



Department for
Business, Energy
& Industrial Strategy

NATIONAL MINIMUM WAGE LAW: ENFORCEMENT

Policy on HM Revenue & Customs
enforcement, prosecutions and naming
employers who break National Minimum
Wage law

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Section 1: Introduction

- 1.1 The government is committed to increasing support for lower and middle income earners and improving the rewards to work. The National Living Wage (NLW) and the National Minimum Wage (NMW) provide protection to low income workers and incentives to work. The NMW/NLW helps business by driving fairness in the labour market ensuring that competition is based on the quality of goods and services provided and not on low prices driven by low rates of pay.
- 1.2 This government is absolutely clear that anyone entitled to be paid the NMW and the NLW should receive it.¹ The enforcement of the NMW and NLW is therefore essential and we are committed to cracking down on employers who break the law in this area in all sectors across the economy. This document sets out how the government operates the civil and criminal enforcement of the NMW/NLW. The Department for Business, Energy and Industrial Strategy (BEIS) is responsible for NMW policy, including the policy on compliance and enforcement. HM Revenue and Customs (HMRC) enforce the NMW Act on behalf of BEIS.

Recent developments

- 1.3 The NLW came into force on 1 April 2016 and applies to workers aged 25 and over. This new rate of pay was introduced through amendment to the National Minimum Wage Regulations 2015 to ensure that the rules that apply to the NMW rates for workers aged under 25 also apply to workers entitled to the NLW. In line with the policy set out in this document, HMRC will enforce the NLW as part of the NMW framework. For ease of reference, the remainder of this document uses 'minimum wage' as a collective term to refer to both the NMW and NLW.
- 1.4 The introduction of the NLW increased the number of workers paid at a statutory minimum rate. This, along with an increase in the number of sectors affected by the minimum wage, could raise non-compliance risks. For this reason, the government announced a package of measures to improve compliance and strengthen the enforcement of the minimum wage. This includes increasing financial penalties for non-compliance from 100% to 200% of the arrears employers owe, setting up a dedicated team in HMRC focused on tackling the most serious cases of non-compliance, and further increasing HMRC's enforcement budget.
- 1.5 In addition, increases in both the level of participation in the labour market and the reported incidences of exploitation have required the government to consider the effectiveness of the way it tackles non-compliance with labour market regulation through its consultation 'Tackling Exploitation in the Labour Market' (October 2015)² run jointly between BIS and the Home Office. The government published its response to the consultation in January 2016, setting out a number of proposals to tackle labour market exploitation, two of which will directly impact on how the minimum wage is

¹ The Calculating the Minimum Wage guidance sets out the rules on how the National Minimum Wage and National Living Wage are calculated: www.gov.uk/government/publications/calculating-the-minimum-wage

² www.gov.uk/government/uploads/system/uploads/attachment_data/file/471048/BIS-15-549-tackling-exploitation-in-the-labour-market.pdf

being enforced by HMRC.³ Firstly, to establish a statutory Director of Labour Market Enforcement, responsible for setting priorities for the enforcement bodies across the spectrum of non-compliance. Secondly, to create a new type of enforcement order, a labour market enforcement undertaking, supported by a criminal offence for non-compliance. These changes were implemented through the Immigration Act 2016 and the new Director took office in January 2017.

³ www.gov.uk/government/uploads/system/uploads/attachment_data/file/491260/BIS-16-11-government-response-to-tackling-exploitation-in-the-labour-market.pdf

Section 2: Background

2.1 Entitlement to the National Minimum Wage and National Living Wage

- 2.1.1 The National Minimum Wage Act 1998 (“the 1998 Act”, as amended, including by the Employment Act 2008 Act (the “2008 Act”)) introduced a statutory right to be paid a certain amount of remuneration for work performed. Almost all workers in the UK are entitled to the National Minimum Wage or the National Living Wage. Workers are defined in Section 54 of the 1998 Act.
- 2.1.2 A qualifying worker who is paid less than the minimum wage for any pay reference period is legally entitled to be paid arrears by his employer (section 17 of the 1998 Act).
- 2.1.3 Arrears are either
- the difference between the remuneration received by the worker and the minimum wage rate which applied at the time they were underpaid⁴; or
 - where the current rate of minimum wage is higher than the rate that applied at the time of the underpayment, the arrears are calculated by reference to the current rate (see paragraph 3.6.4).
- 2.1.4 The Secretary of State has appointed HMRC to act as enforcement officers for the purposes of the minimum wage. HMRC’s enforcement of employers’ obligations to pay workers the minimum wage is focussed on the workers’ right to receive the remuneration they are entitled to.
- 2.1.5 In the agricultural sector, agricultural workers in England must be paid at least the minimum wage. Workers employed before the rules changed on 1 October 2013 still have the right to the Agricultural Minimum Wage if it says so in their contract. In Wales, under the Agricultural Sector (Wales) Act 2014, agricultural wages and employment conditions in Wales are governed by the Agricultural Wages (Wales) Order 2016, which came into force on 26 February 2016.
- 2.1.6 This policy statement only deals with enforcement of the minimum wage by HMRC.⁵ The policy contained in this document will be kept under close review by BEIS and HMRC to ensure that it reflects the government’s priorities for compliance and enforcement. The Crown Prosecution Service (CPS) will be consulted on any changes to the policy on prosecuting minimum wage offences.

