Consultation on the reasonable steps that a labour user should take to check that a labour provider is licensed - Comments by the Association of Labour Providers on Defra Consultation

28 August 2006

Introduction

On 16 June 2006, Defra published a *Consultation on the reasonable steps that a labour user should take to check that a Labour provider is licensed* , accessible at - http://www.defra.gov.uk/corporate/consult/gangmaster.

Comments are sought by 8 September 2006.

This response sets out the views of the Association of Labour Providers (ALP). The ALP was founded by 18 labour providers in January 2004. It now has 120 members and is generally recognised as the trade association for those labour providers that will be regulated under the Gangmasters (Licensing) Act 2004. The consultation is therefore very relevant to all members of the ALP.

This response was prepared based on the views of members of the Association. All members have been notified about the approach taken in this response and a draft of the response has been available to over a month on the ALP website for members and others to comment on. The views expressed should therefore be taken to be the views not of a single organisation but the views of the 120 labour providers each of which will be directly affected by the outcome of the consultation. It may be possible that because of their own particular circumstances some individual members of the ALP might take a different view from the Association's view, but as yet the ALP is not aware that this is the case.

Executive summary

Making it an offence for a labour user to use an unlicensed labour provider is an unusual concept and one fraught with difficulty. This is even more so because of the construction of the Gangmasters (Licensing) Act 2004, which requires labour providers that are corporate bodies to operate through persons named or otherwise specified on the licence.

The offence is using an unlicensed labour provider, not failing to take "reasonable steps". It is very unlikely that there will be any prosecutions of labour users unless they are conniving with an unlicensed labour provider and knowingly breaking the law. The "reasonable steps" are therefore likely to be fairly academic in practice. Any guidance or regulations should not be perceived as being something that needs to be followed in their own right.

Option 4, which in effect would require the GLA to be notified of every significant contact between labour provider and labour user, is hopelessly over-complicated and would be unworkable in practice. It is not supported under any circumstances. It follows that Option 5 is even more unacceptable.

Which of the remaining three options should be selected depends partly on how Defra and the GLA intend to deal with the inconsistencies in the legislation and regulatory regime that has been established. The current view on the options is -

- Option 1, the "do nothing" option, would be appropriate if it recognised that in practice there will be no prosecutions except in the case of connivance between labour user and unlicensed labour provider.

- Option 2, which would simply require the labour user to check that the labour provider is licensed, is the most logical. The consultation paper argues that it is inconsistent with the requirement in the Act for corporate bodies to operate through named individuals or positions. However, the regulatory regime established by the GLA is equally inconsistent with this requirement. Option 2 would recognise the flawed nature of this concept while meeting the intentions of the legislation. It is the ALP's preferred option.

- Option 3, that is as a labour user must check the GLA register to establish whether the labour provider business is licensed and that the person with whom the agreement is made is authorised to act, is workable only if significant changes are made to GLA practices. Even so it is difficult because there is no way that a labour user can ensure that the person or position with whom he is negotiating is who they claim to be. This option is realistic only if this issue and those set out below are satisfactorily addressed.

The GLA has licensed over 160 labour providers that are corporate bodies but for whom no persons are named or otherwise specified. According to the consultation document, a labour user could not use these labour providers. This situation needs to be rectified in its own right and quickly.

The offence of taking labour from an unlicensed labour provider should not be brought into operation until the GLA website is modified to allow a full entry for a labour provider to be saved and to improve the search facility to allow a search of trading names as well as registered names and a search by administrative county.

The context

The Gangmasters (Licensing) Act 2004 makes it an offence for a business to supply labour to the regulated sector, broadly speaking the food industry, unless it is authorised. The Act also introduces the offence of the labour user taking labour from an unauthorised labour provider. Such a provision is unusual in British law. Normally, any regulation applies to the provider of a good or service, not to the buyer of it. It will be a huge communication task to get over to the many thousands of labour users that they will be committing an offence if they take labour from an unlicensed labour provider.

The position is further complicated by the construction of the Act. Sections 20 - 22 of the Act are being interpreted as requiring a labour provider that is a corporate body to operate through people who are named or otherwise specified on the licence. This means that a labour user not only has to check that the labour provider itself is an authorised business but that the person with whom it is dealing is also named or otherwise specified on the licence. Labour users will rightly have difficulty understanding what is envisaged here because as far as they are concerned they are dealing with the business, and any individual in the business who they are dealing with is authorised to deal of behalf of the corporate body as a whole.

