



# Homecare Association



## National Minimum Wage Toolkit

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April 2024

Produced by  
**Homecare Association**

## **The Homecare Association – representing homecare providers**

The Homecare Association Limited is the professional association of homecare providers from the independent, voluntary, not-for-profit, and statutory sectors. The Homecare Association helps organisations that provide home-based social care (also known as domiciliary care or homecare and home nursing), promoting high standards of care and providing representation with national and regional policymakers and regulators.

The Association represents over 2,200 members across the United Kingdom.

### **Helpline support for Homecare Association members**

Homecare Association members are entitled to a range of member benefits, including support from our legal and human resources helplines on issues such as the National Minimum Wage, and employing staff.

If you are not a Homecare Association member, and are a homecare provider, you can find out about joining at: [Membership](#) or call 020 8661 8188, option 2.

### **Anthony Collins Solicitors LLP**

Anthony Collins Solicitors LLP acts as an expert for many leading social care providers, helping them to navigate this highly complex legislative and regulatory environment. At Anthony Collins Solicitors, the firm's purpose is to improve lives, communities, and society by working with like-minded clients who share our vision and passion.

### **Disclaimer**

This guidance, including worked examples, reflects the law as of April 2024. This guidance is only intended to be a summary of the law as it currently stands. Case law, particularly in this area, changes frequently. You should therefore take legal advice specific to your situation before taking or refraining from action based on the content of this guidance.

# Foreword by Homecare Association

**Compliance with the National Minimum Wage in the homecare sector has come under increasing government and public scrutiny.**

Local authorities, who purchase the majority of homecare services, have used their dominant purchasing power to drive prices for homecare services down as a result of public spending cuts and inflationary pressures. The impact on providers' businesses, and their ability to reward social care workers sufficiently, carries serious implications for our sector. In addition, the complex working patterns required for homecare workers, particularly in relation to the payment of travel time and the use of premium payments to incentivise out-of-hours working, are not always well understood.

While there is an increasing recognition of the extremely difficult conditions that affect independent and voluntary sector homecare providers delivering services, it remains the responsibility of individual employers to comply with the National Minimum Wage Regulations. HM Revenue and Customs (HMRC) can conduct impromptu inspections of employers' compliance with Minimum Wage Regulations at any time and are doing so with increasing frequency in the social care sector.

This Toolkit, originally launched in November 2013, has been designed to help homecare providers ensure that they are meeting or exceeding the National Minimum Wage requirements for their workforce. It has been thoroughly revised to take into account the introduction of new regulations, emerging case law and our understanding of how HMRC apply the regulations in practice.

The National Minimum Wage is a complex area of UK law which is often confused by conflicting case law. This Toolkit begins with a summary of what's new in the current version. There is also a Quick Start Guide, which gives a brief overview of key issues (and is not intended as a substitute for reading the whole Toolkit).

In section one of this Toolkit, the Homecare Association's recommended legal advisors, Anthony Collins Solicitors LLP, set out the current position on the law with some practical examples of how to maintain compliance with the Minimum Wage.

The second section provides a step-by-step guide to help providers assess whether an individual worker, or a sample of workers, have received at least the Minimum Wage.

The third section of the Toolkit provides some suggested actions that employers can take, if they are concerned that they are at risk of underpayment of the Minimum Wage.

The Homecare Association would like to thank Anthony Collins Solicitors LLP for their assistance in producing this Toolkit and our former Policy Director, Colin Angel MBE, for his contribution to Section 3. The Homecare Association will continue its extensive campaigning activity to secure a better operating environment for homecare providers that enables them to reward their workforce properly, and to secure the best outcomes for people who use homecare services.

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## What's new in the April 2024 version?

An update concerning revised National Minimum Wage (NMW) rates from 1 April 2024, including extending National Living Wage to those of 21 and over.

## What's new in the November 2021 version?

The last substantive updates, apart from annual NMW rate increases, were:

- An update to take account of the Supreme Court's decision in the cases of Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad (t/a Clifton House Residential Home) on 19 March 2021. Here the Supreme Court found that, where a worker is on call or undertaking a sleep-in, it is only time spent awake and working that counts as working time for NMW purposes.
- An update regarding Opalkova v Acquire Care Limited EAT 6/5/2021, where the court concluded that an individual could fall within the definition of a worker or employee as soon as they accept an offer of employment, even where the agreed start date is after the mandatory training had been completed. Therefore, the time spent on induction training could count as time worked for NMW purposes.

## Quick start guide

This guide gives a brief overview of key issues of the National Minimum Wage for homecare providers **(it is not a substitute for reading the whole toolkit)**.

- Payment of the National Minimum Wage is a legal requirement in all four nations of the United Kingdom (see paragraphs 1 to 5).
- The National Living Wage applies to workers of 21 and over. In this toolkit, references to compliance with the National Minimum Wage include compliance with the National Living Wage.
- Employers can be fined for underpayment of National Minimum Wage and providers who underpay workers can be "named and shamed" by Government (see paragraphs 14 to 20).
- Low rates paid by local authorities, or the NHS, are not a defence for underpayment of the National Minimum Wage, nor is the practice of commissioners paying for care solely by reference to "contact time".
- The way the National Minimum Wage is calculated is affected by the type of work undertaken. Most homecare workers will undertake "time work" and many live-in careworkers undertake "unmeasured work", while office staff are often "salaried" workers (see paragraphs 50 to 84).
- National Minimum Wage is calculated as an average pay over a reference period of not more than a month (see paragraphs 23 to 28). In simple terms, total pay (excluding enhancements) divided by total working time must be at least equal to National Minimum Wage (see paragraphs 125 to 126).

- Not all payments made to workers count towards the calculation of the National Minimum Wage. In particular, enhanced rates paid for unsocial hours working, or higher rates for short homecare visits, will not count towards careworkers' total pay (see paragraph 33).
- Most of the time that careworkers spend travelling between service users' homes, or waiting to start the visit, counts as working time. While it is not necessary to make a separate payment for careworkers' travel time, paying workers just for the time spent delivering care must be at a rate sufficient to cover all working time, including travel time, at the National Minimum Wage or above (see paragraphs 85 to 116).
- Not reimbursing travel expenses – such as car mileage or bus and train fares – can bring workers' average pay below the National Minimum Wage (see paragraphs 111 to 113).
- Time spent undertaking approved training, undergoing supervision or appraisals usually counts as working time, as do scheduled breaks during which the worker is required to work (see paragraphs 117 to 121).
- Induction training is likely to count as working time if the worker is already contracted, has accepted the offer of employment or has been given an unconditional offer of employment (see paragraphs 122 to 124).
- There are particular implications for compliance with the National Minimum Wage if you ask your careworkers to pay for uniforms (see paragraphs 38 to 42).
- There are specific arrangements if you charge any costs for accommodation from workers' wages (see paragraphs 44 to 47).
- Case law and the former Social Care Compliance Scheme ("SCCS") have created significant questions about how the National Minimum Wage Regulations are applied to the following duties:
  - Sleep-ins (see Appendix 1 - Practical examples – total hours worked)
  - On-call arrangements (see Appendix 2 - Practical examples – total hours worked)
  - Live-in care (Appendix 3 - Practical examples – total hours worked).
- There are criminal and financial penalties associated with the failure to pay the National Minimum Wage and/or to maintain appropriate pay records (see paragraphs 14 to 19). Penalties have increased sharply in recent years, to reflect Government's intention to deter employers from underpayment of National Minimum Wage (see paragraph 18).

Non-compliance with the National Minimum Wage carries serious implications for care providers. Relying on enhanced rates of pay or underestimating careworkers' travel time in order to appear compliant with the National Minimum Wage is ill-advised and will not provide a defence against breaking the law. Please use this Toolkit to help you protect your business.

# Section 1 - The legal position

## A. What is it?

1. The National Minimum Wage is the hourly rate of pay to which most workers are entitled.
2. The National Living Wage was introduced on 1 April 2016 and is a rate of pay that applies to the National Minimum Wage for workers of 21 and over (the total is known as the National Living Wage). This initially applied to workers of 25 and over. It was extended to those of 23 and over from 1 April 2021, and further extended to those of 21 and over from 1 April 2024.
3. The National Minimum Wage (including the premium for National Living Wage) is payable regardless of the size of your organisation.
4. The following table illustrates the published rates for different types of workers. The most up-to-date version is published each year at <https://www.gov.uk/national-minimum-wage-rates>.

Rate	21 years and over (National Living Wage)		18 to 20 years	Under 18 years	Apprentice
1 April 2024 – 31 March 2025	£11.44		£8.60	£6.40	£6.40
Rate	23 years and over (National Living Wage)	21 to 22 years	18 to 20 years	Under 18 years	Apprentice
1 April 2023 – 31 March 2024	£10.42	£10.18	£7.49	£5.28	£5.28
1 April 2022 – 31 March 2023	£9.50	£9.18	£6.83	£4.81	£4.81
1 April 2021 – 31 March 2022	£8.91	£8.36	£6.56	£4.62	£4.30
Rate	25 years and over (National Living Wage)	21 to 24 years	18 to 20 years	Under 18 years	Apprentice
1 April 2020 – 31 March 2021	£8.72	£8.20	£6.45	£4.55	£4.15
1 April 2019 – 31 March 2020	£8.21	£7.70	£6.15	£4.35	£3.90
1 April 2018 – 31 March 2019	£7.83	£7.38	£5.90	£4.20	£3.70
1 Apr 2017 – 31 Mar 2018	£7.50	£7.05	£5.60	£4.05	£3.50
1 Oct 2016 – 31 Mar 2017	£7.20	£6.95	£5.55	£4.00	£3.40
1 Apr 2016 – 30 Sep 2016	£7.20	£6.70	£5.30	£3.87	£3.30
1 Oct 2015 – 31 Mar 2016	£6.70		£5.30	£3.87	£3.30
1 Oct 2014 – 30 Sep 2015	£6.50		£5.13	£3.79	£2.73
1 Oct 2013 – 30 Sep 2014	£6.31		£5.03	£3.72	£2.68

5. The National Minimum Wage and the National Living Wage currently increase each April. Providers should review their pay rates no later than each March to ensure that increases applying in April do not result in workers being underpaid after the increases take effect. You should also review your workers' pay when they move from one NMW bracket to another, following a birthday.
6. See [National Minimum Wage and National Living Wage rates - GOV.UK \(www.gov.uk\)](https://www.gov.uk) for more on the rates from 1 April 2024.
7. Providers should note that the rate for apprentices is for those apprentices:
  - Employed under an apprenticeship agreement, contract of apprenticeship or under certain government apprenticeship schemes that are treated as contracts of apprenticeship; and
  - aged 16 to 18; or
  - aged 19 or over and in their first year of apprenticeship.

All other apprentices are entitled to the National Minimum Wage for their age.



## B. Record keeping

8. The burden of proof in National Minimum Wage claims is with the employer with the effect that courts must presume that a worker has been paid at a rate **below** the National Minimum Wage unless the employer can show otherwise. Therefore, it is clearly in your best interest to keep records that will enable you to prove that you have discharged your liability to pay the National Minimum Wage. In any event, you must keep records in respect of workers who qualify for the National Minimum Wage sufficient to establish whether or not your workers are being paid appropriately.

There are criminal offences associated with failure to maintain records (or falsification of records) – please see C. Enforcement and fines for non-compliance.

