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IMPLEMENTATION OF THE AGENCY WORKERS DIRECTIVE
RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS
TO BIS CONSULTATION

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Introduction

On 8 May the Department for Business, Innovation and Skills (BIS) published a consultation (<http://www.berr.gov.uk/consultations/page51233.html>) seeking views on the implementation of the Directive on conditions for temporary (agency) workers – Directive 2008/104/EC - more usually known as the “Agency Workers Directive” (the Directive). Responses are requested by 31st July.

The Association of Labour Providers (ALP) represents over 220 labour providers, all of which will be very directly affected by the application of the Directive. It therefore has a major interest in this consultation.

Executive Summary

- The British government should opt for minimal implementation of the Directive with no gold plating.
- Simple implementation of the Directive, which does not add unnecessary burdens or complexity to temporary agency placements, is vital.
- As much time as is possible should be allowed to prepare for the implementation of these regulations, so there should be a late 2011 implementation of the Directive.
- The directive should apply to workers engaged through umbrella schemes, but exclude managed service contracts. There needs to be careful definition to avoid “vulnerable” contractors working through Personal Service Companies being denied the protection the Directive seeks to afford.
- Equal treatment should be formed on the basis of what the worker would have received if they had been directly recruited, rather than on the basis of a comparator.

- Where the only binding provision in place is that of legislation then this constitutes equal treatment within the terms of the Directive. This should not be extended.
- The definition of pay should be limited to a basic hourly rate.
- Calculating additional holiday pay above the statutory minimum goes beyond 'basic' working and employment conditions.
- The 12 week qualifying period should be measured as 12 concurrent calendar weeks – breaks would apply through breaks in working or changes in key aspects of the assignment.
- Liability will rest with the agency for equal treatment subject to certain conditions, predominantly a stronger onus on the user undertaking to provide information.
- There should be no requirement to change temp-to-perm arrangements.

Responses to questions raised in consultation document

Scope of the Directive – who is covered, definition of “agency worker”

1. We propose that implementation should apply to people finding temporary work through an “employment business”, (not an “employment agency”); that we base the scope of the legislation on the definition of “worker” on that used in the Working Time Regulations 1988, but adjusting this to include agency workers contracted to an “umbrella company”. This would exclude workers who are genuinely self-employed, agency workers working through their own limited company, and agency workers employed on “Managed Service Contracts”.

Q1 Do you agree that implementation should cover workers placed on temporary assignments by “employment businesses” but not those placed permanently by “employment agencies”?

Yes

Please comment

ALP agrees that the Directive should cover the activities of employment businesses and not employment agencies.

Q2 Do you consider that using a definition for agency workers based on that of a “worker” under Regulation 2 of the Working Time Regulations 1988, but in the context of the triangular relationship with the employment business and the hirer, provides the most appropriate coverage for the legislation to implement the Directive ?

Yes

Please comment

ALP agrees with this. The reference for definition of a worker should relate to S230 of the Employment Rights Act 1996

Q3 Should the definition include those agency workers working through an “umbrella company”, but who find work via an employment business?

Yes

Please comment

Workers employed by umbrella companies, but assigned work through employment businesses, should be covered. To do otherwise would leave a significant avoidance mechanism.

Q4 Should the definition exclude the self-employed, Limited Company Contractors and those working on managed service contracts?

Yes No

Please comment

Temporary workers assigned by an employment business should be covered. Sections

44-47 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) should be considered in this context.

Any exclusion considered for Limited Company Contractors should not allow the continuation of a model used by certain employment businesses of setting up personal services company for workers at or around NMW (predominantly migrant workers) in order to avoid paying holiday pay and NI. Such workers are engaged as cleaners or in other low skill roles and are clearly not in business in their own right.

Workers employed through 'managed service contracts' are in effect sub-contracted workers working under the control of the business that supplied them rather than temporary agency workers. This is a clear distinction and these workers should be excluded. However there is a requirement for 'managed service contracts' to be defined effectively so not to be used as an avoidance measure.

