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FCSA Response to:

BEIS consultation on agency worker recommendations

9 May 2018

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Contents

Executive Summary

FCSA supports Matthew Taylor's review of modern working practices which we contributed to during 2017, and we welcome the opportunity to respond to this consultation on agency workers recommendations. In our response we outline the following:

- Support for introducing key facts documents
- Support for introducing regulation to govern intermediaries, providing that **all agency workers will benefit**
- The need to tackle poor practice in how some intermediaries incentivise agencies
- The importance of robust enforcement of any legislative changes
- The importance of monitoring and evaluating any new legislative changes

The most critical point we raise in this consultation response is the need for any intermediary/umbrella regulation to encompass all agency workers, whether they are engaged through an umbrella or any other form of intermediary. Otherwise new rules will create a two-tier system whereby some agency workers are protected due to the manner in which they are engaged, and other workers would not have the same benefit. Such a two-tier scenario would inevitably drive behaviour towards the unregulated section of the market, which would not be in the best interest of affected workers.

We have outlined in some detail the important role that compliant umbrella/intermediary firms play in supporting the contingent workforce, and the advantages that umbrella/intermediaries bring to the whole supply chain: hirers, agencies and most importantly safeguarding the workers themselves. FCSA undertakes regular research and analysis of the sector which has most recently shown a professionalising of the umbrella/intermediary sector with contractors' average income increasing, average length of assignments increasing, and average length of employment with an umbrella also increasing. Our data is presented as an appendix to this report.

A recurring theme in our response is the need for consistent and robust enforcement of any legislative change. It is also important to ensure that a holistic view is taken when designing any new legislation to ensure that it is likely to meet its objectives. In recent years our sector has been subject to numerous legislative changes, a piecemeal approach that has rarely achieved its aim, and all too often has in fact only served to exacerbate poor practice whilst penalising compliant businesses. Implementing recommendations from Matthew Taylor's review gives policymakers an opportunity to make significant changes that will genuinely benefit the UK's workforce, and through our specialist knowledge and experience of other changes within our sector we will play an active role in maximising this opportunity.

However we do not support introducing legislation without clear objectives, and some of the proposed changes do not yet have sufficient clarity of purpose. We would be delighted to work with BEIS in shaping what these aims might be, particularly in reference to potential regulation of umbrellas/intermediaries. Finally, it is essential that any new legislation is properly monitored and evaluated for effectiveness in achieving its stated objectives. This might seem obvious, but we have been consistently disappointed at the lack of such evaluation of significant tax legislation impacting on our sector in recent years.

Background to FCSA

The Freelancer& Contractor Services Association (FCSA) is the largest independent membership body for professional employment services, with members providing umbrella, self-employed, accountancy and business support solutions to the temporary workforce. At the time of writing the FCSA has 16 Accredited Members and 65 Associate Members who collectively represent *over 130,000 professional contractors*.

Set up in 2008, FCSA are industry leaders with credibility and a proven track record. Our purpose is to safeguard the long-term future of the professional freelance sector for the benefit of the UK economy, through:

- Setting and raising standards for service providers who support professional contractors
- Promoting compliance in order to protect professional contractors
- Influencing and lobbying to ensure that members' needs are represented to policymakers
- Collaborating through partnerships with likeminded organisations

FCSA's primary role is to raise standards and promote compliance, and through our accreditation we encourage self-regulation in our sector of supporting contractors to meet their tax and legal obligations.

Our role in self-regulation

FCSA accreditation brings value to the supply chain, and our compliance testing is unique in the following ways:

1. It is truly independent
   - Our assessors are independent of FCSA so there are no conflicts of interest
   - Our assessors are professionally regulated accountants and solicitors
   - Our CEO is appointed by members and is independent, with no commercial conflicts of interest
2. Members must pass our testing annually in order to retain accredited status
3. We publish the compliance standards that we test against
4. We submit a copy of members' audits to HMRC
5. Our standard is recognised by all of the recruitment trade bodies including: APSCo, REC, TEAM

FCSA's code standards are the most stringent and comprehensive in the industry. It includes sections on: governance, corporate structure, employment law, accountancy/tax law, insurance and financial stability checks, relationship with recruitment businesses, relationships with contractors, umbrella employment operations, accountancy support operations, and self-employment operations. Importantly, no FCSA Accredited Member is allowed to operate Offshore Schemes, Loan Schemes, Trusts, Managed Services Companies Schemes, Pay-day-by-Pay models, or similar.

Any contractor, agency, or end-hirer choosing to work with an FCSA accredited member is assured that the member operates at the highest industry standards for the benefit and protection of the contractor/agency/end-hirer.

Change in membership structure

There are currently two types of FCSA member: Accredited who have been independently tested for compliance with our standards, and associate members who have not been tested for compliance as they join FCSA for our trade body activities. With effect from September 2018, the FCSA will no longer offer the associate category of membership and this will be withdrawn as of that date. FCSA membership is perceived to denote that firms have met the FCSA's standard of compliance via Accreditation and therefore we have a duty of care to ensure that this is the case.

Effectively our decision to withdraw the Associate category of membership will result in the FCSA offering a single category of membership – FCSA Accredited Member – and from September requires all of our members to demonstrate the same standard of compliance. Having one standard of membership aligns with our core objectives to raise standards and promote compliance, and will support agencies in making informed decisions regarding their preferred supplier lists. Associate members have had significant advance notice of the change, allowing time to become accredited should they wish to do so.

