

Offence

Failure to pay minimum wage amounts to a breach of wage provisions under the Employment Ordinance. According to the Employment Ordinance, an employer who wilfully and without reasonable excuse fails to pay wages to an employee when it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and to imprisonment for three years. Where a wage offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, such person shall be guilty of the like offence and, upon conviction, is liable to the same penalty.

No contracting out

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.

Employer to keep records of the total number of hours worked by employee

The wage and employment records kept by an employer under the Employment Ordinance should include the total number of hours (including any part of an hour) worked by the employee in a wage period if :

- ❖ SMW applies to the employee; and
- ❖ wages payable in respect of that wage period are less than \$15,300 per month¹².

Therefore, when wages payable in respect of a wage period are less than the monetary cap of \$15,300 per month¹², the employer is required to keep records of the total number of hours worked by the employee in that wage period. The employer must pay the employee not less than the minimum wage, irrespective of whether records on the total number of hours worked need to be kept or not.

The definition of wages for the monthly monetary cap (i.e. \$15,300¹²) in exempting employers from the requirement to keep records of the total number of hours worked by employees is the same as that in the Minimum Wage Ordinance. 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.) should not be counted as part of the wages payable in respect of a wage period. Therefore, in determining whether the wages payable to an employee are not less than the monthly monetary cap, these payments, where applicable, should not be included.

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.

Notes:

1. With effect from 1 May 2019, the SMW rate is raised from \$34.5 to \$37.5 per hour. If 1 May 2019 falls within a wage period, the SMW rate of \$37.5 per hour applies to any hour worked on or after 1 May 2019 in calculating minimum wage for that wage period.
2. Please refer to ***A Concise Guide to the Employment Ordinance***.
3. Please refer to the Minimum Wage Ordinance for the definitions.
4. As the employee under Scenario (1) (meal breaks and rest days without pay) in this example is not entitled to payment for time that is not hours worked, no deduction from his remuneration is required in computing his wages payable.
5. Whether meal breaks are with pay or otherwise and the calculation method of meal break pay are employment terms as agreed between employers and employees. Nevertheless, if an employee's meal breaks also fall under the circumstances of hours worked under the Minimum Wage Ordinance (please refer to the section on **"Hours worked"** above), such time should be included in computing minimum wage.
6. According to the Minimum Wage Ordinance, payment made to an employee for any time that is not hours worked must not be counted as part of the wages payable.
7. Whether meal breaks are with pay or otherwise and the calculation method of meal break pay are employment terms as agreed between employers and employees. In this example, it is assumed that there are 30 days in the month (including 4 rest days and 26 working days). For Scenario (2) (meal breaks with pay; and rest days without pay), the meal break pay in respect of that month will be \$888.9 (i.e. \$8,000 ÷ 26 days ÷ 9 hours x 26 meal breaks). The amount of meal break pay may vary if the number of working days in the relevant month or its calculation method as agreed between employers and employees is different from this example. For illustration purpose, figures are rounded to the nearest integers in this example.
8. Whether rest days are with pay or otherwise and the calculation method of rest day pay are employment terms as agreed between employers and employees.
9. Whether rest days are with pay or otherwise and the calculation method of rest day pay are employment terms as agreed between employers and employees. In this example, it is assumed that there are 30 days in the month (including 4 rest days). The rest day pay in respect of that month will be \$1,066.7 (i.e. \$8,000 ÷ 30 days x 4 rest days). The amount of rest day pay may vary if the number of calendar days or the number of rest days in the relevant month or its calculation method as agreed between employers and employees is different from this example.
10. The amount of rest day pay may vary if the number of calendar days or the number of rest days in the relevant month or its calculation method as agreed between employers and employees is different from this example. For instance, if the agreed calculation method for rest day pay is \$37.5 per hour x 8 hours, the 4 rest days' pay in that month will be \$1,200 (i.e. \$37.5 per hour x 8 hours x 4 rest days). If that month has 31 days (including 4 rest days and 27 working days), the amount of minimum wage based on the total number of hours worked for the month will be \$8,100 (i.e. 27 days x 8 hours x \$37.5). Thus, the employee should be paid \$9,300 in total (i.e. \$8,100 + \$1,200).
11. Whether meal breaks are with pay or otherwise and the calculation method of meal break pay are employment terms as agreed between employers and employees. In this example, it is assumed that there are 30 days in the month (including 4 rest days and 26 working days). For Scenario (4) (both meal breaks and rest days with pay), the meal break pay in respect of that month will be \$770.4 (i.e. \$8,000 ÷ 30 days ÷ 9 hours x 26 meal breaks). The amount of meal break pay may vary if the number of calendar days or the number of working days in the relevant month or its calculation method as agreed between employers and employees is different from this example. For illustration purpose, figures are rounded to the nearest integers in this example.
12. With effect from 1 May 2019, the monetary cap is increased from \$14,100 to \$15,300 per month.

