

Draft Regulations laid before Parliament under section 51(5) of the National Minimum Wage Act 1998, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2020 No.

TERMS AND CONDITIONS OF EMPLOYMENT

The National Minimum Wage
(Amendment) (No. 2) Regulations 2020

Made - - - - - ***
Coming into force - - - - - 6th April 2020

The Secretary of State, in exercise of the powers conferred by sections 2(1), (2)(b), (5)(a) and (d), (6)(a) and 51(1) of the National Minimum Wage Act 1998⁽¹⁾, makes the following Regulations.

A draft of these Regulations was laid before Parliament in accordance with section 51(5) of the National Minimum Wage Act 1998 and approved by a resolution of each House of Parliament.

PART 1

CITATION AND COMMENCEMENT

1. These Regulations may be cited as the National Minimum Wage (Amendment) (No. 2) Regulations 2020 and come into force on 6th April 2020.

PART 2

AMENDMENTS TO THE NATIONAL MINIMUM WAGE REGULATIONS 2015

CHAPTER 1

SALARIED HOURS WORK

2. The National Minimum Wage Regulations 2015⁽²⁾ are amended in accordance with this Part.
3. In regulation 3 (general interpretative provisions)—
 - (a) in the definition of “basic hours” for “21(5)” substitute “21(3)”;

(1) 1998 c. 39.

(2) S.I. 2015/621, to which there are amendments not relevant to these Regulations.

- (b) in the definition of “performance bonus” for “21(6)” substitute “21(8)”; and
 - (c) at the appropriate place insert ““salary premium” has the meaning given in regulation 21(9);”.
4. In regulation 10 (payments and benefits in kind which do not form part of a worker’s remuneration) after sub-paragraph (n) insert “(o) payment of a salary premium.”.
5. In regulation 21 (the meaning of salaried hours work)—
- (a) for paragraph (2) substitute—
 - “(2) The first condition is that the worker is entitled under their contract to be paid—
 - (a) an annual salary; or
 - (b) an annual salary and one or both of—
 - (i) a performance bonus; and
 - (ii) a salary premium.”;
 - (b) in paragraph (3) after “bonus” insert “or salary premium (or all three)”;
 - (c) for paragraph (4) substitute—
 - “(4) The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than—
 - (a) an annual salary; or
 - (b) an annual salary and one or both of—
 - (i) a performance bonus; and
 - (ii) a salary premium.”;
 - (d) for paragraph (5) substitute—
 - “(5) The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week, month or other period, in instalments which—
 - (a) are equal and occur not more often than weekly and not less often than monthly; or
 - (b) occur monthly and vary but have the result that the worker is entitled to be paid an equal amount in each quarter.”;
 - (e) in paragraph (6)—
 - (i) after sub-paragraph (a) insert “(aa) a salary premium is paid”; and
 - (ii) for sub-paragraph (d) substitute—
 - “(d) the employment starts or terminates during a week, month or other period provided for in paragraph (5)(a) with the result that the worker is paid a proportionate amount of their annual salary for that week, month or other period.”; and
 - (f) after paragraph (8) insert—
 - “(9) A “salary premium” is—
 - (a) an amount of pay which is—
 - (i) in addition to the annual salary; or
 - (ii) an increase in the rate of pay for particular working hours;
 - (b) in respect of the basic hours; and
 - (c) attributable to working—

- (i) at a particular time of the day;
 - (ii) on a particular day;
 - (iii) at a particular location;
 - (iv) in a particular working environment;
 - (v) within a particular geographical area;
 - (vi) on a particular task; or
 - (vii) subject to a particular responsibility.”
6. In regulation 22 (determining hours of salaried hours work in a pay reference period)—
- (a) after paragraph (2) insert—

“(2A) Where the pay reference period is two weeks, the hours of salaried hours work in that period are the basic hours divided by 26.

(2B) Where the pay reference period is four weeks, the hours of salaried hours work in that period are the basic hours divided by 13.”;
 - (b) for paragraph (6)(b) substitute—

“(b) is not entitled to be paid more than annual salary, a performance bonus and a salary premium for those additional hours.”; and
 - (c) for paragraph (7) substitute—

“(7) The hours of salaried hours work in a pay reference period are to be determined in accordance with regulation 29 if—

 - (a) the employment terminates before the end of the calculation year;
 - (b) the contract is varied before the end of the calculation year so that it is no longer a contract for salaried hours work; or
 - (c) the calculation year is changed by the employer as provided for in regulation 24(5) to (8).”.
7. In regulation 24 (the meaning of the calculation year)—
- (a) after paragraph (1) insert—

“(1A) Paragraphs (2) to (4) apply unless an alternative calculation year takes effect in accordance with paragraphs (5) to (8).”;
 - (b) in paragraph (4) for “weekly” substitute “other than monthly”; and
 - (c) after paragraph (4) insert—

“(5) Where the requirements specified in paragraph (6) are met (subject to the exception in paragraph (7)), the employer may change a worker’s calculation year by specifying an alternative calculation year in a written notice given to the worker.

