

Labour Market Enforcement Strategy 2023 to 2024: call for evidence

Response from the Low Incomes Tax Reform Group (LITRG)

1 Who we are

- 1.1 We are a group of tax professionals with specialist interest in the pay and tax issues facing the low-paid and insight into what is potentially driving poor behaviour on the part of some engagers (more on 'who we are' below in Section 2).
- 1.2 Our experience of working with HMRC, through being a 'critical friend' for the last 20 years, means we also have a good understanding of their inner workings and organisational culture.
- 1.3 We appreciate that tax/HMRC's administration of the tax system are currently outside the remit of the Director of Labour Market Enforcement (DLME) but in our view the issues of tax enforcement and labour market enforcement are inextricably linked and cannot be separated.
- 1.4 We say this for reasons that include the following:
- Labour market exploitation often manifests itself in problems for workers with their tax and NIC, yet we don't think HMRC, as the tax enforcement body, are doing enough to protect workers from unscrupulous engagers.¹
 - The tax system can encourage engagers to offer work on terms which are significantly disadvantageous for workers, e.g., zero hours contracts.²
 - Employers incorrectly treating workers as self-employed with the intention of reducing their costs (for example National Insurance) is often only the start of problems for workers - the 'self-employed' status acting as a gateway to other abuses.³

¹ For some examples see here: <https://www.litrg.org.uk/latest-news/submissions/151211-tackling-exploitation-labour-market>

² See our guest blog post for the TUC for further explanation: <https://touchstoneblog.org.uk/2017/05/tax-system-driving-people-insecure-work-unexpected-ways/>

- The Gangmasters Licensing and Abuse Authority (GLAA) have a licensing standard that covers tax and NIC.⁴
- Some problems facing workers cut across both tax law and employment law – for example, non-provision of pay documents (the right to a payslip exists under the Employment Rights Act 1996, however, there is a legal requirement on employers to provide P60s and P45s under tax law – Income Tax (Pay As You Earn) Regulations 2003).⁵
- Some umbrella companies use a model (elective deductions model) that exploits other fault lines that exist between employment law and tax law.⁶
- HMRC house the National Minimum Wage (NMW) enforcement function as well as the tax function (which we will call HMRC tax) so their approach to worker issues, for example, provision of information, overlaps.
- HMRC tax and the issues of worker rights and effective enforcement are intertwined. For example, if HMRC could drive away engagers that do not respect tax law, not only would this of itself help protect workers, but as they are likely to be the engagers that are also non-compliant with employment law, there is a potential double benefit.

1.5 Unsurprisingly, the need for the DLME to be cognisant of what is going on in the tax space and for three enforcement bodies to work closely with HMRC tax (not just HMRC NMW) is a theme that has run through our previous submissions to the DLME.⁷

1.6 Much of our recent published work concentrates on issues that we consider are relevant to this call for evidence. Given the tight timeframe within which to formulate a response, we focus on

³ For example, they may be denied the NMW and/or employment rights, like holiday or appropriate rest breaks. Not being paid under PAYE (and having a ‘secondary contributor’ for National Insurance) will also be denying them entitlement to Statutory Sick Pay (and other statutory payments). Their engagers may not have Employers Liability Insurance etc.

⁴ Licensing Standard 2.1 Critical: PAYE, NI and VAT: This Standard requires a licence holder to accurately calculate and deduct tax and National Insurance from all workers’ pay and pay the correct amount to HM Revenue and Customs in a timely manner. The last compliance update that we can find, suggests that it is one that is routinely failed: <https://www.gla.gov.uk/media/4273/compliance-update-nov-2018.pdf>

⁵ This poor employer practice, often linked to false self-employment (and PAYE avoidance), but not always, can have wide reaching knock on effects – e.g., on ability to claim benefits, get credit, check minimum wage compliance.

⁶ Other fault lines that are exploited include tax and NIC, employment and self-employment, temporary and permanent workplace.

⁷ For example, <https://www.litr.org.uk/sites/default/files/151123%20Tackling%20exploitation%20in%20Labour%20Market%20-%20LITRG%20response.pdf> and <https://www.litr.org.uk/sites/default/files/180926-LITRG-response-DLME-FINAL.pdf> and <https://www.litr.org.uk/sites/default/files/files/171010-LITRG-response-Director-LME-FINAL.pdf>

summarising the most pertinent issues arising in some of our recent labour market work areas and then framing them loosely under the questions poised.

- 1.7 We also highlight blogs, consultation responses, presentations and the like – and as they are already published, link to them in case the DLME team wish to refer to them. We are very happy to be contacted if it would be helpful for us to further expand on the points made.

2 About Us

- 2.1 The Low Incomes Tax Reform Group (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 HM Revenue & Customs (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 Questions

3.1 1. Recent changes in how UK labour market is operating

For instance, since the end of the Coronavirus Job Retention Scheme (CJRS), changes in employment status (e.g., the shift away from self-employment following IR35 rules changes) increases in job vacancies.

1a. What changes have you observed or experienced?

