

**Good work: The Taylor review of modern working practices  
Consultation on enforcement of employment rights recommendations  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 Executive Summary**

- 1.1 We welcome the opportunity to put forward our views on the part of this consultation concerned with the state enforcement of holiday pay and sick pay. We are responding as tax specialists with interest and insight into the pay and tax issues of the low-paid.
- 1.2 We agree with Matthew Taylor (and subsequently, the Director of Labour Market Enforcement) that there is an enforcement ‘gap’ in respect of holiday pay. This point of unity suggests that time has certainly come for action.
- 1.3 In our experience, the problems workers face with holiday pay (and sick pay) are often rooted in the same ground as the tax issues that we come across – the workers’ own lack of knowledge of their rights, and the engagers of their labour having little fear of any enforcement action being taken against them.
- 1.4 Based on information provided directly to us by workers, coupled with the gathering body of work in the area, it seems that issues around sick pay and holiday pay are particularly likely to arise for those in low-paid ‘flexible’ work, such as agency work, zero-hours contracts and in ‘dependent’ self-employment, including some of those working in the gig economy.
- 1.5 The starting point is that the people in these disparate groups will likely have the employment status of ‘worker’ (as they are personally providing a service as part of someone else’s business) and as such, are entitled to holiday pay; however we think that

they would have difficulty arriving at that conclusion from the GOV.UK ‘worker’ guidance.<sup>1</sup> In particular, it makes no reference to the fact that many ‘dependent’ self-employed people would be covered by worker status (nor does it give an illustration of a dependent self-employed ‘worker’ to help them self-identify).

- 1.6 There are serious problems with holiday pay in the agency worker sector. Many workers used to get extra pay on top of their hourly rate instead of being given paid holiday leave, however this ‘rolled up’ system has now been deemed unlawful. If a worker is not on a rolled up system and leaves an agency having taken fewer holidays than they are entitled to, they should be paid in lieu of the untaken holiday – but it is our understanding that this does not always happen.
- 1.7 There can often be problems for workers in accessing sick pay, even if there is no wrongdoing on behalf of their engager. We understand that the Government are looking to reform sick pay as part of their *Improving Lives: the Future of Work, Health and Disability* project and we recommend that the earnings criteria be looked at as part of this. We think it would be helpful and intuitive if sick pay was also made expressly a ‘worker’ employment law right rather than one reliant on there being a secondary contributor (that is, someone that is liable to employers’ National Insurance) as outlined in para 4.1.9.
- 1.8 Arming ‘workers’ with the background knowledge to understand and self-check their positions is a good starting point to tackling poor practices around holiday pay and sick pay. However, this may be futile unless it is backed up by a more accessible means for low-paid workers to secure payment if things go wrong – something that, in our view, is currently lacking (particularly for holiday pay, even with the demise of employment tribunal fees).
- 1.9 We support the idea that a state body, *such as* HM Revenue & Customs (HMRC), could be brought in to enforce the basic suite of entitlements of minimum wage, holiday pay and sick pay (indeed minimum wage and sick pay are already enforced by HMRC). As sick pay and holiday pay are taxable as normal income, this in turn will raise Exchequer receipts to help pay for this provision.
- 1.10 However, the fact that workers often feel unable to report their treatment to the authorities needs to be recognised. Any such body will therefore need to use their powers *proactively* to help secure the most vulnerable workers their entitlements.
- 1.11 Risk profiling work is vital to help the enforcement body focus its efforts and resources. It will also help protect compliant employers from disruptive compliance checks. Ultimately, we think that most employers should be supportive of a state enforcement regime as they are potentially harmed by bad employment practices that undercut them.
- 1.12 Holiday and sick pay breaches often go hand-in-hand with bogus self-employment. These cases may be largely invisible to enforcement officers, as they may not appear in employers’ data. We think there is merit in exploring HMRC’s tax evasion data which could be a rich

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<sup>1</sup> <https://www.gov.uk/employment-status/worker>

source of information in this area and should be routinely scrutinised by enforcement officers.

