



HM Revenue
& Customs

National Minimum Wage Social Care Compliance Scheme

A guide to approaching your self-
review
and calculating pay
arrears

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Section 1

About this guide and how to use it

This guide is for employers in the social care sector who have been accepted into the Social Care Compliance Scheme. It is designed to help employers as they conduct their own National Minimum Wage self-review and calculate any arrears of pay that may be due.

For ease of reference, the term National Minimum Wage (NMW) is used to cover both National Minimum Wage and National Living Wage (NLW).

Social care is defined as all forms of personal care and other practical assistance provided for individuals who because of their age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstances, are in need of care or other assistance.

This guide is designed to be used digitally as there are hyperlinks that will take you to further guidance.

Section 2

How to approach your NMW self-review

Your approach will depend on:

- the different contracts or arrangements in place for these workers
- the number of current and former workers affected by sleep-in shifts

2a. Identify those workers at risk of underpayment

NMW legislation does not differentiate between current and former workers, it does not provide any circumstances where former workers should be treated differently to current workers.

By law, you must keep sufficient records to show that you pay your workers at least the minimum wage. You must keep those records for a minimum of three years after the end of the pay reference period following the one that the records cover. Therefore you should identify all workers at risk of being underpaid in the last 3 years. You should extend your review up to 6 years if you find that workers were underpaid in earlier years.

2b Court of Appeal Judgement – Royal Mencap Society v Tomlinson-Blake

On 13 July 2018 the Court of Appeal published its judgment in the Royal Mencap Society v Tomlinson-Blake appeal case. The court allowed Mencap's appeal and, in effect, set aside a number of Employment Appeal Tribunal judgments relating to the consideration of sleeping time.

As a consequence of the change in case-law, the way employers should now consider the sleeping elements of a worker's arrangement is different.

The Court of Appeal identified that the key issue to consider is whether a worker is "available for work" rather than actually working. The position is different depending on whether the worker is:

- a. expected to sleep for all or most of the shift; or
- b. expected to work for most of the shift.

A worker who is expected to work for most of their shift, but is permitted to sleep between activities, is likely to be working rather than “available for work” whilst asleep.

A worker who is required to stay at or near their workplace on the basis that they are expected to sleep for most or all of their shift is likely to be “available for work” for periods during which they are expected to sleep.

In effect, any time a worker is not working but is:

1. “available for work”; and
2. making use of suitable sleeping facilities

is not time they are actually working for NMW purposes unless they are awake for the purpose of working. This means that a worker will not be working when they are expected to sleep and have suitable sleeping facilities available.

In all cases, it is important to consider what happens in practice. Please find below examples that you may wish to take into consideration when conducting your review:

Example 1

Where an employer requires a worker to be awake for the purposes of working, this time is working time for NMW purposes. This could be, for instance, to conduct a handover, provide scheduled assistance to a service user or client.

Susan is engaged on a sleep-in shift between the hours of 10pm-8am and is provided with suitable sleeping facilities.

From 10pm to 10:30pm, her employer requires her to conduct a handover to a staff member who is conducting a waking night shift.

From 7am to 8am, Susan is required to assist the waking night worker to administer medication to the service user.

At all other times, Susan is expected to sleep using the provided facilities.

The 30 minute handover time and 1 hour taken to administer medication are both working time for NMW purposes.

Between the hours of 10:30pm and 7am she is not actually working for NMW purposes unless she is awake for the purpose of working as she is expected to sleep.

Example 2

Where a worker is awake for the purposes of working, this time is working time for NMW purposes. This could be, for instance, to perform duties if disturbed whilst engaged on a sleep-in shift.

Gary is generally expected to sleep between the hours of 10pm-8am and is provided with suitable sleeping facilities.

At 2am, Gary is disturbed by the service user who requires assistance. Gary provides support for 30 minutes and returns to bed at 2:30am.

