



Supporting the Carer Workforce

NATIONAL ASSOCIATION OF CARE & SUPPORT WORKERS

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An Outline Guide to Pay

1. The Minimum Wage

Legislation provides that all those defined as “Workers” (including Employees and Agency Workers) are entitled to receive the minimum wage (NMW). This is a fundamental right and applies even in the absence of a written contract.

For these purposes “worker” is defined as anyone who works for an employer under a contract of employment and performs the work personally. **AGENCY WORKERS & HOMECARE WORKERS ARE EXPRESSLY COVERED BY THE NMW REGULATIONS**

Different NMW rates apply for different age groups.

For up to date information on Minimum wage rates and the NMW calculator please see www.Gov.uk

There are also different types of workers, those paid by the hour (time work,) those paid an annual salary (usually under contract for a basic number of hours each year, salaried hours,) those paid by the piece (output work) and those paid in other ways (unmeasured work.)

2. What counts as working time?

Time spent

- At work, when required to be working (even if work is not possible because work is not available such as a call being cancelled).
- Travelling on business during your normal working hours – you should be paid for ALL travel time in connection with your job. This should include travelling time from one client/assignment to another, waiting for public transport, collecting goods (for care workers read clients, medications etc.) and travelling from work to training. Travelling between home and work/work and home is not classed as payable travelling time. Travelling between home and training is also excluded unless the worker is on a rest break.
- Time spent waiting to meet someone in connection with your work.

- Training and travelling to training if this time falls during your normal working hours. This applies whether training takes place at the workplace or somewhere else. This applies to workers required to undertake training BEFORE starting work for an employer.
- On standby or on call at a place of work.
The NMW need not be paid for time when you are:
 - Being paid less than your normal pay e.g., if you get half pay while on sick leave
 - On any unpaid leave your employer allows you to take
 - On call at home or at another location, but not at work and not working
 - Travelling between work and home
 - Live in care workers who live in the employer's home, share in household chores, leisure activities may not be entitled to NMW if they are being effectively treated as part of the family and are not paying the employer for meals or accommodation.

3. Payments for travel time

Matters relating to travel time are still unresolved for many care workers; many employers continue to fail to pay workers for travel time.

What does the legislation say?

The draft statutory guidance to the Care Act 2014, states;

“When commissioning care contracts, local authorities should assure themselves and have evidence that service providers deliver services through staff who are remunerated so as to retain an effective workforce. Remuneration should be at least sufficient to comply with the NMW legislation.... including remuneration for any time spent travelling between appointments”.

Therefore remuneration should be sufficient to comply with NMW regulations. The effect of not being paid travel time should not have the negative effect of bringing your pay below the appropriate level of NMW. If this does happen, then this is illegal.

Travel time is work time and must be included. It is your legal right.

3.1 Travel Time Case law

The BBC reported in 2015 that staff at MiHomeCare was being paid less than minimum wage.

MiHomeCare is one of the largest care providers in the UK, an internal company document seen by the BBC confirmed they had not been paying its staff the minimum wage, the practice of ‘Clipping’ was also highlighted. ‘Clipping’ occurs where care appointments are scheduled back to back. No travel time is factored in between appointments; the result is that appointments are clipped or cut short.

In February 2016, law firm Leigh Day negotiated a settlement from MiHomeCare for their client Caroline Barlow. Caroline was a care worker who had taken legal action against her ex-employer as she was not paid for time spent travelling to and from appointments. Leigh Day argued that as she was not being paid for her travel time, she was being effectively paid less than the national minimum wage which constituted an unlawful deduction of wages. The Company settled Caroline's claim for her travel time.

Leigh Day believes “there are potentially thousands more care workers, working for MiHomecare, and other care providers, who are being paid less than the National Minimum Wage”.

We await further development in this area.

4. Specific issues in relation to NMW that affect care sector workers

NMW and “sleep in” payments

This area is quite complicated and workers find it very confusing. In an attempt to make the situation more easily understandable it is necessary to break this down further.

4.1 Workers employed on “time work” (those who are paid an hourly rate for the time worked.) Care workers employed in this category may find that their working hours may vary. Here NMW should be paid for

- ALL the time at work(excluding rest breaks)
- at work and available for work
- required to be available for work (known as bank working)
- On stand by/on call at/or near your place of work.,
- Awake for the purpose of working during “sleeping time”. (By arrangement with your employer you sleep at or near your place of work and you are provided with suitable facilities for you to do so)

Case law on “time work” has confirmed that those workers engaged on time work and required to sleep over at a specified location as part of their work are entitled to be paid NMW for all these hours. NMW is payable whether the worker’s sleep was interrupted or not (Whittlestone v BIP Home Support Ltd December 2013.) Increasingly courts are looking into the reasoning why and for what purposes a worker has to be at a specific location.

4.2 Workers paid a salary defined as being paid annually in monthly instalments for set hours, but hours may vary. NMW should be paid

- for all the time when at work working (excluding rest breaks)
- at work and available for work
- required to be available (bank working) for work
- on stand by/on call at/near your place of work
- awake for the purpose of working during “sleeping time” at work (as above).