1b. How might these changes impact non-compliance and is this likely to grow or subside over the coming year (2022 to 2023)?

1c. What response have you observed by the enforcement bodies to identify and address these issues?

- 3.1.1 We restrict ourselves to discussing the increase in people working through umbrella companies, as we think it is an important change.

- 3.1.2 The 'off payroll working' rules were introduced in the private sector in April 2021. The consequences of this are that some people have switched from working through their own limited companies to working through umbrella companies.⁸
- 3.1.3 This is concerning to us because the umbrella sector is unregulated and there is a wide spectrum of operators, including those whose bad practice and non-compliance sadly tarnishes the rest of the industry and exploits workers.
- 3.1.4 Our 150-page deep dive into the umbrella sector,⁹ published in March 2021, found a lot of good practice but highlighted several major concerns. These included the use of Disguised Remuneration (DR) schemes to pay workers,¹⁰ issues with holiday pay, the lack of transparency with pay rates (see question 5), mini-umbrellas and so on. Our response in February 2022 to the call for evidence¹¹ was an update on developments in the umbrella company marketplace since the report (and included discussion around things such as cloning and cyber-attacks). A more recent article highlighting 'Five things to watch out for in 2022/23'¹² raises new potential skims and scams.
- 3.1.5 In brief, the problems in the umbrella sector are 'numerous, multi-faceted and intertwined'¹³ and it is clear that some action is needed.¹⁴
- 3.1.6 Umbrella companies do not just cater for ex-Personal Service Company contractors. They are increasingly involved in low paid agency worker situations, where there may be more vulnerability, less bargaining power and as we explain in our 2021 report, no choice for the worker as to whether to use a particular umbrella company or not. The combination of these three things concerns us greatly.
- 3.1.7 It has long been our view that workers, especially low-paid workers, require their positions to be protected through effective state enforcement (due to the imbalance of power/their inability to articulate problems etc.). However, to date, no one has been able to get to grips with umbrella

⁸ Umbrella companies provide an alternative route for freelance contractors who would otherwise have to work through a limited company. Umbrellas also perform other useful and legitimate functions such as taking on the payroll and HR function of temporary work agencies who can't or won't do this in-house.

⁹ <https://www.litrg.org.uk/latest-news/reports/210324-labour-market-intermediaries>

¹⁰ A disguised remuneration scheme is where you are paid a minimum wage element and a non-taxable element (like a loan, grant, advance etc.).

¹¹ <https://www.litrg.org.uk/latest-news/submissions/220222-call-evidence-umbrella-company-market>

¹² <https://www.litrg.org.uk/latest-news/news/220506-umbrella-companies-five-things-watch-out-202223>

¹³ <https://www.contractoruk.com/news/0015356contractors-dont-miss-golden-opportunity-speak-about-umbrella-companies.html>

¹⁴ <https://www.gov.uk/government/consultations/call-for-evidence-umbrella-company-market>

companies. The eagerly anticipated single enforcement body (SEB) (who have been tasked with regulating umbrellas) has not yet materialised and there is no clear timeframe for this to happen.

- 3.1.8 We hope the responses the Government has received to its recent call for evidence¹⁵ will help them focus on the need to take action and will help determine the shape of the proposed SEB regime of regulation. However, it is vital to understand that many of the problems with umbrella companies sit in the tax space rather than the employment law space (or cross over) and so may not fall under the SEB per se.
- 3.1.9 In order to protect workers in the round, in the longer term there is a clear and unequivocal need for HMRC to share information and work closely with the SEB. In the short term, we would like to see the DLME strongly HMRC to use their existing powers to act now against tax non-compliant umbrella companies, particularly those that use DR to pay workers. DR does not tend to end well for workers from a tax perspective. Currently HMRC, contrary to their own regulations, pursue the workers for being involved in tax avoidance, rather than the umbrella companies for the PAYE failure that sits behind the use of DR schemes. This means there is no incentive for the umbrella companies to stop using DR schemes to pay workers. But DR also artificially depresses workers' 'legitimate' pay so this can lead to lower pension contributions and holiday pay for example.
- 3.1.10 DR is a serious problem that is affecting low-income workers now – some of whom are unaware that they are in any DR scheme as the motivation and benefits sit with others in the labour market supply chain. DR has a significant impact on the well-being of the workers involved but also wider implications for the reputation of the UK's labour market. It is vital that HMRC act.

3.2 2. Workforce

Looking at the experience of people engaged in or available for work, either in a specific geographical location or in a particular firm or industry sector.

2a. What has been the experience of workers arising from changes to the labour market? Please provide specific evidence.

2b. Have changes in the immigration rules in 2021 impacted on workers' experience and has this differed between migrant or domestic workers?

2c. Are these impacts consistent across the board or do they vary by sector? If the latter, then how?

2d. Is there any evidence to suggest additional threats to workers associated with labour shortages?

