

# The National Living Wage and the National Minimum Wage



**All employers must be aware of their responsibilities regarding compliance with the National Living Wage and the National Minimum Wage. At Firm Value Payrolls we can help you with a range of pay issues.**

Anybody working aged 23 or over and not in the first year of an apprenticeship, is legally entitled to the National Living Wage (NLW).

The NMW and NLW cycles have been aligned since April 2017, so that both rates are amended in April. The Government is committed to increasing the amount every year.

Employers will need to make sure they are paying their staff correctly, as the NLW is enforced as strongly as the NMW.

**The table below shows the NMW (for those of at least school leaving age) and NLW (for those aged 23 and over) rates applying since 1 April 2022:**

Age	
Apprentices	£4.81*
Under 18	£4.81
18- 20	£6.83
21 - 22	£9.18
23 and over	£9.50

*\* Under 19, or 19 and over in the first year of their apprenticeship.*

Please note, there are separate minimum rates of pay for agricultural workers. [Visit the government website for more information.](#)

## Who is covered by the NMW?

NMW applies to all workers, with certain exceptions such as:

- Children who are still of compulsory school age
- Those who are genuinely self-employed
- Family members living in the family home and working in the family business
- People working and living as part of a family (e.g. au pairs)
- Voluntary workers

### **How is the NMW calculated?**

The Regulations set out a rather complex procedure detailing the calculation of the NMW. Benefits in kind, expenses, certain allowances and most deductions are not included. Enhanced payments for particular work will not count, but incentive or profit-related payments will be included. See details here. [Calculating the minimum wage - Guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/calculating-the-national-minimum-wage)

### **What working time counts for NMW?**

Job-related travelling and training time is included. Periods of holiday or absence do not count (even though holiday pay is now obligatory), nor does time taken as rest breaks or industrial action.

### **What if the pay is not time-related?**

Piece workers and other non-time workers (e.g. pub landlords) may come to an agreement with their employer about a fair estimate of hours.

### **What about Family Businesses?**

Although there is an exemption for family members working in the family business and residing in the family home of the employer, the regulations specifically refer to the employer's family. If the family business (i.e. the employer) is a limited company, then it does not have a family. Even if the family business operates as a sole trader or partnership, the only family members exempted are those who actually live in the home of the employer.

The general rule is that the family member should be paid for the effort and hours worked in the business. Family members who live in the family home and who work in the business will be outside the scope of the National Minimum Wage (NMW).

### **What about Company Directors?**

In common law, company directors are classed as office holders and can do work and be paid for it in that capacity. This is true no matter what sort of work they do and how it is rewarded. The NMW does not apply to office holders, unless they also have contracts which make them workers.

It is unlikely that a company director will have an implied contract which makes him a worker. The rights and duties of an office are defined by that office, and it exists independently of the person who fills it. Directors can be removed from their office by a simple majority of the votes cast at a general meeting of the company. This contrasts with the rights and duties of an employee which are defined in a contract of employment.

### **What records have to be kept?**

Employers are legally required to keep sufficient records to show that they are meeting their National Minimum Wage obligations. Since 1 April 2021, records must be retained by the employer for a minimum of six years. [Further information about how you must do this can be found here.](#)

## **What rights does the worker have?**

Individuals have the right to apply to a court or tribunal for non-payment of the NMW. They are also protected from suffering any loss for such proceedings.

Confidential help and advice on the NMW is available from the Pay and Work Rights Helpline: 0300 123 1100. Callers can be assisted in over 100 different languages. These lines take complaints from workers, employers and third parties.

## **Criminal Offences**

There are six criminal offences relating to the NMW:

1. Refusing or wilfully neglecting to pay at least equal to the National Minimum Wage.
2. Failing to keep or preserve National Minimum Wage records.
3. Making, knowingly causing or allowing the keeping of false records.
4. Producing, furnishing or knowingly causing or allowing the production of false records or information.
5. Intentionally delaying or obstructing a NMW Officer.
6. Refusing or neglecting to answer any questions, give information or produce any documents to an enforcement officer when required.

The fine on conviction for each offence is up to £20,000 where tried in the magistrates' court (or the Scottish equivalent). The most serious criminal cases are triable in the Crown Court (or Scottish equivalent). This means that employers who deliberately fail to pay the NMW may face a potentially unlimited fine.

## **Enforcement**

The main means of enforcing the NMW are through:

- Compliance officers of HM Revenue & Customs (HMRC)
- Agricultural wages inspectors for the NMW in the agricultural sector (and the agricultural minimum wage)
- Claims by workers before tribunals and courts

HMRC compliance officers will act in response to complaints that an employer is not paying the NMW - whether the complaint is by workers or others. They will also investigate where there may be a risk of non-payment. Since 6 April 2009, HMRC has been able to use the search and seize powers in the Police and Criminal Evidence Act 1984 when investigating criminal offences under the National Minimum Wage Act 1998. Officers may carry out inspections of employers at any time. There is no requirement to provide reasons for an inspection. They must show an identity document on request and have considerable powers to obtain information.

## **Notice of underpayment**

If a compliance officer believes that an employer has failed to pay at least the NMW to a worker, the officer may serve a notice of underpayment, requiring the employer to:

- Repay arrears of the NMW to each worker named on the notice at current Minimum Wage rates.

- Pay a penalty to the Secretary of State totalling up to 200% of the total underpayment for all the workers shown on the notice as underpaid for pay reference periods starting on or after 6 April 2009, with a minimum penalty of £100 and a maximum penalty of £20,000 per worker.
- The penalty will be reduced by 50% if the employer fully complies with all the terms of the notice of underpayment within 14 days of service of the notice.

The employer may appeal against the notice of underpayment within 28 days of service of the notice. An appeal must be made to the employment tribunal (or industrial tribunal in Northern Ireland). If the employer does not comply with the notice of underpayment, HMRC can take a case to a tribunal or County Court (or Scottish equivalent) on behalf of the worker, or prosecute the employer.

Employers who deliberately pay their staff less than the NMW may have their breaches publicised by the Department for Business, Energy and Industrial Strategy. HMRC has created a Dynamic Response Team which will concentrate on the most complex and high profile cases.

### **How we can help**

**If you are an employer, we will be more than happy to provide you with assistance on these matters.**

**[Please contact us.](#)**

*Last updated in June 2022.*