Employment &BusinessBrief

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Name and Shame on Minimum wage: **Could you be caught?**

Think this can't happen to you, think again. The Government named 179 employers for infractions of their minimum wage obligations. Although some of these had headline grabbing amounts from high street names, others involved more modest operations and more modest transgressions.

Some of those on the list relate to one or two employees and refer to unpaid wages of a few hundred pounds.

As well as recovering back pay for thousands of workers the Government also fined the employers in excess of one million pounds in total. Employers who pay workers less than the National Minimum Wage (NMW) not only have to pay back arrears of wages at the current rates but also face penalties of up to 200% of arrears capped at £20,000 per worker. Industries that were the most prolific offenders in this list were retailers, hospitality businesses and hairdressers.

The NMW rates increase from April 2018 (see our Quick reference Section for those new rates).

The Department for Business, Energy and Industry Strategy (BEIS) are launching a campaign to raise awareness and encourage dialogue between employers and employees to resolve the issue before it gets to the name and shame stage.

So where can it all go wrong, after all NMW rates are published and easily researched by employer and employee?

How to calculate pay

Whether a worker has received the NMW will depend on their average hourly rate. This is calculated on the basis of:

- The total remuneration earned over the relevant pay reference period;
- Divided by the total number of hours worked over the pay reference period.

Not all remuneration earned in the relevant pay reference period counts towards the NMW. Furthermore, some payments reduce the amount of pay that is to be taken into account for the purposes of the NMW. Similarly, certain deductions reduce the amount of the worker's total pay for the purposes of the NMW whereas other deductions do not.

Those items that count are

- Basic salary (the gross amount).
- Bonus, commission and other incentive payments based on performance (but not any premium paid for overtime or shift work).
- Piecework payments.
- Accommodation allowance (The only non-cash benefit provided to the worker that should be taken into account is the value of any accommodation provided by the employer, as evaluated under the regulations and as at April 2018 set at a daily maximum of £7.00).

Those items that do not count are

- Benefits in kind whether or not they have a monetary value.
- Loans by the employer.
- Advances of wages.
- Pension payments.
- Lump sum payments on retirement.
- Redundancy payments.
- Tribunal or settlement awards.
- Any premium paid for overtime or shift work. The amount by which the overtime or shift

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payment exceeds the lowest rate that is normally payable is not taken into account

- Since 1 October 2009, employers have not been able to take account of tips, gratuities and service charges when deciding if a worker has received the NMW.

What can be deducted and what can't

Certain sums must be subtracted from the total gross pay in order to reach the basis on which NMW pay can be assessed. These include certain deductions from the worker's wage packet by the employer, such as those in respect of expenditure in connection with employment (for example, to cover the cost of tools or uniforms) or deductions which are for the employer's "own use and benefit". An employer cannot lawfully deduct such sums from the worker's pay if it reduces the overall level below the NMW. Similar rules apply where the employer pays the worker in full but then demands payment back from the worker.

Other deductions from wages which are ignored when calculating NMW pay

- Deductions on account of the employee's misconduct (if permitted by the contract) are expressly excluded from consideration.
- Deductions to repay training costs.
- Deductions (or payments made by the worker) under an agreement for a loan or advance of wages.
- Deductions (or payments made by the worker) because of an accidental overpayment of wages.
- Payments made by the worker (but not deductions) in respect of the purchase of goods or services from the employer (for example, meals purchased from a staff canteen), unless the purchase is required by contract or otherwise required by the employer in connection with employment
- Deductions that are not for expenditure connected to the worker's employment, or for the employer's own use or benefit (for example union subscriptions and pension contributions).

So what to take from this? Think carefully about the calculation of pay and where making deductions, check what is allowable and what is not before you appear on the next name and shame list.

For those who are dealing with the issue of on call workers, we will cover this in next quarter's brief.

GDPR The beast from Europe

No doubt you have all heard more than enough about the impending changes that these regulations are due to bring to all businesses. Much like forecasts of snow we are left wondering if it is going to be a fuss about nothing or whether it will be something that brings normality to a grinding halt.

A well known commentator in the legal world described this process as a journey rather than a destination. As businesses develop and grow, so will the need to review data protection issues. There is no doubt that many organisations are not ready but rather than ostrich like sticking heads in the sand it is not too late to make a start. After all those who say they were ready months ago have by no means finished their journey.

Rather than focus on the headline grabbing fines and penalties we are concentrating on what you can do now to make a start or check that the start you have made is on the right track.

- Give someone responsibility for your journey. Although you will not be able to blame them for any deficiencies it will mean that you can avoid endless round table meetings which resolve nothing. Give them senior leadership support and the resources (time is a key one here) to ascertain what is needed and how you can build this into your business rather than stop the business from operating.
- Have some thought as to what information you have and where it is kept and who it might be shared with.
- Review and update Privacy notices. These are probably hidden away somewhere on your website. Look around at what others have but be careful about copying them due to copyright issues. See if any of your trade organisations have a template for you but make sure it makes sense from your organisation's viewpoint.
- Consent, do you need it and if so how will you capture records of it? Remember consent is not the only way to justify collecting and using data.
- Check your suppliers are looking after your data. Review and update any contractual terms.
- If you use automated decision making you need to check the new provisions regarding this.
- Update any internal Data Protection policy.
- Make sure you and your staff know what to do in the event of a data breach.
- Make sure you and your staff know what to do when a data subject makes a request to access or erase their data.

