



National Minimum Wage

Challenges for the retail sector and how to address them

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Introduction

Paying the national minimum wage (“NMW”) seems easy: just make sure you set hourly rates at or above the legal minimums. But as many businesses have found, it’s just not that simple. From different rates for different ages of worker to surprising rules about what counts as working time, this area of law contains several traps for the unwary employer.

As if that wasn’t enough, it’s not just being sued by employees that you have to worry about: businesses face the additional risk of Government enforcement. HMRC and BEIS have been tasked with fighting for workers’ rights in this area and have been flexing their enforcement powers in recent years. The ‘name and shame’ regime, which saw around 1,584 businesses publicly named for failing to comply between October 2013 and December 2018, was reinstated in 2020.



Throughout the guide, you’ll see sections marked with the symbol above.

In these sections, we explain how Fourth’s solutions can help ease the relevant challenge.



The basics

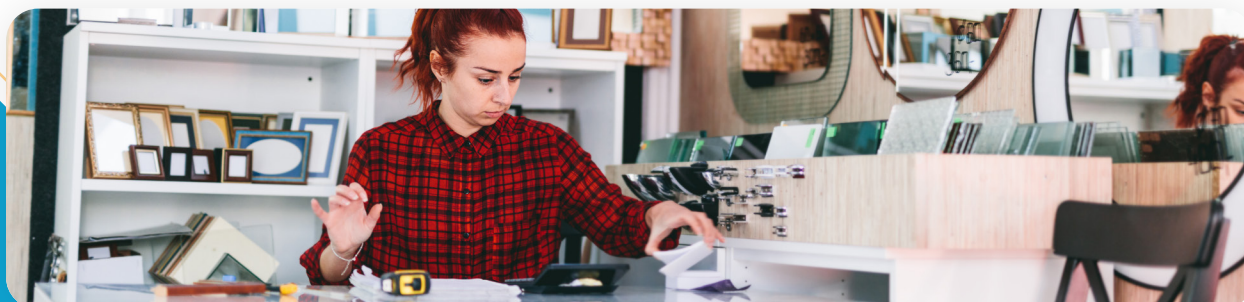
The rates of minimum wage from April 2019 and April 2020, as well as the new rates from April 2021, are set out below:

	From April 2019	From April 2020	New rates from 2021
Apprentice	£3.90	£4.15	£4.30
Under 18	£4.35	£4.55	£4.62
18-20	£6.15	£6.45	£6.56
21-24	£7.70	£8.20	£8.64
25 and over	£8.21	£8.72	£8.91

The National Living wage, in April 21 will be for employees aged 23 and above (previously aged 25+)

Calculating hourly pay for the purposes of determining if NMW has been paid is a deceptively tricky task. The calculation itself is simple - divide the total remuneration in a pay reference period by the total number of hours worked in that pay reference period - but determining the figures to use for the calculation has pitfalls for even the best-intentioned employers.

Below we guide you through the key difficulties employers in the retail sector face with the NMW, explaining the law and how Fourth's technology is able to effectively manage your risk of non-compliance with the NMW.



Dress codes can mean wage woes...

Imposing a uniform requirement can push workers below the minimum wage threshold if you don't allow a buffer to allow for the costs employees incur in purchasing uniform items. This is because under NMW rules expenditure on uniforms is considered to be a deduction from wages, which is therefore excluded from total remuneration for the purposes of determining hourly pay.

For example, if a 23-year old employee is paid £7.70 an hour, works 100 hours a month, but has to pay £20 a month to hire uniform from their employer, their hourly pay will, for NMW purposes, be £7.50 and the employer will be in breach.

The most obvious risk in this area is where a specific uniform is required or where workers are required to wear particular brands while working (e.g. Monsoon were found in 2015 to have underpaid £104,508 to 1,438 workers due to their policy of requiring employees to wear Monsoon clothes at work, which they were able to buy at a discount). However, it has become clear recently that HMRC takes a much wider approach and there is risk of accidental underpayment even where the uniform required is generic (for example, a dress code of black jeans and white t-shirts).



