

Navigating NMW compliance for a fair future

Katy Hampton explains the common reasons why companies fail to adhere to the minimum wage laws and outlines the 10 common mistakes employers make

In recent years, the media has been filled with shocking stories of employers facing financial consequences and reputational damage for underpaying their workers. From popular clothing retailers to beloved restaurants and hotels, businesses across all sectors have found themselves entangled in costly National Minimum Wage (NMW) compliance issues following an HMRC investigation.

Contrary to popular belief, it is not typically rogue employers deliberately underpaying their workers who dominate the headlines. Rather, it's responsible employers with commitments to their workforce unintentionally breaching the regulations due to technicalities, misunderstandings or not having robust policies and procedures in place. As an NMW expert with extensive experience, I share my insights, shedding light on the path towards a fair and compliant future.

NMW compliance is no simple task and has often been underestimated by employers and advisors alike, stemming from HMRC not targeting those types of businesses and a lack of awareness. However, the landscape has certainly shifted, and businesses are starting to recognise more than ever about the risks associated with non-compliance and HMRC investigations. Merely paying the published rates is not always enough. It demands careful attention, expertise, and a commitment to understanding and addressing the intricacies of NMW compliance.

A transformative shift in enforcement

Reflecting on my time at HMRC, I was part of a dedicated team that worked tirelessly to investigate whistle-blower complaints and NMW concerns reported. This work was not only deeply fulfilling, but it often involved assisting many vulnerable workers, uncovering employers with deliberate intent to underpay, and exposing modern-day slavery.

However, in 2017, there was a remarkable turning point when the government made a substantial investment into NMW enforcement. This catalysed significant change compared with the previous five years, when yearly budgets rocketed from £3.8 million to £27 million. HMRC's resources swiftly multiplied, the enforcement toolkit grew stronger, and penalties became harsher, reaching up to 200% of any underpayments identified. Furthermore, the naming and shaming policy underwent reforms, resulting in a surge of public exposure from non-compliant businesses, including numerous household brands.

The latest chapter in HMRC's strategy

In recent years, as employers and their advisors have felt a strong sense of unfairness and heavy-handed enforcement. It seemed there was a lack of practicality and common sense, where both deliberate wrongdoers and well-meaning employers caught in the crossfire of mistakes face the same severe penalties. This punitive approach has included instances where workers ended up worse off as employers, compelled by the threats of non-compliance, felt obligated to withdraw certain benefit schemes, leaving a bitter taste of unfairness lingering in the air.

However, in the midst of these prevailing concerns, it is evident that HMRC has listened to the feedback and made substantial progress in refining its enforcement strategy. In 2023, we are starting to witness a refreshing transformation in their approach, one that should not be underestimated.

Currently in full swing, HMRC are trialling a new approach by adopting a more geographical compliance strategy as opposed to the usual sector-based approach we have seen over the years. They are proactively reaching out to employers through a series of 'nudge' letters. Cities such as Belfast, Bradford and Birmingham are at the forefront of this innovative approach.

These letters serve as an early warning, signalling that the business has captured HMRC's attention, yet offering a unique opportunity for employers to rectify any NMW issues before formal enforcement actions commence. This extraordinary initiative allows businesses to address compliance concerns without bearing the burden of hefty penalties or enduring public scrutiny.

The power of proactive response

This strategic shift by HMRC signifies a pivotal moment for employers which should not be ignored. By embracing this opportunity and seeking expert guidance, employers can ensure they are on the path to compliance, safeguarding their workers' rights and avoiding the detrimental consequences of non-compliance.

The process starts by issuing an NMW checklist to businesses within the targeted area, followed by an offer letter to engage in a health check call with HMRC.

While this signifies a very positive step from HMRC, caution must be also exercised as these letters also serve as an information-gathering exercise and it's important that self-corrections are undertaken correctly. Formal reviews will be opened a few months later to ensure that all NMW-related matters are properly addressed. Failure to have rectified underpayments correctly at this stage will reinstate normal enforcement action leading to penalties of 200% and public shaming.

In addition, HMRC's commitment to fair pay extends beyond communicating with employers. The inclusion of workers of targeted businesses are in process, with letters urging them to check their pay and report any potential underpayments,

further emphasising HMRC's dedication to investigating reported instances for full compliance and verifying the information employers provide during this process.