## **2 About Us**

- 2.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HMRC and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

## **3 Introduction**

- 3.1 In his report, Matthew Taylor wrote:

*'All three of these entitlements (National Minimum Wage (NMW), sick pay and holiday pay) require the enforcement body to have a detailed knowledge of calculating pay and as such, we believe HMRC should assume responsibility for enforcing these rights. As this proposal is designed to protect the most vulnerable in work, enforcement of holiday pay cases should be restricted to those on low pay and not be a state-funded resource for those who could afford to take their case to an employment tribunal. The Review does acknowledge the complexity in achieving this though and would expect any changes in this area to be phased in over a realistic timeframe.'*

- 3.2 The Government have accepted the case for the state taking responsibility for enforcing a basic set of core rights for vulnerable workers (which we welcome) but wish to gather information on the scale and distribution of non-compliance to help determine the best next steps.

- 3.3 We are a group of tax specialists with expertise in the tax and related welfare issues of the low-paid. We run four websites<sup>1</sup> through which people often contact us describing their problems with tax, National Insurance and tax credits. Often these problems have arisen in the context of non-standard flexible forms of employment such as agency work, zero-hours contracts and self-employment. Often, they expose issues related to sick pay and holiday pay. We therefore think that we can provide valuable insight that will be helpful to the Government in shaping their policy proposals.
- 3.4 It is worth saying that our general impression from contact with many such people is that most would like a stable and secure employment. In such work, the rules around sick pay and holiday pay are fairly easy to apply; individuals are well informed as to their rights, employers understand their obligations and the employment relationship tends to be more evenly balanced.
- 3.5 Although not a recommendation, we observe that reversing the trend towards flexible working is therefore probably the only definitive way of bringing about sustainable improvements for many vulnerable of workers; however, we appreciate that factors like the economic landscape, the Government's strategy of labour market deregulation and commercial interests make this a challenging objective. We are nevertheless pleased that along with the Matthew Taylor report came recognition that change is most definitely needed in this area and we have answered specific questions where we feel we can add most value, namely 1-5.
- 3.6 We note that there are no questions in this consultation looking at whether HMRC are, in fact, the right state body to take on the role of enforcing holiday pay and we would urge the Government to consult further on this assumption – certainly before looking at matters of implementation.<sup>2</sup> Some workers will 'fear' HMRC, particularly if they have had problems with them before over tax or tax credits issues. Others will not wish to open themselves up to the scrutiny of HMRC staff.
- 3.7 Furthermore, some stakeholders with experience and knowledge of HMRC's existing enforcement function (both from a tax and minimum wage perspective), may question whether it is possible for them to tackle work of this nature without new vision, energy and far greater resources.
- 3.8 We note that the Director of Labour Market Enforcement is not so prescriptive on who the state body should be:

*'There is effectively no state agency enforcing holiday pay regulations (and evidence suggests that the unpaid amount – what in the US is called "wage theft" – is as large as*

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<sup>1</sup> [www.litr.org.uk](http://www.litr.org.uk), [www.taxguideforstudents.org.uk](http://www.taxguideforstudents.org.uk), [www.disabilitytaxguide.org.uk](http://www.disabilitytaxguide.org.uk) and [www.revenuebenefits.org.uk](http://www.revenuebenefits.org.uk)

<sup>2</sup> HMRC already provide the enforcement function for sick pay as a legacy of this being a statutory payment, redeemable by employers through PAYE, so it seems sensible to leave this where it is.

*noncompliance with the minimum wage). I recommend HMRC, or another state body, be given responsibility for regulating holiday pay.'*

- 3.9 It seems to us that the Government could instead consider the Gangmaster's Licensing and Abuse Authority (GLAA) for this role – they are approachable/independent, it fits squarely under their remit (indeed they have licensing standards covering basic employment rights for certain low-paid sectors already<sup>1</sup>) and they are widely regarded as being robust and effective in helping to stamp out bad practices.
- 3.10 While the Government are considering how best to take this forward, we endorse the Director of Labour Market's recommendation<sup>2</sup> that the Employment Standards Inspectorate (EAS) and GLAA should make use of their existing enforcement frameworks to investigate holiday pay as a matter of priority.

