



House of Commons

Work and Pensions and  
Business, Energy and Industrial  
Strategy Committees

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# A framework for modern employment

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**Second Report of the Work and  
Pensions Committee and First Report  
of the Business, Energy and Industrial  
Strategy Committee of Session  
2017–19**

*Report, together with formal minutes relating  
to the report*

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## Work and Pensions Committee

The Work and Pensions Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Work and Pensions and its associated public bodies.

### Current membership

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The Business, Energy and Industrial Strategy Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Business, Energy and Industrial Strategy.

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Evidence relating to this report is published on the [inquiry publications page](#) of the Parliament website.

### **Work and Pensions Committee staff**

The current staff of the Committee are Adam Mellows-Facer (Clerk), Libby McEnhill (Committee Specialist), Rod McInnes (Committee Specialist), Tom Tyson (Committee Specialist), Jessica Bridges-Palmer (Senior Media and Policy Officer), Alison Pickard (Senior Committee Assistant), Michelle Garratty (Committee Assistant) and Ellen Watson (Assistant Policy Analyst).

### **Business, Energy and Industrial Strategy Committee staff**

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## Summary

The Prime Minister spotlighted the burning injustice a growing number of British citizens experience at work as she stood on the steps of Downing Street for the first time after her election:<sup>1</sup>

If you are from an ordinary working-class family, life is much harder than many people in Westminster realise. You have a job but you don't always have job security.

I know you're working around the clock, I know you are doing your best, and I know that sometimes life can be a struggle. The Government I lead will be driven not by the interests of a privileged few, but by yours.

We will do everything we can to give you more control over your lives [ ... ] When we pass new laws we'll listen not to the mighty but to you.

The Prime Minister's speech reflected concerns that changes in the world of work, while contributing to Britain's prosperity, have also driven the growth of a vulnerable workforce. The expansion of self-employment and business models built around flexible work on digital platforms promise positive opportunities for entrepreneurs, workers and consumers alike. But these changes also create confusion about the rights and entitlements of workers, and add to the potential for exploitation. Evidence tells us this exploitation is already occurring. This raises the important question of what changes to legal and regulatory frameworks are required to protect workers in the modern labour market. It is this question that the Government asked Matthew Taylor to address in his Review of Modern Employment Practices.

Some of Matthew Taylor's recommendations can be satisfied through changes to policy or secondary legislation, but the most transformative require primary legislation. Our two Committees have joined together to propose the legislation that will help deliver the Prime Minister's objectives. We have produced a draft Bill that would take forward the best of the Taylor Report recommendations. We hope the Government will engage with the spirit of our draft Bill, and will not hold against us any deficiencies in drafting. This is presented alongside the proposals on which we have collected evidence and which we believe should be part of a new protective legislative framework.

Responsible businesses have nothing to fear from our recommendations. Indeed, they stand to benefit from the level playing field we seek to create. A willingness to exploit workers should not be a competitive advantage. A race to the bottom risks undercutting the vast majority of businesses that do treat their workers well.

Employment rights and entitlements are linked to employment status. It is difficult for the average worker to understand what category of status they fall into unless they have an extensive knowledge of case law. We agree with the Taylor Review that there is an urgent and overwhelming case for increased clarity on employment status. This could be provided by primary legislation reflecting the case law that has already been built up. Receiving a statement of employment terms and rights on day one of a new job

<sup>1</sup> Prime Minister's Office, [Statement from the new Prime Minister](#), 13 July 2016

would also help employees and workers better understand their rights and entitlements. Combining legislative clarity with this improved awareness should alleviate confusion amongst workers and employers alike, reducing both exploitation and the burden on the courts.

The Government must also close loopholes that enable dubious business practices. Recent court cases have exposed a pattern of companies using bogus self-employed status as a route to cheap labour. Implementing a model of worker status by default for companies with substantial dependent workforces currently labelled as self-employed would better protect such workers. The onus would be on the firm to prove self-employed status, when disputed, rather than on the worker to do so through the courts. This measure must not place unnecessary burdens on genuine self-employment, which is a positive choice for many individuals. Where tribunals remain necessary, they could be more effective. Implementing new, higher fines for companies that have previously lost similar tribunal cases would provide a powerful deterrent. Changes to legislation to enable class actions—claims brought on behalf of groups of workers—to establish employment status would also minimise the burden on individual workers.

Achieving “worker” status, however, is often not enough to alleviate insecurity at work. The volatile availability of paid work is a pressing concern for many workers. Some workers on low hour contracts welcome the flexibility they bring, but others are not well served by this model. The employer has no obligation to provide work and the risk of low demand is borne by the worker. A wage premium above the National Minimum Wage and National Living Wage on non-guaranteed hours could potentially help rebalance the benefits, and might prompt employers to consider offering more stable work: for example, by providing shift details and staff rotas in advance. We propose the Government work with the Low Pay Commission to pilot such an approach to tackle the abuses perpetrated by some companies. The Government should also make it easier for workers and employees to have a say on decisions that affect them at work, and should end practices that leave agency workers open to exploitation.

The Government should set out how it sees the power and resources of the Director of Labour Market Enforcement (LME) developing over the next five years. The strategy and powers of enforcement bodies and the Director of LME must produce a real deterrent against non-compliance with the law. Currently, employers can expect an inspection of their labour practices once every 500 years—and receive only paltry fines if they are found to be breaking the law.

The enforcement bodies and the Director of LME urgently need more resources, so that a more proactive approach to rooting out bad practice becomes a living reality for bad employers, and hence a deterrent. This expansion should be paid for by a significant increase in the fines made to offending employers. Other measures would tilt the balance in favour of compliance without the need for additional expenditure. Companies that flout the law, and those that tolerate exploitation in their supply chains, should be “named and shamed”. Enabling enforcement bodies to issue punitive fines for noncompliance would also help ensure that the risks of being caught outweigh the gains companies stand to make from illegal practices. Concentrated “deep dives”



in industry sectors and geographic areas, where there is evidence of abuse, by all the enforcing bodies should become a regular part of the armour to protect vulnerable low paid workers.

As it seeks to negotiate the best possible Brexit deal, the Government must not allow addressing urgent issues in Britain's labour market to fall by the wayside. In line with the Prime Minister's declaration as she entered Downing Street, we call on the Government to seize the impetus the Taylor Review has created to improve workers lives and prioritise legislating on the issues we have set out. We are mindful that Government resources are harnessed to Brexit legislation. Our Committees therefore stand ready to discuss with civil servants and Ministers what role we might play in this process. This includes the key question of whether our Committees might be given legislative time to take through a Bill, with Government support.

We support the Prime Minister's ambition of addressing issues of unfairness and injustice in Britain's labour market. Our joint report shows there is strong support for this ambition across all parties. We are confident the Prime Minister will be able to secure support from across the House in taking these reforms forward.

# 1 The Taylor Review of Modern Working Practices

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1. In October 2016 the Government commissioned Matthew Taylor to lead an independent review examining “how employment practices need to change to keep pace with modern business models”.<sup>2</sup> Matthew Taylor explained his review would consider three broad areas:<sup>3</sup>

- a) whether there is clarity in the rules and legislation pertaining to employment status, including whether legislative changes are necessary;
- b) how exploitation in atypical forms of work, including in the “gig economy” might be prevented, ensuring workers receive fair treatment and due rights and protections; and
- c) how incentives might be shifted to produce different, beneficial outcomes for workers, companies and the economy.

2. The announcement of the Taylor Review coincided with our predecessor Committees each carrying out inquiries on modern employment practices and their implications.<sup>4</sup> Both inquiries were cut short by the 2017 general election, though the Work and Pensions Committee published a short report in May 2017.<sup>5</sup> It was clear on reconvening that continuing that work should be a priority for both our Committees.

3. Employee jobs remain the most common form of work in Britain. Other forms of work are increasingly common, however. Five million people—15% of the workforce—are now self-employed.<sup>6</sup> This self-employment takes many forms: from entrepreneurs and “one man band” business owners, to consultants and contractors across industries and pay scales. There are 900,000 people on zero-hours contracts, and 1.6 million temporary and agency workers.<sup>7</sup> The gig economy employs an estimated 1.3 million people.<sup>8</sup>

4. The Taylor Review was published in July 2017.<sup>9</sup> A Government response is expected in late 2017. In our joint inquiry, we sought to maintain the momentum created by the Taylor Review and to support Government in implementing its most transformative recommendations. In October 2017 the Committees jointly held evidence sessions with both Matthew Taylor,<sup>10</sup> and Professor Sir David Metcalf, the Government’s Director of Labour Market Enforcement, to help us decide on next steps.<sup>11</sup> We also heard from workers

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2 BEIS, [Taylor Review on Modern Employment Practices launches](#), November 2016. Matthew Taylor is Chief Executive of the Royal Society of Arts.

