



## Minimum wage enforcement following TUPE transfer: could you pay for others’ mistakes?

By **Raoul Parekh** and **Mark Callaghan** - 31 October 2018

As many readers will be aware, national minimum wage (“NMW”) risk is a special case in the employment law world. Not only can you face a claim for backpay from an individual employee, you can also find yourself being pursued by HMRC for penalties and a requirement to make payments to groups of underpaid employees (even if they have not raised a complaint themselves). So employers must worry not just about how likely an individual employee is to bring a claim, but also whether they will be on the receiving end of enforcement action from a well-resourced Government department in pursuit of a politically attractive target.

Now, the picture has worsened yet further: employers could now be on the hook for penalties incurred by the previous employer of any employees who have transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”). This change was made in a seemingly innocuous, but potentially important, announcement regarding national minimum wage penalties following a transfer under TUPE. HMRC have changed their approach to enforcement action when NMW underpayments were made prior to a TUPE transfer. Previously, enforcement action would be taken against the transferor (i.e. the previous employer). Now, all NMW liabilities, including the full penalty amount, will be enforced against the transferee (i.e. the new employer).

As if that wasn’t enough, HMRC’s penalties can amount to a significant liability; since April 2016, the financial penalty for contravention of NMW legislation was increased to 200% of the total underpayment, subject to a maximum penalty of £20,000 per underpaid worker (although, if the employer complies with the notice of underpayment within 14 days of its service, the financial penalty is reduced by 50%).

Transferees may now wish to pay special attention to any potential NMW issues prior to triggering a TUPE transfer, particularly if the target business is in a low-pay sector such as retail or hospitality. In any event, following HMRC’s announcement, the prudent transferee should insist on a watertight indemnity from a transferor to cover any NMW liability, including penalties and associated costs.

HMRC appear to be taking an increasingly aggressive approach to their NMW enforcement obligations - [earlier this year](#), they published a list of employers who had failed to meet their NMW obligations, including several hospitality and retail household names. Very often, the breaches are inadvertent and relate to technical details of the NMW rules. You can download our guide to NMW issues affecting the hospitality sector (co-authored with [Fourth](#)) from [this](#) webpage.