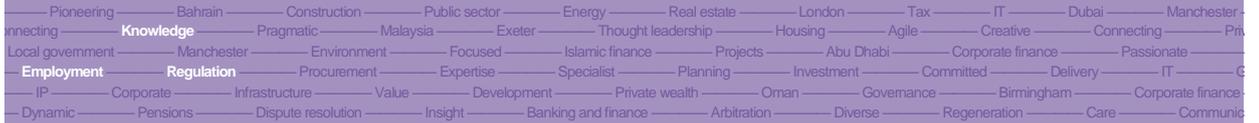




Legal update — July 2017

## Employment

# "Good work": the findings of the Taylor Review



**The findings of the Taylor Review of Modern Working Practices are finally in, but what will they mean for employers? Whilst the wholesale review of employment status which was envisaged in some quarters has not come to pass, the emphasis on a simplification and clarification of approach is certainly a welcome one.**

With suggested action "ranging from specific changes in the short term to longer term strategic shifts" there's certainly plenty of food for thought. As to whether, and to what extent, the recommended changes will be implemented only time will tell!

### The Review's remit

The Prime Minister, Theresa May, commissioned the Independent Review of Employment Practices in the Modern Economy on 1 October 2016. Under the leadership of Matthew Taylor, the Chief Executive of the Royal Society of the Arts, the review considered how employment practices need to change in order to keep pace with modern business models. Amongst other things the review was asked to look into whether current definitions of employment status needed to be updated to reflect new forms of working created by emerging business models, such as on-demand platforms.

### So what will happen to employment status?

The Taylor Review proposes to clarify the law governing employment status by recommending the Government takes a fresh look at existing legislation with the aim of making the definition of employee status simpler and clearer. It notes that there are a range of tests and factors which the courts have established to help them make decisions on employment status (namely personal service, control, mutual obligation and whether the individual is carrying out a business undertaking). If the Government feels that these are an accurate reflection of what they consider to be the main characteristics of employment status then the legislation should be updated to incorporate these factors.

The Review recognises that there needs to be in-built flexibility to enable the law "to respond dynamically to

changing conditions and relevant case law" and suggests that the detail underpinning the criteria set out in the legislation should be updated via secondary legislation and guidance.

### "Dependent contractors" replace "workers"

The Review recommends that the definition of "worker" is amended so that the obligation to provide personal service is no longer an automatic barrier to accessing basic employment rights. It also recommends a new classification so that people who are eligible for "worker" rights but are not employees should be referred to as "dependent contractors".



Source: Fotolia

The Review notes that a clearer distinction needs to be made between an "employee" and a "dependent contractor", and states that, "The status of "dependent contractor" should have a clearer definition which better reflects the reality of modern working arrangements, properly capturing those more casual employment relationships that are on the increase today - an individual who is not an employee, but neither are they genuinely self-employed".

It remains to be seen whether the aim "that the legislation does more of the work and the courts less" will come to pass.

### Supporting flexibility in the gig economy

The Review recognises that for many employed in the gig economy flexibility is key. It recommends a revision of the "output work" rules under the National Minimum

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Wage legislation so that workers would be entitled to a piece rate for platform work (via apps and other digital systems), but would have to take responsibility for choosing to work at times when labour supply outstrips demand. The review states "...it would clearly be unreasonable if someone could log onto an app when they know there is no work and expect to be paid".

Currently where piece rates are used, there is a requirement to issue a notice before the start of the pay reference period, explaining what the "mean hourly output rate" is and stating the rate of sum to be paid to the worker for the performance of the task in question. The review recommends that the Government should explore options for requiring platforms to provide real time data in addition to a "notice" in order to increase transparency for workers.

Emphasis is put on the need to ensure that such a system is implemented without abuse, taking into account considerations such as regional variations. A key consideration will be the individual's complete freedom to choose the time of work and whether or not to accept individual jobs.

#### **Aligning employment and tax status**

Another thing the Review seeks to do is to align employment status legislation and tax status legislation. It states that the differences between the two systems should be reduced to an absolute minimum.

