

**NATIONAL MINIMUM WAGE**

Policy on HM Revenue & Customs  
enforcement and prosecutions

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# NATIONAL MINIMUM WAGE: POLICY ON HM REVENUE & CUSTOMS ENFORCEMENT AND PROSECUTIONS

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## **SECTION 1            INTRODUCTION**

1.1     The Government is committed to simple, effective National Minimum Wage (NMW) enforcement which supports workers and businesses by deterring non-compliant employers from underpaying their workers and removing the unfair competitive advantage that underpayment can bring.

1.2     Since 1999, when the NMW was introduced, we have made every effort to ensure that workers who are underpaid are repaid what they are owed. However, the best protection we can offer workers and compliant businesses is to strive to ensure that underpayment does not occur in the first place.

1.3     The Government has concluded that, a decade on from the National Minimum Wage Act 1998, there should be a new enforcement strategy to deal with the minority of employers who continue to underpay their workers. This strategy is based on a fairer way of dealing with NMW arrears and a simpler, more effective penalty regime to deter non-compliance.

1.4     The Employment Act 2008 changed the basis for imposing a penalty on an employer from non-compliance with the requirements of an enforcement notice to non-compliance with the requirement to pay workers the NMW. It also introduced a new method of calculating arrears that takes into account the length of time that has elapsed since the underpayment.

1.5     This document sets out the how the Government will operate the civil and criminal enforcement of the NMW in the light of the changes introduced by the Employment Act 2008.

## **SECTION 2            BACKGROUND**

### **2.1    Entitlement to the National Minimum Wage**

2.1.1 The National Minimum Wage Act 1998 (the 1998 Act) introduced a statutory right to be paid a certain amount of remuneration for work performed. Almost all workers in the UK are entitled to the NMW. Workers are defined in section 54 of the 1998 Act.

2.1.2 A qualifying worker who is paid less than the NMW for any pay reference period is entitled under his contract to be paid arrears by his employer (section 17 of the 1998 Act, as amended by section 8 of the Employment Act 2008).

2.1.3 Arrears are the difference between the remuneration received by the worker and the NMW rate which applied at the time they were underpaid<sup>1</sup>. However, from 6 April 2009, where the current rate of NMW is higher than the rate that applied at the time of the underpayment, the arrears are calculated by reference to the current rate (see paragraphs 3.2.3 – 3.2.4).

2.1.5 The Secretary of State has appointed HM Revenue & Customs (HMRC) to act as enforcement officers for the purposes of the NMW. HMRC's enforcement of employers' obligations to pay workers the NMW is focussed on the workers' right to receive what they are entitled to. In the agricultural sector, agricultural wages officers in the Department of the Environment, Food and Rural Affairs enforce the NMW whilst enforcing the Agricultural Minimum Wage.

2.1.6 This policy statement only deals with enforcement of the NMW by HMRC<sup>2</sup>. The policy contained in this document will be kept under close review by the Department for Business, Enterprise and Regulatory Reform (BERR), HMRC and Revenue & Customs Prosecution Office and adjusted as necessary.

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<sup>1</sup> Subject to the detailed rules that apply under the National Minimum Wage Regulations 1999 in relation to which payments count as National Minimum Wage pay.

<sup>2</sup> A worker may commence proceedings against his employer to recover arrears:

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

## **2.2 HMRC enforcement process**

2.2.1 HMRC enforcement is initiated either by a complaint from workers or third parties, or as a result of risk assessment (including targeted enforcement of key low paying sectors) by HMRC.

2.2.2 Cases are referred to NMW compliance teams from HMRC's NMW Central Information Unit. On receipt of a case referral, a compliance officer will carry out an investigation of the employer's business. This will usually include a review of the employer's payroll and associated records, an interview with the employer and payroll staff, and interviews with workers.

2.2.3 The purpose of the investigation is to determine whether or not an employer has complied with the requirement to pay workers the NMW. Where a compliance officer discovers that the NMW has not been paid to a worker or group of workers, his aim is to ensure that workers receive what they are entitled to as soon as practicable.

2.2.4 On conclusion of an investigation, the compliance officer may issue a notice of underpayment if appropriate (see section 3.1 below). This notice sets out the arrears of NMW to be repaid by the employer together with the penalty for non-compliance with the requirement to pay workers the NMW.

2.2.5 Where an employer complies fully with the terms of the notice of underpayment, HMRC enforcement action comes to an end.

2.2.6 Where an employer fails to comply with either the requirement to repay arrears and/or the requirement to pay the penalty, HMRC will take further action to enforce these requirements. Compliance officers can pursue payment on behalf of the underpaid worker or workers through a case:

- in the civil courts under section 19D(1)(c) of the 1998 Act; or
- in the employment tribunal under section 19D(1)(a) of the 1998 Act (or, in Northern Ireland, the industrial tribunal under section 19D(1)(b) of the 1998 Act).