(6) The requirements referred to in paragraph (5) are that—

 - (a) the notice includes an explanation of the effect of the change of the calculation year;
 - (b) the alternative calculation year does not begin within the period of three months beginning with the day on which the employer gave the notice;
 - (c) the worker does not, before the day on which the notice specifies that the alternative calculation year begins, give the employer a written objection to the change;

- (d) a change to the worker’s calculation year has not already taken effect within the period of six years ending with the day on which the notice specifies that the alternative calculation year begins; and
- (e) the employer does not make any deduction or require the worker to make any payment or work any additional hours as a result of the change.

(7) The requirements set out in paragraph (6)(a) to (d) do not apply where on the day on which the notice specifies that the alternative calculation year begins the worker has been employed for less than the period of three months ending with that day.

(8) Where in accordance with paragraphs (5) to (7) the employer specifies an alternative calculation year—

- (a) the change takes effect on the day the alternative calculation year begins; and
- (b) in each subsequent year, the calculation year is a year beginning on an anniversary of that day.

(9) Where a worker’s calculation year is changed as provided for in paragraphs (5) to (8), regulation 29 is to apply as if the employment of the worker had been terminated and the last day of the worker’s final pay reference period had fallen on the day before the day on which the new calculation year begins.”.

8. In regulation 26 (determining whether the worker works more than the basic hours in the calculation year) at the ends of each of paragraph (1)(c) and (d) insert “or salary premium (or all three)”.

CHAPTER 2 REDUCTIONS

9. In regulation 12(2) (deductions or payments for the employer’s own use and benefit) for subparagraph (e) substitute—

- “(e) payments as respects the purchase by the worker of goods or services from the employer, unless—
- (i) the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker’s employment; and
 - (ii) the payment is not met, or intended to be met, by a payment paid to the worker by the employer.”.

10. For regulation 13 (deductions or payments as respects a worker’s expenditure), substitute—

“13. Deductions or payments as respects a worker’s expenditure

(1) Subject to the exception in paragraph (2), the following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—

- (a) deductions made by the employer as respects the worker’s expenditure in connection with the employment;
- (b) payments—
 - (i) paid by or due from the worker to the employer as respects the worker’s expenditure in connection with the employment, or
 - (ii) to any other person on account of such expenditure.

(2) The payments referred to in subparagraph (1)(b) are not to be treated as reductions if the expenditure is met, or intended to be met, by a payment paid to the worker by the employer.”.

PART 3
TRANSITIONAL PROVISION
CHAPTER 1
SALARIED HOURS WORK

11. The amendments made by Chapter 1 of Part 2 of these Regulations apply in the case of a re-categorised worker as provided for in this Chapter.

12. A “re-categorised worker” is a worker who on the day these Regulations come into force would—

- (a) meet the conditions for performing salaried hours work in regulation 21(2) to (5) of the National Minimum Wage Regulations 2015 (“the 2015 Regulations”) if the amendments to those conditions were not deferred by this Chapter; and
- (b) do so as a result of the amendments to those conditions made by Chapter 1 of Part 2.

13. The amendments made by Chapter 1 of Part 2 apply in the case of a re-categorised worker from the first day of the worker’s calculation year (as determined by regulation 24 of the 2015 Regulations) beginning after 6th April 2022, unless the employer has nominated a different day in accordance with regulations 14 to 16 of these Regulations.

14. Before 6th April 2022, the employer may (subject to the limitation in regulation 15) give written notice to a re-categorised worker nominating the day on which the amendments made by Chapter 1 of Part 2 shall apply in the worker’s case (the “nominated day”).

15. The nominated day may not occur after 6th April 2022.

16. Where the employer gives written notice of a nominated day—

- (a) the amendments made by Chapter 1 of Part 2 apply in the worker’s case from that day;
- (b) the worker’s calculation year is—
 - (i) in the first year, not determined by regulation 24 of the 2015 Regulations but is a year beginning with the nominated day; and
 - (ii) in each subsequent year, a year beginning on an anniversary of that day, unless an alternative calculation year takes effect in accordance with regulation 24(5) to (8) of the 2015 Regulations; and
- (c) the worker is treated as if for the purpose of regulation 24(6)(d) of the 2015 Regulations a change to the worker’s calculation year took effect on the nominated day.

