



DEBATE PACK

Number 2016/0074, 22 March 2016

National minimum wage in the care sector

Doug Pyper

Summary

Paul Blomfield MP secured a Westminster Hall debate at **14:30 on Wednesday 23 March 2016**, on:

'Government policy on enforcement of the national minimum wage in the care sector'.

This paper provides some background material for the debate.

The Library has also published a briefing on social care funding: [Social care: recent funding announcements and the state of the care home market \(England\)](#)

Contents

1.	The issue for debate	2
2.	Relevant law	7
2.1	Enforcement	7
3.	Recent Parliamentary Questions	10

The House of Commons Library prepares a briefing in hard copy and/or online for most non-legislative debates in the Chamber and Westminster Hall other than half-hour debates. Debate Packs are produced quickly after the announcement of parliamentary business. They are intended to provide a summary or overview of the issue being debated and identify relevant briefings and useful documents, including press and parliamentary material. More detailed briefing can be prepared for Members on request to the Library.

1. The issue for debate

Non-compliance with the National Minimum Wage (NMW) among social care providers is a long-standing issue of concern. Most recently, the Low Pay Commission, which advises government on the NMW, noted in its March 2016 [report](#):

we note that some groups remain at greater risk than others of not receiving the NMW. We remain concerned about workers in social care, where reports continue of non-payment of travel time and sleepovers and the introductory rate of the NLW presents significant affordability challenges.¹

In 2013 HMRC, which enforces the NMW, evaluated the level of NMW compliance in the social care sector in the period April 2011 – March 2013. It found:

Over the period 1st April 2011 to 31st March 2013, HMRC have made enquiries into 224 employers in the social care sector.

183 of these enquiries have been completed. HMRC found non-compliance in 88 (48%) of these enquiries identifying £338,835 arrears of pay for 2443 workers. The average arrears of pay for workers was £138.

The total value of penalties charged was £112,786.

The highest value arrears in a single enquiry (£36,026) and the highest value of arrears owed to a single worker (£11,223) were both attributable to errors by the employer related to the operation of the accommodation offset rules and the provision of accommodation to workers.

In 45 (51%) of enquiries where arrears were found the employers owed a total of over £1000 in pay to workers.

In 40 (45%) of enquiries where arrears were found the employers owed pay to 10 or fewer workers.

In 67 (76%) of enquiries where arrears were found the average arrears due to each worker was less than £250 in value.

Forty one care sector employers are currently under investigation. Emerging findings indicate non-compliance in 13 of these enquiries with estimated pay arrears of £80,000 due for over 2000 workers.²

The report identified a number of reasons for non-compliance:

The most common reason for non-compliance related to deductions from workers pay and payments by the worker for items deemed to be a business expenses (i.e. purchased for the employers benefit and use in their business). Such deductions and payments brought workers pay below NMW rates. Other issues identified as causing underpayment of the national minimum wage to workers included:

- (a) In domiciliary care
- unpaid training time;

¹ *Low Pay Commission report Spring 2016*, March 2016, pxxvii

² HMRC, [National Minimum Wage: Compliance in the social care sector](#), November 2013, p.3

- unpaid travelling time between appointments;
- hourly pay rate below NMW rate; and
- incorrect use of apprentice rates.

(b) In residential care

- a failure to pay workers for all working time;
- unpaid training time; • hourly pay rate below NMW rate;
- a lack or awareness of the accommodation offset rules and their effect on NMW pay calculations; and
- incorrect use of apprentice rates.

In the light of these findings and repeatedly voiced concerns from the Low Pay Commission and other stakeholders, the social care sector is a priority area for HMRC's NMW enforcement teams. This means that complaints from workers in the sector are fast-tracked for support. In the Low Pay Commission's 2015 report it recommended that HMRC should hold a portion of its enforcement budget for targeted compliance work, with social care prioritised.³ The 2015 report noted that non-payment of travel time was a major source of NMW non-compliance:

Failure to pay care workers for travel time again featured heavily in stakeholder evidence as a central cause of underpayment of the NMW in this sector. In its evidence the Government (BIS 2014h) said it was aware that non-payment of travel time was a particular issue for domiciliary care workers and that it had updated the official NMW guidance to make it clear when travelling time and rest breaks must be paid. Despite this, we heard from stakeholders that payment for travel time remained sporadic and additional enforcement and guidance was needed.

