

The National Living Wage and the National Minimum Wage



All employers need to be aware of their responsibilities regarding compliance with the National Living Wage and the National Minimum Wage. At Firm Value Payrolls we can help firms in the Surrey or Hampshire area with a range of pay issues.

Anybody working, aged 25 or over and not in the first year of an apprenticeship, is legally entitled to the National Living Wage (NLW). Despite its name, this new rate is essentially a Minimum wage for over 24s. The Government is committed to increasing this every year.

The NLW rate changes every April, while the National Minimum Wage (NMW) rates have traditionally been revised in October. However, since April 2017 the NMW and NLW cycles have been aligned so that both rates are amended in April each year.

Employers will need to make sure they are paying their staff correctly, as the NLW will be enforced as strongly as the NMW. The table below shows the NMW and NLW rates applying from 1 April 2019:

Age	National Minimum Wage	National Living Wage
Apprentices*	£3.90	-
16 and 17	£4.35	-
18 – 20	£6.15	-
21 – 24	£7.70	-
25 and over	-	£8.21

*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 www.gov.uk/agricultural-workers-rights/pay-and-overtime 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.

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, 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 trade or partnership, the only family members exempted are those who actually live at home.

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?

For workers earning in excess of £12,000 per year, employers simply have to keep sufficient records to demonstrate that the NMW has been paid. For workers earning less than £12,000 per year, full details of the NMW calculation must be kept.

Records should be kept for six years.

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:

- Refusal or wilful neglect to pay the NMW
- Failing to keep or preserve the NMW records
- Causing or allowing a false entry to be made in the NMW records
- Producing or furnishing false records or information
- Intentionally delaying or obstructing a compliance officer
- Refusing or neglecting to answer questions, give information or produce documents to a compliance officer

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
- Pay a penalty to the Secretary of State totalling 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 per cent 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.