Industrial Law Journal, 2024.
https://doi.org/10.1093/indlaw/dwae021

A Legal Obligation on UK Employers to Conduct Labour Law Due Diligence: A Substantive Proposal

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Acceptance Date May 31, 2024; Advanced Access publication on July 24, 2024.

ABSTRACT

The use of non-financial reporting and due diligence legislation to force companies to address specific adverse effects of their operations has become an increasingly common tool for policymakers in recent years. To date, international legislative activity has mainly focussed on potential breaches of human rights and environmental obligations but has also included aspects of labour law. This article proposes a new law that adapts the concept of corporate due diligence to the field of labour law. The new law uses a reflexive model of legislation which is referred to as Labour Law Due Diligence. The under-resourced system of labour market enforcement in the UK and workers' reluctance to use litigation to defend their rights means that persistent non-compliance by employers can go unpunished. Employers would be obliged to carry out an annual audit to assess whether they comply with key labour law obligations and make the results public. Non-compliant employers would need to remedy any unlawful practices within a year or face the prospect of enforcement action being taken against them. Through an evaluation of UK legislation which has attempted to force companies to address specific legislative goals through public disclosure of data, the article seeks to address the weaknesses of such legislation by involving stakeholders and introducing robust systems of enforcement.

1. INTRODUCTION

The labour market enforcement regime in the UK is fragmented, under-resourced and frequently overlooks routine denial of workers'

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rights.[1] Low-paid workers can be reluctant to make complaints about non-compliance by their employers, which in turn deprives enforcement bodies of vital information.[2] This article proposes a solution that would oblige employers to assess their organisation's compliance with existing UK labour law on an annual basis and disclose the results. It would also create an enforcement regime—sitting outside the tribunal system—which would offer workers the chance to be compensated for non-compliant behaviour. The proposal takes the concept of due diligence reporting, which has been increasingly prominent in attempts to increase the accountability of companies for certain negative consequences of their commercial operations and applies it to a new context: namely UK labour law.

The first two sections of the article will consider the background and rationale for the new law: it will analyse the effectiveness of international legislation which has introduced corporate due diligence and non-financial reporting in order to draw lessons which can be learned from recent policy efforts in this area. The third section considers why a fresh approach is necessary for the context of labour market enforcement in the UK. The fourth section provides an overview of the new law and the fifth seeks to evaluate the success of the Gender Pay Gap Reporting Regulations 2017 to establish what lessons can be learned from corporate reporting in that area. The sixth section sets out the substantive content of the new law and how it will complement the existing state enforcement regime. It will be referred to below as Labour Law Due Diligence (LLDD)

2. THE CONCEPTUAL CONTEXT: REFLEXIVE REGULATION

LLDD is a form of reflexive or decentred legislation and one of the objectives of the article is to contribute to the debate about the efficacy of this form of regulation. The premise of reflexive regulation is that new forms of regulation are needed to address the failure of the centralised 'command

[1] J. Davies, 'From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry' (2019) 19 *CCJ* 294–310; ACL Davies and L. Rodgers, 'Towards a More Effective Health and Safety Regime for UK Workplaces Post-COVID 19' (2023) 52 *ILJ* 665–95; S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain' (2020) 62 *JIR* 735–57.

[2] Low Pay Commission, *National Minimum Wage: Low Pay Commission Report 2022* (London: Department of Business, Energy and Industrial Strategy, 2023).

and control' legislative model, ie, a prescriptive and uniform rules-based approach which is enforced retrospectively through criminal sanctions or individualised claims when rules are breached.[3] Such legislation is often poorly designed—typically based on a unilateral approach to creating policy by governments which frequently lack the understanding needed to appreciate the causes of the problems that they are trying to rectify. In addition, governments often do not possess the information to identify whether laws are being complied with and enforcement mechanisms are inadequate.[4] Using the language of autopoiesis or systems theory, it has been argued that law is an autonomous sub-system with its own language and processes.[5] Thus hard law does not translate well into the sub-systems that need to interact with it, namely the economy and administration. This failure results in what Teubner has described as a regulatory trilemma: laws are simply ignored by those who are being subjected to regulation, the creation of the law damages the health of the relevant sub-system in some way or the legitimacy of the legal system itself is harmed due to such laws being perceived as ineffective.[6]

In a UK context, Hepple has highlighted the failure of command and control legislation to bring about improvements in organisations' approach to equality and diversity issues.[7] He argues that organisations are less hierarchical than they were when equality legislation was first introduced, they want high-quality workers and seek greater involvement of customers or service users. A different legislative approach is needed which places greater responsibility on organisations to achieve policy objectives but which is adapted to their own context.

Reflexive or decentred legislation recognises that central governments no longer have a monopoly on power, that regulatees have autonomy which can disrupt or neuter the influence of laws on them and that effective legislation should be co-produced, ideally on a localised basis, with the involvement of different actors including organisations outside

[3] J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103–46; G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239–86.

[4] Ibid. Black, 2001.

[5] G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993).

[6] G. Teubner, 'After Privatization: The Many Autonomies of Private Law' (1998) 51 *Current Legal Problems* 406–14.

[7] B. Hepple, 'Agency Enforcement of Workplace Equality' in L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and compliance* (Oxford: Hart, 2012).

government.[8] This approach is characterised by the desire to facilitate, rather than override, private regulation by improving internal procedures.[9] Teubner describes reflexive law as the search for regulated autonomy.[10] It is less concerned with the substance of laws than the achievement of policy objectives by varied means, including enforced self-regulation; co-regulation; third-party oversight; use of benchmarking procedures and equipping customers or competitors to take direct or indirect enforcement action.[11] This reflexive regulation has the potential to 'avoid the rigidity and complexity of the "command and control" approach while at the same time circumventing the inaction of purely self-regulatory approaches'.[12] In the context of labour law, such an approach can be seen when collective agreements are permitted to modify or override the application of statutory rules regulating working time.[13]

The purpose of this article is to make the case for and propose a new law; it is not to consider the advantages and disadvantages of reflexive regulation *per se*. LLDD is a form of reflexive regulation in that it aims to help organisations to effectively self-regulate by obliging them to regularly collect data in order to assess their own compliance with key labour law obligations and by ensuring that this information is publicly available. It is hoped that this process will improve organisational learning by providing directors and executive management with a clear understanding of how much their workforce is paid, whether workers are working in safe conditions and whether any other labour law rights are being breached. It is hoped that the normative pressure that transparency stimulates will prompt organisations to make improve pay and working conditions and provide substantive equality to their workers. The creation of LLDD aims to remedy a situation to a particular problem, namely the lack of effective state enforcement of key aspects of labour law in the UK and the relative failure of individual enforcement to prevent workers' rights from being frequently undermined.

[8] C. Offe, *Contradictions of the Welfare State* (Oxford: Routledge, 2020).
[9] C. Parker and J. Braithwaite, 'Regulation' in M. Tushnet and P. Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford: OUP, 2012).
[10] Teubner above n.4 at [254].
[11] P. Grabosky, 'Using Non-governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance* 527–50.
[12] C. McLaughlin, 'Equal Pay, Litigation and Reflexive Regulation: The Case of the UK Local Authority Sector' (2014) 43 *ILJ* 1–28 at [5].
[13] Working Time Regulations 1998 (WTR), SI 1998/1833, reg 23.