UNISON told us that failure to pay staff for travel time between appointments was probably the single most important reason for care workers not receiving the NMW. It said that more than half (57.8 per cent) of UNISON homecare workers in England reported that they were not paid for their travel time between visits and that a recent Freedom of Information survey of local authorities revealed that only 10 per cent required that providers must pay travel time when they issued contracts. UNISON said there was a fear that care providers may seek to extend the length of gaps between visits to get round travel time responsibilities.⁴

The March 2016 Low Pay Commission report also discussed reasons for non-compliance, citing, among other things, evidence that the requirement to pay the NMW is often unfunded by local authorities in relation to travel time:

In social care, the United Kingdom Home Care Association (UKHCA) advised that the NMW has evolved into a significant operational issue. There were continuous pressures from local authorities for providers to reduce costs and make efficiencies, while statutory obligations were often unfunded (e.g. payment of travel time). There was also an impact from NMW increases reducing pay differentials.

³ *Low Pay Commission report 2015*, p202

⁴ *Ibid.*, p219

The Registered Nursing Home Association (RNHA) said the independent adult social care sector was 'between a rock and a hard place' over the wages paid to its staff. On the one hand the local authorities, who purchase 60 per cent of all residential care, had not generally increased the amount they pay to care providers over the past five years while the National Minimum Wage has increased each year.

...

In social care, the UK Home Care Association (UKHCA) explained that a high proportion of homecare services (some 70 per cent of the market) were subject to contracts with local authorities, whose budgets were being squeezed. There was a lack of realistic market signals, arising from this dominant purchasing position of local authorities and consequent unrealistically low fees. The UKHCA said that as a result homecare providers could neither offer higher remuneration nor pass on increased costs (such as those arising from the NMW) to their local authority customers. This in turn led to continuous problems with recruitment, retention and staff turnover in the sector.⁵

The Commission's 2015 report had made similar observations:

In our 2014 Report, we concluded that care workers remained at a high, and possibly increasing risk, of non-compliance with the NMW. Evidence provided by HMRC had suggested that the reasons for non-compliance included non-payment for working hours (such as for travel time and time spent training) and deductions which took pay below the NMW (such as for uniforms and accommodation). We had previously estimated that up to 10.6 per cent of care workers may not be being paid the NMW. Government promises to develop tougher measures to deter non-compliance and support compliance had been slow to materialise.

We urged the Government to: build on the work by HMRC and the Equality and Human Rights Commission (which had conducted an investigation in homecare); create better guidance; maintain effective enforcement; and support the use of fee-costing models/ transparency. We also encouraged the Government to take the opportunity of forthcoming statutory guidance on commissioning of care, to include a requirement for local authorities to take into account the actual costs of care.

We have been concerned for many years by the commissioning policies of local authorities that appear not to take proper account of the costs of care on the independent care sector (and its ability to pay at least the NMW). We have made numerous recommendations to address the matter, some accepted by the Government, some simply noted. However, we continue to receive strikingly similar evidence on the issue and the link between commissioning policies and a care worker's risk of not being paid at least the NMW.⁶

In this funding context, care providers are particularly worried about the introduction in April 2016 of a higher rate NMW for those aged 25 and over, known as the 'National Living Wage'. The Low Pay Commission's 2016 report summarised their concerns:

The strongest critical response came from social care, where a number of responses warned that a £7.20 rate would have

⁵ *Low Pay Commission report Spring 2016*, p23, 37

⁶ *Low Pay Commission report 2015*, p216-217

serious implications for a sector already in crisis. Concerns about the affordability of minimum wage increases for domiciliary and residential care are a longstanding complaint made to the LPC – we have regularly received similar evidence in the past and cited it in successive reports – but they were expressed here with renewed intensity. And both parts of the sector – care homes and domiciliary care – had also made representations direct to the Government on their concerns about the NLW and available funding.

The UK Home Care Association (UKHCA), representing domiciliary care providers, reported that fees paid by local authorities averaged £13.66 in September 2014 against a UKHCA recommended minimum of £15.74 (UKHCA, 2015a) – before the NLW takes effect. It thought the £7.20 rate would require a minimum fee of £16.70 an hour. It cited results from a September 2015 survey of its members, where 74 per cent of providers said ‘they would have to look to cease or reduce their supply to councils with which they trade’ (UKHCA, 2015b). It thought the homecare market was set to run at a deficit of £753 million in 2016/17. In an open letter to the Government, UKHCA said that unless the additional costs of the NLW were fully-funded it saw a ‘serious risk of catastrophic failure’ to support people who received state-funded care at home.

