

# Employers' Update National Minimum Wage Special

**Are you NMW  
compliant?**

**NMW - Will I be  
named and  
shamed?**

**Pay deductions  
matter!**



**Why can't I use  
salary sacrifice?**

**What are the rules on  
maternity leave and  
salary sacrifice?**

# New enforcement powers

The arrival of the new National Living Wage (effectively an increase in the National Minimum Wage (NMW) for workers aged 25 and over) from 1st April has been loudly trumpeted across the media in recent months. However, the introduction of new enforcement powers for employers who fail to comply has received far less coverage. Christine Robinson has set out the potential consequences for non-compliance on the next page, and clearly employers will want to avoid the financial cost and reputational damage at all costs.

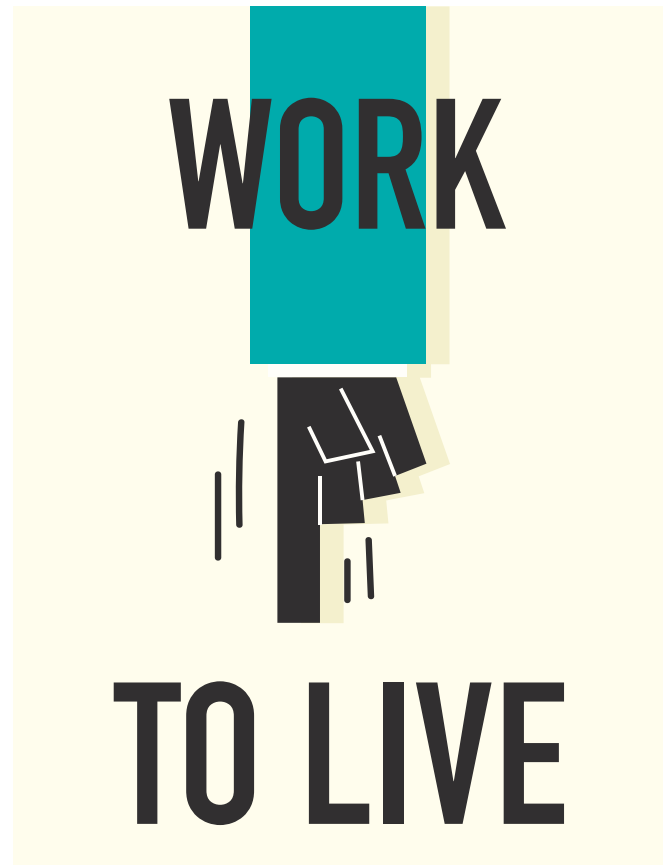
Enforcement is undertaken by HMRC and is initiated either by a complaint from workers (or ex workers) or third parties or as a result of risk profiling, and includes targeted enforcement of key low paying sectors. Investigations are carried out by HMRC's Minimum Wage Compliance teams and will usually include a review of the employer's payroll and associated records, an interview with the employer and payroll staff, and interviews with workers.

The NMW officer will also use this opportunity to consider whether anybody engaged on a self employed basis should be categorised as a "worker" for NMW purposes. Although it could appear that enquiring into employed/self employed status is outside of the remit of a NMW investigation, it should be remembered that the definition of a "worker" is more wide ranging than that of an employee as used for tax and national insurance purposes. Consequently, a person considered not an employee but self employed for tax and national insurance purposes can still be a "worker" for NMW purposes. **Employers should ensure prior to the visit that they are fully confident that self employed status can be justified.**

Virtually all employers will consider that they are fully compliant, but very often "technical" errors are discovered or disputes can arise. For example, an employer might consider in good faith that they have paid to at least the level of the NMW but there is insufficient evidence to demonstrate that this was the case. For instance, an employee might have been paid the NMW for 37 hours a week in accordance with their employment contract, but subsequently claims that they actually worked for 40 hours a week, and was therefore paid less than the NMW. In such cases the NMW officer will consider all of the evidence, to include any records held, and make a decision based upon their "best judgment". If it is considered that record keeping has been inadequate this decision can easily go against the employer and can be very difficult to overturn.

**It is important to note that the full penalty imposition and "naming and shaming" will still proceed even where the employer claims that non-compliance has been accidental.**

So it is clear that record keeping is key. However, although



the legislation requires the employer to keep and retain records it does not stipulate exactly what type of records must be kept. As long as the records can show that workers have been paid at least NMW for the time that they have worked the employer can choose to keep their records in any way they so wish. It is possible that employers will be able to use their payroll records to show levels of pay to workers and already have systems to show time worked. However if all that exist are the employment contract stipulating contracted hours and the payroll record showing payment of the weekly/monthly salary, i.e. no conclusive evidence of hours actually worked, then clearly problems can arise. Whilst there is no suggestion that every employer should adopt a clocking in/out system, it would certainly be prudent for employees to sign (either manually or electronically) to confirm the hours they have worked.

In conclusion, every employer should consider itself to be potentially at risk of a NMW Compliance visit, and in view of the increasingly high stakes for errors it would be a worthwhile exercise to take some time to consider whether existing record keeping can demonstrate without doubt that all is as it should be. If you would like our help with this please don't hesitate to get in touch.