3 [Q354](#) [Matthew Taylor]

4 Work and Pensions Committee, [Self-employment and the gig economy inquiry](#), May 2017; Business, Energy and Industrial Strategy Committee, [The future world of work and workers rights](#), May 2017

5 Work and Pensions Committee, [Self-employment and the gig economy, Thirteenth Report of Session 2016–17](#), HC847, May 2017

6 ONS, [Trends in self-employment in the UK, 2001–2015](#), July 2016

7 ONS, [LFS data for quarter 4 \(October to December\) 2016](#)

8 CIPD, [To gig or not to gig? Stories from the modern economy](#), March 2017

9 [Good work: the Taylor review of modern working practices](#), July 2017

10 Business, Energy and Industrial Strategy and Work and Pensions Committee, [Evidence session with Matthew Taylor](#), October 2017

11 Business, Energy and Industrial Strategy and Work and Pensions Committee, [Evidence session with David Metcalf](#), October 2017

and businesses in the gig economy to examine the challenges both are facing.<sup>12</sup> We were particularly keen to understand which changes could be achieved through policy shifts or secondary legislation, which would require primary legislation, and what support we might offer Government in legislating. To this end, we have produced a draft Bill, which contains some suggested legislative changes for the Government to consider.<sup>13</sup>

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12 Business, Energy and Industrial Strategy Committee, [Evidence session with companies and workers, October 2017](#); Work and Pensions Committee, [Evidence session with companies and workers](#), February 2017. In total we heard from nine workers over three oral evidence panels, and received independent written submissions from a further 25 workers.

13 Michael Newman, Partner at Leigh Day, and Michael Ford QC, Professor of Law at the University of Bristol, acted as Specialist Advisers on our inquiry. We are very grateful for their support.

## 2 Clarity in primary legislation

### Clearer statutory definitions of employment status

5. Entitlement to employment rights and protections is determined by employment status. Employee, worker and self-employed are the three main categories used to determine access to most rights.<sup>14</sup> The different entitlements of each group are clear (see Box 1). What distinguishes one status from another is, however, often much less so.

#### Box 1: Employment status and entitlements

*Self-employed* people, those who run their own businesses, are not covered by employment law. They have very few rights at work, limited to protection for health and safety purposes, and some protection against discrimination.

*Workers* have some employment rights. These include the right to the National Living Wage (NLW) or National Minimum Wage (NMW), protection against unlawful deduction from wages, minimum levels of paid holiday and rest breaks, protection against discrimination, and the right not to be treated less favourably if they work part-time. They may be entitled to benefits such as Statutory Sick Pay and statutory parental pay in some circumstances.

*Employees* have the full complement of employment rights. This includes everything that workers have, plus Statutory Sick Pay, parental pay, minimum notice periods and pay if their employment is ending, protection against unfair dismissal, the right to request flexible working, time off for emergencies and statutory redundancy pay.

6. The existing statutory definitions of employment status are set out in s.230 of the Employment Rights Act 1996. The minimal detail in those definitions is supplemented by an extensive body of case law on which courts base their judgments. In seeking to determine whether someone is self-employed or a worker, employment tribunals take into account factors including:<sup>15</sup>

- a) whether there is a requirement for personal service, or whether the individual is able to appoint a substitute to carry out work on their behalf;
- b) the level of control by an employer over workers in determining matters such as how, when and where work is carried out;
- c) evidence or lack thereof of mutuality: an obligation for the employer to provide work (or pay if there is none), or for the worker to accept it if offered; and
- d) whether the individual's work is carried on as a business undertaking. This might include the extent to which the individual is responsible for their businesses' success or failure, or whether they have the power to negotiate and set rates of pay.

14 "Workers" are more accurately described as "limb (b)" workers, distinguishing them from employees, who also have worker rights.

15 Pyper, D. [Employment status](#), House of Commons Library briefing note no. CBP8045, July 2017

7. The Taylor Review recommended that the tests used by courts to determine employment status be reflected in primary legislation.<sup>16</sup> We heard that employment lawyers are “divided” on whether clearer statutory definitions of employment status are needed.<sup>17</sup> Matthew Taylor acknowledged that redefining employment status in legislation was a “complex question” and that no single set of definitions could guarantee that “the courts are taken out of the process”.<sup>18</sup>

8. The Taylor Review found, however, that there was an “overwhelming case” for introducing greater legislative clarity on employment status “sooner rather than later”.<sup>19</sup> When pressed on priorities for immediate change, Matthew Taylor suggested a greater emphasis in primary legislation on control and supervision by employers as determinants of employment status, and less emphasis on the requirement to perform work personally. He explained these factors were already used frequently by HMRC for such purposes. The issue of control, he felt, was a “good starting point to focus on” for any redefinition.<sup>20</sup> While Sir David Metcalf was personally “agnostic” about the question of redefinition, he felt that “the key thing is you should have clarity and right now we do not have clarity”.<sup>21</sup>

9. The Taylor Review argued that clearer statutory definitions would help workers and companies alike understand the distinction between employment statuses. It would also assist workers in obtaining rights that they are due.<sup>22</sup>

As a first principle, the Government must make legislation clearer. The employment statuses should also be distinct and not open to as much interpretation as currently, nor be so ambiguous that only a court can fully understand the basic principle [ ... ] It should not be as difficult as it is now for ordinary people or responsible employers to seek clarity on employment status.

In the absence of an extensive knowledge of this case law it can be difficult for both individuals and companies to understand which category they and their workers fall into.<sup>23</sup> The Taylor Review argued that better statutory definitions would ensure that “legislation does more of the work and the courts less” in determining status.<sup>24</sup> The current lack of clarity also enables companies that want to take advantage of the lower costs associated with self-employment to easily evade the law,<sup>25</sup> enabling them to exploit workers and undercut their law-abiding competitors.<sup>26</sup>

**10. Questions of employment status are often not clear-cut, and legislative reform would not entirely eliminate the need for the courts. But it is evident that clearer legislation on employment status could be valuable in preventing confusion and promoting fair competition between businesses. This would lessen the need to go**

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16 [Taylor Review](#), p34

17 [Q272](#) [David Metcalf], [Q219](#) [Matthew Taylor]

18 [Q219](#) [Matthew Taylor]

19 [Taylor Review](#), p35

20 [Q219](#) [Matthew Taylor]

21 [Q287](#) [David Metcalf]

22 [Taylor Review](#), p34

23 Law Society, [Better employment law for better work: How to achieve the best working practices in the modern labour market](#), June 2017, p7

24 [Taylor Review](#), p32

25 See, for example, [Aslam, Farrar and Others v. Uber](#); [Dewhurst v. CitySprint](#); [Smith v. Pimlico Plumbers](#).

26 [Q259–260](#) [David Metcalf], [Q209](#) [Matthew Taylor]

**to court, and most importantly, protects vulnerable workers. We recommend the Government legislates to introduce greater clarity on definitions of employment status. This legislation should emphasise the importance of control and supervision of workers by a company, rather than a narrow focus on substitution, in distinguishing between workers and the genuine self-employed. We have set out our proposals in Part 1 of our draft Bill.**

## Worker by default

11. In a number of recent tribunal cases, workers have successfully challenged companies that argued they were not workers or employees. This process has enabled the workers to gain important employment rights.<sup>27</sup> The judgments only apply, however, to the specific workers and organisations under consideration; there are no automatic consequences for other organisations with similar business models. This is a piecemeal approach—and one that places the burden of responsibility for preventing abuse of employment status on workers themselves. Conversely, where there are financial advantages to both individuals and companies in opting for bogus self-employment there is little to stop them from doing so.<sup>28</sup> This state of affairs therefore potentially places considerable costs on both individuals and the public purse.

12. The Work and Pensions Committee proposed moving to a model of “worker [status] by default” to address these problems. The Committee concluded it is too easy for companies to deny workers their rights by designating them self-employed: all they need to do is to devise contracts that offer none of the benefits of employment. The workers themselves are required to challenge legally a designation of self-employment that is not an accurate reflection of their work. Accordingly, the Committee recommended:<sup>29</sup>

An assumption of the employment status of “worker” by default, rather than “self-employed” by default, would protect both those workers and the public purse and would put the onus on companies to provide basic safety net standards of rights and benefits to their workers [ ... ] Companies wishing to deviate from this model would need to present the case for doing so, in effect placing the burden of proof of employment status on the company.

