The Law Society

www.lawsociety.org.uk

Better employment law for better work:

HOW TO ACHIEVE THE BEST WORKING PRACTICES IN THE MODERN WORKPLACE

Welcome

Contents

Executive summary and recommendations

1. A key factor in creating a high value and high skilled economy is to have a solid employment law framework[1]. To achieve this three conditions must be present:
   - A good understanding of employment rights,
   - A strong enforcement system, and
   - Better use of information.
2. Now is the time for government and public policy makers to build upon the current employment law framework so it is in tune with the evolving economy. In this report we make 11 recommendations, to ensure employment rights work for all.
3. It is important that employment law evolves so that it remains relevant to modern working practices, but it is essential that employment law can always be enforced. If workers cannot access the rights Parliament has given them then it is questionable whether these rights truly exist[2]. The evidence shows that many exploited employees feel unable to use their current rights[3]. We are calling on the government to review the current framework and introduce a system that ensures employment rights work for all.
4. Bad employment practices do not only harm those on a low-income. Responsible businesses which follow the law are put at a competitive disadvantage if unscrupulous employers cannot be brought to account for undercutting employee rights.

1 "Good Work is shaped by working practices that benefit employees through good reward schemes and terms and conditions, having a secure position, better training and development, good communication and ways of working that support task discretion and involve employees in securing business improvements."
The Commission on Good Work - http://www.theworkfoundation.com/wp-content/uploads/2016/10/The-Commission-on-Good-Work.pdf

2 https://medium.com/@nick.denys/employment-rights-only-exist-if-theyre-enforced-1848602ec9bc

3 A recent review of Adult Social Care, the National Audit Office found that up to 220,000 care workers in England were paid below the NMW. Her Majesty's Revenue and Customs (HMRC) found that 50 % of care sector providers paid less than the NMW. Despite this evidence, since then only six care providers have been identified and back pay provided to only 202 workers

Summary of recommendations

Create a better understanding of employment rights:

- need to reform how employment status is defined (Page 7)
- all individuals should receive a written statement clarifying their employment status and who their employer is (Page 8)
- a comprehensive review of employment legislation should be undertaken to ensure our laws reflect the reality of work (Page 8)
- the government should mirror the approach applied in the USA under the Fair Labor Standards Act (Page 12)

Create a better enforcement system:

- the Director of Labour Market Enforcement and Gangmasters and Labour Abuse Authority (GLAA) be given the powers to ensure that the labour market remains fair (Page 13)
- to help organisations and individuals comply with the law (Page 13)
- the Director of Labour Market Enforcement should be able to conduct inquiries, similar to the market studies tool deployed by the Competition and Markets Authority, into sectors (Page 13)
- GLAA should be given the responsibility to carry out an investigation to discover whether an organisation or group of organisations in a sector have correctly attributed employment status (Page 14)
- the government should immediately scrap the current employment tribunal fee system (Page 15)

Encourage better information in employment practices to be made widely accessible:

- encouraging businesses to be transparent about their employment practices will help to create fair competition (Page 15)
- organisations with a smaller turnover who operate in a sector that is of particularly high-risk of labour exploitation have to report on employment practices (Page 16)

Background

5. The growth in non-standard working arrangements[4] in developed economies has correlated with the emergence of disruptive business models. Organisations operating under these models see themselves as platforms for service delivery, fostering relationships between those who want and those who can. Often cloud based businesses - for example Uber[5] and Deliveroo[6] - do not view themselves as employers, and often have no wish to owe employment duties to those individuals with whom they contract to provide a service.

6. Proponents argue that this model gives both sides of the wage/work bargain flexibility. For the individual, work can be managed around other aspects of their life, while for the business, it pays the individual only as and when a service is needed. On the other hand, such arrangements have been criticised for depressing wages[7] and creating financial uncertainty for people who will be unsure whether they will gain work and are not guaranteed a steady income. Now is the right moment to ask what type of working environment our society finds acceptable, as the Business, Energy and Industrial Strategy Committee commented in its recent inquiry into Sports Direct:

> "...contractual terms and working conditions which fall way below acceptable standards. There is a risk that this model - which has proved successful for Mr Ashley - will become the norm[8]."

7. Ultimately the Law Society does not take a view as to whether certain models of work are positive or negative. Our interest is in exploring how the framework decided by Parliament can best work in the modern economy and that those minimum employment protections that society deems to be appropriate are applicable to all workers.

8. There is evidence to suggest that a significant minority of employers are circumventing employment protection legislation. For example, research from Citizens Advice in 2015 suggests that one in ten people (or 460,000) are mislabelled self-employed - meaning that they are losing holiday pay, sick pay, and the right to be paid the national minimum wage (NMW)[9].

