



## BRIEFING PAPER

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# The National Minimum Wage: volunteers and interns

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## Summary

This note provides an overview of the application of National Minimum Wage (NMW) law to persons working in a voluntary capacity.

Only persons defined in law as “workers” are entitled to be paid the NMW. In order to fall within the definition, a person must have a contractual relationship with his employer. An unpaid volunteer without any contractual obligations will be ineligible for the NMW.

The *National Minimum Wage Act 1998* provides an exception to this, which enables a limited range of organisations (e.g. charities) to enter contractual relations with volunteers without necessitating payment of the NMW. This is achieved by [section 44](#) of the Act, which creates an exception for “voluntary workers”. A voluntary worker is a type of worker who undertakes work for a charity, voluntary organisation, associated fund-raising body or a statutory body, but is not entitled to monetary payments other than expenses and/or provision for subsistence.

This area of the law is notoriously complex. It can often be unclear whether an individual qualifies for the NMW. For example, paying a “voluntary worker” in excess of his expenses (or reasonably estimated expenses) may take him out of the section 44 exception and confer “worker” status upon him, thereby entitling him to the NMW.

# 1. The National Minimum Wage

National Minimum Wage (NMW) law is set out in both primary and secondary legislation. The *National Minimum Wage Act 1998* (the 1998 Act) provides the main principles, with the detail set out in the *National Minimum Wage Regulations 2015* ([SI 2015/621](#)). Additional regulations are enacted annually updating the NMW rates in October. The rates are set by the Government, having considered the advice of the Low Pay Commission. The Low Pay Commission is an advisory non-departmental public body which publishes substantial annual reports setting out recommended NMW rates. Low Pay Commission reports are available [here](#).<sup>1</sup>

There are different NMW rates for different age groups. Broadly, the rationale for this is that young people occupy a vulnerable position in the labour market with a developmental need to acquire work experience; setting an across-the-board NMW rate could see young people excluded from the labour market in favour of more experienced adults, thereby preventing young people from accumulating work experience.

The NMW is updated annually, in October. As of October 2015, the rates are:

<b>21 and over</b>	<b>18 to 20</b>	<b>Under 18</b>	<b>Apprentice</b>
£6.70	£5.30	£3.87	£3.30

N.B. the apprentice rate is for apprentices under 19 or those in the first year of their apprenticeship.

For further information on the current rates, see the Gov.uk page on the NMW, [here](#).

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<sup>1</sup> Gov.uk, publications by Low Pay Commission

## 2. The employment status of volunteers

[Section 1\(2\)](#) of the 1998 Act provides that a person qualifies for the NMW if he:

- is a **worker**;
- is working, or ordinarily works, in the United Kingdom under his contract; and
- has ceased to be of compulsory school age.

All persons classed as “employees” – i.e. those working under contracts of employment - will be entitled to the NMW, as they are classed “workers”. “Worker” is a status broader than and inclusive of employee status, and is defined in [section 54\(3\)](#) of the 1998 Act as:

an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

As indicated by this definition, a person’s employment status is governed largely by his contractual relations, or absence thereof, with an employer. The existence of a contractual relationship, whether written, oral or implied through conduct, is an essential prerequisite for NMW entitlement. Volunteers, i.e. persons who are not contractually bound to perform work or services, are not entitled to the NMW. Notwithstanding these ostensibly clear distinctions, uncertainty arises from the fact that contracts may come into existence without the parties being aware of it.

For a contract to exist there must be agreement (offer and acceptance), consideration (an exchange of something of value) and an intention to create legal relations. Staff who are not paid a salary have nevertheless probably agreed to perform certain services (e.g. opening the mail, answering the phone, manning the office) and the employer has probably offered something in return (experience, access to the market and perhaps some minor expenses). The general working context and the elements of mutual obligation characteristic of a particular employment may show an intention to create legal relations. Thus, all the elements of a contract are easily inferred. If a volunteer is genuinely supernumerary with no obligation to work, he would not be entitled to the NMW. However, if a “volunteer” is under an obligation to work, then he is, in fact, a “worker” and entitled to the NMW, unless an exception applies.

