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Measuring the scale and nature of labour market non-compliance affecting people in precarious work in the UK: First project report

For the Director of Labour Market Enforcement (DLME)

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Table of Contents

Acknowledgements 6

Executive summary......7

Chapter 1: Introduction 10

Chapter 2: Context......12

- Labour market non-compliance, work-based harms and the ‘continuum of exploitation’ 12
- Labour market enforcement in the UK 14
- Precarity and precarious work......17
- Recent impacts on the UK labour market 19
- Foundational work commissioned by the DLME and informing the current study......21
- Aims and objectives 22
- Why focus specifically on precarious workers?......23
- Research questions 23
- Advisory groups 24
- Ethics......28

Chapter 3: Scale and nature of precarious work in the UK – A revision and extension 29

- The scale of precarious work In the UK (2009-2022)......30
- Precarious Work and Its Correlates – The Nature of Precarious Work......34
- Precarious Work Across the Years – Changes to Being in Precarious Work Over Time 37
- Precarious Work Across the Years – The Five Group-based Trajectories 41
- Modelling Precarious Work Using Longitudinal Analysis – Key Assumptions......42

Chapter 4: Scoping the UK’s Legal Landscape......44

- Methodology and scope......44
- Definitions 44
- Reflections on enforcement......46
- Labour Market Non-Compliance 56
- Work-Based Harms 65
- Conclusion 93

UCLC

Chapter 5: Conceptualising labour market non-compliance and other work-based harm 94

What Constitutes Labour Market Non-Compliance?..94

How to gain a better understanding of labour market non-compliance? 95

Our approach: knowledge creation through focus groups 96

A general overview of the final conceptual map and two examples..101

Chapter 6: Survey operationalisation 107

How to measure labour market non-compliance?..107

How to gain a better understanding of measuring labour market non-compliance? 109

Chapter 7: Conclusion and next steps 113

Conclusions...113

Indicative timeline for next steps 115

References...114

About UCL Consultants (UCLC)...123

About our partners (DLME, DBT, ESRC) 123

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Executive summary

Introduction:

Informed by substantial scoping research and statistical analysis of available data, the Director of Labour Market Enforcement (DLME) commissioned this fully-integrated mixed-methods project to establish the scale and nature of labour market non-compliance affecting precarious workers in the UK. Its cornerstone is a new, large-scale and representative survey of precarious workers, that will inform targeted in-depth interviews and participatory action-oriented focus groups with workers. In this first report, we introduce the overall project, its context, and detail the process, findings and outcomes of the four crucial preparatory stages completed so far.

Context:

Labour market non-compliance covers a broad and varied spectrum of mistreatment of workers, from accidental and relatively minor infringements to deliberate and extreme harms. The DLME is required to report annually on the scale and nature of labour market non-compliance, and to produce a strategy to address it. We will survey precarious workers in such a way as to enable robust inferences and get the best value for money. With precarious work characterised by low pay, insecurity and/or uncertainty, such workers are thought to be at particular risk of labour exploitation and work-based harm.

Measuring precarious work in the UK:

To lay the groundwork for the survey sampling and better understand our target population, we revised and extended our earlier scoping research into precarious work in the UK (Pósch et al. 2020, 2021). We used pragmatic but research-informed criteria, identifying people as precarious workers if they met certain combinations of low income, non-traditional work, a small workplace, and/or immigrant/ethnic minority background. We set the threshold for income at less than 66% of the median income, in line with the OECD definition of relative poverty. Using data from the Understanding Society Survey, we estimated that between 2009 and 2022 some 10-11.7% of the workforce could be classified as precarious workers. Contrary to expectations, our assessment found the proportion of precarious workers to be remarkably stable over the studied time period. Precarious workers are more likely to be female, younger and working class, to work in hospitality, retail or construction, and are half as likely to work in unionised workplaces. Utilising the longitudinal nature of the Understanding Society Survey, we used longitudinal analysis to investigate people's life-trajectories into, through and out of precarious work. We found five distinct groups of workers, differing in their size, proportion of precarious members, and members' traits. The largest group consisted of 'traditional' workers (49.2% of the workers in the sample) who were unlikely to qualify as precarious workers (with, over time, around 1% of them being ever precarious). Around a quarter of the workforce (25.4%) belonged to the 'transitional' category, coming in and out of precarious work (with, on average, around 20% of them being precarious). Two groups, 'early career' (9.8%) and 'non-traditional' (7.6%) workers, started at higher levels of precarity which gradually levelled off over time, with an average share of 7.9% and 30.2% of precarious workers respectively. Finally, workers in the 'increasingly precarious' (8%) group were more and more likely to become precarious over time (on average, 82.9% were precarious). Our results showed, for example, that some groups tend to age into more secure employment, others become increasingly precarious over time, and others dip into and out of precarious work.

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Scoping the legal landscape:

It is crucial that a survey of non-compliance accurately reflects the legal landscape, and that measurements map onto underlying potential breaches. Consequently, we conducted a thorough scoping review of the various employment rights, rules and regulations governing work in the UK's four nations (employment law is devolved in Northern Ireland and some aspects of enforcement differ in Scotland, too). Notably, the DLME's remit is relatively narrow compared to the wider regulatory framework and its reach covers three labour inspectorates only. Overall, we catalogued a very broad and complex regulatory framework with considerable room for improvement in comprehensive enforcement coverage and coordination by state bodies. The limited operational capacity of state enforcement bodies, often facing resource challenges, and the difficulties associated with individual complaints-based enforcement, as well as the complexity of employment rights, create risks of under-enforcement. A substantial proportion of labour market regulations fall outside its scope, including dismissal, discrimination, health and safety at work, trade union rights, and much more. As such, labour market enforcement in the UK relies heavily on individual complaints by workers to a court or tribunal. There are numerous barriers to doing so, including limitation periods and limited access to legal advice. In addition, relatively few criminal offences are used to tackle non-compliance in the labour market and most employment rights are not backed by criminal sanctions for serious, widespread, repeated and deliberate breaches. The reliance on civil sanctions risks fines and compensation for workers being simply factored into the 'cost of doing business'. Moreover, it needs to be recognised that access to some employment rights is restricted with their scope narrowed greatly by legal rules on employment status, qualifying periods of employment, and so on.

Survey conceptualisation:

Conceptualisation is the process by which researchers can get a comprehensive understanding of phenomena of research interest. The next phase therefore focused on breaking down and building up the construct of labour market non-compliance, its sub-constructs and their underlying dimensions, so they would not only accurately reflect legal complexities but also be understood by laypeople. We relied on consultation with six expert advisory groups (such as employer and employee representatives, and precarious workers themselves) to create a conceptual map. We structured a series of two-hour focus groups around the latest iteration of the map, using prompts and tasks to guide discussions. We took detailed notes during the sessions, and between groups we revised the conceptual map to accommodate the ideas and issues raised, taking an expanded version into the next group. The conceptual map was therefore developed iteratively through collaborative knowledge generation, which we illustrate through examples of the challenges encountered in conceptualising violations related to annual leave and unfair deductions.

Survey operationalisation:

Our next challenge was to trim down the conceptual map and develop a set of tangible questions and response options. Since the eventual survey instrument cannot exceed 20 minutes of completion time on average, we needed to narrow the focus to priority issues (e.g. those seen to be most severe, common or relevant to the DLME). We also needed to focus on concepts that could be straightforwardly measured.

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To minimise subjectivity, we prioritised questions about experience over those about perception. First, we reviewed numerous existing survey instruments to identify tried-and-tested questions we might re-use. Then, we developed new question batteries to address various gaps we had found. Next, we developed our draft questionnaire through a series of focus group consultations with our advisory groups, refining questions and response options from session to session. We encountered various tensions and trade-offs, for example the challenges of measuring diverse leave-related potential violations or unfair deductions which may or may not be legal violations. The full first draft questionnaire was sent to the survey company Verian (formerly Kantar) for further scrutiny and modifications ahead of formal question testing.

Conclusions and next steps:

This project will help disentangle the relationship between precarious work and labour market non-compliance, which is often discussed but rarely investigated at scale. Alongside the many strengths of our approach, we also recognise limitations such as a relatively new methodology (respondent-driven sampling) being deployed on a large scale. In terms of key steps to follow, our survey instrument is undergoing rigorous question testing with Verian, which will be followed by further refining, translation and piloting. The pilot will run from November 2024, with main stage data collection from January 2025. Survey findings will inform qualitative data collection (from May 2025) and surveying of a representative sample of the wider workforce on a selected few question (e.g. about certain potential breaches) via the Public Voice Survey (June 2025). A full timeline can be found at the end of this report.

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Chapter 1: Introduction

This publication is the first in a series of reports from a major new programme of research into the scale and nature of labour market non-compliance among precarious workers in the UK. The research was commissioned by the Director of Labour Market Enforcement (hereafter DLME) to help meet their statutory requirements and inform future strategy, policy and practice. The research is being co-funded by the Economic and Social Research Council (ESRC) and the Department for Business and Trade (DBT, formerly part of the Department for Business, Energy and Industrial Strategy, BEIS).

This research programme is designed to provide a strong evidence-base on labour market non-compliance in all four nations of the UK. It focuses specifically on labour market non-compliance within the DLME's remit that is experienced by people in precarious work. Precarious workers are widely seen as a particularly high-risk group for labour market exploitation and associated harms (Pósch et al., 2020, 2021). In generating vital new evidence on a complex, fragmented and largely under-researched issue, the project should also support improvements to monitoring, compliance and enforcement activity, as well as workers' access to justice.

Our primary aim is to establish the scale, nature and correlates of precarious workers' experiences of labour market non-compliance. Our complementary secondary aims are: (1) to disentangle precarious workers' experiences of non-compliance and examine its interplay with other harmful practices at work; and (2) to improve our understanding of precarious workers' access to justice, identifying whether, when and how they are able to exercise their rights and, if not, why not.

Our study has an innovative and integrated mixed-methods design that enables both breadth and depth of insights. At its heart is a new, large-scale, representative survey of people in precarious work, which we will field as an associated study to the Understanding Society survey. Running since 2009 and led by the University of Essex, Understanding Society is the largest household panel survey in the world. It currently features around 40,000 households[1] and it includes a substantial migrant and ethnic minority boost sample.

Through Verian (previously known as Kantar), we will field questions to a representative sample of existing Understanding Society survey members who meet our study criteria of being precarious workers. To dig deeper and access people more difficult to reach through conventional survey methods, we will also use an innovative respondent driven sampling approach (i.e. using onward referrals). That will both expand the sample of precarious workers (increased sample size) and permit various network-based analyses of how experiences of labour market non-compliance concentrate (considering both the structure of and ties within the networks).

[1] For more information, please see https://www.understandingsociety.ac.uk/about/about-the-study

This new survey will provide rigorous and generalisable data on the prevalence of various forms of labour market non-compliance experienced by precarious workers across the UK. It will also offer robust insights into how the picture varies geographically, demographically, according to people's social networks, and in relation to different industries and types of work and employment. We will use these insights to inform a select few questions to be fielded among a representative sample of the broader workforce, through the Public Voice survey[2]. In expanding the focus for these key priority areas (to be determined by the initial survey results), we will be able to gather insights into how concentrations of risk and harm compare, for those defined as precarious workers and for UK workers more generally. For reasons outlined elsewhere, the study needed to focus on precarious workers as the core group believed to be most at risk of labour market non-compliance. Nevertheless, the DLME and the three labour market enforcement bodies within its scope have remits that go beyond precarious workers, making the Public Voice survey component an important addition to the study.

The survey will be complemented by fully integrated qualitative elements to add depth and nuance in understanding the complex nature of labour market non-compliance. Here, our focus will be on exploring how labour market non-compliance is experienced by precarious workers, and on identifying ways to improve government responses and address barriers to accessing justice. The qualitative strand will include 30-40 in-depth interviews with people in precarious work and six focus groups with workers (and possibly other key stakeholders as well). Participants for the qualitative elements will come from the pool of people taking part in the respondent-driven sampling part of the survey, i.e. using nested sampling (Lieberman, 2005; Tanner, 2023). This will also allow for targeted recruitment among otherwise hard-to-reach groups. Throughout the research, we are being supported by six advisory groups, who bring us important insights, constructive criticism and challenges (for more details, see the section 'Methods').

The research project began in June 2022 and is expected to run until November 2025 (41 months). The project was originally due to run for 30 months but was extended due to unavoidable delays in contracting and sub-contracting, linked also to the unexpected impacts of high inflation on budget. Further delays were caused due to a required pause during the purdah period leading up to the July 2024 general election, with additional ramifications for the survey timelines. This report introduces the first 21 months of the programme, covering the work that lays the foundations for the primary data collection for the survey (pilot from November 2024, main stage data collection from January 2025). Those survey results will in turn inform the qualitative data collection (from May 2025).

In this report, we introduce in turn the context to the project and our overall approach (Chapter 2), then detail the process and outcomes of the four crucial preparatory stages completed thus far: 1) longitudinal analysis of existing data from the Understanding Society survey to examine temporal pathways into, within and out of precarious work (Chapter 3); 2) scoping of the legal landscape (Chapter 4); 3) conceptualisation of complex constructs relevant to labour market non-compliance and related work-based harms (Chapter 5); and 4) operationalisation of these constructs into a rigorous survey instrument, which is currently undergoing testing and refinements ahead of the upcoming pilot (Chapter 6). We finish with some concluding comments and a summary of the key milestones to follow (Chapter 7).

[2] For more information, please see https://www.pvoice.co.uk/

Chapter 2: Context

In this chapter, we set the scene for this study, and explain the rationale behind important decisions regarding the focus and the design of the research. This chapter underlines how the current research will address stark knowledge gaps, and help the Director of Labour Market Enforcement meet their legal obligations to report annually on the scale and nature of labour market non-compliance in the UK, and inform their strategy to tackle this problem. We start by introducing key concepts for this study, synthesising existing evidence from the UK and internationally, and identifying knowledge gaps that this project seeks to address. In these initial sections, we focus in turn on labour market non-compliance and related work-based harms, labour market enforcement, and precarity and precarious work. We also provide a brief overview of major recent developments and their impact on the UK labour market: Brexit, Covid-19 and the cost of living crisis. Next, we set out in detail the aims and objectives of the study, the grounds for focusing the study specifically on precarious workers, and the specific research questions this project will address. We then introduce the six advisory groups underpinning the development and delivery of this project, finishing with a discussion of ethics.

Labour market non-compliance, work-based harms and the 'continuum of exploitation'

Labour market non-compliance, as defined by the DLME's remit, covers a broad spectrum of activity, from relatively low-level infringements to the extremes of human trafficking and other so-called 'modern slavery'. The DLME's focus on the spectrum of labour market exploitation aligns with the remit of the Gangmasters and Labour Abuse Authority (GLAA), one of the three core labour market enforcement bodies within its scope (see following section on labour market enforcement). While it can be helpful to think in terms of a dynamic 'continuum of exploitation' (Andrees, 2008; Skrivankova, 2010), even comparatively 'low-level' breaches of labour rights can be experienced as harmful – especially when part of a cumulative landscape of exploitative labour conditions, limited alternative options, and/or sharp economic need (see, e.g., Labour Exploitation Advisory Group, 2024; Thiemann et al., 2024).

Some infringements of labour rights and protections are genuinely accidental, others negligent, others deliberate. In Chapter 4 (mapping the legal landscape), we go into more detail on the range of criminal and civil laws covered under labour market non-compliance. There we also cover related areas of 'work-based harm' (Scott, 2017), which can create or contribute to a broader context of difficult and/or dangerous working conditions (e.g. breaches relating to discrimination or health and safety). We sought also to include other work-based harms in the research where possible, since labour market non-compliance narrowly defined is likely to just be part of a wider tapestry of issues at work. Including such neighbouring topics can also help situate non-compliance in its broader context and identify whether and how disadvantage concentrates. Within the constraints of the time/budget, we will also examine some aspects of workers' experiences regarding access to justice and interactions with state enforcement agencies. Overall, our study will cover a broad and varied range of topics relating to workplace conditions, while prioritising areas under the DLME's remit.

As far as more extreme labour market abuse is concerned, our survey will likely[3] address some indicators of forced labour (e.g. in relation to lack of payslips and aspects of potential debt bondage

[3] We say 'likely' deliberately, as the final draft questionnaire is currently undergoing testing.

through recruitment fees) but we will not explicitly and specifically focus on the extremes of human trafficking/'modern slavery[4]'. This exclusion is due to: the need for a representative sample of workers across the UK; the impossibility of reliably sampling for people who are often extremely isolated and may not live in 'households' (e.g. caravans on farms or other temporary worker accommodation are not captured as such); and the fact that people in extreme exploitation may not have access to the internet or be able to complete a questionnaire safely.

The concept of labour market exploitation as a dynamic spectrum running from 'decent work' to the sharp end of human trafficking/forced labour/other 'modern slavery' has gained in popularity (see, e.g., Boersma & Nolan, 2022; Labour Exploitation Advisory Group, 2024; Strauss & McGrath, 2017). Yet, there has been relatively little large-scale empirical research into whether and how various different labour market breaches concentrate, and how they overlap and integrate with one another. Worker surveys focused on labour market abuses (broadly defined) are extremely rare. Notable exceptions internationally, which have particularly informed our work, include new representative surveys in Canada (Noack & Vosko, 2011; Noack et al., 2015) and the United States (Bernhardt et al., 2009). In the UK, other studies particularly relevant to our current project also include research into wage-theft using a range of data sources including pre-existing survey data (e.g. Clark & Herman, 2017), as well as primary survey research on knowledge of employment rights (Casebourne et al., 2006), and on problems at work and pathways to support among low-paid, non-unionised workers (Pollert & IFF, 2005). In providing vital new insights into the distribution of labour market non-compliance within the precarious labour market, our research will shed light on the systems and structures in which different labour abuses occur/co-occur and how risks are distributed demographically, geographically, by industry and by job type.

Both nationally and internationally, the existing evidence base on labour market non-compliance is limited and fragmented overall, including but not limited to the scarcity of relevant worker survey-based research just described. While we will not repeat earlier analysis here, for a detailed review please see our scoping study for the DLME (Cockbain et al., 2019). Since then, a notable development in the UK evidence base has come through a programme of research into labour market enforcement led by the Resolution Foundation (Judge & Slaughter, 2023). According to their novel survey of 2,011 private-sector employees, various forms of labour market non-compliance are widespread (e.g. non-provision of a payslip, NMW/NLW underpayment), and harms concentrated among certain groups of workers: the youngest, the oldest, migrants and those from ethnic minorities. The nature of work and workplaces were also found to correlate with higher rates of various breaches: for example, zero hours contract workers were particularly exposed to having no paid holiday entitlement, and workers in small firms (under 20 workers) were less likely to receive payslips. Those research results also emphasise the intersectionality of risk and harm: 'personal and job characteristics combine so that low-paid workers are at the sharp end of non-compliant behaviour' (Judge & Slaughter, 2023, p. 6).

Such findings add further weight to the decision to focus the current study on people in precarious work. While the previously discussed research is important, it has several methodological limitations. The sample size of these studies tends to be relatively small (a couple of thousand people at maximum). Even when the sampling is tailored to specific population(s), it almost exclusively relies on quota sampling (i.e. non-probability sampling) which makes results largely, but not truly representative. The surveys used by these studies also tend to be relatively short and only delivered in English.

[4] It is theoretically possible that examples of such extreme abuses might be raised in response to the open-ended final question, but we are not asking about them directly.

By contrast, our study will rely on a survey that is of the highest quality (probabilistic sampling), with a clear and tested way to identify the subpopulation of interest. Our questionnaire will be longer, fully tested (using cognitive interviews and online probing), and translated into commonly spoken languages in the UK, other than English and Welsh, thus also guaranteeing access to workers who speak little or no English. Furthermore, due to its size, we will be able to provide statistical estimates with much higher precision and make reliable inference about particular cross-sections of the population of interest (e.g., specific demographics working in specific regions/industries).

Particularly since the passing of the Modern Slavery Act 2015, there has been a heavy focus in UK policy on the extremes of human trafficking/'modern slavery' (Broad & Turnbull, 2019). Less extreme but more routinised forms of exploitation, while likely to be much more prevalent, tend to attract far less interest and attention from politicians, the media and the public (see, e.g., Cockbain et al., 2019; Davies, 2019; Scott, 2017). Within the rapidly expanding literature and policy debate on human trafficking/'modern slavery', a narrow criminal justice lens remains dominant and labour rights perspectives are often marginal at best (see, e.g., Kenway, 2021; McGrath & Watson, 2018). There is also a tendency to exceptionalise extreme abuses, and overlook the systems and structures within which they are produced (see, e.g., Broad & Gadd, 2022; Kenway, 2021; O'Connell Davidson, 2015). Yet, research indicates that similar structural constraints and disadvantages can produce both labour market abuses across the spectrum of exploitation and sharply curtail access to justice – for example through restrictive visa regimes such as the Overseas Domestic Worker Visa, and the post-Brexit Seasonal Worker Visa and Health and Social Care Visa (FLEX & Fife Migrants Forum, 2021; Sehic & Vicol, 2023; Sharp & Sedacca, 2019; Thiemann et al., 2024).

With the notable exception of large-scale provision of humanitarian visas for Ukrainian refugees, UK immigration policy has generally become more restrictive in recent years, with implications for both labour market exploitation and labour market enforcement (Thiemann et al., 2024). Key developments include Brexit and its end to EU free movement to the UK (see later section), the Nationality and Borders Act 2022, the Illegal Migration Act 2024, ongoing Rwanda deportation plans and curtailments of various groups of workers' rights to bring family members with them to the UK (see, e.g., Benson et al., 2024). Such developments can be seen to conflict with and undermine the Government's stated commitment to tackling 'modern slavery', as well as having implications for less extreme forms of labour market exploitation too (Hodkinson et al., 2021; Sedacca, 2024; Thiemann et al., 2024).

Labour market enforcement in the UK

The UK's enforcement system for promoting labour market compliance and remedying breaches of laws and regulations is complex, fragmented and under-resourced (compared to other peer nations) (Balch, 2012; Cockbain et al., 2019; Judge & Slaughter, 2023). As detailed in Chapter 4, there is neither a single central body responsible for enforcement, nor a single government department to which the many different enforcement agencies report. While the introduction of the DLME was an important step towards increased coordination, budget cuts, delays filling employment vacancies, and political inertia have all hampered its ability to deliver much-needed improvements (see, e.g., Judge & Slaughter, 2023).

Established under the Immigration Act 2016, the DLME's office was designed to (1) provide a comprehensive picture of labour market non-compliance and exploitation in the UK, (2) identify strategies to tackle these issues, and (3) better coordinate and share data between the UK's three main labour market enforcement bodies: the Employment Agency Standards Inspectorate (EAS)/the

Employment Agency Inspectorate (EAI) in Northern Ireland; the Gangmasters and Labour Abuse Authority (GLAA); and His Majesty's Revenue and Customs National Minimum Wage/National Living Wage Enforcement Team (HMRC NMW/NLW). In addition to these three bodies, there are numerous other agencies responsible for enforcement around other aspects of labour rights and work-based harms[5], which fall beyond the DLME's immediate scope but are nevertheless an important part of the bigger picture (c.f. Chapter 4).

As part of their 2019 election manifesto, the Conservative Party pledged to introduce a Single Enforcement Body, which would consolidate and streamline labour market enforcement. That commitment has yet to materialise, to the ongoing disappointment of unions, employers' organisations, academics, the Office of the Independent Anti-Slavery Commissioner, the DLME itself, and many others (see, e.g., Butler, 2023; Donnelly, 2023; Judge & Slaughter, 2023; TUC, 2022; University of Nottingham Rights Lab and the Independent Anti-Slavery Commissioner, 2023). In contrast, the UK's immediate neighbour, the Republic of Ireland, has a much more streamlined enforcement system, with all functions consolidated under a single body (the Workplace Relations Commission) since 2015 (Judge & Slaughter, 2023).

By law, the DLME is required to produce an annual report that includes an assessment of the 'scale and nature of non-compliance in the labour market' in the UK. They must also provide an annual enforcement strategy. Yet, in the years since the office's inception, successive Directors have found their efforts to provide an accurate picture have been hampered by difficulties accessing the data they need to do so effectively: commonly-cited problems include the hidden nature of non-compliance, widespread under-reporting of breaches, low number and infrequent inspections, and the limited, fragmented and skewed nature of the available data (Beels, 2022; Metcalf, 2018, 2019; Taylor, 2021). Securing funding for the current research programme thus represents an important and long-awaited step towards strengthening the evidence base and supporting future reporting, strategy and practice.

We examine the complexities of labour rights and their enforcement in detail in Chapter 4. Here, it is worth stressing that the fragmented enforcement landscape can be unsurprisingly difficult for workers to navigate (see also (Thiemann et al., 2024; University of Nottingham Rights Lab and the Independent Anti-Slavery Commissioner, 2023). The current system places considerable onus on individual workers taking action through Employment Tribunals. Yet, the short time period in which to bring a claim (usually just a three-month window) and other barriers (e.g. lack of information, costs) disadvantage workers (see Chapter 4). The situation has also been exacerbated by the effects of sweeping cuts that have devastated access to legal aid from 2013 onwards (see, e.g., The Law Society, 2023). Even where claims are successful, workers often face further challenges in accessing the money due to them. For example, a 2013 study of Employment Tribunal claimants found that only 49% of those owed awards reported being paid in full, 16% were paid partially and 35% not at all (Department for Business Innovation & Skills, 2013). A more recent report, based on the 2018 Survey of Employment Tribunal Applications, found that 72% of claimants awarded payment reported having been paid (up from 63% in 2012)[6] (Department for Business Energy & Industry Strategy, 2020). Despite various existing barriers to accessing labour justice, the Government is currently consulting on re-introducing fees (albeit at a lower level than previously) for bringing cases to the Employment Tribunals and Employment Appeal

[5] As noted by the Resolution Foundation (Judge and Slaughter, 2023), other relevant enforcement agencies include The Pensions Regulator, Health and Safety Executive, and the Equalities and Human Rights Commission, as well as local authorities. To this list, we would also add the police and the National Crime Agency (particularly in relation to 'modern slavery' offences) and Home Office Immigration Enforcement (e.g. in relation to the 'illegal working' offence).
[6] In contrast, in 2018 93% of employers with a claim awarded against them said they had paid it, up from 87% in 2012.

Tribunals (Ministry of Justice, 2024). Tribunal fees were previously put in place in July 2013, which led to a 53% drop in the number of claims brought in the following year, before they were finally abolished in 2017 by a Supreme Court ruling that they were unlawful (Ministry of Justice, 2024).

Following a four-year programme of research into labour market enforcement, the Resolution Foundation emphasised stark enforcement gaps and pronounced inequalities in access to justice (Judge & Slaughter, 2023). Enforcement agencies are often under-resourced and over-stretched, which can fuel an overreliance on reactive complaints (Cockbain et al., 2019; Judge & Slaughter, 2023). Crucially, there are numerous aspects of labour market non-compliance and related harms that fall outside the remit of any existing enforcement body. For example, non-payment of holiday pay is not currently enforced (except on an individual-level through tribunals), despite an estimated cost to workers of over £2 billion per year in loss of holiday pay (Judge & Slaughter, 2023) (see also (Clark & Herman, 2017).

As in many countries, labour market enforcement in the UK is reportedly often reactive and complaints-driven: although (some) enforcement agencies also engage in proactive intelligence-led enforcement (Metcalf, 2018). For example, HMRC NMW/NLW pursues a combination of targeted and complaint-led investigations[7] – but 'measured by the ratio of cases where arrears are found, complaint-driven cases have a better likelihood of success than targeted ones' (Low Pay Commission, 2023, p. 6). Nevertheless, the dangers of relying too heavily on complaints data are well-recognised both nationally and internationally, first and foremost because most workers who experience labour market violations do not make official complaints (Noack et al., 2015; Weil & Pyles, 2005). The ratio of violations to complaints remains unknown in the UK – due to the lack of representative data on the prevalence or incidence of labour market violations. In the United States, it has been conservatively estimated there is just one complaint for every 130 violations (Weil & Pyles, 2005). There are numerous and well-documented barriers to exploited workers making official complaints, including financial and opportunity costs, isolation, lack of unionisation, not knowing one's rights or where to turn, a lack of employment alternatives, and fear of recriminations – including, in the case of irregular migrants in particular, from the State (see, e.g., Cockbain et al., 2020; FLEX, 2017; Holgate et al., 2011; Pollert, 2007, 2010).

Further emphasising the risks of inferring broader risks of non-compliance from complaints data alone, evidence to date suggests that 'the incidence of complaints is only imperfectly related to underlying workplace conditions' (Weil, 2008, p. 350). There appear also to be important demographic differences in who is and is not able to access justice in the UK: comparing survey data from a representative sample of 2,011 private sector employees with Employment Tribunal data, the Resolution Foundation concluded that 'the groups of workers who are most vulnerable to labour market abuses are the least likely to take individual action through the courts' (examples include the youngest, lowest-paid, and those on temporary contracts) (Judge & Slaughter, 2023, p. 61).

The Resolution Foundation recently highlighted various factors as pointing to a clear 'lack of political will when it comes to enforcing workers' rights' in the UK (Judge & Slaughter, 2023, p. 8). In addition to the delays in establishing the long-anticipated Single Enforcement Body (discussed above), the UK has low levels of funding to many core agencies, and one of the lowest rates of labour inspectors in

[7] For the last two reporting years, HMRC NMW/NLW enforcement has closed roughly twice as many targeted enforcement cases as complaint led cases. For more information, please see Tables 7a and 8a here: https://www.gov.uk/government/publications/national-living-wage-and-national-minimum-wage-government-evidence-on-enforcement-and-compliance-2022#:~:text=This%20document%20looks%20at%20the,2022%20Low%20Pay%20Commission%20recommendations

comparable OECD countries, with under a third of the International Labour Organisation recommended benchmark level of 1 inspector per 10,000 workers (Judge & Slaughter, 2023). The UK's system has also been criticised as lacking sufficient teeth where non-compliance occurs (see also (University of Nottingham Rights Lab and the Independent Anti-Slavery Commissioner, 2023). In short, not only are the chances of detection low, but consequences are limited (Judge & Slaughter, 2023). For example, the maximum fine for unpaid or under-paid wages is just double the arrears due. Such a context can be seen to render the consequences of non-compliance trivial in the eyes of unscrupulous employers. Labour market non-compliance clearly impacts workers (and their families) first and foremost, particularly those at the most precarious end of the labour market. It also carries costs, however, to compliant businesses who are undercut due to their competitors' unlawful (but cost-saving) labour practices. In summarising their view on the current state of labour market enforcement in the UK, the Resolution Foundation stressed that:

'The levels of a wide range of labour market violations are unacceptably high; low-paid and other vulnerable workers who are the least able to assert their rights themselves are at the sharp end of unlawful employer practice; our state enforcement system is incoherent and patchy; our ability to detect violations is limited; and our standard approach to malfeasance when it is uncovered is weak.' (Judge & Slaughter, 2023, p. 12)

Irregular or precarious immigration status has long been considered a risk factor for labour exploitation, as well as a major barrier to accessing redress (see, e.g., Anderson, 2010; Lewis et al., 2014; Thiemann et al., 2024). Irregular migrants working in the UK face additional risks from enforcement activity, since there is no secure reporting pathway that would enable workers to report breaches to law enforcement or labour market enforcement without concern that their personal data be shared onwards with Immigration Enforcement (After Exploitation, 2021; FLEX & LAWRS, 2022). New qualitative research suggests that even migrant workers who do have regular migration status can be deterred from coming forward to seek labour justice due to a broader climate of fear and hostility towards migrants (Thiemann et al., 2024).

Precarity and precarious work

Recent decades have seen growing attention around the distinct but related constructs of precarity and precarious work, which provide important theoretical context to our current study. Interested readers can find more detail on these concepts and the implications for measurement in our current study in an earlier report (Pósch et al., 2021). A key point to stress here is that these constructs have been extensively theorised and are widely used to describe the state of working conditions in advanced economies in particular – but both remain under-developed in terms of empirical measurement.

Broadly speaking, precarity is the wider and more abstract condition – essentially referring to an intensification of insecurity in modern life (Millar, 2017). Precarious work is arguably best seen as a common but not necessary feature of precarity: whereby the defining factors there are the ways in which one's work itself is insecure and uncertain. Precarious work lends itself far more readily to empirical measurement than does precarity (Pósch et al., 2021). Importantly, precarious work does not automatically and necessarily result in labour market non-compliance or other work-based harms, but it is widely considered to increase the risks and negative impacts thereof.

The term 'precarious work' is generally used in a pejorative sense, but work can be precarious without automatically being problematic (e.g. a self-employed contractor working on an ad hoc basis may be

rewarded lucratively in ways that clearly offset the greater insecurity involved). In establishing how best to measure precarious work, we sought to exclude such cases; particularly by jointly considering multiple factors alongside the type of work, such as pay, ethnic minority and immigration status, and the size of the employer (see Chapter 3).

Much of the research on precarity and precarious work focuses on advanced economies of the Global North (Waite, 2009), where it is often stated that the increasing precarity of working conditions (be it through insecurity, casualisation, informalisation, intensification etc.) renders workers increasingly vulnerable to labour market exploitation and related harms (Scott, 2017). Key factors seen to contribute to this changing landscape include the 'fissuring' of workplaces into complex networks (Weil, 2014) and the rise in non-standard employment practices (e.g., part-time, on-call or gig economy work) (ILO, 2016; Taylor et al., 2017). So-called zero hours contracts, which have proliferated in recent years in the UK (Adams & Prassl, 2018; TUC, 2016), are arguably the quintessential example of precarity at work, because of their inherent unpredictability and insecurity.

The scale of gig economy work in the UK is difficult to measure and contested, not least because many people do gig work alongside other jobs. A one-off study estimated that in 2017, 4.4% of adults in Great Britain (roughly 2.8 million people) had worked in the gig economy in the previous year, and 2.4% did so at least monthly; providing courier services was the most common activity reported, followed by transport and food delivery services (Lepanjuuri et al., 2018). In contrast, a recent analysis of Labour Force Survey data concluded that 'just under half a million people in the UK work in the gig economy, and only a fifth of those see it as their main source of income' (Cockett & Willmott, 2023, p. 2). They also found certain demographics were more likely to see it as their main source of income: men, people with disabilities and ethnic minorities. Understanding Society Survey data seems to provide partial support to this point: analysing relevant data for this report, we found that around twice as many people reported working gig economy jobs among male respondents and among ethnic minorities and immigrant respondents. It was also found that people with gig economy jobs were, on average, 10 years younger than other workers in the UK labour market.

With the rise of platform work and digital tracking of workers, there is growing attention around poor working conditions, one-sided flexibility and labour market exploitation within the gig economy (Lata et al., 2023; Wood et al., 2019). In a bid to improve rights and conditions, the EU is moving towards enhanced regulation of this sector via the Platform Work Directive (see, e.g., Espinoza, 2024). In contrast, in the UK there is little sign of change from the status quo in which worker status has to be contested on a case-by-case basis in the courts (see Chapter 4). Yet, there has been remarkably little large-scale research to date into what platform workers themselves want (Martindale et al., 2024). A landmark new survey of such workers in the UK (n=510) produced findings indicating 'strong support for labour rights, trade unions and co-determination' (Martindale et al., 2024, p. 1).