⁴ Subject to the detailed rules that apply under the National Minimum Wage Regulations 2015 in relation to which payments count as national minimum wage.

⁵ A worker may commence proceedings against his employer to recover arrears:

- in the employment tribunal (or, in Northern Ireland, the industrial tribunal) for a breach of Part II of the Employment Rights Act 1996 (or Part IV of the Employment Rights (Northern Ireland) Order 1996) as an unlawful deduction from wages claim or a breach of contract claim; or
- in the County Court (or, in Scotland, the Sheriff Court) as a breach of contract claim.

Section 3: Policy on HMRC civil enforcement

3.1 Background

- 3.1.1 The government recognises that the civil powers contained in the 1998 Act will be sufficient in the great majority of cases. Criminal investigation is appropriate in the case of the small minority of employers that are persistently non-compliant, refuse to cooperate with compliance officers or where there is a broader public interest in prosecution (as set out in section 4).

3.2 Powers of compliance officers

- 3.2.1 The 1998 Act gives compliance officers the power to take information away from the employer's premises (or the premises where the information is held) to copy it. When information is removed from the employer's premises – either because the employer agrees to its removal or the power to remove records is exercised – compliance officers must act in accordance with HMRC rules regarding data security. Records should generally be returned to employers within seven days of removal.
- 3.2.2 Material taken from meetings with employers (such as notes and original or copy business records) are to be treated in the same way as HMRC handles customer's files, that is, they are to be kept safe at all times as set out in HMRC guidance until returned to the employer. Officers are expected to give a receipt to the employer or their adviser or agent. Officers should ensure that the receipt lists the specific records (or copy records) being collected and removed. A copy of the receipt must be made and kept with the investigation papers.
- 3.2.3 HMRC can only accept electronic data in certain formats and the employer must agree to write or download the information to a disk or data stick. The disk or data stick must not be removed from the employer's premises; the data must be copied onto the secure area of the compliance officer's encrypted laptop in situ. The laptop must be transported in accordance with HMRC guidance.

3.3 When a Notice of Underpayment should be issued

- 3.3.1 An NoU should be issued where a compliance officer finds that arrears of minimum wage were outstanding at the start of an investigation, though HMRC have discretion over the issuing of an NoU, as set out in paragraph 3.3.7. The "start of an investigation" is defined as the date a compliance officer first contacts the employer (either by telephone, in writing, or both).
- 3.3.2 One of the government's main policy aims is to ensure that there is a sufficient deterrent against underpayment of the minimum wage. The basis for imposing a penalty on an employer is non-compliance with the requirement to pay workers the minimum wage. The "start of an investigation" is the trigger point that is used to determine whether, in principle, a penalty should be imposed on the employer for non-compliance with the minimum wage.

- 3.3.3 Notices should be issued where arrears are outstanding at the start of an investigation, notwithstanding that the employer claims that the underpayment of minimum wage was accidental. An NoU should also be issued where the employer has repaid the arrears to the worker subsequent to the start of the investigation and before the date the notice is issued.
- 3.3.4 An NoU should be issued where an employer has partly repaid arrears before the start of an investigation (for example, by repaying the underpayment calculated in accordance with section 17(2) but not the arrears calculated in accordance with section 17(4)).
- 3.3.5 An NoU should ordinarily not be issued where an employer has paid workers below the applicable minimum wage rates but has correctly repaid all the arrears that are owing to the workers before the start of an investigation, including where they have self-corrected, for example in response to HMRC nudge activity.
- 3.3.6 HMRC compliance officers have discretion over whether to issue an NoU. While it is expected that an NoU will be issued in almost all situations where HMRC have become aware of minimum wage arrears, there may be specific circumstances - separate to where employers self-correct (see paragraph 3.3.7) - when HMRC officers decide that the employer should not be issued with an NoU, and as such should not be subject to enforcement action, be named or face a financial penalty. Each decision to issue an NoU should be made on a case by case basis.
- 3.3.7 HMRC officers may also require some employers to self-correct. For example, HMRC officers may issue an NoU for the full arrears for all current employees and require the employer to self-correct for ex-employees, or issue an NoU only for the complainant worker, requiring the employer to self-correct for all other workers. In all cases of self-correction HMRC ensures that all workers receive the money they are due. If an employer fails to self-correct, HMRC will issue an NoU for all arrears due. In such cases the employer may be named twice.
- 3.3.8 A time limited scheme of assisted self correction by social care providers in connection with sleeping time shifts was introduced in early November 2017. See section 3.10 for further detail.

3.4 Withdrawal and reissue of Notice of Underpayment

- 3.4.1 A compliance officer may withdraw an NoU if it subsequently appears to him that the notice incorrectly includes or omits any requirement, or is incorrect in any detail. The officer may, at the same time as withdrawing the original notice, issue a replacement NoU. Only one replacement notice may be issued.
- 3.4.2 A replacement NoU cannot include a worker who was not included in the original NoU (section 19G(2)). Where a notice has been issued and an officer subsequently finds that an additional worker not included in that notice is owed arrears, the officer should issue a new notice for that worker.

