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REFERENCE

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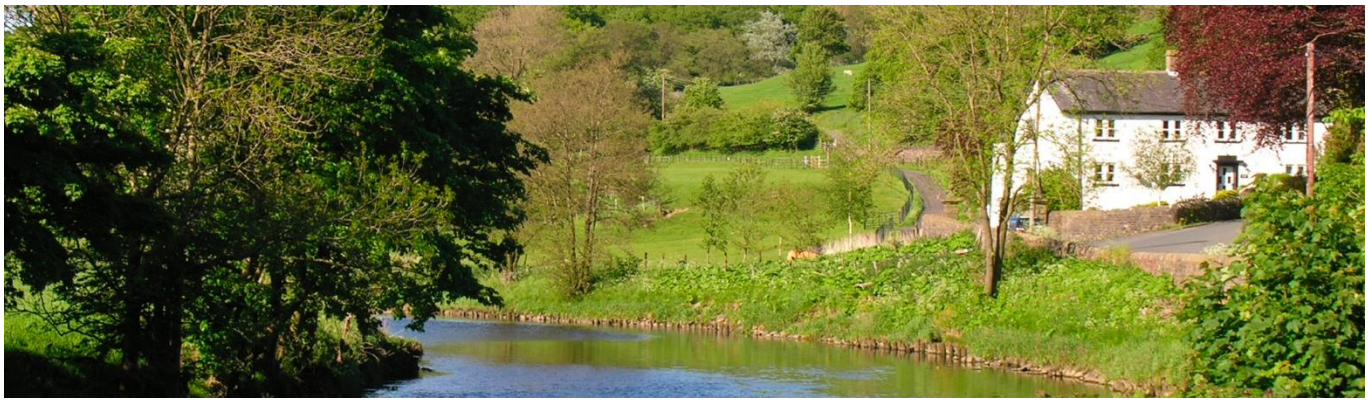
MINIMUM WAGES, ACCOMMODATION OFFSET AND ADDITIONAL CHARGES



1. INTRODUCTION

The purpose of this Guidance Note is to provide a summary of the law and issues relating to payment of the national minimum wage when providing employees with living accommodation, including where rent is charged and/or the employer makes certain charges, for example for utilities. It aims to help members navigate the potential pitfalls and looks at the consequences, if things go wrong.

The Guidance Note is suitable for all workers in England and Wales who are not subject to an agricultural wages order regime.

The relevant law relates to workers and employees and for these purposes, the term "employee" is used to include a "worker".

2. NATIONAL MINIMUM WAGES GENERALLY

Statute guarantees a minimum hourly rate of pay to almost all adult employees.

The main Act is the National Minimum Wage Act 1998 (NMWA) which is fleshed out by regulations, the current ones being the National Minimum Wage Regulations 2015 (NMWR). These are amended annually to take account of the new rates which come into effect at the beginning of April each year.

3. WHAT ARE THE CURRENT NATIONAL MINIMUM WAGE RATES – 2022 TO 2023?

The new rates, which came into effect on 1 April 2022 are set out in the table below.

Age	New hourly rate £	Percentage increase %
23 + National living wage rate	9.50	6.6
21 - 22	9.18	9.8
18 - 20	6.83	4.1
16 - 17	4.81	4.1
Apprentice under 19 or over 19 in first year	4.81	11.9

The accommodation offset is £8.70 a day, i.e., £60.90 a week, an increase of 4.1 per cent.

There are certain exempted workers but these are out of the scope of this Note.

4. HOW DOES THE NMWA WORK?

The NMWA implies a term into every employment contract that the employee will be paid at a rate that is no lower than the national minimum wage (NMW).

It does not matter whether the individual works full-time or part-time. Also, it makes no difference if the person has a second job (or other income) – as the employer would still be obliged to pay them at least the NMW for the job they are doing in the light of the implied term referred to above.

Members should note that it is for the employer to prove that the minimum wage has been paid as, in civil proceedings, there is a presumption in favour of the employee – i.e., that an individual concerned qualifies for and was paid less than the NMW.

Further, as with other statutory employment rights, it is not possible to contract out of the obligation to pay the NMW and any attempt to do so is void.

5. WHAT COUNTS TOWARDS THE NMW?

The following elements of pay count towards the NMW:

- Gross basic salary or wages (before PAYE, national insurance and any employee pension contribution deductions)
- bonuses, commissions and other incentive payments based on performance (but not any premium paid for overtime or shift work)
- piecework payments; and
- the accommodation offset

6. WHAT IS THE ACCOMMODATION OFFSET?

The provision of living accommodation is the only benefit in kind which counts towards payment of the NMW and a value is given to this, known as the accommodation offset. In other words, the accommodation offset is that amount which can be taken into account when calculating whether the NMW has been paid.