The changing structure of work and employment relations has implications for the labour market enforcement system. Existing protections in long-established and overwhelmingly static policy frameworks can appear increasingly unsuitable and ineffective for upholding workers' rights when the landscape itself becomes progressively fragmented and complex (Kenner et al., 2019). For example, in the UK, self-employment rose steadily for two decades, peaking at around 5 million people (or 15.3% of total employment) in late 2019 (ONS, 2022). Self-employment rates then dropped sharply with the Covid pandemic (ONS, 2022) and although they have since risen again, they remain well below pre-pandemic levels (around 650,000 self-employees less) (Francis-Devine & Powell, 2024). At the most recent count (Nov 2023 to Jan 2024) 28.71 million people in the UK were working as employees and

4.33 million people as self-employed (Francis-Devine & Powell, 2024). Self-employees therefore comprise about 13% of the workforce at present, but are excluded from the scope of numerous labour market protections (see Chapter 4). Bogus self-employment is also a particular concern, whereby firms wrongly classify workers as self-employed despite effectively treating them as employees, thus depriving them of access to sick pay, holiday pay and so forth (Citizens Advice, 2015). While the Labour Force Survey has long been a crucial source of official statistics on the UK labour market, its data has become less reliable in recent years especially due to the fall in response rates, something the Office for National Statistics is still seeking to rectify (Francis-Devine, 2023). In their latest review, the Office for Statistics Regulation (OSR) recognised the efforts taken by the ONS team to rectify many of the issues with the Labour Force Survey, but also called for further improvements to be made (OSR, 2024).

The growth in the use of umbrella companies also poses a particular challenge: an estimated half of agency workers now work for umbrella companies (TUC, 2021b). Otherwise known as payroll companies, umbrella companies further fragment employment relations by acting as intermediaries between contractors and, for example, recruitment agencies. Their use has been much criticised for the way it further obscures roles and responsibilities and makes it harder for workers to exercise their basic rights and resolve problems that arise (TUC, 2021b). Their use has been linked to widespread reports of wage theft (TUC, 2021b). Crucially, umbrella companies are not regulated, thus bypassing established regulations on employment agencies and falling outside the purview of the main labour market enforcement bodies.

Numerous intersecting factors are said to contribute to a growth in precarity and precarious work. In the UK, key issues that bear emphasising include declines in welfare provision, deterioration in pay and working conditions, increased in-work poverty, sharp drops in unionisation, anti-union legislation that has eroded workers' collective bargaining power, and 'Hostile Environment'-type policies (Cockbain et al., 2019; Mangan, 2019; Pósch et al., 2021). Such factors likely combine to leave workers additionally exposed to unscrupulous employers and also limited in their ability to exercise their rights. Importantly, these changes do not just affect people in precarious work (however defined), but rather broader swathes of the population – even those in more secure 'traditional' employment (Pósch et al., 2020).

Broadly speaking, there is much consensus around the theory of increasing precarity in advanced economies such as the UK, and precarious work is central to this thesis (Pósch et al., 2020). Notable exceptions that have challenged the dominant thesis of a 'new age of employment insecurity' include research from Fevre (2007, p. 518) and the Institute for Fiscal Studies (IFS, 2017). As we have noted elsewhere, positions in this debate typically hinge on a) 'how precarious work is defined and measured'; and b) 'the extent to which one believes rising levels of precarious work are a necessary precondition for growing precarity' (Pósch et al., 2021, p. 5). The definition and operationalisation of precarious work is challenging, contested and often elusive (see, e.g., Livanos & Papadopoulos, 2019; Mai, 2017), which might help explain the scarcity of quantitative research on this topic (Alberti et al., 2018). Overall, we argue that it is clearly necessary both to take a pragmatic approach (adapting to the limits of available data) and to recognise that no definition will be perfect, making clear the limitations and implications of the metrics used when interpreting results (Pósch et al., 2020, 2021).

Recent impacts on the UK labour market

When considering the current state of the UK labour market, three recent and significant developments are particularly worth highlighting here. Together, they have combined to have a major impact on the

labour market and workers within it: Brexit, and with it the ending of European free movement for the UK; the Covid-19 pandemic; and the cost of living crisis.

Brexit sparked the most significant changes to the UK migration patterns since the late 1960s and early 1970s (Portes, 2024). Coupled with the effects of the pandemic, the end to free movement and the introduction of the new post-Brexit immigration regime has led to major changes in both the number and the composition of people coming to the UK for work (in terms of country of origin, sectors, jobs, etc.) (Portes, 2024). Recent statistics show that EU nationals now make up about 8% of the UK workforce (Cuibus, 2023), but they are fewer in number than pre-2019. Net migration from the EU has been negative since Brexit day (31 January 2020, with changes taking effect from 1 January 2021) and the pandemic began, with EU immigration falling by almost 70% compared from its peak in 2016 to 2022 (Cuibus, 2023). Even before then, there were stark downward trends in EU-migration into the UK for work since the Brexit vote itself (reflecting in falling National Insurance Number (NiNos) registrations), coupled with increased EU emigration (Cuibus, 2023; Vargas-Silva & Walsh, 2020). Under the post-Brexit immigration system, only 5% of visas granted have been to EU nationals (Cuibus, 2023). Meanwhile overall net migration to the UK rose to an estimated 606,000 people in 2022 (Cuibus, 2023), partly linked to the UK's Ukraine visa schemes for people displaced by the war (the proportion of non-EU migrants coming on humanitarian grounds has since decreased, see (ONS, 2023a). By September 2022, there was a net loss of around 1% of the labour force (around 330,000 people), reflecting 'a significant shortfall of around 460,000 EU-origin workers, partially but not wholly compensated for by an increase of about 130,000 non-EU workers' (Springford & Portes, 2023). The most recent, albeit provisional, estimates show net migration (ONS, 2023a) of 672,000 for the year to end June 2023, an increase on the previous year but lower than originally anticipated (ONS, 2023a). In these provisional figures, EU net migration has remained negative (negative 87,000) and the increase in non-EU immigration was mostly driven by people coming to the UK for work, including precarious work, with the increase 'largely attributed to those coming on health and care visas' (ONS, 2023a). Based on official statistics and our own analysis (Pósch et al., 2021), migrants are more likely to be in insecure or precarious work than non-migrant UK residents. Although the effects of Brexit and Covid-19 can be hard to disentangle, overall the post-Brexit period saw job vacancies rise to record levels, peaking in Mar-May 2022 at over 1.3 million estimated vacancies (ONS, 2024b). Estimated vacancies have since declined steadily but their most recent levels of 908,000 in Dec 2023-Feb 2024 are still 107,000 above the figures for Jan to Mar 2020 (ONS, 2024b).

When it comes to the Covid-19 pandemic, workers in the UK were also affected in different ways: lower earners were much more likely to work in sectors worst affected by the lockdowns and non-traditional workers (e.g. the self-employed) reported a much more dramatic drop in earnings than traditional salaried workers (ILO-OECD, 2020). These results are consistent with our own analysis (Pósch et al., 2021), in which we found that a significant share of precarious workers worked in hospitality and retail: the two sectors worst affected by Covid restrictions. Furthermore, analysis by the Office for National Statistics suggested that the youngest age group of workers (16-24 years) – who are significantly more likely to be in precarious work – were particularly hard hit by lockdowns and were the least likely to be able to secure government support (ONS, 2021). The pandemic has also reignited questions about proper sick pay, which, according to the Trades Union Congress's estimate, is not available to 67% of insecure workers compared with 7% of traditional workers (TUC, 2021a).

The 'cost of living crisis' is also particularly salient in understanding the current landscape of work and precarity in the UK. The cost of living crisis – i.e. the fall in 'real' incomes (i.e. adjusted for inflation) – has been ongoing since late 2021 (see, e.g., Hourston, 2022). Inflation levels rose to a 40-year record

high, peaking at 11.1% in October 2022 (Office for Budget Responsibility, 2023). The effects of high inflation have been most sharply felt by people with the lowest-income, because they spend a higher proportion of their income on essentials such as food and energy (Giles, 2022; Hourston, 2022). These early studies are supported by recent ONS data releases, which showed that households in the lowest income deciles experienced the highest inflation with regards to their consumption between January and September of 2023 (ONS, 2023b). Moreover, recent Eurostat (2024) data showed the UK was under the worst inflationary pressure compared to competitor countries in Europe and overseas.

Recent research has emphasised the stark and broad-reaching consequences of the cost of living crisis, and their particular impacts for those on the lowest income (Broome et al., 2023). For example, an estimated one in seven adults in the bottom quintile for income (1.7 million people, or 16% of this bracket) had to eat less or skip meals for seven or more days in the last month, double the rate of the population at large (8%). Negative health impacts were also widely reported, particularly among those aged 25-34 years (of whom 40% reported negative impacts on their health, compared with 30% across all age groups surveyed) (Broome et al., 2023). Meanwhile, according to insights from Barclaycard's Monthly Consumer Spending Index, nearly one in 12 Britons have taken on an extra job due to the cost of living crisis (Barclaycard, 2022). Baseline levels were not reported there. Much of such additional work is likely to fall under our definitions of precarious work. Although the UK narrowly avoided a technical recession, the outlook remains bleak. According to the Office for Budget Responsibility (2023), people in the UK face the biggest reduction in their spending power of the last 70 years and living standards are still not expected to have recovered to pre-pandemic levels by 2027.

Rising food and energy prices and declining spending power were seen as a key factor behind widespread industrial action that swept the UK from June 2022, peaking in December 2022 at the highest number of working days lost in a single month (830,000) since November 2011 (997,000) (ONS, 2024a). Nevertheless, commentators also emphasised that this recent wave of strikes needed to be understood within the broader context of austerity policies and over a decade of real-terms pay-cuts for many public-sector workers. For example, analysis by the Financial Times stressed that 'the workers driving the UK's worst wave of strike action in decades are concentrated in occupations where pay has suffered the sharpest squeeze during a prolonged stagnation in wages' (Smith et al., 2023). Recently, the Government introduced new legislation further restricting union power, in the form of the Strikes (Minimum Services Levels) Act 2023. That was sharply criticised for curtailing workers' freedom of association under the European Convention on Human Rights (ECHR) and disproportionately impacting female workers (see, e.g., Bindmans, 2023; Bogg, 2023; Sharp, 2023). In the UK, there has been an ongoing loss of union power since the 1980s, in terms of both declining union membership (see, e.g., Department for Business & Trade, 2023) and increased anti-union legislation. That is very salient from the perspective of labour market exploitation and enforcement, since strong and active trade unions position workers far better to exercise their labour rights (Weil, 2014).

Foundational work commissioned by the DLME and informing the current study

This study builds on and is closely informed by earlier scoping work commissioned by the DLME and led by our team. The first was a scoping study into how best to assess the scale and nature of labour market non-compliance in the UK (Cockbain et al., 2019). That work involved repeated consultations with stakeholders and international academics, and a rigorous desk review of the relevant domain- and methods-related literature. We concluded by recommending a mixed-methods approach, combining a representative survey of people in precarious work with in-depth qualitative elements. These recommendations were endorsed by successive Directors of Labour Market Enforcement (Metcalf,

2019; Taylor, 2021) and helped inform the open tender for the current project, commissioned by the current Director Margaret Beels.

The second foundational project sought to establish the extent and characteristics of precarious work over the decade from 2009 to 2020, using existing representative survey data from Understanding Society (Pósch et al., 2021; Pósch et al., 2020). We used a weighted classification model according to which we defined people as precarious workers if they a) had a low income and were in non-traditional work (e.g. zero hours or part-time); b) were an immigrant/member of an ethnic minority working at a small firm and having a low income; or c) were an immigrant/member of an ethnic minority working at a small firm in non-traditional work. According to this classification, that was both pragmatic (to enable measurement) and closely informed by the literature on precarity and precarious work (the theoretical grounding), we found that over the period 2009-20 approximately 8.7-10% of the UK workforce (or 5% of the overall UK population) met our criteria for being precarious workers. Clearly, that is a sizeable proportion of the working population. Our results also indicated that precarious workers are more likely to be women, are typically younger than their 'non-precarious' counterparts (by 5-6 years on average), and are much less likely to work at unionised workplaces (23-25% versus over 50% of non-precarious workers). We also found strong concentrations of precarious workers by industry, with a total of 40% found in just three industries combined: hospitality, retail and construction, compared to around 25% for non-precarious workers.

Despite substantial changes in the labour market over that time (e.g. the impacts of the 2008 Great Recession and the rise in zero hours contracts), we found that the proportion of workers in precarious work 'remained steady without much variation throughout the studied period' (Pósch et al., 2021, p. 11). These findings were surprising and contrast sharply with other research, which typically suggests that precarity is rising in advanced economies. We put forward four possible explanations for the remarkable consistency in the scale and nature of precarious work identified through this study: 1) that pivotal changes in the UK labour market predated 2008 (for example, ONS data show that the share of the self-employed in the UK workforce increased by 1.7% from 2001-10, and then only another 0.8% from 2010-19), 2) that precarity has become a feature of those in more traditional work as well, 3) that there are limitations in our measurement (e.g. the intensity of precariousness may have changed, even if its basic presence has not), and/or 4) that our findings show the reality of the situation. Some of these explanations may be complementary, rather than competing (for more details, please see (Pósch et al., 2020, 2021).

Aims and objectives

Our primary aim with this project is to establish the scale and nature of labour market non-compliance among precarious workers across all four nations of the UK. Our complementary secondary aims are: (1) to disentangle their experiences of non-compliance and examine their interplay with harmful work practices; and (2) gain insight into their access to justice. To meet these aims, we will deliver against five key objectives:

1. to conduct cutting-edge, fully-integrated, mixed-methods research covering a broad range of labour market non-compliance and a high-risk population (precarious workers);
2. to generate rigorous, reliable and nuanced findings, which are both generalisable to the wider population under study and replicable for future studies;
3. to engage meaningfully with stakeholders – including precarious workers – throughout the project's lifetime to ensure the work is pertinent, useful, and well-considered;

4. to translate the findings into actionable insights and recommendations for policy and practice, that are sensitive to real-world demands, constraints and levers for change; and
5. to disseminate the outputs in a way that maximises exposure, uptake and impact both nationally and internationally, and sets a template for best practice globally.

Why focus specifically on precarious workers?

Our project focuses specifically on precarious workers, who are widely considered particularly vulnerable to labour market abuses (Cockbain et al., 2019), and are arguably the largest and most important subset of workers on whom the DLME could focus in its remit. Prioritising this group will achieve the greatest insight and policy relevance within the project's budgetary constraints. Expanding the focus to the entire population of UK workers would yield diminishing returns on investment; focusing on a high-risk population is much more cost-effective and provides large analytical benefits due to the increased sample size of this particular group of interest. Our project aligns therefore with where risk and harm are perceived to concentrate, supports strategic priorities for enforcement, and will deliver a detailed picture with meaningful breakdowns by workers' sociodemographic characteristics, geography, sector, form of working relationship, etc. Fielding the survey through Understanding Society will ensure a large and representative sample of precarious workers, including those from a migrant and/or ethnic minority background. The only notable exceptions in coverage will be certain extreme sub-populations unlikely ever to be accessible via a probabilistic survey, most obviously those currently experiencing situations of extreme exploitation in the form of human trafficking or other forms or 'modern slavery'.

Research questions

With a focus on people in precarious work, the overarching research question guiding this study is 'What is the scale and nature of labour market non-compliance in the UK?'. We will then break that down into the following interlinked sub-questions[8]:

1. What proportion of precarious workers in the UK experience labour market non-compliance?
2. What labour market violations do they experience and in what combinations?
3. How do prevalence rates vary by demographic or occupational groups, sectors, geographical locations and social networks?
4. How does non-compliance intersect with other key forms of work-based harm?
5. How do workers experience and respond to labour market non-compliance?
6. What are the implications of the survey findings for efforts to improve monitoring, compliance, enforcement, and access to justice?

Together, these questions speak to both the scale (prevalence) of non-compliance and its complex nature (variation between and within forms of non-compliance, overlap with key related issues, access to justice, the detail of lived experiences, and ideas for change).

[8] Originally, we had also hoped to cover one more research question (To what extent can precarious workers access justice for labour market violations?) but due to survey space constraints, it will unfortunately not be possible to assess this quantitatively. We still aim to explore aspects of access to justice qualitatively, through the interviews and focus groups

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Advisory groups

Since labour market non-compliance and its enforcement is a complex terrain, we deliberately designed the project to involve extensive engagement with a wide and varied range of stakeholder groups. We have benefitted greatly from the contributions of six different groups, broadly divided as follows:

1. Legal experts
2. Labour abuse academics
3. Policy-makers and operational staff
4. Employers and employer representatives
5. Workers' rights representatives
6. People in precarious work themselves

The worker advisory group has been convened and managed by the NGO Focus on Labour Exploitation (FLEX), which enabled us to benefit from their experience and expertise in consultative, collaborative and co-produced research with various marginalised worker groups. To date, we have completed at least two two-hour sessions with each group[9], and also benefitted from their review and written feedback on key documentation, in particular drafts of survey questions. To encourage frank and open participation, none of the comments and feedback from advisory group members are attributed to particular organisations or individuals, nor were the sessions recorded, although we took detailed contemporaneous notes. To the greatest extent possible, we have sought to ensure consistency of membership (by organisation and individual) over time. Table 1 below contains a list of advisory group members (by name and/or organisation as preferred). The first advisory groups took place between June and August 2022 (conceptualisation) and the second advisory groups took place between September and December 2022 (operationalisation). We also approached other individuals and organisations, who for various reasons were not able to participate thus far.

[9] The policy-maker and operational staff group is split into two: an advisory group, with whom we have met twice, and the 'Technical Advisory Group', which consists of representatives of the three enforcement bodies and other key organisations, and with whom we meet roughly quarterly,

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Table 1: Advisory Group Members

Person	***Organisation***	***Group***
Prof Lizzie Barmes	Queen Mary, University of London	*Legal experts*
Prof Catherine Barnard	University of Cambridge	*Legal experts*
Prof Alan Bogg	Bristol University	*Legal experts*
Prof David Cabrelli	University of Edinburgh	*Legal experts*
Prof Hugh Collins	LSE	*Legal experts*
Prof Anne Davis	University of Oxford	*Legal experts*
Prof Keith Ewing	Kings College London	*Legal experts*
Lord John Hendy KC	Old Square Chambers	*Legal experts*
Prof John Howe	University of Melbourne, Australia	*Legal experts*
Prof Deirdre McCann	Durham University	*Legal experts*
Dr Esther McGuiness	Ulster University	*Legal experts*
Prof Gráinne McKeever	Ulster University	*Legal experts*
Prof Tonia Novitz	University of Bristol	*Legal experts*
Prof Hila Shamir	Tel-Aviv University, Israel	*Legal experts*
Prof Bridget Anderson	University of Bristol	*Labour abuse experts*
Prof Alex Balch	Modern Slavery & Human Rights Policy & Evidence Centre; University of Liverpool	*Labour abuse experts*
Dr Kevin Chuah	Northeastern University, USA	*Labour abuse experts*
Prof Nick Clark	Independent	*Labour abuse experts*
Lindsay Judge	Resolution Foundation	*Labour abuse experts*
Dr Tibor Meszmann	Central European Labour Studies Institute, Slovakia	*Labour abuse experts*
Dr Siobhán McGrath	Clark University, USA	*Labour abuse experts*
Dr Andie Noack	Toronto Metropolitan University, Canada	*Labour abuse experts*
Dr Natalia Ollus	HEUNI (European Institute for Crime Prevention and Control, Finland)	*Labour abuse experts*

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Person	*Organisation*	*Group*
Prof Nik Theodore	University of Illinois, Chicago, USA	*Labour abuse experts*
Dr Alexander Trautrims	University of Nottingham	*Labour abuse experts*
Dr Guri Tyldum	Fafo Research Foundation, Norway	*Labour abuse experts*
Prof Anne Visser	University of California, Davis, USA	*Labour abuse experts*
Prof Leah Vosko	York University, Canada	*Labour abuse experts*
Prof Louise Waite	University of Leeds	*Labour abuse experts*

Person	*Organisation*	*Group*
	ACAS	*Policy makers and operational staff (general)*
	Employment Lawyers Association	*Policy makers and operational staff (general)*
	Health and Safety Executive	*Policy makers and operational staff (general)*
Keith Rosser	JobsAware	*Policy makers and operational staff (general)*
	Home Office, Modern Slavery Unit	*Policy makers and operational staff (general)*
	Low Pay Commission	*Policy makers and operational staff (general)*
	Migration Advisory Committee	*Policy makers and operational staff (general)*
	Northern Irish Government	*Policy makers and operational staff (general)*
Katherine Lawson	Office of the Independent Anti-Slavery Commissioner	*Policy makers and operational staff (general)*
	Scottish Government	*Policy makers and operational staff (general)*
	Welsh Government	*Policy makers and operational staff (general)*
	Department for Business and Trade	*Policy makers and operational staff (*Technical Advisory Group)
	Gangmasters and labour Abuse Authority	*Policy makers and operational staff (*Technical Advisory Group)
	HMRC NMW/NLW	*Policy makers and operational staff (*Technical Advisory Group)
	Home Office	*Policy makers and operational staff (*Technical Advisory Group)
	Office of the Director of Labour Market Enforcement	*Policy makers and operational staff (*Technical Advisory Group)
Tania Bowers	Association of Professional Staffing Companies	*Employers and Employer Representatives*

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Person	*Organisation*	*Group*
David Camp	Association of Labour Providers	*Employers and Employer Representatives*
Cosmo Gibson	Federation of Small Businesses	*Employers and Employer Representatives*
Simon Hollingbery FBICSc	Company Secretary of British Cleaning Council	*Employers and Employer Representatives*
Stephen Jones	London Chamber of Commerce and Industry	*Employers and Employer Representatives*
Shazia Imtiaz	Association of Professional Staffing Companies	*Employers and Employer Representatives*
James Mallick	Pro-Force Ltd	*Employers and Employer Representatives*
David Michie	National Farmers Union	*Employers and Employer Representatives*
Andrew Reaney	BooHoo	*Employers and Employer Representatives*
Pamela Zielinski	Stronger Together	*Employers and Employer Representatives*
	British Frozen Food Federation	*Employers and Employer Representatives*
	Build UK	*Employers and Employer Representatives*
	Tesco	*Employers and Employer Representatives*
	Uber	*Employers and Employer Representatives*
	UK Homecare Association	*Employers and Employer Representatives*
	UK Hospitality	*Employers and Employer Representatives*

Person	*Organisation*	*Group*
Bethany Birdsall	Work Rights Centre	*Workers' rights representatives*
Andy Chamberlain	IPSE (The Association of Independent Professionals and the Self-Employed)	*Workers' rights representatives*
Max Dewhurst	Cycle courier and IWGB Union Treasurer	*Workers' rights representatives*
Lucila Granada	Focus on Labour Exploitation (FLEX)	*Workers' rights representatives*
Narmada Thiranagama	UNISON	*Workers' rights representatives*
	JCWI (Joint Council for the Welfare of Immigrants)	*Workers' rights representatives*
	Joseph Rowntree Foundation	*Workers' rights representatives*
	Landworkers' Alliance	*Workers' rights representatives*
	Migrant Rights Network	*Workers' rights representatives*

Person	*Organisation*	*Group*
	Share Action	*Workers' rights representatives*
	Trades Union Congress	*Workers' rights representatives*
	UNITE	*Workers' rights representatives*
	USDAW (Union of Shop, Distributive and Allied Workers)	*Workers' rights representatives*

Ethics

All relevant components of this project thus far have already undergone ethical review at UCL. The principles of informed consent, anonymity and confidentiality, and fair renumeration of participants, have all been central to the research design and its ongoing delivery. The survey question testing, analysis of existing Understanding Society Survey data, and the survey itself (including its pilot) have all undergone UCL Research Ethics Committee review and been approved (respective references: ID 428; ID 429; ID 528). Consultation with precarious workers as an advisory group, facilitated by FLEX, was granted an ethics exemption by UCL (the research team had no access to participants' personal information and were not directly involved in their recruitment or issuing payment). The in-depth qualitative elements of the research (one-on-one interviews and focus groups) are currently undergoing UCL Research Ethics Committee review.

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Chapter 3: Scale and nature of precarious work in the UK – A revision and extension

This chapter contains the first piece of empirical analysis of the project, lays the groundwork for the survey sampling, and estimates the numbers and characteristics of people in precarious work in the UK. We used pragmatic, research-informed criteria to identify people in precarious work, defined as meeting various combinations of two or more of the following (weighted) factors: having non-traditional work; low income; a small workplace; and/or coming from an immigrant and/or ethnic minority background. We found that 10-11.7% of the UK workforce (5.7-6.3% of the population) were in precarious work across the period 2009-2022 inclusive. We then used longitudinal analysis which revealed five distinct group-based trajectories: 'traditional' (49.2% of all workers in the sample); 'early career' (9.8%); 'increasingly precarious' (8%); 'non-traditional' (7.6%); and 'transitional' (25.4%). Our results show, for example, that some people tend to escape precarity as they age into more secure employment, others become increasingly precarious over time, and others transition into and out of precarious work, potentially related to other developments in their lives (e.g. career breaks).

In this chapter, we are going to revisit, revise and extend the work we carried out in April 2020 and updated in December 2021 (Pósch et al. 2020, 2021). To briefly summarise the findings of that previous work:

1) We reviewed the extant literature and showed that precarious work is on a spectrum and that precarity covers both legal and illegal practices. The qualitative and the limited quantitative evidence available suggested that people who are in precarious work are more likely to be exposed to labour market non-compliance. This means that focussing on precarious workers instead of all workers is a prudent approach as they are at particularly high risk of experiencing labour market non-compliance.
2) We argued that in order to identify people in precarious work, we can take a pragmatic approach. We defined precarious work as a combination of two or more of the following (weighted) factors: non-traditional work; low income; working at a small workplace; and having an immigrant/ethnic minority background. In particular, we defined someone as a precarious worker if they either (a) have low income and are in non-traditional work; (b) are an immigrant/member of an ethnic minority, work at a small firm, and have low income; or (c) are an immigrant/member of an ethnic minority, work at a small firm, and are in non-traditional work.
3) We used the Understanding Society Survey (USS) to carry out our analysis and provide robust inferences to the UK population. Our analysis indicated that, of the four criteria, low income and non-standard work were relatively more important in identifying people in precarious work than firm size and immigrant/ethnic minority background. This finding informed our weighting scheme.
4) This original work indicated that between 2009 and 2020 people in precarious work made up around 8.5%-9.7% of the workforce, and 4.9%-5.4% of the whole population. The scale of people in precarious work remained stable, without much variation throughout the period under scrutiny. This finding contrasts with much of the literature, which suggests that precarity (usually measured by a growth in precarious work) has been rising in advanced economies.

5) Finally, we found that precarious workers were more likely to be women, and were on average 5-6 years younger than non-precarious workers. Approximately 40% worked in three industries (hospitality, retail and construction), and around a quarter had occupations associated with the working or lower occupational classes. We also found that less than half of precarious workers (23-25%) worked in unionised workplaces, compared to around 50% of non-precarious workers.

In this chapter we revise and extend our original analysis. Most importantly, discussions within the advisory groups, in which multiple parties (academics, worker representatives and other stakeholders) suggested we had defined low income too conservatively, prompted revision of our original four criteria. They encouraged us to increase our threshold from 60% of the median income (a measure of income poverty used by the UK government) to a higher level, as they felt that the 60% threshold did not account for people who were not defined as poor but were still struggling to make ends meet. The choice of a threshold tends to be arbitrary; there is no good reason why the threshold of poverty could not be 59% or 61% instead of 60%. Thus, in most cases, such decisions are dictated by conventions, such as official or operational definitions set out by statistics agencies or government departments. Hence, we wanted to replace our previous threshold with one that can provide us with the best utility, which meant that we wanted to follow a convention that has been used by reputable organisations, as this could assist us with making out-of-sample comparisons. For this reason, we decided to adopt the definition of low income used by the OECD, which relies on the low-income threshold of 66% of the median income for a country. This will help us make cross-national comparisons.

In order to demonstrate how this small change in the identifying criteria for precarious work made a difference, we reran our earlier models with this updated characteristic. Due to the passage of time, we also had the chance to include more waves of the USS into our analysis. To anticipate the findings, other than a small expansion in the proportion of people defined as precarious workers, our results remained by-and-large consistent with the earlier findings.

We also extended our analysis by utilising a main feature of the USS – the fact that respondents are interviewed at multiple points in time across different survey 'waves' – to carry out longitudinal analysis. Here, we estimated the temporal trajectory for each individual, with an eye on how their values on our identification criteria changed over time (put simply, how they move into or out of precarious work, or stay within it). While we found that around half of the respondents belonged to a 'traditional worker' group, with almost all of them staying non-precarious workers over the study period, for the other half of the sample precarious work was more common at different stages of their working lives. The latter group had multiple different trajectories. This new description (and segmentation) of workers can provide us with further insight into precarious work in the UK.

The scale of precarious work In the UK (2009-2022)

To capture precarious work, we used multiple survey questions available in the USS. We operationalised each of our four identifying criteria in the following way: (1) being in non-traditional work, defined as being self-employed, having a temporary job, or having a second job; (2) working for a small firm, defined as working with fewer than 50 people at the workplace; and (3) being an immigrant and/or from an ethnic minority background; and (4) having low income, defined as earning less than 66% of

the median income in our new definition (recall that our original definition was less than 60% of the median income).

There are two notable changes to the USS, which we represented by using different shades of grey in Table 2. First, from Wave 6 onwards, an Immigrant and Ethnic Minority Boost sample was gradually introduced to the survey, which we denoted by a light greying of the background. Furthermore, from Wave 11 onwards, questions regarding gig economy work were added, which meant that we had one more variable we could use to identify non-traditional work. To retain the consistency of our earlier measures, for Wave 11-Wave 12 we estimated precarious work twice, once with the original set of non-traditional work variables (light grey) and once with gig economy work also considered (dark grey). For further information regarding the USS and variable selection, please refer to our original reports (Pósch et al. 2020, 2021).

For Table 2, we juxtaposed the results for our original (first and second columns) and revised (third and fourth columns) identifying criteria. Depending on the method of estimation, our original identifying criteria suggested that across the different waves, between 8.5%-10.1% of the workforce and 4.7%-5.4% of the population could be considered as being in precarious work. Using our revised criteria (i.e. increasing the low income threshold from 60% to 66%) boosted these numbers to 10-11.7% and 5.7-6.3% respectively. Overall, this amounts to an average 1.5 percentage point increase in the proportion of people in precarious work in the workforce or an average 0.8 percentage point increase in the population, which, in relative terms, equals an approximate 16.5% boost for both.

Despite the revision of our identifying criteria, the conclusions from our earlier analysis held true, in that we found remarkable consistency in the share of people in precarious work across the study period. As the next step, we compared the share of workers in precarious and non-precarious work in each of the four building blocks in our revised criteria (Table 3). As in our earlier analysis, and across all waves, around 95% of the workers identified as precarious had low income, compared to around 15-20% of non-precarious workers. Similarly, around 9 in 10 precarious workers were in non-traditional work, compared to less than 1 in 5 for non-precarious workers. Around two-thirds to three-quarters of precarious workers were UK-born White British, compared to close to 9 in 10 non-precarious workers. Finally, around three-quarters of precarious workers worked for a small firm, compared to less than half among non-precarious workers.

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Table 2: Precarious workers as a % of workers and % of the UK population

	Precarious workers (% of workforce) – 60% low income threshold	Precarious workers (% of the UK population) – 60% low income threshold	Precarious workers (% of workforce) – 66% low income threshold	Precarious workers (% of the UK population) – 66% low income threshold
Wave 1 (2009-2010)	9.3%	5.3%	11.3%	6.5%
Wave 2 (2010-2011)	8.7%	4.9%	10.3%	5.8%
Wave 3 (2011-2012)	8.8%	5%	10.0%	5.7%
Wave 4 (2012-2013)	8.5%	4.9%	10.2%	5.9%
Wave 5 (2013-2014)	9.3%	5.4%	10.7%	6.2%
Wave 6 (2014-2015)	9.4%	5.4%	10.6%	6.2%
Wave 7 (2015-2016)	9.1%	5.3%	10.7%	6.2%
Wave 8 (2016-2017)	9%	5.2%	10.5%	6.0%
Wave 9 (2017-2018)	8.8%	5%	10.4%	6.0%
Wave 10 (2018-2019)	8.9%	5%	10.4%	5.7%
Wave 11* (2019-2020)	8.9%	4.9%	10.3%	5.5%
Wave 12* (2020-2021)	9.1%	4.7%	10.4%	5.7%
Wave 13* (2021-2022)	9.0%	4.7%	10.3%	5.6%
Wave 11* (2019-2020)	9.9%	5.4%	10.6%	5.8%
Wave 12* (2020-2021)	10.1%	5.2%	10.7%	6.0%
Wave 13* (2021-2022)	10.0%	5.1%	10.5%	5.9%

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Table 3: Proportion of low income workers, non-traditional workers, UK-born White British workers, and workers working for a small firm in the precarious and non-precarious worker categories (revised estimates)

	Low income (<66% median)		Non-traditional work		UK-born White British		Working for a small firm	
	Precarious	Non-precar.	Precarious	Non-precar.	Precarious	Non-precar.	Precarious	Non-precar.
Wave 1 (2009-2010)	94.9%	17.1%	87.4%	17.2%	67.3%	85.7%	75.4%	44.9%
Wave 2 (2010-2011)	95.0%	17.1%	89.1%	17.7%	69.8%	88.1%	75.3%	44.9%
Wave 3 (2011-2012)	95.5%	17.3%	88.5%	17.7%	70.2%	87.6%	75.9%	45.1%
Wave 4 (2012-2013)	94.6%	16.4%	89.6%	17.9%	70.9%	87.9%	76.8%	44.5%
Wave 5 (2013-2014)	95.4%	17.5%	88.9%	16.9%	71.9%	88.2%	73.4%	44.3%
Wave 6 (2014-2015)	96.0%	16.0%	89.4%	19.4%	70.1%	87.7%	74.8%	44.1%
Wave 7 (2015-2016)	95.8%	15.8%	89.3%	18.0%	70.8%	87.6%	74.6%	45.1%
Wave 8 (2016-2017)	95.7%	14.4%	88.5%	19.2%	70.2%	88.3%	76.1%	44.3%
Wave 9 (2017-2018)	95.5%	13.9%	88.6%	18.8%	70.9%	88.8%	73.1%	44.2%
Wave 10 (2018-2019)	96.5%	15.6%	90.4%	18.3%	73.7%	88.7%	69.8%	43.3%
Wave 11* (2019-2020)	96.0%	15.2%	91.3%	16.8%	74.5%	88.8%	69.7%	42.4%
Wave 12* (2020-2021)	96.1%	14.8%	90.8%	17.2%	74.7%	88.6%	70.2%	42.4%
Wave 13* (2021-2022)	95.8%	14.7%	90.6%	18.4%	74.8%	88.6%	70.3%	42.6%
Wave 11* (2019-2020)	95.6%	14.9%	89.4%	16.8%	74.1%	88.9%	69.7%	42.3%
Wave 12* (2020-2021)	95.8%	15.1%	89.7%	16.5%	74.3%	89.1%	70.1%	42.4%
Wave 13* (2021-2022)	95.9%	14.9%	89.5%	17.0%	74.2%	89.0%	70.4%	42.6%

Another way of looking at the above evidence is to consider the proportion of workers in each category we identify as precarious. With small natural variation across the years:

- around 45-55% of low-income workers…
- around one-third of non-traditional workers (32-36%)…
- around one in ten UK-born White British workers (8-12%)…
- around 14-19% of workers working for a small firm…

…were identified as precarious workers using our method. This means that although the goal of our method is to identify a subset of workers, this is done in a way that considers multiple dimensions simultaneously, with the result that even the most dominant indicator (i.e. being a low-income worker) does not on its own identify precarious work, since by our measure around half of the people in low income work were not classified as precarious. In simple terms, we are looking at workers with more than one potential risk factor which makes them increasingly likely to be in precarious work.

