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| ID | 68 |
| Type | CS |
| Name | Association of Professional Staffing Companies (Global) Ltd |
| Email | |
| Respondent type | Representing employers' or employees'/workers' interests |
| Which best describes you? - Other respondent type | |
| Representative type | Trade Association |
| Other representative type | |
| Organisation type | |
| Publication consent | Yes |
| Response contact consent | Yes |
| Where did you hear of this consultation? | Email from BEIS |
| Other (please specify) | |
| Do you think workers typically receive pay during periods of annual leave or when they are off sick? | Yes |

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| Please give reasons | Our members' contractors are generally professionals in STEM sectors, professional services, social workers or teachers. They supply their services either through their own personal service companies (PSC), employed by an umbrella company or engaged as a PAYE worker via the recruitment business.<br>The holiday and sick pay of PSC workers is administered by their company.<br>As regards umbrella employed workers and PAYE agency workers our members consider that their statutory sick pay entitlements are correctly administered. We at APSCo do receive occasional enquires around issues such as eligibility for statutory sick pay particularly when a worker undertakes a number of short term contracts.<br>Holiday pay is more complex. An amount intended to cover worker holiday pay forms part of the client rate, usually calculated on an hourly or daily basis. Therefore, the recruitment company (and subsequently an umbrella company in the supply chain) receives a sum to cover the worker's holiday pay ahead of the worker taking the holiday. It is recognised that the practice of paying rolled up holiday pay is unlawful given European Court decisions. Recruitment companies which account for paid holiday on top of worker's pay rate do not literally roll the paid holiday amount up into the pay rate so that one is indistinguishable from the other. Instead the practice is to ensure that the holiday pay amount is separately accounted for and marked on the payslip so that it can be clearly distinguished from the agreed pay rate. Generally speaking when this method is used the recruiter concerned is careful not to use the term 'rolled-up' because it is misleading and does not represent what is actually happening. Paying holiday pay together with the pay rate is often considered a preferable method by the temporary workforce, because they prefer receiving the funds in advance to mitigate the risk of non-payment and the reality is that the temporary work market can move faster than anticipated and not always with the full knowledge of the supplying recruiter. It may be the case, therefore, that a temporary worker leaves an assignment before the recruiter is informed by the client that the assignment is |

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| | terminated. If the recruiter or umbrella company has been accruing holiday pay but has not paid it out to the temporary worker because they have not taken holiday during the assignment, they may then have an amount on account for that temporary worker. However, if they have not been informed that the assignment has ended at the point of paying the temporary worker for the last week worked, it may then be some time before all the dots are joined and the worker's untaken paid holiday is calculated. By this time the temporary worker may have changed address or other contact details (which is a common occurrence). It then becomes difficult and administratively onerous to trace them. For all the reasons stated above it is often preferable to pay the temporary workers on account of their paid holiday entitlement on an ongoing basis and to manage the time worked so that, in the event the worker is engaged in a long term assignment, they do not work a full year without taking any holiday.<br><br>Our members believe that generally workers are given the choice as to whether to be paid holiday pay together with and on top of the pay rate or accrue their holiday pay in a "holiday pot" to be paid when holiday is taken. The holiday pay to our members' knowledge is itemised separately on umbrella company payslips.<br>We do hear, through our legal helpdesk, from members that practices can vary across the umbrella industry. For example, we hear instances of companies retaining holiday pay accrued if holiday is not taken during a leave year . Although this type of contractual clause is standard in employment contracts, it does not feel appropriate if the umbrella company has already received a sum to cover the worker's holiday pay. Further we have heard of companies retaining holiday pay at the end of a contract, unless specifically requested by the worker. However, this may be for practical reasons such as being unable to trace the worker.<br>Generally the amount paid is not an issue as it is calculated on the basis of every hour worked. Our members understand that the purpose of the WTR is to ensure that workers take annual |

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| | leave, rather than to oversee payment of holiday pay. Our members do recognise that umbrella employed workers and agency workers must be encouraged to take their annual leave entitlement during the leave year. |
| Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers? | Yes |

