



BRIEFING PAPER

Number CBP 8817, 28 February 2020

Insecure work: the Taylor Review and the Good Work Plan

By Daniel Ferguson

Contents:

1. Timeline & summary of recommendations and actions
2. Agency workers
3. Continuous service
4. Employment status
5. Enforcement
6. Family-related leave and pay
7. Information and consultation
8. Holiday pay
9. Portable ratings
10. Pregnancy and maternity discrimination
11. Sick leave and pay
12. Tips and gratuities
13. Unpaid internships
14. Written statement of employment particulars
15. Zero-hours contracts
16. Comment

Contents

Summary	3
1. Timeline & summary of recommendations and actions	5
1.1 Timeline	5
1.2 Summary of recommendations & actions	7
2. Agency workers	12
3. Continuous service	17
4. Employment status	18
5. Enforcement	26
6. Family-related leave and pay	33
7. Information and consultation	38
8. Holiday pay	39
9. Portable ratings	40
10. Pregnancy and maternity discrimination	41
11. Sick leave and pay	43
12. Tips and gratuities	47
13. Unpaid internships	48
14. Written statement of employment particulars	50
15. Zero-hours contracts	53
16. Comment	58

Summary

On 1 October 2016, Theresa May, then Prime Minister, commissioned Matthew Taylor, the chief Executive of the Royal Society of the Arts, to lead a review into how employment law needed to adapt to keep pace with modern business practices. The review was driven by the rise in atypical forms of working, particularly in the 'gig economy'.

Data from the Office of National Statistics' Labour Force Survey indicated that there had been a substantial rise in the number of workers working on zero-hours contracts, peaking at 907,000 in the period of October to December 2016. A 2016 report from the TUC suggested that there were as many as 3.2 million insecure workers who lacked access to basic rights and decent levels of pay.

The Taylor Review was formally launched on 30 November 2016, shortly after a landmark ruling involving Uber, the ride-sharing company. The Employment Tribunal found that Uber drivers were not self-employed but were 'workers' entitled to basic workers' rights, including the right to receive the National Minimum Wage and holiday pay.

The Taylor Review of Modern Working Practices was published in July 2017. It concluded that the labour market was changing, that new forms of work were raising questions about the existing legislation and that there was a need to "organise our national framework around an explicit commitment to good work for all." The Review broadly centred around three themes:

- 1 tackling exploitative employment practices;
- 2 increasing clarity in the law and helping people enforce their rights; and
- 3 aligning the incentives driving labour market change with broader national objectives.

It contained a wide range of recommendations on issues such as agency workers, employment status, the enforcement of employment rights, maternity discrimination and zero-hours contracts.

The Review received a mixed response from stakeholders. Business groups broadly welcomed the Review's recognition that flexibility can be a strength in the labour market but cautioned against reforms that could damage job prospects. Trade unions welcomed elements of the Review, such as the recommendation to abolish the 'Swedish Derogation' – a rule that exempts some agency workers from the right to equal pay with directly hired staff. They also welcomed the recommendation that a higher rate of minimum wage should be paid for working hours not fixed in the contract. However, they broadly concluded that the Review was not bold enough, criticising recommendations such as the right to request fixed working hours.

In December 2018, the May Government published the Good Work Plan, outlining how it intended to implement the recommendations of the Taylor Review. The Government stated that it was accepting 51 out of the 53 recommendations made in Taylor and labelled its proposals the largest upgrade to workers' rights in a generation. By contrast, the Labour party criticised the Plan as falling dramatically short of improving the lives of workers.

The Government has passed secondary legislation giving effect to some of the commitments in the Good Work Plan, including legislation that will abolish the Swedish Derogation and legislation to extend to workers the right to receive a written statement of employment rights.

4 Insecure work: the Taylor Review and the Good Work Plan

However, many of the core recommendations in the Taylor Review have yet to be implemented. The Government has held consultations on measures to tackle one-sided flexibility and a proposal to establish a single enforcement body for employment rights. It also held a 'Good Work Plan consultation' on family-related leave, although the issue did not actually feature in either the Taylor Review or the Good Work Plan. As the Government has not responded to the numerous consultations on these reforms, it is not yet clear how it intends to proceed across the full range of issues identified.

Nevertheless, in the December 2019 Queen's Speech, the Johnson Government announced an *Employment Bill*. The Bill has yet to be published, but the Government stated that the Bill would have a variety of purposes, including giving effect to many Good Work Plan recommendations. It said the Bill would include measures such as establishing a single enforcement body, giving workers a right to request a contract with more predictable hours and banning deductions from staff tips.

Some key questions remain, including whether the Government intends to legislate to reform employment status - one of the key aspects of the Taylor Review.

Structure of this paper

This paper provides an overview of the recommendations made in the Taylor Review and the action the Government has taken to date.

Section 1 provides a timeline of key events and publications as well as a summary table listing all of the Taylor Review recommendations and Government actions.

Sections 2 to 15 provide a detailed overview of specific issues raised in Taylor.

Section 16 provides a summary of some of the key stakeholder responses.

1. Timeline & summary of recommendations and actions

The Government's implementation of the Taylor Review has taken place over a number of years. It has involved multiple consultations, numerous pieces of secondary legislation and proposed primary legislation. To date, there are a number of commitments that have yet to be implemented.

1.1 Timeline

October / November 2016

Theresa May, then Prime Minister, appointed Matthew Taylor, the Chief Executive of the Royal Society of the Arts, to [conduct a review of the modern labour market](#). The chief purpose of the review was to consider how modern business practices and new forms of working are impacting on the rights of workers. The review was to [focus on six key themes](#):

- Security, pay and rights
- Progression and training
- The balance of rights and responsibilities
- Representation
- Opportunities for under-represented groups
- New business models

July 2017

The [Taylor Review of Modern Working Practices](#) was published. It made a wide range of recommendations centred around [seven key principles](#):

- 1 The commitment to increase the quantity of work should be complemented by a commitment to creating better jobs;
- 2 The Government's ambition should be that all work is fair and decent with scope for fulfilment and development;
- 3 While there will always be people in work who struggle to meet needs, it should be ensured that such people have dignity in work and a realistic prospect of progressing;
- 4 Insecure and exploitative work is bad for health and wellbeing and generates a cost for society;
- 5 Improving the quality of work is important to improving productivity;
- 6 Technological changes should be seized to make working life better; and
- 7 For citizens to be engaged, responsible and active those virtues must be present in the workplace.

February 2018

The Government published its [response to the Taylor Review](#). The Government also launched four consultations:

- 1 [Agency workers](#)
- 2 [Employment status](#)
- 3 [Enforcement of employment rights](#)
- 4 [Increasing transparency in the labour market](#)

The Government did not publish individual responses to these consultations.

December 2018

The Government published the [Good Work Plan](#), setting out how it intended to implement the recommendations made in the Taylor Review. The Government stated that it was accepting 51 out of the 53 recommendations made by Taylor. It labelled its proposals "[the largest upgrade in a generation to workers rights](#)".

The Government also made the [Employment Rights \(Employment Particulars and Paid Annual Leave\) \(Amendment\) Regulations 2018](#), which will give effect to a number of the proposals made by Taylor from 6 April 2020.

January 2019

The Government published a consultation on [pregnancy and maternity discrimination](#) – one of the issues on which Taylor made recommendations.

March 2019

The Government made three further pieces of secondary legislation giving effect to some of the recommendations in the Taylor Review:

- 1 [Agency Workers \(Amendment\) Regulations 2019](#)
- 2 [Conduct of Employment Agencies and Employment Businesses \(Amendment\) Regulations 2019](#)
- 3 [Employment Rights \(Miscellaneous Amendments\) Regulations 2019](#)

Most of the key provisions of these regulations come into force on 6 April 2020. A few provisions came into effect on 6 April 2019.

July 2019

Shortly before Theresa May's resignation, the Government published three further consultations on the Good Work Plan:

- 1 [One-sided flexibility: addressing unfair flexible working practices](#)
- 2 [Establishing a new single enforcement body for employment rights](#)
- 3 [Proposals to support families](#)

The Government also published a further consultation titled [Health is Everyone's Business](#), elements of which consult on proposals made in the Taylor Review.

The four consultations closed in October and November 2019. Responses have yet to be published.

In July 2019, the Government published its [response to the January 2019 consultation on pregnancy and maternity discrimination](#).

Also in July 2019, the EU officially adopted the Directive on Transparent and Predictable Working Conditions ([Directive \(EU\) 2019/1152](#)) and the Directive on Work-Life-Balance for Parents and Carers ([Directive \(EU\) 2019/1158](#)). These Directives touch on a number of issues on which Taylor made recommendations. However, the implementation deadlines for these Directives are in August 2022 and it is unlikely that the UK will still be bound by EU law at that time.

October 2019

In the [Queen’s Speech](#), the Johnson Government committed to continuing the implementation of the Good Work Plan. It also committed to introducing an *Employment (Allocation of Tips) Bill*, which would implement one of the Good Work Plan commitments

December 2019

In the [Queen’s Speech](#), the Government committed to introducing an *Employment Bill*. The proposed Bill was broad in scope and would cover several proposals made in the Good Work Plan as well as addressing many of the issues that were consulted on in the July 2019 consultations. Notably, the Queen’s Speech did not list employment status as one of the matters the Bill would cover. Employment status was one of the central focuses of the Taylor Review.

1.2 Summary of recommendations & actions

This table tracks Government action on the various recommendations made in the Taylor Review that called for changes in employment legislation or related guidance. It does not track broader recommendations made by Taylor, such as that the “Government should continue to develop advice and support for people embarking on a self-employed career to ensure they have the greatest chance of succeeding”.

The following table summarises the contents of this paper.

Taylor Review Recommendation	Government Response
Agency workers	
Improve transparency of information provided to agency workers on rates of pay and who is responsible for payments	Legislation passed requiring all employment businesses to provide agency workers with 'key information documents' covering issues including pay and the identity of the employer. Effective 6 April 2020
Abolish the 'Swedish Derogation'	Legislation passed to abolish the 'Swedish Derogation'. Effective 6 April 2020
Give agency workers a right to request a direct contract with the hirer	Discussed in the February 2018 consultation on agency workers but not directly addressed in the Good Work Plan or elsewhere.

Taylor Review Recommendation	Government Response
Continuity of service	
Extend period for breaking continuity of service from one week to four weeks	Commitment to legislate in the Good Work Plan
Employment status	
Set out key principles of the employment status test in primary legislation and supplement them with detailed tests in secondary legislation	Consultation launched in February 2018 on options for reforming employment status legislation. Commitment to legislate on employment status in the Good Work Plan. Legislation has yet to be published. Employment status was not listed in the December 2019 Queen's Speech as one of the issues that will be covered by the forthcoming <i>Employment Bill</i> .
Rename 'workers' as 'dependent contractors'	
Develop a new test for 'dependent contractor' status which places more emphasis on control and less emphasis on personal service	
Renew effort to align the employment status frameworks in tax and employment law	
Create online tool for determining employment status	Commitment to develop a tool once the changes to the employment status have been implemented
Reverse the burden of proof so that employers have to show a workers is not entitled to the rights they claim	Commitment to return to the issue once an online tool has been developed
Create an obligation for employment tribunals to consider using aggravated breach penalties if an employer has already lost an employment status case on similar facts	Commitment in the Good Work Plan to legislate to enable the Employment Tribunal to apply sanctions for repeated breaches of employment rights. It also committed to update guidance on existing ET powers. New guidance was published in February 2019. New legislation has yet to be published.
Allow claimants to obtain a determination of their employment status at a preliminary hearing without paying employment tribunal fees.	Currently redundant. The Employment Tribunal fee scheme was struck down as unlawful by the Supreme Court in 2017.
Piece rates legislation should be adapted to govern how app-based workers are paid the National Minimum Wage	Recommendation rejected as overly complex and risky by the BEIS and Work and Pensions Committees. Good Work Plan stated that the Government will not proceed with this recommendation.
Enforcement	
Remit of the Employment Agency Standards Inspectorate (EAS) should be expanded to cover umbrella companies	Commitment in Good Work Plan to include umbrella companies in the remit of a single enforcement body. Commitment in December 2019 Queen's Speech to create a single enforcement body through the <i>Employment Bill</i> .
Remit of EAS should be expanded to cover rights under the <i>Agency Workers Regulations 2010</i>	February 2018 consultation on agency workers sought views on EAS oversight of the <i>Agency Worker Regulations 2010</i> . Issue not mentioned in the Good Work Plan or the July 2019 consultation on establishing a single enforcement body.

Taylor Review Recommendation	Government Response
HMRC should enforce holiday pay for the lowest paid workers as well as the minimum wage and sick pay	Commitment in Good Work Plan to include holiday pay in the remit of a single enforcement body. Commitment in December 2019 Queen's Speech to create a single enforcement body through the <i>Employment Bill</i> .
The enforcement of ET awards should be simplified by the state taking enforcement action without workers having to fill in extra forms or pay fees	Good Work Plan highlighted ongoing HMCTS reform programme but did not mention state enforcement of awards. Consultation on single enforcement body launched in July 2019 asked whether the state should have a greater role in the enforcement of awards.
Set up a naming and shaming scheme for employer who do not pay Tribunal awards within a reasonable time	Guidance on the naming scheme published on 17 December 2018. Government committed to publishing lists "in due course". Lists have yet to be published.
<i>This Good Work Plan commitment did not stem from the Taylor Review</i>	Good Work Plan committed to legislate to increase the maximum level of aggravated breach penalties. Legislation passed to increase maximum level from £5,000 to £20,000. Effective 6 April 2019
The Tribunal should be able to award uplifted compensation for repeated breaches against workers with the same working arrangements	Good Work Plan committed to legislate to enable the Employment Tribunal to apply sanctions for repeated breaches of employment rights. It also committed to update guidance on existing powers. New guidance was published in February 2019. New legislation has yet to be published.
Family related leave and pay	
<i>These proposals did not stem from the Taylor Review or the Good Work Plan but were included in a July 2019 Good Work Plan consultation</i>	<p>Consultation on supporting families sought views on a number of high level proposals to reform family-related leave and pay (incl. paternity, shared parental, maternity and parental leave and pay).</p> <p>Consultation on supporting families sought views on creating a right to neonatal leave and pay for parents of premature or sick babies. Commitment in December 2019 Queen's Speech to legislate to this effect in the forthcoming <i>Employment Bill</i>.</p>
	Consultation on supporting families sought views on requiring employers with more than 250 employees to publish their flexible working and family-related leave policies.
Information and consultation	
Lower the threshold for triggering negotiations for an information and consultation agreement from 10% to 2%	Legislation passed to lower the threshold from 10% to 2%. Effective 6 April 2020
Holiday pay	
Extend the holiday pay reference period from 12 weeks to 52 weeks	Legislation passed to extend the reference period to 52 weeks. Effective 6 April 2020

