Usdaw

Union of Shop, Distributive and Allied Workers

CONSULTATION ON MEASURES TO INCREASE TRANSPARENCY IN THE UK LABOUR MARKET

MAY 2018

Usdaw welcomes the opportunity to submit comments to the BEIS consultation on measures to increase transparency in the UK labour market. Usdaw is the UK's fifth largest trade union and operates solely within the private sector. The Union has over 432,000 members across many sectors including Retail, Warehousing, Transport, Food Manufacturing, Call Centres and Wholesale. Usdaw membership has grown by more than 17% in the last five years and by nearly a third in the last decade.

In recent years the UK has seen a massive increase in the number of vulnerable workers. This is not just an issue relating to the gig economy; it extends across the UK labour market, from short-hours contracts that result in people only having a small number of hours guaranteed each week, to the general problem of under-employment, where people are working fewer hours than they want or need to guarantee a decent basic income.

The Government's continued refusal to tackle issues such as zero-hours contracts, short-hours contracts and underemployment has led to a systemic problem which is now having far reaching affects. The financial insecurity that comes with irregular hours and insecure work should not be underestimated; it can impact both physical and mental health and from this perspective is short sighted of the Government not to tackle these issues head on.

In this respect Usdaw welcomes the Taylor review's recognition of the need for 'Good Work For All' and acknowledge the ensuing consultations are a step in the right direction. It is clear to Usdaw that there is a need for greater transparency around the employment law framework to help ensure that legal rights and responsibilities are not misunderstood or exploited in a changing UK Labour Market. Therefore, we support the following proposals:

- A legal obligation on employers to provide basic information about the employment relationship to all workers and employees from the outset, ie day one.

- An increase in the information contained within the principal written statement – this needs to be focused on increasing clarity specifically on hours and pay and any benefits derived from these.

- An increase in the period or break counted for continuous service from one week to a substantially extended period, for example, six months. The flexibility expectations that have come with the modern UK labour market need to work both ways and in this respect, it is difficult to see how a break of one week between contracts should affect continuity of service. Usdaw does not believe that this reflects the reality of modern day work and supports a substantially extended period, for example six months.

- Increasing awareness of holiday pay entitlements for those who work flexibly.

However, we should also note that while the above proposals are a step in the right direction they are not truly transformative in terms of transparency. Usdaw is concerned that the proposals being put forward are aimed at pacifying critics and tempering some of the negative dialogue around insecure work and zero-hours contracts, rather than being a meaningful and genuine commitment to tackle the growing imbalance of power we have seen from insecure work and underemployment.

To make any real progress we need to see the following being put into action:

- An end to exploitative zero-hours contracts and bogus self-employment. We need a zero-tolerance approach with strong enforcement of regulations.

- A statutory right to a contract that reflects your normal working hours, ie a legal right not just a right to request. The proposals state that the employer should consider the request in 'a reasonable manner'. If the government goes down the right to request route then at a minimum they need very clear criteria which allows employers to assess the request and gives employees/workers clarity around the process/right to appeal. Furthermore, we need to be mindful that this is not just an issue for zero-hours contracts and agency workers. From short-hours contracts that result in people only having a small number of hours guaranteed each week, to the general problem of under-employment, the right to a contract that reflects your normal hours should be at the heart of these proposals, not a side consideration limited to a small population.

- A right to a minimum weekly contract of 16 hours which may only be reduced by a clear request from an individual worker in the presence of a trade union representative.

- A strong focus on industrial relations at the core of delivering good work. Trade unions are crucial to making progress on this issue. The Government need to put aside their outdated ideological views and utilise trade unions to really deliver 'Good Work For All'. This includes reducing the statutory recognition level to allow trade unions to work alongside employers/ICE Regulations. Usdaw has proven success in this area in the form of the Tesco Usdaw Partnership. The Government need to keep more of an open mind when it comes to the role of trade unions and pay attention to some of the points made by David Metcalf, the Director of Labour Market Enforcement on this front.

Usdaw is concerned at the length of time which has already been taken in the review of modern employment practices. The review was initially opened in December 2016, prior to reporting in July 2017 and we are now in May 2018 without any firm action to resolve the issues which have been highlighted. A number of the questions in the consultation paper appear to be focused on whether the Government should take action in an area rather than how resolutions to the issues identified will be resolved. Working people are already suffering as a result of the lack of transparency that is evident in the labour market. Usdaw wants to see the Government press ahead with firm plans following this consultation and would be disappointed to see a further formal consultation process being launched based on the feedback to this consultation. At the same time, we are aware that there may be unintended consequences arising from any proposals and would therefore welcome the opportunity for an informal consultation period to review the proposed actions in light of all four consultations around the Taylor Review.

Answers to Questions

Section A – Written Statements – Questions for Unions

It is welcome that the Government has finally decided to act on trade unions' long-standing call for the right to a written statement to be extended to all workers on day one of their employment.

We agree that the range of information provided to all workers should be expanded to include details of expected hours of work, sick pay and sick leave arrangements, parental leave rights and training provided by employers. In our opinion, all prescribed information should be provided no later than the first day of an individual's employment and where possible within a single document.

These measures would help to improve transparency and increase employers and workers' awareness of their rights and responsibilities at work. They would also reduce the risk of disputes in the workplace and assist workers to enforce their rights.

But providing workers with additional information will not by itself change the power dynamic in the workplace or mean workers have an increased choice whether to accept insecure work. For many working people, insecure and low paid employment is the only option available to them.

Extending the right to a written statement will also be meaningless unless accompanied by effective enforcement.

The Government should also ensure that future changes to the right to a written statement match – if not exceed – proposals from the European Commission for a new Directive on transparent and predictable working conditions. As the UK prepares for Brexit, Usdaw believes it is vital that UK employment laws continue to keep pace with European standards. People working in the UK deserve at least the same floor of rights as their counterparts working in Germany, Ireland or Spain. Such a move would also be consistent with the Prime Minister's repeated promises to 'protect and enhance' workers' rights after the UK leaves the EU.

With this mind, Usdaw is seriously disappointed that the Government is not currently proposing that workers should have a right to notice of any shifts.

Question 1 – Has the employer provided a written statement of employment in the last 12 months to:

a) Your permanent employees

In Usdaw recognised workplaces, the prescribed information is provided to staff in a written contract of employment which is provided before they start employment or on the first day of employment.

However, in non-unionised workplaces, including in sectors such as food manufacturing, logistics, agriculture and hospitality, workers often do not receive any written notice of their pay and conditions. Migrant workers are also less likely to receive a written statement of terms and conditions.

b) Your non-permanent staff

In some workplaces, employers recognise it is good practice to provide non-permanent workers with a written statement or contract of employment.

In 2015, the CIPD reported that over four-fifths (81 per cent) of employers provide zero-hours contract workers with a written contract. Agency workers also have a right to basic written information at the point when they first register with an employment business and before each new assignment.

