

NATIONAL MINIMUM WAGE

Policy on HM Revenue &
Customs enforcement ,
prosecutions and naming
employers who flout national
minimum wage law

JUNE 2012

NATIONAL MINIMUM WAGE (NMW): POLICY ON HM REVENUE & CUSTOMS ENFORCEMENT, PROSECUTIONS AND NAMING EMPLOYERS WHO FLOUT NMW LAW

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SECTION 1

INTRODUCTION

1.1 The Government is committed to increasing support for lower and middle income earners and improving the rewards to work. We support the National Minimum Wage (NMW) because of the protection it gives low income workers and the incentives to work it provides. The NMW helps business by ensuring that competition is based on the quality of goods and services provided and not on low prices based on low rates of pay. The Department for Business, Innovation and Skills (BIS) is responsible for NMW policy, including the policy on compliance and enforcement. HM Revenue and Customs (HMRC) enforce the NMW on behalf of BIS.

1.2 In line with the recommendations of the Low Pay Commission, on 1 October 2010 BIS announced a scheme to name employers who flout NMW law. The scheme came into effect on 1 January 2011. This document sets out how the scheme will operate and the criteria for naming employers.

1.3 This document also sets out the how the Government operates the civil and criminal enforcement of the NMW in the light of the changes introduced by the Employment Act 2008, which came into effect on 6 April 2009.

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 National Minimum Wage (“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 underpaid¹. 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. Agricultural minimum wage rates are currently set by the Agricultural Wages Board.

¹ 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.

2.1.6 This policy statement only deals with enforcement of the NMW by HMRC². The policy contained in this document will be kept under close review by BIS and HMRC to ensure that it reflects the Government's priorities for compliance and enforcement. The Crown Prosecution Service (CPS) will be consulted on any changes to the policy on prosecuting NMW offences.

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 profiling and includes targeted enforcement of key low paying sectors.

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 normally carry out an investigation of the employer's business³. 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 workers⁴.

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

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

³ BIS reserve the right to prioritise enforcement work carried out by HMRC on its behalf.

⁴ HMRC are piloting new an innovative ways of working with a view to freeing up compliance officers' time to focus on the most 'at risk' employers. The level of intervention will be tailored to the perceived risk of non-compliance.

2.2.4 On conclusion of an investigation, the compliance officer may issue a Notice of Underpayment if appropriate (see paragraph 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 amended the National Minimum Wage Act 1998 to replace enforcement and penalty notices with a single Notice of Underpayment. These changes came into effect on 6 April 2009. 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 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 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, for example, arrears incurred when the worker was aged 16-17 would be calculated by reference to the current 16-17 rate, not by reference to the current adult rate (even if the worker is now 21 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 [section 19A(2)]. Where the notice includes a requirement to pay a penalty, the penalty may be suspended where criminal proceedings are envisaged or commenced (see paragraph 3.5 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% 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 came into force [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. The 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 [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 Enforcement on behalf of seafarers

3.6.1 Section 1 of the 1998 Act applies the NMW to a person who “is working, or ordinarily works” in the UK. Section 40 provides that the NMW applies to seafarers working on a UK flagged ship, unless either their employment is wholly outside the UK or they are not ordinarily resident in the UK.

3.6.2 The United Nations Convention on the Law of the Sea generally precludes the Government from applying UK law to foreign flagged vessels in UK territorial waters, on the grounds that this would interfere with their right of innocent passage. In addition, the Government abides by the international custom and practice of not interfering in the “internal economy” of foreign flagged vessels whilst in UK internal waters and ports.

3.6.3 Case law has established that there are two permissible approaches to the application of domestic legislation to seafarers:

- an *in rem* approach where legislation applies to the vessel, which can only be applied to UK or EU/EEA flagged vessels; and

- an *in personam* approach where legislation applies to the seafarer.

3.6.4 In the second approach, a seafarer who can establish a sufficient link to the UK is able to bring a claim in respect of UK employment law (which includes the NMW) through an employment tribunal, regardless of the flag of the ship on which they are employed. Such an approach applies a link between the seafarer and the UK which is not connected to the vessel entering UK territorial waters. As such, this approach can be applied to seafarers without offending international law. It is not dependent on the nationality of the seafarer, nor where the ship is flagged.

3.6.5 The Government considers that the application of the NMW to seafarers should be made through an *in personam* approach. To ensure that the same approach is applied by compliance officers as would be applied by an employment tribunal, a compliance officer should enforce the NMW on behalf of a seafarer who ordinarily works in the UK.

3.6.6 In order to determine whether a seafarer “ordinarily works” in the UK, a compliance officer should consider which country the seafarer’s employment base is in, as recent case law supports the view that this is likely to be the place where the seafarer is to be treated as ordinarily working under the terms of his contract. In determining this, a compliance officer should take into account a number of factors, including:

- where the seafarer’s tour of duty begins and ends;
- where the seafarer is subject to income tax and National Insurance contributions.

3.6.7 Factors which are likely not to be relevant are the nationality of the seafarer and where the ship is registered.

3.7 Powers of compliance officers

3.7.1 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.

3.7.2 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.

3.7.3 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.

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 commit an offence under the 1998 Act 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 Crown

Prosecution Service (“CPS”) 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 BIS 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 CPS 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 CPS.

4.2.5 BIS 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 CPS under section 31(5)(a) or (b) would send clear signals to employers that they must co-operate 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 HMRC's closed case reviews, carried out every two years, have demonstrated that around 15% of employers previously investigated by HMRC are still not compliant with the 1998 Act.

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 the CPS 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.

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.

SECTION 5 POLICY ON NAMING EMPLOYERS WHO FLOUT NATIONAL MINIMUM WAGE LAW

5.1 Background

5.1.1 In October 2010 the Government announced a new scheme to name employers who flout NMW law. The naming scheme came into effect on 1 January 2011.