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Precarious Work and Its Correlates – The Nature of Precarious Work

When we considered the intersection between gender, age, industry, occupational class and precarious work, we largely replicated the findings of the previous reports. According to our revised estimates, people in precarious work:

- were half as likely as non-precarious workers to work in a unionised workplace (Table 4);
- were more likely to be women, with a majority of them belonging to this category compared to a minority among non-precarious workers (Table 5);
- were on average, around 5 years younger than non-precarious workers (Table 5);
- were more likely to belong to lower and working occupational classes (Table 6);
- and were more likely to work in three industries: hospitality, retail and construction, compared to non-precarious workers (Table 6)

Table 4: Proportion of workers at unionised workplaces: by precarious / non-precarious categorisation (revised estimates)

	Proportion of workers at unionised workplaces	
	Precarious	Non-precar.
Wave 2 (2010-2011)	24.3%	51.0%
Wave 4 (2012-2013)	26.5%	51.8%
Wave 6 (2014-2015)	24.7%	50.2%
Wave 8 (2016-2017)	24.4%	46.9%
Wave 10 (2018-2019)	29.4%	46.1%
Wave 12 (2020-2021)	26.7%	49.9%
Wave 12 (2020-2021)	28.3%	51.1%

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Table 5: Proportion of women and mean age of workers: by precarious / non-precarious worker categorisation (revised estimates)

	Proportion of workers who are women	Proportion of workers who are women	Average age	Average age
	Precarious	Non-precar.	Precarious	Non-precar.
Wave 1 (2009-2010)	49.5%	46.1%	37.1	41.1
Wave 2 (2010-2011)	52.7%	47.8%	36.8	41.5
Wave 3 (2011-2012)	52.0%	47.3%	36.9	42.1
Wave 4 (2012-2013)	50.4%	47.5%	37.9	42.1
Wave 5 (2013-2014)	51.4%	47.5%	37.6	42.4
Wave 6 (2014-2015)	53.5%	47.4%	37	42.6
Wave 7 (2015-2016)	52.6%	48.0%	38.0	42.6
Wave 8 (2016-2017)	53.7%	48.4	37.8	42.8
Wave 9 (2017-2018)	55.1%	49.1%	37.7	43.1
Wave 10 (2018-2019)	57.2%	49.4%	39.0	43.2
Wave 11* (2019-2020)	54.6%	50.2%	39.6	43.8
Wave 12* (2020-2021)	54.8%	49.4%	39.8	44.1
Wave 13* (2021-2022)	55.0%	49.9%	39.9	44.4
Wave 11* (2019-2020)	54.2%	50.3%	39.6	43.8
Wave 12* (2020-2021)	54.4%	49.6%	39.8	44.1
Wave 13* (2021-2022)	54.9%	50.1%	39.9	44.4

Table 6: Proportion of workers in occupations considered as working or lower class, proportion of workers in the hospitality, retail and construction industries: by precarious / non-precarious categorisation (revised estimates)

	Working and lower class		Hospitality (Industry)		Retail (Industry)		Construction (Industry)	
	Precarious	Non-precar.	Precarious	Non-precar.	Precarious	Non-precar.	Precarious	Non-precar.
Wave 1 (2009-2010)	26.9%	17.0%	15.3%	5.4%	16.1%	12.9%	10.1%	7.1%
Wave 2 (2010-2011)	27.3%	16.9%	16.1%	5.2%	15.3%	12.8%	9.5%	6.6%
Wave 3 (2011-2012)	26.7%	17.3%	14.9%	5.2%	15.1%	12.8%	10.2%	6.4%
Wave 4 (2012-2013)	27.2%	17.2%	14.7%	5.1%	15.7%	13%	10.2%	6.2%
Wave 5 (2013-2014)	28.3%	17.1%	14.7%	5.2%	14.6%	12.9%	9.4%	6.2%
Wave 6 (2014-2015)	28.2%	17.8%	17.3%	5.2%	15.5%	12.7%	8.2%	6.2%
Wave 7 (2015-2016)	26.4%	17.6%	16.2%	5.5%	14.9%	12.8%	8.9%	5.8%
Wave 8 (2016-2017)	27.9%	17.9%	17.4%	5.5%	14.2%	12.8%	8.1%	5.8%
Wave 9 (2017-2018)	29.1%	17.3%	17.9%	5.5%	13.9%	13.4%	9.4%	5.5%
Wave 10 (2018-2019)	30.2%	17.8%	15.7%	5.6%	15.5%	13.2%	8.8%	5.1%
Wave 11* (2019-2020)	28.9%	17.3%	15.0%	4.9%	14.7%	12.7%	7.5%	5.4%
Wave 12* (2020-2021)	30.5%	16.9%	14.9%	5.0%	14.8%	11.9%	7.6%	5.3%
Wave 13* (2021-2022)	29.7%	17.2%	15.1%	4.9%	15.2%	12.4%	7.4%	4.9%
Wave 11* (2019-2020)	29.1%	17.5%	15.1%	4.8%	14.9%	12.6%	7.4%	5.4%
Wave 12* (2020-2021)	30.8%	17.1%	15.0%	4.9%	15.1%	12.0%	7.5%	5.3%
Wave 13* (2021-2022)	30.1%	17.3%	15.3%	4.7%	15.4%	12.6%	7.1%	4.6%

Precarious Work Across the Years – Changes to Being in Precarious Work Over Time

A powerful feature of the USS is its longitudinal data collection strategy, which means that we can follow how each participant's status changes over time. To track these changes, we used a method called Group-Based Trajectory Modelling (GBTM) (Nagin & Odgers, 2010; Nagin, Jones, & Elmer, 2024). This method estimates typical temporal trajectories based on changes in key variables (in our case: the four identifying criteria of precarious work) and assigns each respondent to the trajectory that best explains the change in their work over time. To summarise, this method (1) identifies typical temporal trajectories in the sample; (2) assigns each respondent to the one that they are most likely to belong to; and (3) can estimate the share of the sample which belongs to each trajectory.

Using this GBTM approach and the USS data, the best-fitting model indicated five distinct trajectories (the changes in all four variables are depicted in Figure 1). We provide a summary for each of them in the next section, highlighting their main characteristics (for further descriptive statistics for each of them, please refer to Table 7). The labels were devised by us based on the emergent characteristics of the members of each of the trajectories.

To summarise the results, our analysis indicates that around one in two (49.2%) UK workers can be deemed 'traditional' with the vast majority of them having relatively high income, being in traditional employment, working for large firms, and being UK-born and White. This group has the lowest share of precarious workers, with an average of less than 1%.

Another trajectory where it is easy to build a clear narrative, is the 'early career' group, making up around one in ten respondents in the sample (9.8%). They are the youngest group, and they take on the traits of the 'traditional' group over time, with a falling share of precarious workers from around one in five to approximately 1%. These are the respondents who successfully leave behind their precarity over time.

The opposite is true for the 'increasingly precarious' group who also represent around one in ten respondents in the sample (9%). Initially, around 15% of this group are in precarious work but, over time, this increases to such a level that it includes almost all of them (around 97%). The most distinguishable trait of this group is that they are low income, but this is compounded by them either taking on non-traditional work or starting to work for a small firm. They are the ones whose situation becomes increasingly precarious wave-on-wave.

Non-traditional workers make up the fourth group, around 7.6% of the sample. Their dominant trait is that they are in non-traditional work although, over time, they increasingly shift to more traditional work (with a decreasing share of them being in precarious work). Their increased mobility across industries is a testament to their flexibility in the labour market.

Finally, around a quarter of the sample (25.4%) are 'transitional' workers. Within this group of respondents, a low proportion are initially in precarious work. Many then 'fall' into precarious work, after which they revert back to more traditional work. This group was the hardest to define, we gave them the 'transitional' label as they were more likely to report career breaks or retirement than any other group, implying that they are likely to be going through some kind of transition in their lives.

Overall, these five groups – 'traditional', 'early career', 'increasingly precarious', 'non-traditional', and 'transitional' – capture the different trajectories that participants are likely to follow over their working

lives. Some of these categories are informed by particular life-stage effects ('early career'), others reflect some disruption or change to one's career ('transitional'), whilst others are likely to emerge as a consequence of changes to work ('non-traditional'). These group trajectories demonstrate that while certain workers are at low to no risk of ending up in precarious work, and that many who do fall into this category are likely to transition out of it, there is a group, around 10% of the sample, who over the 12 years of the survey slid into precarious work. We found some evidence that early commitments in this group (i.e. lack of changes to the industry they work in) were likely to affect them. The distinct geographical patterning (not present for other groups) also implies that some local factors might help perpetuate their increasingly precarious status. As shown in Table 8, a significantly higher share of the increasingly precarious group lived either in London, North-West, or South-West compared to any other group.

Table 7: The five group-based trajectories and their main traits

	Traditional	Transitional	Early career	Increasingly precarious	Non-traditional	Sample averages
% of sample	49.2%	25.4%	9.8%	8%	7.6%	
In precarious work (average %)	0.9%	20.4%	7.9%	67.3%	30.2%	14.1%
Low income (average %)	1.5%	39.5%	13.2%	82.9%	27.2%	20.8%
Non-traditional work (average %)	5.2%	42.2%	19.7%	54.7%	92.1%	26.6%
UK-born British	95.2%	91.7%	77.3%	89.6%	84.7%	91.3%
Working for a small firm (average %)	12.4%	32.2%	45.2%	60.7%	79.7%	29.6%
Average age (at start)	45.2	44.8	29.9	41.2	37.4	42.7
Female (%)	48.4%	57.9%	51.2%	58.1%	46.2%	51.7%
Stays within the same industry (average %)	88.4%	65.6%	54.7%	90.2%	60.2%	77.3%
Break in work (average %)	3.8%	41.4%	39.2%	12.3%	10.2%	18.0%

Figure 1: Share of precarious workers in the group trajectories (over time)

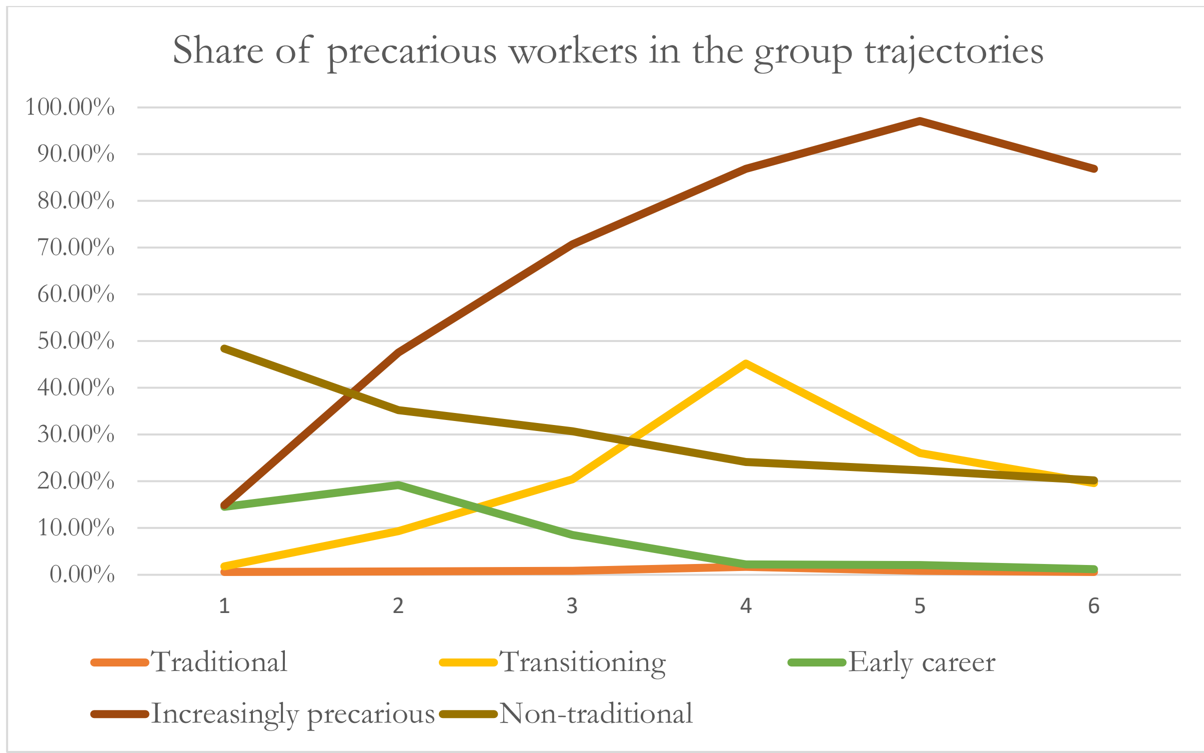

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Table 8: The five group-based trajectories across the UK regions

	Traditional	**Transitional**	**Early career**	**Increasingly precarious**	**Non-traditional**	**Sample averages**
% of sample	49.20%	25.40%	9.80%	8%	7.60%	
North-East	3.60%	3.90%	3.60%	3.30%	3.70%	3.70%
North-West	9.50%	9.90%	9.50%	11.00%	9.80%	9.70%
Yorkshire and the Humber	7.80%	7.70%	7.60%	7.30%	7.80%	7.70%
East-Midlands	7.40%	7.40%	7.30%	6.90%	7.20%	7.30%
West-Midlands	7.70%	8.10%	8.00%	7.80%	8.00%	7.90%
East of England	8.30%	8.50%	8.40%	7.90%	8.10%	8.30%
London	12.50%	11.80%	12.10%	13.40%	12.30%	12.30%
South-East	12.10%	11.50%	11.60%	11.30%	11.90%	11.80%
South-West	7.40%	7.50%	7.50%	8.70%	7.20%	7.50%
Wales	7.70%	7.60%	7.70%	7.10%	7.20%	7.60%
Scotland	9.10%	9.00%	9.40%	8.70%	9.00%	9.10%
Northern Ireland	6.90%	7.20%	7.30%	6.70%	7.70%	7.10%

Precarious Work Across the Years – The Five Group-based Trajectories

In this section, we provide a comprehensive discussion of each of the five groups identified using our analysis. These are all descriptive in nature, but they provide more detail compared to the earlier section which only teased out some of the main features of each of the groups. The statistics referred to in this section can be found in Table 7 and 8 and are also depicted in Figure 1.

1) 'Traditional' – The largest group, with around half (49.2%) of the sample belonging to this category, has the lowest share of precarious workers (M=0.9%, Min=0.6%, Max=1.7%). Despite this group having the lowest share of precarious workers, a little less than one in twenty were in this category across the waves, due to the large overall size of the group. Workers in the 'traditional' category were overwhelmingly relatively high income (95%+), in traditional employment (90%+), non-immigrant White (95+%), working for a large employer (85%+). This group had significantly more men than women, and they were, on average, older than all the other groups.

2) Transitional' – The second largest group, with approximately a quarter (25.4%) of the sample belonging to this trajectory. The members of this group typically start with a very low share of precarious work (Min=1.8%) which steadily increases over time (Max=45.2%), falling back to lower levels later, and averaging around one in five workers (M=20.4%) overall. Despite the average share of precarious workers hovering around 20% due to the size of this group, overall they provide the second largest group of precarious workers; one in three precarious workers belonging to this category. This group transitions from traditional work and high-income to non-traditional work and low income with a slight rebound at the end of the period. Around 92% of them are non-immigrant White, with significantly more women than men, and a higher chance than any other group to leave the labour market either permanently (e.g. retiring, not looking for work) or temporarily (e.g. due to caring responsibilities, such as women re-entering the workforce after having children).

3) 'Early career' – The third largest group, with around one in ten people (9.8%) belonging to this trajectory. They start with a slightly elevated share of precarious workers, which at first slightly increases, then steadily drops to the levels seen for the 'Traditional' category (M=7.9%, Min=1.2%, Max=19.2%). This meant that on average, over the time period covered by the USS, a little over one in twenty precarious workers belonged to this category. This group rapidly transitions from low income, non-traditional work for small employers to high-income, traditional work with large employers. This is the group with the largest number of immigrant and non-White people, around one in four (22.7%). They are the youngest group compared to others, with the highest chance of switching to different industries.

4) 'Increasingly precarious' – This group makes up around 8% of the sample. They start on a similar level as the 'early career' group (Min=14.9%), but unlike them, their share of precarious work steadily increases to very high levels (Max=97.1%) with a little levelling-off later. The overall share of precarious workers is the highest in this category, with an average of 67.3%. Despite starting from a low share, more than a third of precarious workers belonged to this group over the studied time period, providing the highest overall share of any group. Their most distinct trait is being low income, which increases over time (from around 22% to 95%), non-traditional work fluctuates, their share of immigrant and non-White is no different from other groups (10.4%), and they typically work for smaller employers. They are more likely to

be women than men, and show clear industry patterns, with around half (49.3%) of them working in hospitality, retail, agriculture and construction. Unlike the other groups, they exhibit a clear geographical concentration, with around a third (33.1%) of them living in three regions: London, North-West, and South-West.

5) ‘Non-traditional’ – Finally, the smallest group makes up 7.6% of the sample. They start with high levels of precarious work (Max=48.4%) which slowly but steadily decreases over time (Min=20.2%). This group had the third highest share of precarious workers across the waves, with around one in five of them belonging to this category. Their most distinct trait is being in non-traditional work, although less so over time. Similarly, their income improves over time, and they will be more likely to work for larger employers. They have an above average share of immigrants and ethnic minorities (14.7%), are more likely to be men than women, and are more likely to be younger (though not as young as the early career group). They have higher mobility in terms of switching between industries than other groups (but not as high as the early career group).

Modelling Precarious Work Using Longitudinal Analysis – Key Assumptions

Carrying out longitudinal analysis is challenging as there are multiple assumptions one must make during the estimation process. We would like to highlight four of these that are probably the most germane when it comes to the substantive interpretation of the findings: (1) case selection; (2) estimating precarious work for the longitudinal analysis; (3) valid inferences; and (4) addressing (differential) attrition (further technical details regarding the statistical robustness checks we carried out will be made available in the appendix of the full report).

To begin with, we needed to determine which cases to include in the analysis. The difficulty here is at least twofold. On the one hand, there are respondents who had been in work at an early wave/early waves of the study, but later they left the labour market either permanently or for a short period of time. On the other, there are respondents who had not been workers at an early wave/early waves of the study, but later joined the labour market. For such cases we used retrospective and prospective work information respectively. Those who left the labour market were kept in the sample (and analysis) using the last information provided by them. By contrast, those who had not been members of the labour market but became workers later, took on the values realised upon them joining the labour market in preceding waves. We used this method dynamically in a way that those who temporarily left the labour market were given their last available information until their eventual return. We realise that this imposition can create distortions by keeping otherwise ineligible elements in the analysis, but only focussing on the subset of units that remained in work throughout the period would have limited the sample size to around half of what is analysed and discussed here.

Second, and in contrast to the sections on the scale and nature of precarious work, the estimates for these sections are not representative of the UK population. As we only considered a subsample based on the criteria outlined in the previous paragraph, we could only estimate the values using the sample characteristics. Although we cannot make inference to the wider UK population, the five trajectories are still informative in that they provide a temporal typology of work in general (and the pathways of precarious work in particular) using a very large sample afforded by the Understanding Society Survey.

Third, and unlike our earlier modelling, we allowed each of our four criteria to have the same weight in the analysis. This meant that the pathways were determined by where the respondents were located on a 0-4 scale, with 0 meaning that none of the criteria were true for the participant, and 4 that all of them applied. We did this for the sake of simplicity in modelling, and also to create greater variation in the outcome variable, as only three of the criteria varied over time (with immigration/ethnic minority status remaining the same). As shown above, we separately estimated the proportion of people in precarious work (and other group attributes) for each group trajectories.

Finally, as with all longitudinal studies, we needed to find a way to deal with differential attrition (i.e. participants dropping out of the survey either permanently or temporarily). We addressed this issue in three ways. First, we only retained participants who left for less than two consecutive waves. This means that participants who dropped in-and-out for one wave at a time were included, but those who left for two or more waves were excluded. Second, for those who dropped out, we imputed their values using (full information) robust maximum likelihood estimation. This is an iterative process which estimates the potential values the participant could have taken on had they participated in that wave, which also informs the probability of that participant belonging to one or another group trajectory. Lastly, we used attrition weights to compensate for the likelihood of certain participants dropping-out or staying in the study across the waves.

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Chapter 4: Scoping the UK's legal landscape

This chapter details the legal landscape governing the UK labour market and provides a comprehensive overview of the various employment rights, rules and regulations that must be complied with by employers and employment agencies. The scoping exercise covers all four jurisdictions of the UK. The paper divides employment law regulations between the DLME's remit of 'labour market non-compliance,' and other key 'work-based harms' outside of that remit. Within each category, there will be further subdivisions of labour market regulation between 1) individual employment law, 2) collective labour law, and 3) relevant business licensing and conduct regulations. For each aspect of employment law, the chapter details: 1) its legal source; 2) its meaning and scope; 3) whether it is UK-wide or specific to a certain nation(s); 4) whether it is criminal or civil law; and 5) responsibility for enforcement. The first section of the chapter outlines its scope, methodology and definitions. Section two provides some initial observations on the labour market enforcement regime in the UK. The areas of labour market regulation within the DLME's remit are addressed in section three. Section four details the work-based harms that currently fall outside the scope of labour market inspectorates and the DLME.

Methodology and scope

This chapter collates to the greatest possible extent the legislation and key case law on labour market regulation in the UK and examines the nature of labour market enforcement. Key areas of labour market regulation will be examined, including those outside of the DLME's remit. The landscape of labour market regulation is constantly changing. The primary function of this document is to reflect the existing legal realities. Whilst we have sought to be as comprehensive as practicable, there is not space to exhaustively document every legal issue in a complex and dynamic employment landscape.

Legal databases, such as Westlaw, were used to gather the relevant legislative and judicial material. A number of various sources have been used to assess the enforcement framework, such as policy documents, academic literature and think-tank reports. The law is accurate as of the date of publication. All statistical data is accurate as of the date of publication according to publicly available sources.

The scope of the analysis covers all four nations within the UK. As the devolution arrangement currently stands, for Scotland and Wales employment law remains a power reserved to the UK Parliament. Employment law is only a devolved power in Northern Ireland, with the exception of the National Minimum Wage which applies UK-wide. Legal experts from Northern Ireland were consulted on the different regulatory and enforcement arrangements unique to Northern Ireland.

Definitions

'Labour market non-compliance' is defined here as any breach that falls under the DLME's specific remit. These are breaches that fall under the remit of the three enforcement bodies: The HMRC National Minimum Wage/National Living Wage (HMRC NMW/NLW) team, the Employment Agency Standards Inspectorate (EAS) (or the Employment Agency Inspectorate in Northern Ireland (EAI)), and the Gangmasters and Labour Abuse Authority (GLAA).

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‘Work-based harm’ is defined more generally as extending beyond ‘labour market non-compliance’ alone to incorporate breaches of other laws that can also contribute to a difficult working climate.[10]

An employee is a person who works under a contract of employment (sometimes referred to as a contract of service) or apprenticeship.[11] There is a large body of case law developing the relevant tests of control, subordination, mutuality of obligation, inconsistent terms, and economic risk that is outside the scope of this work.

A ‘limb (b) worker’ is defined in section 230(3)(b) of the Employment Rights Act 1996 (ERA) - and article 3(3)(b) of the Employment Rights (Northern Ireland) Order 1996 (ERO) – as any individual who undertakes to do or personally perform any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. Limb (b) workers are commonly found in the gig economy e.g. Uber drivers.[12]

Self-employed contractors work under contract *for* services and fall outside the scope of ‘employee’ and ‘limb (b) workers.’ A broad ‘right of substitution’ (i.e. being allowed to send someone in your place to do the work) can mean someone is classed as a self-employed contractor, as has occurred with Deliveroo riders.[13]

The line between the three categories is not always clear. It is open to manipulation and can be highly contested, especially in the gig economy.

It will be expressly stated throughout where a right or entitlement extends to ‘limb (b) workers.’ The use of ‘employee’ refers exclusively to employees and does not operate as an umbrella term. The term ‘worker’ is used as shorthand for convenience where both employees and ‘limb (b) workers’ (and any additional extension under specific legislation) are covered, but not the self-employed.

An agency worker is defined in regulation 3 of Agency Workers Regulations 2010 (and regulation 3 of the Agency Workers Regulations (Northern Ireland) 2011) as an individual who is supplied by an employment agency or employment business to work temporarily for and under the supervision and direction of a hirer and has a contract with the employment agency or employment business. This can be under a contract of employment, or a contract to perform work or services personally (a limb (b) worker contract). Individuals supplied by agencies can be self-employed contractors, in which case they fall outside the legal scope of ‘agency worker.’

An ‘employment agency’ provides services to individuals for the purpose of finding them employment with employers, or of supplying employers with the individual for employment by them.[14] An ’employment business’ supplies its own workers to act for, and under the control of, another employee.[15]

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[10] Sam Scott, ‘*Labour exploitation and work-based harm*’ (Bristol: Bristol University Press, 2018).

[11] Employment Rights Act 1996 section 230(1)-(2); Employment Rights (Northern Ireland) Order 1996 article 3(1)-(2).

[12] *Uber BV v Aslam* [2021] UKSC 5.

[13] *Independent Workers Union of Great Britain v Central Arbitration Committee and Deliveroo* [2023] UKSC 43.

[14] Employment Agencies Act 1973 section 13(2).

[15] Ibid, section 13(3).

References to the 'tribunal' refer jointly to the Employment Tribunal in England, Wales and Scotland, and the Industrial Tribunal in Northern Ireland. The Fair Employment Tribunal in Northern Ireland will be referred to separately. In Great Britain, appeals are made to the Employment Appeal Tribunal. There is no equivalent appeals tribunal in Northern Ireland. Appeals from the Industrial Tribunal or Fair Employment Tribunal go to the Northern Ireland Court of Appeal.

Reflections on enforcement

A few initial observations can be made about the enforcement of labour market regulations in the UK.

The scope of labour law

Firstly, many rights and entitlements listed below do not have a universal scope.[16] Only employees have access to the full panoply of rights. 'Limb (b) workers' have access to a limited range of rights, such as the NMW, working time rights, non-discrimination, agency worker rights, and whistleblowing protections. Self-employed contractors, aside from possibly non-discrimination extensions, are excluded from labour law. This wholesale exclusion may be problematic as it overlooks the economic dependency a contractor might have on a single business and can incentivise sham self-employment, a notable problem, for example, in the construction industry.[17]

Due to the binary, vertical foundation of labour law (employer-employee/employer-worker), agency workers engaged in a triangular relationship with their agency and the end-user may fall outside the scope of employment rights. It will not always be clear who is the legal 'employer,' if there is one at all. The requirements of control and mutuality of obligation may be missing with the agency, especially outside the context of the Agency Worker Regulations 2010 and Agency Worker Regulations (Northern Ireland) 2011. It can be difficult to establish a long-term employment or worker relationship outside of individual contractual assignments. Furthermore, implying a contract between the agency worker and the end user is unlikely to meet the 'business necessity' test.[18] Section 34 of the National Minimum Wage Act 1998 (NMWA) and section 41 of the Equality Act 2010 directly address the difficulties of triangular relationships and contractual uncertainty to extend NMW and non-discrimination rights to agency workers, but the provisions are not extended to other labour rights e.g. unfair dismissal.[19]

The effect of employee shareholder status should be noted. Under section 205A of the ERA, an employee may exchange their employment rights for an allocation of shares in the company. The rights conceded include the right not to be unfairly dismissed (except for discrimination), redundancy payments, and the right to flexible working. No equivalent concept exists in Northern Ireland.

The requirement to satisfy qualifying periods of employment further restricts the scope of labour rights. Even where the worker falls within the scope of a right, they may not have any recourse for its

[16] For a useful summary of the rights allocated to the different statuses, see: DLME, 'United Kingdom Labour Market Enforcement Strategy - Introductory Report' (July 2017), 19.

[17] Paul Chan et al, 'The Dynamics of Migrant Employment in Construction: Can Supply of Skilled Labour ever Match Demand?' in Bridget Anderson and Martin Ruhs (eds) '*Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy'* (2010, OUP)**;** DLME 'United Kingdom Labour Market Enforcement Strategy 2020/2021', (December 2021), 71-74.

[18] *James v Greenwich London Borough Council* [2008] EWCA Civ 35.

[19] E.g. see *Bunce v Postworth Ltd (t/a Skyblue)* [2005] EWCA Civ 490 and *Montgomery v Johnson Underwood* [2001] EWCA Civ 318.

breach. Notable examples include the one/two year qualifying period for unfair dismissal and redundancy payments, 26 weeks for certain family leave rights, and 12 weeks for agency worker pay parity.

The presence of qualifying periods creates problems for precarious workers who may be on short-term engagements or, particularly in the case of zero-hours contract, have their continuity of employment broken by gaps in their engagement due to the highly flexible and precarious nature of their employment. A gap of just one week is sufficient to break continuity and re-set the clock. Whilst sections 210-219 of the ERA 1996 and articles 6-15 of the ERO (NI) 1996 help workers 'bridge gaps', as seen in *Cornwall CC v Prater,*[20] the provisions may not be able be able to fill all the gaps in between a series of intermittent contracts, especially where work is allocated to other casual workers during a particular week.[21]

Irregular migrant workers are unlikely to be able to access and enforce contractual rights due to the operation of the illegality doctrine (the doctrine that no legal claim can arise from one's own illegal conduct), and punitive provisions in the Immigration Act 2016. Contractual claims did succeed on the particular facts in *Okedina v Chikale.*[22] However, the case concerned claims prior to the dual liability regime enacted in s.34 of the Immigration Act 2016 through the offence of illegal work (so both the worker and the employer's participation in employment are criminalised).[23] It remains unclear precisely what effect s.34 will have on contractual claims brought by irregular migrants. Claims characterised as torts (civil wrongs), such as discrimination, are more likely to survive the illegality doctrine.[24]

Employment law raises a number of obstacles and exclusions that must be surpassed before the question of practically enforcing rights even arises. Many workers will not be able to enforce rights for the simple reason that they do not have legal access to them.

State enforcement

If one compares the length of section 3 and section 4 of this chapter, it is striking the extent to which areas of employment law fall outside of the remit of the DLME, and state enforcement generally. Moreover, the remit of the state enforcement bodies is further narrowed by the inability to enforce labour market rights and protections ostensibly within their regulatory scope.

The fragmentation of enforcement across different bodies results in different funding and staffing levels, and "means their capacity and also their organisational infrastructure are very different, impacting on their approach to enforcement."[25] The funding and staffing levels of the state enforcement bodies is also a pertinent factor in the effectiveness of enforcement operations.

The enforcement options available differ across each state body. The enforcement tools introduced in 2016 and available to the different bodies (but not the HSE) are Labour Market Enforcement

[20] *Cornwall CC v Prater* [2006] EWCA Civ 102.

[21] *Byrne v Birmingham City Council* [1987] ICR 519 (CA).

[22] *Okedina v Chikale* [2019] EWCA Civ 1393.

[23] It is likely that this violates ILO C143 Migrant Workers (Supplementary Provisions) Convention, 1975.

[24] *Hounga v Allen* [2014] UKSC 47.

[25] DLME 'United Kingdom Labour Market Enforcement Strategy 2018/19' (May 2018), 20.

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Undertakings (LMEU) and Labour Market Enforcement Orders (LMEO). LMEUs are sought where an enforcement body believes an offence within its remit has been or is being committed and a measure in the undertaking is necessary to prevent further non-compliance. Undertakings may include prohibitions, restrictions, or impose requirements on businesses to prevent or reduce the risk of non-compliance with requirements in the enactment containing the trigger offence. LMEO's are similar, except that they are imposed by the magistrate's court (or sheriff's court in Scotland) on application by the enforcement body, when an undertaking has not been given within the negotiation period, or where an undertaking has been breached.

Employment Agency Standards Inspectorate

The EAS is expected to regulate around 29,000 employment agencies and employment businesses supplying 1.1 million workers with a budget of just £1.525 million per annum and 29 full time staff.[26] The EAS has been praised for achieving a considerable amount with minimal resources.[27] In 2021/2022, the EAS cleared 2,275 complaints, found 724 infringements, and issued 212 warning letters.[28] Over the course of 2021/22, EAS recovered approximately £169,230.00, an increase of 28% from the previous year.[29]

However, EAS inspections dropped from 303 to 118 from 2019/2020 to 2021/2022, though the pandemic may have impacted this.[30] Just two prosecutions (both successful) were pursued in 2021/2022, and just two Labour Market Enforcement Orders were obtained.[31] Four individuals are currently subject to a prohibition order from EAS barring them from running an employment agency or business.[32]

Despite the EAS and EAI regulating agency work, the Agency Worker Regulation 2010 and Agency Worker Regulation (Northern Ireland) 2011 do not fall within their remit. The scope of their remit within agency work is limited to the Employment Agencies Act 1973 and Conduct of Employment Agencies and Employment Businesses Regulations 2003, and Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 and Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005, respectively.

The lack of resources and inability to enforce the Agency Workers Regulations 2010 has a profound effect on the rights of agency workers. Furthermore, although the EAS may investigate issues relating to withheld wages under article 12 of the 2003 Regulations, and holiday pay may be included as a

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[26] Ibid, 18. Employment Agency Standards Inspectorate, 'Annual Report 2021 – 2022' (Department for Business and Trade, 2023), 5.

[27] DLME '2018/19' (n 16), 18.

[28] Employment Agency Standards Inspectorate, 'Annual Report 2021 – 2022' (n 17), 13.

[29] Ibid.

[30] Ibid; Trade Union Congress, Only 1 in 218 workplaces inspected for safety failures during pandemic, TUC finds' (May 2021) https://www.tuc.org.uk/news/only-1-218-workplaces-inspected-safety-failures-during-pandemic-tuc-finds Accessed 15 July 2022.