But, many workers employed in insecure, non-permanent jobs do not receive any written information about their pay, hours and other working conditions. This inevitably creates an imbalance of power. It also makes it difficult for workers to enforce their rights, including to the National Minimum Wage and holiday pay and to challenge any unfair deductions from wages.

Question 2 – In general, when do individuals starting paid work at your organisation receive a written statement or contract of employment:

In Usdaw recognised workplaces, employers issue staff with a full written contract either before a person starts work or on the first day of their employment.

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

The Government's impact assessment suggests it should only take employers a few moments to prepare a written statement for a new starter. Usdaw agrees.

Employers should prepare a template written statement for different jobs and will only need to adjust a few details before issuing it to a new starter.

The preparation time for written statements will be lower in workplaces:

- Where trade unions are recognised and terms and conditions will be set out in a collective agreement.
- With standardised terms and conditions.

If employers decide to use individualised terms and conditions, the process may take more time.

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

Usdaw is concerned that some employers – particularly SME businesses – report that they usually seek legal advice before completing a written statement. In our view, this is unnecessary.

The Government should develop and promote an online tool which assists employers to prepare written statements.

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. The preparation of a written statement should be a relatively straightforward process for most employers. This should particularly be the case in unionised workplaces and where employers use standardised terms and conditions.

An extension of the right to a written statement is likely to have significant business benefits. It should:

- Improve transparency and openness in the workplace.
- Make employers more aware of their responsibilities and improve compliance with employment law standards.
- Reduce disputes over employment conditions, thereby reducing the risks and costs of litigation.
- Help to create a level playing field, ensuring that good practice employers are not undercut by the employers who mistreat their staff.

Section A

Written Statements – Questions for all

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 strongly

Usdaw firmly supports the Taylor Review recommendation that the right to a written statement should be extended to *all workers*.
We are not alone in taking this view. The CBI and CIPD have also called for the right to a written statement to be extended to all workers.

Usdaw believes there is a compelling case for this policy:

- Many in precarious forms of work, including zero-hours contracts workers, do not receive any written details about their pay and hours of work. As the Government's impact assessment highlighted, this leads to an imbalance of power, and means that individuals are more vulnerable to mistreatment and abuse in the workplace.

- Extending the right to a written statement to all workers could raise workers' and employers' awareness of their respective rights and responsibilities at work

- It could assist workers to enforce their rights, including to be paid the NMW and holiday pay.

- It could encourage employers to plan for their workforce needs and to offer more predictable working patterns to staff. This would assist workers to budget and organise their lives outside the workplace.

- It could encourage managers to treat their staff more consistently. Currently, employers tend to restrict workplace entitlements, such as sick pay and leave, family friendly policies and work-related training, to permanent staff, whilst those on insecure contracts miss out.

- The CIPD has reported over four-fifths (81 per cent) of employers provide zero-hours contract workers with a written contract. Requiring all employers to adopt the same good practice will also create a more level playing field for good employers, by ensuring they cannot be undercut by unscrupulous employers.

The Government's proposal to extend the right to a written statement to all workers is therefore welcome. But it is important to note that providing workers with more information at work will not, by itself, reset the balance of power in the workplace or prevent the mistreatment or abuse of working people.

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' name

Yes

Due to the growing fragmentation of the UK labour market and the increasing use of intermediaries such as agencies, umbrella companies and sub-contractors, individuals are often not aware who their employer is. Informing workers of the name of their employer will increase transparency and assist individuals to enforce their rights.

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

Yes

Providing individuals with their job title and job description helps to clarify work expectations at work. It also enables people to assess whether they are receiving equal treatment at work.

Notifying people of the start date of their employment helps individuals to check whether they have sufficient continuous service to qualify for key employment rights such as maternity and paternity leave, the right to request flexible working, statutory redundancy pay and protection from unfair dismissal.

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

Yes

This information is particularly important for:

Employees affected by TUPE transfers. The law should be amended to ensure that transferred workers receive a written statement detailing the pay and other working conditions which will be transferred to a new employment and are therefore protected by the TUPE Regulations. This would increase transparency and avoid disputes.

Currently, service of certain public sector employees with a previous employer counts for the purposes of calculating entitlement to statutory redundancy pay. This includes teachers and local Government staff who move to a new school or local authority. Usdaw believes these provisions should be extended to other statutory employment rights.

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

Yes

It is very important for workers to be informed how much they will be paid and how their pay will be calculated. Workers should also be notified in writing about all forms of remuneration including overtime pay, commission, or bonuses.
This information assists individuals to assess whether:

- They have been paid in full and on time.
- Their employer has made any unlawful deductions.

- They have been paid the National Minimum Wage.

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

Yes

It is very important that individuals are informed about their hours of work, including whether they will be required to do overtime and/or work at weekends or at night. Such information enables individuals to plan their lives away from the workplace. But too often those in insecure forms of work, such as zero-hours contract workers and agency workers, do not have any guaranteed working hours and can often be offered work or find work is cancelled at very short notice.

Usdaw believes that when the right to a written statement is extended to all workers, the provisions on hours of work should be adapted. All workers should have a right to be informed about their expected hours of work, including the number of hours they will be offered each week/month and the times when they will be called on to work.

Workers should also have a right to reasonable notice of any hours of work (See below). Working parents often require at least four weeks' notice to plan childcare. Details of this notice period should be included in the written statement.

These provisions would mirror proposals currently under discussion in the EU. (See the EU Commission's proposal for a new Directive in Transparent and Predictable Working Conditions).

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

Yes

It is also vital that workers are informed about holiday pay and how it is calculated. Such information is particularly important for agency workers and those on zero-hours contract workers, who often miss out on paid holidays or receive rolled up holiday pay.

The TUC recently estimated that UK workers lose out on £1.6bn each year on holiday pay. Extending the right to a written statement to all workers may help to improve employers' compliance with holiday pay requirements and assist workers to enforce their rights.

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

Yes

Usdaw agrees that the current requirement for employers to inform workers of their place of work and if they will be expected to relocate should be retained. Identifying the place of work assists workers to calculate their right to pay for travel time.

It is important that any guidance on the right to a written statement makes clear that any requirement to relocate is reasonable. This would protect workers, including agency workers, from being asked to travel long distances for work, without being paid for their travel time or reimbursed for their travel costs or accommodation.

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

Yes

See response to (g)

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

It is welcome that the government plans to expand the information to be included in a written statement, in line with recommendations recently published by the EU Commission.

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

Agree strongly

This will provide increased transparency and predictability especially for those in insecure work. It will also encourage employers to plan their work needs in advance.

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

Agree strongly

Usdaw agrees that all workers – not just employees - should be entitled to notice before the contract can be terminated. Details of the relevant notice period should be included in the written statement. These provisions would go some way towards ending the hire and fire culture of zero-hours and agency working.

