

EXPLANATORY MEMORANDUM TO

THE NATIONAL MINIMUM WAGE (AMENDMENT) (NO. 2) REGULATIONS 2020

2020 No. 339

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the National Minimum Wage (NMW) Regulations 2015 in order to reduce burdens on businesses employing salaried staff (those paid an annual salary in equal instalments) from complying with the NMW rules, without removing protections or benefits for workers.
- 2.2 The NMW Regulations 2015 contain different rules for calculating minimum wage pay depending on how the worker is paid. This instrument widens the range of pay arrangements that are compatible with the worker being treated as a salaried hours worker under the NMW rules. The range of compatible payment cycles is increased (such as being paid every two or four weeks), and premium payments (for example for working on bank holidays) become compatible. The instrument also enables employers to specify the ‘calculation year’ for their salaried workers (the reference point to identify when in a year a worker’s basic annual hours, for which they receive their salary, are exceeded).
- 2.3 These amendments to the NMW Regulations 2015 have been made in line with evidence from the Government consultation on salaried work and salary sacrifice schemes.
- 2.4 This instrument also changes the rules on payments by workers which reduce pay for NMW purposes. Where a worker makes a purchase from the employer that is in connection with their employment, this no longer reduces pay for NMW purposes if the employer reimburses the worker.
- 2.5 These provisions come into force on 6th April 2020, subject to Parliamentary approval.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom, the territorial waters of the United Kingdom and the United Kingdom sector of the continental shelf.

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding Human Rights:

“In my view the provisions of The National Minimum Wage (Amendment) (No. 2) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

6.1 This instrument implements the legislative outcomes of the consultation on salaried hours work and salary sacrifice schemes.

6.2 This is the second NMW amendment regulations of 2020. The first regulations implemented the annual increases to the NMW rates.

7. Policy background

What is being done and why?

7.1 The NMW Regulations 2015 provide the conditions under which workers count as performing salaried hours work. Such salaried workers must be paid an annual salary for working a particular number of hours in the year (the “basic hours”). They must also be paid in equal instalments over the course of the year (or in varying instalments which add up to the same amount in each quarter). However, their working hours in each pay period (for example week or month) may vary. The employer must simply ensure that when the basic hours are divided up equally between the pay periods throughout the year, the average hourly rate for each period is always at least NMW.

7.2 This instrument follows the consultation on salaried workers and salary sacrifice schemes. Through the consultation, we have gathered evidence that certain elements of the NMW rules place burdens on employers without generating benefit for workers. An objective of the NMW rules is to ensure fairness in the labour market while only generating the minimum burden necessary for employers.

7.3 This instrument will widen the range of pay arrangements that are compatible with workers being treated as salaried hours workers under the NMW rules by:

- Increasing the range of compatible payment cycles to salaried hours workers (such as payments every two weeks or four weeks – currently only weekly or monthly payment cycles are compatible).
- Making premium payments to salaried hours workers compatible (such as for working on bank holidays), including where a salaried hours worker’s contract specifies a premium pay arrangement. The existing rules do not allow for premium payment arrangements in respect of the worker’s basic hours.
- Enabling employers to specify the ‘calculation year’ for their salaried workers (the reference point to identify when in a year a worker’s basic hours are exceeded). Currently, the calculation year is individual to the worker’s start date, creating difficulty for employers to monitor when annual basic hours are exceeded.

- 7.4 This instrument includes transitional provision for the amendments set out in paragraph 7.3. Where the coming into force of those amendments would result in a worker meeting the conditions for performing salaried hours work, the amendments do not apply to such a worker immediately. Instead they apply from the beginning of the worker's first calculation year starting after 6 April 2022, unless the employer has given the worker written notice that the amendments will apply to the worker on or before that date. Where the employer has given such a notice, the amendments apply from the date specified in the notice. In this case, the date specified becomes the first day of the worker's calculation year.
- 7.5 This instrument will also make a small change to the rules on payments by workers which reduce pay for NMW purposes. Where a worker makes a purchase from their employer in connection with their employment (e.g. the latest clothing line for uniform in an apparel store) then if the employer reimburses the purchase it will not reduce NMW pay. Under the current NMW Regulations such purchases always reduce NMW pay even where they are reimbursed by the employer. These amendments also cover cases where the employer provides money for the purchase before it is made, for example through a uniform allowance payment.
- 7.6 The amendments relating to reductions do not apply for pay reference periods beginning before the day this instrument comes into force.
- 7.7 The amendments made through this instrument will ensure that the NMW rules keep pace with current employment practices; that employers are not constrained by rules which are not justified by worker protection or benefit; and that workers are paid what they are legally entitled to.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no plans to further consolidate the NMW Regulations.

10. Consultation outcome

- 10.1 The Government consultation on salaried workers and salary sacrifice opened on 17 December 2018 and closed on 1 March 2019. The consultation received 101 responses (80 unique). Of the respondents, 51 percent were private sector employers; 13 percent were employer groups; 26 percent were public; 5 percent were unions; 5 percent chose to remain anonymous; and 1 per cent of respondents were in the charity sector.
- 10.2 This instrument follows the Government's consideration of responses and discussions with a range of stakeholders.
- 10.3 Details of this consultation and the Government's response can be found on gov.uk using the following link: <https://www.gov.uk/government/consultations/salaried-workers-and-salary-sacrifice-schemes-changing-the-national-minimum-wage-rules>

11. Guidance

- 11.1 Information about NMW regulations, requirements and penalties can be found on the gov.uk website.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies will primarily be through transitional familiarisation costs.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A de minimis impact assessment has been produced for this regulation. This estimated the benefit to business over ten years at £6 million in Net Present Value terms, which equates to an annualised impact of £0.6 million.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 The consultation collected evidence from small businesses and organisations representing the interests of small businesses.

14. Monitoring & review

- 14.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding the duty to review regulatory provisions in secondary legislation:

“It is not appropriate in the circumstances to make provision for review by the Secretary of State in The National Minimum Wage (Amendment) (No. 2) Regulations 2020. The changes made by the instrument make it easier for workers to fall within the NMW rules for salaried workers, for employers to simplify the application of those rules to their workforce, and a relatively narrow change to the rules on reductions. As such review would be disproportionate when taking into account the economic impact of the regulatory provision on the qualifying activity.”

15. Contact

- 15.1 Patrick Day at the Department for Business, Energy and Industrial Strategy, telephone: 020 7215 3078 or email: Patrick.Day@beis.gov.uk, can answer any queries regarding this instrument.
- 15.2 Tom Griffiths can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.