

THE TAYLOR REVIEW: A SUMMARY

The Taylor Review has been published. Running to over 100 pages, it includes recommendations on a wide range of topics.

For some, the Review goes too far; for others, not far enough. Some of the recommendations are high on aspiration, but low on detail, and quite how they would be translated into practical reality is unclear.

It is important to remember that the Taylor Review has simply made recommendations. There is a consensus that change is required to bring UK law into line with current practices, and the review itself envisages that further consultation will be needed. But which of the recommendations ultimately become law, and in what form, remains to be seen.

In terms of understanding the direction of travel, however, the Review is essential reading for anyone with responsibility for HR or workforce management.

If you want to discuss any aspect of the Review that might impact on your business, please get in touch. Otherwise, we will provide updates via [our blog](#) on any recommendations progressed by the government, or [Workbox](#) users can keep up-to-date via our [What's new?](#) page.

Our full summary of the recommendations is below and there are many interesting suggestions; but we would suggest that the top three issues are:

- **Employment status:** worker status should be retained; with new legislation bringing clearer definitions of employees, workers and the self-employed.
- **Tax:** all workers should be employees for tax purposes; confirms the move towards consistency in taxation between the employed / self-employed.
- **Zero-hours workers:** potential higher national minimum wage for non-guaranteed working hours; right to request guaranteed hours after 12 months.

Employment status

A number of representations to the review suggested replacing the current three-tier system – employees, workers and self-employed – with a binary distinction: you are either an employee or self-employed (as is the case for tax law). The review rejected this.

It wants to retain worker status, believing that it is helpful to have an intermediate category, covering casual, independent relationships, with a more limited set of employment rights.

The review recognises that it can be incredibly difficult (for both individuals and businesses) to understand how the employment status tests developed by the courts apply to their own circumstances. It wants to improve certainty, so individuals know their rights; and businesses can operate on a level playing field.

What does it suggest?

- **Clearer distinction and amended legislation:** Legislation, backed by detailed guidance, should clearly and definitively state the tests for employment status – for employees, workers and the self-employed. There might have to be a re-examination of the different definitions of workers across different legislation.
- **New definition of ‘worker’; no change to ‘employee’ test:** It considers that the definitions of employee and worker are very similar, with ‘worker’ being a slightly lower bar. It envisages a new definition of worker “which better reflects the reality of modern working arrangements”. Although the level of control exercised by an employer is a key factor in determining status just now, it should take on more significance; with less emphasis on personal service (so individuals could send a substitute, rather than work personally, without losing their worker status). There would be no change to the test for ‘employee’ status, for which the need to do work personally would continue to apply.
- **Rename workers as ‘dependent contractors’:** They suggest renaming workers as ‘dependent contractors’.
- **Monitor developments:** The Low Pay Commission should monitor the new framework, and make recommendations for change if necessary to keep pace with the changing labour market.
- **Online tool:** A free online tool should provide individuals and employers with an indication of employment status. This could be a first step for those seeking to enforce their rights, and could signpost their entitlements.
- **Employer must prove status:** If an individual brings an employment tribunal claim, alleging that they are a worker or employee, the burden of proving that they are not should rest with the employer, so long as the individual has obtained confirmation of their status from the online tool and ACAS.
- **Sector-specific advice:** The Low Pay Commission should develop sector-specific codes of practice, which could include advice on when it is appropriate to use certain types of contract.
- **Increased penalties for flagrant breach:** If an employer defends an employment status claim, in circumstances where they have already lost another claim based on similar facts, tribunals should routinely

apply penalties (using powers already available to them); order that the employer pay all of the claimant's costs; and have new power to award increased compensation to the claimant.

- **Employees and continuity of employment:** For casual employees it can be difficult to establish the minimum period of continuous employment needed to qualify for some employment rights – such as the right to claim unfair dismissal which only applies after 2 years' service, or the right to paternity leave (which requires 26 weeks' service). Just now, a gap of up to a week is permitted, after which continuity is broken. This should be increased to one month. At present, there are some exceptions, where continuity is not broken even if there is a gap of a week or more. The government should clarify the situations where these exceptions apply, to help, for example, those who have regular breaks in service because work is assigned to different people.

The review accepts that the changes will not be easy, and will require further consultation.

Tax

Tax law does not recognise 'worker' status: the only distinction is between employees and the self-employed. And is it not always clear into which category workers should fall for tax purposes.

The review indicates that all workers should be 'employees' for tax purposes.

It is also keen that 'self-employment' should mean the same for employment and tax purposes, which is not necessarily the case just now. To facilitate this, it calls on the government to look at how rulings from tax and employment tribunals can be binding across both jurisdictions until the definitions are aligned.