3.5 Issue of Notice of Underpayment where there are/may be criminal proceedings

- 3.5.1 Section 19B of the 1998 Act allows a compliance officer to issue an NoU with a provision suspending the requirement for the employer to pay a penalty where proceedings have been instituted, or may be instituted, against an employer in respect of a criminal offence under section 31 of the 1998 Act in respect of the same pay reference periods covered by the NoU.
- 3.5.2 The decision whether to issue an NoU containing such a provision should be made on a case by case basis, having regard to the interests of the workers and whether doing so would risk prejudicing the success of the prosecution.

3.6 Quantification of arrears

- 3.6.1 This government believes that where a worker has been underpaid the minimum wage, the arrears that are repaid to the worker must take account of the length of time that has elapsed since the underpayment.
- 3.6.2 An NoU requires an employer to repay to the worker or workers the amount of arrears outstanding on the "relevant day" as a result of underpayment of the minimum wage for the pay reference periods ending before the relevant day which are specified in the notice.
- 3.6.3 The "relevant day" is defined as a day on which a sum was due under section 17 for one or more pay reference periods ending before that day. Where more than one worker is named on the NoU, the relevant day may be different for each worker.
- 3.6.4 As set out in paragraph 3.6.1, where a worker has been underpaid the minimum wage, the arrears that are repaid to the worker must take account of the length of time that has elapsed since the underpayment. Where the rate of minimum wage at the time the arrears are calculated is higher than the minimum wage rate that was in force at the time the underpayment occurred, the arrears should be calculated by reference to the current rate (in accordance with section 17(4)).
- 3.6.5 The underpayment of minimum wage (that is, the difference between the remuneration received by the worker and the minimum wage rate which applied at the time they were underpaid (section 17(2))) is divided by the rate of minimum wage that applied at the time of the underpayment and then multiplied by the rate of minimum wage that is currently in force.
- 3.6.6 Where a worker changes age bands, the current rate of minimum wage to be used in the calculation of arrears should be the current rate for the band that applied to the worker at the time the arrears accrued. So, for example, arrears incurred when the worker was aged 16-17 would be calculated by reference to the current 16-17 rate, not by reference to the **current** 21-24 year old rate (even if the worker is now 21 or over).

3.7 Penalty and quantification of penalty

- 3.7.1 The Secretary of State may, by directions, specify circumstances in which an NoU should not impose a penalty (section 19A(2)). Where the notice includes a requirement to pay a penalty, the penalty may be suspended where criminal proceedings are envisaged or commenced (see paragraph 3.5 above).
- 3.7.2 The Secretary of State has issued two directions. First, a direction that an NoU should not include a penalty where an employer has followed written or published guidance obtained from a government department or its agency about the employer's compliance with minimum wage requirements and this guidance is incorrect.
- 3.7.3 This direction would only apply where the employer can demonstrate to the compliance officer that they have:
- sought written or published guidance from a government department or agency that was applicable to their situation; and
 - obtained written or published guidance; and
 - correctly followed that guidance; and
 - the compliance officer considers that the written or published guidance obtained by the employer was incorrect.
- 3.7.4 Second, written guidance entitled 'Calculating the Minimum Wage' published on the www.gov.uk website prior to 27 February 2015 was potentially misleading about the circumstances when the National Minimum Wage is payable for time when a worker is permitted to sleep.⁶ On 27 February 2015 updated, improved guidance was published.
- 3.7.5. The guidance was of a general nature and also explained that each case may be different. However in light of the above, the Secretary of State has issued a second direction specifying circumstances in which an NoU should not impose a penalty. Taking into account the circumstances of employers who typically use arrangements in which workers are permitted to sleep, the direction provides for a transition period following the publication of the updated guidance.
- 3.7.6 The Secretary of State has issued the following direction:

A Notice of Underpayment is not to impose a financial penalty where

- part of the underpayment is attributable to the treatment of, or arrangements concerning, time when the worker was working and was, by arrangement, permitted to sleep; and
- that part of the underpayment occurred in a pay reference period that ended before 26 July 2017.

3.8 Revised minimum wage penalty percentage

⁶ Specifically the section entitled "sleeping between duties" pages 30-31 in the version published on 1 October 2014.

- 3.8.1 The government increased the penalties imposed on employers that underpay their workers in breach of the minimum wage legislation from 100% to 200% of arrears owed to workers. By increasing penalties for underpayment of the minimum wage it was intended to ensure that employers should comply with the law and pay workers the money they are legally due, instead of being tempted to underpay. This forms part of the wider package of measures set out in paragraph 1.2 above intended to further strengthen enforcement of the minimum wage.
- 3.8.2 The increased NMW penalty came into effect on 1 April 2016. The revised penalty will apply to any NoU relating to a pay reference period beginning on or after 1 April 2016. The penalty percentage has been increased from 100% to 200%. The maximum penalty is £20,000 per worker. The revised penalty is calculated as 200% of the total underpayment for all of the workers specified in an NoU relating to pay reference periods that commence on or after 1 April 2016. Where this amount would be less than £100, the minimum penalty of £100 should still be applied. Where this amount would be more than £20,000, the maximum penalty of £20,000 per worker should be applied. The penalty is reduced by 50% if the unpaid wages and the penalty are paid in full within 14 days.
- 3.8.3 The table below sets out the penalty calculations for minimum wage underpayment according to the time of the pay reference period in which the NoU was issued. For arrears falling across these periods, HMRC will issue NoUs according to the table below to ensure employers pay the maximum penalty for the arrears they owed in each pay reference period.

