



# Employment Guide: Statutory Minimum Wage

Note: This Employment Guide is intended to provide general guidance only. It does not constitute legal advice and should not be relied upon as doing so.

## Minimum Wage Rates applicable from 1 January 2022

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### Overview

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The Minimum Wage (Guernsey) Law, 2009 came into force on 1 October 2010. From this date all qualifying workers have had a statutory right to be paid not less than the rate approved by the States. After consultation, the States of Guernsey has ratified an increase to the Minimum Wage (MW) rates. The new rates, applicable in Guernsey<sup>1</sup> from **1 January 2022** are:

- An Adult MW rate of **£9.05** per hour (for workers of 18 years of age and older).
- A Young Persons' MW rate of **£8.60** per hour (for workers of 16 and 17 years old).
- If a worker is provided with accommodation and food the offset is **£122** per week.
- If a worker is provided with accommodation only the offset is **£87** per week.

The MW is a minimum amount per hour that most workers in Guernsey are entitled to be paid. An employer is breaking the law if they are not paying at least the MW to their workers. It does not matter how workers are paid, what their contracts or written record of the terms of their employment<sup>2</sup> say or what agreements have been made with employers.

The calculations to check if the MW is being paid are based on the gross basic pay received by a worker and the number of hours worked. There are few benefits in kind that can be treated as remuneration in these calculations (essentially accommodation or accommodation and food).

To check if workers are being paid at least the MW rate, employers and workers need to know the pay reference period that applies and what elements of pay count towards the MW.

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<sup>1</sup> The Minimum Wage Law applies in Guernsey, Herm, and Jethou only; it does not apply to Sark or Alderney.

<sup>2</sup> Note: From 1<sup>st</sup> Oct 2010 all employees must have a contract or a written record of the terms of their employment. Previously only those working 15 hours a week or more needed this. The threshold has now been removed.

If a worker believes they are being underpaid (that is below the MW) they can see their employer's minimum wage records, or ask the "Enforcement Officer" to investigate for them. Employers and workers can contact the Employment Relations Service for free, confidential advice.

## What are the MW Rates & to whom do they apply?

The rates as of 1 January 2022 are:

- Adult MW rate is £9.05 per hour (18 years of age & older).
- Young Persons' MW rate is £8.60 per hour (16 and 17 years old).

The MW will apply to all workers with the exception of share fisherman, prisoners, and voluntary workers. Most workers are legally entitled to be paid at least the MW and all employers have to pay it to workers. It makes no difference if the worker:

- Is paid weekly or monthly, by cheque, in cash or by any other means
- Works full time, part time or any other working pattern
- Is still in education
- Works at the employer's own premises or elsewhere

**Apprentices<sup>3</sup> under 18 are not protected by the Law.** Employees aged 18 and over qualify for the Adult Rate. Therefore, the Adult Rate applies to all Apprentices over the age of 18.

The rules do not differ for different size businesses or if the worker is working for a private individual. The MW does not apply to anyone who is genuinely self-employed.

Please note that the term 'worker' is a wider description than 'employee' and covers such arrangements as casual work. If a person is self-employed and invoices a client, the MW does not apply; but if the self-employed person employs workers in that business, those workers (who are not self-employed) are entitled to receive the Minimum Wage.

Note: The MW applies to foreign workers, trainees, workers on probation, home-workers, commission workers and agency workers (whoever pays the worker, which in these cases may be the agency rather than whoever they are sent to work for, is regarded as the employer).

Workers are entitled to the MW even if, for whatever reason, they sign a contract or make an agreement to be paid at a lower rate. The contract will have no legal effect and workers must still be paid at least the MW.

The MW may not apply to people engaged in "therapeutic" work or activity; however this is not to say that all work organised by or on behalf of a charity is exempt. In general it is anticipated that this sort of work will be done as part of a specific scheme run under the

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<sup>3</sup> To be classed as an apprentice, the worker must have entered into, or work under, a contract of apprenticeship.

overall control of a States Committee; although charitable operations may qualify for the exemption in exceptional cases.

Guernsey has not made specific regulations relating to “piece” or “output” workers (workers are paid by the number of items produced or tasks performed) although the same overall intention shall apply, which is that the pay received for an hour’s work should, on average, be no less than the MW in the pay reference period.