- 3.2.1 The UK care sector has been repeatedly in the news, mainly in the context of burnout from Covid 19, the government's no job/no job policy, Brexit impacting on the international mobility of care workers and an aging population (both in terms of workers and clients).
- 3.2.2 All of these things have led to even more of an imbalance in the demand and supply of care workers. It is easy to think that severe staff shortages will have led to care workers regaining bargaining power. But this doesn't appear to be the case. Care work remains notoriously low paid due to underlying structural issues around under funding causing huge pressure to be pushed on to private service providers, who in turn have to find ways to operate at lower cost.
- 3.2.3 But the issues go beyond persistent low pay. In the current staff crisis, domiciliary care workers are often stretched even thinner than usual and are having to fit more visits in. This means that they are likely to be at a greater risk of being underpaid the NMW because of non-payment of their travel time and expenses.¹⁶ This has knock on effects on their tax and benefits positions.¹⁷ We worry that this issue of underpayment is only set to get worse, given the scheduled increases in the minimum wage (as against the private service providers' constrained income).
- 3.2.4 We also worry that this downward pressure on care workers, coupled with the cost of living crisis, is going to see an increase in numbers of domiciliary care workers leaving their jobs and joining the 'PA' workforce.¹⁸ Pay rates can seem slightly higher in comparison and there are other perceived benefits. However, in our experience, workers are often incorrectly treated as being 'self-employed' rather than employed, and so the benefits can be illusory.
- 3.2.5 There has been a substantial rise in the numbers of people being given Government funding via personal budgets to engage the services of a PA.¹⁹ There are also self-funders. At the same time there seems to have been an increase in the numbers of 'introductory' agencies that purport to introduce self-employed carers (sometimes live-in carers) to people who need support.

¹⁶ The NMW regulations do not require travel time and expenses to be paid as separate items, even though they stipulate that a care worker's pay should average out at the minimum wage after factoring in the time they spend in the client's home, time spent travelling between their different clients and their associated out-of-pocket expenses.

¹⁷ We explore the predicament of care workers in our report 'Care workers - challenges of the tax and benefits system' (<https://www.litrg.org.uk/latest-news/reports/180502-care-workers---challenges-tax-and-benefits-system>). We also take, by way of illustration, extracts from email correspondence we have received from users of our website in connection with their tax and benefits positions. These expose the extent of the problem of NMW underpayment for care workers.

¹⁸ PAs or personal assistants are those who are engaged directly by the disabled or elderly person who need support or their family – see more here: <https://www.skillsforcare.org.uk/adult-social-care-workforce-data-old/Workforce-intelligence/documents/Individual-employers-and-the-PA-workforce/Individual-employers-and-the-PA-workforce.pdf>

¹⁹ For instance, see here for statistics on personal health budgets: <https://digital.nhs.uk/data-and-information/publications/statistical/personal-health-budget>

- 3.2.6 This self-employed 'model' is obviously very attractive as it can mean people's money goes further. But it is also very likely to be non-compliant from a range of perspectives including tax, employment law and health and safety (particularly in live-in carer situations where there can be serious working time/rest break issues). It carries inherent risks for both the person being cared for (if the usual 'employee' type recruitment checks aren't done) and the worker - the isolated nature of work in private houses places these workers at a distinct disadvantage. We explain more in our article written for a technical journal attached as Appendix 1.
- 3.2.7 We are concerned that as care worker availability tightens, people will increasingly turn to 'self-employed' carers to help plug gaps. This is because there is likely to be a wider pool of such workers available, as it may include people without a proper right to work in the UK for example. This then feeds the vulnerability/risk issue.
- 3.2.8 Some introductory agencies seem to be marketing carer arrangements which they are labelling as being on a self-employed basis very openly. This makes it appear that they have found some kind of loophole or that there has been some kind of workaround agreed between the care sector and the authorities. However, having spoken to both the Employment Agency Standards Inspectorate (EAS) and HMRC, we understand that this is not the case.
- 3.2.9 The insight that the recently published worker account²⁰ gives us about the ongoing role of introductory agencies in PA/client matches is also important. For example, at least one of the accounts seems to suggest that the client was paying the introductory agency on an ongoing basis and the introductory agency (after taking their cut) was paying the worker.
- 3.2.10 The agencies call themselves introductory agencies, rather than managed agencies. However, we have heard about many practices that suggest they may be providing a more ongoing managed service, (for example, that the families continue to pay them an ongoing weekly fee, the agencies try to move workers around assignments even after the initial 'match', they provide cover when the carer is off, and sometimes they collect the client's money and pay the worker).
- 3.2.11 This obviously has implications in terms of whether they are employment agencies or employment businesses (and are meeting the appropriate obligations) under EAS' remit. But in managed agency situations, there is also a PAYE obligation under HMRC's agency legislation,²¹ which currently seems to be being ignored by the agencies and is not (as far as we are aware) being investigated by HMRC or subsequently enforced.

²⁰See 'Worker voices in the social care sector' research report commissioned for the Director of Labour Market Enforcement: 'The use of self-employment and introductory platforms in the care sector without adequate safeguards and regulation is concerning. While some of the care workers we interviewed are genuinely self-employed now (e.g., Kimberley, Angelica), their previous experiences (Kimberley) and the account of other participants suggest that bogus self-employment might be a significant problem in the sector, particularly in live-in care, facilitated by online platforms and introductory agencies.'

