



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

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1 Introduction

- 1.1 The government is committed to increasing support for lower earners and improving the rewards to work. The National Living Wage (NLW) and the National Minimum Wage (NMW) (together referred to as 'minimum wage') provide protection to low income workers and incentives to work. The minimum wage 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 minimum wage should receive it.¹ The enforcement of the minimum wage 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 minimum wage. The Department for Business, Energy and Industrial Strategy (BEIS) is responsible for minimum wage policy, including the policy on compliance and enforcement. HM Revenue and Customs (HMRC) enforce the NMW Act on behalf of BEIS.
- 1.3 The government seeks to support employers to ensure the minimum wage is paid correctly and communicates to workers to raise awareness of entitlement and routes of redress. [Extensive guidance is available to help employers](#). HMRC implement a programme of 'upstream' preventative activities (e.g. webinars, web forum) to improve compliance and help ensure workers get what they are owed without the need for enforcement. If employers have any questions about the minimum wage, they can call ACAS on 0300 123 1100. HMRC and BEIS also run regular campaigns signposting employers to further information, and occasionally host helplines for specific issues.

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/calculating-the-minimum-wage

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 underpaid²; 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 compliance officers for the purposes of enforcing 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.³ 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.

² Subject to the detailed rules that apply under the National Minimum Wage Regulations 2015 in relation to which payments count as national minimum wage.

³ 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.

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, including use of self-correction

- 3.3.1 A Notice of Underpayment (NoU) should be issued where a compliance officer finds that arrears of minimum wage were outstanding at the start of an investigation, though HMRC officers have discretion over the issuing of an NoU, as set out in [paragraph 3.3.6](#) onwards below. 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 The government seeks to ensure that 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.

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- 3.3.3 NoUs should generally 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. This includes where the employer has repaid the arrears to the worker after the start of the investigation and before the date the notice is issued.
- 3.3.4 An NoU should also generally 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 uplifted arrears calculated in accordance with section 17(4) which reflect the increase to the minimum wage rates since the arrears originally arose).
- 3.3.5 An NoU should ordinarily not be issued where an employer 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. Nudge activity involves HMRC sending the same, or a similar, communication to multiple employers at the same time, to help them proactively identify underpayment. It therefore does not mark the start of an investigation into any individual employer.
- 3.3.6 HMRC compliance officers have discretion over whether to issue an NoU, based on their assessment of the facts of the particular case. 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 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. Even in those cases where an NOU is not issued, HMRC will still require the employer to pay any arrears owed.
- 3.3.7 HMRC officers may allow self-correction in other circumstances. For example, HMRC officers may issue an NoU for the full arrears for all current workers and require the employer to self-correct for ex-workers. In all cases of self-correction HMRC needs to be confident that the employer will self-correct accurately and will not hesitate to issue an NoU if the employer is not fully compliant. HMRC ensures that all workers receive the money they are due.

- 3.3.9 In all cases where an officer is considering using self-correction, they are likely to wish to be satisfied that the employer:
- has engaged cooperatively with HMRC's investigation;
 - has taken, or will take, steps to ensure compliance with minimum wage rules going forward; and
 - has not had other minimum wage breaches relating to a similar failing in the previous 6 years.
- 3.3.10 Where there may be other arrears risks in the same pay reference period, an officer will also take those into account when deciding whether to use self-correction (because if an NoU is issued for a pay reference period it must include all the arrears in that period, so self-correction may only be used for all the arrears in a particular period). However, where this is not the case, it is unlikely that self-correction would be used.
- 3.3.11 These considerations for the use of self-correction are for general guidance and are not exhaustive or for rigid application. Decisions about the use of self-correction in a particular case are always for officers to make in light of all the facts of the particular case.
- 3.3.12 A time limited scheme of assisted self-correction by social care providers in connection with sleeping time shifts was introduced in early November 2017 and has since closed. [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 section 3.5 above](#)) and eligibility for naming suspended.
- 3.7.2 The Secretary of State has issued three 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 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.⁴ 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 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 In relation to the above, the Secretary of State 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.
- 3.7.7 Third, a direction has been issued relating to cases where NMW underpayments have arisen as a consequence of certain employer deductions from pay. This direction addresses some specific instances where the design of a salary sacrifice or deduction scheme is associated with NMW underpayments, despite delivering benefits to participating workers, and the worker in practical terms suffers little or no detriment.
- 3.7.8 The intention of the direction is to ensure that historical liabilities are repaid to workers, whilst providing employers with an opportunity to ensure their practices going forward are compliant with the law. The circumstances in which the direction will apply are tightly limited to ensure the continued protection of workers. The full text of this direction is set out in the [annex](#).

