

Real Estate Agency Industry
Statutory Minimum Wage : Industry-specific Reference Guidelines

- Wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate.
- To address the characteristics and particular mode of operation of the real estate agency industry, the Labour Department has drawn up this *Statutory Minimum Wage : Industry-specific Reference Guidelines* in consultation with employer and employee groups in the industry. Some common examples under different situations and employment terms in the industry are included in the *Guidelines*. Employers and employees in the industry may refer to and apply the *Guidelines* flexibly according to their actual circumstances and needs.
- For more details on the provisions of the Minimum Wage Ordinance, please refer to the *Statutory Minimum Wage : Reference Guidelines for Employers and Employees* published by the Labour Department. The *Guidelines* explain the general application of the Ordinance under different scenarios for the reference of employers and employees in different industries. The interpretation of the Minimum Wage Ordinance (Cap. 608) should be based on its original text.

Revised April 2023

Table of Contents

<u>Subject</u>	<u>Question Number</u>
(a) Basic principles in computing minimum wage	1, 2, 24
(b) Wage payment mode and arrangement	3, 4, 5
(c) No contracting out to reduce employees' statutory entitlement to SMW	6
(d) Hours worked and basic computation principles	7, 8
(e) Meal break	9
(f) Time spent on property visits and signing purchase agreement	10, 11
(g) Waiting time	12
(h) Arrangement of substituted rest days and duty roster	13
(i) Wage items and wages payable	14, 15
(j) Rest day pay arrangement	16
(k) "Additional remuneration"	17, 21
(l) Wage period	18
(m) Reckoning and payment arrangement of commission	19, 20
(n) Keeping record of total number of hours worked	22, 23
(o) Variation of terms of employment contract	25, 26

Note: Examples of computing minimum wage are available at [Annex to Real Estate Agency Industry - Statutory Minimum Wage : Industry-specific Reference Guidelines.](#)

Q 1 : How is minimum wage computed?

A 1 : Wages payable to an employee by an employer in respect of any wage period shall not be less than the amount of minimum wage calculated as follows¹:

$$\text{Minimum wage} = \frac{\text{Total number of hours worked by the employee in the wage period}}{\text{Total number of hours worked by the employee in the wage period}} \times \text{SMW rate}$$

Q 2 : Do employers need to pay wages for each and every hour worked by employees? Must wages for each hour meet the SMW rate?

A 2 : According to the Minimum Wage Ordinance, minimum wage for an employee for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate. The employee should be paid wages of not less than this amount in respect of the wage period.

Hence, the basic principle is that wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate. The Ordinance does not prescribe that payment must be accorded for each and every hour worked or wages for each hour must meet the SMW rate.

Q 3 : SMW rate is expressed as an hourly rate, do employers and employees need to change their employment and wage payment mode from monthly/daily-rated plus commission to hourly-rated?

A 3 : The implementation of SMW does not change the employment and wage payment mode (i.e. employed and remunerated at monthly-rated, weekly-rated, daily-rated, hourly-rated, piece-rated, commission-based, etc.) formulated between employers and employees in accordance with their

¹ If the effective date of a revised SMW rate falls within a wage period, the revised SMW rate applies to any hour worked on or after its effective date in calculating minimum wage for that wage period.

employment contracts and the Employment Ordinance (Cap. 57).

The Minimum Wage Ordinance provides a wage floor for employees. In essence, wages payable to an employee in respect of any wage period, when **averaged** over the total number of hours worked in the wage period, should be no less than the SMW rate. As long as the amount of wages payable is not less than the minimum wage, it does not matter which employment and wage payment mode is adopted. Therefore, it is not necessary for employers and employees to change their employment and wage payment mode.

Q 4 : Can employees' basic salary be less than the minimum wage (if the total wages including commission do not fall below the minimum wage)?

A 4 : The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified in the Employment Ordinance, "wages" means all remuneration, earnings, allowances (including travelling allowances, attendance allowances, commission, overtime pay), tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions².

