

THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

WHAT DOES IT SAY?

THE PURPOSE OF THE REVIEW

The overriding ambition of The Taylor Review of Modern Working Practices (**the Review**) is to make the case for all work being "good work" and for this to become a new national priority. In a nutshell, "good work" means that all work in the UK economy should be fair and decent with a realistic scope for development and fulfilment. To help achieve a good work economy, the Review makes recommendations for specific measures to be enacted as soon as possible, as well as longer term strategic shifts.

The proposals for reform contained in the Review are far-reaching and will affect all employers across all sectors to some degree. The reforms which have grabbed the headlines are those affecting employment status and atypical working. These would have a particular impact on businesses operating within sectors that typically engage large numbers of independent contractors (e.g. the IT and construction sectors), agency workers (e.g. the social care and hospitality sectors) and casual or zero hours workers (e.g. the retail and agricultural sectors). They would also have a major impact on businesses operating with the gig economy.

Yet there are many less newsworthy recommendations which will be of great interest to employers, for example, the reforms affecting day-to-day HR matters such as sickness absence, flexible working, pregnancy and maternity, internships and employee consultation.

RECOMMENDATIONS AFFECTING EMPLOYMENT STATUS

Currently, we have a three-tier approach to employment status: employee, worker and self-employed. However, worker status covers both employees and a wider group of "limb b" workers covered by s.230(3)(b) of the Employment Rights Act 1996. This means that all employees will be workers, but not all workers will be employees. The "limb b" workers are individuals who are engaged under a contract where: (i) they are required to work personally; and (ii) the employer cannot be described as a client of the individual's own business (amongst other things, this involves a consideration of how much control the employer has over the individual).

The Review argues that this structure is confusing and a simpler way of determining employment status is needed. In particular, the two types of people that have worker status should be easier to distinguish from one another. To this end, the Review proposes the following reforms (page references included in brackets):

Generally

- There should be a clearer outline of the tests for employment status, setting out the key principles in primary legislation, with further detail contained in secondary legislation and guidance (page 35).
- The Government should develop an online tool that provides an indication of employment status and, in time, more detailed information for employers on their associated responsibilities (page 39).

New status of "dependent contractors"

- All workers who are not employees should be renamed "dependent contractors" (page 35).
- Crucially, it is recommended that there should be new test for acquiring "dependent contractor" status, which is looser than the current test for acquiring worker status. This new test should place much greater weight on the principle of control than on a requirement for personal service. The Review recommends that the absence of a requirement to work personally should not be an automatic barrier to accessing employment rights as a dependent contractor. It is acknowledged that this will *"result in more people being protected by employment law"* and *"make it harder for employers to hide behind substitution clauses"* (page 36).
- For dependent contractors operating in the gig economy the Review highlights the need to strike the balance between maintaining maximum flexibility for the worker and the need to provide them with a fair rate of pay. It recommends that the "piece rates" legislation is adapted for gig workers. This would mean that gig employers would be able to pay workers based on their output provided they could show that an average individual successfully earns the National Minimum Wage with a 20% margin of error (page 38).
- The Review also recommends that the Government explores options for requiring online platforms to provide real time data of the mean hourly output rate to the dependent contractor. This would allow

them to see what the likely pay rate is for the work they do at the time that they are considering working (page 38).

- One of the most significant recommendations in the Review is that the employment and tax status frameworks are aligned. In future, if someone is employed for tax purposes then they should always be treated as either an employee or a dependent contractor for employment status purposes (and vice versa). Further, it is proposed that tax and employment tribunal rulings regarding employment status should be binding on each other (page 38).
- Dependent contractors should have the right to receive a written statement of particulars on Day 1 of their job, and this should include details of their statutory employment rights. They should also have the right to claim compensation where an employer has failed to comply (page 39).

Self-employed

The Review makes various recommendations aimed at supporting and regulating self-employment. The ones of key interest to employers are:

- Even though specific tax changes were outside the remit of the Review, it nevertheless proposes that the level of National Insurance Contributions paid by employees and self-employed people should be moved closer to parity (page 72).
- The Government should "*address areas of entitlement*" (e.g. parental leave) where self-employed people lose out (page 72).
- In an effort to tackle the hidden cash in hand economy, the Review asks the Government to consider accrediting a range of platforms designed to move towards cashless transactions. The aim is that this will increase transparency of payments made to self-employed individuals and ensure that they pay the correct amount of tax. It is estimated that this could "*reap several billions in additional revenue*". Once a cashless Government-accredited platform was up and running, this would also mean that "*only those who intended to*" would participate in the hidden economy (page 80).
- The Review also suggests that the use of cashless platforms could be supported further by making certain rights conditional on using a certain payment mechanism. The example given is linking an individual's right to work in the UK to the use of such a payment mechanism. It is said that this would allow the Government to have some oversight of the work being undertaken by those working under visas in the UK (page 81).