9. Records do not have to be kept in any particular format, as long as the information can show that workers have been paid at least the National Minimum Wage. HMRC requires that the records must be retained for a minimum of 3 years. It is important to note however that, in England, Wales and Northern Ireland, HMRC can review NMW compliance for up to 6 years, and in Scotland for up to 5 years. Providers may therefore wish to keep records for a period longer than 3 years in order to satisfy HMRC of their NMW compliance.
10. If a worker reasonably believes that the provider paid them less than the National Minimum Wage, they can require the provider to produce any relevant records and inspect and examine those records. This right can be exercised by the worker giving the provider a “production notice”, and you must produce the records to the worker before the end of 14 days following the date of receipt of the production notice. Where the worker’s complaint of NMW underpayment is well-founded, and the provider has failed to disclose any such records requested, a court will make an award to pay the worker a sum equal to 80 times the hourly amount of National Minimum Wage.
11. As the issue of travel time is so pertinent to compliance with National Minimum Wage in homecare services, employers should consider how they record careworkers’ travel time, either on paper-based timesheets, or by use of electronic monitoring equipment. HMRC have advised the Homecare Association that this is one of the factors which can have a significant bearing on the amount of time that their investigations of providers’ compliance with NMW take to conduct. For further information on travel time, see Section E. Travel time below.
12. Where providers are operating daily average agreements (see paragraph 78), supporting documentation will need to be provided to demonstrate that they are realistic.

13. When investigating compliance, HMRC may also require to speak to workers to verify the information provided by the provider. Where HMRC request access to the employee's personal data, such as their personal addresses or telephone numbers, providers must ensure that such requests are processed in accordance with the data protection principles ([see Information Commissioner's Office – The Principles](#)).

## **C. Enforcement and fines for non-compliance**

14. HMRC is the enforcement agency for the purposes of the National Minimum Wage. It has various powers, including powers to inspect records, enter premises and interview the employer and its workers. Where, on conclusion of an investigation, a compliance officer believes that a worker who qualifies for the National Minimum Wage has not been remunerated at a rate at least equal to the National Minimum Wage, the officer may issue a notice of underpayment, setting out the arrears of the National Minimum Wage to be paid by the employer together with a financial penalty for non-compliance.
15. The provider's reasons for underpaying the National Minimum Wage will not be taken into account by HMRC when determining whether to issue a notice.
16. In England, Wales and Northern Ireland, a notice of underpayment must be issued by HMRC. It can be issued for any pay reference period that ends less than 6 years before the date on which the notice is served. In Scotland, a notice of underpayment must not show any pay reference period that ends more than 5 years before the date on which the notice is served.
17. For each pay reference period where HMRC finds that the worker has been paid below National Minimum Wage rates, their underpayment will be calculated either as:
- a. the difference between the amount they should have been paid if they had been paid at National Minimum Wage rates on time, and the amount they were actually paid for the pay reference period (if the rate of NMW pay remains the same); or
  - b. the amount calculated using the following formula (where the rate of NMW pay has increased):  $\text{amount due} = (\text{total amount underpaid} \times \text{current NMW rate}) / \text{original NMW rate}$ .
18. In addition, a notice of underpayment will include a penalty. Financial penalties have increased substantially since 2016 and changed to a 'per worker' basis.
- Where the notice of underpayment relates to pay reference periods between 6 April 2009 and 6 March 2014, the financial penalty for non-compliance is calculated as 50% of the total underpayment for all the workers specified in the notice, with a minimum penalty of £100 and a maximum penalty of £5,000.

- For pay reference periods between 7 March 2014 and 25 May 2015, the financial penalty for non-compliance is calculated as 100% of the total underpayment for all workers specified in the notice, with a minimum penalty of £100, and for pay reference periods before 26 May 2015, a maximum penalty of £20,000.
- For pay reference periods between 26 May 2015 and 31 March 2016, the financial penalty for non-compliance is calculated as 100% of the underpayment owed to each worker up to a maximum of £20,000 per worker.
- For pay reference periods beginning on or after 1 April 2016, the 'relevant percentage' (100%) doubles to 200% in respect of the underpayment owed to each worker up to a maximum of £20,000 per worker.
- Penalties on a 'per worker' basis were brought in by The Small Business, Enterprise and Employment Act 2015 (Commencement No. 1) Regulations 2015, and the change to the 'relevant percentage' from 1 April 2016 was included in The National Minimum Wage (Amendment) Regulations 2016.

## Summary of penalty calculation

	Pay Reference Periods	Penalty calculation on a Notice of Underpayment (NoU)
1.	Before 6 April 2009	No penalty to be included on a NoU.
2.	6 April 2009 to 6 March 2014	50% of total underpayment Minimum £100 for the NoU Maximum £5,000 for the NoU
3.	7 March 2014 to 25 May 2015	100% of total underpayment Minimum £100 per NoU Maximum £20,000 per NoU
4.	26 May 2015 to 31 March 2016	100% of total underpayment Minimum £100 per NoU Maximum £20,000 per worker
5.	After 1 April 2016	200% of total underpayment Minimum £100 per NoU Maximum £20,000 per worker

19. There are criminal offences associated with:

- failing to maintain records;
- keeping or providing false records;
- refusing or wilfully neglecting to pay the National Minimum Wage;
- intentionally obstructing or delaying an enforcement officer; and
- refusing or neglecting to answer questions or provide information to an enforcement officer.

All the above offences are subject to unlimited fines.

20. From 1 October 2013, employers who receive a Notice of Underpayment from HMRC can be publicly “named and shamed”. The possibility of this happening may be particularly damaging for providers, who may face adverse publicity in national and local media, and may also have to declare this while tendering for contracts with local authorities and the NHS. Those “named and shamed” are listed on the Gov.uk website from time to time and more continue to be added.
21. A worker who believes they are not paid the National Minimum Wage may contact the Acas helpline (see: [www.acas.org.uk/contact](http://www.acas.org.uk/contact)), who may transfer calls relating to non-payment of National Minimum Wage to HMRC. Workers can also bring a claim themselves for unauthorised deduction from wages before an employment tribunal or in civil court.

22. Tougher penalties for National Minimum Wage and National Living Wage non-compliance came into effect in April 2016. The package of measures included doubling penalties (see above), increasing the enforcement budget, setting up a new team of criminal enforcement specialists, and ensuring company director disqualification for up to 15 years for those found guilty: [www.gov.uk/government/news/measures-to-ensure-people-receive-fair-pay-announced](https://www.gov.uk/government/news/measures-to-ensure-people-receive-fair-pay-announced)

## **D. How is it calculated?**

23. It is important to note that the obligation to pay the National Minimum Wage (this term includes the National Living Wage) is not to ensure that the National Minimum Wage is paid for each hour worked, but to ensure that the average hourly rate is at least the National Minimum Wage over a pay reference period. The National Minimum Wage is calculated by dividing the total eligible earnings earned in a pay reference period by the number of hours worked during that period. In order therefore to determine whether a worker is being paid the National Minimum Wage, it is necessary to determine:
- a. the pay reference period (see paragraph 25 below);
  - b. the total pay received in the relevant pay reference period (see paragraphs 29 – 45 below); and
  - c. the total number of hours worked during that period (see paragraphs 48 – 79 below).
24. To calculate whether you are compliant, go to Section 2 – Step-by-Step Assessment.

### **The pay reference period**

25. A pay reference period is the period for which a worker is paid.
26. A pay reference period is either:
- a. a month; or
  - b. the worker's pay period if shorter, for example weekly if a worker is paid weekly.
27. A pay reference period cannot be longer than one calendar month.
28. When determining the pay reference period, providers need to consider the period the payment covers, and not when the payment of wages is actually made.

### **Total earnings earned in the pay reference period**

#### **What counts?**

29. National Minimum Wage pay is calculated by determining the worker's total remuneration in a pay reference period, including:

- a. all eligible payments received in the pay reference period in respect of that pay reference period; and
  - b. any eligible payments received in respect of the pay reference period but paid in the following pay reference period.
30. If payment is made in any later pay reference period than one pay reference period to the period in which it was earned, then it cannot be linked back to the pay reference period in which it was earned and must count in the pay reference period in which it was actually paid. The only exemption to this would be if the worker fails to submit their time sheets which results in the delay in pay.
31. The worker's eligible remuneration is not **solely** determined by payments received by the worker as wages, but by adding up payments received by the worker which satisfy the conditions under the National Minimum Wage as eligible earnings.
32. Not all payments received as wages count towards eligible earnings for the National Minimum Wage purposes. This is a summary of some of the points you will need to be aware of.
33. Examples of pay and benefits that **do not count as eligible earnings** towards the National Minimum Wage and therefore have to be subtracted from the total pay received before compliance is calculated:
- a. Any enhancements, premiums or increased hourly rates paid in respect of time work (Regulation 10 of the National Minimum Wage Regulations 2015, previously Regulation 31 of the National Minimum Wage Regulations 1999) – the amount that exceeds the lowest rate that would be payable under the contract in respect of work involving particular duties is not taken into account.

Employers should therefore be extremely careful not to rely on enhanced rates paid for working during unsocial hours, weekends and public holidays or higher rates for short homecare visits, in order to maintain compliance with the National Minimum Wage.

Employers should also be extremely careful when paying different hourly rates for some elements of the work (including travel time or training), as the lowest rate paid may be used to calculate compliance with National Minimum Wage. HMRC consider travel time an integral part of delivering of homecare and do not accept it to be work involving different duties.

### Example 1

If the careworker aged 28 usually receives £11.44 per hour in respect of work involving particular duties but receives £12.44 per hour for any overtime or weekend working involving the same duties, only £11.44 per hour is taken into account in respect of all shifts worked for the purposes of calculating National Minimum Wage.

- Basic contact hours: 10 at the rate of £11.44 per hour = £114.40.
  - Antisocial contact hours: 5 at the rate of £12.44 per hour = £62.20
  - Overall Travel time: 2 hours with no extra pay
  - Total pay = £176.60
  - Total number of hours worked: 17 (10+5+2)
  - Difference in hourly pay between antisocial contact hours and basic contact hours: £12.44 - £11.44 = £1.00.
  - Total pay for NMW purposes: £176.60 – (5 x £1.00) = £171.60
  - NMW amount due to worker: £11.44 x 17 = £194.48
  - In this example there has been **NMW underpayment** of £22.88 (£194.48 - £171.60)

### Example 2

If the careworker aged 28 is engaged on a zero-hours contract and usually receives £11.44 per hour in respect of work involving particular duties but receives £12.44 per hour for out of hours working involving those duties, again only £11.44 per hour is taken into account in respect of all shifts worked for the purposes of calculating National Minimum Wage.

### Example 3

If the careworker aged 28 usually receives £11.44 per hour in respect of work involving service user A, but receives £12.94 per hour in respect of work involving service user B as they are a more complicated client and therefore the duties are different, relevant pay rates can be taken into account in respect of all shifts worked for the purposes of calculating the National Minimum Wage.

- Basic hours worked in respect of service user A: 10 at the rate of £11.44 per hour = £114.40
- Basic hours worked in respect of service user B: 10 at the rate of £12.94 per hour = £129.40
- Overall Travel time: 2 hours with no extra pay
- Total hours worked: 22 (10+10+2)
- Total pay = £243.80
- Total pay for NMW purposes = £243.80
- NMW amount due to worker: £11.44 x 22 = £251.68

- In this example there has been **NMW underpayment of £7.88** (£251.68 - £243.80)

#### **Example 4**

If the careworker aged 28 usually receives £11.44 per hour in respect of direct contact involving service users but receives £3.00 per hour in respect of their travel time, there is a significant risk that only £3.00 per hour will be taken into account in respect of all time worked for the purposes of calculating National Minimum Wage. In this example, there could be significant **NMW underpayment**.