9. The United Kingdom has a set of employment rights which set minimum standards that apply to everyone. Most companies are able to respect workers rights and operate a profitable business. Our recommendations will help to ensure that workers and businesses can have confidence that they all operate within the same industrial landscape.

Recommendations to make employment law work better

10. How to create better understanding of employment rights:

- There is an urgent need to **reform how employment status is defined.** The report suggests clearer definitions for the different employment statuses. All those in paid work must be given the assistance necessary to understand what rights they are entitled to, particularly those working outside of a written agreement. All those who pay for someone's labour need to be clear what responsibilities they have and what commitment can be demanded. (Page 7)
- **All individuals should receive a written statement clarifying their employment status and who their employer is.** They should also be sign-posted to information about what rights, responsibilities and freedoms all those in the relationship have. (Page 8)

4 4% of UK working adults aged between 18 and 70 are working in the 'gig economy'. That means approximately 1.3 million people (CIPD 2017).

5 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/future-world-of-work/written/45003.html

6 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/future-world-of-work/written/44676.html

7 Income earned from gig work is typically low, with median reported income ranging from £6 to £7.70 per hour. - To gig or not to gig: Stories from the modern economy (CIPD 2017)

8 https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/news-parliament-2015/working-practices-at-sports-direct-report-published-16-17/

9 https://www.citizensadvice.org.uk/Global/CitizensAdvice/Work%20Publications/Neither%20one%20thing%20nor%20the%20other.pdf

- **A comprehensive review of employment legislation should be undertaken to ensure our laws reflect the reality of work,** especially taking account of the diversity in working practices, from flexible working to the gig economy. (Page 8)
- The government should **mirror the approach applied in the USA under the Fair Labor Standards Act** and, in relation to trade union matters, by the National Labor Relations Board. (Page 12)

11. How to create a better enforcement system:

- It is in the public interest for all organisations to operate within the law. If people cannot uphold their employment rights that has a negative consequence on all of us. The responsibility of employment law enforcement should be shared between individuals and the state, **with the Director of Labour Market Enforcement and Gangmasters and Labour Abuse Authority (GLAA) being given the powers to ensure that the labour market remains fair.** (Page 13)
- The main statutory objective of the Directorate of Labour Market Enforcement should be to **help organisations and individuals comply with the law** and follow the highest standards of practice. (Page 13)
- **The Director of Labour Market Enforcement should be able to conduct inquiries, similar to the market studies tool deployed by the Competition and Markets Authority, into sectors** or the application of employment legislation, when it believes there are systematic issues that need exploring. (Page 13)
- **GLAA should be given the responsibility to carry out an investigation to discover whether an organisation or group of organisations in a sector have correctly attributed employment status** and clarify what rights and responsibilities exist. If an organisation disagrees with the GLAA's assessment then the matter should be referred to the Employment Tribunal (ET) for judgement. (Page 14)
- **The government should immediately scrap the current employment tribunal fee system,** which since its introduction has undermined people's ability to enforce their employment rights. Applying fees to the ET should not be considered until the HMCTS modernisation programme is concluded. (Page 15)

12. How to encourage better information on employment practices to be widely accessible:

- **Encouraging businesses to be transparent about their employment practices will help to create fair competition,** and help to level the playing field by ensuring that all businesses are complying with their legal obligations. (Page 15)
- The Director of Labour Market Enforcement may also, after an inquiry, proscribe that **organisations with a smaller turnover who operate in a sector that is of particularly high-risk of labour exploitation have to report on employment practices.** (Page 16)

Better understanding: simplifying employment status

"The challenge... is to try to clarify the law so that entrepreneurs - business owners - can make judgments based on a clear choice." **Matthew Taylor, interviewed for The Self-Employment Paradox, Radio 4**

13. Determining whether you are an employee, a worker or genuinely self-employed requires the ability to understand complex legislation, which is spread over many Acts, and be aware of a mountain of case law. For individuals, not knowing your employment status means not knowing what employment rights you deserve. For businesses, this situation can lead to uncertainty about their responsibilities and what can be demanded from workers[10]. The situation does not need to be this complicated.

14. **There is an urgent need to reform how employment status is defined**[11]. All those in paid work must be given the assistance necessary to understand what rights they are entitled to, particularly those working outside of a written agreement. All those who pay for someone's labour need to be clear what responsibilities they have and the terms and conditions that underpin that relationship.

