

Temporary Labour Working Group, Final Evaluation

28 August 2006

Introduction

This note briefly evaluates the overall impact of the work of the Temporary Labour Working Group. It is written from the perspective of labour providers, the target of the work of the Group, although it has been drafted as objectively as possible.

The Temporary Labour Working Group

The market for supplying contract labour lends itself to abuse, in particular -

- Use of illegal immigrants who may be paid less than minimum wage and who are particularly vulnerable to abuse because of their status.
- Tax evasion, which generally accompanies illegal working.
- Non-compliance with legal requirements generally because of the rapid turnover of workers, combined with the short term nature of much of the work.

In September 2002, the Temporary Labour Working Group (TLWG) was established to attempt to deal with the problem. It comprised representatives of trades unions, supermarkets, packhouses and farmers with just one labour provider, and was strongly supported by Defra and the government generally. The ALP became involved in the group as soon as it was established in early 2004. The Group lobbied for legislation to control the supply of labour and also worked on drawing up a code of practice for the industry. The two developments ran in parallel and were closely linked.

The Code was formally launched in November 2004; the first audits were carried out in March 2005. Its main provisions were –

- Workers to have written terms and conditions, properly documented with evidence of right to employment.
- All deductions from wages to be with written consent.
- Risk assessments of customers' premises and written H&S responsibility agreement with customers
- Payment of the legal minimum wage.
- Itemised payslips for each pay period.
- Employees are protected by employer's liability insurance.
- Records kept of National Insurance numbers.
- Use of a payroll system.
- Registration for VAT if the VAT threshold is exceeded.
- Written contracts with each customer.

- Sub-contractors must comply with the code.

An audit process was devised to check compliance with the code. The first stage was for a labour provider to register intent to comply with the code; it was then listed on the TLWG website. A labour provider then had a book a two day audit comprising an inspection of records, a visit to a labour user and worker interviews. The audit would identify any non-compliances that would be classified as -

- **Critical non-compliance** - A critical failure to comply with the code of practice resulting in –
 - Serious risk of personal injury or ill health.
 - Use of trafficked workers or bonded labour.
 - Systematic payment of less than the minimum wage.
 - Severe restriction of freedom of association.
 - Tax evasion.
- **Major non-compliance** – a failure to comply with legislation that is significant but not critical.
- **Minor non-compliance** - a minor or technical failure to comply with the law or the good practice requirements of the code.

Once the auditor was satisfied that there were no critical non-compliances outstanding the labour provider was listed on the TLWG website as having been satisfactorily audited. There was no provision for further audits or self-certification. The process was of a “one-off” nature.

With the passage into law of the Gangmasters (Licensing) Act 2004 the task of the TLWG was to ensure a smooth transition from the voluntary to the statutory arrangements. Both the code and the audit process were used as the basis for the regime put in place by the GLA. The last TLWG audits were carried out in May 2006. The list of audited labour providers will be retained until the offence of operating without a licence comes into operation, currently planned for 1 October 2006. The task will then be regarded as complete, the website will be closed down and the code regarded as history.

970 labour providers registered on the code website and 465 were audited (ie fewer than half of those who registered chose to be audited).

The audit results

An analysis of the completed audits shows -

- 1,998 non-compliances were identified. Of these, 140 were defined as critical, 1,316 as major, 169 as reportable and 363 as correctable (these categories are the GLA categories which differ from the original TLWG categories).
- Of the critical non-compliances 97 related to accommodation – either rent being higher than allowed under the offset arrangements (the effect of which was uncertain) or the state of the accommodation.
- The major non-compliances were largely to do with documentation – no written authority for deductions from pay, no written consent to an opt out in respect of the working

time regulations, no written contracts, and section 8 requirements not properly complied with.

- The audits found 897 non-compliances concerning health and safety, accounting for 45% of the total number of non-compliances. The areas with significant numbers of non-compliances were risk assessments (32%), training and contracts (31%), and PSV/PCV licence requirements (20%).