Working with government

In our role as the professional membership body for umbrellas, self-employed solution firms and specialist accountants that support contractors, we represent our members' views to government with the aim of advising on potential complexities of proposed changes and avoiding any unintended consequences. FCSA has worked closely with HMRC, HMT, OTS and BEIS (BIS) in recent years in providing evidence and contributions to their various policy initiatives that have impacted on the financial elements of self-employment. Numerous recent tax policy changes have penalised the contingent workforce and the businesses that support them, leaving them financially worse off and under-valued by a Government that says it recognises the economic importance of the flexible workforce. It would be wrong to further penalise the workers and the businesses that have been the financial backbone of the UK economy in recent years.

Section 1 - Improving the transparency of information provided to work seekers

Key facts page

FCSA supports the principle behind introducing a key facts page, however it is unclear as to the content required and how it will be enforced. We are concerned that it could be an additional task for already over-burdened compliant firms and that less compliant businesses will simply not bother producing their key facts pages, and therefore be more efficient in their operations. In addition the information provided needs to be simple and not involve exhaustive/unnecessary work. Notwithstanding we recognise the benefits that key facts pages should bring in enabling workers to understand more about how they are engaged, so we support the initiative providing that there is enforcement.

Timings

The timing of when a key facts page should be generated is critical. At the outset of a work-seeker engaging with an employment business there are numerous variables in how that worker might choose to be paid: via agency PAYE, via their own limited company or via an umbrella firm or other intermediary.

If producing a key facts page becomes a requirement for the employment business at the outset of discussions with all prospective work seekers then this will be far too burdensome to undertake in reality. It would take the employment business a disproportionate amount of time to produce a document covering all the options, particularly considering at that time the work-seeker may or may not undertake work via that recruitment business.

In addition, recruitment businesses do not currently provide *advice* to work-seekers around their engagement method, however the new key facts requirement could result in the provision of *tax advice* by a recruitment business when it is not qualified to do so. This is an important point that should be borne in mind when considering the mechanics of the new key facts requirement.

It would also be meaningless for the worker at the initial contact given the numerous different options and variables, all for a possible role/assignment that may or may not come to fruition. Therefore, we recommend that the timing of any key facts document should be at the point in which an engagement is being negotiated, i.e. once an assignment/role has been agreed, but still prior to the work-seeker commencing work.

Supply chain

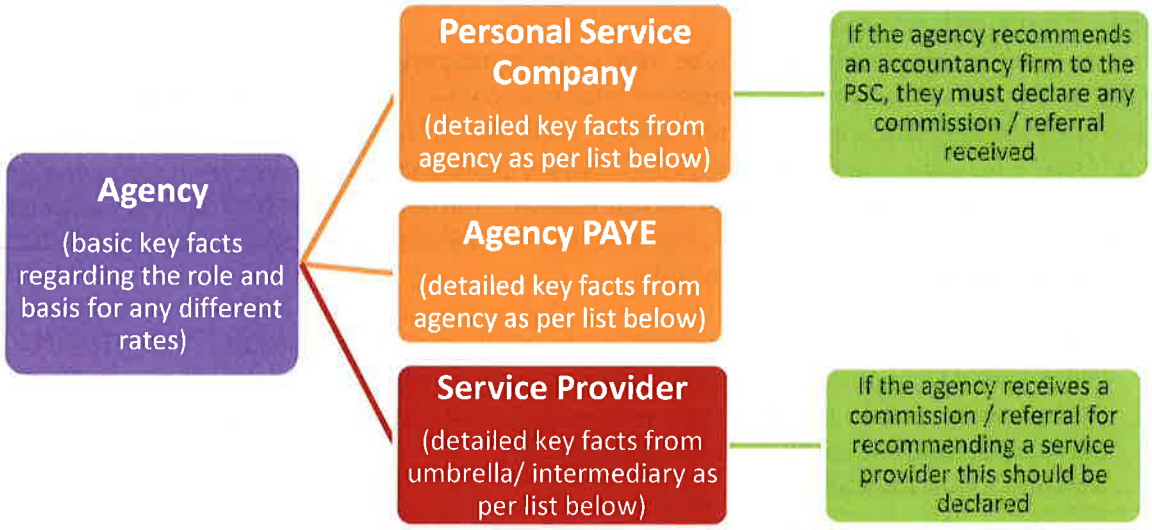
We recommend that whichever firm is the paying party (i.e. responsible for paying the worker's remuneration for their work undertaken) within the supply chain should be required to produce a key facts page relevant for their business. This will minimise the burden on employment businesses who would not produce key facts documents on behalf of their suppliers, such as umbrella companies or other intermediaries. It would be inappropriate for a firm to be liable for describing how another firm's business operates, the detail of which could be deliberately hidden by an unscrupulous intermediary. Similarly, a supplier should not be reliant on another business disseminating key facts about their operations which could be misrepresented or inaccurately portrayed. Therefore we strongly

recommend that individual suppliers should be responsible for producing their own key facts page specific to their business.

Recruitment businesses often have different pay rates, a "PAYE" rate and a "limited company rate" that are dependent on how a work-seeker is engaged. We recommend that the work-seeker should receive information from the recruitment business about how the two rates have been calculated and why one is higher than the other.

In summary, the recruitment agency should be responsible for producing basic key facts regarding the role and basis for any different rates. This should be followed by detailed key facts to be produced by the paying party within the supply chain, which includes specific information on how the work seekers' pay is calculated, tax status, employment status etc.

How the Key Facts responsibility might look in the supply chain:



The flow chart above illustrates that the agency is the paying party for engagements where the work-seeker is paid via their personal service company, or is paid via agency PAYE. In these scenarios, it is appropriate for the agency to produce additional detailed key facts which includes specific information on how pay is calculated, tax status, employment status etc, as per the contents list below. However, when the paying party is a separate entity, such as an umbrella/intermediary/service provider, then it is inappropriate for the agency to produce detailed keys facts on their behalf as the agency will not have access to that information. Instead the service provider/intermediary/umbrella, as the paying party, must produce the detailed key facts.