²¹ <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm2034>

- 3.2.12 We urge EAS and HMRC tax (and any other enforcement bodies that might be involved, for example the Health and Safety executive), to try to get to grips with these issues and address any misinformation and non-compliance that there is out there before the problem gets any bigger.

3.3 3. Workforce Engagement

Looking at evidence of how workers gain understanding and enforce their employment rights.

3a. What examples can you share of initiatives that have assisted workers to understand and enforce their rights – particularly as regards harder to reach workers?

- 3.3.1 We think it is hard - if not impossible - for low paid workers, without representation from a charity or trade union for example, to understand and enforce their rights, for reasons we have set out on various occasions including in previous responses to the DLME.²²
- 3.3.2 Inevitably, things will be worse for migrant workers where there may a lack of experience with the system, cultural differences and a language barrier to further inhibit them.
- 3.3.3 We feel some investment in this area could prove very valuable, in terms of the authorities providing some information about working in the UK to migrant workers in their own language. This would complement the information that the GLAA produce on Worker Rights, available in around 20 different languages.²³ There is also a GLAA reporting form in different languages where people can report labour abuse, or employers or labour provider who they think could be exploiting workers.²⁴ We note that the Health and Safety Executive produce their core guidance for workers in different languages.²⁵
- 3.3.4 Other important bodies in the worker protection safety net, (e.g., ACAS, HMRC) currently provide **no** information to migrants in their own languages about what to expect with their work, pay and taxes etc. This is despite the fact that they are probably particularly vulnerable to poor treatment or exploitation.
- 3.3.5 HMRC used to provide a short introductory guide to the UK tax system 'Coming to work in the UK? We'll show you the way to pay your taxes.' in Bulgarian, Czech, English, Hungarian, Latvian,

²² For example, <https://www.litrg.org.uk/sites/default/files/180926-LITRG-response-DLME-FINAL.pdf> and <https://www.litrg.org.uk/sites/default/files/files/171010-LITRG-response-Director-LME-FINAL.pdf>

²³ <https://www.gla.gov.uk/i-am-a/i-am-a-worker/workers-rights-leaflets/>

²⁴ <https://www.gla.gov.uk/report-issues/>

²⁵ <https://www.hse.gov.uk/languages/index.htm>

Lithuanian, Polish, Portuguese, Romanian, Russian and Slovakian, but they removed it as they thought that it did not help people to integrate (in our view this argument is short sighted).²⁶

- 3.3.6 ACAS/HMRC etc also need to make sure that migrants who need to contact them, can do so. It is currently extremely difficult for people with limited English (and without close family and friends to help translate) to contact ACAS/HMRC with questions or queries or to make a complaint.
- 3.3.7 The Pay and Rights online form (and instructions) is only available in English. While HMRC and ACAS can organise an interpreter, this facility is not well known or publicised. Someone who is unfamiliar with GOV.UK and/or the ACAS website and doesn't speak much English is unlikely to find out about this.²⁷
- 3.3.8 We also have concerns that a migrant who speaks little or no English is unlikely to be able to navigate the voice recognition system on HMRC's helplines²⁸ or the lengthy broadcast messages on the ACAS helpline²⁹ in order to be able to request an interpreter (even if they are able to work out that this facility is available).
- 3.3.9 Given the likely influx of workers from Ukraine as a result of the recent invasion, then it seems to us that the provision of foreign language information becomes even more urgent. Ukrainians who start to work in the UK will need to understand the UK tax system and the rights and protections that there are in the UK. The exceptional situation in which Ukrainian refugees find themselves and the fact they will (hopefully) only be here on a temporary basis means the integration point is moot.
- 3.3.10 Now would seem an appropriate time for ACAS and HMRC – both HMRC tax and HMRC NMW (and other enforcement bodies and supporting bodies, as appropriate) to consider their approach to people who speak limited English.
- 3.3.11 In terms of native English speakers, we would very much welcome better guidance and information about their rights and the obligations their employers have towards them, especially in the context of

²⁶ It is still available to view in the government archives:

<https://webarchive.nationalarchives.gov.uk/20120207125722/http://www.hmrc.gov.uk/migrantworkers/index.htm>

²⁷ See for instance, <https://www.gov.uk/get-help-hmrc-extra-support/information-in-another-language>

²⁸ We have tested HMRC's telephone system and it doesn't recognise 'I don't speak English' or 'I need an interpreter'. The only words the system picked up were 'I need a translator'. However, this response was followed by lengthy messages and questions. These are unlikely to be understood by someone with little or no English, who might then give up.

²⁹ The ACAS helpline contained several broadcast messages (including about the call being recorded, a fake ACAS number, not phoning while driving and something else) which lasted 2.5 minutes before being put through to an adviser.

non-standard forms of working. We are concerned that some disabled people and people with learning disabilities are particularly open to exploitation, especially with the general toughening up of the benefits regime, forcing a number of people into non-standard work.