Q5 Do you think that there are likely to be consequences of using the proposed definition which the government should take into account? If so, please comment.

No, although as with any regulation some will seek to circumvent it.

Working Time and holiday entitlements

2. We consider that the implementation of the Directive as regards equal treatment on the duration of working time, and paid holiday entitlement, entails providing agency workers remaining in a given job for more than 12 weeks should have the same entitlement to rest time and leave as a permanent employee, if such entitlements are more generous than the statutory minimum requirements.

Q6 Do you agree with our proposed approach to implementation of the Directive's requirements in respect of working time and holiday entitlements?

No

Please comment

The principle of equal treatment is defined in Article 5 (1).

"The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."

"Basic working and employment conditions" are defined in Article 3 (1) (f).

"basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

- i. the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
- ii. pay

The first point to make here is that the principle of equal treatment for "basic working and employment conditions" is limited by the Directive to "working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking"

The Directive therefore does not seek to apply equal treatment in user undertakings

where “collective agreements and/or other binding general provisions” are not in force.

National law in seeking to apply this Directive should not seek to extend the application of the Directive beyond this closely defined remit.

Secondly the Directive refers only to “the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays”. It specifically excludes stating “the duration and payment of working time...”.

Temporary workers are entitled to paid holiday entitlement already extended by national regulations from 20 days to 28 days per annum. The proposal goes beyond “basic working and employment conditions” as defined by the Directive. The Directive sets a requirement to match the duration of holidays, but not the payment. There should therefore be an entitlement for workers to be able to book and take holiday in excess of statutory entitlement but not a right to be paid. Holidays above the statutory entitlement may therefore be paid or unpaid as specified by agreement between employment business and user undertaking.

The above also applies to breaks and other aspects of working time.

BIS should have regard to the Agricultural Wages Order on the matter of holiday and working time.

Q7 In particular, do you see benefit in our suggested approach to simplifying the administration of entitlement to leave entitlements above the statutory minimum?

No

Please comment

The Directive gives no right to payment for holidays, only to a right to the same duration.

Q8 Are there other factors not discussed above that need to be taken into account by our implementation? If so, please add comments

No

Pay

3. We propose that the definition of pay, for the purposes of our implementation, should be basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment. This would include payment for overtime, shift allowances, unsocial hours premiums/bonuses, and bonuses where they relate directly to personal and individual performance, but exclude aspects of remuneration that are provided in recognition of the long-term relationship between employer and permanent employee such as profit sharing schemes.

Q9 Do you agree with our proposed approach to the definition of “pay” for the purposes of the Directive?

No

Please comment

We would reiterate here that the Directive does not seek to apply equal treatment in user undertakings where “collective agreements and/or other binding general provisions” are not in force.

The definition of pay should be limited to a basic hourly rate.

If the definition of pay is extended too far this may well result in the reduction of terms for all staff as Companies seek to balance their overall wage bill.

If pay is extended to bonuses it should be restricted to piece rate bonuses. BIS should carry out thorough research about bonus structures and gives clear guidance as to which bonuses should be included and which should be excluded if an attempt to include bonuses within the definition of pay is to be workable.

If pay is extended to shift payments – permanent workers are paid these as a reward for making a commitment to altering their lifestyle from the norm to fit these working hours. Agency workers may generally be required to work across all shifts and should not be so rewarded for working such shifts for a short period only.

If pay is extended to overtime rates – these should only be paid where “normal weekly hours” have already been worked. Overtime rates are designed to incentivise permanent staff to work extra hours. If the temporary worker only covers unsocial hours, they are not in the same position as someone who is completing unsocial shifts in addition to their usual work.

BIS should have regard to the Agricultural Wages Order on the matter of pay and overtime pay.

Q10 Are there other factors not discussed above that need to be taken into account by our implementation? If so, please add comments

No

Q11 Specifically, in the light of the Pensions Act 2008, are you aware of any particular areas of concern regarding agency workers? If so, please give details.

No

Defining the 12 –week qualifying period

4. We propose that the 12-week qualifying period should be 12 calendar weeks, regardless of the working pattern (e.g. part-time as opposed to full-time. We propose that a new qualifying period will begin only if a new assignment with the same employer is substantially different.