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| Please give reasons | Our members' contractors are generally professionals in STEM sectors, professional services, social workers or teachers. They supply their services either through their own personal service companies (PSC), employed by an umbrella company or engaged as a PAYE worker via the recruitment business.<br>The holiday and sick pay of PSC workers is administered by their company.<br>As regards umbrella employed workers and PAYE agency workers our members consider that their statutory sick pay entitlements are correctly administered. We at APSCo do receive occasional enquires around issues such as eligibility for statutory sick pay particularly when a worker undertakes a number of short term contracts.<br>Holiday pay is more complex. An amount intended to cover worker holiday pay forms part of the client rate, usually calculated on an hourly or daily basis. Therefore, the recruitment company (and subsequently an umbrella company in the supply chain) receives a sum to cover the worker's holiday pay ahead of the worker taking the holiday. It is recognised that the practice of paying rolled up holiday pay is unlawful given European Court decisions. Recruitment companies which account for paid holiday on top of worker's pay rate do not literally roll the paid holiday amount up into the pay rate so that one is indistinguishable from the other. Instead the practice is to ensure that the holiday pay amount is separately accounted for and marked on the payslip so that it can be clearly distinguished from the agreed pay rate. Generally speaking when this method is used the recruiter concerned is careful not to use the term 'rolled-up' because it is misleading and does not represent what is actually happening. Paying holiday pay together with the pay rate is often considered a preferable method by the temporary workforce, because they prefer receiving the funds in advance to mitigate the risk of non-payment and the reality is that the temporary work market can move faster than anticipated and not always with the full knowledge of the supplying recruiter. It may be the case, therefore, that a temporary worker leaves an assignment before the recruiter is informed by the client that the assignment is |

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| | leave, rather than to oversee payment of holiday pay. Our members do recognise that umbrella employed workers and agency workers must be encouraged to take their annual leave entitlement during the leave year. |
| What barriers do you think are faced by individuals seeking to ensure they receive these payments? | Lack of clarity and transparency are barriers. Payslips, particularly in the umbrella company market, are complex due to the way a worker's pay may be differentiated between NMW entitlement and additional taxed payments due.<br>Independent advisors such as ACAS do not have a detailed understanding of the umbrella market and currently the umbrella company sector is self regulated and not within the remit of EAS or any other body.<br>APSCo respond to the infrequent complaints made against its affiliate umbrella company members (approximately two per year) and there are other membership organisations such as the FCSA which audit their members to ensure proper and transparent practices are in place. However, our preference is for the employer to have an adequate in house dispute resolution process and upfront guidance on what workers should expect to see on their payslip. |
| What would be the advantages and disadvantages for businesses of state enforcement in these areas? | |
| What would be the advantages and disadvantages for businesses of state enforcement in these areas? | There are no obvious advantages to our members if HMRC or any other state body take responsibility for enforcing the basic set of core pay rights – extending beyond NMW to include sick pay and holiday pay. Given the limited resources of HMRC our members view HMRC's remit should only be extended to cover the lower paid, potentially vulnerable workers and that proportionality should be applied. HMRC should target businesses with higher levels of non-compliance, rather than all instances of often accidental non- compliance, as per the current NMW remit. Our members do consider that given the uncertainty over application of case law on holiday pay then it is not an area suitable for HMRC enforcement. |

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| What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state? | Suggestions covered in other consultations on clearer payslips (i.e. prescribed items in a prescribed clear format) and statements of rights at the commencement of engagements will assist workers in their understanding. Government financing of advertisements and targeted public information campaigns can be effective in raising understanding of what is available to the worker e.g. the HMRC statutory payment dispute team. *In another sphere, the ICO campaign on GDPR has been effective. The very serious potential fines raised awareness and fear in the business community. However, the ICO have combined publicity, clear, sensible, communications through multiple media routes and targeted enforcement in the courts to educate and inform individuals and businesses. |
| Do you agree there is a need to simplify the process for enforcement of employment tribunals? | Yes |
| Please give reasons | Enforcement is currently as complex, if not more complex than the initial application to the Employment Tribunal. The options available to the judgment creditor are very draconian e.g. freezing the debtor's bank accounts or physically seizing goods, meaning a court will consider the facts carefully before making the order. The Fast Track system introduced in 2010 operated by Registry Trust Ltd seems to offer the simplicity required at a cost of £66. This is fairly low, although may still be too high for those on low incomes. Plus, there may be additional costs involved as the enforcement proceeds.<br>If a scheme such as this is coordinated with the BEIS penalty notice process then it would seem to offer a more rounded solution. Considering this from a high level perspective, the Government is running or piloting a number of initiatives including the HMCTS enforcement reform project which would, if a joined up approach is adopted, seem to provide many of the answers to questions posed in this Consultation. |

