Jobs transform lives

Consultation on measures to increase transparency in the UK labour market

Response from the Recruitment & Employment Confederation

Recruitment & Employment Confederation

1. Introduction

1.1. As the professional body for recruitment, we know that jobs transform lives and we fully support Matthew Taylor and the government's ambition that all work in the UK economy should be fair and decent with realistic scope for development.

1.2. The Recruitment & Employment Confederation (REC) have engaged in the Taylor Review process since it was first announced, attending the regional roadshow events, giving oral evidence, making a written submission, engaging with the government following the publication of the report, and attending the Ministerial roundtable immediately following the government's response. We were broadly supportive of both the Taylor Review itself as well as the government's response.[1]

1.3. We particularly welcome this consultation and the approach taken by the government to consult on these proposals before making any significant policy changes that would impact on our sector. We have engaged hundreds of members in the consultation process, through our Employment Policy Commission, sector and regional events, and two dedicated webinars.

1.4. We are encouraged by the government's acknowledgement of the value of both the flexible labour market and the recruitment industry in particular in their response to the review. According to our Recruitment Industry Trends 2016/17 report the recruitment industry is now worth £32.2 billion, placing 1.1 million agency workers on assignment on any given day, and last year placed over 1 million people into a permanent job. The industry also directly employs over 100,000 dedicated recruitment professionals.

1.5. We agree with the government's intention to increase the level of transparency and clarity between workers and employers in the UK labour market. We strongly welcomed the government's decision to extend the right to an itemised payslip to all workers.

1.6. Through the *Employment Agencies Act 1973* and the *Conduct of Employment Agencies and Employment Businesses Regulations 2003* ('the Conduct Regulations') the recruitment industry already has a certain number of provisions to provide transparency to workers and we welcome a levelling of the playing field across other forms of flexible work.

[1] https://www.rec.uk.com/news-and-policy/press-releases/rec-welcomes-the-governments-response-to-taylor-review

1.7. It is important the government, when considering these recommendations, consider the unique position of the recruitment industry and the higher level of regulation it has in comparison to the wider flexible labour market.

1.8. We also urge the government to consider carefully the unintended consequences of these recommendations on the flexible labour market.

2. Written Statements

2.1. *The Review of Modern Working Practices* recommended:

'The government should build on and improve clarity, certainty and understanding of all working people by extending the right to a written statement to 'dependent contractors' as well as employees.'

2.2. **We accepted this recommendation in the Government Response to the review. The REC completely agrees with the view that all workers despite their employment status or length of service should have clarity and transparency on their statutory rights and entitlements. However, the right to a written statement of particulars, should not extend to those work seekers who work through an employment business, as these work seekers are already entitled to written terms and conditions before starting an assignment.**

2.3. The questions have been phrased for employers, employees and workers, and does not consider employment businesses who are an integral part of the UK labour market.

2.4. The REC's response to this question is on behalf of the employment businesses who fall under a separate category and are defined in the *Employment Agencies Act 1973* and the *Conduct of Employment Agencies and Employment Businesses Regulations 2003* ('the Conduct Regulations') as:

'the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) or supplying persons in employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity'

2.5. An employment business engages work-seekers under either a contract for services or a contract of service and supplies those work-seekers to clients for temporary assignments where they will be under the client's supervision, direction or control.

2.6. As the consultation questions are primarily based on a traditional employer and employee relationship, the most relevant question is question 9 and again our response is from an employment business's perspective.

2.7. **REC's position and existing legislation**

2.7.1. The Conduct Regulations together with the *Employment Agencies Act 1973* are the main statutory rules governing the conduct of employment agencies and employment businesses operating in England, Scotland and Wales. For those who operate in Northern Ireland similar legislation, the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 and the Conduct of Employment Agencies and Employment Businesses Regulations 2005 apply. A breach of the Conduct Regulations amounts to a breach of the Act which is a criminal offence. Sanctions include prosecution which range from fines of up to £5000 or unlimited fines if action is taken in the Crown Court. There are also banning orders which prevent individuals or corporate entities from running an employment agency or employment business for up to ten years.

