

## NATIONAL MINIMUM WAGE AND FURLOUGH

### Is there a risk to businesses?

The past eighteen months have been very challenging for businesses as a result of the pandemic with many adopting emergency measures to ensure survival. There is no doubt that the Coronavirus Job Retention Scheme (furlough) has been incredibly useful in enabling businesses to keep their staff at a time when they would otherwise be made redundant, but some businesses have taken additional steps to ensure survival.

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#### How do emergency measures and National Minimum Wage (NMW) interact?

The reality is that there were no concessions to the NMW legislation to provide employers with added flexibility to enable those earning at or slightly above the NMW to retain their jobs during the pandemic. It is clear that “working time” should be paid at or above NMW throughout. Helpfully, furlough does not class as “working time” unless the employee was undertaking training while furloughed. Training time is however regarded as working time for NMW purposes and employers need to ensure that they satisfy the normal NMW rules for training periods, regardless of whether the employee was undertaking structured apprenticeship courses, or simply undergoing employer instigated training to continue their development.

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#### What other measures could affect NMW compliance?

Reducing pay rates for working hours, while commercially essential, can be a serious problem for the lower paid. In some circumstances this will result in a shortfall in wages and a NMW default. Where businesses have reduced pay to say 80% of normal rates across the board, this is likely to be a problem for those paid at or close to NMW. Some businesses have done this and then paid a supplement to those actually working so there is a differentiator between those working and those that are not. This may remove the problem, but whether this counts as “pay” for NMW purposes will depend entirely on the nature of the payment, the reason for the payment and the communication around this. For example, if the payment is described as an allowance to ensure the employee is not out of pocket due to travel costs, etc, this will not be regarded as “pay” for NMW and the salary excluding this will be the amount considered to determine whether a NMW default has occurred.

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#### Surely HM Revenue & Customs (HMRC) will take a light touch given the pandemic?

Sadly not, we are aware of HMRC auditing pay in these circumstances and applying the usual approach. You should therefore expect an aggressive approach from HMRC if there is any NMW default and the normal consequences.

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#### What are the consequences in the event of a NMW default?

Where there has been a NMW default, there are a number of automatic consequences, as follows:

- ▶ The shortfall in pay will need to be paid to the employee at the current NMW applicable to the employee, even if the problem occurred at a time when the rate was lower.
- ▶ HMRC will charge a penalty of probably 100% of the shortfall.
- ▶ In almost all cases, the employer will be publicly named as a NMW defaulter, even if the error was completely accidental and unintentional.

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#### What should you do?

If there is a risk of default because pay rates could have been reduced below the NMW rate, for either working or training time, we strongly recommend that you review the position, identify any shortfalls in payments and pay these to the affected employees before HMRC indicate that they are to undertake a review.

**Menzies have considerable experience in this area and can review your National Minimum Wage position and advise on any action required**

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