EEF response to the BEIS consultation on measures to increase transparency in the labour market

Overview

1. EEF, the manufacturers' organisation, is the voice of manufacturing in the UK, representing all aspects of the manufacturing sector. Representing some 20,000 members employing almost one million workers, EEF members operate in the UK, Europe and throughout the world in a dynamic and highly competitive environment.

2. EEF is also an independent training provider. EEF is also a provider of HR & legal services. Indeed EEF's team of barristers, solicitors and HR professionals makes it one of the largest specialist providers of employment law and HR advice. Therefore we hear first-hand the queries that employers are posing to our HR & legal advisors and we are able to determine what the current key issues are for the HR community.

3. We have previously submitted two responses in this series of consultations those responses should be considered as integral to this, given much of the background previously described is relevant here. Where the consultation has sought answers from employers, we have responded in way that reflects EEF's members following our consultations with them.

Consultation questions

Question 1- Have you provided a written statement of employment in the last 12 months to:

a) Your permanent employees

Yes

b) Your non-permanent staff

Yes

If you answered yes to question 1b, approximately how many have you provided in the last 12 months?

The statement is provided to all new starters without exception.

Question 2 - In general, when do individuals starting paid work at your organisation receive:

a) A written statement

Before paid work starts.

Question 3 – How long, on average, would it take a member of staff to produce a written statement for a new starter?

Between half-an-hour and an hour.

Question 4 – How often do you seek legal advice when producing a written statement?

Sometimes / rarely

Question 5 – Are there other business costs associated with producing a written statement, in addition to personnel and legal costs that we should be aware of?

No.

Question 9 - To what extent do you agree that the right to a written statement should be extended to cover permanent employees with less than one month's service and non-permanent staff?

Agree mostly. For most employers, and EEF members, they will already be providing at least, if not more, information than that required by the ERA. However, there may be some employers who experience a large number of very short-term employees for whom always providing the statement could be an unnecessary burden. For example, employers with large numbers of short-term, seasonal staff, who have no intention of remaining for more than 2 months, may see little benefit in the statement always being provided. Potentially this can be dealt with by the either the employer choosing to supply the statement to all staff as a matter of choice or the employee requesting it sooner than is currently required. Much probably will rest upon whether the employee has an expectation of the position lasting longer than two months.

Question 10 - The following items are currently prescribed contents of a principal written statement. Do you think they are helpful in setting out employment particulars?

a) The business's name

Yes. The entity that is employing the individual needs to be made clear, as this is not always obvious.

b) The employee's name, job title or a description of work and start date

Yes.

c) If a previous job counts towards a period of continuous employment, the date that period started

Yes. This is obvious relevant to issues of continuity of employment.

d) How much, and how often, an employee will get paid

Yes.

e) Hours of work (and whether employees will have to work Sundays, nights or overtime)

Yes, but with some flexibility where for example employees have very flexible hours.

f) Holiday entitlement (and if that includes public holidays)

Yes.

g) Where an employee will be working and whether they might have to relocate

Yes.

h) If an employee works in different places, where these will be and what the employer's address is

Yes.

Question 11 – Do you agree that the following additional items should be included on a principal written statement:

a) How long a temporary job is expected to last, or the end date of a fixed-term contract?

Agree slightly, subject to the ability to qualify this on the part of the employer. At times the employer may not be able to determine precisely how long the job may last, and so should have the ability to indicate the minimum period it is expected to last and not, as the question suggests the maximum period it is expected to last.

b) How much notice the employer and the worker are required to give to terminate the agreement?

Agree strongly. This is generally always provided in our experience.

c) Sick leave and pay entitlement?

Agree strongly – as above.

d) The duration and conditions of any probationary period?

Agree strongly – as above.

e) Training requirements and entitlement?

Agree slightly. There are different issues involved with training requirements and training entitlements. Many jobs have training requirements, or more often requirements to hold a current qualification or certification, for example driving various vehicles. This is different to training entitlements, which are taken to mean the right to a specific piece of training. The statement needs to make it clear which is being referred to and the impact of this.