The difficulty for employers in this latter case is determining the size of the “buffer” they should allow, as there is huge variation in how much a pair of black jeans, to use the example above, might cost. HMRC has, unhelpfully, given no real guidance on this point. However, we would expect that a pragmatic approach will be taken by HMRC and they will expect only a reasonable amount be spent on uniform. Employers should not therefore have to account for an employee’s extravagant taste in designer jeans when determining their NMW risk. If you can see you are at risk here, an easy mitigation strategy to consider is to expressly set out, perhaps in employment contracts, a set amount which you consider reasonable to cover uniform costs (and to ensure that such a cost is sufficient to enable an employee to purchase a uniform, and does not of itself create an NMW risk). This gives certainty to both the employer and employee.

Given that wages in the industry are at or around NMW level, it is probable that many employers are inadvertently in breach. HMRC have made this a focus of their enforcement strategy recently so it is sensible to be proactive to minimise / cut off your risk.



With Fourth, individual payments can be set up to deduct an amount, effectively treating the cost of the uniform as a loan that’s paid back over a number of pay periods. As this is all tracked through the system it’s very easy to see any issues before they arise, for example if an employee had worked less hours one week, and would therefore fall below the NMW due to the deduction. These deductions will also appear on the employee’s payslip, providing a full breakdown of their pay.



A change is as good as a rest, but is it working time?

Any time before or after a shift where the worker is required to remain at work but is unpaid is a NMW risk. Suppose that your employee's shift starts at 6pm, but they need to put on their uniform whites first so they arrive at 5.45pm. When do you need to start paying the NMW? It is perhaps easy to assume that working time begins when the shift begins at 6pm, but that may not be the case.

Sports Direct had a lot of negative publicity on this issue in the last few years, as workers employed by the company that provides the bulk of staff at Sports Direct's warehouses were required to undergo unpaid security checks of up to 15 minutes following a shift. That led an HMRC investigation, and being named and shamed for failing to comply with the NMW.

It is likely that time required by the employer outside of a shift – to get into uniform or to receive instructions - will be considered to be working time for NMW purposes and there is a real risk of pay falling below the NMW for retail businesses paying at or close to the NMW.



Using a biometric solution, you can get complete visibility of when the employee arrives and leaves (and goes on breaks), making it easy to compare this to their scheduled shift time and paid time. You can also set thresholds to manage the acceptable time an employee arrives in the business before their shift or leaves afterwards, and comments or notes can be recorded when a time is changed. This means if your colleague arrives 15 minutes before their shift to change into their whites, the rota time can be easily updated to reflect the clock in time, which then flows straight through to payroll to ensure they are paid the correct amount. And as all of this is recorded in the system, you have evidence in the event of a dispute over payment.

What's past is prologue – so make sure you keep hold of it

Employers are obliged to keep records to establish if the NMW has been paid (regulation 59(1) of the National Minimum Wage Regulations 2015) and workers are entitled to request to inspect these records. They are required to retain all data about the pay received by a worker in a particular pay reference period within a single document.

Maintaining all of these records is of course a logistical nightmare. To further increase the risks, there is a legal presumption that the NMW has not been paid (section 28 of the National Minimum Wage Act 1998). This makes records even more important to protecting an employer's position as they need to prove they did pay the NMW should a dispute arise. In addition, criminal liability can arise for failure to maintain records and for falsification of records.



With Fourth, all records are stored electronically in the cloud which not only ensures security in terms of documents being lost or destroyed, but also means access to information is quick and easy. And not just by HR teams, but also by employees who can access their payslips, personal information, etc. themselves via a mobile app – helping them answer queries themselves.

As Fourth's Workforce Management solution is fully integrated, data flows through the system providing an audit trail as it goes, providing evidence in the event of any issues arising. With Fourth Analytics, you can also track payments to employees to ensure you're meeting National Minimum Wage requirements, and other compliance areas such as Gender Pay Gap reporting.