Q12 Do you agree that the 12 week qualifying period should simply be 12 calendar weeks, no matter the number of hours or days worked during that period?

Yes

Please comment

It is agreed that 12 calendar weeks, regardless of part or full time status, is the simplest way to implement this provision. It should be a continuous 12 weeks on the same assignment. The 12 weeks should include periods of paid holiday, properly notified sick

leave, maternity, paternity and adoptive leave (where due).

The same assignment should be considered as:

- Work with the same user undertaking at the same location
- Assigned by the same employment business.
- In the same, or broadly similar, role i.e. a role that does not entail a period of retraining and paid at the same rate.

A break in the assignment would be caused by:

- The worker accepting a different assignment
- A worker breaking their assignment by refusing work
- A “break between assignment” (see below)

Breaks between assignments

5. We invite views on the minimum duration of a break between assignments before the 12 weeks clock should start again.

Q13 Do you agree that there should be a minimum break between assignments before the “12 week” clock should start again rather than a ‘reference period’? If yes, how long should the minimum break period be?

Yes

Please comment

A break period would be most appropriate.

Initially a break of 1 week or the length of assignment, which ever is shorter, is sufficient.

Once 12 weeks had been reached a longer break period of 4 weeks would apply

Change of responsibilities during an assignment

Q14 Do you agree with the approach we have outlined to the question of whether a change in responsibilities entails the commencement of a new assignment?

Yes

Please comment

The Directive states that equal treatment is on the basis of if the worker had been hired by ‘that undertaking to occupy the same job’. If the job changes then there is a new assignment.

It is agreed that anti-avoidance measures should be implemented. The job would need to be substantively different. This however does not mean that the role should need to be substantially different.

Q15 Are there other factors that our implementation on this point needs to bear in mind, including to reduce scope for circumvention of the Directive's objectives?

No

Permanent contracts of employment and payment between assignments – possible exemption from principle of equal treatment

6. We invite views on the approach to take regarding the flexibility available under the Directive to permit alternative arrangements for agency workers on permanent contracts of employment who are paid between assignments

Q16 Do you agree that it would be helpful to make use of this derogation when implementing the Directive?

Yes

Q17 To what extent would you expect implementation of this exemption to impact on current practice in the agency sector?

Please comment

It will depend on the level of pay required between assignments

Q18 Were the exemption to be implemented, what is your view regarding the level of pay that should be required between assignments? How long should an agency employing a worker on this basis be required to retain that worker after the end of the assignment concerned?

Please comment

The level needs to be such not to be treated as an avoidance measure.

With regard to retention, statutory dismissal legislation should apply.

Agreements between workers' and employers' representatives

7. We invite views on the role that collective or workplace agreements might play in implementing the Directive.

Q19 Do you have any views on the role that collective or workplace agreements might play in implementing the Directive, taking account of the need to provide the appropriate level of protection as set out in the Directive and the TUC and CBI agreement? If so, please provide details

No

Pregnant women and new mothers

8. We invite views on compliance with the Directive's provisions concerning pregnant women and new mothers.

Q20 Do you consider the extension of the provisions described in paragraph 4.40 appropriate for protecting the health and safety of agency workers who are pregnant or new mothers?

Yes No

Please comment

On this matter there is a wider scope of application than for working time and pay because the Directive refers to “any other general provisions” in place in the user undertaking. This extends to reasonable paid time off for ante-natal appointments.

Workers who are pregnant have the right to be protected from risks. Provisions should make clear that the user undertaking must perform the risk assessment, and where possible remove any risks to the pregnant woman. The right to temporary adjustment of working conditions is reasonable.

The right to suspension on pay accords with provisions in place in the user undertaking. Where reasonable adjustments are not possible within a particular workplace an agency should have the option to find an alternative suitable paid work for the worker, which may not be at the same level. There should be an option to top up pay in such circumstances.

There should be right to continuing suspension on pay where a worker unreasonably refuses alternative work.

