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Sent by email

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Response to Good Work: The Taylor Review of Modern Employment Practices – Agency Workers

To whom it may concern

I am writing with reference to the above.

This response is made by PRISM the trade association for service providers in the temporary workers market sector. We have taken a broad market view when considering our response as well as attempting to identify market distortions that could occur.

PRISM has been pressing for a wide reaching strategic review into the issues surrounding employment, employment status and workers' rights for over 2 years. In 2016, we commissioned the Social Market Foundation (SMF) to carry out research into this area. Their report was published early 2017 and a copy has been attached as part of our response.

PRISM has also produced a document, The Case for Strategic Reform, highlighting how the current tax framework provides incentives that are driving some of the emerging employment trends. We have also attached a copy of this as part of our submission.

We would be happy to discuss any aspect in more detail to help ensure we achieve a fair and equitable framework for all.

Yours sincerely

Crawford Temple
CEO

PRISM

Overview

PRISM understands the need for a range of consultations addressing the key findings of The Taylor Report although we believe that a more wide-ranging review will be required to fully understand and address the issues that are emerging in the market.

As an example, the scope of The Taylor Review was restricted and failed to look fully in to tax and the role this plays in driving behaviors. This restriction has resulted in outcomes that fail to fully identify the root causes behind some of the behaviors emerging, many of these are discussed in the 2 documents, Rules of Engagement and The Case for Structural Reform, attached to our submission.

PRISM has also formed the view that any changes to legislation should be tested against three guiding principles:

Simplicity
Compliance
Enforcement

Much of the current confusion comes about due to the multiplicity of legislation across many Government departments. This leaves an individual tax payer unable to attempt to understand their status, rights, or options. In the case of vulnerable workers this can leave them exposed and relying on guidance provided by 'interested parties'. This complexity results in workers confusion, a feeling that they had no choice – as they could not understand what options they had in the first place, and a lack of clarity around their rights.

A critical part of addressing these issues, whilst maintaining the flexibility in the labour market, is to deliver an outcome that creates both simplicity and transparency with certainty of outcomes.

Where this is achieved it allows for a compliance framework that would encourage the correct behaviors with significant risks and penalties for those seeking to circumvent or disregard the rules, this has not been the case with other recently introduced legislation.

Legislation needs to be supported by an enforcement regime that is efficient, swift to act where non-compliance is identified, and visible. Recent changes to legislation together with austerity cut backs has allowed many opportunists to exploit a weakened enforcement regime and gain significant commercial advantages in the market. This has resulted in those companies seeking to apply the rules as intended suffering losses or in the worst-case examples moving to non-compliance in an attempt to keep their businesses. This trend must be reversed.

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1. Improving the transparency of information provided to work seekers

Recommendation: Government should amend the legislation to improve the transparency of information which must be provided to work seekers both in terms of rates of pay and those responsible for paying them.

PRISM entirely agrees with this statement.

PRISM has already carried out work to deliver greater transparency to workers engaged through umbrella companies by jointly producing a document with The Low Incomes Tax Reform Group [LITRG]. The document titled Working through an umbrella company, is written with the lower paid worker in mind and we have attached a copy as part of our submission.

Since the launch of the document many providers and recruitment companies are providing this on a voluntary basis and the LITRG has reported a reduction in calls from umbrella workers to their helplines.

PRISM believes that creating a document, in line with the LITRG example, that covers the key aspects of a worker's options would help bring further clarity to the market. It would also provide the opportunity to address 'alternative' structures as they emerge giving workers clear pointers.

Making it a requirement for recruiters and third-party payment intermediaries to provide the document or a link to it, probably held on the BEIS website, at the earliest opportunity, but in all cases before engagement, would bring further clarity to workers.

Transparency on Operating Structures

Elective Deduction Model

Following the introduction of the Onshore Employment Intermediaries legislation, aimed at identifying false self-employment, we have seen an increase in the number of providers operating an Elective Deduction Model. In simple terms this model engages the worker as self-employed but pays tax under the PAYE regime suggesting to the recruitment company that there is little if any risk to the recruitment company for unpaid taxes.

