

# ENFORCING THE NATIONAL MINIMUM WAGE

## A PRACTICAL GUIDE





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# INTRODUCTION

## HELPING WORKERS GET THE NATIONAL MINIMUM WAGE

This guide is for advisers and union representatives helping low-paid workers secure their national minimum wage (NMW) rights. For more information please see the resources list at the end of this guide.

Effective enforcement is essential so that all workers who are entitled to the NMW actually receive it. Many of those who are not receiving the NMW will not be in a trade union, so unions have an opportunity to recruit new members while helping workers to secure their rights.

Most workers are entitled to the NMW, but there are a few exemptions. This introductory section of the guide examines who is covered.

## WHO IS COVERED?

The vast majority of workers and employees are entitled to the NMW. A worker does not need a written or oral contract of employment to qualify for it. Home workers, agency workers, domestic workers, piece and commission workers, part-time workers, those working for small firms and even some people who are self-employed for tax purposes may all be entitled to the NMW. There is no qualifying period; workers are entitled to it from the start of their employment.

## WHO IS EXEMPT?

### **The following groups are not entitled to the NMW:**

- family members, including those working for a family business, if they live in the employer's home
- people working and living within their employer's family home, who are provided with meals and who share in the tasks and leisure activities of the household (e.g. au pairs)
- friends and neighbours helping each other out informally
- some trainees on government-funded schemes
- some students in higher education on work placements lasting up to one year
- the armed forces, prisoners and share fishermen
- some mariners and offshore workers
- voluntary workers (who work for a charity, voluntary organisation, associated fundraising body or statutory body and who do not receive any payments other than reimbursement of reasonable expenses and no benefits in kind except subsistence and accommodation reasonable in the circumstances of the employment)
- genuinely self-employed people – being treated as self-employed by HM Revenue and Customs (HMRC) for tax and national insurance purposes does not mean someone is necessarily treated as self-employed under the NMW legislation
- company directors, unless they also do work under an employment contract with their company.

If in doubt about exemptions, contact the Pay and Work Rights helpline on **0300 123 1100**.

**The hourly rates are currently:**

<b>Workers aged 25 and over</b>	<b>£7.50</b>
<b>21 to 24-year-olds</b>	<b>£7.05</b>
<b>18 to 20-year-olds</b>	<b>£5.60</b>
<b>16 and 17-year-olds</b>	<b>£4.05</b>
<b>Apprentices</b>	<b>£3.50</b>

The rates will increase in April.

Young people must be above the compulsory school leaving age to qualify for the national minimum wage.

The apprentice rate applies only to those aged 19 or under, plus older apprentices in the first year of their course. Other apprentices are entitled to the aged-based rate.

Agricultural workers are covered by the NMW in England, but separate agricultural minimum wages apply in the other UK nations.

Employers who provide their employees with accommodation free of charge can count an additional amount (the 'accommodation offset') towards national minimum wage pay. The maximum amount of the accommodation offset is currently £42 per week or £6 per day. If the employer charges the worker for accommodation they must not leave the employer with less than the NMW minus the accommodation offset.

Commission-only workers such as door-to-door salespeople and manufacturing homeworkers may be paid in a slightly different way, using a piece-rate system. Phone the helpline for advice.

## HOW TO CALCULATE THE NMW

Having established that a worker qualifies for the NMW and the rate at which they should be paid, you should work out whether the worker is, or was, paid the NMW. The NMW is an average hourly rate of pay, which must be averaged over the worker's pay reference period. There are rules governing what the pay reference period is, what counts as NMW pay and what hours the NMW must be paid for, and these rules vary according to the type of work being performed. These issues need to be explored when working out whether the worker is being paid the right amount. For further guidance, see:

- the government's guide to the national minimum wage at: [gov.uk/government/uploads/system/uploads/attachment\\_data/file/555400/beis-16-30-calculating-minimum-wage.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555400/beis-16-30-calculating-minimum-wage.pdf)
- the **Pay and Work Rights helpline** on **0300 123 1100**.
- the TUC's national minimum wage calculator at: [worksmart.org.uk/tools/minimum-wage-calculator](https://www.worksmart.org.uk/tools/minimum-wage-calculator)







# **SECTION ONE**

## A WORKER'S NMW RIGHTS

### **THE NMW RIGHTS IN BRIEF**

The vast majority of workers aged 16 and over qualify for the NMW. This gives them the following rights:

- to be paid at least the NMW for each hour worked
- to see their pay records (accompanied if they wish)
- not to be dismissed or suffer detriment for a reason connected with the NMW.