- 3.3.12 There are a number of things that the enforcement bodies, including HMRC could work on together to make information and guidance more accessible for vulnerable people, such as easy read versions of basic guides around the difference between employment and self-employment for example, and/or what to do if you get in a muddle with an employment agency or umbrella company and/or don't understand your pay.

3.4 **4. Business Engagement**

Various mechanisms initiated or supported by the enforcement bodies encourage, influence and embed good practice, e.g., Responsible Car Wash Scheme, Construction Protocol and the Apparel and General Merchandise Public/Private Protocol, The National Minimal Wage Naming Scheme and the Good Business Charter.

4a. What impact do you think these interventions have had? i.e., are they effective?

4b. Why? What would make them more effective?

4c. Are there any other examples of good practice? These can be drawn from across the regulatory landscape.

- 3.4.1 We have some comments to make on the NMW Naming Scheme – set up to discourage engagers from flouting their obligation. Whilst changes have been made to the scheme recently (for example, by removing the word 'Shaming' although by implication this is still the intention), it feels that an opportunity has been missed to ensure the scheme has the intended effects. Unfortunately, in our view, the system still seems heavily weighted towards penalising employers who have unintentionally failed to meet their obligations due to the complexity of the NMW rules.
- 3.4.2 For example, on the recent list from December 2021, 208 employers were named. The Government figures show that a large proportion (37%) of NMW breaches were for incorrect deductions from employee wages, including for costs and expenses of acquiring and maintaining uniforms.³⁰ (In a previous DLME response, we have commented on the fact that tax and minimum wage rules interact and diverge somewhat on key issues like uniform, and this may be causing employers confusion.)³¹

³⁰ <https://www.gov.uk/government/news/over-200-employers-called-out-for-falling-short-of-paying-staff-the-minimum-wage>

<https://www.gov.uk/government/news/over-200-employers-called-out-for-falling-short-of-paying-staff-the-minimum-wage>

³¹ Under minimum wage rules, if a worker has to pay for any type of uniform – even if it is just a pair of black trousers, black shoes and a white shirt – the cost incurred must be deducted from their pay to establish

The company at the top of the list underpaid its 3600 staff by an average of £42 each, which is suggestive of them having fallen into such a pitfall.

- 3.4.3 We are also concerned that the ‘headline’ inclusions tend to be big high street/household names,³² who then get picked up by the press/media.
- 3.4.4 Clearly appearing on the list may give them a sense of shame and cause them concerns over reputational damage and the impact on a customer’s impression of their business. Such concerns can be an important driver of compliance. However, some of these businesses would probably be compliant but for being tripped up by a complex technical rule. We understand there is some flexibility/discretion around the list³³ - perhaps more analysis could be undertaken on the incorrect deductions element to get a better understanding of the behaviour behind the breach before deciding whether to include employers on the list?
- 3.4.5 The impact of appearing on the list is somewhat diluted for businesses that aren’t high profile. If they are not picked up in the press/media, then many members of the public would be unaware that they were on the list. Even if they were aware they are on the list, people seem less quick to sanction them and consumers are possibly less likely to change their behaviour. All of these things limit the deterrent value. Yet these businesses are likely to be the ones where arguably more serious and complex breaches take place. For instance, in the most recent naming round, a fish and chip shop whose name appears further down the very long list, underpaid 1 worker by over £17,000.
- 3.4.6 The list also suggests that HMRC enforcement officers’ caseloads are tilted towards ‘broader’ cases where a greater number of workers have been underpaid a smaller amount. This means there is less of a deterrent effect for other types of breaches, including the breaches of minimum wage rules that tend to go hand-in-hand with false self-employment.

whether the minimum wage is being paid. However, under tax law, the rules are harsher – disallowing a deduction on such standard attire from the worker’s earnings for tax purposes: <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim32475>

³² See <https://news.sky.com/story/john-lewis-fury-as-it-heads-latest-name-and-shame-list-for-flouting-wage-rules-12372661> and <https://news.sky.com/story/house-of-fraser-and-waterstones-among-employers-named-and-shamed-over-minimum-wage-12490481#:~:text=News%20%7C%20Sky%20News-,House%20of%20Fraser%20and%20Waterstones%20among%20employers%20named%20and%20shamed,of%20around%20%C2%A31.2m>.

³³ For instance, in some cases, employers offering salary sacrifice will no longer be subject to naming or if the scheme results in employees receiving pay below the NMW rate: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864185/salaried-hours-work-salary-sacrifice-consultation-government-response.pdf