13. Matthew Taylor had some reservations about how worker by default might work in practice. He was concerned that sole traders and those who use their services might “find themselves liable to the full panoply of employment law”.<sup>30</sup> He felt the model could work, however, if targeted at companies that employ substantial proportions of self-employed labour, rather than at sole traders. He explained:<sup>31</sup>

I think the way to address this potentially is through some kind of threshold for a company when it employs a certain number of self-employed people beyond a certain level who have the same basic contracts. At that point you may say, “Look, let’s adopt a default position and work up.”

27 See, for example, [Aslam, Farrar and Others v. Uber](#); [Dewhurst v. CitySprint](#); [Smith v. Pimlico Plumbers](#). In some cases, companies have moved to reclassify their workforces before being taken to tribunal. For example, The Gym Group PLC recently wrote to all self-employed personal trainers offering the option of applying for employee roles, rather than self-employment. See [Letter from Gym Group to Frank Field MP](#).

28 [Self-employment and the gig economy](#), para.15

29 [Self-employment and the gig economy](#), para.20–21

30 [Q230](#) [Matthew Taylor]

31 [Q230](#) [Matthew Taylor]

14. Implementing worker by default would require a clear statutory definition of self-employment, to protect individuals who are legitimately self-employed and running their own business, and ensure they can continue to do so. Such a definition would also provide greater clarity to organisations on the conditions that must be met for a worker to be designated self-employed.

**15. Relying on individual tribunals as a corrective to companies' systematic use of questionable self-employment models places an unacceptable burden on workers to address poor practice, while the companies themselves operate with relative impunity. We recommend the Government legislate to implement a worker by default model, as set out in Part 2 of our draft Bill. This would apply to companies who have a self-employed workforce above a certain size defined in secondary legislation.**

### Non-guaranteed hours

16. A flexible workforce should enable businesses to be responsive to demand and workers to undertake periods of work suitable for them. Office for National Statistics data shows 3.3 million people in the UK are underemployed and want to work more hours,<sup>32</sup> while a very similar number are overemployed and want to work fewer hours with consequential lower pay. Almost 900,000 people are on zero-hour contracts,<sup>33</sup> though in the survey week fewer than one in five worked no hours and, on average, 21 hours were worked.<sup>34</sup> In a survey by CIPD, 65% of those on zero-hour contracts reported being satisfied with their job, slightly higher than employees as a whole, provided they are able to work a suitable number of hours.<sup>35</sup>

17. The Taylor Review described a problem of the flexibility expected of workers not being reciprocated by the businesses they work for. Workers have been required to be available at short notice, without knowing if work will actually be available.<sup>36</sup> We heard from three anonymous workers in the gig economy, put forward and supported by GMB union, on their experiences. This included evidence of Amazon warehouse workers sent home after two hours (earning less than their travel costs) and of contracted workers having an extra 10-hour shift imposed on top of a 40 hour working week.<sup>37</sup> We also heard evidence from workers, put forward by the companies they worked for, who welcomed the flexibility their work provided.<sup>38</sup>

18. The Taylor Review recognised this was not an easy problem to solve, noting “potential adverse consequences to most interventions”.<sup>39</sup> The Review argued that simplistic solutions, such as banning zero hour contracts, could harm workers who rely on flexibility without benefiting workers employed for a small number of guaranteed hours. The Review recommended the Government should “ask the Low Pay Commission to consider the design and impacts of the introduction of a higher NMW/NLW rate for hours that

32 Office for National Statistics, [EMP16: Underemployment and overemployment](#), 16 August 2017

33 Office for National Statistics, [EMP17: People in employment on zero hours contracts](#), 16 August 2017

34 Office for National Statistics, [EMP17: People in employment on zero hours contracts](#), 16 August 2017

35 CIPD Policy Report, [Zero-hours and short-hours contracts in the UK: Employer and employee perspectives](#), December 2015, p6

36 [Taylor Review](#), p43

37 [Q71](#) [Amazon Worker, Mick Rix]

38 Work and Pensions Committee, [Evidence session with companies and workers](#)

39 [Taylor Review](#), p44

are not guaranteed as part of the contract”.<sup>40</sup> Matthew Taylor told us this approach was “more nudge than shove”.<sup>41</sup> The Review has been criticised for not being bolder,<sup>42</sup> but this recommendation has the potential for a significant impact. As the Resolution Foundation set out in their response to the Review, a premium would nudge employers to either rebalance away from non-guaranteed hours or pay for the privilege. It would benefit the lowest paid, who are most likely to be working overtime, and trigger a debate on overtime as a wider public policy tool.<sup>43</sup>

19. Sir David Metcalf, Director of Labour Market Enforcement and a former member of the Low Pay Commission, expressed concern that the proposal could further fragment the NMW/NLW, which already have several rates.<sup>44</sup> He agreed, however, that it could be implemented by “making it equivalent to an overtime rate”.<sup>45</sup>

20. When we took evidence from Matthew Taylor, his thinking had developed, based on international examples,<sup>46</sup> to a proposal of a pilot with the Low Pay Commission to test the impact on employment.<sup>47</sup> A successful pilot could deal with some of the existing abuses seen, such as that “large companies in this country now put people on four or five-hour-a-week contracts when they customarily expect them to work 30 or 35 hours a week”.<sup>48</sup> It might also nudge other businesses into scheduling work to the benefit of their workforces. The Low Pay Commission can also draw on international examples such as legislation passed in New York and Oregon that penalise “surprise scheduling”.<sup>49</sup>

**21. Companies benefiting from a flexible workforce must ensure that this flexibility is not one-sided, either by guaranteeing hours that reflect the periods worked each week, or by compensating workers for uncertainty. We recommend that the Government work with the Low Pay Commission to pilot, for workers who work non-contracted hours, a pay premium on the National Minimum Wage and National Living Wage. The Low Pay Commission should be responsible for identifying suitable companies to be included in this pilot, based on workforce size and turnover. Proposed legislation to enable this is set out in Part 3 of our draft Bill.**

## Continuous service

22. Clarity on employment status will make it easier for individuals to know the rights to which they are entitled. A range of rights are only open to those who are employees and who have completed a minimum level of continuous service. These include entitlement to one week’s notice of dismissal (at one month) or the right to claim for unfair dismissal (at two years). Under the Employment Rights Act 1996, continuous service is broken by

40 [Taylor Review](#), p44. Only workers aged 25+ are eligible for the NLW, so for the premium to cover all workers, it would need to apply to the NMW as well.

41 [Q208](#) [Matthew Taylor]

42 [TUC comment on Taylor Review](#), TUC Press Notice, 11 July 2017

43 [It’s good to focus on overtime, not just Uber](#), Resolution Foundation Press Release, 11 July 2017

44 [Q292–294](#) [David Metcalf]. Currently the NLW is £7.50 for the 25 and over. NMW wage rates are £7.05 for 21–24 year olds, £5.60 for 18–20 year olds, £4.05 for under 18s and £3.50 for apprentices.

45 [Q295](#) [David Metcalf]

46 [Q207](#) [Matthew Taylor]

47 [Q207](#) [Matthew Taylor]

48 [Q207](#) [Matthew Taylor]

49 Sheffield Political Economy Research Institute, [Tackling insecure work: Political actions from around the world](#), September 2017, p5



any one week in which a worker is not governed by a contract of employment.<sup>50</sup> Workers who work infrequently or casually may never manage to attain rights despite working for companies for long periods of time, because any week where they do not have a contract results in the counter returning to zero.

23. The Taylor Review considered this as part of its investigation into one-sided flexibility. It recognised that the law does not discriminate between those workers who choose not to work and those who simply are not offered work by their employer in a specific period. The Review considered creating new measures of employment, through accrued hours and the setting of thresholds for rights.<sup>51</sup> It concluded, however, that these would impose an additional burden on business and could make it more difficult for workers to know when they have attained rights. Instead, Taylor recommended the extension of the time before service is broken from one week to one month.<sup>52</sup>

24. Extending the time limit would ensure workers who undertake irregular but frequent work for a company do not face an impossible task to secure rights. A worker would only reach the qualifying period once they had accrued the appropriate time actually worked; rather than having the clock reset at the end of each week it should merely be paused.

