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Labour Laws Fit for the Future

Full legal analysis

#RECLabourLaws

Labour Laws Fit for the Future: Full legal analysis

Contents

This is a full legal analysis of the labour laws we recommend updating.

For a shorter overview please visit **rec.uk.com/labour-laws-future** to download our summary guide.

The context: What are the current challenges for the UK labour market?

The UK jobs market needs to remain competitive against other nations to grow our economy and be fit for the future. To do this we need to get better at investing in the things that matter to people: engagement, progression, pay, culture and flexibility in work. Getting the "people stuff" right will require a proper labour market strategy and, supporting it, a more modern and effective approach to the regulation of employment.

Businesses and policymakers are well aware of the labour shortages employers face. The REC's Labour Market Tracker in February 2024 showed it would require roughly the population of Northern Ireland to fill all the vacant jobs in the UK. The UK economy faces losing up to £39 billion every year from 2024 unless we can act on labour shortages.

One part of urgently overcoming labour shortages should come from strengthening the core of the labour market. Employment legislation and regulation, as it stands now, reflects old fashioned ways of work. It lacks an integrated oversight on employment rights and creates a scenario where unscrupulous operators can exploit the ambiguities in the law.

Where are we getting it wrong?

The recently introduced Workers (Predictable Terms and Conditions) Act 2023 is an example of getting the people stuff wrong. The UK's flexible labour market is a source of strength – it helps people work in ways that suit them and supports businesses to manage peaks and troughs in demand. But not including umbrella companies explicitly in the Act is an oversight. It will create an incentive to shift many more temporary workers into the employment of umbrellas, so hirers can avoid the bureaucracy of handling stable working requests. Unfortunately, exploitation and compliance breaches are far too common in the umbrella market and current legislation lacks the teeth to clean up the sector. Giving workers and agency workers the right to request more predictable terms and conditions of work will also undermine the viability of the agency sector. It misunderstands the purpose of agency work by keeping it within the scope of the Act. Furthermore, it ignores the advice given to government by the Taylor Review back in 2017. Matthew Taylor originally suggested that requests should be made after 12 months - because it would have allowed for a balanced and fairer right to request.

Enforcement and compliance

It is over four years since the government committed to bringing together the existing labour market enforcement bodies into a single body. Yet, we still await an Employment Bill to make that operational.

The long-promised Single Enforcement Body is not a magic bullet, but it gives us a good shot at improving clarity for workers and employers on rights and tax quickly and thoroughly. It will need proper resourcing and political backing. The government should go further by making the regulations around work and pay much simpler for everyone to understand and comply with.

There are concerns about payroll matters in employment such as companies and workers trying to lessen tax obligations by taking pay in the form of loans, grants, advances and even growth share schemes. Umbrella companies are one such threat to the Exchequer because of the disguised remuneration some of them offer and chameleon-like approach the umbrella market takes. Of most concern is that disguised remuneration may benefit the umbrellas but has no or very little impact on a worker's pay. This means some workers have no idea that they are paid in a tax non-compliant way. The government has consulted on tackling non-compliance in the umbrella company market and there is a consensus among affected stakeholders that regulation, and enforcement of the regulation we have, will help. A definition of umbrella companies in law, will provide a basis for getting this done.

Higher-demand for flexible working

Away from compliance matters, expectations at work are changing with many workers wanting flexibility over where and when they work. We must avoid the risk in policymaking of knee-jerk assumptions that it is only the standard '9 – 5' that is safe and manageable. We need more flexibility in thinking about how people are employed, not less. There are several groups who would benefit from this - from those with caring responsibilities, young people, women returners, the over 50s, long-term unemployed or economically inactive – and many others. As a result of this, we are seeing increased interest in agency work which can deliver a flexible working model.

The additional context of skills shortages resulting from the loss of labour supply adds to the importance of reforming labour laws to help more people work in ways that suit them. We should be making it easier for people to work flexibly, not harder, and need employment legislation that sets out a clear framework for employment rights for all classes of workers.

Agency work – what does it mean?

Agency workers are a vital part of the UK labour market. REC research shows that on any given day there are close to 1 million people engaged via agencies on a work assignment.[1]

The rights of these workers are protected by specific legislation for the recruitment sector, most clearly in the Employment Agencies Act 1973 (EAA), the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Conduct Regulations), and the Agency Work Regulations 2010 (AWR). These pieces of legislation set out the obligations for employment agencies and employment businesses to both their clients and their workers.

Technically speaking, the EAA and Conduct Regulations make a legal distinction between employment agencies and employment businesses. An employment agency provides candidates to a client who then hires them directly, usually on a permanent employee basis. An employment business usually engages the workers themselves and then supplies them to their clients, usually on a temporary or contract basis. Both employment agencies and employment businesses are commonly referred to as agencies, with their temporary workers referred to as agency workers, and this is the language we will be using in this document.

1 REC, UK Recruitment Industry Status Report 2022/23

Contracts of employment or contracts for services

Agency workers usually work in a tripartite arrangement. They have a contract with the agency and the agency will find them work with their clients.

They can be engaged under contracts of employment or, more commonly, on contracts for services. Contracts for services are more flexible with no obligation for the agency worker to do work, and no obligation on the agency to provide it. Both of these types of arrangement fall within the scope of the EAA and the Conduct Regulations.

