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Department for  
Business, Energy  
& Industrial Strategy

# Code of Practice on Labour Market Enforcement Undertakings and Orders

November 2016



# **Immigration Act 2016:**

## **Code of Practice on Labour Market Enforcement Undertakings and Orders**

Presented to Parliament pursuant to section 25(3)(a) of the  
Immigration Act 2016



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## 1. References in this Code

“**Enforcing Authorities**” is defined in section 14(5) of the Immigration Act 2016 (“the Act”) and means the Employment Agency Standards Inspectorate (EAS), HMRC National Minimum Wage Enforcement (HMRC-NMW) and the Gangmasters and Labour Abuse Authority (GLAA).

“**Trigger offence**” is defined in section 14(4) of the Act and means an offence under the Employment Agencies (EA) Act 1973 (other than one under section 9(4)(b) of that Act), an offence under the National Minimum Wage (NMW) Act 1998 or an offence under the Gangmasters (Licensing) (G(L)) Act 2004 including secondary and inchoate offences.

“**Subject**” is defined in section 14(3) of the Act and means a person entering into an LME undertaking.

“**Respondent**” is defined in section 18(2) of the Act and means a person or business who is subject to an LME order.

## 2. Introduction

1. The Government has introduced measures in the Immigration Act 2016 (“the Act”) to provide a more coherent framework for identifying and preventing abuses of labour market legislation, and to strengthen the enforcement response. This includes new powers to apply Labour Market Enforcement (LME) undertakings and orders, which are intended for more serious or persistent offenders where this type of intervention is judged appropriate to prevent further offending. Enforcing authorities will have regard to this Code when using the LME regime under the Act.

2. The new system of undertakings is designed to complement the existing powers already available to the enforcing authorities, and to be deployed where appropriate to prevent further labour market offences. These existing powers include:

- prosecution for offences under National Minimum Wage, Employment Agencies and Gangmaster Licensing legislation<sup>1</sup>;
- the imposition of civil penalties and “naming and shaming”<sup>2</sup> (for businesses which fail to comply with the National Minimum Wage Act);
- the imposition of prohibition orders preventing a person from carrying on an employment agency or employment business;
- the refusal or revocation of a licence to act as a gangmaster and
- lower level administrative measures such as warning letters.

3. Prosecution under existing legislation will remain available for the most serious offenders and enforcing authorities should consider on a case by case basis which sanction is most appropriate in the circumstances. The best response may be a combination of an existing civil or criminal penalty and an LME undertaking.

4. The introduction of the new LME undertakings and orders regime is integral to the Government’s intention to introduce a broader and harder edge to enforcement of labour market offences where these are committed deliberately or recklessly and are not simply a consequence of a straightforward administrative error. The purpose of labour market legislation is to ensure there is a level playing field for legitimate competition between law-abiding businesses, in which workers are guaranteed the national living wage and are protected from exploitation. These objectives are undermined if these important legal protections are not upheld and enforced. Tackling non-compliant business supports growth by supporting legitimate businesses which treat their workers properly.

5. The new regime of LME undertakings and orders means that, for the first time, a prison sentence can ultimately result from some key labour market offences which currently only attract a civil penalty or criminal fine. A two year custodial penalty and/or unlimited fine is available where a business breaches an LME order which has been made by a court either following conviction for a trigger offence or on application from an enforcing authority

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<sup>1</sup>Offences under section 31 of the NMW Act 1998 include failure to pay NMW and associated offences relating to record keeping and obstruction; Offences under the EA Act 1973 include failing to comply with a prohibition order, contravening regulations or the restriction on charging a work finding fee and associated offences relating to record keeping and obstruction; Offences under the G(L)A Act 2004 include acting as a gangmaster without a licence, entering into arrangements with an unlicensed gangmaster and associated offences relating to record keeping and obstruction.

<sup>2</sup> Naming and shaming is a function of BEIS

following failure to enter into, or breach of, an LME undertaking. However, this is balanced by providing the employer with ample opportunity to make a sustained change to their behaviour to avert prosecution. The regime is designed to ensure that employers are no longer able to treat fines as acceptable business overheads.