- 3.4.7 On the December 2021 list, only 4 employers were on the list for ‘worker status error’.³⁴ In our experience, there is already little fear amongst certain employers using false self-employment, that they will get caught by HMRC from a tax perspective.³⁵ These types of cases are notoriously time-consuming and difficult for HMRC to investigate – particularly as there will not usually be any official ‘employer’ data to scrutinise as a starting point. The list reinforces the impression that there are unlikely to be any consequences from an NMW perspective either.
- 3.4.8 We do not condone an employer paying someone less than the NMW, but ‘naming’ employers in cases of genuine confusion or misunderstanding where the resulting underpayments are small and, of themselves, probably do not cause significant worker detriment does nothing to help those workers whose employers are recklessly or consciously underpaying the NMW.
- 3.4.9 It seems to us that it would probably be more effective to operate along the lines of the Pensions Regulator (TPR), which names only the most egregious non-compliance. This would help HMRC demonstrate that they are not just focused on ‘low-hanging fruit’ within an employment setting, and would send out a stronger message to the exploiters.
- 3.4.10 Finally, in terms of industry self-regulation, we would like to highlight the huge amount of work going on within the umbrella company sector to try and raise standards. Many providers are trying to find consensus with HMRC as to ‘what good looks like’ and there are a number of industry led solutions that are trying to fill the gaps that exist with state enforcement/regulation. Many providers are trying to find consensus with HMRC as to ‘what good looks like’ and there are a number of industry led solutions that are trying to fill the gaps that exist with state enforcement/regulation. In the void that exists in the umbrella sector, we think it would be a huge step forward if there could be some kind of trusted, expert stakeholder group (which could include the compliant umbrella companies) to help challenge and guide HMRC (and other enforcement bodies) in this area.

3.5 5. Recruitment

5a. What changes have you observed to recruitment patterns and practices. For example, online recruitment and offshore recruitment.

5b. Do any of these trends you observe raise concerns about compliance?

5c. Do you have any evidence to share in respect of recruitment fraud?

- 3.5.1 We would like to highlight a few trends. We have noticed an increase in businesses recruiting using Facebook and the like (which is concerning as we think people associate social media with

³⁴ ‘This includes instances where the worker is incorrectly treated as self-employed, or an unpaid intern that should be classified as worker’

³⁵ For more discussion of this problem see <https://www.litrg.org.uk/sites/default/files/180531-LITRG-response-Employment-status-FINAL.pdf>

community and friends and so on, meaning their guard may be down). Also, recruitment adverts continue to blur the line between employment and self-employment, often giving the impression it is a matter of choice for the individual or the engager, rather than a matter of fact based on circumstances. As mentioned previously, this then has consequences which are likely to lead to exploitation of the worker.

- 3.5.2 We would also like the DLME to be aware of the recruitment practice of agencies misdescribing pay rates to workers who are looking for work.
- 3.5.3 To explain: a recruitment agency will have a PAYE rate for a particular assignment (the rate they would pay a worker if the worker worked through them). When a recruitment agency quotes somebody a rate to work through an umbrella company, this rate should be uplifted from the PAYE rate to take account of all the 'on top' employment costs the umbrella company will now have. As we explained in our 2021 umbrella report, this uplift procedure is not well explained to workers, causing worry and confusion and sometimes does not always happen either at all or fully, leaving workers out of pocket.
- 3.5.4 Another worrying recruitment trend is that of recruitment agencies being incentivised by a commission into encouraging/forcing workers to join up to certain umbrella companies if they want to work. If these umbrella companies are non-compliant, they can make tax savings/reduce costs (which bolster their profit and/or are passed back up the supply chain) and the cycle continues.
- 3.5.5 We include more detail and an example in the context of DR, in our recent response to the government's call for evidence regarding umbrella companies.³⁶ We hope this demonstrates how easy it is for innocent agency workers who just want a job, to end up as pawns – in a game being played by their recruitment agencies and non-compliant umbrella companies.

3.6 **6. Employment models**

What evidence can you present as regards compliance of newer models of employment – for example gig economy workers, employment through umbrella companies*, joint employment models**

6a. Do you have evidence of these being associated with worker exploitation?

6b. Do you have evidence of other employment models that might give rise to compliance concerns?

***Umbrella company is a term used for company that employs a temporary worker (an agency worker or contractor), often on behalf of an employment agency. The agency will then provide the**

³⁶ <https://www.litr.org.uk/latest-news/submissions/220222-call-evidence-umbrella-company-market>

services of the worker to their clients. Umbrella companies do not find work for the workers they employ.

****Joint employment model: An example of this is an employee formally employed by one employer the (primary employer) may be deemed constructively employed by another employer (secondary employer) for example an employer and a contractor or subcontractor performing services for the employer or a staffing agency providing employees to the employer.**

