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Department for Business, Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET

May 2018

Dear

Re: FSB response to the Department for Business, Energy & Industrial Strategy on measures to increase transparency in the UK labour market

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

FSB is the United Kingdom's (UK) leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. FSB is non-party political, and is the largest organisation representing small and medium sized businesses in the UK. Small businesses make up 99.3 per cent of all businesses in the UK, and are the engine of the UK economy.

FSB welcomed the Matthew Taylor's Review on the changing nature of work, in which we submitted a response in May 2017, entitled [1]'The Changing World of Work for the Self-Employed and Small Businesses: FSB Submission to the Matthew Taylor Review'. In our submission the FSB stated its support for light touch transparency measures which would ensure individuals are aware of their working rights, so they don't fall prey to rogue employers. However, we were also clear we did not want to see new reporting requirements which placed disproportionate burdens on smaller businesses.

In July 2017, Review of Modern Working Practices, Matthew Taylor identified that individuals working under the status of a 'worker', i.e. individuals that fall under the definition found in section 230(3)(b) of the Employment Rights Act 1996 are sometimes more susceptible to power imbalances within the employment relationship. The majority of small businesses take on staff as employees. The FSB supports the Government's efforts in increasing clarity and transparency in the labour market.

FSB has consulted with our members and the proposals raised in this consultation. BEIS will be interested in the impact of these proposals on small businesses. Our response provides recommendations on the following:

- Written Statements
- Continuous Service
- Holiday Pay
- Right to Request
- Information and Consultation of Employees Regulations (2004) (ICE)

Yours sincerely,

[1] FSB submission to the Review of Employment practises in the modern economy, July 2017. Available at https://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-submission-to-the-review-of-employment-practices-in-the-modern-economy---may-2017.pdf?sfvrsn=0

T 01253 336000
E customerservices@fsb.org.uk
W fsb.org.uk

A Sir Frank Whittle Way,
Blackpool Business Park,
Blackpool, FY4 2FE

fsb

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Chairman, Employment and Pensions Committee
Federation of Small Businesses

T 01253 336000
E customerservices@fsb.org.uk
W fsb.org.uk

A Sir Frank Whittle Way,
Blackpool Business Park,
Blackpool, FY4 2FE

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National Federation of Self Employed and Small Businesses Limited,
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Registered in England: 1263540

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Written statements

At present, [2]section one of the Employment Rights Act 1996 (ERA 1996) provides all employees with the right to statements of employment particulars. [3]An employer may use alternative documents, namely a contract of employment or letter of engagement, instead of a written statement of particulars. FSB supports Option 1: to legislate to extend the right to a written statement to non-employee workers'. It is right that an employer should provide a worker, as they do an employee with key information in relation to their employment.

FSB members work hard to comply with the law and want to do the right thing. At the same time, small businesses often lack a dedicated HR function. In 2017, the FSB employment advice line received 1,254 calls in relation to the contracts of employment, so we know small businesses often seek guidance in this area. In light of the above the FSB would recommend that written statements should be introduced for workers, however, they should not be a day one right to ensure an employer is able to seek guidance from organisations, such as Acas if a worker raises queries which an employer cannot immediately address within a written statement.

In most cases written statements for workers will largely be the same, however, the British workforce is diverse and a relatively high share of workers in small and medium-sized enterprises come from groups that face labour market disadvantage, such as people with disabilities and older workers. Such groups may request a bespoke or tailored working arrangement and thus suggest different terms in relation to hours of work. Hours of work is a compulsory particular, as stated in [4]ERA 1996, s 1(4)(c). Therefore FSB recommends that a period of more than two weeks, but less than a month, after starting paid work is acceptable for limb b workers to receive a written statement.

Government has identified that the number of people in the UK categorised as 'workers' for the purpose of employment status is currently unknown. FSB estimates that there is a low number if its membership which employs staff as workers. Although FSB has no direct evidence of the number of workers in smaller businesses our recent data shows that smaller businesses are unlikely to employ staff on atypical working arrangements, who are more likely to be a non-employee workers. We have therefore made the inference that our membership includes a low percentage of non-employee workers. This conclusion follows Government findings in the [5]Employment Status Review of 2015, which found that 'in general, most of the people who fall into the 'worker' category will be working in atypical or non-standard arrangements'.