6. The Government expects to see the enforcing authorities work together collaboratively to deliver the priorities in the annual strategy set out by the Director of Labour Market Enforcement (hereafter “the Director”), to share intelligence and to co-ordinate enforcement activity where the suspected offences in question engage the interests/responsibilities of more than one of the agencies. The authorities will have regard to the Director’s strategy when taking decisions on their own caseloads. The Government expects the authorities to work collaboratively to determine which agency should lead in the context of a joint investigation and which enforcement tools would provide the most effective response to the offending behaviour and would be most likely to prevent it recurring.

7. The Government intends that the GLAA should be responsible for investigating the more serious cases of labour market abuse involving a modern slavery element or multiple offences across a range of specified legislation, working with the police and National Crime Agency (NCA) where appropriate. Although the list of labour market offences that the Director is working to prevent includes some Modern Slavery Act offences, these are too serious to be included within the scope of the undertakings and orders regime and they have maximum penalties which are far in excess of the two year custodial penalty for breach of an LME order.

### **What is the purpose of this Code?**

8. This Code aims to ensure that LME undertakings and orders are applied in a consistent manner by the enforcing authorities. It is a statutory Code, issued under section 25 of the Immigration Act 2016. It has been approved by the Home Secretary and BEIS Secretary of State and laid before Parliament.

### **How should this Code of Practice be used?**

9. The Code sets out the factors to be considered by the enforcing authorities when using the LME regime. It also sets out how the enforcing authorities should work together. It should be read alongside the Director’s strategy and complements existing joint working processes.

### **Who should use this Code of Practice?**

10. Enforcing authorities will have regard to this Code when using the LME regime under the Act. The Code does not impose any legal duties on employers, gangmasters, businesses or enforcing authorities, nor is it an authoritative statement of the law: only the courts can provide that. However, the Code may be used as evidence in legal proceedings and courts will take account of any part of the Code which may be relevant.



## Extent

11. All trigger offences can trigger the use of an LME undertaking in Great Britain. Only NMW trigger offences can do so in Northern Ireland.

## Who can use the regime?

12. The EAS can seek an LME undertaking, apply for an LME order and investigate a breach of an LME order where the trigger offence is under the Employment Agencies Act 1973 (sections 14(5)(a) and 26(1) of the 2016 Act).

13. HMRC NMW can seek an LME undertaking, apply for an LME order and investigate a breach of an LME order where the trigger offence is under the National Minimum Wage Act 1998 (sections 14(5)(b) and 26(2) of the 2016 Act).

14. GLAA enforcement officers can seek an LME undertaking, apply for an LME order and investigate a breach of an LME order where the trigger offence is under the Gangmasters (Licensing) Act 2004 (sections 14(5)(c) and 26(3) of the 2016 Act).

15. Trained GLAA officers who have wider labour market enforcement powers can seek an LME undertaking, apply for an LME order and investigate a breach of an LME order where the trigger offence is under the Gangmasters (Licensing) Act 2004, the Employment Agencies Act 1973 or the National Minimum Wage Act 1998 (sections 14 and 26 of the 2016 Act).

## 3. LME undertakings

### Circumstances when LME undertakings should be considered

16. An undertaking may be sought where an enforcing authority (see section 1) believes a trigger offence (see section 1) has been or is being committed and a measure in the undertaking is necessary to prevent further non-compliance. They are not designed to replace the use of current sanctions to punish breaches and seek redress and should be used alongside these (see chapter 4).

17. The following factors should be taken into account by the enforcing authority before seeking an undertaking from a business:

- the number of trigger offences that are believed to have been committed;
- if previous enforcement action has been taken;
- the number of workers affected by the offence;
- any harm, physical or otherwise, to workers;
- the amount of money due to workers;
- whether the breach believed to have been committed was committed recklessly or intentionally, as opposed to by straightforward error, and if so;
- the level of recklessness by the business that led to the breach; and

- whether the enforcing authority believes that the breach was committed intentionally.

18. Enforcing authorities seeking an undertaking should consider whether they are prepared to take reasonable steps to monitor whether the recipient is adhering to it and to apply to the courts for an LME order in cases where the subject of an undertaking has failed to comply with its terms.

#### Measures in an LME undertaking or order

19. LME undertakings or orders may include prohibitions, restrictions or impose requirements on businesses, only if the measures do one or both of the following:

- prevent or reduce the risk of non-compliance with requirements in the enactment containing the trigger offence; or
- bring the existence of the undertaking, the circumstances in which it was given and any action taken (or not taken) to the attention of interested parties, or (in the case of action taken/not taken) to the attention of the enforcing authorities.