It is common practice for a recruitment business to give contractors details of accountancy service providers, particularly if the work-seeker is considering setting up a personal service company for the first time. Some agencies will receive a commission or referral fee from the accountancy provider in exchange for recommending them to contractors. Likewise, agencies might receive a commission or

referral fee from an intermediary in exchange for recommending them to contractors. We strongly recommend that any such arrangement is disclosed to the work-seeker for transparency purposes.

The practice of paying incentives and rewards to recruitment business employees has grown in recent years, and of particular concern is the likelihood of recruitment businesses recommending dubious providers purely because they pay the most. This puts the worker at risk of exploitation by that intermediary and there is also a potential loss to the Exchequer if that intermediary is running a tax avoidance scheme. We believe that requiring agencies to disclose any such arrangement to the work-seeker will bring transparency to the arrangement and will also raise standards by promoting best practice.

It should be noted that we have no issue with commercial B2B arrangements which are contractually agreed commissions/referrals in exchange for volume of business. However it is the murkier practice of targeting recruitment agency employees with inappropriate incentives where action needs to be taken.

Contents of detailed key facts pages

It would be beneficial for key facts pages to have some mandatory information required as minimum standard, so that the worker receives consistent information which will enable them to understand the terms of their engagement with that intermediary. Recruitment businesses often have different pay rates, a "PAYE" rate and a "limited company rate" that are dependent on how a work-seeker is engaged, and we recommend that the work-seeker should receive information about how the two rates have been calculated and why one is higher than the other. Mandatory contents for the party that is responsible for paying the worker could include:

- Employment status and overview of applicable employment rights/benefits
  (NB: it would be impossible to list all rights and benefits, instead we suggest "your employment status is worker which means you are entitled to 29 statutory rights and benefits. You can find out more about your entitlement via www.gov.uk")
- Whether or not AWR applies
- Tax status and proportion of pay where this is applicable (in order to target disguised remuneration schemes, offshore loans schemes etc)
- Principles of how pay is calculated, particularly rationale behind any different rates
- Details of deductions made from the amount paid to the intermediary
- Details of company margins
- Details of all monies/commissions/BiKs/incentives paid to the business in relation to the work-seeker (similar to mortgage key facts where the advisor states if he/she receives commission)
- Holiday pay arrangements
- Broad details of any pension rights (as some detail might not be known until later)
- Details of any applicable regulator, e.g. Employment Agency Standards Inspectorate

Agencies are already required to produce information to work-seekers at the outset, and there will be some crossover with the key facts document. We suggest that agencies continue to be responsible for producing the basic role-specific information at the outset, and the detailed key facts information should be provided by the party that pays the worker their remuneration.

Ensuring the worker understands

It is important that the key facts document is written in plain English to ensure that the worker has optimal chance to comprehend the information given. It should be mandatory for the paying party to keep a record of key facts documents issued in case of future query. Providing the key facts document is written in plain English, the business providing it cannot be expected to be liable for ensuring that the worker understands it. This is the same in the mortgage industry whereby an advisor is not held liable for ensuring that their client understands the mortgage key facts document that they receive.

Administrative burden

The amount of time required to produce the key facts document will depend on the level of detailed information that is mandatory. Given the variables involved the detail should be of an indicative nature (as set out at "Contents of key facts" above) as per 'Key Facts' documentation as regulated by the Financial Conduct Authority. If recruitment businesses are required to produce information for multiple scenarios, and on behalf of their supply chain, then this becomes very complicated and unworkable. Similarly, it would be unreasonable to require businesses to produce key facts information for each and every prospective worker as this would create a very significant burden and constrict their operations to such an extent it is difficult to see how they could be profitable.

Enforcement

Whilst we support the principle of introducing key facts pages, it is essential that there is enforcement otherwise unscrupulous businesses will simply not conform and therefore the initiative would only penalise compliant firms. We have seen many changes introduced to our sector in recent years that have not been properly enforced, and in our experience this is unfair as it allows firms that do not adhere to the change to gain competitive advantage as their operations can be more efficient. It is absolutely essential that there is a level playing field with any changes, and proper, robust enforcement is key to achieving that.