#### 4 Questions

- 4.1 **1) Do you think workers typically receive pay during periods of annual leave or when they are off sick? Please give reasons.**
- 4.1.1 We think that most workers in full-time, permanent, stable and direct (even if low-paid) employment do. The problem is that this type of work is becoming less common especially amongst the low-paid population and is increasingly replaced by various temporary and flexible working arrangements. See our comments in section 4.2 for more information on why we think that there are major problems around holiday pay and sick pay for those who work 'flexibly'.
- 4.1.2 Of course, those who are genuinely self-employed do not receive pay during periods of annual leave or when they are off sick. They are their own bosses so can allow as much time for rest and recuperation as they want (within the limits of their own affordability and business sustainability). In the absence of sick pay, Employment and Support Allowance<sup>3</sup> may be available instead from the Department for Work and Pensions (DWP).
- 4.1.3 However, much 'low-income self-employment' these days is not genuine. It is often foisted upon the unwary and desperate by engagers seeking to avoid the costs and obligations of employment that only ever rise.<sup>4</sup>

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<sup>1</sup> <http://www.gla.gov.uk/media/1596/licensing-standards-may-2012.pdf>

<sup>2</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf)

<sup>3</sup> <https://www.gov.uk/employment-support-allowance>

<sup>4</sup> The gross monetary cost to employers of hiring employees will include: National Minimum or Living Wage, holiday pay, sick pay, the administrative cost of running a payroll, employment protection costs, such as the costs of unfair dismissal claims and statutory and enhanced redundancy

- 4.1.4 This means that people, such as this young man who wrote into us, will not be receiving pay during periods of annual leave or when they are off sick:

*'My job is as a leaflet distributor. I was initially PAYE, but my employer has informed me that I am now self employed (from Feb 2016). I have undiagnosed learning disabilities and require step by step help with what to do in order to pay tax and National Insurance that is due. My sister is trying to help me, but we really do not know where to start. We have a number of queries. e.g. I do not have a business, but my employer says that I am now self employed. Am I a business? What form should I be filling out to work out my tax and NI? Can I claim expenses (I travel by train or bus to Leighton Buzzard. From there, my employer takes me to the area where we will be posting leaflets). Also, work clothing, in particular footwear.'*

- 4.1.5 There are another group of people who may not be receiving pay during periods of annual leave or when they are off sick. These are people whose work has many of the characteristics of self-employment (e.g. they decide when they work and use their own tools), but who often have less autonomy than genuinely self-employed people and may derive all or most of their income from the business that they work for. These are what we might call 'dependent' self-employed people and could include those who work in the gig economy.
- 4.1.6 If a person performs work personally, outside of their own business or profession, then they are 'workers' for most employment law purposes. This will include the dependent self-employed. This means that they are entitled to receive pay during periods of annual leave (by virtue of Regulation 13 of the Working Time Regulations<sup>1</sup>). Until recently however, there has not been broad awareness of this.<sup>2</sup>
- 4.1.7 In particular, GOV.UK does not explain that 'dependent' self-employed people would be covered by 'worker' status nor does it give any illustration of a dependent self-employed 'worker' to help them self-identify.
- 4.1.8 Thus, many dependent self-employed people probably will not be receiving holiday pay, including this person who wrote to us recently:

*'I am a "self employed" owner driver for a parcel delivery company. I own my own van and pay relevant insurances and fuel. I have a 2 year contract to deliver and collect parcels in a designated area. Until now we have been allowed to work away under our own steam. "New delivery rules" are being implemented which means i am now being told where to go and when, no matter the personal cost in excess fuel and time it will take me. I.E. it may take 1 extra hour and 20 extra miles to do the same route as i do now. I am financially penalised if i miss a time window. Their own drivers are not. There is no pay increase or payment to*

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compensation, Employers' NIC, currently adding 13.8% to much of the wage bill, pension contributions (affecting all employers by 2018) and for larger employers – the Apprenticeship Levy.

<sup>1</sup> <http://www.legislation.gov.uk/ukxi/1998/1833/regulation/13/made>

<sup>2</sup> Until the recent spate of high profile court cases, such as Uber.

*compensate this. I am now expected to do the same job as their own employed drivers without any worker rights. No sick pay, holiday pay or workplace pension like their own employees. My contract has not changed since i signed it. I never had any say in the contract...it was given to me with no negotiation. If i did not sign it i could not work. I have been told i must fulfill my contract but i feel like i am being treated as an employee. There are several of us in this situation and we dont know where to turn. Please help!!!' [sic]*