All workers should also be notified of the disciplinary procedure which employers will follow before deciding to terminate their contract. In our opinion, it is not fair that employers can currently fire 'workers' at will – without first identifying a potential fair reason for a person's dismissal or in redundancy cases exploring alternative forms of employment.

c) Sick leave and pay entitlement?

Agree strongly

All workers should be informed about sick pay and sick leave entitlements as part of a principal written statement. In too many workplaces, enhanced sick pay and leave arrangements only apply to permanent staff, whilst zero-hours workers and agency workers are expected to rely on statutory sick pay when they are too ill to work.

A TUC poll commissioned in 2017 found that just one in eight zero-hours contract workers get any sick pay. We also estimate that nearly 500,000 people on a zero-hours contract or in insecure temporary work do not qualify for statutory sick pay because they do not meet the income tests to qualify for these benefits.

Requiring employers to inform all workers of sick pay and leave arrangements in the principal written statement may encourage managers to treat all staff consistently and to extend enhanced workplace policies to those on temporary or insecure contracts. As a minimum, it would improve workers' awareness of their rights to statutory sick pay.

d) The duration and conditions of any probationary period?

Agree

Where an employer decides to use probationary periods, it is important that workers are informed about the length of the probation and of any conditions which the worker will need to meet.

However, probationary periods are not used in all sectors. It is important this is reflected in any amendments to the Employment Rights Act 1996 and in any accompanying guidance.

Usdaw is increasingly concerned employers use probationary periods to dismiss staff without following a full disciplinary procedure. Where this happens, workers may be deprived of their rights to natural justice and to be accompanied by a trade union rep. This is a clear breach of section 10 of the Employment Relations Act 1999 which provides that workers have a right to be accompanied in any meeting which may result in their dismissal.

It is important that any guidance on the right to a written statement emphasises that employers should not use probationary procedures to circumvent disciplinary procedures or trade union rights. The statutory right to be accompanied should also be extended to apply to probationary hearings.

e) Remuneration beyond pay, eg vouchers, lunch, uniform allowance?

Agree strongly

It is important that workers are informed about all forms of remuneration including vouchers, lunches, uniform allowances and rights to be provided with personal protective equipment.
Requiring employers to inform all workers about all forms of remuneration may encourage managers to treat staff consistently and to ensure that those on temporary or insecure contracts are not treated unfairly or discriminated against.

f) Other types of paid leave, eg maternity, paternity and bereavement leave?

Agree strongly

It is important that the right to a written statement should be updated to take account of new statutory rights to leave. Employers should be required to inform all workers about workplace policies, including pay arrangements, for the different forms of leave, including:

- maternity, paternity and adoptive leave and pay;
- parental leave;
- time off for dependents;
- time to attend ante-natal appointments, GP, dental or other medical appointments;
- time off for jury service etc.

Too often those on temporary or insecure contracts miss out on key family friendly rights and entitlements. This requirement may encourage employers not to discriminate against zero-hours contract workers and agency workers. Any accompanying guidance should encourage employers to extend workplace policies to all workers, not just permanent employees.

Questions 12 & 13 – To what extent do you agree that the principal written statement should be provided on (or before) the individual's start date?

Agree strongly

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

Usdaw believes that the right to a written statement should be a day one right. Currently, the right to a written statement is limited to employees and must be provided during the first two months of their employment. Employees with contracts which last for less than one month are also not entitled to a written statement. This means that many employed in insecure or short-term work do not receive any written information about their pay and conditions.

Preferably workers should receive full information about their pay and conditions before they start work – and certainly no later than the first day of employment.

We do not agree that employers should have up to two months to provide certain information. This approach would mean that many workers, especially those in insecure and temporary work, may never receive the information. This proposal is also not consistent with EU Commission recommendations.

Where possible, information should be included in a single document. Workers are more likely to keep this in a safe place, whilst supplementary documents are more likely to be misplaced.

Workers must retain the right to be informed in writing of any changes to their terms and conditions.

Questions 14 to 16 – Have you ever worked for an organisation that has not provided you with a written statement of employment particulars within two months of starting your job?

Unions have reported that in many workplaces, including in sectors such as food manufacturing, logistics and hospitality, workers often do not receive any written notice of their pay and conditions. Migrant workers are also less likely to receive a written statement of terms and conditions.

If you answered yes to question 14, did you:

a) Consider lodging a complaint with an employment tribunal (even if you did not end up doing it)?

b) Pursue compensation?

If you answered yes to question 15b, were you successful in securing compensation for failing to receive a written statement within two months of starting your job?

In most unionised workplaces, unions will ensure that workers are notified in writing of their pay and conditions.

Unions also play a leading role in supporting members to enforce their statutory rights in employment tribunals, including by seeking compensation for members where they have not received a written statement.

Question 17 – If we introduced a standalone right for individuals to bring a claim for compensation where an employer has failed to provide a written statement, what impact do you think this would have?

Extending the right to a written statement to all workers could prove meaningless in practice unless it is accompanied by effective enforcement. Usdaw therefore believes that:

- The Government should introduce a standalone right for individuals to claim compensation where their employer has failed to provide a written statement. Non-statutory measures alone will not suffice to change employer practice.

- Employers who fail to comply with their duties should face substantial penalties and the worker should be fully compensated. Workers should also be protected from victimisation for pursuing such a claim.

- In all other employment tribunal cases, tribunals should be required to check if a worker has received an accurate written statement. If not, the worker should be entitled to a minimum award or a 25 % uplift in compensation, whichever is the greater.

- Statutory enforcement agencies should also be responsible for checking if employers provide all workers with written statements or a contract of employment.

The Government should develop an online tool, to assist employers to prepare written statements.

Please consider the impact on:

a) Individuals

The introduction of a standalone right for individuals to claim compensation where their employer has failed to provide a written statement is likely to increase compliance with the new rules. It should also mean more workers receive written statements.

However, Usdaw does not believe that a standalone right by itself will be sufficient to change employers particularly in non-unionised workplaces. Most workers are unlikely to take a standalone claim to a tribunal for fear that they will be victimised and lose their job. It is highly unlikely zero-hours contract workers or agency workers would take such a claim for fear they would not be offered any future work.

The Government should take a proactive approach to enforcing new rights to written statements. The onus should not be placed on workers alone to enforce their rights. Employment tribunals should be tasked with checking whether employers have issued written statements in all cases. Where there is no evidence that employers have complied, workers should receive either a fixed award or an uplift in compensation.

b) Employers

Requiring all employers to provide a written statement to all workers would help to create a level playing field. Employers, who already adopt such practices, would no longer be undercut by the employers who mistreat their staff.