Although, those smaller businesses which employ staff as workers the change to written statements will have an impact. The average FSB member small business has seven employees. Based on the Government's [6]impact

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[2] Under the Employment Rights Act 1996, Part I, Section 1, Statement of initial employment particulars. See https://www.legislation.gov.uk/ukpga/1996/18/section/1

[3] Under Employment Rights Act 1996, 7B, Giving of alternative documents before start of employment. See *https://www.legislation.gov.uk/ukpga/1996/18/section/7B*

[4] *Under* Employment Rights Act 1996, section *s 1(4)(c), Statement of initial employment particulars. See https://www.legislation.gov.uk/ukpga/1996/18/section/1 Employment Rights Act 1996*

[5] https://www.gov.uk/government/publications/employment-status-review-2015

[6] Impact Assessment, Extending the right to a written statement to 'dependent contractors' (non-employee workers), 2 February 2018, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701010/extending-right-to-written-statement-non-employee-workers-ia.pdf

T 01253 336000
E customerservices@fsb.org.uk
W fsb.org.uk

A Sir Frank Whittle Way,
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assessment a business which employs seven people will face a one-off familiarisation cost of around £94.29. In addition, Government estimates a written statement for a non-employee worker in a micro and small business will take on average two hours at a cost of £54. This amounts to a total cost of £472 for a business which employs seven members of staff. This is a substantial cost and time to a small business owner who may not feel confident that they have adequately understood all of their responsibilities in line with the change. Although, this proposal provides greater transparency for non-employee workers FSB continues to ask Government to consider the impact of the steeply rising costs of doing business on small employers.

Continuous service

The current position is that, unless an exception applies, an employee's continuous employment will be severed if the employee takes a break of a complete week ending with a Saturday that does not contribute towards continuity. FSB is not aware of any concern from members about the current rules surrounding continuity of service and thus would argue the present rules operate well for small businesses. Therefore FSB recommends that no change is made to this area of law as it may lead to future problems. FSB is pleased that Government intends to update their existing guidance on temporary cessation of work within continuity of employment, so employers and individuals have a clearer understanding of their obligations and rights.

Holiday pay

Increasing awareness of holiday pay entitlements

FSB supports the Government's plan to increase the awareness of holiday pay entitlements to workers and businesses. Small businesses recognise the importance of holidays to their staff. Time off enables workers to have time to pursue hobbies, spend time with their families and ensure they have necessary time for relaxation and recuperation, which are essential to their mental and physical wellbeing. In addition to the right to take a minimum amount of holiday, small businesses are aware of workers' rights to be paid for such holiday. Therefore FSB supports the government's efforts to ensure the most vulnerable workers are able to receive holiday pay for which they are eligible.

Any future campaigns should provide employers with up-to-date relevant guidance materials which provide practical solutions to holiday pay issues. FSB respects that holiday pay is a constantly evolving area of employment law, with numerous cases, both domestic and European, impacting holiday pay guidance. Future campaigns and enforcement of holiday pay regulations should reflect the constant change in this area and provide employers with appropriate time to seek legal support and make necessary changes within their business.

Changing the reference period

The right to be paid for holidays is a statutory entitlement and may also be a contractual entitlement. Holiday pay can become increasingly complex when a worker's working pattern varies, i.e. when they aren't working normal hours. In addition, complexities also arise when determining what payments, such as overtime, bonuses or commission should be included in holiday pay. The consultation refers to 'extending the holiday pay reference period for workers without normal working hours from the current 12 weeks to 52 weeks'. However, a change in reference period in domestic legislation will also have an impact where pay does not vary according to the time worked or the amount of work done, but where an individual work or earns "regular" overtime or commission. A

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clear example of this is in the case of [7]*Lock v British Gas Trading*, in which the Court of Appeal held that commission should be included in holiday pay, and that the calculation for the commission should be calculated using the 12 week reference period provided in domestic legislation.

