locker, to get changed, to log in and be ready to start at the beginning of each shift, after any unpaid breaks and at the end of the shift. Interviews with staff will be used to gauge how long employees think they need to allow and, in some cases, timed trips will be made as well. Eight minutes to get started twice a day and four minutes to leave adds up to two extra hours in a 5-day week for which inspectors will expect minimum wage to be paid. So that means an effective hourly rate of over £8.62 is needed for those aged 25 or more contracted to work a 40-hour week.

In organisations where there is a strong sense of loyalty in the workforce, so that employees may feel duty-bound to stay until the till balances or the last customer has left and the kitchen floor has been mopped, minimum wage inspectors will try and establish exactly how long and how often this occurs in order to demonstrate underpayments. Whilst there is a fine line between employee engagement and employer exploitation, the minimum wage rules make no attempt to distinguish between the two.

Pay reference periods need to be considered. It’s not enough for an employee on an annual salary of £20,000 to have an annual average hourly rate that exceeds the minimum wage. The calculation needs to be carried out using ‘pay reference periods’ (usually a month). The general rule is that for pay to be taken into account in the hourly rate calculation, it must have been paid to the worker no later than the immediately following pay reference period. The rules allow for late payment that is

because the employee delayed in e.g. claiming overtime. The BEIS guidance gives the example of an annual bonus paid in December (mirrored in NMWM09050). Although one-twelfth of the bonus can be taken into account in calculating the November hourly rate (the immediately preceding period), the bonus will have no effect on the calculation for the first ten months of the calendar year. This rule becomes a particular problem with some professional trainees: for example audit or personal tax staff who work very long hours at some times of year. NMWM08120 onwards sets out the involved calculations that apply where that trainee counts as a salaried worker. It is not sufficient to look at the year as a whole.

Nor can it be assumed that anyone carrying out 'professional' work and who has an annual salary will count as a salaried worker for the purposes of the minimum wage rules. NMWM07038 expressly rules out from this category:

- those paid 4-weekly;
- those who only receive 1/52 of their stated annual salary each week (a calendar year contains one day more than 52 weeks - two days more if it is a leap year - and so this fact is applied to take such workers out of the 'salaried worker' category); and
- any employee with a contract that has a clause to the effect that 'you will work such hours as required (see NMW07030)'.

This makes the long hours issue far more acute because only the salary paid in respect of the month or shorter pay reference period can be matched with the hours worked in that period.

A variation of this problem is the annualised hours contract. Unless the worker is definitely within the salaried worker definition (noting the exclusions above), then the worker who builds up a reservoir of worked time ready for the school holidays, for example, is likely to have been underpaid when each pay reference period is considered in isolation. When unions, employees and employers support annualised hours, it is a shame that BEIS allows its legislation to make such arrangements unworkable.

Employers need to ensure that their processes for authorising and paying overtime once it has been claimed are slick. Whilst employees' delays in claiming will allow the payment to be related back to the pay reference period in which the additional hours were worked, slow processing after the employee's claim has reached the

employer could result in underpayment in a particular pay reference period – regardless of the fact that the position evens itself out a month or so later. The example in NMWM09250 illustrates this.

Employee circumstances

Employers need good records to avoid minimum wage breaches.

With the increase in the range of training offered under apprenticeships and large employers trying to make use of their Apprenticeship Levy payments, care is needed to ensure that when apprentices aged 19 or over have completed their first year of an apprenticeship, they immediately move onto the rate applicable to their age. This could require a significant increase of more than double the hourly rate for a worker aged 25 or more. Crossing any of the other age-related thresholds may require the employer to increase pay. An employer such as a restaurateur that is unaware of the 21st birthday of its casual employee could have a minimum wage underpayment.

The optional remuneration arrangement rules (OpRA) in ITEPA 2003 may have reduced the number of salary sacrifice arrangements, but there are still pitfalls for employers that do not check hourly rates when employees with salary sacrifice agreements reduce their working hours. They may have had checks in place when the original salary sacrifice was entered into, but a reduction in working hours with no additional check can create an underpayment. Even if the employee is willing to, and knowingly does, accept a low rate of pay, for example when a parent works at a private school in order that her child can attend the school at a much reduced fee, there will be a minimum wage breach by the employer.

Sometimes employers take on young employees in anticipation of those workers starting an apprenticeship, but there is a period before the formal apprenticeship is arranged. Paying the apprentice rate in that period can create a minimum wage underpayment.

Finally, just as cash-in-hand payments to the member of staff who takes the office tea towels home to be washed can cause a PAYE underpayment, the minimum wage equivalent is the employment contract that requires employees to wear e.g. ‘dark skirt or trousers’ or ‘black shoes’. By earmarking part of the employee’s pay to cover the cost of this item, the employer has effectively taken that amount out of pay for minimum wage purposes.

Sanctions

If all that came of a minimum wage visit was that an employer needed to find some back pay for an unintentional, technical breach the rules might not be a source of anxiety. Unfortunately, unlike tax and National Insurance errors, minimum wage breaches come with the sanction of the employer being named publicly (often referred to as ‘naming and shaming’). BEIS will consider this sanction for any employer where the total arrears are more than £100. An employer that can demonstrate that personal harm might result from naming or that either national security could be endangered or it would not be in the public interest would have a defence, but otherwise the consideration by BEIS appears to result in automatic inclusion in the list.

Conclusion

I hope I have demonstrated that minimum wage issues are not an area in which any employer should be complacent. It is no longer sufficient to rely on paying an hourly rate that is greater than the NMW or NLW: a detailed appraisal of the category of work into which the employment falls, the pay reference periods and the timing of irregular or fluctuating remuneration all need to be taken into account as well as industry-specific quirks. In a short, general article such as this, it has not been possible to consider vexed areas such as sleeping time, what actually makes up pay for minimum wage purposes and how the accommodation offset works. There are many others.