Table: Penalties for minimum wage underpayment

Time of pay reference period in which NoU was issued	Penalty as a percentage of arrears	Penalty cap
Pre 7 March 2014	50%	£5000 per employer
Between 7 March 2014 and 25 May 2015	100%	£20,000 per worker (implemented through HMRC issuing multiple NOUs)
Between 26 May 2015 and 1 April 2016	100%	£20,000 per worker
Post 1 April 2016	200%	£20,000 per worker

3.9 Enforcement on behalf of seafarers

- 3.9.1 Section 1 of the 1998 Act applies the minimum wage to a worker who 'is working, or ordinarily works' in the UK. Section 40 of the Act provides that a seafarer who works on a UK flagged ship is to be treated as ordinarily working in the UK unless either their employment is wholly outside the UK or they are not ordinarily a resident in the UK.

3.9.2 Guidance on the application of the Equality Act 2010 and the National Minimum Wage for Seafarers is available in the guidance entitled ‘Calculating the National Minimum Wage’.

3.10 Interim approach to enforcement of sleeping time arrears in the social care sector

3.10.1 Under NMW regulations, sleep-in shifts can count as work for which NMW is payable. However, historically many providers have paid a flat rate below the NMW rate for such shifts. The result is that those providers are liable to pay (often substantial) sleeping time arrears. We set out below the Government’s interim approach to the enforcement of those arrears. This is designed to maximise the prospects of workers being paid the full arrears owed to them as soon as possible, while at the same time protecting existing jobs and ensuring the continuity of service provision in the sector.

3.10.2 The need for a temporary, bespoke enforcement approach in this sector has arisen owing to specific and unforeseen circumstances. Initial evidence from the social care sector suggests there are likely to be substantial liabilities relating to sleeping time arrears owed by social care providers which may have accrued over a significant period. The scale of those liabilities could pose a significant risk to the normal operation of the social care market, risking insolvency for providers, job losses and non-payment of arrears for workers and withdrawal of services for vulnerable individuals.

3.10.3 This is a complex issue. Court and employment tribunal judgments have, over time, helped to clarify the position on what constitutes “work” in connection with sleeping time and therefore when the NMW is payable for sleep-in shifts. A recent key judgment set out that a multi-factorial approach should be adopted for assessing each sleeping time case. Government guidance has been updated following developments in the law, but for a period before February 2015 was potentially misleading on this issue.

3.10.4 In the Government’s view, the combination of the critical importance of the social care sector, the significant period over which substantial liabilities for NMW may have accrued in that sector and the complexity of assessment of entitlement to NMW for sleep-in shifts warrant a temporary bespoke approach to enforcement. Any such approach must seek to maximise the payment of arrears to workers whilst having regard to the importance of maintaining stability in the sector in the interests of care recipients as well as providers and their workers.

3.10.5 On 1 November 2017, in recognition of the extraordinary circumstances affecting the social care sector, HMRC introduced the Social Care Compliance Scheme (SCCS). It is an interim enforcement scheme designed to facilitate a solution to the issue of NMW underpayment for sleep-in shifts in the social care sector. It represents a proportionate, time-limited, sector-specific approach which recognises the importance of continued care for vulnerable individuals whilst securing arrears of pay for care workers working sleep-in shifts. Information on the SCCS is available here: <https://www.gov.uk/guidance/tell-hmrc-if-youve-underpaid-national-minimum-wage-in-the-social-care-sector>. The timescales of the SCCS are based around HMRC’s assessment of the period that would typically be needed to investigate a sleeping time case in the social care sector. Providers entering the SCCS will have the benefit of clarity around timescales for repayment.

- 3.10.6 HMRC officers will, taking into account certain criteria set out in the scheme, retain discretion over the operation of the SCCS case by case, including which providers will be permitted to enter the scheme and whether any providers should later be removed from the scheme and subject to normal enforcement processes (see below). Officers will also take steps to check that employers are making adequate progress during the course of their self-review and will have discretion to deal appropriately with any exceptional circumstances. HMRC is issuing a separate employer information pack and officers will provide further guidance as necessary. The scheme will generally be open for providers to opt in to irrespective of whether they have been the subject of complaints to HMRC and this should help to extend the reach of the identification and payment of arrears, as compared with a normal enforcement approach.
- 3.10.7 If an employer chooses not to opt into the scheme, withdraws from it, or fails to meet their obligations once in the scheme (either in not conducting a robust self-review or in not repaying workers) then enforcement will be carried out as usual by HMRC. This means an investigation would be carried out, and an NoU issued if appropriate.
- 3.10.8 There are a limited number of HMRC investigations at an advanced stage that were paused in July 2017. For these cases and for some providers who are not accepted into the scheme (as discussed at paragraph 3.10.6 above), a bespoke financial assessment may be undertaken to establish the impact of repaying liabilities upon that employer's viability. Enforcement action may be delayed for these providers, allowing additional time for the repayment of sleeping time arrears, if the financial assessment establishes that such time is required to avoid threatening the loss of existing care workers' employment and/or the interests of vulnerable service users.
- 3.10.9 The SCCS was launched on 1 November 2017 and will end on 31 March 2019, by which time all providers must have shown that they have repaid their arrears relating to sleeping time. Nothing in the scheme prevents individual workers taking their own legal action (whether in the Employment Tribunal or Court) to recover arrears owing to them. They should seek legal advice before doing so.