Taylor Review Recommendation	Government Response
<p>Allow workers to receive 'rolled-up' holiday pay</p>	<p>Recommendation rejected on the grounds that 'rolled-up' holiday pay is not permitted by EU law</p>
Portable ratings	
<p>Encourage gig economy platforms to permit workers to carry their ratings with them to new platforms</p>	<p>Accepted in principle. Monitoring whether the GDPR has made it easier for workers to do this.</p>
Pregnancy and maternity discrimination	
<p>Review and consolidate guidance on legislation that protects women who are pregnant or on maternity leave and consider options for further legislative intervention</p>	<p>Consultation on pregnancy and maternity discrimination launched in January 2019, response published in July 2019. Commitment in December 2019 Queen's Speech to extend redundancy protections through the forthcoming <i>Employment Bill</i>.</p>
Sickness absence	
<p>Reform statutory sick pay to make it a basic right available to all workers from day one</p>	<p>Consultation on ill-health related job loss, launched in July 2019, sought views on reforming sick pay. Proposals did not include expanding eligibility for sick pay.</p>
<p>Statutory sick pay should accrue with length of service</p>	<p>Recommendation rejected on the grounds that it risks individuals going without income while they are recovering from an illness.</p>
<p>Introduce a right to return to work for workers who have been on long-term sickness absence.</p>	<p>Consultation on ill-health related job loss sought views on measures to increase support for returning to work, including imposing legal obligations on employers.</p>
Tips and gratuities	
<p><i>This Good Work Plan commitment did not stem from the Taylor Review</i></p>	<p>Commitment in Good Work Plan to legislate to prohibit employers deducting from staff tips. Commitment in December 2019 Queen's Speech to legislate to this effect.</p>
Unpaid internships	
<p>Improve interpretation of the law and HMRC enforcement action to stamp out exploitative unpaid internships</p>	<p>Government Response to Taylor committed to update guidance, engage further with relevant sectors and prioritise HMRC enforcement action to focus on unpaid interns. Also committed to review existing legal framework if this approach fails.</p>
Written statement of employment particulars	
<p>Extend the right to receive a written statement of employment particulars to 'workers'</p>	<p>Legislation passed to extend the right to receive written particulars to workers. Effective 6 April 2020</p>
<p>Make the right to receive a written statement of employment particulars a day one right</p>	<p>Legislation passed to make the right to receive written particulars a day one right. Effective 6 April 2020</p>
<p>Consider creating a standalone right to claim compensation for a failure to provide written particulars</p>	<p>Recommendation not addressed in the Good Work Plan or subsequent legislation</p>

Taylor Review Recommendation	Government Response
Zero-hours contracts	
<p>Give workers on zero-hours contracts who have been in post for 12 months a right to request a contract that better reflects the hours they work</p>	<p>Recommendation accepted in the Good Work Plan. Low Pay Commission report recommended a stronger 'right to switch' to stable hours as well as a right to reasonable notice of shifts and shift cancellations. Consultation on notice of shifts and shift cancellations launched in July 2019. Commitment in the December 2019 Queen's Speech to introduce a right to request a more stable contract in the forthcoming <i>Employment Bill</i>.</p>
<p>Require non-guaranteed hours to be paid at a higher rate of National Minimum Wage</p>	<p>Recommendation rejected on the basis of the Low Pay Commission's report</p>

2. Agency workers

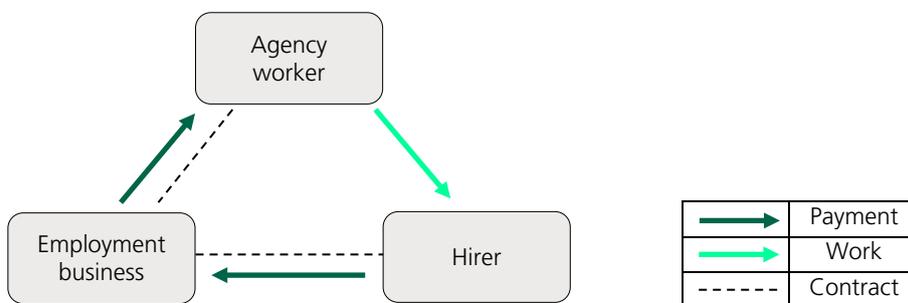
Current legal framework

Working arrangements

Agency working, sometimes called ‘temping’, takes the form of a triangular relationship between a worker, an [employment business](#) and a hirer. The worker enters into a contract with an employment business which then supplies the worker to a client (the hirer) to work under their direction.

Figuring out the employment relationships of an agency worker can be complicated. As the worker has a contract with the employment business, they may be able to establish an employment relationship with them. However, one of the key tests for establishing an employment relationship is control. Given that the worker works under the direction of the hirer, it can be difficult to show that the employment business exercises sufficient control over the worker for there to be an employment relationship.¹ If the worker can show that they are an ‘employee’ or a ‘worker’ for the employment business, they will enjoy certain employment rights. Separately, under the [Agency Workers Regulations 2010](#), agency workers have certain rights in relation to the hirer, even though there is no contract between them.

Agency Working Arrangement



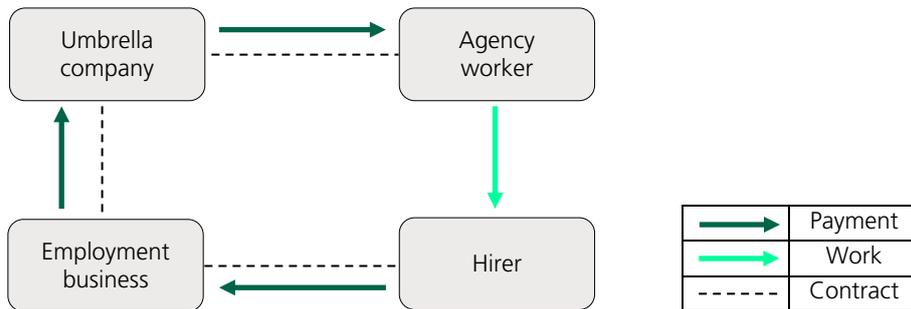
This triangular relationship can be further complicated by the addition of an ‘umbrella company’. Under an umbrella company arrangement, the worker is employed by a company (i.e. they are an ‘employee’). The company deals with issues such as pay, tax and national insurance. The company has a contract with the employment business to provide them with the worker. The employment business finds a hirer to whom the worker is finally provided.

The [Low-Income Tax Reform Group](#) explained:

In this situation, the end client pays the agency for your work. The agency takes its fee and then passes the balance on to the umbrella company and the umbrella company then pays you under PAYE.

¹ See [Employment Status](#), Commons Library Briefing Paper, CBP-8045, 28 March 2018, section 5.1.

Umbrella Company Arrangement



The fact that workers do not have a direct contract with the end client can have particularly serious implications on issues such as dismissal. Courts have held that even where agency workers have worked with a particular hirer for a number of years, they cannot claim unfair dismissal when the relationship is terminated.²

Provision of information

Under the [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#) (the '2003 Regulations') an employment business must agree written terms with the agency worker before undertaking any work-finding services for them.³ This must cover issues such as:

- whether the worker will be employed by the employment business and type of contract they are employed under;
- the length of notice the worker must give the employment business and the length of notice they are entitled to receive with respect to the termination of an assignment with a hirer;
- information relating to remuneration; and
- details relating to any annual leave entitlement.

Swedish Derogation

Under the *Agency Workers Regulations 2010*, an agency worker who has worked for a hirer for 12 continuous calendar weeks becomes entitled to the same basic terms of employment as workers who are directly recruited by the hirer. This includes terms relating to issues such as pay and working hours that the hirer would normally include in the contract of a comparable employee.⁴

There is currently an exception to the right to equal pay. It is commonly called the 'Swedish Derogation', named after a provision that the Swedish government introduced to the EU directive that the 2010 Regulations implement.⁵ Regulation 10 provides that the right to equal pay does not apply to agency workers who have a permanent contract

² [James v Greenwich London Borough Council](#) [2008] EWCA Civ. 35.

³ Regs. 14-15, *Conduct of Employment Agencies and Employment Businesses Regulations 2003*.

⁴ Regs 5-6, *Agency Workers Regulations 2010*.

⁵ Article 5(2), [Directive 2008/104/EC](#).

of employment with an employment business (here called 'temporary work agencies').

There are certain conditions that the contract must satisfy. In particular, it must set out the minimum rate or scale of remuneration or the method for calculating remuneration. During the periods in which the agency worker is not working for a hirer, they must be paid at least 50% of the highest rate of pay received during any "pay reference period" (e.g. a month) falling within the last 12 weeks of their previous assignment.⁶ These contracts are often called 'pay between assignment contracts'.

Taylor Review Recommendations

Information for agency workers⁷

The Taylor Review found that the information provided to agency workers under the current legislation was not always clear. In particular, Taylor concluded that the use of umbrella companies created confusion about rates of pay and raised questions about who the worker is employed by. Notably, umbrella companies can charge workers administration fees. Employment businesses are prohibited from charging a work-seeker fees for finding them work.⁸

Taylor recommended that the Government should amend the relevant legislation to improve the transparency of information that is provided to agency workers.

Abolishing the Swedish Derogation⁹

The Taylor Review found that pay between assignment contracts were often being abused. This ranged from staff being forced to sign such contracts to temporary work agencies finding ways to structure work so as to avoid having to pay workers between assignments. Taylor concluded that while one solution might be to ensure greater oversight of the abuse of pay between assignment contracts, the Employment Agency Standards Inspectorate (EAS), the Government agency that oversees employment agencies and businesses, did not have the capacity to do so.

Taylor recommended that the Swedish Derogation be abolished.

Right to a direct contract with the hirer¹⁰

The Taylor Review cited evidence from the Recruitment and Employment Confederation, which suggested that 4.3% of assignments with hirers under agency worker arrangements lasted for longer than a year. Taylor concluded that despite the length of the assignments, many agency workers experienced high levels of uncertainty about the stability of their work, not least because agency workers usually do not have protection from unfair dismissal in relation to the hirer.

⁶ Regs. 10(1)(c)(iii) and 11, *Agency Workers Regulations 2010*.

⁷ Department for Business, Energy and Industrial Strategy, [Good Work: The Taylor Review of Modern Working Practices](#), 11 July 2017 ('Taylor Review'), pp. 38-39.

⁸ Section 6, [Employment Agencies Act 1973](#).

⁹ Taylor Review, pp. 58-59.

¹⁰ Taylor Review, pp. 47-48.

Taylor recommended that agency workers who have worked with the same hirer for a period of 12 months should have the right to request a direct contract with the hirer.

Government response

Key Facts Page

In the February 2018 consultation on agency workers the Government sought views on a proposal to provide agency workers with a “key facts page” that sets out who is paying them, what deductions are made and why they are made.

The Government undertook to legislate to this effect in the Good Work Plan. The key facts page would cover the type of contract a worker is employed under, the minimum rate of pay they can expect and, if they are paid through an intermediary, what deductions will be made.¹¹

The [*Conduct of Employment Agencies and Employment Businesses \(Amendment\) Regulations 2019*](#), made on 28 March 2019, give effect to this commitment. It requires employment businesses to provide worker seekers with a ‘Key Information Document’ before any written terms are agreed between them. The legislation lists the various pieces of information that the document must contain, including the type of contract, minimum rates of pay and statutory and non-statutory deductions from pay. The Employment Agencies Standards Inspectorate (EAS) has produced [detailed guidance](#) on the regulations. This sets out the information that must be provided to a worker when they are engaged with an employment business, when they are engaged through an umbrella company.

The key information document must be clearly labelled, straightforward to understand and must not exceed two sides of A4.

The 2019 Regulations take effect from 6 April 2020. They only apply to agency workers engaged by a new employment business after that date. Agency workers who have already agreed written terms with an employment business do not have to be given the document.

Abolishing the ‘Swedish Derogation’

The February 2018 consultation on agency workers sought views on the repeal of the Swedish Derogation. It noted that while the Government did not have evidence of widespread abuse of pay between assignment contracts, if evidence came to light in the consultation its preferred position would be to repeal.

In the Good Work Plan the Government committed to legislate to repeal the Swedish Derogation.¹²

The [*Agency Workers \(Amendment\) Regulations 2019*](#), made on 28 March 2019, give effect to this commitment. As a result, all agency workers, regardless of the type of contract they have with the

¹¹ Department for Business, Energy and Industrial Strategy, [Good Work Plan](#), Cm 9755, 17 December 2018 (‘Good Work Plan’), pp. 32-33.

¹² Good Work Plan, pp. 15-16.

employment business, will be entitled to the right to equal pay after 12 weeks working with the same hirer.

The 2019 Regulations come into effect on 6 April 2020. If agency workers are still engaged on a pay between assignment contract from that date, the employment business must notify them of the change to the law regarding the right to equal pay after 12 weeks. Notification must be given by 30 April 2020.

The Employment Agencies Standards Inspectorate produced [detailed guidance](#) on the new regulatory framework.

Right to a direct contract with the hirer

The Government's response to the Taylor Review considered the recommendation that agency workers be given a right to request a direct contract with the hirer, together with the recommendation that workers on zero-hours contracts be given a right to request a contract with fixed hours (see 'Zero-hours contract' below). It stated:

The government supports the intention underlying these recommendations to provide a 'right to request' to improve predictability of work, but we believe this is an area where we should go further. Both those on zero hours contracts and agency workers are an important part of the UK's labour market, but they represent a relatively small proportion of the UK workforce. [...] That is why the government will go further and create a right for all workers rather than specific groups to request a more predictable contract where appropriate.¹³

The Good Work Plan likewise stated that it would introduce a right to request a more predictable and stable contract for all workers.¹⁴

However, it was unclear whether the right to request a stable contract would encompass a right for agency workers to request a direct contract with a hirer. [Thompsons Solicitors](#) stated that the Good Work Plan did not implement the right to request a direct contract.

The issue was raised in the House of Commons in January 2019:

Stephen Morgan

A recent Resolution Foundation report shows that barely half of agency workers remain in one job beyond six months, making the Government's arbitrary timeframe of 12 months before the right to request a direct contract kicks in totally meaningless. Labour has committed to giving all workers equal rights from day one; why have the Government not committed to doing the same?

Greg Clark [Business Secretary]

The hon. Gentleman will welcome the reforms that have been made to deal with insecure work and, in particular, to do something that has been campaigned for by the trade union movement and supported by many employers, which is to remove the Swedish derogation that has provided a loophole for employers to avoid those rights. That legislation is now before the House, and I hope he will support it.¹⁵

¹³ Government Response to the Taylor Review, p. 39.

¹⁴ Good Work Plan, p. 46.

¹⁵ [HC Deb 8 January 2019 vol 652 c157](#)

3. Continuous service

Current legal framework

Many employment rights are available to workers from the first day of their employment. However, some rights only become available after a period of continuous employment. The protection from unfair dismissal (2 years) and the right to maternity pay (26 weeks) are common examples. In addition, the content of certain rights can vary depending on the length of continuous service (e.g. redundancy pay).

The key rules for calculating a period of continuous employment are set out in Part 14 of the [Employment Rights Act 1996](#). A period of employment begins on the day the employee starts working and is presumed to be continuous unless the contrary is shown.

The general rule is that a period of continuous employment will be broken if there is a gap of more than one week (Sunday to Saturday) during which the relationship is not governed by a contract of employment. There are a number of ways to avoid such a break in continuity. One way is to show the existence of an umbrella contract which continues to place certain obligations on the parties between assignments. Alternatively, even if there is a break, if it is for one of the reasons listed in the legislation, such as sickness or temporary cessation of work, the event will not break continuity.

Umbrella contracts (also called 'global contracts') exist where there are a series of short term work contracts with gaps in between but where the conduct of the parties implies an overarching contract that continues to impose certain minimal obligations during the gaps.

Taylor Review recommendations¹⁶

The Taylor Review concluded that it is currently too difficult for casual workers to establish sufficient continuity of service. It recommended that instead of one week, a break of four weeks should be required to break continuity. A similar recommendation was made in a joint report from the Business, Energy and Industrial Strategy and Work and Pensions Committees.¹⁷

Government response

The Government's Response to Taylor committed to extending the break period to more than one week. The Government's consultation on transparency in the labour market sought views on how long the break period should be extended to. In the Good Work Plan, it committed to legislate to extend the break period to four weeks.¹⁸

The Government has yet to bring forward this legislation. During the [debate on the October 2019 Queen's Speech](#), Lord Stevenson of Balmacara, an Opposition Whip, asked what the Government intended to do with respect to continuity of service. Responding to the debate, Lord Gardiner of Kimble, the Parliamentary Undersecretary of State for the Department for the Environment, Food and Rural Affairs, did not answer that point.