2.2.7 By taking this action, HMRC compliance officers establish a debt that is enforceable in law. Where the debt to the workers remains unpaid following judgment, HMRC can use distraint or other measures available to the Court or tribunal to enforce the judgment.

## **SECTION 3 POLICY ON HMRC CIVIL ENFORCEMENT**

### **3.1 When a notice of underpayment should be issued**

3.1.1 The Employment Act 2008 amends the National Minimum Wage Act 1998 to replace enforcement and penalty notices by a single notice of underpayment. A notice of underpayment should be issued in all cases where a compliance officer finds that arrears of NMW were outstanding at the start of an investigation. The 'start of an investigation' is defined as the date a compliance officer first contacts the employer (either by telephone or in writing, or both).

3.1.2 One of the Government's main policy aims for the changes brought in by the Employment Act 2008 is to ensure that there is a sufficient deterrent against underpayment of the NMW. The 2008 Act changed the basis for imposing a penalty on an employer from non-compliance with the requirements of an enforcement notice to non-compliance with the requirement to pay workers the NMW. The 'start of an investigation' is the trigger point that is used to determine whether, in principle, a penalty should be imposed on the employer for non-compliance with the NMW.

3.1.3 A notice of underpayment should be issued where the employer has repaid the arrears to the worker subsequent to the start of the investigation and before the date the notice is issued, unless all the underpayments relate to pay reference periods starting before 6 April 2009 since, in these circumstances, no penalty would be due (see paragraph 3.3.4).

3.1.4 The reasons for the underpayment should not be taken into account when determining whether or not to issue a notice of underpayment. Notices should be issued in all cases where arrears are outstanding at the start of an investigation, notwithstanding that the employer claims that the underpayment of NMW was accidental.

3.1.5 A notice of underpayment should be issued where an employer has partly repaid arrears before the start of an investigation (for example by repaying the underpayment calculated in accordance with section 17(2) but not the arrears calculated in accordance with new section 17(4)).

3.1.6 No notice of underpayment should be issued where an employer has paid workers below the applicable NMW rates but has correctly repaid all the arrears that are owing to the workers before the start of an investigation.

## **3.2. Quantification of arrears**

3.2.1 A notice of underpayment requires an employer to repay to the worker or workers the amount of arrears outstanding on the 'relevant day' as a result of underpayment of the NMW for the pay reference periods ending before the relevant day which are specified in the notice.

3.2.2 The 'relevant day' is defined as the day after the end of the last pay reference period for which the employer has paid the worker at a rate below the applicable NMW rate. Where more than one worker is named on the notice of underpayment, the relevant day may be different for each worker.

3.2.3 One of the Government's main policy aims for the changes brought in by the Employment Act 2008 is to ensure that, where a worker has been underpaid the NMW, the arrears that are repaid to the worker take account of the length of time that has elapsed since the underpayment. Where the rate of NMW at the time the arrears are calculated is higher than the NMW rate that was in force at the time the underpayment occurred, the arrears should be calculated by reference to the current rate (in accordance with section 17(4)).

3.2.4 The underpayment of NMW (that is, the difference between the remuneration received by the worker and the NMW rate which applied at the time they were underpaid [section 17(2)]) is divided by the rate of NMW that applied at the time of the underpayment and then multiplied by the rate of NMW that is currently in force.

3.2.5 Where a worker changes age bands, the current rate of NMW to be used in the calculation of arrears should be the current rate for the band that applied to the worker at the time the arrears accrued. So, arrears incurred when the worker was aged 16-17 would be calculated by reference to the current 16-17 rate, not by reference to the current adult rate (even if the worker is now 22 or over).

## **3.3. Penalty and quantification of penalty**

3.3.1 The Secretary of State may, by directions, specify circumstances in which a notice of underpayment should not impose a penalty [new section 19A(2)]. Where the notice includes a requirement to pay a penalty, the penalty may be suspended where criminal proceedings are envisaged or commenced (see section 3.5 below).

3.3.2 The Secretary of State has issued a direction that a notice of underpayment should not include a penalty where an employer has followed written or published guidance obtained from a Government department or its agency about the employer's compliance with NMW requirements and this guidance is incorrect.

3.3.3 This direction would only apply where:

- the employer can demonstrate to the compliance officer that they have:
  - sought written or published guidance from a Government department or agency that was applicable to their situation; and
  - obtained written or published guidance; and
  - correctly followed that guidance; and
- the compliance officer considers that the written or published guidance obtained by the employer was incorrect.

