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## Member Brief No 136

# Providing Transport to Agency Workers

### Introduction

This Briefing offers guidance to labour providers who are considering providing transport to their workers using their own vehicles or by subcontracting the service to a 3<sup>rd</sup> party contractor.

The ALP also produces the following Briefs which may be downloaded from the ALP Members' Area Briefs and Guidance Transport section:

- Charging for Transport to Work
- The Cost of Providing Transport
- Vehicle Insurance for Labour Providers

Labour providers should exercise due diligence in both the initial choice of a 3<sup>rd</sup> party contractor and by periodically checking their licences, insurance and other documents. Contracts for the supply of such services should include sufficient indemnities to protect the labour provider in the event of liability through the contractors' negligence, despite due diligence.

Failure by the labour provider, or the transport contractor, to observe these regulations may lead to criminal offences being committed, non-compliance with the GLA Licensing Standards, non-compliance to the PSV or Taxi Operator Licence legislation, and/or liability for failing in duties of care towards workers and employees. Charges of Corporate Manslaughter could result from fatalities of workers being transported.

### GLA Licensing Standards Requirements

Certain sections of the GLA Licensing Standards are particularly relevant to this briefing note. Whilst the wording of the standards is targeted towards the labour provider's own transport provision, they imply a due diligence requirement when a 3<sup>rd</sup> party contractor provides the service on behalf of the labour provider.

Failure against these critical standards may lead to a licence being revoked.

LS 1.1 – Fit and Proper - The licence holder, Principal Authority and any person named or otherwise specified in the licence must at all times act in a fit and proper manner.

LS 1.2 – Principal Authority Competency Test - The GLA will consider the Principal Authority's competence and capability to hold a GLA licence.

It is quite possible that the GLA would consider that a labour provider who had insufficient management processes to ensure the correct operation of vehicles by themselves or their contractors would be regarded as not having the competence and capability to hold a GLA licence.

LS 6.4 – Transport Requirements - A vehicle used by the licence holder to transport workers must have paid the appropriate vehicle tax, have an applicable MOT certificate if required, have appropriate insurance, including cover for all circumstances of hire or reward regardless of the size of the vehicle, be in a roadworthy condition and have no obvious or identifiable defects, and carry workers in a safe manner.

A licence holder who operates vehicles with 9 or more passenger seats used for hire or reward (PSVs) must, have a Public Service Vehicles (PSV) Operator's licence, and have documentary evidence that the vehicles are registered and maintained as PSVs and have a Certificate of Initial Fitness.

A driver used by the licence holder to transport workers must hold a valid driving licence, have Passenger Carrying Vehicle (PCV) entitlement and a Certificate of Professional Competence if driving a vehicle with nine or more passenger seats used for hire or reward, and comply with rules covering drivers' hours and tachographs.

Other Critical Standards may also apply, particularly LS 3.3 relating to withholding wages and LS 2.2, National Minimum wage compliance, when some or all of the costs of providing transport (even on a purely voluntary basis) are recovered through wage deductions. See ALP Brief Charging for Transport to Work for further details.

## **Definitions**

Taxis and Private Hire vehicle – “A motor vehicle constructed or adapted to seat fewer than nine passengers, (*other than a hackney carriage or public service vehicle or a London cab or tramcar,*) which is provided for hire with the services of a driver for the purpose of carrying passengers”.

Public Service Vehicle (PSV) – “A motor vehicle which, being a vehicle constructed or adapted to carry more than eight passengers is used for carrying passengers for hire or reward”.

Minibus –a “small bus” being any motor vehicle constructed or adapted to carry more than eight (but not more than sixteen) seated passengers in addition to the driver. NB This definition extends to panel vans so adapted.

Coach –a “large bus” carrying more than sixteen passengers, with a maximum gross weight exceeding 7.5 tonnes and a top speed exceeding 60mph.

Bus – “A motor vehicle which is constructed or adapted to carry more than eight seated passengers.”