The complexity of the law in this area, and the ease with which contracts may be inferred by conduct, creates the possibility that

volunteers may unexpectedly fall within the definition of worker. This can lead to uncertainty for organisations, such as charities, that are heavily reliant on volunteers. It is largely for this reason that NMW legislation creates an exception for “voluntary workers”.

## 2.1 Voluntary workers

[Section 44](#) of the 1998 Act deals with voluntary workers. It excludes from the scope of the NMW any worker “employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body” if he receives:

- no monetary payments of any description, or no monetary payments except in respect of expenses
- actually incurred in the performance of his duties; or
- reasonably estimated as likely to be or to have been so incurred; and
- no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.

The Department of Trade and Industry (now the Department for Business, Innovation and Skills) published a [consultation document](#) on the *Draft National Minimum Wage Regulations* in September 1998.

[Annex 4](#) of the document discusses voluntary workers:

### **Volunteers and voluntary workers**

Most volunteers will automatically be excluded from the Act because they are not covered by the definition of “worker”, due to the absence of any intention to enter into legal relations and the resulting absence of any contract.

However, some volunteers who receive expenses, benefits in kind, and/or subsistence payments might in certain circumstances be regarded as workers under a contract making them “workers”. Section 44 of the Act provides an exit for such “voluntary workers” so that if they receive a very limited range of expenses, benefits in kind, and/or subsistence payments they will be excluded from the NMW, provided that certain conditions are met. Workers who are working on a voluntary basis for a charity, a voluntary organisation, an associated fund-raising body (e.g. a charity shop) or a statutory body (e.g. a school or hospital) do not qualify for the NMW if they do not receive:

- any payment other than a payment in respect of expenses actually incurred in their voluntary work, or expenses reasonably estimated as likely to be incurred or to have been incurred; and
- any benefits in kind other than the provision of reasonable subsistence or accommodation (this would cover, for example, food and accommodation provided for those voluntary workers helping at youth hostels); and
- a monetary payment of subsistence, except where the voluntary worker has been placed with the host employer by a charity, and the host is itself a charity, voluntary organisation, associated fund-raising body or statutory

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body. (This would cover e.g. voluntary workers placed by a central volunteering organisation with schools, hospitals and voluntary organisations, often away from home.)

A similar indication of the restricted application of the volunteer exemption comes from the *Hansard* debates on the NMW. Ian McCartney, the Minister then responsible for NMW legislation, explained the purpose of the provision during the debate at Report stage:

The main point is that the Bill will apply only to workers, and that none of its clauses will apply to volunteers. Our judgment is that the vast majority who do volunteering work of one sort or another will not be affected in any way by the Bill, because they are not workers. That is what we want to achieve.

We are conscious, however, that there is a grey area. The definition of "worker" in clause 52 is quite wide, although no wider than the definition used for the purposes of provisions on unauthorised deductions in the Employment Rights Act 1996, which originated in the Wages Act 1986. Because of that, some genuine volunteers--although, we think, only a small proportion--might work under arrangements that would amount to a worker's contract. It is precisely those people--the Bill calls them "voluntary workers"--who are included accidentally, and whom we want to exclude through the "exit" of clause 42.

Let me briefly explain the main effects of new clause 1, and how it differs from the original clause 42. The overall effect is to broaden slightly the definition of "voluntary worker" to reflect the reality of volunteering. Subsection (1) broadens the range of bodies for which a voluntary worker may work while still falling within the exemption from the national minimum wage. It will now include not only charities and voluntary organisations, as before, but any "associated fund-raising body"--that is, a body separate from a charity or voluntary organisation but whose profits go to that organisation, such as a body running a charity's shops--and any "statutory body". Therefore, volunteers who work for charity shops, schools and hospitals, as well as for charities and voluntary organisations, and who happen to be workers, will be exempted from the national minimum wage.

