ADDLESHAW GODDARD

Taking up the baton from the Taylor Review? Select Committees publish joint report and draft bill outlining a new framework for modern employment

On 20 November 2017, the House of Commons Work and Pensions and Business, Energy and Industrial Strategy Select Committees published a joint report entitled "A framework for modern employment". The report develops some of the recommendations made in the Taylor Review on Modern Working Practices and annexes a draft bill covering the reforms that it proposes the Government take forward.

What is the background?

In July 2017, the Taylor Review on Modern Working Practices (**the Taylor Review**) was published. It made wide-ranging recommendations for the reform of working practices in the United Kingdom. The primary purpose of the Taylor Review was to consider what changes to the legal and regulatory frameworks were needed to protect workers in the modern labour market. In particular, consideration was given to what was needed to protect those working in business models built around flexible work on digital platforms (commonly known as the "gig economy"). Although the proposals contained in the Taylor Review were far-reaching, the reforms which grabbed the headlines were those affecting employment status and atypical working. You can read our full analysis of the implications of the Taylor Review for employers here. The Government is due to publish its response to the Taylor Review by the end of 2017.

What does the report say?

The House of Commons Work and Pensions and Business, Energy and Industrial Strategy Select Committees have taken up the baton from the Taylor Review and produced a report (**the Report**) and draft bill (**Bill**). The Report recommends taking forward "the best" of the proposals from the Taylor Review.

	Proposal for reform	**What does this mean for employers?**
1. Clearer statutory definitions of employment status	The Report notes that there is "*an urgent and overwhelming case for increased clarity on employment status*" and says this could be provided by way of primary legislation to codify the existing case law. It is said that greater clarity would reduce the number of Tribunal cases on the issue	A codification of the case law principles on employment status should provide employers with welcome certainty as to which status applies in any given case.

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	and protect vulnerable workers. The Report recommends that the Government legislates to introduce greater clarity on definitions of employment status, emphasising the importance of control and supervision of workers by a company, rather than a narrow focus on substitution. The following proposals are set out in **Part 1** of the draft Bill: ***Employee*** Although no changes are proposed to the existing definitions of "employee" or "contract of employment" found in section 230 of the Employment Rights Act 1996 (**ERA**) the draft Bill would introduce a list of specified factors that a Court or Tribunal may have regard to when determining employee status. The factors to be considered are: • Does the individual have to perform the work personally? • Does the other party retain control to a substantial degree over how the work is carried out? • Is the individual integrated into the other party's business? • Does the other party provide tools or equipment? • What is the degree of financial risk undertaken by the individual? • Is the individual prohibited from working for others? ***Worker*** The draft Bill does not take forward the Taylor Review recommendation to replace "worker" status with a new "dependent contractor" status. However, a new definition of "worker" is proposed which removes the	The proposed weakening of a requirement for personal service in the new worker definition means that some individuals previously viewed as independent contractors because of the presence of a contractual right to substitute may acquire worker status. This would bring with it enhanced obligations for employers such as the right to paid holiday, rest breaks and to be auto-enrolled in a pension scheme. Employers should consider auditing their workforce to identify the cohort of individuals who are deemed to be independent contractors solely because of the presence of a contractual substitution clause. The new test should then be applied to ascertain whether they are likely to fall within the worker definition.

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	current requirement to perform the work personally. Instead, the new test is limited to an assessment of whether the individual is truly in business on their own account. The draft Bill goes on to set out the factors that a Tribunal or Court may have regard to when assessing whether someone is a worker: • All of the same factors to be considered when assessing "employee" status (see above), save for the question of personal service. • Whether the individual was engaged in marketing their own business prior to entering into the contract. • Whether any substitution clause is capable of being freely exercised by the individual in practice (the mere presence of a contractual right to substitute shall not be sufficient to defeat worker status). ***Independent contractors*** The draft Bill goes on to say that an individual will be an "independent contractor" if he is neither an employee nor a worker. Again, a set of factors are given, which a Court or Tribunal may have regard to when considering this question.	
2. Introduction of a "worker by default" model	The Report recommends that the Government: • Requires employers to provide individuals with a written statement of their employment status (either employee or worker) and the associated rights and entitlements within 7 days of beginning work. • Provides that in a Tribunal dispute, the default presumption should be that the individual is a worker unless proven	The first reform would require employers to provide both employees and workers with information about their status and associated rights at the beginning of their employment. This would be in addition to the requirement to provide a statement of particulars of employment under s.1 of the ERA (see section 7 below). It is not yet clear whether the Government would produce a standard form statement that could be used for this purpose.