3. THE RATIONALE FOR LLDD (PART ONE): EXISTING DISCLOSURE LEGISLATION

In recent years, there has been a plethora of legal, quasi-legal and voluntary instruments which have to encourage—and in some instances legally mandate—large multinational companies to investigate and report on the impacts of their operations across a range of issues, including human rights, environmental, anti-corruption and aspects of labour law. This reporting process has not been confined to their own operations but has included those of other companies further down their supply chains. The completion of due diligence and the disclosure of its results has been a central component of many global governance and national initiatives.

In particular, addressing the detrimental impact of commercial activity on human rights and providing accessible information for stakeholder use has been an issue of increasing importance for transnational policymakers over the last 50 years. This work came to fruition in 2011 when the UN adopted the Guiding Principles on Business and Human Rights (UNGPs).[14] The UNGPs interpret human rights widely to include elements of labour law. Principle 12 refers to companies respecting 'internationally recognised human rights' including rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.[15] The ILO Declaration refers to five broad areas that ILO member countries are expected to respect and promote: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labour; the effective abolition of child labour; the elimination of discrimination and a safe and healthy work environment.

Articles 17–21 of the UNGPs set out a model of due diligence that companies are encouraged to implement. The model comprises the identification of adverse human rights impacts by each company, arising from its own activities or indirectly through its business relationships with companies in its supply chain. Identification is followed by action to prevent and/or mitigate any identified impacts, track the efficacy of its responses and provide accessible and detailed information to facilitate accountability. The model has been used by other transnational bodies as the basis for their

[14] UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (2012). https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 28 May 2024).

[15] International Labour Organization (ILO), *Declaration on Fundamental Principles and Rights at Work* (1998, amended in 2022). https://www.ilo.org/resource/conference-paper/ilo-1998-declaration-fundamental-principles-and-rights-work-and-its-follow (accessed 30 May 2024).

corporate due diligence guidance, for example, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct[16] and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[17]

The last decade has seen a number of legislative initiatives that have continued this policy agenda. Existing disclosure legislation falls into three categories: (1) legislation which mandates corporate disclosure on modern slavery in supply chains; (2) legislation which mandates disclosure on issues linked to corporate social responsibility more generally, of which broadly defined aspects of labour law form a part; (3) sector-specific legislation in high-risk areas (eg, companies which use natural resources in their manufacturing processes).[18] Table 1 provides an overview of four pieces of legislation from the first two categories. It does not include any examples of legislation in the third category as it is the least relevant to labour lawyers.

Large UK companies are already obliged to report on key issues that relate to labour law, albeit in general terms. Company directors are obliged to act in a way that promotes the best interests of its members as a whole, having regard to, *inter alia*, the interests of the company's employees.[19] Non-financial reporting obligations have been introduced to help shareholders assess whether the directors have discharged this duty. Legal changes have been made that, at least for trade, banking and insurance companies which employ more than 500 employees, largely mirror the provisions of the Non-Financial Reporting Directive (NFRD).[20] For Public Limited Companies (PLCs) employing less than 500 employees, less stringent measures apply. Some UK-based companies with significant activities in the European Union (EU) (including those with a branch or subsidiary in the EU which meets the threshold criteria for turnover) will be subject to the Corporate Sustainability Reporting Directive (CSRD) from 2028. In summary, large UK companies are familiar with the idea that policymakers want them to

[16] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023). www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en (accessed 17 May 2024).

[17] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (2022). www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (accessed 29 May 2024).

[18] ILO, *Mapping and Measuring the Effectiveness of Labour-Related Disclosure Requirements for Global Supply Chains* (2018). www.ilo.org/global/research/publications/working-papers/WCMS_632120/lang--en/index.htm (accessed 13 May 2024).

[19] Companies Act 2006, s 172.

[20] Companies Act 2006, ss 44A–D

Table 1. Examples of Disclosure Legislation by Category

	Legislation	Scope	Overview of Key Provisions	Enforcement	Applicability to Labour Law
Type 1					
Legislation which focuses on eliminating egregious breaches of fundamental labour standards	California Transparency in Supply Chains Act (SB 657) (2012)	Manufacturing and retail companies with annual gross revenue of $100 million or more	Affected companies must publish an annual statement on their websites detailing efforts to eradicate human trafficking and modern slavery in their supply chains	No direct penalties for non-disclosure Companies which uncover forced labour in their supply chains are required to provide assistance to the victims identified	Elimination of forced/ compulsory labour under ILO Declaration on Fundamental Principles and Rights at Work 1998, Convention on Abolition of Forced Labour 1957
	s.54 Modern Slavery Act 2015 (MSA)	Any commercial organisation operating in the UK with an annual turnover of more than £36 million	Affected companies must publish an annual statement on their website (or if no website, provide a copy on request) which details any actions, policies or procedures taken to eradicate modern slavery in its business or in its supply chain. Companies have the option of disclosing that they have not taken any action	No direct penalties for non-disclosure Secretary of State can apply to the High Court for an injunction against any company not complying with s 54	As above

Table 1. Continued

	Legislation	Scope	Overview of Key Provisions	Enforcement	Applicability to Labour Law
Type 2 Legislation requiring corporate non-financial reporting	EU Non-Financial Reporting Directive (2014/95/EU) (NFRD)	All companies incorporated in the EU, listed on an EU exchange, with more than 500 employees and a net annual turnover of at least €40 million	Affected companies must publish a non-financial statement in their annual corporate report or separately This should cover the company's activity that relates to: environmental issues, social and employee matters, respect for human rights, anti-corruption and bribery matters. This includes any company policies on the above, how the company manages any key risks facing the company and use of non-financial KPIs to assess the company's performance	NFRD takes a 'comply or explain' approach, ie, companies not taking action in any of the areas listed are required to explain why National legislation provides for sanctions for failure to report	The EU Commission's guidance to the NFRD states that 'social and employee matters' comprises a diverse set of issues, which includes rights protected by the ILO Declaration, diversity issues including equal treatment, working conditions, trade union relationships and health and safety at work

Table 1. Continued

Legislation	Scope	Overview of Key Provisions	Enforcement	Applicability to Labour Law
EU Corporate Sustainability Reporting Directive (2022/2464/EU) (CSRD) Member states must transpose the Directive by 6 July 2024	The CSRD will apply to all companies incorporated in the EU (apart from micro-enterprises) and non-EU businesses which have significant activities in the EU Implementation will be staggered from 2024 to 2028	Affected companies are obliged to report on 'sustainability matters'. The CSRD builds on the NFRD, most notably by mandating the use of European Sustainability Reporting Standards against which affected companies will be required to report. The intention is to standardise corporate reporting. Sector-specific standards have yet to be finalised	Information reported will be subject to third party verification	The CSRD specifically mentions 'equal treatment and opportunities for all', 'working conditions' and 'respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions' and the ILO Declaration as measures which will be included in the reporting standards

conduct business in a responsible, ethical and sustainable way and obliging them to disclose information is an attempt to hold them to account.