¹⁶ Taylor Review, pp. 44-46.

¹⁷ Business, Energy and Industrial Strategy and Work and Pensions Committees, [A framework for modern employment](#), 15 November 2017, HC 352, para. 25.

¹⁸ Good Work Plan, p. 14.

4. Employment status

Current legal framework

Employment status is one of the most important issues in employment law. The statutory rights that a person enjoys depends on their status. Broadly speaking, there are three types of status:

- 1 employees, who enjoy the full range of statutory employment rights;
- 2 workers, who enjoy a more limited set of basic rights, such as the National Minimum Wage (NMW) and holiday pay; and
- 3 the self-employed, who are largely not covered by employment rights legislation.

This issue is covered in the [Library Briefing Paper, Employment Status](#).

Basic definitions of ‘employee’ and ‘worker’ are set out in legislation. The most important provision is section 230 of the *Employment Rights Act 1996*. This provides:

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual

As can be seen, employees fall within the definition of ‘worker’ but not all workers will be employees. As such, those who are just workers are sometimes called “limb (b) workers” to differentiate them from employees. This paper will use ‘worker’ to refer to limb (b) workers.

While section 230 is the most widely applicable definition of ‘employee’ and ‘worker’, slightly different definitions can be found in trade union legislation,¹⁹ equality legislation²⁰ and social security legislation.²¹ There is also an autonomous EU law definition of the term ‘worker’ that applies to EU-derived workers’ rights.²² Tax law has an entirely different

¹⁹ Section 296, [Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

²⁰ Section 83, [Equality Act 2010](#).

²¹ Section 2, [Social Security Contributions and Benefits Act 1992](#).

²² [O’Brien v Ministry of Justice \[2013\] UKSC 6](#).

employment status test which only distinguishes between the employed and the self-employed.²³

In any case, legislative definitions of 'employee' and 'worker' are relatively basic. The details of the tests are set out in caselaw.

'Employee' is defined by reference to the pre-existing common law concept of a contract of service. For there to be a contract of service, there are an 'irreducible minimum' of three tests that must be met:²⁴

- The worker must agree to **work personally** (called the 'personal service' obligation).
- There must be a **mutuality of obligations** between the parties (sometimes called a 'wage-work bargain').
- The employer must exercise a sufficient degree of **control** over the employee.

In addition, courts have considered a range of additional factors such as whether the person provides their own equipment, the level of financial risk they take, the extent to which they can profit from sound management in the performance of the task.

The 'worker' category was created by statute and the tests for identifying a worker are less developed. Current case law suggests that the tests for identifying a worker are the same as those for identifying an employee, albeit that the "pass mark is lower."²⁵

However, this judgment attracted some criticism.²⁶ In particular, there has been much debate over the type and extent of mutuality of obligation that needs to be shown for a person to establish themselves as a worker.²⁷ A further point of discussion has been the extent to which courts and tribunals can look beyond the written terms of the contract and assess 'the reality' of the relationship between the parties.²⁸

Most of the key cases on the gig economy have been concerned with whether the claimant was a worker, and thus entitled to the minimum wage and holiday pay, or self-employed. To date, in the majority of cases the claimants have been found to be workers.²⁹ In the cases where the claimants failed to establish worker status, the reason has

²³ [Self-employment in the construction industry](#), Commons Library Briefing Paper SN 0196, 23 August 2019.

²⁴ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

²⁵ [Windle v Secretary of State for Justice \[2016\] EWCA Civ 459](#).

²⁶ Jeremias Prassl, 'Who is a worker?' (2017) 133 (Jul) *Law Quarterly Review* 366-372.

²⁷ Ewan McGaughey, 'Uber, the Taylor Review, mutuality and the duty not to misrepresent employment status' (2019) 48(2) *Industrial Law Journal* 180-198.

²⁸ [Uber BV v Aslam \[2018\] EWCA Civ 2748](#); Alan Bogg and Michael Ford QC, 'Between statute and contract: who is a worker?' (2019) 135 (Jul) *Law Quarterly Review* 347-353.

²⁹ See e.g. [Uber BV v Aslam \[2018\] EWCA Civ 2748](#); [Pimlico Plumbers Ltd v Smith \[2018\] UKSC 29](#); [Adison Lee Ltd v Gascoigne UKEAT/0289/17](#); [Dewhurst v Citysprint UK Ltd ET/220512/16](#).

been the existence of a genuine right of substitution.³⁰ A UK Employment Tribunal recently made a preliminary reference to the European Court of Justice asking whether a person with a right of substitution can still be a ‘worker’ under EU law.³¹

Taylor Review recommendations

Employment status was one of the key focuses of the Taylor Review.

New legislation on employment status³²

Taylor stated that the current legal framework works well for most people who he said would be ‘employees’ in traditional full-time roles. However, he highlighted that changing employment practices, especially in the gig economy, created problems. While noting that the courts were managing to apply the law to changing employment models, he concluded that new legislation was needed in order to bring clarity for workers and employers.

Taylor made several recommendations with respect to this new legislative framework.

As a starting point, Taylor recommended that the current tripartite model be retained, arguing that an intermediate status between employee and self-employed ensures that those who work in atypical arrangements still enjoy basic employment rights. However, Taylor argued that greater legislative clarity was needed. He recommended that the Government set out key principles in primary legislation and supplement them with detailed tests in secondary legislation that can be amended to reflect changing employment practices.

Rename ‘workers’ as ‘dependent contractors’³³

Taylor also made specific recommendations relating to worker status itself. First, he recommended that ‘limb (b) workers’ be renamed ‘dependent contractors’ to clearly separate them from ‘employees’. Second, he recommended that separate tests be developed for establishing dependent contractor status.

Taylor criticised the existing approach that applies the same tests to employees and workers with a lower bar for the latter. Instead, he recommended that for dependent contractors greater emphasis should be placed on the control exercised over them by the putative employer and less emphasis on the requirement to provide personal service. Taylor also recommended that the Government create an online tool to help people identify their employment status. The Government already has an online tool for determining employment status for tax purposes.

³⁰ [R \(on the application of Independent Workers Union of Great Britain\) v Central Arbitration Committee \[2018\] EWHC 3342 \(Admin\)](#).

³¹ [Case C-692/19 Reference for a preliminary ruling from the Watford Employment Tribunal \(United Kingdom\) made on 19 September 2019 – B v Yodel Delivery Network Ltd](#).

³² Taylor Review, pp. 33-35.

³³ Taylor Review, pp. 35-36, 39.

Alignment between tax law and employment law³⁴

Taylor recommended that in creating the new legislative framework for employment status, the Government should attempt to ensure greater alignment between employment status for employment rights and employment status for tax. As noted above, tax law currently uses an entirely different employment status test that only distinguishes between 'employed' and 'self-employed'.

Enforcement of employment status³⁵

Finally, Taylor made recommendations around the enforcement of employment status. First, regarding access, he recommended that claimants should be able to obtain judicial determination of their employment status without having to pay a fee. This recommendation has, to a large degree, been made redundant after the Supreme Court struck down the Employment Tribunal fees arrangement as unlawful.³⁶ Second, he recommended that the burden of proof should be reversed in employment status claims. This would mean that the burden would fall on the employer to show that a claimant is not entitled to certain rights, rather than on the claimant to show that they are entitled to them, as is currently the case. Third, Taylor recommended that if an employer loses repeated employment status cases on broadly similar facts, Employment Tribunals should be able to apply aggravated breach penalties. An aggravated breach penalty is a financial penalty of up to £20,000 that is paid to the Secretary of State on top of any financial award the tribunal orders.³⁷

Working time in the gig economy³⁸

Looking beyond the direct question of employment status, Taylor also made recommendations about calculating working time for the purposes of the National Minimum Wage for workers in the gig economy.

Courts have struggled with the question of how to calculate working time for workers who work through an app. In *Aslam v Uber*, the Employment Tribunal held that drivers were working for Uber London whenever they were: a) in London; b) logged on to the app; and c) ready and willing to work.³⁹ The Court of Appeal expressed hesitation but agreed that this was a conclusion the Tribunal was entitled to reach:

We agree with the [Employment Tribunal ('ET')] that at the latest the driver is working for Uber from the moment when he accepts any trip. The point which we have found much more difficult, as did Judge Eady QC in the [Employment Appeal Tribunal], is whether the driver can be said to be working for Uber when he is in London with the App switched on but before he has accepted a trip. In the end, like Judge Eady, we take the view that the conclusion in paragraph 100 was one which the ET were entitled

³⁴ Taylor Review, p. 38.

³⁵ Taylor Review, pp. 63-64.

³⁶ [R \(UNISON\) v Lord Chancellor \[2017\] UKSC 51](#).

³⁷ Section 12A, [Employment Tribunals Act 1996](#).

³⁸ Taylor Review, pp. 36-38.

³⁹ [Aslam & others v Uber BV and others 2202550/2015](#), para. 100.

to reach. We bear in mind that appeal from an ET lies only on a question of law.⁴⁰

Taylor concluded that it was important that workers in the gig economy retain their right to log on to an app and be available to work at a time of their choosing. At the same time, he stated that workers should not be entitled to the NMW if they log into an app fully expecting there to be no work.

To address this issue, Taylor recommended that the Government adapt piece rate legislation to those in the gig economy to ensure that they enjoy flexibility while retaining the ability to earn the NMW. Taylor explained his proposal in more detail in an evidence session before the BEIS and Work and Pensions Committees. He said that if three conditions applied to a worker, adapted piece rates legislation could be applied:

[...] number one, those companies would have to demonstrate by opening up their data that the average worker working averagely hard got 1.2 times the Minimum Wage, which is indeed the piece-work rule; number two, the firms would have to guarantee that it is genuinely the case that people can work whenever they want and there is no sanction for them working or not working at any particular time; and number three—and this is critical—those companies—and they also have very clever databases and algorithms—would have to provide people with accurate real-time information about how much they will earn if they were to work at any particular moment.⁴¹

Piece rates legislation applies to workers to who are paid based on output. A survey establishes the average hourly output of workers. Workers are paid for their output at a rate that would be 120% of the NMW if their output was the same as that of the average worker. Workers who work slower than average may be paid below the NMW.

Government response

The Government did not make any specific commitments regarding employment status in its response to the Taylor Review. Instead, the February 2018 consultation on employment status sought views on a range of different options for reforming employment status.

New legislation on employment status

First, the consultation addressed Taylor's recommendation that primary legislation should set out the key principles of an employment status test. It sought views on which principles should be included within any primary legislation. It asked about the relevance and importance of the tests that make up the irreducible minimum of obligations: mutuality of obligation, control and personal service. It also asked about a number of other principles, including whether the worker took a financial risk, whether the worker was an integral part of the business, whether the worker provided their own equipment and the way that the parties characterised their relationship.

The consultation also asked whether it would be desirable to set out supplementary tests in secondary legislation. In particular, it highlighted

⁴⁰ [Uber BV v Aslam \[2018\] EWCA Civ. 2748](#), para. 103.

⁴¹ Business, Energy and Industrial Strategy and Work and Pensions Committees, [Oral evidence: Taylor Review of Modern Working Practices](#), 11 October 2017, HC 352, Q211.

the balance between the benefit of flexibility and the risk of businesses having to keep up with frequent changes to legislation.

Alternative options for determining employment status

The consultation also sought views on a range of alternative proposals for a new employment status test. It mentioned:

- A model where employment status is established by length of service (the Dutch model);
- A model where employment status is established by work for an employer making up a certain percentage of the workers income;
- A model where a worker is presumed to be an employee unless the employer can show, based on statutory criteria, that they are not (the American 'ABC' model); and
- A model where a worker can establish employment status by satisfying just three out of any five tests (the German model).

Worker status

The consultation also addressed Taylor's recommendations on worker status, focussing in particular on the boundary line between workers and the self-employed. It sought views on whether an intermediate category of 'worker' was necessary and whether it is sufficiently distinguished from the 'employee' and 'self-employed' categories. It also asked whether the tests that are currently applied for establishing worker status (broadly the same tests as for employees but with a 'lower pass mark') are the correct ones. It also sought views on Taylor's recommendation that workers be renamed 'dependent contractors'.

Minimum wage for app-based workers

The consultation asked a number of questions concerning how the NMW should be calculated for app-based workers. It asked whether the Government should take any measures to address the concerns raised by Taylor and how best it could balance flexibility with fairness. The consultation did not specifically mention Taylor's proposal that piece rates legislation should be adapted.

In November 2017 the BEIS and Work and Pensions Committees jointly published a report on a framework for modern employment. The report rejected Taylor's recommendation on piece rates, arguing that it was overly complex and risked workers not being paid the NMW.⁴²

In the Good Work Plan the Government cited the report as grounds for rejecting Taylor's recommendation.

⁴² BEIS and Work and Pensions Committees, [A framework for modern employment](#), 20 November 2017, HC352, paras. 32-36.

Alignment between tax law and employment law

Finally, the consultation sought views on the high-level question of whether there should be greater alignment between the employment status tests for tax and employment law. The consultation specifically asked a question about the concept of 'deemed employee' under tax law. Under a rule known as IR35, workers who undertake work for a client through an intermediary (such as a personal service company) can, in certain circumstances, be deemed to be an employee of the end-user for the purposes of tax law.⁴³ The consultation seeks views on whether those who are deemed to be employees for tax purposes should also be entitled to certain employment rights.

This is a complicated issue. From an employment law perspective a person who works through a personal service company may well have employment rights. However, these rights are exercisable against the PSC, which is indistinguishable from the worker, rather than against the end-user for whom they actually undertake work.⁴⁴

In response to a Parliamentary Question in September 2019 about the employment rights of persons deemed to be employees of an end-user under IR35, Jesse Norman, the Financial Secretary to the Treasury, stated:

At present there is no direct link between employment status for rights and employment status for tax.

Those who wish to challenge their employment status for rights can take their case to an employment tribunal, regardless of their tax status. In order to modernise and enhance the enforcement of the employment rights for workers, the government is currently consulting on the proposal to introduce a new single enforcement body for employment rights. The government is also consulting on strengthening enforcement and extending entitlement to statutory sick pay.⁴⁵

In the Good Work Plan the Government accepted Taylor's recommendation that there should be new legislation on employment status. It accepted that workers should be renamed dependent contractors with greater emphasis placed on the control exercised over them. It also accepted that there should be greater alignment between tax and employment law. The Government committed to legislate on all these issues.⁴⁶

In addition, the Government committed to introduce a new online tool for determining employment status once the new tests have been implemented. It committed to return to the question of the burden of proof once the online tool was set up.

A personal service company is not defined in law, but is usually taken to mean a limited company, the sole or main shareholder of which is also its director, who, instead of working directly for clients, or taking up employment with other businesses, operates through their own company.

⁴³ See generally [Personal service companies and IR35](#), Commons Library Briefing Paper, SN5976, 16 January 2020.

⁴⁴ See Michael Ford QC, 'The Fissured Worker: Personal Service Companies and Employment Rights' (2019) *Industrial Law Journal*.

⁴⁵ [PQ285449 \[on Employment: Taxation\] 9 September 2019](#).

⁴⁶ Good Work Plan, pp. 26-29.