Pay should be in accord with the definition of a weeks pay in the Employment Rights Act 1996

Q21 Is the length or expected length of the placement the appropriate period during which a woman should continue to be offered alternative work or suspended on full pay as a result of a health and safety risk?

Yes No

Please comment

The length of suspension on pay should reflect the intended length of the assignment as in accord with the current right to payment for SSP. It is not feasible that an agency would have to pay a worker full pay for the length of their pregnancy when they only intended the assignment to last a week.

Access to employment, collective facilities and vocational training

9. We invite views on the Directive’s provisions regarding access to employment, collective facilities and vocational training, including the possible implications for our current legislation on “temp to perm” fees.

Q22 Do you consider that our proposals will meet the requirements of Article 6.1?

Yes

Q23 Do you think our proposals (in question 22) will properly include the interests of agency workers who are on short-term assignments or who are often away from the hirer’s premises, eg drivers or those working in satellite sites?

Yes

Temporary to permanent status

Q24 Do you consider that the existing legislative provisions are consistent with the requirements of the Directive in respect of prohibiting agency workers from taking up permanent employment with the hirer?

Yes

Please comment

Article 6(2) states that action should be taken if there are clauses 'prohibiting or having the effect of preventing the conclusion of a contract'.

Current requirements on temp-to-perm fees are that they must

- Be agreed in writing – thus providing the opportunity for the Client to refuse to agree to any unreasonable terms
- Require the option of an extended hire period - this in itself caps the level of cost for hirers.
- Terms have to comply with unfair contract terms legislation.

Existing legislative provisions are consistent with the requirements of the Directive. There is no evidence that temp-to-perm fees currently restrict workers ability to obtain permanent work on the basis that they are unreasonable.

Q25 Were it to be necessary to adjust the current legislation to make specific provision on the question of a 'reasonable level of recompense', do you have views as to how the provision should be framed? In particular, should legislation or guidance seek to address the question of how the level of the 'reasonable recompense' should be calculated?

Yes No

Please comment

There is no requirement to adjust the current legislation as the provisions are consistent with the requirements of the Directive

Access to onsite facilities for agency workers

Q26 Do you agree with the proposed approach (5.14 – 5.16) regarding implementation of the Directive's provision on access to onsite facilities?

Yes

Please comment

Access to training

Q27 Are there further steps that could be taken to help "employment businesses" and hirers use Government initiatives to promote training for agency workers?

Yes No

Please comment

ALP supports the steps which the consultation suggests the Government will take to ensure that temporary agency workers have access to government funded training

opportunities on a similar basis to those in direct employment relationships.

Thresholds for bodies representing workers

10. We invite views on our proposals for implementing the Directive's provisions for calculating the threshold above which bodies representing workers are to be formed, in particular on whether the threshold should apply to the agency or the hirer.

Q28 Have we identified the relevant thresholds under UK law to which Article 7 applies?

Yes

Q29 Do you agree that temporary agency workers should count towards the thresholds applicable to the temporary-work agency rather than those applicable to the hirer?

Yes

Q30 Do you have other comments on the way this Article should be transposed?

No

Information to workers' representatives

11. We invite views on complying with the Directive's requirements concerning hirer's obligations to provide suitable information on the use of agency workers when providing information on the employment situation to bodies representing workers.

Q31 Does the list under paragraph 7.2 identify the relevant regulations which establish a direct or indirect requirement to provide information on the employment situation?

Yes

Q32 Do you agree with our interpretation of the legal effect of Article 8 of the Directive (paragraph 7.3)?

Yes

Q33 Do you agree that it would be preferable to define the meaning of the term 'suitable information' in our implementation (paragraphs 6.4-6.5 above)?

Yes

Establishing "equal treatment"

12. In order to establish that an agency worker has not received equal treatment, it will be necessary to identify the "given job" (ie the job occupied by the agency worker).

Q34 Do you agree with the approach to defining the limits of a "given job"?

Yes

Q35 Are there any particular considerations we should bear in mind regarding the preparation of the Regulations on this point, or factors you would like to see reflected in the guidance concerned?