This section explains these rights in more detail.

## **THE RIGHT TO BE PAID THE NMW**

All workers who qualify for the NMW are entitled to be paid at least the NMW, whether or not this right is stated in a written or verbal contract.

## **THE RIGHT OF ACCESS TO RECORDS**

Employers must keep sufficient records that show that the NMW is being paid. Workers who suspect that they are not receiving the NMW have the right to see and copy their pay records. The request must be made in writing (a 'production notice').

Workers have the right to be accompanied to see their records. They may wish to take a staff representative, a union officer, an adviser or a colleague with them. If they wish to be accompanied, this must be stated in their request to see the records.

The employer must produce the records at the workplace or another agreed place within 14 days or a later time if this is agreed with the worker. The worker must be given reasonable notice of the time and place.



## **THE RIGHT TO PROTECTION AGAINST DETRIMENT AND DISMISSAL**

All workers have the right not to suffer detriment or dismissal for a reason connected with the NMW.

A “reason connected with the NMW” is either that the worker tried to assert their right to the NMW, or the employer had legal action taken against them under the NMW Act as a result of action taken by the worker, or the worker qualifies, or will qualify, or believes that they qualify for the NMW.

It is automatically unfair to dismiss an employee for a reason connected with the NMW. Note that this does not apply to workers who are not employees, such as agency workers (seek further advice in such cases).

However, the right not to suffer detriment for a reason connected with the NMW does apply to workers as well as employees and can be relied upon when the detriment is dismissal. The compensation available to workers who are dismissed for a reason connected with the NMW is the same as that available for employees making claims of unfair dismissal.

‘Detriment’ basically means something that the employer has done or not done which has caused damage or disadvantage to a worker. Examples of detriment could include harassment, missing out on a pay rise awarded to other staff, changes to a worker’s terms of employment and dismissal.

Detrimental changes to terms of employment might include:

- reducing pay rates, working hours or holiday entitlement
- changing general duties, resulting in demotion
- reducing or removing benefits such as clothing or site allowances, or consolidating them with basic pay (if this has not been negotiated as part of a wage settlement).



# SECTION TWO

## HOW CAN NMW RIGHTS BE ENFORCED?

A worker may seek advice from you (the rep or adviser) for any of the following reasons:

- non-payment or suspected non-payment of the NMW
- the employer's refusal or failure to show pay records
- detrimental action by the employer for a reason relating to the NMW
- dismissal for a reason relating to the NMW
- breach of contract relating to the NMW.

There are a number of steps you can take to help the worker claim their NMW rights. It will be important at the outset to find out as much information about the worker's claim as you can.

## CHECKLIST – INFORMATION TO SEEK FROM WORKERS

There are a number of questions it will be useful to ask the worker at the outset to help establish the nature of the case.

### **a) In all cases**

- Is the worker in a trade union? If so, have they approached the union for assistance?
- Does the worker have any payslips? If so, are the hours worked and pay rates recorded accurately on the payslips? If not, has the worker kept their own records?

### **To check whether the worker qualifies for the NMW, and at what rate, ask:**

- How old is the worker?
- Does the worker fall into any of the groups not entitled to the NMW listed in the introductory section?
- Does their employer provide the worker with accommodation and is there any charge for that accommodation?
- Is the worker an apprentice?

### **b) Where the worker is still employed and is (or was) not receiving the NMW**

- Has the worker raised the issue with the employer? If so, what was the response?
- Are any of the worker's colleagues not receiving the NMW?
- If the worker is now receiving the NMW but was not receiving it at an earlier date, when was the last under-payment? If less than three months ago, it will be possible to make their own claim to an employment tribunal, but this costs at least £160.

It is often more attractive for workers and their advisors to ask HMRC to investigate their complaint.

If the last underpayment was more than three months ago action can still be taken via HMRC or through the county courts.



**c) Where the worker has left or been dismissed after not receiving the NMW**

- What were the circumstances of the dismissal? Did it follow the worker raising the issue of NMW payment with the employer?
- How long ago did the worker leave the job? If it is less than three months ago, it will still be possible to make a claim to an employment tribunal but meeting the deadline is vital (See 'making a claim to an employment tribunal' on page 22). If it was more than three months ago action can still be taken through HMRC or the county court to recover any underpayments of the NMW.

**d) Where the employer has failed or refused to give access to the worker's pay records**

- How long ago did the worker ask to see the records?
- Did they put the request in writing?

