Department for
Business, Energy
& Industrial Strategy

National Living Wage and National Minimum Wage

Government evidence on enforcement and compliance 2020/2021

May 2022

Any enquiries regarding this publication should be sent to us at:
enquiries@beis.gov.uk

Introduction

This report outlines the Government's enforcement of the National Minimum Wage during the 2020/21 financial year. It presents key statistics and describes important trends shown in the accompanying excel tables, referencing the data throughout. It follows last year's report, published in February 2021[1], covering activity during the 2019/20 financial year.

The period covered by this report coincided with the Covid-19 pandemic, which had a very significant impact on some employers' business activities, as well as on worker complaints and HMRC investigations. Despite this, HMRC continued to enforce minimum wage regulations, adopting a flexible approach in response to restrictions and in line with Government guidance.

The Low Pay Commission regularly make recommendations to the Government on NMW enforcement. In their 2021 report, the LPC reviewed progress in some of the key areas of work they had focused on in recent years and expanded on some of the original recommendations. Included in this report is our response to the reviewed recommendations.

Key Results

Box 1: Summary of 2020/21 enforcement results

2020/21 saw strong enforcement results in a year impacted by the Covid-19 pandemic

HMRC closed **over 2,700 cases** with nearly **1,000 closed with arrears.**

£16.8 million in arrears were identified, for **over 155,000 workers.**

HMRC issued almost **580 penalties**, **totalling £14.1 million.**

Targeted enforcement concentrated on sectors least impacted by Covid-19, however every complaint received was considered regardless of sector. This allowed HMRC to continue their work, taking a **flexible approach** and ensuring all workers who were entitled to the NMW **received the correct pay**, whilst adapting to the challenges businesses were facing.

[1] Department for Business, Energy, and Industrial Strategy (2021a)

Box 2: Summary of 2020/21 educational activity

HMRC follow a **"Promote, Prevent and Respond"** approach, using a variety of techniques to promote awareness…

Over 67,000 mass emails opened

Over 6,500 views of live Minimum Wage content (including webinars)

Over 13,000 views of pre-recorded Minimum Wage content

Over 408,000 SMS sent

In addition to this, HMRC also sent over 198,000 letters to employers and workers. In total, **771,000 employers and workers** sought out further information in our comprehensive and refreshed guidance.

Report outline

The remainder of this report is structured as follows:

Background

The minimum wage rates

The National Minimum Wage (NMW) was introduced in 1999, with the National Living Wage (NLW) introduced in 2016. The NMW and NLW (together referred to as the minimum wage) provide essential protection for the lowest paid workers, ensuring they are fairly paid for their contribution to the UK economy.

The minimum wage sets a minimum hourly rate of pay that all employers are legally required to pay to their workers. Almost all UK workers are entitled to be paid at least the relevant minimum wage rate. The rate they are entitled to is dependent on their age and whether they are an apprentice[2]. Table 1 below shows the minimum wage rates that were applicable across the 2020/21 financial year.

Table 1. Minimum wage rates (per hour) as of April 2020 and April 2021

Age Band	From 1st April 2020	Age Band[3]	From 1st April 2021
25 years old and over	£8.72	23 years old and over	£8.91
21 to 24	£8.20	21 to 22 years old	£8.36
18 to 20	£6.45	18 to 20 years old	£6.56
16 to 17	£4.55	Under 18	£4.62
Apprentice	£4.15	Apprentice	£4.30

Source: HM Government (2021b)

Enforcement of the minimum wage

Government is clear that anyone entitled to the minimum wage should receive it and is committed to taking robust enforcement action against employers who fail to pay their staff correctly. This ensures that workers receive the pay to which they are legally entitled.

Her Majesty's Revenue and Customs (HMRC) enforce the minimum wage on behalf of the Government. HMRC proactively use a variety of methods to encourage compliance and enforce the legislation, based around a "Promote, Prevent and Respond" strategy.

"Promote" is based on the idea that some instances of failure to comply with minimum wage legislation are due to insufficient information or understanding, rather than deliberate non-

[2] See HM Government (2021a) for details of the workers entitled to the Minimum Wage, and exceptions to this.
[3] The upper age band was extended to include workers aged 23 years and over with effect from 1st April 2021.

compliance by an employer. The key aim is to improve the information available to employers on the assumption that employers will comply with the law once they understand their obligations. Employers who do not respond to compliance measures will be subjected to full enforcement action.

“Prevent” is based on the principal that some employers will deliberately underpay, balancing the potential benefits of underpaying workers against the risk and consequences of being caught, and that some employers will be incentivised into checking that they are compliant. The prevent strategy aims to alter employers’ behaviour by highlighting the risk and consequences of failing to comply.

“Respond” is triggered when HMRC identify non-compliance, either as a result of a worker complaint, or as a result of their targeted enforcement work that draws on HMRC intelligence and risk analysis.

Once an underpayment has been identified, HMRC will issue a notice of underpayment (NoU) which requires the employer to pay the arrears back to workers within 28 days. In addition to this, in almost all cases HMRC will take full enforcement action resulting in the imposition of penalties and Naming by the Department for Business, Energy and Industrial Strategy (BEIS) on Gov.uk[4]. In more serious cases, HMRC will be able to seek a Labour Market Enforcement Undertaking or Order and, in the most serious cases, it may pursue a criminal prosecution.

The budget for enforcement and compliance has nearly doubled since the introduction of the NLW, increasing from £13.2 million in 2015/16, to £27.5 million in 2020/21. The increased budget provides for more HMRC compliance officers to look into worker complaints, undertake enforcement activity and, increasingly, promote compliance. It also takes account of the increasing number of workers brought within scope of the legislation as a result of increased minimum wage rates.

[4] Employers will only be eligible for Naming if the total value of arrears owed to workers exceeds £500.