It is probable that many labour users will commit offences under the act by taking labour from unlicensed labour providers. They will do so in ignorance and could very reasonably argue that there is no reason why they should be aware of the legal provision given its exceptionally unusual nature and the fact that little effort has been made to tell them about it. One assumes that as is normal the GLA will simply issue a warning in the first instance and that the typical labour user will thereafter comply with the legal requirements.

The "reasonable steps" regulations are relevant only if a labour user is prosecuted for taking labour from unlicensed labour provider. They provide the labour user with a defence. The concept is very similar to that under Section 8 of the Asylum and Immigration Act. However, there is an important lesson from this latter provision. The general assumption is that the various procedures described in Section 8 have to be gone through as a legal requirement, rather that they

are merely a means of establishing a defence in the event of being prosecuted for employing a worker not legally entitled to work in the UK.

They may be occasions where a labour user is deliberately using an unlicensed labour provider in order to obtain a commercial advantage. In those circumstances, the reasonable steps requirements are unlikely to be relevant.

The difficulty of the working through the named individuals concept

It is impossible to consider the issue addressed by the consultation paper without understanding the concept of names on licences.

The legislation requires corporate bodies to operate through people named or otherwise specified on the licence. This is a difficult and unusual concept which has caused considerable problems. Labour providers that are companies operate in the same way as other companies; business is with the company as an entity not with an individual in it. Any employee of the company can bind the company contractually and it is not unusual for a number of different people to be involved at different stages of the contractual process. The Act introduces the artificial concept of a company having to work through named individuals or positions. The concept will not be easily understood by labour users or providers as it is contrary to normal business practice. It is also impractical. If a labour user contacts a labour user it can check that that labour provider is licensed. However, there is no way that the labour user can verify that a particular position or person that he is speaking to is who they say they are. All he can do is verify that the person or position they are speaking to claims to be a person or position named on the licence.

The problems are further compounded by the GLA application form and guidance notes. The specific question asked on the application form is: "For the regulated sectors, please state the name, date of birth and business phone number for anybody within the organisation who is authorised by you to negotiate with and supply workers to customers. All of the people named must be direct employees of the business and not subcontractors." The guidance notes have an additional qualification "If your organisation does not have employees who fulfil this role (i.e. it is only you, the directors or partners who can do so) please go to section E".

Labour providers have the option of specifying job titles, something which was thought to be most appropriate to the larger ones.

In other words, the people named should not be directors and also the GLA was not expecting the principal authority (who in any event is likely to be a director) to be named. The wording in the application form and the guidance has reasonably led many labour providers that are companies not to name any people on the grounds that no one other than the principal authority or some other directors are authorised to negotiate contracts. The GLA has accepted this as nearly half of companies that have been registered have no additional names. However, the consultation paper envisages requiring the labour user to verify that the person they are dealing with is named or otherwise specified on the licence. As the ALP has already pointed out, the application form, the guidance notes and the legislation are inconsistent, and there is now a further inconsistency in the Defra consultation paper.

The following table shows the approach to naming people adopted by 358 companies whose licence details were on the GLA website on 28 and 29 June 2006 –

no names	164
one name	72

two names	33
three names	30
four names	13
five names	10
six names	9
seven names	1
eight names	4
9 - 19 names	7
22 names	1
27 names	1
Positions	13
Total	**358**

46% of companies recorded no additional names or positions. However, it is worth noting that nine labour providers listed the principal authority as a name either on his or her own or as one of a number, contrary to the GLA's instructions and guidance. Of the 13 labour providers that opted to give positions, one named one position (managing director) and three others named between two and three positions. The other numbers of positions were 6, 10, 15, 23, 24, 28, 103, 140, and 1,195. The company with 1,195 positions is Adecco - 20 account managers, 350 branch managers, 800 recruitment consultants and 25 regional managers.

The Defra consultation paper is in effect saying that labour users cannot deal with 46% of corporate bodies that have been given licences by the GLA. This is clearly unreasonable. It implies that the GLA has given licences which have no value and which therefore have been given improperly. This issue needs to be resolved between Defra and the GLA in its own right and is a prerequisite to a decision being taken on the "reasonable steps".