The Good Work Plan also addressed the question of sanctions for employers who repeatedly lose employment status cases on similar facts. The Government considered this issue together with a broader recommendation by Taylor to allow Employment Tribunals to uplift compensation for repeated breaches of employment rights. The Government committed to legislate to give the ET powers to apply sanctions in such cases (see 'Enforcement' below).

The Government has yet to publish legislation on employment status. It was announced in the [December 2019 Queen's Speech](#) that the Government will be introducing an *Employment Bill*. However, employment status is not listed as one of the issues the Bill will cover.

The last time the issue of employment status was mentioned by the Government in Parliament was in May 2019 when Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, reiterated the commitment in the Good Work Plan to legislate on the issue.⁴⁷

⁴⁷ [PQ249272 \[on Conditions of Employment\] 9 May 2019.](#)

5. Enforcement

Current legal framework

There are two principal frameworks through which employment rights are enforced in the UK: individual enforcement and state enforcement.

Individual enforcement

Individual claims for breaches of employment law are generally made to the Employment Tribunal (ET). The ET has the jurisdiction to hear claims relating to breaches of statutory employment rights. The relevant legislation will provide for remedies via claims to the ET. These claims typically need to be brought within three months of the incident being complained of.

The ET was set up under the [Employment Tribunals Act 1996](#). Proceedings in the ET are regulated by the [Employment Tribunal \(Constitution and Rules of Procedure\) Regulations 2013](#). The Presidents of the Employment Tribunals also have the power to issue Practice Directions and Presidential Guidance.⁴⁸

The ET has a range of powers at its disposal, including the power to make Cost Orders and Wasted Cost Orders as well as the power to award Aggravated Breach Penalties or to uplift compensation.⁴⁹

In 2013, the Government introduced fees for bringing a claim to the Employment Tribunal. The fee scheme was struck down as unlawful by the Supreme Court in 2017 and, to date, has not be reintroduced.⁵⁰

The ET does not have the power to enforce its own judgments. Rather, judgments are enforced through the County Court in England and Wales or the Sheriff Court in Scotland.⁵¹ There are a number of ways to enforce a judgment through the County Court as set out in the [Part 70 of the Civil Procedure Rules](#) and the accompanying [Practice Directions](#). HM Courts and Tribunals (HMCTS) form [EX328](#) provides an overview of these methods. The most commonly used procedure is the Employment Tribunal Fast Track scheme where a High Court Enforcement Officer, acting under the supervision of a solicitor, will file and attempt to recover the unpaid award. This is explained in HMCTS form [EX727](#). There is a fee of £66 which is added to the sum the respondent owes.

Since 2016, the Government has also operated a penalty scheme for employers who do not pay ET awards. If an enforcement officer finds that an award has not been paid they can issue a warning letter to the employer. If the award is not paid within 28 days the officer can issue a penalty notice imposing a penalty of up to 50% of the unpaid award (subject to a cap of £5,000).⁵² The penalty is paid to the Government, not to the claimant.

⁴⁸ Courts and Tribunals Judiciary, [Employment Rules and Legislation: Practice Directions](#)

⁴⁹ BEIS, [Employment Tribunal Powers: Tribunal user guidance on use and application](#), February 2019.

⁵⁰ [R \(UNISON\) v Lord Chancellor \[2017\] UKSC 51](#).

⁵¹ Section 15, *Employment Tribunals Act 1996*.

⁵² Part 2A, *Employment Tribunals Act 1996*.

State enforcement

In addition to individual enforcement, a limited set of employment rights are enforced by the state.

The UK currently has four key labour market enforcement bodies:

- 1 Gangmasters and Labour Abuse Authority (GLAA)
- 2 Employment Agencies Standards Inspectorate (EAS)
- 3 Her Majesty's Revenue and Customs (HMRC)
- 4 Health and Safety Executive (HSE)

Each body has its own remit and covers different sectors and rights.

Enforcement Body	Remit
GLAA	Labour exploitation; modern slavery; licensing for high risk sectors (agriculture, horticulture etc.)
EAS	Employment businesses / employment agencies
HMRC	National Minimum Wage (on behalf of BEIS); statutory sick pay (on behalf of DWP)
HSE	Workplace health and safety (higher risk sectors)

Since 2016, the Director of Labour Market Enforcement (DLME) has had oversight of labour market enforcement in the areas covered by three of these bodies: the GLAA, the EAS and HMRC.⁵³ The DLME must publish an annual report setting out their assessment of the state of non-compliance and a proposal for how labour market enforcement functions should be exercised. In August 2019, Matthew Taylor, the author of the Taylor Review, was appointed as interim DLME.⁵⁴

These state enforcement bodies currently have a range of powers at their disposal.

The **GLAA** has two primary functions. First, it acts as the licensing authority for certain sectors (agriculture, horticulture and shellfish gathering). It is an offence to act as a gangmaster without a license or to enter into arrangements with an unlicensed gangmaster.⁵⁵ Enforcement officers have the power to require a relevant person to furnish them with documents, as well as to enter premises. It is a criminal offence to fail to comply with a request without reasonable cause. Officers can also enter a premises under warrant if admission to the premises has been refused.⁵⁶ The GLAA produce detailed guidance on [licensing decisions](#) and [enforcement action](#). It maintains a [public list](#) of companies that have been the subject of inspections. Cases can be passed to the Crown Prosecution Service (CPS) for prosecution.

Since April 2017, the GLAA has had a broader responsibility for investigating labour market offences. Labour Abuse Prevention Officers (LAPOs) can exercise certain powers under the [Police and Criminal Evidence Act 1984](#) (PACE), including powers to execute warrants,

⁵³ Sections 1-9, [Immigration Act 2016](#).

⁵⁴ GOV.UK, [Interim Director of Labour Market Enforcement: Matthew Taylor](#)

⁵⁵ Sections 12-14, [Gangmasters \(Licensing\) Act 2004](#).

⁵⁶ Sections 16-18, [Gangmasters \(Licensing\) Act 2004](#).

powers of seizure and powers of a constable to use reasonable force.⁵⁷ LAPOs can exercise these powers to investigate labour market offences relating to the minimum wage, employment agencies and businesses, gangmaster licensing and modern slavery.

The **EAS** has the power to investigate employment businesses and agencies, including the power to enter premises and inspect documents.⁵⁸ BEIS prosecution lawyers can instigate criminal proceedings for breaches of the relevant legislation.⁵⁹ The EAS can also apply to the employment tribunal for a prohibition order to prohibit a person from carrying on an employment business or agency.⁶⁰ The EAS maintains a [public list](#) of persons who are subject to a prohibition order. EAS enforcement decisions are guided by [BEIS policy documents](#).

HMRC compliance officers have the power to make a notice of underpayment (NoU) where they find that there are outstanding arrears of the minimum wage. The NoU will require an employer to pay the specified workers the amount owed to them within 28 days. In addition, the compliance officer can impose a financial penalty of 200% of the total underpayment to all workers specified in the NoU (subject to a cap of £20,000 per worker). HMRC can start civil proceedings if an employer fails to comply with an NoU.⁶¹ Where an employer refuses to pay the minimum wage, HMRC can also refer cases to the CPS for prosecution.⁶² HMRC also operate a scheme of naming employers who fail to comply with an NoU within 28 days. The scheme was suspended in 2018 pending an internal review but the Government announced that it was reinstating the scheme in February 2020. The naming scheme will be similar to the scheme that was suspended, although it will now only apply to arrears of over £500 (formerly £100).⁶³ The Government has also updated the [BEIS guidance on National Minimum Wage enforcement](#).

The [Immigration Act 2016](#) also created a power for the GLAA, EAS and HMRC to issue notices inviting a company to negotiate a labour market enforcement undertaking (LME undertaking).⁶⁴ The power to request an LME undertaking is available to an enforcement authority if it believes that an offence under the relevant legislation (called a 'triggering offence') has been or is being committed. LME undertakings can include measures that can prevent or reduce the risk of non-compliance and which the authority considers just and reasonable. If a person fails to negotiate an LME undertaking within 14 days or refuses to give one, the enforcement authority can apply to a court for an LME order. A person who breaches an LME order is liable, upon conviction, to a custodial

⁵⁷ [The Police and Criminal Evidence Act 1984 \(Application to Labour Abuse Prevention Officers\) Regulations 2017](#); Section 114B, *Police and Criminal Evidence Act 1984*.

⁵⁸ Section 9, *Employment Agencies Act 1973*.

⁵⁹ Section 5(2) and 6(2), *Employment Agencies Act 1973*.

⁶⁰ Section 3A, *Employment Agencies Act 1973*.

⁶¹ Sections 19-19D, *National Minimum Wage Act 1998*.

⁶² Section 31, [National Minimum Wage Act 1998](#).

⁶³ [HC Deb 11 February 2020 vol 671 c21WS](#).

⁶⁴ Sections 14-30, *Immigration Act 2016*.

sentence. The Home Office and BEIS have produced [guidance on LME undertakings and orders](#).

Taylor Review recommendations

The issue of the enforcement of employment rights was another of the key focuses of the Taylor Review. Taylor made recommendations on a number of different aspects of enforcement.

Remit of enforcement bodies⁶⁵

The Taylor Review concluded that the limited remit of the EAS was not covering key issues faced by agency workers. In particular, Taylor found that the introduction of umbrella companies into the agency working arrangement was detrimental for lower-paid workers. In addition, Taylor found that many workers were being pushed onto contracts that were detrimental to their rights, including pay-between-assignment contracts that deprived them of their right to equal pay under the Swedish Derogation (discussed above). Taylor recommended that the Government should consider expanding the remit of the EAS to cover umbrella companies and compliance with the *Agency Worker Regulations 2010* (AWR) more broadly.

Taylor also concluded that the lack of state enforcement for holiday pay was detrimental for lower-paid workers who could often not afford to bring claims through the tribunal system. He recommended that along with minimum wage and statutory sick pay, the remit of HMRC be expanded to cover holiday pay for the most vulnerable workers.

Enforcement of Employment Tribunal awards⁶⁶

The Taylor Review expressed concern at the number of ET awards that go unpaid. It cited a [2013 study](#) by the Department for Business, Industry and Skills (now BEIS) which found that overall, 35% of claimants did not receive any payment at all. Taylor stated that the enforcement routes open to individuals had limitations and was critical of the fact that they attracted fees. He also criticised the fact that while BEIS pursues financial penalties, it does not pursue the award itself. Taylor recommended that the Government simplify the process for enforcing ET awards by taking on the responsibility for enforcing awards without claimants having to pay fees or instigate court proceedings. He also recommended that the Government establish a naming and shaming scheme for employers who do not pay ET awards.

Employment Tribunal powers⁶⁷

The Taylor Review also considered enforcement in the broader context of the workforce. Among other things, it considered, and rejected, the idea of applying judgments to the entire workforce. Ultimately, Taylor settled on the idea of penalising employers for repeated breaches. He recommended that tribunals should be able to uplift compensation if an employer is subsequently found to have breached the rights of workers

⁶⁵ Taylor Review, pp. 58-59

⁶⁶ Taylor Review, pp. 62-63.

⁶⁷ Taylor Review, pp. 63-64.

with similar working arrangements. The ET currently has the power to uplift or reduce compensation for certain claims where one of the parties has failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures.⁶⁸

Government response

Overview

The Government's position on reforming labour market enforcement has developed significantly in the years following the Taylor Review.

The Government's response to the Taylor Review and the February 2018 consultations largely focussed on the specific recommendations that Taylor made, although it contained an additional commitment on financial penalties for aggravated breaches.

The Good Work Plan went further and proposed the creation of a single enforcement body. This was not something that had been recommended by Taylor or the DLME. The Coalition Government had previously considered consolidating the enforcement functions of the various different bodies but decided not to pursue the idea.⁶⁹ The DLME welcomed the Government's proposal but noted that it "clearly warrants careful consideration."⁷⁰

Remit of enforcement bodies

The Government's response to the Taylor Review accepted the principle of expanding the remit of the EAS to cover umbrella companies and committed to consult on expanding its remit to cover the AWR. The response also accepted that HMRC should be responsible for enforcing holiday pay for vulnerable workers. The February 2018 consultation on agency workers and the consultation on enforcement sought views on these proposals.

The DLME's [Labour Market Enforcement Strategy 2018/19](#), published in May 2018, supported Taylor's proposals relating to the EAS's remit, although it noted that this would require additional resources. It also supported HMRC enforcement of holiday pay but recommended that this cover all workers, regardless of income level.

In the Good Work Plan the Government committed to legislate to expand the remit of the EAS to cover umbrella companies. It also committed to legislate to enable state enforcement of holiday pay for vulnerable workers. These recommendations sat alongside the commitment to consult on creating a single enforcement body.⁷¹ The Good Work Plan did not address the recommendation that EAS's remit be expanded to cover the AWR more broadly.

The July 2019 consultation on a single enforcement body proposed that its core remit include the existing functions of the GLAA, EAS and HMRC as well as oversight of umbrella companies and the enforcement

⁶⁸ Section 207A, *Trade Union and Labour Relations (Consolidation) Act 1992*.

⁶⁹ [HC Deb 10 July 2012 vol. 548 c11WS](#)

⁷⁰ HM Government, [United Kingdom Labour Market Enforcement Strategy 2019/20](#), July 2019, pp. 142-144.

⁷¹ Good Work Plan, p. 40.

of holiday pay. The consultation also proposed to give the enforcement body powers to impose civil penalties where an employment business withholds payments from agency workers (the EAS does not currently have the power to impose civil penalties). The consultation did not propose to include the AWR within the enforcement body's remit.

The Government has yet to publish a response to the consultation. In the [December 2019 Queen's Speech](#) the Government committed to introduce an *Employment Bill*. One of the purposes of this Bill is to create a single enforcement body. However, further details have yet to be published.

Enforcement of Employment Tribunal awards

The Government's response to the Taylor Review accepted that there was a need to simplify the process of enforcing unpaid ET awards. The February 2018 consultation on enforcement highlighted the ongoing [HMCTS reform programme](#), noting that it would enable enforcement action to be instigated digitally and provide claimants with better information about the most suitable enforcement method for their circumstances. The consultation did not address the recommendation that the state take on a greater role in the enforcement of awards.

The Good Work Plan reiterated the Government's commitment to simplify the enforcement process through the use of digital technology and the provision of better guidance.⁷² The July 2019 consultation on a single enforcement body stated that the new body will continue to apply the BEIS penalty scheme. It also stated that the Government was "interested in views about whether the new body should have any further role in unpaid awards."

The Government's response to Taylor accepted that there was a need to establish a naming scheme for employers who do not pay ET awards. On 17 December 2018, the day the Good Work Plan was published, the Government launched [guidance on a naming scheme for employers who do not pay ET awards](#). The guidance states that the naming scheme will apply to ET awards of over £200 issued on or after 18 December 2018. Employers will be sent a naming letter at the penalty notice stage (i.e. 28 days after they are first sent a warning letter concerning non-payment). If the employer does not make valid representations to BEIS within 14 days, their name and the outstanding award will be published in the next naming list. The guidance states that the naming lists will be published quarterly as press releases.

In response to a Parliamentary Question in March 2019, Kelly Tolhurst, the BEIS Minister, stated that the first naming list would be published "in due course".⁷³ However, to date the Government does not appear to have published a naming list.

Employment Tribunal powers

The February 2018 consultation on enforcement sought views on Taylor's proposal that the ET should be able to uplift compensation

⁷² Good Work Plan, p. 36-37.

⁷³ [PQ226188 \[on Employment Tribunals Service: Non-payment\], 5 March 2019](#).

where an employer repeatedly breaches rights in cases with similar facts. It proposed that existing powers could be used to achieve this, although it noted that legislative changes could be needed. For example, it suggested that the legislation on aggravated breach penalties could be amended to specify that the ET should consider use of the penalties for “second offences”.

