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GLAA LICENSING STANDARDS CONSULTATION SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS

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The Consultation

The Gangmasters and Labour Abuse Authority (GLAA) is consulting on proposals to update its Licensing Standards to best support its mission to protect vulnerable and exploited workers. The proposals for updating the Standards are those, as advised by the GLAA can be implemented within the existing legislative framework and do not require amendments to the Gangmasters (Licensing Conditions) Rules 2009 (the “2009 Rules”).

The Association of Labour Providers (ALP)

ALP (www.labourproviders.org.uk) is a trade association promoting responsible recruitment and good practice for organisations that supply the workforce to the consumer goods supply chain across the food processing, horticultural and wider manufacturing, industrial, warehousing and distribution sectors.

ALP member organisations supply approximately 70% of the temporary contingent workforce into the food growing and manufacturing supply chain. Many of these workers progress to form the permanent workforce for UK industry. All organisations that supply labour into these sectors are required to be licensed by the GLAA.

ALP Submission

1. Changes to Section 4 Guidance concerning ‘Assessing Compliance and GLAA Inspections’

The GLAA proposes that a new paragraph is added at 4.2 of the guidance to the Standards which includes the following wording: ‘Workers employed by a labour provider should expect to receive the same fair treatment irrespective of which sector they work. If a business wishes to obtain or hold a GLAA licence the GLAA will consider its conduct beyond the licensed sectors as well as within them. This will be taken into account when making a decision as to whether the business is fit and proper and its compliance with all of the Licensing Standards’.

Question 1 of the consultation asks, “Does this revised section about assessing compliance make clear what level of compliance is required and what action the GLAA may take?”

Whilst the ALP is not averse to this proposal, the revised section is not clear, for the following reasons.

- The GLAA since its formation has, to the ALP’s knowledge, never made clear the legal basis on which it is intra vires to consider a businesses’ conduct beyond the licensed sectors in making a decision as to whether the business is fit and proper and its compliance with all of the Licensing Standards. The GLAA offers no legal argument now as to why it is within the power of the GLAA to do so. This leaves the situation unclear.
- If, as is asserted at Consultation point 3.14, “The GLAA already actively considers whether an applicant or licence holder and anyone named on a licence is fit and proper and/or competent when non-compliances in other sectors are identified.” Then it is unclear why the assertion is made at Consultation point 3.16, that, “The GLAA however anticipates that those businesses which choose to operate differently for non-GLAA sector workers may now need to consider whether those operations are compliant if they have not done so previously. There is a contradiction here and the ALP is unable to ascertain what in fact is changing by the insertion of the proposed paragraph.
- Whilst the proposed paragraph states that, “This will be taken into account when making a decision as to whether the business is fit and proper and its compliance with all of the Licensing Standards”, there is in fact no proposed change to Licensing Standard 1.1. As the GLAA has proposed to make this change, it is only reasonable to refer to this within the relevant licensing standard. The ALP is not clear why the GLAA has omitted this.
- At Consultation point 3.15, the GLAA states that it “is proposing to provide clear guidance for applicants and licence holders on how the GLAA deals with this situation.” It is difficult to provide complete comment on this proposal when the GLAA has not stated how it will deal with this situation. There is no clarity on what conduct beyond the licensed sectors will be taken into account. Is it everything within Licensing Standard 1.1 or something different or additional to this?
- At Consultation point 3.19, the ALP welcomes clarity on the types of non-compliance that will be referred to other bodies and departments but suggests that the list is more comprehensive, for example:
 - The Police regarding Licensing Standard 3.
 - The Insolvency Service where there are grounds for potential director disqualification
 - HMRC for breaches of 3.3 and 7.1 that take pay below NMW/NLW
 - The Pensions Regulator where there is deliberate manipulation of auto-enrolment pensions.

2. Changes to Licensing Standard 1.4 - Changes in Details - Circumstances when a licence expires following a change of VAT Number

The GLAA proposes to remove the requirement that a licence expires if a licence holder’s VAT number changes. The licence holder will be required to notify the GLAA within 20

working days if a VAT number changes (in line with the time period for notifying other changes in details). This gives the GLAA the opportunity to review whether a new application is required.

Question 2 of the consultation asks, “Do you agree that Rule 5 should be amended by removing the requirement that a licence expires if a licence holder’s VAT number changes? And Question 3, “Do you agree that, if Rule 5 is changed, a licence holder should notify the GLAA within 20 working days that its VAT number has changed?”

The ALP supports this proposal in principle, but makes the following comments:

- Rule 5 of The Gangmasters (Licensing Conditions) Rules 2009 stipulates that: ‘A licence expires if the licence holder’s registered number (if it is a company), Unique Tax Reference or Value Added Tax number change’.