In the absence of such a right for workers to take a standalone claim to an employment tribunal would mean unscrupulous employers are likely to ignore the law and vulnerable workers will lose out on the rights.

c) The Tribunal Service

Usdaw does not anticipate that the creation of a standalone right to claim compensation where an employer has failed to provide a written statement is unlikely substantially to increase the workloads of tribunals.

Most workers are unlikely to take a standalone claim to a tribunal for fear that they will be victimised at work. This is particularly true for zero-hours contract workers and agency workers who are likely to be deterred from taking a claim for fear they would not be offered future work.

Questions 18 & 19 – Which of the following best describes your awareness of the Acas guidance on Written Statements?

Usdaw has a good knowledge of the Acas guidance on written statements. It is unlikely however that most union reps are aware of the guidance.

If you have some knowledge of the Acas guidance on written statements, how helpful did you find it?

Quite helpful
Usdaw believes that the Acas guidance is quite helpful. But the text is slightly misleading as it suggests that the written statement is a legally binding agreement between the employer and the employee. It would be clearer to say that a statement can be taken as evidence of a contract of employment (which will be legally binding).

It would be helpful for Acas to provide more detailed, good practice guidance on the use of written statements. Throughout this response we have highlighted points for inclusion in the guidance.

Usdaw would also support the development of an online tool to assist employers to prepare written statements.

Section B

Continuous service

Usdaw believes the rules on continuity of employment need to be modernised to reflect the reality of the world of work.

Too often those employed on temporary contracts or in intermittent work miss out on key employment protections because they experience gaps in their employment. The current system makes it all too easy for employers to dodge their employment law obligations.

Usdaw believes that all workers should have day one rights to maternity leave, and the right to request flexible working, statutory redundancy pay, and protection from unfair dismissal.

Failing this, it is proposed the rules on continuity of employment should be reformed so that:

- Workers should accrue service on a month by month basis.

- Any periods of statutory leave, including holiday and any form of parental leave, should count towards a worker's continuous service.

- Where a worker has a gap in work of more than a month, their continuous service will not be broken and the clock will not return to zero. Instead it will pause and restart whenever they do work in future for the same employer.

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

Currently, it is too easy for employers to game the system and circumvent employment law obligations.

Employers can make significant cost savings by employing workers on short-term or intermittent contracts. For example, they can avoid statutory redundancy payments, making it far cheaper to lay off staff. They can also fire staff at will, without the need to provide workers with notice or follow a fair disciplinary and dismissal procedure.

As a result, they can gain significant competitive advantage over more reputable firms

Question 21 – If you are employed, or represent employees what are the implications for you, or those you represent of the current rules on continuous service?

The current system is heavily weighted against employees. Employers can easily manipulate the rules to deprive them of their rights.

The rules also mean that those most in need of protection in the workplace – including zero-hours contract workers, agency workers and those employed on fixed term contracts – are the ones most likely to lose out key protections because they experience gaps in employment.

As a result:

- Working parents in insecure work are not guaranteed the right to return to work after having a baby.
- Those who opt for so-called 'flexible forms of work' to balance their work and family lives do not have a right to request flexible working.
- Zero-hours contracts can be fired at will, without any notice.
- Agency workers, zero-hours contract workers and independent contractors are not entitled to statutory redundancy pay when the work dries up, even though they may have worked for the same employer for many years.

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

Yes

Zero-hours contract workers and others employed on casual contracts face significant difficulties accruing sufficient continuous service qualifying for key statutory rights.

In *Carmichael v National Power PLC*, the House of Lords confirmed that when at work, casual workers qualify as employees. But their contract ceases to exist as soon as the working day comes to an end, due to a lack of mutuality of employment. This means that if a zero-hours contract worker has a gap of more than one week in work, their service will be broken, and they will not qualify for statutory rights. This will be the case even where they have worked for the same employer over several years.

The courts have tried to resolve with this problem by finding that an umbrella contract spans any gaps between work. This has assisted some zero-hours contract workers who work relatively regularly and have a genuine expectation of future hours. But those with more varied or random working patterns continue to lose out.

But the problems with continuity of employment are not limited to those employed in highly insecure work. Staff employed on a succession of fixed term contracts, term-time only contracts and sessional work face significant difficulties accruing sufficient continuous service to qualify for key statutory rights. Employers will often schedule staff contracts in a pattern designed to prevent individuals qualifying for statutory rights. For example:

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?

The Government's commitment to revise the rules on continuous employment is welcome. However, the proposal to extend the period counted as a break in employment from one week to one month, does not go far enough. It will not prevent unscrupulous employers from gaming the system to deprive working people of their statutory rights.

Usdaw would call on the Government to take a more comprehensive approach when reforming rules on continuous service to ensure that workers benefit from full employment rights and employers are not able to game the system.

Usdaw's preferred option would be for the Government to introduce day one rights for all workers. This approach would solve all the current problems relating to continuous employment.

Failing this, we would propose a three-pronged approach to the reform of continuity rules:

- Workers would accrue service on a month-by-month basis (rather than the current week-by-week approach).
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- Any calendar month during which an individual does any work for an employer or which is partly, or wholly governed by an employment contract, will count towards a workers' continuous service. The test should also be amended to confirm that mutuality of obligation should not be taken into consideration when determining whether an individual has continuous employment.
- The reasons for absence from work which do not break but rather count continuity should be extended to include all forms of statutory leave (including family related leave and statutory holidays).

Where a worker has a gap in work of more than a month, their continuous service will not be broken and stop clock will not return to zero. Instead it will pause and restart whenever they do future for the same employer.

If the Government decides not to adopt this more comprehensive approach, it important that any legal reforms reflect the reality of working practice and that employers are not able to game the system. In our opinion, extending the period which does not break continuity from one week to one month would be insufficient.

The change might also have a perverse impact, with unscrupulous employers deciding to lay staff off for five or six weeks each year to avoid statutory employment rights. This would place unreasonable pressure on household incomes, as workers would not be paid during this period. The Government would therefore need to substantially extend the period to, for example, six months.

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

No

If no, do you have views on additional circumstances that should be added?

The existing exemptions to the break in continuous service should be updated to include all forms of statutory leave including statutory holidays, maternity, paternity and adoption leave, shared parental leave, parental leave, and time off for dependants.

It is particularly important that statutory holiday is included, as it is not always clear whether zero-hours workers' contracts continue to exist during any periods of statutory leave.

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)

Usdaw agrees that the Government should update the guidance on continuous service. It would be helpful for the guidance to include:

Real examples of how the continuity rules should work in practice, including examples:

- Based on existing case law.
- Illustrating how the rules apply to zero-hours contract workers and agency workers.
- Signposts to further information.
- Information on what workers should do if they feel their employer has not complied with the legislation.