- 3.6.1 We talked about umbrella companies and the different models they run that can leave workers at risk of exploitation in answer to question 1 and question 5.
- 3.6.2 In terms of other models of engagement that cause compliance concerns, we are concerned about those working in the gig economy – particularly the ones doing lower paid manual work like driving, couriership and food delivery. They often seem to face uncertain hours and low pay, and an unrelenting focus on speed and unrealistic targets.
- 3.6.3 Because their work has some characteristics of self-employment (for example, they decide when they work and sometimes use their own tools), they are typically treated as self-employed for tax purposes.
- 3.6.4 Many find it difficult to navigate the Self Assessment tax system and file their annual tax return, because of a lack of skills, lower levels of education, limited English or a general lack of experience of the tax system. Many will not engage an accountant or tax adviser. There is also a lack of support from official sources. These factors can often result in non-compliance or underreporting due to ignorance and misunderstanding.³⁷ Penalties and even bankruptcy can result – which can have devastating consequences for them and their life chances.
- 3.6.5 Changes due to come in around basis period reform and the Making Tax Digital programme mean those just about managing in Self Assessment will need to become versed in a completely new system, creating more confusion and queries.
- 3.6.6 The added complexity for many in the gig economy, given they are on low incomes, is that they are also claiming in-work benefits. The fact they are treated as self-employed for taxes (even where this might be incorrect), means that they will probably be treated as self-employed for benefits. The main in-work benefit is Universal Credit (UC). The rules in UC for the self-employed tend to be less generous/more burdensome than for employees. For example, the Minimum Income Floor (MIF) rules (which treat people as earning a certain amount when calculating their monthly UC, even if they haven't) penalise those who have fluctuating incomes and those who have big business expenses that fall in one month rather than spread over the year. This means that workers who have

³⁷ The £1,000 tax free 'allowances' – although welcome in many respects – can give out mixed messages about sharing and gig economy income and record keeping obligations.

a bad month or spend all their income on outgoings in any one month, may receive little or no UC to support them.³⁸

- 3.6.7 We would have thought all of this leaves them in a very precarious position and therefore very vulnerable to exploitation.
- 3.6.8 Although they are treated as self-employed for tax purposes, they 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 (so can't really be said to be in business on their own account).
- 3.6.9 Many may well fall under the definition of 'worker' for employment law purposes (and indeed, 'employee' for tax purposes, however this has not yet been tested in the courts). 'Worker status' is extremely valuable status for those in the gig economy as it recognises that some people may be subordinate and many not be able to decide how much to charge, or afford to give themselves time off etc. It provides them with some basic protection from their engager.
- 3.6.10 We know that some workers have had success enforcing their worker status in the employment tribunal,³⁹ however there will be many others that do not have the wherewithal to do this and it is not clear to what extent the enforcement bodies are engaged with the issues.
- 3.6.11 Basically, we think at the moment, many workers in the gig economy are getting the worst of all worlds and this is before you even start to think about things like health and safety and worker wellbeing. In a recent IFS/CIOT debate on how gig workers should be taxed,⁴⁰ we presented a range of worker queries that we have received into the LITRG mailbox and also some that have been posted on other sites that we've come across in our work. These are very illuminating and expose all sorts of difficult issues that workers face in terms of the how they fit within the current framework.
- 3.6.12 As online platforms in the gig economy move from aggressive growth to something more stable and become household names in the UK, it is foreseeable that there may be some reflection on the sheer imbalance of power. This may result in some concessions and compromises to workers, for example payment of NMW, holiday pay, sick coverage – even where it hasn't been provoked by a court case. We hope there might be some organic change coming as organisations create plans to help them retain workers and future proof their businesses.
- 3.6.13 However, in the meantime, we would invite the DLME to watch the IFS/CIOT debate to try and understand workers' experiences and to think about what intervention or changes might be appropriate to improve things for gig economy workers. We suggest that rewriting the confusing

³⁵ See the worked examples in appendix 2 which illustrate the issue of fluctuating income:
<https://www.litrg.org.uk/sites/default/files/Self%20Employment%20report%20FINAL%20for%20release.pdf>

³⁹ We discuss the Supreme Court judgement in the Uber case here for example:
<https://www.litrg.org.uk/latest-news/news/210311-curious-case-worker-status-and-statutory-sick-pay>

⁴⁰ <https://www.presenta.co.uk/CIOT/IFS/230621/index.html>

official information and guidance on GOV.UK on 'worker' status, particularly to bring greater clarity for the 'dependent' self-employed, would be a good start. In particular it should contain some real-world examples of where the dividing line between employees, workers and the self-employed sits. We also think HMRC should undertake a case to test the employment status of gig workers for tax purposes.

3.7 7. Enforcement resourcing

All 3 enforcement bodies engage in educational activity, promotion of compliance, enforcement and support to workers.

7a. What assessment do you make of how these 3 bodies operate?

7b. Provide evidence and examples of best practice to address labour market non-compliance that you would like to highlight to the Director?

- 3.7.1 It is hard to draw any conclusions as to whether the bodies are operating effectively as there isn't really much detailed, granular information published about how they use their enforcement powers in actual cases.
- 3.7.2 The closest thing to openness and transparency is probably the GLAA's press releases⁴¹ where people are able to see some real-life, positive examples of them exercising their functions. This helps create the impression that they are fully focused on mission priorities in terms of stamping out vicious and bad working practices.
- 3.7.3 We are unsure whether the same can be said for the other two bodies, where there is no 'inside' information issued at all. Our perception is that there is probably progress being made, but maybe at a slower rate.
- 3.7.4 We appreciate this may be down to a comparative lack of funding or resources, however, in order to use the funding resources they do have most effectively, we think it is important that they devote the necessary time, effort and money to ensuring that they really have their finger on the pulse of what is going on in the labour market. This will help them keep track of emerging trends and evolving experiences, will help them understand the true nature and extent of non-compliance, and to prioritise risk areas more effectively. This is crucial in this area as it is fast-changing and evolving.
- 3.7.5 For example, until a conversation that we recently had with the EAS, it did not appear that they were aware of they were aware of the 'introductory agencies profiting from facilitating falsely self-employed workers' problem (as set out previously). We would like to see the EAS conducting specific outreach work to introductory agencies in terms of providing guidance to improve practices, behaviours and compliance with legal obligations.