- 4.1.9 Sick pay is often thought of as an employment law right but is actually dependent on whether there is a 'secondary contributor' (that is, someone that is liable to employers' National Insurance). In cases where a worker is paid and taxed as self-employed, as those who work in the 'gig economy' often are (whether or not they are a 'worker' for employment law purposes), there will not be a secondary contributor – and therefore no sick pay for them.
- 4.1.10 There is wide misreporting of this in the commentary that we have seen,<sup>1</sup> which is worrying and potentially, dangerous. Of note is the fact that the GOV.UK page on 'worker' rights currently avoids the question completely by saying that 'workers' *may* be entitled to statutory payments, which is less than helpful to a worker who is trying to research and fully understand their position.
- 4.2 **2) Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers? Please give reasons.**
- 4.2.1 We think problems around holiday pay and sick pay will be most notable for low-paid workers who are in 'flexible' forms of work. This is no coincidence – major financial pressures faced by such workers means they will often take whatever work they can get. However, in the absence of any better employment options, this means that the workers are left open to exploitation.
- 4.2.2 A recent press release from Citizens Advice 'Employers tricking people out of sick pay'<sup>2</sup> makes for worrying reading. Tactics used by employers identified by Citizens Advice include:
- Cancelling people's shifts after they call in sick, so that it looks like they are not meant to be working
  - Reducing people's wages and downplaying their working hours so they do not meet the earnings threshold
  - Saying that they need a GP note as evidence they are ill for even a few days off, even though people can self-certify for up to seven days
  - Refusing to fill in a HMRC sick pay form, which would make employers explain their reasons for not paying

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<sup>1</sup> <https://www.independent.co.uk/news/business/analysis-and-features/uber-court-defeat-prices-customers-surge-drivers-full-rights-employees-ride-sharing-app-a8048051.html>

<sup>2</sup> <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/employers-tricking-people-out-of-sick-pay-says-citizens-advice/>

- Sacking people rather than paying them.

- 4.2.3 We have no doubt that the removal of the Percentage Threshold Scheme for statutory sick pay in 2014 may be driving some of this behaviour.
- 4.2.4 We think that agency workers face a uniquely tough time in securing payments because they work in an industry in which avoidance behaviour seems to be widespread (indeed, there is a consultation looking at problems facing agency workers running alongside this one<sup>1</sup>).
- 4.2.5 For example, because of problems inherent in very short-term agency work when it comes to calculating holiday leave and pay, workers used to get extra pay on top of their hourly rate instead of being given paid holiday leave. This is known as ‘rolled-up’ holiday pay. Although many workers liked this ‘rolled up’ system, particularly those who could not afford to take any time off work, it is now considered unlawful<sup>2</sup> – workers should now be paid out at the time annual leave is taken.
- 4.2.6 The problem is that if a worker is not on a rolled up system and leaves an agency having taken fewer holidays than they are entitled to, they should be paid in lieu of the untaken holiday – but it is our understanding that this does not always happen. Whether it is down to worker ignorance or vulnerable workers not feeling that they can challenge the agencies, we do not know, but we do understand that some engagers in the agency worker arena are starting to view untaken holiday pay as an additional revenue stream.
- 4.2.7 There are some staggering figures put around this ‘wage theft’ in the Director of Labour Market enforcement’s strategy,<sup>3</sup> and while we cannot confirm these figures, what we are hearing in our work would tend to support the analysis of the situation.
- 4.2.8 In his review, Matthew Taylor said:

*‘We also believe individuals should have greater choice in the way in which they receive paid annual leave. As a general rule, annual leave entitlement equates to 12.07% of hours worked. We believe individuals should have the choice to be paid for this entitlement in real time – known as “rolled-up” holiday pay. This would result in dependent contractors receiving a 12.07% premium on their pay. So in the case of someone being paid the NLW of £7.50, their actual remuneration would be £8.41 an hour. Additional safeguards would have to be built in to ensure individuals did not simply work 52 weeks a year as a result, but we*

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<sup>1</sup> <https://www.gov.uk/government/consultations/agency-workers-recommendations>

<sup>2</sup> The GOV.UK page on holiday pay states that an employer cannot include rolled-up holiday pay in the hourly rate, and that the use of rolled-up holiday pay in existing employment contracts must be re-negotiated: <https://www.gov.uk/holiday-entitlement-rights/holiday-pay-the-basics>

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf)

*believe giving individuals this kind of choice will suit many working in casual arrangements and in the on-demand economy.'*

