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RECRUITMENT SECTOR LEGISLATION - CONSULTATION ON REFORMING THE REGULATORY FRAMEWORK FOR EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES

RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS

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Introduction

The Association of Labour Providers (ALP) represents around 250 labour providers, which together supply the majority of the seasonal and temporary workforce to the agricultural and food processing industries.

ALP members are subject to the licensing standards of the Gangmasters Licensing Authority (GLA). The Association has been heavily involved in the GLA regulation of labour providers over the last nine years.

This BIS Consultation is concerned with two pieces of legislation, the Employment Agencies Act 1973 (the Act) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Regulations). These two pieces of legislation are disapplied for activities for which a GLA licence is required under the Gangmasters (Licensing) Act 2004, but in effect their requirements are closely mirrored in the Gangmasters (Licensing Conditions) Rules 2009.

However, for all activity undertaken by ALP members outside of the GLA Licensed sector, the Act and Regulations apply. ALP members are therefore subject to a two tier regulatory framework depending on whether activities fall in or out of the GLA sector.

Legitimate labour providers want, and have a right to expect, a “level playing field” in order to compete fairly within the law. To enable this it is essential that action is taken to prevent rogue businesses from undercutting legitimate labour providers, either through tax evasion, worker exploitation or both.

To this end, the ALP supports an intelligence-led, risk-based proportionate regulatory and enforcement regime that facilitates a fair, competitive trading environment for labour providers.

ALP Response

Question 1: a) Do you agree with the four outcomes that the government believe should be achieved by the recruitment sector legislation (outcomes are listed below)?

Employment businesses and employment agencies are restricted from charging fees to work-seekers

We agree that employment businesses and employment agencies should be restricted from charging for providing work finding services.

However they should be able to continue to charge for the provision of non-mandatory ancillary services over and above the provision of work-finding services. Examples of this would be optional transport to work, personal accident insurance etc.

There is clarity on who is responsible for paying temporary workers for the work they have done

Individuals should have clarity as to their contractual arrangements, employment status, the service that is being offered to them and they are signing up to and who is responsible for paying them (See Question 7).

The contracts people have with recruitment firms should not hinder their movement between jobs and temp-to-perm transfer fees are reasonable

Contracts with recruitment firms should not hinder movement between jobs but there should be no reasonableness test for temp-to-perm transfer fees (See Question 8 and 9).

Work-seekers have the confidence to use the recruitment sector and are able to assert their rights

Work-seekers should have the confidence to use the recruitment sector and be able to assert their rights but we do not agree with the means proposed in the consultation to achieve this. (See Question 10,11 and 12)

Question 2: a) Are there any other outcomes that you think should be achieved by the new legislation?

YES

ALP supports the REC consultation response arguments for:

- Better analysis of current recruitment/supply activity & examination of whether the current definitions are fit for purpose.
- Requirement for clarity on the opt-out provision
- Retention of the statutory provisions that require employment agencies and businesses to carry out suitability checks
- Mandatory umbrella/travel & subsistence use
- Clarity on composition of pay, particularly through intermediaries and allocation of tax savings.

Question 3: a) Do you think there are circumstances, outside of the entertainment and modelling sector, where agencies should be allowed to charge fees?

No

The ALP believes that there should be free access to jobs and does not think that there are circumstances, outside of the entertainment and modelling sectors, where agencies should be allowed to charge fees.

Question 4: a) Do you think the current definition of "employment agency" as set out in section 13 of the Employment Agencies Act 1973 could be improved?

Yes

The current definition of "employment agency" should be reviewed to provide clarity in light of a) Job Boards and b) situations where employment businesses effectively act as an employment agency by introducing an individual worker to an umbrella company or other intermediary, who then employs that individual.

Question 5: a) Do you think legislation should require employment agencies to allow work-seekers a cooling off period in situations where fees can be charged?

Question 6: a) If you answered yes to question 5, do you think there should be one standard cooling off period?

As the ALP believes that employment agencies should not charge fees to work-seekers for providing work finding services, these questions are not applicable.

Question 7: a) Do you think it is necessary to legislate to ensure that there is clarity on who is responsible for paying a temporary worker for the work they have done?

Yes

The ALP supports the REC position on this matter with regard to the need for clarity with regard to intermediaries in current labour supply chains e.g. umbrella companies, payroll companies and master/vendor arrangements and particularly:

- how "temporary workers" are defined and whether any new legislation will aim to protect individuals and/or limited companies;

- how intermediaries should be covered by any new legislation given their responsibilities for employing and paying individuals ; and

- if other intermediaries are responsible for employing and paying individuals, employment businesses should not be required to underwrite payment of individuals where those intermediaries have failed to pay those individuals.

The ALP supports that:

- Intermediaries should have a separate definition to employment businesses

- Any new legislation should make clear that the intermediary that is the "employer" for other employment rights (e.g. responsible for paying holiday pay) should also be responsible for paying the temporary worker

- The definition of employer should be consistent with other employment law

- There should, of course, be clarity about who is responsible for paying a temporary worker but there should also be clarity about the service that is being offered to the individual.