RECOMMENDATIONS AFFECTING ATYPICAL WORKERS

Casual / Zero hours workers

The Review recognises that casual and zero hours contracts carry the benefit of flexibility for both the employer and individual. However, the Review calls upon the Government to take steps to ensure that flexibility does not unreasonably favour the employer at the expense of the worker. With this in mind, the Review proposes the following:

- The Low Pay Commission should consider the design and impact of the introduction of a new higher National Minimum Wage rate for hours of work that are not guaranteed as part of the contract. In other words, the employer will be required to pay more in exchange for the additional flexibility required (page 44). 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. Indeed, Torsten Bell, Director of the Resolution Foundation think tank, said that "*a new minimum wage for overtime*" was the Review's "*most radical proposal*" and would have a particular impact on sectors such as retail and social care.
- The Government should also consider other ways in which employers can be encouraged to guarantee more hours to their staff, including the role of voluntary collective agreements (page 44).
- To maximise the chances of zero hours workers accruing employment protections the rules around continuous service should be relaxed. The Government should preserve continuity of employment

where any gap in employment is less than one month, rather than the current one week. They should also clarify the situations where cessations of work could be justified (page 45).

- Zero hours workers who have been engaged for 12 months or more should have the right to request a contract that guarantees the hours which reflect the actual hours worked (page 48). The employer should also be required to report on how many requests of this nature have been received and how many were agreed (page 55).
- In respect of holiday pay, the Government should increase the pay "reference period" used to calculate holiday pay for such workers from 12 to 52 weeks to take account of seasonal variations in work (page 47).
- Also on holiday pay, it is recommended that such workers (and, indeed, all dependent contractors) are given the choice of either taking paid holiday or receiving "rolled up holiday pay" (i.e. the practice of not paying holiday pay while the worker is on holiday, but making a compensatory payment during the weeks worked). According to the Review, this would equate to 12.07% premium on pay (page 47). Strangely, the Review does not reference the fact that the practice of paying rolled up holiday pay is contrary to the EU Working Time Directive. Although the Working Time Regulations 1998 do not expressly prohibit rolled-up holiday pay, Government guidance provides that the practice is currently unlawful. Presumably, therefore, the intention is that this reform should be introduced after Britain has left the European Union.

Agency workers

The Review makes several recommendations designed to improve the position for agency workers:

- The Government should amend legislation to improve the transparency of information which must be provided to agency workers both in terms of rates of pay and those responsible for paying them (page 46).
- Agency workers should have the right to request a direct contract of employment after 12 months with same hirer, which the hirer would have to reasonably consider (page 48). The employer should also be required to report on how many requests of this nature have been received and how many were agreed (page 55).
- The "Swedish derogation" should be abolished. This is the provision in the Agency Workers Regulations 2010 which allows agencies to avoid matching end-user pay by employing agency workers in a way that allows for pay between assignments (page 59).
- The new Director of Labour Market Enforcement should consider whether the remit of the Employment Agency Standards Inspectorate should be extended to cover: (i) policing umbrella companies and other intermediaries in the supply chain (page 58); and (ii) compliance with the Agency Workers Regulations 2010 (page 59).

RECOMMENDATIONS AFFECTING THE ENFORCEMENT OF EMPLOYMENT RIGHTS

- HMRC should be given responsibility for enforcing National Minimum Wage, sick pay and holiday pay rights for the lowest paid workers (page 59).
- Although the Review does not go as far as calling for the abolition of employment tribunal fees, it does recommend that claimants should be able to have their employment status determined at an expedited preliminary hearing without having to pay a fee (page 62).
- The burden of proof in hearings where employment status is in dispute should be reversed and placed upon the employer (page 62).
- The Government should seek to enforce tribunal awards itself without action from the claimant, or payment of any additional fee (page 63). They should also establish a "naming and shaming" scheme for employers who do not pay awards within a reasonable time (page 63).

- Tribunals should be obliged to consider the use of awarding aggravated damages and making costs orders if an employer has already lost an employment status case on broadly comparable facts (page 63).
- Tribunals should be allowed to award uplifts in compensation if there are subsequent breaches against workers with the same, or materially the same, working arrangements (page 64).