The accommodation offset applies when living accommodation is provided to an employee by an employer (and in some cases, by a third party: see 10 below).

Issues relating to the provision of living accommodation and the accommodation offset have arisen primarily as a result of regulations 14 and 16 of the NMWR, extracts from which are set out below:

> 14. (1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period …., is treated as a reduction to the extent that it exceeds the amount determined in accordance with Regulation 16….
>
> 16. (1) In regulations 9(1)(e), 14 and 15, the amount as respects the provision of living accommodation is the amount resulting from multiplying the number of days in the pay reference period for which accommodation was provided by £ [the daily accommodation offset rate].
>
> (2) Living accommodation is provided for a day only if it is provided for the whole of a day.

(3) Amounts required to be determined in accordance with paragraph (1) as respects a pay reference period are to be determined in accordance with the regulations as they are in force on the first day of that period."

Members should note that the phrases "living accommodation" and "provision of living accommodation" are neither defined in the legislation nor in any case law and this gives rise to uncertainty surrounding the scope of the provisions: see 10 below.

7. HOW DOES THE ACCOMMODATION OFFSET WORK?

If the accommodation is provided without charge as part of the employment package, the employer can add an amount equal to the accommodation offset onto the employee's total pay, when calculating the wage for NMW purposes: (regulation 9 (1) (e) NMWR).

Where the employee pays rent, and for these purposes, it does not matter if the rent is deducted from the wages or is paid separately by the employee, any rent up to the amount of the accommodation offset is disregarded, but any excess over and above it is treated as a deduction which reduces the employee's pay for NMW purposes: (regulation 14(1) NMWR above).

There is a complication in respect of "time work", where employees are hourly paid, rather than salaried. Where the employee is absent and certain conditions are satisfied, the employer must make an adjustment before applying the accommodation offset and only the amount of the adjusted deduction or payment which exceeds the accommodation offset will reduce pay for NMW purposes. This is dealt with in the Department of Business Energy and Industrial Strategy (BEIS) Guidance referred to below.

8. ADDITIONAL CHARGES

Members should note that any additional charges the employee is obliged to pay as a condition of being provided with the accommodation, such as payments for utilities or furniture, must be taken into account when determining the total charge for accommodation. Accordingly, if an employer pays its employees the minimum wage and makes full use of the accommodation offset, it cannot then levy a further charge for e.g., gas, electricity, even if any such charge is less than the employee would have to pay to buy the utilities concerned direct from the supplier.

9. WHAT IS LIVING ACCOMMODATION?

The accommodation must be habitable, and if it is, then generally, the standard or age of the facilities provided will not be taken into account, but they should be within the accommodation itself or reasonably close by.

The type of accommodation provided by the employer is not regarded as the definitive factor.

The issue is whether the arrangements enable the worker to live in the accommodation and, in this respect, all the circumstances are taken into account. The HM Revenue and Customs (HMRC)'s Manuals are helpful and provide examples:

- NMWM 100100 https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm10100

- NMWM 100110 https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm10110 and the following pages

10. WHEN IS ACCOMMODATION PROVIDED BY THE EMPLOYER?

Insofar as there is no definition of the “provision of living accommodation”, there are some uncertainties as to the circumstances where living accommodation is provided by the employer.

However, there is a case but this is just on the meaning of “employer”. In HMRC -v- Ant Marketing Ltd [2020] IRLR 744 EAT, the owner of the accommodation was a separate property company but in the same ownership as the employer. The only issue in the case was the definition of "employer". HMRC argued that “employer” should be construed widely so as to include a connected property company but failed. The term had to be given the meaning in the NMWA and this is a much narrower definition. The accommodation could not be said to be provided by the employer and so the deductions for rent were not to be treated as reductions for the purposes of the NMW. However, the judge, Choudhury J, said that if the question had been broader, whether the employer could be said to be a provider of accommodation, even though not the owner or landlord, he would have "unhesitatingly answered in the affirmative".

There is guidance on the scope of the provision of accommodation.

The Department of Business, Energy and Industrial Strategy (BEIS) Guidance

Although government guidance cannot always be determinative of the law, BEIS has produced Guidance and considers that accommodation offset provisions can apply in a wide range of circumstances, not merely where the employer owns the property occupied by the employee.