2.7.2. Protecting work seekers is a fundamental part of the legislation. Providing work seekers with specific information before the commencement of an assignment is set out in Regulations 14, 15, 18 and 21 of the Conduct Regulations (see Schedule 2 and 3 of this consultation response).

2.7.3 Terms and conditions to be supplied to work seekers before proving work-finding services

2.7.4 Regulations 14 and 15 of the Conduct Regulations state that *before an employment business provides work-finding services to a work-seeker*, it has to obtain agreement to the terms and conditions that will apply to the work-seeker which include:

i. a statement that the employment business will operate as an employment business;
ii. the type of work that the employment business will find for the work-seeker;
iii. whether the work-seeker will work under a contract of service, apprenticeship, or a contract for services, and in either case, the terms and conditions which apply/will apply;

iv. an undertaking that the employment business will pay the work-seeker in respect of work done, whether or not it is paid by the client in respect of that work;
v. the length of notice of termination the work-seeker is entitled to give and entitled to receive – if none, a statement to this effect;
vi. either the rate of remuneration; or minimum rate of remuneration the employment business reasonably expects to achieve for the work-seeker;
vii. details of the intervals at which remuneration will be paid; and
viii. details of any entitlement to annual leave and payment in respect of annual leave.

2.8 The above information must be recorded in a single document or where more than one document has been issued, copies of all documents should be given at the same time to the work-seeker before the commencement of the assignment. Regulation 14 also contains provisions that restrict amendments to the information provided without prior notification and consent from the work seeker.

2.9 **Information to be supplied to a work seeker at the point an assignment is offered**

2.10 Furthermore, under Regulation 18 and 21 an employment business cannot supply a work-seeker to a client unless they have obtained sufficient information from the client to select a suitable work-seeker for the position and it requires employment businesses to send out in paper or electronic format the information below to the work seeker a*t the point the assignment is offered:*

i. the identity of the client, and, if applicable, the nature of the client's business;
ii. the date work is to commence and the duration/likely duration of the assignment;
iii. the position the client is looking to fill, including the type of work, location, hours, health and safety risks known to the client and what steps the client has taken to prevent or control such risks;
iv. the experience, training, qualifications and any authorisation which the client considers are necessary, or which are required by law, or any professional body, for a work-seeker to possess in order to work in the position;
v. any expenses payable to the work-seeker.

2.11 Therefore, as the above makes clear, under the Conduct Regulations, **there is already a statutory requirement for an employment business that is supplying**

work seekers to clients to provide specific information to the work seeker before the commencement of an assignment.

2.12 Imposing an additional statutory obligation to provide another document which duplicates some of the information in the Conduct Regulations will be bureaucratic and unnecessarily burdensome for employment businesses. It could also create confusion for worker seekers if they have to receive separate documents which will contain similar information.

2.13 In light of the government's plan for a key facts page which is discussed in the Agency Worker consultation, it is unclear as to whether both the written statement and key facts page will be required. If so, this will be adding more red tape to the process of supplying work seekers and delay the commencement of assignments which can deter clients from using the services of agency workers.

2.14 **Government needs to consider who will be responsible for completing the written statement in recruitment supply chains**

2.15 If government do decide that agency workers will receive a written statement they need to consider which entity will be responsible for completing the written statement given that in the recruitment sector, we have moved away from a traditional model where there is a tripartite arrangement and the existing legislation does not reflect modern working practices.

2.16 Supply chains have developed and now sometimes include multiple intermediaries e.g. umbrella companies, online platforms and master/neutral vendor arrangements.

2.17 We now find that the work-seekers could either be an individual or a company with either one or several employees. What is typically regarded as the employment business could have a contractual relationship with just the client but no contractual relationship with the individual who is undertaking the work. **There needs to be a clear idea as to who will be responsible for ensuring that work seekers are provided with information about the terms on which they are engaged.**

2.18 **The Conduct Regulations should instead be enhanced**

2.19 Perhaps a way forward will be to retain the information required under Regulations 14, 15, 18 and 21 of the Conduct Regulations and include some of the salient provisions in the written statement proposal such as the entitlement to sick leave/pay and pensions automatic enrolment together with some of the recommendations for the key facts document such as deductions, fees, costs and who is responsible for paying the worker. The information should be provided before the assignment commences.