- b. Any allowances or payments that are not attributable to the employee's performance, for example London weighting, an on-call allowance, or travel time allowance. However, if these payments are consolidated into standard pay or are attributable to the performance of the worker in carrying out the work (for example, a performance bonus), they will count towards the National Minimum Wage. From the Freedom of Information Act response that Anthony Collins Solicitors LLP received from HMRC in March 2017, it appears that "sleeping allowance" will count as eligible pay if it "forms part of the pay arrangements".
- c. Expenses or allowances, including the repayment of money spent in connection with the job – for example, to cover the cost of uniforms. It is unlawful to make deductions or to require money to be paid back for such expenses if this will reduce the amount of pay below the level required to meet the National Minimum Wage. Employers should therefore think carefully before allowing workers to re-pay uniform costs through deductions from pay, unless this practice will not impact on NMW compliance (see paragraph 38–42 below).
- d. Benefits in kind, whether or not they have a monetary value – e.g. vouchers;
- e. Loans by the employer;
- f. Employer Pension contributions;
- g. Redundancy payments;
- h. Holiday, sickness or maternity pay etc; and
- i. Settlement and compensation payments or court awards.

#### **34. Examples of deductions that do not affect the calculation of the National Minimum Wage pay:**

- a. Deductions (or payments made by the worker) under an agreement for a loan or advance of wages;
- b. Deductions (or payments made by the worker) because of an accidental overpayment of wages;



- c. Deductions or payments that are not for expenditure connected to the worker's employment, or for the employer's own use or benefit - for example, pension contributions and union subscriptions. Any deduction made from worker's pay to pay for criminal record (Disclosure and Barring Service (DBS), Disclosure Scotland or AccessNI) checks (see below) on their behalf will not reduce the National Minimum Wage pay since it is paid over by you to meet the liability of the worker; and
  - d. Deductions for tax and national insurance.
35. **Criminal record checks and checks against adults' and children's barred lists (DBS, Disclosure Scotland checks and AccessNI Disclosures)**
36. HMRC's own internal guidance indicates that the responsibility for the cost of checks against criminal records and adults' and children's barring lists (including those undertaken by the Disclosure and Barring Service in England and Wales, Disclosure Scotland and AccessNI) sits with the individual upon whom that check is being undertaken, rather than the employer, even though you may decide to pay for the necessary disclosure checks on behalf of your workers. Any deduction therefore made from the worker's pay to pay for this check on their behalf **will not** reduce the National Minimum Wage pay if it is paid over by you to a third party to meet the liability of the worker. This guidance is of course subject to change and we are not confident that the courts would reach the same view if an individual employee took enforcement action.
37. If you impose an administrative charge for handling the application, however, then the amount of the administrative charge will reduce the worker's National Minimum Wage pay.
38. **Uniforms**
39. If you require workers to wear specific uniforms and staff are required to purchase those, then any deductions made from pay or payments made to you by the worker in respect of such uniforms **will reduce** the National Minimum Wage pay. If the worker makes payment to a third party for the required uniforms, those payments **will also reduce** the National Minimum Wage pay since it would be seen by HMRC as expenditure incurred in connection with the worker's employment.
40. If you provide a uniform free of charge, any charge by you made for ordinary wear and tear to that uniform **will reduce** the worker's National Minimum Wage pay. However, if the worker damages the uniform, loses it or does not return it at the end of their employment where contractually required to do so, the charge made by you **will not reduce** the National Minimum Wage pay providing you are contractually entitled to make the charge (i.e. the contract of employment confirms this).
41. If, however, uniforms are not required and the worker freely chooses to pay for additional items of uniform, any payment to you or a third party **will not reduce** the National Minimum Wage pay.

### Uniforms: useful tip

42. If you require workers to wear specific uniforms, you may want to ask staff to pay a deposit for the uniform rather than paying for it. Providing the arrangement is structured appropriately, it is **arguable** that the taking of such a deposit will not reduce the National Minimum Wage pay provided the monies held by you is simply as security for those uniforms, held on trust for your workers and not for your use or benefit. The deposit will need to be returned to staff on termination of their employment unless the worker damages the uniform, loses it or does not return it at the end of their employment. However, any charge by you made for ordinary wear and tear to that uniform **will reduce** the worker's National Minimum Wage pay. If you are wanting to rely on this, we would suggest that you seek specific advice as HMRC guidance is contrary to this approach.

### 43. Accommodation

44. Although this will not be relevant to all homecare providers, those who provide accommodation to their staff should note that if a person lives in accommodation provided by their employer and they either:

- a. have the rent for that accommodation deducted from their earnings; or
- b. they are paid their earnings and give some of that money back to their employer in respect of their rent,

only some of this money can be taken into account when calculating the total earnings in the pay reference period.

45. There is an accommodation offset allowance that determines how much of the money paid in respect of rent can be taken into account for the purposes of the National Minimum Wage. From 1 April 2024, this amount is £9.99 per day that the accommodation has been provided during the pay reference period: [National Minimum Wage and Living Wage: accommodation: Accommodation rates - GOV.UK](#).

46. In a similar way, if the accommodation is provided free of charge, the same allowance can be added to the total pay for the pay reference period.

47. The reasoning for this is the policy behind the National Minimum Wage is that workers should receive pay in the form of cash, rather than benefits in kind. Accommodation is the only non-cash benefit that has an allowance that can be taken into account which is used to value the accommodation provided. Other benefits in kind such as vouchers will not count at all.

### What does this mean in practice?

#### Example 1

An employee is provided with free accommodation. They are paid every 28 days and have resided in the accommodation for all 28 days. When the employer is calculating the total earnings for the pay reference period, they can add £279.72 (28 x £9.99) to the total wages received.

## Example 2

An employee pays their employer discounted rent for their accommodation. They are paid every 28 days and have resided in the accommodation for all 28 days. They are paid £600 every 28 days. They pay £300 rent every 28 days.

When the employer is calculating the total earnings for the pay reference period, they need to subtract the rental payment that is not covered by the accommodation offset allowance i.e.  $£300 - (£9.99 \times 28) = £20.28$ . This makes their total pay for the pay reference period  $£600 - £20.28 = £579.72$ .

## Number of hours worked during the pay reference period

48. The total number of hours worked that you will need to take into account will depend on the type of work the worker is engaged in. There are different rules which apply to different categories of work for National Minimum Wage calculation purposes.
49. In order to calculate whether a worker is receiving the National Minimum Wage, you will therefore need to identify the type of work they are undertaking.

Please read the following four parts carefully, to ensure that you have correctly assessed the type of work being performed.

**WARNING:** We would recommend that providers who engage workers on a self-employed basis should take appropriate legal advice to ensure that their arrangements are properly documented and are a true reflection of the arrangements in place. Our experience is that a number of providers believe their workers are self-employed, when this is not the case.

For further information, please refer to the Homecare Association Factsheet available to members at:

[Guide to employment status of careworkers \(homecareassociation.org.uk\)](https://homecareassociation.org.uk).

## Time work

50. This is work paid for according to the amount of time the worker spends working, for example, a worker who is paid an hourly rate.
51. It is likely that most of your careworkers (and possibly your supervisors) will be engaged under this type of working arrangement. However, careworkers providing live-in care services may be undertaking unmeasured work (please see paragraphs 74 - 79).

## **Total of hours worked for time workers?**

52. In relation to time work, in theory, the formula is quite straightforward. You must simply add up the total number of hours of time work done by the worker in the pay reference period including time spent working by the worker (i.e. “contact time”); and time treated as worked (e.g. time spent training, travelling, waiting to work, and/or time on-call). It seems obvious but what time counts as time worked or treated as worked can be complicated, as set out below.
53. In relation to time work, time spent absent from work (for example, sickness absence, annual leave and maternity leave) will not count. The time spent on such absences and the money received during these absences should not be taken into account.
54. Rest breaks such as a lunch hour will not count, even if the worker works voluntarily during that time. However, if they are instructed or required to work during a break, the time will count.
55. Any time spent engaged in industrial action will not count as time spent working (any pay received during this period will not count either).
56. Travel time and time spent training generally count towards calculation of National Minimum Wage and are dealt with later in this toolkit under E. Travel time and F. Training time and costs, including individual and group supervision, below. Please read these sections carefully.
57. There has been much confusion over the legal requirements to ensure that time workers are being paid the appropriate wage for on-call and/or sleep-ins.
- Where a worker is on call or undertaking a sleep-in, the key question is whether they are actually working (and therefore the time counts as working time) or if they are “available for work” (and therefore one of the exemptions in the legislation may apply and it may not count as working time).
58. The National Minimum Wage Regulations 2015 state at regulation 32:
- (1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.
  - (2) In paragraph (1), hours when a worker is “available” only include hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.
59. There is quite a lot of case law on what this actually means in practice.

60. In March 2021, the Supreme Court handed down judgment in the cases of *Royal Mencap Society v Tomlinson-Blake* and *Shannon v Rampersad* (t/a Clifton House Residential Home). In a very clear decision, the Supreme Court found that it is only time spent awake and working that counts as working time for NMW purposes. The judgment, therefore, put an end to many years of uncertainty. The Supreme Court decided that if the employee is undertaking a sleep-in (but this would equally apply to an on-call) and the only requirement on the worker is to respond to emergency calls, the worker's time in those hours is not included in the NMW calculation for time work purposes unless the worker actually answers an emergency call or attends the person they support. Only the time the worker spends answering the call, or attending the person they support, is included for NMW calculations.
61. Please refer to the Scenario in Appendix 2 - Practical examples – total hours worked - on call for a detailed analysis of the current position and Anthony Collins Solicitors' view on the current position.

### **Salaried work**

62. This is where a worker is paid a set amount to work a set number of hours per year and is paid their annual salary in equal weekly or monthly instalments or in variable amounts which add up to the same each quarter.
63. Please note that the fact that your staff are paid on annual salary basis does not in itself automatically mean that they would fall within the salaried work definition.
64. Providers should note that a contract which describes hours to be worked on a weekly basis (such as 37 hours a week) might not contain sufficient information to determine the basic hours for workers who work varied hours because a weekly calculation would not cover a full calendar year.
65. You are likely to have this type of working arrangement with your office-based staff and managers, and possibly with your supervisors and senior careworkers.

### **Total of hours worked for salaried workers?**

66. In order to ascertain the number of salaried hours worked in a relevant pay reference period, the first step is to calculate the worker's total basic annual hours and divide them by the pay reference period, for example, for a monthly pay reference period: 1,950 annual hours divided by 12 months = 162.5 hours per month. The second step is to determine the number of hours worked in the relevant pay reference period outside the basic hours in respect of which the worker has no entitlement to extra pay.
67. Again, time spent actually working will count excluding when the worker is paid less than normal pay (for example, during maternity leave, annual leave or sickness absence) and also excluding time participating in industrial action.

68. Travel time and time spent training generally count towards calculation of National Minimum Wage and are dealt with later in this toolkit in sections E. Travel time and F. Training time and costs, including individual and group supervision, below. Please read these sections carefully.
69. As with time work, there has been much confusion over the legal requirements to ensure that salaried workers are being paid the appropriate wage for on-call and/or sleep-ins. The confirmed position is that time where a worker performing salaried work is not working but is required by their employer to be available at or near a place of work for the purposes of working will not be treated as working time. It is only time spent responding to calls or dealing with disturbances that will count.
70. Regulations 27(1)(b) and 27(2) of the National Minimum Wage Regulations 2015 confirm:
- 27 (1) (b) hours a worker is available at or near a place of work for the purposes of working, unless the worker is at home.
- 27 (2) In paragraph 1(b), hours when a worker is available only includes hours when the worker is awake for the purposes of working, even if a worker is required to sleep at or near a place of work and the employer provides suitable facilities for sleeping.
71. There is quite a lot of case law on what this actually means in practice, but as confirmed above, the confirmed position in relation to salaried work is that where the careworker is required by their employer to be available at or near a place of work for the purposes of working, this will not count as working time if they are expected to sleep for all or most of that period of availability. **Please refer to the Scenario in Appendix 2 - Practical examples – total hours worked – on call for a detailed analysis of the current position and Anthony Collins Solicitors’ view on the current position.**

### Output work

72. This is where a worker is paid according to how productive they are; for example; creating a product and they are paid according to the number of products they produce. However, if the worker is required to work a set number of hours each day or is set a minimum or maximum number of hours or is told the amount of time to be spent on each product, this will count as time work (see paragraphs 50 – 57 above).
73. This guide does not cover output work as it is difficult to see how social care could be carried out on an output basis. You are unlikely to have any staff engaged on this type of working arrangement.