20. In addition, the measures in LME undertakings or orders must be just and reasonable; the undertaking or order must make clear how the measures address the trigger offence that the enforcing authority suspects has been committed and any risk of future non-compliance with the legislation which contains the trigger offence.

21. The Government expects the enforcing authorities to use their expertise and knowledge of the type of breach to choose the most appropriate measures to prevent future non-compliance in each case. Therefore this Code does not contain an exhaustive list of possible measures. Instead, the case study below provides illustrative examples.

#### Case study 1:

Measures match non-compliance
GLA - A short period of operating without a licence, where there is no exploitation of workers, or any identified non-compliance with labour market legislation including the GLA licensing standards, might result in a decision not to prosecute but to issue an undertaking that a person/business applies for a licence within a given period, does not continue to operate illegally during that time, and corrects any identified non-compliance before a licence is granted.

22. Where the trigger offence is a breach of the National Minimum Wage Act 1998 and the £100 de minimis threshold for naming and shaming has not been reached, enforcing authorities should consider carefully whether it is appropriate for an undertaking to contain a

measure requiring the subject to make interested parties aware of it. As the LME regime will be used against serious and persistent offenders, such a measure may still be appropriate on occasion where the subject is a persistent offender but the threshold has not been met in the individual case in question.

#### Process for giving notice of an undertaking

23. A notice seeking an undertaking may be given by the enforcing authority to a business. The undertaking cannot be imposed on the business: the business determines whether or not to give the undertaking. However, see below in relation to LME orders when a business does not give an undertaking.

24. A notice seeking the undertaking may be served in person, by post or electronically, (subject to the person specifying the electronic format and address), and can be served on an individual, a company officer or a partner, depending on the type of business. The notice must set out which offence the enforcing authority believes has been or is being committed, why the enforcing authority believes this to be the case, and will invite the person to give an undertaking to comply with any prohibitions, restrictions or requirements set by the enforcing authority (see 'Measures in an LME undertaking or order', above). The notice must set out how these measures prevent or reduce the risk of the particular non-compliance identified.

25. An undertaking can be given by an individual, a company or both.

#### Negotiation period

26. A negotiation period of 14 days (or alternative period if the enforcing authority so proposes) will be triggered by service of the notice given to the business to provide an opportunity for them to propose alternative means of achieving compliance. If that alternative is not accepted by the enforcing authority (because the enforcing authority does not believe that it will achieve compliance to a similar degree or timescale) and the person does not agree to the measures in the original notice, the person is deemed to have refused to give an undertaking. In these circumstances, an enforcing body may apply to the courts for an LME order under section 19 of the Immigration Act 2016, or pursue alternative action under existing legal powers. Save in exceptional circumstances, an enforcing authority should always take one of these actions. This is to preserve the integrity of the LME undertakings regime and enable it to act as a deterrent.

#### Duration

27. An undertaking takes effect when it is accepted by the enforcing authority unless a later date is specified in the undertaking. The duration is specified in the undertaking subject to a maximum of 2 years.

#### Monitoring compliance

28. When an undertaking has been accepted, the enforcing authority should determine on a case by case basis how, and at what intervals, compliance with the measures should be monitored. This should be proportionate and in accordance with the Director's strategy. For

example, if a business has used the services of an unlicensed gangmaster, an undertaking could require that business to notify the enforcing authority when new gangmasters are used. An initial visit could be made to check that the business was no longer using unlicensed gangmasters. The business would also be expected to register for the GLAA's active check service for all gangmasters that it used to ensure that it did not inadvertently use unlicensed gangmasters in the future. The undertaking could remain in place until the enforcing authority was satisfied that arrangements were in place to check that only licensed gangmasters were being used (subject to the two year maximum). A complaint from a worker might indicate the need for a follow up visit.

## Release

29. A business can be released from an undertaking by the enforcing authority and must be released where, in the judgement of the enforcing authority, compliance has been achieved and the compliance will be maintained without the measures in the undertaking being in place.

30. This will be the case either where the measures in the undertaking have been acted upon, or compliance has been achieved through measures other than that/those set out in the undertaking. It would, however, be appropriate for the enforcing authority to maintain the undertaking if it believed that, despite having complied on a particular occasion, the measures remained necessary to prevent future non-compliance. This requires the enforcing authority to form a view on the behaviour and response of the subject of the undertaking in the round.

