



## **GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES**

**A written response to the Business, Energy and Industrial Strategy Committee's consultation on  
agency worker recommendations**

**By Taylor Vinters LLP**

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#### **About Taylor Vinters LLP**

Taylor Vinters is an international law firm supporting the businesses which drive the innovation economy, and the entrepreneurs and private wealth that underpin them. Our practice is global, operating from innovation clusters in the UK and Asia. Our employment law practice operates globally, with clients ranging from major US conglomerates to multi-national organisations with workforces spanning multiple jurisdictions.

Taylor Vinters is best known for its work helping entrepreneurial clients make great things happen, whatever their size and sector. Our clients range from Fortune 500 technology multinationals through fast growth venture backed businesses and owner managed businesses, to individuals driven by great ideas.

Launched in January 2018, The Taylor Vinters Zebra Project is bringing business leaders and experts together to navigate one of the biggest challenges facing us in the future: the world of work. The first programme of its kind to be launched by a law firm in the UK, The Zebra Project supports Taylor Vinters' long-term vision of becoming a leading advisor to innovative and entrepreneurially-minded businesses and people.

## **Background to our consultation response**

- In preparing this response, we have focussed on answering those questions where we feel we can genuinely add insight. As a law firm primarily acting for “employer” clients, we may have less direct experience of issues faced by Work Seekers than others responding to this consultation. We have therefore deliberately qualified our answers to certain questions that require us to draw directly on the experience of Work Seekers or present related evidence.
- Capitalised terms used in this response are as those terms are defined at page 22 of the Department for Business, Energy and Industrial Strategy: Consultation on agency workers recommendations document dated February 2018 (the “**Consultation Document**”).
- Should the reader require any further detail about matters covered by our response, the contributors would be very happy to have such a discussion. Please contact Rachel Ashwood on [rachel.ashwood@taylorvinters.com](mailto:rachel.ashwood@taylorvinters.com) who will be able to assist.

**TAYLOR VINTERS LLP**

**9 May 2018**

## **Section 1: Improving the transparency of information provided to Work Seekers**

### **Consultation Questions**

**1. To what extent would you agree that a 'key facts' page would support Work Seekers in making decisions about work?**

We agree strongly that a 'key facts' page would support Work Seekers in making decisions about work.

We consider that a 'key facts' page would help to remove ambiguity and uncertainty for Work Seekers when determining whether to accept a particular work opportunity. This would be the case, regardless of whether the opportunity was being proposed directly by an Employment Business or whether the Work Seeker would carry out the work via an Umbrella Company or other Intermediary.

If a Work Seeker were to be presented with an appropriately worded and presented 'key facts' page at the outset of any discussions regarding a job offer, they would be properly informed about the terms on which the role was being proposed and in the best possible position to decide whether to decide if the opportunity is appropriate for them.

We acknowledge that in some sectors, the Work Seeker would have limited ability (if any) to negotiate the terms as set out in the 'key facts' document. However, provided the 'key facts' page is drafted in such a way that makes it as meaningful as possible for the Work Seekers (to include but not necessarily be limited to using concise language and the absence of small print), then in our opinion, it could play a key role in promoting transparency.

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

We consider that the following information should be included in the 'key facts' page. The items marked with an asterisk are those we consider to be the most important to draw to the attention of Work Seekers:

- How the Work Seeker will be engaged (employment status); \*
- Who will be responsible for the employment of the Work Seeker; \*
- If the Work Seeker has an issue or "grievance" in relation to a role that they need to resolve (either during or after the role has ended), who any issue or "grievance" should be raised with;
- Who will be responsible for paying the Work Seeker; \*
- The gross amount that the Work Seeker will be paid; \*

- Any fees, costs or charges which will be deducted from a Work Seeker's gross pay. This will include but is not necessarily limited to any fees payable to an Umbrella Company or Intermediary (where appropriate), all relevant PAYE deductions and National Insurance contributions, Apprenticeship Levy contributions; and auto-enrolment pension contributions. All deductions should be clearly itemised; \*
- What additional benefits (if any) the Work Seeker is entitled to e.g. access to a benefit in kind scheme, childcare vouchers, group insurance policies etc.;
- Details of annual leave entitlement; and
- Details of how to report any concerns to the Employment Agency Standards (EAS) Inspectorate.

**2(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?**

We believe that the 'key facts' page should be a standalone document which is provided to a Work Seeker prior to the start of any relevant engagement. The existence of the document should be made clear to the Work Seeker by the Employment Business or other third party that issues the document.

The language used in the 'key facts' page should be simple and concise, to facilitate a Work Seeker's understanding of the key terms and to enable them to identify any breaches of those terms, should they arise.

In addition, we believe that efforts should be made to educate Work Seekers about their right to receive a 'key facts' page, through appropriate publicity campaigns or media coverage. At a relatively basic level, if Work Seekers are cognisant of the requirement to provide this document, they will feel more confident in asking for a 'key facts' page if one is not provided from the outset. Should it then transpire that a 'key facts' page is unavailable, the Work Seeker would have the basic information/knowledge they need to report the body responsible for providing the key page document to the EAS Inspectorate.