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| The HMCTS enforcement reform project will improve user accessibility and support by introducing a digital point of entry for users interested in starting enforcement proceedings. How best do you think HMCTS can do this and is there anything further we can do to improve users' accessibility and provide support to users? | The HMCTS reform project applies across the court system. Piloting the enforcement of employment tribunal awards in the HMCTS enforcement reform project will assist with providing accessibility and support to all users. Employment Tribunal claimants are a pool of individuals that are more likely to be unrepresented by lawyers, have little pre-existing legal knowledge and less able to access or competently use digital systems. By focusing development on the needs of this group then you are likely to improve accessibility and support. |
| The HMCTS enforcement reform project will simplify and digitise requests for enforcement through the introduction of a simplified digital system. How do you think HMCTS can simplify the enforcement process further for users? | |
| The HMCTS enforcement reform project will streamline enforcement action by digitising and automating processes where appropriate. What parts of the civil enforcement process do you think would benefit from automation and what processes do you feel should remain as they currently are? | |
| Do you think HMCTS should make the enforcement of employment tribunals swifter by defaulting all judgments to the High Court for enforcement or should the option for each user to select High Court or County Court enforcement remain? | Ultimately the system needs to be cost effective, cheap to access and workable – can this be delivered better through the High Court or County Court system? Most enforcement of worker rights claims are for low amounts. |
| Do you have any further views on how the enforcement process can be simplified to make it more effective for users? | In respect of enforcing Employment Tribunal decisions, one member offered a suggestion in relation to NMW shortfalls, statutory sick pay and holiday pay Employment Tribunal awards whereby HMRC works with other agencies such as the Employment Tribunal, Tax Tribunal and BEIS on enforcement. Collection of the shortfall could be made from the defaulting employer through PAYE real time system and the allocation made to the employee taxpayer's account as a credit. The taxpayer could request repayment or set against a tax liability. Naturally an appropriate right of appeal process would be required. However, it could be a benefit of the "Making Tax Digital" programme. |
| When do you think it is most appropriate to name an employer for non-payment (issued with a penalty notice / issued with a warning notice/ unpaid penalty/ other)? | Issued with a penalty notice |

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| Please give reasons | Our members concluded at point of issue of a penalty notice subject to the representations not to be named as listed on page 17 of the consultation. They take the view the £200 lower limit for naming is too low, although the amount should be determined by the outcome of an analysis of average/mean/median non-payment amounts. |
| What other, if any, representations should be accepted for employers to not be named | Presumably if the judgment is pending appeal to the EAT then the naming process will not be applicable. |
| What other ways do you think government could incentivise prompt payment of employment tribunal awards? | |
| Do you think that the power to impose a financial penalty for aggravated breach could be used more effectively if the legislation set out what types of breaches of employment law would be considered as an aggravated breach? | No |
| Please give reasons | Greater guidance is needed for the judiciary potentially to assess the criteria to determine whether breach of any employment right amounts to an aggravated breach. There will always be a balancing act. General guidance for employers could be issued on t |
| Is what constitutes aggravated breach best left to judicial discretion or should we make changes to the circumstances that these powers can be applied? | Yes |
| Please give reasons | Best left to judicial discretion. |
| Can you provide any categories that you think should be included as examples of aggravated breach? | |
| When considering the grounds for a second offence breach of employment status who should be responsible for providing evidence (or absence) of a first offence? | Our members take the view that employers should be responsible for providing evidence or absence of a first offence as they are the party with access to the evidence. However, there must be a mechanism to limit vexatious claims brought by employees. |

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| What factors should be considered in determining whether a subsequent claim is a 'second offence'? e.g. time period between claim and previous judgment, type of claim (different or the same), different claimants or same claimants, size of workforce etc. | Our members are potentially at risk of breaching employment status legislation given that they supply high numbers of personal service company contractors, agency workers and umbrella workers on short term service contracts to clients, where they are generally working alongside the clients' employed workforces.<br>It may be easier to base the offence on number of employment status decisions across a group of companies over a period of time e.g. 6 months or 12 months either as evidence of widespread non-compliance across all roles or as repeated non-compliance in identical or similar roles. There could be warnings issued during the "qualifying period" to seek to change behaviour without the need for the offence breach decision. |
| How should a subsequent claim be deemed a "second offence"? e.g. broadly comparable facts, same or materially same working arrangements, other etc. | Our members have real concerns around the phrase "broadly comparable facts", which is subjective and to our knowledge has no established legal meaning, generally interpreted as "similar characteristics". Unless it is a very straightforward case of ident |
| Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance?<br>a. Aggravated breach penalty<br>b. Costs order<br>c. Uplift in compensation | Aggravated breach penalty |
| Please give reasons | Our members concluded that a properly applied aggravated breach order process, using mechanisms already in place together with costs order are the more effective mechanisms already in force. Naming and shaming is useful if used judiciously as there is re |
| Are there any alternative powers that could be used to achieve the aim of taking action against repeated non-compliance? | One option may be removal of a licence if an employer works in a licenced activity e.g. GLAA and is a serious repeat offender.<br>Fundamentally our members fear that well run and managed businesses may be caught up in administration and legislation simply |