This model is growing in popularity in sectors engaging low paid workers, as part of the presentation is that as the workers are self-employed the National Minimum Wage does not apply.

The workers also appear to be encouraged to claim expenses that would be denied through other operating structures.

This model is relying on the complexity of legislation and whilst it is avoided by many, those working in low paid sectors are gaining a commercial advantage by offering it.

We believe that HMRC, BEIS and EAS have a key role in market transparency and the EDM model highlights this. Whilst HMRC have been aware of its existence for some time they have failed to release any public information on their views. HMRC, BEIS and EAS can bring transparency to this part of the market by making clear their views on the use of these arrangements, or other emerging models. These public statements would reduce the number of organisations prepared to use the models and so restrict their access to the market.

Generally non-compliant providers can only gain access to the market where a recruitment company is prepared to engage with them. Restricting the numbers of recruitment companies that would engage with providers offering these types of arrangements would reduce their appeal to the promoters and help increase compliance in the market. This can only be achieved if HMRC, BEIS and EAS take a more active and transparent role in addressing these arrangements.

Umbrella companies

The term umbrella company has been used frequently throughout the consultation document although there is no legal definition of an umbrella company. This lack of definition allows many to use the term generically for arrangements that many would not see as an 'umbrella'.

An important step towards transparency in the market would be to create a universally recognised definition of an umbrella company.

Once the term has been defined it would assist both recruiters and workers identifying whether the company meets the tests of an umbrella, as well as understanding their rights.

Limited Companies

It is generally accepted that limited companies are used by contractors at rates on or above £15 per hour where they are prepared to accept all that comes with operating through a limited company. Since the introduction of the Employment Allowance we have seen many contrived situations placing two or more lower paid workers in a limited company with the sole intention of claiming the employment allowance. Often these companies are being referred to as mini umbrellas.

Creating clear guiding principles for both recruiters and workers will help them assess what is being offered and will limit access to the market for the non-compliant structures.

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Self-employed

Other than in the construction sector it is not usual for recruitment companies to allow contractors to operate as self-employed as the Regulations can leave them exposed to unpaid tax debts. Further legislation was introduced applying a test of whether the worker was subject to supervision, direction or control. This reduced the number of self-employed workers in construction.

The result of this has been the growth of the EDM model previously described.

Creating a transparent document, similar to the jointly produced Working through an umbrella information sheet, would allow simple explanations for workers.

Transparency on Rates

1. Assignment Rate Offered

   We have seen confusion with workers not understanding the rate they are being offered and how this translates in to what they actually get paid. As an example; 2 separate recruitment companies could be offering the same assignment, one at £12 per hour and one at £12.50 per hour. The worker is likely to select what appears to be a higher rate for the same role. The £12 per hour is a rate offered as a PAYE rate with the worker engaged by the recruitment company on their own PAYE. This means the worker actually gets £12 for each hour they work. The recruitment company covers the additional costs of employment such as employers NI, holiday pay etc. The £12.50 rate is, what is often referred to as, the limited company rate. This rate is 'uplifted' as it includes the costs of employment that would have to paid from the £12.50. When a worker receives their first payslip they find that they are actually being paid, depending on the particular charges of the payment intermediary, less than £10 per hour.

   This confusion often unfairly results in the umbrella company bearing the brunt of the negative feedback. An umbrella can only work with the rate provided and agreed with the recruiter. Responsible providers make clear to workers, as part of their take on process, that deductions will be applied and in almost all cases will provide a financial illustration to the worker.

   At this time the worker is entirely focussed on working and so tends to be only interested in what they take home.

   Within the Working through an Umbrella document we have tried to address this by providing a comparison showing the uplift required on a 'PAYE' rate for the worker to receive the same value from the assignment.

   This confusion and lack of clarity has resulted in an increasing number of examples where rates are not being fully 'uplifted'.

