

dti

NATIONAL MINIMUM WAGE

The National Minimum Wage
and the childcare sector

The National Minimum Wage (NMW) and the Childcare Sector

This guide is produced by the Department of Trade and Industry (DTI) and HM Revenue & Customs (HMRC) in association with the Department for Education and Skills to advise the childcare sector of NMW requirements.

The DTI are responsible for the policy requirements for NMW: the rules and regulations. HMRC are responsible for making sure employers pay their workers correctly. NMW compliance officers sometimes visit employers to make sure the rules are met. An employer must pay their workers a minimum amount as defined by law. This is called the NMW.

Who must get NMW?

Most workers in the United Kingdom are entitled to be paid at least NMW rates. If you have a contract of employment you are a worker. You are also a worker if you work under any other form of contract, you are doing the work personally for someone else and you are not genuinely self-employed. The contract does not have to be written; it can be an implied contract or an oral (verbal) contract.

Some workers, though, are not entitled to the NMW and more information on workers who do not qualify is provided below.

New rates of NMW in force from 1 October 2006

The NMW provides a legally binding minimum hourly rate of pay for most workers over compulsory school age.

From 1 October 2006 the hourly rates are:

- £5.35 – for workers aged 22 and over;
- £4.45 – for workers aged 18 to 21;
- £3.30 – for workers aged 16 –17.

Minimum Earning Levels for Apprentices in England

Note: In England only, if apprenticeship funding is provided by the Learning and Skills Council (LSC), it is a requirement that employed apprentices earn a minimum of £80 per week. Part time apprentices are required to receive the same pro-rata level of pay. If you are not receiving this payment you should make contact with the LSC via its helpline on **0870 900 6800**.

This requirement does not replace a worker's right to be paid the NMW although it can be counted towards partially fulfilling an employer's NMW responsibilities.

Workers who do not qualify for NMW

Some workers do not qualify for NMW or only qualify for NMW after a specified period of time. For example,

- apprentices under 19 do not qualify for NMW;
- apprentices 19 and over only qualify for NMW after the first 12 months of their apprenticeship with their employer;
- From 1st October 2006 the upper age restriction for people to be treated as an apprentice was removed.

Apprenticeships and NMW

An apprentice is a worker who is either:

1. Employed under a deed or contract of apprenticeship (a contract of apprenticeship does not have to be in writing for NMW purposes, but it does need to be in written form for other employment law purposes).

or

2. Someone engaged under a Government training programme which is known:
 - In England - as Apprenticeships or Advanced Apprenticeships;
 - In Scotland - as Skillseekers or Modern Apprenticeships and the arrangements are for the purpose of gaining a Scottish Vocational Qualification (SVQ) at Level 2 or 3 or a National Vocational Qualification (NVQ) at level 2 or 3;
 - In Northern Ireland - as Jobskills Traineeships or Modern Apprenticeships;
 - In Wales - as Modern Apprenticeships or Foundation Modern Apprenticeships.

Pre-apprenticeship courses and NMW

Participants on specified pre-apprenticeship courses are not entitled to NMW. These courses are:

- In England – Entry to Employment;
- In Scotland – Get Ready for Work;
- In Northern Ireland – Access;
- In Wales – Skillbuild.

Other Trainees and NMW

Most other trainees who are workers, including those undertaking on-the-job training at their place of employment, will be entitled to NMW at the appropriate rate.

“Non-employed Status” Trainees

The term “non employed status” is commonly used by training providers and is often found on documents such as training agreements and learning plans. It has no bearing on entitlement to NMW which is determined by examining the relationship between the employer and the person placed with them. However, it appears that when some training providers arrange placements for trainees, they advise the employer that trainees with “non employed status” will not be entitled to payment of NMW. Any exemption from NMW is not because of the “non employed status” label but because the worker is not entitled to NMW under the legislation, for example they may be an apprentice under age 19.