Recommendations

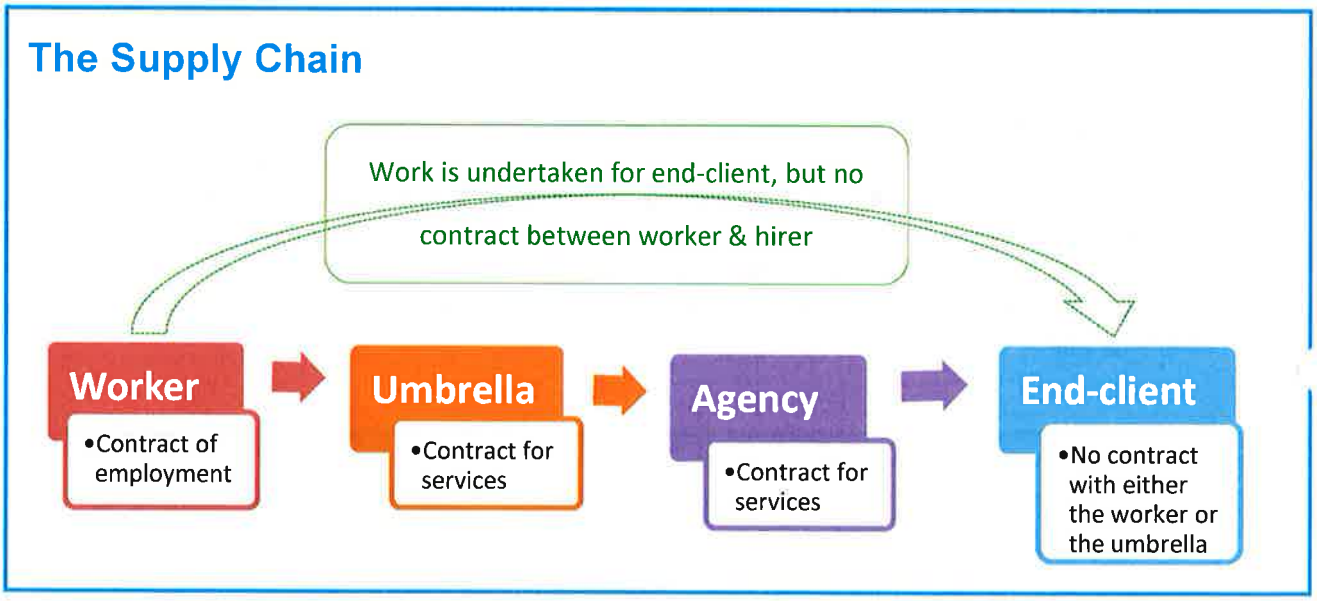
1. Implement key facts page at the point in which the work-seeker is about to be engaged.
2. Do not require key facts page to be produced for every single prospective work-seeker on their initial contact with the agency / umbrella / intermediary.
3. Require basic role-related key facts to be produced by the recruitment agency.
4. Require detailed key facts pages to be produced by the party in the supply chain that is responsible for paying the work-seeker his/her remuneration.
5. Make each business within the supply chain responsible for producing their own key facts pages, i.e. no business should be producing information on behalf of another.
6. Ensure that disclosing any referral fee/commission received in relation to the work-seeker is a requirement of key facts page.
7. Ensure content is simple, in plain English and covers the 'principles' of the engagement; otherwise it will be unworkable.
8. Ensure proper and robust enforcement of key facts pages.

Section 2 - Extending the remit of the Employment Agency Standards Inspectorate to cover umbrella companies and intermediaries in the supply chain

What is an umbrella company?

The definition of an umbrella and the contractual arrangement illustrated within the consultation document is incorrect. Within the agency sector, an umbrella company will contract with an agency to undertake work for end clients. An umbrella company employs workers (employees) to carry out the work for an end client. Employees will complete numerous different assignments at various locations for recruitment agencies and/or end clients.

There is an over-arching contract of employment between the umbrella and the employee, and this provides a portable package of employment rights enabling the employee to receive those same rights and benefits whilst working for various end-hirers. An umbrella company enables someone to be permanently employed whilst having the flexibility of being a contractor undertaking numerous short-term assignments. The contractual relationship in the supply chain is shown below:



NB - the worker is contractually engaged by the umbrella and not the agency.

Key benefits of umbrella employment to the worker

- **Employment rights,** including all 84 statutory rights and benefits such as holiday pay, maternity, paternity, sick leave, pension etc.
- **Employment history** whilst working on a contingent, multi-location basis (notably to support access to finance, housing/mortgages, etc.)
- **Joined up pay from fragmented working:**
    - Many undertake multiple assignments during a week or a month

- **Peace of mind that tax is paid appropriately,** with no need to submit an annual self-assessment return to HMRC
- **Employee rights/HR support,** as an Employee the worker has a full suite of statutory employment rights and statutory benefits. In addition, an individual can obtain HR advice
- **Ability to claim tax deductible travel and subsistence expenses** subject to status
- **Ability to receive additional employment benefits** such as reward schemes, health insurance, personal accident insurance

Key benefits of umbrella employment to the agency or end-hirer

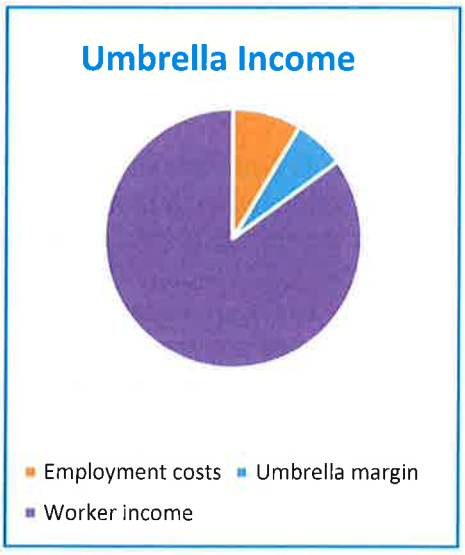
A fully compliant umbrella employer manages the commercial, contractual, employment, taxation, and statutory risks associated with the use of temporary workers for the supply chain. This minimises the overheads, employment risk and administrative burden of managing temporary workers in-house.

The alternative would be to process a significant amount of paperwork every time an individual wishes to be redeployed to a different role, agency or hirer. In a fast-paced project-driven environment where workers frequently change assignments, the resulting red tape of treating each change as a new employment would quickly become unmanageable.

How pay is calculated

The umbrella firm receives a contract sum for work undertaken by the umbrella, and this income belongs to the umbrella. Like any business, the umbrella must cover its costs, therefore it will deduct a margin from the income received. Employment costs are also deducted, including employers' national insurance, apprenticeship levy, holiday pay and pension contributions. These costs are deducted from the contract sum. After the deduction of the margin and employment costs, the balance is the workers' pay.

With regards to employment costs, an umbrella's are the same as would be incurred by either the recruitment agency or the end-hirer if the individual were to be engaged by them. The difference is that the umbrella recharges these costs back to the supply chain, which is where they would normally be paid if there was no umbrella in the mix.



