

The hidden dangers of the NMW

Jeni Morris explains how organisations can guard against breaking the National Minimum Wage laws

HMRC enforce National Minimum Wage laws; however, many businesses and professional advisors are often surprised by not only the depth of the technical complexities but also the length of time an investigation can take to conclude.

NMW is not just a rate, it is actually a whole calculation. Only three elements are required to perform a NMW check – pay, deductions and time worked. However, the requirements and frequency of each calculation will vary depending on which type of worker contract and worker category each individual.

A correct NMW check requires fully understanding what should be included in each of the pay, deductions and time worked elements. Errors involving what should be included as working time are frequently found during a NMW investigation. Some employers do not monitor the actual working hours of their employees, choosing to use the employee's contracted working hours in their NMW checks. Unfortunately, if the employee is completing additional working time this will also need to be factored into the NMW checks and calculations.

Difficulty arises if a business does not have robust processes in place to capture any additional working time. Many employees are completing 'under the radar' tasks outside of their contracted hours. This kind of work has become normalised after the pandemic, and whilst not all bad it is potentially creating a significant NMW risk for businesses.

We all know that in certain sectors it is expected that some elements of work are undertaken outside the normal workday. How many of us just 'check our emails' during the evenings or weekends, only to find an hour later you've become involved in an email trail which requires immediate action? Think of those quick work tasks that seep into personal time, such as checking rotas or answering messages from colleagues.

Workers have been undertaking similar tasks for a while, but since the pandemic effectively overhauled the way people work the lines between professional and personal activities have become increasingly fuzzy embedding these behaviours. These hidden, even quiet, additional work moments may not strictly feel like work, but they still are. These extra working moments also appear to be morphing into an expectation, making it harder for workers to shake off such work duties and even harder for employers to know how many actual hours an employee is working.

There are myriad ways a person's day job can slip into their non-working hours. Anyone can be susceptible to hidden overwork – from retail workers checking their weekly rotas and completing their health and safety training from home one evening whilst watching TV, to those employees who need slightly longer to prepare for a client meeting.

For many employees it's easy to fall into these hidden overwork patterns, which can become baked into a workplace culture, making what was a choice now an expectation, unintentionally or otherwise.

Where's the NMW compliance risk?

A business is expected to perform regular calculations to ensure employees are being paid at least NMW rates for all the hours worked. This requirement is for both hourly paid workers and those who are salaried.

The way the calculations are performed are slightly different for each category of worker, but the overriding elements required are:

- The pay received in each pay period.
- Any deductions made to the salary (excluding statutory deductions).
- The ACTUAL hours worked (not just contracted hours).
- Unpaid working time is one of the top reasons why businesses are regularly found to be underpaying employees.

If during a NMW investigation a business is found not to have kept evidence of the actual hours worked, HMRC will test these calculations for accuracy by interviewing current and former employees to build up a true picture of the actual hours worked. HMRC also requests data from various sources; for example it can request computer data showing the times employees have logged in and out of their laptops. This data is then interrogated to identify any out of hours work that has been undertaken.

You could be forgiven for thinking that this risk is only for those employees paid at or close to NMW/NLW rates. However, employers who pay significantly above NMW rates are increasingly finding themselves falling foul of NMW rules.

For salaried employees any additional excess hours must be paid at, at least, the National Minimum Wage/National Living Wage rate the worker is entitled to. Once those contractual hours are worked, in essence, the contracted salary has been attributed in full.

If a worker reaches their annual contractual hours following the final working day in Month 11 of their contractual year all hours worked in Month 12 will be 'excess' hours. Their regular salary in Month 12 won't count towards these excess hours as it's already attributed to the basic annual hours worked in Months 1-11. Any hours worked in month 12 must be paid at least at the NMW rate.

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