At 6am, Gary is disturbed for a second time with support lasting 30 minutes. Gary returns to bed at 6:30am.

Gary was awake for the purposes of working for a total of 1 hour so is entitled to NMW for this time.

Example 3

Where a worker is regularly disturbed and required to be awake for most or all of their shift, but is permitted to sleep when there are no tasks to be performed, it is likely that all of this shift is working time.

Sally's shift lasts between the hours of 10pm-8am and she is provided with suitable sleeping facilities to use when she is not busy. A typical shift for Sally is as follows.

At 11pm, Sally is disturbed by the service user who requires assistance. Sally provides support for 1 hour and returns to bed at 12am.

At 12:45, Sally is disturbed by the service user who requires assistance. Sally provides support for 15 minutes and returns to bed at 1am.

At 1:45am, Sally is disturbed by the service user who requires assistance. Sally provides support for 15 minutes and returns to bed at 2am.

At 3am, Sally is disturbed by the service user who requires assistance. Sally provides support for 20 minutes and returns to bed at 3:20am.

At 4:30am, Sally is disturbed by the service user who requires assistance. Sally provides support for 30 minutes and returns to bed at 5am.

At 5:25am, Sally is disturbed by the service user who requires assistance. Sally provides support for 5 minutes and returns to bed at 5:30am.

At 6am, Sally is disturbed by the service user who requires assistance. Sally provides support for 1 hour and returns to bed at 7am.

In this example, the employer would have to consider whether in practice, it is reasonable for the worker to be expected to sleep throughout the shift.

If the worker cannot be expected to sleep during all or most of a shift but merely permitted to sleep occasionally, it is likely that all of the shift will be working time for NMW purposes.

2c. Has there been any underpayment of NMW for time when workers are awake for the purposes of working?

You need to determine whether workers have been paid for all their working time in each pay reference period at or above National Minimum Wage. If you have paid less than the National Minimum Wage then you need to calculate the amount of underpayment for each worker.

If you find that there has been no underpayment of NMW after including the time spent awake for the purposes of working during sleep-in shifts in your calculation of working time, then this is the end of the review process. However you are still required to tell us the outcome of your review by completing and submitting a declaration form stating that no pay arrears have been identified – see **Step 2f**

2d. Has there been any other underpayment of NMW?

You should take this opportunity to assess if there has been any underpayment of NMW other than for sleep-in shifts. Section 3 (below) gives details of some of the most common minimum wage errors in the social care sector. If you do find other errors, you must include these in your review and ensure that they are part of your calculations - please see Section 3 (below) for further help

2e. Applying the correct rates and calculating pay arrears

If you did not pay a worker the correct minimum wage rate when they were entitled to it, they are entitled to have any arrears repaid.

The Government increases the NMW rates every year in April. Arrears are calculated according to a formula using current minimum wage rates. This means that you will have to pay arrears for previous years at today's rates. To do this you need to apply the following calculation (A/B) x C where:

A = the amount of underpayment identified

B = the rate of the National Living Wage or National Minimum Wage at the time

C = the current rate of National Living Wage or National Minimum Wage

Current and previous National Minimum Wage rates can be found at:

www.gov.uk/national-minimum-wage-rates

For example Joe, aged 27, had been a worker at employer X for a total of 58 weeks (41 weeks at the 2016/17 National Living Wage rate plus a further 17 weeks at the 2017/18 NLW) before an employer self-review identified that there had been underpayments. He was entitled to the 2016/17 NLW rate which was £7.20, and £7.50 for 2017/18 but he was only paid an equivalent of £6.90 an hour.

Joe is paid weekly and works 40 hours a week.