Unravelling the complexity of NMW compliance

To strengthen NMW compliance practices and future-proof against an investigation, employers must take proactive steps. The remainder of this article will explore 10 common mistakes that employers make, leading to underpayment, penalties and public naming and shaming.

1. **Insufficient time records:** While the majority of employers pay the published hourly rate, many are at risk of being challenged by HMRC as they cannot provide evidence of the actual hours worked for which workers should be paid. Within many sectors, rotas often record the number of shifts allocated but not the actual hours worked. In addition, unpaid breaks can lead to a challenge if they are not taken or recorded properly.
2. **Unpaid hours worked:** Workers are often asked to carry out additional duties not strictly included within their day-to-day roles where NMW applies. Examples include arriving before the start of the shift, security checks, cleaning up after a shift, and working additional hours for which time off in lieu is not immediately provided.
3. **Deductions from pay:** Any amount taken from pay that is deemed for the employer's 'own use or benefit' or 'in connection with employment' can reduce pay for NMW purposes. Examples can include deductions for uniform, transport and tools/equipment, etc..
4. **Workers' purchases or benefits:** Care must be taken whenever workers can purchase a product or service, or participate in a benefit scheme when it is deducted from pay, even when the workers enter into the arrangement voluntarily. This includes savings schemes, travel, car parking, gym, meals, etc..
5. **Deposits and other 'first day' deductions:** Compulsory deposit items such as uniforms and locker keys can reduce pay for NMW purposes, as would any deductions or payments for equipment or training costs.
6. **Living accommodation:** The provision of living accommodation is the only benefit in kind that counts towards NMW. Its value is currently capped at £63.70 per week (including all associated costs). Any deduction or payments above this level will reduce pay for NMW purposes.
7. **Trial periods:** Most employers will want to understand the level of skills possessed by a candidate, and some may reasonably require a demonstration. Considerations must be given on the timing on any trial periods, and where this turns into work, NMW must be paid.
8. **Uniform/dress code:** Any requirement to purchase a particular type of clothing to meet an employer's dress code policy will reduce pay for NMW purposes. This can apply to new starters and existing workers who need to

renew clothing to continue to meet the dress code. Examples include a requirement to wear a specific style or colour of clothing/shoes. HMRC can challenge even when the worker is not required to purchase the items directly from the employer.

9. Salaried work: Strict rules apply for the calculation of pay for NMW purposes in respect of salaried work. Employers must ensure that all working hours are captured when pay levels are calculated. It is vital that employers track and monitor workers hours on an annual basis to ensure NMW compliance.
10. Salary sacrifice arrangements: While designed to benefit workers, any reduction in contractual pay due to salary sacrifice will decrease pay for NMW purposes. Workers' pay should never be brought below NMW due to salary sacrifice.

This list is not exhaustive but provides insight into the type of challenges typically raised by HMRC. What is clear is that paying the correct hourly rate is only the first step in ensuring compliance with the NMW. Moreover, while the level of underpayments identified continues to rise year on year, HMRC is unlikely to reduce its focus on this key area of the government's social and economic policy.

Measures and support

In conclusion, navigating NMW compliance is a crucial responsibility for employers in today's landscape. The risks and consequences of non-compliance have become increasingly apparent, with financial penalties and reputational damage looming over businesses. The recent shifts in HMRC's enforcement strategy present a significant opportunity for employers to rectify any NMW issues before facing severe penalties and public scrutiny.

Being proactive and seeking expert advice is paramount in this journey towards fair and compliant practices. Employers must understand the intricacies of NMW regulations, diligently maintain accurate records, and ensure that their policies and procedures align with the requirements. By prioritising fairness and transparency in remuneration, employers not only protect their workforce but also foster a positive work environment and future proof should HMRC come knocking.

NMW compliance demands expertise and a comprehensive understanding of the ever-evolving regulations. By engaging with NMW experts, employers can stay informed, address potential pitfalls, and proactively take steps to ensure compliance. Expert advice serves as a guiding light, empowering employers to navigate the complexities of NMW regulations and create a fair and compliant future.

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