15. There are three main legal categories of employment status in this country; employee, worker and self-employed. Despite these different headings, many people believe that certain minimum employment protections are applicable to all individuals doing paid work, regardless of legal status. The reality is much more complex.

16. There are no simple or definitive definitions for any of these three categories and the different rights and obligations attached to each one has developed through statute and case law. The consequence of this piecemeal development is that employment status is little understood by those it most affects; those who receive money for their labour. Some businesses have seen this gap in legal knowledge as an opportunity to minimise regulatory burdens. Large groups of people are working in environments where they are denied even the basic benefits set by Parliament, including access to the National Minimum Wage, when it is not clear that this is right.

17. The ET has the responsibility to examine, untangle and define the relationship between parties in order to determine a worker's employment status. In the absence of universally agreed definitions, the ET will examine, amongst other factors, the balance of control and freedom between an employer and worker; the idea being that the greater freedom an individual has over their work, the fewer the obligations that are placed on their employer. This system has worked well for those willing to challenge their employers in this way. However, the increase in employment tribunal fees in 2013 has excluded many from being able to bring their claim to the ET.

18. If the definitions of each employment status are clear there will be less dispute as to what employment rights different types of workers are owed. This will lower the number of disputes that have to be resolved through the adversarial process of the ET.

10 Close to a third of members of the Institute of Directors say they are not confident that they fully understand the difference between self-employed individuals and workers for the purpose of employment rights (April 2017).

11 75% of Institute of Directors members say they would support clearer legal definitions of 'employees', 'workers' and the 'self-employed'. - Future of Flexible Work (IoD 2017) - pg5

The argument for codifying employment legislation

19. The law should be understood by most - if not all - of those it affects. While specialists are able to navigate the current minefield and monitor developments in case law most people do not have a true grasp on how employment status is decided. **A comprehensive review of employment legislation is therefore needed to ensure employment laws reflect the reality of work, especially taking account of the diversity in working practices, from flexible working to the gig economy.** Any changes must build on the parts of the current process that works well. For example, section 1 of the Employment Rights Act (ERA) 1996 stipulates that an employer must provide employees with a written statement of the particulars of employment. **This could be strengthened by requiring employers to clearly set out what employment status their members of staff are intended to hold.** This will help alleviate uncertainty for individuals.

20. The simplest means of clarifying this complex area of law is to bring together the various laws on employment status, and the rights attached to them, under a single piece of legislation. **We recommend that the Law Commission conducts a review of employment status law, with a view to recommending how employment status can be made fair, simple and relevant to the modern world of work.**

21. To help the debate below we propose some ways the Law Commission could achieve this aim.

Defining employment status

22. A clear statement of intent, alongside clear definitions, will empower workers to more clearly assess whether they have been given the appropriate status. The Advisory, Conciliation and Arbitration Service (ACAS) would provide plain language descriptions of how the different statuses operate and what rights and responsibilities are attached to each status. They would also provide details of where to report doubt about the status ascribed[12]. All work contracts should provide a link to this independent information. This will help workers to understand what their status means and assess whether they have been classified correctly.

23. The most commonly referenced starting point for examining employee and worker status is usually the ERA 1996. These definitions are set out below, alongside what we propose are clearer alternatives.

24. While the current definition, found in section 230(1) of the ERA 1996 might be clear to ET judges, it can be misleading for the average person. Not only can workers operate under an employment contract, the contract does not even have to be a written agreement.

12 See Better Employment, pg12

Employee:

Current definition	Proposed definition
An individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.	A person in paid work is an employee if: (a) they provide work under a contract of service or apprenticeship, whether express or implied; and (b) the contract places an obligation on the employer to provide work, and the individual to accept and execute allocated work personally; and (c) the employer retains control over how the work will be carried out, for example: i. where the work will be executed, ii. how activities will be performed, iii. the hours during which the work is to be performed; and (d) the contract provides for regular remuneration by the employer regardless of the level of profit enjoyed by his business.

25. Building on the guidance of the ERA 1996, the courts have established two essential elements of an employee relationship. These are that:

- The worker is required to provide his own work and skill for a wage or other remuneration, and
- Performance of that service is subject to the control of the employer[13].

26. This expanded definition is now well-established and provides a relatively clear basis for the ET to determine employee status.

27. Our proposed definition expands the statutory definition to take account of case law development. Setting out the elements of establishing employee status in plain language will benefit those seeking to access the full extent of the benefits attached to it. These benefits include Statutory Sick Pay and Statutory Redundancy Pay, as well as protection against unfair dismissal (subject to length of service).