3.3.4 The penalty is calculated as 50 per cent of the total underpayment for all the workers specified in the notice of underpayment in pay reference periods that commence on or after 6 April 2009 (the date that section 9 of the Employment Act 2008 comes into force [new section 19A(4)]). Where this amount would be less than £100, the minimum penalty of £100 should be applied. Where this amount would be more than £5,000, the maximum penalty of £5,000 should be applied.

3.3.5 The total underpayment for a worker is the difference between the remuneration received by the worker and the NMW rate(s) which applied at the time they were underpaid. This will be less than the arrears which are due to the worker if the NMW rate in force at the time the notice of underpayment is served on the employer is higher than the rate that was in force at the time the underpayment occurred, as the worker is entitled to be repaid at current NMW rates (see paragraphs 3.2.3 – 3.2.4).

### **3.4 Withdrawal and reissue of notice of underpayment**

3.4.1 A compliance officer may withdraw a notice of underpayment if it subsequently appears to him that the notice incorrectly includes or omits any requirement, or is incorrect in any detail. An officer may, at the same time as withdrawing the original notice, issue a replacement notice of underpayment. Only one replacement notice may be issued.

3.4.2 A replacement notice of underpayment cannot include a worker who was not included in the original notice of underpayment [new section 19G(2)]. Where a notice has been issued and an officer subsequently finds that an additional worker not included in that notice is owed arrears, the officer should issue a new notice for that worker.

### **3.5 Issue of notice of underpayment where there are/may be criminal proceedings**

3.5.1 Section 19B of the 1998 Act allows a compliance officer to issue a notice of underpayment with a provision suspending the requirement for the employer to pay a penalty where proceedings have been instituted, or may be instituted, against an employer in respect of a criminal offence under section 31 of the 1998 Act.

3.5.2 The decision whether to issue a notice containing such a provision should be made on a case by case basis, having regard to the interests of the workers and whether doing so would risk prejudicing the success of the prosecution.

### **3.6 Powers of compliance officers**

3.6.1 The Employment Act 2008 amends the 1998 Act to give compliance officers the power to take information away from the employer's premises (or the premises where the information is held) to copy it. When information is removed from the employer's premises – either because the employer agrees to its removal or the power to remove records is exercised – compliance officers must act in accordance with HMRC rules regarding data security. Records should generally be returned to employers within seven days of removal.

3.6.2 Material taken from meetings with employers (such as notes and original or copy business records) are to be treated in the same way as HMRC handles customer's files, that is, they are to be kept safe at all times as set out in HMRC guidance until returned to the employer. Officers are expected to give a receipt to the employer or their adviser or agent. Officers should ensure that the receipt lists the specific records (or copy records) being collected and removed. A copy of the receipt must be made and kept with the investigation papers.

3.6.3 Electronic records must only be stored on an encrypted laptop. HMRC can only accept electronic data in certain formats and the employer must agree to write or download the information to a disk or data stick. The disk or data stick must not be removed from the employer's premises; the data must be copied onto the secure area of the compliance officer's encrypted laptop in situ. The laptop must be transported in accordance with HMRC guidance.

### **3.7 Transitional arrangements**

3.7.1 Section 9 of the Employment Act 2009, which replaces enforcement and penalty notices with a single notice of underpayment, came into force on 6 April 2009.

3.7.2 Where HMRC have served an enforcement notice before 6 April 2009, the provisions (in sections 19 to 22F of the 1998 Act) that were in force at the time of service of the enforcement notice will continue to apply to that case. This is so even if the enforcement notice served before 6 April 2009 was received by the employer later than that date. These provisions will govern an employer's right to appeal, any further service of a penalty notice should the employer fail to comply with the enforcement notice and any further enforcement action by compliance officers on behalf of underpaid workers.

3.7.3 HMRC enforcement action (that is, service of an enforcement notice) commenced before 6 April 2009 will not include any requirement for the employer to repay arrears based on the new methodology introduced by section 8 of the Employment Act 2008. However, in these circumstances, this does not preclude the right of a worker to take individual action in the courts, or to otherwise pursue his employer, for any additional amount that he would have received if the new methodology had been applied.

3.7.4 The new enforcement regime will apply in all other cases.

## SECTION 4 POLICY ON HMRC CRIMINAL ENFORCEMENT

### 4.1 Background

4.1.1 The 1998 Act makes provision for criminal proceedings to be brought for offences under section 31 of that Act. The offences cover a range of possible non-compliant behaviour, summarised below:

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

4.1.2 The objective of these criminal offences is to support the underlying mechanisms for enforcement of the NMW by ensuring that payment of the NMW and the role of the compliance officer are taken seriously. Employers who deliberately flout the law are liable to criminal prosecution and as such may be liable to a fine.

4.1.3 The Government recognises that the civil powers contained in the 1998 Act (as amended by the Employment Act 2008) will be sufficient in the great majority of cases. However, for the small minority of employers that are persistently non-compliant and refuse to cooperate with compliance officers, criminal investigation is appropriate.