In the Good Work Plan the Government committed to legislate to enable the ET to use sanctions where an employer has repeatedly breached employment rights on the same issue. The Government also stated that it would provide new guidance on how existing ET powers could be better used.⁷⁴

In February 2019 BEIS published [new guidance on Employment Tribunal powers](#). Under the section on aggravated breach penalties, the guidance lists one possible aggravating feature as “where the employer had repeatedly breached the employment right concerned.” The guidance is not binding on the ET. To date, the Government has not proposed or published further legislation to create sanctions for repeated breaches.

Separately, in the Good Work Plan the Government also committed to legislate to increase the maximum level of an aggravated breach penalty from £5,000 to £20,000. This was not something that had been proposed by Taylor.⁷⁵

The [Employment Rights \(Miscellaneous Amendments\) Regulations 2019](#) give effect to this commitment by amending the relevant provisions in the *Employment Tribunals Act 1996*. The relevant provisions of the 2019 Regulations came into effect on 6 April 2019.

⁷⁴ Good Work Plan, p. 38.

⁷⁵ Good Work Plan, p. 10.

6. Family-related leave and pay

Current legal framework

Employment and social security legislation recognises a range of different rights to family-related leave and pay. These include:

- **Maternity leave:** up to 52 weeks of leave available to pregnant employees as a day one right;
- **Statutory maternity pay:** up to 39 weeks of pay (6 weeks at 90% of salary and 33 weeks at the statutory rate) available to pregnant employees with 26 weeks' continuous service with their employer by the 15th week before the expected week of childbirth (EWC) and who earn above £118 per week;
- **Paternity leave and pay:** up to two weeks of leave paid at the statutory rate available to fathers or partners who are employees with 26 weeks' continuous service by the 15th week before the EWC and who continue to be employed until the expected week of childbirth. To be eligible for pay they must also earn above £118 per week;
- **Adoption leave:** up to 52 weeks of leave available as a day one right to an employee who has been matched with a child for adoption and who, if they are in a couple, has elected to be the parent who receives adoption leave;
- **Statutory adoption pay:** up to 39 weeks of pay (6 weeks at 90% of salary and 33 weeks at the statutory rate) available to employees with 26 weeks' continuous service with their employer by the week they are matched with a child and who earn above £118 per week. For couples, one partner must elect to receive adoption pay. The other may claim paternity leave and pay;
- **Shared parental leave:** a system where a mother on maternity leave or a parent on adoption leave can curtail their leave and share the remainder with the father or partner. The right is available to employees with 26 weeks' continuous service by the 15th week before the EWC or by the week they are matched with a child. They must also remain employed until the week before shared parental leave begins. It is possible for a mother / adoptive parent without 26 weeks' service to be eligible for maternity / adoption leave but not for shared parental leave. If they curtail their leave, an eligible father or partner can take all of the remaining leave as shared parental leave;
- **Statutory shared parental pay:** a system where a mother receiving statutory maternity pay or an adoptive parent receiving statutory adoption pay can curtail their pay and share the remainder with the father or partner. This right is available for employees with 26 weeks' continuous service, who remain in employment until the week before the pay period begins and who earn above £118 per week. A mother who is not eligible for statutory maternity pay but who receives maternity allowance can curtail her allowance, in which case the father or partner can take the remaining allowance as statutory shared parental pay. The payment is at the statutory rate; and

- **Parental leave:** unpaid leave that can be taken by employees with one year's continuous service who have parental responsibility for a child. A parent has a total of eighteen weeks leave for each child up to the age of 18 and can take up to four weeks leave per year.

These rights are covered in detail in the Library Briefing Paper, [Key Employment Rights](#).

Those who are pregnant or on maternity leave have special protections from redundancy and discrimination (considered below under 'Pregnancy and maternity discrimination').

In January 2020, the Government laid regulations that will bring into effect a new right to parental bereavement leave and pay in April 2020. This stems from the [Parental Bereavement \(Leave and Pay\) Act 2018](#) which is considered in the Library Briefing, [Parental Bereavement \(Leave and Pay\) Bill 2017-19](#).

Government proposals

The Taylor Review itself did not mention or make any recommendations about family-related leave and pay. Likewise, the Good Work Plan did not contain any commitments on the issue beyond those on pregnancy and maternity discrimination (discussed below).

However, in July 2019, the Government published three Good Work Plan consultations, one of which concerned [proposals to support families](#). Despite being labelled a Good Work Plan consultation, it does not actually relate to any commitments made in the Good Work Plan.

There have been other reports and reviews on family related leave and pay. In March 2018, the Women and Equalities Select Committee (WESC) published a [report on fathers and the workplace](#). It recommended that paternity leave be made a day one right and that statutory paternity pay be increased to 90% of the recipient's salary. It also recommended that the Government consider replacing shared parental leave with a right to 12 weeks paternal leave paid for four weeks at 90% of salary and for the remaining eight weeks at the statutory rate.

In November 2018, the Department for Business, Energy and Industrial Strategy (BEIS) also conducted an internal review of provision for parents of sick or premature babies.⁷⁶

The 2019 consultation sought views on three broad issues:

- 1 High level options for reforming family-related leave and pay;
- 2 Introducing a right to neonatal leave and pay for parents with premature or sick babies; and
- 3 Proposals to encourage transparency about flexible working and parental leave policies.

⁷⁶ [HC Deb 13 November 2018 vol 649 c81WH](#).

First, the Government sought views on options for reforming various types of family-related leave and pay.⁷⁷ It asked whether paternity leave or pay should be increased and to which priority should be given. It also asked whether a father or partner should be able to take enhanced leave at any time or whether it should only be available once the mother has returned to work. The Government sought views on whether shared parental pay should be enhanced, whether the availability of the right should continue to be dependent on the mother curtailing her maternity rights or whether each parent should be given a pot of leave and pay. It also asked how these reforms could impact on maternity entitlements. Finally, the Government asked whether there should be some level of pay for parental leave in order to incentivise take-up.

The Government also sought views on a more “radical” reforms of family-related leave and pay, including creating a single family entitlement, rather than individual entitlements. The Government asked for views on the various objectives that underpin its family-related leave policies.

Second, following the internal BEIS review, the Government sought views on a proposal to create a right to neonatal leave and pay.⁷⁸ The Government has proposed that neonatal leave would be available as a day one right, while neonatal pay would be subject to the same requirement of continuous service as maternity or shared parental pay. Parents whose baby spends two weeks or more in neonatal care would each be entitled to a week of leave per week the baby is in care, subject to a potential cap. Neonatal pay would be paid at the statutory rate. For administrative convenience, the Government proposes that neonatal leave and pay would be added at the end of a period of maternity, paternity leave. The Government acknowledged that it would have to consider how this would apply for those on shared parental leave.

Finally, the Government sought views on requiring employers to be transparent about flexible working and family-related leave policies.⁷⁹ The Government sought views on a proposal to require employers with more than 250 employees to publish their flexible working and family-related leave and pay policies on their website. It also sought views on requiring employers to specify in a job advert whether the role could be undertaken flexibly.

The Government has yet to publish a response to the consultation.

In the December 2019 Queen’s Speech the Johnson Government announced an *Employment Bill*. The [background notes to the Queen’s Speech](#) stated that one of the purposes of the Bill will be to “offer greater protections for workers by prioritising fairness in the workplace, and introducing better support for working families.” However, the only specific commitment was to introduce neonatal leave and pay.

⁷⁷ HM Government, [Good Work Plan: Proposals to support families](#), July 2019, pp. 22-28.

⁷⁸ *Ibid.*, pp. 32-44.

⁷⁹ *Ibid.*, pp. 46-51.

EU Directive on Work-Life Balance for Parents and Carers

On 12 July 2019, the EU adopted the Directive on Work-Life Balance for Parents and Carers ([Directive \(EU\) 2019/1158](#)) ('the 2019 Directive'). The 2019 Directive will replace the Parental Leave Directive ([Directive 2010/18/EU](#)) on 2 August 2022.

The 2019 Directive will create a number of new EU law rights for parents and carers.⁸⁰ These include:

- A right to 10 working days of paternity leave available to employed fathers or partners as a day one right and a right to paternity pay, paid at least at the rate of national sick pay, which can be restricted on the basis of length of service;
- Enhancing the existing right to four months unpaid parental leave to require that two months be paid and made non-transferable;
- A right to 5 days unpaid carers' leave per year to care for a relative or someone in the workers' household; and
- Extending the existing right to flexible working so that all parents with children up to the age of at least eight and all carers can request flexible working, a right which can be restricted to workers with six months service.

The implementation deadline for the 2019 Directive is 2 August 2022. The transition period under the Withdrawal Agreement is set to end on 31 December 2020. Unless the transition period is extended, the UK will not be bound to implement the Directive.

In a number of respects, UK law already provides equivalent rights to those set out in the Directive. For example, the UK law already recognises right to request flexible working which is available to all employees, not only to parents.⁸¹ In other areas, the 2019 Directive goes further. The right to paternity leave in the UK is not a day one right. While the UK does provide a right to 18 weeks of unpaid parental leave and a right to shared parental pay, the Directive provides for an individual right to two months of non-transferable paid parental leave. The UK does not currently recognise a specific right to carer's leave. However the Government has stated that the *Employment Bill* will create a right to one week's leave for unpaid carers.

The Government has been asked on a number of occasions whether it intends to fully implement the rights set out in the 2019 Directive. In response to a Parliamentary Question on 4 February 2020, Lord Duncan, the Parliamentary Undersecretary for BEIS, stated:

The Government is committed to maintaining and enhancing workers' rights, and to supporting people to balance their work and caring responsibilities. This month we laid regulations in Parliament which will give grieving parents a right to paid time off work. We also committed in the Queen's Speech to bring forward an Employment Bill which will introduce a new entitlement to

⁸⁰ Articles 4-9, *Directive (EU) 2019/1158*.

⁸¹ Section 80F, *Employment Rights Act 1996*.

carer's leave; and introduce a new entitlement to leave and pay for parents of children who spend time in neonatal care. Our manifesto committed to make it easier for fathers to take paternity leave; we have recently consulted on high-level options for reforming parental leave and pay, including Paternity Leave and Pay and Unpaid Parental Leave, and will respond to this consultation in due course.

After we leave the EU, we will be able to set our own standards for workers' rights, and we intend to use this opportunity to make the UK the best place in the world to work.⁸²

⁸² [PO HL698 \[on Flexible Working\] 4 February 2020.](#)

7. Information and consultation

Current legal framework

The [*Information and Consultation of Employees Regulations 2004*](#) ('ICE Regulations') set out a number of rights relating to the consultation of workers. These are additional to more specific rules on consultation that apply in certain circumstances (e.g. consultations about collective redundancies).

Under the ICE Regulations, employees have a right to trigger a negotiation with their employer to agree an information and consultation agreement ('I&C agreement'). An I&C agreement will set out how the employer will inform and consult its employees on an ongoing basis.⁸³

The ICE Regulations apply to all undertakings with 50 or more employees. The threshold for triggering a negotiation was initially set at 10% of employees, subject to a minimum of 15 and a maximum of 2,500.⁸⁴

Taylor Review recommendations⁸⁵

The Taylor Review found that take-up of rights under the ICE Regulations remained low. Taylor recommended that the threshold for triggering negotiations should be lowered from 10% to 2%.

Government response

The Government's consultation on transparency in the labour market also highlighted the low take up of rights under the ICE Regulations and sought views on whether the threshold should be lowered to 2% and whether the minimum number of employees required should be maintained at 15. In the Good Work Plan, the Government proposed to legislate to reduce the threshold to 2%.⁸⁶

Part 4 of the [*Employment Rights \(Miscellaneous Amendments\) Regulations 2019*](#), made on 28 March 2019, give effect to this commitment. The 2019 Regulations will lower the threshold to 2% from 6 April 2020. The minimum number of employees will be maintained at 15 and the maximum at 2,500.

⁸³ For an overview, see Department for Business, Innovation and Skills, [Informing and Consulting Employees – A Brief Guide to the Legislation \[Archived\]](#), (accessed 7 February 2020)

⁸⁴ Reg. 7, *Information and Consultation of Employees Regulations 2004*.

⁸⁵ Taylor Review, pp. 52-53.

⁸⁶ Good Work Plan, p. 22.

8. Holiday pay

Current legal framework

Under the [Working Time Regulations 1998](#), workers are entitled to 5.6 weeks of paid annual leave. Annual leave is paid at a rate of a week's pay for a week's leave. A week's pay is calculated in accordance with the methods set out in sections 221 to 224 of the [Employment Rights Act 1996](#).⁸⁷

For workers with variable pay, such as those without fixed hours or those who are paid based on the amount of work done, a week's pay is calculated based on average weekly remuneration over the previous 12 weeks. This is called the 'reference period'. Government guidance on calculating holiday pay contains a number of examples.⁸⁸

Taylor Review recommendations⁸⁹

The Taylor Review concluded that the 12-week reference did not work for workers with variable hours, especially seasonal workers who work long hours during some parts of the year and much shorter hours during others. It recommended that the reference period should be extended to 52 weeks to better reflect the average amount of work done by a worker. It also recommended that workers should be allowed to receive 'rolled-up holiday pay'.

Government response

The Government's Response to Taylor accepted the need to change the reference period to 52 weeks. However, it noted that it would not re-introduce rolled up holiday pay. In 2006, the European Court of Justice (ECJ) ruled in a case from the UK that rolled up pay was not permitted under the EU's Working Time Directive ([Directive 2003/88/EC](#)) (which sets out the right to paid annual leave).⁹⁰

In the Good Work Plan, the Government committed to legislate to extend the reference period.⁹¹

Part 3 of the [Employment Rights \(Employment Particulars and Paid Annual Leave\) \(Amendment\) Regulations 2018](#), made on 17 December 2018, will give effect to this commitment from 6 April 2020. The regulations amend the *Working Time Regulations 1998* to extend the reference period to 52 weeks or, for workers who have not yet worked 52 weeks, the number of weeks they have worked.

Rolled up holiday pay is where a worker's total holiday pay is spread out and paid as part of their regular salary. Workers on rolled up pay receive a higher salary but are not paid while on holiday.

⁸⁷ Reg. 16, *Working Time Regulations 1998*.

⁸⁸ Department for Business, Energy and Industrial Strategy, [Holiday Pay: Guidance on calculating holiday pay for workers without fixed hours or pay](#), February 2019.

⁸⁹ Taylor Review, pp. 46-47.

⁹⁰ [Robinson-Steele v RD Retail Service Ltd, C-131/04](#) [2006] ICR 932.

⁹¹ Good Work Plan, p. 33.

9. Portable ratings

Current legal framework

Many gig economy platforms allow users to rate those providing them with a service. Rating systems, and the consequences of poor ratings, vary from platform to platform. To take one example, in a landmark 2016 judgment, the Employment Tribunal described Uber's rating system as follows:

The Claimants rely on the ratings system as a further means by which Uber seeks to exert control over drivers. Uber says otherwise. Passengers are required to rate drivers at the end of every trip on a simple 0-5 scoring system. Ratings are monitored and drivers with average scores below 4.4 become subject to a graduated series of "quality interventions" aimed at assisting them to improve. "Experienced" drivers whose figures do not improve to 4.4 or better are "removed from the platform" and their accounts "deactivated."⁹²

At the time of writing, Uber's [Community Guidelines](#) for the UK state that "Drivers will not lose access to their accounts for poor ratings."