2.20 As a result of the complicated supply chains that now exist, government must consider the entities that are best placed to provide the information which ideally should be the entity that has a contract with and is responsible for paying the work seeker which may be the employment business or another intermediary in the supply chain.

2.21 We have included our response to the 'Key Facts' consultation questions in the Agency Workers consultation in Schedule 1, as we believe these two questions, while in different consultations, are entirely dependent on each other.

2.22 **Key issues for government to consider**

2.23 In order to ensure that there is clarity and transparency for the work seeker, the REC believes government needs to consider:

- What is already in existing legislation and how that is enforced?
- Whether government will be introducing both the written statement and a key facts document for workers engaged by an employment business, bearing in mind that there are existing statutory requirements in the *Conduct Regulations 2003* and unnecessary duplication must be avoided.
- Who will be responsible for issuing the written statement if implemented? And taking into account the complexity of modern supply chains and whether intermediaries may be covered by any new legislation particularly where they are responsible for employing and paying work seekers. This is discussed in detail in our response to the Agency Worker Consultation.
- **Instead of creating a new statutory requirement, retain the existing information requirements in the Conduct Regulations and include more details of pay in relation to deductions, fees, costs, statutory sick pay, pensions automatic enrolment contributions and the complaints procedure.**

3 Holiday pay

3.1 *The Review of Modern Working Practices* recommended:

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

3.2 We agree with government's proposal to do more to promote awareness of holiday pay entitlements, however we do not think the government should change the length of the holiday pay reference period. Government should also consider other options that will give atypical workers more choice in how they receive holiday pay.

3.3 **Legislation and case law on holiday pay calculations**

3.3.1 Holiday pay calculations and pay reference periods have been discussed in a number of cases in UK tribunals and the European Court of Justice in the past few years.

3.3.2 The main point of contention is how much a worker should receive when they take annual leave particularly when their pay fluctuates during the respective annual leave year.

3.3.3 The overriding objective is to ensure that workers are paid what they ordinarily would receive if they had been working. The decisions in leading holiday pay cases clearly demonstrate that **the court's key objective is to protect workers and ensure that they are not deterred from taking annual leave as required under that the *Working Time Regulations 1998*** which is essentially health and safety legislation.

3.3.4 As stated in the consultation, the method for calculating a week's pay is set out in sections 221-224 of the Employment Rights Act 1996 for the purposes of holiday pay. These sections state that a normal weeks' pay will be either:

- what a worker would earn in a normal working week if s/he works regular hours each week (overtime will normally be included unless the contract provides for a fixed or minimum number of overtime hours);
- if a worker's normal working hours vary from week to week, the average hourly rate of pay multiplied by the average of their normal working hours over the previous 12 weeks;

- if a worker has no normal working hours it will be the average total pay received over the previous 12 weeks.

3.3.5 For temporary workers that do not have fixed hours in their contract, the 12 week pay reference period takes an average over the previous 12 weeks. Although, when rates may have fluctuated, it is likely that different averages will arise at different times depending on the pattern of work in each 12 week period.

3.3.6 When overtime and commission payments form part of the worker's remuneration or the worker has worked longer hours, the 12-week average may not be representative of the worker's normal pay, depending on when holiday is taken. It could lead to artificially high levels of holiday pay after peak periods or even unfair lower rates during quiet periods.

3.3.7 The case of Bear Scotland Ltd v Fulton and others; Hertel v Wood and others; and Amec Group v Law and others [2014] UKEAT 0047/13/0411[2], considered the entitlement of workers to have overtime payments included in the calculation of their holiday pay and how far back workers can go to claim for any shortfall in holiday pay. In this case the employees' weekly working hours varied and they were entitled to be paid overtime for each hour they worked above a certain threshold and were obliged to work overtime if reasonably requested to do so. Due to the nature of the work they were entitled to a higher rate for night shift work, standby payments and emergency call out payments. It was clear that the employees did significant amounts of overtime and regularly worked night shifts. However their holiday pay was calculated according to their basic pay for hours worked on day shifts which was at a lower rate.The EAT in its decision ruled in favour of the workers and concluded that the overtime must be included in the holiday pay calculations and the Working Time Regulations 1998 can be interpreted to give effect to this outcome.