[31] Ibid.

[32] BEIS 'People prohibited from running an employment agency or business: guidance' (October 2023)

https://www.gov.uk/government/publications/list-of-people-banned-from-running-an-employment-agency-or-business/employment-agency-standards-inspectorates-eas-people-prohibited-from-running-an-employment-agency-or-business

'withheld wage' as a result of *HMRC v Stringer*,[33] it does not have the general power to recover unpaid wages or holiday pay. As such, according to the Resolution Foundation, in 2017, agency workers collectively missed out on as much as £500 million of unpaid holiday pay.[34]

A key issue for agency workers is the 'pay between assignment contract.' Agency workers engaged on this type of contract with a temporary work agency give up the right to pay parity with comparable permanent staff in return for a guarantee to receive a certain amount of pay in gaps between assignments. This raises two problems. Firstly, agency workers may not actually receive the pay between assignments. Prior to their 2019 abolition in Great Britain, it was estimated that unpaid wages between assignments amounted to £1 billion per annum.[35] Non-payment may still be an issue in Northern Ireland.

Secondly, they may still be illegally used to reduce the wages of agency workers. Prior to their abolition, the DLME reported that many agency workers were pressured or coerced into signing up to these contracts with little knowledge of their effect.[36] It was also reported that awareness of the rights in the Agency Worker Regulations 2010 relating to equal pay and conditions after 12 weeks was poor.[37] It is unclear how many of these contracts are still illegally used in Great Britain. As the regulations prohibiting their use fall outside of the EAS's remit, enforcement of the prohibition is left to individual workers. Despite their prohibition, it is unclear how workers are supposed to meaningfully enforce the prohibition and obtain pay parity during their assignments. The DLME has recommended that the EAS remit should be extended to cover the enforcement of compliance with the Agency Worker Regulations 2010.[38]

HMRC NMW/NLW

The HMRC NMW/NLW covers approximately 1.6 million low-paid workers with a budget of £27.5 million per annum and 450 full time staff.[39] Although the HMRC NMW/NLW team in 2021/2022 closed around 2,800 cases, issued 696 penalties totalling £13.2 million, and identified pay arrears in excess of £16.3 million for over 120,000 workers, these figures represent a consistent decline from previous years.[40] The Low Pay Commission has estimated that around 334,000 workers received less than the NMW in 2021/2022.[41] As a percentage, underpayment as a share of coverage has remained stable at

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[33] *HMRC v Stringer* [2009] UKHL 31.

[34] Lindsay Judge, 'The good, the bad and the ugly: the experience of agency workers and the policy response" (Resolution Foundation, November 2018), 18.

[35] DLME 2018/2019 (n 16), 15.

[36] Ibid, 112.

[37] Ibid.

[38] Ibid, 7.

[39] DLME 2018/2019 (n 16), 21; Department for Business and Trade, 'National Living Wage and National Minimum Wage: Government evidence on enforcement and compliance 2021/2022 (April 2023), 5.The Low Pay Commission. "Compliance and enforcement of the National Minimum Wage" (September 2023), 9. 'Low-paid workers' refers to those paid up to 5p above the relevant NMW/NLW rate.

[40] Department for Business and Trade, 'National Living Wage and National Minimum Wage: Government evidence on enforcement and compliance 2021/2022 (April 2023), 6-7.

[41] The Low Pay Commission, (n 30), 9.

around 21.5%.[42] The Resolution Foundation estimates that minimum wage underpayment denies low-paid workers £255 million per annum.[43]

The HMRC NMW/NLW team undertakes large scale compliance work alongside its enforcement activity. The compliance programme takes a geographic approach aimed at upstream education and advice to employers. The DLME has praised this initiative.[44] However, problems have been identified on the enforcement side. The Resolution Foundation has estimated that HMRC only identified 1,456 firms from at least 11,000 firms underpaying the NMW, amounting to a detection rate of just 13%.[45] It has been estimated that employers are only likely to be inspected by HMRC once every 500 years.[46] HMRC inspections fell by about 20% from 3,300 to 2,740 between 2019/2020 and 2020/2021.[47]

40 LMEUs were issued in 2021/2022. The DLME has also raised concerns about the lack of successful criminal prosecutions for NMW offences in the 2020/21 report.[48] Whilst prosecutions are not the first enforcement option, and there may be better routes of redress for workers, there have been only 18 successful prosecutions since 2007, and just 3 since the start of 2020.

The scope of the HMRC NMW/NLW team's remit has been in issue. It does not currently have the power to enforce holiday pay entitlements. This is despite its privileged regulatory position and the widely acknowledged complexity of annual leave that makes individual enforcement difficult. Individual workers are effectively required to be fully aware of their annual leave entitlements, spot miscalculations and deliberate underpayment, and re-negotiate any contracts that unlawfully include 'rolled-up' holiday pay (see below). An estimated 2 million employees miss out on some holiday pay each year, amounting to between £2 billion and £3.1 billion per annum.[49] The DLME has recommended that the HMRC NMW/NLW team should be tasked with enforcing annual leave.[50] Beyond the scope of the NMW, whilst estimates vary, wage theft more generally is thought to run into billions of pounds per annum.[51]

GLAA

The GLAA has a budget of £7.1 million per annum and 121 employees in order to regulate over 1,100 gangmasters supplying 500,000 workers. As the GLAA was given additional powers in 2017 for its Labour Abuse Prevention Officers to investigate potential criminal offences under the Employment

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[42] Ibid.

[43] Lindsay Judge and Hannah Slaughter, 'Enforce for good: Effectively enforcing labour market rights in the 2020s and beyond' (The Resolution Foundation, April 2023), 18.

[44] DLME, 'United Kingdom Labour Market Enforcement Strategy 2023/2024' (October 2023), 9-10.

[45] Lindsay Judge and Anna Stansbury, 'Under the wage floor: Exploring firms' incentives to comply with the minimum wage' (Resolution Foundation, January 2020), 4.

[46] Sarah O'Connor, "Bigger fines urged for employers who underpay staff," Financial Times (London, December 2017).

[47] Trade Union Congress, 'Only 1 in 218 workplaces inspected for safety failures during pandemic, TUC finds' (May 2021) https://www.tuc.org.uk/news/only-1-218-workplaces-inspected-safety-failures-during-pandemic-tuc-finds.

[48] DLME '2020/2021 (n 8), 17.

[49] Trade Union Congress, 'TUC action plan to reform labour market enforcement' (London, 2021), 5; The Resolution Foundation, 'Enforce for good' (n 34), 18.

[50] DLME, 2018/2019 (n 16), 7.

[51] https://www.tuc.org.uk/news/workers-uk-put-more-ps35-billion-worth-unpaid-overtime-last-year-tuc-analysis
https://www.businessinsider.com/unpaid-britain-report-uk-workers-cheated-out-of-pay-2017-7?r=US&IR=T

Agencies Act 1973, the NMWA 1998 and the Modern Slavery Act 2015, its coverage extends to millions of workers.[52]

The GLAA is limited to licensing gangmasters in just four economic sectors: agriculture, horticulture, shellfish gathering, and food processing and packaging. The DLME has recommended expanding its remit to directly include nail bars and hand car washes.[53] The DLME has also recommended an expansion of multi-agency work across the enforcement bodies in the care sector.[54] The GLAA's remit is partially extended in two ways. Firstly, it may take into account activity in other sectors when administering licences if it indicates non-compliance within its sectoral remit. Secondly, s.11 of the Immigration Act 2016 confers upon the GLAA the power to investigate criminal offences in the Modern Slavery Act 2015, Employment Agencies Act 1973, and National Minimum Wage Act 1998, across England and Wales. Investigating officers can arrest suspects, seize evidence, and conduct searches.

GLAA licensing activity has, in some respect, been positive. The number of licences issued/renewed, cancelled, and revoked has been relatively stable since 2017. In 2022/2023, 9 licences were refused and 4 revoked, down from a peak of 20 revocations in 2019/2020.[55] £165,582 (£115,000 was retained holiday pay) was recovered for 4,598 workers, a marginal increase from £157,000 for 1,941 workers in 2019/2020.[56]

However, as the number of inspections has fallen, so has the number of breaches identified in licensed areas, down to 80 in 2019/20 from 123 the previous year, against a drop from 87 to 61 compliance inspections.[57] The DLME concluded in the 2020/21 report that the GLAA resources are not sufficient to have complete confidence that all those with a licence are acting compliantly.[58] This conclusion is illustrated by the fact that 364 licence holders have not been inspected in over 10 years. The total number of GLAA inspections fell from 224 to 155 between 2017/18 and 2019/20.[59] The GLAA acknowledges that it has been unable to meet its inspection deliverables due to capacity limitations. In 2022/2023, compliance inspections fell from 61 to 13, and overall inspections fell by 31% against a target of a 20% increase.[60]

The GLAA issued 7 LMEUs in 2022/2023. Since 2008/9 there have been 71 convictions for operating as an unlicensed gangmaster, and 24 convictions for using an unlicensed gangmaster to supply labour.[61] The GLAA also has the power to issue Slavery and Trafficking Prevention Orders (STPOs) and Slavery and Trafficking Risk Orders (STROs). A combined total of 32 have been issued since April 2021.[62] These

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[52] The TUC estimates its remit as approximately 10 million workers - Trade Union Congress, 'TUC action plan to reform labour market enforcement' (London, 2021), 12.

[53] DLME '2020/2021' (n 8),124.

[54] DLME, '2023/2024' (n 35), 12-13.

[55] DLME '2020/2021' (n 8), 124; GLAA, 'Gangmasters and Labour Abuse Authority Annual Report and Accounts 1 April 2022 to 31 March 2023' (GLAA, 2024), 12.

[56] Ibid.

[57] Ibid.

[58] Ibid, 60.

[59] DLME '2020/2021' (n 8) 124. 2019/2020 data only covers April-December 2019.

[60] GLAA 'Annual accounts' (n 45), 15.

[61] DLME '2020/2021' (n 8), 60-62.

[62] GLAA 'Annual accounts' (n 45), 12.

orders are used to restrict the activities of individuals convicted or suspected of modern slavery offences, where it is necessary to prevent harm associated with slavery or trafficking offences

Health and Safety Executive (HSE)

With a larger budget of £262 million in 2022/23, the HSE has the greatest capacity for enforcement operations.[63] The HSE's budget has, however, been cut by £5 million from the previous year and by 50% in real terms since 2010. [64] The number of inspectors fell from 1,450 in 2011 to 985 in 2018.[65]

In 2022/23, 86% of investigations into fatal incidents were completed within 12 months (against an 80% target), and 95% of investigations into non-fatal incidents were completed within 12 months (against a 90% target).[66] Over 8,000 notices were issued, and 216 prosecutions completed, with a 94% conviction rate.[67] There were 16,800 proactive inspections in 2022/23,[68] but HSE inspections fell by 27% from 2011 to 2019.[69]

The Health and Safety Executive for Northern Ireland completed nine successful prosecutions totalling fines of £55,100, conducted 2,902 inspections and served 123 enforcement notices, and handled 945 complaints about alleged unsatisfactory working conditions and activities.[70] However, there has been an overall downward trend in the number of prosecutions since 2016.[71]

Modern slavery

The Police, National Crime Agency, GLAA and Home Office all have enforcement powers against modern slavery offences. Estimates of victims of modern slavery are difficult and range widely. In 2022, 16,398 people were referred to the National Referral Mechanism (NRM) and 6,172 conclusive grounds decisions were made.[72] In the year to March 2021, there were 8,730 modern slavery offences recorded by the police.[73]

However, investigation and prosecution numbers have been consistently low compared to these figures. The Home Affairs Committee reported that in 2022, less than 1% of cases resulted in a charge or summons, with only 282 individuals convicted.[74] In 2018, there were 91 prosecutions brought in

[63] Health and Safety Executive, 'Health and Safety Executive Annual Report and Accounts 2022/2023' (July 2022).

[64] Jon Stone 'Huge cuts to workplace safety inspections since Tories took office 'left UK unprepared during pandemic' *The Independent* (London, 28th April 2021)

https://www.independent.co.uk/news/uk/politics/workplace-safety-inspections-covid-tuc-b1838989.html

[65] Ibid.

[66] Health and Safety Executive, 'Health and Safety Executive Annual Report and Accounts 2022/2023' (July 2022).

[67] Ibid.

[68] Ibid.

[69] Stone, *The Independent* (n 54).

[70] Health and Safety Executive for Northern Ireland, 'Health and Safety Executive for Northern Ireland Annual Report and Accounts 2021/2022' (September 2022), 1.

[71] Ibid, 40-41.

[72] Home Office, 'National Referral Mechanism and Duty to Notify Statistics, 2014-2022' (Modern Slavery Research & Analysis, 2022).

[73] Home Office,''2021 UK Annual Report on Modern Slavery' (October 2021), 16.

[74] Home Affairs Committee 'Human trafficking' First report of session 2023/2024, HC124, 37.

England and Wales for either forced or compulsory labour offences under the Modern Slavery Act 2015, with 21 convictions. In Scotland there were no slavery or forced or compulsory labour convictions between 2013/14 and 2020/21, and in Northern Ireland no slavery, servitude, or forced or compulsory labour offences were prosecuted in the same period.[75]

Overall capacity

Though there have been some budget increases, the enforcement bodies have experienced real term cuts.[76] The limited budgets and staffing levels further undermine the capacity of state enforcement bodies to undertake inspections and enforcement actions, even within their narrow remit. At current levels, the capacity for inspections and effective enforcement operations is limited. The total percentage of workplaces inspected is low, and there has been an overall fall in inspections over the last decade. Analysis by the TUC further shows that just 1 in 171 workplaces had a safety or workers' rights inspection between March 2020 and April 2021. For safety inspections alone, the figure is just 1 in 218 workplaces.[77]

The current total capacity of the enforcement bodies is below the level of one inspector per 10,000 workers recommended by the International Labour Organisation.[78] The DLME estimates that the UK is currently operating at around one inspector per 20,000 workers.[79] This restricts the capacity of the state enforcement bodies to conduct proactive inspections, rather than reactive inspections that rely on worker complaints. FLEX, an anti-exploitation research and policy organisation, has recommended that state enforcement bodies should set a goal, advocated by the World Bank, of at least 40% reactive and 60% proactive inspections.[80] Meeting this goal would require greater resources for the state enforcement bodies. Furthermore, whilst criminal investigations and prosecutions are often more expensive for state bodies, there is growing concern that businesses are able to simply factor in the financial cost of civil penalties for non-compliance. Since their introduction in 2017, state bodies have only issued 84 LMEUs and 4 LMEOs.[81]

Tribunal enforcement

Labour market enforcement in the UK is heavily reliant on individuals bringing claims to the tribunal (or civil courts for some cases).

In 2022/2023, 85,301 claims were received by the Employment Tribunal, and 70,933 were disposed of.[82] In Q2 2023/24, there were 20,000 new Employment Tribunal claims, 38% (7,400) of which were single claims receipts, and the remaining 62% (12,000) were multiple claims receipts. The ET disposed

[75] DLME '2020/2021' (n 8), 90.

[76] DLME, '2023/2024' (n 35), 8.

[77] Trade Union Congress, 'TUC action plan to reform labour market enforcement' (London, 2021).

[78] International Labour Organisation (ILO) 'Strategies and practice for labour inspection. In:

297th Session of the Committee on Employment and Social Policy' (Geneva, November 2006).

[79] DLME, '2023/2024' (n 35), 8.

[80] Focus on Labour Exploitation, Risky Business: Tackling Exploitation in the UK Labour Market (FLEX, 2017).

[81] Resolution Foundation, Enforce for Good' (n 34), 54.

[82] https://data.justice.gov.uk/courts/tribunals

of 21,000 cases in Q2 2023/24. At the end of the financial year, 470,000 cases were outstanding.[83] In the last set of fully collated statistics, in the quarter January to March 2021, just 11% of the 11,000 claims heard were successful at the tribunal, though 24% of the claims brought were settled out of court (perhaps illustrating the effectiveness of ACAS conciliation).[84]

There are various problems with individual tribunal complaints that restrict the efficacy of enforcement of labour rights.

Firstly, for tribunal claims there is a short limitation period of just 3 months. The short period may cause problems for individuals with other things on their mind, e.g. depression from being unfairly dismissed or a heavily pregnant woman experiencing maternity/pregnancy discrimination. The short time period also makes it difficult to gather sufficient information to assess the likelihood of success, thereby discouraging claims.

Secondly, there are various fundamental, practical problems with heavy reliance on tribunal complaints. The model relies on awareness and understanding of labour rights, which may be lacking – in particular amongst precarious workers and migrant workers. Individuals may be put off by legalistic and time consuming processes.[85] The adversarial nature of tribunal complaints may further discourage complaints if the individual is still employed by that employer, as it may create awkwardness, hostility or resentment. A 2005 survey by the Department for Trade and Industry found that only 3% of workers who had experienced a problem with their rights at work brought an employment tribunal case.[86] The Resolution Foundation also found just 3% of private sector workers would take a legal route.[87]

Problems also arise if an individual worker cannot afford a lawyer. They are either discouraged from bringing a claim or are disadvantaged by representing themselves. Just 60% of claimants in 2022/2023 were represented by a lawyer.[88] Whilst this marks a significant increase from previous years, a significant minority are unrepresented, and it remains lower than the percentage of employers who are represented.[89]

Thirdly, outside of Northern Ireland, the non-discrimination duties on employers are subject to minimal state oversight and enforcement, instead reliant on individual, reactive discrimination complaints. The difficulty with individual enforcement, particularly in fragmented and non-unionised workplaces, is the issue of asymmetric information. Often individual workers do not have access to, nor a statutory right to access, the information required to establish discrimination, particularly complex indirect discrimination. Academics such as Fredman argue that the equal pay provisions do not go far enough

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[83] https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-july-to-september-2023/tribunal-statistics-quarterly-july-to-september-2023#employment-tribunals

[84] MoJ, 'Employment tribunal statistics quarterly: January to March 2021' (June 2021)

https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2021/tribunal-statistics-quarterly-january-to-march-2021#employment-tribunals

It should be noted that undertaking early conciliation with ACAS is a prerequisite to bringing an employment tribunal claim.

[85] Nicole Busby and Morag McDermont, 'Workers, Marginalised Voices and the ET System: Some Preliminary Findings' (2012) *Industrial Law Journal* 41(2) 166-183.

[86] Department of Trade and Industry, 'Employment Rights at Work - Survey of Employees' (2005), 116-118.

[87] Resolution Foundation 'Enforce for good' (n 34), 61.

[88] https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2023/tribunal-statistics-quarterly-april-to-june-2023#fn:5

[89] Ibid.

and have criticised the limitations of complaints-based enforcement in equal pay law. Fredman has called for a more proactive, positive duty to eliminate pay disparities that could be extended to discrimination writ large.[90] Similarly, the positive duty on public sector employers to eliminate discrimination and advance equality objectives has not been extended to private sector employers in Great Britain.

Fourthly, the short time frame for effective, practical enjoyment of many labour rights e.g. time-off cases, right to be accompanied, and family leave cases, means that enforcement in the tribunal several months later for compensation is of limited value to individuals when what is required is immediate enforcement and practical enjoyment of the right. Claims that have a low-monetary value but are nonetheless important for workers' respect and dignity are perhaps not best suited to conciliation or a trial several weeks or months later.

Finally, enforcement of employment tribunal awards by individuals is a major issue. Research in 2013 showed that there is 'an even chance that individuals who receive a monetary award will not receive payment of their award without the use of [judicial] enforcement', and that even after seeking enforcement of the tribunal award, over a third of claimants were paid nothing (35%), under half were paid in full (49%) and a further 16% received part payment.[91] Only 41% of awards were paid in full without requiring further enforcement of the award.[92] Some tribunal awards are capped, such as unfair dismissal which is currently limited to £105,707, and breach of contract which has as a maximum of £25,000

Criminal offences

Very few of the labour rights and entitlements detailed above are enforced through criminal sanctions. Where criminal offences do exist, the maximum punishment is often a fine. Exceptions that bring custodial sentences include modern slavery offences and gross negligence manslaughter where health and safety violations have caused death.

However, due to the prevalence of monetary penalties over imprisonment, civil compensation and criminal fines may simply be factored into the 'cost of doing business,' enabling flagrant, deliberate and calculated breaches of employment law by large companies, as seen in the P&O Ferries scandal.

There is no general criminal offence of 'wage theft' by employers, though some cases could potentially constitute fraud under the Fraud Act 2006. Criminal offences relating to pay are limited to refusing or wilfully neglecting to pay the NMW, though prosecutions are rare despite chronic levels of underpayment. Outside of the NMW, individuals are generally expected (with exception in extreme modern slavery cases and agency work) to enforce unlawful deductions, non-payment of wages, and non-payment of annual leave themselves through civil claims.

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[90] Sandra Fredman, 'Reforming Equal Pay Laws' (2008) *Industrial Law Journal* 37(3) 193–218,

[91] BEIS, Payment of Tribunal Awards: 2013 Study (IFF Research), 7, 42 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf)

[92] Ibid, 31.

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Trade unions

Finally, it is worth briefly noting the effect the decline of trade unions has had on enforcement. As of 2022, 6.25 million people are members of trade unions, less than a quarter of employees.[93] Only 2.4 million employees in the private sector are trade union members, compared to 3.84 million in the public sector.[94] Furthermore, engaging in industrial action is increasingly difficult as the state has become increasingly hostile towards trade unions. Due to the Trade Union Act 2016, in addition to the many administrative requirements in the Trade Union and Labour Relations (Consolidation) Act 1992, the UK has one of the most restrictive collective labour law regimes in Europe. There have been recent attempts to undermine the effectiveness of trade union action by repealing the prohibition on using agency workers as 'strike-breakers.'[95]

As Keith Ewing illustrates, trade unions have various functions concerned with enforcement.[96] Unions can be a key source of advice and support, making workers aware of their rights, negotiating with employers on their behalf from a position of collective strength, deploying industrial relations strategies, and providing legal assistance to workers.

Without effective trade union support, the power dynamics in the employment relationship often shift further in favour of the employer and isolated workers may struggle to exercise and enforce their legal rights.

Labour Market Non-Compliance

The DLME was established by section 1 of the Immigration Act 2016 to assess the scale and nature of non-compliance in the UK labour market and "to provide coordination and strategic oversight between the three main state enforcement bodies"[97] through an annual 'Labour Market Enforcement Strategy'. Per section 3 of the Immigration Act 2016, its remit covers the remits of the GLAA, HMRC NMW/NLW team, and EAS. The remit is broad and varied, covering a wide spectrum of severity. This part first considers non-compliance related to individual work rights and protections, before turning to collective labour law issues and licensing and regulatory obligations on employers.

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[93] DBT, 'Trade Union Membership, UK 1995-2022: Statistical Bulletin' (May 2022)https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1158789/Trade_Union_Membership_UK_1995-2022_Statistical_Bulletin.pdf

[94] Ibid.

[95] The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 regulation 2. The regulation was quashed by the High Court in *ASLEF, Unison and NASUWT v Secretary of State for Trade and Business* [2023] EWHC 1781 (Admin).

[96] Keith Ewing, 'The Functions of Trade Unions,' (2005) *Industrial Law Journal* 34(1) 1-22.

[97] DLME '2018/19' (n 16), 19.

Individual labour law breaches

National Minimum Wage

The National Minimum Wage (NMW) which must be paid by the employer[98] (also known as the National Living Wage for over 23 year-olds, and will apply to workers aged 21 and over from 1st April 2024) is governed across the UK by the NMWA 1998 and the National Minimum Wage Regulations 2015 (NMWR). The basic hourly rate must satisfy the NMW – generally speaking 'extra payments' such as tips and overtime are not included.[99] New legislation requires tips, gratuities and service charges to be allocated fairly and transparently amongst workers (expected to come into force April 2024).[100]

An individual qualifies for the NMW if they are a 'worker' under section 54 (3), capturing employees and 'limb (b) workers'. Agency workers also fall within the scope of the Act as, under section 34, they must be paid the NMW by whichever of the end user or agency is either contractually or practically responsible for payment. Certain exclusions apply to the NMW, notably some domestic workers,[101] share fishermen, prisoners, and immigration detainees.[102]

The NMW becomes payable when an individual is no longer of compulsory school age. This precise point differs slightly across the UK, though the age is always 16. In England and Wales, it is the last Friday of June if they are 16 by the end of the summer holidays (usually 1st September). In Scotland there are two possible leaving dates - if a child turns 16 between 1st March and 30th September, they may leave school on 31st May of that year; or if a child turns 16 between 1st October and 28th February of the following year, they may leave school on the first day of the Christmas holidays. Finally, in Northern Ireland if a child turns 16 during the school year (between 1st September and 1st July) they can leave school after 30th June, or if they turn 16 between 2nd July and 31st August, they cannot leave school until 30th June the following year.

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[98] See NMWR 2015 regulation 10; and *Revenue and Customs Commissioners v Annabel's (Berkley Square) Ltd* [2009] EWCA Civ 361.

[99] NMWR 2015 regulation 10. But see regulation 10(j) on payments made at 'premium rates' for time work and output work calculations.

[100] Employment (Allocation of Tips) Act 2023.

[101] National Minimum Wage Regulations 2015 regulation 57. See also *Nambalat v Taher* [2012] EWCA Civ 1249.

[102] National Minimum Wage Act 1998 section 43-45B. On immigration detainees, the Court of Appeal in *R (Badmus) v. Secretary of State for the Home Department* [2020] EWCA Civ. 657 held that a rate of £1 an hour was lawful.

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The NMW rate is scaled across different age groups and there is also a specific rate for apprenticeships. The NMW changes on April 1st every year. The rates are as follows:

	Over 23	21-22	18-20	Under 18	Apprentice
April 2023-2024	£10.42	£10.18	£7.49	£5.28	£5.28
April 2022-2023	£9.50	£9.18	£6.83	£4.81	£4.81
April 2021-March 2022	£8.91	£8.36	£6.56	£4.62	£4.30
April 2020-March 2021	£8.72	£8.20	£6.45	£4.55	£4.15
April 2019-March 2020	£8.21	£7.70	£6.15	£4.35	£3.90

Whether an employer complies with the NMW depends on a pay/work calculation which can be quite complex. There are four types of work for the purpose of NMW calculations: time work, salaried hours work, output work, and unmeasured work.

Time work, paid by the hour, is the simplest to calculate.[103] Per regulation 30, it constitutes work paid by reference to a set or varying period of time, typically hourly. As well as normal working hours, a worker is entitled to the minimum wage for ‘on call time’ i.e. time spent being available at or near the place of work for the purpose of doing time work (‘available’ means awake for the purpose of working). Travel time where it is part of the job or travelling between assignments is also included. Time spent training is also included. Time absent from work, on strike, rest breaks, ordinary commuting time, time ‘on call’ at home, and situations where the worker is provided with sleeping accommodation and not required to be awake for purposes of working (the ‘sleep-in exception’), are not included.[104]

Salaried hours work is, per regulation 21 of the National Minimum Wage Regulations 2015, where the individual is paid in instalments not less often than weekly and not more often than monthly in respect of their basic contractual hours. The NMW is normally calculated on the basis of these hours. As hours spent training, ‘on call,’ or travelling between assignments or as part of the job are included as work,[105] a person may work more than their basic hours. In this situation, regulation 28 creates a very complex calculation but its essence is to ensure that extra hours worked are included in the NMW calculation.

Output work is defined by regulation 36 as work paid for by reference to the amount of work done, such as ‘piece work’. Training and travel to assignments are included.[106] Output work can be converted to time work and/or, where the worker is engaged in ‘rated output work’ (meaning work where there

103 NMWR 2015 regulation 30.

104 NMWR 2015 regulations 32-35. This ‘sleep-in exception’ has controversially arisen recently in the context of ‘sleep-in’ care work, see *Tomlinson-Blake v Royal Mencap Society* [2021] UKSC 8.

105 NMWR 2015 regulation 27.

106 NMWR 2015 regulations 38-39.

are no maximum hours and the employer does not determine or control the hours actually worked) the employer's determination of the average time taken to perform the task in question. [107] A test to determine the speed must first be conducted and the individual provided with the telephone number for the Secretary of State's helpline on workers' pay.[108] Whilst the calculation is open to challenge, it seems unlikely that a tribunal would overturn it.[109]

Finally, 'unmeasured work' is a fourth, default category commonly applicable where the worker does not have fixed hours.[110] Time spent training and travelling to assignments are included.[111] One option is to adopt the same approach as time work to the calculation by paying according to the hours worked. The National Minimum Wage Regulations 2015 provides an alternative option through a 'daily average agreement' under regulation 49. The agreement sets out how many hours the worker is reasonably likely to work per day. The agreement satisfies the NMWR regardless of whether the person actually works more or less than the estimated daily average in the agreement on any given day.

What counts as 'work' is therefore essential to NMW compliance. The legal framework can, however, operate to exclude or diminish the legal protections from labour market abuses for certain vulnerable or low-paid groups, such as some domestic workers and sleep-in care workers.[112]

Wage deductions generally cannot take a worker below the NMW. Some deductions can be made that may practically take a worker below the NMW as they do not count towards the calculation. These include recovering overpayment on wages and damage caused by the worker's conduct for which they are liable.[113] Deductions can also be made for the cost of providing workers with accommodation (which can be common in the agricultural industry, for example) up to a maximum of £8.70 a day.[114]

Enforcement of the NMW is civil and criminal. As a contractual entitlement, the NMW can be enforced by individuals bringing claims to the civil courts or tribunal.[115] If a worker has reasonable grounds for suspecting they are not being paid the NMW, they are entitled to inspect the employer's NMW records.[116] Failure to allow access to the records may be subject to a complaint to the tribunal.[117] Section 28 of the NMWA 1998 also reverses the burden of proof regarding entitlement to the NMW in civil claims. An individual is presumed to qualify, and in cases of deductions presumed to have been paid at less than the minimum rate. The employer must prove that the person was either not entitled to the NMW or was paid at the correct rate.

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107 NMWR 2015 regulation 37.

108 NMWR 2015 regulation 41(2).

109 Anne Davies, '*Employment Law'* (2015, Pearson), 256.

110 NMWR 2015 regulation 44.

111 NMWR 2015 regulation 46-47.

112 The au pair exemption in regulation 57 is set to be abolished. On sleep-in care workers, see *Royal Mencap Society v Tomlinson-Blake* [2021] [2021] UKSC 8.

113 NMWR 2015 regulation 12.

114 NMWR 2015 regulation 16.

115 NMWA 1998 section 17.

116 NMWA 1998 section 10.

117 NMWA 1998 section 11.

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Workers asserting their NMW rights are protected from detrimental treatment by section 23 of the NMWA 1998, enforced by bringing claims to the tribunal.[118] Dismissing employees for asserting their NMW rights is automatically unfair,[119] enforced by bringing claims to the tribunal.[120]

There are multiple options for enforcement by the state, primarily through the HMRC NMW/NLW team. It may issue a 'notice of underpayment' requiring the employer to pay the arrears to the affected worker(s) within 28 days.[121] The notice must also impose a penalty, payable to the Secretary of State, of 200% of the underpayment per worker, subject to a minimum of £100 and a maximum of £20,000 per worker.[122] The HMRC NMW/NLW team may take legal action to enforce the payment of the arrears and the penalty.[123] The government routinely publishes the names of businesses who fail to pay the NMW, detailing their arrears and how many workers are affected.[124] The GLAA and EAS may also investigate offences under the NMW. The HMRC NMW/NLW team may also seek LMEU or LMEO triggered by National Minimum Wage Act offences.[125] Enforcement of wages in the Scottish and Northern Irish agricultural sectors is undertaken by the Agricultural Wages Board for Northern Ireland and the Scottish Agricultural Wages Board, not the HMRC NMW/NLW team. It is a criminal offence to 'refuse or wilfully neglect' to pay the NMW,[126] enforced by HMRC NMW/NLW team.

A series of supplementary duties reinforce the operation of the NMW regime. Employers are required to keep records under section 9 of the NMWA 1998. These duties are subject to criminal enforcement through the offences of: failing to keep records, falsifying records, providing false records, and obstructing an officer conducting an investigation.[127] HMRC are primarily responsible for enforcing these offences. They may also be the subject of a LMEU or LMEO sought by HMRC.[128]

Extreme forms of exploitation

Legislation governing the sharpest end of the spectrum of labour market non-compliance is devolved across the UK. It centres around human trafficking and other extreme forms of exploitation, increasingly referred to under the umbrella term 'modern slavery'.

In England and Wales, the Modern Slavery Act 2015 contains various criminal offences that apply in the employment context. Section 1 criminalises modern slavery, servitude and forced or compulsory labour. Human trafficking, entailing the arrangement or facilitation of travel of another person with a view to that person being exploited, is criminalised under section 2. Section 3 explains that exploitation here includes a section 1 offence, sexual exploitation, and the removal of organs.

118 Employment Rights Act 1996 section 48; Employment Rights (Northern Ireland) Order 1996 article 78

119 ERA 1996 section 104A; ERO (NI) 1996 article 135A.

120 ERA 1996 section 111; ERO (NI) 1996 article 145.

121 NMWA 1998 section 19.

122 NMWA 1998 section 19A.

123 NMWA 1998 section 19D.

124 For the latest publication: https://www.gov.uk/government/news/employers-named-and-shamed-for-paying-less-than-minimum-wage

125 Immigration Act 2016 section 14(4)(b).

126 NMWA 1998 section 31.

127 NMWA 1998 section 31(2)-(5).

128 NMWA section 13; Immigration Act 2016 sections 14 and 18.

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In Northern Ireland, section 1 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 criminalises modern slavery, servitude and forced or compulsory labour. Human trafficking, involving the commission of a section 1 offence or sexual exploitation, is criminalised under section 2.

In Scotland, section 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 criminalises modern slavery, servitude and forced or compulsory labour. Human trafficking, involving the commission of a section 4 offence or sexual exploitation such as prostitution, is criminalised under section 1.

Slavery, forced labour, servitude and human trafficking are also violations of Article 4 of the European Convention of Human Rights. According to each Act, the meanings of slavery, servitude and forced labour are to be construed in accordance with Article 4. Anti-trafficking legislation is also underpinned by the United Nations Convention Against Transnational Organized Crime and the Council of Europe Convention on Action against Trafficking in Human Beings.

Modern slavery and human trafficking offences, rather than constituting an exception to the regular labour market, can occur within its context and within otherwise 'ordinary' workplaces. It should also be noted that the DLME's remit does not directly cover offences outside of the regular labour market, such domestic servitude, sexual exploitation or exploitation in criminalised work.

The Police (including the National Crime Agency), GLAA, and the Home Office's Criminal and Financial Investigations and Immigration Compliance and Enforcement teams have the power to investigate and enforce these offences. LMEUs and LMEOs may also be sought, as well as STPOs and STROs.