## Unmeasured work

74. This is effectively a catch-all category which includes any work that does not fall into the other three categories. It will generally be workers who do not receive a salary or be paid at an hourly rate or according to what they produce. Unmeasured work includes work in respect of which there are no specified hours and the worker is required to work when needed. For example, this may be where a worker is paid a set amount of money to complete a particular task, regardless of how long it takes. Careworkers who undertake unmeasured work will be paid by reference to something other than time, for example, the market rate, complexity of a task or the needs of the service user they are caring for.

75. You may have this type of working arrangement with care staff who provide live-in care and/or where workers are paid a set daily fee, regardless of how many hours they work on a given day.

76. **NOTE:** We are aware that many providers have complicated employment arrangements with live-in careworkers who may be employed by another agency, the service users themselves or are self-employed. We would recommend that if any of these arrangements apply to your organisation, you take legal advice to ensure that your arrangements are properly documented and that the legal paperwork reflects the reality of the arrangements in place. As a starting point, we would recommend you read the HMRC guidance at <https://www.gov.uk/guidance/check-employment-status-for-tax>.

## Total of hours worked for unmeasured workers?

77. Unmeasured work is described as “any other work that is not time work, salaried hours work or output work.” (The National Minimum Wage Regulations 2015, regulation 44.)

The hours of unmeasured work which count as the number of hours worked in each pay reference period are “...the total number of hours which are worked... by the worker in that period or which the worker is treated as working under a daily average agreement in that period.” (Regulation 45).

78. You should therefore ensure that you have in place arrangements that enable you to determine the hours that are to be taken into account for *unmeasured work*. There are two ways of doing this:

- a. To record every hour worked and therefore calculate the actual hours worked during the pay reference period; or
- b. Agree what is referred to as a “**daily average agreement**” (explored further in Section 2 – Step-by-Step Assessment) which sets out in a written agreement, between you and the worker, the average hours which the worker is likely to spend carrying out duties each day. A daily average agreement could however be held to be invalid if the average number of hours agreed is not realistic.



**Please note:** You have a duty to keep records in respect of workers who qualify for the National Minimum Wage sufficient to establish what your workers are being paid. For unmeasured work purposes, this includes evidence that the average number of hours agreed is realistic. (For further details, go to B. Record keeping above).

79. As with time work and salaried work, a worker will not be treated as doing unmeasured work while taking part in industrial action or when they are absent from work (for example, sickness absence, annual leave and maternity leave).

80. Travel time and time spent training for the purposes of unmeasured work will be treated as time spent doing unmeasured work.

81. For the purposes of calculating the hours that are to be taken into account for unmeasured work, it is arguable that an entire shift spent **on call** or **sleeping-in** (including in a **live-in care arrangement**) counts as carrying out contractual duties as it is a contractual requirement to be there, in particular where there is no daily average agreement in place. The risk of the whole of a live-in care day being treated as time worked is low where there is a valid daily average agreement in place, based on a Court of Appeal case on this point, *Walton v Independent Living Organisation Ltd* (2003). The judgment in the *Mencap* case, whilst not “placing any weight” on the *Walton* decision, did imply that *Walton* was correctly decided.

**82. *Walton v Independent Living Organisation Ltd* (2003)**

In this case, Miss Walton was a careworker who looked after aged or disabled people in their own homes. She was required to carry out various tasks such as the client’s washing, ironing, shopping, preparing meals for her and her medication. Miss Walton was required to remain in the client’s home 24 hours per day in case she was required to give assistance to her client – occasionally she was called upon to do this, sometimes this happened during the night. Miss Walton worked for 3 days per week for a flat rate of £31.40 per day.

Miss Walton argued that her hourly rate should be ascertained by dividing her payment by 24. Miss Walton had agreed with her employer that she spent on average 6 hours 50 minutes completing her contractual duties each day. Her employer therefore argued that her payment should be divided by 6 hours and 50 minutes, giving her a wage per hour of £4.60 which was above the National Minimum Wage of £3.60 per hour, at that time.

The Employment Tribunal and Court of Appeal held that the employer was correct and that Miss Walton was carrying out unmeasured work as she was not paid by reference to time spent, rather her daily rate varied according to the complexity of the needs of the client she was looking after and was related to the nature of the tasks she would be carrying out. There was a written agreement in place which specified a realistic assessment of the time it would take her to carry out the required duties.



The Court of Appeal upheld this view and did not accept that because the applicant was required to stay at the client's home 24 hours a day, she spent 24 hours a day in carrying out her contractual duties. When not performing her specified duties, she was not required to give the client her full attention. In those circumstances, it could not be said that she was continuously performing her contractual duties for 24 hours each day for the purposes of her daily average agreement. This is in contrast to the view reached in a time work case which found that you can be working when asleep. This is covered in detail at Appendix 1 - Practical examples – total hours worked – sleep-ins of this guide.

83. **Point to note: multiple arrangements** - It is our view that workers can work under more than one type of payment arrangement. To give an example, a worker could be paid a salary for their usual hours worked during the day and a separate payment for any on-call shifts that they undertake which could be a flat rate payment on an unmeasured basis. HMRC appear to take the view that there must be separate contracts for time work, salaried work, and unmeasured work in order for a multiple work arrangement to exist. Where there is only one contract in place, HMRC states that “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”. **Providers should therefore enter into separate and clear contractual arrangements in respect of any unmeasured work.**

84. For practical examples of scenarios which are typical of common arrangements in the social care sector and their impact on calculating the total of hours worked, please go to Appendix 1 - Practical examples – total hours worked – sleep-ins.

## E. Travel time

### General principles

85. Generally, travel time for the purposes of calculating hours worked when determining the National Minimum Wage will fall within one of two categories:
- Time spent travelling between home and a worker's normal place of work and back, which **will not count** as time worked when determining whether the National Minimum Wage has been paid; and
  - Time spent travelling on business, which **will count** as time worked when determining whether the National Minimum Wage has been paid.

86. Time spent travelling on business **includes** time when the worker is:
- a. required to travel in connection with their work by a mode of transport or is making a journey on foot. The legislation and the government guidance are unclear on whether any rest breaks taken during the time the worker is travelling will count as time worked (for example, a lunch break on board a train). Providers that however are able to document that a break was taken during the time spent travelling may be able to show that this time does not count as working time;
  - b. waiting at the place of departure to begin the journey or waiting for the journey to recommence (for example, waiting for a train or a bus to arrive or awaiting a connecting train/bus);
  - c. travelling from one place of work/work assignment to another (except when a worker is taking a rest break);
  - d. waiting at the end of a journey (for example, to meet someone in connection with work or start a job); and
  - e. travelling from work to training venues (travel between the worker's home and the training venue does not count).
87. Please note: despite the practice of the majority of local authorities purchasing homecare by reference to "contact time" only, it is extremely important to understand that the above types of travel time are included for the purposes of National Minimum Wage compliance.

### **Domiciliary care – sector-specific issues**

88. In many cases, domiciliary care will be provided in short visits lasting under an hour. Typically, careworkers will cover a number of these appointments and will travel to a number of appointments during their working day. Effective rostering of careworkers may well mean that there is little gap between appointments, so that there is just sufficient time for a careworker to travel on to their next appointment from the last appointment. However, there may also be situations where the careworker has significantly more time between appointments than is needed in order to travel between appointments.
89. Determining how, and when, travelling and waiting time counts for the purposes of calculating whether the National Minimum Wage has been paid can therefore be very difficult in the sector and there is no one-size-fits-all approach.
90. We have therefore identified the following scenarios which, in our experience, are typical of travelling time arrangements in the domiciliary care sector to assist you with deciding how to account for any travel time.

### **Typical Scenarios**

91. *What is the key issue?* - The key issue is to properly assess the travel time that counts towards the calculation of the National Minimum Wage.

92. *What time counts?*

The position is as follows:

93. Scenario 1: A careworker is rostered to carry out visits throughout the day and travels to their first appointment from home and then from one appointment to another. The gap between appointments is calculated to ensure that the careworker has sufficient time to travel between appointments, but no more. Following their last appointment, the careworker will travel back to their home.

94. When calculating the number of hours worked for the purposes of the National Minimum Wage:

- a. Time spent travelling to an appointment from home or from an appointment to home is not to be included;
- b. Time actually spent carrying out the appointment will obviously count; and
- c. Time travelling between appointments will also count (whether driving, getting public transport or walking.)

95. Scenario 2: The scenario is the same as the situation set out in Scenario 1 above with the exception that the gap between some or all of the appointments is more than the amount of time needed to travel between appointments. The careworker is therefore waiting to start their next appointment, is not working during this time, but also the worker does not have sufficient time to travel home or take a proper rest break.

96. When calculating the number of hours worked for the purposes of the National Minimum Wage:

- a. Again, time spent travelling to and from home will not count towards the number of hours worked for the purposes of the National Minimum Wage;
- b. Again, time actually spent in carrying out the appointment will count;
- c. Travel time between appointments will also count including waiting to travel (for example, at a bus or train station);
- d. Regulation 20 of the National Minimum Wage Regulations 2015 states: “‘travelling’ includes hours when the worker is [...] waiting at the end of a journey for the purpose of carrying out duties, or to receive training, except for any time the worker spends taking a rest break.” Therefore, time spent between appointments where the careworker is not working but is waiting to start work, will count towards hours of work for the purposes of the National Minimum Wage. If the worker is waiting to work but is on a contractual rest break, the rest break will not count towards hours of work for the purposes of the National Minimum Wage. In order to count as a contractual rest break, the time needs to be properly rota’d on the worker’s timesheet/schedule.

Where there is a gap between appointments when the careworker is not otherwise required to be working and is not simply waiting to start work, it is arguable that this time will not count towards hours of work for the purposes of the National Minimum Wage. Providers should consider scheduling this time as a break on the rota or having other systems of recording time (for example, timesheets) to evidence that the time was taken as a break. We do not consider that allocating time retrospectively as a break would achieve compliance unless timesheet records are kept confirming the same.

Providers should be aware that HMRC guidance to its inspectors suggests that it is for the Inspecting Officer to gather the facts from both the employer and the worker and form an opinion on the length of any permitted breaks. We understand that a break between appointments of less than 30 minutes is likely to be classed as working time by HMRC. We would recommend that any gaps where the worker is not required to be working are therefore scheduled as a rest break or records of any rest breaks taken are recorded by careworkers using timesheets.

An Employment Tribunal ruling in favour of the claimants in a minimum wage case has raised questions about whether the interpretation of “working time” has changed. The ruling was that when calculating what is classed as “working time”, travel between assignments and waiting time of up to 60 minutes would be included. The method of calculation was not challenged by the employers and so is unlikely to be appealed. A briefing by Anthony Collins Solicitors LLP, [“Working time” – new clarity or more confusion?](#), comments that this decision, while still only at first instance (and therefore not binding in other cases), is nevertheless an important one as there is little case law on the issue.