The ALP preferred option

Two options can be ruled out immediately. Option 4 is out of keeping with the rest of the paper. It is even drafted in a different tone, lapsing back into use of the word "gangmaster" which can only confuse as the legislation is not dealing with gangmasters per se, but rather with employment businesses and agencies. It is hopelessly over-complicated, would be unworkable in practice and would lead to the GLA having an unreasonably intrusive role in commercial contracts. It would require significant additional steps in the process of taking labour from the labour provider that

cannot be justified by the outcome. As Option 4 is unacceptable so is Option 5 which would require everything in Option 4 together with face to face contact between labour provider and labour user.

Option 2 is the ALP's preferred option. It is the logical commonsense one of a requirement to check whether the labour provider business is licensed. The consultation document suggests that it does not meet the legal requirements in respect of names on licences. However, as has already been pointed out the concept is very difficult to operate. Option 2 would make the best of a bad job. It would meet the intentions of the legislation and would enable the requirement to name people and positions to be dropped. It may be argued that it does not meet the requirements of the legislation. However, for the reasons stated above the regime established by the GLA does not meet the requirements either, which in any event are illogical. It has to be asked, for example, what public purpose is served by a labour user ensuring that the person he is dealing with is a "recruitment consultant" with Addeco or a "temporary consultant" with Blue Arrow.

Option 3 is that a labour user should check the GLA register to establish whether the labour provider business is licensed and that the person with whom the agreement is made is authorised to act as a labour provider. This option is workable only if –

- The requirement to ensure that the person or position is named should be replaced by a requirement to ensure that the person or position with whom a labour provider is dealing is the same as on the licence. It is impossible for a labour user to verify that they are dealing with a named individual or position. Government cannot require businesses to do the impossible.

- The GLA website is modified to allow entries to be saved.

- The GLA amends its application form and guidance notes and writes to all labour providers that have been licensed, acknowledging that the original versions were incorrect and asking for names of people authorised to act, including the principal authority and directors.

The Association would prefer guidance rather than regulations given that there is no obligation on anyone to follow either the guidance or the regulations, and given the context described earlier. However, it is important that if guidance is issued it has precisely that status and does not assume some additional status of almost being requirements that labour users must follow. Regulations seem unnecessary where the effect is merely to establish a defence. Also, the danger, as has been noted with the section 8 regulations, is that they are seen as being a requirement as of right rather than merely a means of establishing a defence.

Detailed comments on Option 3

The procedure set out in paragraph 5 is over-elaborate and can be considerably simplified. There should be no requirement to check the register before contacting a known labour provider. Rather, the checking of the register must be done before the arrangement is entered into.

The second bullet point says "keep a copy of the register entry". The GLA website was constructed in such a way that it was impossible either to save the register entry. Following earlier representations from the ALP it is now possible to print out, but still not to save, register entries. The website needs to be reconstructed to enable this to be done otherwise it is difficult to see how the offence can be implemented.

The requirement that further communications should be signed or sent by one of the named people or a person with one of the specified job descriptions is unreasonable. Once a contract has been agreed it is quite common for other arrangements to be dealt with less formally by other members of staff. This requirement seems to be particularly pointless where job descriptions have

been given. For example, Blue Arrow has declared 400 "temporary consultants". It is difficult to see what public purpose is served by requiring a business to communicate entirely through a position called “temporary consultant”.

It is suggested that invoices should be identified as coming from a licensed labour provider business. This is contrary to accepted business practice. Government departments among others outsource their invoicing arrangements. All it needs to be done is for the invoice to identify the labour provider who has provided the service. The reference to signing an invoice should be removed as invoices are not signed.

The third bullet point suggests that there should be a further check of the register if two days have elapsed since the initial check. This is an unreasonable requirement. Labour users cannot be expected to constantly check for changes in the register. The requirement to check the register at monthly intervals and to keep a copy is unrealistic unless the GLA website enables this to be done. The requirement also seems incompatible with the GLA requirement that changes to the information published on licences need to be notified within 20 days.

The fifth bullet point seeks to impose a duty on labour users to check whether a labour provider is using a subcontractor. There is no such legal obligation on labour users so the requirement should be removed.

Detailed comments on Option 4

Paragraph 1 refers to "gangmaster" rather than "labour provider", the expression used elsewhere in the document.

