

OVERVIEW OF REGULATIONS ON EXEMPTION FROM NATIONAL MINIMUM WAGE (NMW)

INTRODUCTION AND PURPOSE

The National Minimum Wage Act of 2018 (NMWA) introduced a national minimum wage (NMW). Schedule One to the NMWA was revised and as of 1 March 2021 the national minimum wage is R21.69 per hour for each ordinary hour worked. This amount also applies to farm workers which category includes persons employed as domestic workers employed in a home on a farm or forestry environment and a security guard on a farm or other agricultural premises, excluding a security guard employed in the private security industry in terms of the Private Security Industry Regulation Act 56 of 2001.

The NMW rate for other domestic workers (including a gardener, a person employed by a household to drive a vehicle; a person employed to care for children, the aged, the frail, the sick or the disabled; and domestic workers employed or supplied by employment services) is R19.09 per hour, and for persons employed on Expanded Public Works Programmes, it is R11.93 per hour.

The Act makes provision for an employer to apply for exemption from paying the full NMW. Regulations on exemption were issued on 19 December 2018. They set out the form and manner in which exemptions must be made – the information to be submitted, obligations on employers to consult, the tests for affordability. The Regulations also set out the period for exemptions and processes for withdrawal thereof.

WHAT IS AN EXEMPTION?

The Regulations do not provide for total exemption, but provide for a maximum of 10% reduction from, e.g. R21.69 an hour to R19.52 an hour for qualifying employers. A NMW of R19.52 leads to a monthly wage of R3357.44 instead of R3730.68, based on a 40-hour week.

The normal NMW for domestic workers of R19.09 can be lowered to a minimum of R17.18 if a household is exempted. An exemption may be granted only from the date of application for exemption, for a maximum of 12 months.

WHO MAY APPLY?

An employer or its registered employers' organisation may apply for exemption. However, mass applications by employers' organisations on behalf of all their members are not allowed and applications must be made for each member one at a time.

HOW TO APPLY

An employer, or employers' organisation representative, must apply online through the National Minimum Wage Exemption system. The system is publicly accessible online at <https://nmw.labour.gov> or at any Department of Employment and Labour office.

The system will prompt detailed employer particulars including SARS number, bargaining council details and binding collective agreements. The following information is required by the system:

- Statements of Income and Expenditure
- Businesses:
 - Statement of financial performance (Income Statement: current year predictions and two previous years)
 - Statement of financial position (balance sheet)
 - Details of depreciation, entertainment, write offs, dividends etc.
- Private Households:
 - Statement of financial performance (Income and expenditure, including education, food, beverages, entertainment, travel)
- Employees' working hours and wage information
- Proof of consultation with every representative trade union or, if no such union, the affected workers.

Exemption will only be considered if the employer has confirmed compliance with statutory payments including Unemployment Insurance Fund, Compensation Fund and Bargaining Council Agreements.

The employer must then download the application and provide a copy to the Bargaining Council, any registered trade union and affected workers.

TESTS TO QUALIFY FOR EXEMPTION

Exemption may only be granted if the delegated authority (the Director-General of the Department of Employment and Labour or delegated official) is satisfied that:

- the employer cannot afford to pay the minimum wage; and
- the employer has consulted every representative trade union in the workplace and, if there is no trade union, the affected workers.

The Regulations create a series of tests companies can use to qualify for exemption from the NMW, based on profitability, liquidity and solvency. When deciding whether to grant an exemption, the first step is to determine how much more the NMW will cost the employer. The next step is to determine whether the employer can afford the increase.

As a starting point, exemption will be granted if the employer is operating at a loss.

Even companies making a profit can be exempted if their return on assets – according to a prescribed formula – falls under 6% and they also pass a series of tests of their financial strength or *Solvency*. *Solvency* tests look at the company's assets. If there was a decrease in assets, exemption will be granted. If there was an increase in assets, a debt-to-asset ratio is determined. If the ratio is more than 50% (meaning more than 50% of assets are owned by creditors) exemption will be granted. If the ratio is less than 50%, exemption will be refused.

Companies with returns on assets higher than 6% can still get exempted if they can prove that the new higher wage would cause losses. For this, *Liquidity* tests are conducted. Total liquid assets such as debtors, inventory and other current assets are compared against the bank overdraft. If assets can cover the overdraft, exemption will be refused.

There are separate tests for households and non-profit organisations (NPOs). For households, income and expenditure is analysed to determine whether the employer can afford the required increase in wages. If not, exemption will be granted. An NPO may be exempted if it cannot afford to pay the full amount due to a deficit from income versus expenditure analysis or if due to an insufficient surplus from income versus expenditure analysis.

WHAT IF EXEMPTION IS GRANTED?

An exempted employer must display the exemption certificate at the workplace and provide a copy to the Bargaining Council, representative union and any workers who request a copy.

WITHDRAWAL OF EXEMPTION

- Any affected person may apply online for withdrawal of the exemption. An exemption may be withdrawn if there are grounds such as-
- false or incorrect information led to granting the application
 - the employer is not complying with the exemption notice
 - the employer's finances have improved so that it can afford the NMW.

RELEVANT LEGISLATION

- Basic Conditions of Employment Amendment Act 7 of 2018
- National Minimum Wage Act 9 of 2018.
- Regulations to the National Minimum Wage Act, 2018.