31. If the practical measures contained in the undertaking have been taken by the business in question and compliance with the requirements of the legislation containing the trigger offence has still not been achieved, the enforcing authority should consider whether the original undertaking was inadequate, and whether the subject should be released from it. In these circumstances, the enforcing authority should consider whether, to secure compliance, a new undertaking should be sought containing different measures.

## Case study 2:

Must be released as no further risk of trigger offence
<ul style="list-style-type: none"><li>• Enforcing authority seeks an undertaking with measure A.</li><li>• Business gives undertaking on A but does B instead.</li><li>• Enforcing authority must release undertaking if compliance achieved using measure B, unless it believes it is necessary to leave measure A in place to prevent future non-compliance.</li></ul>

## Breaches of LME undertakings

32. Save in exceptional circumstances, an enforcing authority should apply to a court for an LME order if it believes that an undertaking has been breached. The process is set out in the next chapter. This is to preserve the integrity of the LME undertakings regime and ensure that it acts as a suitably strong deterrent to prevent future offending.

## **4. LME orders**

### LME orders on application

33. An enforcing authority may apply to the court for an LME order where an undertaking has not been given within the negotiation period or where an undertaking has been breached. The standard of proof relating to the breach is the balance of probabilities. The higher criminal standard of proof will be applied if the respondent is prosecuted for breaching an LME order imposed by the court. This provides the business with a further opportunity to address non-compliance before facing a potential criminal sanction.

34. The relevant court is the magistrates' court in England and Wales, the sheriff court in Scotland or the court of summary jurisdiction in Northern Ireland, according to where the conduct constituting the trigger offence took place.

35. The scope of measures in an LME order mirrors that of the related undertaking, in that the measures must be just and reasonable. The enforcing authority will suggest measures when it applies to the court for an order, although a court is not obliged to include the measures suggested, or the measures contained in the undertaking. An LME order takes effect on the date specified in it by the court and has the same maximum duration as an undertaking (2 years). When an order is made, a court may release the respondent from a previous order made in the same jurisdiction or from an undertaking given in relation to the same trigger offence.

### LME orders following conviction

36. A sentencing court may make an LME order where the respondent has been convicted of a trigger offence. Enforcing Authorities will wish to consider at the time of conviction whether to invite the court to make an LME order in addition to sentencing for the trigger offence.

### Variation and Discharge

37. The respondent or the enforcing authority which applied for the order can apply to the court that made the order for it to be varied or discharged. Where the order was made following conviction, only the enforcing authority whose investigation led to the prosecution can apply.

### Breaches of LME orders

38. An offence is committed if the respondent fails to comply with an LME order.

39. The criminal standard of proof applies – i.e. that it is beyond reasonable doubt that the respondent has breached the LME order. The maximum penalty is 2 years' imprisonment and/or a fine on conviction on indictment and 12 months' imprisonment<sup>3</sup> (6 months in Northern Ireland) and/or a fine on summary conviction.

40. It is not necessary to wait until a new trigger offence is committed before prosecuting for breach of the LME order- it is enough that one of the measures in the order has not been complied with.

41. Bodies corporate, unincorporated associations and partnerships are liable to prosecution, as is an individual company officer where the offending conduct is attributable to their neglect or was committed with their consent or connivance.

## **5. How the enforcement regime of LME undertakings and orders sits alongside existing sanctions already available to enforcing authorities**

42. Undertakings may be used in parallel or as an alternative to existing powers available to enforcing authorities (as to which see paragraph 2). Enforcing authorities will determine the appropriate approach to adopt in each case based on their assessment of the best means of preventing or reducing the risk of further labour market offences being committed by the business in question. For example, an employment agency may have been fined for contravening the restriction on charging a work finding fee. If this is not a first offence or if the impact on workers is significant, EAS may consider it appropriate to seek an undertaking that the agency will not charge a work finding fee. This would prevent that agency treating the fine as an acceptable business overhead and charging the fee again within the validity of the undertaking. Individuals in the agency may ultimately face a custodial sentence (if it breaches the undertaking and a court makes an LME order) if it carries on contravening this restriction.

