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Agricultural Wages in Wales

Agricultural Sector (Wales) Act 2014 Consultation

WRITTEN SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS

Contact

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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 300 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 and Labour Abuse Authority (GLAA). The ALP provides a range of services to help labour providers achieve labour standards compliance and good practice in the supply of workers.

Introduction

The terms of the Agricultural Sector (Wales) Act 2014 (the "Act") are complicated. Some workers supplied by ALP members in Wales may be subject to the Act regulations some of the time and some may be subject all of the time.

The consequences of labour providers' non-compliance with the Act regulations are significantly more severe than any other types of businesses operating in Wales. The GLAA has confirmed that it "expects licence holders to pay the relevant agricultural rates in order to comply with the critical Licensing Standard 2.2." This means that any labour provider not paying in accordance with the Act 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 illogicality and complexities of the Act as transferred over from the England and Wales Agricultural Wages Order for many years and therefore have a keen interest in the consultation.

ALP Response

Question 1

a) Do you consider that the Agricultural Advisory Panel has fulfilled all of its duties since its establishment?
b) Are there any priority areas/issues either in relation to agricultural wages orders, career development or any other issue you would suggest the Panel focuses on?
c) Do you consider that that the Panel and its sub-committee should have more time to develop their work?

The ALP has seen no evidence that the Agricultural Advisory Panel has fulfilled its duties in respect of career and skills development.

Question 2

a) Do you consider that the sub-committee on Skills Development and Training has identified the key areas it needs to focus its efforts on?
b) Are there any other areas within the industry which you believe would benefit from the establishment of a sub-committee?

The ALP has seen no evidence that the sub-committee on Skills Development and Training has identified key areas to focus on.

Question 3

Do you have any suggestions for additional information to be included in an updated version of the guidance, or for further clarification of the existing guidance?

No

Question 4

a) Do you consider that having agricultural wages orders which set minimum levels of hourly rates of pay and conditions is beneficial for the agricultural industry?

b) Do you have any comment to make on specific aspects of Agricultural Wages (Wales) Orders?

There are massive issues thrown up by the scope of the Act. The Act applies 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 Act 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 GLAA may determine that an employment relationship has been formed and therefore the terms of the relevant Act apply. The process that the GLAA follows to determine employment status is outlined in GLAA Brief 18 – How the GLAA tests Employment Status.

Question 5

a) Do you consider there needs to be increased awareness of the Agricultural Minimum Wage provisions?

b) If so, what do you think would be the most effective way to communicate this?

c) Do you have any concerns around compliance or enforcement of the regulations that you would like to bring to our attention?

Enforcement is minimal

The practical experience of labour providers is that enforcement of the Act is virtually non-existent outside the sector regulated by the GLAA. This is not surprising. The nature of agricultural work is such that it is largely below the radar of enforcement agencies, and also it lends itself to cash payments which benefit both workers and agricultural businesses at the expense of the rest of the community. It is the experience of labour providers that in practice many directly employed workers do not receive what they are entitled to under the Act.

Question 6

Do you have suggestion, concerns or views on cross border arrangements?

The Act is complex with boundary/scope/border issues and distortions

1. "Agricultural work" is not something that is easy to define. Take for instance Defra's previous advice 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 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.

This usefully illustrates how difficult it is to construct a boundary, how complex the arrangements are and the scope for serious differences of view about what the Order means.

2. There are differences in view between administrations with regard to cross border working.

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

- 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

- 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.

However, the policy of the Rural Business Development department of the Scottish Government and the Department of Rural Development in Northern Ireland is that, while cross-border working will be considered on a case by case basis, it is where the worker is actually working at any given time that determines the appropriate minimum wage regime and not where the employer is based.

Question 7

How effective do you consider communications to have been in the review period 2014-2017?