This whole procedure is so complicated that he would be unworkable in practice and indeed could bring somewhat questionable legislation into disrepute if it was implemented, particularly if it was seen as a procedure that should be gone through in any event.

Paragraph 5 requires the labour user to check that the person with whom he enters into arrangements is listed on the register entry. This is impossible without a formal identity check or written confirmation from the company in the case of positions.

Paragraph 6 imposes requirements that are impossible to meet. A labour user cannot "ensure that the person signing the document or sending the e-mail is authorised to act". The requirement cannot extend beyond checking that the name or the position given is that of someone authorised to act.

Paragraph 9 introduces a requirement on the labour user to undertake a document check to verify the identity of workers supplied. There is no such requirement in the Act and it is irrelevant to the offence.

Paragraph 10 imposes yet another significant element of bureaucracy, that is that the labour user should check the register monthly and record his interest with the authority.

Paragraph 11 seems to imply that invoices are issued by a member of staff. They are issued by businesses. What is a labour user to do if an invoice does not mention the current UACRN? There is an expectation here that labour providers will have to amend their invoicing procedures to add an additional field.

Responses to consultation questions

This section answers the specific consultation questions although all the points are made earlier in this response

1. Option 2 is the ALP's preferred choice. However, each of the options is difficult because of inconsistencies in the legislation and the licensing regime.

2. Option 2 should not be rejected. Options 4 and 5 should be rejected.

3. There is no obligation on a labour user to make any check and therefore there is no need to look for less burdensome requirements.

4. Both appendices 1 and 2 introduce unnecessary requirements and could be greatly simplified.

5. The format of the appendices is fine; it is the wording that needs to be simplified. Option 2 would require a much shorter guidance note.

6. In practice most labour providers will do no checks so it seems pointless suggesting that they do two when one is the best that can be hoped for.

7. Checking the register monthly is unduly onerous. Every three months would be quite sufficient. In practice, the good labour user will quickly find out by some other means if a labour provider has been struck off.

8. Keeping relevant correspondence for as long as three years would be unduly onerous. One year should be quite sufficient. Also, records should be acceptable in electronic form. Again, the point needs to be made that the GLA website does not allow this to be done at present.

9. It would be preferable to have a single list of all labour providers showing whether they are licensed or have had their licence revoked. Clearly those that have had a licence revoked should be highlighted in some way in the main list.

Comments on the regulatory impact assessment

The RIA is a comprehensive and helpful document. This is particularly important given the nature of the issue under consideration. The Association has a small number of comments on the RIA.

- A previous RIA is quoted in paragraph 7.2 saying that the licensing arrangements will potentially affect some 8,236 Labour users. This figure seems unduly precise but also seems very substantially on the low side. The regulations would affect all businesses in the food industry that use employment agencies or businesses to obtain temporary or permanent workers. Paragraph 9.2 noted that 266,025 businesses could be regarded as part of the UK food and drink supply chain. This figure seems more relevant. To the extent that the 8,236 figure is low this would increase the costs to businesses.

- The overall conclusion that the cost of whatever option is chosen will be relatively modest is correct, subject to one proviso. If a labour user regularly uses labour providers he will be familiar with the legislation and will take steps to comply with it. However, there is a constant flow of new businesses being established in the food industry and many established businesses may begin using employment agencies or businesses for the first time. The time and cost to them will be finding out about the legislation and the requirements, rather than operating them. This is not properly represented in the RIA.

The consultation process

The consultation document is excellent, given the context in which it has been prepared. However, this is a difficult consultation exercise. The proposals affect predominantly not labour providers but rather labour users most of whom have no knowledge of the legislation not are they likely to gain any knowledge of it from any publicity campaign that the government might

undertake. Food businesses do not believe that they take labour from “gangmasters” so it is particular important that any publicity refers continually to labour providers or employment agencies and employment businesses and not to gangmasters. The experience with consultation so far is that labour users have been fairly passive. The nature of this exercise is such that Defra should directly contact a number of the major labour using associations and should also arrange at least one informal consultation event which will help get over the importance of the issue. There is a real danger that there will not be proper consideration of the proposals which will then be introduced and will cause substantial disruption. However, this really applies more to the issue of the offence of taking labour without a licence rather than not following the reasonable steps requirements.