

MODERN WORKING PRACTICES: Consultation on Agency Workers Recommendations

Issued 9 May 2018

ICAEW welcomes the opportunity to respond to the *Consultation on Agency Workers Recommendations* published by BEIS on 7 February 2018, a copy of which is available from this [link](#) as part of the [government's response](#) to the Taylor 'Good Work' report.

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This response reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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General Points

1. ICAEW respects the findings of the Taylor Review and the Government's response to it, and therefore this response does not comment upon the policy aspects of this consultation, other than to consider issues that would add clarity and fairness to employment arrangements
2. ICAEW as a representative body supports small and large employers in the professional business services sector - both by way of policy work and directly through our members who operate or advise businesses
3. Our members work within a diverse range of organisations (from sole practitioners to multi-national corporations) and are employed and employ others through an equally diverse range of employer-worker relationships. Accordingly we have refrained from making any comments 'as an employer', and we have not commented on specific worker – employer relationships.
4. ICAEW members frequently advise businesses on 'process' and are very aware of the 'burden' that additional regulatory requirements may place on business, particularly smaller businesses. For this reason we have chosen to answer only those questions which refer to 'process' and 'burden' in *Section 1: Improving the Transparency of Information Provided To Work Seekers*.
5. We would however like to highlight a number of major points on the issue of agency workers that we feel should form the backdrop to any changes to the current system (although we agree that changes are required).

Major Points

1. We note that agency workers represent a significant and growing proportion of the UK work force. According to the most recent estimates between 800,000 and 1.2 million people are employed as agency workers. This suggests that agency work is attractive to both employers and employees. There is evidence, however, to support the view that the benefits to employers can outweigh the benefits for some employees who only accept agency work because there is no alternative. There is always an inherent imbalance of power between the employer and the employee and it is arguably more marked in the relationship between recruitment agencies, umbrella organisations and the agency worker but that does not mean there is no room for this sort of employment arrangement. We agree that this should be addressed rather than stopping employers and employees from benefiting from the flexibility of agency work. Any changes should be mindful of this.
2. We note that employment status is a complex area. There is a danger that trying to reflect quite complex contractual arrangements in a simple and 'standardised' way will lead to more challenge and confusion if the nature of the arrangements does not 'fit the boxes provided.' Hence any solutions must be clear, concise and understandable, but not simplistic.
3. Additionally, the outcomes must reflect the fact that 'work seeker – employer' relationships are not fixed and static, but vary and change with time. The imposition of standardised or mandatory 'paperwork' and processes must therefore allow for such changes, and in fact embrace them, to ensure that the contractual relationship and the documentation supporting it does not become obsolete within a short period of it being created. This would undermine the whole ethos of the changes. As noted in the government's response to the *Taylor Report* the flexibility of the UK labour market is

one of its key strengths and should not be undermined without any demonstrable benefit to the economy as a whole.

4. There is considerable variability in the types of arrangements between employers, agents and workers and this is only likely to increase over time as technology evolves. The guidance will play a valuable role, but this should most probably be framed in the context of a set of flexible guiding principles built on minimum standards
5. The consultation assumes that the requirement for a key facts page would be included in the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and so subject to the same penalties for non-compliance. We think this should be more than an assumption. It should be a requirement. For key facts pages to help work seekers and to reduce the competitive advantage gained by employers who do not adhere to the regulations there must be a way to monitor compliance and ensure key fact pages can be corrected if found to be misleading or untrue. If there is no mechanism for redress then key facts pages will only add to the regulatory burden on businesses that comply fully but without a corresponding increase in the protection of employees.
6. ICAEW's Tax Faculty has noted in its response to a previous consultation that *'Agencies perform a valuable role in flexibly matching supply to demand, so we see little merit in constraining businesses from using agency workers. Equally, demand might reduce if employment and tax law did not make it more expensive to employ people than to use self-employed labour. Clearly workers should be protected from exploitation and there is a balance to be struck. However, the inquiry should be mindful that employers are currently incentivised by the tax and NIC system and employment laws not to take on employees owing to the tax/NIC costs and employment law obligations'*.¹ We regret that the government has not sought to address these issues as part of its response to the Taylor Report and we are concerned that this 'lost opportunity' will mean that any other measures implemented –such as key facts pages - are merely tinkering at the edges.

