

Naming, but is it really shaming? New Government guidance on naming employers who flout the [National Minimum Wage](#) laws in the UK

Following the recommendations of the [Low Pay Commission](#), on 1 October last year the [Department for Business, Innovation and Skills](#) (BIS) trumpeted a scheme to name employers who flout National Minimum Wage (NMW) law, and BIS has recently published that policy which came into effect on 1 January 2011.

The objective of the “*naming scheme*” is ostensibly to raise awareness of NMW enforcement and deter employers who may otherwise be tempted to flout NMW law. Although there are many holes in the scheme (some of which are referred to below), solicitors should still be aware of the possible consequences if one of their clients were to flout the NMW laws.

Some practitioners may be surprised that BIS is **not** going to maintain an actual public register of employers who have failed to pay the NMW, or even maintain a register of those companies that have been named. Instead employers will be named in a press notice.

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. Furthermore, employers will not be named whilst prosecution proceedings are in hand, or are being considered; as such some may view the new policy as being the lightest level of light touch supervision.

As solicitors may be instructed to make representations to BIS on behalf of their clients they should consider the “*illustrative*”, non exhaustive list, of the circumstances in which BIS will name an employer. These include situations where the employer:

- Knowingly or deliberately failed to comply with their NMW obligations, and,
- Refused or neglected to answer questions put to them by a NMW [compliance officer](#), or to provide information or produce documents.

Civil and [Criminal enforcement](#) of the NMW

The BIS scheme includes guidance on how the Government intends to operate the civil and criminal enforcement of the NMW. The Secretary of State has appointed [HMRC](#) to act as enforcement officers for the purposes of the NMW, and 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.

Enforcement procedure

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. How risk profiles are arrived at is not made clear in the guidance.

The NMW Act 1998 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 as summarised below:

Section of NMW	Offence
31(1)	Employer refuses or wilfully neglects to pay NMW. The guidance indicates that 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.
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.

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 guidance indicates that 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**.

A copy of the BIS policy can be found at:

<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/n/11-529-national-minimum-wage-enforcement-prosecutions>

c. Philip Henson, partner in Bargate Murray

www.bargatemurray.com