The TLWG was not very good at feeding back the results of audits to labour providers collectively. The ALP did what it could to do so. Its most recent report to members commented that the main areas of non-compliance were -

- No written allocation of health and safety responsibility between labour providers and all their customers.
- Labour providers not taking the necessary steps to make themselves aware of the risks at the place of work of their workers.
- Charging for transport where vehicles do not have PSV licences.
- Deductions from pay without workers' consent.
- Failure to demonstrate compliance with rules on establishing identity of workers.
- Contracts not issued to workers or being issued late.
- Workers do not understand their contracts.

A more comprehensive report was produced in June 2005. This is reproduced in Appendix 1.

The first conclusion that can be drawn from the audit results is that most of the non-compliances were on documentation rather than substance, eg failure to have a record of opt outs under the Working Time Regulations or for deductions from pay. The statistics on non-compliances are not very helpful without some context. The assumption almost seems to be that every piece of legislation is fully complied with, except by labour providers in the agriculture and fresh produce trade. This is not the case. Most surveys of compliance with the law find massive non-compliance. Appendix 2 sets out some examples. They include –

- Fewer than 10% of children who have jobs have the necessary parental and local education authority consent.
- 27% of all public service vehicles fail an initial inspection.
- More than half of mortgage disclosure documents produced by intermediaries contain five or more errors.
- 50 % of all car services are poor or very poor; over 80% of garages miss at least one introduced fault

Addressing significant malpractice

There are two significant forms of malpractice in the provision of contract labour –

- Abuse of workers – for example bonded labour, paying less than the minimum wage and harsh treatment.

- Tax evasion, where the worker is often a party to and beneficiary from the evasion.

It was found that the minimum wage was not being paid in 5% of cases and bonded labour was found in 5% of cases.

On the tax evasion point, the auditors were not experts in tax evasion. As the tax authorities have been unable to stop tax evasion it could hardly be expected that the auditors would fare any better. No significant cases of tax evasion were found.

Limitations

The TLWG was voluntary and limited to a specific sector of the economy. This resulted in some limitations in its approach –

- It largely covered the provision of labour to packhouses that supplied the supermarkets, arguably the part of the market where standards were already relatively high. To a large extent it was pressure from the supermarkets through their suppliers that encouraged labour providers to seek to participate in the scheme. The arrangements hardly touched the provision of temporary workers to farmers or to that part of the food chain which goes nowhere near the supermarkets, for example supply through wholesale markets.
- The audits provided only a snapshot at a point of time. Once audited and duly listed on the TLWG website, a business could then rapidly change its practices with no mechanism for revisiting its status. Audited status was used as a marketing tactic, including by those that were not complying with the code.
- The most significant malpractice is the combination of operating through cash payments and the informal economy. Typically, this is done through a mixture of subcontracting and side arrangements to supply labour outside the formal contract between labour provider and labour user. The TLWG audit mechanism was not equipped to detect such arrangements, hardly surprising as the tax authorities have failed to do so for many years.

Successes

The TLWG has had a number of clear successes –

- Bringing together a coalition of organisations with widely differing interests.
- Helping to secure the passage of the Gangmasters (Licensing) Act 2004.
- Developing a code of practice for labour providers which could be used as the basis for a statutory licensing regime.
- Developing an audit mechanism which again could be used as the basis for a statutory system.
- Enabling the operation of the contract labour market to be far better understood.
- Significantly improving compliance with legal requirements by those labour providers that participated in the audit scheme.

In retrospect it is probably the third, fourth and fifth points that are the most important. In respect of improving compliance, this is largely on paperwork and process issues rather than substantive issues. There is no evidence that the work of the TLWG has reduced malpractice in the labour supply market, and indeed it would be unreasonable to expect such an outcome. ALP

members continued to report that they are constantly being undercut by others working at a rate at which it is not possible to comply with legal requirements.