In summary- the direction has broadly the following effect. If, following an HMRC investigation, the only reason minimum wage was underpaid was because the employer made a deduction from a worker's pay/ enrolled them in a salary sacrifice scheme, with the worker's consent, and the worker has received the correct good/benefit as a result of that deduction (e.g. childcare vouchers, savings club,

⁴ Specifically the section entitled 'sleeping between duties' pages 30-31 in the version published on 1 October 2014.

season ticket etc.), the employer will not face a penalty (or be named). This direction does not apply to deductions for items: in connection with employment (e.g. uniform), expenses or accommodation. Employers that have been convicted of NMW offences, been party to a labour market enforcement undertaking or order, or who have been issued an NoU in the past six years (unless for not more than £500, withdrawn or under appeal) will not benefit from this direction.

3.8 Revised minimum wage penalty percentage

- 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 applies 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 all of the unpaid wages and 50% of 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 appropriate 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%	£5,000 per employer
Between 7 March 2014 and 25 May 2015	100%	£20,000 per worker
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 from: www.gov.uk/government/publications/seafarers-employment-rights-and-minimum-wage.
- 3.9.3 The Department for Transport (DfT) is currently working on a draft Order to extend the right to the National Minimum Wage to Seafarers working in the UK's territorial sea. DfT are hopeful that the draft Order will be laid before Parliament for approval later this year.

3.10 Sleep-in shifts

- 3.10.1 The Court of Appeal judgment in the joined cases of Mencap v Tomlinson-Blake and Shannon v Rampersad ([2018] EWCA Civ 1641) was published on 13 July 2018. In the Court of Appeal's judgment, employers are not required to pay the National Minimum Wage for 'sleep-in' shifts in the specific circumstances defined by the Court. The judgment is reflected in updated guidance: www.gov.uk/government/publications/calculating-the-minimum-wage.
- 3.10.2 The Supreme Court has granted Unison leave to appeal against the Court of Appeal judgment. In the meantime, the Court of Appeal judgment constitutes the current interpretation of the law.

4 Policy on HMRC criminal enforcement

4.1 Background

- 4.1.1 Employers bear an important social responsibility for ensuring they pay their workers 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 workers, 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.
- 4.1.2 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.
- 4.1.3 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.
- 4.1.4 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.
- 4.1.5 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.

4.1.6 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

4.1.7 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 workers 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 workers.
- (ii) Where the evidence indicates that NMW offences affect workers 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 workers. This is because an insolvent employer may not have the financial means to pay the arrears of wages due to the workers. 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 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 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:
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 workers. 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 Director of Labour Market Enforcement

- 4.5.1 The government has created a 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.

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 deterrents.
- 5.1.3 As outlined in previous sections, following issue of an NoU, employers have 28 days to pay all arrears to workers and the full penalty (or 14 days if they wish to take advantage of a 50% reduction in the penalty charge). HMRC refers details to BEIS, and BEIS considers whether to name the employer once all arrears have been paid to workers and the appropriate penalty has been paid.
- 5.1.4 If an employer appeals the NoU, they will not be referred to BEIS to consider Naming until the appeal is decided and is unsuccessful (if that is the case) and the appropriate penalty has been paid Naming will proceed if the employers does not appeal but fails to pay the arrears and/or penalty. The government is clear that the naming scheme is not an alternative to prosecution. **However, if no appeal has been made and the NoU remains unpaid for 28 days, then the government will consider naming.** [See para 5.2.1 for details.](#)
- 5.1.5 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.