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# Deductions and payments from pay - why they are important

**Anything** that reduces an employee's pay may have an impact on whether the NMW rules have been complied with. The purpose of the NMW rules is to ensure that employees are paid at least the minimum amount set by law and that they are free to choose how to spend their money.

The legislation distinguishes between **deductions** that are taken from pay, and **payments** that the employee makes to the employer. Certain deductions reduce the pay for NMW purposes and, if an employee's contract says that an employee has to make a payment to the employer, this will also reduce the pay for NMW purposes.

**This distinction matters, particularly in cases where an employee has bought goods or services from their employer, or where a deduction is made that is for the employer's own benefit.**

Quite a lot of the high profile NMW cases reported in the press are to do with employees buying goods or services from an employer: either because the employee's contract said that they had to buy the goods, or because the employer deducted money from pay for the goods. Even if the employee chooses to buy the goods, if the money is deducted from pay by the employer, the pay will be reduced for NMW because it is classified as being for the employer's own benefit.

Other deductions to be aware of that are deemed to be for the employer's own benefit, are administration charges that an employer may make for, e.g. CRB checks or for dealing with payments to third parties.



Of course there are deductions that don't reduce pay for NMW purposes such as tax and National Insurance; repayments of a loan or recovery of overpaid wages and importantly, payments that aren't connected with the employment, that an employee has asked the employer to make such as for trade union subscriptions, pension contributions; CRB checks or for health cash plans like Westfield.

Other deductions that don't reduce pay are for contractually agreed amounts that relate to conduct or discipline; amounts to buy shares and for accommodation, as long as the charge for accommodation is at, or below the accommodation offset charge.

(The rules on accommodation are complicated and not discussed here but see <http://www.hmrc.gov.uk/manuals/nmwmanual/NMWM10000.htm> for more details.)

which provides details of the arrears of pay that have to be repaid to the employee and the penalty that is to be charged. The arrears will be calculated at the NMW rate that applies at the time of the visit and HMRC can go back to 1 April 1999.

Penalties from 1 April 2016 are calculated at 200% of the arrears, capped at £20,000 per worker. (Between 26.5.15 and 31.3.16, they were 100% of the arrears.) The penalty can be reduced by paying the arrears and the penalty within 14 days of the date on the notice.

In addition, all employers who have underpaid employees will be 'named and shamed' by the Department for Business, Innovation and Skills unless there is a risk of personal harm to an individual or their family; there are national security risks or it would not be in the public interest to do so.

## What happens when things go wrong?

If HMRC visit and find that NMW has not been paid to employees, they will issue a notice of underpayment



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Method of purchase	Nature of purchase	Effect on NMW pay
Payment to employer	Employer requirement	Reduces NMW pay
Payment to employer	Worker freely chooses to make the purchase	Does not reduce NMW pay
Deduction from worker's pay	Employer requirement	Reduces NMW pay
Deduction from worker's pay	Worker freely chooses to make the purchase	Reduces NMW pay

## Are you below the line?



A salary sacrifice cannot in any circumstances take your employee's pay below the level of the National Minimum Wage or National Living Wage if they are aged over 25.

A salary sacrifice cannot be taken from statutory payments such as statutory sick, maternity, paternity or adoption pay.

Before agreeing to any salary sacrifice arrangement the employer will need to be comfortable that the employee's earnings will be sufficient, throughout the length of the salary sacrifice agreement, to ensure that the employee earns at least NMW or NLW after the deduction of all salary sacrifices.

If an employee's salary is sufficient today what about in three years time when they have maybe reached 18, 21 or 25 or when the NLW has increased? Don't forget apprentices' rates either.

As an employer you will need to keep tabs on the NMW rates and on the ages of all your employees, especially those that have entered into a salary sacrifice.

But, this does not take away from the benefits of using salary sacrifice to provide benefits to employees cost effectively.

So if something should happen which has or had the effect of taking an employee salary to below NMW or NLW level, your business will be in breach of the legislation. The first thing to do is check your scheme rules. If they are silent then you may need to come to a new arrangement with an employee or decide that the agreement has to be terminated.

As an employer if your employee fails the NMW test due to a change in the NMW rate or the employee's age we

recommend that you either rectify this with a pay rise or agree with the employee to vary the amount of the salary sacrifice. You will need to evidence this change and the employee's agreement. Without the agreement then the sacrifice will need to be terminated.

If an employee's pay drops whilst on maternity leave check your scheme rules. You cannot take a salary sacrifice from Statutory Maternity Pay. However, you must continue to provide the benefit whilst the employee is on maternity leave, at the business' expense.

For other events it will depend on the benefit the employee is receiving. Again check the scheme rules. It may be possible to extend the length of the agreement or agree to sacrifice a slightly different amount.

Non-statutory maternity or sick pay may be used to fund the salary sacrifice.

HMRC permits a salary sacrifice to be varied under certain conditions, such as marriage, divorce, or for other lifestyle changes.

If an employee chooses to leave there may be a termination penalty in the salary sacrifice agreement. If so and it is the employee's choice to leave then the penalty, however big, will not reduce NMW pay.

The severe penalties involved mean every employer should check and take advice.



For further information  
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**Your business is our business**