Hence, regardless of the composition of the wage items (e.g. respective amount of basic salary and commission), it will be acceptable if the minimum wage level is met in accordance

² According to the Employment Ordinance, the following items are not wages:

- the value of any accommodation, education, food, fuel, water, light or medical care provided by the employer;
- employer's contribution to any retirement scheme;
- commission, attendance allowance or attendance bonus which is of a gratuitous nature or is payable only at the discretion of the employer;
- non-recurrent travelling allowance or the value of any travelling concession or travelling allowance for actual expenses incurred by the employment;
- any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
- end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer; and
- gratuity payable on completion or termination of a contract of employment.

with the Minimum Wage Ordinance.

Q 5 : Does it mean that employers only need to pay minimum wage to employees to comply with the law?

A 5 : SMW only provides a wage floor for employees. This does not mean that employers only need to pay employees minimum wage. Employers still have to comply with the Employment Ordinance and terms in employment contracts (e.g. salary, arrangement of meal break and rest day) in dealing with employees' statutory and contractual entitlements.

Q 6 : Can an employer and an employee agree between themselves that the employee is to be paid less than the minimum wage?

A 6 : Any provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Minimum Wage Ordinance shall be void. In other words, an employer and an employee cannot by agreement reduce the employee's entitlement to SMW.

Q 7 : What should be counted as hours worked for computing minimum wage?

A 7 : According to the Minimum Wage Ordinance, for the purpose of computing minimum wage, hours worked (including any part of an hour) include any time when the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer:

- in attendance at a place of employment, irrespective of whether he is provided with work or training at that time; or
- travelling in connection with his employment, excluding travelling (in either direction) between his place of residence and his place of employment (other than a place of employment that is outside Hong Kong and is not his usual place of employment).

A place of employment means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in

attendance for the purpose of doing work or receiving training.

Apart from the Minimum Wage Ordinance, if the time in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, such time should be included in computing minimum wage.

Q 8 : Is it required that any part of an hour be rounded up to one whole hour in counting hours worked for computing minimum wage?

A 8 : The Minimum Wage Ordinance does not require that any part of an hour be rounded up to one whole hour in counting hours worked for computing minimum wage. The Ordinance only provides that any part of an hour should be included in the hours worked for SMW computation. Therefore, if the hour worked is less than one whole hour, the minimum wage should be computed based on the **actual** period of time worked.

Q 9 : An estate agent is on duty from 10:00 a.m. to 8:00 p.m.. During this period, he is provided with 2 hours of meal breaks. Are the meal breaks counted as hours worked for computing minimum wage?

A 9 : When this employee during his meal break also falls under the circumstances of hours worked as specified in the Minimum Wage Ordinance, such meal break **is** hours worked for computing minimum wage. For example, if he is, during his meal break, in accordance with the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work (irrespective of whether he is provided with work or not), such meal break is included in the hours worked for computing minimum wage.

On the contrary, meal breaks falling outside the provisions on hours worked in the Minimum Wage Ordinance is **not** counted as hours worked for computing minimum wage. For example, if he, during his meal breaks, needs not remain in attendance at his post and is free to go out for lunch or to have rest, such time is not counted as hours worked for computing minimum wage as he is not, in accordance with

the employment contract or with the agreement or at the direction of the employer, in attendance at his post for the purpose of doing work.

If meal breaks are counted as hours worked by the employee according to his employment contract or agreement with the employer, such time **must** be taken into account in computing minimum wage. For example, if an employer and his employee regard meal break as hours worked by the employee in accordance with their employment contract or agreement, such time should be included in the total number of hours worked in each wage period for computing minimum wage.

Q 10 : Is the time spent by an estate agent on accompanying customers in making property visits counted as hours worked for computing minimum wage?

A 10 : When the estate agent is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, accompanying customers in making property visits or in attendance at a property sales office or another place for the purpose of doing work, such place is a place of employment as defined in the Minimum Wage Ordinance and such time is hours worked for the purpose of computing minimum wage. Besides, such travelling time in connection with employment (e.g. time spent on travelling among different property units) is also hours worked for computing minimum wage.

Q 11 : Is the time spent by an estate agent on accompanying customers to sign purchase agreements counted as hours worked for computing minimum wage?

A 11 : When the estate agent is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, and for the purpose of doing work, accompanying customers to sign purchase agreements, such time is hours worked for computing minimum wage.