There should also be come consideration given to the position of apprentices and others under training. Apprentices usually have a specific employment contract and also an employer commitment statement, which will be fuller than a written statement in this context. An employer could easily become confused between the various statements and care must be taken to ensure that an employer knows which statement is needed in any particular set of circumstances.

f) Remuneration beyond pay e.g. vouchers, lunch, uniform allowance?

Agree slightly. This is probably information which should be provided but not necessarily in the principle statement, and some of this may be non-contractual.

g) Other types of paid leave e.g. maternity, paternity and bereavement leave?

Agree strongly. Generally paid leave entitlements are always specified but again, not necessarily in the principal statement. If all the elements which have been referred above are included in the principal statement it would make the statement potentially very long, and so there should be balance struck between the information which is contained in the principle statement and the information which can be contained elsewhere.

Question 12 - To what extent do you agree that the principal written statement should be provided on (or before) the individual's start date?

Agree strongly in most cases. For manufacturers, there should be little difficulty in nearly all cases with providing the statement before the start date, but for other businesses, there could be other constraints, for example where employees start immediately or at very short notice. Imposing a blanket rule might inadvertently prevent employees being hired very quickly or where the employer is unable to provide every element of the principal statement, in which case the employee cannot start work.

Question 13 - To what extent do you agree that other parts of the written statement should be provided within two months of their start date?

Agree strongly. As indicated above there is a balance between the information to be provided in the principle statement and information, which can be provided in a different format. More detailed information may only be available after the employee has started work – for example an entitlement to parental leave.

Question 20 - What do you think are the implications for business of the current rules on continuous service?

For manufacturers, comparatively little. Most manufacturers employ their staff on permanent, open-ended contracts, and many have long-service staff, and for them there are few examples of breaks in service which are relevant to the calculation of continuity of service. There will be other businesses, or some types of manufacturing, where this the position id different. Some forms of manufacturing for example food processing, experience higher forms of churn and the issue of continuous service will be relevant.

Question 22 - Do you have examples of instances where breaks in service have prevented employees from obtaining their rights that require a qualifying period?

No.

Question 23 - Do the current rules on continuous service cause any issues in your sector?

No.

Question 24 - We have committed to extending the period counted as a break in continuous service beyond one week. What length do you think the break in continuous service should be?

Other. We need some clear evidence before considering this. Probably there is no fixed and simple answer to this question, as breaks in service are more or less prevalent in different sectors and in different occupational groups. The longer the break, then the more complex the issue becomes, as some employees may move between contracts with the same employer. We have no definitive evidence at EEF that the current period of one week causes unfairness to employees or undue complexities for employers. Whatever the period, it should be based on clear evidence, which we do not believe currently exists. EEF members do make use, at times, of short-term working or lay-offs, should there be a slump in demand, but in these cases, continuity of employment is unaffected.

Question 25 - Do you believe the existing exemptions to the break in continuous service rules are sufficient?

Yes for manufacturers. We have examples of the current rules causing difficulties for EEF members.

Question 26: We intend to update the guidance on continuous service, and would like to know what types of information you would find helpful in that guidance. (Select all that apply)

Real examples, and signposts to further information.

Providing examples is usually the best way to explain how the current rules work, but employers do not usually wish to have a highly legalistic explanation based strictly on case-law. Often, when guidance is provided, it only deals with straightforward examples and does not deal with the difficult examples which just fall either side of the line. Guidance must then be realistic and useful to employers. In terms of signposting, Acas is usually an organisation employers look to for impartial guidance.

Question 27 - Do you agree that government should take action to change the length of the holiday pay reference period?

No. EEF has conducted extensive work on the calculation of holiday pay with many members and has dealt with a number of workplace agreements dealing with the issue. The reference period for determining holiday pay can be highly variable, for example there may be seasonal or production variations, or a reference period for some occupations may not be fair for all occupations. EEF has worked with many businesses to devise a reference period which is representative of normal pay for the staff in question and attempting to determine a single, fixed, period which is longer than the current minimum for all staff in all businesses and in all job roles would undermine those businesses which have already reached workforce agreements. Similarly, a particular business may, in the future, wish to reach an agreement with a different reference period and so should be allowed to do so.