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| <p>How the underpayment is calculated:</p> <p>2016/17 underpayment In each PRP Joe was paid - 40 hrs work @ £6.90/hr = £276.00 Joe should have been paid – 40 hrs work @ £7.20/hr = £288.00 Joe was underpaid - £12.00 in each PRP Joe was underpaid this way for 41 PRPs x £12.00 = £492.00 Because the NLW rate has changed it must be uplifted to the current NLW rate, so: $£492.00 \times £7.50/£7.20 = \mathbf{£512.50}$</p> <p>2017/18 underpayment In each PRP Joe was paid - 40 hrs work @ £6.90/hr = £276.00 Joe should have been paid – 40 hrs work @ £7.50/hr = £300.00 Joe was underpaid - £24.00 in each PRP Joe was underpaid this way for 17 PRPs x £24.00 = £408.00 The NLW rate has not changed, so: $£408.00 \times £7.50/£7.50 = \mathbf{£408.00}$</p> <p>Total underpayment $£512.50 + £408 = \mathbf{£920.50}$</p> | <p>The National Living Wage rate for 2016/17 was £7.20</p> <p>The National Living Wage rate for 2017/18 is £7.50</p> |
|--|--|

Pay reference periods are usually set by how often someone is paid - for example weekly or monthly. A pay reference period cannot be longer than 31 days. A worker must be paid the minimum wage for the time worked in each pay reference period.

Further help and support on how to carry out these calculations is available via the helpline on 0300 123 4494.

2f. Returning your declaration form

On completion of your self-review, you need to complete the declaration form in full and send it to HMRC by no later than:

- 12 months of your application to the SCCS or
- 31 December 2018,

whichever is sooner.

You should complete the declaration form on the following basis

- If you find there has been no underpayment, complete the form and declare NIL

- ▮ If you find there have been underpayments you need to show the total arrears of pay for sleep-in shifts and other types of NMW underpayment separately in the different boxes provided on the form
- ▮ You must pay your workers for any of those other types of NMW underpayments you discover **before** you return your declaration form
- ▮ You must pay your workers any underpayment for sleep-in shifts within 3 months of returning your declaration or by 31 March 2019, whichever is sooner
- ▮ You must confirm that all your workers will be paid at least the NMW or NLW from the date of your declaration
- ▮ Please refer to Section 4 for sending tax and national insurance contributions to HMRC
- ▮ You must keep records to demonstrate how you have arrived at your decision including Nil declarations and how you calculated what you owe to workers. Please see Section 6 for further help
- ▮ When you are ready to return the completed declaration form, please contact us at compliancescheme.nmwsocialcare@hmrc.gsi.gov.uk and we will send you special instructions telling you how to send in your declaration form (and possible attachments) to HMRC
- ▮ HMRC will carry out assurance checks on all declaration forms. If we discover discrepancies we will contact you to request additional information

In exceptional cases HMRC may shorten the timescales set out above, in which case you will be informed in writing of the revised deadlines.

Section 3

Other types of NMW errors in the social care sector that can lead to underpayments

- 3a. Status - Use the **NMW Worker Checklist** and the Calculating the National Minimum Wage guide if an individual should be classed as a 'worker' and therefore entitled to NMW. Incorrectly classifying the wrong type of work or treating workers as volunteers, interns or self-employed can lead to underpayments of NMW.
- 3b. Type of work – There are 4 different types of work for NMW purposes, Salaried, Time, Output and Unmeasured each with their own set of rules for the calculation of working time. The hours you must pay a worker the minimum wage for depends on the type of work they perform. A common error employers make in applying NMW law is mis-categorising the type of work being performed. When considering the type of work, it is necessary to consider the arrangement in full. For example, where a worker is mainly paid per hour but with some flat rate or bonus additions, it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement.