If you believe that your situation may fall into these categories (therapeutic activity, piece or output work) and the payment of the MW may present problems, you should contact the Employment Relations Service for further information and advice.

## Minimum Wage Calculations

To check if workers are being paid at least the MW rate, employers and workers need to know the pay reference period that applies and what elements of pay count towards the MW calculation. They will also need to establish the eligible hours for the purpose of calculation.

## Pay Reference Periods

This is usually the period of time that someone is actually paid for. For example, a worker paid weekly has a pay reference period of one week. Similarly someone paid once a month has a pay reference period of one month.

The Law requires that a worker is paid, on average, at least the MW during each pay reference period.

Under the MW rules, the pay reference period cannot be longer than a month. A worker paid at longer intervals (e.g. once a quarter) must still get the MW on average each month during that quarter.

The pay that is allocated to a pay reference period is:

- Pay received during that period; and
- Pay earned in that period but which is not received until the next period (pay received in the next period BUT earned during the current period is used to calculate whether the worker is being paid the MW).

## What Pay Counts towards the Minimum Wage Calculation?

MW pay is calculated on gross pay (before tax and insurance have been deducted). Gross pay includes basic pay for the work done plus other types of pay which count towards the MW. E.g. sales commission, performance-related pay or other payments based on how well a job is done.

Some payments do not count towards MW pay. These should be deducted from the total pay before doing the MW calculation.

Payments which do not count include:

- loans
- advances of wages
- pension payments
- retirement lump sums
- redundancy payments
- rewards under staff suggestion schemes
- premium payments element (that is anything paid on top of basic pay) for working at special times, e.g. overtime or on bank holidays
- allowances on top of basic pay, such as for working unsocial hours in dangerous conditions, 'on call', or performing special duties
- tips, gratuities, service charges and cover charges

Some deductions from pay, or payments made to an employer, are ignored in the MW calculations. These are:

- penalties for misconduct (as long as these penalties are in the employment contract)
- repayment of an advance of wages
- repayment of an accidental overpayment of wages
- the costs of any shares or securities bought in a firm by a worker
- money the worker has agreed to have deducted from pay (e.g. a pension contribution or trade union subscription), as long as the deduction is not required as part of your work and is not for your employer's own use and benefit
- payments made by a worker and employer to buy goods or services from them, for example, money on meals in the staff canteen

Some deductions from pay, or payments made to an employer, are taken into account in the MW calculations. These are:

- refunds of any money spent in connection with work, for example the cost of purchasing tools or uniform
- refunds of any expenses incurred doing the job, for example travel costs
- deductions to cover the cost of items your employer supplied to you that are needed for your job, for example, tools or uniform
- deductions for the employer's own use and benefit for goods and services, for example transport provided to workers to and from work, regardless of whether there is an option of using the goods or services

Benefits in kind are anything an employer provides for the benefit of a worker apart from pay. There is nothing to stop employers offering benefits in kind. However, an equivalent value in money for a benefit in kind can only be counted towards pay in the MW calculations, in two cases. These are the provision of accommodation & food or accommodation only.

If a worker is provided with accommodation only, the maximum deduction (or “offset”) is £84 per week.

If a worker is provided with accommodation & food, the maximum deduction/offset is £117 per week.

Workers have a legal right to “opt out” of the food provision. It is recommended that a worker confirms in writing to their employer if they wish to opt out of food provision. MW calculations will then be based on the accommodation “offset” only.

Examples of benefits in kind which do not count towards MW pay are:

- transport to work
- fuel
- a car
- your employer’s contribution to a pension fund
- help with removals
- medical insurance
- lunch vouchers

## **Establishing the Hours Worked for the MW Calculation (Time Work vs. Salary)**

Unlike the UK, Guernsey has not made express provision within the Law regarding what is and is not to be counted as “work” for which the minimum wage must be paid.

It is, therefore, important that employers address very carefully, within the written statement (or contract), what will constitute working hours and what will not. This is particularly important where there is provision for the worker to sleep whilst at or near the place of work or where “on call” arrangements may be required.

### **All comments below are for guidance only**

Workers paid according to the number of hours they are at work, so that pay goes up or down depending on the actual hours they work, are likely to be doing time work.