In order to maximise the efficacy of LLDD, its legislative design must take into account criticisms of existing disclosure legislation. The efficacy of the latter can be assessed firstly in terms of its design (including enforcement mechanisms) and secondly in terms of compliance and achievement of corporate behaviour change.[21] Given that most disclosure legislation is relatively new, assessment of the second aspect is more difficult than the first. Corporate responses to these initiatives can only be assessed in general terms; there is currently no literature which assesses their effectiveness specifically in relation to labour law issues.

Criticism of the design and enforcement of disclosure legislation has focussed on the following areas: lack of prescriptive rules as to how companies should report their findings; companies not being obliged to take action as a result of their due diligence processes; variation and weaknesses in how legislation is enforced and limited scope.[22] The first significant weakness is that companies are afforded a significant amount of discretion about how to conduct the disclosure process.[23] This has resulted in significant variation in the methodology and standards used, the level of rigour and the timing of disclosure. This inconsistency means that it is impossible to compare levels of compliance between companies in the same sector. The NFRD, for example, does not mandate the use of a single reporting tool (a weakness that the CSRD aims to remedy). Studies have argued that companies have taken advantage of this discretion by publishing qualitative information rather than quantitative data and focussing on 'good news' to bolster their own image.[24] By contrast, LLDD will prescribe exactly what action or information is required from employers, the format in which it should be presented and the time at which it should be filed.

Secondly, disclosure legislation only mandates reporting rather than creating an obligation to complete due diligence or take action in response.[25]

[21] Above n.18.
[22] Above n.18.
[23] Above n.18; S. Marshall, I. Landau, H. Shamir, T. Barkay, J. Fudge and A. van Heerden, *A Mandatory Human Rights Due Diligence: Risks and Opportunities for Workers and Unions* (2023). https://media.business-humanrights.org/media/documents/TraffLabReport_March23.pdf (accessed 28 May 2024).
[24] C. Deegan and B. Gordon, 'A Study of the Environmental Disclosure Practices of Australian Corporations' (1996) 26 *Accounting and Business Research* 187–99.
[25] Marshall, above n.23.

There is evidence that a mandatory disclosure process can lead to concrete action. Analysis of listed companies in China, both before and after the introduction of mandatory non-financial reporting in 2008, concludes that firms which made disclosures also changed their behaviour compared to non-disclosing firms, eg, they reduced their levels of wastewater, their sulfur dioxide emissions and had fewer workplace fatalities.[26] But generally, there remains little evidence of companies making changes to their commercial practices as a result of disclosure legislation: 'there is very limited evidence to suggest that the legislation has been effective in terms of changing the behaviour of firms or suppliers, or driving tangible improvements in labour standards in global supply chains'.[27]

Lack of transparency about which companies are subject to legislation and weak enforcement mechanisms has resulted in low levels of compliance. For example, an independent review of the Modern Slavery Act (MSA) 2015 reported that over a third of eligible companies failed to publish a modern slavery statement in 2018.[28] It is a similar story in California where only 31% of companies identified as having to comply with the Transparency in Supply Chains Act had published fully compliant statements.[29]

In terms of the companies targeted by disclosure legislation, to date, it has generally targeted large private-sector companies. (The CSRD is an exception as smaller companies will be obliged to report.) In the context of improving supply chain transparency, this approach is understandable as larger companies tend to make greater use of supply chains. However, it does not translate well to a labour law context where UK employment protection rights are accessible to eligible workers regardless of employer size and sector. Therefore the obligation to conduct LLDD will apply to all organisations who employ people.

It can also be argued that the above disclosure initiatives are too wide in terms of their scope. The labour law element is only one part of a broad set of

[26] Y.-C. Chen, M. Hung and Y. Wang, 'The Effect of Mandatory CSR Disclosure on Firm Profitability and Social Externalities: Evidence from China' (2018) 65 *Journal of Accounting and Economics* 169–90.

[27] Above n.18 at [18].

[28] F. Field, M. Miller and E. Butler-Sloss, *Independent Review of the Modern Slavery Act: Second Interim Report* (2019). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/796500/FINAL_Independent_MSA_Review_Interim_Report_2_-_TISC.pdf (accessed 13 May 2024).

[29] Know The Chain, *Five Years of the California Transparency in Supply Chains Act* (2015). https://knowthechain.org/wp-content/uploads/KnowTheChain_InsightsBrief_093015.pdf (accessed 13 May 2024).

issues that companies are obliged to investigate. One objective of many of these initiatives is to force companies to consider factors external to the company (eg, the impact of its operations on the environment). Companies might focus their efforts in areas where labour law breaches are more egregious and where reputational damage would be severe if publicised, eg, the use of forced labour in their supply chains.[30] In addition, the scope of the labour law element in the UNGPs and the NFRD is drafted in very general terms (eg, rights in the ILO Declaration) or targeted at specific egregious abuses (eg, child labour, human trafficking and forced labour). By contrast, LLDD would focus on protecting a specific set of rights which, as Section 3 illustrates, are those which UK workers are most likely to be denied. It would force UK employers to consider whether the rights and working conditions of their own workers are being respected.

This section of the article has argued that the increasing number of due diligence and non-financial reporting laws—at national and transnational levels—have helped to inculcate a sense that large companies should attempt to minimise the negative effects of their operations on the environment and on people (both their own workers and workers not directly employed by them). Arguably the relative failure of the legislation to prompt corporate behaviour change to date is primarily due to the shortcomings in its design and weak enforcement regimes. It should be possible for the due diligence concept to be effectively applied to labour law provided that the legislation addresses the critique set out above. Firstly, it must include a substantive obligation on companies to act in response to the findings of their due diligence process (rather than simply make disclosures). Secondly, a single method of reporting must be used to create consistency and comparability of responses. Thirdly, it must have a wider scope than current legislation: SMEs and public sector organisations should be required to complete LLDD as well as multinational companies. Finally, there must be genuine accountability: effective enforcement mechanisms must be put in place to ensure compliance with legislative obligations.