There are many guidelines and best practice notes behind these bullet points but the first step is to make a start. Even if you are not going to be ready by the 25th May the Information Commissioner's Office will appreciate those that are making genuine and real efforts to put their business in order.

Agency Workers:

How to compare their working and employment conditions with permanent staff

Until recently opinion has been divided as whether the duty not to treat agency workers less favourably than permanent staff relied on a term by term analysis or an overall view.

We have now had the first appellate decision concerning the meaning of words used in the Regulations requiring "the same basic working and employment conditions".

The Employment Appeals Tribunal has now settled on a term by term approach similar to that taken in discrimination in equal pay cases.

The employer in this case sought to argue that the reduction in leave allowed to agency workers was compensated for overall by the increased pay they received. In this case it was noted that market conditions sometimes dictate that agency workers are paid a higher rate than comparable permanent employees but this was often to compensate for job insecurity and it could not therefore also be used to compensate for less favourable rights, for example, to take time off.

The Court indicated that it might be possible to justify if there was transparency as to precisely what elements of overall pay were attributed to the lost time off. It is therefore the case that the transparency argument may still be able to be used to justify differences but employers should take care. Although this argument might be able to be used successfully in relation to payment for time off, it seems doubtful that it would cover some of the other benefits such as access to the collective facilities or the overall length of rest breaks.

Removing a company director

Generally, there is no upper limit to how many directors a company may have but from time to time, it might be necessary to remove a director.

The removal of a limited company director may happen for a number of reasons, such as they have resigned their employment voluntarily, retired, retired due to ill health, or an event which prevents them from remaining as a director such as bankruptcy or disqualification by the Court.

It is therefore important that the company has clearly outlined in their articles of association or any shareholders' or employment agreement, the circumstances in which a Director can be removed and also the procedures.

The reason for the need to remove the director will dictate which procedure is used. This could be for example:

- Removed under the articles of association of the company
- Removed by an ordinary resolution
- Removed due to disqualification

If removing a director who is also a shareholder, it typically does not affect their position or rights as a shareholder. Often the company will seek to buy the removed director's shares. There may also be a clause in the articles of association which means a shareholder who stops being a director must transfer their shares back to the company.

Companies House must be notified of the appointment or removal of a director within 14 days.

It is worth checking the provisions that are within a company's articles of association and any related agreement to make sure they are robust to help to deal with this situation, should it ever arise.

Employment Marketing Notice Changes to Treatment of Pregnant Workers

A recent case attracted some attention because the Advocate General's opinion in Europe was that the Pregnant Workers Directive should protect workers against dismissal from the moment they became pregnant, even if the employer was not aware of the pregnancy.

The Directive provides for a protected period "from the beginning of pregnancy". The Advocate General felt that if there was any ambiguity over the need to inform the employer, this should be resolved in favour of the worker, even if it had unduly harsh repercussions for the employer.

The European Court of Justice in the recent case did not need to rule on this question, as it was not relevant to the facts in the case. Their decision therefore did not change the current position. In the UK it is generally accepted that a woman does not benefit from the statutory protections on account of her pregnancy until such time as her employer is aware that she is pregnant.

The Court also decided not to go as far as the Advocate General's comment that where a pregnant worker was dismissed as a result of a redundancy exercise, any notification of dismissal needed to acknowledge exceptional circumstances to justify the dismissal. It held that as long as it could be established the reason for the dismissal was not connected with the pregnancy, the protection of the directive would not be engaged.

Under UK Law women who are on maternity leave and placed at risk of redundancy are entitled to be given first refusal on suitable alternative vacancies. In this regard the UK Law goes further than the requirements of the European Directive. It should be noted that women who have returned from maternity leave or who are breast feeding do not enjoy the same protections.

Employers should be aware that according to the Court's interpretation of the European Directive a pregnant worker must be informed in writing of the reasons for the redundancy and the relevant objective selection criteria. This latter requirement is not currently expressly set out in domestic laws which simply say that a pregnant worker is entitled to written reasons for dismissal.

CONTACT

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Quick reference section

Statutory minimum notice periods:
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

National Minimum Wage

	April 2017	April 2018
Apprentices	£3.50	£3.70
16-17	£4.05	£4.20
18-20	£5.60	£5.90
21-24	£7.05	£7.38
25+	£7.50	£7.83

Statutory Sick Pay (from April 2018)
Per week £92.05

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
(basic rate) (from April 2018) £145.18

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6th April 2017 at £489.00; for dismissal after 6th April 2018 at £508.00