3.3.8 The other leading holiday pay case of ZJR Lock v British Gas[3] which focuses on commission payments, considered the 12 week pay reference period at length and concluded that the pay reference period must reflect the normal working pattern of the employee. Therefore where a worker, whose pay consists of an element of fixed basic pay and variable commission, the commission element must be included in the calculation of the holiday pay.

[2] http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2014/0047_13_0411.html&query=(Bear)+AND+(Scotland)+AND+(Ltd)+AND+(v)+AND+(Fulton)+AND+(others

[3] http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/983.html&query=(British)+AND+(Gas)+AND+(v)+AND+(Lock)

In this case, the Advocate General clearly stated that because the commission payments were intrinsically linked to the work specifically carried out by the worker, it should be taken into account when calculating his holiday pay in addition to his basic pay. The Advocate General went further to suggest that the method of calculating the holiday pay could include the average commission received over a 12 month period rather than 12 weeks.

3.4 REC's position in relation to temporary workers

3.4.1 The REC fully supports any proposal that protect workers and ensures that they are not deterred from taking annual leave particularly if their pay fluctuates because of their working patterns.

3.4.2 However, it is important to consider the distinction between employees working patterns and temporary workers' working patterns. The longer pay reference period of 52 weeks will be more akin to employees rather than temporary workers because temporary assignments typically do not last 12 months.

3.4.3 A 12 week pay reference period will be more of a representative period to work out the average holiday pay for temporary workers.

3.4.4 The initial feedback from our members is that the 12 week pay reference period does not deter workers from taking annual leave given that the nature of temporary assignments gives workers the flexibility to choose when they want to work and when they choose to take annual leave. Workers who are engaged under a contract for services will normally have no obligation to work and can decide when they are or not available to provide their services to a client.

3.5 Key issues for the government to consider:

- The difference between employees and temporary workers' working patterns and whether a 52 week pay reference will adequately reflect both employees and temporary workers working patterns.
- The cost implications for adjusting payroll systems to reflect a 52 week pay reference period.
- The timing for implementation bearing in mind that the annual leave year differ across employers and changing it part way through the holiday pay year would

create significant challenges and possible errors in processing holiday pay.

- What the default pay reference period will be if the individual has not worked for 52 weeks.

- Providing guidance for employment businesses and agency workers on holiday pay.

3.6 Recommendation for government - the Working Time Regulations 1998 should be amended to reflect atypical working and make holiday pay entitlements clearer for agency workers

3.6.1 The statutory holiday entitlement works best with traditional employment where individuals work standard hours under a contract of employment. The provisions do not lend themselves to other types of working.

3.6.2 Most agency workers are engaged under a contract for services and do not have employee status. As workers they are nevertheless entitled to statutory holiday.

3.6.3 Agency workers can take annual leave and be paid for this time off, but due to the temporary nature of the work, it is more common for agency workers not to take annual leave. This situation could be improved by better information being provided for agency workers but there are practical issues that arise, for example if a person is taken on to do an assignment of one week or two weeks – when should they take annual leave during that short assignment? If the leave is not taken, it should be paid on termination of 'employment'.

However, what determines a 'termination' of employment for an agency worker who is not engaged on a contract of employment? There is no requirement for the agency worker to 'resign' when engaged under a contract for services, and there is no requirement for the agency to terminate the contract. Commonly an agency worker will be seeking further assignments as one comes to an end and so will 'remain on the books' of the agency so they can be given work as and when it arises. In that regard the relationship is treated as ongoing. This is generally the expectation of both parties.

3.6.4 The agency is only required to pay the agency worker for holiday that they have accrued and not been taken once the relationship ends. The agency worker may not be aware that they are entitled to this pay only when the 'employment' with the agency ends, and/or what they can do to ensure that this is made clear to the agency.

3.6.5 In the short term, more information for agency workers could help to address this. For example, we would suggest adding guidance to the Gov.uk website explaining that agency workers should let their agency know when they intend the 'employment' to end so that holiday pay can be paid. We would be willing to work with the government on any guidance to agencies on holiday pay.