- 4.2.9 We agree with this recommendation. However, in their 'Increasing Transparency' consultation document, the Government say that they cannot proceed with this recommendation<sup>1</sup> because it defeats the object of the Working Time Directive. As this stems from EU law, Brexit may present a realistic opportunity to explore implementation of this recommendation further whilst ensuring the protections offered by the Working Time Directive are not lost.
- 4.2.10 Shifts in the way in which agencies and other intermediaries engage their workers in response to ongoing changes to legislation in the temporary worker arena, such as the onshore intermediaries rules in April 2014 (basically clamping down on the use of 'self-employed' agency workers to avoid PAYE), mean that businesses are increasingly inventing models which have knock-on effects in relation to holiday pay and/or sick pay.
- 4.2.11 Under the elective deductions model, for example, the individual is treated as an employee for tax purposes so that PAYE is operated as is required under law (this means that as far as HMRC are concerned, everything appears to be in order), but treated as self-employed for all other purposes, meaning that they are not paid the minimum wage, not given paid annual leave, etc. Operating such a scheme may save the businesses concerned money, but is unlikely to benefit the worker in any way at all.
- 4.2.12 An example of the confusion caused by this model can be seen in this worker query:
- 'hi im after a little advice please, i am classed as self employed..i think, i work for a sub contractor in the XX delivery network as a delivery driver, in about august my route got took over by a new sub contractor who i now deliver for, my wages used to be paid directly to me by my old employer who did not deduct any tax and ni and i had to sort that out which was fine, i didnt have any holiday pay pension sick pay etc which i accepted as i was sel employed, now this new company i work for use some sort of company called YY who pay me my wages with tax and national insurance deducted so it seems i am employed but with no benifits ie no pension holiday pay etc my question is are they allowed to do this basically am i employed or self employed as i keep getting told different things by my friends many thanks' (sic)*
- 4.2.13 As far as we are aware, HMRC have not taken any widespread action against the elective deduction model from a NMW perspective. This is one of the reasons that we question their ability to handle further enforcement work in para 3.7.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/679849/Consultation - Increasing Transparency - 070218\\_3 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679849/Consultation_-_Increasing_Transparency_-_070218_3_.pdf)

- 4.2.14 Finally, it is worth noting that problems can arise for the very low-paid or those with irregular earnings, such as part-time or casual workers, even if there is no ‘wrongdoing’ as such.
- 4.2.15 For example, entitlement to sick pay depends on whether an individual is treated as an ‘employed earner’ under social security legislation, is liable to pay Class 1 National Insurance and has weekly earnings that exceed £116 (in 2018/19). However many will not work enough hours to meet the earnings criteria. There also seem to be problems in how average weekly earnings are calculated by HMRC, meaning that even people actually earning over £116 each week may not qualify.<sup>1</sup>
- 4.2.16 We understand that the Government are looking to reform sick pay as part of their *Improving Lives: the Future of Work, Health and Disability* project and we recommend that the earnings criteria be looked at as part of this. We think it would be helpful and intuitive if sick pay were also made expressly a ‘worker’ employment law right which is not reliant on there being a secondary contributor (as outlined in para 4.1.9).
- 4.3 **3) What barriers do you think are faced by individuals seeking to ensure they receive these payments?**
- 4.3.1 Ensuring workers receive their entitlements must begin with education and awareness. Yet there are currently huge gaps in the information on GOV.UK meaning that those in ‘non-standard’ work face a difficult, in some cases impossible, task in trying to understand their employment status – a key determinant of eligibility for things like holiday pay and other employment rights.
- 4.3.2 The starting point for most people in non-standard work is that they are ‘workers’ (as they are personally providing a service as part of someone else’s business) and therefore have rights to the basic employment law protections such as holiday pay and the minimum wage. However, the ‘one-size-fits-all’ GOV.UK information on ‘worker’ status and rights is very confusing.<sup>2</sup> It is also incomplete – the fact that ‘workers’ are entitled to auto-enrolment is missing from the list of rights (and see para 4.1.5 for comments on ‘dependent’ self-employed people<sup>3</sup>).

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<sup>1</sup> See an example here: <http://forums.moneysavingexpert.com/showthread.php?t=5787490>

<sup>2</sup> <https://www.gov.uk/employment-status/worker>

<sup>3</sup> In our response to the BEIS review into ‘The future world of work and the rights of workers’ we gave some specific examples of the poor standard of official information and guidance on GOV.UK: <https://www.litrg.org.uk/sites/default/files/files/161216-LITRG-response-BEIS-Future-work-rights-worker-FINAL.pdf>