Other related issues and the NMW

Au pairs and nannies

Au pairs and nannies are entitled to the NMW. However, there is an exemption for such workers who:

- live in the family home where they are working, and;
- are treated as a member of the family, who share in the tasks and leisure activities of the household and in particular with regard to the provision of accommodation and meals; and
- are not liable for any charge in respect of the accommodation or meals.

Self-employed childminders

The NMW does not apply to the genuinely self-employed, such as self-employed childminders. If a person is unsure of their status as a worker they should contact the NMW helpline on **0845 6000 678**.

HMRC enquiries

Individuals can ask HMRC to give an opinion about whether or not they are entitled to NMW. HMRC officers may also visit employers to ensure NMW is being paid. In order for NMW officers to give their opinion about whether NMW is due, they need to gather facts and establish actual working arrangements. They do this by speaking to the employer, the “worker” and any other parties.

They may need to speak to individuals more than once to check information and/or resolve any inconsistencies. It is what actually happens in practice that forms the basis on which the NMW officer gives their opinion and assesses any arrears. In cases of dispute only Tribunals or Courts can make a decision about an individual's NMW entitlement.

Good employment practices in the childcare sector

The Government wants to ensure that childcare providers, including those in both the public and private sectors, can improve quality and give parents increased confidence. When parents are paying for their childcare the Government would expect the provider to have sound employment practices.

Early Years and Childcare Workers in Scotland

From 1 October 2006 early years and childcare workers in Scotland have to gain suitable qualifications and be registered. For more details visit: www.sssc.uk.com

Common scenarios

The following are some common scenarios found in the childcare sector. They may help you decide if the NMW applies to your situation. For general help and advice contact the NMW Helpline on **0845 6000 678**. You can also visit the DTI NMW website at www.dti.gov.uk/employment/pay/national-minimum-wage/index.html.

Please note that all names are entirely fictitious and comments made are purely an opinion. As mentioned earlier only Courts and Tribunals can make decisions in any matter of dispute.

Scenario 1

Kirsty started work at a nursery just after her 18th birthday. She has been working at the nursery for 2 years, and is now aged 20. Her employer operates several nurseries and after school clubs in the local area. As soon as she started work, Kirsty began training on a Government Apprenticeship programme run by a local training organisation. Her employer pays her at a rate suggested by the training organisation which is lower than the NMW.

Comments

Whilst the employer is complying with the requirements of an Apprenticeship arrangement with the training organisation they are not operating the special NMW rules for apprentices which only allow an exemption from NMW for a limited period. Although Kirsty was not entitled to receive NMW for the first 12 months of her apprenticeship she qualifies for NMW from just after her 19th birthday. Her employer must now pay her the arrears of NMW as well as ensuring she is paid at NMW rates in future.

Scenario 2

Debbie, aged 17, started working at a nursery straight after leaving school in June 2006. Her employer wasn't sure that she would like the work, so took her on for a trial period before enrolling her with a local training provider. During this time, Debbie generally helped out with jobs around the nursery whilst her employer took this opportunity to undertake the necessary employment checks. She started on a Government Apprenticeship programme with a training provider in September 2006 on day release. Her employer pays her at a rate below the NMW because she is inexperienced.

Comments

As Debbie is under age 19, she does not qualify for the NMW whilst she is an apprentice. However, the apprenticeship contract did not start until September 2006. Therefore she is entitled to be paid the NMW for the work she performed up to the time her apprenticeship starts. Her employer must pay her arrears for this period.

Scenario 3

Helen, aged 20, started work at an independent day nursery and immediately began a Government Apprenticeship programme through an arrangement with a local training provider. After 12 months her employer started paying her the correct rate of NMW. However, 6 months later the nursery closed and she had to find work at another nursery. Her new employer arranged for her to re-start the Government Apprenticeship programme. The second employer advised her that because she was on a Government Apprenticeship scheme that she did not qualify for the NMW for the first 12 months of her new contract. Helen was not happy as she felt that she had already been on an Apprenticeship scheme for over 12 months and should be due NMW rates of pay. She raised a query with the NMW Helpline.

