

Minimum wage and statutory pay obligations

Regulations covering minimum wages and statutory pay apply to almost every business.

It is illegal to pay less than the National Minimum Wage so you need to be clear about your responsibilities as an employer if you are going to minimise disruption to your business and prevent disputes arising.

This briefing covers:

- National minimum wage.
- Statutory maternity pay and maternity allowance.
- Statutory paternity and adoption pay.
- Statutory sick pay.

1 The minimum wage

1.1 Almost **all workers** aged 18 and over are entitled to the National Minimum Wage (NMW).

- The NMW for those aged 22 and over is £5.73.
- There is a lower minimum wage of £4.77 for those aged 18 to 21.
- Freelance and temporary workers are entitled to the minimum wage.
- Workers aged 16 and 17 (except apprentices) are entitled to a minimum of £3.53 per hour.

1.2 Workers' average pay must be at or above the minimum wage for each '**pay reference period**'.

- The reference period is the worker's actual pay period, up to a maximum of a month.

- Premium payments (eg overtime at time-and-a-half) cannot be included when calculating whether the worker has been paid the minimum wage. Only the standard hourly rate portion of the overtime payment can be counted.

1.3 Hours worked will depend on the type of work the worker does.

- For waged workers, the hours are usually clearly stated.
- For salaried workers, hours are usually a set number of basic hours per year.

1.4 The position of workers who **sleep on the premises** is under review. Current advice from the Department for Business, Enterprise and Regulatory Reform (formerly the DTI) is that workers need not be

Directors' Briefing

a book in four pages

More than 160 briefings are now available.

If you need further information or help, ask the distributor of this briefing about the services available to you.

paid the minimum wage in respect of the period when they are not actually working, provided that:

- The employment contract clearly sets out the period when the worker is permitted to sleep, and the employer provides suitable sleeping facilities.

1.5 The value of most **perks** cannot be included when calculating whether the employee is being paid the minimum wage.

- The value of accommodation provided free can be included, but only up to a value of £31.22 a week.
- The value of perks which can be freely exchanged for money, goods or services is included (eg incentives and bonuses).
- Tips do not count towards the minimum wage, unless collected by the employer and paid through the normal pay system.

1.6 There is **no opt out** from the NMW.

- Workers cannot agree to be paid less.
- Workers must be paid the minimum, no matter how poor their performance is.
- Dismissing a worker to avoid paying the minimum wage is automatically unfair.
- Even the directors of the smallest start-up must be able to show that they pay themselves at least £5.52 an hour.

1.7 You need to keep adequate **pay records** to prove you are paying the minimum wage. If workers suspect they are underpaid, they can request, inspect and copy any records that will establish whether this is true or not.

- You must respond to a request for relevant information within 14 days.
- Records don't have to be kept in a specific format. If most of your employees are paid well above the minimum wage, you may not need to keep any additional records beyond those you already keep for PAYE.
- In case of dispute, you will have to prove that you have paid the minimum wage.

1.8 The minimum wage is enforced by **HM Revenue & Customs** (HMRC).

- It has the power to demand records, enter premises and interview employees.
- It may detect breaches of the minimum wage requirements on your PAYE returns.
- Failing to keep adequate records, keeping false records, and obstructing an enforcement officer are all separate criminal offences. You could be liable for fines of up to £5,000 for any of these offences.

- If it is discovered that an employer is not paying the minimum wage, they will have to pay arrears within seven days. If the employer misses the seven day deadline, they will have to pay a minimum fine of £231.84 per worker. If the employer still fails to pay, they risk prosecution and an additional £5,000 fine.

2 Maternity pay

Many pregnant women on ordinary maternity leave are entitled to statutory maternity pay (SMP).

This is treated as income and is paid net of income tax and National Insurance contributions (NICs).

2.1 To qualify for **statutory maternity pay**, a woman must have completed 26 weeks' service by the end of the 15th week before the week the birth is due. This is known as the 'qualifying week'.

- She must have average weekly earnings of at least £95 in the eight weeks up to and including the qualifying week.
- She must still be pregnant, or have had her baby, by the 11th week before the expected week of childbirth.
- She must have stopped working, or taken ordinary maternity leave.
- She must have provided evidence of the expected date of birth.

2.2 There are **two rates** of SMP.

- A woman entitled to SMP receives the higher rate, equal to 90 per cent of her average weekly earnings (if more than £123.06 per week), for the first six weeks.
- She then moves to a fixed rate of £123.06 or 90 per cent of her average earnings if lower for up to 33 more weeks. These are set rates and are not altered in the case of multiple births.
- The level of SMP has to be recalculated if a pay rise takes effect at any time between the start of the reference period and the end of the maternity leave, both ordinary and additional.

2.3 Employees not entitled to SMP may qualify for **maternity allowance** (see 3).

2.4 The **Government** compensates employers for making SMP payments.

- Small businesses can claim back more SMP than they pay out.

► Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

You can claim 104.5 per cent if you are a small enterprise with total NI payments (employer's and employees' combined) of less than £45,000 a year.

- Larger employers can reclaim 92 per cent of the gross SMP paid.

You can claim back the SMP by making deductions from the NICs you usually forward to HMRC.

You must maintain detailed records of SMP and keep them for at least three years.

2.5 SMP stops if the employee is taken into custody, or dies.

- Mothers can work for 10 days during maternity leave (known as 'keeping in touch days') without it affecting their right to SMP.

2.6 Some employers offer **enhanced maternity pay** to some or all of their female employees.

3 Maternity allowance

3.1 Maternity allowance (MA) is paid by **JobCentre Plus** and is based on the woman's recent employment and earnings record.