The Review states that the dividing line should be between the new "dependent contractor" status and self-employment so that being employed for tax purposes naturally means an individual is either an employee or a "dependent contractor".

#### **Providing greater transparency of rights**

One way of avoiding misunderstanding is to embed the rights and responsibilities set out in the legislation and this is exactly what the Review recommends that the Government does. It suggests that one way of doing this is to provide people with helpful information when they start work and recommends that the written statement of employment particulars which currently has to be provided to employees should also be provided to "dependent contractors". The Review recommends that there should be a statutory requirement for both an employee and a "dependent contractor" to receive a written statement on day 1 of their job. In order to encourage employer compliance the Review suggests that Government should consider introducing a right for individuals to bring a claim for compensation if an employer has failed to provide such a statement.

In the case of "dependent contractors" the statement should include details of the statutory rights that "workers" are entitled to, how they are calculated and

how they are paid. The Review recommends the development of a standard format that can be adapted by the employer to contain specific information.

#### **Online employment status tool**

The Review suggests that an online tool could be developed which provides individuals with an indication of their employment status. This would be similar to the Employment Status Indicator tool for tax purposes.

#### **What about casual workers?**

Zero hours contracts, it seems, are here to stay! The Review notes that flexibility in the labour market is important and is something that should be retained in order to keep participation rates high. However, there is an acknowledgment that employers "could be more forward thinking in their scheduling".

In order to ensure that "flexibility does not benefit the employer, at the unreasonable expense of the worker, and that flexibility is genuinely a mutually beneficial arrangement", the Review recommends that the Government ask the Low Pay Commission (LPC) to advise on the impact of bringing in a new higher National Minimum Wage (NMW) for hours which are not guaranteed in a contract.

An example is given of an individual on a contract which only guarantees 6 hours a week, but who is regularly asked to work more than this. They should be entitled to the standard NMW for the first 6 hours they work in a week and then be paid the new higher rate for any hours beyond that. This would still give employers a level of flexibility to respond to changing demand, but would also give individuals more certainty over the pay they are likely to receive in a given period.

The Review also acknowledges the need to manage gaps in the service to ensure that casual workers should not be denied employment status due to a difficulty in establishing the minimum period of continuous employment needed to qualify for some employment rights. Currently a gap of one week is permitted before continuity is broken and the Review recommends that this should be increased to a month.

The Review recommends that the Government re-examine the rules on what information needs to be provided to agency workers before accepting work. It recommends the legislation should be amended to improve the transparency of information which must be provided to agency workers both in terms of pay and those responsible for paying them.

Some workers, especially lower skilled, lower paid agency workers and those on zero hours contracts either did not know that they were entitled to paid annual leave or were afraid to take it according to the Review's findings. As a result, it has suggested that the

Government should do more to promote awareness of holiday pay entitlements, increasing the pay reference period to 52 weeks to take account of seasonal variations and giving "dependent contractors" the opportunity to receive rolled-up holiday pay.

Finally, the Review found that some companies were relying on temporary workers to fill longer term positions, with the result that the same agency worker was doing the same job for years without being taken on as an employee. The solution proposed by the Review is for the Government to introduce a right to request a direct contract of employment for agency workers who have been placed with the same hirer for 12 months, and an obligation on the hirer to consider the request in a reasonable manner. For those on zero hour contracts who have been in post for 12 months, the Government should create a right to request a contract that guarantees hours which better reflect the hours worked.

#### Promoting good employment relations

The Review calls for a renewed focus on good employee engagement, drawing on the expertise of bodies such as Investors in People and Acas. As part of this renewed focus the Review suggests that the Government examines the effectiveness of the Information and Consultation Regulations (these offer a framework to encourage long-term information and consultation arrangements between employers and employees). As these currently only apply to employees, the Review recommends that they are extended to include workers ("dependent contractors") too and that the threshold for implementation is reduced from 10% to 2% of the workforce making the request.

There is also a push for greater transparency surrounding companies' practices in relation to their workforces. The Review states that while there are many benefits to atypical work "we believe that companies should take decisions about how to structure their workforces consciously, rather than by default or through regulatory arbitrage".