Travel time: **does it count?**

When travel time will be working time for NMW purposes is tricky legally and can be difficult to accurately monitor in practice. Commuting (i.e. travel time to and from work) will generally not be working time for NMW purposes. However, travel during working hours for business purposes will be classed as working time. For example, staff might be required to travel between worksites in the course of their shift to cover a staff shortage or respond to varying demand levels. This travel time will count as working time and therefore must be reflected in pay, otherwise there is a real risk of non-compliance with the NMW.



With Fourth, travel time between sites can be captured on the schedule. Not only does this make sure employees and managers are fully aware of the shape of their day but also that, when approved, the schedule will feed directly into the payroll system to ensure the correct payments are made. Employees can also clock in and out at different sites so the exact timings can be fed through for checking and approval.



Honey, I underpaid the kids

As we saw above, different rates of NMW are applied depending on the individual's age. Therefore, it is possible for a worker's entitlement to change over the course of a pay reference period. This can happen in all sectors but is particularly acute in retail given the number of younger workers. It is not uncommon for a worker to move between age bands during a shift or over the course of a week, and wages must reflect that shifting entitlement. For instance, a 24-year-old working from 8pm to 2am could become entitled to a higher wage at midnight - if they were unlucky enough to be working late on the day before their birthday.



These situations give rise to complex calculations that can easily trip up even the best-intentioned employers. With Fourth, however, a specific report highlights any employees that are at risk of being paid under the minimum wage for the pay period. A batch update can then be run to correct the issues before the pay run. Of course if you outsource your payroll to Fourth, we'd take care of this on your behalf.

By using price bands, you can also establish a maximum and minimum wage based on age. With fully automated systems such as Fourth, every employee's personal details are held securely in the system. When an employee reaches a particular age, they will therefore be switched over to the next pay bracket.



...and all the rest

There's a whole host of routine NMW issues that come up every day and be easily missed, but that technology can take care of:

Calculating pay reference periods

The pay reference period that is used to determine figures for the calculation of hourly pay for NMW purposes will shift depending on how the individual is paid. If they are paid weekly, the pay reference period will be a week. If paid monthly, it will be one month. If payments are made quarterly (or in instalments longer than monthly), employers need to ensure that the NMW is paid each month as the maximum length of the pay reference period is one month.



Fourth's Workforce Management solutions are designed specifically for the retail sector, and as such are designed to handle all variances of pay reference periods (e.g. weekly, fortnightly, four-weekly or monthly), as well as shift workers, variable hours, etc. The system will therefore automatically calculate the relevant pay for the period. Alternatively, our Payroll Bureau service can take care of the whole process for you.



Keeping up with changes to the rate of pay and other regulatory changes

The rates of NMW change every April. A pay reference period might straddle this change, creating a risk of accidental non-compliance, but technology allows you to easily monitor and accommodate these changes.



In Fourth, we update all of our systems in line with changing legislation. All changes to the NMW can therefore be set up in advance with a date at which the changes become effective (e.g. 1st April).

In addition, Fourth's system includes reports to show if salaried employees are in danger of not being paid the NMW if they have worked significantly more than their contracted hours in a particular period. You can even set up an alert which will notify you of employees that might be at risk of being paid less than the NMW.



Rounding time worked up or down

Time worked may be rounded up but should never be rounded down. Rounding down presents real risks of accidental non-compliance with the NMW as the calculation looks at the actual time worked in the pay reference period.



As suggested above, using a biometric solution means you can get the exact time that an employee started and ended their shift, and when they took their breaks. All of this information feeds through to the schedule and on to payroll once approved, ensuring that employees are always paid for the time they worked.

Unpaid trial shifts

If you're using unpaid shifts, they present risk of non-compliance unpaid trial shifts are common in the industry. However, these present a risk of non-compliance with the NMW. They are very likely to be counted as working time for the purposes of the NMW (especially if they exceed a short duration necessary for the recruitment process) and therefore will be included in the total hours worked in the pay reference period.