Section 4: Policy on HMRC criminal enforcement

Employers bear an important social responsibility for ensuring they pay their employees the national minimum wage (NMW). Payment of the NMW is a legally enforceable right. The NMW helps bring people out of poverty and improves the living standards of some of the poorest in our society. Employers who fail to pay the NMW not only breach the legal obligations they owe to their employees, but they are also contributing to depressing the pay of people working in their local communities. This can cause a downward spiral of pay and working conditions which often results in people choosing to work in the “shadow economy”. People working in the shadow economy usually have poor employment rights and do not pay taxes. The loss of tax revenue has serious consequences for society because it means the Government has less money to spend on vital public services.

Non-compliance with the NMW can also have a devastating effect on businesses because it is very difficult for honest businesses to compete against those who are able to under-cut them as a consequence of not paying the NMW. Set against these factors this policy provides HMRC enforcement teams the guidance they require to deal with breaches of the National Minimum Wage Act 1998 (the 1998 Act) through criminal investigation and prosecution.

4.1 Background

- 4.1.1 As already mentioned in previous chapters, HMRC has a range of enforcement options at its disposal to deal with those who breach the 1998 Act. Where it is appropriate and proportionate to do so, HMRC is able to offer alternative out of court disposals when employers breach the 1998 Act and the level of culpability and harm caused is considered to be low. However, for some employers, criminal investigation followed by prosecution before the criminal courts will by necessity be the most appropriate course of action to take when there is sufficient evidence and it is proportionate and reasonable to do so.
- 4.1.2 Criminal prosecutions will not necessarily result in arrears being paid to workers so civil enforcement action may be pursued in parallel to criminal proceedings to ensure that workers are repaid what is lawfully owed to them.
- 4.1.3 HMRC enforcement teams are invested with powers that enable them to conduct criminal investigations into suspected offences under the 1998 Act. HMRC will use these powers to launch criminal investigations against appropriate suspects with a view to prosecution by the Crown Prosecution Service (CPS) when both the evidential and public interest stages of the Code for Crown Prosecutors (the Code) are satisfied. Each case will be considered on its own merits.
- 4.1.4 Section 31 of the 1998 Act makes provision for criminal proceedings to be brought for a number of offences covering a range of misconduct. These are summarised below:

Section	Offence
31(1)	Employer refuses or wilfully neglects to pay NMW
31(2)	Person fails to keep or preserve NMW records
31(3)	Person knowingly causes or allows false entry in NMW records
31(4)	Person produces or furnishes false NMW records or information
31(5)(a)	Person delays or obstructs NMW compliance officer
31(5)(b)	Person refuses or neglects to answer any questions, furnish information or produce documents when required to do so

- 4.1.5 These criminal offences underpin the Government's national minimum wage policies and labour market enforcement programme. Their existence sends out a clear message to employers that misconduct falling under the 1998 Act could lead to prosecution and an unlimited fine.

4.2 General criteria for prosecution cases

- 4.2.1 HMRC will instigate criminal investigations when appropriate to bolster our overall enforcement strategy.
- 4.2.2 HMRC will investigate the most serious cases and those NMW offences where they form part of a pattern of criminality; including for example, a suspected tax fraud, or cross-government offences such as employing illegal workers. In these cases HMRC investigators will join forces with the police or other criminal investigation teams.
- 4.2.3 There is a balance to be struck between effectiveness and value for money in enforcement. HMRC will focus criminal investigation on cases where prosecution will do most to deter employers from deliberately flouting the law.
- 4.2.4 In a case of failure to pay the NMW, the amount of the alleged arrears owed to employees will not, of itself, be the deciding factor when determining if a criminal investigation should be started. When deciding whether to prosecute cases, the CPS will specifically consider the following factors, as well as those set out in the Code for Crown Prosecutors.
 - (i) The commission of NMW offences over a long period of time will count in favour of prosecution, as it indicates a cynical exploitation of employees.
 - (ii) Where the evidence indicates that NMW offences affect employees belonging to a vulnerable group of people (e.g. because they are physically or mentally disabled or are paid less than the NMW because of their vulnerable status).
 - (iii) The CPS will consider bringing criminal proceedings under the Modern Slavery Act 2015 should the evidence prove that victims have been held in slavery or servitude and have been forced to provide compulsory labour. Cases falling into this category are extremely serious and those suspected of having committing offences can expect to be prosecuted.
 - (iv) There may however be cases which because of their unique facts we are less likely to refer to the CPS for criminal proceedings. For instance, if enforcement or prosecution action could tip an employer into insolvency we would need to consider if the continuation of enforcement action was in the interests of the employees. This is because an insolvent employer may not have the financial means to pay the arrears of wages due to the employees. However, we would not let insolvency or the threat of insolvency prevent us from referring cases to the CPS for criminal proceedings if the level of offending justified this course of action.
- 4.2.5 BEIS and HMRC will keep this approach under review. It may be adjusted both in the light of experience and also in line with other Government initiatives. It is possible, for example, that criminal investigations may be conducted against specific employers who exploit workers because of a change in the labour market landscape in which they operate.