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	otherwise. It is said that this should apply only to companies who have a self-employed workforce above a certain size (to be defined in secondary legislation). These proposals are as set out in **Part 2** of the draft Bill.	The second reform would mean that in Tribunal cases where employment status is in dispute, the burden of proof would be on the employer to make the case that the individual does not have worker status (and, similarly, the burden of proof would be on the individual to make the case that they have employee status if that is their position). However, this reform would only apply to businesses who have self-employed populations over a certain threshold, which suggests that it is intended to target gig economy employers.
3. Non-guaranteed hours	The Report says that companies benefiting from a flexible workforce must ensure that flexibility is not one-sided, either by guaranteeing hours that reflect the periods worked each week, or by compensating workers for such uncertainty. Proposed legislation to enable this is set out in **Part 3** of the draft Bill. The draft Bill contains no provisions requiring employers to offer guaranteed hours reflecting actual hours worked per week. Indeed, the Taylor Review only went as far as saying that the Government should consider ways of "encouraging" employers to offer more guaranteed hours, for example by the use of voluntary collective agreements. However, the draft Bill provides for regulations to enable the Government to work with the Low Pay Commission to pilot a pay premium on the National Minimum Wage and National Living Wage for workers who work non-guaranteed hours. The pilot scheme would last for a maximum period of 2 years and would apply to selected sectors or employers only (to be linked to workforce size and turnover). No detail is given on the rate of any such premium, save that it is said that the Low Pay Commission should be consulted over the rate.	The proposed pilot scheme will not affect all employers. However, if successful, the premium rate may be rolled out across the board in due course. As well as enhancing pay for zero hours workers, this proposal would also affect many standard employees and workers who work non-guaranteed overtime hours. Employers may wish to audit their exposure to an enhanced National Minimum / Living Wage rate – some employers may already have this information to hand following an audit for the purposes of assessing holiday pay entitlements. Once the proposed premium rate is known, employers may wish to assess whether there is any shortfall in pay and, if so, whether the cost will simply be absorbed or whether other steps will be taken to avoid the premium rate e.g. converting non-guaranteed overtime to guaranteed overtime.
4. Employment Tribunals	The Report says that restrictions on class actions and the absence of penalties for widespread abuses may incentivise employers to “wait and see” whether individuals are willing to risk pursuing their rights. The Report recommends that the Government takes steps to enable greater	An expansion of the use of class action in disputes over wages, status and working time will assist those working within the gig economy. Currently, if an ostensibly self-employed individual pursued a working time claim and successfully argued they had

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	use of class actions in disputes over wages, status and working time. The proposal in relation to enabling class actions are set out in **Part 4** of the draft Bill. The Report also suggests creating an obligation on Employment Tribunals to consider the increased use of higher, punitive fines and costs orders if an employer has already lost a similar case.	worker status, then the employer would not be obliged to treat similar individuals as workers. Under a class action, those similar individuals would automatically be deemed to be workers, despite the fact that they were not a party to the claim. This would mean that a single Tribunal decision could have significant consequences for an employer. This could lead to an increased appetite to appeal cases as far as possible, increasing legal costs. Where a decision ultimately goes against an employer, the consequences for the rest of the affected class will be immediate and potentially expensive.
5. Continuous service	The Report says that companies who benefit from a flexible workforce should still guarantee rights when workers reach the necessary qualifying period, even when there has been a gap in service. The Report recommends that the Government extends the time allowance for a break in service while still accruing employment rights for continuous service from one week to one month. The proposal is set out in **Part 5** in the draft Bill.	This reform would make it easier for zero hours and casual workers to acquire the necessary qualifying period required for certain employment rights based on length of service (e.g. the right to request flexible working after 26 weeks' continuous service or the right to claim unfair dismissal after 2 years' continuous service). Under the current rules, it is relatively easy for continuity of service to be broken, meaning that such workers don't often acquire such rights. Employers would need to ensure that they maintained good records detailing periods of work and non-work so that an accurate assessment of service can be made.
6. Preservation of the National Minimum / Living Wage	The Report notes that a flexible labour force can provide benefits to workers, consumers and businesses, but that workers should not bear all the risks of such flexibility. Workers should not be faced with a choice between not working and working for below the minimum wage. The Report recommends that the Government rules out introducing any legislation that would "undermine" the National Minimum / Living Wage. This proposal is not addressed in the draft Bill.	The Taylor Review had recommended that employers in the gig economy should be able to pay workers based only on the number of tasks performed (i.e. effectively a "piece rate") provided that an average individual earned the National Minimum / Living Wage with a 20% margin of error. The Report rejected that proposal as "overly complex" and in danger of undermining the National Minimum / Living Wage by inviting workers to work for a lower rate of pay. The Report simply recommends that no legislation that risks undermining the National Minimum / Living Wage be taken forward. Therefore, there should be no change for employers in this area.