- 3c. Unpaid working time – A failure to include time spent travelling for the purposes of the job, for example the time spent travelling between clients' homes, waiting time and time spent gaining access to those homes. Time spent training might also be an issue.
- 3d. Handover time – A failure to include time spent attending handovers either at the start or at the end of a shift. For example where a worker has to be at work before their shift starts to discuss any issues or concerns during the previous shift.
- 3e. Disturbances – A failure to pay a worker for time they spend awake and working during a sleep-in shift. For example when workers are woken and have to respond to a resident's needs or if a worker has to administer medication.
- 3f. Deductions - that take a worker's pay below NMW/NLW rates – for items connected with the job, for example DBS administration fees, uniforms, tools, safety clothing or training. Any deductions made by the employer for his own use and benefit including for the cost of meals provided, provision of transport or administrative costs that reduce pay below NMW rates.
- 3g. Underpaying workers - typically as a result of a failure to implement annual rate increases correctly, missed birthdays as workers move from one age band to another or errors in applying the apprentice rates.
- 3h. Including certain payments or premium payments when calculating a worker's pay for NMW purposes – for example care should be taken with shift allowances, higher rates for weekend or evening work which might not count towards the calculation of NMW pay dependent on worker type.
- 3i. Accommodation provided by you to the worker is the only benefit in kind that can count towards a worker's minimum wage pay. You may deduct rent from the worker's pay, charge a specific amount once the worker has received their pay, or provide accommodation on an uncharged basis as part of a package. In all these cases, the rules allow a notional daily amount called the accommodation offset to count towards NMW. If you charge more than the amount of the accommodation offset, the amount of the charge over and above the level of the offset will reduce the worker's pay for minimum wage purposes. Deductions or charges related to the accommodation, for example for heating and lighting may also reduce NMW pay.

Further information can be found at: Calculating the National Minimum

Wage [www.gov.uk/government/publications/calculating-the-minimum-](http://www.gov.uk/government/publications/calculating-the-minimum-wage)

[wage](http://www.gov.uk/government/publications/calculating-the-minimum-wage) Summary of National Minimum Wage and accommodation rates

www.gov.uk/national-minimum-wage-accommodation/rates

Guidance on whether a person is a worker

www.gov.uk/employment-status/worker

Guidance on who is and is not entitled to the minimum wage

The National Minimum Wage and Living Wage: Who gets the minimum wage - GOV.UK

The current minimum wage rates

www.gov.uk/national-minimum-wage-rates

Workers

NMW Worker Checklist

Section 4

a. Guidance for dealing with former workers

A qualifying worker who is paid less than the minimum wage for any pay reference period is legally entitled to be paid arrears by his employer, regardless of whether he is a current or former employee. You must make every effort to contact all of your former workers to inform them of any arrears owed before you make the declaration to HMRC under the Social Care Compliance Scheme.

Note - If any of the arrears that you have identified are for other types of NMW underpayments you must pay the arrears **before** you return your declaration form. If you need additional advice on this please call the helpline.

b. PAYE

When you pay the arrears to your workers you must make deductions for PAYE. We will send you more information to help you get this right.

Section 5

What are the next steps?

- ▢ You can call the helpline on 0300 123 4494 if you require any assistance with your self-review
- ▢ HMRC will contact you again during the self-review period to make sure that you are progressing and able to make your declaration on time. HMRC may remove an employer from the scheme if it considers that insufficient progress is being made or a deadline is missed
- ▢ When HMRC receive your declaration form we will carry out assurance checks. We may contact you to ask for additional information
- ▢ If your declaration is accepted, HMRC will issue you with a letter confirming this
- ▢ HMRC will be contacting your workers to confirm that they have been paid the correct amount. We will also undertake checks on nil declarations, so it is important that you keep documentary evidence to support your review for 3 years after sending your declaration, regardless of whether arrears have been identified or not
- ▢ Any arrears to be paid at a later date will also be subject to further checks by HMRC at the appropriate time

Section 6

Additional Records you will need to keep – HMRC may ask you for these records as part of the assurance process

Besides your normal pay records etc. the following documents are examples of what an employer would be expected to produce as evidence that a thorough review has taken place:

- A letter summarising the review and the results
- Copies of calculations of arrears
- Copies of explanations given to workers to explain the additional pay
- Copies of payslips showing payment of arrears
- Copies of bank account statements showing payments
- Contact details for workers who have been paid arrears

Section 7

Additional support available

HMRC's dedicated helpline for Social Care Compliance Scheme is available on telephone **0300 123 4494**, Monday to Friday 8.00am to 4.00pm or alternatively contact us by email on **compliancescheme.nmwsocialcare@hmrc.gsi.gov.uk**

HMRC support will include:

Sign-posting to:

- The National Minimum Wage Act 1998
- The National Minimum Wage Regulations 2015
- 'Calculating the minimum wage' This guide produced by the Department for Business, Energy & Industrial Strategy provides practical advice and examples to explain National Minimum Wage eligibility, how to calculate the minimum wage and what does or does not count as pay for minimum wage purposes:
www.gov.uk/government/publications/calculating-the-minimum-wage
- ▢ Advice to employers about the Social Care Compliance Scheme and the administrative process for joining the scheme and making a declaration to HMRC
- ▢ Sign-posting employers to Social Care Compliance Scheme guidance:
 - The Social Care Compliance Scheme Employer Guide
 - The Social Care Compliance Scheme flow chart, including advice on how to use this as part of a review
 - Social Care Compliance Scheme frequently asked questions
- ▢ Sign-posting employers to simple educational tools such as:
 - HMRC National Minimum Wage eLearning: **HMRC Course: Paying your workers the minimum wage**
 - Recorded versions of the HMRC 'Cutting your risk' series of National Minimum Wage Webinars: **www.gov.uk/government/news/webinars-emails-and-videos-on-employing-people**

- ▮ Providing advice to employers on the type of questions that they should be asking themselves in regard to their working arrangements, in order to ensure that NMW risks have been fully considered

HMRC cannot:

- ▮ Provide advice or comment on an employer's specific contractual arrangements
- ▮ Endorse, or give assurance or make comment on an employer's arrears calculations prior to a declaration being made
- ▮ Provide an opinion of or assurance on the view formed by an employer

Appendix 1 Corresponding with HMRC by email

HMRC takes the security of personal information very seriously.

About the risks

The main risks associated with using email that concern HMRC are:

- confidentiality/privacy - there is a risk that emails sent over the internet may be intercepted
- confirming your identity - it is crucial that we only communicate with established contacts at their correct email addresses
- there is no guarantee that an email received over an insecure network, like the internet, has not been altered during transit
- attachments could contain a virus or malicious code

How we can reduce the risks

We will desensitise information, for example by only quoting part of any unique reference numbers. We can also use encryption. We are happy to discuss how you may do the same but still provide the information we need.

If you don't want to use email

You may prefer that we don't respond to your enquiry by email, for example because other people have access to your email account. If so, we are happy to respond by an alternative method. We will agree this with you either by telephone, fax or in writing via post.

If you do want to use email

If you would like HMRC to respond to your query by email, we will need you to confirm in writing by post, email or fax:

- that you understand and accept the risks of using email
- that you are content for financial information to be sent by email
- that attachments can be used

Contacting you direct

If you would like us to contact you direct, we will need you to confirm:

- the names and email addresses of staff within your organisation with whom we may correspond by email
- that you have ensured that your spam filters are not set to reject and/or automatically delete HMRC emails

Contacting your agent

If you would like us to contact authorised representatives of your organisation's agents, we will need you to confirm their names and email addresses.

How we use your agreement

Your confirmation will be held on file and will apply to future email correspondence. We will review the agreement at regular intervals to ensure there are no changes.

If HMRC receive email from someone we don't recognise

If we receive email contact from someone we don't recognise from the information you gave us, we will verify the position with you before responding.

Opting out

You may opt out of using email at any time by letting us know.

More information For more information on HMRC's privacy policy, visit <https://www.gov.uk/help/privacy-policy>