Section C: Holiday Pay

Usdaw is deeply concerned that the consultation paper fails to take account of many of the most significant issues around holiday pay and holiday entitlement. One of the biggest issues for our members in terms of holiday pay in recent years has been the complexities in terms of determining how to calculate what they are entitled to. Firstly, an individual needs to identify if they are taking holiday under one of Regulation 13 or Regulation 13A of the Working Time Directive or if they are taking non-statutory holiday provided under the contract of employment. From this, they will have to refer to the Employment Rights Act 1996 to determine if they have normal working hours, which would be applied differently depending on the type of leave to be taken, and then if their remuneration varies with the amount of work done or according to the time of work. If they do not have normal working hours, their holiday pay is calculated according to the 12 week average.

This is far too complex for many workers to understand and leaves an absolute lack of transparency in the calculation. Usdaw does not see any reason why all workers are not entitled to have all aspects of holiday pay calculated according to the 12 week average. The current situation is wholly unfair to short-hours contract workers. A zero-hours contract worker will be deemed to not have normal working hours and therefore will have both Regulation 13 and Regulation 13A holidays calculated according to the average. However, a worker on a 3 or 4 hour per week contract who regularly works significant additional hours will be deemed as having normal working hours of 3 or 4 hours per week. As a result, such a worker faces significant financial detriment when exercising their right to Regulation 13A holidays.

The Acas guidance on calculating holiday pay states that workers, 'should not be deterred from taking leave because they are paid less while they are on leave.' However, it is quite clear that many workers regularly suffer a financial detriment when taking leave. Usdaw's recent survey on working hours identified that 64% of our members regularly work overtime. Whilst Usdaw has many agreements which provide for average holiday pay for all leave, other employers, especially those that do not have a recognised trade union, have refused to provide holiday pay greater than the statutory minimum. To ensure transparency and fairness around holiday pay, Usdaw urges the Government to improve the definition of a week's pay in reference to annual leave.

Do you think that the Government should take action to change the length of the holiday pay reference period?

No. Usdaw believes that the default position for holiday pay reference periods should remain at 12 weeks; we do not support a proposal to extend the reference period to 52 weeks as a default position. It is unclear from the consultation paper and the Taylor report which parties are meant to benefit from such a change, apart from unscrupulous employers. Whilst the consultation paper discusses disharmony in the workplace over the timing of employees' holidays, Usdaw does not have significant experience of this causing an issue, mainly because people do not have an adequate understanding of how holiday pay is calculated.

In Usdaw's experience, issues around when members take their holidays occur more frequently as a result of the peaks and troughs of trading performance, with employers wanting to be overly prescriptive around when employees can take their leave.

In terms of the current reference periods, Usdaw has agreements which calculate holiday averages over periods such as 12, 17, 26 and 52 week reference periods. Our preference default position is for a 12 week reference period, as this best enables our members to understand what they are likely to be paid during holiday periods where the reference to average applies. A number of our employers also prefer 12 week reference period. In businesses which have a significant Christmas peak, employers want their staff to work as much as possible during the final weeks of the year. To achieve this, they will severely restrict, and to some extent ban, annual leave in the final weeks and months of the year. This then leads to a situation where the employer is required to provide a disproportionate amount of leave in the remaining three quarters of the year. The fact that annual leave during the first quarter of the year will be paid at a higher rate than any other period of the year, when using a 12 week reference period, enables employers to resolve this issue.

Usdaw does have some agreements where we have agreed to a longer reference period of up to 52 weeks as a rolling average. These agreements have been made with trusted employers where we have been able to set-out transparent calculations which have the confidence of the workforce. In such circumstances, there may be a value in such agreements however, we would be concerned of such provisions being applied without adequate checks and balances. Under 12 week reference periods, employees can have a general 'feel' for what their average has been over the reference period and would be able to identify payments where there appears to be an anomaly. However, under a 52 week average, such a 'feel' would be far more difficult to identify leaving employees open to missing out on their statutory entitlements.

If you answered 'yes' to Q27, should the Government:

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

No

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

No.

c) Set a different reference period

Yes. Usdaw believes that the default reference period should remain at 12 weeks and the provisions should be enacted so that a company may agree, with a recognised and independent trade union to extend the reference period up to a maximum of 12 weeks. Due to the issues around the transparency of the calculation explained in our answer to question 27, Usdaw does not believe that provision should be enacted for workforce agreements made without the oversight of an independent trade union acting on behalf of the workforce.

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?

Usdaw has significant experience of short-hours contract workers. 64% of our members are regularly working additional hours not guaranteed in their contract. In a number of employers, we have reached agreements whereby all annual leave is paid according to the individual's average working hours. However, there are a number of our employers who still refuse to make such an agreement and we are aware that there are issues in employers where we do not have an agreement. This provision is resulting in workers being deterred from taking their annual leave as a result of the financial implications. As a result, there are significant proportions of individuals across the country who are not exercising their rights to annual leave.

Furthermore, Usdaw is aware of agency workers not feeling confident of taking annual leave. The lack of employment protection available for these types of workers far too often leads to a fear that they will lose hours or even have their assignment terminated if they exercise their rights to holidays. Usdaw believes that the only way to address this issue is to provide additional employment rights to agency and zero-hours contract workers, the first of which must be a contract that reflects their normal hours of work.

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

Don't know.

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

No.

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

Usdaw is pleased to see that the Government has decided not to push ahead with the proposal to allow rolled up holiday pay. We agree with the Government's interpretation that as a result of the Court of Justice of the European Union (CJEU) case of Robinson-Steele v RD Retail Services Ltd 2006 C-131/04, rolled up holiday pay is unlawful. Usdaw considers that any move to allow a system of rolled up holiday pay is likely to be interpreted as the Government's first attempt to weaken employment legislation in light of Brexit.

In terms of ensuring that the leave is taken, Usdaw believes that it is not a question of choice over how individuals are able to take leave but ensuring protection from any form of retribution or detriment if leave is taken. Far too often, zero-hours contract workers and agency workers find that their hours will simply disappear following any period of annual leave.

It would be beneficial to ensure that people are consistently aware of their entitlement to annual leave. As part of the introduction of an itemised payslip for all workers, Usdaw believes that a worker's entitlement to annual leave should also be included on the payslip. Such a move would ensure transparency in relation to holiday entitlement and reinforce the fact that annual leave is an entitlement for all workers.

Section D: Right to Request

As already outlined, Usdaw has significant experience of short hours contracts and the issues debated in the Taylor Review chapter on one-sided flexibility. According to a survey at the end of last year which received 5,965 responses, 64% of our members regularly work additional hours, above those guaranteed in the contract. Out of these, 68% would like these hours guaranteed. For information, we have attached a copy of the report detailing the results of this survey. Respondents to the survey will be disproportionately workers employed in unionised companies where the issues around short hours and zero-hours contracts are likely to be less pronounced. For example, Usdaw research shows that only 5% of our members identify as having a zero-hours contract. Such a figure is likely to be significantly higher across non-unionised companies within the industries in which we organise.