5.2 Revised National Minimum Wage Naming Scheme

- 5.2.1 The naming scheme was revised in October 2013, and then paused in July 2018, to take account of Ministerial concerns and recommendations made by the previous Director of Labour Market Enforcement. Naming will recommence in 2020, on a revised basis. Specifically, the government will;
- increase the arrears threshold over which employers will be considered for naming from over £100 to over £500 (with exceptions as set out at 5.3.4)
 - provide more information about reasons for breaches
 - publish an educational bulletin for employers, highlighting common reasons for underpayment
 - name employers more frequently than previously

- 5.2.2 The government is also making further changes to the naming scheme: If a NoU remains unpaid 28 days after it has been issued and no appeal has been made, HMRC prepares instructions for solicitors to commence recovery action. Previously, these employers would not be referred to BEIS for naming until the court or employment tribunal action is complete. **Going forward, the government is amending this policy and HMRC will refer details to BEIS to consider naming at the point that solicitors are instructed to commence recovery action.** This will ensure that the employers who have been least compliant with the process are named, and reduces delay between issuing the NoU and naming (payment recovery can go on for years and under the previous process, the details would not be referred to BEIS until payment had been made in full or the payment arrangement broke down).
- 5.2.3 The revised naming scheme set out in further detail from 5.3. The revised scheme applies to all cases from the date of publication of the revisions, including those where the NoU was issued before this date.

5.3 National Minimum Wage Naming Scheme from 2020 onwards

- 5.3.1 An employer that breaks minimum wage law will be issued with an 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 appeal⁵ 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 considers all cases for naming where the total arrears owed to workers was more than £500. However, a lower threshold of arrears of more than £100 applies in cases where on the date the NoU was issued the employer:
- has been issued with another NoU within the previous six years⁶;
 - was subject to an outstanding Labour Market Enforcement Order or Undertaking⁷, or,
 - has previously been convicted of an NMW offence which is not spent.

These criteria will be kept under review to ensure that the naming scheme continues to meet the policy objectives outlined in [paragraph 5.1.2](#).

⁵ If an employer takes an appeal against the NoU to an Employment Tribunal, HMRC will wait for the judgment 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 Judgments in cases where an employer has unsuccessfully appealed against an NoU and will continue to do so.

⁶ Unless the NoU was withdrawn by HMRC without replacement, or rescinded by a tribunal on appeal.

⁷ As referred to in Part 1 of the Immigration Act 2016.

- 5.3.4 The employer will have 14 days from the date of the HMRC case closure letter⁸ 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 practice, BEIS accepts very few representations. BEIS is most likely to accept representations where there is real evidence of a risk of personal harm. BEIS takes a restrictive view on what is in the public interest: for example, BEIS has named businesses that have made 'public interest' representations on grounds that they inadvertently breached the rules, or that they relied on advice from a third party, or because they are a small business that is relied on by the community. This is because it is the employer's responsibility to make sure they are compliant with the legislation. 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 employers have any questions about the minimum wage, they can call Acas on 0300 1231100 or visit GOV.UK. Employer representations on naming are not handled by ACAS and should be sent to nmw.namingscheme@beis.gov.uk, or alternatively to:
- Department for Business, Energy and Industrial Strategy
National Minimum Wage Team - NMW Naming Scheme Representations
Spur 2, 1st Floor
1 Victoria Street
London
SW1H 0ET
- 5.3.6 The details of where to send representations are also provided in the case closure letter. BEIS will also inform an employer if they are under consideration for naming in 'Notification of Naming' letter and that all representations must be received by 14 days after the date on the letter. This date is clearly stated in the letter to prevent confusion. The same letter also informs the employer they will be named no sooner than 10 working days after the deadline for representations has passed. 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 5.3.4, the employer will not be named under the naming scheme and will receive a letter informing them of this.
- 5.3.7 If BEIS do not receive any representations from the employer within the 14 days on the 'Notification of Naming' letter or do not accept the representations made by the employer, the employer will be automatically named under the scheme. If the employer made no representation they will receive no further correspondence until they are sent a copy of the press release, or unless they opt to be added to the email list to receive an electronic copy before publication, if the employer did make a representation and it was not accepted they will be sent a letter informing them that they will be named no