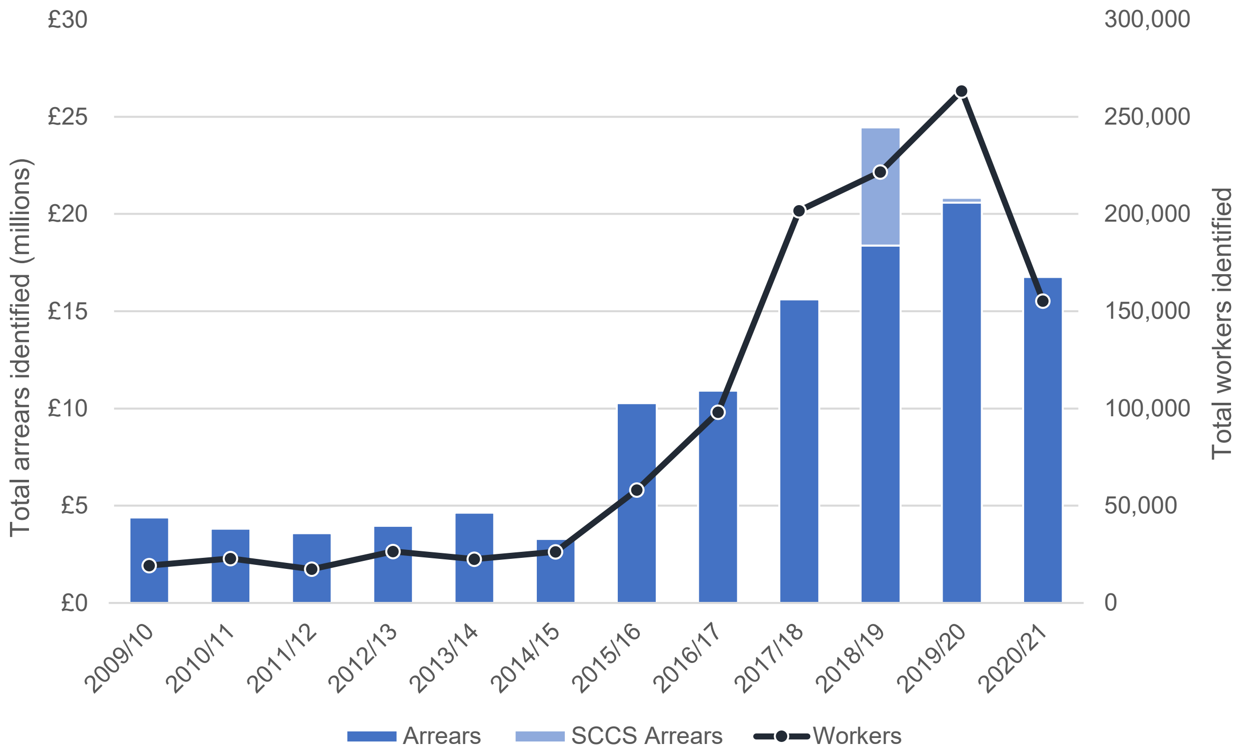
Enforcement in 2020/21

The 2020/21 financial year was a strong year for minimum wage enforcement despite issues caused by the Covid-19 pandemic. HMRC opened over 2,600 cases, and closed more than 2,700, with nearly 1,000 of these closing with arrears. The proportion of closed investigations where employers are found to be non-compliant was 39% compared to 42% in 2019/20.

Figure 1 below shows that HMRC identified £16.8 million in arrears for more than 155,000 workers and issued 575 penalties totalling £14.1 million to non-compliant employers.

Since 2015 there has been a substantial increase in the total arrears identified by HMRC with the 2020/21 figure exceeding all years prior to 2018/19, see Figure 1 below. This means that since the introduction of the NMW in 1999, the Government has ordered employers to repay over £156 million to around 1.3 million workers, issued over £73 million in financial penalties and completed over 84,000 investigations.

Figure 1. Minimum Wage investigations: arrears and workers identified



Source: BEIS / HMRC enforcement data

Notes:

1. An additional 30 cases were originally closed in 2015/16 but the employer notified HMRC of additional arrears in 2016/17. The arrears in these cases are included in the arrears total for 2016/17.

2.There are an additional 11 cases originally closed prior to 2018/19 which notified further arrears in 2018/19. These cases are included in the arrears total for 2018/19

3.The SCCS arrears are included within this table.

4.There are an additional 8 cases originally closed prior to 2019/20 which notified further arrears in 2019/20. These cases are included in the arrears total for 2019/20.
5. An additional 3 cases were originally closed prior to 2020/21 but the employer notified HMRC of additional arrears in 2020/21. The arrears in these cases are included in the arrears total for 2020/21

Table 1 in the accompanying Excel data also shows that average arrears per case stood at over £6,000 in 2020/21, and that average arrears per worker was £108 – this figure has increased slightly compared to last year but is still consistent with the longer-term trend of declining average arrears per worker. This is in part due to the change in HMRC's approach, which now takes account of non-compliance across an employer's whole business, rather than just the specific worker who may have complained. Whilst this means employers can be fully compliant in the future and that more workers are reached, the arrears identified can vary significantly in value.

Table 2 in the accompanying Excel data shows that in 2020/21, of the 997 cases closed with arrears, HMRC closed 15 cases which had over £100,000 in arrears each. Together, these cases reached a total of over £12.7 million in arrears and accounted for over 108,600 workers. This reflects HMRC's efforts to enforce the NMW, protect workers and their rights and return arrears to workers as quickly as possible.

Enforcement during Covid-19 pandemic

The Covid-19 pandemic impacted on enforcement activity during the 2020/21 financial year, and as a result, HMRC revised their enforcement approach accordingly.

Throughout the year, HMRC prioritised worker complaints to ensure that underpaid workers received their arrears as quickly as possible, initially focusing on completing ongoing investigations where compliance officers had already visited employers. Most new investigations were desk-based, with HMRC interviewing employers and workers by telephone where feasible, however face-to-face visits continued where it was appropriate to the NMW risks identified. They also reviewed their targeted enforcement plans to focus on high-risk sectors while scaling back proactive enforcement in sectors such as hospitality and social care that were hit particularly hard by the pandemic. Given this, HMRC adopted a more flexible and dynamic approach when contacting employers and workers, particularly those in the hardest hit sectors, and allowed extra time for employers dealing with Covid guidelines and furloughed staff.

HMRC also took the opportunity to focus more on "Promote" activity that aims to drive compliance by promoting better understanding of minimum wage regulations through new webinars and guidance. Over the course of 2020/21, HMRC facilitated 771,000 employers and workers to seek further information in relation to the minimum wage, including live webinars on minimum wage rate increases and on issues relevant to the social care sector.

Despite adapting their approach, HMRC faced a number of challenges during the year as a result of Covid-19. The Coronavirus Job Retention Scheme (CJRS) meant that many low-paid workers were not working and were therefore not entitled to be paid at least the minimum wage leading to a reduction in the volume of complaints. This was likely compounded by workers being reluctant to complain due to concerns about losing their job. Employers were also reluctant to engage with HMRC at a time when their businesses were in financial and operational difficulty due to the changing nature of Covid-19 guidelines and laws. These challenges are reflected in the enforcement statistics for 2020-21 and will likely impact future statistics due to HMRC being able to investigate records from up to 6 years ago.