The ONS has reported that figures from the November 2017 survey of businesses reported that there are 1.8 million contracts that did not guarantee a minimum number of hours. In addition the ONS estimates that there are 2.5 million part-time workers who want longer working hours. Under employment is a significant problem across the economy. Usdaw's research suggests that 28% of our members either have or are looking for a second job. For such people, the fact that they already have a job does not mean that they are able to survive. The Government needs to take action to ensure that people are guaranteed enough contractual hours to survive.

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

Yes.

We agree that the Government should take action in this area however we are unclear as to what a right to request a more stable contract would entail. Usdaw's response to the Taylor review confirmed that, in light of the repeated issues we have encountered in this area, employees should be given a right to a guaranteed contract based on the hours they normally work. We believe that such a right should be based on a 12 week reference period in line with the Employment Rights Act. This right would provide workers with more stability, and discourage employers from overusing short-hours contracts. For such a proposal to work, individuals would have to be given an entitlement to a contract reflective of their typical working hours.

In addition, Usdaw believes that there should be a statutory default minimum contract of 16 hours per week. Such a minimum would provide a clear floor in the labour market and ensure that people are aware of the minimum contract they can expect when looking for work. There will be some cases where individuals are looking for lower contractual hours and such hours, beneath 16, should be available when requested by the individual. To ensure that employers do not put pressure on individuals to request a lower contract, such a request must only be made by an individual who is represented by an independent trade union representative. Usdaw has witnessed through the individual opt-out to the 48 hour maximum working week under the Working Time Regulations that unscrupulous employers merely insert the opt-out into the contract, effectively taking the option away from the individual. Therefore, the role of a trade union representative is paramount for the minimum working week to effectively deal with the current excessive use of zero and short-hours contracts.

As stated above, in addition to a minimum 16 hour per week contract, Usdaw believes that individuals must be given a right to a contract that reflects their normal hours of work. This right would contain certain safeguards for the business to ensure they could deal with temporary requirements to increase an individual's workload. For example Usdaw has reached the following voluntary agreement with a major discount retailer:

> Agreement was reached that where a colleague has worked a set number of hours above their contracted hours for a period of six months or more, if they approach the Store Manager these hours will be reviewed and where possible will form part of the colleague's ongoing contract of employment. There may be instances where it is not possible to amend contracts of employment, such as cover for Maternity Leave, long term absence or anticipated impact on sales (ie ongoing trend of fall in customer footfall or knowledge of potential new competitors).

Whilst we would be looking for legislation to go further than this, it does show that tackling the issue of short-hours and zero-hours contracts in typically low paying sectors is possible.

However, Usdaw is concerned that merely having an individual right to a stable contract, or a lesser right to request a stable contract, will be open to abuse and will not necessarily address the issues which were raised in the one-sided flexibility chapter of the Taylor Review. According to ONS statistics, zero-hours contracts are most prevalent in large employers, with 28% of employers with more than 250 employees making use of zero-hours contracts compared to only 6% of all employers. It is likely that, due to the increased imbalance of power in large employers, employees within large organisations will fear victimisation as a result of invoking any right. Furthermore, large employers would be able to rotate staff hours if individual employees requested stable contracts. Such behaviour was clearly evident in the introduction of the Agency Workers Regulations where, as a result of the 12 week qualification period, agency workers commonly have assignments terminated after 11 weeks.

Furthermore, Usdaw is concerned that an individual right to request is likely to bring about issues in terms of the number of requests made as well as being open to potential abuse by employers. As already outlined, significant numbers of Usdaw members are looking to have their regular additional hours guaranteed in their contract. These members are in organised workplaces where there is a comparatively low level of zero-hours contracts and the Union has already made representations to move to contracts which are reflective of the hours worked. In other employers within our industries the volume of requests is likely to be even higher. Therefore, merely as a result of the volume of individuals exercising the new right, Usdaw is concerned that employers may look to take a blanket approach of turning everyone down.

To avoid this, Usdaw believes that there should be a provision to submit a collective request for a stable contract whereby a group of workers would be entitled to be represented by an independent trade union. In such circumstance, the trade union would be entitled to key information to enable a rigorous analysis of the hours worked by location/department. Where hours are worked consistently within the business, they should be guaranteed within an individual's contract. Such discussions would obviously look at the future trading expectations for the location/department, whether hours have only been required as a result of temporary changes to the business and any other reasons why the hours should not be added to the individual's contract. There is obviously no benefit for the Union to argue that the total number of contractual hours within a location/department should be increased at a point where they would be decreased again in the near future. The benefits to allowing such a collective right would include:

- It would not introduce a perverse incentive for employers to offer less stable contracts than those currently provided. This was seen through the introduction of the Agency Workers' Regulations where agency workers are commonly rotated every 12 weeks.

- Individuals would not be at risk of detrimental treatment as a result of making an individual request.

- It would require employers to take a strategic look at the needs of their business and discuss these with experienced workplace representatives.

If the Government do go down the individual right to request route, then clear safeguards must be in place to ensure that the provision has some effect. These safeguards would include:

- **Timescales for employers to respond to requests by.** Usdaw would expect employers to have to respond to requests within two weeks of the request being made.

- **A requirement to hold a meeting.** The current lack of a requirement to hold a meeting for a right to request flexible working means that some employers do not even seriously consider a request. Furthermore, some individuals struggle to fully articulate their request in writing and would benefit significantly from having a formal meeting to discuss their requirements. This meeting should be part of the process.

- **A right to be accompanied.** As a result of the imbalance of power in the employment relationship, a factor which may well be increased as the employee is likely to be working a number of additional hours not guaranteed in the contract, there is a need for the employee to have the option of accompaniment at the meeting. The option must be for a work colleague or representative of an independent trade union to attend the meeting.

- **A right to a written response and for the employer to monitor and publish the number of requests received and the number accepted.** Under the current right to request flexible working, there is no effective method record keeping system and anecdotal evidence suggests that many managers take a blanket approach to rejecting requests. This is commonly done at a local level despite the best intentions of senior company personnel. Factors such as gender pay gap reporting are introducing greater transparency in the labour market and promoting greater levels of equality. A clear method of monitoring the success of the right to request would help to entrench this approach. The employer must also justify any decision not to provide the individual with a stable contract.

- **A right of appeal.** The right to appeal a decision is a natural part of the UK's approach to fairness and transparency. Currently, under the right to request flexible working, poor managers simply offer a bland reason to reject a request, such as 'needs of the business' and this is never questioned. The right of appeal would ensure that all managers truly consider the reasons for rejecting a request. Employees must also be given the right to representation in appeal hearings.