Worker:

Current definition	Proposed definition
An individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.	A person in paid work is a worker if they work (or worked): (a) under a contract of employment (or other contract) whether express or implied; and (b) the contract places an obligation on the worker to personally perform allocated work or service in a manner stipulated by the employer; and (c) the contract does not provide that the worker will work exclusively for the employer; and (d) the status of the employer is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the worker.

28. Perhaps due to its vague statutory definition, this term has become an all-encompassing status, applicable to all in paid work. However, the brevity of this statutory definition is no longer fit for purpose in the modern economy. As mentioned above, employee status attracts a number of statutory benefits and those unable to access these benefits are left with little option but to fight for worker status in order to access the basic minimum benefits defined by Parliament. These include access to the NMW, the right not to suffer deductions from wages or unlawful discrimination, and to be entitled to paid annual leave.

29. Workers have traditionally been thought of as those in a 'subordinate and dependent position'[14]. This remains true today. As reflected in our suggested definition, the key difference between employee and worker status is found by examining the level of control an employer retains over their activities. Where a contract includes an element of exclusivity, for example, that a driver cannot work for another private transport business, the ET is likely to infer employee status. In the same vein, where a contract places no such restriction and an individual is free to work for other businesses, the more likely they are to be considered a worker. In the absence of a clear written contract, it is vital that statute precisely sets out the types of factors which point to greater control, and therefore, a genuine worker status.

13 Ready Mixed Concrete v Minister of Pensions and National Insurance [1968] 2 QB 497

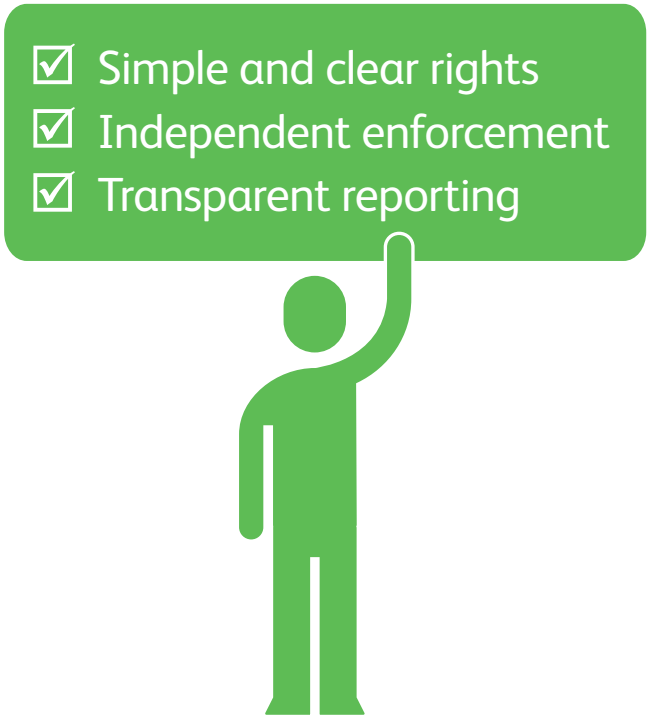
14 Byrne Brothers (Formwork) Limited v Baird [2001] UKEAT 542_01_1809 30

Self-employed:

Current definition	Proposed definition
None.	A person is self-employed if they: (a) hold themselves out as an independent entity (b) Indications of self-employment include that the person: i. assumes responsibility for the success or failure of the business; and/or ii. can hire others at their own expense; and/or iii. can negotiate and set the price for their services; and/or iv. is responsible for their own indemnity cover and/or public libability insurance

30. There is no single definition for self-employment in the United Kingdom and the term is used to describe those working in industries ranging from professional services to consultancies. It is therefore inherently difficult to formulate a single clear definition to reflect the complexities of business relationships in these various industries. However a single definition is nevertheless necessary given the considerable risks assumed by this growing category[15]. Moreover, there is a desire for a clear definition amongst the self-employed[16].

31. We propose that the simplest definition may be the most appropriate. As self-employed workers typically assume full responsibility for the success or failure of their businesses, they hold themselves out as being independent entities. The law reflects this and has traditionally considered self-employed persons as being in a 'sufficiently arms-length and independent position to be treated as being able to look after themselves'[17]. Those in this category are therefore more likely to be engaged under a contract for services and more likely to enjoy a genuine customer-client relationship with the other party to any contracts.



15 Comparing the estimates for type of employment for October to December 2015 with those for a year earlier, self-employed people increased by 154,000 to 4.66 million. UK Labour Market: February 2016, Office for National Statistics, (https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/february2016#employment)

16 36 % of respondents of the Dean review "strongly agreed" and 22 % "agreed" that the lack of a legal definition of self-employment was an issue for them.