4. THE RATIONALE FOR LLDD (PART TWO): THE UK CONTEXT

The previous section of the article argued that whilst national and international initiatives have forced companies to consider the adverse impacts

[30] I. Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 *Melbourne Journal of International Law* 221–47 at [238].

of their operations in terms of human rights and on the environment, this has not yet translated into tangible corporate action to address these issues. However, LLDD has the potential to be effective if the lessons from previous initiatives are learned. This section will focus on the UK labour market to provide a rationale for the need to improve the protection of workers' rights under the legislation. The strategic focus of enforcement efforts in recent years has been on attempts to eradicate forced labour and human trafficking. Ensuring compliance with more mainstream labour law rights has arguably been overlooked in recent years.[31]

LLDD is needed to address persistent non-compliance. The issue of low pay will be considered first. Of jobs covered by the UK minimum wage (ie, paid up to 5p per hour more than the minimum wage), 41% of 21- to 22-year-olds, 36% of 23- to 24-year-olds and 32% of employees aged 25 and over were paid less than the minimum wage.[32] The latter figure means that nearly 400,000 employees from the standard minimum wage rate were paid less than they were entitled to. This figure rises to just over half a million employees in total if youth rates are included. Widespread labour shortages in the UK labour market should result in a reduction in the number of workers who are paid less than the minimum wage. However, rates of underpayment as a percentage of workers covered by the minimum wage have remained stable. Almost one in five low-paid employees are not being paid at the legally set rate.[33]

It is not just underpayment of the minimum wage that is a cause for concern. Analysis of a nationally representative survey found that 900,000 employees claim to have not received paid holiday and 1.8 million claims that they did not receive an itemised pay statement.[34] All workers have the right to 5.6 weeks paid holiday per year[35] and the right to an itemised pay statement at the point at which wages are paid.[36]

Workers in the UK who should be protected under equality law are vulnerable to being denied employment rights, including being subjected to discrimination. Jobs done by women are more likely to be low paid than those

[31] Mustchin and Martinez-Lucio, above n.1 at [739].
[32] Low Pay Commission, *Compliance and Enforcement of the National Minimum Wage* (2023). https://assets.publishing.service.gov.uk/media/65004e0657278000142519c1/NC_report_2023_final.pdf (accessed 11 May 2024).
[33] Above n.2 at [5].
[34] N. Cominetti, R. Costa, N. Datta and F. Odamtten, *Low Pay Britain 2022: Low Pay and Insecurity in the UK Labour Market* (London: Resolution Foundation, 2022).
[35] Regs 13/13A Working Time Regulations 1998.
[36] s.8 Employment Rights Act 1996.

done by men.[37] Workers under 25 and over 65 are much more likely not to receive paid holiday or a wage statement. Workers on 0-hr and on temporary contracts are much more likely not to receive paid holiday.[38] Workers in BAME groups are much more likely to be in insecure work, which makes them more vulnerable to breaches of their rights under labour law. Despite anti-discrimination laws, workers in BAME groups are still being subjected to racism. A survey carried out with BAME workers shortly before the COVID-19 pandemic found that 45% felt that they had been given harder or less popular work tasks, the same percentage felt that they had been unfairly criticised at work, 35% reported that they had been unfairly turned down for a job and 24% that they had been singled out for redundancy.[39]

Jobs in a relatively small number of occupational areas are characterised by low pay: retail, hospitality, cleaning and social care are the primary examples.[40] Workers in these sectors are at greater risk of being denied rights under labour law. Constraints of space prevent a detailed analysis of working practices in all of these areas. However, it is clear from available research on the adult social care sector that non-compliant practices are widespread. Working practices that have been identified as non-legally compliant are lack of clarity around what activities constitute working time (eg, on-call time, travelling between clients, sleep-in shifts); failure to pay overtime, breaks and shift handovers; lack of detail and transparency on pay statements; unlawful deductions from pay for things like DBS checks training and uniforms and widespread use of bogus employment status, ie, people being nominally self-employed whereas their work bears all the characteristics of an employee or worker.[41]

These findings are corroborated by data from qualitative interviews with workers in social care.[42] Three participants worked for live-in introductory agencies which did not employ workers directly. They were technically self-employed even though it was clear that the workers had no influence

[37] Above n.33 at [50].
[38] Above n.34.
[39] Trades Union Congress, *Dying on the Job: Racism and Risk at Work* (2020). www.tuc.org.uk/research-analysis/reports/dying-job-racism-and-risk-work (accessed 5 May 2024)
[40] Above n.33.
[41] Director of Labour Market Enforcement, UK Labour Market Enforcement Strategy 2020/21 (2021). https://assets.publishing.service.gov.uk/media/61b74743d3bf7f0557065424/E02666987_UK_LMES_2020-21_Bookmarked.pdf (accessed 2 May 2024).
[42] S. Hussein and A. Turnpenny, *Worker Voices in the Social Care Sector: Case Studies and Summary Report* (2020). https://assets.publishing.service.gov.uk/media/61b72b-8be90e0704439f43b1/worker-voices-in-care.pdf (accessed 4 May 2024).

over their pay or other conditions. Thus their employers obtained the financial and other benefits of not employing them, whilst the workers were not provided with the financial benefits and employment rights associated with employee status. Other examples of potentially unlawful conduct from the study included deductions made from salary (without the worker being informed) to cover liability insurance which it was not a legal requirement to hold; some workers having to perform introductory training for which they did not get paid and which was not recognised by other agencies (and so would have to be repeated if they joined another agency); workers having to pay for expenses associated with recruitment (such as uniform) and laws around rest breaks/daily rest periods not being respected.

Secondly, state-led enforcement is not effectively tackling non-compliance with labour law rights because the enforcement regime is fragmented, under-resourced and frequently starved of quality information regarding non-compliance.[43] The International Labour Organisation recommends a target of 1 inspector per 10,000 workers for an effective enforcement regime. According to the Trades Union Congress (TUC), which analysed statistics from the various enforcement bodies, the UK would need to recruit around 1,800 more inspectors to reach that target.[44] The current enforcement system is divided between six different enforcement bodies and local authorities (the latter are responsible for health and safety enforcement in some workplaces). This has led to the fragmentation of the compliance effort and a retreat from a proactive inspection model.[45] This is in contrast to most other OECD countries, which have consolidated enforcement powers in one organisation. The creation of a Single Enforcement Body (SEB) has been advocated for both in and outside of government in recent years, although the progress of the relevant legislation has stalled. The creation of a SEB will take time, and assuming that a Labour government takes power following the next general election, priorities in other policy areas may well push this issue down the pecking order. LLDD could fill the void as a stop-gap measure.

[43] Independent Anti-Slavery Commissioner, *Restating the Case for a Single Enforcement Body* (2023). http://www.antislaverycommissioner.co.uk/media/1837/rights-lab-iasc-restating-the-case-for-the-seb-report-2023.pdf (accessed 15 May 2024).

[44] Trades Union Congress, *TUC Action Plan to Reform Labour Market Enforcement* (2021). https://www.tuc.org.uk/sites/default/files/2021-05/Enforce%20report%20draft%20Final%20Version%202020%20110521.pdf (accessed 3 May 2024).

[45] Mustchin and Martinez Lucio, above at n.1.