- **Effective detriment provisions.** Following the experience from the introduction of the Agency Workers' Regulations, we must ensure that effective provisions are put in place to ensure that individuals do not suffer a detriment merely as a result of the right to request coming into effect. If an employer rotates shift patterns between workers at a timeframe in line with reference periods for the right to request, without a drop in the number of hours worked, the employer should compensate the employee a sum significantly higher than the financial loss experienced. Furthermore, employees must be protected from any detriment as a result of submitting a request. This should be partially resolved by allowing a trade union to take a collective claim as outlined above. Furthermore, legal provisions must be put in place to ensure that no workers are placed in a worse position following a request being submitted.

- **An enhanced right for agency workers to request a direct and permanent contract with the hirer.** If the work is ongoing, the hirer will have to demonstrate why they have not given the agency worker a permanent role.

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

No.

Usdaw does not see any reason why a particular group should be excluded from the right to a stable contract.

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

Possibly yes.

Usdaw believes that a right to a stable contract, underpinned by a right to a collective discussion over the provision of a stable contract, as we have outlined would resolve the issues raised in the review. However, a right to request which mirrors the current right to request flexible working is unlikely to have any significant impact on the issues raised in the review. Usdaw, and our members, have significant experience of the negative effects that zero and short hours contracts can have on working people. We would be happy to arrange a meeting for the review team to discuss the issues raised in the review with a group of our members.

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

Yes.

As outlined above, Usdaw believes that an individual's working pattern should be taken into account and that 12 weeks would represent an effective reference period. However, we are concerned that, in light of the reaction of bad employers to the Agency Workers' Regulations, some employers may utilise significant resources attempting to manipulate any reference period. We are aware of instances where agency workers are moved to different assignments after 11 weeks in order to avoid equal treatment on pay. It is clear that disingenuous actions from bad employers should not deter the Government from taking action on this area. Also, where hours are worked on a regular basis within a location/department, these should be guaranteed within an individual's contract. For that reason, as already outlined, Usdaw urges the Government to broaden the scope of their current plans to enable a trade union access to information on the total hours worked and take this information into account when reviewing contractual hours. Members of an independent trade union should be given a right to collective trade union representation on these issues.

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

No.

Any qualifying period would have the effect of excluding zero-hours contract workers, agency workers and those on temporary contracts from the right to request a more stable contract.

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

One month. In most cases the request will be to confirm the current working arrangements for the individual. As there will rarely be a change to current working practices, there should not be any need for a significant period of reflection for the employer.

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?

No.

Usdaw sees no reason why a right to request should be limited.

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

Yes.

If yes, do you think they should have any dispensations applied, eg longer to respond? We do not believe there should be any dispensations. The impact of unstable and zero/short hours contracts have the same impact on the individual irrespective of the size of the employer.

Section E: Information and Consultation of Employees Regulations (2004) (ICE)

It is welcome that the Taylor Review and the subsequent government consultation is considering ways of providing working people with an independent voice in the workplace. Evidence demonstrates that union presence in workplaces, delivers significant benefits for both workers and employers, from much improved uptake of learning and skills to improved health and safety outcomes, and more equal workplaces.

For example:

- Union workplaces are safer, with union safety reps reducing serious workplace injuries by 50 per cent
- Union safety reps save taxpayers between £181m and £578m (2004 prices) every year by reducing the time lost due to occupational injuries and work-related illnesses by between 286,000 and 616,000 days.
- Union workplaces are more likely to offer better flexible working practices, including job shares, term-time working and annualised hours. 52% of unionised workplaces provide enhanced maternity pay compared with 35% of non-unionised workplaces. 77% of unionised workplaces offered retraining for women returning to work after maternity leave, compared with 58% of non-unionised workplaces.
- Unions negotiate high-quality training and skills, helping the workforce gain transferable skills and employers to meet their future skills needs. Every £1 of Government investment into the Union Learning Fund generates a total economic return of £12.30.
- More than three in four (77%) employers say that engagement with union learning has a positive effect on their workplaces and just over three quarters (77 per cent) of employers believe their organisation receives a return on their investment in union learning activity.
- More than two thirds (68%) of learners with no previous qualifications gained a qualification as a result of union learning.

- Two-thirds of union learners (65%) became better able to organise, mentor and support other people.
- 68% of employers recognise that unions are effective at inspiring reluctant learners to engage in training and development.
- Union workplace reps help to resolve disputes in the workplace, thereby reducing the risk of employment tribunal claims and all the associated legal costs and reducing staff turnover and recruitment costs.
- Where organisations face difficult economic conditions, unions work with employers to develop fair processes for managing redundancies and restructuring. Analysis of the 2011 WERS found that a large majority of lead union representatives reported working closely with management where changes were being introduced in the workplace. This included 66% of union representatives in the public sector.
- Unions improve business performance. A report commissioned in 2007 by the then Department of Business, Enterprise and Regulatory Reform found that the work of union reps resulted in overall productivity gains worth between £4bn to £12bn to the UK economy.
- Union reps also play an important role in improving workforce engagement and morale, by helping to ensure employees' concerns regarding their working conditions are listened to and addressed. This in turn can improve workplace productivity, the quality of services provided, and ultimately the financial performance of organisations.
- Research undertaken by Acas found that union representatives play an important role in improving workforce engagement and morale, by helping to ensure employees' concerns regarding their working conditions are listened to and addressed. This in turn can improve workplace productivity, the quality of services provided, and ultimately the financial performance of organisations.
- Union workplace reps also work with employers to secure improvements in public service delivery. For example, the Fire Brigades Union trains highly qualified Serious Accident Investigators (SAIs) who work with fire authorities to investigate where firefighters are killed on duty and to identify and implement service improvements which can prevent future fatalities.

In the light of this evidence, it is welcome that the Government is considering ways of giving workers a genuine voice in the workplace. But, in our opinion, the Taylor review proposals on information and consultation do not go far enough.

The Government needs to act to ensure all workers have the right to a voice at work and to be represented by an independent trade union. The Government introduce a new framework of rights which:

- Ensure unions have a right to access workplaces so they can tell workers about the benefits of union membership
- Strengthen the right to be accompanied to ensure individual workers have the right to be represented by a union rep, including when seeking an improvement in pay and conditions.
- Adopt measures which promote and extend collective bargaining, including in low paid, low productivity sectors.

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

Yes.

Usdaw is recognised for collective bargaining in over 170 bargaining units in addition to a small number of agreements which contain consultation facilities but not yet full collective bargaining provisions. In nearly all cases, the provisions were requested by the employees through their trade union representatives and then subsequently agreed on a voluntary basis by the employer. Usdaw only has one collective bargaining agreement which was reached as a result of a decision from the Central Arbitration Committee using the statutory trade union recognition legislation. However, we do have a number of agreements which have been reached following the Union invoking the initial stages of the procedure in order to arrange discussions with the relevant employer.

All of Usdaw's agreements grant the Union recognition to be consulted on issues of importance to Usdaw members for example, pensions provisions, health and safety issues and terms and conditions. Where we also have collective bargaining agreements, Usdaw will have the right to negotiate over pay, hours and holidays as a minimum.