4.3 Likely offences

Employer obstruction – offences under section 31(5) of the 1998 Act

- 4.3.1 It is very important that HMRC compliance officers are able to make enquiries of employers to determine if breaches of the 1998 Act have occurred. A criminal investigation will be started with a view to prosecution where employers are suspected of having intentionally delayed or obstructed officers exercising their powers under the 1998 Act, or where they have refused or neglected to answer questions or provide the information that has been requested. HMRC may be able to tackle obstruction in such circumstances through an NoU. A notice may be served if a compliance officer uses his/her best judgement to determine that a worker has not been paid the minimum wage for any pay reference period (section 19(1)). In many cases, HMRC will have sufficient information to form an opinion, but there will be instances where HMRC will not possess the information required to calculate the level of arrears or even establish the identity of workers who have been underpaid.

Failure to pay the NMW – offences under section 31(1) of the 1998 Act

- 4.3.2 Criminal proceedings will also be considered against employers under section 31(2) of the 1998 Act if they fail to preserve wage records in accordance with the National Minimum Wage Regulations. HMRC regard both the failure to keep or preserve records and the falsification of records as serious offences. When considering whether to take action for failing to keep or preserve records or the falsification of records, HMRC will look at the surrounding circumstances. HMRC will aim to refer cases to the CPS for prosecution where it is clear from enquiries that employers have failed to preserve wage records without good reason or if they have falsified them.
- 4.3.3 An employer who repeatedly fails to pay the NMW risks prosecution under section 31(1) of the 1998 Act. However, HMRC also reserve the right to refer a first failure to pay the NMW to the CPS for consideration of criminal proceedings whenever the circumstances of the case merit this course of action.
- 4.3.4 As set out in paragraph 1.2, the Government has created a new type of enforcement order, a Labour Market Enforcement Order, supported by a criminal offence for non-compliance. The new order is specifically targeted at those employers who deliberately, persistently and brazenly commit breaches of labour law, and fail to take remedial action. This cannot always be done satisfactorily through repeated use of existing penalties or offences, which may lead to continued exploitation of workers.
- 4.3.5 Under the new order, HMRC (as well as the other enforcement bodies covered by the legislation: the Employment Agency Standards (EAS) Inspectorate and the Gangmasters and Labour Abuse Authority (GLAA)) will have the power to request that a business which has already repeatedly or very seriously breached labour market legislation enters into an undertaking to take steps to prevent further labour market offending. This will provide a proportionate mechanism for enforcement bodies to address non-compliant behaviour by working with the business and will be governed by a Code of Practice. This will be used alongside current penalties for failure to pay the National Minimum Wage so that workers will continue to receive the money they are owed.

- 4.3.6 If a business refuses to enter into or fails to comply with the undertaking (or separately is convicted of another labour market offence), a magistrates' court (or Sheriff's Court in Scotland or court of summary jurisdiction in Northern Ireland) will have the power to impose a Labour Market Enforcement Order requiring the business to take steps to avoid the commission of further labour market offences. For the first time, a custodial sentence of up to two years can now be given following some key labour market offences. Further information is available from:
<https://www.gov.uk/government/publications/labour-market-enforcement-undertakings-and-orders-code-of-practice>.

4.4 General considerations for pursuing criminal investigation

- 4.4.1 HMRC will always refer the most serious criminal cases to the CPS for criminal proceedings. When determining if criminal proceedings should be brought CPS prosecutors will apply the Code for Crown Prosecutors (the Code).
- 4.4.2 Relevant considerations for criminal investigation include the level of culpability of the employer and the harm caused to the employees. The higher the level of culpability and harm the more likely it is an employer will be investigated with a view to prosecution under the 1998 Act.
- 4.4.3 Examples of circumstances that might indicate that prosecution would be in the public interest are set out below. These are for illustrative purposes only and are not minimum criteria. We will send cases to the CPS for prosecution when the facts of the case merit this course of action.
- 4.4.4 Factors that might indicate that prosecution is the appropriate course of action include:
- Where the number of workers who have not been paid the NMW exceeds five;
 - Where there has been a previous failure to pay the NMW by the same employer which required action in either the civil courts or the employment tribunal to enforce payment.
 - Where an employer fails to preserve wage records in contravention of the National Minimum Wage Regulations.
 - Where an employer produces or furnishes or knowingly allows or causes to be produced or furnished any record or information s/he knows to be false in a material particular.
 - Where an employer delays or obstructs a compliance officer exercising their functions under the 1998 Act. Where an employer refuses or neglects to provide the information required under the 1998 Act.

4.5 New Director of Labour Market Enforcement

- 4.5.1 As set out in paragraph 1.5, the government has created a new Director of Labour Market Enforcement (“the Director”) in order to provide better leadership and co-ordination of the efforts of the three enforcement bodies working across the spectrum of labour market enforcement - the HMRC NMW team, the Employment Agency Standards Inspectorate (EAS) and the GLAA - with a common view of risk and priorities drawn from shared intelligence. This will allow a joint strategy to be set and resources to be allocated in the best way to achieve the government’s aims of tackling exploitation and ensuring compliance. The Director is a statutory postholder provided for in the Immigration Act 2016.
- 4.5.2 The Director’s remit extends across the whole of the labour market – including direct employment as well as labour providers – and the whole of the spectrum of non-compliance, from accidental infringement to serious criminality.
- 4.5.3 The Director leads an intelligence hub that forms a coherent view of the nature and extent of exploitation and non-compliance in the labour market, and uses this to formulate the overarching labour market enforcement strategy. The intelligence hub will primarily be drawn from HMRC’s NMW enforcement teams, the GLAA, EAS/BEIS and the Home Office, retaining strong links to those bodies.