As the consultation states, a week's pay is calculated under sections 221-224 of the ERA 1996. Where a worker is without normal working hours, their week's pay is determined by reference to a 12 week averaging calculation, as specified in section 224(2) ERA 1996. In many sectors, particularly in seasonal businesses the current 12 week reference period is unrepresentative of normal pay, depending on when holiday is taken. For many small businesses this may often lead to artificially high levels of holiday pay after peak periods of work. Therefore, FSB supports a move to an extended reference period. A 52-week reference would suit both worker and employee, as it will take better account of periods of predictable and unpredictable surges in activity as well as periods where a worker works normal hours.

FSB recognises flexibility is important to smaller businesses and to the wider economy, so we would recommend the ability for an employer and worker to be able to set a shorter reference period if they so wish. To ensure transparency and protection for both parties this should be agreed at the start of the working relationship and confirmed by way of contractual agreement between both parties. A similar position already exists in relation to working hours, as governed by the Working Time Directive, in which a [8]worker can opt out of the default 48-hour week by way of an opt-out agreement. This enables employers to manage their businesses and help workers balance their responsibilities. Workers should have the right to amend their reference period by giving their employer a period of reasonable notice, with any changes to be implemented in the next tax year. There should be no obligation on a worker to agree to a shorter reference period and they should not suffer any detriment if they choose not to do so.

The courts have also suggested that a longer reference period is best suited for calculating holiday pay. In [9]*Williams and others v British Airways plc* C-155/10 (ECJ); [2011], the court held that a worker must receive normal remuneration for periods of annual leave which is comparable to periods of work and that the average needs to be calculated over a reference period that is 'representative'. In the preliminary Attorney General Opinion in [10]*Lock v British Gas Trading* C-539/12, a one year reference period was suggested by Advocate General Bot, but that suggestion was not taken up by the ECJ in its full judgment.

Certain industries are more prone to having staff working non-normal hours of work, as identified in the Taylor Review. As such FSB believes the holiday pay reference period is not the only area relating to holiday pay calculations which require a mandatory change. Payroll software should also recognise the extent of work variation and thus ensure their systems are able to make calculations for holiday pay over a 52-week period. Her Majesty's Revenue and Customs (HMRC) should mandate all payroll software providers to enable their systems to make holiday pay calculations based over a 52 week period, this should be a mandatory change for payroll providers and

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[7] Lock v British Gas Trading, Court of Appeal, [2016] EWCA Civ 983, 7 October 2016. Judgment available at http://www.bailii.org/ew/cases/EWCA/Civ/2016/983.html

[88] GOV.UK, Maximum weekly working hours. Available at https://www.gov.uk/maximum-weekly-working-hours

[9] *Williams and others v British Airways plc* C-155/10 (ECJ); [2011], 15 September 2011. Judgment available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-155/10

[10] Lock v British Gas Trading C-539/12, 22 May 2014. Judgment available at http://curia.europa.eu/juris/document/document.jsf?docid=152651&doclang=EN

T 01253 336000
E customerservices@fsb.org.uk
W fsb.org.uk

A Sir Frank Whittle Way,
Blackpool Business Park,
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should operate in the same way as statutory calculations, such as statutory sick pay and statutory maternity pay. Quite rightly, payroll providers should be given sufficient time to prepare for this change, but It is essential that smaller businesses do not experience any additional implementation costs as a result of this proposed change.

Right to Request

Our response to the consultation presents new evidence from a recent FSB survey conducted at the beginning of May 2018. Only 15 percent of smaller businesses have recruited staff on non-guaranteed contracts in the last twelve months. This evidence supports previous findings from FSB that non-guaranteed hours are not common place amongst micro and small businesses, in comparison to larger businesses or the public and sector. Small businesses are by their nature flexible, and the kind of contracts their staff are on depends on the nature of the business. However, staff in small firms are typically on permanent contracts, working full or part-time. For the majority of small businesses, non-guaranteed hours contracts are often not appropriate because the firm has an established workforce and/or business is sufficiently predictable. Nevertheless, for a certain types of businesses, such as health & social care, retail and the accommodation & food sector, non-guaranteed hours arrangements are more common place.

Non-guaranteed hours are often used to provide flexibility for both the employer and worker, [11]this enables employers to scale the size of their workforce due to fluctuations in demand. Flexible working arrangements are at the core of the social care sector. While demand for social care is systematically high and constant across the week, homecare is time and location specific with some peaks and troughs throughout the day. This feature of service delivery combined with 'chronic underfunding' and the commissioning model used by most local councils leads to the use of zero-hours arrangements.