- Employment businesses should not be required to underwrite payment of temporary workers where other parties have failed to pay those workers.

Question 8: a) Regulation 6 restricts employment agencies and businesses from penalising a work-seeker for terminating or giving notice to terminate a contract. Do you think that the text of regulation 6 could be improved?

Temporary workers should be able to move within the labour market without detrimental action being taken against them. Individuals should not be penalised because they have terminated or because they give notice to terminate a contract with an employment agency or business.

However, the use of post termination restrictions in employment contracts is commonplace and there may be situations where it may be appropriate in this sector such as hirers wishing to restrict an individual from going to work for a competitor or incorporated work seekers that are in business of their own account.

Question 9: a) Regulation 10 has the effect of restricting employment businesses from charging unreasonable transfer fees to hirers. Do you think that the text of regulation 10 could be improved?

No

The ALP position is that as a principle it is not for the Government to legislate on what is a reasonable fee in a commercial negotiation. Any new legislation needs to retain a provision in line with Regulation 10, which gives a precise outcome as opposed to any test of reasonableness.

Proposals to implement "reasonableness" should not be considered as they would:

- Prejudice employment businesses ability to receive a reasonable level of recompense. Article 6.2 of the Agency Workers Directive states that action Member States take, shall be "without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers". It enables at any stage a hirer to issue a legal letter prior to action stating that it no longer considers the temp to perm charges that it previously agreed to as "reasonable". This will in effect compromise employment businesses to accept lesser terms than those originally agreed to in writing between the parties.

- Be unnecessary. The current Regulations allow that:

    - Temp-to-perm fees must be agreed in writing – thus providing the opportunity for the client to refuse any unreasonable terms – and if they are not in writing then they are null and void.

    - Any agreement must include the option of an extended hire period - and if they don't they are null and void. This precludes any transfer fee which has

the effect of preventing the conclusion of an employment relationship between the user undertaking and the agency workers and

- The Unfair Contracts and Terms Act 1977 establishes provisions for the assurance of reasonableness in contractual terms.

- Increase bureaucracy, red-tape and litigation. There would need to be legislation or guidance that dealt with:
  - A reasonable process to determine what is “reasonable”.
  - What situations may render terms agreed as reasonable between the parties, within the commercial contract, to no longer be reasonable.
  - Mediation and arbitration as alternatives to litigation.
  - The process to replace what are regarded as unreasonable terms with reasonable ones without rendering them null and void.

Question 10: a) Do you think employment agencies and businesses should publish information about their business?

Question 11: What information do you think would be of most interest to: a) work-seekers b) hirers

Question 12: a) Do you think it should be compulsory for employment agencies and businesses to publish information about their business?

The ALP promotes a stakeholder partnership approach to continuously improve standards of labour provision and to raise labour standards beyond base compliance. The ALP supports labour providers and hirers to meet their legal and ethical responsibilities to the contingent workforce and to treat temporary and seasonal workers fairly and with respect.

Within the agricultural and food processing sectors, employment businesses (referred to as labour providers) are:

- Inspected by and subject to the licensing standards of the Gangmasters Licensing Authority
- Able, at low cost, to use the ALP Complyer tool to self-audit against the GLA licensing standards
- Regularly audited by their clients to monitor compliance with GLA licensing standards
- Audited by professional third party Social Compliance Auditors against compliance to Ethical Labour Standards Base codes

Consequently, significant compliance information, or the means to access this, is currently available to hirers within the food and agricultural sector.

ALP does not support the proposal that employment agencies and businesses should publish information about their business:

- It would add bureaucracy and red-tape and divert focus away from businesses building growth.

- It would not be practically or logistically possible to detail information accurately and consistently

- It would be open to abuse by less scrupulous agencies.

- It would be impossible for the government to viably ensure that the data published is accurate

- It would be impossible for the government to properly enforce

Question 13: a) Do you think trade association codes of practice help to maintain standards in the sector?

Trade association codes of practice can help to maintain standards. However they are only part of the solution and there are many issues about how they are constructed and implemented that should be improved or integrated within a broader portfolio of measures (see answer to Question 14).

Question 14: What other non-regulatory tools could be used to maintain standards in the recruitment sector? Please be as specific as you can in your response.

The food and agricultural sector has made significant progress in raising standards within the last ten years.

The food and agricultural sector invests considerable time and resource into ensuring compliance. This is partly driven by the large supermarkets who demand compliant ethical labour standards in their supply chains to protect their reputation. It is also driven by the underpinning of a regulator with teeth whereby a non-compliant labour provider runs the risk of losing its GLA licence and its ability to trade and a complicit hirer risks reputation damaging media attention.