Lessons

A number of lessons have been learnt –

- The nature of the labour market is different from that which was envisaged. Everything has been labelled "temporary labour" but what has been audited is generally the provision of permanent contract labour, that is outsourcing the supply of labour to a specialist business.
- In retrospect the code was far too wide. The code should have concentrated on the major areas of non-compliance.
- The audits identified non-compliances in respect of health and safety matters but most of these were the responsibility of the labour user rather than the labour provider.
- The provision of labour to packhouses is a very competitive business. The supermarkets determine the prices that will be paid to packhouses and the conditions that must be met by them. Packhouses have sometimes responded by expecting labour providers to work at rates that do not enable legal requirements to be met. It is unrealistic to require labour providers to operate wholly within the law but for them to be paid an amount which does not permit them to do so.
- The legal requirements that labour providers, and other businesses, have to meet are so complex and in some cases uncertain that it is virtually impossible to be fully compliant. This is amply illustrated by the first version of the code. This was drawn up over a period of many months with access to widespread expertise including from four different government departments. However, that code included a number of errors most of which were subsequently corrected but some of which were allowed to continue. If the combined might of the TLWG was unable to understand the law then it is hardly surprising that small businesses with limited resources are unable to do so. The errors included –
 - Section 8 of the Asylum and Immigration Act was wrongly cited as requiring employers to make a basic document check on every person they intend to employ; the legal requirement is not to employ illegal workers.
 - The section 8 requirements (which relate to establishing a defence) were wrongly quoted as requiring one document from each of two lists.
 - The code suggested that employers should advise their workers to register "immediately" under the Worker Registration Scheme; the requirement is to register within a month.
 - Health and safety violations that were legally the responsibility of labour users were held to be the responsibility of labour providers.
 - The code failed to distinguish between employees and workers. It regarded all workers as employees whereas most labour providers employ workers under a contract for services such that they are not employees.
 - It was wrongly stated that labour users are required to send ACU2 forms to the Inland Revenue.
 - It was wrongly stated that "drivers with foreign-issued licences are only able to drive on those licences for a year before having to obtain a UK licence".

- It was wrongly stated that PSV licences are required only where workers are charged for transport.
- Not only were legal requirements wrongly identified but labour providers have also had to cope with significant changes in the legal requirements they have to meet, either as a result of new regulations or legislation, or the decisions of courts and tribunals or changes in interpretation. Also, on a number of areas there has been uncertainty as to what the requirements are. Among such areas that the ALP has dealt with, in addition to the major issues of the Code and the Act, are –
 - Annual changes in the minimum wage and the agricultural minimum wage, the latter often being finalized at the last minute.
 - The proposed increase in holiday entitlement.
 - A court decision that roll-up holiday pay is illegal.
 - Uncertainty on the application of the accommodation offset arrangements in relation to the minimum wage.
 - Uncertainty on the definition of “hire and reward” in respect of transporting workers.
 - New regulations under the Employment Agencies Act 2006.
 - The introduction of the Accession States Worker Registration Scheme, several changes in the scheme and in the early stages huge delays in handling applications.
 - The introduction of new arrangements for verifying entitlement to work.

Conclusion

The TLWG has played a valuable role in increasing understanding of the operation of the market for contract and temporary labour to the food industry and in facilitating the introduction of a statutory licensing regime.

Those labour providers that volunteered to be audited were largely compliant, most non-compliances being on documentation rather than substance. It is doubtful if anything has been done to prevent significant malpractice, but it would be unreasonable to expect this from a voluntary arrangement. The process has also highlighted the difficulties that labour providers have in complying with the law.