⁸ 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 solicitors will now pursue this debt through the civil courts.

earlier than 10 working days from the date on that letter, attaching the fact sheet that HMRC gave them at the start of the process.

- 5.3.8 BEIS will also publish a quarterly educational bulletin with the aims of raising awareness of relevant law and helping employers to comply without the need for enforcement action. These bulletins will include statistical information on the types of breaches found recently, as well as anonymised case studies to contextualise breaches of minimum wage regulations.
- 5.3.9 Employers can be named once for every NoU that is issued. If they are issued multiple NoUs, then they may also be named multiple times.

Annex: Secretary of State direction

The Secretary of State has issued the following direction on 11 February 2020:

“A notice of underpayment relating to a worker for a pay reference period (or relating to more than one worker and / or to more than one pay reference period) is not to impose a requirement to pay a financial penalty where all of the following five conditions are met in respect of each such worker and each such pay reference period:

First condition: nature of the underpayment

All of the underpayment relating to the worker for the pay reference period is attributable to one or more of the following:

- (1) a reduction by the employer of the worker’s pay in accordance with a salary sacrifice scheme, unless the sacrifice is made in order to comply with a requirement imposed by the employer in connection with the worker’s employment;
- (2) an amount deducted by the employer from the worker’s pay as respects the purchase by the worker of goods or services from the employer, unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker’s employment;
- (3) an amount deducted by the employer from the worker’s pay under the terms of a savings scheme operated by the employer for the benefit of the worker and in accordance with which all amounts deducted are subsequently paid or to be paid to the worker.

Second condition: exclusions

No part of the underpayment relied upon to meet the first condition is attributable to either of the following:

- (1) a deduction falling within the scope of regulation 13 of the National Minimum Wage Regulations 2015 (deductions or payments as respects a worker’s expenditure);
- (2) a deduction falling within the scope of regulation 14 of the National Minimum Wage Regulations 2015 (deductions or payments as respects living accommodation).

Third condition: consent of the worker

The worker has consented to the reduction or deduction.

Fourth condition: receipt of goods or services or benefits by the worker

The worker has received the relevant goods or services, or the benefits envisaged under the relevant salary sacrifice scheme, or the repayment of monies under the relevant savings scheme, in full or in part and, where in part, in full compliance to date with the relevant terms or arrangements.

Fifth condition: prior conduct of the employer

None of the following applies to the employer:

- (1) the employer has been convicted of an offence under the National Minimum Wage Act 1998 and that conviction remains unspent under the Rehabilitation of Offenders Act 1974, the Rehabilitation of Offenders (Northern Ireland) Order 1978 or other relevant legislation relating to the rehabilitation of offenders;
- (2) the employer has given a labour market enforcement undertaking or been the subject of a labour market enforcement order (as referred to in Part 1 of the Immigration Act 2016) which relates wholly or partly to the National Minimum Wage and which (so far as it relates to the National Minimum Wage) remains in any respect outstanding; or
- (3) the employer has within the six years prior to the date of the notice of underpayment been served with a previous notice of underpayment relating to the National Minimum Wage, unless: (i) the amount of the underpayment in the previous notice was not more than £500; (ii) the previous notice was withdrawn without replacement or rescinded on appeal; or (iii) the previous notice remains under appeal.

This direction applies to notices of underpayment issued after the date of the direction, whether or not the related investigation commenced before the date of the direction.

This direction will continue unless and until amended or revoked by a further direction under section 19A(3) National Minimum Wage Act 1998.”

The Secretary of State intends to review the effect of the direction in 2021.

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