97. Scenario 3: This is the same as the scenario set out in Scenario 2 above but the gaps between some or all appointments are longer and the careworker carries out paperwork whilst they are waiting for their next appointment.

98. When calculating the number of hours worked for the purposes of the National Minimum Wage:

- a. Again, time spent travelling to and from home will not count towards the number of hours worked for the purposes of the minimum wage;
- b. Again, time actually spent in carrying out the appointment will count;
- c. Travel time between appointments will also count;
- d. Time between appointments spent doing the paperwork will count;

- e. However, time spent waiting between appointments where the careworker is not working, waiting to travel or waiting to work and is not otherwise required to be working will not count (see paragraph 96 d. above and Scenario 4 below).

99. Scenario 4: The careworker has a smaller number of appointments scattered throughout the day with significant gaps in between (much more than the amount of time needed to travel between appointments). The careworker therefore goes home between appointments and travels to and from their home for each appointment.

100. When calculating the number of hours worked for the purposes of the National Minimum Wage where the careworker travels to each appointment from their home (or another personal appointment) and then back to their home after the appointment, no travelling time will count. It is important to note that it is what actually happens in practice, rather than whether the worker could travel home which counts.

101. Scenario 5: The careworker carries out a number of appointments throughout the day, some of which only have the minimum amount of time required to travel, some which have more time than is required for travelling and some where the careworker has sufficient time to go home between appointments (and does in fact do so).

102. When calculating the number of hours worked for the purposes of the National Minimum Wage, this case is essentially a mix of the other scenarios and, in this situation, each journey needs to be analysed separately in order to assess whether the time counts and, if so, how much of the time counts, using the principles outlined above.

103. **Note:** We have assumed that careworkers working in the scenarios outlined above will be paid either a **salary** or by reference to the amount of **time work**. For treatment of travel time where careworkers are working **unmeasured work**, go to paragraph 80 above.

### **Travel time - Important reminder: what does this mean in practice?**

104. In many cases, contracting authorities and domiciliary care providers will only pay for the time spent in the service user's home (we refer to this as "contact time"), but not pay for travel time between visits. This in itself is not a problem, as the law does not require that all time at work must be paid at the rate of the National Minimum Wage or higher. However, the law requires that a worker is paid the National Minimum Wage on average based on the total of hours worked over a pay reference period.

105. Compliance with the National Minimum Wage is therefore worked out by calculating the total amount of eligible pay received during a pay reference period (which depends on how frequently the workers are paid and cannot be any longer than a month) and dividing this by the total number of hours which count for National Minimum Wage purposes during that pay reference period.

106. Domiciliary care providers could therefore satisfy the law by:

- a. Paying the National Minimum Wage (or higher) for all the time that counts (including the travel and waiting time); or
- b. Paying “contact time” at a higher rate than National Minimum Wage, so long as, on average, at least the National Minimum Wage is paid for all working time (including travel and waiting time). This is possibly the most commonly occurring method of payment in the homecare sector, but carries a particular risk of non-compliance with National Minimum Wage. It is difficult to be sure that the rate paid for “contact time” is always high enough to meet compliance, particularly for workers where travel time makes up a significant proportion of working time or there are only short gaps between appointments.

107. Providers who pay different rates of pay for travel time and contact time should be aware of the rules on using the lowest rate for **time work** as set out in paragraph 33. above and therefore be extremely careful not to rely on enhanced, or different rates paid when calculating National Minimum Wage compliance. As explained above, HMRC’s view is that travel time is an integral part of delivering homecare and they do not accept it to be work involving different duties. This means that HMRC may use a low travel time rate as the lowest hourly rate for homecare too and assess compliance based on this.

Is there a ruling which means that providers now have to pay careworkers for any journeys from their homes to their place of work and vice versa?

108. In the Tyco case (Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another (c-266/14)), the European Court of Justice ruled that, for workers who have no fixed or habitual place of work, time spent travelling from home to their first appointment and from their last appointment back home **does** count as working time **under the Working Time Regulations**, which cover issues such as:

- a. Limit on the average working week;
- b. Holiday accrual and pay; and
- c. Rest breaks.

109. Pay is an entirely separate issue, which is governed by the National Minimum Wage legislation and the contract of employment. Therefore, this case **does not** automatically mean that workers with no fixed place of work are entitled to be **paid** for time spent travelling between their home and client’s homes.

110. As this travelling time (between home and a place of work) is currently unpaid for careworkers undertaking time work and salaried work, it is unlikely that this decision will create any new right to be paid. However, ambiguous wording in a contract, especially where careworkers are paid on an hourly rate basis, could be exploited to create a basis of payment or to argue that travel time uses up normal hours of work. Providers may wish to review their contracts on this point and consider implementing a travel time policy to clarify the position.

### **Travel expenses**

111. Providers should note that if travel expenses are not paid, then these expenses incurred by a worker would be deducted from pay for National Minimum Wage purposes. Where workers are using their own cars to travel to appointments, this is probably limited to petrol expenses rather than including any contribution towards wear and tear or other vehicle-related expenses. However, the rules on this aren't very clear.
112. Where workers are using public transport and are not refunded their travelling expenses, including ticket fares, then these expenses incurred by a worker would be deducted from pay for National Minimum Wage purposes.
113. Providers should note however that, where travel expenses are paid, these payments do not count towards pay for National Minimum Wage purposes.

### **Worked example**

114. A careworker works from 8am to 4pm seeing service users. The careworker drives from home at 7.45am to start her first appointment at 8am. The careworker has two 15-minute appointments each hour and spends the other 30 minutes in each hour travelling to the appointments. At 12pm, having travelled to her next appointment, the careworker takes a lunch break in her car until 1pm. She doesn't carry out any work. She then continues to work in the same pattern with her last appointment finishing at 4pm. She then drives home, arriving home at 4.15pm.
115. The careworker (who is paid weekly) receives £5.00 for each 15 minute visit but is not paid anything for travel time or her lunch break. The careworker is therefore paid £70 for the day's work (14 visits). For National Minimum Wage purposes:
- the 15 minutes on each appointment counts;
  - the time travelling between appointments counts;
  - the lunch break of 1 hour does not count;
  - the 15 minutes travelling to and from her home at the beginning and end of the day does not count.

116. On this basis, 7 hours would count for National Minimum Wage purposes. The rate of pay for the day is therefore £10 per hour. Assuming this pattern of work and pay is replicated for the rest of the week and the worker is at least 21, the employer will have underpaid the worker by £1.44 every hour (based on the April 2024 rate of the National Minimum Wage of £11.44).

## F. Training time and costs, including individual and group supervision

### General Principles

117. Any training that has been approved by the employer will generally count as time work and should be included in the “number of hours worked” part of the calculation, when calculating if the National Minimum Wage has been received over the pay reference period. The same logic applies to workers attending supervisory sessions or appraisals. This will include:
- a. A member of staff attending training or supervision during normal working hours at a place other than their normal place of work for the purpose of receiving training approved by the employer.
  - b. Travelling during normal working hours from the staff member’s workplace to and from the place where the training or supervision is provided (but not from home to the training venue or from the training venue to home).
  - c. Receiving supervision or training (approved by the employer) at the workplace.
118. Therefore, where a worker who normally does **time work, salaried hours work** or **unmeasured work** attends any of the above training, it will count as time worked and the hours spent should be counted for National Minimum Wage purposes.
119. **Salaried hours work – point to note:** If the staff member is paid by way of a salary, any training that is connected to their work and meets any of the criteria in the bullet points above will also count as working time. This means that if this time is outside of their normal contracted working hours, the additional hours will need to be taken into account when calculating if the National Minimum Wage has been paid.

### How about distance learning training?

120. As technology advances, it is possible for some training to be undertaken via distance learning (for example, over the internet or completing assignments etc.). If careworkers are doing such courses (which are approved by their employer) when they are not working (for example, at home), it is possible that the time they spend on this will need to be taken into account when calculating if the National Minimum Wage has been received over the pay reference period.



## **How does this affect zero-hours workers or those working irregular hours?**

121. As a zero-hours worker, the term, “normal working hours,” in the legislation could mean any hours a zero-hours worker can be called upon to work at any time. Therefore, with zero-hours workers, the time of day they do the training is irrelevant but where they do it is relevant, as if it is at a normal place of work (which they are being paid in relation to that time already), they won't be entitled to any extra payment. But, if they are attending somewhere other than their usual places of work, they will be entitled to the National Minimum Wage.

## **Induction training costs**

122. If a staff member is classed as a worker or employee during the time they carry out their induction training, they will be entitled to have that time taken into account when calculating if the National Minimum Wage has been paid. Any money the staff member pays to the organisation in respect of the training (so if they are charged to attend) will be taken off the money that they receive as wages for the purposes of calculating whether they have received the National Minimum Wage.

123. In **Opalkova v Acquire Care Limited EAT 6/5/2021**, the court concluded that an individual could fall within the definition of a worker or employee as soon as they accept an offer of employment, even where the agreed start date is after the mandatory training had been completed. Therefore, the time spent on induction training could count as time worked for NMW purposes.

## **Training: useful tip**

124. Some organisations are reluctant to pay for induction training as staff may attend the training, enjoy the benefit of it and leave before completing any shifts. There are two potential ways to address this concern:

### **a. Option 1 – Claiming back training costs if the worker leaves**

Pay the member of staff for attending the course, but have a claw-back clause in the contract which means that, if they leave within a set period of time, they will be required to repay a sum which covers your expenses in putting on this course. This should be a stepped payment which decreases in correlation to the length of time the staff member has stayed with the organisation, for example, 100% of the course costs will be paid back if the employee leaves within 3 months, 75% if they leave within 6 months etc. This option would not enable you to recoup the payment for the time they have spent attending the course.

It would be wise to take legal advice on any such clauses as whether they could be enforced will depend on how much benefit the organisation has had from the member of staff attending the course by the time they leave.

The organisation would still need to ensure that the member of staff had received the minimum wage in respect of the hours that they had worked for the organisation after the deduction or repayment has been made.

### **b. Option 2 – Completing induction training before employment begins**

If the potential staff member has a contract, they will be classed as a worker and be entitled to the induction hours being taken into account when calculating over the pay reference period if they have received the National Minimum Wage. In order to ensure the potential staff member is not a worker at the point of induction, we suggest the following:

When making a job offer to potential new members of staff, this should be subject to satisfactory completion of:

- induction training;
- Criminal Record Checks (through DBS, Disclosure Scotland or AccessNI, as the case may be);
- reference checks;
- (any other reasonable conditions the organisation usually imposes).

They can be provided with a sample contract that they will be required to sign if they meet the conditions. It should be explained to the candidate that should they successfully complete the training and pass the other requirements, they will be paid "X" amount (for attending the training) after working "Y" number of hours. The number of hours will depend on how long the organisation thinks it will take to cover the costs of the training. The new member of staff should not be offered any hours or given their own contract before the induction is completed.

This would mean that time spent attending the induction training would not be paid for unless the staff member completes a set number of hours after they have completed the training phase.

**Please note:** If payment is made following the commencement of employment for time spent at induction training, if the arrangements are not properly formalised, the payment can fall within the definition of loyalty bonus and therefore be an allowance, and will not count towards the National Minimum Wage pay.

**Please also note:** If the careworker is not an employee when they undertake their induction training, there is no legal obligation to make a payment for this time, although your organisation may wish to consider whether this is an ethical practice. If you would like to operate in this way, we would suggest that you seek advice to ensure that you set up the arrangements properly.

## **G. Calculating workers' hourly rate**

125. Having determined the pay received by the worker and number of hours worked in the pay reference period, you will be able to determine the worker's hourly rate of pay. This is to be determined as follows:

- a. Total gross eligible pay received by the worker for time work, salaried hours, and unmeasured work worked by the worker in the pay reference period;

**Divided by**

- b. Total number of hours of time work, salaried work and unmeasured work worked by the worker in the pay reference period.