The Guidance states that an employer **will** be considered to be providing accommodation and the accommodation offset rules will apply (along with deductions for or payment of rent and deductions for additional charges, thus affecting whether the NMW has been paid) if accommodation is provided by the employer or by a third party where:

- the accommodation is provided in connection with the employee’s contract of employment

- the employee’s continued employment is dependent upon occupying particular accommodation

- the employee’s occupation of accommodation is dependent on remaining in a particular job

As regards other scenarios, the Guidance says that where the provision of accommodation by the employer and the employee’s employment are not dependent upon each other, the employer **may** still be considered to be providing accommodation if one of the following applies:

- the employer is the employee's landlord either because it owns the property or because it is subletting the property
- the employer and the landlord are part of the same group of companies or are companies trading in association
- the employer's and the landlord's businesses have the same owner, or business partners, directors or shareholders in common
- the employer or an owner, business partner, member, shareholder or director of the employer's business receives a monetary payment and/or some other benefit from the third party acting as landlord to the employees.

The Guidance then continues by considering that for the purposes of the accommodation offset rules, third parties will include:

- businesses and companies, which are separate legal entities to the employer
- individuals including those who are family members of a director, business partner, shareholder, member or owner of the employing business
- businesses or companies with a director, shareholder, member, owner or business partner who is a family member of a director, shareholder, owner or business partner of the employing business

The Guidance, which includes worked examples, can be found at: https://www.gov.uk/guidance/calculating-the-minimum-wage/calculating-the-minimum-wage#accommodation-offset

HMRC Manual

HMRC has also provided guidance.

- HMRC Manual at NMWM10170 deals with third party landlords and says that if the employee rents the accommodation directly from a third party, the employer can deduct the rent from their pay and pay it to the third party as long as it pays it straight over and the expenditure is not connected to the employment. This deduction will not reduce the employee's NMW. However, if the employer uses the money or benefits from the arrangement in some way, and the examples given are taking a commission or charging a fee, then that amount will reduce the employee's pay for national minimum wage purposes: https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm10170
- Where there is a joint tenancy and the employer employs one of a couple, the employer is regarded as providing accommodation to the employee and the offset rules will apply. However, if the tenancy is in the name of the other partner, and the employed partner is not required to live in the accommodation etc., then the accommodation is not provided to the employee (but rather to the partner) and the offset rules do not apply: see NMWM

10060 https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm10060

Members who think that they may be affected should check the employment contacts, occupation or tenancy agreements and their pay records.

11. FURTHER OBLIGATIONS – WHAT RECORDS DO I HAVE TO KEEP?

Employers have an ongoing obligation to keep certain records (on paper or computer) in relation to the hours worked by, and the payments made to employees: section 9 NMWA. They must keep sufficient records to establish that their workers have received the NMW and do so in such a way that all the information about the pay received by a worker in a particular pay reference period is contained in a single document: regulation 59(1) NMWR.

The amount of information depends on the circumstances and if accommodation is provided then, as well as the employee's pay and time records, the various elements that make up the total pay, such as deductions for accommodation charges, should also be included. Accordingly, in the light of the reverse burden of proof referred to at 4 above, members should ensure that their records to enable them to defend any claim relating to any alleged failure to pay the NMW. (There are also criminal offences associated with failure to maintain records and falsification of records: see 13 below.)

From 1 April 2021, these records must now be kept for a minimum of six years from the end of the pay reference period following the period to which they relate. (This also applies to records made before 1 April 2021 if the employer was required to keep the records at that time.)

Production and inspection of pay records

By section 10 NMWA, an employee has a statutory right to require their employer to produce their pay records by making a written request and to permit them to inspect their records and take copies. Members should note that if the employer fails to allow access to the records within 14 days of such a request, the employee can bring a claim in the employment tribunal. If successful, the tribunal can make an order and award up to 80 times the relevant NMW rate. Not engaging can be very expensive…

An HMRC enforcement officer may also inspect an employer's NMW records or require them to be produced on reasonable notice. It is a criminal offence to refuse: see 13 below. Further, compliance officers have the power to remove records from employer's premises, but they must comply with data security rules.

12. ENFORCING THE NMW

The NMW can be enforced by HMRC compliance officers on behalf of BEIS or by an employee making a claim in an employment tribunal or court.

There is government guidance available at: https://www.gov.uk/guidance/calculating-the-minimum-wage/enforcing-the-minimum-wage

A copy of HMRC's policy on enforcement can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923118/national-minimum-wage-enforcement-policy-1-oct-2020.pdf

12. HMRC CIVIL ENFORCEMENT

Investigations can be opened as a result of an employee complaint or as a result of targeted investigations initiated by HMRC.