Agency Worker Protections

It is illegal for employment agencies and employment businesses to charge recruitment fees.[129] According to schedule 3 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005, fees may be charged for the following occupations: actor, musician, singer, dancer, background artist, extra, walk-on or other performer, photographic or fashion model, professional sports person, composer, writer, artist, director, production manager, lighting cameraman, camera operator, make-up artist, clothes, hair or make-up stylist, film editor, action arranger or co-ordinator, stunt arranger, costume or production designer, recording engineer, property master, film continuity person, sound mixer, photographer, stage manager, producer, choreographer, theatre designer. Fees are still prohibited for these occupations if the employment agency or employment business is also charging the end-user recruitment fees.[130] Furthermore, any fee that is permissibly charged must be payable out of the agency workers' earnings rather than as a signing-on fee.[131]

Charging for additional services is prohibited in certain circumstances. No employment agencies nor employment businesses may make the provision of their services conditional upon the worker using

[129] Employment Agencies Act 1973 section 6; Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 7.

[130] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 26(3); Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 26(3).

[131] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 26(2); Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 26(2).

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other services for which fees are not prohibited, or hiring or purchasing goods (e.g. a uniform).[132] Agency workers that do voluntarily make use of the additional services must be able to withdraw from them without incurring a penalty fee.[133]

There is a cooling-off period of 30 days in which fees cannot be charged for the provision of a photographic image or audio or video recording.[134] Fees can be charged for including a fashion and photographic model's details in a publication, but these should only come out of their earnings and cannot constitute a signing-on fee.[135]

Various requirements apply prior to signing on with an employment agency or employment business. Agency workers must be notified of the terms of the relationship, especially any fees and charges.[136] In Great Britain (the provision does not apply in Northern Ireland), employment businesses must provide a 'key information document' about the relationship between the employment business and the agency worker.[137]

Per regulations 14-16 and articles 14-16 of the 2003 and 2005 regulations, before any services are provided, the agreed terms must be provided in a written document (a single document where possible). The terms cannot then be varied without the work seeker's consent. If there is an agreed variation, a new agreement must be issued within 5 business days.

The terms of an agency workers' contract are subject to additional regulations. Regulation 10 and article 10 of the 2003 and 2005 regulations, respectively, place limits on restrictive covenants preventing workers from entering into direct contracts with the end-user going forward. The maximum period direct dealings can be prevented will be the longer of 14 weeks after the first working day and 8 weeks after the last working day.

Employment businesses cannot withhold or threaten to withhold pay on the following grounds: non-receipt of payment from the end-user in respect of the supply of any service provided by the employment business, the agency worker's failure to provide a signed time-sheet, the agency worker not working during any period other than that to which the payment relates, or any matter within the control of the employment business.[138]

Prior to introducing or supplying an agency worker to an end-user, employment agencies and employment businesses must obtain specified information. This includes the identity of the end-user, the nature of their business, the start date, likely duration, position, type of work, location, hours,

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[132] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 5(1); Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 5(1).

[133] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 5(2); Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 5(2).

[134] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 5(3); Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 5(3).

[135] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 26(5); Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 26(5).

[136] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 13; Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 13.

[137] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 13A.

[138] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 12;.Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 12.

experience, training and qualifications sought, and, in the case of an employment agency, minimum rate of pay, other benefits and length of notice. The employment agency or employment business must assess the health and safety risks and ensure that it would not be detrimental to the interests of either party for the placement to go ahead. Finally, they must ensure that the agency worker has suitable experience, training, qualifications and authorisations, satisfies the legal and professional requirements (e.g. DBS checks), and is willing to undertake the work.[139] It is a requirement that employment agencies and employment businesses keep records to demonstrate compliance with all of the above. The records must be kept for at least one year after the date on which the service was last provided.[140]

In Northern Ireland, agency workers cannot be supplied to end-users as strike-breakers.[141] Equivalent prohibitions in England, Wales and Scotland were initially repealed by regulation 2 of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022. The regulations were quashed in *ASLEF, Unison and NASUWT v Secretary of State for Trade and Business,* restoring the original prohibition.[142]

Per regulation 6 and article 6 of the 2003 and 2005 regulations, workers must not be subjected to detrimental treatment (or the threat of it) by the employment agency or employment business for terminating their contract with them. Individual contractors who contract their services through their own limited company may opt out of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 or Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 article in their entirety.

The EAS is responsible for enforcing all of the above in Great Britain, whilst the EAI is responsible for enforcement in Northern Ireland. Criminal prosecutions can be brought for charging illegal recruitment fees,[143] keeping false records,[144] and breaching any of the requirements imposed in the 2003 or 2005 Regulations.[145]

The EAS and EAI may apply to the tribunal to issue prohibition orders banning non-compliant individuals from running an employment agency for up to 10 years.[146] LMEUs and LMEOs requiring the specified person to comply with specified requirements or restrictions may also be sought.

[139] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulations 18-22; Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 18-22.

[140] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 29; Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 29.

[141] Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 regulation 7.

[142] ASLEF, Unison and NASUWT v Secretary of State for Trade and Business [2023] EWHC 1781 (Admin).

[143] Employment Agencies Act 1973 section 6; The Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 7.

[144] Employment Agencies Act 1973 section 10; The Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 9.

[145] Employment Agencies Act 1973 section 5; The Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 6.

[146] Employment Agencies Act 1973 section 3A; The Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 5A.

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Collective labour law rights

The remit of the DLME does not cover breaches of collective labour laws pertaining to workforces as collectives, trade union rights, and industrial action. The DLME has, however, noted “the key role that unions play in labour market enforcement…and the need for the enforcement bodies to treat with our trade unions and gain from their expertise.”[147]

Licensing and regulatory breaches

Licensing

The gangmaster licensing regime is governed by the Gangmasters (Licensing) Act 2004 and Immigration Act 2016. Both Acts apply across the UK. Gangmasters are defined in section 3 of Gangmasters (Licensing) Act 2004 as follows: A person (“A”) acts as a gangmaster if he supplies a worker to do work to which this Act applies for another person (“B”). This broad definition captures employment agencies, employment businesses, and any other labour providers.[148]

Gangmasters providing workers in the agricultural, horticultural, shellfish, food packaging and food processing sectors must have a licence from the GLAA. [149] Acting as a gangmaster without a licence is a criminal offence.[150] It is also a criminal offence under section 12(2) to possess or have control of a false document with the intention of inducing another to believe they are a licenced gangmaster. Gangmasters, employment agencies and employment businesses outside these sectors do not require a licence.

A person also commits a criminal offence per section 13(1) if they enter into an arrangement with an unlicensed gangmaster to supply workers. A person has a defence under section 13(2) if they took all reasonable steps to satisfy himself that the gangmaster was licenced and had no reasonable grounds for suspecting the gangmaster did not have a valid licence.

The GLAA is responsible for enforcing the licensing regime and its criminal sanctions. The GLAA can revoke licences and, in severe cases, refer the gangmaster for criminal prosecution. Under section 14 and section 18 Immigration Act 2016, the GLAA may seek LMEUs and LMEOs requiring the specified person to comply with specified requirements or restrictions.

Employment Agency Advertising

Regulation 27 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and article 27 of the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 impose transparency requirements on advertisements. They must contain details of the employment agency or employment business and of the work offered. In Great Britain, employment agencies and employment businesses must not advertise in an EEA state unless they

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[147] DLME ‘2018/2019’ (n 16), iv.

[148] All employment agencies and employment businesses were once required to be registered and licensed under the Employment Agencies Act 1973. The Deregulation and Contracting Out Act 1994 removed this requirement. Only labour providers within the scope of the GLAA’s remit require a licence.

[149] Gangmasters (Licensing) Act 2004 section 3 and section 6.

[150] Gangmasters (Licensing) Act 2004 section 12(1).

advertise in English in Great Britain at the same time or publish it in English in Great Britain for all or part of the 28 day period prior to the EEA advertisement.[151] The requirement does not apply in Northern Ireland.

The EAS is responsible for enforcement in Great Britain, whilst the EAI is responsible for enforcement in Northern Ireland. Criminal prosecutions can be brought for breaching the advertisement requirements.[152] The EAS and EAI may apply to the tribunal to issue prohibition orders banning non-compliant individuals from running an employment agency for up to 10 years.[153] They may seek LMEUs and LMEOs requiring the specified person to comply with specified requirements or restrictions.

Compliance with inspections, investigations and orders

It is a criminal offence to fail to comply with inspections and investigations conducted by the GLAA, EAS/EAI, and HMRC NMW/NLW team (and the Health and Safety Executive).

Breaching a Labour Market Enforcement Order is an imprisonable criminal offence.[154] Breaching a prohibition order is a criminal offence

Work-Based Harms

A substantial proportion of work-related rights and protections (and their enforcement) falls outside the scope of the DLME's remit. This section covers the various specific labour laws that fall outside the DLME remit of labour market non-compliance. Such breaches may be broadly defined as 'work-based harms.' These harms are usually, with exceptions, solely enforced in the tribunal (or Fair Employment Tribunal in religious and political discrimination cases in Northern Ireland). It should be noted that in order to bring a claim to the Employment Tribunal, claimants must participate in early conciliation through the Advisory, Conciliation and Arbitration Service (ACAS). In Northern Ireland, claims are routed through the Labour Relations Agency first before getting to the Industrial or Fair Employment Tribunal.[155]

Additionally, arbitration (a form of dispute resolution outside of the courts) is an alternative to effectively all Industrial Tribunal claims in Northern Ireland under the Labour Relations Agency Arbitration Scheme, whereas in England, Scotland and Wales it is only available in unfair dismissal and flexible working request claims.

[151] Conduct of Employment Agencies and Employment Businesses Regulations 2003 regulation 27A.

[152] Employment Agencies Act 1973 section 5; The Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 6.

[153] Employment Agencies Act 1973 section 3A; The Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 article 5A.

[154] Immigration Act 2016 section 27.

[155] Employment (NI) Act 2016 sections 1-7.

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Individual labour law rights and protections

Dismissal and redundancy

Employees have a right not to be unfairly dismissed by their employer. For England, Scotland and Wales this right is found in section 94 of the ERA 1996. In Northern Ireland, it is contained in article 126 of the ERO 1996. Unfair dismissal protection only applies to employees and not 'limb (b) workers' or self-employed contractors. Unfair dismissal is a civil breach and is enforced by tribunal claims.[156]

An employee is dismissed if either: their contract is terminated, their fixed-term contract is not renewed, or the employee terminates the contract in circumstances in which s/he is entitled to terminate it without notice by reason of the employer's conduct, known as constructive dismissal.[157]

A dismissal is potentially fair if the principal reason relates to the employee's capability, conduct, redundancy, contravention of a statutory duty or restriction (such as HGV drivers requiring a valid HGV licence), or some other substantial reason.[158] A large body of case law has developed on each of these potentially fair grounds; in short, the employer must act reasonably and follow a fair procedure in dismissing the employee.[159]

Generally, an employee must have been continuously employed for the required qualifying period to access the right. The key divergence between the four nations is that the qualifying period for the right in Northern Ireland is one year of continuous employment,[160] compared to two years in England, Scotland and Wales. The qualifying period is excluded (with minor exceptions) if the dismissal was for an automatically unfair reason. Automatically unfair reasons relate to assertions of statutory rights, trade union rights, and non-discrimination.[161] The qualifying period is also removed if the employee was dismissed because of their political opinion, though this does not make the dismissal automatically unfair.[162] The disapplication of the qualifying period for political opinion dismissals only applies in Great Britain, though political opinion is a free-standing protected characteristic in Northern Irish discrimination law (there are no qualifying periods for discrimination claims).[163]

Wrongful dismissal is a dismissal in breach of the employee's contract. The breach is usually a failure to provide the requisite notice of dismissal. Section 86(1) of the ERA 1996 and article 118 of the ERO (NI) 1996 require employees to be provided with at least one week's notice of dismissal, up to a maximum of 12 weeks depending on length of employment (the employee must have been employed for at least one month). Longer notice periods can be included in contracts. Section 86(1) and article

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[156] ERA 1996 section 111; ERO (NI) 1996 article 145.

[157] ERA 1996 section 95(1)(c); ERO (NI) 1996 article 127(1)(c).

The employer's conduct must be such that, without reasonable and proper cause, it is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence - *Malik v BCCI* [1997] UKHL 23.

[158] ERA 1996 section 98(1)-(2); ERO (NI) 1996 article 130(1)-(2).

See also *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; *Foley v Post Office* [2000] ICR 1283*; BHS v Burchell* [1978] IRLR 379.

[159] ERA 1996 section 98(4); ERO (NI) 1996 article 130(4).

[160] ERO (NI) 1996 section 140(1).

[161] ERA 1996 section 98A-section 105; ERO (NI) 1996 article 130A-137.

[162] ERA 1996 section 108(4); See also *Redfearn v UK* [2012] ECHR 1878.

[163] For example, see Northern Ireland Act 1998 section 75(1)(a).

118 do not apply to 'limb (b) workers'. They must fall back on any notice clause contained in their contract, though the courts will imply an appropriate notice if the contract is silent.[164] The statutory notice periods can be disregarded where an employee commits a repudiatory breach of contract (meaning conduct that entitles the employer to treat the contract as terminated, such as gross misconduct), accepts a payment in lieu of notice, or agrees to waive the notice.[165] It should be noted that even in cases of repudiatory breach (a serious breach of contract that entitles the other party to terminate the contract) a fair dismissal procedure still needs to be followed, though see *Edwards* below. As a breach of contract, wrongful dismissal is a civil claim enforceable in the civil courts or tribunal. Wrongful dismissal protection and enforcement operates across the UK.

A development related to the termination of employment is the implied term of mutual trust and confidence (in essence that both the employer and employee should behave in ways that maintain a functioning employment relationship). *Malik v BCCI* allowed a claim for damages for breach of contract in respect of the financial loss the former employees had suffered as a result of not being able to find new jobs due to BCCI's extensive criminal activity. Likewise in *Gogay v Hertfordshire CC,* an employee recovered damages for the depression and inability to work she suffered after a wrongful and careless suspension for child abuse.[166] However, the requirement for the damage suffered to be a reasonably foreseeable consequence of the breach imposes a difficult obstacle for employees.[167]

The relationship between the implied term and wrongful dismissal is complex. Firstly, a wrongful dismissal claim cannot be brought on the basis that the implied term was breached by the fact and manner of dismissal (which caused depression and inability to work) as this is already covered by the statutory right against unfair dismissal.[168] *Eastwood v Magnox Electric Plc* held that if the breach of the term arose in the period before the dismissal, the cause of action for breach of contract survives the dismissal.[169] According to *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*, an employer's failure to comply with contractual disciplinary procedures falls within the 'Johnson v Unisys exclusion zone' and cannot be used by workers to form the basis of contractual claims for wrongful dismissal.[170]

Employers are required to make statutory redundancy payments to employees they make redundant.[171] Redundancy payment protections apply across the UK. An employee who is given notice of redundancy is entitled to take reasonable time off to look for work or attend training.[172] This time off is to be paid at their normal rate.[173] An employee in Great Britain must have completed two years continuous employment and must not have refused reasonable alternative employment, whilst the qualifying period in Northern Ireland is one year of continuous employment.

Statutory redundancy payments must also be made under the 'lay-off/short-time'' provisions whereby, due a cessation of business, an employee is temporarily not provided work or the work diminishes such

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164 *Richardson v Koefod* [1969] 1 WLR 1812 (CA).

165 ERA 1996 section 86(3)-(6).

166 *Gogay v Hertfordshire CC* [2000] IRLR 703.

167 *Yapp v Foreign and Commonwealth* Office [2014] EWCA Civ 1512 .

168 *Johnson v Unisys* [2001] UKHL 13.

169 *Eastwood v Magnox Electric Plc* [2004] UKHL 35.

170 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.

171 ERA 1996 section 135; ERO (NI) 1996 article 170.

172 ERA 1996 section 52; ERO (NI) 1996 article 80.

173 ERA 1996 section 53; ERO (NI) 1996 article 81.

that they receive less than half a week's pay for either.[174] The diminution in work must last for more than 4 weeks in a row, or more than 6 non-consecutive weeks in a 13 week period.[175] To qualify, two years continuous employment is required in Great Britain and one year in Northern Ireland. The provision does not apply to 'limb (b) workers.'

Failure to pay statutory redundancy payments for redundancy, lay-off, or short-time is a civil breach enforceable in the tribunal. As is refusing time off or failure to pay the normal rate.[176] If an employee's contract stipulates enhanced redundancy payments additional to the statutory payment, failure to pay is a civil breach of contract enforceable in the civil courts or tribunal.

Equal Pay

Equal pay between men and women is governed by the Equality Act 2010 in Great Britain (the provisions for equal pay are separate from general discrimination provisions) and the Equal Pay (Northern Ireland) Act 1970 in Northern Ireland. Despite the different legislative sources, the key concepts and provisions operate in substantially the same way.[177]

Discrimination law adopts a slightly different definition of employment. Under section 83(2)(a) of the Equality Act 2010, employment includes employees, apprentices, 'limb (b) workers', and anyone with a contract to personally do work. As the 'contract to personally do work' category does not include the 'client or customer' exception for 'limb (b) workers', it is potentially broader to include self-employed contractors, though the judgment in *Jivraj v Hashwani* suggests that the scope of section 83 may be limited to 'limb (b) workers'.[178] Northern Ireland's non-discrimination legislation also adopts this definition e.g. in section 1(7)(a) of the Equal Pay (Northern Ireland) Act 1970.

Unlike discrimination generally, there must be a real comparator for the discrimination (e.g. the male worker being paid more) and not a hypothetical one.[179] The comparator can be a previous worker (e.g. a woman replaces a man in a job but is paid less).[180] The comparator must either be at the same establishment with the same or associated employer, or at a different establishment with the same or associated employer.[181] Whilst the comparator does not need to be employed by the same employer, there does need to be a 'single source' responsible for the difference in pay.[182] This requirement creates a risk that employers can minimise the scope for equal pay comparisons by contracting out or

[174] ERA 1996 section 147; ERO (NI) 1996 article 182.

[175] ERA 1996 section 148; ERO (NI) 1996 article 183.

[176] ERA 1996 section 54; ERO (NI) 1996 article 82.

[177] Discrimination in pay on the basis of the other protected characteristics in the Equality Act 2010, e.g. ethnicity, is covered by general discrimination law.

[178] *Jivraj v Hashwani* [2011] UKSC 40.

[179] Equality Act 2010 section 7; Equal Pay (Northern Ireland) Act 1970 section 1.

[180] Equality Act 2010 section 64(2); Equal Pay (Northern Ireland) Act 1970 section 1.

[181] Equality Act 2010 section 79(3)-(4); Equal Pay (Northern Ireland) Act 19701 section 1(7).

[182] *Lawrence and others v Regent Office Care Ltd* [2002] IRLR 822 ECJ.

subcontracting certain functions and decentralising pay structures.[183] Agency workers in particular are at risk of falling outside the scope of equal pay protections.

Section 71 of the Equality Act 2010 ensures that where there is no real comparator, a general direct sex discrimination claim can still be pursued (e.g. a woman is told she would be paid more if she was a man, but there is no real male comparator). Indirect sex discrimination in relation to terms and pay can only be challenged through the equal pay provisions.[184] Once a comparator is established, 'equal work' must be established. This can either be: 'like' work, equivalent work, or work of equal value.[185]

Direct pay discrimination on the basis of sex cannot be justified. However, per section 69 of the Equality Act 2010 and section 1(3) of the Equal Pay (Northern Ireland) Act 1970, employers can justify pay inequalities if the material factor relied upon (the factor placing people of their sex doing equal work at a particular disadvantage) is a proportionate means of achieving a legitimate aim. In Great Britain, the long-term goal of reducing pay inequality between men and women is always a legitimate aim - there is no equivalent provision in Northern Ireland.[186] Other 'material factors' may include market forces[187] and length of service.[188]

Equal pay is only enforced through civil claims. Claims can either be brought to the civil courts due to the contractual basis of the implied sex equality clause[189] or the tribunal.[190] Asserting the statutory right to equal pay is an automatically unfair reason for dismissal,[191] enforced in the tribunal.[192] In Northern Ireland, as an additional measure, the Ministry of Health and Social Services may also refer cases to the industrial tribunal.[193]

The difficulty in establishing an equal pay claim due to asymmetric information is implicitly acknowledged by the legislative provisions. Firstly, the burden of proof is reversed onto the employer to defend itself once unequal pay is established.[194] Furthermore, section 77 of the Equality Act 2010 states that terms banning workers from discussing their pay in relation to a discrimination query are unenforceable - there is no equivalent provision in the Equal Pay (Northern Ireland) Act 1970. Finally, although the formal questionnaire procedure for pay inequality queries was replaced with informal, non-binding guidance for employers, tribunals may draw adverse inferences from an employer's refusal to answer a worker's questions.[195]

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[183] This was evident in the case of *Allonby v Accrington & Rossendale College* [2004] IRLR 224, ECJ in which predominantly female part-time lecturers were made redundant and required to provide their services to the college via an agency. The European Court of Justice held they could not establish a 'single source' for the inequality in pay.

[184] In Northern Ireland, equal pay and sex discrimination are governed by entirely distinct legislation.

[185] Equality Act 2010 section 65(2)-(3); Equal Pay (Northern Ireland) Act 1970 section 1(2)(a)-(c).

[186] Equality Act 2010 section 69 (3).

[187] *Rainey v Greater Glasgow Health Board* [1987] IRLR 26; *Enderby v Frenchay HA* [1993] IRLR 591.

[188] *Cadman v Health and Safety Executive* [2006] IRLR 969 ECJ.

[189] Equality Act section 69; Equal Pay (Northern Ireland) Act 1970 section 1.

[190] Equality Act section 120; Equal Pay (Northern Ireland) Act 1970 section 2.

[191] ERA 1996 section 104; ERO (NI) 1996 section 135.

[192] ERA 1996 section 111; ERO (NI) 1996 section 145.

[193] Equal Pay (Northern Ireland) Act 1970 section 2(2).

[194] Equality Act section 136; Equal Pay (Northern Ireland) Act 1970 section 2A.

[195] Equality Act section 138(4); Equal Pay (Northern Ireland) Act 1970 section 6B(4).

Employers can voluntarily sign up to the 'Think, Act, Report' scheme for equal pay auditing, whilst the employment tribunal may order an equal pay audit after a successful claim.[196] The power to order equal pay audits does not extend to Northern Ireland.

Other pay-related breaches

Unlawful deductions from pay are protected by section 13 of the ERA 1996 and article 47 of the ERO (NI) 1996. A deduction can only be made where the employer has a statutory or contractual right to do so, or the worker's prior written consent. Employers can only rely on a contractual right if the relevant provision has been brought to the worker's attention (this further highlights the need for written contracts and statements of particulars).[197] Employees and 'limb (b) workers' are protected.

There is no requirement for a fair procedure or proportionality in the deduction. A worker might only be protected by the implied term of mutual trust and confidence, but that would be weak in the face of a clear, express term permitting the deduction. There is limited case law treating excessive deductions (compared to the employer's loss) as an unenforceable penalty clause (a clause that levies an excessive penalty unrelated to actual harm and damage suffered).[198] Deductions for retail workers due to cash shortages or stock deficiencies cannot exceed 10% of the worker's gross pay for that day.[199]

Generally, deductions cannot take the wage level below the National Minimum wage. Unlawful deductions are enforced by civil claims to the tribunal or civil courts for breach of contract.[200]

A simple failure to pay wages, without any suggestion of a deduction, is also actionable. At common law, non-payment of all or some wages due is a breach of contract enforceable in the civil courts or tribunal (except where it is a permitted deduction). Failure to pay wages could also form the basis of a constructive dismissal claim in the tribunal.

Non-payment of wages may fall within the enforcement remit of the HMRC NMW/NLW team and GLAA where it is related to the NMW, and within the remit of the EAS and EAI where agency workers are affected. Enforcement of all wages in the Northern Irish and Scottish agricultural sectors is undertaken by the Agricultural Wages Board for Northern Ireland and the Scottish Agricultural Wages Board.

It is important to note that a worker taking strike action is not entitled to be paid, per section 14(5) of the ERA 1996 and article 46(5) of the ERO (NI) 1996. Action short of a strike (working but using some disruptive strategies during industrial action e.g. by refusing to perform some duties) is a particularly complex area in relation to wage deduction. Deductions to reflect the work not done have been upheld,[201] or upheld but adjusted.[202] *Wiluszynski v London Borough of Tower Hamlets* went further, holding that the employer was entitled to refuse anything less than full performance. Any work done

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[196] Equality Act 2010 (Equal Pay Audits) Regulations 2014.

[197] ERA 1996 section 13(2); ERO (NI) 1996 article 47(2).

[198] *Giruad UK Ltd v Smith* [2000] IRLR 763 (EAT).

[199] ERA 1996 section 18(2); ERO (NI) 1996 article 50(2).

[200] ERA 1996 section 23; ERO (NI) 1996 article 55.

[201] *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216.

[202] *Royle v Trafford Borough Council* [1984] IRLR 184.

during the industrial action was treated by the council as voluntary and therefore no payment was due for the period despite most work duties being performed.[203]

Under section 28(1) of the ERA 1996 and article 60 of the ERO (NI) 1996, a guaranteed payment must be paid in respect of a 'workless' day', i.e. a day in which the person was contractually obliged to work but no work, including a suitable alternative,[204] was available for reasons relating to the employer's business. Only employees with one month's employment qualify for such payments. [205] The payment is currently set at £31 a day.[206] In any three-month period, only five days may be claimed for.[207] The payment does not affect the ordinary contractual remuneration an employee is otherwise entitled to.[208] The right to a guaranteed payment is enforceable by a complaint to the tribunal.[209] It is automatically unfair to dismiss an employee for seeking to enforce this statutory right,[210] enforceable by a complaint to the tribunal.[211]

Finally in regard to pay, the Pensions Act 2008 imposes various duties upon employer's to enrol staff in pension schemes.[212] Section 45 establishes criminal offences relating to a failure to enrol staff in schemes. The Pensions Regulator enforces the UK's pension scheme and may issue a variety of notices for non-compliance with statutory duties including fixed-penalty notices.[213] Identical provisions are contained in the Pensions (No.2) Act (Northern Ireland) 2008. Dismissing employees for seeking to enforce pension enrolment duties is automatically unfair,[214] enforced by tribunal claims.[215]

Working time

Regulation of working time is governed in Great Britain by the Working Time Regulations 1998 (WTR) and in Northern Ireland by the Working Time Regulations (Northern Ireland) 2016 (WTR NI). The two regulations are effectively identical. Working time regulation can be divided into four key areas: 1) working limits and rest; 2) annual leave; 3) sick leave; and 4) flexible working.

Breaches of statutory duties relating to working time can be enforced by workers in the civil courts. *Barber v RJB Mining Ltd* opened up the possibility of obtaining an injunction in the civil courts to stop an employer from breaching WTR limits.[216] Employees and workers seeking to enforce their WTR

[203] *Wiluszynski v London Borough of Tower Hamlets* [1989] ICR 493.
[204] ERA 1996 section 29; ERO (NI) 1996 article 61.
[205] ERA 1996 section 29(1); ERO (NI) 1996 article 61(1).
[206] ERA 1996 section 31(1); ERO (NI) 1996 article 63(1).
[207] ERA 1996 section 31(2),(3); ERO (NI) 1996 article 63(1),(2).
[208] ERA 1996 section 32(1); ERO (NI) 1996 article 64(1).
[209] ERA 1996 section 34; ERO (NI) 1996 article 66.
[210] ERA 1996 section 104; ERO (NI) 1996 article 135.
[211] ERA 1996 section 111; ERO (NI) 1996 article 145.
[212] Pensions Act 2008 Chapter 1.
[213] Pensions Act 2008 sections 36-42.
[214] ERA 1996 section 104D; ERO (NI) 1996 article 135D.
[215] ERA 1996 section 111; ERO (NI) 1996 article 145.
[216] *Barber v RJB Mining Ltd* [1999] IRLR 208.

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entitlements are protected from detrimental treatment. Dismissing employees for seeking their WTR rights is automatically unfair,[217] enforced by tribunal claims.[218]

1. Working time limits and rest

Regulation 4 of the WTR 1998 and regulation 4 of the WTR (NI) 2016 impose a weekly working time limit of 48 hours (averaged over 17 weeks, or up to 52 weeks by agreement). The limit applies to employees and 'limb (b)' workers, unless they choose to 'opt out'. For young workers (under 18) the limit is 40 hours a week and 8 hours daily.[219] There is no opt-out for young workers. Maritime shipping, fishing vessels, specific services such as the armed forces or the police, certain specific activities in the civil protection services, civil aviation, domestic work, and unmeasured work are excluded from the weekly limit.[220]

Where the limit applies, employers must take all reasonable steps to ensure the limit is met and keep up-to-date records of workers to whom it does not apply by reason of their prior agreement.[221] Employers have a general duty to keep 'adequate' records of compliance with the regulations and maintain them for two years. Employers do not need to record each worker's daily working hours if they can demonstrate compliance otherwise.[222]

Night work limits are imposed at 8 hours over a 24 hour period (averaged over 17 weeks) per regulation 6 of the WTR 1996 and regulation 7 of the WTR (NI) 2016. Workers under 18 are prohibited from night work.[223] The night-work limit is within the record-keeping obligations imposed on employers by regulation 9 and regulation 11, respectively. Regulation 10 of the WTR 1998 and regulation 12 of the WTR (NI) 2016 provide a minimum daily rest period of 11 consecutive hours in a 24 hour period. For under 18s the rest period is 12 hours. Regulation 11 of the WTR and regulation 13 of the WTR (NI) 2016 provide a minimum weekly rest period of 24 consecutive hours in a 7 day period. For adults this can be changed to 48 hours in a 14 day period. The minimum is 48 hours in a 7 day period for under 18s.

Enforcement of the time limits (unless excluded or opted-out from) are civil and criminal. Under regulation 29 of the WTR 1998 and regulation 37 of the WTR (NI) 2016 it is a criminal offence to contravene the limits and the record-keeping obligations. Responsibility for enforcement is divided between the Health and Safety Executive, local authorities or another sectoral regulator, depending on the sector.

During the working day, employees and workers are entitled to a rest break of 20 minutes every 6 hours (this does not have to be paid) in accordance with regulation 12 of the WTR 1998 and regulation 14 of the WTR (NI) 2016. Failure to provide the minimum rest periods or rest breaks when required gives rise to a civil claim in the tribunal.[224]

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[217] ERA 1996 section 101A; ERO (NI) 1996 article 132A.

[218] ERA 1996 section 111; ERO (NI) 1996 article 145.

[219] WTR 1998 regulation 5A; WTR (NI) 2016 regulation 6.

[220] WTR 1998 regulation 18-20; WTR (NI) 2016 regulation 22-24.

[221] WTR 1998 regulation 4(2); WTR (NI) 2016 regulation 4(2).

[222] WTR 1998 regulation 9; WTR (NI) 2016 regulation 11.

[223] WTR 1998 regulation 6A; WTR (NI) 2016 regulation 7.

[224] WTR 1998 regulation 30; WTR (NI) 2016) regulation 43.

The WTR 1998 and WTR (NI) 2016 contain numerous exceptions (for adults) to the rest period and rest break provisions. The sectors listed above are further excluded. As are shift workers when changing shifts and when their working activities involve periods of work split up over the day, as may be the case for cleaning staff.[225] Other 'special cases' include agriculture, hospital and care facilities, offshore work, dock work, security guards and instances of a "foreseeable surge in activity", as may be the case in hospitality.[226]

Where a worker, due to their particular activities, falls outside the provisions on rest breaks and rest periods, they are (apart from the sectors entirely excluded from the regulations) entitled to a compensatory rest break under reg. 24 WTR 1996 and reg.28 WTR (NI) 2016. This is not an absolute entitlement. They are only entitled to compensatory rest 'wherever possible' unless it is not possible for objective reasons in 'exceptional cases.' If the employer cannot find a way to provide compensatory rest, they must find another way to keep the employee healthy and safe.

Enforcement of compensatory rest breaks can be civil and criminal. Under regulation 29 of the WTR 1998 and regulation 37 of the WTR (NI) 2016, it is a criminal offence to contravene the entitlement and the record keeping-obligations. Responsibility for enforcement is divided between the Health and Safety Executive, local authorities or another sectoral regulator, depending on the sector. They can also be subject to tribunal claims.

2. *Annual leave*

Employees and limb (b) workers have a day one entitlement to annual leave, currently set at 5.6 weeks under regulation 13 and regulation 13A of the WTR 1998 and regulation 15 and regulation 16 of the WTR (NI) 2016.

Calculating holiday pay is a complex area for part-time workers. In *Harpur Trust v Brazel,* the Supreme Court struck down the employer's practice of calculating holiday pay as 12.07% of the claimant's school term-time earnings.[227] The correct method of calculating weekly holiday pay as set out in s.224 of the ERA was the average of the most recent 12 weeks' of earnings, ignoring any weeks where earnings were zero (e.g. school holidays in this case). Nothing in the WTR required holiday pay to be pro-rated, nor prohibited part-time workers being treated more favourably.

In response, the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 has been introduced to effectively reverse the judgment. The regulations provide that 'part-year,' and 'irregular hour' workers will accrue holiday at the rate of 12.07% of the number of hours worked in each pay period, capped at 28 days (the equivalent of 5.6 weeks for an individual who works 5 days per week. This will only apply to leave years beginning on or after 1 April 2024.

Annual leave must be paid leave, paid when the leave is actually taken.[228] Per *Williams v British Airways,* the pay must enable the worker to enjoy a period of rest and relaxation in which economic conditions are comparable to those relating to the exercising of their employment.[229] As such, the practice of

[225] WTR 1996 regulation 22; WTR (NI) 2016 regulation 26.

[226] WTR 1996 regulation 21; WTR (NI) 2016 regulation 25.

[227] *Harpur Trust v Brazel* [2022] UKSC 21.

[228] WTR 1998 regulation 16; WTR (NI) 2016 regulation 17.

[229] *Williams v British Airways* [2011] ECR I-8409, [23].

'rolled-up' annual leave (where annual leave pay is included in the basic pay) is an unlawful method of paying annual leave.[230] This judgment is reversed by the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 in relation to irregular hour and part-year workers.

Where an employer dismisses a worker before they have taken their full annual leave entitlement they are entitled to a payment in lieu.[231]

Where a worker has been on sick leave, their unused annual leave rolls over to the next year.[232] Where it was not reasonably practicable for the worker to take annual leave because of the coronavirus pandemic, the unused leave rolls-over for a maximum of two years.[233]

Failure to permit a worker to exercise their leave or failing to fully pay their leave gives rise to a civil claim in the tribunal.[234] Despite recommendations by the DLME for a state body such as HMRC to have responsibility for enforcing paid annual leave, it remains solely enforceable by individuals in the tribunal.[235]

Workers exercising, claiming, or pursuing annual leave rights are protected from detrimental treatment,[236] and dismissal based on these reasons is automatically unfair.[237] Both are enforced by claims to the tribunal.[238] Non-payment of annual leave may fall within the enforcement remit of the EAS/EAI where agency workers are affected, by virtue of article 12 of the 2003 Regulations and the judgment in *HMRC v Stringer.* However, this only pertains to investigations for withheld wages, and does not include the power to recover unpaid holiday pay. Otherwise, holiday pay falls outside of the main enforcement bodies' remit.