4.1.4 Criminal investigations will be conducted by officers within HMRC Criminal Investigations Directorate who are trained to carry out investigations to a criminal standard. The Revenue & Customs Prosecutions Office (RCPO) are solely responsible for deciding whether there is sufficient evidence to provide a realistic prospect of conviction and whether a prosecution is in the public interest.

### 4.2 General criteria for prosecution cases

4.2.1 HMRC and BERR will operate a policy of selective and exemplary criminal investigations to bolster our overall enforcement strategy. 'Selective' means that HMRC will investigate only the most serious cases; 'exemplary'

means that HMRC will investigate cases across the whole range of available offences and in a range of trade sectors. The intended effect is to encourage and improve voluntary compliance with the provisions of NMW legislation across the business community as a whole.

4.2.2 HMRC will also investigate NMW offences in the context of the whole pattern of criminality where an employer's conduct also involves, for example, a suspected tax fraud.

4.2.3 Criminal investigations by HMRC and prosecutions by RCPO will not necessarily result in NMW arrears being paid to workers as this is not the objective of such proceedings. Further enforcement action may, therefore, still be required to ensure that workers are repaid their arrears.

4.2.4 There is a balance to be struck between effectiveness and value for money in enforcement. The focus of HMRC investigators must therefore be on cases where prosecution will do most to promote compliance with the law by deterring employers who deliberately disregard the 1998 Act. In a case of failure to pay, the size of the alleged arrears will not, of itself, be the determining factor in the decision to start or continue with a criminal investigation. However, the more extensive and substantial the alleged arrears, the more likely it is that HMRC will wish to investigate with a view to prosecution by RCPO.

4.2.5 BERR and HMRC will keep this approach under close review and it may be adjusted both in the light of experience with the approach and also in line with other Government initiatives. It is possible, for example, that there may be linkages between the approach on criminal investigations and targeted enforcement in specific trade sectors.

### **4.3 Likely offences**

#### *Employer obstruction*

4.3.1 Criminal sanctions are needed to tackle employers who refuse to allow compliance officers access to business records and will not respond to other enquiries about NMW compliance. HMRC may be able to tackle obstruction in such circumstances through a notice of underpayment. A notice may be served if a compliance officer '... is of the opinion...' that a worker has not been paid the NMW for any pay reference period [section 19(1)]. In many cases, HMRC will have sufficient information to form an opinion, but there will be instances where HMRC hold no evidence to calculate the level of arrears or even establish the identity of workers who have been underpaid. In such cases a criminal investigation followed by a prosecution determined by RCPO under section 31(5)(a) or (b) would send clear signals to employers that they must cooperate with NMW compliance officers.

### *Repeated failures*

4.3.2 The Employment Act 2008 changes the enforcement regime for the NMW to provide for a penalty to be imposed on employers who do not comply with the requirement to pay their workers the NMW. However, an additional sanction is needed to deter the determinedly non-compliant.

4.3.3 The first two closed case reviews carried out by HMRC indicate that around 15 per cent of employers are again failing to comply with NMW legislation in some respect within a year of a previous investigation<sup>3</sup>.

4.3.4 Part of the job of NMW compliance officers is to make sure that employers are aware of their obligations and understand how NMW legislation applies to them. An employer who repeatedly fails to either pay the NMW or keep sufficient records for NMW purposes could be prosecuted by RCPO under section 31(1) or (2) of the 1998 Act. Such a case would send a clear message to other would-be recidivist employers that non-payment of NMW or a failure to keep records is not a risk-free occupation.

### *Failure to keep or preserve NMW records and falsifying records*

4.3.5 The principal obstacle facing compliance officers is a lack of NMW records and sometimes employers present records to the compliance officer that they know to be false. HMRC regard both the failure to keep or preserve records and the falsification of records as serious offences. When considering whether to take action for failing to keep or preserve records or the falsification of records, HMRC will look at the surrounding circumstances and are likely to prosecute where the offence is combined with other offences, repeated or deliberate.

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<sup>3</sup> Fewer than two per cent of cases closed were revisited during the following year to assess continued compliance. The cases for the reviews were not randomly selected; more than a third were chosen by compliance teams as being 'at risk' cases.

#### **4.4 General criteria for selection of cases**

4.4.1 Each case is selected for prosecution on its own merits. However, we would expect to see common features in each case selected for criminal investigation:

- In cases under section 31(1), the number of workers involved would normally exceed five and there would normally be at least one previous instance of a failure to pay by the same employer which required action in either the civil courts or the employment tribunal to enforce payment.
- Generally cases under section 31(2) to (4) will not be the subject of a criminal investigation except in the context of another offence under section 31.
- In cases under section 31(5)(a) and (b) there would normally have been two or more occasions on which a refusal has taken place.

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