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7. Entitlement to a written statement of employment particulars	The Report recommends that the Government extends the duty to provide a written statement of employment particulars to cover workers, as well as employees (this is in addition to the proposed new obligation to provide new starters with a statement of their employment status – see section 2 above). The right should apply from day one of a new job, with the statement to be provided within 7 days. The report says that this change should be made by secondary legislation under the Employment Relations Act 1999. This proposal is not addressed in the draft Bill.	Employers are already used to providing statements of particulars to employees. This proposal would widen the cohort of individuals who are entitled to such a statement, which increases the administrative burden on employers. In addition, the statement would need to be given much more promptly than is currently the case (the current rule is within 2 months of starting work).
8. Lowering the Information and Consultation of Employees (ICE) threshold	The Report says that it should be easier for employees and workers to have their voices heard at work. Currently, "workers" are not covered by the ICE regulations. The Report also says that even employees in organisations that are eligible may be prevented from exercising this right by the prohibitively high threshold (currently 10% of employees) for application of the regulations. Adopting the Taylor Review recommendations, the Report proposes that: • Workers, as well as employees, be counted towards the 50 workers needed before a company is covered by the ICE regulations. • The threshold for implementation of the ICE regulations be reduced from 10% to 2% of the workforce. These changes would require amending secondary legislation under the Employment Relations Act 2004. This proposal is not addressed in the draft Bill.	Matthew Taylor said that the reform of the ICE regulations was, in his view, the "*single most important recommendation*" in the Taylor Review. By including workers in the numbers, this would widen the number of employers who could potentially receive a request to negotiate an information and consultation framework. Further, by reducing the trigger from 10% to 2%, it will also be easier for the workforce to make a valid request. Employers who are currently outside the scope of the ICE regulations would need to ensure that they understood the framework and were able to respond to a request if lodged.
9. Agency workers and the "Swedish derogation"	The Report says that the "Swedish derogation" loophole is subject to widespread illegal abuse and the Taylor Review was right to call for its abolition. The Report recommends that:	End-user employers who currently engage agency workers and take the benefit of the Swedish derogation would see their costs increase if it were abolished. The result would be that agency workers would be entitled to the same rate of pay as comparable employees after 12 weeks. Employers in this position may wish to assess the potential increase to the cost of engaging such workers which may,

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	• The Government amends the Agency Worker Regulations 2010 to remove the opt-out for equal pay. This proposal is not addressed in the draft Bill. • The Employment Agency Standards Inspectorate be given the powers and resources it needs to enforce the remainder of the Agency Workers Regulations 2010.	in turn, lead to a review of the use of agency workers vs. permanent workers.
10. Deterring breaches of employment laws	The Report endorses the conclusion of the Taylor Review that businesses who choose not to comply with employment laws should face significant penalties to their finances and reputation, as punishment to them and a deterrent to others. The Report recommends that the Government: • Brings forward stronger and more deterrent penalties, including punitive fines, for repeat or serious breaches of employment laws. • Expands "naming and shaming" to all non-accidental breaches of employment rights by businesses and supply chains. This proposal is not addressed in the draft Bill.	Employers who lose Tribunal claims where there was a repeat or serious breach of employment rights would be exposed to higher awards and costs orders in any future claims. This could be a particular issue in claims turning on employment status. Where an employer lost a claim turning on employment status then it would be well-advised to audit its workforce to assess how many others were in a broadly comparable position. A decision would then need to be made on whether to: (i) change the view of the status of those individuals and treat them accordingly; or (ii) keep the existing arrangements and take the risk of future penalties, fines and naming and shaming.
11. Proactive enforcement	The Report recommends that the Government provides the Director of Labour Market Enforcement and the main enforcement agencies with the resources necessary to undertake "*both reactive and proactive roles*", including deep-dives into industrial sectors and geographic areas, and supply-chain wide enforcement actions. Where extra resources are needed, they should be funded through higher fines on non-compliant organisations. The Report also recommends that the Government sets out how it intends the powers and resources of the Director of Labour Market Enforcement will develop over the next five years. These proposals are not addressed in the draft Bill.	There are no material impacts for employers, save for the risk of further scrutiny from the Director of Labour Market Enforcement and other enforcement agencies.

What are the next steps?

It is unlikely that the draft Bill will be taken forward in its current form: firstly, the Government has yet to respond to the Taylor Review and secondly, it would be highly unusual for legislation to be developed via Select Committee.

Furthermore, the proposals have had a lukewarm reception, which would suggest that a full public consultation would be needed to refine the draft Bill before it could proceed. Neil Carberry, Managing Director of People and Infrastructure at the CBI said that the proposals in the Report went too far and would *"…close off flexibility for firms to grow and create jobs"*. On the other side of the coin, Jason Moyer-Lee of the Independent Workers Union of Great Britain (the trade union involved in the Deliveroo case) said that the Report did not go far enough and did not extend basic employment rights such as statutory sick pay to workers. Jim Roache, General Secretary of the GMB union said the proposals *"may make a small difference".*

Perhaps the true purpose of the Report is to maintain the momentum created by the Taylor Review. The Report says the hope is that the Government *"will engage with the spirit of the draft Bill"* and *"not allow addressing urgent issues in Britain's labour market to fall by the wayside"* as a result of the focus on the Brexit negotiations.

In the Autumn Budget published on 22 November 2017, the Government said it will publish a "discussion paper" as part of its response to the Taylor Review. The intention is that this will explore the case and options for longer-term reform to the employment status test for both employment rights and taxation purposes.

You can read the full Report and draft Bill here.