3.6.6 In the longer term, we recommend, that once we have left the European Union, the Working Time Regulations should be amended through secondary legislation to clarify when agency workers are entitled to receive holiday pay.

4 Right to Request

4.1. *The Review of Modern Working Practices* recommended:

'The government should introduce a right to request a direct contract of employment for agency workers who have been placed with the same hirer for 12 months, and an obligation on the hirer to consider the request in a reasonable manner.'

'The government should act to create a right to request a contract that guarantees hours for those on zero hours contracts who have been in post for 12 months which better reflects the hours worked.'

4.2. **While we agree in principle with the right for an agency worker to request a permanent contract, the consultation does not go far enough to explain what the process will entail to request a more stable contract or how it will be enforced. Therefore having a firm position on this issue is difficult at this stage.**

4.3. There has to be more detailed information provided in terms of the statutory obligation for employers when dealing with the requests for a direct contract of employment for agency workers that have been placed with the same hirer for 12 months or a contract that guarantees hours for those on zero hours contracts who have been in post for 12 months.

4.4. Government needs to be clear on the approach they will take for implementing and enforcing the right to request. For instance the *Fixed Term Employees Regulations 2002* (FTE 2002) contains a mechanism, for converting fixed-term contracts into permanent contracts in certain circumstances. Under the FTE 2002, there is a provision, where an employee has been continuously employed on a series of successive fixed-term contracts for four years or more, he or she will automatically

achieve permanent status, unless there is an objective reason that justifies a further renewal for a fixed term. If an employee believes that he/she should be a permanent employee under the FTE 2002, they can then request in writing a written statement from their employer confirming the permanent employee status and the employer must respond within 21 days. The employer's written statement is admissible in any court or tribunal proceedings. **The lack of detail in the consultation does not confirm whether the Right to Request will be applied in a similar manner.**

4.5. Conversely, the *Employment Rights Act 1996* and the *Flexible Working Regulations 2014*, gives an employee an opportunity to request flexible working, although it does not give an absolute right to work flexibly. There are a series of specific business grounds on which an employer can turn down an application. The reasons include the following:

i. Burden of additional costs;
ii. Detrimental effect on ability to meet customer demand;
iii. Inability to re-organise work among existing staff;
iv. Inability to recruit additional staff;
v. Detrimental impact on performance;
vi. Detrimental impact on quality;
vii. Insufficiency of work during proposed hours;
viii. Planned structural changes

Nevertheless there is a requirement on an employer that receives a flexible working application to 'deal with it in a reasonable manner', if not the employer runs the risk of an employment tribunal claim.

4.6. Another example is the *Agency Worker Regulations 2010*, under Regulation 13, from the first day of the assignment, all agency workers should be provided with information about any relevant job vacancies within the hirer's establishment. This right is simply to be informed and does not constitute an automatic entitlement to the role. The obligation does not prevent the hirer from setting their eligibility criteria neither does it dictate their decision making process for job applications.

4.7. The above examples demonstrate that the obligations of the employer and the statutory entitlements of the worker differ. Government's approach to the Right to Request needs further detail and clarity and they must clearly define what "consider the request in a reasonable manner" will mean in practice along with the rights of redress the worker has against the employer.

4.8. In our initial engagement with members, our data which was quoted by the Taylor Review showed that only 4.3% of agency workers are on an assignment that lasts

more than 12 months, so this recommendation would only impact a minority of workers. However, there are some sectors and regions that have a higher proportion of workers on longer term contracts. Feedback we have received from some members is that it could add an extra bureaucratic burden on businesses and could lead to some clients structuring assignments to finish after 11 months unless there are express anti avoidance provisions in the legislation to prevent structuring assignments to prevent workers from reaching the 12 months qualifying period.

4.9. The government should carefully consider how the right to request a more stable contract will be enforced and how the legislation will construe the requirement to consider 'the request in a reasonable manner'.

5. Conclusion

5.1. We welcome the government's aim to increase transparency of information provided to employees and workers. We particularly welcomed the government's decision to extend payslips to all workers and this is something the REC has called for.