Two specific areas have been highlighted with regard to existing arrangements:

a) ALP raised an issue in May 2016 to alert the relative Agricultural Wages Boards to a potentially discriminatory issue regarding overtime following the introduction of the National Living Wage. Scotland addressed this issue and restructured their Wages Order. Wales has not addressed this. ALP has referred this matter to the Equality and Human Rights Commission.

b) ALP wrote to the relative Agricultural Wages Boards to say that businesses operating in these sectors should, as a minimum, reasonably expect three months' notice of the forthcoming increases in order to allow for commercial negotiations impacted by the new rates. Scotland addressed this issue and gave good notice of their Wages Order. Wales took no regard of the interest of business and issued the following alert the day before the wage increase was scheduled to come into effect ,http://gov.wales/topics/environmentcountryside/farmingandcountryside/agricultural-sector-wales-act-2014/interim-order/?skip=1&lang=cy /

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Question 8

Do you think that the Act should be preserved?

The case for separate arrangements for agricultural workers

1. Historically, separate wages councils and boards existed for a number of sectors of the economy where it was considered that workers would not be sufficiently protected by normal market forces. Most of these arrangements were abolished in 1988. In 1998 the National Minimum Wage (NMW) was introduced. The reasons for retaining special arrangements for agriculture at that time are not clear and in any event are no longer relevant.

2. The only justification for retaining special arrangements can be that workers in agriculture "deserve" more generous arrangements than workers in other sectors. There are other sectors that are characterised by low pay and long hours, such as office cleaning, catering and hospitality, but where the workers are entitled to the minimum wage only. If the separate Act did not exist there would be no justification whatever for introducing it and there is no logical justification for maintaining this special arrangement for one sector.

The arrangements disadvantage workers

3. The Act rates for each year are invariably decided at the last minute, in marked contrast to the efficient and orderly way in which changes to the NMW are made.

   The Low Pay Commission does extensive research on the impact of the minimum wage and in making its recommendations is conscious of the need to balance protecting jobs and paying more to lower paid workers. The NMW is not distortionary. With the exception of lower rates for younger workers there is a single rate applying across the board. Employers are free to offer more than the minimum wage, either in basic rates or through overtime, holiday entitlement or other benefits, the same factors that apply elsewhere in the economy. In agriculture and food production in particular employers find it difficult to pay more than the minimum wage because the market power of the supermarkets holds down the price that they can get for their produce.

4. By contrast the Act results in serious distortions that work to the disbenefit of workers. The major one is the requirement that overtime must be paid after eight hours a day and 39 hours a week. The minimum overtime rate is 50% more than the basic rate. Many agricultural businesses simply could not recover from their customer's labour costs that are 50% above the minimum wage. The result is that most agricultural businesses that take labour from labour providers stipulate that workers can work no more than eight hours a day and 39 hours a week. Many, if not most, agricultural workers want to worker longer hours than these and have no expectation of being able to be paid 50% more than the minimum wage. They are denied the opportunity of working longer hours and earning more money. In reality this gives further encouragement to the "informal economy", as if workers want to work 60 hours a week they will do so; if they are subject to the Act then the first 39 hours will be at

the Agricultural Wages Act rate and the other 21 hours will be at whatever is on offer in the thriving cash economy.

Question 9

Are there any other comments that you wish to make in respect of this consultation?

Reducing administrative burdens

1. The differences between Act terms and general employment law create other problems:

    - The accommodation offset arrangements are different between the two regimes in a significant way.
    - Agricultural holiday pay arrangements require special calculations that most payroll systems cannot deal with
    - Agricultural sick pay arrangements are complex

    The Act is unnecessarily complicated which makes it difficult to understand and to operate. This is particularly the case when the same workers may be subject to Act and general employment law in the same working period or when working in the same place.

2. The Welsh government is committed to reducing the administrative burdens on business. The Act arrangements are in themselves a huge administrative burden. For labour providers, and to a lesser extent agricultural businesses, this burden is accentuated because they are subject to both Act and NMW rules often for the same workers doing the same job in the same place. It would be a welcome simplification of a complex regulatory regime to have a single set of minimum wage rules for all workers.