Umbrella firms as tax collectors

An umbrella firm, by definition, pays their employees via RTI payroll which ensures that all taxes and national insurance is paid. In this regard, they undertake the following on behalf of the supply chain:

- Collect and manage personal data in order to run payroll
- Pay apprenticeship levy

- Pay pensions contributions
- Deduct PAYE from gross pay
- Report via RTI
- Pay HMRC
- Report employee expenses and benefits
- Issue P45s, P60s and P11ds

If umbrella firms were not in the supply chain, all of the above administration would need to be carried out by either the end-hirer or the recruitment agency. In some sectors workers change their assignments frequently (because they have the flexibility to do so) and in such instances the umbrella provides continuity of employment as well as consolidated pay. Also, if the contractor stays with the same umbrella then it avoids all of the above processes being necessary for each and every assignment being undertaken. This is particularly beneficial in sectors which require numerous short-term positions, potentially at a different end-client every day of the week.

Quantifying and defining the umbrella sector

In 2015, FCSA undertook detailed research in order to quantify the size of the umbrella market and established at that time there were some 500 umbrella firms operating in the UK. Importantly, this research defined umbrella companies as intermediaries that **employ** temporary workers. However, there are also a large number of intermediaries that provide a similar function, but do not employ the worker, meaning that they do not have to provide that worker with any rights or benefits. Colloquially, such firms have also become known as "umbrella" although there is no statutory definition. We feel it is useful to clarify that where there is an absence of an employment contract in reality we are looking at an intermediary, not an umbrella company.

There is significant scope for exploitation and poor practice because the worker has no minimum entitlements or statutory rights. This means that workers are not protected and therefore abuses such as not receiving minimum wage are more likely. FCSA's code of conduct ensures that there is significant protection for workers if they want to be for example self-employed rather than an employee. Where there has been media coverage of poor practices within the "umbrella" sector this has focussed on companies at the 'fringe' of the market. It is therefore **critical that any regulation of umbrella/intermediary businesses is targeted to addresses the rogue element of the market.**

Otherwise any regulation that is restricted to companies that employ workers will only encapsulate those, by definition, that are already meeting a minimum standard. FCSA's code of conduct is a good starting place as it addresses umbrella, self-employed, accountancy and business support solutions which are provided to the temporary workforce within the Agency sector. Without regulation, rogue business will become even more attractive as an unregulated element of the sector, with a competitive advantage and therefore create an un-level playing field that is distorted against compliant businesses.

The size of the rogue business market is unquantified, but has certainly grown exponentially in response to IR35 changes in the public sector that were introduced in April 2017.

The purpose of regulation

Presumably media exposure of poor practices and the possible exploitation of workers is the rationale behind the consideration of 'umbrella' being regulated. In which case, FCSA supports the prospect of umbrellas and intermediaries being regulated, providing it encompasses the rogue market. Assuming regulation were to be introduced, there needs to be a definition of the firms being regulated, and such a definition must encapsulate the types of businesses which might be abusing or exploiting workers.

We propose that the target for regulation should be the paying party within the supply chain. This would mean that any business that is responsible for paying workers' their income, will be responsible for ensuring it is done compliantly. There is precedent for legal responsibility being conferred on such intermediaries; the public sector IR35 reforms in 2017 introduced "feepayer" status which makes such businesses liable for ensuring correct tax and NICs are paid from individuals' self-employed income.

What might regulation look like?

The consultation document raises the possibility of umbrella/intermediary regulation being akin to the agency conduct regulations, however we are not convinced that this is the most appropriate basis given that they do not apply in most circumstances. The regulations were originally designed to protect workers who are controlled by their end-clients, however it is common practice for professional contractors to opt out of these regulations. The agency conduct regulations themselves are designed for recruitment businesses with a lot of detail on the specifics of finding and placing people in to work, which does not form part of the role of umbrella/intermediary companies, so large swathes of that particular framework are not applicable to the umbrellas/intermediary sector.

Rather than attempting to make earlier legislation fit business operations that were not its original intention, we would recommend a proactive approach starting with clarifying the objective of exactly what the new regulation is intended to achieve.

We have experience of recent piecemeal tax legislation that has not been properly designed and has only served to exacerbate poor practice and has not achieved its intention. Therefore we recommend a more holistic approach that is specifically designed to target intermediaries who are the "paying party" (responsible for paying the worker their remuneration) rather than attempting to make earlier conduct regulations fit circumstances for which they were not designed.

FCSA's Chief Executive has recently met with the Employment Agency Standards Inspectorate and had a positive high level discussion regarding how intermediaries might be regulated. A further meeting is planned with FCSA Accredited Members and the Employment Agency Standards Inspectorate to discuss potential regulation in more detail, and as the most reputable professional membership body for the umbrella sector FCSA is pleased to contribute to the development of any such regulation. Indeed, FCSA is best placed to work with the government in this regard as we understand the industry in depth, and we have long-campaigned for a level-playing field that will eradicate the rogue providers who bring the sector into disrepute.

Incentive payments

We recommend that a priority for regulation should be the practice of umbrellas/intermediaries paying incentives and rewards to recruitment business employees in exchange for that individual recommending the intermediary to the work-seeker. To reiterate our earlier point, there is no issue with commercial B2B arrangements which are contractually agreed commissions/referrals in exchange for volume of business. However it is the murkier practice of targeting recruitment agency employees with inappropriate incentives where action needs to be taken.

This practice has grown in recent years, and of particular concern is the likelihood of recruitment businesses recommending dubious intermediaries purely because they pay the highest amounts to the agency. This puts the worker at risk of exploitation by that umbrella/intermediary and potentially there is also a loss to the Exchequer if that intermediary is running a tax avoidance scheme or there is no disclosure of any payment.