**e) Where the worker has had their hours reduced or allowances consolidated**

- When did the change take place?
- Was this part of an agreement negotiated with a trade union?
- Did the worker object to the change when it happened?

## **CONTACT THE EMPLOYER**

The worker may already have raised the issue of the NMW with the employer with no result. The worker may want you to raise it with the employer on their behalf. If there is a grievance procedure, you should consider with the worker the possibility of using it (note that workers have the right to be accompanied at grievance and disciplinary hearings by a workplace colleague, a trade union official or trade union representative). Before taking any action on behalf of the worker, it will be useful to establish whether there are others in the same workplace also not receiving the NMW. In many cases, an approach by an adviser or a trade union representative may be enough to prompt the employer to start complying with the law.

## CONTACT HMRC

If contacting the employer directly does not work, or if the worker is reluctant to raise the issue with their employer due to the fear of victimisation or discrimination, the next step should be to decide whether to take their own case to tribunal or, more commonly, whether to ask HMRC to investigate using the helpline. HMRC actively enforces payment of the NMW. One of HMRC's NMW compliance teams will follow up individual complaints.

### **The Pay and Work Rights helpline**

Telephone: **0300 123 1100**

Monday, Wednesday and Thursday, 8am–8pm

Tuesday and Friday, 8am–6pm

Online complaint form: **[gov.uk/government/publications/pay-and-work-rights-complaints-individuals](https://www.gov.uk/government/publications/pay-and-work-rights-complaints-individuals)**

## WHAT DO THE HMRC COMPLIANCE OFFICERS DO?

Once the helpline has received a complaint they pass it on to the NMW Central Information Unit who allocate it to the compliance team that covers the area where the employer is based. The Central Information Unit collects information about, and considers cases of, NMW non-payment. Their information comes from different sources:

- complaints made direct by workers or ex-workers, via the helpline, online or in writing
- complaints made by third parties: trade unions, advisers, workers' relatives and friends etc. – many of these will be complaints made on behalf of a particular worker.

Compliance teams also check employers identified as being at risk of not paying the minimum wage.

Whether initiated by a complaint or through risk assessment, compliance officers may look across the whole workforce to identify any workers who have not been paid the minimum wage.

NMW compliance officers follow up all the complaints they receive. They do not divulge to employers that their call or visit is as a result of a complaint. In a typical investigation, the employer and workers will be interviewed and records examined. Compliance officers will take steps to ensure that the NMW is paid (including any back-pay).

The advantages of using HMRC are:

- An approach by HMRC may be enough to persuade employers to comply and any NMW arrears will be enforced for workers.
- Compliance officers have special powers to seek information and enforce compliance.
- They can follow up complaints without giving the name of the worker who has complained about possible non-payment of the minimum wage, thus protecting anonymity.
- There is no cost to the worker.
- As well as recovering arrears for the worker, HMRC charges employers a civil penalty of up to £20,000 per underpaid worker. In addition, many employers are also named and shamed.

Compliance officers will act to recover underpayments for former workers if they had not been receiving the NMW and can use formal powers against the employer in relation to workers who have left.

Workers who have suffered detriment or dismissal as a result of the NMW (e.g. had their hours reduced or been victimised or dismissed as a result of raising the NMW) need to take their claims to an employment tribunal or the civil courts (see below for more information).



## **BEFORE CONTACTING THE NMW HELPLINE**

It is important to discuss with the worker all the possible consequences of taking this action. A worker whose employer believes that they have reported them to HMRC may be vulnerable to adverse treatment or even dismissal by the employer.

Workers are protected by law against detriment or dismissal resulting from their attempts to be paid the NMW, and unions and advisers (but not HMRC) can help them to take a case to an employment tribunal on these grounds if necessary. It is worth noting that a successful case against dismissal is likely to lead to financial compensation rather than reinstatement. A worker who fears adverse treatment by their employer as a result of action being taken should make this clear to the compliance officers, and ask that their name is not released to the employer. Some workers may prefer to have the support of other workers before making a complaint.

## **DOES THE WORKER WANT TO BE NAMED?**

A worker can request that the compliance officers do not release their name to the employer, and this request will be respected.

But if a claim against the employer at a tribunal is necessary, then for the case to proceed the worker's name must be given and they could be asked to act as a witness.

You can also make anonymous complaints to the helpline on behalf of a worker who has asked to remain unidentified. Compliance officers will investigate the case, but if there is no named worker to report back to, you and the worker will not receive any further information about the case.