- 4.3.3 As alluded to throughout this response (and regardless of what measures come out of the Employment status consultation<sup>1</sup>), we think that GOV.UK ‘worker’ guidance needs to be improved immediately.
- 4.3.4 Workers not understanding their status or rights goes some way to explaining a recent Citizens Advice statement<sup>2</sup> saying that half of people on zero-hours contracts, and two in five people on temporary contracts, wrongly believe they are not entitled to paid holidays.
- 4.3.5 Even if workers are aware of their holiday pay and sick pay rights, they may not know how to secure them. Where would a self-employed person who was really a ‘worker’ go with a problem about holiday pay for example? The first page of the GOV.UK ‘employment status’<sup>3</sup> guide suggests ACAS may be able to help, however from using ACAS’s Helpline Online Automated tool (where you are directed if you call the ACAS helpline)<sup>4</sup>, there seems to be very little detailed advice for ‘workers’ on what their options are if they believe they are not receiving their entitlements.
- 4.3.6 Other GOV.UK guidance<sup>5</sup> suggests there may be other avenues for reporting problems, for example, the EAS, the Health and Safety Executive, etc. (enforcement of holiday pay technically falls within the remit of the Health and Safety Executive however they say they do not enforce paid annual leave entitlements<sup>6</sup>). So, should workers use ACAS? Or should they go directly to the enforcement body concerned?
- 4.3.7 Other groups within the ‘worker’ category (e.g. agency workers or those on zero-hours contracts) may be clearer on what they need to do if they do not get their holiday or sick pay, but there may still be barriers to them actually doing it.
- 4.3.8 Making a phone call to the HMRC statutory sick pay team or initiating a claim to an employment tribunal for holiday pay (which involves submitting a grievance in writing, contacting ACAS for ‘early conciliation’, etc. before they can actually do this) may just seem overwhelming or even impossible, in particular for people who may lack the confidence or knowledge of the system. This may include young people with lower levels of education or

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<sup>1</sup> <https://www.gov.uk/government/consultations/employment-status>

<sup>2</sup> <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/sharp-practices-paid-holiday1/>

<sup>3</sup> <https://www.gov.uk/employment-status>

<sup>4</sup> <http://www.acas.org.uk/index.aspx?articleid=1410>

<sup>5</sup> <https://www.gov.uk/pay-and-work-rights>

<sup>6</sup> See Q249

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/taylor-review-of-modern-working-practices/oral/72191.htm>

migrant workers with English as a second language or due to cultural differences do not feel trusting of the establishment (see also section 4.5).

4.3.9 In this regard, there could be lessons learned from the ‘Freelance isn’t Free Act’<sup>1</sup> implemented in New York. This established protections for ‘freelance’ workers, which included strengthening the avenues for recourse against non-payment of wages because of the barriers people faced in enforcing their rights. We suggest that this, and other international comparisons, would be worth investigating further as part of the Government’s work in this area.

4.4 ***4) What would be the advantages and disadvantages for businesses of state enforcement in these areas?***

4.4.1 Employers do not always understand, and thus fulfil, their responsibilities. We know that some employers find holiday pay and sick pay calculations complicated, especially where workers do not work regular hours or have elements like overtime, bonuses and commission, making up their pay.

4.4.2 State enforcement in these areas must be accompanied by improved information, advice and support for employers on holiday pay and sick pay. This could include guidance around the technical errors employers have made so that others can learn from their mistakes. Employers who want to be compliant with the rules would no doubt welcome this.

4.4.3 Incidentally, while the focus of this response is on difficulties workers face in securing their entitlements, we also note that the system may be unhelpful to some employers. For example, the page on GOV.UK that describes ‘casual or irregular work’<sup>2</sup> consistently refers to a relationship between a business and a worker, such that someone engaging a worker for themselves personally and not in the course of business (e.g. a nanny or a cleaner) would not necessarily appreciate that the guidance applies equally to them.

4.4.4 There will always be employers who do not want to do the right thing no matter how much help and guidance they are given. Proactive enforcement work would therefore no doubt also be welcomed by compliant employers, who are put at a competitive disadvantage if unscrupulous employers are not brought to account for undercutting employee rights.

4.4.5 However, in order for this ‘level playing field’ to be achieved, enforcement action needs to be visible, to serve as a deterrent to those that seek to disregard the rules; and fast – so that the state has a chance of recovery. It also needs to be fair so as not to alienate compliant employers who have made a genuine mistake – i.e. they should not be treated the same as employers that have shown a complete disregard to the rules.