Q 12 : On a customer's request, an estate agent, after duty hours, returns to the office to wait for the former to sign a purchase agreement. If the customer eventually fails to turn up, is the

waiting time spent counted as hours worked for computing minimum wage?

A 12 : When the estate agent, in accordance with the contract of employment, or with the agreement or at the direction of the employer, and for the purpose of doing work, returns to the office to wait for the customer to sign a purchase agreement (irrespective of whether he is provided with work or not and whether the customer turns up or not), such time is hours worked for the purpose of computing minimum wage. However, the travelling time between the estate agent's place of residence and place of employment is not hours worked under the Minimum Wage Ordinance for computing minimum wage.

Q 13 : If a monthly-rated employee takes extra or fewer rest days in a wage period because of substituted rest days or duty roster arrangement, how should the employer count the total number of hours worked for computing minimum wage?

A 13 : Minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate.

Therefore, the total number of hours worked by an employee in a wage period is based on the **actual** hours worked. If the number of rest days is less than normal in a wage period, his total number of hours worked, and correspondingly his minimum wage, in the wage period will increase. If the wages payable in respect of the wage period are less than the minimum wage owing to the increase in the total number of hours worked, the employer has to pay the difference (i.e. "additional remuneration") to the employee in respect of that wage period.

Q 14 : In determining whether wages meet the minimum wage requirement, which items are included? What are wages payable to an employee?

A 14 : The definition of wages for SMW is aligned closely with that under the Employment Ordinance. Unless otherwise specified in the Employment Ordinance, "wages" means all

remuneration, earnings, allowances (including travelling allowances, attendance allowances, commission, overtime pay), tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done, subject to certain exclusions². For example, contractual bonus (not of a gratuitous nature or payable at the discretion of the employer) payable to an employee when certain conditions are met (e.g. sales amount) is part of wages. For detailed definition of wages under the Employment Ordinance, please refer to *A Concise Guide to the Employment Ordinance* published by the Labour Department. The Guide can be downloaded from the Labour Department's homepage (www.labour.gov.hk) or obtained from the offices of the Labour Relations Division of the Labour Department.

According to the Minimum Wage Ordinance, since the calculation of minimum wage excludes the time that is not hours worked, payment made to the employee for any time that is not hours worked (e.g. rest day pay, holiday pay, annual leave pay, maternity leave pay, paternity leave pay, sickness allowance, etc.) must **not** be counted as part of the wages payable to the employee in the calculation of minimum wage. The Minimum Wage Ordinance also sets out whether certain sums should be counted as wages payable to an employee in respect of a wage period in specific situations in order to determine whether the wages meet the minimum wage requirement.

If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. "additional remuneration"). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. This additional remuneration also applies in calculating entitlements under other relevant legislation.

Q 15 : In determining whether wages meet the minimum wage requirement, is end of year payment included?

A 15 : The definition of wages for SMW is aligned closely with that under the Employment Ordinance. According to the

Employment Ordinance, the definition of wages does **not include** end of year payment (i.e. any annual payment (including double pay, 13th month payment, end of year bonus, etc.) of a contractual nature, and the contract of employment can be made orally or in writing and can include express or implied terms) and annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer. Hence, in determining whether wages meet the minimum wage requirement, end of year payment, or annual bonus which is of a gratuitous nature or is payable only at the discretion of the employer, is similarly **not included**.

Q 16 : Are employees' rest days paid? Is it required that rest days be remunerated at the SMW rate?

A 16 : Neither the Minimum Wage Ordinance nor the Employment Ordinance prescribes that rest days should be paid. Whether rest days are with pay or otherwise and the calculation method of rest day pay (including whether rest days are remunerated at the SMW rate) are employment terms in accordance with the employment contract or agreement between employers and employees. Where necessary, employers and employees should seek consensus on the concerned employment terms on lawful, sensible and reasonable grounds through labour-management communication and consultation.

According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. The Labour Department stands ready to assist employers and employees to resolve their problems and reach consensus. If employees suspect that their employment rights have been undermined, they could seek help from the Labour Department. The Labour Department will actively follow up such cases.

Note: Employees are entitled to paid statutory holidays and paid annual leave if they meet the relevant requirements of the Employment Ordinance. For details, please refer to *A Concise Guide to the Employment Ordinance* published by the Labour Department.