## WHO SHOULD CONTACT THE HELPLINE?

It can be good for workers to contact the NMW helpline themselves, so that details are received first-hand, if the worker is happy to do this with your support.

## THE ROLE OF THE ADVISER/UNION REPRESENTATIVE

Some workers will prefer you to contact the helpline on their behalf and the Helpline staff are happy to take complaints made by third parties on behalf of workers.

HMRC is able to feed-back information to you as the worker's agent, providing that the worker gives HMRC written authority to do so.

A sample authorisation form is set out below. It is important to name yourself as the individual whom the compliance officers are authorised to contact, and not just your organisation. It should also give the nature of the information to be disclosed. The form should be given to the compliance officer dealing with the case.

**I [insert name and address of worker] authorize the HM Revenue and Customs to inform [insert name of adviser/union representative] at [insert name and address of your organisation/union] when I am given information about my case against my employer [insert name and address of employer] for non-payment of the NMW.**

## CHECKLIST OF INFORMATION REQUIRED FOR MAKING A COMPLAINT

- the worker's name, address and telephone number (can be omitted for anonymous complaints, but see limitations above)
- the worker's age
- the employer's name, address and telephone number
- how the worker is paid (e.g. by the hour, piece-work, annual salary)
- rate of pay
- pay reference period (e.g. paid weekly, monthly or in some other way)
- hours of work
- breaks and whether these are paid
- whether the worker is an apprentice
- whether the worker has been provided with accommodation by the employer and whether there are any charges for this
- whether the employer is making any deductions or taking any payments from the worker (e.g. for uniforms, tools, transport or meals)
- whether the worker is still not receiving the NMW
- when the employer raised wages to the NMW rate if the worker is now receiving the NMW
- date of leaving if the worker has left that employment.

## **WHAT HAPPENS ONCE THE COMPLAINT HAS BEEN MADE?**

The main steps are set out below:

- A simple information query will be dealt with immediately. However for complaints, the details will be entered on a computer and a reference number will be assigned to the case.
- The helpline will pass the complaint to the NMW Central Information Unit for allocation to a compliance team. Once a compliance officer in a team has received the complaint, they will write to the worker confirming that they are now dealing with the complaint and giving them a contact and telephone number. They will also write to the adviser/union representative if this has been authorised by the worker (see above).
- In some cases, if it emerges that the worker or their representative has misunderstood their position, the compliance officer may deal with the complaint without contacting the employer.
- In most cases, the compliance officer will make contact with the employer within 30 days of receiving the complaint and arrange to visit the employer.
- In the meantime, the compliance officer may try to find out more information from the worker or from their adviser/union representative where they believe that this will further the investigation.
- Once the compliance officer has visited the employer, their next steps will depend on what they have found out during their visit.

## **NEXT STEPS FOR COMPLIANCE OFFICERS**

In many cases, a visit from a compliance officer will be enough to persuade an employer to comply and start paying the NMW (and to pay any arrears owed). If not, compliance officers have various enforcement powers that they can use. Clearly, they will not use these unless they believe that the employer is not paying the NMW or is not supplying the information they need to assess whether the NMW is being paid.

Firstly, compliance officers have the legal right to see the relevant records, have them explained and remove them to make copies. They can also ask to speak to relevant staff (e.g. payroll staff). They have the right to enter the employer's premises to get this information.

If the compliance officer finds that an employer is not paying the NMW, they can serve a 'notice of underpayment' requiring the employer to pay the worker the NMW up to the date of the notice and to pay the NMW in the future. Compliance officers make an estimation of the amount owed, with arrears calculated at the current NMW rates. A notice can apply to more than one worker. An employer can appeal to an employment tribunal within four weeks from the date of the notice.

If the employer still refuses to comply, the compliance officer can make a claim to an employment tribunal or recover the debt via a county court on the worker's behalf.

HMRC also impose a civil penalty on most employers caught underpaying. This matches the amount owed, with a minimum of £100 and a maximum of £20,000 per underpaid worker. Civil penalties are halved for speedy payment.

Most underpaying employers are also publicly named and shamed, subject to their owing a minimum of £100.

In the worst cases, HMRC can also prosecute the employer. Willful refusal to pay the NMW and failure to keep NMW records are criminal offences liable for a fine of up to £5,000.

## **WHAT INFORMATION WILL YOU AND THE WORKER BE GIVEN WHILE A COMPLAINT IS BEING PROCESSED?**

The compliance officer will inform the worker of what action they are taking and what stage the process has reached. They will discuss further action, particularly the possibility of taking a claim to an employment tribunal with the worker. If the worker has requested it and given authorisation, the compliance officer will contact you at the same time as they contact the worker.