5.1.2 The objective of the naming scheme is to raise awareness of NMW enforcement and deter employers who would otherwise be tempted to flout NMW law. The Government recognises that some employers are more likely to respond to the social and economic sanctions that may flow from details of their payment practices being made public, than from financial deterrents⁵. The naming scheme will ensure that the public and businesses, including workers, prospective workers, and law abiding employers, have access to information which will enable them to make informed choices about who they work for (in the case of workers) and who they do business with (in the case of employers). The Government envisages that raising awareness of NMW enforcement in this way could also encourage more workers who have been underpaid to come forward.

5.1.3 The Government is clear that the naming scheme is not an alternative to prosecutions. The criteria for naming are not the same as the criteria for prosecutions (see paragraphs 4.2-4.4 above). Employers will not be named under the scheme whilst prosecution proceedings are in hand or are being considered. Where a potential prosecution case is rejected by the CPS, the employer will still be named if he meets the criteria for naming. Those who are prosecuted will also be named.

⁵ Such as the automatic penalty which was brought in by amendments to the National Minimum Wage Act which came into effect on 6 April 2009

5.1.4 On the conclusion of their investigation, unless there is a referral to the CPS, HMRC will refer cases to BIS which meet the published criteria for naming (see paragraph 5.2) where a Notice of Underpayment has been issued. The employer will be given 28 days to make representations to BIS against being named (see paragraph 5.5) and, having considered any representations made by the employer, BIS will make the final decision as to whether the employer should be named or not. Where there is a successful prosecution HMRC will issue a press notice immediately without referring the case to BIS under the naming scheme or seeking representations from the employer.

5.2 General criteria for naming cases

5.2.1 HMRC will refer cases to BIS under the naming scheme where they consider that **one or more** of the following criteria is met⁶:

- i. there is evidence that the employer knowingly or deliberately failed to comply with their NMW obligations
- ii. there is evidence that the employer has previously received advice from HMRC about the steps they need to take to ensure future compliance with national minimum wage and has not taken those steps
- iii. there is evidence that the employer has failed to take adequate steps to keep or preserve NMW records
- iv. there is evidence that the employer has delayed or obstructed a NMW compliance officer in the performance of their duties
- v. there is evidence that the employer has refused or neglected to answer questions put to them by a NMW compliance officer

⁶ HMRC will only refer cases to BIS under the naming scheme where they have issued a Notice of Underpayment to the employer requiring them to repay arrears of the NMW to a worker(s) or former worker(s). Employers will not be named under the scheme where they have appealed the Notice of Underpayment and their appeal has not been withdrawn or dismissed. Where an employer's appeal against a Notice of Underpayment is partially accepted, but the criteria (including the financial criteria) is still met, the employer may still be named.

- vi. there is evidence that the employer has refused or neglected to provide information or produce documents to a NMW compliance officer
- vii. there is evidence that the employer refused or neglected to pay arrears of the NMW to workers, following HMRC intervention, which has resulted in HMRC taking action against the employer to ensure payment of arrears to workers

5.2.2 HMRC will not refer cases to BIS unless the total arrears owed to workers are at least £2,000 and the average arrears per worker are at least £500. This financial criterion will be kept under review to ensure that the naming scheme continues to meet the policy objectives outlined in paragraph 5.1.2.

5.2.3 Employers will be given the opportunity to make representations against being named under the scheme (see paragraph 5.5). BIS will take into account such representations when deciding whether to name the employer or not.

5.3 Naming Examples

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

Knowingly or deliberately failed to comply with their NMW obligations:

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

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

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

Failed to take adequate steps to keep or preserve NMW records:

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

Delayed or obstructed an NMW compliance officer in the performance of their duties:

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

Refused or neglected to answer questions put to them by a NMW compliance officer:

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

Refused or neglected to provide information or produce documents to a NMW compliance officer:

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

Neglected to pay arrears of NMW to workers following HMRC intervention:

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

5.4 Process for referring cases to BIS

5.4.1 At the conclusion of an investigation, if HMRC are satisfied that there is sufficient evidence that an employer meets one of more of the published criteria (see paragraph 5.2) they will refer the case to BIS setting out the evidence. If BIS is satisfied that the employer does not meet any of the published criteria no further action will be taken⁷ unless the employer fails to comply with the Notice of Underpayment (see criterion vii).

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

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

⁷ HMRC reserve the right to revisit their decision to refer a case to BIS under the naming scheme once they have closed a case if new information comes to light which suggests that the employer meets one or more of the published criteria.

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

5.5 Representations

5.5.1 Before an employer is named they will be given the opportunity to make representations to BIS.

5.5.2 BIS will not name an employer where they are persuaded that there is a real risk of personal harm to an individual or their family or where BIS consider that factors drawn to their attention by the employer or others outweigh the public interest in naming the employer. BIS would not, for example, name an employer if this risked the identity of someone in the witness protection programme, or if national security risks were associated with naming the employer. In all cases where an employer makes representations to BIS they will need to provide evidence in support of their case for not being named.

5.5.3 Where the representations relate to HMRC's handling of the case BIS will consider whether the representations amount to a complaint which needs to be considered by HMRC under their procedure for handling complaints. This, in itself, does not amount to grounds for not naming the employer.

5.5.4 If, on receipt of representations from an employer, BIS are satisfied that the employer should not be named under the naming scheme no further action with regard to naming will be taken⁸ and the employer will be notified accordingly. The employer is still, however, liable to repay any outstanding arrears to workers and a penalty to the Secretary of State as applicable.

⁸ Unless the employer is successfully prosecuted for an offence under the 1998 Act.

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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URN 12/896