The GLAA proposals for updating the Standards are those which can be implemented within the existing legislative framework and which do not require amendments to the Gangmasters (Licensing Conditions) Rules 20092 (the “2009 Rules”).

The ALP is therefore unclear how Rule 5 can be “amended”, as stated in question 2, to remove the requirement that a licence expires if a licence holder’s VAT number changes. The ALP presumes, but this is not clear, that the GLAA is instead proposing to amend its own application and enforcement of Rule 5, rather than the “2009 Rules” themselves. ALP requests for this point to be clarified.

- Rule 5 has been critical in bringing about an end to the practice of phoenixing within the licensed sector, but ALP accepts that there are situations where the VAT number changes for legitimate business reasons and the legal entity itself remains unaffected.

It is not clear whether the GLAA will specify the particular circumstances when a VAT number changes and a new licence is or is not required or whether this will be determined on a case by case basis. The former is preferred for the sake of clarity.

- In either scenario, the application of Rule 5 should be amended so that licence holders may inform the GLAA of the proposed change to their VAT number before the change takes place and the GLAA confirm at that stage whether a new application is required. This allows the licence holder to be aware before it determines whether to make the VAT change.
- If the application of Rule 5 is changed, and the facility to receive advance confirmation as above is available, then ALP accepts that requiring a licence holder to notify the GLAA within 20 working days that its VAT number has changed is reasonable. However, the GLAA, has not advised how it will treat non-notification and whether this will be regarded as not being candid and truthful under Licensing Standard 1.1, or an 8 point or 16 point non-compliance under Licensing Standard 1.4, or indeed there will be no licensing standard non-compliance for failure to notify. This should have been made clear in the consultation.

3. Changes to Standard 3.1 Critical: Physical and Mental Mistreatment

The GLAA is proposing to strengthen the Standards in relation to the mistreatment of workers by including the ILO indicators of forced labour. The GLAA is proposing to expand Licensing Standard 3.1 to include the following:

- a licence holder must pay due regard to the Equality Act (2010) and not abuse a worker because of any vulnerability
- a licence holder must not deceive a worker about the nature of the work, pay or living conditions
- a licence holder must not subject a worker to isolation
- a licence holder must not subject a worker to abusive working, living conditions or excessive overtime.

Question 4 of the consultation asks, “Do you consider Licensing Standard 3.1 should cover the indicators of forced labour not already expressly covered in the Licensing Standards?”

The ALP supports this proposal but makes the following comments:

- The proposed wording is not acceptably drafted:
 - It is unclear what, “must pay due regard to the Equality Act (2010)” refers to or why this term is necessary”;
 - There should be the addition of the term in this standard, “which has the intention and/or effect of creating a situation of forced labour”. This is the matter to which these behaviours relate. Without this addition, there is no scale of severity or proportionality built into the standard. For example, there may be a high level of overtime worked due to the seasonal requirement or some other reason and this may be desirable by the workers affected; or with regards to isolation, many jobs by their nature involve lone working. It is essential that in the wording of this standard these behaviours are set in the context of forced labour.
- Consultation point 3.31 states that the GLAA “will develop guidance as to how the above will be assessed using the ILO definitions.” This is to be welcomed but this does not lessen the need for clear licensing standards that are not open to misinterpretation.

4. Changes to Licensing Standard 3.2 - Restricting a Worker’s Movement, Debt Bondage and Retaining ID Documents

The GLAA considers debt bondage should not just be limited to loans made for travel or other expenses in order to take up a job but should cover any loans by an employer to a worker. Therefore, the GLAA proposes the Standard be amended to say: ‘If a worker is loaned money directly or indirectly by the licence holder, the worker cannot be required to repay a sum greater than the sum loaned, and must be provided in writing with full details of the repayment terms of any loan’.

Question 5 of the Consultation asks, “Do you consider Licensing Standard 3.2 should cover all loans from an employer to a worker?”

The ALP supports amending Licensing Standard 3.2 to better address debt bondage but does not feel that this has been wholly achieved by the revised wording and raises the following points regarding the GLAA's proposal:

- It is not clear how the GLAA proposes to amend Licensing Standard 3.2 when the 2009 Rules at 21 (7) that, "If a worker is loaned money by the licence holder, the labour user or any intermediary to meet travel or other expenses in order to take up a position" limit the state specifically. To amend the wording as proposed appears to be at variance to the 2009 Rules.
- Inclusion of the terms "labour user or any intermediary" as contained within the 2009 Rules are clearer than the current term "indirectly" that is used in the Standard.
- The GLAA in quoting the ILO description of debt bondage as: 'Wage advances or loans to cover recruitment or transport costs or from daily living or emergency expense, such as medical costs', has provided only part of the ILO definition. To have established the appropriate context the GLAA should have included the second part of the ILO definition, 'where It has the effect of binding the worker to the employer for an unspecified period of time, anything from a single season, to years, or even successive generations.' It bears no resemblance to taking a "normal" loan from a bank or other independent lender, for repayment on mutually agreed and acceptable terms."