CHAPTER 2
REDUCTIONS

17. The amendments made by Chapter 2 of Part 2 do not apply in respect of a pay reference period which begins before 6th April 2020.

Date

Name
Minister for Small Business, Consumers and
Corporate Responsibility
Department for Business, Energy and Industrial
Strategy

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the National Minimum Wage Regulations 2015 (“the 2015 Regulations”). These Regulations come into force on 6th April 2020.

Chapter 1 of Part 2 sets out the amendments to the 2015 Regulations which relate to salaried hours work. Regulation 3 adds a definition of “salary premium” to regulation 3 of the 2015 Regulations. A salary premium is an additional amount of pay attributable to working in defined circumstances, such as at a particular time of day (for example at night), or on a particular day (for example a bank holiday). The salary premium may be a separate amount that is in addition to the worker’s salary, or it may be an increase in the worker’s rate of pay for particular working hours.

Regulation 4 amends regulation 10 of the 2015 Regulations so that where a worker receives a salary premium, it is discounted from the worker’s remuneration for minimum wage purposes. Where the salary premium is in the form of an increase in the worker’s rate of pay, for example where a higher hourly rate is paid for working on a bank holiday, then only the amount of the increase is discounted.

Regulation 5 amends certain aspects of the conditions set out in regulation 21 of the 2015 Regulations which determine whether or not a worker is performing salaried hours work. The amendments provide that a salaried hours worker may:

- receive a salary premium in respect of the hours in the year for which the worker is paid an annual salary (the “basic hours”); and
- be paid in equal instalments which are not more often than weekly and not less often than monthly.

Regulation 7 amends regulation 24 of the 2015 Regulations, which determines a worker’s calculation year by reference to the day their employment began. The calculation year is used for calculating if and when a worker has worked all of their basic hours in a particular year. The amendments enable the employer to change the worker’s calculation year so that it begins with a day chosen by the employer. This may be done by giving the worker at least three months’ written notice, provided that certain requirements are met, such as that the employer provides a written explanation of the effect of the change. Where an employer changes a worker’s calculation year, regulation 29 of the 2015 Regulations applies, such that the employer may have to make an additional payment to the worker where the worker has worked in excess of the basic hours prorated for the proportion of the calculation year that has then elapsed.

Chapter 2 of Part 2 sets out the amendments to the 2015 Regulations which relate to reductions from a worker’s remuneration for the purpose of calculating the rate at which a worker has been paid. Regulation 9 amends regulation 12(2)(e) of the 2015 Regulations, which concerns reductions where a worker purchases goods or services from their employer. Where the purchase is made to comply with a requirement imposed by the employer, then this will not be a reduction if the employer reimburses the worker for the purchase (or intends to do so).

A similar effect is achieved by Regulation 10, which amends regulation 13 of the 2015 Regulations which concerns deductions and payments as respects a worker’s expenditure in connection with their employment. Payments paid by, or due from, the worker to the employer as respects such expenditure will not constitute a reduction if the employer reimburses the worker (or intends to do so). This makes this provision consistent with the position where the payment on account of such expenditure is to a third party.

Part 3 contains transitional provision which determines when and how the amendments made by Part 2 apply. Chapter 1 of Part 3 determines how the amendments made by Chapter 1 of Part 2 (relating to salaried hours work) apply in the case of a “re-categorised worker”. A “re-categorised worker” is a worker who on the day these Regulations come into force would meet the conditions for performing salaried hours work in regulation 21 of the 2015 Regulations as amended, but would do so only as a result of the amendments. For a re-categorised worker the amendments made by Chapter 1 of Part 2 only apply from the beginning of the worker’s first calculation year starting after 6th April 2022. The exception to this is where the employer has given the worker a written notice which nominates a day on which the amendments apply, in which case the amendments apply from that day. The nominated day must be on or before 6th April 2022.

Chapter 2 of Part 3 ensures that the amendments made by Chapter 2 of Part 2 (relating to reductions) do not take effect until the first pay reference period which begins on or after 6th April 2020.

A full impact assessment has not been prepared for this instrument as no significant impact on business activities is foreseen. Instead a de minimis assessment has been prepared as this instrument is likely to entail some costs for businesses, including transitional and recurring costs, but the net impact is estimated to be below £5million per year.