Enquiries

24-hour Enquiry Hotline: **2717 1771** (handled by "1823")

Enquiry in person to Offices of the Labour Relations Division of the Labour Department

Hong Kong

Hong Kong East	12/F, 14 Taikoo Wan Road, Taikoo Shing, Hong Kong.
Hong Kong West	3/F, Western Magistracy Building, 2A Pok Fu Lam Road, Hong Kong.

Kowloon

Kowloon East	UGF, Trade and Industry Tower, 3 Concorde Road, Kowloon.
Kowloon West	Room 1009, 10/F, Cheung Sha Wan Government Offices, 303 Cheung Sha Wan Road, Sham Shui Po, Kowloon.
Kowloon South	2/F, Mongkok Government Offices, 30 Luen Wan Street, Mong Kok, Kowloon.
Kwun Tong	Units 801-806, 8/F, Tower 1, Millennium City 1, 388 Kwun Tong Road, Kwun Tong, Kowloon.

New Territories

Tsuen Wan	5/F, Tsuen Wan Government Offices, 38 Sai Lau Kok Road, Tsuen Wan, New Territories.
Kwai Chung	6/F, Kwai Hing Government Offices, 166 - 174 Hing Fong Road, Kwai Chung, New Territories.
Tuen Mun	Unit 2, East Wing, 22/F, Tuen Mun Central Square, 22 Hoi Wing Road, Tuen Mun, New Territories.
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Labour Department's Homepage:
www.labour.gov.hk

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Concise Guide to Statutory Minimum Wage

\$37.5

per hour

Effective from 1 May 2019



The Statutory Minimum Wage (SMW) rate is \$37.5 per hour with effect from 1 May 2019¹. 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.

This leaflet aims to explain in simple terms some major SMW requirements. The interpretation of the Minimum Wage Ordinance (Cap. 608) should be based on its original text. The full text of the Ordinance has been uploaded to the Hong Kong e-Legislation of the Department of Justice website at www.elegislation.gov.hk.

Coverage of the Ordinance

SMW applies to all employees, whether they are monthly-rated, daily-rated, hourly-rated, permanent, casual, full-time, part-time or other employees, and regardless of whether or not they are employed under a continuous contract² as defined in the Employment Ordinance, with the following exceptions :

- ❖ persons to whom the Employment Ordinance does not apply²
- ❖ live-in domestic workers³, irrespective of their sex, race or nationality
- ❖ specified student interns³ as well as work experience students during a period of exempt student employment³

SMW also applies to employees with disabilities. Special arrangement is provided under the Minimum Wage Ordinance so that they have the right to choose to undergo productivity assessment and receive wages based on the assessment result. For details, please refer to the *Concise Guide to Productivity Assessment for Employees with Disabilities under the Statutory Minimum Wage Regime*.

Amount of minimum wage

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 :

$$\text{Minimum wage} = \text{Total number of hours worked by the employee in the wage period} \times \text{SMW rate (i.e. \$37.5 per hour with effect from 1 May 2019)}$$

Hours worked

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.

Example 1: An employee works up to 6pm in accordance with his contract of employment. One day, he works overtime from 6pm to 7pm at the direction of the employer. This one-hour overtime is also hour worked for computing minimum wage.