There is also a very developed ethical trade compliance understanding spearheaded by the supermarkets to their supply chain; the GLA licensing standards; the Ethical Trading Initiative; the Supplier Ethical Data Exchange (Sedex) and the labour standards auditing programmes undertaken by global social compliance auditing programmes. The sector faces rigorous scrutiny by trades unions, the media, the Equalities and Human Rights Commission and third sector bodies such as the Joseph Rowntree Foundation; Anti-Slavery International, the Institute for Human Rights and Business and more.

Many lessons can be learned by other sectors from the journey that employment businesses in this market have undergone.

Some of the most relevant non-regulatory tools that maintain standards in the recruitment sector are:

- A collaborative multi-stakeholder approach

- The risk of reputation damaging publicity

- An effective and proportionate regulator with teeth

- Demonstrable compliance being a marketable benefit to clients

- Low cost/high quality compliance training for employment businesses and hirers
- Low cost self-audit tools that enable employment businesses to assess their own compliance and implement corrective actions
- Low cost audit tools that enables hirers to audit employment businesses to assess compliance and work in practice to implement corrective actions
- A consistent low cost approach to third party independent social compliance auditing which recognises:
    - All legal requirements i.e. more akin to GLA Licensing Standards
    - Key Ethical Base code requirements
    - Which matters are under the control of the hirer

  The ALP supports standardisation of compliance self-assessment and auditing and is working with the UK food supply chain and global auditing bodies on this matter.
- The ability to share audits with multiple clients (through a body such as Sedex) to avoid an unnecessary audit burden.

Question 15: Do you think that it is necessary for the Government to enforce the recruitment sector legislation?

Yes

The ALP believes that proportionate regulation facilitates fair competition and supports economic growth. In the last ALP survey, over 70% of members stated that they support the licensing of employment businesses.

Scrapping the Employment Agency Standards Inspectorate (EASI) and moving to a purely civil, employment tribunal enforcement regime would be a retrograde step for a number of reasons:

- Compliant employment businesses want stronger enforcement action against non-compliant businesses for gross abuses such as failing to pay wages; NMW; holiday pay and the like than an employment tribunal is likely to bring.
- Workers in exploitative situations rarely bring tribunal action for fear of repercussions such as losing work altogether.
- Compliant employment businesses and clients would be left with no recourse to report grievances against other businesses.

However the remit, powers and resources of EASI are currently wholly inadequate.

ALP advocates further consultation on how to ensure there is a focus on the worst breaches of legislation within the recruitment industry. Particular proposals to be considered include:

- There should be a move towards closer integration between EASI and the GLA to share intelligence gathering; conduct joint enforcement activities and examine areas for efficiency improvements.

- EASI's remit should be extended to enforce the same issues as the GLA
- EASI should be provided with a range of civil i.e. Maccrory regulatory penalties up to and including prohibition.
- EASI to be properly resourced to undertake its function

Question 16: a) Do you think that prohibition orders should be included in the new enforcement regime?

Yes

As a civil rather than criminal power.

Question 17: a) Do you think individuals should be able to enforce their rights at an Employment Tribunal?

Agency workers may already enforce their rights at Employment Tribunal, most notably under the Agency Workers Regulations 2010, National Minimum Wage Regulations 1999; Employment Rights Act 1996; Working Time Regulations 1998 and the Equality Act 2010.

In light of the ALP response to the other questions in this Consultation, ALP does not perceive that there is a need to add further remedies.

Question 18: What guidance do you think individuals would need to be fully aware of their rights and how to enforce them?

Individuals need to have straightforward guidance made available to them which allows them to understand their rights and how to seek further information from the Pay and Work Rights Helpline.

The GLA already makes available a Worker Rights leaflet in multiple languages for agency workers in the food and agricultural sectors.

Question 19: a) Do you think that the Government should proactively publish the findings of investigations that have been carried out, including the trading name of each employment agency/business, and listing the infringements to the legislation?

Yes

"Regulation by Reputation" by publicly naming non-compliant businesses is an effective way to drive improvement in standards.

There would need to be fair and proportionate regulatory principles in place in accordance with the Regulators' Compliance Code, most notably:

1. Proportionality in decision making – Recognition of difference between systematic and isolated non-compliance; willingness to co-operate, correct and comply.

2. Right to fairly present a case - In accordance with the Regulators' Compliance Code 8.2 that: "When considering formal enforcement action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach" and the "Audi alteram partem" principle of natural justice that no person should be judged without a fair

hearing in which the party is given the opportunity to respond to the evidence against them.

3. Right to appeal - that does not impose unnecessary burden and accords with good regulatory practice.

4. Right to correct – A proportionate right to correct non-compliance, (excluding proven extreme cases of abuse) by putting matters right within a set period to avoid having details of non-compliance published.

There is significant experience within the GLA that can be shared on this matter.

Question 20: a) Do you think it is necessary to legislate to require employment agencies and businesses to keep records to demonstrate that they have complied with the regulatory requirements?

Yes

Question 21: What records do you think employment agencies and employment businesses should be required to keep relating to: a) work-seekers? b) hirers? c) other employment agencies/employment businesses?

As per the current GLA Licensing requirements