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September 2008

## ALP POLICY PAPER

### The Agricultural Wages Order and Agency Workers engaged on Contracts for Services

#### Introduction

The Association of Labour Providers believes that in law the Agricultural Wages Order does not apply to workers engaged on contracts for services supplied by a Labour Provider to work for an end user in the agricultural sector. Our reasons for making this assertion are based on the case outlined below.

These arguments are currently being tested through the GLA Appeals process.

The ALP has made this case to DEFRA and the GLA since December 2006 but DEFRA retain their position that the industry standard Contract for Services (as issued by the REC and adopted by the ALP) is in fact a Contract of Service (Employment). The GLA are following DEFRA's position on this matter and therefore are assessing labour providers' workers in the agricultural sector against the Agricultural Wages Order entitlements.

Any Labour Provider who is assessed as non compliant by the GLA on a matter where national legislation has been complied with but not the Agricultural Wages Order e.g. Overtime, Agricultural Holidays etc may consider using these arguments in any appeal. This argument is opinion only and Labour Providers should take specific legal advice on their individual circumstance.

#### The Case as to why the Agricultural Wages Order does not apply to agency workers engaged on Contracts for Services

1. The ALP believes that the GLA is wrong to apply the Agricultural Wages Order 2007 when enforcing the Licensing Standards. The reasons for this are as follows:
2. [Labour Provider] engages workers on contracts for services and supplies these workers to work for end user clients in food, agriculture and other industrial environments. Due to the absence of mutuality of obligation and other factors these workers are not employees as defined under 230(1) the Employment Rights Act 1996 but are instead workers as defined under S 230(3) (b) "any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."
3. [Labour Provider]'s Terms of Engagement with Temporary Workers is explicit in

defining its status as follows:

“2.1 These Terms constitute a contract for services between the Employment Business and the Temporary Worker and they govern all Assignments undertaken by the Temporary Worker. However, no contract shall exist between the Employment Business and the Temporary Worker between Assignments.

2.2 For the avoidance of doubt, these Terms shall not give rise to a contract of employment between the Employment Business and the Temporary Worker. The Temporary Worker is engaged as a self-employed worker, although the Employment Business is required to make statutory deductions from his remuneration in accordance with clause 4.1”

4. The GLA regarded [Labour Provider]’s workers when working in the agricultural sector to be covered by the Agricultural Wages Order 2007.
5. It is contested that this is an incorrect position and that the correct legal interpretation of the relevant legislation is that “workers” on contracts for services are not subject to the Agricultural Wages Order 2007. They are instead subject to relevant national statutory legislation i.e. national minimum wage and working time regulations which is adhered to by [Labour Provider].
6. That this is the correct position is as defined by the relevant legislation. The Agricultural Wages Order 2007, Section 1.2. “Who the Order applies to” states: “The Order applies to any worker employed in agriculture anywhere in England and Wales.”
7. The Agricultural Wages Order 2007, Section 1.4. “Employment” states: “In this Order “employment” has the meaning given in section 17 of the Agricultural Wages Act 1948, the relevant part of which is reproduced at Definition 1.4 below. Definition 1.4 - Employment. “Employment means employment under a contract of service or apprenticeship.”
8. The Agricultural Wages Act 1948 Section 17 states:

In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say,--

“agriculture” includes dairy-farming, the production of any consumable produce which is grown for sale or for consumption or other use for the purposes of a trade or business or of any other undertaking (whether carried on for profit or not), and the use of land as grazing, meadow or pasture land or orchard or osier land or woodland or for market gardens or nursery grounds;

“employment” means employment under a contract of service or apprenticeship, and the expressions “employed” and “employer” shall be construed accordingly;
9. The Agricultural Wages Act 1948 and The Agricultural Wages Order 2007 are clear in stating that the legislation applies only to those employed in agriculture under a contract of service or apprenticeship.
10. [Labour Provider]’s workers are engaged on a contract for services. This is not “employment under a contract of service or apprenticeship” and therefore the Agricultural Wages Order 2007 does not apply but instead national statutory legislation applies.

11. Additionally the relevant express contractual relationship in this situation is between [Labour Provider] and the worker. [Labour Provider] is free to offer the worker work in any sector and the worker is free to accept or refuse this. The worker is engaged under contract with [Labour Provider] and is not “employed in agriculture”. Even though [Labour Provider] may have placed the worker at an agricultural client the worker is not “employed in agriculture”. The Agricultural Wages Order 2007 applies only to employees “employed in agriculture” and it should therefore not apply to an agency worker contracted with [Labour Provider]s who may in fact work anywhere but only on this particular assignment has been assigned to an agricultural business.
12. If it is accepted that workers on contracts for services are not covered by the Agricultural Wages Order but that [Labour Provider]’s Terms of Engagement with Temporary Workers is regarded to be actually a contract of services then we would submit as follows:
  - a. The Agricultural Wages Order 2007 states, “In the event of a dispute over the application of this Order it is for the Courts or Employment Tribunals to decide whether a worker is employed in agriculture.” The express contractual position is that the worker is not employed in agriculture. As stated only the Courts or Employment Tribunals have the authority to decide otherwise, not a GLA Compliance Inspector. It is proposed that GLA Compliance Inspectors are acting ultra vires in implying a different contractual status to the express contract in place. The GLA is acting outside of its powers and beyond its authority.
  - b. Notwithstanding point a. above, should it be determined that GLA Compliance Inspectors do have the power to imply a different contractual status then it is contested that the GLA Compliance Inspector has failed to take account of the Court of Appeal ruling in *James v London Borough of Greenwich* that only where it is necessary to make sense of the arrangements between the two parties should a contract of employment be implied.
  - c. Notwithstanding points a. and b. above the Compliance Inspector undertook no analysis of the facts of the contractual terms and the actual nature of the working relationship in determining that the contract for services was in fact a contract of service. This should also have been determined in accordance with the latest findings of the Employment Tribunals. This was not done at all.
  - d. In [Labour Provider]’s Terms of Engagement with Temporary Workers a worker is not obliged to take work at all, nor is [Labour Provider] obliged to provide work. [Labour Provider] has the express right to terminate an assignment without notice, as does the worker. The contract calls itself a Contract for Services, and not a contract of service. It is contested that taking into account the absence of mutuality of obligation and other factors that the contract is in fact a contract for service and not a contract of employment.
13. As stated it is contested that the Agricultural Wages Order 2007 does not apply and that the relevant Licensing Standards should have been construed in accordance with national legislation.