A number of academics have [called for a system of portable ratings](#) where workers in the gig economy can carry their ratings from one platform to another. Jeremias Prassl, a Professor of Law at the University of Oxford, has written:

Another problem that current labour standards fail to address is the power that algorithmic ratings have in tying workers into particular platforms: as long as better work and higher pay are limited to workers with high ratings, individuals will struggle to diversify their crowdwork portfolio and end up tied to one company's ecosystem. A system of portable ratings would empower workers to follow up grievances and negotiated for better conditions – or to move to a different platform.⁹³

Professor Prassl has argued for a system of portable ratings modelled on the data portability provisions in the EU's General Data Protection Regulation ([Regulation \(EU\) 2016/679](#)).

Taylor Review recommendation⁹⁴

The Taylor Review recommended that the Government should strongly encourage gig economy platforms to permit workers to carry their ratings with them when they move platforms.

Government response

The Government's Response agreed with the recommendation in principle. It stated that the implementation of the GDPR in May 2018 would make it easier for ratings to be transferred and that it would monitor the situation.

The Good Work Plan reiterated this response.

⁹² [Aslam v Uber BV \[2017\] IRLR 4](#), para. 55.

⁹³ J. Prassl, *Humans as a Service* (Oxford University Press, 2018), p. 111.

⁹⁴ Taylor Review, pp. 87-88.

10. Pregnancy and maternity discrimination

Current legal framework

Two key pieces of legislation offer protection for woman who are pregnant or on maternity leave.

Protections from redundancy

First, under the [Maternity and Parental Leave \(etc.\) Regulations 1999](#), a woman who is on ordinary or additional maternity leave has special protections from redundancy. If a woman on maternity leave can no longer be employed on her existing contract by reason of redundancy, her employer must offer her a suitable alternative vacancy, if one is available.⁹⁵ If a suitable vacancy is available but is not offered to her and she is made redundant, this will amount to automatic unfair dismissal.⁹⁶ The right is available to 'employees'.

Pregnancy and maternity discrimination

Second, the [Equality Act 2010](#) prohibits pregnancy and maternity discrimination.⁹⁷ The Equality and Human Rights Commission's [Employment Statutory Code of Practice](#) explains:

It is unlawful discrimination to treat a woman unfavourably because of her pregnancy or a related illness, or because she is exercising, has exercised or is seeking or has sought to exercise her right to maternity leave.

[...]

[U]nlike in cases of direct sex discrimination, there is no need to compare the way a pregnant worker is treated with the treatment of any other workers. If she is treated unfavourably by her employer because of her pregnancy or maternity leave, this is automatically discrimination.⁹⁸

These protections apply to 'employees'. However, the definition of 'employee' under equality legislation is significantly broader than under employment legislation.⁹⁹ It has been interpreted as including those who are 'workers' under employment legislation.¹⁰⁰

These provisions apply during the "protected period". This begins when the woman becomes pregnant and ends when the woman returns to work from maternity leave or when her maternity leave ends. If a woman is not entitled to maternity leave (e.g. because she is a 'worker') then the protected period ends two weeks after she gives birth.

⁹⁵ Reg. 10, *Maternity and Parental Leave (etc.) Regulations 1999*.

⁹⁶ Reg. 20, *Maternity and Parental Leave (etc.) Regulations 1999*.

⁹⁷ Section 18, *Equality Act 2010*.

⁹⁸ Equality and Human Rights Commission, *Employment Statutory Code of Practice*, paras. 8.4 and 8.6.

⁹⁹ Section 83, *Equality Act 2010*.

¹⁰⁰ [Windle v Secretary of State for Justice \[2016\] EWCA Civ. 459](#) at [8].

Taylor Review recommendations¹⁰¹

The Taylor Review cited statistics which showed that 77% of mothers had a negative or discriminatory experience during pregnancy, maternity leave or their return to work. Taylor recommended that the Government should consolidate and review existing guidance and legislation that protect pregnant women and new mothers. It also recommended that the Government consider further legislative intervention.

The Taylor Review also noted an earlier [report](#) by the Women and Equalities Select Committee (WESC) on pregnancy and maternity discrimination. Among other things, that report called for:

- greater parity between employees and workers in pregnancy-related rights;
- the extension of redundancy protections to cover a period of six months after a woman returns to work; and
- the extension of the time limit for bringing a discrimination claim to the Employment Tribunal from three months to six months.

The [Government's response to the WESC report](#), also noted by Taylor, accepted the need to extend redundancy protections but rejected the extension of the time limit for claims to the tribunal. With respect to extending rights to workers, the Government had highlighted the then ongoing Taylor Review.

Government response

The Government's Response to the Taylor Review accepted the need for better guidance. It committed to working with the Advisory, Conciliating and Arbitration Service (Acas) and the Equality and Human Rights Commission (EHRC) to improve existing guidance.

In the Good Work Plan the Government highlighted ongoing work with Acas and the EHRC. It also committed to consult on extending redundancy protections for women returning from maternity leave.¹⁰²

In January 2019, the Government published a [consultation on pregnancy and redundancy discrimination](#). The consultation sought views on extending the redundancy protections under the *Maternity and Parental Leave (etc.) Regulations 1999* to a period of six months after a woman's return to work. It also sought views on extending the protections to those returning from adoption and shared parental leave.

The [Government's response to the consultation](#), published in July 2019, committed to legislate to give effect to both of these proposals.

In the December 2019 Queen's Speech the Government committed to introducing an *Employment Bill*. The [background notes to the Queen's Speech](#) state that one of the main elements of the Bill will be "extending redundancy protections to prevent pregnancy and maternity discrimination".

¹⁰¹ Taylor Review, pp. 96-97.

¹⁰² Good Work Plan, p. 55.

11. Sick leave and pay

Current legal framework

Sickness absence and dismissal

In employment legislation there is no specific concept of 'sick leave', although an employee who is absent because of sickness may qualify for statutory sick pay (see below).

A person who is on long-term sickness absence does not currently have a specific statutory right to return to work. However, there are more general legal protections that may apply.

Employees with two years' continuous service are protected from unfair dismissal. Dismissal will be considered to be unfair unless the employer can show that it was for a potentially fair reason listed in the legislation and that dismissal was reasonable in the circumstances.¹⁰³ In cases of dismissal following sickness absence, an employer will often rely on the potentially fair reason of capability, which can be assessed by reference to health. In determining whether dismissal was reasonable in the circumstances, courts have had regard to a range of factors, including what steps the employer took to ascertain the medical situation, whether the employer consulted with the employee and whether any alternatives to dismissal were considered. Acas have produced detailed [guidance on managing sickness absences](#).

Where a person is dismissed following sickness absence and the sickness was related to a disability, there may be a claim of discrimination. As discussed above, protection from discrimination is available to 'employees' which, as defined under the *Equality Act 2010*, includes 'workers'. In cases concerning sickness absence, the claim will often be one of 'discrimination arising from disability' or a failure to make a reasonable adjustment.¹⁰⁴ Chapter 17 of the Equality and Human Rights Commission's [Employment Statutory Code of Practice](#) contains a number of examples of discrimination in the context of sickness absence.

Statutory sick pay

Under the [Social Security Contributions and Benefits Act 1992](#), employees who earn above the lower earnings limit for Class 1 National Insurance Contributions (currently £118 per week) are entitled to statutory sick pay (SSP). SSP is payable for every "qualifying day" that falls within a "period of incapacity for work". A period of incapacity is four or more consecutive days (including weekends and public holidays) where the employee is sick and unable to work. Qualifying days are days agreed between the employer and the employee or, in the absence of an agreement, the days the employee is required to work.¹⁰⁵

SSP is payable from the fourth qualifying day that falls within the period of incapacity from work – the first three qualifying days are "waiting

¹⁰³ Section 98, *Employment Rights Act 1996*.

¹⁰⁴ Sections 15 and 20, *Equality Act 2010*.

¹⁰⁵ Sections 151-154, *Social Security Contributions and Benefits Act 1992*.

days". SSP is paid at the statutory rate of £94.25 per week. An employee is entitled to up to 28 weeks of SSP in any three-year period.

SSP is available to 'employees' as defined under social security legislation.¹⁰⁶ This definition is slightly broader than the definition of 'employee' under employment legislation. However, it does not capture those who are 'workers'.

Example

An employee works Mondays to Fridays. They fall ill on Sunday and are sick until the following Sunday. This is a period of incapacity for work (4+ days of sickness). There are five qualifying days in this period (Monday to Friday). SSP is payable from the fourth qualifying day (i.e. for Thursday and Friday).

The employee is entitled to £37.70 of SSP for these two days ($94.25 \times 0.4 = 37.7$).

Taylor Review recommendations¹⁰⁷

The Taylor Review concluded that the right to sick pay was a fundamental employment right akin to the National Minimum Wage or holiday pay. Taylor recommended that the Government should legislate to extend SSP to cover 'workers' as well as employees. He also recommended that it should be available to all workers regardless of income. At the same time, Taylor concluded that under the current framework, employers can be liable for significant payments with respect to workers who have been in their service for only a short period of time. As such, he recommended that SSP should not be available as a day one right but that it should accrue with a worker's length of service.

Taylor also concluded that not enough was being done to support employees returning to work from periods of sickness absence. In particular, he stated that workers who are sick should not face losing their job. He recommended that workers should be given a 'right to return' to the same or similar job.

Government response

Statutory sick pay

In November 2017, the Department for Work and Pensions and the Department for Health published [Improving Lives: The Future of Work, Health and Disability](#). The paper was a response to an earlier Green Paper, as well as to the recommendations in [Thriving at work: The Stevenson / Farmer review of mental health and employers](#). The paper expressed support for recommendations – initially made in the Stevenson / Farmer review – that SSP should be reformed so as to be more flexible. In particular, this included allowing SSP to be taken on a pro-rata basis during phased returns to work after periods of sickness absence. The Government said it would consult on these reforms.¹⁰⁸

The Government's Response to the Taylor Review highlighted the work that was ongoing under *Improving Lives*. It stated that it would consider

¹⁰⁶ Section 2, *Social Security Contributions and Benefits Act 1992*.

¹⁰⁷ Taylor Review p. 59.

¹⁰⁸ Department for Work and Pensions and Department for Health, *Improving Lives: The Future of Work, Health and Disability*, Cm 9526, November 2017, paras. 114-120.

Taylor's recommendations in light of these wider reforms. It also committed to undertake "deeper analysis and research" into whether the right to SSP could be made a basic employment right.

In the Good Work Plan the Government agreed that the framework for SSP could be improved and committed to consult on the matter.

In July 2019, the Government published [Health is everyone's business: Proposals to reduce ill health-related job loss](#), a consultation on various proposals relating to health and work. The consultation was published by the Department for Work and Pensions and the Department for Health and is not titled as a Good Work Plan consultation. However, the introduction to the consultation document states that it forms part of the Good Work Plan "vision".

The proposals for reforming SSP that were consulted on included:

- allowing SSP to be taken on a pro rata basis during a phased return to work;
- removing the concept of qualifying days and calculating waiting days by reference to the number of days an employee normally works each week;
- removing the requirement that an employee earn above the lower earnings limit; and
- providing a rebate to small and medium-sized enterprises for SSP.

The consultation rejected the proposal made in Taylor that SSP should be changed from a day-one right to one that accrues with length of service on the grounds that it risked individuals being without income while recovering from illness. The consultation did not discuss the proposal of extending the right to SSP to 'workers'.

The Government has yet to publish a response to the consultation. The reform of SSP was not mentioned in the [December 2019 Queen's Speech](#).

Right to return

The Government's Response to the Taylor Review said that the introduction of a right to return to work needed to be considered in the broader context of the reform of occupational health that was ongoing under *Improving Lives*.

The Good Work Plan did not contain a specific commitment on establishing a right to return to work, although the Government committed to consult on occupational health more broadly.¹⁰⁹

Health is everyone's business specifically mentioned Taylor's proposal to create a right to return to work. The Government did not specifically propose to legislate for a right to return to work, focussing instead on strengthening statutory guidance. However, one of the consultation questions did ask what support employers would need to comply with a

¹⁰⁹ Good Work Plan, p. 57.

legal obligation to support sick employees returning to work.¹¹⁰ The consultation also sought views on introducing a right to request “work(place) modifications” for workers returning from long-term sickness absence. This would be similar to the right to request reasonable adjustments, which is currently available to disabled people under the *Equality Act 2010*.

¹¹⁰ HM Government, *Health is everyone’s business: Proposals to reduce ill health-related job loss*, CP 134, July 2019, p. 25.

12. Tips and gratuities

Current legal framework

There is currently no legislation that specifically regulates tips and gratuities. Since 2009, tips have not been included when determining whether a worker has been paid the National Minimum Wage.¹¹¹ Tax, national insurance and consumer protection legislation can also have a bearing on the treatment of tips.¹¹² A [code of best practice](#) adopted by the Government, unions and business organisations in 2009 states that employers should have a clear and transparent policy regarding distribution of service charges, tips and gratuities. However, the code of practice is voluntary.

Government consultation

In 2016, the Government held a [consultation on tips, gratuities, cover and service charges](#). Among other things, the consultation sought views on proposals to ensure workers received a fair share of tips and gratuities. The proposals consulted on included banning or limiting deductions from discretionary service payments and incentivising the use of troncs systems.

Good Work Plan proposal

The Government did not publish a response to the consultation on tipping. However, in the Good Work Plan it committed to legislate to ban employers from making deductions from staff tips.¹¹³

In the [October 2019 Queen's Speech](#), the Government announced an *Employment (Allocation of Tips) Bill*. The purpose of the Bill was to:

Promote fairness for workers by creating legal obligations on employers to pass on all tips to workers in full and, where they distribute tips amongst workers, to do so on a fair and transparent basis.¹¹⁴

The Bill was not published before Parliament was dissolved on 6 November 2019.

The Government did not propose specific legislation on tips and gratuities in the [December 2019 Queen's Speech](#). Instead, tips and gratuities will be covered in a broader *Employment Bill*. The Bill has yet to be published.

¹¹¹ Reg. 10(m), *National Minimum Wage Regulations 2015*.

¹¹² See Department for Business, Innovation and Skills, [Government consultation on tipping, gratuities, cover and service charges](#), May 2016, Annex B.

¹¹³ Good Work Plan, pp. 21-22.

¹¹⁴ HM Government, [The Queen's Speech and associated background briefing, on the occasion of the Opening of Parliament on Monday 14 October 2019](#), p. 64.

13. Unpaid internships

Current legal framework

'Internship' is not a legal term and does not have a specific meaning within employment law. When considering the rights of interns, the key question, as with all other types of workers, concerns their employment status. The BEIS guide on the National Minimum Wage explains:

Work experience can also be called a 'placement' or an 'internship'. 'Internships' are sometimes understood to be positions requiring a higher level of qualification than other forms of work experience, and are associated with gaining experience for a professional career.

However, entitlement to the minimum wage does not depend on what someone is called, the type of work they do, how the work is described (such as 'unpaid' or 'expenses only') or the profession or sector they work in. What matters is whether the agreement or arrangement they have makes them a "worker" for minimum wage purposes.¹¹⁵

If an intern can establish worker status, they will generally be entitled to the National Minimum Wage (NMW). The test for employment status that is applied to interns is the same test that would apply to anyone seeking to establish worker status.¹¹⁶ The tests are described in detail in the Commons Library Briefing Paper, [Employment Status](#).

There are a number of circumstances in which an intern may not qualify for the NMW. For example, a person undertaking a work placement of under one year as part of a higher education course is not entitled to the NMW.¹¹⁷ If an intern is a 'voluntary worker' – an unpaid worker with a charity or voluntary organisation – they may also be excluded from the right to be paid the NMW.¹¹⁸ The GOV.UK website contains a page on [employment rights and pay for interns](#).