Yes No

Please comment

The “given job” should relate to:

- Work with the same user undertaking at the same location
- Work in the same, or broadly similar, role i.e. a role that does not entail a period of retraining and is paid at the same rate.

Determining equal treatment

13 We consider that the key factor in establishing “equal treatment” for an agency worker will in practice be comparison with a comparable worker doing broadly similar work in the same organisation. The wording of the Directive does not, however, rule out other factors being brought to bear and we would envisage making it clear, perhaps in our accompanying guidance, the circumstances in which other factors might be relevant in the absence of a comparable worker.

Q36 Do you agree with our proposed approach on the question of determining equal treatment within the context of the Directive’s requirements? Are there additional factors that you consider should be taken into account?

No

Please comment

The Directive speaks of establishing equal treatment on the basis of basic working and employment conditions. Basic working and employment conditions means, in words of the Directive those conditions laid down by ‘legislation, regulations, administrative provisions, collective agreements and/or other binding provisions in force in the user undertaking’.

Where “collective agreements and/or other binding general provisions” are not in force the only binding provision in place is that of legislation and then this constitutes equal treatment.

If “collective agreements and/or other binding general provisions” are in force then if the hire is for a unique role pay should be negotiated freely. Other conditions, such as holiday pay, breaks will be set down on a company wide level. If the role is not unique then any binding pay scales would apply.

The Directive speaks of establishing equal treatment on the basis of basic working and employment conditions which temporary workers would have received if they ‘had been recruited directly by that undertaking to occupy the same job’.

The term if they ‘had been recruited directly by that undertaking to occupy the same job’ indicates that the proposal for the use of comparators goes beyond the terms of the Directive.

If comparators were to be used then this should only be the case when binding provisions covering pay scales and terms are not in place. On this basis companies may wish to establish ‘binding provisions’ to make it clearer and easier to hire temporary agency workers in the future.

If comparators were to be used a comparable worker should be picked on the basis of a real life comparator role. It would not be desirable to create hypothetical workers or

roles to establish a comparator for equal treatment. The comparison is then made on the basis of job evaluation criteria of a role, rather than an individual.

The need to establish equal treatment should occur after the 12 week qualifying period - established on the basis if the worker had been hired directly at the start of the 13th week of their assignment. Equal treatment only needs to be established at this point. It should not need to be revised if/when pay and working conditions change in the user enterprise as this eventuality is not addressed by the Directive.

Liability

14. We propose that primary liability will for compliance with obligations under the Directive rest with the agency, whilst acknowledging that the agency will inevitably be reliant on information from the hirer. We suggest that agencies should have a reliable defence in the event that they had taken “reasonable steps” or “best endeavours” to obtain information from the hirer, who would become liable if it became clear that information provided was inaccurate or incomplete. We propose not to make specific provision regarding the nature of the information that should pass from hirer to agency, but to give agency workers the ability to ask their agency for information relating to their equal treatment rights under the Directive.

Q37 Do you agree with our proposed approach to liability?

Yes No

Please comment

The proposal that that rests with the agency for equal treatment is accepted on the condition of the caveats as proposed by the REC that:

- There is a legal obligation in the regulations for the employer to provide the information necessary to establish equal treatment.
- If the agency seeks the information from the client which is not provided or is wrong then the liability should be able to be passed on to the client at the discretion of the agency.
- The agency must have the option of being able to bring the client to an employment tribunal at the earliest stage if the agency has taken ‘reasonable steps’ to establish equal treatment.
- The regulations should forbid clients from putting indemnity clauses into contracts to circumvent liability.
- The regulations must address the involvement of an intermediary e.g. a neutral or master vendor. Umbrella companies who may employ agency workers should also be considered.

Q38 Are there any additional factors that you would wish to see addressed in guidance accompanying the implementing Regulations?

No

Information on equal treatment for workers

Q39 Do you agree that the approach described in paragraph 8.15 is appropriate for ensuring that agency workers have access to information on equal treatment ?