We believe that recruitment businesses should only recommend umbrellas/intermediaries where they have undertaken sufficient due diligence to be assured that they are operating compliantly. The optimal arrangement is to have a preferred supplier list consisting of businesses where they maintain a good working relationship and both parties are committed to the best interests of the worker. In this situation, we believe it is acceptable to have a B2B commercial arrangement in place for commission / referral fees in exchange for business received via that agency.

However payments made directly to individual employees of the recruitment business could be perceived to be bribery, and it effectively brings a conflict of interest to that employee when it comes to referring the worker to an appropriate intermediary. There is also the issue of whether these payments are being disclosed and tax paid accordingly.

Enforcement

Any new regulation to govern umbrellas/intermediaries must be properly enforced. The consultation document suggests the Employment Agency Standard Inspectorate as the most appropriate body to have responsibility for such enforcement. Given that umbrellas/intermediaries work very closely with agencies within the supply chain, we fully support the proposal that any new regulation for umbrellas/intermediaries should be enforced by the EAS Inspectorate. It is essential that any such enforcement is consistent and robust in order to encourage and sustain compliance with the legislation and drive the dubious non-compliant firms out of business. This will not only protect workers from exploitation, but will also create a level playing field enabling compliant firms to be competitive.

Monitoring and evaluation

When introducing new legislation we believe it is essential to evaluate the impact and effectiveness of the change and consider whether it meets the original objectives. The regulatory policy committee (RPC) echoed this view in their review[1] published in February 2017:

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593213/RPC_Report_-_Review_of_Government_impact_assessment_capability_-_February_2017.pdf

"As both the national audit office and public accounts committee noted, monitoring, evaluation and review are essential to the policy-making process in order to:

- *improve government's understanding of how regulatory interventions work in practice by learning from experience*
- *gather evidence to assess the on-going need for intervention*
- *highlight where further interventions are required, or whether non-regulatory actions are now appropriate;*
- *improve the use of evidence and analysis in appraisal*
- *understand the unintended consequences of specific regulations, and where interventions have produced unexpected results*

RPC will continue to press for departments to produce high-quality post-implementation reviews of significant measures"

The possible regulation of umbrellas/intermediaries has the potential to be far-reaching and have a very significant impact on businesses operating in this sector. Therefore we strongly recommend that the effectiveness of any such regulation should be thoroughly evaluated within an agreed timeframe to ensure that it is fit for purpose. If the evaluation finds that the regulation is not meeting objectives, or creates an un-level playing field then there should be a commitment to making appropriate legislative adjustments.

Recommendations

9. Ensure that any regulation of umbrella/intermediaries supports all agency workers and is targeted towards to the rogue elements of the sector.
10. Ensure that any umbrella/intermediary regulation is targeted to the paying party within the supply chain.
11. Take a holistic approach in designing any umbrella/intermediary regulation to specifically target undesired behaviours rather than attempting to adjust other legislation (such as agency conduct regulations) to fit.
12. Ensure that any umbrella/intermediary regulation targets practices of incentivising agencies in the wrong way.
13. Ensure that any umbrella/intermediary regulation is robustly enforced.
14. Ensure that any umbrella/intermediary regulation is properly evaluated after implementation and amended if it is not achieving its objectives.

Section 3 - Pay Between Assignments

Prevalence of Pay Between Assignment (Known as the 'Swedish Derogation')

FCSA's code of conduct has provision (and regulates) for the compliant implementation of Swedish Derogation arrangements. The prevalence of such arrangements is difficult to ascertain; our members do not all use them, and those that do operate Swedish Derogation will generally do so at the request of their recruitment agency partner rather than proactively seeking such arrangements. In our experience, the use of Swedish Derogation is driven by end-hirers rather than by recruitment agencies or other intermediaries.

We recognise the value that Swedish Derogation can bring to the economy as it gives certainty regarding the cost of a non-permanent workforce, alongside the flexibility that engaging non-permanent workers brings to the hiring business. We believe that operating such contracts is compliant providing that the worker understands the terms on which they are engaged, it is then their choice as to whether to accept the work on those terms or not.

Should Swedish Derogation be repealed?

It is worth pointing out the Swedish Derogation arrangements were expressly agreed by the CBI, trade unions and recruitment trade bodies prior to AWR legislation being introduced. Inarguably, Swedish Derogation is the law as set out in Regulation 10 of the AWR legislation, and therefore is not a loophole.

We do not have any evidence that Swedish Derogation contracts/workers are being abused, and the government's research undertaken in 2016 does not robustly evidence any abuse either. In the absence of supporting evidence, repealing Swedish Derogation would seem to be a kneejerk reaction that might not be necessary in practice. Instead we support the other option suggested in the consultation, that stronger enforcement should be sufficient to address any issues that may arise.

Potential regulation of AWR

The consultation document asks if AWR should be enforced by the Employment Agency Standards Inspectorate, however there doesn't seem to be sufficient evidence to justify such a change. It is unclear as to the potential gain for policing AWR given that there no barriers to workers bringing about a claim through the Employment Tribunal system in the same way as any employee. There would need to be a sound rationale in order to justify treating agency workers differently from other workers and there does not seem to be sufficient evidence to underpin such a change.

If there were adequate supporting evidence for the Employment Agency Standards Inspectorate to become responsible for regulating AWR, then consideration needs to be given to the scale of such enforcement. According to the Recruitment and Employment Confederation[2], there are approximately 1.1m agency workers currently in the UK, and enforcement would require oversight of day 1 rights and then 12 week rights, both of which could take place several times per year for any individual worker. Conservatively estimating that each agency worker has 5 such AWR milestones annually, then the reach

[2] Recruitment and Employment Confederation, Recruitment Industry Trends Survey 2016/17

of enforcement would therefore cover at least 5.5m instances annually. Furthermore there are numerous elements to AWR rights at both day 1 and 12 weeks, some of which are subjective and potentially complex, and such cases are best dealt with via tribunal.