HMRC estimates that the government loses £5.1bn a year from lower rates of NICs paid by the self-employed. If self-employment rates continue to increase, it could lose a further £3.5bn by 2021-22.

Unsurprisingly therefore, the review backs the government's previous proposals to equalise national insurance for the employed and self-employed, noting that the current differences create incentives for individuals and companies to use self-employment.

The review also notes that rates of national insurance paid by the employed and self-employed have diverged in the last 50 years, but the benefit entitlements of both groups have moved closer, for example in relation to the state pension. The review advises that in future they should receive all of the same benefits from the state, including parental benefits.

The review also advises that the government should:

- Raise awareness of the differential taxing of the employed and self-employed.
- In the longer-term, engage with stakeholders to examine how companies who engage self-employed labour could contribute more to the overall national insurance payments of the self-employed, in the same way as they pay employee national insurance contributions. However, it makes clear that no measure would be easy or uncontroversial.

- Again, in the longer-term, seek to examine ways in which the tax system might address the disparity between the level of tax applied to employed and self-employed labour.
- Explore ways to improve pension provision amongst the self-employed, utilising opportunities presented by digital platforms and cashless transactions.
- Consider platforms that support the self-employed with tax compliance eg. platforms that hold a proportion of income to cover potential tax liabilities (so individuals are not left short).
- Consider accrediting platforms designed to support the move towards more cashless transactions, to improve transparency and tax collection from cash-in-hand businesses.

Minimum wage

1. Sectoral strategies

The Low Pay Commission should undertake reviews in sectors where a significant proportion of the workforce is on, or close to, the minimum wage, such as retail, social care and hospitality. Sectoral strategies should be developed to ensure people can progress beyond the minimum wage.

2. 'Platform workers'

'Platform workers' – such as Uber drivers who login to an app to access work – should continue to enjoy flexibility, but also earn the national minimum wage (NMW).

However, they cannot expect to login at any time, including times when they know there is little work available, and expect to receive the minimum wage. The proposed solution is to adapt the 'piece rate' provisions in the national minimum wage legislation. Platforms could be required to provide real time data with information on how much an individual can expect to earn if they login at a particular time.

3. Zero-hours and short-hours workers

Employers should be incentivised to schedule guaranteed hours; but businesses should still be able to offer zero or short-hour contracts.

The Low Pay Commission should advise on the impact of a higher national minimum wage for hours which are not guaranteed in a contract. So an individual on a 6-hour per week contract would be entitled to the NMW for the first 6 hours worked in a week, but a new higher rate for any hours beyond that (although employers would be able to average hours and pay over a pay reference period).

This wouldn't mean that all zero-hours workers would get a higher rate for non-guaranteed hours, just those paid at the national minimum wage level.

The review considered that voluntary collective agreements might be a way of encouraging employers to guarantee more hours to their staff.

4. Unpaid internships

The government should clarify the circumstances in which an intern should be classified as a worker, and entitled to the NMW, and encourage enforcement action by HMRC.

Contracts

1. Written statements for workers and employees

Employees currently have a right to receive a written statement outlining certain terms of their employment within two months of starting work.

- This should become a right from day 1 of the job.
- Workers should be granted a new right to a written statement at the start of their engagement, including details of their statutory rights (at present only 'employees' are covered).
- The government should specify a standard format for written statements, so they are easily understood.
- Workers and employees should have a standalone right to compensation for failure to provide a written statement. At present, compensation is only available in limited circumstances.

2. Zero-hours and short-hours workers – right to request guaranteed hours

The review found that there is an important role for flexibility in the labour market; but too many employers and businesses are relying on zero-hours, short-hours or agency contracts, when they could be more forward-thinking in their scheduling.

Zero-hours and short-hours workers should be entitled to request a contract that guarantees hours which better reflect their actual hours if they have been in post for 12 months. At that point, their average weekly working hours over the previous 12 months should be the starting assumption for any new contract.

3. Agency workers

Agency workers should be given the right to request a direct contract of employment after 12 months with the same hirer, and the hirer would need to consider this reasonably.

The 'Swedish derogation' should be abolished – this allows workers with a contract that provides for a minimum level of pay between assignments to be excluded from the right to equal pay with permanent employees.

The government should amend the legislation to improve transparency on the information that needs to be provided to agency workers before accepting work (particularly on rates of pay and those responsible for paying them).

The remit of the Employment Agency Standards Inspectorate should be extended to cover policing umbrella companies and other intermediaries in the supply chain to ensure compliance with agency workers legislation.