“Time workers” can normally expect to be entitled to be paid the MW for hours spent:

- at work and required to be working or on standby near the workplace (but not on rest breaks)
- when kept at the workplace but unable to work because of machine breakdown
- travelling on business during normal working hours
- training or travelling to training during normal working hours
- awake and working during “sleeping time” (sleeping time means any time when they are allowed to sleep if the employer arranges for them to sleep at or near the place of work and provides suitable facilities for doing so)

However, the contract may contain provisions to not pay “time workers” the minimum wage for hours spent:

- travelling between home and work
- away from work on rest breaks, holidays, sick leave or maternity leave
- away from work because of industrial action
- asleep, or awake but not working, during “sleeping time”

Workers paid for a set basic number of hours a year, who receive an annual salary paid in equal weekly or monthly instalments would normally be described as salaried workers. A contract does not have to state hours as an annual figure (e.g. 2,000 hours a year), but it must be possible to work out from the contract what the basic annual hours are.

“Salaried workers” can normally expect to be entitled to be paid the MW for hours spent:

- at work and required to be working
- on standby, or on call, at or near the place of work
- when kept at the workplace but unable to work because of machine breakdown
- travelling on business during normal working hours
- training or travelling to training during normal working hours
- away from work on rest breaks, lunch breaks, holidays, sick leave or maternity leave, where these form part of the minimum hours under the contract
- awake and working during “sleeping time” (see “time work” above)

The contract may contain provision for “salaried workers” not to be paid the MW for hours when:

- paid less than the normal pay rate, for instance if receiving half-pay while on sick leave
- on any unpaid leave which the employer allows them to take
- away from work because of industrial action
- asleep, or awake but not working, during “sleeping time” where the contract clearly sets out the period when the worker is permitted to sleep
- It is strongly recommended written statements (contracts) fully address intended working hours or a worker may be deemed to be on duty for 24 hours and, if not specifically provided with sleeping time or rest breaks between set hours, may have to be paid the MW for the full 24 hours.

## Calculating whether the Minimum Wage has been paid

The total pay received in the pay reference period should be calculated taking account of the information described above.

This will start with the gross pay before tax and insurance deductions. To this are added the basic value of pay for additional hours worked and any bonus or performance related elements of pay. Bonuses paid over a longer period than the pay reference period are averaged out. For example, a quarterly bonus is divided by three to arrive at the amount applicable to the monthly pay reference period.

The number of hours worked should be established. In the case of salaried staff the average hours per pay reference period have to be calculated. In many cases this is uniform but for example school staff will only work in term time but salary is paid in equal monthly amounts.

If your particular situation appears more complicated than this, advice and assistance are available from the Employment Relations Service (contact details at the end of this document).

The amount of eligible pay is then divided by the number of eligible hours to arrive at an hourly rate. If this is £8.70 per hour or more (£8.25 per hour for those aged 16 and under 18) it follows that the worker's pay is above the statutory MW.

## **Rights and Responsibilities under the Minimum Wage Law**

Employers should be aware that:

- they are required to pay no less than the MW to workers who qualify under the Law
- records, sufficient to prove they are paying the MW, must be kept for 3 years
- records must be made available to workers, on written request, within 14 days
- access to records may also be required by an Enforcement Officer, Civil Court or Employment & Discrimination Tribunal
- if there is a failure to provide records to a worker, the worker may make a complaint to the Employment & Discrimination Tribunal which can impose a penalty of 80 x MW rate (80 x £8.70 = £696)
- employers who wish to check whether they have paid the MW to workers may contact the Employment Relations Service who will assist and give advice
- an Enforcement Officer may investigate claims of non-compliance with the MW Law and may issue enforcement notices in situations where they believe the MW has not been paid
- the burden of proof rests with the employer to prove the MW has been paid in any Court or Tribunal proceedings
- where an employer has failed to pay the MW he will be required to pay arrears to the worker by the Court or Tribunal
- an employer may be subject to criminal prosecution for refusing to pay the MW, obstructing an enforcement officer, or failing to keep or keeping false or misleading records. Penalties are fines of up to £10,000, 3 months in prison, or both.