Comments

A NMW Compliance Officer checked the arrangements and contracts and confirmed that the second employer was acting correctly. Although the arrangement with the training provider had not substantially changed, the latest employer had entered into a new apprenticeship contract with Helen and therefore she was not entitled to NMW as she was on an Apprenticeship scheme and within the first 12 months of her starting her contract.

Scenario 4

Andrew, aged 19, has two jobs working with children. During the day he is employed for 14 hours a week as a classroom assistant in the local school. He earns £7:00 an hour for this and in the evening he works 15 hours in an out of school care club. This is run by a voluntary management committee who pay the school to use the premises and who pay Andrew £3:50 an hour. The manager of the club has said that because they are using the school premises and because he works there during the day, it counts as one job for him. So by combining his classroom assistant salary with his out of school care salary they are meeting the NMW requirement. The club have also advised him that they will be deducting the cost of the Criminal Records Bureau (CRB) check they have undertaken on his behalf.

Comments

Andrew is undertaking two jobs working with different employers and is entitled to the NMW in both employments. The school care club will need to pay Andrew at least the NMW for the 15 hours he works with them.

However, the school care club is able to deduct the cost of the CRB check. The CRB has arrangements which allow employers to send the fee on behalf of the worker but it is the worker who remains responsible for payment. Provided that the worker

has agreed to the deduction in writing, the employer can deduct the amount from the worker's wages without it affecting NMW pay. This is because he is making it on behalf of the worker.

Scenario 5

Tracey is 21 and started work part time at a children's day care centre shortly after her daughter started attending. Her employer arranged for her to undertake an NVQ level 2 in Early Years Care and Education with a local training provider. After 18 months Tracey progressed to study at NVQ level 3.

Her employer paid Tracey below the NMW until she passed her level 2 NVQ because they said she was part time and an inexperienced trainee until she obtained this qualification.

Comments

Tracey is entitled to be paid at least the NMW for the whole of the time she works with the employer. She is not attending a Government Apprenticeship programme so she cannot be treated as an apprentice for NMW purposes and part timers are entitled to be paid at least the NMW for the hours they work.

Scenario 6

Linda is an unqualified nursery nurse working in a nursery whilst studying in her own time via distance learning and workplace assessment to attain an NVQ. Her employer pays her below the NMW.

Comments

As with scenario 5 Linda is entitled to be paid at least the NMW for the whole of the time she works with the employer. She is not attending a Government Apprenticeship programme so she cannot be treated as an apprentice for NMW purposes.

Scenario 7

Sophie, aged 27, is an experienced nursery worker who works 36 hours a week at the same nursery attended by her two young children. Her employer pays her below the NMW rate because they say she is benefiting from paying reduced nursery fees in respect of her children due to a staff discount. Her nursery fees are deducted each week from her wages as is a small charge for the provision of a uniform.

Comments

Sophie is entitled to the main rate of NMW from the date she started work. The value of the benefit in kind of reduced nursery fees does not count towards the calculation of NMW pay. If the employer makes any deduction from the worker's pay which is for his

own use or benefit, such as the nursery fees and the cost of the uniform, the amount deducted will not count towards NMW pay. The employer must ensure Sophie receives at least NMW rates of pay for all the hours she works.

Scenario 8

Matt, aged 28, starts work at a local nursery. His employer has made arrangements for him to attend college as part of a Government Apprenticeship programme. The employer has told him that they will be paying him less than NMW rates as he is being treated as an apprentice and so does not qualify for NMW for the first 12 months of the contract. Matt thinks he is too old to be treated as an apprentice.

Comments

The employer is correct and can treat Matt as an apprentice for NMW purposes so he does not qualify for NMW for the first 12 months of his contract. The age restriction of 26 for people to be treated as an apprentice was removed from 1st October 2006.

Scenario 9

Anya is 22 and has been an apprentice in a nursery for the past two years attending the local college under the Government's Apprenticeship programme. She attends college for 7 hours on Mondays and then works Tuesday to Friday.