17 Mr Recorder Underhill in Byrne Brothers (Formwork) Limited v Baird [2001] UKEAT 542_01_1809

Case study - What status is the driver?

Employee

The driver works for a company that has its own fleet of cars. As demand for travel is consistent and predictable the company decides to employ a certain amount of drivers to work certain set hours. The driver is given a contract of employment; they are expected to work a certain amount of hours per week and can guarantee a set wage, the car and all the other equipment the drive uses are provided by the company. The contract says that the driver is not allowed to work for any competitors. This is because drivers hear a lot, thus are often privy to trade secrets and, the company wants to ensure that they are not spending an unhealthy amount of time driving vehicles.

Worker

The driver works when they want to and for a number of different platforms/cab firms, though when they are working for the platform/cab firm they are expected to work exclusively for that provider. The driver will provide their own car, but they are specifically told what type of car they need to drive. The platform/cab firm also stipulates other behaviors, such as smartness of dress, as it wants to grow its corporate reputation. The passenger is booking the ride from the platform/cab firm. They pay the platform/cab firm and they are told the price by the platform/cab firm. The passenger rates the driver, which feeds into performance review, and if they have any complaints they make them to the platform/cab firm. The driver cannot negotiate the fare. While working for the platform/cab firm they have to accept the rides that are given to them, and do not even know the destination until they pick up the passenger.

Self-employed

The driver works when they want to and for a number of different platforms/cab firms. Who and how much they work for changes regularly depending on the needs of the driver and the demand from customers. They are able to gain work from a number of different platforms/cab firms at the same time. It will depend on who is offering the type of rides that the driver wishes to take. The driver is free to negotiate fares and build up a direct relationship with the person who requires a lift. They provide their own car and equipment and have to pay for their own licenses and indemnity insurance. The platform/cab firms are under no obligation to funnel rides to the driver. Neither are they obliged to resolve complaints passengers may have, beyond the regulatory responsibilities placed on them by transport authorities. Any issue should be resolved between the driver and passenger. It should be obvious to the passenger that the platform/cab firm is a marketplace that facilitates the connection of those who want rides and those who can give rides. The rest of the relationship is directly between the passenger and driver.

Identity of the employer

32. Most of the discussion on the scope of employment rights, both in policy and case law terms, has focused on the rights attached to employee and worker status. It is also necessary to understand how the employing entity is defined by the law, as it is the employer who bears responsibility for compliance with, and liability for breach of, employment legislation. For this reason it is important to understand which entity, or entities, should be considered to be the employer.

33. The common law has traditionally adopted a 'unitary' approach which treats the employer as the relevant contracting person. Only in specific contexts will the law look behind that strict identification of the employer. An example is where in relation to relevant transfers falling within the scope of the Transfer of Undertakings (Protection of Employment) Regulations 2006 an employee may be deemed employed by the transferor in the relevant undertaking, and therefore within scope to transfer, even if the individual is employed by an entity other than the transferor[18].

18 Albron Catering BV v FNN Bondgenoten and another [2011] IRLR 76, ECJ)

34. The traditional approach of identifying the employer can limit the effectiveness of employment protection legislation if the consequence is that the legislation does not engage in relation to those persons with the ability to ensure compliance. For example, private equity portfolio companies and end user clients of employment agencies may in effect control workers' activities and compliance with employment law standards but not be legally responsible for compliance on the basis of not being the individuals' employer either in contractual or statutory terms. Also, in group company situations the actual/contractual employer might not take the decisions which employment law seeks to regulate, for example decisions concerning redundancies[19].

35. **We would recommend that the government considers the approach applied in the USA under the Fair Labor Standards Act and, in relation to trade union matters, by the National Labor Relations Board.** Under the 'joint employer' approach, various factors can be taken into account in determining whether a worker is jointly employed both by the 'contractual' employer and some other person or persons. These include the authority to hire and fire employees, authority to set conditions of employment, day-to-day supervisors and other relevant factors. By adopting this approach the ambit of employment protection could be widened to circumstances where an entity other than the contractual employer is able to control and determine employment law compliance[20].

Better enforcement: employment rights only exist if they can be enforced

"Of course, this system only works if everyone plays by the same rules. The vast majority of employers do just that, treating their employees well and paying them fairly. However, too many still think they can get away with ignoring the rules, breaking the law, and taking advantage of hardworking men and women who want nothing more than an honest job." **Rt Hon Sajid Javid's MP, introducing the government's response to the consultation on creating a Director of Labour Market Enforcement**

36. Evidence shows that many exploited employees feel unable to enforce their rights[21].

37. Bad employment practices do not only harm those on a low-income, many of whom are in a vulnerable position and feel unable to challenge their treatment. Responsible businesses are put at a competitive disadvantage if unscrupulous employers cannot be brought to account for undercutting employee rights. Without creating a robust and proactive enforcement system other employment law reforms will not have significant impact.

