

Is your employer paying you the National Minimum Wage?



The purpose of this factsheet is to provide general advice when you think that your employer may not be paying you the National Minimum Wage (“NMW”).

1. Enforcement by the State

The National Minimum Wage (“NMW”) may be enforced by Her Majesty’s Revenue and Customs (“HMRC”).

HMRC enforcement is initiated following a complaint from workers or third parties or as a result of risk profiling or targeted enforcement of a particular low-paying sector.

HMRC Officers can carry out inspections at any time, without providing a reason, and can require employers to produce records/documentation or access to premises in order to determine entitlement to the NMW. They may also remove records to make copies.

Where a compliance officer concludes that the NMW has not been paid, they may issue a Notice of Underpayment.

When will a Notice of Underpayment be issued?

A Notice of Underpayment will be issued in all cases where it is found that arrears of the NMW were outstanding at the start of the investigation.

This will be done regardless of any explanation given by the employer (for example, if the underpayment was accidental) or where the employer has partly repaid the arrears by the time the Notice is issued (although no notice will be issued if the arrears have been fully repaid).

What does a Notice of Underpayment contain?

Notices of Underpayment set out the arrears of NMW to be repaid by the employer, together with a requirement for the employer to pay a financial penalty to the Secretary of State within 28 days of service. The penalty is set at 50% of the total underpayment of the NMW; the minimum penalty is £100 and the maximum penalty is £5,000.

If the employer complies with the notice within 14 days of its service, the financial penalty will be reduced by 50%.

Arrears of pay are calculated by taking into account the rate of the NMW in force at the date of determination of the arrears. This means that the worker will be repaid any arrears at a higher rate if the NMW has increased since the underpayment. However, where the employee has entered a new age band since the underpayment, the arrears should still be paid according to the age band that applied at the date of the underpayment.

Failure to comply with a Notice of Underpayment: further enforcement action

If the employer complies fully with the terms of the Notice of Underpayment, there will be no further enforcement action.

If the employer does not comply with the Notice of Underpayment, the enforcement officer can:

- Issue civil proceedings in the civil courts or in the Employment Tribunal to recover the sums that should have been paid to the worker. If, following the judgment, the debt remains unpaid, HMRC will take steps to enforce the debt.
- Prosecute the employer.

Criminal investigation and penalties

Civil enforcement is likely to be sufficient in the majority of cases. However, for a small minority of employers who are persistently non-compliant and refuse to co-operate with compliance officers, criminal investigation is appropriate. Criminal investigation will be conducted by officers from HMRC's Criminal Investigations Directorate, although the Crown Prosecution Service alone will decide whether there is sufficient evidence to provide a realistic prospect of conviction and whether a prosecution is in the public interest.

2. Enforcement by the Worker

A worker who does not receive the NMW to which they are entitled may bring a claim:

- For an unlawful deduction from wages. Such claims must be brought in an Employment Tribunal within three months of the date of the deduction (that is, the failure to pay the NMW) or the last in a series of deductions. There is no limit on the length of arrears that can be claimed, provided it is all part of the same series of unlawful deductions.

Detriment and dismissal

A worker may also bring an unfair dismissal or a detriment claim in an Employment Tribunal if their employer (respectively) dismisses them or takes any detrimental action against them because of:

- Becoming eligible for the NMW, or a different NMW rate.
- Taking any action to seek to ensure that they receive the appropriate NMW.
- The employer being prosecuted for an offence under the National Minimum Wage Act 1998.

Any dismissal of an employee in those circumstances will be automatically unfair and the usual two year qualifying period for unfair dismissal claims will not apply.

The worker has three months to bring such a claim and may be awarded:

- If the worker has suffered a detriment, such compensation as the tribunal considers just and equitable in the circumstances.
- If the worker has suffered a detriment that is dismissal, but is not an employee and so cannot claim unfair dismissal, compensation limited to the total of the basic award and compensatory award that would have applied had the worker been an employee.
- If the worker has suffered a detriment that is dismissal and is an employee, the normal compensation for unfair dismissal.

This Fact Sheet is for information only and is not intended to be a substitute for legal advice.

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