The use of non-guaranteed hours contracts is not only different across sectors, but also across different-sized businesses, as such when considering whether to implement a right to request stable contract after 12 months. It is reasonable that where an individual has worked consistent hours over a period of 12 months, with no significant break of continuity of service that they should have a right to request a stable contract. Most small businesses recognise the many benefits of offering a stable contract to their workforce. It benefits business productivity, staff morale and retention. Providing a stable contract to a worker who has worked for a business over a 12 month period also provides individuals with more certainty of income and security in work.

Implementing solutions to ensure greater job security should depend on the nature and size of the business. Income and security of future work are concerns also shared by small employers, so it would reasonable for an employer to be able to refuse a stable contract, as their business may be in a period of financial uncertainty and operating on fine margins. Dealing with formal rights to request may be easily accommodated by large businesses, but such procedures can be more onerous and burdensome for smaller firms that lack HR support. An employer, particularly small and micro employers should also have a suitable length of time to respond to a request. FSB recommends a period of three months as an appropriate length of time for an employer to respond to a request for a stable contract.

T 01253 336000
E customerservices@fsb.org.uk
W fsb.org.uk

A Sir Frank Whittle Way,
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Information and Consultation of Employees Regulations (2004) (ICE)

FSB recognises the importance of the [12]Information and Consultation of Employees Regulations 2004 (ICER 2004), which require employers based in Great Britain to provide information to their employees and to consult with them about the operation of their business. Since 6 April 2008, ICER 2004 has applied to undertakings with at least 50 employees in the UK (for the year before that date it only applied where there were at least 100 employees). Where an employee is contracted to work fewer than 75 hours in any month, the employer can decide to count them as half an employee.

The average FSB member has seven members of staff. Therefore, the majority of FSB members are currently not required to comply with the ICER regulations. However, despite this lack of formal compulsion many small businesses inform and consult with their workforce on a less formal basis on a number of issues from product innovation to family friendly policies. Therefore ICER regulations are not appropriate for small businesses due to small size and lack of hierarchical structures.

FSB welcomed the Government's commitment to 'Good Work' in its response to the Taylor Review in February 2018. FSB represents a variety of small businesses from a number of industries and through our engagement with our members we are aware of the importance and value placed on the employee voice within small businesses. The lack of hierarchical structures and less bureaucracy within smaller firms can often lead to greater autonomy, where staff have the opportunity to share ideas and be involved in key decisions. This level of openness and ability to influence their working environment may lead to greater innovation and a desire to increase skills, crucial factors to closing the UK's productivity gap.

Over the last few months FSB has been working with other business organisations, trade unions and the Carnegie Trust to identify measures that can be used to evaluate the quality of work. Through this work FSB has ensured that the experience of small businesses and the self-employed will be reflected within a forthcoming job quality measurement framework. Employee Voice is an integral part of the framework and captures the informal nature of small businesses than formal ICER regulations.

ICER 2004 creates three different types of employee representative, with employers required to make arrangements for employees to elect or appoint negotiating representatives. FSB supports the proposal to extend ICER regulations to workers, but does not support the proposal to lower the ICER 2004 threshold from 10% to 2%. This will place a regulatory obligation on micro and small employers and their staff to ensure employees are elected as representatives and meet the ICER requirements. As stated above, small business employers are already fulfilling many of the goals identified in ICER 2004, the Taylor Review and in the forthcoming job quality framework.

Government should focus on one mechanism to ensure employee voice is heard. In addition, Government should ensure that other employment regulations, such as the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) and statutory regulations to inform and consult during redundancy procedures are properly enforced.

We trust that you will find our comments helpful and that they will be taken into consideration.

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[12] The Information and Consultation of Employees Regulations 2004, SI 2004/3426. Available at http://www.legislation.gov.uk/uksi/2004/3426/pdfs/uksi_20043426_en.pdf

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W fsb.org.uk

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For further information please contact _mployment and Pensions Policy Advisor in our London office.

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W fsb.org.uk

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