Q 17 : Can employers deduct the amount of additional remuneration paid from employees' wages of subsequent wage periods?

A 17 : If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. “additional remuneration”). The contract of employment of the employee must be taken to provide that the employee is entitled to additional remuneration in respect of that wage period. The additional remuneration also applies in calculating entitlements under other relevant legislation. Therefore, employers cannot deduct the amount of additional remuneration paid from employees’ wages of subsequent wage periods.

Q 18 : Can wages be averaged over a year or a quarter, instead of a wage period, to determine whether an employee’s wages are no less than the SMW rate?

A 18 : According to the Minimum Wage Ordinance, an employee is entitled to be paid wages in respect of **any wage period** of not less than the minimum wage. Therefore, in determining whether his wages are not less than the SMW rate, it must be calculated on the basis of individual wage periods, and is not averaged over a year or a quarter. The definition of “wage period” in the Minimum Wage Ordinance is aligned with that under the Employment Ordinance. Specifically, a wage period is one month unless the contrary is proved.

Q 19 : How is commission counted under the SMW regime?

A 19 : According to the Employment Ordinance, the definition of wages includes commission (except commission which is of a gratuitous nature or which is payable only at the discretion of the employer). Hence, other than commission which is gratuitous or payable only at the discretion of the employer, commission is wages and must be paid in accordance with the provisions of the Employment Ordinance. Subject to the provisions of other legislation, employers and employees may agree on how commission is calculated and payable in their employment contracts.

Commission payable according to the contract of employment

In determining whether the wages of an employee meet the minimum wage requirement, commission payable under the

contract of employment is counted as wages payable in respect of the wage period as specified in the employment contract. If commission is payable in respect of a number of wage periods according to the contract of employment, in determining whether the wages of an employee meet the minimum wage requirement, commission is counted as wages payable in respect of the corresponding wage period as provided in the contract of employment.

Commission paid according to the Minimum Wage Ordinance

In addition, given the unique nature of commission, the Minimum Wage Ordinance sets out the following provision for employers and employees to apply in the counting of commission as wages payable:

For the purpose of computing minimum wage, any commission paid

- with the prior agreement of the employee
- at any time after the first 7 days of a wage period but before the end of the 7th day immediately after that wage period

must be counted as part of the wages payable in respect of that wage period irrespective of when the work is done or the commission is otherwise payable under the contract of employment.

Hence, in determining whether the wages of an employee meet the minimum wage requirement, if there is prior agreement of the employee, commission can be counted as part of the wages payable in respect of a wage period according to the timing when the commission is paid. Without the prior agreement of the employee, the above provision is not applicable. In applying the provision, employers have to comply with the provisions on wage payment and deductions under the Employment Ordinance. Please refer to *A Concise Guide to the Employment Ordinance* published by the Labour Department for details.

Q 20 : Can commission be paid in advance? Any example to illustrate how commission is counted under the SMW regime as wages payable in respect of a wage period according to the

timing when it is paid?

- A 20 : As explained in Q 19, according to the Minimum Wage Ordinance, in determining whether the wages of an employee meet the minimum wage requirement, an employer can, with the prior agreement of the employee, pay the employee commission in advance so that it will be counted as wages payable in respect of the wage period when it is paid.

Example:

An employee's wage period is a calendar month. With the prior agreement of the employee, the employer pays him commission of \$1,500 and \$2,000 on 30 April and 6 June respectively. The commission is originally payable in respect of the wage period of July.

In this example, in accordance with the Minimum Wage Ordinance, with the prior agreement of the employee, commission paid in the period of 8 April to 7 May is counted as wages payable in respect of April (in this example, commission is paid on 30 April); and commission paid in the period of 8 May to 7 June is counted as wages payable in respect of May (in this example, commission is paid on 6 June).

Thus, in determining whether the wages of this employee meet the minimum wage requirement, the commission of \$1,500 is counted as wages payable in respect of April and the commission of \$2,000 is counted as wages payable in respect of May, both not being regarded as wages payable in respect of July.

- Q 21 : An estate agent's commission is calculated according to the value of the deals he closes. If his total wages fall below the minimum wage in a wage period during which he closes no deal and earns no commission, does the employer need to pay him additional remuneration?