**25. Companies who benefit from a flexible but committed workforce should still guarantee rights when workers reach the necessary qualifying period, even when there has been a gap in service. We recommend that the Government extend the time allowance for a break in service while still accruing employment rights for continuous service from one week to one month. We have set out proposals in Part 5 in our draft Bill.**

## Employment tribunals

26. As we noted earlier in this chapter, employment rights are often enforced through workers taking their employer to a tribunal following unsuccessful attempts at conciliation, rather than by state agencies.<sup>53</sup> Recent high profile tribunals have assigned worker status to people in the gig economy who worked for companies that maintained they were not workers but self-employed. Tribunals are also used to enforce most other legislation, such as the National Minimum Wage Act 1998 and the Working Time Regulations 1998.

27. Hugo Martin, Director of Legal and Public Affairs at Hermes Parcelnet, told us that the low take-up of employment tribunals suggested that couriers were “in the vast majority of cases [ ... ] very happy being self-employed”.<sup>54</sup> By contrast, the Taylor Review noted that, while tribunals are intended to be less legalistic than traditional courts and enable self-representation,<sup>55</sup> the reality is that “the odds are often stacked against the worker”.<sup>56</sup> We do not accept that workers not bringing cases means that they are satisfied with their status or treatment in the workplace. This is evidenced by the significant drop in the number of cases brought before tribunals following the imposition of fees, before

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50 Employment Rights Act 1996, [S. 212](#)

51 [Taylor Review](#), p45

52 [Taylor Review](#), p45

53 For example, [Aslam, Farrar and Others v. Uber](#); [Dewhurst v. CitySprint](#); [Smith v. Pimlico Plumbers](#)

54 [Q98](#) [Hugo Martin]

55 [Taylor Review](#), p60

56 [Taylor Review](#), p57

the Supreme Court judgment on 26 July 2017 saw them removed again.<sup>57</sup> The legal costs, complexity and risks of appeal act as disincentives to bringing a tribunal case. Workers may also fear victimisation, including the risk of their work being withdrawn, if they bring a case. Even if they win their case, there is no guarantee that workers will receive any payment that they are due. Just half of all successful claimants received full or part payment without taking further legal action in 2013.<sup>58</sup>

28. Relying on tribunals to enforce rights for entire workforces places a burden on both the judicial system and those seeking access to justice. Partial compliance by poor employers denies good employers a “level playing field” and risks them either failing or adopting models that do not provide ‘good work’.<sup>59</sup> Matthew Taylor described businesses taking the unhealthy attitude that:<sup>60</sup>

As long as there are ways to get around it, we will get around it and wait until we are taken to the courts.

We heard this position first hand from Hermes Parcelnet, who said:<sup>61</sup>

It will be for the individual courier to assert their right through the tribunal. We would wait to see the take-up of that.

29. The Employment Tribunal Procedure Rules enable multiple individuals to bring a claim when their cases are based on the same set of facts, providing for a form of group action (see Box 2).<sup>62</sup> The Taylor Review considered and ruled out applying single tribunal judgments to entire workforces or all those on similar contracts. The Review noted, however, that it is “neither just nor efficient for the system to operate so that every single person in an organisation has to bring a case to be recognised as a worker”.<sup>63</sup> Instead of this approach, the Review proposed to increase penalties for companies who repeatedly lose employment status cases.<sup>64</sup> We would welcome increased penalties as a means of deterrence, and consider this in detail in Chapter 4 of this report.

#### **Box 2: Class actions**

In legal terms, “class action” means that if one person brings a claim successfully, the result is applied to everyone in the class. Class actions are only permitted in consumer protection cases in England and Wales.

A system of bringing group claims has developed in other areas, such as equal pay. The difference in these cases is that each individual has to bring a claim. The tribunal or court then selects lead claimants and decides their cases. To get the benefit of the court judgment, each individual must follow the full legal process, including paying fees and providing individual documents.

57 Ministry of Justice, [Tribunals and gender recognitions certificates statistics quarterly: January to March 2017](#), 20 June 2017

58 [Letter from David Lidington](#)

59 [Q215](#) [Matthew Taylor]

60 [Q215](#) [Matthew Taylor]

61 [Q98](#) [Hugo Martin]

62 Ministry of Justice, [The Employment Tribunals Rules of Procedure 2013](#), February 2015, p9

63 [Taylor Review](#), p63

64 [Taylor Review](#), p63

For example, in the [Uber v Mr Y Aslam, Mr J. Farrar & others](#) case, thirteen drivers brought claims, and the tribunal judges select two test claimants. The final outcome of the process will only apply to the thirteen drivers who brought claims. Although the same result might well be reached by any other driver who brought a case, there is no obligation for Uber to apply automatically the result to all drivers. Under a class action, all Uber drivers would automatically become workers, regardless of whether they had brought a claim or not.

30. We asked Matthew Taylor whether greater use of class action claims might enable more comprehensive enforcement of rights. He told us this was “an important idea”, although it would not work in all cases. This might apply not just to employment status disputes, but to other issues such as underpayment of the NLW/NMW. We are, however, concerned that this approach still relies on individual workers bearing the risk of litigation, in a tribunal system that is not currently providing effective access to justice for all. Sir David Metcalf told us fear of victimisation prevents individuals pursuing their rights via the tribunal system. He explained there are “many vulnerable workers” who are either unaware of their rights or who are “rather frightened of complaining”.<sup>65</sup>

**31. Workers frequently rely on the employment tribunal system to establish their rights. But restrictions on class actions and the absence of penalties for widespread abuses may incentivise employers to “wait and see” whether individuals are willing to risk pursuing their rights. We recommend that the Government creates an obligation on employment tribunals to consider the increased use of higher, punitive fines and costs orders if an employer has already lost a similar case. We further recommend that the Government takes steps to enable greater use of class actions in disputes over wages, status and working time. Our proposals are set out in Part 4 of our draft Bill.**

## Flexibility and the National Minimum Wage

32. The growth of the gig economy and increased use of intermediary digital platforms to connect workers and consumers has changed the way people work. Matthew Taylor told us these changes had enabled greater flexibility for both consumers and workers.<sup>66</sup> These business models can also be very lucrative for the companies involved. Uber’s Head of Public Policy, Andrew Byrne, said that his company faced the challenge of “having enough drivers to service the level of demand” from consumers who valued its accessible and flexible service.<sup>67</sup> For some workers, such as an Uber driver who spoke to us, the flexibility to choose when to work was very important.<sup>68</sup> Deliveroo’s Managing Director, Dan Warne, said their platform allowed riders to “build their work around their life, rather than vice versa”.<sup>69</sup> The Taylor Review sought to retain the benefits of flexibility in the labour market, but in the form of “genuine two-sided flexibility”, where workers as well as companies benefit.<sup>70</sup> The Review promoted the need for portable benefit platforms

65 [Q269](#) [David Metcalf]

66 [Q220](#) [Matthew Taylor]

67 [Q175](#) [Andrew Byrne]

68 For example, [Q12](#) [Uber Worker]

69 [Q96](#) [Dan Warne]

70 [Taylor Review](#), p36

and transferrable ratings, which could support workers to have genuine flexibility within the gig economy.<sup>71</sup> It argued that “employers must not use flexible working models simply to reduce costs”.<sup>72</sup>

33. The Review encountered problems, however, with the interaction of minimum wage legislation and gig economy workers on digital platforms. It found that such workers have “greater freedom over when to work, and what jobs to accept or decline, than [in] most other business models”.<sup>73</sup> They can log on to an app at any time. Matthew Taylor explained to us how this might lead to unintended consequences:<sup>74</sup>

A situation where people are guaranteed the Minimum Wage but they can work whenever they want to could lead to a situation in which thousands of people log on in the middle of the night when there isn’t much work but are guaranteed the Minimum Wage.

Matthew Taylor acknowledged that he thinks businesses “slightly exaggerate” the extent of this potential problem. However, he nevertheless argued that enforcing the NMW/NLW for platform workers could result in companies choosing to adopt a shift system which would deprive workers of flexibility.<sup>75</sup> A platform worker could log onto an app during a period of low demand, not be able to find any work, and still be entitled to the NMW/NLW. Instead, the Taylor Review recommended that existing piece rates legislation be adapted to calculate pay for platform workers (Box 3).<sup>76</sup> It claimed that this would “avoid undermining the National Minimum Wage”.<sup>77</sup>

**Box 3: Piece rates**

Piece rates legislation aims to ensure that workers whose working time is not tracked, and are therefore paid based on output (such as envelope stuffers), can earn a fair rate of pay.<sup>78</sup> A sample of workers is surveyed to establish the average output of an individual in an hour. Each worker is then paid for their output at a rate that would reflect an hourly rate of at least 120% of the NMW/NLW, based on the output of that average worker. In cases of workers who work significantly more slowly than the average, they may receive pay at a rate below the NMW/NLW.