PRISM feels that where a rate, other than Agency PAYE, is offered a set calculation should be applied to show the worker the equivalent PAYE rate, the benchmarked PAYE rate. Whilst this would not always be exact we believe it would be close enough for the worker to easily compare rates for the same, or similar roles, across the market.

It should be a requirement that all roles have either a PAYE rate or this benchmarked PAYE rate displayed.

2. Market Dynamics

For many workers the most important point when considering a contract is how much they will be paid or, refining it further, how much they will be taking home. This focus on 'take home pay' can encourage some recruitment companies to engage with providers that would not generally be seen as compliant.

Whilst there is legislation in place designed to stop this the lack of enforcement is allowing those companies with an appetite for risk to gain a significant commercial advantage. This clearly illustrates the point that legislation alone will not achieve the orderly market place. A swift and effective enforcement regime is essential in completing the circle.

Recruitment companies will often cite that it is the pressure from end clients to drive rates down that leads them to seek out these types of alternatives. That being the case it would seem logical, and reasonable, to included requirements on end clients to ensure complete end to end supply chain compliance with a requirement for recruiters to confirm the rates being paid to workers and engagement style to the end clients as this plays a key part in assessing end to end supply chain compliance.

3. Assignment Status

The value of an assignment to a worker is more than just the rate, although understanding the rate is a key part. There are 2 other factors that will determine the true value of an assignment:

    1. Whether the worker carrying out the assignment is considered under the Supervision, Direction or Control [SDC] of the client
    2. When operating through a limited company the IR35 status of the assignment.

With recent changes in legislation restricting expenses where the worker is subject to SDC can significantly change the value of an assignment. As an example a worker who is subject to SDC and unable to offset travel expenses is unlikely to accept an assignment a significant distance from their home, unless the rate is so good it makes it worthwhile.

Whereas an assignment that is not subject to SDC allows workers to claim tax relief on their expenses and so changes the financial value of the assignment.

With SDC being such a major influence on the true financial value of an assignment PRISM believes that the SDC status should be stated as part of the assignment offer. This added level of transparency would allow workers to more fully understand what is being offered and the terms of the offer.

The same situation would be true for IR35 as an assignment inside IR35 has less value than one that is outside. We have seen the impact this has had in the roll out to the public sector with many seeking out roles outside IR35 or demanding significant rate increases to compensate. Making the IR35 status transparent allows workers to assess the true financial value of an assignment.

It is worth highlighting that whilst we make the comments on SDC and IR35 PRISM feels that both of these assessments need to be more fully considered as part of a strategic review as they fail to meet the tests of simplicity, compliance and enforcement. In both cases there is also a lack of certainty in the outcomes which, in the case of IR35, results in tax tribunal cases.

Transparency on Rights

PRISM supports the idea of transparency on a worker's rights as illustrated by the Working through an umbrella information sheet.

To simplify the process, we would suggest a series of template documents are produced covering the common engagement models as well as a clear framework of required information where one of the templates is not used.

To achieve this there needs to be a clear common understanding on the definitions of the models, for example an umbrella company. Changes to legislation has meant that some umbrella providers continue to use overarching employment contracts with others reverting to an equivalent of a zero-hour contract where a worker is likely to always be under SDC.

Workers should be provided the relevant template/s for their situation by the recruitment company at point of offer and relate to all the possible options available to that worker.

Once the worker has selected their operating structure, eg. PAYE, umbrella or limited company the payment intermediary should be required to provide the relevant key fact sheet covering the details on their rights through the selected structure.

Consideration would need to be made on how this can be applied to the wider marketplace as an accountant setting up a limited company for a contractor may not be

aware of the specific requirements relating to contractors if they do not specialise in these types of workers and are merely obtaining the client by virtue of being an accountant.

Transparency in General

1. Many contractors have previously worked as employees and in some cases have been provided with additional employee benefits such as enhanced pensions, death in service, private healthcare etc. This is particularly true for the higher paid. The cost, and value, of these is rarely appreciated or understood with many just looking at the increase in income that contracting appears to deliver.