4.3 Workers employed in” unmeasured work” defined as working when required to do so, here there are no specified hours and the worker carries out contractual duties for a flat rate.

Examples of this are where a live in carer works, for a one off flat rate in a client’s home prior to taking a break. Alternatively there may be certain tasks to be performed, but hours are not specified for these tasks to be completed.

In these cases calculating hours for which NMW is payable is difficult.

If a worker has not entered into an average hour’s agreement but is employed in unmeasured work, the employer must record their hours during the pay reference period and pay NMW for every hour worked.

5. NMW and “daily average hour’s agreements.”

These apply particularly to Live In care workers and are defined by an agreement **in writing** between a care worker and an employer, which outlines the tasks and duties to be performed and the average daily number of hours the care worker is likely to spend carrying out these tasks and duties. NMW should be paid for these hours.

However workers who enter into an average hour agreement **do not** have to be paid NMW for each hour worked. They **must be paid NMW on average** for the time worked in their “**pay reference period**”. The “**pay reference period**” is defined as the period of time a workers wage is actually calculated; this can be weekly, fortnightly, or monthly etc, but cannot be longer than one calendar month.

6. Sleep in Shifts

The law is complex and changing constantly, particularly in relation to sleep in shifts whilst on call and not working. The information in this fact sheet is for guidance only; we highly recommend that specialist advice is taken on the individual circumstances of each case.

In February 2015 the Government published draft National Minimum wage Regulations repealing and re-enacting the law relating to the National Minimum Wage in the UK. Due to an obvious need the Government indicated that they intend to issue guidance to give further clarity on issues such as sleeping time, travel time and the definition of rest breaks.

The law was enacted on 6th April 2015 and the guidance gives the following advice about sleeping between duties:

It is possible for a worker to be working whilst asleep. In order to determine whether a worker is, in fact working, employers need to consider whether work related responsibilities would still apply whilst that worker is asleep. For example where there is a statutory requirement for the worker to be present at work and they would face disciplinary action if they left the workplace (a worker working in a care home where there must be someone on the premises.)

A worker, who is ‘working’ even though they are asleep, is entitled to NMW for the entire time they are at work.

When a worker is simply available for work and is allowed to sleep (and suitable sleeping facilities are provided at the workplace) they will not be ‘working’ and the NMW is **not payable**.

However workers must be paid the NMW when they are actually awake for the purposes of working.

A **sleep-in** is defined as a night shift where the worker sleeps at the workplace, and is available to support people during the night.

A **waking night** shift is defined in terms of the worker staying at the workplace overnight, working as they would during the day. There is most usually no ability to sleep.

Pay to be taken into account when calculating the average hourly rate of pay during a pay reference period.

Include

- Total gross pay, comprised of basic salary, any bonus/commission/incentive payments received or earned in the period.

- The only benefit in kind that can be taken into account when calculating NMW is the provision of accommodation by an employer. The NMW can be “offset” by some of your accommodations value. **Please see the Direct.Gov website for more information.**

Not included

- Benefits in kind such as meals, fuel, car allowances, employer’s contributions to pension funds, medical insurance, child care vouchers, luncheon vouchers.
- Salary sacrifices schemes, loans, salary advances, pension and redundancy payments.
- Repayment of expenses.
- Travel expenses to a temporary workplace.

In calculating salary for NMW the following are generally also excluded:

Premiums paid for overtime, shift work, weekend/Bank Holiday working and on call/sleep in shifts.

Special allowances paid above standard pay, (for working in dangerous conditions, unsocial hours, geographical payments (i.e. London Weighting) and for performing special duties.)

These may however count if they are consolidated into the workers standard pay or relate to the worker’s normal duties.

The Government run a Pay and Work Rights Helpline 0800 917 2368, which can provide advice about the NMW and deal with complaints from workers who are being paid below the threshold.

Employers must keep records showing that NMW has been paid for 3 years.

Workers who have reasonable grounds to believe that they have not been paid NMW have the right to inspect these records. Workers can complain to an Employment Tribunal if they are not allowed to see these records.

Workers also have the right not to be subjected to any act of detriment by their employer as a result of taking action to enforce the right to NMW.

NMW regulations are enforced by the HMRC, compliance and enforcement officers can prosecute Employers for not abiding by the NMW. Compliance officers can carry out inspections at any time. From February 2014 the fines for failing to pay employees NMW increased from £5,000 to £20,000.

Enforcement actions can be initiated by worker or third party complaints. HMRC is also targeting low paid workers, care workers frequently fall within this category.

The Small Business, Enterprise and Employment Act (approved by Parliament in March 2015) will allow for the maximum £20,000 penalty for non-payment to apply for each worker who has not been paid the NMW. As yet no date has been set.

Employers can also be prosecuted in the criminal court. Potential penalties for those employers who do not pay NMW are increasing, hopefully so will protection for Care Sector employees as a result.

Mileage Allowances

If you are paid less than the TAX FREE mileage amount; for example, your employer pays less than the current 45p maximum rate per mile, for work journeys, you are entitled to an additional tax relief known as Mileage Allowance Relief, claimable via Form P87, Tax Relief for Expenses of Employment on the HMRC website.

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