5.2. It is important that this consultation is undertaken holistically with the other consultations being undertaken following the Taylor Review as several of the policy areas looked at in this consultation are inherently interlinked with other policy recommendations elsewhere. An example of this are questions surrounding the transparency of information provided to the agency worker, in the agency workers consultation. The transparency consultation does not reference these questions, but these cannot be considered separately to the written statement proposal. There is a danger that there could be duplication, creating confusion for work seekers and businesses if these are not considered at the same time.

5.3. We believe that, because the Conduct Regulations already stipulate the information that must be provided to the agencyworker before starting an assignment, the information could be enhanced to include more details of pay in relation to deductions, fees, costs, statutory sick pay, pensions automatic enrolment contributions and the complaints procedure.

5.4. On holiday pay, it is important to emphasise the intention of the Working Time Regulations is to encourage workers to take time off, and anything which undermines this should not be considered by the government. The regulations could certainly be made clearer on how holiday pay works for atypical workers, particularly agency workers. This could be through guidance for work seekers in the short term, and a clarification in the Working Time Regulations in the longer term.

5.5. The 12 week reference period works for our sector, as the average agency assignment length is only 17 weeks, but if the government were minded to change this, we would urge them to consider the cost implications for businesses for adjusting payroll systems to reflect a 52 week pay reference period, the timing for implementation and what the default pay reference period will be if the individual has not worked for 52 weeks.

5.6. While we agree in principle with the right for an agency worker to request a permanent contract, the government should consider carefully the unintended consequences of such a right and provide more details of what such a right would look like in legislation. We would welcome a further consultation on this, once the government have considered this proposal further.

Schedule 1: REC's response to consultation on agency workers recommendations

Improving transparency of information provided to work seekers

To what extent would you agree that a 'key facts' page would support work seekers in making decisions about work?

We fully support the principle that individuals who are agency workers (meaning individuals who are engaged by one party but supplied to provide their services to another) should have absolute clarity as to who they are engaged by and what they will be paid and any deductions that will/may be made from their pay. However it is important that the obligations for both employment agencies and employment businesses are considered and that where there are other intermediaries in the supply chain, it is clear which party is required to provide information to individual work-seekers.

What information would be important to include in a 'key facts' page?

The information should make it clear what service will be provided to them together with the information above.

What conditions should be in place to ensure the 'key facts' page is provided and understood by the work seeker before any contractual engagement?

While we fully support the provision of clearer information being providing to individual agency workers, we also acknowledge that some of the information may be difficult to obtain at registration stage and it may potentially only be possible to provide certain details to the agency worker at the time that a specific assignment is offered.

Should an employment business be required to ensure that the work seeker understands fully the information being given to them?

There is little justification for requiring agencies to go further than other employers to provide information about terms and conditions under which they will be engaged.

Do you feel an hour is an accurate estimate of the time it would take to produce information document for a work seeker?

In most instances, employment businesses and employment agencies already capture and provide much of this information under the current legislation. However the current obligations should not be duplicated with the requirement to provide a key facts document.

We have set out below more in more detail our responses to above consultation questions.

Where the arrangements under which workers are supplied to provide work to clients of recruitment businesses has changed since enactment of the current legislative framework that governs the recruitment sector. The use of additional intermediaries in the supply arrangements and also the emergence of online recruitment platforms and the 'gig economy' as new forms of providing contingent labour, it is necessary to update the legislative framework and the enforcement strategy that supports it. This will help to ensure that it remains effective and current in protecting those using the services of recruitment businesses, while also ensuring a level playing field. As technology develops, there is scope for other supply arrangements to emerge rapidly and it is important that changes made at this stage are forward looking.

We agree that the individual needs to understand key information such as:

- What service is being/will be provided by the recruitment business
- Who will be the individual's engager/employer and from that point – who will be responsible for paying the individual and meeting their employment rights
- The pay and some basic terms that will be offered and any payments.