Work and health

1. Right to return

Individuals with a relevant qualifying period should be entitled to have their job protected for a period of time if they are on sick leave, with the right to return to the same or a similar job after a period of prolonged ill health (similar to the right to return after maternity leave). However, this right should be conditional on engagement with the Fit for Work Service if an assessment has been recommended.

The review doesn't indicate what an appropriate qualifying period would be; or an appropriate period of time for which a job should be protected.

2. Statutory sick pay

At present, SSP is due to those whose earnings are liable for Class 1 national insurance contributions, so some casual workers could qualify.

But, it is only due to those who meet the income threshold for national insurance. The review wants SSP to apply to all workers, regardless of income.

However, it states that SSP should accrue based on length of service, so that employers don't have to give the full 6 months of SSP to someone who has only worked for them for a short time. The stated rationale for this is that having to pay full SSP from day 1 is a disincentive to taking on those with long-term health conditions.

The government should do more to increase awareness of the right to SSP.

Holiday pay

HMRC currently enforces the right to the NMW and statutory sick pay. It should also take on the role of enforcing the right to holiday pay (and possibly also protection against other unlawful deductions from wages) for low-paid workers.

The government should intensify its efforts in promoting awareness of holiday pay entitlements.

Holiday entitlement for someone without normal working hours is based on the hours they have worked over the previous 12 weeks. This does not work for everyone, especially where work is seasonal or there are significant peaks and troughs in work. To combat this, the reference period should be increased from 12 to 52 weeks.

Individuals should have the choice to receive rolled-up holiday pay i.e. a premium on their pay instead of holiday pay when they actually take time off. Although rolled-up holiday pay is technically unlawful at present, in practice,

some employers already operate systems of this nature for casual workers. With paid holiday being intended to protect the health and safety of workers, the review points to the need for additional safeguards to ensure workers don't simply work 52 weeks of the year.

Other issues

1. Consultation of employees

Although it has been in the headlines in recent months, the review indicated that it did not have a strong view on whether workers should be directly represented on company boards.

It does, however, make the case for widening the Information and Consultation of Employees Regulations. Under current rules, employers must put in place arrangements for informing and consulting with employees on various issues if they employ at least 50 employees in the UK, and receive a request from at least 10% of those employees.

The review would like the Regulations to apply when 2% of the workforce request it, and for the relevant workforce to include both employees and workers.

2. Company reporting obligations

There should be new duties on employers (above a certain size) to publish reports on:

- Their model of employment and use of agency services beyond a certain threshold; and
- The number of requests they have received (and agreed to) from zero-hours workers for fixed hours, and from agency workers for permanent positions.

There could also be a new reporting obligation in relation to unpaid tribunal awards.

3. Employment tribunal fees

The review noted its concerns with employment tribunal fees but recognised "with regret" that it is unlikely the government will abolish them. It proposes that:

- The government should keep the level of fees under review.
- Given the level of fees, it should be made clear that the presumption is that in all successful hearings, the individual should receive at least the cost of the tribunal fees from the employer, unless there is a strong justification to the contrary. In practice, this is already the case.
- Employment status should be determined without an individual having to pay the usual tribunal fees, and at an expedited preliminary hearing.

4. Enforcing tribunal awards

There has been concern for many years about the number of employment tribunal awards that go unpaid.

The government has already established a penalty system for employers who fail to pay but, at present, the government can only pursue the employer for payment of the penalty, not the original tribunal award. The government should also be able to pursue the original award (on the claimant's behalf).

It should also consider a naming and shaming scheme for employers who don't pay.

5. Apprenticeships and the apprenticeship levy

The government should:

- Examine how the new system could work better for those working atypically, including through agencies; and
- Consider making the funding generated by the levy available for high-quality, off-the-job training other than apprenticeships.

The Institute for Apprenticeships should also report on and address disparities in the take-up of apprenticeships for different groups (such as those from BAME backgrounds or with disabilities).

6. Flexible working

The review laments that too few jobs are advertised as being available to people who may want to work flexibly.

As part of the review of flexible working due in 2019, the government should consider how to promote genuine flexibility at work. The review mentions that the government should consider allowing temporary changes to contracts (for example, to accommodate particular caring requirements) however, there is nothing stopping employees requesting, or employers agreeing, temporary changes at present.

7. Pregnancy and maternity

Pregnancy and maternity legislation should be reviewed and consolidated. The government should consider options for new legislation (although the review provides no detail on this).

Noting the prevalence of pregnancy and maternity discrimination, it advises that if improvements to guidance don't bring about change, the government should act quickly to bring in directive measures.