HMRC compliance officers may carry out inspections and they do not have to provide reasons for doing so.

Officers have various powers to obtain information, including entering premises at a reasonable time to interview employers or inspect their records, require them or their staff to produce and explain records about NMW pay and supply further explanations as necessary to determine whether the legislation has been complied with. They can also remove NMW records for copying.

Notice of underpayment

If a compliance officer believes that that an employer has failed to pay the NMW to any employee or employees, the officer may issue a notice of underpayment.

The officers do have some discretion in the matter and they will not do so if arrears have been paid before the start of an investigation, such as following their "nudge" action, i.e., writing to employers to help them identify potential underpayment situations. However, they will generally do so if arrears have been paid or partially paid after the start of an investigation even if the underpayment was accidental.

A notice of underpayment requires the employer to pay any arrears to each employee named on the notice and to pay a financial penalty. The penalty can be up to 200% of the value of the MNW arrears, up to a maximum penalty of £20,000 per worker. The penalty will be reduced by 50% if the employer complies with all the terms of the notice of underpayment within 14 days of its service.

An employer can appeal to the employment tribunal against a notice of underpayment within 28 days of service of the notice. However, there are only three limited grounds of appeal, namely that the notice should not have been issued, any requirement imposed to pay arrears was incorrect and/or the requirement to pay a financial penalty was incorrect. Members should note that if they fail to appeal against a notice of underpayment and HMRC then brings civil court proceedings to enforce the debt, their defence will usually be struck out on the ground that the county court is not the correct forum to challenge a notice of underpayment.

If an employer does not comply with the notice of underpayment, HMRC can take a case to the employment tribunal or county court on behalf of the employee or, in serious cases, seek a criminal prosecution.

The "naming and shaming scheme"

The scheme applies to any employer issued with a notice of underpayment by HMRC who has not appealed against the notice or has been unsuccessful in any appeal after HMRC closes the case.

BEIS consider all cases for naming where the total arrears owed to workers is more than £500. There is a lower threshold of arrears, of more than £100 for cases where the employer has been issued with another notice of underpayment within the previous six years, was subject to an outstanding Labour Market Enforcement Order or Undertaking or has previously been convicted of a NMW offence which is not yet spent.

It is possible for an employer to request not to be named where there are exceptional circumstances. These include a risk of personal harm to an individual or their family or another factor which suggests that it would not be in the public interest to name the employer. In both cases the employer must provide evidence and/or details. Incidentally, in the latter case, BEIS takes a restrictive view and, for example, representations that employers inadvertently breached the rules, or that they relied on advice from a third party, or because they are a small business that is relied on by the community, will not suffice.

13. HMRC CRIMINAL ENFORCEMENT

There are six criminal offences relating to the NMW under section 31 NMWA:

- refusal or wilful neglect to pay the NMW
- failure to keep the required records
- keeping false records
- providing false records or information
- intentionally obstructing or delaying an enforcement officer; and
- refusing or neglecting to answer questions or provide information to an enforcement officer.

Civil enforcement is usually sufficient in most cases, but in those rare cases where criminal sanctions are pursued against a small minority of employers, this tends to be because they have seriously obstructed HMRC's investigation, repeatedly fail to pay the NMW or falsified records.

HMRC officers have the same investigation powers to deal with criminal offences under section 31 as they have when investigating other criminal offences. If the offence is committed by a company with the consent or connivance or by the neglect of an officer of that company then that officer, as well as the company, is guilty of the offence: section 31 NMWA.

14. WHAT CAN AN EMPLOYEE DO?

As mentioned at 12 above, employees can also take direct action independently of HMRC for example by bringing claims in the employment tribunal or the county court. An employee may bring a claim for an unlawful deduction from wages, breach of contract and/or depending on the circumstances, unfair dismissal or detriment. A detailed discussion of these remedies is beyond the scope of this Guidance Note as it would depend on the facts giving rise to a claim.

FURTHER LEGAL ADVICE

Careful consideration of these issues is needed in every case as employment situations are fact specific. Bespoke advice is available from the CLA Legal Department.

Name of contact Roberta Sacaloff
Job title Senior Legal Adviser
Email address Roberta.sacaloff@cla.org.uk

For further information please contact:
CLA 16 Belgrave Square
London SW1X 8PQ
020 7235 0511
www.cla.org.uk