The third weakness in the enforcement regime is the reluctance of many workers to complain or take legal action against their employer to obtain redress. To take underpayment of the minimum wage as an example, there is a big shortfall between the number of complaints raised by workers compared to the number of underpaid workers in total. In 2021/22, there were 3,310 complaints made to Advisory, Conciliation and Arbitration Service (ACAS) and HM Revenue and Customs (HMRC) (the latter is the government organisation responsible for enforcement of the minimum wage legislation).[46] This is a very small number when compared to the roughly half a million workers who are underpaid (discussed above). In addition, those workers who are most vulnerable to denial of rights under labour law are those least likely to make an Employment Tribunal claim.[47] A report into compliance and enforcement of the minimum wage in the Leicester textile industry found that the low volume of worker complaints was driven by fear about the repercussions of making a complaint in a sector where job mobility was low, a lack of faith in enforcement bodies and a feeling that complaining would not change anything.[48] A report on the experiences of low-paid BAME workers in the health and social care sector also noted a lack of awareness of rights around paid holiday and entitlement to statutory sick pay as well as a lack of clear information on hours worked from pay statements.[49] The focus of governmental efforts to reform the Employment Tribunal system has been driven by a desire to reduce the cost of the system and claimants' access to justice rather than considering effective enforcement from the perspective of employees.[50] It is clear that alternatives to individual enforcement of labour law rights through the Employment

[46] Department of Business and Trade, National Living Wage and National Minimum Wage: Government evidence on enforcement and compliance 2021/22 (2023). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1149863/enforcement_and_compliance_report_2021_2022.pdf (accessed 2 May 2024).

[47] Low Pay Commission, *Compliance and Enforcement of the National Minimum Wage: The Case of the Leicester Textiles Sector* (2022). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093191/2022_LPC_enforcement_report_FINAL.pdf (accessed 5 May 2024).

[48] Ibid.

[49] Equality and Human Rights Commission, Experiences from health and social care: the treatment of lower-paid ethnic minority workers (2022). www.equalityhumanrights.com/sites/default/files/2022/inquiry-experiences-and-treatment-of-lower-paid-ethnic-minority-workers-in-health-social-care-report.pdf (accessed 13 May 2024).

[50] L. Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford: Hart, 2012).

Tribunal system need to be considered. LLDD seeks to do so by pursuing a combined approach of making employers responsible for monitoring their own compliance and seeking to involve state enforcement agencies when the due diligence process flags up a breach in relation to low pay or health and safety.

This section of the article has demonstrated that there is endemic non-compliance across a spectrum of key labour law rights in the UK, much of which is left unpunished by under-resourced enforcement bodies. Many workers are unwilling to complain about breach of labour law rights or to enforce their rights through Employment Tribunals. There is a vacuum in terms of enforcement which needs to be addressed. The next section of the article will present LLDD as part of the solution to this problem.

5. LLDD: AN OVERVIEW

The introduction of LLDD aims to address two problems with the current system: a weak state enforcement regime and worker reluctance to use the Tribunal system to enforce labour rights. LLDD will place responsibility on employers to assess their own compliance on an annual basis and make the results public, including to their own workforce. Non-compliant employers will be given 12 months to remedy their own non-compliance, including payment of back pay to workers. If this is not done, LLDD will provide affected workers with access to a quick and informal enforcement process which sits outside the Employment Tribunal system.

Workers will be able to make a claim for financial loss to a newly created Labour Market Ombudsman. (Alternatively, the SEB could be made responsible for implementing the scheme.) Workers would need to complete a simple claim form and provide supporting evidence. They would be required to submit claims as groups of workers rather than as individuals. They would also be required to obtain advice on the strength of their claim from trade unions or other stakeholder organisations such as ACAS before submitting a claim. In order to keep the enforcement process manageable and relatively quick, the amount claimed would need to be subject to a relatively low limit, eg, no more than £10,000 per worker. As part of the process, employers would be able to submit a defence and would be required to produce their LLDD reports and any plans to remedy non-compliance for the relevant period. If the employer cannot supply this material, the Labour Market Ombudsman would be obliged to fine the employer (in addition to

awarding compensation to workers). As currently applies in discrimination claims, the burden of proof will be reversed, ie, unless employers can supply evidence that refutes the workers' claims in their defence, claims will be accepted. There will be no oral hearing and no requirement for workers to apply separately to have judgments enforced. In order to encourage workers to use the Ombudsman process and discourage employer reprisals, statutory protection against dismissal of workers (or action short of dismissal) who have made a claim would need to be part of the legislation.

By providing workers with any evidence of non-compliant behaviour—in the form of the LLDD report—and requiring workers to submit group claims, workers should be emboldened to use the ombudsman system.

LLDD would also aim to complement the state enforcement regime by remedying the lack of intelligence available to UK enforcement bodies in the current system.[51] The increasing disconnect between enforcement agencies and stakeholder organisations (such as ACAS, trade unions and legal advice centres) has meant that the former has had difficulty accessing good quality information on compliance in individual workplaces with, for example, health and safety rules. LLDD would provide an up-to-date and publicly available source of information (the annual audits completed by employers) that would help inspectors and stakeholder organisations to construct a profile of individual employers over time.

6. COULD LLDD SUCCEED IN IMPROVING EMPLOYER COMPLIANCE WITH LABOUR LAW OBLIGATIONS?

In order to assess the prospects of LLDD creating an environment which would ultimately improve compliance with workers' rights, it is necessary to consider the success of similar legislation in terms of design. In other words, legislation which aims to establish internal organisational processes in order to produce publicly available information which in turn applies normative pressure on companies to make substantive changes on a voluntary basis. Whilst section 54 of the Modern Slavery Act 2015 had similar aims, for the reasons explored above, has not been successful in creating the conditions where UK companies have made changes which have resulted in improved labour standards in their supply chains.

[51] Mustchin and Martinez Lucio, above n.1.

In terms of similar UK legislation, the most obvious parallel is the gender pay gap (GPG) reporting regulations.[52] This legislation obliges companies which employ over 250 employees to compile and publish annual data on their GPG. Affected employers release data in six categories including their mean and median GPGs (based on hourly rate), the same data in relation to bonuses and the proportion of men and women in four pay quartiles.[53] This information must be accompanied by a statement that the data is accurate and which is, in the case of limited companies, signed by a company director and published on the company's website.[54] Non-compliance with the legislation may result in action being taken against the company by the Equality and Human Rights Commission. Whilst compliance with the GPG Regulations remains high, there are questions over the reliability of data disclosed by some companies.[55] In terms of the optional elements of the GPG regulations, less than one-third of companies have produced an accompanying narrative alongside the data and less than one-fifth have set themselves actions to be taken.[56] The lack of clear obligation to take action to address GPGs, no definitive list of companies which come within the scope of the legislation and the absence of an effective mechanism for enforcement are all weaknesses in the GPG reporting framework. The investigatory and enforcement powers of the Commission under the Equality Act 2006 are not well suited to securing enforcement with the GPG Regulations and the latter did not provide for any sanctions for non-compliance. All these weaknesses have been taken into account in the design of LLDD; all companies will be required to report so there is no confusion about which companies are affected. There will be an effective enforcement mechanism and non-compliant organisations will be obliged to submit an action plan.

