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Agricultural Sector (Wales) Act 2014 Proposals for an Interim Agricultural Wages Order

WRITTEN SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS

Sent by email to: slmenquiries@wales.gsi.gov.uk

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The Association of Labour Providers (ALP)

The Association of Labour Providers (ALP) is a trade association supporting and representing those organisations that supply seasonal, agency and contingent labour into the UK food production, horticultural and agricultural sectors. The ALP has approximately 290 organisations that voluntarily choose to be members of the Association on payment of an annual subscription and commitment to abide by the ALP Constitution. ALP member organisations supply approximately 70% of the temporary workers into these sectors. All organisations that supply labour into these sectors are required to be licensed by the Gangmasters Licensing Authority (GLA). The ALP provides a range of services to help labour providers achieve labour standards compliance and good practice in the supply of workers.

Introduction

Agricultural Wages Orders are complicated.

Some workers supplied by ALP members may be subject to the Agricultural Wages Order (AWO) regulations some of the time and some may be subject all of the time.

The consequences of labour providers' non-compliance with the AWO regulations are significantly more severe than any other types of businesses operating in Wales. The Gangmasters Licensing Authority (GLA) has confirmed that it "expects licence holders to pay the relevant agricultural rates in order to comply with the critical Licensing Standard 2.2." Licensing standard 2.2 is a critical Licensing Standard, which means that any labour provider not paying in accordance with the Agricultural Wages Order will be regarded as non-compliant and which may, taking into account proportionality, result in a licence revocation without immediate effect.

ALP members have had to deal with the illogicalities and complexities of the AWO for many years and therefore have a keen interest in the consultation.

Response

The ALP calls upon Welsh Government officials when developing the interim AWO to address various anomalies that have historically existed in such regulations.

Point 1 - Scope of the Agricultural Wages Order

Agricultural Wages Orders apply to workers who are “employed in agriculture”. Employment means “employment under a contract of service or apprenticeship.”

Workers engaged by labour providers on contracts for services are not employees as defined under section 230(1) (a) the Employment Rights Act 1996 but are instead workers as defined under 230(3) (b) of this act.

Workers on contracts for services are therefore not covered by the Agricultural Wages Orders and as such there is a requirement only to provide them with terms in accordance with national laws.

However:

- Workers supplied by labour providers who are on contracts of employment are covered by the Orders.
- The provisions of the Agency Worker Regulations 2010 apply equally to agricultural workers as to any other sector.
- Where workers supplied are treated more like employees on a contract of employment than a worker on a contract for services then the GLA may determine that an employment relationship has been formed and therefore the terms of the relevant Agricultural Wages Order apply. The process that the GLA follows to determine employment status is outlined in [GLA Brief 18 – How the GLA tests Employment Status](#).

Recommendation 1 - The ALP recommends that the scope of the AWO is made clear as to whether the regulations apply or do not apply to those with the status of “worker” but not “employee”.

Point 2 - Cross Border Working – When does the Agricultural Wages Order apply?

The advised policy of the Agriculture and Rural Affairs Division of the Welsh Government regarding the appropriate terms to apply are:

1. A business based in England but whose workers may work in Wales on a limited ad hoc basis – National Minimum Wage (NMW) conditions will apply
2. A business based in Wales but whose workers may work in England on a limited ad hoc basis – the rates applicable to Agricultural Wages in Wales apply.

This is general advice based on the understanding that workers normally work in the country in which they are based. However this advice is vague and is unpublished.

Recommendation 2 - The ALP advises that clear rules are published as to which rate applies in various cross border working scenarios.

Point 3 - Definition of Agriculture Work

Agricultural work is broadly defined as including -

- Crop/livestock production
- Site preparation, planting and crop maintenance
- Harvesting
- Horticultural production (including work in market gardens or nursery grounds)
- Forestry
- Processing and packing of produce on the farm or enterprise where it is grown
- Work on a farm that is ancillary to the production process

Defra has previously advised the following as to whether packhouse workers are to be regarded as working in agriculture:

- The packaging and processing of produce is deemed to be agricultural work if the produce has been grown on the farm (or enterprise, which could consist of more than one farm or unit in the same ownership or group) where the packing takes place and it is considered to be "first stage packaging" (in other words the last stage in the production process, before the produce is sold on).
- Where the produce to be packaged / processed is bought in, either from farms in different ownership or imported, workers employed in any aspect of packing, processing or handling are not covered by the provisions of the Order.
- On the processing side, it depends on whether the nature of the produce is substantially changed as to whether workers are covered by the Order. For example, turning potatoes into chips would be outside the scope of the Order, irrespective of whether the potatoes are bought in or home grown. Workers engaged in simple processing (for example, topping and tailing, to render vegetables into saleable condition) would be covered by the Order if they were dealing with produce which that had not been bought in.
- If the packaging is a very technical process or the goods have been extensively processed before the packing operation, workers could be considered to be employed in a separate industry from the farm.
- With regard to workers handling produce after it has been packed, these would be covered by the Order if the produce has not passed its first point of sale.

- It is possible for workers to be engaged in work which is split between that within the remit of the Order and that which falls outside.

Where workers undertake a mixture of agricultural and non-agricultural work the Agricultural Wages Order applies to every hour of agricultural work.

Recommendation 3 - The ALP requests that the AWO is clear as to when it applies to work undertaken in packhouses.

Point 4 - Piece rates for Agricultural Workers

Recommendation 4 – The AWO should be clear that piece rates must be paid as a minimum at the appropriate agricultural minimum wage (at standard or overtime rates as relevant) averaged over the whole pay reference period i.e. a week if paid weekly and not for each individual hour worked.

Point 5 - Overtime for Agricultural Workers

In Agricultural Wages Orders it is a statutory requirement for overtime to be paid at a minimum of time and a half of the Agricultural Minimum Wage for any work in excess of 39 hours in a week (and eight hours on any one day).

Recommendation 5 – The AWO should provide clarity on common scenarios with regard to overtime pay:

1. Workers work at agricultural and non-agricultural assignments in the same week. In this case the hours worked outside of agriculture are disregarded. Overtime rates only apply once a worker has completed the requisite number of agricultural work hours.
2. Workers are used by a labour provider at various agricultural assignments. For example: The worker works 20 hours at Farmer 1, 15 hours at Farmer 2, 18 hours at Farmer 3, a total of 53 hours. In this case the Agricultural Wages Orders oblige the labour provider to pay the workers overtime if their hours exceed 8 in any one day or 39 in a week regardless of whether this cost can be passed onto the labour user.
3. Whether voluntary overtime is included in remuneration when calculating the rate at which holiday pay should be paid.