- Those who are self-employed, or a pregnant employee who is recently employed, or does not qualify for SMP, may qualify for MA.
- These include women who earn between £30 and £95 a week and have been employed or self-employed for at least 26 weeks of the 66 weeks ending with the week before the expected week of childbirth.
- They must earn on average at least £30 per week.

3.2 Maternity allowance is paid for a **maximum** of 39 weeks at £123.06 or 90 per cent of average weekly pay if lower than £123.06. Get full details of the SMP and MA schemes on the Department for Work and Pensions website at www.dwp.gov.uk.

4 Paternity pay

4.1 Fathers (or those with responsibility for bringing up children) are entitled to take paid time off at or around the time of the child's birth. Those employees who qualify for paternity leave are entitled to **statutory paternity pay** (SPP).

- SPP is for either one or two consecutive weeks as specified by the employee.
- The rate of SPP is £123.06 a week or 90 per cent of average pay, if lower.
- Employees who have weekly earnings below the lower earnings limit for National Insurance purposes (£95 a week) do not qualify for SPP.
- As with SMP, you claim back the SPP by making deductions from the NICs you usually forward to HMRC.

5 Adoption pay

5.1 Adoption leave and **statutory adoption pay** (SAP) is available to employees who adopt, or one member of a couple where the couple adopt jointly.

- Most adopters are entitled to £123.06 a week or 90 per cent of average pay if lower for up to 39 weeks.
- Adopters who have average weekly earnings below the lower earnings limit for NICs (£95 a week) do not qualify for SAP.
- As with SMP and SPP, you can recover the amount of SAP you pay by offsetting the amount against NICs.
- Any additional adoption leave is unpaid.
- A right to paternity leave and pay for the other member of the couple, or an adopter's spouse or partner, is also available.

6 Statutory sick pay

6.1 **Statutory sick pay** (SSP) is paid up to a maximum of 28 weeks, to employees who are unable to work because of sickness.

- If an employee qualifies for SSP (see **6.2**), it is paid at a flat rate of £79.15 a week.
- There is no qualifying length of service or minimum number of hours a week.
- Even if it is an employee's first day of work with a new employer and they become sick part way through the day, they may be entitled to SSP.

6.2 To be entitled to SSP an employee **must**:

- Be sick for at least four or more days in a row (including weekends and bank holidays).
- Earn over the NI lower-earnings limit of £95 a week.

6.3 Employees become **entitled** to SSP from the fourth 'qualifying day' of sickness.

A qualifying day is basically a day on which the employee would normally have worked.

- In practice, the rule means that there are usually three clear 'waiting days' before SSP is payable in any 'period of incapacity for work' (PIW).
- If the employee is sick on a weekend day or a Bank Holiday — or any other non-working day — this counts towards the four-day PIW, but is not a 'qualifying day'.
- Employers must issue form SSP1 by the end of the 23rd week to let the employee know when SSP will be ending.

6.4 You are entitled to ask for evidence that an employee is sick. This will usually be in the form of a **sick note** from their doctor.

- For the first seven days that they are sick, an employee must fill in a self-certificate of their own or form SC2 (Employee self certification form) which can be obtained from a GP's surgery or HMRC's website (www.hmrc.gov.uk).

6.5 If an employee is receiving SSP for a **pregnancy related illness** at the start of, or in the four weeks before her baby is due, SSP will stop and any entitlement to statutory maternity pay (SMP) or maternity allowance (MA) will start automatically.

- If she is entitled to SMP or MA, she cannot receive SSP for 26 weeks starting with the day of entitlement to those payments.
- If she is not entitled to SMP or MA, she cannot receive SSP for 18 weeks starting with the Sunday of the week her baby is born, or the Sunday of the week she is sick from work for a pregnancy related illness.

6.6 You can **withhold SSP** if the employee:

- Has recently drawn a state benefit (such as sickness, incapacity or maternity benefit).
- Is held in custody.

6.7 Employers must keep **full records** of SSP.

- Records must be kept for three years.
- Failure to do so can lead to a £1,000 fine.

6.8 You can get **money back** from HMRC if the SSP you pay out exceeds a set level.

- If your SSP exceeds 13 per cent of your gross NICs in any month (which is unusual), you can reclaim the extra in full.

You do this by deducting the amount first from your NI payments and then from the PAYE you are due to pay.

7 Getting help

Because of new legislation and the effects of case law, printed material on statutory pay obligations quickly goes out of date.

7.1 The best **up-to-date information** is often available from Acas on 08457 47 47 47 or at www.acas.org.uk and the Department for Work and Pensions on 020 7712 2171 or at www.dwp.gov.uk.

7.2 For advice on the national minimum wage, call the **national minimum wage helpline** on 0845 6000 678, or visit www.berr.gov.uk/employment/pay/national-minimum-wage/index.html.

- For a copy of 'A detailed guide to the national minimum wage', call the national minimum wage orderline on 0845 845 0360 or visit <http://www.berr.gov.uk/employment/pay/national-minimum-wage/index.html>.

7.3 For information on SMP, SSP and other aspects of NICs and PAYE, contact the **employers' helpline** on 08457 143 143.

7.4 For **interactive tools** giving guidance on employment rights, visit www.direct.gov.uk/employment/index.htm.

© BHP Information Solutions Ltd 2009.
ISSN 1369-1996. All rights reserved. No part of this publication may be reproduced or transmitted without the written permission of the publisher. This publication is for general guidance only. The publisher, expert contributors and distributor disclaim all liability for any errors or omissions. Consult your local business support organisation or your professional adviser for help and advice.