Whilst there has been a slow downward trend in GPGs in reporting companies, the introduction of the GPG Regulations has not had a seismic effect in reducing those gaps.[57] However, the legislation has prompted companies

[52] Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017/172 (GPG Regulations).
[53] GPG Regulations 2017, reg 2.
[54] GPG Regulations 2017, regs 14 and 15.
[55] Business, Energy and Industrial Strategy Committee, *Gender Pay Gap Reporting* (2017–19, HC 928). https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/928/928.pdf (accessed 6 May 2024).
[56] Ibid.
[57] PWC, Mandatory Gender Pay Gap Reporting: Year 6 2022/2023 (2023). www.pwc.co.uk/human-resource-services/assets/pdfs/year-6-gender-pay-gap-report-2022-2023.pdf (accessed 8 May 2024).

with previously high GPGs to take steps to narrow them.[58] There is also evidence that companies compare their own data with those of competitors. Companies with higher gaps relative to their competitors have taken steps to reduce them.[59] Thus the creation of a transparent reporting process is the greatest strength of the GPG Regulations: it forces employers to disclose data which is publicly available and makes them accountable for any GPGs in their companies. Employers are conscious of the possibility of adverse publicity when large GPGs attract media attention. The critical media coverage of Ryanair's GPG, the 7th highest of the companies which submitted data, is a case in point.[60] This might prompt companies to make substantive changes that will narrow their GPG. Whilst the prospect of adverse publicity alone is unlikely to ensure compliance, it is one advantage of disclosure-based laws like LLDD.

7. FRAMEWORK FOR LLDD: LEGISLATIVE PROPOSALS

The design of LLDD has engaged with the principles of responsive regulation described by Hepple in the context of enforcement of equality law.[61] Firstly, there must be internal scrutiny of the problematic issue by organisations. Legislation has a role to play in stimulating that scrutiny and setting the parameters of the deliberation. Dissemination of best practices between organisations can also be beneficial and benchmarking awards might facilitate this process.[62] Secondly, stakeholders must be 'informed, consulted and engaged in the process of change'.[63] Thirdly, there must be a government body responsible for enforcement if voluntary methods fail.

The proposed law would oblige all employers to conduct LLDD in relation to their own workers. Thus LLDD introduces a substantive obligation to conduct due diligence, as opposed to merely producing a statement as in s.54 Modern Slavery Act 2015. Legislation would be required to introduce

[58] M. Jones and E. Kaya, *Organisational Gender Pay Gaps in the UK: What Happened Post-transparency?* (IZA Discussion Paper No. 15,342, 2022). https://docs.iza.org/dp15342.pdf (accessed 12 May 2024).
[59] Ibid.
[60] J. Blundell, *Wage Responses to Gender Pay Gap Reporting Requirements* (Centre for Economic Performance Discussion Paper no. 1750, 2021). https://cep.lse.ac.uk/pubs/download/dp1750.pdf (accessed 19 May 2024).
[61] Above n.7.
[62] Above n.12.
[63] Above n.7 at [55].

the overarching concept, but employers would be able to make use of records that they are already obliged to keep or information that they are already obliged to provide to workers. This information would be the basis of an annual due diligence report that employers would be obliged to put before a meeting of the board of directors (or, in the case of public sector employers, executive management) which details the company's level of compliance with the nine areas of labour law listed in Table 2. To ensure that the process of producing the report involves employees of the organisation, organisations would be obliged to appoint a committee to collect the data and collate the report. Either a representative from a recognised trade union or an employee representative would need to be part of the committee. In a similar way to the GPG Regulations,[64] all committee members would be obliged to confirm the accuracy of the report in writing. In addition, a director or senior employee would have to confirm the accuracy of the report and sign it before publication.

With the exception of the final item on the list above, employers are already obliged to extend rights to workers in these areas, so there is a strong rationale for arguing that they represent the minimum standards that all workers are entitled to. The proposal does not include rights that extend to employees (which include unfair dismissal protection, the right to payment on redundancy and the right to statutory sick pay). Given that a uniform system of reporting is preferable to ensure transparency and comparability

Table 2. The Nine Areas of Labour Law Rights Included in LLDD

National minimum wage legislation
Working time legislation
Health and safety legislation
Equality legislation (including legislation protecting part-time workers from less favourable treatment)
Protection for whistle blowers
Provision of s 1 Employment Rights Act (ERA) 1996 statement of key terms and conditions, provision of itemised pay statements (s.8 ERA 1996)
Unauthorised deductions from wages (s.13 ERA 1996)
Trade union recognition (for employers with more than 20 workers)
Confirmation that contractual documentation that relates to workers has been reviewed and does not facilitate false self-employment

[64] Above n.52, reg 14.

of employer responses, LLDD will mandate the use of a *pro forma* report that companies will be obliged to use and statutory guidance will be created. The government will be obliged to consult with ACAS, trade unions and employer groups before guidance is finalised.

The annual report would be a publicly available document and employers would be obliged to provide an electronic copy to all its workers. Employers would be obliged to file the report with Companies House at the same time as they file their annual accounts. Employers would also be obliged to make a declaration of compliance with labour law at the same time. (This obligation is similar to the proposed Dutch Child Labour Due Diligence Act 2019, where affected companies must declare that they have exercised due diligence to prevent the use of child labour in the production of goods or services that it supplies.) Non-compliant companies would be required to draft a plan of action. This would highlight the areas of non-compliance and the steps that the organisation will take to address these in the next 12 months. This would include paying their workers any unpaid salary or work-related expenses.

A relevant issue is whether smaller employers (or employers with a small turnover) should be exempt from completing LLDD. The disclosure legislation considered above was limited to large companies. The author's view is that a small employer exemption should not be included. The overall objective of LLDD is to ensure that employers comply with their legal obligations—small employers must not be excluded from completing this exercise. It will not be unduly onerous, and the potential benefits that will accrue to workers—specifically improvements to pay and other working practices—will outweigh the inconvenience to employers. LLDD would be akin to completing yearly accounts, only in relation to labour law compliance.

It is hoped that completion of LLDD will improve the quality of information available to directors/executive management on significant areas of workers' rights and make them directly responsible for compliance with workers' rights under labour law. It might also increase directors' understanding of UK labour law obligations. The rationale is that improved cognisance of non-compliant practices at executive management level and normative pressure will lead to changes being made voluntarily. To improve the quality of information available within organisations, the introduction of LLDD will need to be accompanied by some changes to existing UK law. Further detail on how employers would assess their own compliance with the nine areas of labour law are provided in the sections below.

A. Demonstrating Compliance with National Minimum Wage

Having completed the due diligence process, if there are reasonable grounds to suspect that one or more workers are being paid less than the national minimum wage, LLDD will require the board of directors or executive management to inform HMRC and to make immediate changes to the hourly rate of the affected workers. HMRC will be obliged to investigate the organisation. However, if there are reasonable grounds to suspect that organisations have made changes and are compliant, then no further enforcement action will be taken against them.