“Hire and Reward” – Hire and Reward is deemed when the operator of the vehicle derives any form of benefit from the operation of the vehicles. For labour providers the reward comes from the profit made on the services of the workers transported. Current interpretation, as with NMW enforcement, is that the acceptance of the transport service, even on a purely voluntary or free basis, constitutes “Hire and Reward”.

## PSV Operator Licensing

The operator of a public service vehicle used on a public road for carrying passengers for hire or reward has to hold an Operator's "O" licence. Failure to comply with the requirements for holding a PSV "O" licence is a serious offence (maximum fine £2500).

There are 4 types of PSV operator licence;

- A standard licence for both national and international operations allows an operator to run both national and international operations with a professionally competent person holding the relevant Certificate of Professional Competence (CPC).
- A standard licence for national operations only allows an operator to run passenger vehicles for hire or reward within Great Britain. The licence holder must name a professionally competent person who has the relevant CPC.
- A restricted licence allows a business whose main occupation of the operator is not the operation of public service vehicles to operate one or two vehicles with more than 8, but not more than 16 passenger seats, in Great Britain. A restricted licence does not require a CPC holder to be named on the licence and the financial standing requirements are less.
- A special restricted licence (for holders of taxi and private hire licences) allows an operator to use one or two vehicles with no more than eight passenger seats on national operations.

"O" licences are issued and controlled by the Traffic Commissioners who operate in Scotland, Wales and six English regions (Traffic Areas). There are separate arrangements in Northern Ireland.

Separate licences are required for each of the regions in which the operator maintains Operating Centres.

The registered CPC holder is personally liable for the proper conduct of the licence and any infringements will remain on the Traffic Commissioners' records.

On application, and periodically thereafter, the operator must demonstrate that

- they are of good repute and are of sufficient financial standing to run the operation correctly and safely,
- that the vehicles will be maintained properly, either "in house" or contracted out,
- that there are sufficient defect reporting and corrections procedures to maintain their safe condition at all times and to monitor the hours of work of the driver,
- that suitable off road parking is available when the vehicles are not in use,
- that the operator has a place of business where all relevant records can be examined, if required (Operating Centre).

The Traffic Commissioner will make checks and decide on the suitability of the application for the number of vehicles requested and will consider objections to applications from the police, local authorities and other specified public bodies.

The Traffic Commissioner will be advised by the enforcement agencies such as the Police and Driver & Vehicle Standards Agency (DVSA) inspectors, of any breaches of applicable regulations and may suspend, curtail or revoke a licence if the operator does not maintain vehicles satisfactorily, permits breaches of the Driver's Hours regulations, breaches any conditions on their licence or fails to cooperate or makes a false statement with any inspection.

The DVSA [PSV Operator Licensing Guide](#) gives full details of the licencing requirements and processes.

## **Construction and Use**

There is extensive legislation governing the initial design and construction of all motor vehicles and subsequent adaptation or modification. There are particular measures applicable to PSVs, including the fitting of seat belts, speed limiters and tachographs that depend on the vehicle itself. Breaches of these regulations will constitute an offence by making the vehicle un-roadworthy.

All PSV's will be issued with Certificates of Initial Fitness when manufactured, or of Conformity when adapted, which should be retained by the operator.

## **Preventative and Corrective Maintenance**

There is a legal obligation on the part of the driver and the operator of all passenger carrying vehicles to ensure that the vehicle is roadworthy at all times. Also, a civil law duty of care is owed to all passengers which extends to the labour provider whether they provide the transport or contract it out.

If a vehicle is found to be un-roadworthy, the driver and operator are guilty of a serious offence (it is not necessary for guilty intent to be proven).

If passengers are injured due wholly or partly to an avoidable defect, it is likely that they will argue that the operator and/or the hirer was negligent and claim damages.

To meet their legal obligations, operators of all passenger carrying vehicles should implement a system which ensures that:

- vehicles are checked thoroughly prior to use (this may be done by the driver provided adequate instruction has been given),
- safety related items are inspected regularly by a competent engineer,
- defects are reported to someone competent and authorised to say whether the vehicle may or may not be used (for example, whether it is legal and safe) and who will make arrangements for repairs,
- vehicles are serviced according to the manufacturer's schedules by a competent person,
- the operator maintains sufficient records to demonstrate compliance.