38. The British employment legislative framework puts the onus on the individual to assert that they are being exploited. This places a big burden on a person to uphold society's wishes. If a person feels confident enough to challenge bad treatment it is their responsibility to pursue what could be a complex and time-consuming claim, with the risk of reprisals from an unscrupulous employer—including blacklisting.

19 The law only has limited provision for that latter situation - where collective redundancy consultation is required by an employer under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, it is in effect no defence for the employer that a parent company took the relevant decision and did not allow the subsidiary sufficient time to consult.

20 For further discussion of the issue of the identity of the employer see Prassl, 'The Concept of the Employer', Oxford University Press, 2015 and Prassl and Einat, 'Employees, Employers, and Beyond: Identifying the Parties to the Contract of Employment', chapter 16 of Freedland (ed), 'The Contract of Employment', Oxford University Press 2016.

21 https://www.lawsociety.org.uk/news/blog/workers-rights-without-enforcement-are-meaningless/

39. It is not surprising, therefore, that so few NMW and unpaid wages actions have been brought. **It is in the public interest for all organisations to operate within the law. The responsibility of employment law enforcement should be shared between individuals and the state.**

Creating a proactive enforcement system

40. The best way to ensure that all people work under secure, decent and lawful working conditions is to have an enforcement system that:

- Provides information to help people and businesses to understand their rights and responsibilities;
- Conducts investigations into areas of high concern, to monitor the effectiveness of employment law and highlight improvements;
- Investigates specific areas of risks, to quickly ensure that employment legislation is being complied with;
- Punish those who do not abide by employment legislation and regulation.

Providing information

41. Organisations should be able to access information that helps them to operate just and fair working conditions. The purpose of enforcement is to stop those who wilfully or neglectfully do not respect the law, it is not to try and catch-out businesses who want to comply. **The first principle of the Directorate of Labour Market Enforcement should be to help organisations and individuals comply with the law and follow the highest standards of practice.**

42. There is appetite from organisations[22] for the provision of training and the development of codes of conduct, which would help them to better understand what is required by law.

43. Rather than creating a new communication structure, the Director of Labour Market Enforcement should work in partnership with ACAS to:

- Promote greater awareness of how employment law works in practice;
- Provide advice and guidance, possibly sector-specific, on how to comply with employment law;
- Share examples of best employment practice in different industries;
- Publish regular reports that analyse where and how workers are treated in different sectors of the UK economy.

44. Employment law experts could audit working practices and give bespoke advice on how best to comply with the law. Receiving advice from such experts would not provide the organisation with safe harbour from investigation by an employment agency or from being penalised, as it would still be the responsibility of the organisation to comply in practice with employment law.

Inquiries

45. **The Director of Labour Market Enforcement should be able to conduct inquiries into sectors or the application of employment legislation, when it believes there are systematic issues that need exploring.** The Director does not need to suspect unlawful activity to conduct an inquiry, though they will need to explain why the inquiry is in the public interest.

46. When conducting an inquiry the Director:

- Must publish and consult on the terms of reference (TOR);
- Can require organisations and individuals to provide information in relation to the TORs;
- Must publish a report of findings;
- Can make recommendations for changes to policy and practices within a sector or organisation, and/or changes to government policy and legislation.

47. If during an inquiry the Director becomes concerned that illegal activity is taking place they will raise their concerns with the relevant enforcement agency, who will decided whether to investigate the issue.