## **MAKING A CLAIM TO AN EMPLOYMENT TRIBUNAL**

It is not possible to make an anonymous claim against an employer in an employment tribunal; it will be necessary for the worker to be named.





## **WHO SHOULD MAKE THE CLAIM?**

HMRC compliance officers have the resources and experience to make claims of NMW non-payment in respect of a worker or workers. Compliance officers have taken a large number of cases to an employment tribunal and have an excellent success rate.

However, HMRC only has powers to take cases of NMW non-payment. It cannot take cases of detriment, dismissal or refusal of workers requests for access to records. If a case involves these problems as well rather than NMW non-payment, it will be necessary for the worker to make the claim supported by their union representative or adviser.

### **Claims can be presented to an employment tribunal on one (or more) of four grounds:**

#### **1. Non-payment of the NMW**

If the tribunal finds against the employer, it will order the employer to pay to the worker(s) the money owed.

#### **2. Refusal of access to records**

A worker can make a claim to a tribunal if their employer fails to give the worker access to pay records. If the tribunal finds against the employer, it can order the employer to pay the worker a sum of 80 times the hourly adult NMW rate.

#### **3. Detriment or dismissal**

If the worker believes that the action (or inaction) which caused the detriment or dismissal was for a reason connected with the NMW, they may make a complaint to an employment tribunal.

#### **4. Unfair dismissal**

Employees (but not other workers) can make claims of 'unfair dismissal' against their employer. Dismissal of an employee as a result of eligibility for or requests to be paid the NMW is automatically unfair.

**In all cases:**

- Workers have the right to claim their rights to the NMW from day one of employment and those rights exist regardless of hours worked or the size of the company/organisation.
- The time limit for making a complaint to an employment tribunal is three months from the date of the infringement, whether this be underpayment (in which case the limit runs from the date of the latest underpayment); failure to produce records; detriment (in which case the limit runs from the incident) or dismissal.
- The burden of proof in all cases of underpayment (but not unfair dismissal) is on the employer. This means that so long as the worker's claim is made in good faith, the employer must prove that the worker was not entitled to the NMW, or was receiving the NMW or was dismissed for a reason not connected with the NMW.



## **USING THE CIVIL COURTS**

The main reason for using the civil courts rather than the employment tribunal to enforce NMW rights is if the three-month time limit for employment tribunal claims has been exceeded. It is possible to use the civil courts to enforce NMW rights because NMW rights are implied terms in contracts of employment. The time limit for claims in civil courts is six years from the date of the breach of contract (five in Scotland).

## **SUPPLYING LOCAL LABOUR MARKET INFORMATION TO THE ENFORCEMENT AGENCY**

Union representatives and advisers are in a good position to know or suspect that a particular employer is not paying the NMW. You can feed this information to the NMW Helpline in exactly the same way as making a complaint on behalf of a worker. It will be treated as an anonymous complaint, and the compliance officers will follow up the case with the employer according to the same steps laid out above. You will not get feedback on the case, although you can ask for the case reference number, which will enable you to feed in to the investigation any further information that you obtain. Last year (2015/16) HMRC recovered £10.3m for underpaid workers.



# RESOURCES

## GOV.UK

Basic information on the NMW:

**[gov.uk/national-minimum-wage-rates](https://www.gov.uk/national-minimum-wage-rates)**

## BEIS (DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY)

Calculating the NMW, 2016, 53 pages:

**[gov.uk/government/uploads/system/uploads/attachment\\_data/file/555400/beis-16-30-calculating-minimum-wage.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555400/beis-16-30-calculating-minimum-wage.pdf)**

Policy on HMRC enforcement, prosecutions and naming employers who break NMW law, 2016, 22 pages:

**[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539577/bis-16-373-enforcement-policy-document-national-minimum-wage.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539577/bis-16-373-enforcement-policy-document-national-minimum-wage.pdf)**

## TRADES UNION CONGRESS


The TUC's workSMART website gives advice about the minimum wage and pay in general:

**[worksmart.org.uk/pension-advice/pay/minimum-wage](https://www.worksmart.org.uk/pension-advice/pay/minimum-wage)**

TUC online minimum wage calculator:

**[worksmart.org.uk/tools/minimum-wage-calculator](https://www.worksmart.org.uk/tools/minimum-wage-calculator)**





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