Hirers should also play a part in ensuring that Employment Businesses that they engage with produce compliant 'key facts' pages. Should the Hirer become aware that an Employment Business is in breach of this requirement, then we propose that there should be an obligation on the Hirer to issue a notice requiring the Employment Business to remedy the situation within a set period of time. Should the Employment Business fail to comply (after having been served with the Hirer's notice), then the Hirer would face penalties if it continued to source workers via that Employment Business. Alternatively, it could be a condition of any temporary work

assignment, that the Employment Business provides a copy of the 'key facts' document (or evidence that it has been issued) to the Hirer, before the assignment commences. Appropriate penalties could then be imposed upon the Hirer, if it cannot evidence that the document/evidence was obtained and the assignment commenced irrespective of this. Such penalties would be in addition to any consequences faced by the Employment Business for its non-compliance.

**3. Should an Employment Business be required to ensure that the Work Seeker understands fully the information being given to them?**

It would be extremely difficult for any issuer of the 'key facts' page to actually ensure that a Work Seeker has fully understood the information which has been provided to them. Imposing such a requirement on an Employment Business would be unfair (and involve disproportionate effort), in our opinion. For example, it may be onerous to expect Employment Businesses to provide Work Seekers with, for example, translations of the 'key facts' page into other languages.

Instead, we suggest that an Employment Business' duty should be deemed to have been discharged once it has provided the Work Seeker with an adequate 'key facts' page. As stated above, an adequate document will be one that is concise and meaningful. We acknowledge that this involves a degree of judgement and some subjectivity. It should, however, include making alternative formats of the document available on request to Work Seekers (this may also be considered to be a reasonable adjustment for disabled workers under the Equality Act 2010) and the availability of alternative formats should be made clear within the 'key facts' page itself.

**4. Do you feel an hour is an accurate estimate of the time it would take to produce an information document for a Work Seeker?**

In our opinion, provided that each Employment Business had an approved template document in which to insert the relevant key facts, then tailoring this for each Work Seeker's assignment could feasibly be done in less than one hour. Without this template, the work could take significantly more time.

**Section 2: Extending the remit of the Employment Agency Standards inspectorate to cover Umbrella Companies and Intermediaries in the supply chain.**

**Consultation questions**

- 5. Have you used or are you currently using an Umbrella/Intermediary? If so, for what reason? For example, as a Work Seeker or Employment Business for payroll purposes? What has your experience been?**

No. This question is not applicable to us.

- 6. Do you know of any examples of the benefits and/or problems for agency workers of using an Umbrella Company or Intermediary?**

As a law firm that primarily advises employers, we only have limited direct experience of the problems and benefits faced by workers that are engaged by an Umbrella Company. However, as lawyers who take an active interest in this area, we are aware of the common issues (both good and bad) faced by agency workers providing labour using such an arrangement.

We consider that the two key problems faced by those working for through Umbrella Companies are set out below:

- (i) Lack of transparency in the quoted rate that workers believe they will receive for a role.**

We are aware of situations where certain Employment Businesses have over-inflated the rate that Work Seekers will actually receive if they accept the opportunity in question. Such inflated claims generally arise where the Employment Business fails to inform the Work Seeker about all relevant deductions that will be made to the amount that the Employment Business transfers to the Umbrella Company.

This situation can be compounded by false claims by Umbrella Companies themselves, that the Work Seeker's pay will be subject to fewer deductions than is actually the case (or as required by law).

As a result of the lack of clarity in terms of what categories of deductions will be made from earnings, and at what rate those deductions will be made, many Work Seekers are left confused by what they should lawfully (or will actually) be receiving.

- (ii) **Work Seekers being pushed into working through an Umbrella Company, rather than having a genuine choice as to whether they are subject to PAYE deductions by the agency, or indeed provide their services in another way.**

It appears to be increasingly common across industry sectors for Work Seekers that secure work through an Employment Business, to be required to sign up to working through an Umbrella Company as a condition of the role. We are also aware that certain Employment Businesses are not giving the Work Seeker a choice of which Umbrella Company to use. In respect of this latter issue, the Employment Business's choice of Umbrella Company ultimately determines how fairly a Work Seeker is treated. Whilst there are clearly compliant and reputable Umbrella Companies (and this response does not seek to stop such models from operating), we consider that more can be done to address potentially unscrupulous practices.

**7. Should the extension of the remit of the Employment Agency Standards Inspectorate to cover the regulation of certain activities of Umbrella Companies and Intermediaries in the supply of Work Seekers to a Hirer:**

- (i) **be limited to the regulation of the key facts page and provision of information relating to those facts as part of a work offer by the Hirer or employer:**
- (ii) **be aligned to the regulation of the types of employment rights already regulated by EAS under the current legislative framework such as non-payment of wages, deductions from wages which the Work Seeker has not agreed to, and failure to provide written terms and conditions before the assignment starts?**

We firmly support the proposal that the EAS should regulate certain activities of Umbrella Companies. In light of the prevalence of this business model (which shows no immediate sign of abating) and the reported injustices faced by individuals that have experienced working through an Umbrella Company, we welcome the increased policing of this sector.