Lastly, contractors who provide their services via a limited company and genuinely self-employed are exempt from AWR thus only a proportion of Agency Workers would gain any form of 'protection'. If the Employment Agency Standards Inspectorate became responsible for enforcing AWR, we are concerned that this could artificially create demand for people to be engaged via limited companies or becoming self-employed, whether or not this is appropriate to their circumstances. This could result in more people being exploited because these workers are not entitled to any minimum rights or protections. Furthermore, any individuals that are unwittingly forced into their own limited company/self-employment will subsequently have certain legal responsibilities that they are unaware of.

In summary, we are very concerned that potential AWR enforcement will create a very significant volume of work that is inherently complex to implement for an already over-stretched government department that arguably has more pressing priorities. We recommend a more measured approach in maintaining the status quo, particularly given the other changes to be implemented, such as the key facts document, which will make agency workers more aware of their rights. We also recommend that BEIS continues to monitor AWR issues and considers taking future action if there is sufficient tangible evidence to do so.

Recommendations

15. Retain Swedish Derogation as a compliant mechanism to engage temporary workers.
16. Do not add enforcement of AWR to the responsibilities of the Employment Agency Standards Inspectorate.

Conclusions

In this consultation response we have proposed that the "paying party" within the supply chain that pays the worker their remuneration should be targeted two-fold:

1. Have responsibility for producing key facts document
2. Be targeted in any regulation intended to improve practices of "umbrellas/intermediaries"

The rationale is that the "paying party" is ultimately responsible for the workers' remuneration, which is a very significant transaction for that individual worker, and as such it is appropriate to ensure that all such umbrellas/intermediaries are adhering to certain minimum standards and acting in the best interests of the worker. Unscrupulous/rogue firms that implement schemes which exploit workers do so because there is seemingly no redress, and such operators deliberately set themselves up to mislead workers by appearing to be compliant at first glance. It is unrealistic to expect workers to have sufficient in-depth knowledge to effectively navigate around the dubious providers, and given the potential for unsuspecting workers to be exploited therefore we support the introduction of regulation in order to raise standards and create a level playing field.

It is appropriate for such regulation to be within the remit of the Employment Agency Standards Inspectorate, and we support this proposal. The consultation also considers further widening their role in order to police AWR, however we do not think this is appropriate at the current time given the lack of evidence suggesting that it is necessary. We believe that the transparency proposals within the consultation will ensure that agency workers have a much better awareness of routes to seek redress which in itself will improve matters. Additionally, we would prefer that the Employment Agency Standards Inspectorate prioritises the potential regulation of umbrella and other intermediaries because there is clearly potential for workers to be exploited; therefore change is needed in order to raise standards.

As the most credible experts with specialist in-depth knowledge of intermediaries, FCSA is ideally placed to support BEIS in developing any such regulation to ensure that it does indeed target the unscrupulous providers that bring our sector into disrepute.

In summary, we want to work with policymakers in implementing appropriate agency worker recommendations from Taylor's review of modern working practices, and together we can ensure that a careful approach is taken that will achieve objectives without unintended consequences. We must not inhibit the growth of the UK economy by imposing restrictions on the creation of flexible non-permanent employment. Given the current uncertainties in relation to leaving the EU, a stable platform for growth and economic prosperity must be at the heart of the UK's employment strategy. There is universal recognition that workforce flexibility is a key competitive advantage to the UK, and is (rightly) here to stay.

Contact details for further information

If you would like further information on any aspect of this response, please do not hesitate to contact:

APPENDIX 1: Summary of recommendations

FCSA exists to raise standards and promote compliance, and through our accreditation we encourage self-regulation in our sector of supporting contractors to meet their tax and legal obligations. We make several recommendations at the end of each report section which we have listed here in the order in which they are discussed.

Section 1: improving the transparency of information to work seekers

1. Implement key facts pages at the point in which the work-seeker is about to be engaged.
2. Do not require key facts pages to be produced for every single prospective work-seeker on their initial contact with the agency / umbrella / intermediary.
3. Require basic role-related key facts to be produced by the recruitment agency.
4. Require detailed key facts pages to be produced by the party in the supply chain that is responsible for paying the work seeker his/her remuneration.
5. Make each business within the supply chain responsible for producing their own key facts pages, i.e. no business should be producing information on behalf of another.
6. Ensure that disclosing any referral fee/commission received in relation to the work-seeker is a requirement of key facts pages.
7. Ensure proper and robust enforcement of key facts pages.
8. Contents of Key Facts document should be in plain english and contain the 'principals of the engagement as opposed to the detail.

Section 2: Extending the remit of the Employment Agency Standards Inspectorate to cover umbrella companies and intermediaries in the supply chain

9. **Ensure that any regulation of umbrella/intermediaries supports all agency workers and is targeted towards to the rogue elements of the sector.**
10. Ensure that any umbrella/intermediary regulation is targeted to the paying party within the supply chain.
11. Take a holistic approach in designing any umbrella/intermediary rergulation to specifically target undesired behaviours rather than attempting to adjust other legislation (such as agency conduct regulations) to fit.
12. Ensure that any umbrella/intermediary regulation targets dubious practices of incentivising agencies.
13. Ensure that any umbrella/intermediary regulation is robustly enforced.
14. Ensure that any umbrella/intermediary regulation is properly evaluated after implementation and amended if it is not achieving its objectives.

Section 3: Pay between assignments

15. Retain Swedish Derogation as a compliant mechanism to engage temporary workers.
16. Do not add enforcement of AWR to the responsibilities of the Employment Agency Standards Inspectorate.