34. In evidence to us, Matthew Taylor said that, under his proposal, the employer would need to meet three conditions for a platform worker to earn less than the NMW/NLW and not be entitled to bring a minimum wage claim against them. First, the employer would need to prove that the average worker working averagely hard could earn 120% of the NMW/NLW. Second, they would need to prove that the worker could genuinely choose when to work and when not to. Finally, they would need to provide accurate, up-to-date information to workers on how much they could expect to earn at a given time.<sup>79</sup>

71 [Taylor Review](#), p37

72 [Taylor Review](#), p48

73 [Taylor Review](#), p37

74 [Q211](#) [Matthew Taylor]

75 [Q211](#) [Matthew Taylor]

76 [Taylor Review](#), p37

77 [Taylor Review](#), p37

78 The National Minimum Wage Regulations 2015 ([SI 2015/621](#))

79 [Q211](#) [Matthew Taylor]

35. Matthew Taylor acknowledged that this recommendation is “in danger of being too clever by half” and that it is “not one that is easy for people to fully get their head around”.<sup>80</sup> We are concerned that the proposal is overly complex and risks undermining the NMW/NLW by inviting workers to choose to work for a lower rate of pay. Workers should receive at least the minimum for which Parliament has legislated.

**36. A flexible labour force can provide benefits to workers, consumers and businesses. What we do not accept is that the gig economy should burden workers with all the risks of this flexibility. They should not be faced with a choice between not working and working for below the minimum wage. We recommend the Government rules out introducing any legislation that would undermine the National Minimum Wage/National Living Wage.**

## 3 Improvements in secondary legislation

### Entitlement to a written statement of employment particulars

37. Awareness of employment statuses and associated rights, among both workers and employers, is an integral part of ensuring compliance with the law. Sir David Metcalf told us that, in his role as Director of Labour Market Enforcement, he had found a lack of awareness is a “major issue”: both firms and workers were “very patchily aware of what their rights are”.<sup>81</sup> This state of affairs can help unscrupulous organisations exploit their employees, as many workers do not realise they are being exploited. It can also lead to unintentional noncompliance due to a lack of understanding.<sup>82</sup>

38. Currently, employees are entitled to a written statement of terms and conditions within two months of starting a new job—although this is poorly enforced—but workers are not.<sup>83</sup> The Taylor Review suggested that one way of improving awareness would be for both employees and workers to receive a written statement of status and entitlements on day one of a new job.<sup>84</sup> This would be provided in plain English (perhaps based on a standard format), and would list, at minimum, the employer’s name, the place of work, hours of work, and arrangements for pay including holiday pay, sick pay and pension.<sup>85</sup> Matthew Taylor suggested this would help to expose from the beginning companies who are “playing fast and loose” with employment law.<sup>86</sup> More broadly, it would provide workers with clear information about the type of contract they are on and their entitlements. This could also help prompt employers to consider whether they are categorising their workers appropriately.<sup>87</sup>

39. Both Matthew Taylor and Sir David Metcalf told us that introducing the right to a statement of written particulars on day one of a new job, for both employees and workers, should be an immediate priority for Government. Matthew Taylor felt this measure could be “easily” enacted and would “make a material difference” to workers.<sup>88</sup> It could potentially allow discussions over rights and entitlements to take place much earlier, with less eventual reliance on the courts.<sup>89</sup> Sir David emphasised that although such a measure “sounds quite modest”, it would “have a very important effect”—so important he identified it as the single step that could “make the most difference” in protecting workers’ rights.<sup>90</sup>

**40. Workers should be better equipped with the knowledge to identify if they are being treated unfairly at work, and to challenge poor practice with confidence. A requirement to set out rights and entitlements will be beneficial to good businesses, helping to root out noncompliant organisations and create a more level playing field. We recommend that the Government extends the duty of employers to provide a clearly written statement of employment conditions to cover workers, as well as employees. We**

81 [Q269](#) [David Metcalf]

82 Director of Labour Market Enforcement, [Labour market enforcement strategy: introductory report](#), July 2017, p11; p49

83 Gov.uk, [Employment contracts](#)

84 [Taylor Review](#), p39

85 [Taylor Review](#), p39

86 [Q217](#) [Matthew Taylor]

87 [Taylor Review](#), p38

88 [Q217](#) [Matthew Taylor]

89 [Q221](#) [Matthew Taylor]

90 [Q264](#), [Q273](#) [David Metcalf]

*further recommend that this right apply from day one of a new job, with the statement to be provided within seven days. This change should be made by secondary legislation under s23 (4)-(5) of the Employment Relations Act 1999.*

## Lowering the Information and Consultation of Employees (ICE) threshold

41. The Taylor Review found that an employee voice in corporate decision-making is important to good workforce relations. This view was reflected in the package of corporate governance reforms announced by the Government in August 2017.<sup>91</sup> Well-run companies take the views of their workers into account.

42. The Information and Consultation of Employees (ICE) Regulations 2004 offer, in workplaces without trade union representation, a framework for consultation with employees on business decisions that affect them. The regulations are subject to a number of conditions. Eligible organisations must have 50 or more employees—those on worker contracts do not count—and at least 10% of those employees, and a minimum of 15 people, must support the implementation. Largely due to these restrictions, only 14% of eligible organisations had established consultative arrangements in 2011.<sup>92</sup>

43. The Taylor Review argued that while the ICE regulations are helpful in supporting consultation between companies and workers, the restrictive eligibility conditions are hampering their widespread application. Accordingly, it recommended that alongside examining the effectiveness of the regulations more widely, Government should commit to reducing the threshold for implementation from 10% to 2% of the workforce.<sup>93</sup>

44. When asked what measures from his Review he would prioritise for implementation, Matthew Taylor told us that the “single recommendation, more than any other, that I think is most important” would be lowering the ICE threshold, and extending it to include workers as well as employees. He explained:<sup>94</sup>

It was very clear to us as we went around the country that one of the biggest problems for casual workers is the sense that were they ever to stand up to management, were they ever to raise concerns, legitimate concerns, concerns that actually might improve the productivity of the company if only they were heard, their feeling is, “If I say anything, I will lose my hours”, and those people should have somewhere they can legitimately take concerns to and they can be raised.

Matthew Taylor argued this easily enacted measure would “provide a better framework of rights and opportunities for people to be heard at work”, *improving “the quality of employment relations and ultimately productivity”*.<sup>95</sup>

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91 Department for Business, Energy and Industrial Strategy, [World-leading package of corporate governance reforms announced to increase boardroom accountability and enhance trust in business](#), August 2017

92 [Taylor Review](#), p52

93 [Taylor Review](#), pp52–53

94 [Q229](#) [Matthew Taylor]

95 [Q229](#) [Matthew Taylor]

45. **Making it easier for employees and workers to have their voices heard at work would send an important message about the significance the Government ascribes to good corporate governance. Currently, some workers most at risk of exploitation—those on worker contracts—are not covered by regulations intended to promote an employee voice. Even employees in organisations that are eligible may be prevented from exercising this right by the prohibitively high threshold for application of the regulations. *We recommend that people on worker contracts, as well as employees, be counted towards the 50 workers needed before a company is covered by the ICE regulations. We also recommend the threshold for implementation of the regulations be reduced from 10% to 2% of the workforce. This would require amending secondary legislation under s42 of the Employment Relations Act 2004.***

### Ending the Swedish Derogation

46. The Agency Worker Regulations 2010,<sup>96</sup> which came into force on 1 October 2011, implemented EU Directive 2008/104/EC on temporary agency work.<sup>97</sup> The regulations are intended to ensure temporary agency workers receive equal treatment to permanent employees of the same organisation, subject to a qualification period of 12 weeks' work. Temporary agency workers should, after that qualification period and for the duration of their assignment at a hirer, receive pay and other basic working and employment conditions (duration of working time, overtime, breaks, rest periods, night work, holidays, and public holidays) at least as good as those that would apply if they had been recruited directly to occupy the same job.<sup>98</sup>

47. The Directive provided an opt-out from this equal treatment in relation to pay, known as the “Swedish Derogation”. This covered workers permanently contracted as an employee of an agency and in receipt of pay from that agency between assignments. In the UK, agencies must be actively seeking and offering legitimate work to that employee and pay them at least 50% of the hourly rate received in their last assignment (subject to the NMW/NLW) for a period of no less than four weeks.

48. The Taylor Review drew attention to the Swedish Derogation as a means by which companies avoid paying agency workers what they are entitled. In his evidence to us, Matthew Taylor explained how the “quite widespread abuse” of the system could work:<sup>99</sup>

Somebody could basically be working for 11 weeks, be pulled back into the agency for a couple of hours where they just sit and have a sandwich, they get paid for those two hours, that is paid between assignments, and then the clock starts again.