Example 2: An employee works in Hong Kong. The time spent in travelling between his place of residence and his company is not hours worked for computing minimum wage. One day, at the direction of the employer, the employee travels from his company to a client's office to deliver documents and then returns to his company. The time spent in travelling between his company and the client's office is also hours worked for computing minimum wage.

Wages payable to employee in respect of wage period

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 exclusions.²

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 (i.e. “wages payable”) in respect of a wage period for computing minimum wage. The Minimum Wage Ordinance also sets out whether certain sums should be counted as wages payable in specific situations in order to determine whether the wages meet the minimum wage.

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 he is entitled to additional remuneration in respect of that wage period. The additional remuneration also applies in calculating entitlements under other relevant legislation.

Neither the Minimum Wage Ordinance nor the Employment Ordinance prescribes that meal breaks and rest days should be paid. Whether meal breaks and rest days are with pay or otherwise are employment terms as agreed between employers and employees. Whether meal breaks are hours worked and/or with pay, whether rest days are with pay, wage period, wage calculation, reckoning and payment arrangement of commission, etc. are relevant in the computation of minimum wage. Where necessary, employers and employees should seek consensus on the 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.

Example 3: SMW rate of \$37.5 per hour with effect from 1 May 2019

Assuming

- ❖ according to the contract of employment :
 - ❖ remuneration at \$8,000 per month with rest days on Sundays
 - ❖ Monday to Saturday – 8 hours' work per day plus 1-hour meal break daily
- ❖ in a month (wage period) of 30 days (including 4 Sundays), the total number of hours worked is 208 hours (26 days x 8 hours)

Scenario (1) meal breaks and rest days without pay

Calculation

- Minimum wage according to the total number of hours worked for this month: **\$7,800** (208 hours X \$37.5)
 - Wages payable in respect of this month⁴: \$8,000
- ❖ In this example, since (ii) is not less than (i), the minimum wage requirement is met and the employer is not required to pay any additional remuneration.

Scenario (2) meal breaks with pay⁵; and rest days without pay

Calculation

- Minimum wage according to the total number of hours worked for this month: **\$7,800** (208 hours x \$37.5)
 - Wages payable in respect of this month⁶: \$7,111.1 (\$8,000 – \$888.9 meal break pay⁷)
- ❖ In this example, since (ii) is less than (i), apart from paying the employee monthly wage of **\$8,000**, the employer also has to pay additional remuneration of **\$688.9** (\$7,800 – \$7,111.1) to meet the minimum wage requirement. Thus, the employee should be paid **\$8,688.9** (\$8,000 + \$688.9) in total.

Scenario (3) meal breaks without pay; and rest days with pay⁸

Calculation

- Minimum wage according to the total number of hours worked for this month: **\$7,800** (208 hours x \$37.5)
 - Wages payable in respect of this month⁶: \$6,933.3 (\$8,000 – \$1,066.7 rest day pay⁹)
- ❖ In this example, since (ii) is less than (i), apart from paying the employee monthly wage of **\$8,000**, the employer also has to pay additional remuneration of **\$866.7** (\$7,800 – \$6,933.3) to meet the minimum wage requirement. Thus, the employee should be paid **\$8,866.7** (\$8,000 + \$866.7) in total.¹⁰

Scenario (4) both meal breaks⁵ and rest days⁸ with pay

Calculation

- Minimum wage according to the total number of hours worked for this month: **\$7,800** (208 hours x \$37.5)
 - Wages payable in respect of this month⁶: \$6,162.9 (\$8,000 – \$1,066.7 rest day pay⁹ – \$770.4 meal break pay¹¹)
- ❖ In this example, since (ii) is less than (i), apart from paying the employee monthly wage of **\$8,000**, the employer also has to pay additional remuneration of **\$1,637.1** (\$7,800 – \$6,162.9) to meet the minimum wage requirement. Thus, the employee should be paid **\$9,637.1** (\$8,000 + \$1,637.1) in total.