3. Sick leave

Employees and 'limb (b) workers' are entitled to take sick leave. In Great Britain this must be in accordance with regulation 2 of the Statutory Sick Pay (General) Regulations 1982 and regulation 2 of the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982. Employees and workers are entitled to at least Statutory Sick Pay (after 4 days of illness) for 28 weeks[239] and any additional occupational or contractual sick pay the employer has agreed to. If a person is sick for longer than 4 weeks they are classed as 'long-term sick'. Disputes over entitlement to statutory sick pay can be

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[230] *Robinson-Steele v RD Retail Services Ltd* [2006] ECR I-2531.

[231] WTR 1998 regulation 14; WTR (NI) 2016 regulation 17.

[232] *Schultz-Hoff v DRB* [2009] ECR I-179; *NHS Leeds v Larner* [2012] IRLR 28. The leave must be used within 18 months of its roll-over.

[233] WTR 1998 regulation 13(10)-(11); WTR (NI) 2016 regulation 15(6)-(7).

[234] WTR 1998 regulation 30; WTR (NI) 2016 regulation 43.

[235] DLME '2018/2019' (n 16), 7.

[236] ERA 1996 section 45A; ERO (NI) 1996 article 68A.

[237] ERA 1996 section 101A and section 104(4)(d); ERO (NI) 1996 article 132A and article 135(4)(d).

[238] ERA 1996 section 48 and section 111; ERO (NI) 1996 article 72 and article 145.

[239] Statutory Sick Pay (General) Regulations 1982 regulation 6; Social Security Contributions and Benefits Act 1992 section 151- 154; Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 regulation 6; Social Security Contributions and Benefits (Northern Ireland) Act 1992 sections 147-150.

referred to the HMRC Statutory Payment Dispute Team. Contractual breaches by employers are enforced by claims in the civil courts or tribunal.

4. *Flexible working*

The right to flexible working requests is set out in section 80F of the ERA 1996 and the Flexible Working Regulations 2014. In Northern Ireland, the right is contained in article 112F of the ERO (NI) 1996. The right is only available to employees who have completed a period of 26 weeks continuous employment.[240]

Employers in Great Britain are expressly required to deal with requests in a "reasonable manner."[241] In all jurisdictions, employers may only refuse the request on the basis of a permitted reason enumerated in section 80G(1)(b) of the ERA 1996, or article 112G of the ERO (NI) 1996.

If a request is refused, an employee, per section 80H(1) or article 112H, may complain to the tribunal that the employer has failed to comply with the procedural requirements, based their decision on incorrect facts, or notified the employee the request was considered withdrawn when not permitted to do so. If both parties agree, they may instead refer the dispute to an appointed arbitrator.[242]

The right operates substantively the same in Northern Ireland with two key differences. Firstly, complaints cannot be made by employees on the basis that the employer impermissibly treated the request as withdrawn by virtue of the employee's conduct. Secondly, the process for requests is still contained in the Employment Rights Order (NI) 1996, whereas in Great Britain it is in ACAS guidance.

An employee must not suffer a detriment because they made a request, brought proceedings, or alleged there are grounds for proceedings.[243] Dismissal for exercising flexible work request rights is automatically unfair.[244] Suffering detrimental treatment or being dismissed can be the basis for a complaint to the tribunal.[245]

Family rights

Various rights to time off work for family reasons are protected across the UK. The rights, with exceptions, only cover employees.

In England, Scotland, and Wales the right to maternity leave is contained in sections 71-73 of the ERA 1996 and the Maternity and Parental Leave etc Regulations 1999. In Northern Ireland, the equivalent right is found in articles 103-105 of the ERO (NI) 1996. The right to paid shared parental leave is found in section 75E of the ERA 1996 and the Shared Parental Leave Regulations 2014. In Northern Ireland, the equivalent right is found in article 107E of the ERO (NI) 1996. Section 80 of the ERA 1996 and the Paternity and Adoption Leave Regulations 2002 provide a right to paid paternity leave. In Northern Ireland, the equivalent right is found in article 122 of the ERO (NI) 1996. Adoption leave is provided by

[240] Flexible Working Regulations 2014 regulation 3.

[241] ERA 1996 section 80G(1)(a).

[242] ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.

[243] ERA1996 section 47E; ERO (NI) article 70E.

[244] ERA 1996 section 104C; ERO (NI) 1996 article 135C.

[245] ERA section 48 and section 111; ERO (NI) 1996 article 71 and article 145.

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s.75A ERA 1996 and the Paternity and Adoption Leave Regulations 2002. In Northern Ireland, the equivalent right is found in article 107A of the ERO (NI) 1996. Employees must have completed 26 weeks of continuous employment to qualify.

Parental leave is provided by section 76 ERA of the 1996 and the Maternity and Parental Leave etc Regulations 1999. Unlike other leave rights it is unpaid. In Northern Ireland, the equivalent right is found in article 108 of the ERO (NI) 1996. Parental leave is subject to a qualifying period of one year's continuous employment. Paid time off for ante-natal care[246] and adoption appointments,[247] are also provided and extended to cover agency workers.

Section 57A ERA 1996 and article 85A ERO (NI) 1996 provide the right to emergency leave to take necessary action to care for a dependent. Section 80EA of the ERA 1996 and the Parental Bereavement Leave Regulations 2020 provides a right to parental bereavement leave when an employee's child (u18) dies. In Northern Ireland, the equivalent right is found in article 112EA of the ERO (NI) 1996.

Leave for family reasons is protected by civil provisions against detriments and dismissal that are enforceable by complaints to the tribunal. [248] The rights to time off for paid ante-natal care and emergency leave are separately enforced by a complaint to the tribunal. Protection from discrimination on the grounds of dependants is a protected characteristic in Northern Ireland per s.75(1)(d) Northern Ireland Act 1998. It is automatically unfair to dismiss on the basis of leave for family reasons.[249] It is also impermissible for companies to discriminate on the basis of pregnancy and sex in their family leave policies.

It is a criminal offence under section 72(5) of the ERA 1996 and article 104(5) of the ERO (NI) 1996 for an employer to permit an employee to work during the compulsory maternity leave period of two weeks from the date of childbirth, or four weeks if the woman works in a factory.

Time-off for miscellaneous reasons

Employees have the right time off for various additional reasons under the ERA 1996 and ERO (NI) 1996. This includes time off for public duties, undertaking jury service, occupational pension scheme trustee duties, and requesting time off for study and training. The latter two must be remunerated. The statutory right to request time off for study and training is not applicable in Northern Ireland.

Failure to permit the time off is a civil breach enforced by employees by a complaint to the tribunal. [250] The right operates in substantively the same way across the UK. Subjecting an employee to a detriment for exercising or enforcing time-off rights is a civil breach,[251] enforced by employees in a complaint to the tribunal. [252] A dismissal on this basis is automatically unfair.[253]

[246] ERA 1996 section 55 and section 57ZA; ERO (NI) 1996 article 83 and article 85ZA.

[247] ERA 1996 section 57ZJ; ERO (NI) 1996 article 85ZJ.

[248] ERA 1996 section 47C, section 48, and section 111; ERO (NI) 1996 article 145.

[249] ERA 1996 section 99; ERO (NI) 1996 article 131.

[250] ERA 1996 section 51; ERO (NI) 1996 article 79.

[251] ERA 1996 section 46; ERO (NI) 1996 article 69.

[252] ERA 1996 section 48; ERO (NI) 1996 article 71.

[253] ERA 1996 section 102; ERO (NI) 1996 article 133.

Also see time-off for trade union duties and activities below.

Whistleblowing

Employees and workers both receive protection where they make a 'protected disclosure,' otherwise known as 'whistleblowing.' Northern Ireland and Great Britain have separate legislation on whistleblowing, but the provisions are substantially the same.

The disclosure made must be a protected disclosure[254] made to the right person.[255] Employees and 'limb (b)' workers are protected from suffering detrimental treatment on the basis of making a protected disclosure.[256] Claims can be brought to the tribunal.[257] It is also automatically unfair to dismiss employees on the basis of whistleblowing,[258] a right enforceable in the tribunal.[259]

Documentation

Under section 1 of the ERA 1996, 'employees' and 'limb b workers' have a right to a written statement of particulars from their employer on the first day of employment, a statement of changes under section 4, and an itemised payslip under section 8.

In Northern Ireland, per Articles 33 and 40 of the ERO (NI) 1996, the right to a written statement and itemised payslip only applies to employees and only requires that a written statement is given within two months of commencement of employment.

Failure to provide a required statement, or comply with the required particulars, is a civil breach of employment law. A worker may make a reference to the tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with its legal requirements. [260]

Discrimination and harassment

Equality rights in England, Scotland and Wales are enshrined in the Equality Act 2010. The protected characteristics in England, Scotland and Wales are:[261] disability (this includes an additional duty to make reasonable adjustments),[262] religion or philosophical belief,[263] race (including nationality and ethnic origin), gender reassignment, marriage and civil partnership, pregnancy and maternity,[264] and

[254] ERA 1996 sections 43B, 43G, 43H; ERO (NI) 1996 articles 67B, 67G, 67H.

[255] ERA 1996 sections 43C-43F; ERO (NI) 1996 articles 67C-67F.

[256] ERA 1996 section 47B; ERO (NI) 1996 article 70B.

[257] ERA 1996 section 48; ERO (NI) 1996 article 72.

[258] ERA 1996 section 103A; ERO (NI) 1996 article 143A.

[259] ERA 1996 section 111; ERO (NI) 1996 article 145.

[260] ERA 1996 section 11; ERO (NI) 1996 article 43.

[261] Equality Act 2010 section 4.

[262] Equality Act 2010 section 20.

[263] Religious beliefs are also protected under Article 9 of the European Convention on Human Rights. On the requirements for a protected philosophical belief, see *Grainger v Plc v Nicholson* [2010] ICR 360 (EAT).

[264] Pregnancy does not apply to indirect discrimination, though a pregnant woman may be able to present her claim as sex discrimination - *Commissioner of Police of the Metropolis v Keohane* [2014] Eq LR 386 (EAT).

sexual orientation. The characteristic can be 'real,' 'perceived'[265] or 'associated' with the person.[266] Discrimination on the basis of trade union membership is also prohibited, see section 4.2 below.

Whilst political opinion has been protected from unfair dismissal by the European Court of Human Rights in *Redfearn v UK,* this case was decided primarily on the basis of freedom of association rather than non-discrimination.[267] The government's response was not to include political opinion as a protected characteristic or automatically unfair reason, but to remove the qualifying period for unfair dismissal.[268] Therefore, unlike in Northern Ireland, in Great Britain political opinion is not a free-standing protected characteristic in discrimination law, though some political opinions may fall within the broader scope of protected philosophical beliefs.

Under section 13(1), it is unlawful for an employer to engage in direct discrimination against a person by treating them less favourably than they would treat others on the basis of a protected characteristic, including during the hiring process. Section 109 and section 111 extends employers' liability for discriminatory acts committed by third parties, such as managers or other employees. Public sector employers are required to comply with the 'public sector equality duty' under sections 149-157 of the Equality Act 2010 to ensure their practices comply with equality norms.

Direct discrimination cannot normally be justified. Limited exceptions are provided for age discrimination[269] and situations of occupational requirements provided they are a proportionate means of achieving a legitimate aim.[270] Disability is also subject to limited exceptions from non-justification. Discrimination 'arising from disability' is addressed in section 15. This means the discrimination is not based on the fact of being disabled itself, but something consequential from the disability such as lower productivity or greater sick leave absences. In these circumstances the employer has a defence to direct discrimination if they can show the action was a proportionate means of achieving a legitimate aim or they did not know or could not have been reasonably expected to know about the disability.[271] Furthermore, the duty to make adjustments for disabilities e.g. by making physical changes to the business premises or redeploying the worker to a different job, is qualified by a 'reasonableness' test.[272]

Indirect discrimination is prohibited by section 19. This applies to any provision, criterion or practice of the employer (including in hiring) that is applied generally and puts, or would put, the person and people with whom the person shares the protected characteristic at a particular disadvantage compared with people without that characteristic. Indirect discrimination can be justified as a proportionate means of achieving a legitimate aim.[273]

[265] *English v Thomas Sanderson Blinds* [2008] EWCA Civ 1421.

[266] Equality Act 2010 section 24; *ERB Attridge Law LLP v Coleman* [2010] ICR 242 (EAT).

[267] *Redfearn v UK* [2012] ECHR 1878.

[268] ERA 1996 section 108(4).

[269] Equality Act 2010 section 13(2) and schedule 9 part 2. For example, policies on retirement age - *Seldon v Clarkson & Wright* [2012] UKSC 16, or using age in a banding approach to redundancy payments - *Lockwood v Department of Work and Pensions* [2013] EWCA Civ 1195.

[270] Equality Act 2010 Schedule 9. For example, female only staff in a women's refuge shelter.

[271] Equality Act 2010 section 15.

[272] On redeployment, see *Archibald v Fife Council* [2004] UKHL 32.

[273] Equality Act 2010 section 19(2)(d).

Harassment, contrary to section 26, occurs when a person engages in unwanted conduct towards another related to a relevant protected characteristic that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment. Section 26 also covers sexual harassment where the unwanted conduct is of a sexual nature. Harassment is also a tort (civil wrong) and criminal offence under section 1 of the Protection of Harassment Act 1997. Harassment does not require a protected characteristic and can apply in the workplace.[274] Sexual harassment is not currently a criminal offence in its own right.

Victimisation of a person by an employer breaches section 27. This entails subjecting a person to a detriment because they have performed, or it is believed they have or may perform, a protected act. A protected act broadly means asserting legal rights in line with the Equality Act or helping someone else to do so.

Discrimination law adopts a slightly different definition of employment. Under section 83(2)(a), employment includes employees, apprentices, 'limb (b) workers', and anyone with a contract to personally do work. As the 'contract to personally do work' category does not include the 'client or customer' exception for 'limb (b) workers,' it is potentially broader and may include some self-employed contractors. Northern Ireland's non-discrimination legislation also adopts this definition e.g. in art.2 Race Relations (Northern Ireland) Order 1997.

Widespread exceptions are made for religious organisations (e.g. sex, sexuality, marital status and gender reassignment) and more limited exceptions for the armed forces (sex and gender reassignment) in schedule 9 paragraph 2-4.

Direct discrimination, indirect discrimination, harassment, and victimisation are all enforceable by civil claims in the employment tribunal. The Equality and Human Rights Commission has the power to investigate firms and support litigation,[275] but its resources are very limited, and the powers are not used often.[276]

Northern Ireland has a distinct legislative framework for anti-discrimination law that lacks a piece of consolidating legislation. It consists of: Employment Equality (Age) Regulations (NI) 2006; Disability Discrimination Act 1995; Sex Discrimination (NI) Order 1976; Race Relations (NI) Order 1997; Fair Employment & Treatment (NI) Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; and the Equality Act (Sexual Orientation) Regulations (NI) 2006. S.75 Northern Ireland Act 1998 provides an overarching framework and an obligation to promote equality of opportunity. Whilst the personal scope, protected characteristics and core concepts of direct discrimination, indirect discrimination, harassment, and victimisation, substantially mirror the Great Britain provisions, there are some key differences.

It is contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) for employers to discriminate, harass, or victimise on the grounds of political opinion.[277] Political opinion as well as religious belief claims are brought to the Fair Employment Tribunal rather than the Industrial

[274] *Marjowski v Guy's and St. Thomas's NHS Trust* [2006] UKHL 34. The Northern Ireland equivalent is Protection of Harassment (NI) Order 1997.

[275] Equality Act 2006 section 26-28.

[276] Davies (n 98), 227.

[277] FETO 1998 article 3, article 3A, and article 19.

Tribunal.[278] Article 70 FET0 1998 contains exemptions for religious organisations and an occupational requirement exception for political opinions. It is also contrary to section 75(1)(d) of the Northern Ireland Act 1998 to discriminate on the basis of dependants.

There is an additional form of discrimination under employers' equal opportunity duty that applies on the grounds of religious belief,[279] political opinion,[280] race,[281] and sexual orientation.[282] Discrimination on these grounds also consists of 'applying a requirement or condition which is or would apply equally to persons not of the same protected characteristic, but considerably fewer people with the protected characteristic can comply with it than those without the protected characteristic, and the person suffers a detriment because he cannot comply with it'. An employer may be able to justify the discriminatory requirement or condition. This form of discrimination can be enforced by civil claims to the Industrial Tribunal or Fair Employment Tribunal, depending on the ground of discrimination.

In addition to individual claims, the Northern Ireland Equality Commission has a variety of enforcement powers in relation to employers' equality duty. The Commission may conduct investigations into employers to assist them in promoting equality of opportunity, issue undertakings of the actions the employer ought to take, and enforce them in the Fair Employment Tribunal in the event of non-compliance.[283] These powers are more expansive than those held by the Equality and Humans Rights Commission.

Immigration-related offences

An employer commits the offence of illegal employment if they employ someone who is disqualified from employment by reason of the employee's immigration status. This includes irregular migrants, asylum seekers who are prohibited from working, and regular migrants breaching the conditions of their leave by working in that job. 'Employ' has a narrow meaning, limited to employment under a contract of employment.

The criminal offence, found in section 21 of the Immigration, Asylum and Nationality Act 2006, is enforced by the Police, and the Home Office's Criminal and Financial Investigation and Immigration Compliance and Enforcement teams. The civil penalty, found in section 15, is enforced by the Secretary of State, usually through the Home Office's Criminal and Financial Investigation and Immigration Compliance and Enforcement teams. An immigration officer from the Home Office may also issue an 'illegal working closure notice' to close a business premises per schedule 6 of the Immigration Act 2016. Both apply equally across the UK.

Illegal work is a criminal offence under section 34 of the Immigration Act 2016. It is an offence for a person disqualified from working by reason of their immigration status to work. This includes irregular migrants, asylum seekers who are prohibited from working, and regular migrants breaching the conditions of their leave by working in that job. In contrast to the illegal employment offence, illegal

[278] FETO 1998 article 38.

[279] FETO 1998 article 3(2).

[280] Ibid.

[281] Race Relations (Northern Ireland) Order 1997 article 3.

[282] Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 article 3.

[283] FETO 1998 articles 11-17.

work captures employees, apprentices, workers, and self-employed contractors.[284] It applies equally across the UK. The offence can be enforced by the Police and the Home Office's Criminal and Financial Investigation and Immigration Compliance and Enforcement teams. The wages of 'illegal workers' can be confiscated under the Proceeds of Crime Act 2002.[285]

Dismissal for an irregular immigration status constitutes a fair reason within section 98 (2)(d) of the ERA 1996 and article 130(2)(d) of the ERO (NI) 1996.[286] Although a 'right to work' check may provide a statutory excuse to illegal employment, *Baker v Abellio London* held that there is no statutory obligation on employers to obtain proof of regular status before or during employment.[287] However, *Hounslow v Klusova* held that an employer's belief that there would be a contravention of the law if they employed the claimant without the documents they thought were required could amount to some other substantial reason for dismissal within section 98(1)(b).[288] By virtue of the illegality doctrine, an irregular migration status may also preclude access to labour rights characterised as contractual, such as unfair dismissal[289] and the NMW or any unpaid wages.[290]

Sections 36 and 37 also targets licensed working through provisions on illegal work in licensed business premises and illegal working in relation to private hire vehicles, respectively. They require holders of licences to have a legal right to work in the UK and are enforced through the relevant licensing regimes and permits the Home Secretary to issue civil immigration penalties.[291] The latter applies UK-wide, the former only applies to England and Wales.

Health and Safety

The primary piece of legislation governing health and safety is the Health and Safety at Work Act 1974. Part 1 of the Act that contains the key general duties and offences applies across the UK. The Act is supplemented by a wide range of regulations, codes of practice and guidance on specific types of activity in specific sectors that may vary across the UK nations.[292]

Under section 2, employers are required to take such steps as are reasonably practicable to mitigate risks facing employees and others (including limb (b) workers and agency workers). The duty includes providing: safe systems of work, safe handling of dangerous substances, proper training, safe access and exit routes, and adequate facilities and arrangements for staff welfare (this brings in an overlap with working time regulation to ensure workers are not overworked). Employers must also conduct risk assessments[293] and consult employees on health and safety matters at work.[294]

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[284] Immigration Act 2016 section 34(10).

[285] Immigration Act 2016 section 34(5).

[286] *Baker v Abellio London* [2007] UKEAT/0250/16, [21]-[26].

[287] Ibid.

[288] *Hounslow v Klusova* [2007] EWCA Civ 1127.

[289] *Vakante v Addey & Stanhope School* [2004] EWCA Civ 1065.

[290] *Blue Chip Trading Ltd v Helbawi* [2009] IRLR 128.

[291] Immigration Act 2016 schedule 4 and schedule 5.

[292] A recent example is the provision of PPE during the pandemic.

[293] Management of Health and Safety at Work Regulations 1999.

[294] Health and Safety at Work Act 1974 section 2(6).

Health and safety duties are primarily enforced by the Health and Safety Executive and the Health and Safety Executive Northern Ireland (there are a few sector specific regulators tasked with enforcement such as the Office for Nuclear Regulation) alongside local authorities. The Executives can conduct inspections and issue improvement notices and prohibition notices.[295]

Section 33 establishes a variety of criminal offences, including contravening a section 2 duty, contravening any health and safety regulations, and contravening a requirement imposed by an inspector. Prosecutions may be brought by the Health and Safety Executives and local authorities. Health and safety duties are enforced by criminal law.

Employees with one month employment have the right to be paid by their employer for up to 26 weeks where they are suspended from work on medical or maternity grounds in accordance with a code of practice issued by the Health and Safety Executives.[296] Terminating the supply of an agency worker (with one month qualifying employment with the end user) on maternity grounds requires the employment agency to remunerate the worker for the remainder of the assignment.[297] Complaints can be brought to the tribunal for a failure to remunerate.[298]

Employees and workers also have the right to leave the workplace where there are circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert.[299] Employees and workers are protected from detrimental treatment on health and safety grounds,[300] enforced by tribunal claims.[301] Dismissing an employee on health and safety grounds is an automatically unfair reason for dismissal,[302] enforced in the tribunal.[303]

Employers owe their workers a common law duty of care in tort law (civil wrongs). Employers may be liable for personal injuries suffered at work through the common law tort of negligence.[304] The tort is enforceable through civil claims and applies UK wide. Employers can also be prosecuted for gross negligence manslaughter if breaches of health and safety regulations and/or their duty of care result in death.

Non-standard employment

Agency workers in Great Britain receive targeted protection from the Agency Workers Regulations 2010. Substantially similar regulations apply in Northern Ireland in the Agency Workers Regulation (Northern Ireland) 2011. The Regulations are currently outside the scope of the EAS and EAI's remit.

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[295] Health and Safety at Work Act 1974 sections 20-23; Health and Safety at Work (Northern Ireland) Order 1978 articles 21-24

[296] ERA 1996 sections 64-68; ERO (NI) 1996 articles 96-100.

[297] ERA 1996 sections 68A-68D; ERO (NI) 1996 articles 100A-100D.

[298] ERA 1996 section 70; ERO (NI) 1996 article 102.

[299] ERA 1996 section 44(1A)(a); ERO (NI) 1996 article 68(1A)(a).

[300] ERA 1996 section 44; ERO (NI) 1996 article 68.

[301] ERA 1996 section 48; ERO (NI) 1996 article 71.

[302] ERA 1996 section 100; ERO (NI) 1996 article 132.

[303] ERA 1996 section 111; ERO (NI) 1996 article 145.

[304] This applies to physical injuries: *Brown v Corus (UK) Ltd* [2004] EWCA civ 374; and mental/psychiatric injuries: *Walker v Northumberland CC* [1995] ICR 702 (QB), *Barber v Somerset CC* [2004] UKHL 13.

Agency workers are entitled to equal treatment with the end users' (the hiring company) directly employed workers in terms of basic working terms and conditions e.g. hourly pay.[305] The entitlement, however, only applies after the worker has worked in the same role with the same hirer for 12 continuous weeks, during one or more assignments.[306]

Agency workers are specifically protected against discrimination by their agency or the end user by section 55 and section 41 of the Equality Act 2010, respectively. There may, however, be a gap in the protection offered by section 41 if the worker is not deemed to be 'employed by' the agency due to e.g. a lack of subordination or a right of substitution (i.e. not working under someone's control or having the right to send someone else to do the work in your place).[307] A gap in protection also arises in equal pay discrimination due to the requirement of a 'single source' responsible for the pay inequality. If responsibility for payment is on the agency and not the end user, the inequality may not be attributable to a single source.

Where an agency worker considers that the agency or end user may be infringing their right to equal treatment, they may request information from, first, the agency or, subsequently, the end user relating to the treatment in question.[308] Whilst the request cannot be enforced by itself, a failure to respond to the request entitles tribunals to draw an adverse inference, namely that the agency or end user breached regulation 5.

Agency workers are entitled to equal access to collective facilities, e.g. canteens, transport services and break rooms.[309] This entitlement applies from the first day of their employment with the end user. The objective justification defence is open to end users (i.e. they have a good enough, objective business reason for the treatment).

Per regulation 13 of Agency Worker Regulations 2010 and Agency Worker Regulations (Northern Ireland) 2011, agency workers have during an assignment the right to be informed by the end user of any relevant vacant posts with the end user, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the end user. This entitlement applies from the first day of their employment with the end user.

Per regulation 17, all agency workers have the right not to be subjected to detrimental treatment for reasons relating to the application and enforcement of the regulations. It is automatically unfair to dismiss an agency worker who is an employee on that basis. In Great Britain this extends to asserting rights related to the abolition of the 'Swedish derogation (see below).

Agency workers are entitled to the NMW and paid time off for ante-natal care. Both rights impose duties on both the end user and the agency. The rights to equal treatment, equal access to collective facilities, equal access to employment, detrimental treatment, and unfair dismissal are all enforced by complaints to the tribunal.[310]

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[305] Agency Workers Regulation 2010 regulation 5(1); Agency Workers Regulation 2011 (Northern Ireland) regulation 5(1).

[306] Agency Workers Regulation 2010 regulation 7; Agency Workers Regulation 2011 (Northern Ireland) regulation 7.

[307] A point illustrated by *Jivraj v Hashwani* [2011] UKSC 40, and *Muschett v HM Prison Service* [2010] EWCA Civ 25.

[308] Agency Workers Regulation 2010 regulation 16; Agency Workers Regulation 2011 (Northern Ireland) regulation 16.

[309] Agency Workers Regulation 2010 regulation 12; Agency Workers Regulation 2011 (Northern Ireland) regulation 12.

[310] Agency Workers Regulation 2010 regulation 18; Agency Workers Regulation 2011 (Northern Ireland) regulation 18.

A key difference between Northern Ireland and Great Britain concerns the 'Swedish derogation,' otherwise known as 'pay between assignment' contracts. As noted above, agency workers engaged on these contracts with a temporary worker agency (TWA) give up the right to equal working conditions with comparable permanent staff in return for a guarantee from the agency to receive a certain amount of pay in gaps between assignments. The agency must comply with certain duties to search for and offer assignments, and the duty to pay lasts for at least an aggregate of four weeks after the first assignment ends. They were abolished in Great Britain by regulation 3 of the Agency Workers (Amendment) Regulation 2019, but still operate in Northern Ireland through regulation 10 of the Agency Workers Regulation (Northern Ireland) 2011. Pay between assignments is primarily enforced in Northern Ireland by complaints to the Industrial Tribunal.[311]

Less favourable treatment of part-time employees and 'limb (b) workers' is addressed by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and Part-time Workers (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2000 (the provisions are substantially the same). It is contrary to regulation 5 to treat part-time workers less favourably than a (real) comparable full-time worker. Where a worker becomes part-time or returns to work part-time after an absence, regulations 3-4 provide that their part-time terms and conditions can be compared to their previous full-time terms and conditions. The 'objective justification' defence is open to employers. Less favourable treatment is a breach enforced by complaints to the tribunal per regulation 8. Due to the prominence of women amongst part-time staff, it may also be indirectly discriminatory to treat part-time workers differently e.g. by making them redundant before full-time workers.[312]

Under regulation 6, part-time workers have a right to receive a written statement from the employer justifying the less favourable treatment. Workers are protected from detrimental treatment and employees from automatically unfair dismissals on this basis per regulation 7, enforced in the tribunal.

Less favourable treatment of fixed-term employees is addressed by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 (the provisions are substantially the same). Fixed-term employees ('limb (b) workers' and agency workers are not covered) are protected against discrimination when compared with the employer's real, 'comparable' permanent employees e.g. they cannot be paid less per hour. Difference in treatment can be justified by employers through the 'objective justification' defence found in regulation 3(3)(b) and regulation 4. The terms are taken as a whole and not compared on a 'line-by-line basis.' The prohibition of less favourable treatment is enforced by claims to the tribunal.[313]

Regulation 8 of the regulations deals with the problem of abusing successive fixed-term contracts. The effect is to turn fixed-term contracts into permanent contracts where the employee has been employed on more than one fixed-term contract for four years or more. The objective justification defence also applies.

Under regulation 5 and regulation 9 of the regulations, fixed-term employees have a right to receive a written statement from the employer justifying the less favourable treatment or why their employment

[311] Agency Workers Regulation 2011 (Northern Ireland) regulation 18.

[312] *Clarke v Eley (IMI) Kynoch Ltd* [1983] ICR 165.

[313] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 regulation 7; Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 regulation 7.

remains fixed-term. It should also be recalled that expiry of a fixed-term contract is treated in law as a dismissal. Employees are protected from automatically unfair dismissals and detrimental treatment on this basis per regulation 6, enforced in the tribunal.

Exclusivity clauses in zero-hour contracts that prohibit a worker from working with another employer, either at all or without the employer's consent, are unenforceable in Great Britain.[314] A zero-hour contract is defined as a contract of employment or a contract to do work personally undertaken conditionally on the employer making work or services available, and there is no certainty that any such work or services will be made available - essentially there is no contractual obligation for the employer to guarantee any work.[315] No such ban exists in Northern Ireland.

Data protection

Employers are likely to be 'data controllers' under section 6 of the Data Protection Act 2018. As such, they are subject to various data protection principles and duties and must not commit data breaches. Controllers must register with the ICO and observe data protection principles, including having legitimate reasons for collecting the data and allowing individuals to access, correct and object to the use of their data.

Data breaches committed by employers, most notably the compilation and use of 'blacklists' (see section 4.2 below), can be enforced by the Information Commissioner's Office and by individual complaints to the Commissioner or the civil courts.[316] Unlawfully obtaining personal data is a criminal offence under section 170. The Data Protection Act 2018 applies across the UK.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides three main protections when a business changes ownership, or there is a service provision change (e.g. outsourcing). They are: 1) to transfer jobs; 2) to preserve existing terms and conditions; and 3) to ensure workforces are consulted about the proposed transfer. The personal scope of TUPE is not entirely clear. However, a recent Employment Tribunal case suggests that the regulations may apply to 'limb (b) workers' as well as employees, though the judgment is not binding.[317]

Per regulation 4(1) TUPE, a transfer does not terminate the contract of employment. Furthermore, any dismissals will be automatically unfair where the sole or principal reason for the dismissal is the transfer. Dismissals may not be automatically unfair where the dismissal is for an economical, technical or organisational (ETO) reason requiring a change in the workforce. Employees can bring unfair dismissal claims in the tribunal against the new owner.[318] However, it is not clear whether the new owner must hire dismissed employees. Despite being an automatically unfair reason, the one or two year qualifying period must be met by employees for unfair dismissals on this ground. Refusing to transfer terminates the contract but does not constitute a dismissal.

[314] ERA 1996 section 27A(3).

[315] ERA 1996 section 27A(1).

[316] Data Protection Act 2018 sections 165-169.

[317] *Dewhurst & Ors v Revisecatch Limited (t/a Ecourier) & Anor* [2019] UKET 2201909/2018 (26 November 2019).

[318] *Lister v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 (HL).

Under regulation 4(4), an employer may not vary an employee's contract if the sole or principal reason is the transfer. Regulation 4(5) permits variations if the sole or principal reason is an ETO reason, or the contract permits the variations. Unpermitted variations are null and void, enforceable through individual complaints to the tribunal.

TUPE applies equally across England, Scotland and Wales. TUPE in Northern Ireland is governed by the original provisions of TUPE 2006. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 that amended TUPE 2006 does not apply in Northern Ireland.

Collective labour law breaches

Recognition of trade unions and collective bargaining

The statutory recognition procedure for trade unions is found in schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) for Great Britain and schedule A1 of the Trade Union and Labour Relations (Northern Ireland) Order 1995. Employer recognition is required in order to engage in collective bargaining and take time-off. Recognition also overlaps with the prohibition on inducements - see paragraph 269.

The statutory procedure is enforced by the Central Arbitration Committee (CAC) in Great Britain and by the Industrial Court in Northern Ireland. The union must have first made a request to the employer (though voluntary recognition is rare in practice) before submitting a request to the relevant authority.

Where the employer is hostile to the recognition procedure, 'unfair practice' provisions in schedule A1 paragraph 27 give unions (and employers) the right to complain to the CAC or Industrial Tribunal. Unfair practices include threats of dismissal, coercion, and offers of money.

Collective bargaining agreements between employers and trade unions are, generally, not legally enforceable in courts.[319] A collective agreement can be enforceable under section 179 of TULRCA and article 26 of the Industrial Relations (Northern Ireland) Order 1992, if it is written and states that the parties intended that the agreement shall be a legally enforceable contract. However, the history of industrial relations shows that parties, especially unions, favour keeping collective agreements out of the courts.[320]

In order to engage effectively in collective bargaining, a recognised union has a statutory right to seek information, laid down in section 181 of TULRCA and article 39 of the Industrial Relations (Northern Ireland) Order 1992. The information can only be germane to matters the union is recognised for and needed for collective bargaining. Complaints of a failure to disclose information is presented to the CAC[321] or the Labour Relations Agency and, subsequently, Industrial Tribunal.[322]

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[319] The agreements are enforced by industrial relation practices between employers and unions rather than by bringing claims for breach of contract.

[320] Paul Davies and Mark Freedland, '*Labour and the Law*' (London: Stevens & Sons 1983,).

[321] TULRCA 1992 section 183.

[322] Industrial Relations (Northern Ireland) Order 1992 article 41.