   As part of the work on transparency guidance should be given on the true value of a employed salary package and the contract rate required to at least match this. There should be a clarity from Government and government departments that a rate is not just income and the additional monies should be used to replace lost employee benefits.

2. Recruitment companies are in control of the umbrella companies they allow workers to operate through with many seeking to work with independently assessed compliant providers through a preferred supplier listing.

   In many cases recruitment companies will seek a financial reward for this relationship. The rewards originally came about where recruitment companies used self-billing arrangements which saved the umbrella providers time and money in their processes. In these cases the agreed reward was on a business to business basis.

   We are seeing an increasing trend where the levels of rewards being demanded by recruiters are reaching unsustainable levels. There is also an increasing trend for the recruitment consultants to also seek a financial reward from providers for pointing their workers to that particular company.

   Whilst many responsible providers pay these awards through the HMRC tax award scheme, meaning that basic rate tax and NI is paid there remains a requirement for the consultant to declare this income on their tax return and pay any high rate tax liability, we have seen an increase in the numbers of providers prepared to pay significant levels of rewards to consultants outside of the HMRC scheme. Often these providers are offering solutions that may not be generally considered as compliant and use the incentives to gain access to the market.

   PRISM believes that this is an area that needs careful consideration and must be addressed.

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3. Holiday pay has been the subject of much scrutiny and still seems to be an area full of conflicting views and advice.

   Firstly there is the issue of 'accrued' and 'rolled up', accrued being the worker has to claim the holiday pay and rolled up meaning it is automatically paid to workers with each pay run.

   Accrued is legal and rolled up is not although there is now a general acceptance that where the worker expressly requests rolled up, and understands what this means, and the holiday pay is clearly shown on the pay advice there is no financial risk to a company operating in this way.

   We are seeing examples now where accrued is the only option available to workers although there is little transparency on the amount of holiday accrued and available. As part of the work on transparency this area needs to be considered with clear requirements in place on information that should be provided to workers on available accrued holiday. We would suggest that this should be shown as both a monetary value as well as the days available.

   There is further complexity in this area as modern employment contracts will have a 'holiday year'. This has become a health and safety requirement designed to make workers take their holiday for their own well-being and where they fail to take it they lose any unused entitlement at the end of the 'holiday year'.

   The health and safety issue is also cited as one of the reasons why rolled up is an issue as it means the worker may not take the rest and work throughout.

   We are seeing situations where the lack of transparency in this area is allowing companies to keep significant amounts of unpaid holiday pay through their legal contractual obligations. Many are relying on the fact that the terms will be within a long legal contract often not read or understood by the workers.

   PRISM would urge specific requirements on providing the information to workers with complete transparency on the consequences of not taking it.

4. Consideration has to be made where the requirement to issue this statement sits. Many workers will opt out of the Agency Regulations which could result in the measure missing its intended objective.

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2. Extending the remit of the Employment Agency Standards inspectorate to cover umbrella companies and intermediaries in the supply chain

Recommendation: The new Director of Labour Market Enforcement should consider whether the remit of the Employment Agencies Standards [EAS] Inspectorate ought to be extended to cover policing umbrella companies and other intermediaries in the supply chain.

PRISM agrees with this statement with some reservations.

The principle of the EAS policing umbrella companies would appear to be a logical step as they would have complete transparency on providers being used by recruiters based on their work in the recruitment sector. The area of payment intermediaries is complex with the majority of legislation applying to their compliance being under the control of HMRC therefore it is important to consider the extent and scope of their policing.

As we have already highlighted an important first step would be to create a universally understood definition of an umbrella.

You will see from our Working through an umbrella company fact sheet that complaint umbrella companies are unable to engage with workers below a rate of around £9.50, subject to their charges, and meet all their obligations including holiday pay, NMW and auto enrolment. The lowest paid workers are generally being engaged through the EDM structure and not umbrella companies.

