

The Minimum Wage Act 1983: A Summary - Tech Edition

Today, the Minimum Wage Act 1983 (the Act) and Minimum Wage Order 2019 ensure that employees are paid an average of at least \$17.70 per hour worked.¹ Kiwisaver must be paid on top of this amount.²

“Hours worked” includes:

- hours spent on billable and non-billable work;
- time spent waiting for work;
- lunch breaks if the employee works through lunch; and
- two paid ten-minute rest breaks (assuming that the employee is working a seven to ten-hour day).

Most salaried positions in tech are not in danger of breaching the Act where employees work 40 hours per week. However, many employers do not check that employees are always paid more than the minimum wage when working longer hours.

Two Tech workers on \$50k, but below minimum wage, an example:

Alex is employed by SaaS (Software as a Service) company Unekor for \$50,000 per year. Alex’s fortnightly pay averages out to \$1923.08 per fortnight, so when Alex works a 40 hour week it works out to \$24.04 per hour. This is well above \$17.70, the current minimum wage, so Unekor is complying with minimum wage law.

In order for Unekor’s new product to hit the release date, Alex works extra “crunch” hours with the hope of getting a promotion at the end of the quarter. In the final two weeks before release, Alex works 55 hours each week. If Alex is not paid any extra, they will be working for \$17.48 per hour. This is lower than minimum wage, and Unekor needs to pay Alex an additional \$17.48 for that fortnight to comply with the law. Alex shrugs it off because they enjoyed the work and everyone else was also doing long hours to hit the deadline. This is not an excuse for Unekor not to pay Alex the extra \$17.48.

Alex’s colleague Maia is a support engineer (also earning \$50,000 per year). Maia is on-call and in the weeks following release is called in out of hours to help customers with the new product, Maia works for 70 hours the first week week and 65 hours the next (135 hours that fortnight). If Maia is not paid any extra, Maia will be working for \$14.24 per hour. That is less than the minimum wage from five years ago! Unekor needs to pay Maia an additional \$466.42 to comply with minimum wage law.

¹ Minimum Wage Act 1983, s 4; and Minimum Wage Order 2019, cl 4.

² Terranova Homes and Care Ltd v Faitala [2013] NZCA 435 at [34]–[35].

Unekor has a time in lieu policy and Maia is offered 2 days in lieu at the end of the fortnight to re-establish contact with family and friends and get some sleep. This does not satisfy the Act's requirements. Unekor still needs to pay Maia an additional \$466.42 as well as the day in lieu (since that day is part of its policy).

The Details

For the purposes of the Act, the amount employees are paid per hour is calculated on (at most) a fortnightly basis.³ This means that each fortnight, the amount employees are paid (before tax/deductions) must be equal to or greater than the minimum wage for each hour worked. It cannot be averaged over a longer period, even if employees are paid monthly or budgets are based on hours billed per month.

An employer who does not comply with the Act is liable for a penalty of up to \$20,000 for each breach of the Act.⁴

Helpful calculations:

There are three steps to calculate whether you are working for less than the minimum wage:

- Step 1: Fortnightly pay is annual salary divided by 26.
- Step 2: Actual hourly rate is fortnightly pay divided by the number of hours worked in any given fortnight.
- Step 3: If actual hourly rate is less than \$17.70 per hour, the employee is being paid less than the minimum wage.

What can you do?

Inform your employer. Employers may not realise that their employees are working for under the minimum wage and will correct this as soon as they know. It will help if you have carefully recorded your time. You can speak with a people manager or a member of the HR team.

Join ATU and ask ATU to inform your employer. It can be easier to let someone else do the explaining. Please note that if you ask ATU to get in touch with your employer on your behalf, you will not be able to remain anonymous. If you have been paid under the minimum wage and want to stay anonymous, we can speak to the labour inspectorate and ask them to investigate your employer.

File a Statement of Problem in the Employment Relations Authority (ERA) to seek a penalty for non-compliance and for arrears of wages at the minimum wage (or ask ATU to do so on your behalf). We

³ *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522; *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576 at [210]; and Minimum Wage Order, cl 6(d).

⁴ Employment Relations Act 2000, s 135(2)(b).



only recommend this option after you have tried at least two of the options above with no success. Filing in the ERA is expensive and will escalate the matter significantly.

We're working on a survey methodology that will help us improve pay transparency in the tech industry. It's important to us that we make this a secure and anonymous forum for our members. If you would like to help us build and run our NZ Tech Pay Survey, please contact us at kiaora@atu.org.nz