- A 21 : An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage. The minimum wage for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the SMW rate. If the wages payable to the employee in respect

of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. “additional remuneration”).

Therefore, if the wages payable to an employee in respect of a wage period are less than the minimum wage because he does not earn any commission, his employer has to pay him additional remuneration in accordance with the Minimum Wage Ordinance to meet the minimum wage requirement.

Q 22 : Owing to the characteristics of the industry, employers may not be able to know the exact time spent by employees on work every day. Can employers request employees to submit reports to account for the hours worked? Must time cards be used to record hours worked?

A 22 : Neither the Employment Ordinance nor the Minimum Wage Ordinance specifies the ways of employers recording hours worked by employees. Employers and employees can draw up reasonable and practicable ways to record hours worked with regard to their trade characteristics, administrative measures and monitoring needs in individual establishments, nature of work of the employees, etc.

Employers and employees should keep proper records in relation to attendance, hours worked, wages, etc. to safeguard their respective rights and benefits and help avoid unnecessary disputes.

Q 23 : Is there any specified format for the record of the total number of hours worked? Does the Labour Department provide any sample form of the record to employers?

A 23 : Neither the Employment Ordinance nor the Minimum Wage Ordinance specifies the format for recording the total number of hours worked. Officers of the Labour Department may inspect the wage and employment records and require the total number of hours worked and the following particulars in the wage and employment records (which are set out in the Employment Ordinance) to be produced in a single document:

- name and identity card number of the employee
- wage period
- wages paid in respect of each wage period

- periods of annual leave, sick leave, maternity leave, paternity leave and holidays entitled and taken, together with details of payments made in respect of such periods

The Labour Department has published the booklet *Proper Keeping of Wage and Employment Records* for public reference. For details, please visit the Labour Department's homepage (www.labour.gov.hk).

Q 24 : Can one assume that the minimum wage requirement would certainly be met if employees are paid at wage level equivalent to the monthly monetary cap on keeping record of the total number of hours worked?

A 24 : Wages payable to an employee by an employer in respect of any wage period shall not be less than the amount of minimum wage calculated as follows:

Total number of hours worked in the wage period × SMW rate

The monthly monetary cap is only the amount of wages payable for exempting employers from the requirement to keep record of the total number of hours worked by employees, irrespective of whether an employee's wages have met the minimum wage requirement. Minimum wage of an employee is determined by his total number of hours worked in a wage period. An employer must pay his employee wages of not less than the minimum wage, regardless of whether or not he is required to record the employee's total number of hours worked.

Q 25 : Can employers unilaterally reduce benefits to which employees are currently entitled under employment contracts?

A 25 : According to the Employment Ordinance, employers should not unilaterally vary the employment terms and conditions of employees. For details, please refer to *A Concise Guide to the Employment Ordinance* published by the Labour Department. The Labour Department will actively follow up cases of employees suspecting their employment rights have been undermined.

In contemplating any change to the employment terms, employers should carefully assess the impact both on themselves and on the employees.

Q 26 : Can employers unilaterally change the status of employees to self-employed persons?

A 26 : An employer should not unilaterally change the status of his employee to a self-employed person. Otherwise, the employee may claim against the employer for remedies under the Employment Ordinance and common law.

If an employee intends to change his status to a self-employed person, he must carefully assess the pros and cons involved, including the employment rights and benefits that he may lose in such a change.

If in essence there exists an employer-employee relationship between the parties, even though the employee is called or described as a self-employed person in the contract, the employer is still required to fulfil his responsibilities under the relevant legislation by paying back statutory benefits retroactively to the employee who is falsely labelled as a self-employed person. The employer may also be liable to criminal sanctions for contravention of the relevant legislation.

For information about the differences between an “employee” and a “self-employed person”, please refer to the booklet *Clarify Your Employment Status* published by the Labour Department.

Enquiries

24-hour Enquiry Hotline: 2717 1771 (handled by “1823”)

Enquiry in person to Offices of the Labour
Relations Division:

www.labour.gov.hk/eng/tele/lr1.htm



Labour Department's Homepage:

www.labour.gov.hk