126. The result is the worker's hourly rate of pay that should be equal, at least, to the applicable National Minimum Wage rate.

**To calculate whether you are compliant, go to Section 2 – Step-by-Step Assessment.**

# Appendix 1 - Practical examples – total hours worked – sleep-ins

## Scenario 1, sleep-ins

A careworker is paid a flat fee of £40 to undertake a sleep-in. They are required to start work at 10pm when they participate in a handover and may assist the client that they are supporting with getting ready for bed. They are provided with facilities for sleeping and it is unusual that the client requires them to provide assistance during the night, but they do occasionally do this. They are expected to be able to sleep between 11pm - 7am. They then assist the client with getting up from 7am to 8am the following morning.

What is the key issue?

The key issue in this particular scenario is:

- Does the National Minimum Wage need to be paid for times when the careworker is simply present at the place of work, even if asleep and not actually working?

## Legal Analysis

### Time work/Salaried work

Where a careworker is considered to be working “time work” or “salaried work” (which has been the position in all sleep-in court cases considered to date), the Regulations and guidance from the Department for Business, Innovation and Skills (as was) used to indicate that where a worker is sleeping at or near a place of work (during time in which they are permitted to sleep), then those hours will not count towards the calculation of the National Minimum Wage. Guidance issued in 2015 and updated in 2016 backtracked on this position and added in additional considerations to determine whether this time should count as working time. This was reflective of the changes in the case law. However, following the Supreme Court’s decision in *Mencap*, the Department for Business, Energy and Industrial Strategy’s guidance document, “Calculating the minimum wage,” was updated. Now issued by the Department of Business and Trade, [the guidance](#) (under Special Situations) states:

### ‘Sleep-in’ shifts

“In some sectors such as the care sector, workers perform sleep-in shifts. This means that workers:

- are contractually obliged to spend a shift at or near their workplace, usually at night but it could be during the day;
- are expected to sleep for all or most of that shift;
- are woken if required to undertake a specific work activity.

In the 2021 joint court cases on sleep-in shifts and eligibility for the minimum wage, the Supreme Court’s unanimous judgment clarified that sleep-in workers are only working and eligible for minimum wage when they are ‘awake for the purposes of working’. They are not entitled to

minimum wage when they are permitted to sleep (judgment 19 March 2021 in the cases of *Royal Mencap Society v Tomlinson-Blake* and *Shannon v Rampersad* [2021] UKSC 8).

The position is different where workers are expected to perform activities for all or most of a shift, and are only permitted to sleep between tasks where possible (such as napping when not busy). In such cases, it is likely that at least the minimum wage must be paid for the whole of the shift, including for any time spent asleep, on the basis that the worker is in effect working all of that time.

**For time work and salaried hours work, the National Minimum Wage Regulations expressly require that, in order for the time spent asleep not to be eligible for minimum wage purposes, the employer must provide suitable sleeping facilities. If suitable sleeping facilities are not provided then the minimum wage must be paid for the entire shift.”**

### **Scenario 1 above - What is the solution?**

#### **Time/salaried work**

Even though the careworker is not paid by reference to a salary or time, the courts and HMRC appear willing to take the view that this type of arrangement constitutes time work. It follows that it may also be accepted as salaried work.

#### **Treat the sleep-in as time work or salaried work and rely on the exemptions in the legislation and Mencap**

As the case law now stands, as the intention of this arrangement is that the careworker is expected to sleep for most of the sleep-in, only time spent awake for the purposes of carrying out duties will count for the purposes of calculating if the National Minimum Wage has been received. Therefore, you should ensure that, when the flat rate paid is taken into account for total earnings, the pay is at the rate of National Minimum Wage or above, only taking into account the hours spent conducting handovers and assisting the client (as well as any other hours worked during the pay reference period). You would not include time spent asleep or time spent awake, but not for the purposes of carrying out duties in the National Minimum Wage calculation.

### **Scenario 2, sleep-ins**

A careworker is paid a flat fee of £40 to undertake a sleep-in. They are required to start work at 8pm when they participate in a handover and assist the client they are supporting with getting ready for bed. They are provided with facilities for sleeping. They are disturbed regularly throughout the night but can sleep in between disturbances. For example, they may go to bed at 11pm, provide support from 11.30pm – Midnight, sleep for 45 minutes and provide support for half an hour again at 12:45am. This continues throughout the night. They then assist the client with getting up from 7am to 8am the following morning.

Applying the legislation and the Mencap case, as the careworker cannot be expected to sleep during all or most of a shift (even though they can sleep in between duties), it is likely that all of the shift will be working time for National Minimum Wage purposes. This means that you will need to take every hour into account when calculating if the National Minimum Wage has been received and pay for every hour or introduce top-up arrangements.

## Appendix 2 - Practical examples – total hours worked – on call

### Scenario 3, on call

An individual (usually a member of the management team) provides an “on call” service from a mobile telephone for an agreed fixed flat fee. In some cases, they may be required to be at or within a certain distance of a particular location, in others they won’t. In the same way, in some cases the on-call workers will be required personally to attend any unplanned or emergency situations and, in other cases, they will be expected just to deal with any calls over the phone.

### What is the key issue?

Again, the key issue in this particular scenario is:

- Does time when the manager is “on call”, perhaps even asleep and not actually actively responding to calls, count towards calculation of the National Minimum Wage?

Again, the first thing that needs to be considered is what type of work is the worker performing whilst providing an “on-call” service?

Because a flat fee is paid and the manager is not paid by reference to time or by a salary, it is arguable that they are performing unmeasured work. As above however, we understand that HMRC generally take the view that unless there is a separate contract for the different types of work, “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”.

### Scenario 3 - Does the National Minimum Wage need to be paid for times when the manager working on a time worked or salaried basis is on-call?

Any time a worker responding to the calls or undertaking any actual work during a period of being “on call” is treated as working time for National Minimum Wage purposes.

With regards to the on-call/stand-by time, for National Minimum Wage purposes, the actual arrangements need to be considered in detail to determine whether the worker is performing work during “on-call” periods.

The most important factor to consider in any on-call arrangements will be the contractual restrictions and level of burden imposed on the worker. HMRC guidance suggests that the main thing that HMRC will consider is whether a worker is restricted to a place specified by the employer or whether the worker is required to perform any duties whilst “on call”. HMRC imply however that restrictions regarding alcohol during a period of on call, will not necessarily mean that the worker is working during such periods.

### Where they are required to be on call at a designated location

If the manager is required to be at a specific location (in particular, if it's not their home), the position is similar to Scenario 1 above. If they are not at home, it will be relevant if they are provided with suitable facilities for sleeping so that regulation 32(2) can apply (see paragraph 58).

### **Where they are required to be on call near a designated location**

If there is a restriction on the employee to remain within a certain area, because of the degree of flexibility, there is an argument here that the National Minimum Wage legislation, and the HMRC guidance, could be relied on to enable the provider to argue that only time spent responding to calls would count. This is because the worker is just required to be near their place of work, and they would arguably still be able to go to a late-night movie or have fish and chips (as long as they were able to take calls).

As this scenario still restricts the worker to some extent however, in that they are required to remain within a certain area, there is a risk that HMRC could take the view that time where a worker is required to be available near a place of work is working time for National Minimum Wage purposes. The provider is requiring the presence of the worker at a restricted location and time of their choosing for the purposes of working and the worker has to comply with that requirement.

The actual arrangements will need to be considered on a case-by-case basis, in order to determine what time may count for the purposes of National Minimum Wage compliance.

If the worker's home happens to be within the area that they must remain within, time that they spent at home and are simply available for work may fall under regulation 32(1) or 27(1)(b) and not count for National Minimum Wage purposes.

### **Where they are not required to be at a designated location**

The position has not been tested in the courts, in respect of situations where the worker is on call, but is not required to be on call at or near a particular location. Our view is that the courts and HMRC may take the view that as the worker has no substantial restrictions on their freedom, they cannot reasonably be considered to be working. The position will be stronger here if the worker was able to deal with the calls by phone and was not required to attend to and respond to calls. This is because if they are required to attend somewhere, arguably they must stay within travelling distance of that place.

### **Scenario 3 - Does the National Minimum Wage need to be paid for times when the manager working on an *unmeasured basis* is on-call?**

As explained above, where a flat fee is paid and the worker is not paid by reference to time or by a salary, it is arguable that they are performing unmeasured work. For example, where a manager is paid a salary or an hourly rate (time work) for their core duties (for example, 9am-5pm) and is then paid a flat rate to work on call during the evening, the provider could set it up as an unmeasured work arrangement.



If it was accepted that workers are carrying out unmeasured work, it could potentially be argued that only a realistic average of the hours likely to be spent in carrying out duties whilst on call will count towards calculation of the National Minimum Wage. The realistic average of the hours likely to be spent working would need to be agreed using what is referred to as a **“daily average agreement”**.

The average number of hours would again have to be realistic and providers should revisit these agreements periodically to assess if the average number of hours agreed remains an accurate reflection of what happens in practice.

If providers were keen to make an additional payment when a call is dealt with effectively, we would advise against making an hourly rate payment, because as explained above, this could lead HMRC to conclude that the worker is performing time work. If an additional payment was to be made, it could potentially be set up as a “performance bonus payment” for when calls are dealt with appropriately (this would not be paid if calls are not dealt with effectively.)

### **Scenario 3 - What are the potential solutions?**

#### **Rely on limited restrictions argument**

Treat on-call as time work or salaried work and rely on the exemptions in the legislation (regulations 32(1) and 32(2), and regulations 27(1) and 27(2)), and the argument that you are not requiring the presence of the worker at a specified location and time of your choosing, and therefore to use the example given in the case law, they are still able to go to a late-night movie or have fish and chips (the limited restrictions argument).

#### **Treat the on-call as unmeasured work and implement a daily average agreement**

Careworkers who are not paid a salary or hourly rate for on-calls could arguably be regarded as carrying out “unmeasured work”. It is possible to agree with workers who carry out “unmeasured work”, for which they are paid a flat fee which has not been calculated on the basis of the time worked, that only a realistic average of the hours likely to be spent in carrying out duties whilst on-call will count towards calculation of the minimum wage. This can be agreed using what is referred to as a “daily average agreement.”

To have a good prospect of succeeding with the argument that an on call is unmeasured work, and only the hours actually worked count, providers must again ensure:

- the way in which the worker is paid for that on-call duty is not by reference to time or by a salary (so, for example, is paid a flat rate for the on-call duty that is calculated according to factors other than time and receives no other payment in respect of that work - an “unmeasured” arrangement);

- you enter into a separate and clear contractual arrangement, a daily average agreement, to agree the realistic daily average of hours spent carrying out duties whilst on call. A specimen daily average agreement and guidance on its use is available to Homecare Association members at: [Daily Average Agreement \(homecareassociation.org.uk\)](https://homecareassociation.org.uk);
- you pay at least the National Minimum Wage on average over a pay reference period when these hours are taken into account;
- your payslips show a flat-fee payment and don't break the payment up into hours.

Be aware that if the worker is paid at their hourly rate for any time spent awake in addition to their flat-rate payment, this may confuse the arrangement and result in the on-call duty being found to constitute time work – see above.

### **Treat the on call as unmeasured work, don't implement a daily average agreement**

If providers decide to rely on either of the above options, you should ensure that the level of restriction is clarified and agreed during an on-call duty.

You will still need to ensure that the National Minimum Wage is being paid over the pay reference period when time spent responding to calls is included.

Obviously, the more restrictions there are on the workers, the higher the risk of the whole shift being deemed as time work or salaried work.