You are correct in your statement on the benefits of continuity of employment for workers using an umbrella company and also in your statement that this is subject to whether the recruitment company will allow the worker to work through the company. The issue of commissions to consultants is playing a key role in this and we are seeing an increase in workers being moved from one provider to another as the consultant receives a financial incentive for this.

We have also seen an overall reduction in the number of recruitment companies that offer the workers an agency PAYE option as they prefer to use third party providers and are often making financial arrangements with these providers. This turns an area of expense to the company, when running their own PAYE, in to a highly profitable arrangement.

There is no reliable data on the numbers of umbrella companies but there has certainly been a spike as a direct result of the off-payroll in the public-sector rules.

You reference recent media comments which we would consider, in the majority of cases, to be inaccurate and misleading. These uninformed comments are supported by a lack of

understanding and transparency in the market as well as no clear definition or understanding of an umbrella arrangement. Many reference umbrella companies although seem to go on and describe arrangements that the informed would not consider to be an umbrella, let alone a compliant umbrella. This further illustrates the need for a recognised definition of an umbrella company.

Work needs to be carried out ensuring consistency of advice in key areas. HMRC, BEIS and EAS has an important role in ensuring that the information, guidance and understanding of the rules is aligned and accurate. This currently is not the case and results in confusion and variations that not only confuse workers but recruiters and end clients seeking to ensure they deal with compliant providers. An example of this is relates to the Taxation of employee expenses, specifically relating to the situation where a worker passes their permanent place of work when travelling to a temporary workplace.

HMRC guidance contained within 490 was in direct conflict with the guidance in The Employment Income Manual.

490 stated: *Passing work on the way to somewhere else*
3.48
An employee may pass a permanent workplace on the way to or from a temporary workplace. If the employee stops and performs substantive duties at the permanent workplace then there are 2 journeys – ordinary commuting between home and the permanent workplace and a business journey between the permanent workplace and the temporary workplace. Tax relief will be available for the cost of the second of these journeys – but not the first.

3.49
Where the employee does not stop at the permanent workplace, or any stop is incidental to the business journey, all of the journey is business travel.

Example
Darren drives each day between his home in Southampton and his office in Winchester. One day he has to travel on business to Birmingham and back. He drives directly from home to Birmingham but stops off at his office to pick up some papers. His stop is incidental to his business journey. His business journey is from his home in Southampton to Birmingham and back. Tax relief is available for the cost of his journey from his home to Birmingham and back.

Example
Andrew drives each day between his home in Gloucester and his office in Bristol. One day he is required to attend a training event in Bath. Rather than travelling directly to Bath from his home he has to stop off at his office in Bristol to take part in a telephone conference about a project he has been working on. After the telephone conference has finished he drives to the training event in Bath. As Andrew has stopped off at his workplace to carry out substantive duties on the way to the training event in Bath the first part of his journey between home and Bristol is ordinary commuting. Tax relief is available for the cost of his journey from Bristol to Bath, and from Bath back to his home address as this is travel to a temporary workplace.

Whereas the guidance in The Employment Income Manual stated:
This is intended as a common sense rule that applies where the journey between home and a temporary workplace is broadly the same as the employee's ordinary commuting journey. In particular, it will deny relief where employees or employers seek to turn an ordinary commuting journey into a business journey to try to get a tax deduction.

Applying this rule will depend on the facts of the particular case and some common cases are illustrated by the examples beginning with example EIM32301. However, you should not try to argue that a journey to or from a temporary workplace is substantially ordinary commuting where the extra distance involved is 10 miles or more each way, see example EIM32306.

A journey to a temporary workplace that takes the employee in a completely different direction to his or her ordinary commuting journey is not substantially ordinary commuting even if the distance is the same. Conversely, a journey that is made in broadly the same direction and is substantially the same length as the ordinary commuting journey is substantially ordinary commuting even if the employee takes a different route. The effect of this rule is illustrated by the examples beginning with example EIM32307.