HMRC have evaluated the innovations introduced when Covid restrictions were in force and used these to plan their future enforcement approach. This resulted in the introduction of the New Compliance Approach in 2021/22 which seeks to improve compliance by increasing communication between HMRC and businesses, promoting and supporting self-correction where possible. The underlying theory behind this approach is discussed further in the 'Promote' section. In addition, HMRC's evaluations highlighted that the online delivery of training for HMRC enforcement officers was a success and resulted in more cost-effective and timely training opportunities.

Promoting compliance

Promote activity aims to prevent non-compliance by changing the behaviour of employers and workers. Both BEIS and HMRC carry out communications activity to raise awareness of the minimum wage regulations and encourage compliance.

HMRC's minimum wage 'Promote' team carry out a variety of work to achieve this, by working with employers to put them in a position to be compliant, encouraging workers to check their pay in line with the minimum wage legislation and signposting routes to make a complaint if necessary.

In 2020/21, HMRC's Promote team encouraged 771,000 employers and workers to seek further information regarding the minimum wage and also provided a record amount of information to ensure that workers and employers were aware of legislation. This was mainly through text messaging (SMS), mass email and letter campaigns and resulted in:

- Over 67,000 mass emails opened.
- Nearly 20,000 views of live and recorded webinars.
- Over 408,000 SMS sent,
- Over 198,000 letters sent to employers and workers.

This demonstrates the significant work the Promote team have done to inform workers of their rights and employers of their obligations, ensuring future compliance with legislation. The figures presented show that employers and workers are making use of the information and are actively seeking to educate themselves on specific aspects.

Targeted and complaint-led enforcement

Non-compliance with the minimum wage is identified through two routes. Firstly, a worker can raise a complaint via the Acas helpline or via HMRC's online complaint form. This is referred to as "complaint-led" or reactive enforcement. HMRC consider every complaint made by a worker (either to HMRC or referred via Acas) and use a risk-based triage to determine the most appropriate course of action.

As with last year, the majority of complaint-led cases in 2020/21 were received via HMRC's online complaint form (2,472), as opposed to the Acas helpline (283) or 'other' sources (16). For more information, please see Table 9b in the accompanying Excel spreadsheet.

There are a number of interventions that HMRC can use to pursue a complaint-led case. These are proportionate to the level of risk of non-compliance and are designed to ensure that workers understand their legal entitlements and receive any arrears owed. The interventions that HMRC use include: 'nudge' letters, telephone contact with employers and workers and face-to-face meetings with employers and workers[5].

Additionally, HMRC can themselves identify cases of non-compliance by proactively targeting sectors or employers where they believe non-compliance is prevalent. This is referred to as "targeted enforcement".

Targeted enforcement is informed by HMRC's risk model, which uses data from a range of sources (including PAYE, information from other labour market enforcement bodies, NMW intelligence, complaints data and ministerial priorities) to identify workers most at risk of NMW underpayment. The risk model continues to yield encouraging results and accurately identify businesses with a high risk of underpayment. For information about the volume of targeted enforcement cases through these different sources, please see Table 8b in the accompanying Excel spreadsheet.

As with complaint-led enforcement, there are a number of ways in which HMRC can pursue a targeted enforcement case. These include one-to-one meetings with employers, team-based reviews of larger businesses and multi-agency joint working (to tackle risks of cross-cutting illegal behaviours).

The threat of being the subject to targeted enforcement provides a valuable deterrent to employers and supports workers who may not be aware that they are underpaid or who are unwilling to raise a complaint. Targeted enforcement is therefore an essential means to reach at risk workers, who may not otherwise come forward to make a complaint.

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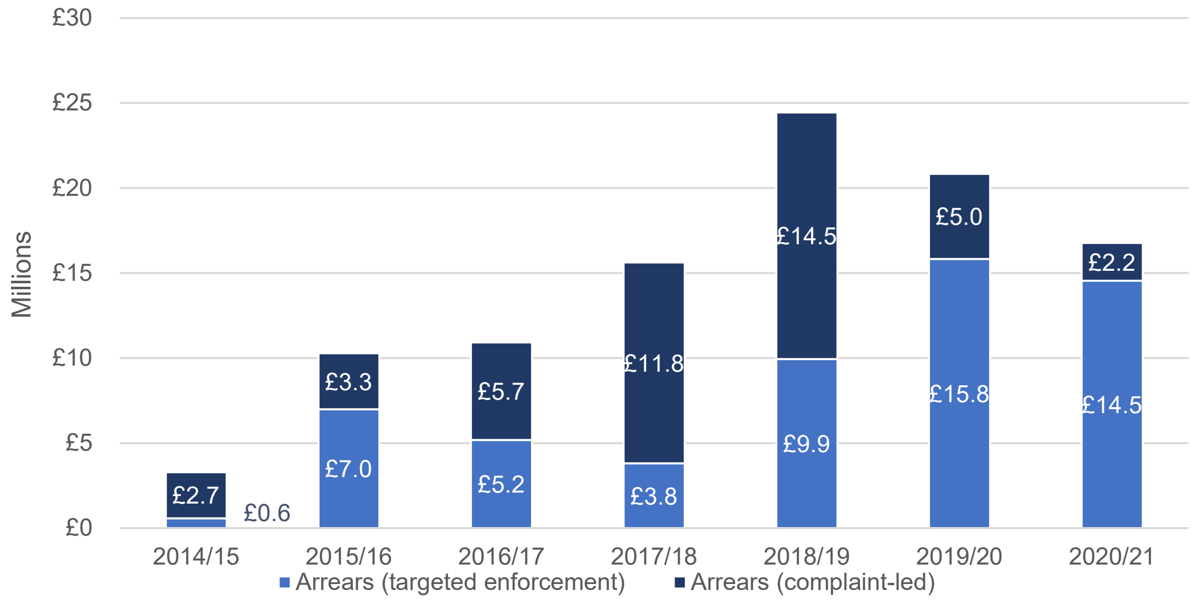
[5] For more information about this activity, please see the 2018/19 report on minimum wage enforcement and compliance (Department for Business, Energy and Industrial Strategy, 2020a).