No

Please comment

The information required by a worker to justify a claim of unequal treatment must be simple to collect and provide. A period of longer than 21 days will be required in many cases.

Q40 Do you consider that a template for information provision to workers could be of assistance?

Yes

Q41 Could existing regulations on the provision of information to work-seekers be further simplified in the context of our implementation to reduce the administrative burden on the recruitment industry whilst ensuring that protection for workers and employers remains in place ? If so how?

Yes

Please comment

Provision of information requirements to work seekers should be simplified and be consistent in terms of the requirements and language used across this legislation, The Conduct Regs and the Gangmaster legislation.

Dispute resolution and Employment Tribunals

15. On dispute resolution, we propose that an agency worker's first port of call should be the temporary work agency; we are also discussing with Acas how they might become involved in helping to resolve disputes and claims, such as pre-claim and post-claim conciliation. Where complaints cannot be resolved in this way, and we intend to enable agency workers should be able to pursue a claim through Employment Tribunals.

Q42 Do you agree with our proposed approach to dispute resolution? In particular, do you agree that the agency concerned should be the first point of contact for an aggrieved agency worker?

Yes

Please comment

The work with Acas to establish pre-claim and post-claim conciliation is supported.

The agency should be the first point of contact for an aggrieved agency worker.

Claims against the rights afforded by agency workers in the Directive should only be enforced through the employment tribunal system. It would not be appropriate for the Employment Agency Standards Inspectorate or the Gangmasters Licensing Authority to be involved in the process.

To allow the GLA enforcement powers would create a differential enforcement regime within one sector.

Review of restrictions and prohibitions on use of temporary agency workers

16. We invite views on complying with the Directive's requirement to review any restrictions and prohibitions on the use of agency work.

Q43 Do you agree with our view that there are no restrictions in UK legislation that would need review in the context of Article 4? If not, which provisions do you think require consideration?

No response

Reducing administrative burdens/regulatory costs

17. We will be setting up a working group to consider how administrative burdens surrounding the use of agency workers, partly in relation to the Directive, but also more generally, to see if there is any scope for further simplification.

Q44 Which areas do think the working group should focus on?

Please comment

The working group as part of its remit should consider

- How the information requirements in these regulations relate to other requirements laid down in the Gangmasters Licensing Act and supplementary legislation.
- Differential enforcement of the same legislation by the GLA and BIS.
- The application of the Agricultural Wages Order to agency workers and its interaction with this legislation
- Improved guidance on carrying out health and safety obligations

Entry into force

18. All Member States are required to adopt the necessary laws to implement the Directive by 5 December 2011. We have received a number of representations to the effect that the entry into force of the regulations should be delayed in order for all concerned to adjust to their requirements, particularly during difficult economic times. We are also aware, however, that others would wish to see earlier entry into force in order to enable agency workers to derive benefit from the Directive from an earlier point

Q45 When do you consider the regulations should come into force and why?

Please comment

The legislation should be adopted on 5th December 2011 or the last common commencement date prior to this.

This is to allow the maximum time for effective communication of the requirements; renegotiation of contracts; establishment and implementation of systems and procedures; training within employment businesses and end users.

The change will require re-budgeting and new business plans for employment businesses and end users and will allow organisations to deal with the consequences of this.

This timescale will employment businesses and end users time to establish equal treatment and reduce the burden on employment tribunals.

There is a danger that if the entry into force of these regulations is too quick, employers will simply stop using agency workers with the consequential negative effect on the labour market.

Other areas

19. We consider that we have identified the key issues that need to be addressed in this Consultation Paper. However we would welcome your views on whether there are any other aspects of implementation on which you would welcome elaboration in legislation or guidance, including your proposed solutions.

Please comment on whether there are any other aspects of implementation on which you would welcome elaboration in legislation or guidance, including your proposed solutions

We do not intend to acknowledge receipt of individual responses unless you tick the box below:

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We will publish all the responses received in this consultation unless you tick the box below

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We would like to keep you informed of the progress of these proposals, including further consultation. If you wish to join the mailing list for further proposals please tick the box below

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