Loans may be provided to workers to tide them over a difficult period. In all cases it is accepted that interest should not be charged, and the loan should be in writing. Licensing Standard 3.2 should be worded appropriately to not deter licence holders from providing loans where it is in the interests of workers facing financial challenges.

5. Changes to Licensing Standard 3.3 - Withholding Wages

The GLAA proposes a consolidation of wording of the standards regarding holiday pay in Licensing Standards 2.3, 3.3 and 5.1 into a new Standard 2.5 stating:

- a licence holder must maintain records to show that a worker receives paid annual leave to which they are legally entitled (8 points)
- a worker must be paid any holiday pay to which they are legally entitled during the course of their employment (30 points)
- where a worker's employment is terminated during the course of a leave year a licence holder must give them payment in lieu (30 points)
- a licence holder must not illegally prevent a worker from taking annual leave (30 points).

Non-compliance with this new Standard will contribute a maximum of 30 points to a Licensing Standard compliance score. If more than one non-compliance is identified, the Standard will only be failed once with only the highest score being accrued. Failure against this new Standard for holiday pay may lead to a licence being revoked with immediate effect.

Question 6 of the Consultation asks, “Do you consider the proposed new Standard for holiday pay is clear and do you agree that it should have a sliding scale of points with a maximum of 30 points?”

The ALP understands the GLAA’s position in wishing to clearly establish in the Licensing Standards that withholding holiday pay is akin to withholding of wages and sees merit in making clear that non or underpayment of holiday can only be failed once. However:

- The ALP regards that the GLAA’s proposition that failure against this Standard for under-payment of holiday pay may lead to a licence being revoked with immediate effect as disproportionate. It is unlikely to be regarded as in compliance with 1.1 of the Regulators Code. It is likely to be found to be disproportionate by the Courts. The GLAA should reclassify this as no more than revocation without immediate effect. It should not be regarded the same as the Standard 3.3 - Withholding Pay – as this, in its worst form, is an ILO indicator of forced labour.
- The ALP has misgivings regarding the choice of wording for this standard and makes the following specific points:
 - “a licence holder must maintain records to show that a worker receives paid annual leave to which they are legally entitled” and, “a worker must be paid any holiday pay to which they are legally entitled during the course of their employment. This wording, presumably unintentionally, if literally interpreted, goes beyond the legal requirement.
 - Use of the term “employment” is not appropriate in relation to the status of workers.
- The Standard makes no reference as to whether the GLAA has the powers, and if so whether it intends to use these powers, to require licence holders as part of an Additional Licence Condition to repay underpaid holiday pay to workers and if so for what period. ALP seeks GLAA’s clarification on this point.
- Consultation point 3.38 states, “Unfortunately, some labour providers do not have an understanding of how holidays should be paid or deliberately seek to withhold monies owed to workers.” There is a significant difference between the two. The Standard does not, but should, in terms of proportionality distinguish between:
 - Deliberate and accidental underpayment of holiday pay;
 - Gross and minor underpayment of holiday pay;
 - Widespread and isolated cases of underpayment of holiday pay;
 - Business size and capacity to interpret complex legislative interpretation.
- One of the main reasons for workers being paid holiday pay incorrectly is that there is both significant complexity in calculating holiday pay and also areas where the law is unclear, so employers and labour providers often do not completely understand how to calculate holiday pay correctly and consequently there may be underpayment and incorrect payment particularly for casual and agency workers and those who work irregular hours. This includes:

- Conflict between the Working Time Regulations 1998, Employment Rights Act 2006, Agricultural Wages Orders and Agency Workers Regulations 2010. In certain scenarios it may be impossible to comply with each of these laws
- Lack of clarity regarding what constitutes “irregular and infrequent” overtime and whether and in what circumstances this should or should not be included in the calculation of holiday
- Lack of clarity regarding what constitutes a week’s pay as defined in the Employment Rights Act 1996
- A plethora of case law which needs to be consolidated and incorporated into statute

ALP has for many months been preparing a technical brief to provide a step by step pragmatic guide for labour providers as to correctly calculate and pay holiday pay for agency workers. This has presented many challenges, extensive consultation and debates with lawyers and referral on technical points to specialist barristers. ALP seeks confirmation from the GLAA that it will interpret and enforce in accordance with the guidance within this brief.

- The ALP has concern that as currently drafted this proposal does not support the statutory principles of good regulation (3) (a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent. Because of the complexity in this area, ALP would request that the final wording used be approved by lawyers from the Home Office or BEIS as appropriate.

