Employment e-briefing

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Good Work: The Taylor Review of Modern Working Practices - Briefing note

This week, the much anticipated 115 page report, 'The Taylor Review of Modern Working Practices' has been published.

The review was commissioned by UK Prime Minister Theresa May and produced by Matthew Taylor. The driving impetus behind the report is, in Matthew Taylor's words, "based on a single overriding ambition: all work in the UK economy should be fair and decent with realistic scope for development and fulfilment."

The report contains recommendations for the variety of relationships that can exist between businesses and their staff, from 'gig economy' to the more traditional models.

If the recommendations are put into place, then we are likely to see a significant overhaul of current working practices. However, the government is yet to decide whether or not to adopt some or all of the recommendations, which we realise may be a tall order given the current slim Government majority and the fact that the Parliamentary timetable is dominated by Brexit.

We appreciate that you are busy, so please find a summary below of some of Matthew Taylor's key recommendations for employers to take a note of:

1. More legislation, setting out clearer tests for employment status and easier access to an Employment Tribunal decision on employment status

This follows a string of recent, highly publicised cases (Uber, Deliveroo, Cityspring…) which have highlighted the need for greater legal clarity regarding the categorisation of individuals as either self-employed, a worker or an employee for the purposes of employment rights.

The report recommends that the current law in this area, predominantly based on case law, is replaced with primary and secondary legislation.

Further, the report recommends that individuals should be able to get a decision of their employment status at an Employment Tribunal without paying a fee and also recommends the reversal of the burden of proof in employment status disputes (so that the employer, rather than the individual claimant, will have to prove that the individual is not entitled to the employment rights that the individual is claiming).

What do we think?

We agree that the law in this area is crying out for more clarity, particularly in respect of legal definitions, namely, the elusive "worker status". Often, this grey area of law results in long, complicated and expensive disputes in employment tribunals. However, it is questionable as to whether any legislation could keep up with this changing landscape. Employment status is currently determined in accordance with individual factual circumstances, and, while new legislation could tidy up the definitions for the different types of employment status, we are sceptical how far legislation would go in terms of stamping out future disputes in this area. The Employment Tribunal is likely to still have to interpret any new legislation implemented in accordance with the factual circumstances of each case.

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2. Renaming 'workers' as 'dependent contractors'

As many of you will know, 'worker' status is a particularly divisive area. It currently covers all employees, as well as some self-employed workers, which can give rise to confusion. It also blurs the boundaries for tax status. The report contends that changing the name in this way should help individuals and businesses recognise that the extent of 'control' over the individual is the key consideration when answering the question of whether a member of staff is a worker or not. The report encourages less emphasis on 'personal service' in respect of this question than under the current legal position.

What do we think?

We would welcome a new definition of worker if it brings greater clarity. It will enable employers to decipher, with more ease, the exact employment rights and entitlements of the individuals in their workforce.

However, reducing the current emphasis on 'personal service' is likely to make it more difficult for employers to rely on substitution clauses in written agreements with their staff, as evidence which points away from an employment relationship, towards one of self-employment.

3. Greater flexibility

The report highlights that workers or 'dependent contractors' (i.e. the category of workers that are neither employees or genuinely in business on their own account) are the group most likely to suffer from unfair, one-sided flexibility. It calls on the particular need for this group to be supported by a genuine "two-way flexibility". This stems from the concern highlighted in the report, which is that, currently, an individual can have "almost every aspect of their work controlled by a business, from rates of pay to disciplinary action", even if they are not an employee with the benefit of the array of employment protections under law.

More generally, the report calls on the Government to consider how to further promote genuine flexibility in the workplace, such as temporary changes to staff contracts where an individual has caring responsibilities or studies. The report also emphasises that flexibility should benefit individuals, not just businesses, and that flexibility should not be at the expense of unreasonable uncertainty regarding hours and pay.

What do we think?

Over the last few years, we have seen a move towards greater flexibility, such as the introduction of the employee's right to request flexible working. Businesses use flexible working arrangements such as zero-hour contracts to, for example, deal with fluctuating periods of demand and supply. We have already seen the removal of exclusivity clauses from zero hour contracts, which is already a step towards regulating this highly controversial area of employment practice.