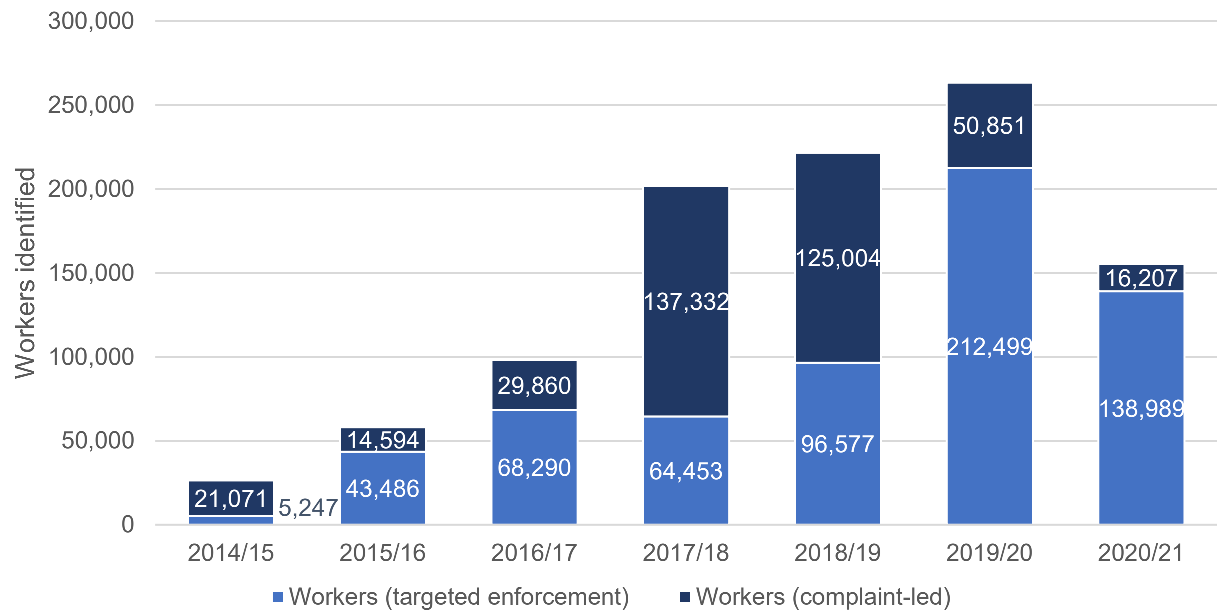
In 2020/21, targeted enforcement continued to form an important part of enforcement activity; HMRC closed nearly 1,800 targeted enforcement cases, with just under one third of these cases closing with arrears. These cases returned £14.5m in arrears to 139,000 workers. For more information, please see Table 8a in the accompanying Excel spreadsheet. Figures 2 and 3 below show that 87% of arrears (£14.5 million) and 90% of workers (138,989) identified were found through targeted enforcement; and that this proportion has increased greatly compared to pre-pandemic levels.

Figure 2. Arrears identified through targeted and complaint-driven enforcement



Source: BEIS / HMRC enforcement data

Figure 3. Workers identified as underpaid through targeted and complaint-driven enforcement



Source: BEIS / HMRC enforcement data

Tables 8a and 9a in the accompanying Excel data show that the proportion of cases closed with arrears for targeted enforcement cases is lower than in complaint led cases (32%, as opposed to 50%). This gap has increased slightly since 2019/20 as difficulties in contacting workers due to Covid-19 were exacerbated in targeted enforcement cases (i.e. compared to complaint-led cases where at a minimum HMRC can contact the worker who made the compliant).

Ensuring arrears are returned to workers is a key priority for HMRC, even more so during difficult times for workers and employers. Therefore, investigating employers where there was a direct source of intelligence (a worker's complaint), as opposed to predicting non-compliance to target certain employers was the most appropriate course of action during this turbulent period. It is also important to highlight that a low strike rate is not necessarily a negative result; it also shows that those being targeted are compliant or are willing to cooperate with HMRC to protect workers' rights. HMRC are currently working on increasing their compliance work with employers through the New Compliance Approach which is yielding positive results thus far and will be discussed in more detail in next year's report. Despite this, the proportion of cases where employers are found to be non-compliant through targeted enforcement remains relatively high, and this reflects HMRC's ability to successfully identify employers, especially given the increasing volume of targeted enforcement cases.

Penalties, undertakings, prosecutions, and the minimum wage Naming Scheme

HMRC continues to respond strongly in cases where workers have been underpaid the minimum wage, using a mixture of civil penalties, Labour Market Enforcement Undertakings and criminal prosecutions. In addition, the BEIS National Minimum Wage Naming Scheme also acts as a deterrent to employers from underpaying their workers.

Civil penalties

One of the Government's aims is to ensure that, as a result of enforcement action, workers receive the money they are owed as quickly as possible. In the vast majority of cases HMRC pursues the civil enforcement route, which is the quickest way of ensuring workers receive their arrears. The civil route involves HMRC conducting an investigation, identifying if workers have been underpaid, calculating the value of any arrears, and instructing employers to repay the arrears as quickly as possible. A penalty of 200% of the total underpayment for all workers specified on the NoU is also imposed with the incentive of a reduction to 100% if all the unpaid wages and the penalty are paid within 14 days. HMRC can also take enforcement action via the civil courts if employers fail to pay the arrears to workers.

575 penalties were issued to non-compliant employers in 2020/21, totalling £14.1m. Whilst these figures have fallen compared to 2019/20 (992 penalties totalling to £18.5m), they remain high compared to historic levels despite the difficulties HMRC faced when enforcing throughout this financial year.

Criminal prosecutions

For the most serious non-compliance offences, HMRC can refer cases for criminal investigation and prosecution. Criminal prosecutions are significantly more costly than civil cases, involve much longer timescales and therefore delays in securing arrears, and do not guarantee that the full value of arrears is repaid to workers. Therefore, further enforcement may be required to secure all arrears.

HMRC's Serious Non-Compliance teams undertake a programme of employer-specific investigations and multi-agency operations to identify deliberate and persistent offenders and take action to bring these employers into compliance. As a result of this, HMRC may also identify criminal offences to refer for criminal investigation by HMRC's Fraud Investigation Service (FIS). FIS will consider all the evidence and whether it is in the public interest to prosecute. HMRC will then refer cases to the Crown Prosecution Service, which will ultimately decide whether to bring a case for criminal prosecution.

Since 2007, 16 employers have been successfully prosecuted for underpaying the minimum wage with an additional case accepting a caution; this is an increase on last year's figure (15) with the most recent prosecution taking place in April 2021. For more information about these prosecutions, please see Table 13 in the accompanying Excel data.

Labour Market Enforcement Undertakings and Orders

The regime of Labour Market Enforcement (LME) Undertakings and Orders is specifically targeted at those employers where serious or persistent breaches of NMW law have been identified and action is needed to prevent further offences. Where HMRC identify an employer to be in this category, they may ask them to agree to enter an Undertaking with a number of measures which will ensure future compliance. If the employer refuses to enter an Undertaking, or fails to comply with an Undertaking, a magistrates' court (or similar in devolved administrations) will have the power to impose an LME Order requiring the employer to take action to avoid further offences. Failure to comply with an Order can result in a two-year custodial penalty and/or unlimited fine. The number of LMEUs issued by HMRC has increased from last year, rising to 24 at the end of 2020/21.