The [DVSA Guide to maintaining roadworthiness](#) summarises the key points of a good maintenance system and gives detailed information, including sample documentation to aid compliance.

## Annual testing

All PCVs must be tested annually from the end of their first year by a DVSA approved examiner to the approved standard for the type of vehicle.

It should be noted that a valid test certificate means only that the examiner considers that the vehicle meets the criteria in the testers' manual on that day at that time. It does not certify that the vehicle is roadworthy until it expires, labour providers using 3<sup>rd</sup> party providers would be prudent to seek assurance on the on-going roadworthiness of vehicles used.

## Drivers Hours

Operators of PSVs are required to ensure their drivers comply with the relevant regulations governing their hours of work, driving time and rest periods. To do so they must have appropriate processes to keep accurate records and to identify and act on any infringements. Drivers must be properly trained and suitably disciplined for breaches. The operator must not impose work schedules that could lead to infringement of the regulations.

The provision of transport services does not constitute a Regular Service in the terms of these regulations and all PSV drivers will be subject to the EU rules (unless they can claim exemption as an occasional mobile worker). NB Drivers of vehicles of less than 8 seats carrying workers will be subject to the GB Rules.

## Summary of EU Rules

**Rest:** An uninterrupted period of time where the driver may freely dispose their time. Time spent under any obligation or instruction (other work) for any employer, including self-employed, cannot be counted as Rest.

Daily Rest period	11 hours continuous rest within 24 hours of the end of the previous Daily or Weekly rest period. Can be split into 3 + 9 hours in 24 hours. Can be reduced to 9 hours, three times between 2 Weekly Rest Periods.
Weekly Rest period	45 hours continuous rest within 6 days from the end of the previous Weekly Rest period. Can be reduced to 24 hours, provided the reduction is compensated by being attached to a Daily or Weekly Rest period, by the end of the 3 <sup>rd</sup> week following the reduction.

**Work:** Time spent in performing any duties other than Driving under obligation or instruction, or on a self-employed basis.

Each day	Normally 13 hours maximum but can be 12 or 15, depending on Daily rest, with ½ hour break after 8 hours.
Each week	No more than 48 hours on average in a pre-determined reference period (17 or 26 weeks). Maximum 60 hours in a week, provided

excess is compensated for within the reference period, maintaining the 48 hour average.

**Driving:** Time spent actually driving a vehicle

In a fixed week : 00:00 Monday to 24:00 Sunday  
Maximum 56 hours, with 45 minute breaks after 4 ½ hours driving in addition to normal rest periods.

In 2 consecutive fixed weeks  
Maximum 90 hours

Most PSVs will be equipped with tachographs that keep automatic records either mechanically or electronically. The Operator is required to download, analyse and take action on any infringements by the drivers of their vehicles.

Drivers of vehicles equipped with digital tachographs will maintain copies of the vehicle records for each vehicle they drive on personal Driver Smart Cards which can be similarly accessed by enforcement authorities.

Full details are contained in the DVSA [Rules on drivers hours and tachographs for PSVs.](#) or online at <https://www.gov.uk/tachographs>.

## **PCV Driving Licences**

Both small and large buses require specific vocational driving licences (class D or D1). Holders of the equivalent licences from other EU countries, resident in the UK, are permitted to drive in the UK but must register their licence with DVLA within 12 months.

Some older car licences imply the holder may drive a minibus (class D1) but, without an additional test, the licence will bear a type 101 exclusion, prohibiting driving for "Hire and Reward" and cannot drive in these circumstances.

Further details can be viewed on the Gov.UK website at [Driving licences - online guidance.](#)

As from 1<sup>st</sup> September 2014 these licences are supplemented by an additional Driver's Certification of Professional Competency which is evidenced by a "Drivers Qualification Card" (DQC).