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Inducements

Following the landmark case of *Wilson and Palmer v UK,*[323] an employer violates section 145A of TULRCA 1992 or, in Northern Ireland, article 77A of ERO (NI) 1996, if it makes an offer to an employee or 'limb (b) worker' for the sole or main purpose of inducing them: a) not to be or seek to become a member of an independent trade union, b) not to take part, at an appropriate time, in the activities of an independent trade union, c) not to make use, at an appropriate time, of trade union services, or d) to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

Furthermore, employees or 'limb (b) workers' who are members of a recognised union have a right not to be made an offer, acceptance of which would mean that their terms of employment (or any one of them) will not or will no longer be determined by collective agreement.[324] The result must be the sole or main purpose of the offer. Employers are prevented from making offers directly to individual workers outside the collective bargaining process. The Supreme Court in *Kostal UK Ltd v Dunkley & Ors* held that the removal of the term does not have to be permanent. Removal of the term on even a single occasion can be an unlawful inducement.[325]

Trade union membership

Discrimination on the grounds of trade union membership and activities (including non-membership) is prohibited. This applies to employees and 'limb (b) workers.' Section 137 of TULRCA 1992 and article 26 of ERO (NI) 1996 prohibits discrimination at the hiring stage, and section 138 and article 27 extend this to employment agencies and employment businesses. Discrimination at this stage is enforced by civil claims to the tribunal.[326]

Article 73 ERO (NI) 1996 prohibits detrimental treatment on trade union grounds, as does section 146 TULRCA 1992. Detrimental treatment protection is afforded to employees and workers and is enforced by civil claims to the tribunal.[327]

It is automatically unfair to dismiss an employee on the basis of their trade union membership and activity.[328] This right only applies to employees and is enforced by civil claims in the tribunal.[329] It should be noted, however, that the law only provides protection against dismissal for industrial action for a 12 week period per ballot- the clock starts from the first strike action and ticks continuously e.g. 12 weekly one-day strikes hits the 12 week limit.[330] A fresh strike ballot is required to restart the clock. Taking part in unofficial strike action is not covered by unfair dismissal protection.[331]

[323] *Wilson and Palmer v UK* [2002] ECHR 552.

[324] TULRCA 1992 section 145B; ERO (NI) Order 1996 article 77B.

[325] *Kostal UK Ltd v Dunkley & Ors* [2021] UKSC 47.

[326] TULRCA 1992 sections 137-183; ERO (NI) 1996 article 28.

[327] TULRCA 1992 section 146; ERO (NI) 1996 article 74.

[328] TULRCA 1992 section 152; ERO (NI) 1996 article 136.

[329] TULRCA 1992 section 146; ERO (NI) 1996 article 145.

[330] TULRCA 1992 section 238A; ERO (NI) 1996 article 144A.

[331] TULRCA 1992 section 237; ERO (NI) 1996 article 143.

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The dismissal and detriment protections extend to involvement in a trade union recognition procedure.[332]

'Blacklisting,' whereby employers use compiled lists of union members or activists to avoid hiring them, is unlawful under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 and regulation 3 of the Employment Relations (Northern Ireland) Order 1999 (Blacklists) Regulations (Northern Ireland) 2014 (the provisions are identical). The use of a blacklist to refuse employment on the grounds of trade union membership is a civil breach of a statutory duty. Proceedings may be brought under regulation 13 in the civil courts by a worker or trade union. Individuals who are refused employment because of a blacklist may bring claims in the tribunal under regulation 5. Regulation 5(3) reverses the burden of proof in these claims.

Regulation 9 contains protections against detrimental treatment on blacklisting grounds, enforced in the tribunal. Dismissing an employee on blacklisting grounds is an automatically unfair reason for dismissal,[333] enforced in the tribunal.[334]

Under section 168 of TULRCA 1992 and article 92 of ERO (NI) 1996, employees who are officials of recognised trade unions have the right to reasonable time off to conduct trade union duties. The time off must be remunerated per section 169 and article 93. Failure to permit the time-off or remunerate the time gives rise to a claim in the tribunal.[335]

Under section 170 TULRCA 1992 and article 94 ERO (NI) 1996, employees who are members of recognised trade unions have the right to reasonable time off to conduct trade union activities e.g. voting or attending meetings. There is no right to be paid for this time off, and the right does not extend to industrial action. Failure to permit the time-off gives rise to a claim in the tribunal.[336]

Employees and 'limb (b) workers' have a right to be accompanied at a disciplinary or grievance hearing by a trade union official or a colleague.[337] The right is enforced by claims to the tribunal.[338] Subjecting an employee to a detriment for this reason is a civil breach,[339] enforced by a complaint to the tribunal.[340] A dismissal on this basis is automatically unfair,[341] enforced in the tribunal.[342]

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[332] TULRCA 1992 Schedule A1 paragraphs 156-165; Trade Union and Labour Relations (Northern Ireland) Order 1995 Schedule A1 paragraphs 156-165.

[333] ERA 1996 section 104F; ERO (NI) 1996 article 135F.

[334] ERA 1996 section 111; ERO (NI) 1996 article 145.

[335] TULRCA 1992 section 168-169; ERO (NI) 1996 article 95.

[336] TULRCA 1992 section 170; ERO (NI) 1996 article 95.

[337] Employment Relations Act 1999 section 10; Employment Relations (Northern Ireland) Order 1999 article 12.

[338] Employment Relations Act 1999 section 11; Employment Relations (Northern Ireland) Order 1999 article 13.

[339] Employment Relations Act 1999 section 12 Employment Relations (Northern Ireland) Order 1999 article 14.

[340] Employment Rights Act 1996 section 48; Employment Rights (Northern Ireland) Order 1996 article 71.

[341] Employment Relations Act 1999 section 12 Employment Relations (Northern Ireland) Order 1999 article 14.

[342] ERA 1996 section 102; ERO (NI) 1996 article 133.

Consultations

There are various situations in which employers are legally required to consult with trade union representatives or, if none, an elected or appointed employee representative.

In addition to obligations pertaining to individual employees in redundancy situations, labour law imposes duties on employers in situations of collective redundancies affecting multiple employees. Where an employer is proposing to make at least 20 employees ('limb (b) workers' are excluded) at a single establishment redundant over a 90-day period,[343] they must consult with employee representatives - usually the trade union or, if there is none, employee representatives chosen by the employer or elected by the affected employees.[344] The consultation must begin at least 30 days before the first dismissal, and at least 45 days before where the employer is proposing to dismiss 100 or more employees.[345] Employers must consult about ways of avoiding the dismissals, reducing the dismissals, and mitigating the consequences of dismissal, with a view to reaching an agreement.[346] Failure to comply with a consultation requirement can be subject to a civil claim in the tribunal, for damages of up to 90 days' pay.[347]

The duty to consult applies across the UK. The only difference in Northern Ireland is that collective redundancies of 100+ employees require consultations to begin 90 days before the first dismissal.[348]

TUPE consultations ahead of a proposed transfer with the workforces of the old and new employer are required under regulation 13(2)-13(7) TUPE. Trade union representatives or employee representatives must be informed and consulted on the effect of the transfer and the measures being taken. Firms with fewer than 10 employees may inform and consult them individually.[349] There is no prescribed consultation period. Under regulation 13(2), the consultation period length should be as long as necessary before the transfer. TUPE consultations apply UK wide. However, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 that amended TUPE 2006 does not apply in Northern Ireland. A failure to consult or comply with TUPE requirements can result in tribunal claims for compensation by each employee affected by the transfer of up to 13 weeks' pay.[350]

For TUPE transfers occurring on or after the 1st of July 2024, under the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 businesses with fewer than 50 employees will be able to consult directly with employees if there are no representatives in place already. Businesses of any size undertaking a transfer that will impact fewer than 10 employees will be able to consult directly with employees if there are no representatives in place already. Employers will not need to arrange for the election of employee representatives in these circumstances.

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[343] On the meaning of 'single establishment' see C-80/14, *USDAW v Woolworths* (30 April 2015).

[344] TULRCA section 188; ERO (NI) 1996 article 216.

[345] TULRCA section 188(1A); ERO (NI) 1996 article 216.

[346] TULRCA section 188(2); ERO (NI) 1996 article 216(4).

[347] TULRCA section 189(4); ERO (NI) 1996 article 217(4).

[348] ERO (NI) 996 article 216(2)(a).

[349] TUPE 2006 regulation 13A.

[350] TUPE 2006 regulations 15(1) and 16(3).

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The Transnational Information and Consultation of Employees Regulations 1999 requires employers to engage in 'TICER consultations' with employee representatives when 100 employees across at least two establishments in at least two EU states trigger a request for consultation on an issue. Only 'employees' are included in the consultation calculation.

Following Brexit, no new requests for consultation under TICER can be made by people employed in the UK. However, provisions relevant to ongoing consultations and work councils remain in force and requests made but not completed before 1st January 2021 will be allowed to be completed. Complaints about a failure to comply with TICER must be first presented to the Central Arbitration Committee (CAC).[351] Applications can also be made to the Employment Appeal Tribunal (EAT) for a penalty notice where the CAC upholds the complaint.[352] The penalty of up to £100,000 can be ordered to be paid to the Secretary of State. TICER consultations apply equally across the UK.

Similarly, the Information and Consultation of Employees Regulations 2004 (ICER) and Information and Consultation of Employees Regulations (Northern Ireland) 2005 also require employers to engage in 'ICER consultations' with worker representatives or when at least 2% of employees (minimum of 15, maximum of 2500) trigger a request for consultation on an issue.[353] Only 'employees' are included in the consultation calculation. The regulations only apply to undertakings employing at least 50 employees where worker representatives are not already in place.[354] Firms with fewer than 10 employees may inform and consult individually where worker representatives are not in place. ICER consultations are provided across the UK. There are some differences in Northern Ireland. For example, the threshold for consultation is 10%.

Complaints about a failure to comply with ICER must be first presented to the CAC.[355] The EAT may order a penalty of up £75,000 be paid to the Secretary of State if the CAC upholds the complaint. Additionally, the regulation is enforced through complaints to the Industrial Tribunal and High Court, rather than the CAC and EAT, respectively.[356]

Where a union is recognised, employers must from time to time consult with the union on training for their workers.[357] Consultation on training is enforced by a complaint from the union to the tribunal.[358]

Employee representatives have the right to take time off to perform their functions. In England, Scotland and Wales, this applies to representatives for TUPE, ICER, TICER and collective redundancy consultations (see the 'consultation' section below).[359] In Northern Ireland, article 89 of the Employment Rights (Northern Ireland) Order 1996 only contains the right to take time off for TUPE consultations. It is silent on collective redundancies, though the time off arguably falls within scope of time off for trade union duties. TICER applies equally in Northern Ireland, and article 27 of the

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351 TICER regulations 20-21.

352 TICER regulation 22.

353 ICER Part III; ICER (NI) Part III.

354 ICER schedule 1; ICER (Northern Ireland) Schedule 1.

355 ICER regulation 22(1).

356 ICER (Northern Ireland) regulation 22.

357 TULRCA 1992 sections 70B; Trade Union and Labour Relations (Northern Ireland) Order 1995 article 44B.

358 TULRCA 1992 sections 70C; Trade Union and Labour Relations (Northern Ireland) Order 1995 article 44C.

359 ERA1996 section 61; ICER regulation 27; TICER regulation 25.

Information and Consultation of Employees Regulations (Northern Ireland) 2005 provides an identical right to time off.

In all jurisdictions the time off must be remunerated[360] and a failure to permit the time off or provide remuneration gives rise to a civil claim in the tribunal.[361] Acting or standing as an employee representative is also a prohibited ground for detrimental treatment[362] and is an automatically unfair reason for dismissal.[363]

Licensing and regulatory breaches

Registration

In Northern Ireland, article 52 of the Fair Employment and Treatment Order (Northern Ireland) 1998 requires private sector employers with more than 10 employees (who work over 16 hours per week) to register with the Equality Commission of Northern Ireland, monitor the religious composition of their workforce and job applicants, and file an annual return to the Equality Commission. Employers must also conduct reviews of their workforce composition at least once every three years, covering recruitment, training and promotion.

If the Equality Commission decides that that fair participation is not being offered, the employer must remedy the situation with appropriate affirmative action. Under articles 11-17 FETO 1998, the Equality Commission may conduct investigations into employers to assist them in promoting equality of opportunity and issue undertakings of the actions the employer ought to take. The Equality Commission is heavily involved throughout by setting goals and timetables to assist in evaluating progress towards fair participation, and enforcing the undertakings in the Fair Employment Tribunal in the event of non-compliance.

[360] ERA 1996 section 62; ICER regulation 28; TICER regulation 26; ERO (NI) 1996 article 90.

[361] ERA1996 section 63; ERO (NI) 1996 article 91.

[362] ERA 1996 section 47; ERO (NI) 1996 article 70.

[363] ERA1996 section 103; ICER regulation 30; TICER regulation 30; ERO (NI) 1996 article 134.

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Notification

In situations of proposed collective redundancies of at least 100 employees in 90 days, under section 193 TULRCA 1992 an employer must, subject to special circumstances,[364] notify the Secretary of State for BEIS in writing at least 45 days before the first dismissal. For collective redundancies of at least 20 employees, notification must be given in writing at least 30 days before. In Northern Ireland, the notification must be sent to the Department for the Economy at least 90 days before the first dismissal where at least 100 are proposed, and 30 days where at least 20 are proposed.[365]

Failure to give the requisite notice is a criminal offence carrying a potential fine of up to £5,000. Criminal proceedings cannot be instituted without the consent of the Secretary of State (or Department for the Economy in Northern Ireland).[366] The recent P&O Ferries scandal appears to be a case in which the notification requirements were not complied with.

Licensing

Employers hiring migrant workers, such as those on a Skilled Work visa or a temporary work visa like Seasonal Agricultural Workers visa, require a sponsorship licence from the Home Office. The sponsorship licencing system is an administrative practice not found in any immigration legislation and falls outside the scope of the Immigration Rules.[367] Migrant worker sponsorship licences come with a variety of monitoring and reporting obligations, supervised and administered by UK Visas and Immigration. Failure to comply with sponsorship duties can result in the licence being revoked.[368]

When applying for a licence the Home Office will examine whether the company or any of its key personnel have previously been in breach of immigration rules.[369] It does not appear, however, that previous compliance or non-compliance with employment law is examined.

Employing a migrant worker without a sponsorship licence may mean that the worker is working beyond the terms of their immigration leave and thus working illegally. As a result, the employer is exposed to the civil and criminal penalties for illegal employment.

Compliance

If an employer fails to comply with a tribunal judgment, the employee, worker etc. must go to the civil courts to have the judgment enforced.[370] Failure to comply with civil court orders risks being in contempt of court.

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[364] TULRCA 1992 section 193(7).

[365] ERO (NI) 1996 article 221.

[366] TULRCA 1992 section 194; ERO (NI) 1996 article 222.

[367] *R(New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51

[368] UKVI, 'Workers and Temporary Workers: guidance for sponsors part 3: sponsor duties and compliance' (April 2022).

[369] Ibid.

[370] Employment Tribunals Act 1996 section 15; The Industrial Tribunals (Northern Ireland) Order 1996 article 17.

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Conclusion

This chapter has sought to illustrate the highly complex and fragmented legal landscape in the UK labour market. A wide variety of rights are available to workers, though this may depend on their particular employment status and length of employment. It is clear that only a small percentage of labour rights and protections fall under the DLME's remit and are enforced by state bodies. A significant proportion of labour rights are wholly reliant on individual enforcement. Over-reliance on individual enforcement has, for the reasons given in section 2.3, contributed to a significant enforcement gap in the UK labour market. Furthermore, the effectiveness of enforcement by state bodies within their remit is undermined by their limited resources, fragmentation, and the omission of certain labour rights that are closely connected to their current remits.

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Chapter 5: Conceptualising labour market non-compliance and other work-based harm

In this chapter, we introduce the conceptualisation stage of the survey development. Conceptualisation is the process by which researchers can get a comprehensive understanding of a phenomenon or set thereof. Some practices of labour market non-compliance might be perceived as unfair or exploitative, but actually be legal, and for others the opposite might apply. Our survey needed to be capable of asking about potential non-compliance in ways normal people can understand and answer as easily and consistently as possible. We relied on a series of two-hour focus group consultations with our advisory group members and used 'group concept mapping' as a methodological approach: a participatory action development tool that engages group members in the co-creation and integration of knowledge. This tool follows a guided approach to structure discussions in such a way that participants need not have prior knowledge of the methods but simply discuss concepts, questions and issues as prompted in a series of tasks using their expertise or lived experiences. We as researchers documented the discussions and used our notes to develop and refine a visual geography of the issues in focus, a conceptual map, which was refined throughout a series of sessions. This chapter describes the process in more detail (including materials and prompts used), shows how the conceptual maps developed, and draws out some illustrative examples for more detailed discussion (i.e. the challenges associated with violations related to annual leave and unfair deductions).

What Constitutes Labour Market Non-Compliance?

As detailed in Chapter 2 ('Context'), labour market non-compliance is a complex phenomenon, spanning numerous and varied breaches across a so-called 'continuum of exploitation' (Andrees, 2008; Skrivankova, 2010). The DLME's remit covers a broad spectrum of non-compliance, from accidental, relatively minor infringements to serious crimes. Beyond its scope are various other acts that could be experienced as 'work-based harm' (Scott, 2017) but are not considered labour market non-compliance specifically (e.g. some health and safety violations, sexual harassment).

The evidence base on the prevalence, incidence and correlates of labour market non-compliance is fragmented and still underdeveloped (Cockbain et al., 2019; Scott, 2017). From a measurement perspective, relying on complaints data is insufficient not only because many breaches are not monitored at scale, but also because those which are, more likely poorly reflect the distribution of actual non-compliance (Judge & Slaughter, 2023; Weil & Pyles, 2005). Yet, challenges in primary research also arise due to the fragmentation and complexity of the labour law landscape, and the fact that people may not be aware of all their rights or that they have been breached (see Chapter 4). When surveying people in work, whether or not a given act could constitute non-compliance can be heavily contingent on whether someone is an employee, a worker, or is self-employed, but also (and depending on the specific breach) on their age, length of service, industry/occupation, exact hours worked, specifics of any deductions, and/or which nation of the UK they are in, etc. It is therefore vital that any survey is aligned with and sensitive to the complexities of the legal landscape. Surveys also need to be well-attuned to the realities on the ground and able to ask about potential non-compliance in ways people can understand and sensibly answer. In the rest of this chapter, we describe the process by which we sought to conceptualise labour market non-compliance for the new survey.

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How to gain a better understanding of labour market non-compliance?

Labour market non-compliance is an inherently complex concept which covers a wide range of activities, behaviours, and perceptions. It is often ill-defined, partly because people might believe that there are certain practices which should constitute non-compliance even when they do not, and also because they might also have other experiences which are, in fact, non-compliant, but they might not recognise them as such (Vosko, 2010). The definition can also be challenging as it is often ill-understood what constitutes non-compliance from a legal perspective (refer to Chapter 4 for our comprehensive review regarding this).

As researchers, our goal is to be able to identify, understand and explain what constitutes labour market non-compliance. To get a comprehensive understanding of this set of phenomena, we tend to rely on a process called conceptualisation (Long & Rodgers, 2017). Conceptualisation helps to clarify every aspect (i.e. all underlying dimensions) of a certain construct, whilst also being able to tell apart what does and does not belong to the said construct. Conceptualisation can be done via a synthesis of expert opinion (e.g. Xu, Evans, & Benson, 2023), can be informed by lived experiences of people from the relevant population (e.g. Vaughn et al., 2017), can rely on the amalgamation of prevailing legal definitions (e.g., Pasinato & de Ávila, 2023), and can, equally, be based on the understanding and preferences of relevant governmental and non-governmental stakeholders and policymakers (e.g., Thomson, Torenvlied, & Judge, 2020). Arguably, defining labour market non-compliance requires inputs from all four: (1) people personally affected by non-compliance; (2) experts in the field; (3) legal experts to determine what is (il)legal; and (4) stakeholders and policymakers invested in this area.

To help with the conceptualisation, we used 'group concept mapping' as a methodological approach (Kane & Rosas, 2018). This is a participatory action development tool, which can help engage group members in the co-creation and integration of knowledge. Participants are considered knowledge holders, and this method assists them by giving them a chance to articulate their thoughts, organise their knowledge in a coherent and visual manner, and by allowing group wisdom to emerge from their discussion. Group members do not need to have any knowledge about how this method works – from their perspective, they are simply debating concepts, questions or problems pertinent to them and 'drawing' a map of how these are related to each other. At the end of this exercise, a visual geography of thoughts and concepts is created, which can assist with the synthesis of knowledge and can help start further discussions and reflections.

For our project, to gain a better understanding of what constitutes labour market non-compliance, we drew our conceptual map using the approach recommended by Rosas (2017a, 2017b). This is a pragmatic, step-wise approach with the goal of extracting the unevenly distributed knowledge of group(s) of participants. If you are a researcher, legal expert, policy-maker, worker representative, employer representative, precarious worker etc., you will have your own unique perspective on concepts and experiences related to labour market non-compliance. To tap into this diversity of perspectives, we therefore used multiple concurrent advisory groups to generate and structure the underlying constructs, and find proper representation for each of them. In doing so, we also sought to elicit information about issues that might be particularly challenging to measure through a survey, better understand the different groups' key priorities for measurement, and start to build up ideas for response options and question design.

We followed 'group concept mapping' also, heeding to Saunders et al.'s (2018) thoughts on saturation, by simultaneously working towards approaching inductive saturation (i.e. when few new themes are

being identified); theoretical saturation (i.e. assuring key theoretical and conceptual categories cannot be much more fully developed); and data saturation (i.e. when the same ideas or experiences begin to repeat and little new information is being raised, in other words, when the accounts become repetitive). We considered saturation as a process and not as an event, which meant that we were not looking for a single sign that we reached our goal. and we had a clearly defined set of advisory groups that we wanted to consult with, but as the groups went on it was clear that we were approaching the various forms of saturation we had sought. We did not see a need to continue consultation beyond the original groups planned because little new information, ideas, or concepts/themes were being generated.

The goal of every conceptualisation exercise is to create a layout which is not only distinct and meaningful, but also covers all the underlying dimensions (if any) of the particular concept. However, when it comes to labour market non-compliance we faced three further challenges: legal realities vs subjective perceptions; relevance to policy-makers and other professional stakeholders; and pertinence to people most likely to experience labour market non-compliance.

Thus, firstly, we needed to identify whether a certain behaviour or practice might be perceived as a legal violation but is not actually one (or indeed, vice versa). To ascertain this for each concept, we asked for input from legal experts in particular but also other stakeholders (labour abuse academics, policy-makers and operational staff, employers and employer representatives, and worker representatives). After all, legal realities often do not correspond well with the social realities, and there are often loopholes in existing legislations making safeguards porous (e.g. some rights only become enforceable after certain qualifying periods, such as protections against unfair dismissal requiring two years of employment). The issue here is one of determining actual non-compliance according to the law, rather than broader exploitative / harmful behaviour that is not technically illegal.

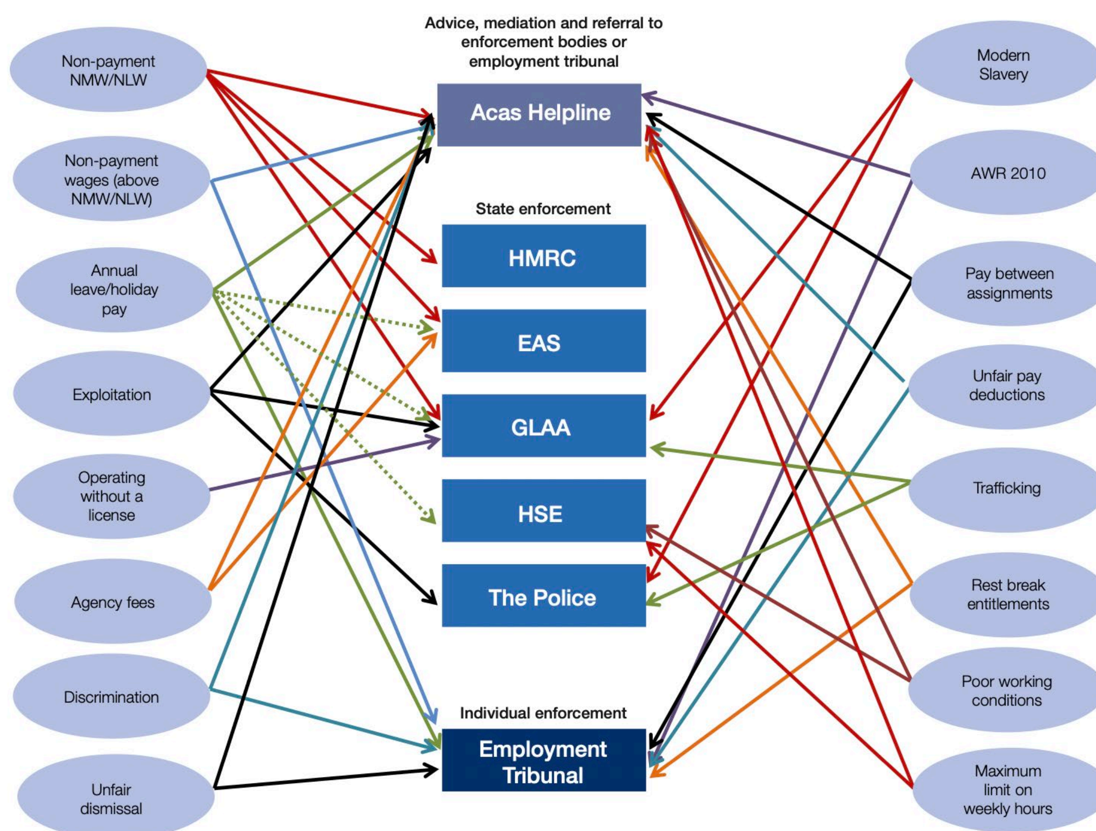
Secondly, we wanted to tackle concepts that are important for policy-makers and other professional stakeholders. Certain forms of labour market non-compliance could be applicable from a conceptual point of view, but if they are (or are perceived to be) rare, less harmful, or otherwise considered less relevant by people working in the field, this should be considered during the conceptualisation process. The issue here is one of prioritising non-compliance.

Finally, and most importantly, our priority was to explore concepts pertinent to people who are most likely to experience labour market non-compliance themselves: precarious workers. Often there can be a gap between what experts of a certain field consider priorities and the thoughts of people who are directly affected by the issues. As discussed in the next section, we listened to precarious workers and were eager to be guided by them when determining which concepts should receive deeper scrutiny going forward. The issue here was about capturing the concerns and priorities of those in the target population for the study.

Our approach: knowledge creation through focus groups

Instead of starting with a blank slate, we wanted to begin with a conceptual map that was comprehensive and relevant to the general goals of labour market enforcement in the UK. Thus, we began with a diagram (Figure 2) from the DLME's UK Labour Market Enforcement Strategy 2018-19 (Metcalfe, 2018), which shows the various components of labour market non-compliance and their fragmented enforcement.

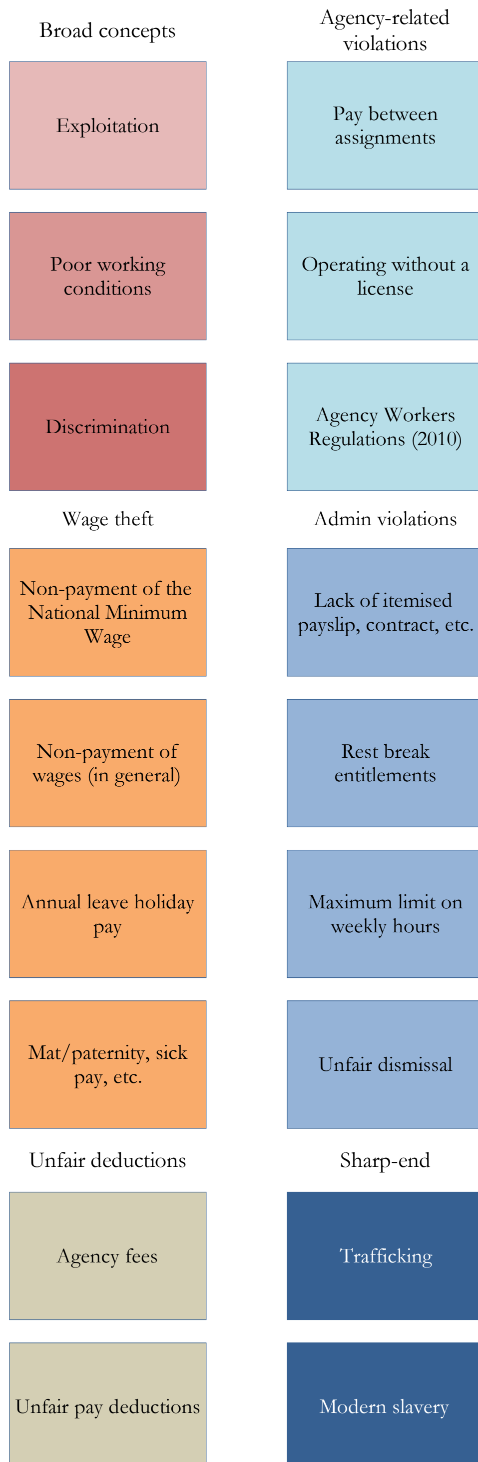
Figure 2: The starting point for the concept mapping (Metcalf, 2018)



For ease of interpretation, we then removed the enforcement-related elements, focusing instead on the forms of non-compliance alone, and grouped the various concepts together creating six conceptual areas of interest (see Figure 3):

1. Broad concepts – general concepts which are likely to overlap with several other areas, such as exploitation, poor working conditions, and discrimination
2. Wage theft – this group encompassed national minimum wage violations, non-payment of wages, and holiday pay-related matters
3. Unfair deductions – these included practices that might be illegal (such as certain agency fees) as well as general deductions which might be legal but can be construed as unfair (such as for ‘breakages’ in the hospitality sector)
4. Agency-related violations – this group included matters related to the Agency Workers Regulations (2010), pay between assignments, and similar issues
5. Admin violations – these incorporated, among others, payslip and contract-related issues and exceeding the maximum limit on average weekly hours (some, but not all of these are actual legal violations)
6. Sharp-end – while this is not the focus of our work, we wanted to keep this part of the conceptual map to provide a thorough understanding of all aspects of the topic
7. Gaps – although this was not part of the figure, we were interested in other areas and concepts that would emerge outside these main areas, and encouraged participants to tell us when they were missing something from the map

Figure 3: Our adapted starting point for the concept mapping (based on Metcalf, 2018)



It should be noted that the titles here reflect our original titles, and some of these turned out to be contentious: for example, various participants took issue with the phrasing 'wage theft' because it implied deliberate withholding of workers' earnings, and argued instead for a more neutral label that reflected that non-payment or under-payment of wages could be genuinely accidental, negligent, or deliberate. We made clear that these group headers were working titles for ease of grouping, and would not be part in the survey questions themselves.

With the support of the DLME's team, our partner FLEX (Focus on Labour Exploitation) and our teams' own professional networks, we recruited six advisory groups for the project. The six groups were selected to cover what we saw as the major stakeholders around labour market non-compliance and its enforcement. They are listed below and together covered a wide range of valuable expertise and experience.

1. Legal experts
2. Labour abuse academics
3. Policy-makers and operational staff
4. Employers and employer representatives
5. Workers' rights representatives
6. People in precarious work themselves

We aimed to have around 8-12 members per group, although in practice the numbers fluctuated and some were larger or smaller depending on availability on the day. For all groups, we recruited purposively for key informants (i.e. those with particularly relevant knowledge and expertise). The first two groups also included prominent international labour law and labour abuse academics, so we could also learn from cutting-edge expertise in these domains outside of the UK (including people who had been involved in important foundational survey research among precarious workers in other countries). For the other groups, members were all UK-based as we wanted to ensure we were thinking carefully about the UK legislative and enforcement context, and the local particularities that would inform the research. We worked closely with FLEX on the worker advisory group, with FLEX leading the recruitment, organisation and facilitation of those groups, in line with their extensive experience in this domain. Here, we recruited for diversity in participants' characteristics (age, gender, migration status etc), industries/occupations and locations within the UK. We also tried to ensure diversity in expertise, locations and particular focal interests across the other groups (e.g. the worker rights group covered a range of relevant unions, workers' rights and migrants' rights NGOs, and the employer and employer representatives group covered a mixture of large corporations, industry groups and federations). A full list of participating organisations can be found in Chapter 2.

The process was similar across most advisory groups (except for the precarious worker advisory group, discussed below). The sessions were organised online and each of them took around two hours. They started with a brief welcome and introductions of the members of the advisory group. This was followed by a short presentation about the goals of the research project and the research methodology. After this, participants listened to the presentation about the aim of the workshop. We showed them a couple of examples of what conceptual maps look like and explained their goals. We asked each participant to think about the following questions during the subsequent discussion:

1. Define each concept in one sentence. Try to use plain language, something that a non-expert person (e.g. your grandma) would understand.

2. Choose the number of dimensions (i.e. sub-constructs) that will be needed to measure the concept. Try to capture all aspects of a given concept and be as detailed as possible.
3. As in step (a), define each dimension in one sentence in an easily understandable way.

Following the presentation, each person was assigned to a breakout room to discuss selected parts of the conceptual map. Although we encouraged participants to answer questions (a-c) and kept reminding them of this, different groups engaged with these questions and concepts in distinct ways. For instance, legal experts gave us feedback by considering the letter of the law (i.e. how and whether current legislation understands and tackles each of the constructs). Conversely, employers and worker representatives were more likely to bring up examples based on their personal experiences and struggles.

As with similar approaches to focus groups (cf. elicitation methods in Liamputtong, 2011), we tried to keep the discussion free-flowing and conversational, and only intervened when we felt that we needed to move on the discussion to other concepts. Focus groups can be especially valuable when the goal is to gather evidence based on interactions between group-members which can support the exploration of the topics discussed (Cyr, 2016). Widespread agreement can be a sign that a certain part of the conceptual map is close to being crystallised, whilst disagreements point to the need to further develop the map.

Our approach also borrows from visual-elicited focus group methods (e.g. Walstra, 2020; Ferrari, 2022) as we anchored our discussions with conceptual maps. Visual elicitation in a group setting can keep everyone focussed on the same set of themes, providing a joint trigger to discuss the topics of interest. As with other focus group elicitation techniques, this approach can identify points of agreement, such as certain concepts/themes which are endorsed by every member of the group, but the figures can also shed light on some differences of opinion when it comes to certain concepts. A further strength of providing a graphical depiction such as a conceptual map, is that it helps gaining structural and relational information about each of the concepts. Participants might challenge why certain topics are separated or encourage merging others. Similarly, they can point to missing arrows or question existing arrows on the map, depending on whether they think that certain topics should be (in)dependent of each other (examples of these graphical representations are provided in the next section).

In the last part of the workshop, we asked one nominated participant from each group to provide a summary of the main points raised. After these summaries, we opened the floor for any reflections and feedback from the group members, and thanked them for their work.

Table 9 shows which parts of the conceptual map were tackled by each advisory group. As demonstrated, almost all topics were always present (wage theft, unfair deductions, agency-related and admin violations). The gaps section was deployed from the second group onwards, based on issues the first group had identified as missing and then (like the other sections) expanded onwards with additions and amendments following each subsequent group. We decided against bringing up the broad concepts with the legal experts, whose understanding of the letter of the law for particular breaches, and reflections on what a survey may (not) be able to identify, was more important. We also did not cover the discussion of the sharp-end of labour abuse in any group, as it is very unlikely that our sampling will be able to reach (m)any people affected by it, so it would be a poor use of resources to dedicate specific questions to these issues. However, should any respondents wish to raise experiences related to more extreme exploitation, they will be able to do so in the final, open-ended question of the survey.