APPENDIX 2: The changing profile of umbrella

FCSA undertakes regular research on the contingent workforce. Two such studies were completed in 2015 and 2017, and they evidence a professionalisation of the umbrella sector. Data shows that umbrella employees increasingly work at the **higher, more stable end of the skills spectrum** in a diverse range of occupations:

- The proportion of construction workers within the Umbrella workforce has significantly diminished since 2015.
- Umbrella employment has increased in popularity within health & social care since 2015, predominantly as a means of providing overarching employment to fragmented working.

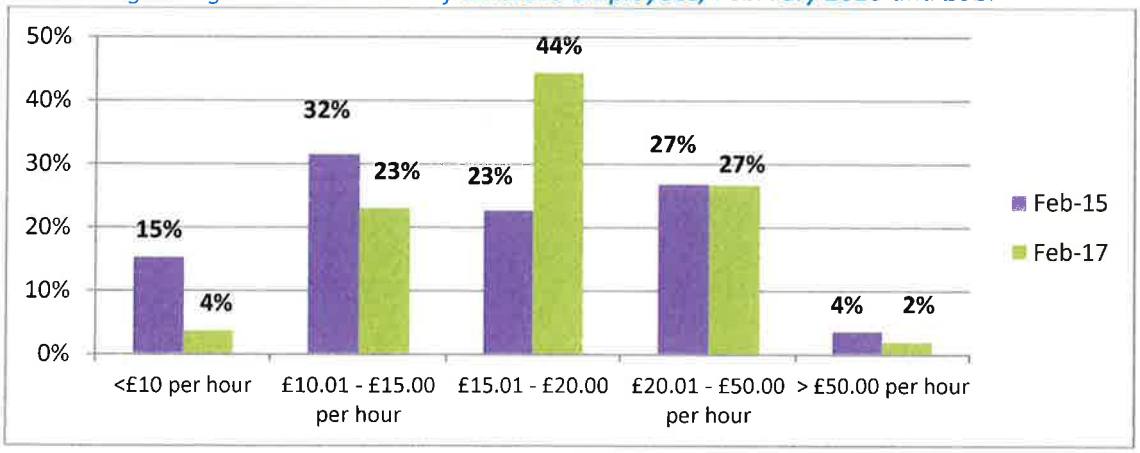
The proportional share of umbrella employees, by major occupational group, February 2015 & 2017

Occupation	% umbrella employees: 2015 (sample = 85,000)	% umbrella employees: 2017 (sample = 62,000)
White collar professionals (commercial, banking, finance, accountancy, education, legal, sales)	40%	38%
Construction	21%	7%
IT and telecoms	12%	10%
Transport & logistics	10%	7%
Engineering	7%	14%
Health & social care	6%	17%
Industrial / blue collar / utilities	2%	2%
Other	2%	5%

Source: FCSA Umbrella Employment Survey, April 2017

The average assignment rate of umbrella workers has risen significantly over the last two years. **Three quarters (73%) have an assignment rate above £15 per hour** (up from 53% in Feb 2015).

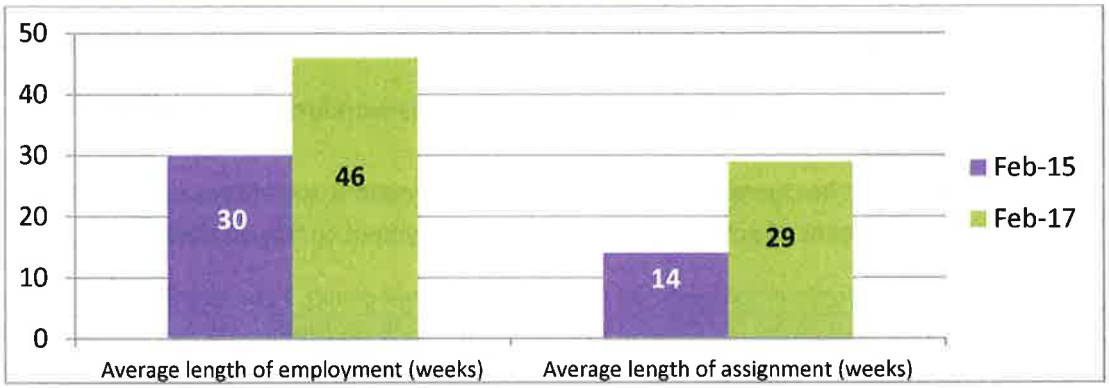
The average assignment rate band of umbrella employees, February 2015 and 2017



Source: FCSA Umbrella Employment Survey, April 2017

The average length of employment has **increased by over 50%** since February 2015, whilst the average **length of assignment has doubled** in the same period:

The average length (weeks) of employment and assignment, February 2015 and 2017



Source: FCSA Umbrella Employment Survey, April 2017

Umbrella employment is more stable than other more precarious forms of work, and is a modern employment practice that should be encouraged. The average length of contract assignments for an umbrella employee is 7 months (29 weeks), compared with 3 months (14 weeks) just 2 years ago. Most contractors stay with their umbrella firm for almost 1 year (46 weeks), 53% longer than the average (30 weeks) two years ago. Both of these factors clearly illustrate that umbrella provides more stability than temporary employment and/or zero hour contracts. An umbrella firm very rarely terminates someone's employment, the turnover of contractors is almost entirely led by the decisions of individual contractors – they either move to another umbrella firm or choose to work independently for themselves.

There are some dubious practices that take place driven by unscrupulous intermediaries that are **not umbrella,** and it is important to recognise the differences to avoid misunderstandings. (For more information on the differences, see section 'Quantifying and defining the umbrella sector' on page 12 of the main body of our response).