6. Changes to Licensing Standards 2.3 - Benefits

The GLAA is proposing to expand Licensing Standard 2.3 to cover the payment of sick, maternity, paternity and adoption pay to which a worker is legally entitled. The GLAA is also considering covering workplace pensions under Licensing Standard 2.3.

Question 7 of the Consultation asks, “Do you consider that the expansion of Standard 2.3 to cover all benefits including pensions will provide clarity for licence holders? Should this Standard remain as non-critical and why?”

ALP considers that Standard 2.3 should be expanded to include pensions and remain as non-critical. Apparent deliberate avoidance of enrolling staff into an auto-enrolment workplace pension scheme should be referred to the Pensions Regulator. Subsequent prosecution may be reviewed by the GLAA under its fit and proper powers.

7. Licensing Standard 7.1 - Fees and providing Additional Services

The GLAA proposes to consolidate all matters relating to fees and services by incorporating the requirements of 7.3 in relation to fees and services in to Standard 7.1. The issues currently covered in the non-Critical Standard of 7.3 would be classed as Critical under Standard 7.1.

Question 8 of the Consultation asks, “Do you agree with moving the wording in Standard 7.3 that relates to fees and service into Standard 7.1 and making it a critical Standard?”

The ALP supports this proposal by the GLAA and raises the following comments:

- The following underlined words should be inserted as follows, “A worker must be able to cancel or withdraw from any services provided at any time without incurring any detriment or penalty, subject to the worker being required to give no more than 5 working days’ notice or, for services relating to providing accommodation, no more than 10 working days.”

However, ongoing non-compliance in this area is not due to the wording of the Licensing Standard. ALP considers that GLAA should have allocated more focus and resource to actively enforced this Licensing Standard over the years. One licence holder has expressed this forcefully to the ALP:

“the GLAA continues to turn a blind eye to GLAA licence holders both in the UK and overseas continuing to charge businesses recruitment fees that do not cover the cost of the recruiting process, which is then topped up by either extortionate pastoral care or questionable training schemes. The GLAA has been made aware of these practices on a regular basis but chooses to ignore the practice, which flies in the face of creating a level playing field or promoting growth.”

ALP continues to offer its support to the GLAA as to how compliance and enforcement of this Licensing Standard may be improved. The amendment to the wording is welcomed, but it is increased enforcement of this Standard by the GLAA that is required.

8. Conduct of Employment Agencies and Employment Business Regulations

GLAA proposes to amend its licensing standards to align with the repeal of certain requirements of the Conduct Regulations which were implemented in May 2016.

Question 9 of the Consultation asks, “Do you agree that there would be no or very little impact on workers by removing these requirements from Standard 7.3, 7.4 and 8.2?”

ALP comments that:

- Removal of the requirements from Standard 7.3 would have no or very little impact on workers.
- The ALP does not agree with the proposal to amend Standard 7.4 to remove the requirement to agree terms with the Labour User. These terms contain legal agreements which provide important protections for workers and provide clarity over responsibility. GLAA offers no argument as to why this removed. There is no requirement to align with the Conduct Regulations.
- The ALP does not agree with the proposal to amend Standard 8.2 to remove the requirement to keep particulars relating to any other employment agency or business. ALP believes this provides important information on second tiering and subcontracting.
- It is not clear how the GLAA proposes to amend these Licensing Standards when the 2009 Rules contains these provisions. To amend the wording as proposed appears to be at variance to the 2009 Rules.

9. Licensing Standard 5.5 - Confidentiality

Separately to the consultation document, the GLAA has proposed to amend Licensing Standard 5.5 to state, “A licence holder must meet its responsibilities in terms of

compliance with Data Protection legislation and ensure that personal data and information about workers is held securely and is not disclosed without consent or other legal authority.”

The ALP agrees with this proposed wording.

10. Supplementary issues not covered in the consultation document

- a. Licensing Standards – Part 1 – Sections should be added addressing the following:
 - Signposting to the GLAA scope of licensing document
 - Inclusion of conditions where a licence decision may be taken without an application inspection
 - Inclusion of description of Licence Suspension
 - Inclusion of description of Interim Licence Decisions
- b. Licensing Standard 4.1 should be updated to include minimum room sizes for Houses in Multiple Occupation in accordance with the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 which comes into force from 1st October 2018. From this date it is estimated that an additional 177,000 HMOs will become subject to mandatory licensing in England and operating without one is a strict liability criminal offence.
- c. The GLAA proposals to update the Licensing Standards are, as stated by the GLAA, those that “can be implemented within the existing legislative framework and do not require amendments to the Gangmasters (Licensing Conditions) Rules 2009 (the “2009 Rules”)”. The ALP seeks clarity from the GLAA on which statutory authority it relies to make this assertion.