⁴¹ <https://www.gla.gov.uk/whats-new/latest-press-releases/>

- 3.7.6 We would also flag the worrying proliferation of salary advance schemes as another example of the authorities seemingly not keeping up with rapidly changing practices.⁴² Our understanding from HMRC's NMW guidance⁴³ is that when the salary advance (or loan) is made the amount is not taken into account as part of NMW pay. The recovery of a salary advance (or loan) is not a reduction in pay for NMW purposes.
- 3.7.7 However, there is a question over whether the fees that are deducted from the employee's pay should count as a reduction in their NMW pay⁴⁴ (which could then bring their pay beneath the prevailing NMW hourly rate). Such fees could perhaps be seen as being in connection with work or as a deduction or payment for the employer's own use and benefit (even if it is also benefiting the worker) as the worker using the third party service to essentially better align their work and earnings, provides an advantage to the employer who might otherwise face quite a lot of payroll administration. This is something we have sought to clarify with HMRC, yet the question remains unanswered. HMRC have not published their view of these schemes from a tax perspective either,⁴⁵ meaning there a degree of uncertainty for those involved.
- 3.7.8 In terms of best practice, the DLME should see if she can learn anything from TPR who are widely regarded as successful and effective at enforcing the auto enrolment programme. They have a clear strategy⁴⁶ which can be summed up as aiming to prevent problems from developing in the first place. But where they find potential problems they will take action to educate, enable or enforce against those involved.
- 3.7.9 In our view, one particularly effective aspect of TPR's approach is that not only do they seem to actually use the powers they have, but they are also not afraid to divulge details of how they have

⁴² A salary advance scheme is a way for employees to access some of their wages before payday.

It is a relatively new form of borrowing where third party salary advance companies work with employers to let employees access part of their salary as they earn it, rather than having to wait until their payday. A salary advance company will usually charge a fee per withdrawal for using this service. Sometimes employers subsidise the cost of the fees. At the end of the month, the employee's pay will be less than usual, as the advance plus the fees are taken out of what would usually be the total amount of their pay.

The Financial Conduct Authority has highlighted the risks of using salary advance schemes - for both employees and employers - and has particularly raised concerns surrounding the fact that this type of activity is currently unregulated: <https://www.fca.org.uk/news/statements/fca-sets-out-views-employer-salary-advance-schemes>

⁴³ <https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm09210>

⁴⁴ <https://www.legislation.gov.uk/ukxi/2015/621/part/4/chapter/2/made>

⁴⁵ The scheme providers say there is no impact on an employers' payroll processes of implementing such a scheme, however we are not so sure this is correct.

⁴⁶ <https://www.thepensionsregulator.gov.uk/en/about-us/how-we-regulate-and-enforce/our-approach-to-regulating>

used them – employers are fully aware that TPR have a range of powers that they can use and that if they fail to give their employees the pensions they are entitled to, they are very likely to get caught and be fined.

3.7.10 In particular, their enforcement and compliance bulletins⁴⁷ set out cases and the powers TPR have used. Further, where TPR consider a case is sufficiently important they may publish specific details.⁴⁸ While they use these powers in a measured way, they say having the ability to publish detailed information about their enforcement activity plays a vital part in securing the important outcomes of transparency, education and guidance, and deterrence.

3.8 Other issues

8. Over and above the issues raised above, are there any other relevant issues you would like to bring to my attention for this strategy? For instance, effectiveness of labour market enforcement and how this could be improved, allocation of resources and good practice that can be drawn from across the regulatory landscape.

3.8.1 We strongly believe that HMRC tax are a large and important part of the labour market enforcement landscape – they hold the key to a number of the priority areas requiring action.

3.8.2 Ideally we would like to see the DLME's statutory role in relation to non-compliance in the labour market expanded to include tax. One way of achieving this would be to add non-compliance with PAYE regulations to Section 3 Immigration Act 2016⁴⁹. This would give the DLME an opportunity to assess HMRC's tax compliance and enforcement function efforts in this area as part of her assessment of the scale and nature of non-compliance in the labour market. It would also allow her to include proposals for tackling any non-compliance issues identified, in her labour market enforcement strategy.

3.8.3 Even if this is not possible, we hope our comments have been useful and would very much welcome anything the DLME can do to help encourage HMRC to work with her on labour market issues and on protecting low paid workers from unscrupulous engagers.

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27 May 2022

⁴⁷ <https://www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/enforcement-bulletins>

⁴⁸ <https://www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/regulatory-intervention-reports>

⁴⁹ <https://www.legislation.gov.uk/ukpga/2016/19/part/1/chapter/1/crossheading/director-of-labour-market-enforcement>