Broadly speaking, the range of bodies covers volunteering in the whole statutory sector, but it does not cover volunteering in non-charitable commercial enterprises. To include that would undermine the Bill, and would go against the principle that volunteering should be for social good rather than being a form of cheap labour for commercial profit.<sup>2</sup>

Considerable care needs to be taken when reimbursing voluntary workers for their expenses, or when estimating their future expenses. If the estimate is not a reasonable one, e.g. if a person is paid a monthly amount which is likely to exceed his expenses, the section 44 exception will not apply and the person will be classed as a worker. The Gov.uk website provides some basic [guidance](#) on pay and expenses for volunteers.<sup>3</sup>

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<sup>2</sup> [HC Deb 9 March 1998 cc 23-24](#)

<sup>3</sup> Volunteer placements, rights and expenses, Pay and expenses, Gov.uk

### 3. Internships

Interns that are genuine volunteers, under no obligation to perform work or provide services, will not fall within the definition of “worker” under the 1998 Act and will not be eligible for the NMW. However, if an organisation treats an intern as though he were a worker a contractual relationship may arise. To avoid this, a sponsor must ensure that the intern is not subject to any obligation to perform work or provide services and that regular payments are not made to the intern. A court would look at the circumstances of the case to discover the “true” relationship between the parties, irrespective of whether it is described as an internship.

For example, in *Vetta v London Dreams Motion Pictures Ltd* ET/2703377/08, the Reading Employment Tribunal held that Nicola Vetta, who was engaged by the defendant as an art department assistant on an expenses-only basis, was entitled to the NMW, as mutual obligations existed between Ms Vetta and the defendant. Similarly, *Hudson v TPG Web Publishing Ltd & Ors* (ET/2200565/11) concerned a claim by an intern that she was entitled to the NMW.<sup>4</sup> Ms Hudson’s “internship” involved working from 10am – 6pm and supervising a team. The employer had at one point considered paying her, but decided against this. Based on this conduct, the tribunal concluded that a contract existed and that Ms Hudson was a worker, and therefore entitled to be paid at least the NMW.

In response to a Parliamentary Question, the previous Coalition Government outlined its approach to promoting understanding of interns’ rights:

**Lord Storey:** To ask Her Majesty’s Government what plans they have to encourage and support the remuneration of internships.

**Lord Wallace of Saltaire:** The term “intern” is not defined in any legislation: entitlement to the minimum wage depends on whether or not an individual is a worker. If an internship meets the legal definition of a worker, then they must be paid at least the minimum wage from the start. Given the dependency on employment status, it is vital that employers and workers understand how this is determined.

Last November, the Minister for Employment Relations launched a series of posters and an information video alongside 200 letters to employers to increase awareness of employers and interns rights and responsibilities in relation to the National Minimum Wage. This was followed by a Facebook campaign. The Facebook messages reached 160,000 young people and HMRC are currently evaluating the impact of the letters sent to employers.

In addition, complaints from interns about non-payment of the minimum wage are prioritised by HMRC for investigation and HMRC will investigate every complaint made to the Pay and Work Rights Helpline. Any worker who believes that they are being paid below the minimum wage should call the helpline on 0800 917 2368.

<sup>4</sup> See: [Unpaid website intern celebrates court victory](#), the *Guardian* [online], 23 May 2011



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Determining an individual's employment status can be complicated; this is why the Business Secretary announced a review of employment status in October this year, to help ensure an employment status framework in the UK that meets the needs of everyone. This is an internal review and will present findings to ministers early next year.<sup>5</sup>

Guidance on internships and the NMW is available [here](#) (Acas) and [here](#) (the Department for Business, Innovation and Skills).<sup>6</sup> Best practice guidance is available on the GOV.UK website, [here](#).<sup>7</sup> Sources of legal advice are discussed at the end of this note.