22 Tackling Exploitation in the Labour Market: Government response (2016), pg 16

48. Three areas where we would suggest that the Director conducts inquiries are:

- **What employment status those who provide services for platforms in certain sectors should have.** The world of work is being disrupted by new business models - often digital platforms that see themselves as existing in the cloud above the nation state. Such platforms seek to foster a relationship between the provider and consumer in which they have responsibility directly to each other, with as little interference as possible from the platform owner. Often such businesses do not view themselves as employers, and have no wish to owe employment duties to those with whom they contract to provide a service. There is a tension between how these stratospheric organisations want to operate and employment legislation.
- **The barriers to justice for victims of exploitation in the labour market.** It is now harder for individual victims of labour market exploitation to pursue their case through the ET. ET fees have harmed access to justice[23] and since July 2013 many people have not been able to enforce their employment rights. The most recent Ministry of Justice statistics show that there has been a decrease in claims to the tribunal by around 70%. The fee, which can be up to £1,200, is prohibitively high for most people, and the remission system is complicated to use.
- **Reviewing the concept of illegal working and its consequences on the contract of employment.** The courts have already suggested how the law should develop. The Supreme Court judgement in Hounga -v- Allan & Anor [2014] UKSC47[24] allowed a claim by an illegal immigrant to proceed, in part on the public policy principle to protect victims of trafficking. The Supreme Court was able to do this because it relied on non-contractual rights. If the exploitation had been classified simply as leading to an unfair dismissal rather than discrimination the claim may not have been able to proceed, even though it had been recognised that exploitation had occurred. Employment law should be considered more broadly to make sure that victims of exploitation in the labour market are not powerless due to the illegality defence.

Investigating uncertainty of employment status

49. **The Gangmasters and Labour Abuse Authority (GLAA) should be given the responsibility to carry out an investigation to discover whether an organisation or group of organisations in a sector have correctly attributed employment status and clarify what rights and responsibilities exist.**

50. When conducting an investigation the GLAA must:

- Publish the reasons why it is investigating the organisation or sector
- Provide those who are affected by the investigation with an opportunity to comment on the reasons
- Publish an interim report which clearly expresses what conclusions the GLAA is working towards, and give those affected appropriate time to respond
- Publish a final report which states the employment status, evidences why it has taken the view, and explains what rights and responsibilities exist

51. If an organisation, sector disagrees or group of workers disagree with the GLAA's judgement then the matter will be referred to the ET for a final decision.

52. If an organisation refuses to comply with the ET's decision the GLAA can use its new powers to require the organisation to abide by the decision. The new offence of aggravated breach of labour market legislation is supported by a criminal offence for non-compliance. The order gives the GLAA the power to require a business, where there is reasonable belief that a labour market offence has been committed, to enter into an undertaking to take steps to prevent further offending. If the organisation still refuses to comply, an enforcement order can be requested from the court. Non-compliance with the court order could lead to a two year custodial sentence and unlimited fines.

23 http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/letter-to-the-ministry-of-justice-employment-tribunal-fees-review-team/

24 http://ukscblog.com/case-comment-hounga-v-allen-anor-2014-uksc-47/

Reform Employment Tribunal (ET) fees so they no longer hamper access to justice

53. **The government should immediately scrap the current employment tribunal fee system, which since its introduction has undermined people's ability to enforce their employment rights.**

54. Since the introduction of ET fees in July 2013 many people have not been able to enforce their employment rights. Ministry of Justice statistics show that there has been a decrease in claims to the ET by around 70% in the last three years. Our members have told us that claimants with strong cases see the fee as a significant deterrent to pursuing a complaint. We have heard of examples where respondents have refused to consider engaging in ACAS early conciliation or settling the matter before it reaches the tribunal because they wanted to 'call the claimant's bluff[25] on whether the employee would pay the fee.

55. ET fees have harmed access to justice in four ways:

- The ET fee is high compared to earnings
- The ET fee is high compared to awards
- Even for those who win there is a high chance that the fee will not be reimbursed
- The remission system is not helping as many people as it should

56. ET fees have failed to maintain access to justice and failed to encourage parties to seek alternative ways of resolving their dispute. We believe that for employment rights to be enforceable the ET fees system needs to be scrapped.

57. The government's legitimate aims, notably maintaining access to justice and encouraging parties to seek alternative ways of resolving their disputes, could be achieved by less discriminatory means, such as maintaining the Acas early conciliation scheme and assessing its impact without the requirement for payment of ET fees.

58. **Applying fees to the ET should not be considered until HMCTS modernisation programme is concluded.**

Better information: reporting on employment practices

"The 'golden thread' of safeguards in society that are good for human rights - democratic freedoms, the rule of law, good governance, transparency, property rights and civil society - also provide fertile conditions for private sector led growth." **Good Business Implementation the UN Guiding Principles on Business and Human Rights (May 2016), the Home Office**

59. **Encouraging businesses to be transparent about their employment practices will help to create fair competition, and help to level the playing field by ensuring that all businesses are complying with their legal obligations.** Reporting obligations will encourage businesses to engage in the wider discussion about the evolving nature of the workforce and how best to increase productivity.

It will highlight those organisations who take the development of their workforce seriously at the top level and nudge others to determine, demonstrate and explain their policies[26].