Holders of D or D1 licences issued before 1<sup>st</sup> September 2008 will have obtained their initial qualification via "acquired rights" but all others will have taken a prescribed test with minimum training requirements. All Driver CPC holders must undertake at least 35 hours of approved training in 5 years to maintain the qualification.

Holders of equivalent EU licences can apply for a DQC provided at least 7 of the 35 hours approved initial training has been taken in the UK.

See [Driver Certificate of Professional Competence](#) for full details.

Where an electronic tachographs is fitted, it must be used for which the driver must hold a personal Driver Smart Card.

## **Vehicle Excise Duty**

Vehicle Excise Duty (VED) (also known as vehicle tax, car tax and road tax), is levied on types of vehicle which are to be used (or parked) on the public roads in the United Kingdom.

Although the new computerised system has removed the requirement to display a tax disc in each vehicle, the operator of the vehicle must, at all times, have paid the VED applicable to the type and use of the vehicle.

Enforcement is largely undertaken remotely through the use of Number Plate Recognition technology (NPR) or direct enquiry onto the DLVA system by enforcement officers.

### **Taxi & Private Hire Vehicles Licencing**

Operators of Taxi & Private Hire Vehicles are licenced by Local Authorities under conditions determined locally.

Nonetheless the safety of passengers is one of the key principles. Whilst less stringent than the PSV "O" licence requirements, and enforced locally, not by the Traffic Commissioners, requirements for effective preventative and corrective vehicle maintenance, regular inspection and certification are very similar.

Any use of a 3<sup>rd</sup> party provider, such as pre-booked taxis, will be subject to this local regulatory regime and the labour provider should exercise due diligence in both the initial choice of provider and by periodically checking their licence, insurance and other documents. Contracts for the supply of such services should include sufficient indemnities to protect the labour provider in the event of liability through the contractors' negligence, despite due diligence.

### **Vehicles with 8 or less passenger seats**

Whilst vehicles with 8 or less passenger seats would normally fall outside the PSV or Taxi legislation, the labour provider will become liable for any damage, and particularly death or injury to passengers, if the driver / owner is rewarded in any way for the carriage of the passengers since they may be deemed to be operating for "Hire & Reward".

Where company vehicles are used by employees, or other workers, to transport agency workers on behalf of the labour provider, levels of care comparable to that required for using PSVs must be exercised. Suitable processes for checks on the roadworthiness of the vehicle, the licence of the driver and adequate insurance should be in place.

Labour providers may require their employees to use their own private vehicles for company business, including the transport of workers and a similar duty of care will apply. Since the vehicle will be insured for Business Use by the employee, it would be prudent for the labour provider to have sight of written confirmation that carriage of passengers for Hire & Reward is included, as above.

In all cases, the drivers of these vehicles, when carrying passengers for Hire & Reward will be subject to the GB Driver's Hours restrictions, allowing no more than 16 hours work in 24, and at least 24 hours rest in any two week period.

See <https://www.gov.uk/drivers-hours/gb-domestic-rules> for details.

### **Agency Workers own vehicles**

A private agreement between individuals to share the costs of transport, including traveling to work, is normally not deemed to be Hire & Reward; however, if the labour provider can be seen to be promoting, funding or rewarding the driver/owner in any way or otherwise

arranging for the transport, they will assume all the liabilities applicable to using their own vehicles. They might also be guilty of aiding and abetting criminal activities.

### **Contact us for more information**

Labour providers who wish to explore the provision of transport to their operatives are invited to contact the Association for further discussion. It may be appropriate to refer you to our trusted experts for specific legal advice.

Please note that this document is not exhaustive and is not intended to be used as a substitute for legal advice. To the fullest extent permissible by law, ALP and its advisors hereby exclude all liability for any claim, loss, demands or damages of any kind whatsoever (whether such claim, loss, demands or damages were foreseeable, known or otherwise) arising out of or in connection with the use of any of these documents and/or the information, content and/or advice included within these documents.