



Helping you to avoid the compliance traps

The NMW challenge for HE

National minimum wage (“NMW”) compliance is fundamental to your reputation as an employer of choice. With HMRC enforcement activity on the increase, universities need to take action to ensure that they are meeting their obligations under the NMW and can demonstrate that compliance when inspected.

The NMW legislation is notoriously complex, creating a serious risk of inadvertent breaches, significant financial penalties and reputational damage. Enforcement action does not distinguish between deliberate and technical breaches – in all cases, HMRC can order repayment of any amounts underpaid, fine the employer 200% of the underpayment, and

“name and shame” the employer online. Many of the largest fines levied over recent years have been levied against organisations that have been “caught out” by the complexity of the NMW rules.

Under the enforcement regime, inspectors have a broad range of powers to obtain documents, interview staff and carry out an inspection, either following a complaint or at their own instigation. The starting point is that an underpayment has occurred – to overturn that presumption, the employer has to prove compliance by providing the required records and documentation.

Key compliance risks for HE

Compliance with the NMW is not primarily about the headline hourly rate of pay written into the worker's contract. Instead, it is about paying the right amounts at the right time – the focus of the NMW legislation is on whether the worker has been paid, in the required pay reference period, the applicable NMW rate for all hours worked (or deemed to be worked) in that reference period. Payments made at the wrong time don't count and can't be offset against fines and underpayments. There are complex rules for determining what does and does not count as working time; what does and does not count towards pay; and when payment for the hours worked has to be made. These can vary depending on whether the worker is classed as carrying out salaried hours work, time work, output work or unmeasured work.

Key areas of risk for HE include:

- term time only staff who are paid in twelve equal monthly instalments. Smoothing out pay over the calendar year creates a risk, that the shortfall against their NMW entitlements in the pay reference periods falling immediately after their actual periods of work. Although the NMW does allow for an annualised approach to both working time and pay, this is only available if the wording of the relevant contracts meets strict conditions
- payments in the form of fees, bursaries or stipends, for example for supervisors, interns and students on research placements. These arrangements may fall foul of the NMW legislation because there is no clear correlation between the fee or bursary and the hours actually worked. The payment may also be paid at the "wrong time" to count for NMW purposes – ie outside the relevant pay reference period – such that the worker is deemed not to have been paid at all. Similar issues arise with
 - external examiners – a key issue here is whether the external examiner can be treated as not being a "worker" and therefore falling outside the scope of the NMW legislation
- salaried workers with notional or open-ended working hours or workers who work unpaid overtime. In these cases, actual hourly rates of pay may fall below the required NMW rate or the employer may be unable to prove that the NMW rate has been paid
- salary sacrifice and flexible benefit schemes, deductions from pay and on call and stand by arrangements – these arrangements may take the hourly rate of pay below NMW rates, because they affect the calculation of either pay or working time under the legislation. The provision of free or discounted accommodation is another risk area, as the NMW rules limit the extent to which this benefit can be counted towards payment of the NMW



- workers (for example casual staff) paid on submission of time sheets. Unless the correct wording is included in their contracts to link payment to the receipt of timesheets, any delays in payment can lead to NMW breaches
- “volunteers” carrying out unpaid work or who are paid expenses or benefits in kind – the key issue here is whether the “volunteer” is actually a “worker” and so should receive the NMW

How we can help – audits and remedial action

We have assisted many clients with NMW investigations and compliance concerns, from large organisations in the retail and care sectors to educational institutions. Our deep experience and the lessons learned from various sectors and clients enable us to carry out robust compliance audits, not just identifying compliance issues but, crucially, identifying effective remedial action. Our experience in data gathering and analysis helps to quantify risk in a clear and usable form. Our experience in dealing with HMRC inspectors means we can give practical guidance on how to approach and prepare for an inspection and, if required and appropriate, to challenge HMRC enforcement action.

Compliance audits – our approach

Our audits involve the following key steps

Stage 1: Data gathering

We use questionnaires to gather information and gain a comprehensive overview of working practices and pay arrangements for all categories of worker, including their working hours and patterns of work, the types of payment they receive, the frequency of payments, and the impact of deductions and salary sacrifice arrangements. We also gather relevant

records essential to demonstrate compliance – contracts, appointment letters, payslips, relevant policies and procedures and records of hours worked.

A briefing meeting is also often helpful at this stage, at which we would provide a short overview of the legal framework and typical areas of concern, to help identify your risk areas which will require more detailed consideration.

Stage 2: Analysis and advice

We would analyse the information gathered to identify breaches of the NMW legislation or areas of potential challenge. A traffic light report would detail our findings and provide practical guidance and strategies to address or minimise the risk of a compliance failure. We can also help you to quantify the level of risk in each area of non-compliance, in terms of potential liability for underpayments and penalties.

We would meet with you to discuss the issues and the recommended remedial steps in more detail, to help develop a clear action plan.

Stage 3: Remedial action

The audit process will identify areas of non-compliance and risk and recommendations for remedial action. We can then work with you to address these issues and implement the action points, including making changes to contracts, working practices, payment arrangements and record keeping.

We can also advise at this stage on how to manage any investigations by HMRC and how to respond during inspections to questions about historic issues of non-compliance or other areas of potential vulnerability.

Key contacts



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Eversheds Sutherland has very impressive resources and depth, and their advice has been first-class. They are always very prompt and their advice is succinct and to the point.

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I like their can-do approach, flexibility and ability to provide a balanced overview.

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