Many reputable agencies do not abuse this opt out. Others, Matthew Taylor told us, are reluctantly “complicit due to pressure from companies they supply” and had urged him to recommend its abolition.<sup>100</sup>

96 The Agency Workers Regulations 2010 ([SI 2010/93](#))

97 Council Directive [2008/104/EC](#)

98 [Explanatory Memorandum to the Agency Worker Regulations 2010 \(SI 2010/93\)](#)

99 [Q243](#) [David Metcalf]

100 [Q243](#) [David Metcalf]



49. Structuring contracts to avoid equal pay is an explicit breach of the regulations. However, as Sir David Metcalf explained, the regulations cannot currently be enforced by the Employment Agency Standards (EAS) Inspectorate.<sup>101</sup> Instead, agency workers rely on the employment tribunal system. This is clearly unsatisfactory. Sir David said the choice for Government on the Swedish Derogation was stark: “either we enforce it or we abolish it”.<sup>102</sup>

50. Sir David told us that the EAS Inspectorate was not currently resourced to carry out such enforcement.<sup>103</sup> The Taylor Review found that legitimate uses of the Swedish Derogation were not beneficial enough to justify the continued use of contracts which rely on it. It dismissed arguments that its removal would limit the options for agency workers, or add administrative costs for law-abiding businesses.<sup>104</sup> The Taylor Review therefore recommended the Government should repeal the legislation enabling opt-out from equal pay entitlements, and extend the responsibilities of the EAS Inspectorate to monitoring the remainder of the Agency Worker Regulations.<sup>105</sup>

**51. All agency workers should be entitled, without exception, to the same treatment as permanent employees once they have completed 12 weeks’ service. The Swedish Derogation loophole is subject to widespread illegal abuse to the detriment of both agency workers and legitimate agency employers. The Taylor Review was right to call for its abolition. We recommend the Government amends the Agency Worker Regulations 2010 to remove the opt-out for equal pay. We further recommend that the Employment Agency Standards Inspectorate be given the powers and resources it needs to enforce the remainder of those regulations.**

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101 [Q288](#) [David Metcalf]

102 [Q288](#) [David Metcalf]

103 [Q288](#) [David Metcalf]

104 [Taylor Review](#), p59

105 [Taylor Review](#), p59

## 4 Effective enforcement

52. The Immigration Act 2016 introduced the role of Director of Labour Market Enforcement, to “improve the effectiveness of the enforcement of certain employment rights to prevent non-compliance and the exploitation of vulnerable workers, via an intelligence-led, targeted approach”.<sup>106</sup> The Director sets the strategy of the three major enforcement bodies: the Employment Agency Standards Inspectorate, the Gangmasters and Labour Abuse Authority and the HM Revenue and Customs National Minimum Wage enforcement team. He also reports on their effectiveness. Combined, the three bodies examined nearly 4,000 potential cases of abuse in the labour market in 2015–16.<sup>107</sup>

53. The Taylor Review made a number of recommendations for improving the enforcement of employment rights. The majority of these fall within the scope of the employment tribunal system, some of which have been superseded by the July 2017 Supreme Court judgment ending the current tribunal fees regime.<sup>108</sup> The enforcement of other rights falls within the remit of the Director. We have focused our attention on areas where immediate action by the Government can have the greatest impact.

### Deterrence

54. The Director of Labour Market Enforcement’s first strategy set out the principles of effective enforcement, including the importance of the deterrence effect.<sup>109</sup> For penalties against non-compliance to be effective, the expected level of penalty must be set at a point which genuinely deters companies from non-compliance.

55. Where penalties are available for breaches of employment rights, they vary, based on the offence committed, from small civil penalties to imprisonment. For the NMW/NLW, non-payment incurs a maximum fine of only twice the wage arrears owed, an average maximum fine of just £220.<sup>110</sup> Sir David explained that such small fines were ineffective given the very limited enforcement resources:<sup>111</sup>

If you take HMRC and the minimum wage, there are 1.3 million firms with employees. They took 2,600 cases last year. That means the average firm can expect an investigation once every 500 years.

Without larger fines, or a vast increase in enforcement action, unscrupulous employers minded to abuse minimum wage laws have a low risk of being caught and face inconsequential punishments if they are. Sir David was clear on the choice: “if you don’t have enough enforcement resources, then the punishments should be larger”.<sup>112</sup>

56. Employers caught not paying the minimum wage and owing over £100 are eligible to be “named and shamed” by HMRC. This recognises that some employers are more likely

106 Home Office, [Immigration Act 2016 Factsheet – Labour market enforcement](#), September 2015

107 Director of Labour Market Enforcement, [Informing Labour Market Enforcement Strategy 2016 to 2017: Introductory Report](#), July 2017, p18

108 [R \(on the application of UNISON\) v Lord Chancellor](#), [2017] UKSC 51

109 Director of Labour Market Enforcement, [Informing labour market enforcement strategy 2018/19: Summary of Issues](#), July 2017, p4

110 [Q258](#) [David Metcalf]

111 [Q258](#) [David Metcalf]

112 [Q258](#) [David Metcalf]

to respond to potential negative reputational impact than simple financial deterrents.<sup>113</sup> Sir David told us there was of a lack of evidence on the financial impact of naming. He argued, however, that given some major firms and representative bodies are “very apprehensive about naming and shaming [ ... ] it does work because these firms are jealous of their reputation”.<sup>114</sup>

57. The Taylor Review considered fines and naming as tools to improve compliance with employment rights. It recommended penalties where companies have failed to follow rulings, and a naming and shaming scheme for employers who do not pay tribunal awards within a reasonable time”.<sup>115</sup>

58. Sir David told us that the Department for Business, Energy and Industrial Strategy was “reasonably hostile to extra regulation” in the form of higher fines and penalties.<sup>116</sup> Sir David argued, however, that his views were compatible for support for business, in that they would promote “a level playing field”.<sup>117</sup> We agree. Higher penalties for non-compliance should not be seen as a burden for business, but as a means to support the majority of businesses who are compliant. Punitive fines could also provide valuable additional resources to support enforcement agencies and employment tribunals.

**59. Compliance with the law is a minimum standard that any employee or consumer should expect from a business. We agree with the Taylor Review that businesses who choose not to comply should face significant penalties to their finances and reputation, as punishment to them and a deterrent to others. Punitive fines and a robust enforcement regime that is fair, and perceived to be fair by the public, the vast majority of businesses and their workers, would increase the public’s confidence in the role of business in society. We recommend that the Government brings forward stronger and more deterrent penalties, including punitive fines, for repeat or serious breaches of employment legislation, and expand “naming and shaming” to all non-accidental breaches of employment rights by businesses and supply chains.**

## Proactive enforcement

60. The Taylor Review recommended that company owners take greater responsibility for people who work in their supply chains.<sup>118</sup> Sir David told us that “non-compliance is absolutely rife in the garment trade in Leicester” and that closer working between the enforcement agencies and other bodies could have an impact there.<sup>119</sup> Both Matthew Taylor and Sir David said that transparency in supply chains would put increased pressure on companies at the head of the chain to ensure their reputations are not damaged.

61. In his evidence to the Committees, Sir David said that while major firms themselves are generally operating legally, they have a tendency to “wash their hands of what goes on” in their supply chains. He told us that he is considering how the head of a supply chain or brand might be considered “jointly liable” for abuses further down the chain, as occurs

113 Department for Business, Energy & Industrial Strategy and HM Revenue & Customs, [National Minimum Wage Enforcement Law: Enforcement](#), July 2017, p16

114 [Q285](#) [David Metcalf]

115 [Taylor Review](#), p63

116 [Q259](#) [David Metcalf]

117 [Q259](#) [David Metcalf]

118 [Taylor Review](#), p52

119 [Q254](#) [David Metcalf]

in Australia, Canada and parts of Europe.<sup>120</sup> He argued that the threat of reputational damage to major firms, through “naming and shaming”, could provide incentives for them to better police their own supply chains. Sir David also drew our attention to the embargoing of goods from non-compliant businesses by HMRC as a potential “very strong incentive”<sup>121</sup> for retailers to promote compliance in their chains.<sup>122</sup>

62. Sir David explained that there was a trade-off between enforcement resources and powers. Existing limited resources allocated to enforcement bodies for policing minimum wage compliance, for example, were adequate provided they were combined with stronger enforcement powers.<sup>123</sup> He used the further example of the EAS inspectorate:<sup>124</sup>

They only have a £0.5 million budget. They have 11 staff, only nine inspectors, and there are 18,000 employment agencies. I am not going to come in calling for more resources just like that, but there is a trade-off. If you don't have enough enforcement resources, then the punishments should be larger.