Question 28 - If you answered yes to Q27, should government:

a) Increase the reference period from the current 12 weeks to the 52 weeks recommended in the review?

N/A

b) Set a 52 week default position but allow employees and workers to agree a shorter reference period?

This would be more preferable than a simple 52-week reference period but it should be noted that this has the potential to become a very divisive issue, as some employees may lose out and some may gain.

c) Set a different reference period

The better solution would be for a minimum period, such as that we have, and encourage employers to agree a different period where this is needed. A 52 weeks reference period is in essence the maximum possible and leaves little room for any other model to be used, even where this produces a calculation which the employer and employees are both content with.

Question 29 - What is your understanding of atypical workers' arrangements in relation to annual leave and holiday pay? For example:

a) Are they receiving and taking annual leave?

Don't know. When consulted, very few EEF members had any atypical workers; where there are such arrangements, then their entitlement to holiday pay mirrors that of employees on permanent contracts.

b) Are they receiving holiday pay but not taking annual leave?

Don't know. There are an insufficient number of such workers to provide a realistic response.

c) Do you know of any other arrangements that are used?

See above.

Question 30 - How might atypical workers be offered more choice in how they receive their holiday pay?

There is little we can add to the above, save to say, we are aware of businesses who still pay rolled-up holiday pay, as is considered in the consultation paper. This has already been considered by the CJEU and is unlawful; this position will not change when the UK leaves the EU, as this principle will be included within retained EU law, unless the UK wishes to specifically repeal this element.

Question 31 - Do you agree that we should introduce a Right to Request a more stable contract?

Yes with some limitations. This is a right to request, not a right to a different contract, and further consideration needs to be given to the process which would be adopted. The right to request flexible working could be a process to consider, where employees are encouraged to seek an informal agreement before making a formal request. Some consideration will need to be given to what a more stable contract amounts to. For example, is this in relation

to a pattern of hours, or hours, or days or simply the guarantee of certain hours or days, but not a specific pattern?

Question 32 - Should any group of workers be excluded from this right?

Yes. We believe that there should be a service requirement, similar to the right to request flexible working, (that is 26 weeks), and that applicants should be limited in the number of applications that they have made in a year to one.

Question 33 - Do you think this will help resolve the issues the review recommendations sought to address?

Yes to an extent. It will provide some basis for employees to raise a change to their employment contract, but in reality, there is nothing which prevents this now.

Question 34 - Should employers take account of the individual's working pattern in considering a request?

Yes in principle, but this is likely to be hard to define in practice. It's not obvious what a working pattern consists of or over what period of time this is to be calculated. For example, would a working pattern including voluntary overtime which was not guaranteed? Similarly, some workers work on a combination to time or piece work, or might have banked hours, all of which will be factored in.

Question 35 - Should there be a qualifying period of continuous service before individuals are eligible for this right?

Yes; we believe that this should be 26 weeks, to mirror that for flexible working.

Question 36 - What is an appropriate length of time the employer should be given to respond to the request?

1 month, with the options for both employer and employee to extend this if they both agree.

Question 37 - Should there be a limit on the number of requests an individual can submit to their employer in a certain period of time?

Yes, we believe that this should be one in a single year, which is already the system operating for flexible working.

Please explain your reason for this and include a suggestion of what an appropriate limit might be and why.

The system for the request of flexible working is known by employers and workers, is stable and works well. Multiple requests from workers for substantially the same outcome can undermine good workforce relations, and place employers in a difficult position if, for example, they are legally required to consider each request, follow a process, and then consider the request on set grounds. There needs to be some limit to the making of such requests to prevent them being made every month and needing to be considered every month, and we know that an annual right to request to seek a permanent change to an employment contract strikes a reasonable balance between the interests of workers and their employers.

Question 38 - When considering requests, should Small and Medium Enterprises (SMEs) be included?

Yes, as SME's vary greatly in size, with some being large businesses, but there is a case for exempting micro businesses, where formal processes tend to be less relevant and issues such these are more likely to be resolved informally. Micro businesses are also likely to be unfamiliar with formal processes and find dealing with formal requests more challenging.