25 Evidence sent to the Law Society by an employment solicitor - September 2015

26 For example, if a certain percentage of an organisation is made up of zero-hour contracts they could explain that the main reason for this is fluctuation in demand

60. There are a variety of groups who have a legitimate interest in knowing how organisations provide services. Potential workers will want to know how the organisation views those they task to provide services and what type of relationship is desired. Those customers who wish to take into account how an organisation treats those tasked with providing the service should be able to do so. Company boards, shareholders and potential investors should be interested in employment practices, which are crucial to how the organisation achieves its aims. Being transparent about employment practices also minimises the risk of an expose damaging a company's share price.

61. Being positive about how an organisation treats those who it tasks to provide services can protect and enhance reputation and brand value, including:

- Safeguard and expand customer base;
- Help attract and retain good staff; - build and maintain a sustainable and effective relationship with employees and external stakeholders[27];
- Reduce risks to operational continuity resulting from conflict;
- Reduce the risk of litigation;
- Attract institutional investors, including pension funds, who are increasingly taking ethical factors into account in their investment decisions;
- Support company ethics and values.

62. A number of voluntary standard marks already exist that highlight organisations who achieve positive employment practices. The most high profile of these are being kite-marked as a Living Wage employer or an Investors in People organisation. Such kite-marking is also used to commit those who commission services to demand certain employment practices from contractors. UNISON's Ethical Care Campaign is currently trying to encourage local councils to adopt an Ethical Care Charter which highlights the link between better standard of care with contractors offering guaranteed hours to carers[28].

Who should be required to report?

63. We hope that many organisations, of varying sizes and from different sectors, will see the benefits in making a public statement on employment practices. We also recognise that thought needs to be given as to how to introduce such requirements in a proportionate way. At first we propose mirroring the requirement on who must publish an employment practices statement on the critical aid out for reporting in the Modern Slavery Act. If an organisation:

- is a body corporate, partnership or public body;
- carries on business, or part of a business, in the UK;
- supplies goods or services, and;
- has an annual turnover of £6m or more;

they must make the annual statement.

64. **The Director of Labour Market Enforcement may also, after an inquiry, proscribe that organisations with a smaller turnover who operate in a sector that is of particularly high-risk of labour exploitation have to report.**

What should be reported?

65. The purpose of the statement would be to encourage businesses to be transparent about their employment practices. We believe that this will increase competition to drive up standards by incentivising companies to constantly question whether they employ the best working practices. There should be a consultation to gain a consensus on what information can proportionally be made public to achieve this aim.

66. The basic obligations will create a measure which will bring about real transparency, but still give businesses enough flexibility to make the right choices for their business.

27 Research by the CBI in 2016 found that "workplaces that are inclusive - where people can be themselves and give their best work - are more likely to have engaged and productive teams which is vital to long-term business success."

28 10% of local councils have currently signed the Charter

67. There has already been some debate what information should be made public. Citizens Advice recommends that large companies should have to publish information on the proportion of their workforce on different types of employment contracts. They believe that this would require businesses to engage in discussions about the overall shape of their workforce and job quality[29]. The Conservative Party's manifesto promised that companies with more than 250 employees will have to publish more data on the pay gap between men and women, and that large employers will have to publish information on the pay gap for people from different ethnic backgrounds. The Labour Party's manifesto promised to amend the takeover code to ensure every takeover proposal has a clear and publicised plan in place to protect workers and pensioners.

68. The benefits of reporting will only be realised if statements are easily accessible. The signed statement must be published on an organisation's website with a link in a prominent place on the homepage. If an organisation does not have a website then the statement should be made available on request within ten working days.

69. The statements will evolve over time, to reflect the changes in business practices.

Punishment for those who do not report

70. If an organisation which is required to produce a statement fails to do so the Director of Labour Market Enforcement will be able to request an injunction through the High Court requiring compliance. If the organisation then fails to comply they will be in contempt of court, which is punishable by an unlimited fine.

71. Organisations that are prepared to break one part of labour market law are often also guilty of neglecting other laws. Not complying with the reporting requirement would highlight to enforcement agencies that there is a high risk that the organisation is not taking its employment duties seriously. This is likely to necessitate a direct intervention into the organisation.

72. A failure of an organisation to comply with reporting provisions has the risk of damaging the reputation of the organisation. Customers, investors and elements of civic society may wish to apply pressure if they believe an organisation is operating unethically.

29 How can job security exist in the modern world of work? - Cotozens Advice, January 2017

The Law Society

113 Chancery Lane
London WC2A 1PL

Tel: 020 7242 1222
Fax: 020 7831 0344
DX: DX 56 London/Chancery Lane

www.lawsociety.org.uk

@TheLawSociety