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<sup>1</sup> <http://www1.nyc.gov/office-of-the-mayor/news/307-17/freelancers-aren-t-free-mayor-first-nation-protections-freelance-workers>

<sup>2</sup> <https://www.gov.uk/employment-status/worker>

- 4.4.6 The Government say that they need to remain mindful of the need to minimise burdens on compliant businesses and ensure that enforcement activity is cost effective. We agree that these are important factors in developing any compliance approach and appropriate risk profiling work, as described in section 4.5, would ensure the best use of resources and that disruption to compliant employers is kept to a minimum.
- 4.5 ***5) What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?***
- 4.5.1 Most worker guidance on employment disputes suggests that low paid workers with problems around holiday or sick pay ‘try talking to their employer’. In reality, we do not think it is realistic to expect low-paid workers to do this, given the likely imbalance of power and the fear of future repercussions – especially if there has been no or limited dialogue in the past.
- 4.5.2 We think that the Government could take many different measures to try and encourage workers to complain to the state – e.g. undertake an awareness raising campaign, build confidence in the system by naming employers who are found to be non-compliant, have a free, central helpline staffed by people well versed in holiday pay and sick pay matters (and that potentially have access to interpreters) and have an easy-to-use, online reporting system that accepts anonymised complaints, etc.<sup>1</sup> (to ease the worker’s task of navigating the different enforcement mechanisms, there should be a single reporting gateway to all the units potentially involved, as well as an internal case management system).
- 4.5.3 However, too much of the current enforcement framework relies on workers complaining about their engagers. Yet not only may workers struggle to actually make a complaint, as alluded to in para 4.3.8, even if they can, it should be recognised that realistically, they may still not.
- 4.5.4 Bearing in mind the characteristics that may be typical of low-paid flexible workers (see para 4.3.8), it is easy to envisage some workers being afraid of reporting their engager to the authorities for fear of their engager finding out they are the ‘whistle-blower’ or alternatively losing their job if non-compliance is upheld and their engager becomes insolvent – because of back assessment of holiday pay, for example.
- 4.5.5 We can certainly confirm that enquirers to the LITRG website who have found themselves in various different tax ‘schemes’ have been reluctant to give their real name, or send copies of payslips showing what is happening to them. They are likely to be even less forthcoming with the authorities themselves, and we have lost contact with enquirers altogether where we have suggested they make an official complaint.
- 4.5.6 We also think it is important to acknowledge that workers may have been encouraged to accept the position in the first place by Jobcentre Plus and be concerned about sanctions and a subsequent loss of benefits if they complain or try and leave. As can be seen in public

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<sup>1</sup> With equivalent arrangements made for those who may be digitally excluded.

forums, there is clearly a risk that the authorities may be tempted to influence people to accept whatever is on offer whether or not the terms are appropriate to the particular situation, or indeed, that claimants are so keen to comply with their benefit obligations due to the risk of sanctions, that they take up whatever is on offer without question.<sup>1</sup>

- 4.5.7 This is clearly in the Government's hands to do something about. But in the meantime, in light of all these things, we think that proactive work should have at least as much focus on, if not more than, reactive work to compensate for low-paid workers' inability or unwillingness to complain.
- 4.5.8 A state enforcement body should use third party intelligence and research to help identify potential non-compliance, such as from charities who are on the ground helping people with problems at work (such as Citizens Advice and TaxAid), and trade organisations and representative bodies who may be keen to help stamp out wrongdoing in their sectors by reporting exploitation. It should also work together and share information with the other enforcement bodies, such as the EAS and undertake risk profiling using HMRC tax evasion data – this is likely to be a rich source of information, given abuses of employment law rights tend to go hand in hand with tax problems such as false self-employment.
- 4.5.9 Workers who are being denied holiday pay/sick pay through false self-employment will be largely invisible to compliance officers as they will probably not appear in official data, however workers may have reported such irregularities to the 'cash in hand' hotline.<sup>2</sup> Even where HMRC do not investigate reports themselves from a tax perspective, they could pass the data over to their enforcement colleagues for their consideration. They could also work with other parts of Government, for example the Jobcentre Plus, to identify online job adverts that appear based on false self-employment.
- 4.5.10 As sick pay and holiday pay are taxable as normal income, this in turn, will help raise Exchequer receipts, so the incentives for getting an effective state enforcement mechanism in place are there.

LITRG  
16 May 2018

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<sup>1</sup> See here: <http://forums.moneysavingexpert.com/showthread.php?t=5721490>

<sup>2</sup> <https://www.gov.uk/report-cash-in-hand-pay>