## Appendix 3 - Practical examples – total hours worked – live-in care

### Scenario 4, live-in care services

A careworker provides a “live-in” service involving the careworker living at the client’s house for a period of time, usually between 1 and 2 weeks, during which the careworker will be expected to provide certain services such as assistance with meals, shopping and personal care. For the remainder of the time, the careworker will be “on-call”.

### Scenario 4: Live-In Care

#### What is the issue?

Again, the key issue in this particular scenario is:

- Does time when the careworker is simply present at the client’s premises, perhaps even asleep and not actually actively carrying out duties, count towards calculation of the National Minimum Wage?

The first thing again that needs to be considered is what type of work is the worker performing whilst providing an “on-call” service?

#### **Scenario 4 - Does the National Minimum Wage need to be paid for times when the live-in care is set up as time work or salaried work?**

If the careworker is paid for the majority of their time by reference to time or by a salary, case law currently indicates that time spent sleeping whilst on call (and so whilst sleeping during providing live-in care) will count as working time. Please see Scenario 1 above for further details.

#### **Scenario 4 - Does the National Minimum Wage need to be paid for times when the worker working on an unmeasured basis is on-call?**

Where a flat fee is paid for live-in care assignments and the worker is not paid by reference to time or by a salary, it is currently accepted by the courts and HMRC that they are performing unmeasured work.

Where a properly set up “**daily average agreement**” is in place, only a realistic average of the hours likely to be spent in carrying out duties whilst providing live-in care will count towards calculation of the National Minimum Wage. The average number of hours will have to be realistic and providers should revisit these agreements periodically to assess if the average number of hours agreed remains an accurate reflection of what happens in practice.

## Scenario 4 - What are the potential solutions?

### **Treat the on-call as unmeasured work and implement a daily average agreement.**

Where a flat fee is paid for live-in care assignments and the worker is not paid by reference to time or by a salary, it is currently accepted that they are performing unmeasured work. To succeed in the argument that only a limited number of live-in care hours count for National Minimum Wage purposes, providers must again ensure:

- the way in which the worker is paid for live-in care assignments is not by reference to time or by a salary (so, for example, is paid a flat rate for the on-call duty that is calculated according to factors other than time and receives no other payment in respect of that work – an “unmeasured” arrangement);
- you enter into a separate and clear contractual arrangement, a daily average agreement, to agree the realistic daily average of hours spent carrying out duties whilst on call. A specimen daily average agreement and guidance on its use is available to Homecare Association members at: [Daily Average Agreement \(homecareassociation.org.uk\)](https://homecareassociation.org.uk/daily-average-agreement);
- you pay at least the National Minimum Wage on average over a pay reference period when these hours are taken into account;
- your payslips show a flat-fee payment and don't break the payment up into hours.

### **Treat the live-in care as unmeasured work and don't implement a daily average agreement.**

This option is very risky.

Where there is no daily average agreement in place, the following hours would count as working hours even where a flat fee is paid:

- Time spent actually delivering care;
- Time treated as worked including any time spent waiting.

HMRC guidance suggests however that any time where a provider requires a worker performing unmeasured work to be available at or near a place of work for the purposes of working, which does not fall under a daily average agreement, is likely to be working time for National Minimum Wage purposes and therefore there is a significant risk that the entire 24-hour period would count.

## **Appendix 4 - Practical examples – total hours worked – waking night**

### **Scenario 5, waking night**

A careworker works a “waking-night” shift and is awake and working for the entire night shift.

#### **What is the issue?**

As the careworker is awake at all times, all hours will count for the purposes of calculating whether they have received the National Minimum Wage over the pay reference period.

#### **What are the potential solutions?**

Although all hours of the “waking-night” shift count for National Minimum Wage purposes, it is important to remember that the obligation is to ensure that the National Minimum Wage is met on average over the pay reference period. Providers will therefore simply need to ensure that the National Minimum Wage is paid on average for all hours worked in the pay reference period including all hours of the “waking-night” shift.

## Section 2 - Step-by-Step Assessment

Providers must ensure that each and every worker they engage is paid the National Minimum Wage/the National Living Wage. Ideally therefore, every single worker's pay should be assessed for compliance on a regular basis.

You can be fined if you are unable to provide evidence to HMRC that each and every worker has been paid the National Minimum Wage.

We appreciate that to carry out a National Minimum Wage assessment on every worker in every pay reference period will be practically very difficult for the majority of homecare providers and we recognise that the administrative burden in doing this would be enormous.

In order to satisfy yourself that the National Minimum Wage has been paid, we suggest that providers carry out the assessment set out below, randomly, on different workers, in different pay reference periods.

### **How often should the National Minimum Wage assessment be carried out?**

While no hard-and-fast rule can be applied, providers should ensure that the assessment is carried out often enough to provide them with a reassurance that they continue to be compliant with the National Minimum Wage rules.

A more regular assessment should be carried out where there is a significant variation in the workers' hours, shift patterns and pay from one pay reference period to another. Less regular assessment can be carried out where workers' arrangements do not change significantly between different pay reference periods.

Where your previous assessments suggest that there is a significant number of workers that are close to the National Minimum Wage limit, we would recommend repeating the assessment on a more regular basis to ensure that you continue to meet your National Minimum Wage obligations. This may mean making a commitment to assess a sample of workers on a rolling programme, until confidence that compliance with National Minimum Wage has been achieved, and then reassessing compliance annually, for example when the National Minimum Wage is due to increase each April, or if there is a significant change in working patterns of your workforce.

### **Who should be assessed?**

It would be advisable that the workers selected for assessment should represent different types of workers within your workforce. If regular National Minimum Wage compliance assessments are carried out on different workers, who are a representative reflection of your workforce, this may be accepted by HMRC as evidence of overall National Minimum Wage compliance; although we cannot guarantee this, and liability for under-payment of National Minimum Wage (including back-payments, fines and "naming and shaming") is still likely to be imposed by HMRC.

When selecting your workers for compliance assessment, you should ensure that you include workers who you are concerned may not be receiving the National Minimum Wage. In fact, we would recommend that those workers are selected, so that any non-compliance is identified and, if necessary, changes are made to ensure compliance. We would suggest that, during your assessment, you consider including workers who:

- may have a large amount of travel time, relative to “contact time”;
- have very short visits during their working week;
- have big gaps between visits;
- are on the lowest hourly pay rates;
- receive premium rates/allowances for out-of-hours working;
- have had a recent birthday which moves them into a higher rate of National Minimum Wage (for example, they have turned 21 and are entitled to the National Living Wage from 1 April 2024, when the regulations changed);
- need to use public transport or walk between service users’ homes;
- receive accommodation supplied by you and pay you rent;
- undertake on-call or sleep-in shifts; and
- have recently started work.

We would recommend that if the outcome of your assessment suggests that there are a significant number of workers in a specific category that are close to the National Minimum Wage limit, you should consider extending your assessment in that particular category to a larger sample of workers to ensure that you are definitely compliant.

#### **How many workers should be selected for an assessment?**

Again, there is no hard-and-fast rule that can be applied here. What you ought to do is ensure that the workers selected for the assessment are a true representation of your workforce and the numbers assessed give you confidence that you are compliant.

#### **What next?**

If you discover that you are not compliant, immediately rectify this so that you are not subject to any future fines from HMRC, criminal charges or court judgments. See C. Enforcement and fines for non-compliance.

A range of suggested actions for employers to consider is provided in Section 3 - Possible actions to achieve compliance with NMW.

## Undertaking the step-by-step assessment

The objective of the step-by-step assessment is to check whether a worker has been paid at a rate equal to, or above, the National Minimum Wage/National Living Wage during the pay reference period.

Familiarise yourself with the definitions of **time work** (see paragraphs 51 -61 above), **salaried work** (see paragraphs 62 - 71 above) and **unmeasured work** (see paragraphs 74 - 84 above) before proceeding.

We recommend that you keep a record of each check that you do on individual workers, showing your calculations. This can provide evidence to HMRC that you are acting as a responsible employer seeking to ensure that you maintain voluntary compliance with National Minimum Wage.

### The assessment

For each worker, complete steps 1 and 2 in section A, below. Then go to section B, C or D as indicated, and complete steps 3 to 6. Repeat steps 1 to 6 for each worker.

Remember that from April 2024, workers aged 21 and above are entitled to the National Living Wage.

## A. Establish initial information to enable you to calculate NMW compliance

### Step 1

Identify the worker for whom you wish to calculate hourly rate of pay.

### Step 2

Establish the type of work the worker is carrying out:

- **time work?** (Section B below)
- **salaried work?** (Section C below)
- **unmeasured work?** (Section D below)

**Remember** - Workers can work under more than one type of payment arrangement. However, where there is only one contract in place, HMRC states that “it is unlikely the individual parts of the arrangement will be treated as a separate type of work because a view can be formed on the overall arrangement”. Therefore, although we do not agree with this, HMRC take the view that there must be separate contracts for workers to be considered to work under more than one type of payment arrangement.

If a worker is working under more than one type of payment arrangement, you will need to carry out the calculations below in respect of each payment arrangement relevant during the pay reference period.



## **B. Calculation for time work (please refer to paragraphs 50 - 61 above)**

### **Step 3**

Establish the pay reference period during which you want to calculate the worker's hourly rate.

### **Step 4**

Establish **total pay received** by the worker during the pay reference period identified at Step 3.

Figure A - Total monies paid to the worker.

**LESS** any of the following which are included in Figure A (please refer to paragraph 33 above):

- any loan payments made by you to the worker during the pay reference period;
- any employer pensions contributions;
- any difference in pay between the lower rate payable under the contract in respect of work involving particular duties and the enhancements paid for overtime or shift work in respect of those duties (i.e. you need to reduce all hourly rates of pay to the lowest rate at which the worker gets paid);
- any allowances or expenses (London allowance, car allowance, petrol or hospitality expenses) unless these are consolidated into standard pay or are an allowance attributable to the performance of the worker in carrying out their work;
- payments in respect of time off (e.g. holiday, sickness, maternity pay);
- any rent paid to you or deducted from earnings that is in excess of the accommodation offset allowance (£9.99 per day for each day of the pay reference period that accommodation is provided).

**PLUS** (please refer to paragraph 34 above):

- any monies deducted from the worker's wages to pay back a loan made to them by you and any deductions made for accidental overpayments made in previous pay reference periods;
- any deductions or payments that are not for expenditure connected to the worker's employment, or for the employer's own use or benefit - for example, employee pension contributions and union subscriptions;
- any deductions for criminal records and barring list checks (with DBS, Disclosure Scotland or AccessNI);
- any deductions for tax and National Insurance.

**PLUS** (please refer to paragraph 43 above):

- If you provide free accommodation to the worker, add £9.99 per day that accommodation has been provided in the pay reference period.

### **Step 5**

Establish **total number of hours worked** during the pay reference period by adding up the following time (please refer to paragraphs 50 - 61 above):

- Total time actually spent carrying out duties during the pay reference period (i.e. time spent carrying out appointments).

**PLUS**

- Total of hours spent travelling between appointments during the pay reference period (see E. Travel time above).

**PLUS**

- Total time between appointments spent working (E. Travel time above).

**PLUS**

- Total time spent waiting to start work (E. Travel time above).

**PLUS**

- Total time spent attending training or undertaking long-distance travelling (E. Travel time above).

**PLUS**

- Total time spent travelling during normal working hours to attend training (E. Travel time above).

**Reminder!**

- Time spent travelling to and from home will not count
- Any rest breaks that the worker takes in between the appointments will not count
- Time spent training prior to an individual becoming your worker will not count

**Step 6**

Establish **the average hourly rate** by dividing the total earnings in the pay reference period by total time worked.