Example
A health and safety inspector lives in Leicester and is employed in an office in Nottingham. His office is 500 yards from a bean processing plant that he has to inspect. He travels direct from home to the plant.

Although the plant is a temporary workplace his journey to the plant is substantially the same as his ordinary commuting journey. Therefore his travel is treated as ordinary commuting and the cost is not deductible.

Example
An employee is a production manager. He normally drives to a permanent workplace 18 miles from his home. One day he has to visit a client to discuss in detail the specifications for a new product. The client's office is 3 miles along his ordinary commuting route. After he has seen the client he drives the remaining 15 miles along his ordinary commuting route to his permanent workplace.

The client's office is a temporary workplace. The journey to that workplace is on the same route as the employee's ordinary commuting journey but it is much shorter. So it is not substantially ordinary commuting, see EIM32300. The employee is entitled to mileage allowance relief, see EIM31626.

This lack of clarity causes confusing and distortions in the market.

We are aware that this was raised directly with HMRC and has now been addressed however it still serves to illustrate the point. If this had not be drawn to HMRC's attention how much longer would the conflicting advice remain?

Over recent years the understanding of operational processes and procedures within the payment intermediaries market has been improved. A number of organisations are attempting to align standards in these procedures to support a commonly agreed principle of compliance.

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To support and develop this a clear communication strategy and engagement with these organisations should be undertaken.

Compliant processes and procedures should be transparent and openly communicated to assist in creating a level playing field and marginalise those seeking to circumvent the rules. A key aspect of this would be direct engagement and communication with those organisations where there are changes in legislation that would affect the market or enforcements interpretation of the rules changes. This would ensure continued alignment for complaint processes with required changes being adopted in a timely manner.

Extending the powers also seems logical as enforcement of the recruitment companies provides complete transparency of the upper and lower contractual chain in the supply chain. This is likely to highlight any discrepancies within the arrangements.

The key issue in extending the powers is knowledge. The complexity of the arrangements and breadth of legislation that applies means that detailed expert knowledge is required by those carrying out the enforcement. The EAS enforcement could provide an initial assessment with a focus on areas such as AWR, NMW and Holiday pay. Any failings in these areas should result in a more widespread enquiry with additional expert resources being brought in as required.

Many compliant organisations that are suffering commercially due to the lack, and speed, of enforcement would welcome a clear whistle blower policy. We have seen many examples where non-compliant and abusive arrangements have been reported only to find that years later the operations continue, seemingly without challenge.

The compliant market is a great advocate in the levelling of the playing field and will be prepared to provide valuable information to assist in ongoing enforcement. If a stronger whistle blower process was adopted this would allow targeted enforcement although consideration still needs to be made on speed and visibility of the enforcement. The current processes coupled with a lack of speed and visibility has lost the enthusiasm of the market and this needs to be rebuilt.

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3. Pay Between Assignments

Recommendation: The government should repeal the legislation that allows agency workers to opt out of equal pay entitlements [the 'Swedish Derogation'].

In addition the government should consider extending the remit of the EAS inspectorate to include compliance with the Agency Workers Regulations [which would include enforcement of the Swedish Derogation, if not repealed].

PRISM agrees with this statement with some reservations.

In our experience the use of the Swedish Derogation contract is very limited in the market with almost all contracts being issued as matched pay within the terms of the regulations. Having said that we have seen genuine isolated examples where the Swedish Derogation contract was entirely appropriate as the pay arrangements at the end client, particularly regarding bonus', meant that it was not possible to accurately assess the comparable pay. These exceptions would need to be considered if the legislation was repealed.

Volume use of the Swedish Derogation contract seems to have emerged at the lower end of the market and we would question whether these arrangements are in fact being operated correctly. A combination of the measures outlined in this response could help address this including:

- EAS taking the responsibility of enforcement of the regulations
- Clear statements of rights to workers
- Clear communications on the accepted compliance processes
- Clear Whistle Blower processes

Effective, swift and visible enforcement is critical. We believe that having a stronger proactive approach to enforcement would address many of the emerging bad practices.