63. Expanding enforcement activity, without diverting resources from existing activity, will however require more resources. Sir David explained that his office, to date, “just have not had the time or the resources” to carry out intensive “deep dive” sectoral enforcement. Similarly, increased action in supply chains and adaptation to ongoing innovation in the gig economy will inevitably be resource-intensive. Recent answers to Parliamentary Questions also raise concerns that enforcement agencies are being resourced well below their intended staff complement. In April 2017 HMRC had 83 vacancies in a NMW staff team that had 399 staff in post.<sup>125</sup>

64. We welcome the creation of the Director of Labour Market Enforcement role and of Sir David's work setting a strategy for better enforcement. Sir David highlighted the challenge of getting the necessary approval for his strategy from both the Home Secretary and the Secretary of State for Business, Energy and Industrial Strategy, departments that “do not always see eye-to-eye”.<sup>126</sup> Ensuring that companies operate within the law should be welcomed across Government, as indeed it will be welcomed by reputable, law-abiding businesses who seek to compete on a level playing field.

**65. We welcome the Government's establishment of a Director of Labour Market Enforcement. The enforcement agencies he oversees must have adequate resources to take a more proactive approach to identifying and deterring abuses. We recommend that the Government provides the Director of Labour Market Enforcement and the main enforcement agencies with the resources necessary to undertake both reactive and proactive roles, including deep-dives into industrial sectors and geographic areas, and supply-chain wide enforcement actions. Where extra resources are needed, they should be funded through higher fines on noncompliant organisations. We also recommend that the Government sets out, in response to this report, how it intends the powers and resources of the Director of Labour Market Enforcement will develop over the next five years.**

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120 [Q268](#) [David Metcalf]

121 [Q268](#) [David Metcalf]

122 [Q268](#) [David Metcalf]

123 [Q258](#) [David Metcalf]

124 [Q258](#) [David Metcalf]

125 [PQ 70785](#) (13 April 2017) and [PQ88](#) (21 June 2017), tabled by Chris Stephens MP

126 [Q245](#) [David Metcalf]

# Conclusions and recommendations

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## Clearer statutory definitions of employments status

1. Questions of employment status are often not clear-cut, and legislative reform would not entirely eliminate the need for the courts. But it is evident that clearer legislation on employment status could be valuable in preventing confusion and promoting fair competition between businesses. This would lessen the need to go to court, and most importantly, protects vulnerable workers. *We recommend the Government legislates to introduce greater clarity on definitions of employment status. This legislation should emphasise the importance of control and supervision of workers by a company, rather than a narrow focus on substitution, in distinguishing between workers and the genuine self-employed. We have set out our proposals in Part 1 of our draft Bill.* (Paragraph 10)

## Worker by default

2. Relying on individual tribunals as a corrective to companies' systematic use of questionable self-employment models places an unacceptable burden on workers to address poor practice, while the companies themselves operate with relative impunity. *We recommend the Government legislate to implement a worker by default model, as set out in Part 2 of our draft Bill. This would apply to companies who have a self-employed workforce above a certain size defined in secondary legislation.* (Paragraph 15)

## Non-guaranteed hours

3. Companies benefiting from a flexible workforce must ensure that this flexibility is not one-sided, either by guaranteeing hours that reflect the periods worked each week, or by compensating workers for uncertainty. *We recommend that the Government work with the Low Pay Commission to pilot, for workers who work non-contracted hours, a pay premium on the National Minimum Wage and National Living Wage. The Low Pay Commission should be responsible for identifying suitable companies to be included in this pilot, based on workforce size and turnover. Proposed legislation to enable this is set out in Part 3 of our draft Bill.* (Paragraph 21)

## Continuous service

4. Companies who benefit from a flexible but committed workforce should still guarantee rights when workers reach the necessary qualifying period, even when there has been a gap in service. *We recommend that the Government extend the time allowance for a break in service while still accruing employment rights for continuous service from one week to one month. We have set out proposals in Part 5 in our draft Bill.* (Paragraph 25)

### Employment tribunals

5. Workers frequently rely on the employment tribunal system to establish their rights. But restrictions on class actions and the absence of penalties for widespread abuses may incentivise employers to “wait and see” whether individuals are willing to risk pursuing their rights. *We recommend that the Government creates an obligation on employment tribunals to consider the increased use of higher, punitive fines and costs orders if an employer has already lost a similar case. We further recommend that the Government takes steps to enable greater use of class actions in disputes over wages, status and working time. Our proposals are set out in Part 4 of our draft Bill.* (Paragraph 31)

### Flexibility and the National Minimum Wage

6. A flexible labour force can provide benefits to workers, consumers and businesses. What we do not accept is that the gig economy should burden workers with all the risks of this flexibility. They should not be faced with a choice between not working and working for below the minimum wage. *We recommend the Government rules out introducing any legislation that would undermine the National Minimum Wage/ National Living Wage.* (Paragraph 36)

### Entitlement to a written statement of employment particulars

7. Workers should be better equipped with the knowledge to identify if they are being treated unfairly at work, and to challenge poor practice with confidence. A requirement to set out rights and entitlements will be beneficial to good businesses, helping to root out noncompliant organisations and create a more level playing field. *We recommend that the Government extends the duty of employers to provide a clearly written statement of employment conditions to cover workers, as well as employees. We further recommend that this right apply from day one of a new job, with the statement to be provided within seven days. This change should be made by secondary legislation under s23 (4)-(5) of the Employment Relations Act 1999.* (Paragraph 40)

### Lowering the Information and Consultation of Employees (ICE) threshold

8. Making it easier for employees and workers to have their voices heard at work would send an important message about the significance the Government ascribes to good corporate governance. Currently, some workers most at risk of exploitation—those on worker contracts—are not covered by regulations intended to promote an employee voice. Even employees in organisations that are eligible may be prevented from exercising this right by the prohibitively high threshold for application of the regulations. *We recommend that people on worker contracts, as well as employees, be counted towards the 50 workers needed before a company is covered by the ICE regulations. We also recommend the threshold for implementation of the regulations be reduced from 10% to 2% of the workforce. This would require amending secondary legislation under s42 of the Employment Relations Act 2004.* (Paragraph 45)

## Ending the Swedish Derogation

9. All agency workers should be entitled, without exception, to the same treatment as permanent employees once they have completed 12 weeks' service. The Swedish Derogation loophole is subject to widespread illegal abuse to the detriment of both agency workers and legitimate agency employers. The Taylor Review was right to call for its abolition. *We recommend the Government amends the Agency Worker Regulations 2010 to remove the opt-out for equal pay. We further recommend that the Employment Agency Standards Inspectorate be given the powers and resources it needs to enforce the remainder of those regulations.* (Paragraph 51)

## Deterrence

10. Compliance with the law is a minimum standard that any employee or consumer should expect from a business. We agree with the Taylor Review that businesses who choose not to comply should face significant penalties to their finances and reputation, as punishment to them and a deterrent to others. Punitive fines and a robust enforcement regime that is fair, and perceived to be fair by the public, the vast majority of businesses and their workers, would increase the public's confidence in the role of business in society. *We recommend that the Government brings forward stronger and more deterrent penalties, including punitive fines, for repeat or serious breaches of employment legislation, and expand "naming and shaming" to all non-accidental breaches of employment rights by businesses and supply chains.* (Paragraph 59)

## Proactive enforcement

11. We welcome the Government's establishment of a Director of Labour Market Enforcement. The enforcement agencies he oversees must have adequate resources to take a more proactive approach to identifying and deterring abuses. *We recommend that the Government provides the Director of Labour Market Enforcement and the main enforcement agencies with the resources necessary to undertake both reactive and proactive roles, including deep-dives into industrial sectors and geographic areas, and supply-chain wide enforcement actions. Where extra resources are needed, they should be funded through higher fines on noncompliant organisations. We also recommend that the Government sets out, in response to this report, how it intends the powers and resources of the Director of Labour Market Enforcement will develop over the next five years.* (Paragraph 65)

# Committees' draft Bill

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## 1 Employment and worker status: definitions

(1) Section 230 of the Employment Rights Act 1996 is amended as follows.