Taylor Review recommendation¹¹⁹

The Taylor Review found that internships were concentrated in London and that up to a third of graduate internships were unpaid. However, Taylor rejected the proposal of creating a separate 'intern' status for employment rights. Instead, he recommended that the Government tackle exploitative unpaid internships by offering clear interpretations of the law and increasing HMRC enforcement action.

Government response

The Government's Response accepted the recommendation and committed to undertaking greater enforcement action with regards to

¹¹⁵ BEIS, [National Minimum Wage and National Living Wage: calculating the minimum wage](#), April 2019, p. 7.

¹¹⁶ Section 54, *National Minimum Wage Act 1998*.

¹¹⁷ Reg. 53, *National Minimum Wage Regulations 2015*.

¹¹⁸ Section 44, *National Minimum Wage Act 1998*.

¹¹⁹ Taylor Review, p. 91.

unpaid internships. It also committed to reviewing the existing legal framework should this approach not work.

The Good Work Plan highlighted the steps that had been taken by HMRC to increase awareness of interns' right to be paid the NMW.¹²⁰

In response to a Written Question in May 2019, Kelly Tolhurst, the Parliamentary Undersecretary of State for BEIS, outlined the steps the Government had taken:

The law is clear that any individual performing work is entitled to receive the National Minimum and National Living Wage (NMW). The Government is committed to enforcing this right. In 2018/19 HM Revenue & Customs (HMRC) identified a record £24.4 million in arrears for over 220,000 workers and issued over £17 million in penalties to non-compliant employers. The budget to enforce the NMW stands at its highest ever.

HMRC have contacted over 2,000 employers found to be advertising unpaid internships online to ensure they are compliant with the law. They have also issued over 15,000 letters to employers in industries where internships are common to remind them of their responsibilities.

Earlier this month my hon Friend the Minister of State (Department for Digital, Culture, Media and Sport) (Digital Policy) (Margot James) and I co-hosted a roundtable on internships with employers and organisations in the creative industries. Discussion focused on how Government can work better with employers to raise the profile of existing rules and ensure that interns are paid in accordance with NMW law. The event provided important insight which will be used to improve compliance with the law across all sectors.¹²¹

¹²⁰ Good Work Plan, p. 54.

¹²¹ [PO256245 \[on Work experience: pay\], 20 May 2019.](#)

14. Written statement of employment particulars

Current legal framework

There is no legal requirement for a contract of employment to be in writing. However, under section 1 of the *Employment Rights Act 1996*, employees are entitled to receive a written statement of employment rights from their employer (called a 'statement of initial employment particulars'). The statement must cover all the basic terms of employment listed in the legislation, such as rates of pay, working hours and holiday entitlements.

At present, the right to receive a written statement is limited to employees and is not available to workers. The statement must be given to the employee within two months of their first day of employment.

Where a written statement is not provided or is incomplete, an employee can bring a claim to an Employment Tribunal which can rule that a statement should have been provided.¹²² However, there is no standalone right to compensation for a failure to provide a statement. Compensation can only be awarded when a claim is brought in conjunction with a successful claim based on one of the rights listed in Schedule 5 to the *Employment Act 2002* (e.g. a claim for unlawful deduction from wages).¹²³

Taylor Review Recommendations¹²⁴

The Taylor Review highlighted a number of ways in which modern business arrangements can create confusion about employment rights for workers. Taylor concluded that extending the right to receive a written statement to workers would help provide them with greater clarity about their rights. Taylor also recommended that workers should have a right to receive a written statement on their first day of employment. Furthermore, he encouraged the Government to consider creating a standalone right to compensation for breaches of the right.

Government Response

The Government sought views on these recommendations in the February 2018 on transparency in the labour market. It also sought views on whether the list of rights ('particulars') that must be included in the statement should be expanded.

In the Good Work Plan the Government committed to legislate to extend the right to receive a written statement to workers and to make it a day one right. It also committed to extending the list of particulars that must be included in the statement.¹²⁵ However, the Good Work Plan did not mention a standalone right to compensation.

¹²² Section 11, *Employment Rights Act 1996*.

¹²³ Section 38, *Employment Relations Act 2002*.

¹²⁴ Taylor Review, pp. 38-39.

¹²⁵ Good Work Plan, pp.30-31.

These commitments are being given effect to through secondary legislation. Part 3 of the [Employment Rights \(Miscellaneous Amendments\) Regulations 2019](#) will extend the right to receive a written statement to workers from 6 April 2020. Part 2 of the [Employment Rights \(Employment Particulars and Paid Annual Leave\) \(Amendment\) Regulations 2018](#) make the right a day one right and also add a number of new particulars that must be included in the written statement from 6 April 2020. This includes information about probationary periods and training entitlements. It also required employers to inform workers which hours and days they are expected to work and, if these are variable, the process for determining how they are to be varied.

EU directive on transparent and predictable working

The right to a written statement in the 1996 Act gives effect to the Written Statements Directive ([Directive 91/533/EEC](#)). On 11 July 2019, the EU published the Directive on Transparent and Predictable Working Conditions ([Directive \(EU\) 2019/1152](#)) ('the 2019 Directive'), which will repeal and replace the Written Statements Directive on 1 August 2022.

The 2019 Directive will make a number of changes to the requirement to provide a written statement. First, basic information (e.g. remuneration, working hours) must be provided within the first seven days of employment. Other information (e.g. training entitlements, notice periods) must be provided within the first month.¹²⁶ The Directive will also expand the list of information that employers must provide to workers. This includes training entitlements, probation periods and the end-dates for fixed term contracts. Where work patterns are unpredictable employers must provide information about reference hours (hours during which the employer can ask the worker to work), as well as information about the minimum notice that will be provided before work is assigned or cancelled.¹²⁷

The 2019 Directive also creates a number of rights relating to the minimum predictability of work. These are discussed under 'Zero-hours contracts' (below).

The implementation deadline for the 2019 Directive is 1 August 2022. The transition period under the Withdrawal Agreement is set to end on 31 December 2020. Unless the transition period is extended, the UK will not be bound to implement the Directive.

Nonetheless, many of the amendments to the 1996 Act reflect the changes in the 2019 Directive, such as the inclusion of information about training, probation periods and unpredictable hours.

The Government has argued that the rights in the Good Work Plan are as good as those being introduced under the 2019 Directive. During a

¹²⁶ Article 5, Directive (EU) 2019/1152.

¹²⁷ Article 4(2), Directive (EU) 2019/1152.

House of Commons debate on Brexit and workers' rights in October 2019, Andrea Leadsom, the Business Secretary, stated:

It is true that the EU has introduced proposals in the transparent and predictable working conditions directive, but it is not true that those proposals go further than the good work plan. For example, we brought forward a statutory instrument in March this year under which the right to a written statement on day one for every worker will come into force in April 2020, whereas under the EU's proposals, if it does introduce that directive, it will not take effect until the summer of 2022, so the UK is bringing forward workers' rights further and faster than the European Union.¹²⁸

15. Zero-hours contracts

Current legal framework

There is no single definition of a 'zero-hours contract' (ZHC). The Department of Business, Energy and Industrial Strategy's (BEIS) [guidance on ZHCs](#) suggests that a general defining feature is that the employer is not obliged to offer work and the worker is not obliged to accept it:

Generally speaking, a zero hours contract is one in which the employer does not guarantee the individual any hours of work. The employer offers the individual work when it arises, and the individual can either accept the work offered, or decide not to take up the offer of work on that occasion.

Section 27A of the *Employment Rights Act 1996* now contains a limited statutory definition of 'zero-hours contract'. This applies for the purpose of the prohibition on exclusivity clauses. Here, ZHCs are defined in the following terms:

- (1) In this section "zero hours contract" means a contract of employment or other worker's contract under which—
- (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
 - (b) there is no certainty that any such work or services will be made available to the worker.

However, academic commentary draws attention to the fact that there are actually many different types of zero-hours arrangements. For example, Professors Hugh Collins, Keith Ewing and Aileen McColgan drew a distinction between 'zero-hours contracts', where the worker is obliged to accept any work offered, and 'casual work contracts', where the worker can refuse to accept work.¹²⁹ Professors Abi Adams, Mark Freedland and Jeremias Prassl concluded that "the supposed category of Zero-Hours Contracts is a deeply uncertain and therefore unsatisfactory one" and that as "a matter of legal analysis, it is conceptually uncertain what kinds of personal work arrangement should or even can be regarded as ZHCs."¹³⁰

Again, the employment rights that zero-hours workers will enjoy will depend on their employment status. This will depend on the type of zero-hours arrangement. The absence of a 'mutuality of obligations' (promises to provide and perform future work) will usually mean that those on ZHCs cannot be 'employees'.¹³¹ On occasion, the tribunal has looked beyond the written terms of the contract to find that, in reality, mutuality did exist between the parties and that the workers were 'employees'.¹³² However, in most cases, those on ZHCs will be

Exclusivity clauses are clauses which prohibit a worker from working for another employer. Since 2015, exclusivity clauses cannot be enforced against workers on a ZHC.

¹²⁹ H. Collins, K. Ewing and A. McColgan, *Labour Law* (2nd ed, CUP 2019), p. 264.

¹³⁰ A. Adams, M. Freedland and J. Prassl, 'The 'zero-hours contract': regulating casual work, or legitimating precarity?', Oxford Legal Studies Research Paper No. 11/2015

¹³¹ *Carmichael v National Power plc* [2000] IRLR 43

¹³² *Pulse Healthcare Ltd v Carewatch Care Services Ltd* [2012] UKEAT 0123/12/BA

'workers', entitled to a basic set of employment rights such as the National Minimum Wage and paid annual leave.

The Library Briefing Paper, [Zero-hours contracts](#), provides an overview of the prevalence of ZHCs and the debate surrounding their use.

Taylor Review Recommendations¹³³

The Taylor Review concluded that ZHCs did have positive aspects, allowing workers to work flexibly and employers to adapt to changing market conditions. However, Taylor identified a problem with 'one-sided flexibility'. He noted that employers cancelled shifts at short notice and that even if workers had a right to refuse assignments, many felt they could not do so as this could risk work not being provided again in the future. Taylor noted that a workers' dependency on the employer to provide work could lead to income insecurity and a hesitance to raise concerns about working conditions.

Taylor recommended that in order to redress the balance of one-sided flexibility, the Government should consult the Low Pay Commission (LPC) on a proposal that non-guaranteed hours should attract a higher rate of National Minimum Wage. In a subsequent blog, he suggested a model where working hours for which a worker has had less than seven days' notice would be paid at a rate of 15% above the normal NMW.¹³⁴

In addition, Taylor recommended that workers on ZHCs who had worked for the same employer for 12 months should have a right to request a contract with guaranteed hours. This would be modelled on the existing right to request flexible working. Employers can refuse such requests but only on the basis of one of the grounds listed in the legislation.¹³⁵

Low Pay Commission report

In December 2018, the Low Pay Commission published a [report on one-sided flexibility](#). The LPC rejected the idea of a higher rate of minimum wage. It concluded that such models could not address all of the problems with one-sided flexibility and that conversely they could risk reducing the availability of hours and legitimising the practice of unpredictable hours. Instead, the LPC recommended a package of alternative measures.

First, the LPC recommended a stronger right for a worker to switch to a contract that reflects their normal working hours. Its report stated:

The Taylor Review recommended a right to request a more stable and predictable contract. Government has since consulted on such a measure based on the right to request flexible working. However, we are of the view that a stronger framework is appropriate, as the issue is not about a worker requesting a change to the amount of work they do, but rather the proper recognition of their normal hours. Workers already worried about

¹³³ Taylor Review, pp. 44, 47-48.

¹³⁴ Matthew Taylor, [Paying for flexibility: should workers on zero-hours contracts receive a higher minimum wage?](#), RSA, 23 March 2018 (accessed 7 February 2020).

¹³⁵ Part 8A, *Employment Rights Act 1996*.

raising issues in the workplace, because of fears of employer retaliation, are less likely to raise a 'request' – so the right needs to be stronger than this.¹³⁶

It suggested that an employer could only refuse such a contract if it could objectively justify doing so based on narrow criteria set out in legislation. The report suggested a number of criteria that could be used based on Irish legislation. These include where there is a lack of evidence establishing the number of hours a worker normally works or in cases where there are exceptional or emergency circumstances.¹³⁷

Second, it recommended that workers should have a right to reasonable notice of work shifts.

Third, it recommended that workers should have a right to compensation when shifts are cancelled or curtailed without reasonable notice.

Government Response

The Government's response to the Taylor Review agreed that all workers should have a right to request a "predictable and stable" contract. The February 2018 consultation on transparency in the labour market sought views on this proposal.

In the Good Work Plan, the Government committed to legislate to give all workers a right to request a stable contract after 26 weeks of service.¹³⁸

In July 2019, the May Government launched a [consultation on one-sided flexibility](#). The consultation sought views on the LPC's proposals relating to notice of shifts and compensation for shift cancellations. The consultation also suggested that the Government's proposal to create a right to request a predictable contract was broadly similar to the LPC's proposal to create a right to switch contracts. The consultation stated:

As outlined in the Government's Good Work Plan, it has been our intention to bring forward legislation that introduces a right for all workers to potentially move towards a more predictable and stable contract, subject to conditions set out in legislation.⁶ This was informed by previous consultations and will provide workers with greater certainty around the number of hours a person receives, or fixed days on which they will be asked to work, providing much of the protection that is suggested by the LPC's proposal. As such, we are taking forward the LPC's recommendation and will legislate to introduce a right for all workers to switch to a more predictable work pattern.¹³⁹

The consultation closed on 11 October 2019. A response to the consultation has yet to be published.

¹³⁶ Low Pay Commission, [A response to Government on one-sided flexibility](#), 17 December 2018, p. 43.

¹³⁷ Section 18, *Employment (Miscellaneous Provisions) Act 2018* (Ireland); see further J. McMahon, 'Plus ça change? Regulating zero-hours work in Ireland: an analysis of the provisions of the Employment (Miscellaneous Provisions) Act 2018' (2019) 48(3) *Industrial Law Journal*, 447-467.

¹³⁸ Good Work Plan, p. 13.

¹³⁹ BEIS, Good work plan: Consultation on measures to address one-sided flexibility, 19 July 2019, p. 10.

In the December 2019 Queen's Speech, the Johnson Government announced an *Employment Bill*. The [background notes to the Queen's Speech](#) state that one of the elements of the Bill will be to introduce "a new right for all workers to request a more predictable contract." This proposal, phrased in the language of a 'right to request', would appear to be similar to the model that the LPC rejected as insufficiently strong.

The Queen's Speech did not mention the LPC's proposals relating to notice of shifts and compensation for shift cancellations.

EU Directive on Transparent and Predictable Working Conditions

The EU adopted the Directive on Transparent and Predictable Working Conditions ([Directive \(EU\) 2019/1152](#)) in July 2019. Its implementation deadline is 1 August 2022.

As well as amending the rules relating to written statements, discussed above, the Directive creates new rules on the minimum predictability of work.¹⁴⁰ These rules include the following:

- Written statements provided by employers to workers must contain 'reference hours' – hours during which an employer can request the worker to undertake work
- Workers have a right to refuse a work assignment if it falls outside of their reference hours or if the employer does not provide them with "reasonable notice"
- Workers have a right to compensation if an employer cancels a work assignment past a "reasonable deadline"
- Measures must be introduced to limit the use and duration of "on-demand contracts"
- Workers have a right to request a contract with more predictable hours after six months' service with their employer;

As indicated above, the implementation deadline for the Directive is set to fall after the end of the implementation period under the Withdrawal Agreement (31 December 2020). As such, it is unlikely that the UK will be bound to implement the Directive.