Appendix 1

The results of the audit reports, ALP 2005 analysis

The Code secretariat has now analysed the first 47 audits. The results enable labour providers who have been audited to assess their position against other labour providers and give those who

have yet to be audited an indication of areas where other labour providers have had non-compliances. In summary –

- On average Labour Providers had 0.4 critical, 8.1 major and 3.2 minor non-compliances. However, there have been considerable differences between auditors. Auditors from one company have reported more than twice as many non-compliances as the other auditors. Also there seems to be some duplication with the same non-compliance being reported under a number of headings.
- By far the largest number of non-compliances have been in health & safety, including 17 out of 18 of the critical non-compliances. However, many of these should properly have been recorded as observations to be reported to the labour user rather than non-compliances against the labour provider.
- More than 10 non-compliances were identified in respect of validating the right to work in the UK, employment of children and young people, employment contracts, contracts/service level agreements with customers, health and safety, employer's liability insurance, transport, regularity of employment, payment of the minimum wage, working hours and pensions.

Following is a summary of the major problem areas and how they can be dealt with –

No written contracts with customers

The Code and the Employment Agencies Act 1973 require contracts between labour providers and labour users to be in writing. The contracts do not have to be long and detailed. There is an example of a contract in the Labour User's Toolkit in the appendices to the Code, available on the Code website.

Failure to supply details of workers to labour users

Details of workers must be provided on form ACU2 or in another format.

No or inadequate contracts with workers

Workers employed for at least one month are entitled to a written contract. This can be either a contract of employment or a contract for services. Member Brief No 9 gives a model contract of employment. As this Brief has pointed out many labour providers use contracts for services. In some cases these have resulted in a non-compliance. This will not happen in future.

Workers not understanding contracts and health and safety guidance

It is the responsibility of labour providers to ensure that their workers understand their terms and conditions of employment and health and safety matters. It is not a code requirement that documents are translated into native languages. However, labour providers must ensure that this requirement is met by one of more of translations, an interpreting service and use of signs.

Failure to verify entitlement to work in the UK

Labour providers must verify that all their workers are entitled to work in the UK and retain copies of relevant documents. The requirements were explained in detail in Member Brief No 17.

Failure to encourage registration with the Accession States Worker Registration Scheme

Labour providers must encourage workers from the eight Accession States to register within one month of commencing employment and should retain a copy of the completed application form. Again, this is covered in Member Brief No 17.

Employment of young people without adequate safeguards

Where children under the age of 18 are employed there are special rules in respect of risk assessments and hours of work. Dates of birth of young workers should be recorded.

Failure to help workers obtain permanent national insurance numbers

Labour providers should assist their workers to obtain permanent national insurance numbers and that assistance should be documented. It is recognised that in many parts of the country it is difficult to obtain permanent numbers; this is not the responsibility of the labour provider as long as he has made a reasonable effort.

Failure to agree and document responsibility for health and safety and risk assessments

Either the labour provider or the labour user must accept responsibility for health and safety matters and risk assessments and this must be documented.

Failure to verify employer's liability insurance

This is an area where non-compliances have been wrongly recorded. Responsibility for employer's liability insurance is a matter of law not of contract. Whoever controls the workers (normally the labour user) must have employer's liability insurance. It is prudent for labour providers to seek confirmation from labour users that there is an appropriate policy. Member Brief No 23 covers this.

Drivers not having appropriate licences

Drivers driving PSV registered minibuses must have the appropriate licence. Member Brief No 18 covers this.

Illegal deduction from pay

Other than tax and national insurance any deductions from pay must be with the worker's consent. Compulsory deductions, for example for transport, must not take the worker below the minimum wage. Member Brief No 22 covers this.

Failure to observe working time regulations

Where workers work in excess of 48 hours they must sign an opt out and the appropriate rest breaks must be allowed.

Failure to offer a pension scheme

Workers must be offered the opportunity to join a stakeholder pension scheme. Member Brief No 10 explains how this can be done at no cost to the labour provider.

Appendix 2

Examples of non-compliance with the law

Surveys of compliance with legal requirements, best practice requirements or national targets invariably show significant non-compliance. This appendix notes the results of a few such surveys which have been published in the last few months. They range from outright failure to comply with a clear legal requirement to administrative errors.