Employers may wish to explore options for promoting and managing more flexible arrangements within the workplace now.

4. What is included in pay?

Notably, the report recommends that agency workers engaging with hirers for more than 12 months should be given the right to request a direct employment contract. This arises out of concerns that some businesses are using agency workers over a longer period of time as a substitute for effective workforce management. Also, the report recommends that current legislation enabling agency workers to opt out of the right to equal pay with permanent staff (" the Swedish Derogation"), should be repealed, coupled with stronger compliance mechanisms.

Zero-hours workers should have an explicit right to request a fixed hours contract. The report acknowledges that it is arguable that this right is already included in flexible working requests. Nevertheless, it advocates an explicit right in this context. The average weekly hours worked over the previous 12 months should be the starting assumption for any new contract that follows.

What do we think?

The right to request contracts should help employers focus on the long-term needs of their business, and provide them with a juncture at which to assess how long they wish to retain agency and zero hours workers for.

We anticipate that it would be advisable to implement Company procedures to deal with any contract requests fairly, along the lines of the current flexible working procedures.

5. Aligning tax status and employment status

Currently, tax and employment status rulings in the tax and employment tribunals, respectively, are persuasive, but not binding on each other. The report states that the government "could ensure that where a tribunal determines that an individual is an "employee" for tax purposes, that decision is also binding for tax purposes.

What do we think?

The greatest complicating factor in employment status is the fact that the employment rights and tax-status consequences of a particular set of circumstances do not align. Anything that can be done to resolve this issue will be useful, although we note that the term of reference for the Taylor Review significantly restricted its ability to consider the current tax regime, and this has limited the scope of the report to recommend the significant reform of this area which is necessary.

Companies will probably have to start paying National Insurance Contributions for people classed as employees and 'dependent contractors' (previously, workers).

The alignment may increase efficiency, and consistency between the tax and employment tribunals, which should, in turn, save public resource.

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6. Increased transparency

The report advocates that individuals should have a better understanding of their rights from the outset of the business relationship. In particular, the report recommends that 'dependent contractors' should have a written statement setting out their key rights from the beginning of the relationship, and that a stand-alone claim should be available to individuals who do not receive a statement. The report recommends that written statements for 'dependent contractors' should incorporate rights specific to this group of workers (but offers no real clarity on this point).

The report considers that there would be merit in ensuring that organisations above a certain size are 'publicly accountable' for their chosen workforce structure. The report is clear that it does not want to overburden businesses but recommends that the Government should introduce new reporting duties on businesses to report certain information on workforce structure, including having their model of employment and use of agency services beyond a certain threshold made publicly available (although how this should be done is not specified).

What do we think?

We would always recommend a written agreement setting out the terms of any working relationship- employment or otherwise- and so this seems like a sensible measure.

Regarding reporting obligations, the report does not recommend how information on workforce structures should be made available, but if implemented, we suspect that the reporting may be similar with the recent Gender Pay Gap reporting obligations, which entails businesses uploading the required information to their own and also to a central government website.

7. Considering increased National Minimum and Living Wages for hours that are not guaranteed as part of the contract

The report recommends that the Low Pay Commission consider the potential impact of how such pay increases could impact upon businesses. The report perceives a potential trade-off between security of income and pay. So, an employee with a fixed-hours contract may receive a lower hourly rate than his counterpart who performs the same work for the same employer, but on a zero-hours contract.

This recommendation reflects one of the underlying themes within the report which is that flexibility should not benefit the employer at the unreasonable expense of the worker. The report suggests that this new, higher rate, should be set at a level which incentivises businesses to schedule guaranteed hours as far as reasonably possible.

What do we think?

It will be interesting to see what the Low Pay Commission might say.

This area would require careful consideration. Many employers who use zero-hours contracts are financially stretched already, particularly as a result of having to adapt to the National Living Wage, before having to potentially increase staff wages further.

Increasing NMW and NLW may deter businesses from operating flexible employment models, which, of course, would be ironic: the report recognises flexibility within employment as a valuable asset to the UK economy.

There are other recommendations included in the Report that could be relevant to your organisation. If you would like any further guidance or the opportunity to discuss particular areas, please do not hesitate to contact the Prettys' Employment team who will be more than happy to assist.

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