In our opinion, the starting remit of the EAS should be limited to regulating the provision of concise and meaningful 'key facts' pages to Work Seekers. We consider that the policing of these statements by the EAS could realistically start to make the current "less scrupulous" Umbrella Companies re-think the way that they are currently doing business and/or in the longer term, start to expose and penalise any Umbrella Companies that fail to comply. Policing of this aspect alone could potentially help raise standards amongst Umbrella Companies and ensure that compliant companies can continue to offer a good service to their clients on a level playing field.



We do not support extending the EAS's scope (beyond providing the 'key facts' page) in the first instance, although this should be kept under review. In the meantime though, and in consideration of the likely bandwidth of the EAS, we have considered what other ways could be introduced to help raise the standards and perceptions of Umbrella Companies generally. As part of this exercise, we have found a set of voluntary guidelines that have been drafted by "All Umbrella Companies are Equal (AUCAE)" (the "Guidelines"):

<https://www.allumbrellacompaniesareequal.com/industry-guidelines.html>

The Guidelines are an entirely voluntary "charter", which

*"aim to provide guidance to Umbrella Companies to create a level playing field and standardise industry practices, and support to contractors and agencies who choose to work with an Umbrella Company."*

We are not aware how many Umbrella Companies have signed up to the Guidelines. However, this less formal approach to raising standards appears, in our opinion, to sit more comfortably in a sector where flexibility of labour is one of the key drivers. Put simply, we are concerned that imposing more regulation could hinder this flexibility.

**7(a).What do you think the impact of ensuring that Umbrella Companies provide Work Seekers with a key facts page would be on:**

**(i) The Work Seeker;**

The first problem that we identified for Work Seekers who provide services through Umbrella Companies was a lack of transparency of terms (particularly financial terms). Therefore, we would fully support the introduction of this 'key facts' document, which we believe would have a significantly positive impact on Work Seekers. Provided that it was concise and drafted in an "easy to understand" format (and the format was "tested" in advance of it becoming introduced), then it should provide an invaluable source of information for the Work Seeker to help them understand the basis upon which they are providing their labour.

**(ii) The recruitment sector**

Although there will be some increased administration involved for those employers in the recruitment sector who are required to provide 'key facts' pages, the Consultation Document rightly identifies that this can be mitigated by the Government producing a standard form template. Therefore, overall we do not view this as having a significant impact on the recruitment sector.

### **Section 3: Pay between Assignments**

#### **Consultation Questions**

**8. Have you used or are you currently using a pay between assignments (PBA) contract?**

No. This question is not applicable to us.

**9. In your experience, what are the benefits and any problems associated with working on a PBA contract basis?**

We have limited direct experience of this issue. However, our understanding of the issue is that when the practice is used properly, it gives Work Seekers a degree of comfort that they will continue to receive a form of income when they are between assignments. However, we acknowledge that there is potential for this practice to become open to abuse by Employment Businesses as it allows them to keep the individuals on agency contracts for a potentially indefinite period, without the entitlement to receive the same basic pay and conditions as comparable employees who are employed directly by the hirer. We are aware (primarily from seeking the input of other professional advisers) that this loophole has been exploited by Employment Businesses, to the detriment of Work Seekers.

**10. In your experience, how effective do you think pay between assignments contracts are in supporting workers and Work Seekers when they are not working?**

We have limited direct experience of this issue. However, we recognise that the current system is potentially open to abuse. For example, Employment Businesses may invent jobs between assignments or ask the individual to come into the agency for an hour when they are not working. Both tactics could be used to avoid paying the individual between assignments. This means that some individuals are being exploited between assignments, because they are not aware that these practices affect their ability to be paid whilst not working. It goes against the principle of trying to support Work Seekers between assignments and significantly limits the support that is supposed to be provided by pay between assignments. Therefore, some intervention is required to avoid exploitation of vulnerable workers, although this must be balanced carefully against the need to maintain as much flexibility as possible in the labour market

**11. Do you have evidence that there are wider issues (beyond equal pay) with PBA contracts, for example agency workers not being able to access to facilities, rest break, annual leave or job vacancies?**

We do not have sufficient evidence to respond to this question.

**11(a). Do you believe that that the above issues would justify wider state enforcement?**

We do not have sufficient evidence to respond to this question.

**12. To what extent do you agree that enforcement of the Agency Worker Regulations 2010 should come within the remit of the Employment Agency Standards Inspectorate?**

We believe that the enforcement of the Agency Worker Regulations 2010 should fall under the EAS Inspectorate and query why this has not previously been considered given that part of its remit is to:

*"ensure effective enforcement of and compliance with the law on employment agencies and businesses"<sup>1</sup>*

If the Agency Worker Regulations 2010 did fall under the remit of EAS, then we believe this would be helpful in ensuring that pay between assignments is not used as a loophole for agency workers to be paid less than comparable employees who are employed directly by the hirer.

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<sup>1</sup> Department for Business, Energy & Industrial Strategy, Employment Agency Standards (EAS) Inspectorate, Annual Report 2016 – 2017 (November 2017).

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