- A report by the Commission for Social Care Inspection on 6 February 2006 suggested that “almost half of England’s nursing and care homes fail to meet national standards of medication, with some staff poorly trained and records not properly kept”.
- The National Patient Safety Agency has reported that 2,159 people died in 2005/06 because of serious lapses in care by hospitals, doctors’ surgeries, ambulance trusts and in community and mental healthcare. A further 4,429 patients suffered severe harm because of avoidable mistakes and there were more than 500,000 patient safety incidents.
- A report by the Department of Health in August 2006 showed that nearly 20% of ambulance trusts misreported data to the Department on their response times.
- After four years of promotion, just one third of large organisations have completed an equal pay review, according to the Equal Opportunities Commission (EOC). Only 11% of all organisations reported that they had done, or were currently doing, a pay review that checked for both equal pay and work of equal value, this check is one of the foundations of an equal pay review - as recommended in the Code of Practice on Equal Pay.
- The Children and Young Persons Act 1933 requires local authorities to enforce the regulation of child employment. Whilst there is no requirement for a permit scheme in the 1933 Act, this is how the regulations have been implemented since their inception. The byelaws generally state that for each child that they employ, employers are required to send certain information to the local authority. A permit will then be issued by the local authority. Without a permit, children are working illegally. Most working children are unlikely to hold a permit. One survey found that, of current and former child employees, the percentage who had ever had a work permit was 4% in Blackburn, 6% in Cumbria and 7% in North Tyneside 13%.
- A report by the Public accounts Committee published in February 2006 showed that at least a quarter of PAYE codes were calculated incorrectly by HMRC and that at least one in three income tax returns is incorrect.
- A report published by the Home Office on 8 February 2006 showed that supermarkets were illegally selling alcohol to young people. In test purchases Waitrose sold alcohol to 22% of under age people. The figures for the other supermarkets ranged from 15% to 20%.
- A survey by Durham County Council published at the end of February 2006 showed that 73% of the food on sale on eBay failed food laws.
- Surveys by trading standards officers in Barnsley found that more than half of all pubs sold a pint of beer that was between 5% and 10% short, and in west Yorkshire it was found that almost a quarter of shorts were short.
- On 1 August 2006 The Financial Services Authority (FSA) published a report detailing its financial promotions work over the last two years. 32% of investment promotions fell below regulatory standards.
- In May 2005 the Financial Services Authority published the results of a mystery shopping exercise on equity release. The FSA commented: “The result of the mystery shopping shows that a concerning number of advisers did not gather enough relevant information about their customers to make recommendations suitable to the consumers’ personal and financial

circumstances or enable them to make informed decisions about whether equity release is right for them.” Between 67% and 95% of advisers failed to ask particular questions.

- On 29 June 2006 the Financial services Authority published the results of a review of mortgage disclosure documentation 25% of the Key Facts Illustrations issued by small and medium-sized intermediaries and small lenders contained material errors relating to fees and charges and more than half of the intermediary initial disclosure documents reviewed contained five or more errors.
- A survey published in the October 2005 issue of Which? showed that 63% of mortgage advisers broke some aspect of regulations that came into force in 2004 and “just one of 43 advisers gave acceptable advice”.
- A mystery shopping exercise, commissioned by the DTI, into car servicing in 2002 showed –

o Only 5% of garages surveyed were rated very good indicating that they had carried out a thorough service according to the manufacturers’ service schedules, rectified all the introduced faults and other defects found prior to service.

o 51% were rated either poor or very poor.

o 17% of garages carried out unnecessary work, a problem particularly prevalent in London and the South where the figure was 28%.

o 40% of garages missed or did not replace at least one item on the service schedule. For female car owner, the figure was 58%.

o 86% of garage missed at least one of the introduced faults and 17% missed all four introduced faults.

The VOSA annual effectiveness report shows that 27% of all public service vehicles fail an initial inspection and 9% of all vehicles checked are issued with prohibition notices.

Government departments are required to respond to freedom of information requests in 20 days. A survey published in Which? in May 2006 showed that the Treasury failed to do so in 57% of cases, the Home Office in 37% of cases, Defra in 21% in cases and DWP in 10% of cases.