UK employers are already obliged to keep records that demonstrate that they comply with minimum wage legislation. The Secretary of State has the power to require employers to keep and preserve records for the purposes of the Act.[65] Employers are required to keep records in relation to workers which are 'sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage'.[66] Employers must keep these records for 6 years.[67] The only guidance that the NMW Regulations provide about the format of the records is that they 'are to be in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document'.[68] They provide no other guidance on what constitutes 'sufficient' records. Government guidance on calculating the minimum wage suggests that employers are not obliged to collate information that it may hold in several different places into one document.[69]

To remedy this deficiency in record keeping and enable an objective judgment to be made in relation to each worker, the LLDD law would amend the NMW Regulations 2015 to oblige an employer to produce one document which fulfils its obligation under reg 59(1). This would be onerous on large employers and therefore, as an alternative, documents for individual workers could be produced on a regional basis, verified through Human Resources and signed off by the HR Director. In order to ensure that there is government oversight, HMRC will also be obliged to carry out spot checks of organisations' minimum wage records to establish that they are accurate.

[65] National Minimum Wage Act 1998, s 9.
[66] National Minimum Wage Regulations 2015, 2015/621, reg 59(1).
[67] Ibid., reg 59(8).
[68] Ibid., reg 59(2).
[69] Department for Business and Trade, *Calculating the Minimum Wage—Employer Guidance* (2021). https://www.gov.uk/guidance/calculating-the-minimum-wage/calculating-the-minimum-wage (accessed 19 May 2024).

To add an additional layer of transparency, the right of workers to request access to their pay records under s.10 NMWA 1998 should be amended to make it easier for workers to utilise. Currently, workers can only request access if they have reasonable grounds for believing that they are being paid less than the minimum wage in relation to any pay reference period.[70] In addition, they need to complete a formal document (called a production notice) in order to exercise the right.[71] The amendment would remove the need for reasonable belief and the requirement to complete a production notice. Workers could simply make a request in writing and employers would be obliged to produce the pay records within a 14-day period (which is the timeframe currently used by s.10). In addition, employers must ensure that there is a designated person (eg, an employee with HR responsibilities) available to answer any queries that workers might have in relation to their pay records and to respond within 48 hr of any query being made. These changes would provide added incentive for employers to maintain legally compliant records.

B. Demonstrating Compliance with Working Time and Health and Safety Legislation

In order to make the due diligence report an effective exercise, organisations must keep accurate records of the time that has been worked by their workers. The record-keeping obligations under the Working Time Regulations 1998 (WTR 1998) are less onerous than those under minimum wage legislation, in that employers are required to keep records in relation to some rules but not others,[72] eg, they are obliged to keep records that demonstrate compliance with the maximum 48-hr week and a record of workers who have opted out of the maximum by written consent. Employers are only obliged to keep these records for 2 years from the date on which they were made.[73] Given the decision by the ECJ in *CCOO v Deutsche Bank*,[74] it is doubtful that the WTR 1998 rules on record keeping are compliant with the revised Working Time Directive.[75] The claimant, a Spanish trade union, sought a

[70] National Minimum Wage Act 1998, s 10(2).
[71] National Minimum wage Act 1998, s 10(5).
[72] Above n.13, reg 9a.
[73] Above n.13, reg 9b.
[74] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] 3 CMLR 32.
[75] Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/09.

declaration from the bank that, under Spanish law, it was obliged to set up a system to record time worked by its employees on a daily basis. Such a system would ensure that employers' obligations to provide workers with daily and weekly rest periods were being upheld, as well as to ensure compliance with the 48-hr maximum working week. A preliminary ruling was sought from the ECJ, which said the national law of Member States needed to oblige the introduction of a time recording system. If it did not, then workers and employers would not be able to verify whether rights under the Directive were being complied with.

UK employers are not currently obliged to keep records relating to daily and weekly rest periods. It seems clear that reg 9 WTR 1998 is not compatible with the revised Working Time Directive. In an ideal world, it would be amended to reflect the ruling in the *Deutsche Bank* case. However, given the agenda of the current government, such a change seems highly unlikely. In fact, the Department for Business and Trade recently published a consultation document which sought responses from businesses and workers on the topic of record keeping under WTR 1998.[76] It seems clear that the government intends to 'remove unnecessary bureaucracy' from business.[77] The consultation document specifically refers to the decision in the *Deutsche Bank* case, and proposes to legislate 'to remove this uncertainty and the potentially high cost of implementing a system of recording working hours by legislating to clarify that businesses do not have to keep a record of daily working hours of their workers'.[78] If employers are not obliged to keep records of working time, it would seem almost impossible for workers to establish that rights under the WTR 1998 have been breached. Even for workers who are supplied with a record of time worked, it is unreasonable to expect them to keep an accurate record against which to check the accuracy of these documents. So in order for the working time element of LLDD to function effectively, a law which mandates organisations to introduce a system which records daily working time will need to be introduced.

Another significant area of employer responsibility is to take reasonable steps to protect the health, safety and welfare of employees.[79] In this

[76]Department for Business and Trade, *Retained EU Employment Law: Consultation on Reforms to the Working Time Regulations, Holiday Pay and the Transfer of Undertakings (Protection of Employment) Regulations* (2023b). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156206/retained-eu-employment-law-consultation.pdf (accessed 15 May 2024).
[77]Ibid., at [4].
[78]Ibid., at [10].
[79]Health and Safety at Work etc. Act 1974, s 2.

area, employers are not obliged to keep records that demonstrate compliance in the same way as under the NMWA 1998 or WTR 1998. However, there are documents that employers should have produced that could form the basis of an annual review of health and safety information. LLDD will oblige organisations to carry out a review of their health and safety policies, which all employers who employ 5 or more employees must have in place.[80] Another source of information which must be reviewed is the obligation to carry out risk assessments to identify health and safety risks posed to employees and certain non-employees[81] and to provide employees with information about the risks identified by these assessments and the preventative measures that the employer has put in place.[82] If the due diligence exercise reveals reasonable grounds to suspect that any aspect of health and safety law is not being complied with, LLDD will require the board of directors or executive management to inform the Health and Safety Executive (HSE) and to make immediate changes. The HSE will be obliged to investigate, but if there are reasonable grounds to suggest that the organisation is now compliant, no further action will be taken.

C. Demonstrating Compliance with Protection of Wages, Statements Under ss 1 and 8 ERA 1996, Equality Law, Whistleblowing Protection and Trade Union Recognition

It is proposed that employers should only be obliged to conduct due diligence in respect of rules relating to the protection of wages[83] and the provision of a statement of key terms and conditions to workers[84] if they have been found to be in breach of the law in these areas or a worker has successfully sought a reference from an Employment Tribunal in the previous 12 months.[85] (Currently, claimants can apply to Employment Tribunals for a reference under this section when employers have not provided a statement of key terms or have provided a non-compliant statement.[86]) In other words, employers acting lawfully in respect of payment of wages will not have any obligations under LLDD in these areas. Employers who have been found to have acted unlawfully will be obliged to review their internal

[80] Health and Safety at Work etc. Act 1974, s 2(3).
[81] Management of Health and Safety at Work Regulations 1999, 1999/3242, reg 3.
[82] Ibid., reg 10.
[83] Employment Rights Act 1996, ss 13 and 15.
[84] Ibid., ss 1 and 8.
[85] Ibid., s 11.
[86] Employment Rights Act 1996, s 11(1).

procedures and to record the changes made. So these elements of LLDD create a rebuttable presumption of lawful behaviour on the part of employers. Organisations which have acted unlawfully in these areas will be obliged to inform the Labour Market Ombudsman of the adverse Employment Tribunal verdict. The Ombudsman will be required to check the due diligence reports of these organisations to ensure that their reports include the above information. Any organisations which do not record this information in the due diligence report will be subject to a fine.