Naming Scheme

The National Minimum Wage Naming Scheme remains a key deterrent to employers from breaking minimum wage law. The Naming Scheme highlights non-compliant employers by exposing their breaches publicly, promoting their future compliance and deterring other businesses from underpaying the minimum wage.

Following the review of the Naming Scheme in 2020[6] and the increase in the Naming arrears threshold to £500 or above, Naming Round 16 was published on 31 December 2020[7]. Round

[6] Department for Business, Energy and Industrial Strategy (2020b)
[7] Department for Business, Energy and Industrial Strategy (2020c)

17 and 18 of Naming have also taken place however Round 16 was the only round to take place during the 2020/21 financial year.

In Round 16, 139 employers were named for £6.7 million in minimum wage arrears owed to 95,000 workers – the largest amount of arrears ever identified in a Naming round. This means that up to and including Round 16 of Naming, over 2,000 employers had been named for £17.5m in arrears for 185,000 workers.

Alongside the list of named employers, from Round 16 the Government published a new educational bulletin which highlighted and explained the risk of minimum wage underpayment in connection with deductions and payments. The bulletin's purpose is to increase awareness of the most common reasons for underpayment, providing employers with an opportunity to review their practices in these areas. Future Naming rounds will also be published with an educational bulletin on a particular issue that commonly risks leading to underpayment.

For more information, please see: https://www.gov.uk/government/news/rogue-employers-named-and-shamed-for-failing-to-pay-minimum-wage

Focus Item: Work of HMRC’s Specialist Enforcement Teams (SET)

In the ‘focus item’ section, we review a specific part of enforcement and compliance activity in more depth.

The HMRC Specialist Enforcement Teams (SET) were created in April 2017 with five teams of 15 staff each across England, Scotland and Wales. Their role is to deal with large businesses and particularly complex minimum wage enforcement issues. Their creation followed HMRC investigations that had raised public concerns about large businesses that often operate on multiple sites. Previously, large businesses had generally been considered to be in a position to comply with NMW legislation, given their access to legal and HR support.

Most SET work comprises “targeted enforcement” cases identified by HMRC’s well-developed risk model. SET may also handle complaints from workers and third-party information relating to large companies. Businesses indicated that they preferred a “once-and-done” approach to tackle all potential minimum wage risks in a company or group. SET therefore investigate a whole company structure or group, rather than a single entity or location.

SET work very closely with HMRC’s large business customer compliance managers who share information, including details of group/company structures and contact details, to ensure SET communicate with businesses at the appropriate level. Those managers now also include discussions around the importance of compliance with NMW legislation as part of their annual risk review discussions with businesses. In addition, SET use the expertise of HMRC data analysts to transfer sensitive personal and payroll/time recording data between the business and HMRC.

SET face a number of challenges when investigating large businesses and complex minimum wage issues. These include complexities arising from the size of a workforce spread over multiple locations with different worker types and roles, and the diverse nature of some of the businesses investigated. In addition, large businesses often have the resources to obtain external financial and legal advice, as well as the appetite to challenge minimum wage legislation.

There are also challenges in how investigations are conducted. There is significant work in issuing a very large “notice of underpayment”, which sets out the value of arrears owed to workers and the amount of the penalty, where detailed schedules and calculations need to be set out for each underpaid worker. Legislation provides that a notice of underpayment, may be re-issued only once if any detail in an original notice is found to be incorrect. Any inaccuracy can potentially be appealed at an employment tribunal.

Where SET investigate employment agencies with numerous end-users in multiple locations, there are practical difficulties in organising visits and arranging to interview workers face-to-face. Some agencies work with intermediaries, setting up complex structures, such as umbrella or payroll companies, both onshore and offshore, with “administration” deductions from workers’ pay. This can make it difficult at times to establish who is the actual employer. Movement of workers between agencies is not uncommon with legal disputes between the parties regarding the application of TUPE regulations when workers move between agencies. This is key to determining who is liable to pay the arrears and penalty, as HMRC can take enforcement action against the employer only.

SET are also involved in emerging labour market issues and have reviewed worker status issues within the gig economy to understand the actual working arrangements and relationships in place across different sectors.

The creation of SET had an immediate impact with the leading accountancy firms, who provide advice on complying with NMW legislation, recruiting additional staff. This is a positive outcome as these advisers often carry out due diligence checks of minimum wage compliance as a routine matter, with compliance checks sometimes having started or completed before HMRC investigations are opened.

Due to the success of SET activity and the limited number of large businesses, HMRC reduced the number of teams from 5 to 4 during 2020/21 in line with the recommendations of the Director of Labour Market Enforcement and BEIS. SET resource is constantly monitored to ensure there continues to be a deterrent effect, whilst acknowledging that significant minimum wage rises may bring previously compliant large businesses within potential scope of SET enforcement activity.

Table 2: Outcome of SET enforcement activity

Year	Case closures	Arrears(£)	Workers
2017 - 2018	152	11.0 m	173,000
2018 - 2019	243	10.6 m	152,000
2019 - 2020	319	15.7 m	237,000
2020 - 2021	238	12.2 m	132,000
Total	**952**	**49.5 m**	**693,000**

Source: BEIS/HMRC enforcement data
Notes: Totals may not sum exactly due to rounding.

Measuring non-compliance with the minimum wage

The Government uses a number of information sources to assess the scale and nature of minimum wage non-compliance, which in turn informs our enforcement approach.

Estimates of non-compliance can be made using the Office for National Statistics' (ONS) Annual Survey of Hours and Earnings (ASHE); a survey of employees completed by employers. ASHE provides information about the levels, distribution and make-up of earnings and hours paid for employees[8]. Using ASHE, we can estimate the number of jobs paid below the minimum wage at a particular point in time. These estimates can be broken down by sex, age, region, sector, and full-time and part-time working.

However, a number of methodological issues (including the proximity of the survey to the annual minimum wage uprating; the fact that the survey only measures underpayment in the formal economy; and there being legitimate reasons for underpayment) mean that ASHE does not offer a direct measure of minimum wage non-compliance. Government takes these limitations into consideration when using ASHE to inform enforcement.

In addition, the last two waves of the survey in April 2020 and 2021 have faced particular challenges due to the Covid-19 pandemic, namely:

1. **Some businesses were not open during fieldwork**, meaning that employers could not complete the paper questionnaires sent to their premises. This meant a smaller number of employers completed the survey than in previous years.