Anya is paid by the hour with an unpaid lunch break of an hour each day. Her rate of pay has always been less than the appropriate NMW rate. She queried this recently but her employer has told her she is not due to be paid NMW as she is still "training".

Comments

Although Anya is still on her apprenticeship programme, she is over 19 and has been on her apprenticeship with her employer for longer than 12 months. She is therefore due to be paid NMW at the main rate for every hour she works. The time worked by Anya includes the time working at the nursery and the time spent at the college but excludes her unpaid lunch hours. Her employer should now pay her at the correct NMW rate and must also pay the arrears due from the end of her 12 month apprenticeship exemption period.

Scenario 10

George is 18 and has just left school. He is starting an Early Childhood Studies degree in the autumn and wants to gain experience over the summer. His next door neighbour is the owner of a day nursery and, as a favour to George, offers him a temporary job working 5 hours every afternoon from Monday to Friday. The employer has told George that he can only offer him work for a three month period.

Comments

The fact that the job is temporary and part time has no bearing on whether NMW is due. George is a worker and should be paid the NMW development rate for 18-21 year olds for every hour he works at the nursery. The existence or not of a permanent job after the period covered by the contract is not a relevant factor when determining whether NMW is due.

Scenario 11

Beata is 22 from Poland and is working legally in this country as an au pair. She works 5 hours a day for 5 days a week and is paid £55 a week. She is treated as part of the family and shares in the tasks and leisure activities in the same way as other family members.

Comments

Foreign workers working legally in the United Kingdom are entitled to the NMW in exactly the same way as any other worker, regardless of how long or short their stay may be and this includes au pairs.

However au pairs (and nannies) who;

- live in the family home where they are working, and;
- are treated as a member of the family, who share in the tasks and leisure activities of the household and in particular with regard to the provision of accommodation and meals, and;
- are not liable for any charge in respect of the accommodation or meals do not need to be paid the NMW.

If Beata was not being treated as above, the NMW would apply and she would need to be paid the NMW rate for workers aged 22 for all of the hours she worked.

Where the exemption does not apply because the au pair or nanny is not being treated as above, a further consideration employers need to take into account is the treatment of benefits in kind. No benefits in kind count towards NMW pay including the provision of meals or use of a car, except accommodation, and then there is a limit on the amount that an employer providing accommodation can count towards NMW pay.

How can I find out more

For general help and confidential advice contact the NMW Helpline on **0845 6000 678**. The Helpline is run by Her Majesty's Revenue & Customs on behalf of DTI.

In **Northern Ireland** there is a separate NMW helpline on **0845 6500 207**. This helpline is run by Citizen's Advice on behalf of the DTI.

Calls will be charged at local rates. To help us improve the quality of our service, your call may be monitored or recorded for internal training purposes only.

You can also write to NMW enquiries, Freepost PHQ1, Newcastle upon Tyne, NE98 1ZH or email your enquiry to nmw@hmrc.gov.uk. You can also visit the DTI NMW website at: www.dti.gov.uk/employment/pay/national-minimum-wage/index.html

Training programmes and minimum earning levels for apprentices

- In England details are available from the Learning and Skills Council via its helpline **0870 900 6800**;
- In Wales via the Welsh Assembly Government on **08456 088 066**;

- In Northern Ireland details are available from the Department of Employment and Learning on **028 9044 1881**;
- In Scotland details are available from Careers Scotland on **0845 8 502 502**, the Local Enterprise Companies and the relevant Sector Skills Council.

Information about other financial support available to 16-19 year olds is contained in the booklet "Financial Help for Young People", published on the Learning and Skills Council's website at:
<http://readingroom.lsc.gov.uk/lsc/2006/learningopportunities/youngpeople/nat-financialhelpforyoungpeople-re-mar2006.pdf>

The information contained in this guide is intended to provide general guidance only. It should not be regarded as a complete authoritative statement of the law.



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