(2) Omit subsection (3) and insert:

“

(3) For the purpose of subsections (1) and (2) a tribunal or court may have regard to the following factors, for example:

(a) whether the contract places an obligation on the individual to perform work personally;

(b) whether the other party to the contract retains the potential to control to a substantial degree how the individual's work will be carried out in relation factors such as:

(i) disciplining the individual;

(ii) the activities to be carried out;

(iii) the order in which activities are to be carried out;

(iv) the equipment or products to be used in carrying out the activities;

(v) the rate of pay for the activities;

(vi) where the work will be carried out;

(vii) how the activities will be carried out; and

(viii) the hours during which the work is to be carried out.

(c) whether the individual is integrated into the other party to the contract's business;

(d) whether the other party to the contract provides tools or equipment;

(e) the degree of financial risk undertaken by the individual; and

(f) whether the individual is prohibited from working for others during the contract.

(3A) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who —

(a) has a contract of employment; or

(b) has entered into or works under any other contract, whether express or implied and (if it express) whether oral or in writing whereby the individual



undertakes to do or perform 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.

(3B) For the purpose of subsection (3A)(b) a tribunal or court may have regard to the following factors, for example:

- (a) those mentioned in subsections (3)(b)-(f) above;
- (b) whether the worker was engaged in marketing their business before the contract came into existence; and
- (c) whether any substitution clause is capable of being freely exercised by the individual in practice (but the fact an individual has a contractual right to appoint a substitute under the contract shall not of itself prevent that individual from being a worker).

(3C) In this Act an individual is “an independent contractor” if he is neither an employee nor worker.

(3D) For the purpose of subsection (3C) a tribunal or court may have regard to the following factors, for example —

- (a) whether the individual assumes responsibility for the success or failure of his business;
- (b) whether the individual can hire others at their own expense;
- (c) whether the individual has the ability to determine the manner in which the services are carried out;
- (d) whether the individual actively markets their services;
- (e) whether the individual can negotiate and set the price for their services; or
- (f) whether the individual is responsible for their own indemnity cover or public liability insurance”.

[Harmonising amending provisions need to be made in:

- section 296 Trade Union and Labour Relations (Consolidation) Act 1992;
- section 54 of the National Minimum Wage Act 1996;
- regulation 2 Working Time Regulations 1998
- regulation 1 Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- section 83(2) Equality Act 2010]

## 2 Worker by default

(3) Before section 1 of the Employment Rights Act 1996, insert:

### **“1ZA Statement of status**

(1) Where an individual begins working for another party, that party shall give to the individual a written statement of status not later than seven days after the beginning of the work.

(2) The statement must contain —

(a) a clear statement of status, specifying whether the individual is -

(i) an employee; or

(ii) a worker

according to the definitions in subsections (1) to (3B) of section 230;

(b) details of the rights and entitlements of the individual by virtue of their status.

(3) The Secretary of State may make regulations requiring companies to publish information in relation to statements of employment and worker status.

### **1ZB Worker status by default unless evidence of self-employment**

Where in any complaint made to an employment tribunal any question arises as to whether an individual is a worker, it shall be presumed that the individual is a worker unless the contrary is established”.

## 3 Pilot for non-guaranteed hours

(4) After section 51(8) of the National Minimum Wage Act 1998, insert:

“

(9) The regulations may make provision for pilot schemes for matters such as the payment of different rates for hours which are not guaranteed by the employer. Such pilot schemes may apply only to some sectors or some employers, and subsection (8) shall not apply to them accordingly.

(10) Any regulations to which this subsection applies may be made so as to have effect for a specified period not exceeding 24 months.

(11) The Low Pay Commission shall be consulted with over the draft of any orders made under this subsection, and in particular over:

(a) the rate at which the premium should be set;

(b) the potential impact on marginal hours of employment; and

(c) the potential impact on compliance”.

## 4 Collective proceedings

(5) After section 15 of the Employment Tribunals Act 1996, insert:

### “15A Collective proceedings

(1) Subject to the provisions of this Act and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, proceedings may be brought before the Employment Tribunal combining two or more claims under the following legislation:

- (a) Part II of the Employment Rights Act 1996;
- (b) The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994;
- (c) any complaint made to an employment tribunal having dispute about employment or worker status under section 230 Employment Rights Act 1996 being determined as a preliminary issue; or
- (d) Claims under regulation 30 of the Working Time Regulations 1998 (“collective proceedings”).

(2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.

(3) The following points apply in relation to claims in collective proceedings—

- (a) it is not a requirement that all of the claims should be against all of the respondents to the proceedings;
- (b) the proceedings may combine claims which have been made in proceedings under legislation in subsection 1 above and claims which have not; and
- (c) a claim which has been made in proceedings under the legislation set out subsection 1 above may be continued in collective proceedings only with the consent of the person who made that claim.

(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.

(5) The Tribunal may make a collective proceedings order only—

- (1) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection 8; and
- (2) in respect of claims which are eligible for inclusion in collective proceedings.

(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

- (7) A collective proceedings order must include the following matters—
- (a) authorisation of the person who brought the proceedings to act as the representative in those proceedings;
  - (b) description of a class of persons whose claims are eligible for inclusion in the proceedings; and
  - (c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections 10 and 11).
- (8) The Tribunal may authorise a person to act as the representative in collective proceedings—
- (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a “class member”), but
  - (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.
- (9) The Tribunal may vary or revoke a collective proceedings order at any time.
- (10) “Opt-in collective proceedings” are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.
- (11) “Opt-out collective proceedings” are collective proceedings which are brought on behalf of each class member except—
- (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings; and,
  - (b) any class member who—
    - (i) is not domiciled in the United Kingdom at a time specified; and
    - (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.
- (12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all class members, except as otherwise specified.
- (13) The right to make a claim in collective proceedings does not affect the right to bring any other proceedings in respect of the claim.
- (14) In this Part, “specified” means specified in a direction or Presidential Guidance made by the Tribunal”.

[Secondary legislation would also be required in respect of the Employment Tribunal Rules of Procedure.]

## 5 Continuous service

- (6) Substitute “a month” for “a week” in section 210(4) Employment Rights Act 1996.

# Work and Pensions Committee

## Formal Minutes

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**Wednesday 15 November 2017**

Members present:

Rt Hon Frank Field, in the Chair

Heidi Allen

Andrew Bowie

Jack Brereton

Alex Burghart

Emma Dent Coad

Ruth George

Chris Green

Steve McCabe

Chris Stephens

Draft report (*A framework for modern employment*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 65 read and agreed to.

Summary agreed to.

Annex agreed to.

*Resolved*, That the Report be the Second Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 22 November at 9.15am]

# Business, Energy and Industrial Strategy Committee Formal Minutes

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**Wednesday 15 November 2017**

Members present:

Rachel Reeves, in the Chair

Vernon Coaker

Rachel Maclean

Drew Hendry

Albert Owen

Stephen Kerr

Mark Pawsey

Peter Kyle

Antoinette Sandbach

Mr Ian Liddell-Grainger

Draft Report (*A framework for modern employment*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 65 read and agreed to.

Summary agreed to.

Annex agreed to.

*Resolved*, That the Report be the First Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 21 November at 9.45 am

# Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

## Tuesday 10 October 2017

*Question number*

**Mick Rix**, National Officer, GMB, an Uber worker, an Amazon worker and a Hermes worker

[Q1–94](#)

**Andrew Byrne**, Head of Public Policy, Uber, **Hugo Martin**, Director of Legal Affairs, Hermes, and **Dan Warne**, Managing Director UK and Ireland, Deliveroo

[Q95–201](#)

## Wednesday 11 October 2017

**Matthew Taylor**, Leader of the Government's Review of Modern Working Practices

[Q201–244](#)

## Wednesday 25 October 2017

**Professor Sir David Metcalf CBE**, Director, Labour Market Enforcement, Department for Business, Energy and Industrial Strategy

[Q245–299](#)

## List of Reports from the Work and Pensions Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2017–19

First Report	Universal Credit: the six week wait	HC 336
First Special Report	Child Maintenance Service: Government's Response to the Committee's Fourteenth Report of Session 2016–17	HC 354
Second Special Report	Government Response to the Communities and Local Government and Work and Pensions Committees Joint Report: Future of supported housing	HC 867 (Cm 9522)

## List of Reports from the Business, Energy and Industrial Strategy Committee during the current Parliament

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The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2017–19

First Special Report	Industrial Strategy: First Review: Government Response to the Committee's Second Report of Session 2016–17	HC 337
Second Special Report	Corporate governance: Government Response to the Committee's Third Report of Session 2016–17	HC 338
Fourth Special Report	Leaving the EU: negotiation priorities for energy and climate change policy: Government Response to the Committee's Fourth Report of Session 2016–17	HC 550