2. **The type of employers who completed the survey also changed**, as certain types of employer (e.g. those in the retail and hospitality sector) were more likely to be affected by lockdown restrictions. This meant that additional weighting was required to adjust the profile of the survey.

3. **Workers were furloughed**, meaning that many workers earnt less than they normally would during the survey period (i.e. 80% of their normal earnings). The rules for calculating furlough pay for the Coronavirus Job Retention Scheme (CJRS) also meant that the 2020 and 2021 minimum wage uprating may not have applied to the calculation of furlough payments. This is because furlough payments received via the CJRS corresponded to hours not worked and the minimum wage only applies to hours worked[9]. Likewise, in 2021 the introduction of flexi-furlough – whereby a worker would

[8] Office for National Statistics (2021)

[9] This is because furloughed workers' minimum wage entitlement depends on when they 'started' furlough. For example, if a worker started furlough prior to 1st April 2020, they were entitled to the 2019 rates throughout the period they were on furlough. If a worker started furlough from the 1st April 2020 onwards, the 2020 rates applied. Likewise, if they started furlough from the 1st April 2021, the 2021 rates applied. It is not possible to determine which year's minimum wage rates apply to each worker, because the date they started furlough is not available in the ASHE data.

work some of their contracted hours and received furlough pay for the remainder - created further issues for understanding workers' hourly pay for minimum wage compliance purposes.

Aided by conversations with BEIS and the LPC, the ONS took steps to mitigate the impact of the Covid-19 pandemic. This included:

- adding new variables to capture if employers were topping up furlough pay above 80% and whether workers were flexi-furloughed;
- including additional guidance separate to the questionnaire, to help employers complete the survey for furloughed workers;
- extending fieldwork to allow for a greater number of employers to respond to the survey;
- creating new survey weighting so that the employers who responded better reflected the UK employer population as a whole;
- working with HMRC to append markers for furloughed workers;
- and conducting extra data validation to correct pay information.

Despite this, there are signs that the data and particularly estimates of underpayment have changed relative to the years prior to 2020. It is difficult to establish with certainty that any minimum wage underpayment is 'genuine' underpayment. It could equally be a result of the conditions attached to furlough, or because of employers providing erroneous information due to uncertainty over how to account for furlough in their response.

Measuring minimum wage non-compliance in 2021

The issues outlined above mean that unlike in years prior to 2020, there are various ways in which underpayment estimates may be calculated, based on including or excluding furloughed workers; and including or excluding those who saw a "loss in their pay" due to furlough.

Furloughed workers are predominantly receiving pay for hours not worked, which is not subject to NMW legislation. This means that most instances where furloughed workers receive an amount below the minimum wage, it is unlikely to be 'true' minimum wage non-compliance. It is instead likely to be associated with the conditions attached to furlough. However, we acknowledge that furloughed workers are more likely to be lower-paid, and that some furloughed workers in ASHE may already have been receiving less than the minimum wage in their job prior to being furloughed (i.e. would have been part of the 408,000 underpaid workers identified in 2019, see Figure 4 below).

Analysis of workers with pay below the NLW/NMW

Estimates from the ONS found that around 1 million workers earned below the minimum wage in April 2021. However, as they acknowledged, a proportion of these workers were furloughed, and this is therefore not representative of minimum wage non-compliance. These workers would not have worked any hours in the reference period, therefore minimum wage legislation would not be applicable to these pay estimates.

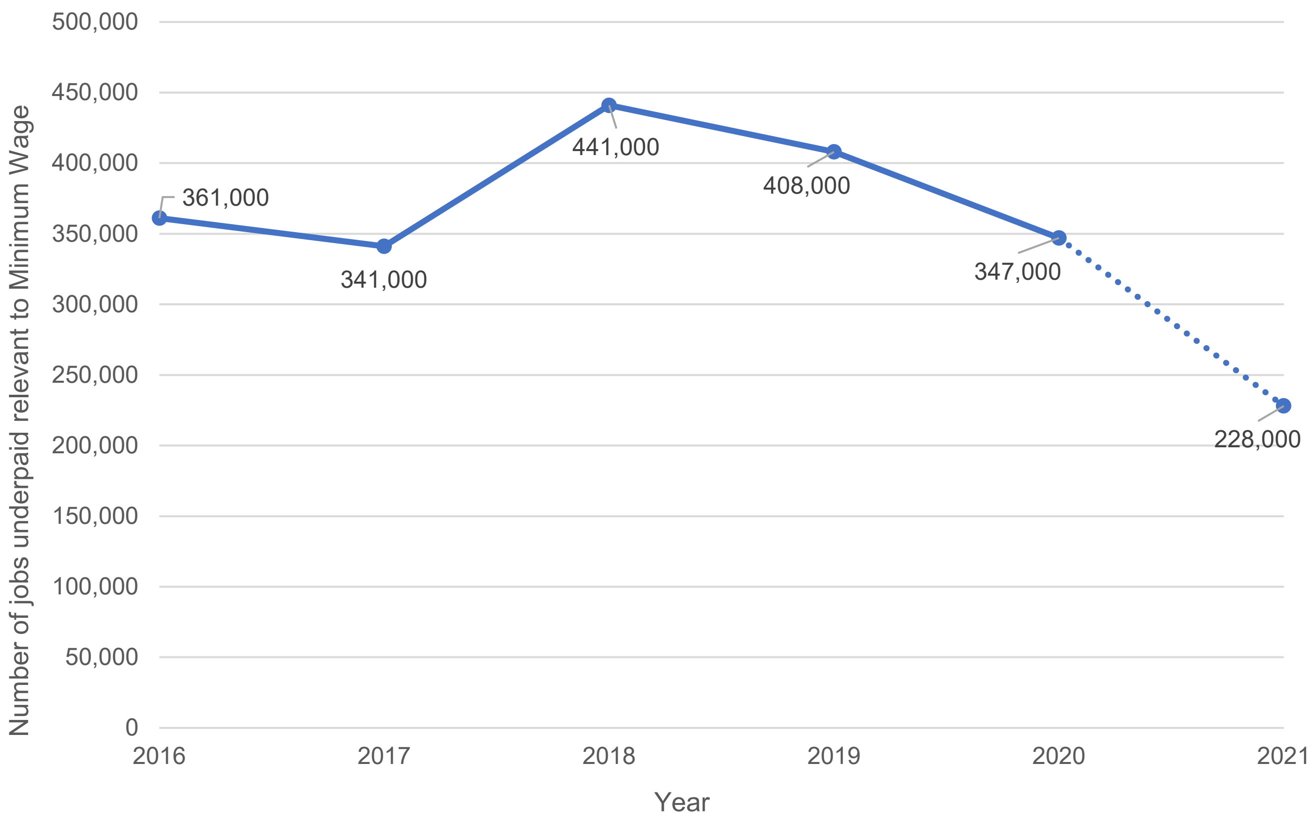
As noted by the Low Pay Commission in their 2021 report[10], estimates including furloughed workers are an overestimate of underpayment, as many of the furloughed workers would not ordinarily be paid below the minimum wage. Similarly, if we exclude furloughed workers, then our estimates of underpayment are likely to be underestimates. The reason for this is that workers who were still furloughed in April 2021 are likely to be those in low paying sectors which were most impacted by the pandemic and restrictions surrounding this. These sectors tend to be where the majority of underpayment occurs, hence why excluding this cohort will lead to an underestimate of underpayment.