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<sup>5</sup> [Work Experience: Written question - HL3766, 15 December 2014](#)

<sup>6</sup> [Volunteers, work experience and internships](#), Acas website; [Employment rights and pay for interns](#), Gov.uk

<sup>7</sup> [Providing quality internships: guidance for employers and interns](#), Gov.uk

## 4. The Low Pay Commission

In its 2013 [annual report](#) on the National Minimum Wage, the Low Pay Commission outlined at some length the difficulties in applying NMW law to volunteers and similar individuals:

In recent years the Commission has received a substantial volume of evidence suggesting a growth in the terms 'internship', 'work experience' or 'volunteer' to denote unpaid activities that look like work and to which the NMW should apply. We have previously recommended that the Government raise awareness of the NMW rules through improved guidance and called for better enforcement of the regulations.

We again received evidence on this matter. Many stakeholders representing interns' interests told us that the widespread breach of NMW rules has continued. The TUC said that work experience and internships remained the fastest growing source of abuse under the minimum wage. Mark Watson, a freelancer in the television industry, said that detailed evidence he had assembled over the past year suggested very little had changed with regards to the scale of unpaid internships.

The entertainment and media industry has again featured strongly in the evidence we received. We were told that the performing arts continued to see a proliferation of unpaid work. As well as advertisements for unpaid work we heard about unpaid stage performance work and a growth of charities promoting unpaid work and then 'selling' their unpaid workers on to third parties to help them with productions. Equity said that organisations, such as film schools, had used their charitable status in order to justify non-payment of the NMW in contexts that the union did not regard as compatible with the intentions of either the Charities or NMW Acts. The Broadcasting Entertainment Cinematograph and Theatre Union (BECTU) said the main area of illegally unpaid work was the large, informal micro-budget film production sector which operated outside the commercial mainstream. The National Union of Journalists (NUJ) told us student members were forced to work for nothing in order to gain a foothold in its industry and that many employers were flouting the law. Enforcement was proving difficult. Creative and Cultural Skills, YMCA England and GMB were among a number of stakeholders who again voiced concerns about the impact of non-payment of the NMW on social mobility.

Intern Aware (IA) believed that there were several shortcomings in current enforcement arrangements: advertisements were unchecked; specific intelligence from third parties was not followed up; HMRC's risk-based assessment process was flawed; vulnerable workers were given inadequate support and guidance; and enforcement of the NMW was not communicated. In oral evidence to us IA reported that it had achieved success in some cases when it took legal action or provided legal support against companies not paying wages to their interns. It had received some funding from the Joseph Rowntree Reform Trust to support this activity, and pro bono legal assistance in providing letters to companies confronting them with their alleged unlawful behaviour and asking for payment. It said the companies had often settled out of court without admitting liability, sometimes below the level of NMW pay arrears due, so full payment was not achieved.

Among employer organisations the Unquoted Companies Group said that it wanted interns to remain outside the NMW system. It regarded interns as students investing in themselves and was concerned that opportunities would be affected if payment of the NMW to interns was pursued. While the Recruitment and Employment Confederation (REC) believed that there was value to be gained from brief, well-managed internships, it thought there was a danger that some employers will look to longer-term, unpaid internships as a substitute for entry-level paid employment. Inspiring Interns' (an interns recruitment agency) main concern was that the NMW should be applied appropriately, and did not cover opportunities which were clearly learning experiences designed to help a student/graduate gain relevant skills.

HMRC told us of the enforcement actions it had undertaken in this field. It had carried out a targeted enforcement campaign in the fashion industry. 'Health checks' were conducted on a number of employers in the sector identified as 'at risk' of not paying the NMW, with a visit to follow up within six to nine months to ensure full compliance. It said that, in tandem with this campaign it had also worked with interns' awareness-raising groups to promote the Pay and Work Rights Helpline (PWRH) and to ensure that its NMW guidance was fit for purpose. The PWRH was asked to fast-track callers who appeared to be interns, volunteers or working for no pay/expenses only. As at 31 August 2012, 61 employers had been investigated following fast-tracked complaints to the Helpline and other cases generated through the risk-assessed process. Investigations continue and we were told that (excluding cases selected for the health check) to date arrears totalling £137,000 had been identified for 138 workers. Although it had carried out a targeted enforcement campaign in the fashion sector HMRC had not yet rolled out the targeted campaign to the TV/film sector, as envisaged in evidence to us last year. However, HMRC had actively engaged with trade unions and other interested third parties in the creative sector to raise awareness of non-compliance with the NMW arising from unpaid work during the course of an internship.