If yes, were these provisions:

- **Requested by employees?** As noted above, Usdaw's recognition agreements were, in the main, requested by employees through their trade union.

Question 41 – How might the ICE Regulations be improved?

The ICE provisions are currently cumbersome to enact and frequently do not enable the workforce to have an effective voice in the workplace. Usdaw is pleased to see that the Government is seriously looking at how they could be improved. As noted below, Usdaw believes that there is a strong need to reduce the 10% threshold within the Regulations.

Usdaw also believes that the lack of automatic trade union representation also brings about significant weaknesses in the legislation. Often, it is far too much to expect of employees to band together and contact their employer seeking that information and consultation structures are put in place. The employees concerned are likely to fear detrimental treatment for adding their name to the request and in practice many individuals are likely to be looking at merely getting on with the job rather than seeking information and consultation. If an independent trade union was able to gather support for the introduction of information and consultation structures, and then had a statutory right to negotiate how those structures would be put in place, it is far more likely that adequate information and consultation would take place.

Furthermore, where Usdaw has seen ICE processes put in place by a business, which we believe has been done in a number of businesses purely to make it more difficult for an independent trade union to gain recognition, the eventual structures have not held up to scrutiny. There are a number of large retailers that have local and national information and consultation processes which are far more shaped to brief employees on information being given out by the company rather than looking to hear the views and concerns of the workforce. As a result, these structures do little to facilitate employee/worker voice.

If employees are to be given a voice in the workforce, it seems obscure that the employer then gets to effectively choose the structure and format that of how the voice will be portrayed. For an employee voice to be truly effective, the employees through their representatives, should have the opportunity to shape it. Usdaw believes that, in companies without a recognised union, an independent trade union should have an automatic right to negotiate ICE structures when the union has recruited 2% of the relevant workforce into membership. In order to avoid employers setting up obstructive, weak processes, this should be allowed even where a business has set up a procedure that does not already involve an independent trade union.

Question 42 – Should the ICE Regulations be extended to include workers in addition to employees?

Yes.

As raised by the TUC during their response to the Taylor Review, Usdaw believes that the worker status should be abolished and a single employee status should be default for all individuals. This would resolve the current detrimental impact felt by workers and ensure that rights, such as the right to information and consultation are applied to all individuals.
If the Government is not willing to apply this recommendation, Usdaw believes that ICE Regulations should be extended to include workers in addition to employees. Workers are frequently the first to be affected by any downsizing within a business operation yet, there is little, if any requirement to discuss the impact of such changes with a worker population.

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

Yes.

The current threshold for triggering the ICE Regulations is far too high and proves impossible to achieve in large scale, multi-site, businesses. Usdaw has been running long-term recruitment campaigns across three large national retailers yet, as a result of the scale of the businesses and the rate of staff turnover, despite significant investment, we have not yet been able to reach the 10% threshold in terms of our membership numbers. This leads to the regulations having no real effect in large businesses.

Usdaw supports the call for the threshold to be reduced from 10% to 2% of the workforce. . At the same time, we believe that the threshold for statutory trade union recognition should be lowered to the same rate.

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

No.

The figure is arbitrary and has no relevance. The vast majority of businesses in the UK employ less than 250 people and would be disproportionately affected by a minimum figure of 15 people. Usdaw believes that if five employees seek ICE provisions, or five union members seek ICE provisions, then the company should be required to enter negotiations.

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

Usdaw believes that one of the main causes of ICE failing to drive forward good employee engagement has been the lack of incentive on any party to work to enact the provisions. Those businesses who understood the benefits of engagement prior to ICE provisions coming into effect had already recognised a trade union. There were some bad employers who have created poor consultation provision in light of ICE provisions but many are not aware of the benefits of employee/worker engagement.

Usdaw operates in an industry that is currently undergoing significant structural changes. As a result of increased automation, a move from spending on the high street to spending online and a continued squeeze on living standards, many retail employers are struggling to survive. However, where Usdaw or other trade unions are recognised, there is a clear pattern of employers who are managing to address the current structural issues in the economy and deliver strong financial performance. Whilst there have been poor results from companies such as House of Fraser, Mothercare, Toys r Us and Maplin, unionised employers such as Tesco, Primark, Morrisons and Asda have continued to grow. It is clear that those businesses with union representation, and the requirement to discuss business strategy with an independent trade union, have proved adaptable enough to cope with the current headwinds facing the industry. The business case for trade union representation is clear.

David Metcalf, Director of Labour Market Enforcement, highlighted in his strategy 2018/19 document the impact that the decline in trade unions over the last 30 years has had in terms of enforcement and complexity of the labour market.

The Government should build on the effective role that trade unions play in worker engagement. Primarily, this can be done by opening up workplaces to union recruitment. Unions should be given access to workplaces so that they can advise individuals of the benefits of trade union membership as outlined above. Furthermore, Government should extend the right to accompaniment so that individual workers can be represented by a trade union representative in all meetings, including when seeking an improvement to pay and conditions for workers who are not covered by a collective bargaining agreement for terms and conditions.

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?

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

Usdaw is the recognised trade union for many successful businesses, including a number of major retailers. In recent years, the Retail Sector has undergone substantial changes, including the rise of internet shopping, the emergence of new market entrants and significant changes to shopping habits. Usdaw's presence within these companies has provided employers with both local and national forums whereby issues can be raised and potential problems with any proposals can be addressed prior to implementation.

Usdaw believes that there would be a significant benefit for employers if these conversations also took place at board level through the statutory provision of worker board members. Within large, as well as some medium sized employers, there can often be a significant disconnect between the views expressed by the board and the perception of the company's aims and objectives at shop floor level. This can be seen through how statements such as, 'our people are our greatest asset' or 'our performance reflects the hard work, expertise, and commitment of our people' are almost always contained within a company's annual report yet rarely, if ever, transposed to the workforce.

Usdaw fully supports the idea of a statutory provision to allow a worker director on company boards. Usdaw has witnessed, through many sets of negotiations, the positive impact that effective workplace representation can have on business decisions. For this reason, Usdaw fully supports the recommendations made within the TUC's, 'All Aboard' publication looking at making worker representation on company boards a reality.

However, worker membership at board level is only a small step towards ensuring that the views of employees are adequately represented throughout an organisation's decision making structure. To be effective, the message from the board needs to be clearly and appropriately conveyed throughout the organisation. It is only through providing an independent and clear process for engaging with an employee voice that businesses will fully feel the benefit of utilising the knowledge of their workforce. This independent and clear employee voice is best represented through an independent trade union utilising appropriate recognition, negotiation and consultation procedures with an independent trade union. Therefore, as mentioned above, we support a significant lowering of the thresholds for statutory trade union recognition.

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