## **C. Calculation for salaried work (please refer to paragraphs 62 - 71)**

### **Step 3**

Establish the pay reference period during which you want to calculate the worker's hourly rate.

### **Step 4**

Establish **total pay received** by the worker during the pay reference period identified at Step 3.

Figure A - Total monies paid to the worker.

**LESS** any of the following which are included in Figure A (please refer to paragraph 33 above):

- any loan payments made by you to the worker during the pay reference period;
- any employer pensions contributions;
- any allowances or expenses (London allowance, car allowance, petrol or hospitality expenses) unless these are consolidated into standard pay or are an allowance attributable to the performance of the worker in carrying out their work;
- payments in respect of time off unless paid at full pay (e.g. sickness, maternity pay);
- any rent paid to you or deducted from earnings that is in excess of the accommodation offset allowance (£9.99 per day for each day of the pay reference period that accommodation is provided).

**PLUS** (please refer to paragraph 34 above):

- any monies deducted from the worker's wages to pay back a loan made to them by you and any deductions made for accidental overpayments made in previous pay reference periods;
- any deductions or payments that are not for expenditure connected to the worker's employment, or for the employer's own use or benefit - for example, employee pension contributions and union subscriptions;
- any deductions for criminal record and barring list checks (with DBS, Disclosure Scotland and AccessNI);
- any deductions for tax and National Insurance.

**PLUS** (please refer to paragraph 43 above):

- If you provide free accommodation to the worker, add £9.99 per day that accommodation has been provided in the pay reference period.

## Step 5

Establish **total number of hours worked** during the pay reference period by adding up the following time (please refer to sections 62 – 71 above):

The number of basic hours worked in the pay reference period. This is calculated by dividing the number of annual contractual hours by the number of the pay reference periods in the year (e.g. 1,950 hours divided by 12 months if paid monthly or 52 if paid weekly).

### **LESS**

Number of hours in the pay reference period when the worker was absent from work (annual leave, sickness where not paid at full pay).

### **PLUS**

Number of additional hours worked in the pay reference period for which no additional payment has been received (including any additional business travel time or training time).

## Step 6

Establish **the average hourly rate** by dividing the total earnings in the pay reference period by total time worked.

## **D. Calculation for unmeasured work (please refer to sections 74 -84 above)**

### Step 3

Establish the pay reference period during which you want to calculate the worker's hourly rate.

### Step 4

Establish **total pay received** by the worker during the pay reference period identified at Step 3.

Figure A - Total monies paid to the worker.

**LESS** any of the following which are included in Figure A (please refer to paragraph 33 above):

- any loan payments made by you to the worker during the pay reference period;
- any employer pensions contributions;
- any allowances or expenses (London allowance, car allowance, petrol or hospitality expenses) unless these are consolidated into basic pay or are an allowance attributable to the performance of the worker in carrying out their work;
- payments in respect of time off (e.g. sickness, maternity pay);
- any rent paid to you or deducted from earnings that is in excess of the accommodation offset allowance (£9.99 per day for each day of the pay reference period that accommodation is provided.)

**PLUS** (please refer to paragraph 34 above):

- any monies deducted from the worker's wages to pay back a loan made to them by you and any deductions made for accidental overpayments made in previous pay reference periods;
- any deductions or payments that are not for expenditure connected to the worker's employment, or for the employer's own use or benefit - for example, employee pension contributions and union subscriptions;
- any deductions for criminal record and barring list checks (with DBS, Disclosure Scotland or AccessNI);
- any deductions for tax and national insurance.

**PLUS** (please refer to paragraph 43 above):

- If you provide free accommodation to the worker, add £9.99 per day that accommodation has been provided in the pay reference period.

## Step 5

Establish **total number of hours worked** during the pay reference period by adding up the following time (please refer to paragraphs 74- 84 above):

Option 1: Time agreed as agreed average hours in the Daily Average Agreement.

Option 2: Time treated as worked (including time recorded as worked); time spent waiting; travelling and training - add up all hours worked by the worker during the relevant pay reference period.

## PLUS

Any additional and out-of-ordinary hours worked over and above agreed average hours (e.g. if additional and lengthy training out of normal working hours).

## Step 6

Establish **the average hourly rate** by dividing the total earnings in the pay reference period by total time worked.

## **Section 3 - Possible actions to achieve compliance with NMW**

The following suggestions include actions which homecare providers should consider taking if sampling of workers described in Section 2 – Step-by-Step Assessment suggests actual, or borderline, non-compliance with the National Minimum Wage.

Please note that these suggestions are by no means exhaustive. Some are relatively straightforward to implement, while others are potentially complex and will require more time and effort to implement. Deciding which, if any, of these actions are appropriate for your organisation must be made on a case-by-case basis, balancing:

- the likelihood of successfully achieving compliance with the National Minimum Wage;
- the cost-effectiveness of implementing the changes considered;
- the financial resources of the organisation;
- the ability to implement the proposed action, including consulting with staff where a change in terms and conditions of employment may occur.

### **Good employee relations**

- Staff may approach you with concerns that you are not paying them at least the National Minimum Wage. Take their concerns seriously, and consider investigating. If you are confident that you are compliant with the National Minimum Wage, a helpful, supportive approach, which may include re-explaining how their pay is calculated, may resolve matters, and may reassure the employees that there is no need for them to refer their concerns to the Acas Helpline, which could trigger an investigation from HMRC (see paragraph 21). Make sure you explain any top-up payments you make to staff, and how these are calculated.
- Ensure that managers and supervisors are able to explain to careworkers which parts of their travel time do and do not count towards the National Minimum Wage. At the very least, ensure staff know who to refer these questions to in the case of doubt. (This entire guide will help, but see paragraphs 85 and 86 in particular.)

### **Travel time and travel costs**

- Remind your care coordinators of the significant impact that long travel time has on compliance with the National Minimum Wage, encouraging them to roster careworkers with the minimum travel time necessary, while resisting the practice of “call cramming”.
- Where workers’ travel time is a considerable proportion of “contact time”, consider investing in rostering software with route-optimisation.

- Where paying homecare workers solely by reference to “contact time”, consider whether the time you assume your workers need to travel accurately reflects the time it really takes them. It may be necessary to audit a group of workers’ travel records, for example, asking them to complete an accurate log of their travel times.
- Consider whether you should amend timesheets so that careworkers record their actual travel time, as well as their “contact time”. For this to be effective, you must also have a system in place to record this information systematically. While this is likely to be a significant investment, it will provide you with more accurate information to calculate pay rates, and provide evidence to HMRC of the actual travel time your workers undertake (see paragraphs 8 - 10).
- Review rates currently paid for mileage travelled (see paragraph 111). Where you make no contribution to travel expenses, consider introducing them.
- Consider reimbursing careworkers’ travel by public transport, on production of receipts, if this is not already your current practice (see paragraph 112).
- Employers who are not already doing so should consider making payments for travel time. If adopting this action, consider how this will be implemented into your existing pay structures and payroll systems.

### **Payment for induction, training and supervision**

- If you currently require workers to complete induction training on an unpaid basis (see note in paragraph 124 about the ethical considerations of this practice), consider putting arrangements in place to ensure that you remain compliant with the National Minimum Wage (see paragraph 122).
- Ensure that post-induction training and supervisory sessions are paid, as these both count as working time (see paragraph 117).

### **Changes to rates of pay**

- Consider increasing the basic rate of pay, concentrating on raising the lowest applicable rate (usually the weekday, daytime rate), which is the rate that HMRC will use when checking compliance with the National Minimum Wage (see paragraph 33 a).
- Consider adopting a flat rate of pay, reducing enhanced rates of pay for anti-social hours and working to increase the basic rate of pay. This is probably a strategy of last resort, if other measures will not achieve compliance. Careful thought should be given before adopting this action, as it may impact on your ability to cover out-of-hours working and is likely to require formal consultation with staff on the proposed changes.

## **Changing terms and conditions**

- If you are thinking about changing terms and conditions as part of your response to the ongoing increases to the National Minimum Wage/National Living Wage, you must follow a fair process that includes consultation with staff and, in most cases, staff representatives. This is particularly important if you find you are forced to reduce some terms and conditions to meet the increased costs (for example, reducing weekend rates to fund an increase in basic pay to above National Living Wage level). You should seek appropriate legal and human resources advice at the outset to reassure yourself that the proposed changes to contract terms are lawful and that the planned process to be undertaken is compliant.

## **Arrangements for “sleep-ins”, “on-call”, “waking nights” and “live-in” care**

- Ensure you have consulted the appropriate appendices of this guide for suggestions on how to manage staff undertaking the following:
  - “Sleep-ins”(Appendix 1 - Practical examples – total hours worked – sleep-ins);
  - “On-call” duties (Appendix 2 - Practical examples – total hours worked – on call);
  - “Live-in” care (Appendix 3 - Practical examples – total hours worked – live-in care services); or
  - “Waking nights” (Appendix 4 - Practical examples – total hours worked – waking night).

Consider the case law, options available and any risks that attach to individual options.

In addition, in March 2021, the Supreme Court decided the appeal in *Mencap v Tomlinson-Blake* on what counts as working time for sleep-ins.

You should:

- Have a clear policy about how you pay for sleep-ins.
- Ensure that staff know how to handle enquiries about sleep-ins. Explain to your staff that the judgment in *Mencap* was about hours of work not the value of care work, if they are concerned about the outcome.
- Look at your sleep-in arrangements with your employees to see what they are required to do overnight. If they are required to do something as part of their job, that counts as working time.
- Review those care packages which include sleep-ins to assess the payment arrangements and what you are able to commit to in the future.
- If you are currently paying an hourly rate for sleep-ins and this is being funded by commissioners, you will need to seek assurance that funding will continue so that you do not have to change payment arrangements.



- Because the National Minimum Wage regulations do not apply to sleep-ins, top-ups and the use of daily average agreements for sleep-ins can cease.
- Take legal advice and consult properly with your workforce if changing their pay or terms and conditions (for example, if changing from paying an hourly rate to a flat rate for a sleep-in).

#### **Other staff terms and conditions**

- Ensure that you have understood whether each worker is undertaking time work, salaried work or unmeasured work. It may be worth confirming this in future statements of main terms and conditions of employment issued to new workers (see paragraphs 50 - 84).
- If you believe that your workers are self-employed, take appropriate legal advice to ensure that your arrangements are properly documented. In our view, a number of employers believe their workers are self-employed, when this is not the case (see paragraph 49).
- Check that staff undertaking unmeasured work (usually live-in careworkers or staff working “on-call”) have a suitable “daily average agreement” in place (see paragraph 78).
- Consider how and whether you should charge staff for uniforms. While this practice may be lawful, allowing staff to pay back the cost of uniforms in instalments may affect compliance with the National Minimum Wage (see paragraphs 38 - 42).
- Where staff are provided with accommodation for which rent is deducted from their earnings etc, make sure that the “accommodation offset” is correctly applied to calculations of their wages (see paragraph 45).

#### **Contracts with statutory sector commissioners (councils and the NHS)**

- Use the Homecare Association’s free online costing model to understand the costs of care, particularly where bidding for new contracts. The model can also be used to enter into discussion with your statutory sector commissioners about the actual costs of care in your local area. (See: [Costing Model \(homecareassociation.org.uk\)](https://homecareassociation.org.uk/costing-model) and [Homecare Association publishes Minimum Price for Homecare 2024-25.](#))
- Assess whether individual packages of care (or entire contracts) are economically viable. Be prepared to decline packages of care, or (in extreme cases) consider terminating entire contracts, which could lead to non-compliance with the National Minimum Wage, including National Living Wage.

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# Shaping homecare together

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