It is currently unclear to what extent the Government plans to implement these rights in domestic law. In response to a Written Question in April 2019, Greg Clark, then the Business Secretary in the May Government, stated:

The UK has led the development of this Directive. We already meet, exceed or plan to take action in all key areas.

Last month, the Government published proposals that would give Parliament the right to consider and vote on any future changes in EU law that strengthened workers' rights.¹⁴¹

¹⁴⁰ Articles 4(m) and 10-12, [Directive \(EU\) 2019/1152](#).

¹⁴¹ [PQ910614 \[Working Conditions: EU Action\], 30 April 2019](#).

The European Scrutiny Committee also highlighted that the Directive would be the first new EU workers' rights instrument on which the Government had committed to report under the new reporting framework that was to be set out in a forthcoming *Withdrawal Agreement Bill*.¹⁴²

However, the *European Union (Withdrawal Agreement) Bill 2019-20* that was published by the Johnson Government in December 2019 no longer contains the relevant clauses on the protection of EU workers' rights. This is discussed in the Commons Library Insight, [Removal of workers' rights in the new EU \(Withdrawal Agreement\) Bill](#).

As indicated above, the Government has already legislated to require reference hours to be included in a written statement of particulars from April 2020. Furthermore, the commitment in the December 2019 Queen's Speech to legislate to give workers a right to request a more stable contract appears to be similar to the right the Directive will create for workers to request a contract with predictable hours. A right to reasonable notice of shifts and shift cancellations were recommended by the LPC and formed part of the consultation launched in July 2019. However, as noted, there have yet to be specific commitments to legislate for this.

¹⁴² European Scrutiny Committee, [Seventy-fourth report of Session 2017-19](#), HC 301-lxxii, 8 October 2019, para. 3.13.

16. Comment

Taylor Review

The Taylor Review received a mixed response from stakeholders.

Business organisations broadly welcomed the approach taken by Taylor, while cautioning that certain recommendations could have adverse consequences on jobs.

The Confederation of British Industry (CBI) stated:

The Taylor Review rightly recognises that labour market flexibility is a key strength of the UK economy, driving better outcomes for everyone. Businesses agree that flexibility must be matched with fairness, but building on our current approach, as the report concludes, is the right way forwards. The CBI is ready to work in partnership with the government to address the challenges the report raises.¹⁴³

The CBI expressed concerns about the proposals relating to agency workers, reforming employment status and setting a higher rate of NMW for non-guaranteed hours. The British Chamber of Commerce (BCC) made similar comments, likewise welcoming Taylor's recognition of the importance of flexibility.¹⁴⁴ Meanwhile, the Institute of Directors said that the Review "strikes the right balance".¹⁴⁵

In contrast, Unions broadly criticised the proposals as insufficient, although many welcomed certain proposals.

The TUC welcomed the recommendation that the Swedish Derogation be abolished. However, overall it concluded:

It's no secret that we wanted this review to be bolder. This is not the game-changer needed to end insecurity at work.¹⁴⁶

The Independent Workers Union of Great Britain (IWGB) argued that the proposals were "next to meaningless" and that adapted piece rates legislation would leave gig economy workers worse off.¹⁴⁷

Meanwhile, workers' rights organisation Focus on Labour Exploitation (FLEX) stated that Taylor "made a decent start" but that "much more work is needed to tackle the root cause of exploitation".¹⁴⁸

Government response

The reaction to the Government's Response to the Taylor Review and to the Good Work Plan reflected the reactions to the Taylor Review itself.

¹⁴³ WiredGov, [CBI: "Labour market flexibility is a key strength of the UK economy, driving better outcomes for everyone"](#), 11 July 2017 (accessed 7 February 2020).

¹⁴⁴ British Chamber of Commerce, [BCC comments on Taylor Review](#), 11 July 2017 (accessed 7 February 2020).

¹⁴⁵ Institute for Directors, [Taylor Review strikes the right balance on flexible work](#), 11 July 2017 (accessed 7 February 2020).

¹⁴⁶ TUC, [TUC comment on Taylor Review](#), 11 July 2017 (accessed 7 February 2020).

¹⁴⁷ IWGB, [BREAKING: IWGB response to the Taylor Review](#), 14 July 2017 (accessed 7 February 2020).

¹⁴⁸ FLEX, [FLEX responds to the Taylor Review of Modern Working Practices](#), 11 July 2017 (accessed 7 February 2020).

Matthew Taylor praised the Good Work Plan, saying the response was “substantive, positive and significant.” He also noted that some would be unhappy that the recommendations did not go further:

There will be people wanting to go further than the Government. But remember that not only do we as a country have a good record on employment numbers to maintain but also real wages are starting to rise and it turns out our productivity performance isn't quite as bad as we thought. Overall, the case for incremental improvement in our system is stronger than that for wholesale change. The case for pragmatism is based on the evidence not ideology or political expediency.¹⁴⁹

Again, business groups supported the Good Work Plan with the CBI saying, “Companies support the Good Work agenda because there is a strong business case for it.”¹⁵⁰

Unions likewise reiterated their criticism. The TUC, in particular, criticised the Government's proposal to create a right to request fixed hours, saying “the right to ask nicely is no right at all – it will give insecure workers as much power as Oliver Twist.”¹⁵¹

The Institute for Employment Rights, a left-leaning think tank, argued that the Government's response was even worse than the Taylor Review.¹⁵²

In a debate on the Good Work Plan in the House of Commons, Rebecca Long Bailey, the Shadow Business Secretary, reiterated many of the concerns expressed by unions, adding that there was significant ambiguity around the proposals relating to employment status and the enforcement of employment rights. She concluded:

The Government's proposals were an opportunity to improve the lives of those workers, but sadly they fall dramatically short, and those workers face a Dickensian future unless the Government take serious action to protect and enforce the intrinsic value of their human capital within our economy.¹⁵³

Agency workers

The proposals relating to Agency Workers, in particular the repeal of the Swedish Derogation, were welcomed by unions. In the House of Commons debate, Ms Long Bailey said:

Proposals for a labour inspectorate, the abolition of the Swedish derogation and ensuring that workers keep their tips were among Labour's policies to transform our labour market, so I am pleased that, after a hard-fought campaign by Labour Members and our

¹⁴⁹ Matthew Taylor, [Good news on good work](#), RSA, 16 December 2018 (accessed 7 February 2020).

¹⁵⁰ WiredGov, [CBI: Our response to Government's Good Work Plan](#), 19 December 2018 (accessed 7 February 2020).

¹⁵¹ Kate Bell, [Stuck on a zero-hours contract? The government thinks you can ask your boss for a better deal](#), TUC, 17 December 2018 (accessed 7 February 2020).

¹⁵² John Hendy QC, [‘Good Work’ the government's Response to the Taylor Review](#), IER, 12 February 2018 (accessed 7 February 2020).

¹⁵³ [HC Deb 17 December 2018 vol. 651 c575](#).

trade unions, these points have finally made an appearance in the Government's good work plan.¹⁵⁴

Business groups had initially expressed strong opposition to this recommendation. The CBI's response to the Taylor Review stated:

The Swedish Derogation is not a loophole, but a key part of both the EU Directive and the UK deal that brought in the regulations, allowing workers a stable relationship with one agency and therefore greater security.¹⁵⁵

In response to Government's decision in the Good Work Plan to abolish the Swedish Derogation, the CBI said:

Companies have consistently called for reform to ensure the current rules are working as intended. A phased removal over time is needed to help firms and their workers identify a suitable alternative contractual arrangement.¹⁵⁶

Employment status

Employment status has been one of the key focuses of the academic commentary on the Taylor Review and the Good Work Plan, much of which has been critical of the proposals.

Following the publication of the February 2018 consultation on employment status, a number of academics at the University of Bristol's Centre for Law at Work argued that a test that places greater focus on control could harm workers in the gig economy:

Control is not an express statutory requirement or even a determinative factor for limb (b) workers (despite the claims of the relevant consultation paper to the contrary). This new criterion would be a backward step. First, it would make it more difficult for gig economy workers, such as the drivers for Uber and Addison Lee to access statutory protections. Second, it would probably mean that agency workers, who typically are not controlled by their agency, would cease to be 'workers'. The Government proposes consultation on Taylor's suggestion that statutory 'sick pay' (SSP) should embrace 'workers' and not just 'employees'; but this would not apply to anyone hired as a driver who has insufficient 'control' over their work.¹⁵⁷

They concluded that the Taylor Review and the Government's response was a "politically convenient fairy tale" that ignores broader concerns around deregulation and the suppression of union organisation.

Separately, Hugh Collins, now the Cassel Chair of Commercial Law at the LSE, argued that the Government's consultation on employment status missed an opportunity to address a range of anomalies in the way that employment status is currently determined, such as the fact that various pieces of legislation contain different definitions:

¹⁵⁴ Ibid.

¹⁵⁵ WiredGov, [CBI: "Labour market flexibility is a key strength of the UK economy, driving better outcomes for everyone"](#), 11 July 2017 (accessed 7 February 2020).

¹⁵⁶ WiredGov, [CBI: Our response to Government's Good Work Plan](#), 19 December 2018 (accessed 7 February 2020).

¹⁵⁷ Dr Katie Bales et al., [Bad Work: the Government's Response to the Taylor Review](#), University of Bristol Law School Blog, 1 March 2019 (accessed 7 February 2020).

In my view, there is rarely a good reason to have variable personal scope for employment law. Why, for instance, should a minimum period of notice and protection against unfair dismissal be confined to employees, but the larger category of ‘workers’ have the entitlement to a paid holiday and the minimum wage? If a worker deserves a holiday, a rest break, and a living wage, why should they not also be entitled to some protections for job security in view of their economic and psychological dependence on the employer?¹⁵⁸

Furthermore, some legal commentators have questioned whether renaming ‘workers’ as ‘dependent contractors’ is anything more than a cosmetic exercise.¹⁵⁹

Zero-hours contracts

Another of the most controversial issues in the Taylor Review and the Good Work Plan has been the proposal to give workers a right to request fixed working hours. As noted above, the Low Pay Commission’s report to the Government argued that a stronger “right to switch” was necessary.

Unions have expressed significant concern about this recommendation. As noted, the TUC has labelled the proposal the “Oliver Twist clause”. In its response to the Government’s February 2018 consultation on transparency in the labour market, it stated that if the Government was to proceed with the proposal, it should strengthen the right. This could include making it a day-one right, giving workers a right to a meeting with their employer accompanied by a union representative and anti-victimisation protections.¹⁶⁰

By contrast, business organisations have supported the right to request, arguing that dialogue and transparency are most important. In its response to the Government consultation, the Chartered Institute of Personnel and Development (CIPD) stated:

CIPD supports the proposal for a right to request a more stable contract which would afford workers some degree of choice, although dependent on acceptance of the request from the employer. Lessons can be learnt from experiences of the right to request flexible working, for example that a main source of value of having a right to request is the conversation between employer and the individual.¹⁶¹

Implementation of the Good Work Plan

A number of commentators noted that many proposals in the Good Work Plan were short on detail and would require further steps before they could be implemented.

¹⁵⁸ Hugh Collins, [A Missed Opportunity of a Unified test for Employment Status, UK Labour Law](#), 31 July 2018 (accessed 7 February 2020).

¹⁵⁹ Darren Newman, [What about the dependent contractors?](#), A Range of Reasonable Responses Blog, 11 July 2017 (accessed 7 February 2020).

¹⁶⁰ TUC, [Taylor Review: Measures to improve transparency in the UK labour market: TUC response to the BEIS consultation](#), 27 June 2018, pp. 5-6.

¹⁶¹ CIPD, [Good Work: the Taylor Review of Modern Working Practices Consultation on increasing transparency in the UK labour market](#), May 2018, p. 28.

Michael Burd, Partner and Chair of Lewis Silkin, a law firm specialising in employment law, wrote:

While the plan gives useful information on what is likely to happen, it is too early for employers to take many steps to prepare. The draft regulations that have been published so far are relatively straightforward, and most changes will not come into effect until April 2020 at the earliest. Draft legislation and firm timings are needed for the more significant changes in relation to employment status and the right to request a more predictable contract. With the imminent Christmas holidays and ongoing Brexit negotiations, it's probably best not to hold your breath...¹⁶²

Thomsons Solicitors, also a law firm with specialism in employment law, were particularly critical of the proposals on employment status, saying:

The fact that the Government has commissioned yet more research "to find out more about those with uncertain employment status" smacks of a Government afraid to make bold decisions to resolve the central issue to achieving the good quality work it says it is committed to.¹⁶³

As has been noted, the Government has made four pieces of secondary legislation to give effect to a number of recommendations in the Good Work Plan. However, in the [Delegated Legislation Committee](#), a number of MPs were critical of the fact that this legislation does not come into effect until April 2020. Gill Furniss, a Labour MP, said:

I welcome the draft Agency Workers (Amendment) Regulations 2019. After years of campaigning and pressure from trade unions, the regulations will effectively close the Swedish derogation loophole, which has been used by employers and recruitment agencies to avoid their obligations to provide pay parity for agency workers. However, why has it taken the Minister so long, and why do agency workers have to wait over a year—until 2020—for the regulations to come into force?

Kelly Tolhurst, then the Parliamentary Under-Secretary of State for BEIS, responded that the gap was necessary to ensure businesses could adequately prepare.

In a recent report, the TUC argued that the Good Work Plan is "inadequate on paper and implementation has been glacial."¹⁶⁴

Employment Bill

As noted above, the Government announced in the December 2019 Queen's Speech that it will be introducing an *Employment Bill*. Although the Bill has yet to be published, it was raised by a number of MPs and Peers in the course of the Queen's Speech debates.

In the [Queen's Speech debate in the House of Commons](#), Rachel Reeves, a Labour MP and the recently re-appointed Chair of the Business, Energy and Industrial Strategy Committee, welcomed a

¹⁶² Michael Burd, [The Good Work Plan – any good?](#), Lewis Silkin, 19 December 2018 (accessed 7 February 2020).

¹⁶³ Thompsons Solicitors, [A GOOD WORK PLAN? THOMPSONS SOLICITORS RESPONSE](#) (accessed 7 February 2020).

¹⁶⁴ TUC, [Insecure work: Why the new PM must put decent work at the top of his to-do list](#), 29 July 2019, p. 3.

number of the proposals, including the establishment of a single enforcement body. However, she criticised the Government for failing to address the fact that many employers did not pay workers basic statutory payments:

Too many firms, particularly in the gig economy, try to get out of paying full taxes, national insurance, the national minimum wage, and holiday and sick pay. That is a disgrace and we need much stronger action, yet the Government have let the issue drift while a growing number of workers miss out on the rights that we have fought so hard to secure both in this Parliament and, indeed, through the European Parliament.

Margaret Greenwood, the Shadow Secretary of State for Work and Pensions, also questioned why the Government had not included employment status within the scope of the Bill.

In the [Queen's Speech debate in the House of Lords](#), Lord Hendy, a Labour Peer, employment barrister and Chair of the Institute for Employment Rights, criticised the "Oliver Twist clause" and asked why no reference had been made to the EU Directive on Transparent and Predictable Working Conditions.

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcenquiries@parliament.uk.

Disclaimer

This information is provided to Members of Parliament in support of their parliamentary duties. It is a general briefing only and should not be relied on as a substitute for specific advice. The House of Commons or the author(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice.

The House of Commons accepts no responsibility for any references or links to, or the content of, information maintained by third parties. This information is provided subject to the [conditions of the Open Parliament Licence](#).