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The final advisory group, made up of with precarious workers, was different from the earlier ones. We did not ask them to engage with the conceptualisation task, instead we requested them to share their views about the final conceptual map (see Figure 6), based on their lived experiences and priorities. We wanted to get an understanding of whether the members in all the other advisory groups got it 'right', and whether there was anything missing from the previous deliberations. We also asked them to highlight the issues that were most salient to them, which informed the subsequent work on the survey and particularly the operationalisation that followed.

Table 9: Conceptual areas discussed across the advisory groups

	Labour abuse experts	Legal experts	Policy-makers and practitioners	Employer representatives	Worker representatives
Broad concepts	Yes	No	Yes	Yes	Yes
Wage theft	Yes	Yes	Yes	Yes	Yes
Unfair deductions	Yes	Yes	Yes	Yes	Yes
Agency-related violations	Yes	Yes	Yes	Yes	Yes
Admin violations	Yes	Yes	Yes	Yes	Yes
Sharp-end	No	No	No	No	No
Gaps	N/A	Yes	Yes	Yes	Yes

A general overview of the final conceptual map and two examples

Discussing the evolution of the conceptual map would take dozens of pages; merely focussing on every aspect of the conceptual map could fill a separate report, and would require exemplary tenacity to read through. Therefore, instead of covering all the minutiae of the various aspects of the conceptual map, we will approach our results in two different ways. First, we will provide a general overview of the final conceptual map, highlighting the main changes compared to the initial map. Second, to demonstrate the process, and exemplify the utility of this approach, we will pick two concepts – leave-related problems and unfair deductions – and describe how each of them changed from advisory group to advisory group, and map-to-map.

General overview

The final conceptual map (Figure 6) intimidates by its sheer size. In this section, we will highlight the main changes that were made to the final conceptual map compared to the first, relatively simple one (cf. Figure 3).

It became clear after the advisory group with the legal experts, that discrimination is only a part of a bigger group of issues that could be defined as equality rights. We were urged to add harassment and health-related questions alongside discrimination to this group of concepts, as they are very similar in their effects and functioning.

Although at first, we wanted to treat unfair deductions separately, the academic experts convinced us early on that unfair deductions could be considered an alternative form of wage theft, thus we merged those two groups. Importantly, it was also pointed out that wage-related (e.g. withholding tips) and non-wage-related factors (e.g. travel costs) both can result in unfair pay deductions, and that those should be handled separately.

We found that the initial conceptual map for agency-related violations included areas which were found to be less obvious priorities for the survey – pay between assignments, which was only pertinent to Northern Ireland, and gangmasters in regulated sectors operating without a licence, which was a breach of which workers would be unlikely to be aware. Instead, we were advised to consider the agency workers regulations and to distinguish between three groups of concepts: (1) potential legal violations; (2) practices that are legal but unfair; and (3) legislative limitations that lead to bad employer practices/precarity.

We were also convinced that a new and separate area, agency fees, deserved particular attention and its own category, as this is something that workers can find easy to understand and has considerable impact on them. Here particular challenges were identified, however, between fees charged to workers by UK based recruitment and employment agencies (illegal except in very limited industries) and by overseas agencies (legal from a UK perspective, but potentially illegal locally, depending on the country).

In addition to changes and amendments to the original conceptual map, we were most impressed by the gaps identified by the advisory groups. All of these were extremely valuable, but we will highlight the four that were discussed the most. Health and safety violations, although outside the DLME's remit, was tapped as an area that required more attention – physical and mental health consequences included. This is a good example of something that is not defined in the UK as labour market non-compliance but nevertheless was widely perceived as an important work-based harm. Access (and barriers) to justice also came up multiple times, with issues related to navigating the current system and finding sufficient legal representation. Enforcement (or lack thereof) was also an area that was mentioned multiple times. Finally, and crucially, the role of trade unions, their relationship with the employer and their perception by the workers was also cited as something worth exploring further. Again, none of these latter three are strictly within the non-compliance remit, but were widely seen to be important in exercising ones labour rights and accessing redress (or not).

The above developments have merit on their own, as they describe the various aspects of labour market non-compliance. The sub-dimensions of each concept (not detailed here for space reasons) will

also become germane for the next step: turning these concepts into survey questions and measurements (i.e. operationalisation) will be discussed in the next chapter.

Two examples – Leave-related problems and unfair deductions

Leave-related problems

Leave-related problems (Figure 4), encompass annual leave holiday pay related problems and other types of leave (maternity, paternity, bereavement, etc.) pay. Many participants identified annual leave holiday pay non-payment as one major issues of labour market non-compliance. It was pointed out that calculating annual leave holiday pay can be extremely difficult, especially when workers are employed hour-by-hour and day-by-day. Legal experts pointed out that the legislation was outdated (as it was originally designed in a time when fixed shifts were common).

The enforceability of annual leave holiday pay was also contested. There was agreement that this was not publicly enforced (i.e. there was no active naming-and-shaming associated with it), which meant that it often remained overlooked. Although some claimed that this could be (at least partially) enforceable by HMRC using payroll record data, but others pointed out that there were serious challenges with this as some workers could have up to 40-50 workplaces each year, and that the fragmentation and casualisation of work can pose a serious challenge to remedying breaches.

Many advisory group participants found it problematic, both with annual leave and other types of leaves, that both public and private sector companies often had specific rules, and that due to this 'scattershot approach' it can be very difficult to determine (non-)compliance. Limiting when someone can take leave might be unreasonably restrictive in some professions but a necessity in others (such as education or health care). Due to the great variation of approaches taken to various leaves, it was suggested by the advisory groups that it might be impossible to clearly discern cases of non-compliance.

It was also highlighted that often the discussion of the various leave-related benefits was avoided from inductions and induction-related materials. There was often a strong disparity between what people were entitled to on paper and how the workplace dealt with certain requests (e.g. generous sick pay policy on paper, but the workers are encouraged to use it as little as possible).

Unfair pay deductions

Unfair pay deductions (Figure 5) was another group of concepts that we were particularly interested in. We first wanted to handle these separately, but then we were encouraged to add this to the 'wage theft' section. It demonstrates the dynamic nature of our concept mapping method that we were quickly advised that unfair pay deductions might be wage-related but can also include non-wage benefits as well. The deductions of non-wage benefits cover both legal but potentially extensive cuts (where often workers opt into these deductions when taking on the job), a grey area (such as deductions of travel costs which might bring the wage below the national minimum wage), and also illegal practices, such as contract violations (which may or may not be accidental).

Wage-related unfair deductions may be tied to the work (e.g. in the case of bonded work), can occur at certain stages of the work (e.g. upon starting/leaving the job – such as penalties on dismissal), and can involve certain job-related deductions (e.g. breakages, unpaid sleep-ins, inadequate uniform and

kit allowance). We were advised that unfair deductions are likely to be more common when workers are employed via an umbrella company, and that often workers are signed up, without proper consultation, for certain schemes that might lead to deductions from their pay.

Figure 4: Leave-related problems

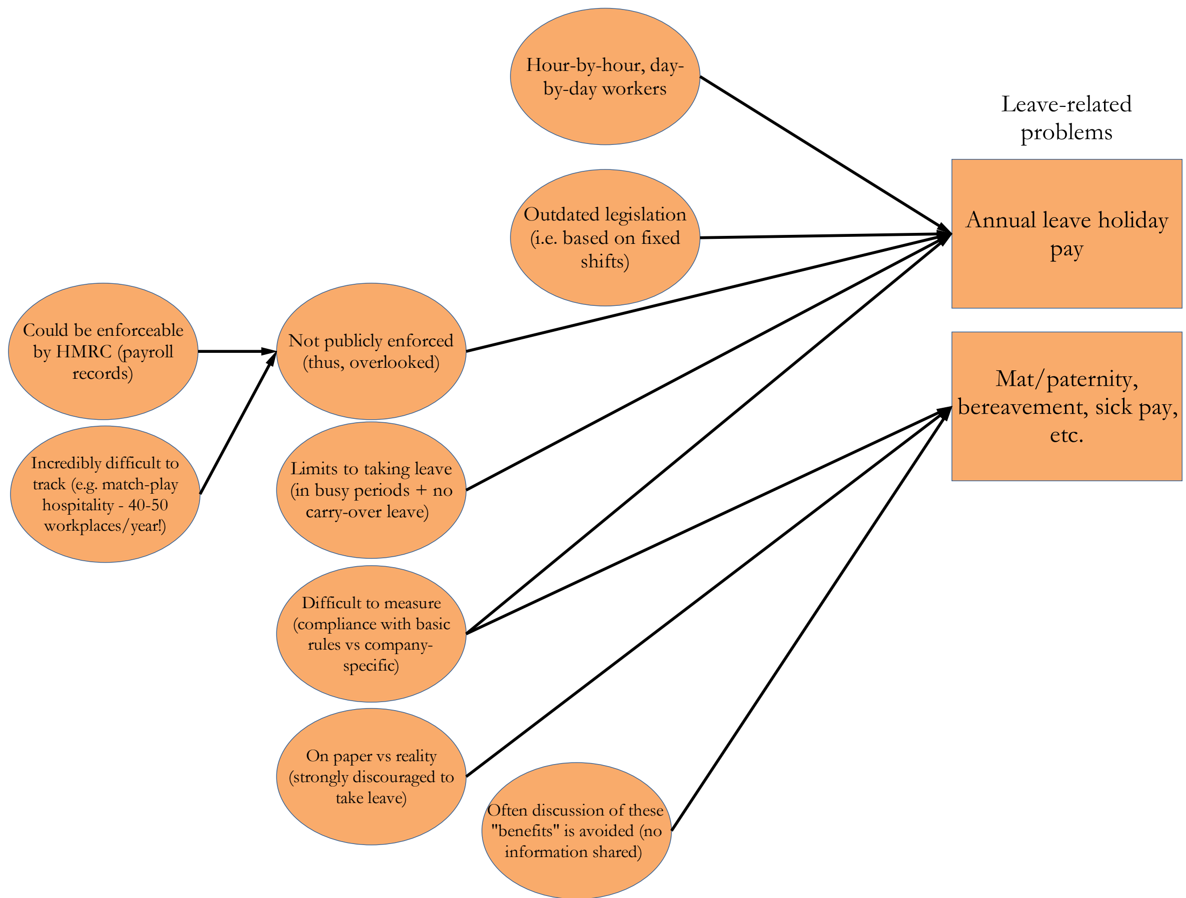

Figure 5: Unfair pay deductions

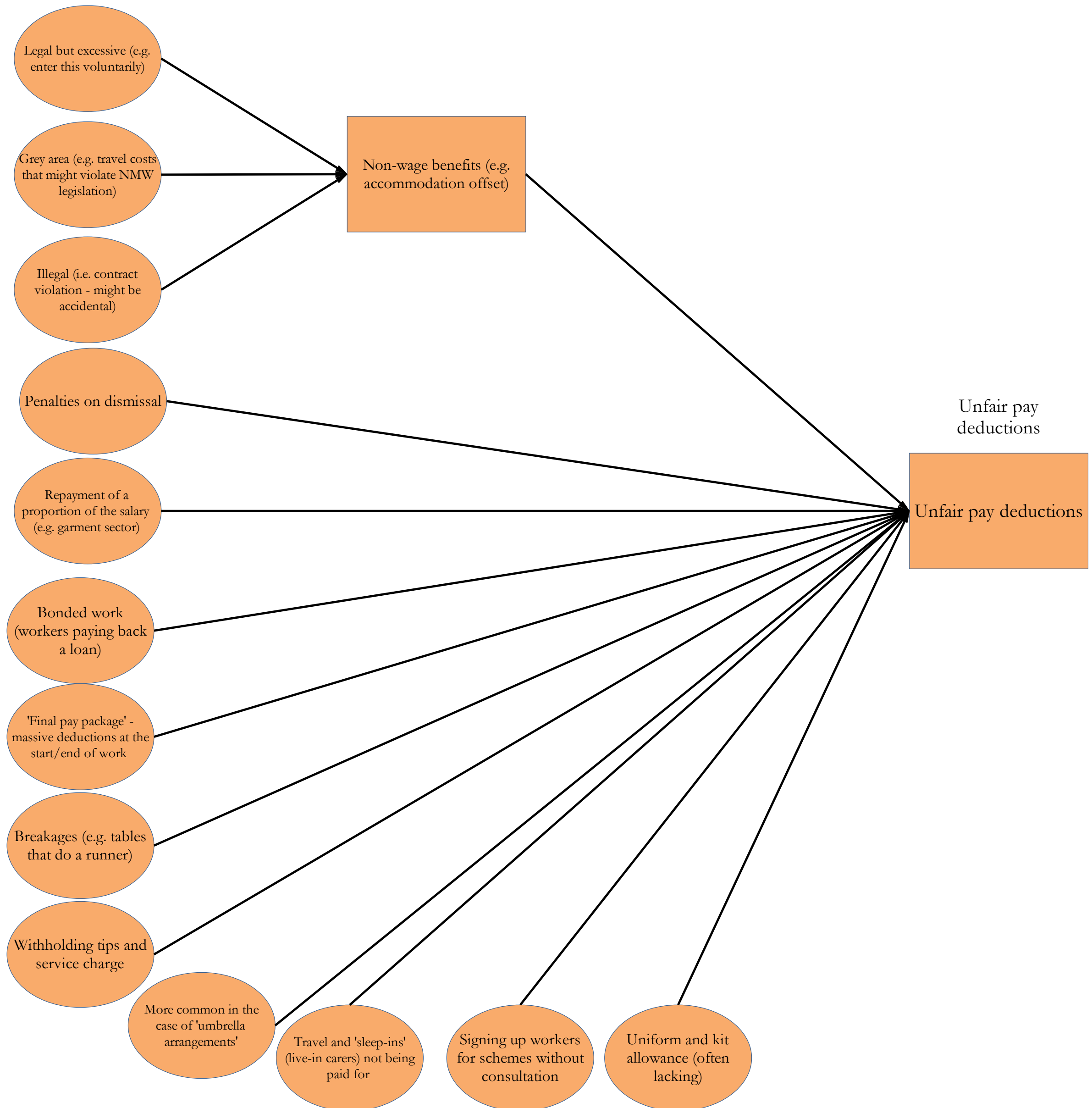

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Figure 6: Final conceptual map

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Chapter 6: Survey operationalisation

In this chapter, we now focus on the operationalisation stage of the survey development. Operationalisation is a process of developing measurement tools, such as surveys, to tap into people's experiences and attitudes. Having developed a comprehensive conceptual map that reflected the legal complexities and the social realities of our area of interest, our next challenge was to trim this map down. We narrowed our focus by (1) considering the most pressing issues, based on their severity, impact, presumed prevalence, and relevance to the DLME's remit; and (2) finding the concepts that could be measured in a straightforward way by excluding issues that respondents could not reasonably be expected to answer questions about. We started by reviewing a large number of existing survey instruments (chosen for domain relevance) to identify existing questions that we could use. Based on the gaps in existing surveys, our team then developed new question batteries for conceptual areas not covered in existing surveys, for example working time limits, unfair deductions, or administrative violations (e.g. not providing payslips). For this stage too, we used consultative two-hour long focus groups with our advisory groups, this time working on the principles of refining the draft survey instruments including the question wording and response options. In this chapter, we explain the methods and prompts used, and provide example resources. To avoid overwhelming the reader, we focus on two key areas to explain and illustrate this process, and the considerations and trade-offs we faced: leave related difficulties and unfair deductions.

How to measure labour market non-compliance?

In the previous chapter (Chapter 5), we showed how we used focus groups to identify and unpack the different dimensions of what constitutes labour market non-compliance. The final product of this exercise was a comprehensive conceptual map. Our next challenge was to trim this map based on two main requirements. First, selecting the parts that were the most pertinent, because of their severity, presumed prevalence and relevance to the DLME's remit. Second, finding the concepts that could be measured in a straightforward way (i.e. when workers are asked about these, they can readily respond to them). Lastly, we wanted to focus on experiences instead of perceptions, as the latter is more likely to be subjective in nature.

It is always better to rely on existing survey instruments whenever possible instead of developing new ones. They are already tried-and-tested and can potentially be used as benchmarks against which we can compare our results. With these considerations in mind, we started by reviewing the following surveys, selected for their relevance to the domains under consideration:

- Understanding Society Survey
- Labour Force Survey
- British Social Attitudes Survey
- Unrepresented Worker Survey (Pollert, 2004)
- Employment Rights at Work Survey
- Workplace Employment Relations Study
- Working Times Regulation Survey
- Work-Life Balance Survey
- Survey of Employment Tribunal Applications

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First, our research team went through all of these surveys and selected the questions that we deemed relevant (either in terms of the demographic and other background information we were seeking to collect, or workplace-related topics). When there were multiple alternatives, sometimes we would decide to keep one set of questions over the others either because of the longer track-record of particular questions being collected (e.g. we were partial to questions in the Understanding Society and Labour Force surveys), or due to phrasing that struck us as more immediately relevant to the population of interest (e.g. when it comes to sources of income, it seemed sensible not to inquire about investment, bonuses, or dividends). However, usually it was unclear which survey instruments were superior, so we kept all of them for further scrutiny. Then, we needed to weigh the importance of certain questions and topics and only keep the most important ones from the full list of several hundred potential candidates.

Having reviewed the surveys, we realised that for several topics (listed in full later) there were not any questions available. This meant that we needed to design instruments from scratch to address several of the concept areas. Due to the size and complexity of the conceptual map, we could not develop questions for every topic. We also needed to be considerate of the final length of our survey –which should take about 20 minutes to complete. Therefore, we had to exclude certain concepts which were difficult to measure. For example, while we are able to ask people directly if they are on a zero-hour contract, we could not use the series of 12 questions developed in the Labour Force Survey to measure that more accurately and indirectly. Similarly, for certain concepts we needed to be mindful of the complexities of measuring whether an apparent violation was being reported. For example, measuring non-compliance with leave-related allowances is challenging because there is a great degree of variation depending on the legal status of the worker, the minimum requirements (e.g. those in heavy physical work have a higher minimum maternity leave), and individual companies' policies. Finally, we also had to rule out asking questions which were unlikely to be pertinent to our survey population. For example, although we would have loved to learn more about the experiences of workers on Seasonal Worker Visas or Overseas Domestic Worker Visas, it is very unlikely that we would be able to reach them through our survey, which utilises the Understanding Society sample and then branches out from there.

With all these caveats, we ended up developing new questions for the following topics:

- 48-hour workweek
- Unfair deductions
- Violation of NMW regulations
- Wage non-payment (including under-payment)
- Leave-related violations
- Admin violations – non-provision of contract, key information document or payslips
- Rest break entitlements – 20-minute break and toilet breaks
- Access to benefits-related violation
- Health and safety – injury (of oneself and observed injury of colleague) and concerns
- Enforcement – encounters with and awareness of enforcement agencies
- Trade Unions – perception of and steps taken against them by the employer
- Access to justice – likelihood of reporting, reasons for (not) reporting
- Specific questions for particular types of employment:
    - Agency fees and agency oversight
    - Apprenticeship-related motivations and violations
    - Reasons for working in the gig economy/as self-employed

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- An open-ended catch-all question for violations that affected the respondents the most (if any).

Notably, although all of the above went through expert scrutiny (as detailed below), we needed to cut several before entering them into the question testing, due to the draft survey being excessively long. These included rest break entitlements, access to benefits-related violations, and questions surrounding access to justice (the latter we expect to explore in detail in the qualitative elements). Our 'prototype' questionnaire (including those cut pre-testing) is available in the Appendix for anyone who might be interested in continuing with those questions.

How to gain a better understanding of measuring labour market non-compliance?

To get a better understanding regarding the measurement of labour market non-compliance, we relied on the advisory groups to comment on a draft version of the questionnaire. As before, we ran these as interactive focus-group sessions (lasting 2 hours). Participants were assigned to smaller groups and were asked to discuss the draft survey instruments (for the most part, these groups were different compared to the earlier session, to encourage a novel mix of ideas). We did not expect either of the members to be experts on questionnaire design. Instead, we asked them to read the proposed measures and try to answer the following questions:

a) Do these measures fit the concept well (i.e. can they capture what they intend to)?
b) Is there anything missing/is there something that is redundant?
c) Do you think all respondents will interpret the questions and response options in the same way?

In addition to the above, the legal experts were also asked to tell us whether these measures provided an accurate representation of the UK legal landscape, also taking into account any differences in devolved administrations.

As with the conceptualisation stage, we made changes to the questionnaire draft after every consultation, taking revised questions into the next session. Due to the large number of questions, it would be impossible to discuss all of the many incremental changes made between the different versions of the questionnaire. Therefore, we will use the same two concepts as we used for the conceptualisation to exemplify the process: leave-related problems and unfair deductions.

Leave-related problems

As alluded to earlier, due to the complexities regarding leave provisions (e.g. annual leave, parental leave, sick leave etc), we found it extremely difficult to measure leave-related problems. The main issue raised by the advisory groups during the conceptualisation was of holiday pay not being provided for annual leave. At the same time, evidence from past surveys suggests that often workers do not have a good understanding of what they are entitled to. For instance, many teachers would argue that they do not receive appropriate leave despite the paid leave that they receive as part of their profession in school holidays.

The above complexities meant that, from the very beginning, we were minded to ask about this topic in an open-ended manner. Open-ended questions are well-suited for exploratory analysis where it is unclear how to ask about a certain topic in a clearly structured manner due to the high number of

alternatives (Fowler and Cosenza, 2009). Answers to open-ended questions tend to be more authentic and can encourage cooperation and rapport as they allow respondents to 'speak their mind' (Robson, 2002).

The proposed questions (Table 10) received some criticisms across the focus groups. Legal experts pointed out that sick leave should be handled separately, as there is a legal requirement to allow you to go on leave when sick, compared to annual leave, where there is more employer discretion as to when it can be taken. They suggested focussing on and asking about 'legally entitled leave' which is distinct from the other types of leave. Policymakers would have liked to know about return to work after long period(s) of leave were being handled by employers. The employer representatives took issue with not touching on non-payment of accrued holiday pay which, to their mind, is the biggest leave-related problem. By contrast, worker representatives felt we were missing any attribution of potential difficulties to employers. Although we appreciated all the feedback received, we felt that the respondents are unlikely routinely be able to answer some of these questions (e.g. what are they legally entitled to) and to have sufficient knowledge about others (e.g. accrued holiday pay non-payment). Similarly, we did not want to add further complexity by asking questions about specific types of leaves as it is unclear which type of leave tends to be the most problematic in terms of the scale and impacts of any difficulties accessing one's entitlements. Thus, despite multiple rounds of scrutiny, the broad questions we suggested were left unchanged.

To give a rundown of the proposed instrument for leave-related problems: first, the block starts with a question where respondents are asked whether they had any difficulties taking leave in the past two years. This is a traditional branching question, where people who respond in the affirmative are asked follow-up questions, but the others are not. The first follow-up question inquires about the type of leave that the participant had a difficulty with, and the final question in this block asks them to provide further details about the experience in an open-ended manner.

Table 10: Draft questions for leave-related problems

Question	*Response alternatives*
In the past two years, have you had any difficulties taking time off from work?	Yes / No / Don't know
You indicated that you had difficulties taking time off from work. Has this been in relation to... (Please tick all that apply)	Annual leave / Sick leave / Maternity/paternity leave / Parental leave / Carers' leave / Training / Other
In your own words, could you please summarise the difficulties you encountered?	Fill in

Unfair deductions

With unfair pay deductions, we went through multiple iterations when it came to both the main question and the response alternatives (Table 11). Changes were made based on the feedback received from each of the advisory groups. Here, it is also worth noting that the section title of 'unfair

deductions' (which will not be included in the survey itself) was in itself contentious, because unfair is a moral, subjective assessment, whereas unlawful is not. Alas, whether a deduction is unlawful depends on numerous factors which makes this close to impossible to assess using a general (sub)population survey. Consequently, we still refer here to unfair, which we feel speaks more to the spirit of inquiry around workers' experiences.

The question itself went through two changes. The first version was problematic for multiple reasons. Firstly, it asked about two things at the same time, i.e. 'being charged' AND 'without receiving reimbursement'. Then, the advisory groups rightly pointed out that the word 'reimbursement' is likely to be unclear to several respondents. This version also lacked a fixed time frame, making it impossible to tell when any deduction(s) reported had happened. The second version addressed these issues. as it clearly defined a two-year time window, and removed the double-barrelled statement and the complex word. The second version, however, remained complicated with the two different ways of payment staying in the main part of the question. To remedy this, in the third and final version, we moved the ways of payment within brackets to the end of the question as a qualifier/explainer. It is possible that some ambiguity remains because people may be required to pay but then get reimbursed, but that should be teased out in the question testing.

The response alternatives also went through organic changes. From the second version, we removed training and car hire/leasing from the alternatives as these are common and often legitimate ways certain companies reward employees (by asking for only a partial/symbolic payment or using them as part as a promotion package). As ever, there are some trade-offs here between not wanting to capture reasonable deductions (and thus risk artificially inflating estimates), and the risk of excluding some unreasonable/unlawful deductions (e.g. time spent on mandatory training may still need to be paid). However, we added paying for accommodation and vehicle maintenance fees. The third and final change (made for version 4) included adding insurance to the list.

Despite the incremental improvements made, we could not integrate all comments we received from the advisory groups. It was pointed out by the legal experts that one should distinguish between deductions that were authorised or unauthorised by the individual. Employer representatives suggested adding 'breakages' to the list. Policymakers and worker representatives both argued that travel costs should also be added to the list. Unfortunately, we could not adopt these either because of the potential difficulties understanding some of the terms (e.g. what is (un)authorised and breakages) or due to the great deal of complexity when it comes to deductions for travel (e.g. many workers fully expect to pay their travel costs to and from work). However, as indicated earlier, all the other suggestions were heeded.

Table 11: Unfair pay deductions

<table>
<tr><th>Version 1</th><th>Version 2</th><th>Version 3</th><th>Version 4</th></tr>
<tr><td>Were you personally charged for any of the following without any reimbursement (either as a deduction from your salary or as direct payment)? Please select all that apply.</td><td>In the past two years, has your workplace taken any money from you as a salary deduction or required you to pay for any of the following? Please select all that apply.</td><td colspan="2">In the past two years, have you had to pay your workplace for any of the following (directly or via salary deduction)? Please select all that apply.</td></tr>
<tr><td>training / personal protective equipment (PPE) / uniform / fuel / car hire/leasing / tools for your work / any materials needed for your work (e.g. paper, cleaning supplies) / other / none of the above</td><td colspan="2">accommodation / personal protective equipment (PPE) / uniform / fuel / vehicle maintenance fees / tools for your work / any materials needed for your work (e.g. paper, cleaning supplies) / other / none of the above</td><td>accommodation / personal protective equipment (PPE) / uniform / fuel / vehicle maintenance fees / tools for your work / any materials needed for your work (e.g. paper, cleaning supplies) / insurance / other / none of the above</td></tr>
</table>

In conclusion, these examples illustrate the process through which we operationalised the survey.

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Chapter 7: Conclusion and next steps

In this final chapter, we briefly conclude the report with a summary of some key observations and their implications, as well as a discussion of the strengths and limitations of our approach. We finish with an overview of the next steps and key milestones to follow.

Conclusions

There is growing and understandable concern about work becoming increasingly precarious in many developed economies, and its ramifications for a largely low-paid, insecure and uncertain subset of the workforce with limited rights and protections.

Contrary to expectations and various prior research, our analysis of Understanding Society survey data indicated that the proportion of the workforce in precarious work has remained remarkably stable over the period 2009 to 2022 (Chapter 3). Nevertheless, the fact that – by our definition at least – **around one in ten workers in the UK (10-11.7%) can be considered precarious** is concerning in itself. This observation is then compounded by the clear overrepresentation among the precarious worker group of women, younger people, and people working in particular industries, namely hospitality, retail and construction. This industrial tilt raises further questions about the business models of these industries and their potential human costs.

Our longitudinal analysis revealing different group-based trajectories into, through and out of precarious work also merits discussion. Clearly, the 'increasingly precarious' group (i.e. people who get more and more precarious over time – an estimated 8% of all workers) requires more attention. We also find evidence that for some people precarity in the workforce is temporary and part of their transition to 'traditional' work (i.e. 'early career') or caused by interruptions in their lives (i.e. 'transitional'). **Overall, our longitudinal analysis indicates that precariousness at work is more fluid than expected.**

To be clear, we should not confuse precarity (which, although generally used pejoratively as a term, might not always be experienced negatively) and non-compliance (which fundamentally breaches workers' rights, however routinised it might be). Indeed, the relationship between precariousness at work and labour market exploitation in its various forms is oft-discussed but rarely investigated at scale. Fielding our survey will be a vital next step in disentangling this relationship in a robust and nuanced manner. It will also be important in understanding how different sociodemographic, geographic, industry- and occupation-related variables interact when it comes to experiences of different forms of labour market non-compliance, and other intersecting work-based harms. While there are clear indications from prior research that precarious workers are particularly exposed to risks and harms of labour market exploitation (see Chapter 2), they are clearly not a homogenous group and we would expect to see different (and intersecting) sub-groups differentially impacted.

Importantly, there is no single agreed definition of precarious work, so we recognise that operationalising the construct in different ways could have yielded different results (indeed, although adjusting our low-income threshold had only small effects, other decisions could change the picture substantially). We hope that the justification for the criteria we used is sufficiently clear, well-evidenced and compelling. While we think it was the most suitable approach for the purposes of this project, its research design and its reliance on existing Understanding Society infrastructure, complex social

constructs can rarely (if ever) be quantified perfectly, and we make no claims to have done so. Additionally, our data only show the numbers and certain characteristics of the UK workforce in precarious work (operationalised as a binary) – that might well hide changes in how intensively this precariousness is experienced and/or the impacts it has on people's working lives, health and livelihoods. For example, the relatively static overall rates of precarious workers might mask work that already met the threshold to be considered precarious becoming increasingly more so, as indicated by the collective organising of numerous different groups of workers against ongoing reported degradation in their pay and working conditions. Moreover, as detailed in Chapter 2, the impacts of precarious working conditions are almost certainly compounded by pressures from inflation, high housing costs, and the broader cost of living crisis.

Our initial context chapter (Chapter 2) set the scene in terms of the many challenges and tensions around conceptualising and measuring precarity, precarious work, labour market non-compliance and work-based harm, as well as synthesising key research and particular evidence-gaps that informed our approach (see also Cockbain et al., 2019; Pósch et al. 2020, 2021; Scott, 2017). The scoping of the legal landscape presented in Chapter 4, however, throws into even starker relief the complexity of the regulatory landscape around work and employment, and how much of what could be considered labour market exploitation and work-based harm falls outside of the DLME's remit, and of our definition of labour market non-compliance. It also strongly emphasises the constrained scope of labour market enforcement undertaken by state enforcement bodies, which are also resourced well under the International Labour Organization's benchmark (of one inspector per 10,000 workers in industrial market economies). Beyond the fairly narrow scope of state-led enforcement, labour market enforcement in the UK is heavily reliant on individual workers enforcing their rights through court or tribunal claims. – with all the numerous barriers involved (e.g. lack of rights' awareness, resources, access to legal advice, etc.). One would expect these barriers to be particularly acute for those in precarious work, given the predominance of low pay and other forms by which they can be marginalised (including multiply so – e.g. as a low paid, migrant and ethnic minority woman). Exacerbating matters further, are the additional legal barriers to accessing employment rights posed by various restrictions based on, for example, having a particular employment status or having worked for a certain qualifying period. Even just the higher-than-average rates of people in non-traditional work among the precarious worker group (see Chapter 3) emphasises how much more exposed precarious workers can be to being denied labour rights and protections. Although the survey itself will be crucial in understanding this issue in more depth, we would expect that those who are least protected in law might well be the most susceptible to a whole range of forms of treatment that would appear unfair, exploitative or downright illegal for other groups.

Through the **survey conceptualisation and operationalisation** phases we have endeavoured, as throughout this programme, to be as clear and transparent as possible about the steps taken and the rationale behind our process. Here, as elsewhere, we have been guided by a combination of scientific rationale, established methods and practical considerations (e.g. there were practical limits to the number of different stakeholder groups with whom we could consult, so we prioritised according to expertise and relevance to this project, but our selection is not exhaustive). Moreover, we appreciate that there is subjectivity in the process, and while we sought to produce a comprehensive conceptual map – we cannot claim that it is absolutely exhaustive, especially as we actively refrained from focusing on the extremes of human trafficking, forced labour and other forms of 'modern slavery', as we are very unlikely to be able to sample people affected by these (see Chapter 2 for more details on why it was beyond our scope). Others reading even the most expanded final version of this study might spot sub-constructs or dimensions they would have included but we did not.

In operationalising the survey, i.e. developing the questions, again we have tried to make the process as robust and transparent as possible, but some issues are surprisingly difficult to ask relatively simple, meaningful questions about, and even the jargon of this field proved challenging too. The term 'labour market non-compliance' is evidently not one we can expect lay people to know and understand. Yet, many of the alternatives present challenges in being too vague and all-encompassing, too technical, implicitly requiring knowledge of the endlessly complex regulatory landscape or having too overtly negative connotations (e.g. problems at work, labour exploitation, mistreatment at work, harms at work, breaches of your labour rights, etc.).

The strengths of our overall approach to this research programme lie in our innovative and robust methodological approach, use of the exceptional Understanding Society infrastructure (which is not only methodologically beneficial but also very cost-effective), outstanding multidisciplinary team and external collaborators, and the exceptional generosity of all project advisory group members and of the DLME team themselves in sharing their ideas, experiences, expertise, suggestions and genuinely constructive criticisms. We look forward to working on the analysis of all the research data to come, and hope these findings can inform and support efforts to encourage compliance and improve access to justice for all workers, but particularly those in precarious positions.

Indicative timeline for next steps

The following timeline provides an overview of the next stages of the project, including data collection on different strands and various project reports. The final report is due to be completed by the end of November 2025, with any interim reporting posted on the project webpage as it becomes available.

If you would like to be added to a mailing list to receive project reports, please contact us via email or sign up for notifications on the project webpage.

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Phase	Task	2024								2025										
		May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
All	Project management, incl regular meetings with ODLME & technical advisory group	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
	Consultation with project advisory groups											■	■					■	■	
Survey development	Finish question testing (cognitive interviews and online probing)			■	■	■	■													
	Survey pilot							■	■											
Main survey	Finalising any amendments to survey materials/methods post-pilot								■	■										
	Preparation for main stage data collection, including translations of materials							■	■											
	Main stage survey data collection									■	■	■	■							
Qualitative strand	Finalising thematic foci and materials for qualitative strands												■							
	In-depth interviews with people in precarious work													■	■	■				
	Focus groups with people in precarious work														■	■				
Public Voice survey	Selecting key questions to ask of representative sample of wider workforce													■						
	Fielding questions via Public Voice survey														■					
Project reports	Second report (technical report on questionnaire testing)							■												
	Third report (technical report on survey pilot)										■									
	Internal data reports (on preliminary main survey findings)													■	■					
	Internal data report (on Public Voice survey findings)														■	■				
	Draft of final project report																			■

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