In the absence of being able to accurately estimate minimum wage non-compliance, we undertake our analysis on pay estimates of workers not furloughed, reflecting that minimum wage legislation only applies to worked hours.

Once furloughed workers are removed, we estimate that approximately 228,000 workers were paid below the relevant minimum wage in April 2021, as shown in Table 3 and Figure 4 below. We recognise that this may be an underestimate, as it excludes some low-paid workers who would otherwise be underpaid (i.e. as discussed above, some furloughed workers were likely paid below the minimum wage before being furloughed). Given this, it is likely that the true figure for underpayment is somewhat higher than this estimate. However, this is unobservable in the data. Tables 16-18 and Figures 17-18 in the accompanying excel data provide further information on underpayment across different subgroups of worker.

[10] Low Pay Commission (2021)

Figure 4. Minimum wage underpayment over time (2016-2021)



Source: BEIS analysis of ASHE 2016-2021 (ONS)

Notes:
Figures are rounded to the nearest thousand.
This shows underpayment across all minimum wage rates

Table 3. Estimates of minimum wage non-compliance in April 2021

Minimum wage rate	April 2021
23 years old and over (NLW)	193,000
21 to 22 years old (NMW)	15,000
18 to 20 years old (Development)	15,000
16 to 17 years old (Youth)	2,000
Apprentice	3,000
Total	228,000

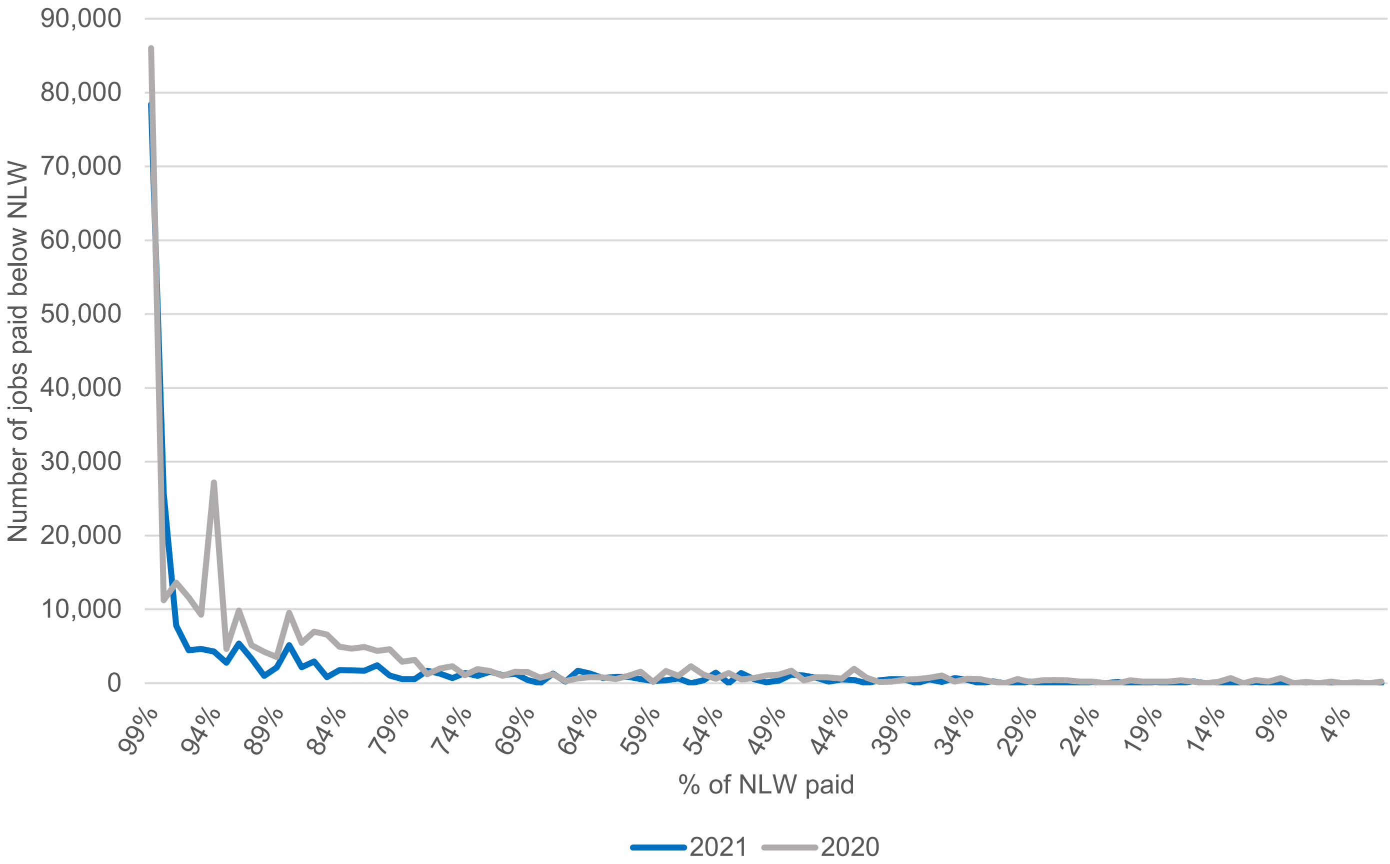
Source: BEIS analysis of ASHE 2021 (ONS)
Notes:
Figures are rounded to the nearest thousand.

Underpayment figures for each of the minimum wage rates do not sum to the totals presented because of rounding.
There have been changes to the minimum wage rate bands which will also contribute to the variation in figures.

Due to the issues with the 2021 data, we cannot be certain how the outlook for underpayment has changed compared to last year. Once furloughed workers are removed, the distribution of National Living Wage underpayment follows a similar trend to previous years.