ANSWERS TO SPECIFIC QUESTIONS

Section 1: Improving the Transparency of Information Provided To Work Seekers

Q1: To what extent would you agree that a key facts page would support work seekers in making decisions about work?

1. We strongly agree that a key facts page is a useful tool to ensure that workers fully understand who they are working for, their pay, statutory deductions and any other fees, costs or charges that the employer will deduct and any benefits accruing to their employment. If workers are unaware of what they are entitled to or what is being deducted (or indeed whether such deductions are legal) it is very easy for them to be exploited by unscrupulous employers. The nature of agency work is that there can be an imbalance of power between the employer and the employee.
2. The Government in its response to the *Taylor Report* has highlighted the need for 'informed choices'. Unfortunately many work seekers may wish to make an informed choice but if they do not have the luxury of receiving a number of job offers or their availability for work is hampered by factors such as caring responsibilities or lack of access to transport they may have to accept the first one offered or the one that best

¹ ICAEW REP 199/16 *Future world of work and rights of workers* (The Business, Energy and Industrial Strategy Committee on 26 October 2016.)

fits with their domestic arrangements. In these instances it is debateable whether a key facts page will be used by work seekers as intended by the government.

3. We agree with the consultation's proposed key facts to be included in a key facts page but we would suggest that the following should also be included :
 - a. Clear information concerning the calculation of any variable elements of pay, unsocial allowances, or bonuses
 - b. Details regarding the timing of pay, and any cut off dates applicable to ensure that payment is made by the due date (eg submission of timesheets)
 - c. Employer's reference for HMRC purposes
 - d. Contact details (for a named person) in the case of questions and queries.

All of these would enable work seekers to understand their entitlements and provide them with a way to ask for further information if they are unsure.

4. We do, however, acknowledge that a key facts page could have a negative impact on employers in the recruitment sector by increasing the regulatory burden. This negative impact, however, could be outweighed by the positive effect on those employers whose reputation or competitive edge is enhanced if work seekers (or customers) believe that they are fair and scrupulous employers. In turn this could help to minimise the unfair competitive advantage of those employers who ignore the rights of their employees and so by reducing costs (such as NIC and other tax contributions) are able to charge less for their goods or services.

Q2 (a): What conditions should be in place to ensure the key facts page is provided and understood by the work seeker before any contractual engagement?

5. It should be prominent within the contract and signed by the work seeker to show that they have seen and understood it.

Q3: Should an employment business be required to ensure that the work seeker understands fully the information being given to them?

6. Yes. The inadequacies of the existing system is in part a result of workers not understanding their rights.

Q3 (a): If yes, how do you think this should be achieved?

7. This should be achieved through standardised guidance accompanying the contractual agreement, clearly tailored to the particular circumstances of the engagement.

Q4: Do you feel an hour is an accurate estimate of the time it would take to produce an information document for a work seeker?

8. This seems a reasonable estimate of the time required once the system has been embedded. The time taken in the first year may be higher and in subsequent years as explained in paragraphs 10 and 11 below.

Q4 (a): N/A

Q4 (b): Other than the time taken by personal to produce a key facts document, are there another business costs we should be aware of?

9. Yes. Inevitably there will be frequent occasions where the work seeker requires guidance and clarification, and where the relationship with the 'hirer' actually gives rise to issues between the work seeker and the employment business.

10. In addition, whilst the key facts document will need to be produced for each new contractual engagement, it will also need to be updated each time there is a change to the information which it contains. For example, unless the 'rate of pay' is linked to /specified as the 'National Minimum Wage' or the 'National Living Wage', then each time pay changes the key facts document will need to be reissued. Admittedly this would take less time to prepare than the first key facts document, but inevitably it could add to the administrative burden in subsequent years. Hence the 'burden' as calculated by BEIS could be a significant underestimate.
11. The BEIS figures also ignore transfers and changes of role in the original base numbers for the first year. These may or not be significant, but will add to the level of burden as calculated in the consultation document.