Section 5: Policy on naming employers who break National Minimum Wage law

5.1 Background

- 5.1.1 In October 2010 the government announced a new scheme to name employers who break minimum wage law. The naming scheme came into effect on 1 January 2011.
- 5.1.2 The objective of the naming scheme is to raise awareness of minimum wage enforcement and deter employers who would otherwise be tempted to break minimum wage law. The government recognises that some employers are more likely to respond to the social and economic sanctions that may flow from details of their payment practices being made public, than from financial deterrents⁷.
- 5.1.3 The naming scheme will ensure that the public and businesses, including workers, prospective workers, and law abiding employers, have access to information which will enable them to make informed choices about who they work for (in the case of workers) and who they do business with (in the case of employers and the general public). The government envisages that raising awareness of minimum wage enforcement in this way could also encourage more workers who have been underpaid to come forward.
- 5.1.4 The government is clear that the naming scheme is not an alternative to prosecution. Employers will not be named under the scheme whilst prosecution proceedings are in hand or are being considered. Where a potential prosecution case is rejected by the Crown Prosecution Service, the employer will still be named. Those who are prosecuted will then also be named.
- 5.1.5 Under the original scheme employers had to meet one of seven criteria plus a financial threshold before they could be named (see sections 5.4 and 5.5 on the original naming criteria).
- 5.1.6 The government revised the scheme from 1 October 2013.

5.2 Revised National Minimum Wage Naming Scheme (from 1 October 2013)

- 5.2.1 The revised scheme will apply to any employer that is investigated by HMRC and issued with a Notice of Underpayment from 1 October 2013 onwards. For cases in which an investigation commenced before 1 October 2013, the previous naming scheme criteria and process applies (see section 5.4).

⁷ Such as the automatic penalty which was brought in by amendments to the National Minimum Wage Act which came into effect on 6 April 2009.

5.3 Naming policy

- 5.3.1 An employer that breaks minimum wage law will be issued with a Notice of Underpayment (NoU) by HMRC. This is a formal notice that sets out the arrears of minimum wage to be repaid by the employer together with the penalty for non-compliance with the requirement to pay workers the minimum wage. An information sheet is given to the employer at the start of the investigation which sets out details about the BEIS naming scheme. The employer will have 28 days to appeal against the NoU issued by HMRC.
- 5.3.2 If the employer does not appeal⁸ or an appeal is unsuccessful HMRC will refer the employer to BEIS to be considered for naming once the HMRC case closure letter has been issued to the employer.
- 5.3.3 BEIS only consider cases for naming where the total arrears owed to workers are more than £100. This financial criterion will be kept under review to ensure that the naming scheme continues to meet the policy objectives outlined in paragraph 5.1.2.
- 5.3.4 The employer will have 14 days from the date of the HMRC case closure letter⁹ to make written representations to BEIS outlining whether they fall under any of the exceptional circumstances for not being named under the scheme. The exceptional circumstances are:
- Naming by BEIS carries a risk of personal harm to an individual or their family.
 - There are national security risks associated with naming in this instance.
 - Other factors which suggest that it would not be in the public interest to name the employer (employer to provide details).
- 5.3.5 In all cases where an employer makes representations to BEIS, the employer will need to provide evidence in support of their case for not being named. If an employer seeks advice from a third party, which is incorrect, it does not necessarily mean that the employer will not be named. Employers have a personal responsibility to ensure that they are paying their workers the correct minimum wage rate. If employers have any questions about the minimum wage they can call Acas on 0300 123 1100 or visit www.gov.uk. Representations are sent to nmw.namingscheme@bis.gsi.gov.uk, or alternatively to:

Department for Business, Energy and Industrial Strategy
National Minimum Wage Team - NMW Naming Scheme Representations
Abbey 1, 3rd Floor
1 Victoria Street
London
SW1H 0ET

⁸ If an employer takes an appeal against the NoU to an Employment Tribunal, HMRC will wait for the judgement before forwarding the case to BEIS to consider for naming. If the appeal is unsuccessful, HMRC will automatically forward to BEIS to consider for naming. HMRC currently publicise the decisions of Employment Tribunal's and County Court Judgements in cases where an employer has unsuccessfully appealed against a NoU and will continue to do so.

⁹ A case closure letter is issued in all cases where an NoU has been issued, including cases where the employer has not paid back arrears and this informs the employer that HMRC's Solicitors Office will now pursue this debt through the County Court.

The details of where to send representations are also provided in the case closure letter.

- 5.3.6 If, on receipt of representations from an employer, BEIS are satisfied that the employer meets one or more of the exceptional circumstances set out in 5.3.3, the employer will not be named under the naming scheme.
- 5.3.7 If BEIS do not receive any representations from the employer within 14 days of the date of the HMRC case closure letter or do not accept the representations made by the employer, the employer will be automatically named under the scheme via a BEIS press notice. BEIS will send a letter to employers stating that they will be named no earlier than 10 days from the date on that letter, attaching the fact sheet that HMRC gave them at the start of the process. BEIS will not maintain a public register of employers who have failed to pay the minimum wage or who have been named.
- 5.3.8 Where compliance officers pursue payment on behalf of the worker or workers in the civil courts under section 19D(1)(c) of the 1998 Act; or in the employment tribunal under section 19D(1)(a) of the 1998 Act (or, in Northern Ireland, the industrial tribunal under section 19D(1)(b) of the 1998 Act), cases are closed but not referred to BEIS for naming until the court or employment tribunal action is complete.