RECOMMENDATIONS AFFECTING EMPLOYEE ENGAGEMENT AND TRANSPARENCY

- The Government should examine the effectiveness of the Information and Consultation of Employee Regulations 2004 in improving employee engagement at work, extend the rules to workers and reduce the threshold from 10% to 2% of workforce making the request (page 53).
- The Government should work with Investors in People, Acas, trade unions and others to promote the development of better employee engagement and workforce relations, particularly in sectors with high levels of casual employment (page 53).
- Companies above a certain size should be required to be more transparent. Amongst other things, they should be required to publicise their model of employment and use of agency services (page 55). No detail is offered as to what the size threshold would be.

RECOMMENDATIONS AFFECTING OTHER AREAS

Apprenticeship Levy

- The Government should ask the Institute for Apprenticeships to work with sectors using high levels of lower paying and atypical work to ensure they are making best use of the current apprenticeship framework (page 85).
- The Government should consider making the funding generated by the levy available for high quality "off the job" training other than apprenticeships (page 85).

Internships

- The Review considers that unpaid internships are *"an abuse of power by employers and extremely damaging to social mobility"* and should be *"stamped out"* (page 91).
- Whilst the Review declines to call for a separate "intern" employment status, it states that interns will most likely be workers and will be entitled to the National Minimum or National Living Wage. It calls upon the Government to clarify the interpretation of the law and encourage enforcement action by HMRC (page 91).

Flexible working

- When the flexible working system is evaluated in 2019, the Government should consider whether the system might be used to permit requests for temporary changes to contracts (e.g. to accommodate a caring obligation) (page 95).
- The Review considers that more needs to be done to address the practical and cultural issues around flexible working. It suggests that the Government should work with organisations such as Working Families and Timewise to encourage flexible working initiatives such as the use of the "happy to talk about flexible working" strapline in job advertisements (page 95).

Pregnancy and maternity

- Guidance on pregnancy and maternity discrimination should be reviewed and consolidated to enable women to more easily spot unlawful discrimination and challenge it. The Review also recommends focusing efforts on sectors, occupations and types of employers where research highlights there are particular issues (page 97).

- Consideration should also be given to "*further options for legislative intervention*" in this field, although no detail is offered as to what this might involve (page 97).

Sickness absence

- The Review states that that access to a basic level of income replacement when a worker is unable to work through illness should be part of a core set of employment rights which should apply to all, save for the truly self-employed. To that end, they recommend that statutory sick pay should be reformed so that it is a basic employment right for which all workers are eligible, regardless of income, from Day 1. It should be paid by the employer and should be accrued by length of service, in a similar way to paid holiday (page 99).
- The Review says that employers should do more to support workers who are absent on long-term sickness grounds to return to work and employers should go "*above and beyond*" the duty to make reasonable adjustments (page 99).
- In terms of legislative reform, the Review recommends that individuals who have been absent on prolonged sick leave (which is not defined) should have the right to return to the same or similar job. This right to return should be made conditional upon engagement with the Fit for Work service (page 99).

Low pay

The Low Pay Commission (**LPC**) is an advisory body providing advice to the Government about the National Minimum and National Living Wage. The Review makes the following recommendations on the LPC:

- The LPC's remit should be widened so that it can make recommendations to Government on areas of change needed to improve the quality of work in the UK (page 107).
- The LPC should work with employers, employees and stakeholders to promote quality work across all regions and sectors. It should also work with industry experts (e.g. the CIPD), business and trade unions when it comes to making recommendations for reforming the legal framework to deliver "*fair and decent*" work (page 107).
- A sector-focused approach will be required. The Review notes that certain sectors have a heavy reliance on atypical work (e.g. zero hours contracts in the hospitality sector; self-employment in the construction sector; agency workers in the agriculture sector). The Review says the LPC should work with employers and worker representatives to ensure sector-specific codes of practice are developed that "*support the provision of quality work*". The initial focus should be on driving productivity in the retail, care and hospitality sectors (pages 108-109).

COMMENT

The proposals for reform are clearly ambitious and would have a radical impact on employment practices across many sectors. In our second article in this series, we will assess the potential impacts for employers.

Of course, the question remains whether the Government has the capacity to introduce this suite of reforms, given the necessary focus on Brexit-related legislation. Indeed, as we highlighted in recent our [briefing on the Queen's Speech](#) many of the Conservative Party's manifesto commitments on employment law were left out of the Queen's Speech. A [subsequent newspaper report](#) has suggested that some of these commitments have now been dropped altogether.

In her leadership relaunch speech on 11 July 2017, PM Theresa May said the Government would study the Review, but she did not commit to introducing legislative measures. Instead, she stressed the importance of enforcing existing legislation and co-operation by business.

[Good Work: The Taylor Review of Modern Working Practices](#)

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