The current recruitment legislative framework that applies to the recruitment industry legislation currently applies to employment agencies and to employment businesses – these are specifically defined in the Employment Agencies Act 1973. As recruitment processes and supply arrangements for temporary workers change, the distinction between the two can sometimes be blurred. For the purpose of this consultation response, we refer to them generically as recruitment business, however to summarise the legal definitions, an employment businesses supplies persons that it employs to work under the control of another person (this could be an individual or a body corporate). An employment agency provides a service of finding employment for persons – effectively introducing persons to others who will employ them directly.

In over 40 years, these definitions have barely changed but modern working practices have moved on significantly. Businesses that are now involved in the supply of agency workers may not look like the traditional employment businesses and employment agencies that existed when these definitions were created, but it is important that the enforcement regime is flexible enough to recognise new supply models and to utilise the existing definitions to ensure that work-seekers continue to be protected within the scope of the legislative framework.

Understanding the range of different supply arrangements and how this impacts in the status of the recruitment business

Some intermediaries provide a pure payroll function to the recruitment business, purely processing pay for the recruitment business but not employing or otherwise engaging the individuals whose pay is processed.

Other intermediaries offer to employ or otherwise engage the individuals who are ultimately supplied to provide services to the recruitment businesses clients. In this case, there is no contract between the recruitment business and the individual who will be doing the work.

In some instances, individuals already have a contractual relationship with an umbrella company, and when they approach a recruiter seeking work, their expectation is that the recruiter will enter into a contract with the umbrella company that they have already chosen to be engaged by.

Increasingly we are seeing online platforms which look like employment businesses but appear to have a model by which they do not engage individuals at all. They work in conjunction with umbrella companies who ultimately engage the individual or leave it to the client to employ the individual directly.

The specific arrangement will determine in what capacity the recruitment business is acting – i.e. as an employment agency (if it is not going to engage the individual) or as an employment business, if it is going to engage the individual.

Current obligation to provide information to work-seekers

While supporting proposals to ensure that individuals are provided with clear information, we would highlight the fact that there are existing provisions which already impose obligations on employment agencies and employment businesses to provide information to work-seekers about pay and terms of engagement. The exact requirement depends on the capacity in which the recruitment business is operating. It is not clear from the consultation document whether the 'key facts' document would replace the existing obligations and we would certainly argue that it would be an unnecessary burden for these obligations to be duplicated.

The information that must currently be provided depends on whether the recruitment business is acting as an employment agency or as an employment business. The former must comply with the requirements in schedule one and the latter must comply with the requirements in schedule two (attached). Our view is that it would make sense to update these provisions to ensure that the individual receives full information about pay and in particular, any proposed deductions that either the employment business or the party that they will be engaged by, intends to make. If necessary refer to them as key facts if this aids the understanding of the work-seeker of the service that is going to be provided to them.

The REC previously submitted a paper to the Department for Business, Energy and Industrial Strategy 'REC query to BIS regarding clarification on agency use of umbrella companies' in which we set out how we identified the issue of clarifying information provided to individual work-seekers who work through intermediaries could be resolved.

In our view, it is imperative that the enforcement regime recognises the circumstances in which a recruitment business acts as an employment agency to an individual work-seeker if it is not intending to engage the individual directly, but will instead introduce that individual to another party (umbrella company/other intermediary) that will employ them. If not, this could lead to unintended consequences as set out below.

Unintended consequences

A recruitment business cannot be regarded as acting as an employment business in respect of individuals it does not engage directly. The proposals for employment businesses to provide the key facts document should not, in our view, apply to recruitment businesses that do not engage individual work-seekers. If the recruitment business is acting as an employment agency, it will not be required to provide the key facts document to an individual work-seeker. In many instances an umbrella company/intermediary meets the definition of an employment business and this is the party that should be providing either the information in Schedules 1 and 2/or the key facts information.

A failure to recognise which part in the supply chain is actually acting as an employment business to the individual work-seeker could leave individual work seekers without the benefit of the key facts document – see our response blow to question 2 of the consultation. Also, individuals engaged through other supply arrangements involving businesses that have never regarded themselves as employment businesses (online platforms and providers in the gig economy), will not benefit from the key facts document.

Timing/when should the information be provided

Employment businesses and employment agencies will need to work to ensure that the intermediaries they engage with provide the information that is to be provided in the key facts document.