The Review recommends that the Government should introduce new duties on employers to report (and to bring to the attention of the workforce) certain information on workforce structure. This should include placing a requirement on companies beyond a certain size to:

- Make public their model of employment and use of agency services beyond a certain threshold.
- Report on how many requests they have received (and the number agreed to) from zero hours contracts workers for fixed hours after a certain period.
- Report on how many requests they have received (and the number agreed) from agency workers for permanent positions with the hirer after a certain period.

#### Fairer enforcement

The Review concludes that "Action is needed to ensure employment protections are enforced and that vulnerable people have confidence that they will get redress for exploitation".



Source: Fotolia

The Review recommends that the "Swedish derogation" under the Agency Workers Regulations 2010, under which workers who have a contract that provides for a minimum level of pay between assignments are excluded from the right to equal pay with permanent employees, should be abolished. In addition HMRC should be responsible not only for the enforcement of the NMW and statutory sick pay (SSP), but also for holiday pay too. In addition the report recommends that HMRC should enforce the right to holiday pay for low-paid workers (in addition to its current NMW and sick pay enforcement rights), that individuals should be able to have their employment status determined by a tribunal without having to pay a fee, and that the burden of proof in cases where employment status is in dispute should be placed on the employer.

In addition the Review suggests that employers who have already lost employment status cases on broadly comparable facts should be penalised via the bestowing of an obligation on employment tribunals to consider the use of aggravated breach penalties and costs orders.

#### Self-employment and taxation

Evidence was gathered by the Review that the nature of the tax system acts as an incentive for practices such as bogus claiming of self-employed status by both businesses or individuals. As a result the Review recommends that ways in which the tax system might address the disparity between the level of tax applied to employed and self-employed labour should be examined.

### Affording opportunity to progress

"As a society we should be bolder in designing flexible jobs that allow people to remain and progress in the labour market as their personal circumstances change". Such is the gauntlet thrown down by the Review!

Ways of implementing this opportunity to progress include the Government considering how further to promote genuine flexibility in the workplace as part of the statutory evaluation of the Right to Request Flexible Working which takes place in 2019. An example of a consideration to take into account is whether temporary changes to contracts might be allowed, to accommodate flexibility needed for a particular caring requirement.

A need to support pregnant women and those on maternity leave was identified and the Review recommends that the Government should review and consolidate in one place guidance on the legislation which protects those who are pregnant or on maternity leave to bring clarity to both employers and employees.

SSP should be reformed so that it becomes a basic employment right, comparable to the NMW. The right should accrue on length of service, in a similar way to paid holiday so that employers do not have to give the full six months of SSP to individuals who have only worked for them for a short time.

### So what does it all mean?

On the face of it the Review requires a fairly substantial shake-up of employment practices though, as mentioned at the beginning of this bulletin, to what extent the recommendations will come to pass remains to be seen. In the meantime it's worth bearing the following points in mind:

- It is important that you understand which "status" category your staff currently fall into and how this may change.
- The obligation to provide work personally may no longer be an automatic barrier to accessing basic employment rights.
- A written statement of employment particulars (for "dependent contractors" as well as employees) may have to be provided on day 1.
- Employment status frameworks and tax status frameworks may be aligned to reflect one another.
- Companies operating in the gig economy may have to face onerous administrative burdens if platforms are required to provide real time data and issue notices at the beginning of a pay reference period.
- There may be a new higher NMW rate for any non-guaranteed hours worked under a zero-hours contract which is likely to lead to increased expense for employers.
- Long-term use of agency workers and zero hours workers may no longer be a way of avoiding hiring a permanent employee or avoiding a guarantee for hours which reflect those actually worked.
- Use of zero hours and agency staff may have to be reported, as well as the possibility of a duty to examine their usage in any supply chain you may have.

This review may not bring about the clarity that was perhaps hoped for. Certainly in the short term it has the effect of bringing more uncertainty, though perhaps once the recommended measures start to be implemented it will provide welcome simplification to the complex, and much litigated, area of employment status. What is certain though is that the administrative burden on employers is likely to increase rather than lessen.

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