If yes, do you think they should have any dispensations applied e.g. longer to respond

See above. Creating different systems for companies of different sizes is likely to be confusing, and we favour a single model with an exemption for the smallest employers.

Question 39 – Are there formal provisions in your workplace for informing and consulting employees about changes that may affect their work?

Yes. Most EEF members have a process for informing and consulting their employees. For the largest members these tend to highly formalised systems, for example a workforce agreement with a recognised trade union or an EWC. Where these formal arrangements do not exist, then EEF members usually have a more informal arrangement, such as a staff consultative committee, or a hybrid arrangement with elected representatives to a staff forum.

If yes, were these provisions:

- **requested by employees?**
- **initiated voluntarily by the employer/manager?**

It is not always a straightforward process to determine the history of these arrangements, particularly where they are not formalised. For some sub-sectors of manufacturing, such as transport and defence, there is often a history of trade union recognition,

Question 41 - How might the ICE regulations be improved?

We have little evidence upon which to respond to this question. At the point the regulations came into force in the UK, EEF conducted a considerable amount of work relating to the regulations. We produced an extensive guide for EEF members and model agreements. We also provided training to member companies and still have materials which we occasionally use for this purpose. Having produced these materials and guide, we have received very little demand from EEF members. We have one member of staff only who covers this area, (out of approximately 70 legal advisers) and we rarely receive requests for information or training in this area. In the last year, we have received one such request, but this has not led to an agreement under the regulations.

Question 42 - Should the ICE regulations be extended to include workers in addition to employees?

No. We do not see that there is any evidence that the regulations are in need of any change as the current regulations are not being used to any great extent by either employers or employees. We see no reason to think that expanding the regulations to include workers in our sector would have any effect on the current situation, in part due to the fact that there are few individuals employed on worker status in our sector.

Question 43 – Should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%?

No.

Please explain your answer.

We do not believe that reducing the threshold would have any impact on the current level of use of the regulations. We have no evidence that any potential ICE agreements are frustrated by the current threshold level, or that reducing the threshold would cause the regulations to be used to any greater extent.

Question 44 – Is it necessary for the percentage threshold for implementing ICE to equate to a minimum of 15 employees?

Yes, to ensure that there is a sufficiently large representative group to trigger the implementation of the regulations. There is by their nature a degree of administration involved in triggering the regulations, and formal agreements, such as those under ICE, as usually inappropriate for the small businesses, where information and consultation is usually dealt with in less formal ways.

Question 45 - Are there other ways that the government can support businesses on employee/worker engagement?

Yes, by the provision of guidance and best practice. Acas currently produce a range of materials but greater emphasis could be placed on the business benefits of good workforce engagement and linking this to improvements in productivity and government's industrial strategy.

Question 46 - How might government build on the expertise of stakeholders such as Investors in People, Acas and Trade Unions to ensure employees and workers engage with information about their work?

Employers are more likely to engage with organisations such as EEF and Acas, and workers are more likely to engage with a trade union than government. We do not believe that government is likely to be more successful in engaging with employers and their workforces than other stakeholders who already have a longstanding relationship with businesses and workers.

Question 47 - What steps could be taken to ensure workers' views are heard by employers and taken into account?

We think that the reason why the ICE regulations are used so infrequently is that other methods of workplace engagement are used more often and more effectively. The ICE regulations for the most part do not have a natural home in the modern workplace. They are a formalised platform, and workplaces tend to either have informal arrangements which work, as they are tailored to the particular environment, or they have structured processes, which in manufacturing usually means that a trade union is involved. The ICE regulations are very unlikely to be used where there is recognised trade union, and for a workforce seeking some form of more formal arrangement they are more likely to seek an agreement via a trade union.

Question 48 - Are there other ways that the government can support businesses on employee/worker engagement?

We presume that there is no intention to provide direct support to businesses, in form of financial support, or in kind support, but our evidence shows very strongly that management

training is a key component of good workplace relations and can often be overlooked. Government has some tools available to encourage leadership and management training, for example by the improved and more flexible deployed of the apprenticeship levy.