In residential care, the level of concern was reflected in the five biggest providers (Four Seasons Health Care, Bupa UK, HC-One, Care UK and Barchester Healthcare) also writing to the Chancellor calling for more funding before the Spending Review. As we highlight in Chapter 8, the real value of local authority fees for care home residents has been falling for a number of years (Laing and Buisson, 2015b). The evidence we received suggested that funding risks to care home providers varied by operator and region, depending on their reliance on local authority fees. Operators in the South East, South West and Eastern England had been helped by a greater proportion of private payers, whereas the industry in other parts of the country, such as the North East, was much more dependent on local authorities alone so was particularly exposed (Laing and Buisson, 2015c and 2015d).

Social care sector representatives were sceptical that policy changes, including the introduction of a council tax precept hypothecated for adult social care announced in the Autumn Statement, would make up the shortfall in funding the NLW: the view was the Council Tax precept simply transferred the burden of care funding rather than resolved it, and would likely be used by local authorities to improve volume of purchases rather than tackling inadequate provider margins. The Association of Directors of Adult Social Services (ADASS, 2015) said the Council Tax precept would raise least money in areas of greatest need which risked heightening inequality; councils in deprived areas will have greatest social care needs yet would raise less than one-third of the income of more affluent areas. Sector representatives also thought there was limited scope for organisational and other change to fund the higher rate: raising productivity would likely mean lower staff ratios and (for homecare) shorter visits, both undesirable in an industry based on quality of relationships.⁷

Given non-compliance in the social care sector with the existing NMW, lack of local authority funding, particularly in relation to travel time, and

⁷ Ibid., pp58-59

the prospect of the new National Living Wage, the Low Pay Commission concluded that the social care sector should continue to be a priority area for NMW enforcement:

In our last report, we highlighted evidence on adult social care that was familiar and concerning in equal measure – as local government finance, poor commissioning, low funding and non-inclusion of payment of travel time drove non-compliance. This year, these concerns have once again been the dominant theme from stakeholders – albeit sharply heightened in view of the forthcoming introduction of the NLW and, in the evidence we have received, not substantially assuaged by extra funding measures announced in the 2015 Spending Review. Providers are increasingly talking about risks of business failure, not just non-compliance.

Analysis of the care home market by Laing and Buisson (2015d), found that despite a predicted rise in demand for care home services, capacity was now falling, driven by squeezed operating margins in areas of the country with high exposure to publicly funded residents as local authorities continued to offer sub-inflation fee uplifts. It described a highly polarised market where at one end those operators with a focus on private pay residents were doing relatively well, while at the opposite end those which catered mainly for government supported residents faced bearing the brunt of council fee freezes (Laing and Buisson, 2015c). And the sector depends heavily on a cross-subsidy from (higher paying) private funders to those whose services are publicly supported, which development of a polarised system may undermine.

...

The LPC urges the Government to maintain social care as a priority sector for minimum wage enforcement. We believe that HMRC should continue to undertake targeted action in the sector, focusing on providers in local authorities combining low hourly rates, and low proportions of private payers. This is particularly important in the context of the introduction of the NLW, where providers are warning of substantial risks, so areas like travel time and pay may come under further pressure. Ultimately though, non-compliance is mainly a symptom of broader funding and commissioning problems. It is important that councils, deciding whether and how to exercise their new freedom to raise Council Tax by two per cent to fund social care, and the relevant parts of the Government including HM Treasury, Department for Communities and Local Government (DCLG) and Department of Health (DH), monitor closely the health of the sector.

More broadly, our earlier proposal that the Government take action to reconcile the different estimates of NMW non-compliance has particular relevance in the care sector where there remains a stark discrepancy between the numbers cited in research and what appears to be HMRC's practical experience when it investigates cases – as set out in the latest case data quoted above. It would be helpful, in order to obtain a better idea of the level of non-compliance occurring in social care, and other sectors, that as well as the strike rate for cases, HMRC published information on the number of workers covered in their investigations and in what proportion of these wages are found to be NMW non-compliant.⁸

⁸ Ibid., pp279-282

2. Relevant law

The *National Minimum Wage Act 1998* is the principal statutory authority on which the NMW is based. The detail is then set out in secondary legislation, recently consolidated into the [National Minimum Wage Regulations 2015 \(SI 2015/621\)](#).