Despite this activity many stakeholders suggested that the overall problem had not reduced and further action was needed. Some acknowledged the revised NMW guidance on interns the Government had produced in response to our 2011 recommendation. However, this revised guidance had been cut back on the GOV.UK site in the autumn of 2012, which stakeholders said was making it harder to ensure internships were NMW compliant. The TUC said the targeted enforcement in fashion was well executed, but it was not enough – other sectors now needed to be targeted. The National Union of Students called for strong enforcement action to avoid further exploitation of young people.

A number of groups, including the TUC and NUJ, suggested that advertising for unpaid interns should be illegal. Others said advertisements not offering the NMW should be required to cite the NMW exemption they were relying upon. The Stage Management Association urged HMRC to put more resources into investigating advertisements offering training or internships for low or no pay and to identify employment where a small increase in hours or unregulated hours would lead to a breach of the NMW. Equity was among those unions asking for the law to be amended to allow cases to be taken to Employment Tribunals by

trade unions, so that individuals did not need to come forward, at risk to their careers. It also thought that the practice of film schools using their charitable status to advertise jobs under the guise of voluntary work should be challenged urgently. The Union of Shop, Distributive and Allied Workers (Usdaw) voiced concern that mandatory government work experience schemes, where employers had free labour for six weeks, could undermine the NMW. It suggested that anyone undertaking mandatory work experience should be entitled to the NMW.

Several stakeholders sought better advice from the PWRH and there were again calls in the entertainment industry for sector specific advice, in line with a previous Commission recommendation. The Arts Council England said more could be done to raise awareness of the NMW guidance and, in common with others, that the lack of a legal definition of an internship should be rectified. It thought the NMW was not enforced strictly enough and it would support the compulsory declaration or registration of all internship schemes with HMRC as a measure to prevent unpaid internships.

Despite the targeted enforcement of unlawful internships which breach the NMW we continue to receive evidence of widespread non-payment of the minimum wage for positions that appear to be work. The longer this continues the greater is the risk that extracting work from unpaid interns becomes a 'new normal'. The cutting back of the improved official NMW guidance with the move to the GOV.UK site increases the likelihood of non-compliance.

The suggestion that HMRC target for attention advertisers who appear to offer non-compliant employment seems to us sensible. However, we are not yet persuaded that action such as banning advertisements that appear to breach the NMW rules would be effective. There is force to the concern that it would add to regulation of legitimate employers while less scrupulous ones would still be able to adopt forms of words which avoid presenting an obvious target to enforcement authorities, for example by referring to NMW exemptions (which can only really be tested when employment has begun). We would like to see the Government put in place effective, clear and accessible guidance on all aspects of the issue (as it agreed to do in 2012) and combine that with vigorous and targeted enforcement action. We hope this will reduce the problem of unpaid work. If it should fail to do so then we would expect the Government to consider other measures to secure NMW compliance, not excluding changes to the law.<sup>8</sup>

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<sup>8</sup> Low Pay Commission, *National Minimum Wage*, April 2013, pp131-133

## 5. Further guidance and legal advice in employment matters

The Department for Business, Innovation and Skills has produced a 'worker checklist', outlining the key features of "worker" status, intended for individuals who wish to know whether or not they fall within the definition of worker. The document is available [here](#).<sup>9</sup>

Acas operates a helpline which offers free advice on employment law to both employers and employees; see [here](#).<sup>10</sup>

Further sources of legal advice are detailed in the Library's standard note on [legal advice and help in employment matters](#).<sup>11</sup>

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<sup>9</sup> BIS, *National Minimum Wage: Worker Checklist*, 2011

<sup>10</sup> Acas Helpline, Acas website

<sup>11</sup> [Legal advice and help in employment matters](#), Commons Briefing Paper, SN02830, 24 May 2013

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