Figure 5 examines this in more detail, by looking at how many people were earning different percentages of the minimum wage. In 2020, there was a clear spike in underpayment at the previous year's NLW rate, however the 2021 data differs. There is a small spike in underpayment at the 2020 21-24 rate (£8.20). This demonstrates that some underpayment may have arisen from an employer's failure to uplift their employees pay in line with the change in age band to bring 23-year-olds into scope of the NLW. For example, the 2021 line shows a peak at around 92% of the 2021 rate, roughly equivalent to the 2020 21-24 rate (£8.20). In addition to this, given the complexities with the ASHE data, it is likely that our method of removing furloughed workers is imperfect and will still contain information relating to furlough. Therefore, we cannot be certain that all furloughed workers will have been removed from the data and that our results may be skewed due to this. The analysis in this chart complements Table 19 and Figure 19 in the accompanying Excel spreadsheet.

Figure 5. Distribution of National Living Wage underpayment in April 2020 and April 2021



Source: BEIS analysis of ASHE 2021 (ONS)

Responding to the Low Pay Commission's enforcement recommendations

In their "Non-compliance and Enforcement of the National Minimum Wage" report of April 2021, the Low Pay Commission did not, for the most part, make new recommendations to Government. Instead, they reviewed progress in some of the key areas they had focused on in recent years and expanded on some of the original recommendations.

Previous LPC recommendations on **worker support** highlighted in the report are:

- Continue to invest strongly in communications to workers. (2017)
- Consider how to build confidence in the complaints process, and to work with trade unions to understand the current barriers to reporting. (2019)
- Review the regulations on records to be kept by an employer, to set out the minimum requirements needed to keep sufficient records. (2020)

On **worker support**, the Government confirms the actions and measures below:

BEIS continues to invest further in communications to workers on minimum wage increases. Although the Covid-19 pandemic necessitated reprioritisation and the normal communications campaign did not run in 2020, a campaign ran alongside the April 2021 increases to the National Living Wage and National Minimum Wage. This focused on informing employers and workers of the new minimum wage rates and encouraging workers to check their pay. It also aimed to build confidence in the complaints process by highlighting different avenues for any workers who were concerned about underpayment to submit complaints.

HMRC has continued to build a better understanding of what motivates and discourages workers from reporting underpayment. Research into complaint behaviour in other settings suggests that fear of reprisal and anonymity are recognised respective barriers and enablers. With over half of the complaints received by HMRC relating to a worker's previous employer, as opposed to current, this suggests fear of reprisal is a barrier to reporting minimum wage underpayment.

In a small survey of workers who have made a complaint to HMRC, nearly half of respondents expressed concern for other workers at the same employer and want to make sure that colleagues receive what they are rightfully entitled to too.

Reflecting these insights, HMRC messaging to workers has been adapted to include reference to the option to remain anonymous, the ability to report a previous employer and the potential benefits to other workers. Perhaps as a consequence, more workers are now asking to remain anonymous to their employer when they make a complaint.

HMRC has been conducting a series of randomised control trials, using bulk letter releases to workers, to better understand the different motivators to reporting and how those are communicated.

HMRC has also engaged with Citizens Advice and trade unions, providing training and awareness sessions to help front line worker advocates to recognise potential underpayment, signpost accordingly and ultimately build confidence in the complaints process.

In 2021, following a review, BEIS also amended the National Minimum Wage regulations on record keeping, extending the period of time for which employers are required to retain pay records for minimum wage enforcement purposes from 3 years to 6 years. This brought record-keeping requirements in line with the 6-year limitation for which HMRC can require payment of minimum wage arrears. Following this, the minimum wage guidance on record keeping was amended after constructive feedback from worker representatives, and reference to the record-keeping is included in all educational bulletins published in connection with the National Minimum Wage Naming scheme since its relaunch.

Previous LPC recommendations on **employer engagement** highlighted in the report are:

- Invest time in getting the guidance to employers right, as this will simplify the task of enforcement in the longer term. (2019)
- Monitor the effects of the increase in the threshold for Naming employers found to have underpaid workers. (2020)
- Develop a similar approach to the Section 89 notices used by the Pensions Regulator for minimum wage compliance. (2017)

On **employer engagement**, the Government confirms the actions and measures below:

The Government reviewed its comprehensive “Calculating the Minimum Wage” guidance, drawing on the views of an external stakeholder panel comprising representatives of employers, workers and payroll providers. Following publication of the revised guidance in March 2021, BEIS has worked to improve navigation of the guidance. In addition, HMRC have been seeking stakeholder feedback and sharing this with BEIS with a view to making further improvements.

In line with the LPC’s recommendation on Section 89 notices, and as part of the Naming review, the Government also committed to be more transparent about the most commonly found types of breaches. Typically, these are deductions from worker’s pay and unpaid working time. BEIS therefore publishes an educational bulletin with each Naming round to help raise awareness of minimum wage rules and improve compliance. Bulletins include analysis of the most common breaches in each Naming round, examples to ensure understanding of how such breaches can be avoided, and links to the Government’s Calculating Minimum Wage guidance for further details.

Previous bulletins have also referenced the amended record-keeping requirements in line with the LPC's recommendation on worker support. The Government has committed to monitoring the effects of the increased Naming threshold and will do so once several Naming rounds have been published.

Previous LPC recommendations on **prioritisation** highlighted in the report are:

- Evaluate what data is recorded in non-compliance investigations and consider how this can be used to develop measures of cost-effectiveness. (2020)

On **prioritisation**, the Government confirms the actions and measures below:

HMRC enforces Minimum Wage regulations on behalf of BEIS using case management and reporting systems to support the operational management of cases. Those systems do not provide granular levels of data around status of workers, ethnicity or type of payroll.

Most of HMRC's proactive enforcement cases stem from their risk model, which is updated annually and identifies employers with the largest risk of minimum wage underpayment. The model considers a range of information including Real Time Information, HMRC employer compliance information, underpayment data from the Office of National Statistics' Annual Survey of Hours and Earnings (ASHE), apprenticeship data, location data, as well as worker characteristics including gender and age. HMRC's Risk Intelligence Service further analyses the data to determine the links to Minimum Wage underpayments. This allows HMRC to produce proactive enforcement cases for sectors and populations at highest risk of underpayment.

HMRC have also undertaken several targeted projects in the last few years, focused specifically on apprentices and the sectors in which they are most prevalent, such as hairdressing and childcare sectors.

The development of new IT systems will allow scope for more detailed granular information to be tracked on types of workers and protected characteristics, subject to GDPR requirements and workers' willingness to provide this information as part of the investigation process.

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