In respect of whistle-blowing, employers will be obliged to establish whether any workers have made qualifying disclosures in the previous 12 months and whether there has been any contact from any of the statutorily prescribed organisations[87] in relation to disclosures that have been made by their workers in that time frame. If either of these scenarios have occurred, employers will be obliged to review their policies and procedures around whistle-blowing and to record the changes made.

In terms of equality law, LLDD would oblige employers who employ 5 or more employees to have a written equality and diversity policy in place. This reflects the exemption for very small employers that is currently in place as regards the obligation to have a written health and safety policy. Having a written equality and diversity policy in place would encourage good practice as well as increasing the chances of a successful defence if an employer is sued as vicariously liable for a discriminatory act carried out by one of its employees.[88] Company directors or executive management would be required to review and approve the policy on an annual basis. In addition, any organisation which has been found to be in breach of equality law in the previous 12 months would be required to record any changes made to the policy in the light of the Employment Tribunal judgment. Employers would be provided with a template equality and diversity policy which they could adapt. LLDD would extend the public sector equality duty[89] in that organisations to which the duty applies would be obliged to publish any risk assessments that they had produced in the previous 12 months in order to demonstrate compliance with the duty.

In respect of trade union recognition, LLDD would not apply to employers who employ less than 21 workers, so it is consistent with existing legislation.[90] In addition, LLDD would only apply to employers who are not

[87] Ibid., s 43FA.
[88] Equality Act 2010, s 109.
[89] Equality Act 2010, s 149.
[90] Trade Union and Labour Relations Consolidation Act 1992, sch A1, [7].

already parties to a collective bargaining agreement. Employers without an agreement in place would be required to confirm whether a trade union had made a formal request to the Central Arbitration Committee (CAC) for recognition in the previous 12 months. If so, the report should provide directors/executive management with a progress update on that request. In addition, the report should contain any changes to trade union membership in their workforce in the previous 12 months as a percentage of the overall workforce. This would alert directors to the possibility that a distinct part of the workforce (a 'bargaining unit' for the purposes of the statutory recognition procedure) might apply for recognition in the near future.

D. Review of Contractual Documentation Relating to Work Carried Out Personally

As part of the annual report, there would be an obligation to carry out a review of all contractual documentation that relates to work carried out personally on the company's behalf, ie, if the organisation employs workers as opposed to employees. If there are reasonable grounds to suspect that any contractual documentation used by the organisation presents a misleading impression of the employment status of one or more workers in the organisation, LLDD would oblige organisations to amend that documentation and to secure the consent of the affected workers prior to the change being implemented.

To ensure that employers have access to accurate information about how courts and tribunals determine employment status, LLDD would mandate the production of statutory guidance on the issue. The Code of Practice produced by the Department of Social Protection in the Republic of Ireland demonstrates the approach that should be adopted.[91] The Code provides information on key characteristics of employees and self-employed people (currently there is no 'worker' status in Irish law), explains key legal terms and emphasises why it is important to ensure that workers are categorised correctly.

Clearly, additional measures are needed to tackle the problem of false self-employment. In the Republic of Ireland, individual workers have the right to query their employment status at an early stage. The Department of Social Protection investigates and decides on an individual's employment

[91] Department of Social Protection, Code of Practice on Determining Employment Status (2021). www.gov.ie/pdf/?file=https://assets.gov.ie/34185/fcfac49276914907b939f64fad110ae8.pdf#page=null (accessed 27 May 2024).

status. This kind of scheme could be effective in the UK as it would potentially avoid the need for litigation. However, adequate funding would be needed and employers would have to agree to abide by the decision. Arguably an organisation that was independent of government should perform this function in the UK. But this could be a less costly alternative to litigation for workers. Another possibility is to replicate the proposed EU Directive concerning working conditions for platform workers, which introduces a rebuttable presumption of an employment relationship when certain specific criteria have been fulfilled.[92] The rationale is that the existence of the presumption will facilitate the recognition and enforcement of workers' rights without the latter having to resort to litigation.[93]

8. CONCLUSION

This article has put forward a case for the adoption of an annual due diligence procedure which obliges employers to assess their own compliance with key employment rights for their workers and produce an annual report which is publicly available. It follows the four-stage model adopted in the UNGPs: identification of unlawful activity; mitigation of any breaches discovered; assessment of the efficacy of those responses and the provision of information on the above stages. LLDD attempts to address the shortcomings of national and international legislation which has required corporate disclosure of information. UK organisations will be obliged to carry out due diligence rather than just report on it and to take action to remedy any breach that the process brings to light. It is much more specific in nature than EU legislation such as the NFRD or CSRD, which only require companies to consider labour law rights in general terms and as one part of a wider set of information. It is prescriptive about what action or information is required and employers will be obliged to use a *pro forma* report. All employers will be obliged to carry it out so that the maximum number of workers will benefit from the due diligence process. The creation of the due diligence report will also involve trade unions or other employee representatives from the start, as well as giving roles to government enforcement agencies when appropriate. The possibility of workers making claims

[92] Commission, Proposal for a Directive on improving working conditions in platform work, COM (2021) 762 final, arts 4 and 5.
[93] Ibid., [24] of the recital.

for compensation against non-compliant employers which have not taken action to remedy any unlawful practices will provide an additional incentive for organisations to complete the due diligence process in good faith.

LLDD has a greater chance of success if it is adopted as part of a wider governmental strategy to improve workers' awareness of their rights in addition to enforcing them more effectively. Realistically, LLDD has a much better chance of being adopted by the Labour Party in government. Protection of workers' rights is higher up its agenda than the current government: it has proposed a three-pronged strategy that involves improving rights for individual workers, creating sectoral Fair Pay Agreements (FPAs) that have been agreed between employers and worker representatives, as well as the creation of the SEB to better protect workers' rights.[94] Undoubtedly these measures would benefit UK workers. However, LLDD provides the possibility of improving protection for workers' rights in the short-term, without workers having to resort to litigation. Establishing FPAs and the SEB will take time and money, and certainly in the case of FPAs, agreements will take time to be finalised. By contrast, LLDD could be implemented quickly and at low or no cost to taxpayers. The creation of a Labour Market Ombudsman to oversee workers' claims would be required, but hopefully, it would be self-financing, in that fines collected from employers which have not engaged with the LLDD process would pay for the cost of creating the ombudsman service. LLDD does not claim to be a total solution to the problem of denial of workers' rights, but it would be a quick fix, at least until the SEB is established and functions effectively.

[94]Labour Party, *Delivering a New Deal for Working People* (2022). https://labour.org.uk/wp-content/uploads/2024/05/LABOURS-PLAN-TO-MAKE-WORK-PAY.pdf (accessed 29 May 2024).