Information such as who will be engaging the individual should be provided at the point of registration so that there is clarity from the outset, as should minimum rates of pay. However, the detail around rates of pay are likely only to be available to the employment agency or employment business once a specific assignment has been identified and a rate agreed with a client. The provisions should allow for this details to be provided at the point that an assignment is offered to the individual.

Avoid creating additional confusion about employment status.

It is important to keep in mind the interaction of this consultation document, with the Employment Status consultation which was also opened in response to the Taylor Review. There is a clear drive to address the complexities around employment status, noting that currently 'particularly for those in atypical work, employment status can be a complex issue.'

The consultation document refers to individuals being 'employed for payroll purposes' by the intermediary/umbrella company. However, this is not a recognised employment status. The recruitment business should identify whether it or another party will be engaging the individual.

Summary

We agree that there is a need for clearer information to be provided to individual work-seekers where there are other intermediaries in the supply arrangements that clarifies the basis on which they will be engaged, payment they will receive, who will be engaging them, and any deductions that will be made from their pay.

This needs to be implemented in a way that ensures that there is a level playing field across different recruitment models. The enforcement process needs to recognise circumstances where recruiters are acting in the capacity of an employment agency (i.e. they are not engaging individual work-seekers but introduce them to another party to be engaged.

The existing requirements to provide information set out in Regulations 14,15, 18 and 21 could be updated to achieve this outcome and the key facts requirements should not be introduced as an addition to this requirement as this unnecessarily duplicate the processes that recruitment businesses already follow.

Schedule 2: Information that currently must be provided by an employment business to a work-seeker before the employment business provides any work-finding services. A summary of regulations 14 and 15 of the Conduct Regulations

Before first providing any work-finding services to a work-seeker, an employment business shall obtain the agreement of the work-seeker to the terms which apply or will apply as between the employment business and the work-seeker including:

- a statement that the employment business will operate as an employment business in relation to the work-seeker;
- the type of work the employment business will find or seek to find for the work-seeker; and
- the terms referred to below:
    - whether the work-seeker is or will be employed by the employment business under a contract of service or apprenticeship, or a contract for services, and in either case, the terms and conditions of employment of the work-seeker which apply, or will apply;
    - an undertaking that the employment business will pay the work-seeker in respect of work done by him, whether or not it is paid by the hirer in respect of that work;
    - the length of notice of termination which the work-seeker will be required to give the employment business, and which he will be entitled to receive from the employment business, in respect of particular assignments with hirers;
    - either--
        - the rate of remuneration payable to the work-seeker; or
        - the minimum rate of remuneration the employment business reasonably expects to achieve for the work-seeker;
- details of the intervals at which remuneration will be paid; and
- details of any entitlement to annual holidays and to payment in respect of such holidays.

This information must be set out in one document or if not possible more than one document, but these must all be given to the work-seeker at the same time. There is no requirement to give this information to work-seekers who are instead given a written statement of particulars (which alternatively sets out the basic terms of employment).

Schedule 3 – Information that currently must be provided by employment agencies and an employment businesses at the time that they put a work-seeker forward for a particular role. A summary of regulations 18 and 21 of the Conduct Regulations

An agency or employment business shall ensure that at the same time as it offers a work-seeker a position with a hirer it gives to the work-seeker the information below:

- the identity of the hirer and, if applicable, the nature of the hirer's business;
- the date on which the hirer requires a work-seeker to commence work and the duration, or likely duration, of the work;
- the position which the hirer seeks to fill, including the type of work a work-seeker in that position would be required to do, the location at which and the hours during which he would be required to work and any risks to health or safety known to the hirer and what steps the hirer has taken to prevent or control such risks;
- the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law, or by any professional body, for a work-seeker to possess in order to work in the position;
- any expenses payable by or to the work-seeker; and
- if the actual rate of pay has not previously been agreed, this must be provided at this stage.

The following only applies to employment agencies and not to employment businesses

- in the case of an agency--
  - the minimum rate of remuneration and any other benefits which the hirer would offer to a person in the position which it seeks to fill, and the intervals at which the person would be paid; and
  - where applicable, the length of notice which a work-seeker in such a position would be required to give, and entitled to receive, to terminate the employment with the hirer.