Annex

Original Naming Scheme (1 January 2011- 30 September 2013)

For investigations commenced by HMRC for breaking minimum wage law between 1 January 2011 to 30 September 2013, the original naming scheme criteria and process will be applied. This is set out below.

General criteria for naming cases

HMRC will refer cases to BEIS under the naming scheme where they consider that one or more of the following criteria is met¹⁰:

- i. there is evidence that the employer knowingly or deliberately failed to comply with their minimum wage obligations
- ii. there is evidence that the employer has previously received advice from HMRC about the steps they need to take to ensure future compliance with national minimum wage and has not taken those steps
- iii. there is evidence that the employer has failed to take adequate steps to keep or preserve minimum wage records
- iv. there is evidence that the employer has delayed or obstructed a minimum wage compliance officer in the performance of their duties
- v. there is evidence that the employer has refused or neglected to answer questions put to them by a minimum wage compliance officer
- vi. there is evidence that the employer has refused or neglected to provide information or produce documents to a minimum wage compliance officer
- vii. there is evidence that the employer refused or neglected to pay arrears of the minimum wage to workers, following HMRC intervention, which has resulted in HMRC taking action against the employer to ensure payment of arrears to workers.

¹⁰ MRC will only refer cases to BIS under the naming scheme where they have issued a Notice of Underpayment to the employer requiring them to repay arrears of the NMW to a worker(s) or former worker(s). Employers will not be named under the scheme where they have appealed the Notice of Underpayment and their appeal has not been withdrawn or dismissed. Where an employer's appeal against a Notice of Underpayment is partially accepted, but the criteria (including the financial criteria) is still met, the employer may still be named

Process for referring cases from HMRC to BEIS under the original scheme

At the conclusion of an investigation, if HMRC are satisfied that there is sufficient evidence that an employer meets one or more of the published criteria (see section 5.5) they will refer the case to BEIS setting out the evidence. If BEIS is satisfied that the employer does not meet any of the published criteria no further action will be taken unless the employer fails to comply with the Notice of Underpayment (see criterion vii).

If the case has been referred to the CPS for prosecution, HMRC will not refer the case to BEIS under the naming scheme until the outcome of the referral to the CPS or the outcome of the prosecution (if taken forward) has been determined. The fact that a case has been rejected by the CPS does not necessarily mean that an employer will not be named under the scheme as the criteria for naming and prosecution are different. Similarly if the employer chooses to appeal the Notice of Underpayment, the case will not be referred to BEIS until the appeal has been concluded. Where the employer successfully appeals against the Notice of Underpayment they will not be named (see footnote 6).

If, having reviewed the evidence, BEIS decide that the employer should be named, notwithstanding any representations made by the employer, the employer will be named in a press notice. BEIS will not maintain a public register of employers who have failed to pay the minimum wage or who have been named.

If further information that would have affected the decision to name the employer comes to light prior to the press notice being issued, this will be fed into the decision making process. If such information comes to light after the press notice has been issued, for example, where the employer makes late representations which would have had a bearing on the decision to name them, BEIS will consider whether it would be appropriate, in the circumstances of the case, to retract the original press notice.

Naming Examples under the original scheme

The following examples are for illustrative purposes only and are not, and are not intended to be, an exhaustive list of the circumstances in which BEIS will name an employer.

Knowingly or deliberately failed to comply with their minimum wage obligations

There is evidence that an employer has intentionally failed to pay the minimum wage to one or more workers (including where the breach has been drawn the employer's attention).

Previously received advice from HMRC about the steps they need to take to ensure future compliance with minimum wage and has not taken those steps:

An employer fails to implement advice given by HMRC and is found to be non-compliant in respect of the same or similar issues/areas on which they received advice.

Failed to take adequate steps to keep or preserve minimum wage records

An employer fails to keep or preserve sufficient records for HMRC to determine whether the minimum wage has been paid and it is necessary to rely on other evidence (e.g. the workers' own records) to establish the debt.

Delayed or obstructed an minimum wage compliance officer in the performance of their duties

An employer obstructs HMRC's investigation by cancelling, without reasonable explanation, pre-arranged meetings. The obstruction hampers or significantly delays HMRC's investigation. The employer is liable to be named under the scheme notwithstanding the fact that he eventually cooperates.

Refused or neglected to answer questions put to them by a minimum wage compliance officer

An employer fails to provide satisfactory answers to a compliance officer's questions at interview or in writing. HMRC make a further request to provide the information, but still do not receive this information within a reasonable time.

Refused or neglected to provide information or produce documents to a minimum wage compliance officer

An employer fails to provide documentation which would assist HMRC in establishing whether or not arrears of the minimum wage are owed. The documentation is eventually provided but only after a significant delay.

Neglected to pay arrears of minimum wage to workers following HMRC intervention

Following an employer's appeal against a Notice of Underpayment being dismissed, the **employer** did not pay the arrears owed to the workers. As a result a claim was made to the civil court to recover the arrears owed.



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