Workers should be aware that:

- workers who qualify under the Law should be paid no less than the MW rate
- workers who believe they are not being paid the MW have the right to access the records, held by the employer, relating to their rate of pay, on written request
- access to these records should be provided within 14 days
- if there is a failure to provide records to a worker, the worker may complain to the Employment & Discrimination Tribunal (contact details at the end of this guide) which can impose a penalty of 80 x MW rate
- workers who wish to check whether they have been paid the MW may contact an Enforcement Officer, based within the Committee *for* Employment, Housing and Social Security within the Employment Relations Team who will assist and give advice
- workers who wish to complain that they have not been paid the MW may contact an Enforcement Officer, the Employment & Discrimination Tribunal or the Civil Court

## Employment Protection and the Minimum Wage

It is against the law to dismiss a worker, or treat a worker less favourably (“cause them to suffer a detriment”), for reasons connected with exercising their rights under the MW law. If an employer treats a worker less favourably when they “opt out” of food this may be considered a detriment.

If a worker is dismissed for such a reason they may make a complaint of unfair dismissal to the Employment & Discrimination Tribunal. If a complaint of unfair dismissal is upheld it will be deemed an “automatically unfair” reason, resulting in an award of 6 months’ pay. The Award for suffering a detriment is 1 month’s pay.

There is no requirement for a qualifying period of employment for such complaints. Complaints need to be submitted to a Tribunal within **3 months** of the dismissal or act of detriment.

## Getting Help about Pay below the Minimum Wage

### The Enforcement Officer

A worker may contact the Enforcement Officer at the Employment Relations Service.

An Enforcement Officer, who believes an employer is not complying with the Law, has powers to:

- enter any (relevant) premises
  - a) business premises
  - b) used in connection with a business



c) agent of business (e.g. accountant, book keeper)

- require the production of records
- request explanation/additional information

If an Enforcement Officer is of the opinion that the employer is paying less than the MW, an enforcement notice may be issued. This will require the employer to pay the worker at a rate equal to the MW from the date of the notice and to pay a sum due to the worker for the previous failure to pay at the appropriate rate.

If an employer fails to comply with an Enforcement Notice, the Enforcement Officer may take a claim to the Employment & Discrimination Tribunal on behalf of the worker and the employer may face criminal prosecution.

## The Employment & Discrimination Tribunal

A worker who believes they are being paid less than the MW may take a claim **directly** to the Employment & Discrimination Tribunal. The worker will need to complete a form ET1 – “Application to the Employment & Discrimination Tribunal”. There is no charge for making a claim to the Tribunal.

Further information on the process for making a claim can be found in the Guidance Notes, “Making a Claim to the Employment & Discrimination Tribunal”. Forms and Booklets can be downloaded from the website (please see contact information later in this document) or obtained from the Employment Relations Service.

If the Tribunal finds that the worker has been paid below the MW, it shall award the difference between the amount received by the worker and the amount which should have been paid for the period of underpayment.

## The Civil Court (Petty Debts)

**Alternatively**, a worker who believes they are being paid less than the MW may take a claim directly to the Civil Court. For amounts of less than £10,000 this will be the Petty Debts Court. Fees and charges will apply to claims taken through the Civil Court.

Further information on making a claim in this way, including information on current fees and charges may be obtained from the Office of HM Sheriff, telephone number 01481 711281.

Where the Court finds the worker has been paid below the MW it shall award the difference between the amount received by the worker and the amount which should have been paid for the period of underpayment.

Where a complaint of failure to be paid at least the MW is made to the Employment & Discrimination Tribunal or the Civil Court, the Law allows the matter to be referred to the Employment Relations Service who will endeavour to assist the parties to reach a

“conciliated settlement”, thus avoiding the need for a Tribunal or Court Hearing. (See guidance notes on conciliation.)

## Other Publications

Publications can be downloaded from the website on a wide range of employment relations matters including local employment legislation and best practice guidance on other employment related matters.

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### For further advice

- Check [www.gov.gg/employmentrelations](http://www.gov.gg/employmentrelations)
- Email [employmentrelations@gov.gg](mailto:employmentrelations@gov.gg)
- Contact the **Employment Relations Service**, Edward T Wheadon House, Le Truchot, St Peter Port, GY1 3WH
- Telephone number: **01481 220026**