43. LME undertakings and orders are an additional tool in more serious and persistent cases, where the enforcing authority is of the view that existing civil sanctions will not prevent or stop the non-compliance and prosecution is not yet proportionate. For example, a previous civil penalty or other sanction may have already been given but the offending behaviour has continued or the business has resorted to a different type of non-compliance in order to maintain profits. The existence of an undertaking or order will ensure that there are consequences for businesses which treat a civil penalty or fine as an acceptable overhead and continue to mistreat workers.

44. The situation should be assessed on a case by case basis to ensure that the sanction is proportionate to the trigger offence. For example, although the primary objective of NMW enforcement is to recover money for the worker, and this may be achieved by a notice of underpayment, an undertaking may be appropriate alongside a notice in order to maintain compliance where there is a risk of further offending. An undertaking could also deal with

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<sup>3</sup> 6 months in England and Wales pending commencement of section 154(1) of the Criminal Justice Act 2003.

any associated obstruction by requiring the employer to produce records within a specified timescale.

45. Although it is ultimately an operational decision for enforcing authorities whether or not to seek an undertaking, the LME regime has been designed to provide an additional tool against labour market exploitation and there is an expectation that it will be used where it is the best tool to prevent non-compliance. The Director may make recommendations in their annual strategy on the manner in which the LME undertaking and orders regime may best be used to target non-compliance. The regime will be reflected in the Government's NMW enforcement policy document<sup>4</sup>, EAS's enforcement policy statement<sup>5</sup> and the GLAA's enforcement statement on prosecution<sup>6</sup>

46. It may be appropriate to use an LME undertaking for a first offence if the impact on workers is significant (especially if a prosecution is not yet being pursued) or a number of trigger offences are discovered simultaneously e.g. NMW underpayment combined with poor record keeping or obstruction. Relevant factors (as set out at paragraph 17 above) would include the extent of the underpayment, the number of workers affected and whether poor record keeping is intentional, reckless or the result of straightforward administrative error. An LME undertaking or order is designed to reduce the risk of future non-compliance and therefore complements existing sanctions which address past non-compliance. As stated above, the notice seeking the undertaking must set out how the particular measures prevent or reduce the risk of the particular non-compliance in question.

Case study 3:

Regime used alongside existing sanctions.
Employment agency fined for charging work finding fee. Persistent offender, so undertaking sought including measure requiring alteration to contract/registration form and no other fees to be charged without reference to the enforcing authority to ensure that they are legal, and not used to mask further non-compliance and hide recruitment fees

## 6. How the enforcement authorities will work together

47. All three enforcing authorities have the power to seek undertakings, apply for orders, and investigate the offence of breaching an LME order, where the trigger offence is in their own area (sections 14, 18 and 26 of the Immigration Act 2016 and see paragraphs 12 – 15 above).

<sup>4</sup> <https://www.gov.uk/government/publications/enforcing-national-minimum-wage-law>

<sup>5</sup> <https://www.gov.uk/government/publications/employment-agency-standards-eas-inspectorate-enforcement-policy-statement>

<sup>6</sup> <http://www.gla.gov.uk/our-impact/how-we-inspect-and-prosecute/> - see prosecution

48. In addition, the BEIS Secretary of State has made arrangements with the GLAA for certain officers who have been trained appropriately to act for the purposes of the National Minimum Wage Act 1998 and the Employment Agencies Act 1973 in England and Wales.

49. As the GLAA is the only enforcing authority whose remit covers all trigger offences, where trigger offences are committed under more than one area of legislation (see paragraphs 12 – 15 above), the GLAA is the only body which can co-ordinate activity and seek the undertaking/order. This is true even where there is no Gangmasters (Licensing) Act offence. HMRC NMW/EAS will continue to be involved/provide expert witness testimony on the following aspects in respect of their own legislation:

- framing measures in an undertaking;
- negotiating with the business during the 14 day period on any alternative proposals for securing compliance;
- monitoring compliance with undertakings or orders, including advising on whether a measure is still necessary to prevent non-compliance ( a pre-requisite for undertakings);
- applications to the court for an order;
- variation of an order (either making an application or responding);
- responding to appeals against an order;
- prosecutions.

50. Enforcing authorities will work together closely to identify the appropriate response to non-compliance where more than one enforcing authority is involved. The Government's intention is that a business should only be subject to one undertaking at a time wherever possible.