Due to the flexibility of Fourth's systems, trial shifts can quickly set up and included in the schedule. This allows full tracking of when these shifts took place and any payments made in regard to the trial, and ensures records are accurate.



A new approach on the horizon?

In 2020 HMRC made a change to the law to remove the risk of technical breach under the 'John Lewis problem'. The issue came to prominence when the department store faced a £36m bill in 2017 where workers were paid the minimum wage when assessed over a full year, but fell short in certain pay periods because of extra hours worked. The change will allow certain workers to be paid in equal biweekly or four-weekly instalments, with minimum wage compliance assessed over a full year rather than based on the actual hours worked in a given pay period.

HMRC has also announced that its enforcement strategy will shift to focus on serious or repeated breaches of the law with a greater emphasis on giving clear guidance to employees.



Technology best practices

As we've seen above, technology can help make compliance with NMW requirements easier, but it's important to remember that the technology will only work for you if it's configured in the right way, and you have the right processes in place.

Fourth will help you configure your Workforce Management solution, to ensure you have the relevant settings in place. This would include:

- Setting up pay bandings in job titles.
- Including holidays in shift totals.
- Excluding payment types from NMW calculations where applicable.
- Making use of the apprentice functionality,
- Auto-deduction of breaks.

With any technology that you use for workforce management, there are also some best practices to consider to help reduce the risk of non-compliance:

- Rotas should be scheduled and approved in advance of the rota start date.
- Breaks should be planned and therefore scheduled in, as should travel time between sites.
- Ensure that all employees are clocking in and out on every shift, and
- be clear on when they should clock in (i.e. before they change into their work clothes).
- Salaried staff must also clock in and out to ensure accurate records of working times are kept.
- Time and attendance should be reviewed and hours updated daily to ensure the employee is paid for every minute worked. With Fourth, 'Copy T&A' will ensure clock in times match paid hours. Ensure that only 'working time' is paid and add a note or comment if this gets amended to ensure accurate records are kept.
- Rotas should be rolled back to include any forgotten or missed hours, rather than trying to fix the issue in the next pay run which can lead to issues if audited.
- With Fourth, run the NMW export in Payroll to identify any potential areas of non-compliance, and also run the NMW batch update before each pay run to correct any issues.

If you'd like to find out more about how Fourth and GQ|Littler can help you manage compliance with the NMW requirements, please get in touch using the details below.

About GQ | Littler

GQ | Littler is a leading specialist law firm for employers in the UK and Ireland. Our team of 27 lawyers in London equals or exceeds the employment law capability of most full-service City firms in size, experience and expertise. We are part of Littler, the world's largest employment law firm with more than 1,600 lawyers in over 90 offices worldwide, providing a single source solution to international businesses, including cutting-edge technology and research solutions.

Offering risk-based contentious and non-contentious advice our legal expertise includes employment, immigration, data privacy and employee tax and incentives. Our client base spans a wide range of sectors including financial services, technology, healthcare, professional services and luxury goods, in the UK and internationally.

As a premium boutique, the firm combines the benefits of high-quality full-service law firms with the flexibility, dynamism and personal service of a smaller firm. GQ | Littler is recognised as a leader in its field by both Chambers & Partners and Legal 500, which describes the firm as an "excellent team with strength and depth in every aspect."



About Fourth

Fourth provides end-to-end, best-in-class technology and services for the retail, restaurant, and hospitality industries. Their procurement, inventory, and workforce management solutions, coupled with the industry's most complete data and analytics suite, give operators the actionable insights they need to control costs, scale profitability, improve employee engagement, and maintain compliance. Since its merger with US-based HotSchedules, Fourth serves more than 7,000 customers across 120,000 locations globally.



You have enough to do.

Let's help get the administrative busywork off your plate. To learn how we can help simplify your back-office operations and boost your efficiency and profitability, give us a call.

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