The NMW applies to most workers and sets minimum hourly rates of pay. The rates are provided in regulations made by the Secretary for State with parliamentary approval, based on the recommendations of the Low Pay Commission. The rates are updated every October. The current rates took effect on 1 October 2015. They are:

21 and over	18 to 20	Under	Apprentice
£6.70	£5.30	£3.87	£3.30

On 1 April 2016 a new national minimum wage will be introduced, known as the National Living Wage (NLW). Despite its name the NLW is distinct from the voluntary 'living wage', which is determined by reference to the cost of living, and is currently £8.25 outside London and £9.40 inside London. The NLW is a higher rate NMW which must be paid to workers aged 25 and over, and is due to be set at £7.20.

The method of calculating pay for NMW purposes differs depending on the type of work undertaken. There are four different types: time work; salaried work; output work; and unmeasured work.

One of the main issues in the context of social work is the status of travel time and sleep-in care for the purposes of the NMW. Workers must be paid at least the NMW for travel that is a part of their work and not incidental to it. If the work consists of assignments carried out at different places between which the worker is obliged to travel, the worker must be paid for that travelling time. If a worker is contractually required to be at their place of work even when sleeping the time spent there will count for NMW purposes, irrespective of the level of activity.⁹

The NMW is enforced in two ways: by workers, and by the State.

2.1 Enforcement

Enforcement by workers

The right to be paid the NMW takes effect as part of a worker's contract. A worker paid less than the NMW will be contractually entitled to whichever is the higher of:

- the difference between his pay and the rate he would have been paid had the NMW been complied with; or
- the difference adjusted to take account of any increase in the NMW as at the time the arrears are determined.

⁹ See [Whittlestone v BJP Home Support Ltd](#) [2013] UKEAT 0128_13_1907

Given that the worker is contractually entitled to this, he may enforce his rights by taking a claim to an employment tribunal or to a civil court.¹⁰

Enforcement by the State

The NMW is enforced by Her Majesty's Revenue and Customs (HMRC) on behalf of the Department for Business, Innovation and Skills. The principal means by which HMRC enforces the NMW is through notices of underpayment, although, in more serious cases, the employer may have committed a criminal offence, in which case HMRC may refer the matter to the Crown Prosecution Service. There is also an associated system of naming and shaming employers that breach NMW law, which is designed to deter employers from underpaying workers. Under this system, employers issued with a notice of underpayment are named via a Department of Business, Innovation and Skills (BIS) press notice.

Before describing the operation of notices of underpayment, the below sets out the previous system of "enforcement notices" and explains why the current system of financial penalties was introduced.

Enforcement notices

Until 2009, HMRC enforcement officers issued enforcement notices, under section 19 of the *National Minimum Wage Act 1998*, requiring employers to pay the NMW. Although officers were also empowered to impose financial penalties, they could only do this if an enforcement notice was ignored. This came to be seen as unsatisfactory: employers could easily avoid paying the penalty, therefore it had little deterrent effect. The Low Pay Commission noted this in its 2007 report:

We believe it is essential that employers who underpay the minimum wage are penalised to an appropriate degree. At present, however, the minimum wage legislation has no provision to enable this so long as the employer makes good minimum wage arrears within a prescribed timescale; only those who refuse to pay arrears might have a penalty applied. This in effect means that there is no deterrent to non-compliance....¹¹

The Commission recommended that "as a deterrent to non-compliance, the Government introduce a penalty to apply to any employer found to have underpaid the minimum wage".¹²

In May 2007 the Labour Government, having accepted the Commission's recommendation, sought views on how best to implement a "simpler, more effective penalty".¹³ The consultation document indicated that, at that time, 95% of non-compliant employers identified by HMRC did not pay a penalty.¹⁴ The Government published its consultation response in December 2007,

¹⁰ Enforcing either his common law contractual rights or the right not to suffer unauthorised deduction from wages: see [Part II of the Employment Rights Act 1996](#)

¹¹ LPC, [National Minimum Wage - Low Pay Commission Report 2007](#), March 2007, p235

¹² *ibid.*

¹³ BERR, [National minimum wage and employment agency standards enforcement](#), 16 May 2007, p21

¹⁴ *ibid.*, p16

stating that its preferred approach was to create a penalty, imposed whenever a notice is served, based on the total amount of NMW arrears owed to all workers by the employer.¹⁵

The changes to the penalty regime were implemented by the *Employment Act 2008*, which amended the *National Minimum Wage Act 1998* to replace enforcement notices with notices of underpayment.¹⁶

Notices of underpayment and financial penalties

Sections 19 and 19A of the *National Minimum Wage Act 1998* form the statutory basis for notices of underpayment.

Section 19 deals with the notices as they apply to arrears, providing that where an officer, acting for the purposes the Act, is of the opinion that a worker is entitled to additional remuneration, the officer may “serve a notice requiring the employer to pay to the worker, within the 28-day period, the sum due to the worker”.¹⁷

Section 19A deals with the financial penalty that attaches to the notice of underpayment. Section 19A(1) provides:

A notice of underpayment must, subject to this section, require the employer to pay a financial penalty specified in the notice to the Secretary of State within the 28-day period.

When notices of underpayment were originally introduced the financial penalty was 50% of the amount owed to all workers to which the notice related, subject to a £5,000 limit.¹⁸ The Coalition Government increased this twice. First, via the *National Minimum Wage (Variation of Financial Penalty) Regulations 2014 (SI 2014/547)*, the penalty was increased to 100% of the amount owed to all workers, subject to a limit of £20,000.¹⁹ Second, the *Small Business, Enterprise and Employment Act 2015* amended the £20,000 limit so that it applied on a per worker basis, rather than to all workers.²⁰ Thus, the penalty is currently set at 100% of the total arrears owed to all workers to whom the notice relates, subject to a maximum of £20,000 per worker and a minimum of £100.

Naming and shaming

There is an associated system of naming and shaming employers that breach NMW law, which is designed to deter employers from underpaying workers. Under this system, employers issued with a notice of underpayment are named via a Department of Business, Innovation and Skills press notice. The last such notice is available [here](#).

¹⁵ BERR, [National minimum wage and employment agency standards enforcement: Government response](#), December 2007, p11

¹⁶ For further background, see: [Employment Bill \[HL\] 2007-08](#), Library Research Paper 08/63, 11 July 2008

¹⁷ Section 19(2)

¹⁸ See *Employment Act 2008*, section 9

¹⁹ See *National Minimum Wage (Variation of Financial Penalty) Regulations 2014 (2014/547)*, regulation 2

²⁰ For background on this, see [Small Business, Enterprise and Employment Bill](#), Commons Library Research Paper, 17 July 2014

3. Recent Parliamentary Questions

[Care Homes: Written question - 30413](#)

Asked by Mr Douglas Carswell - Asked on: 09 March 2016

To ask the Secretary of State for Health, whether the Government plans to make funding available to councils for care homes in addition to the two per cent council tax precept to cover costs arising from the increase in the national minimum wage.

Answered by: Alistair Burt - Answered on: 14 March 2016

Local authorities are responsible for commissioning adult social care services. Fee levels are agreed by local authorities and social care providers, reflecting local conditions. In setting fee levels, local authorities are obliged to consider the sustainability of their local social care market.

At the Spending Review, the Government made up to £3.5 billion extra available by 2019/20 to local authorities for adult social care through the social care precept and Better Care Fund. This will help give councils more flexibility to meet local priorities as they see fit.

[Social Services: Written question - 12194](#)

Asked by Mr Jamie Reed - Asked on: 16 October 2015

To ask the Secretary of State for Health, what steps he is taking to improve working conditions for employees in the social care sector.

Answered by: Alistair Burt - Answered on: 26 October 2015

The Government has taken a number of measures to improve working conditions for employees in the social care sector.

The Government has taken action where social care providers have not previously paid the National Minimum Wage, to ensure staff receive the money owed to them and are paid fairly in future. The Government will introduce a National Living Wage from April 2016 to ensure care workers are better paid for the vital work they do. Guidance from Her Majesty's Revenue and Customs has been updated to make it clear when staff must be paid for travelling time and rest breaks.

The Department continues to work closely with the social care sector to improve skills and is investing funding for training and developing the adult social care workforce.

[Minimum Wage: Written question - 8830](#)

Asked by Ian Austin - Asked on: 04 September 2015

To ask the Secretary of State for Business, Innovation and Skills, how he plans to respond to the concerns raised by the Low Pay Commission in the Report of March 2015, National Minimum Wage, Cm 9017, regarding problems meeting the existing National Minimum Wage in the social care sector.

Answered by: Nick Boles - Answered on: 14 September 2015

We are working with the social care sector, including care providers from the voluntary sector, to ensure we understand fully how the introduction of the National Living Wage will affect them.

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publically available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcinfo@parliament.uk.

Disclaimer

This information is provided to Members of Parliament in support of their parliamentary duties. It is a general briefing only and should not be relied on as a substitute for specific advice. The House of Commons or the author(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice.

The House of Commons accepts no responsibility for any references or links to, or the content of, information maintained by third parties. This information is provided subject to the [conditions of the Open Parliament Licence](#).