However, the EAA is now over 50 years old. The Conduct Regulations, which were made in accordance with the EAA, are now over 20 years old. These laws were introduced to a UK labour market that is very different from the one we see today. Whilst there are a range of employment laws that apply to the full spectrum of working arrangements, it is fair to say that much of this legislation is designed to work with a traditional employment arrangement in mind. i.e., a person engaged on a contract of employment who intends to stay in the role for a longer period of time and work regular hours. This means that agency workers often find themselves outside of the scope of the law as it is, and where it may be difficult to know their employment rights and have them enforced.

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Employees vs workers: different types of employment status

Agency worker is not its own employment status, and agency workers can either be classed as 'employees' or 'workers' depending on how they are engaged, or the laws we are considering.

Employment Rights Act 1996

Under the Employment Rights Act 1996 (ERA) an employee is defined as follows:

> *"employee" means an individual who has entered into or works under … a contract of employment.*
>
> *and for the purpose of this legislation a "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

The ERA also defines a worker:

> *(3) In this Act "worker" … means an individual who has entered into or works under …*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.*

So, for the purposes of the ERA the definition of worker includes employees and also those with more flexible types of contractual working arrangements.

Health and Safety at Work Act 1974

The classifications of employee versus worker in the ERA are not, however, those used in the Health and Safety at Work Act 1974 (HASAWA). There is an obvious reason for this, this Act came 22 years before the employee and workers definition were established in the ERA. Yet HASAWA is an important piece of legislation in the UK, covering the general responsibilities employers have to protect the health and safety of those who work for them. This piecing together of employee rights between laws formed over two decades apart means employment rights are not applied consistently across different legislation. For example, the HASAWA only makes a distinction between employees and the self-employed.

An employee is defined here as follows:

> *'…employee means an individual who works under a contract of employment …'*

and a self-employed person is defined as:

> *'an individual who works for gain or reward otherwise than under a contract of employment, whether or not he himself employs others;'*

Therefore, if a person is not an employee, they are treated as self-employed and fall under those provisions within the Act. This has implications for the various regulations made under this primary legislation – these are set out in more detail later in this document.

Use of worker status

More modern legislation has started to include the definition of worker in line with its use in the ERA. Legislation related to working time, national minimum wage and pensions auto-enrolment all have some form of worker status included within them. This is a starting

point but as the rest of this document will set out, the legislation in many cases does not accurately reflect the reality of a modern agency worker in terms of how and when they work or the actual contractual status they work under. So even newer legislation is still difficult to apply effectively in the modern labour market.

Umbrella company complications

In recent years the use of umbrella companies as intermediaries in the supply chain for agency workers has complicated things from both an employment status perspective and an employment rights perspective. Umbrella companies engage agency workers directly, often on contracts that are unclear about how the worker is specifically engaged. Because of the contractual relationship between an agency and an umbrella, the rights conferred to a "work-seeker" under the EAA and Conduct Regulations are applied to the umbrella. The umbrella then has no obligations to apply any of the provisions from the EAA or Conduct Regulations to the workers they engage as the relationship between worker and umbrella is not covered by these regulations. Additionally, some umbrella companies take opportunities to avoid or evade tax obligations, so regulation of this market is crucial to protect the agency worker market.

What legislation can we learn from?

Before looking at what needs to change, the Working Time Regulations serve as an example of where the government has taken the right steps to simplify, modernise and condense the law.

Changes introduced through the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 helped to address the outdated and confusing patchwork of legislation and case law that had emerged in this space since 1998. The REC had long been pushing for this type of reform, and the government needs to learn from the positive changes made to the WTR and apply this to the other problematic legislation explored in more detail later in this document.

Working Time Regulations 1998

Application of the Working Time Regulations

The Working Time Regulations 1998 (WTR) cover the rights of workers regarding holiday pay and other rest periods and breaks from work. The legislation originally used the term workers throughout and defines this as including employees and other workers. The legislation was amended in January 2024 to include further definitions for "irregular hours workers" and "part-year workers". This was a key step in acknowledging the changes in working practices and patterns that we would like to see replicated across all relevant legislation. This was introduced following a lengthy consultation with industry and has helped to clarify the position of holiday pay for different types of worker. This approach now needs to be applied to other legislation.

Paid leave

Under regulations 13, 13A, and 16 of the WTR, all workers are guaranteed a total of 5.6 weeks of paid leave as a full-time worker. While EU law guarantees 4 weeks of this entitlement via Regulation 3, the UK adds an extra 1.6 weeks under Regulation 13A. Notably, Regulation 16 mandates this holiday as paid. Distinctions between these types of leave hold significance due to case law differentiating their rules and application for workers. For example, case law provides that holiday pay for leave taken under Regulation 3 should be based on a worker's "normal remuneration", including payments such as overtime and commission, whereas pay for leave under Regulation 13A and additional contractual leave does not need to include these additional payments.

This split system suits conventional employment where fixed-hour workers receive the same pay as they usually do during a week where they take holiday. However, complexities arise for those with different working hours, as the WTR doesn't accommodate them well and the workers may receive different amounts of pay from week to week or month to month.

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The EU Working Time Directive (WTD) and WTR prioritise health and safety to ensure workers get sufficient rest. Agency workers can take paid annual leave, yet due to the nature of temporary assignments and the short-term nature of these, they often don't take holiday during an assignment. Ambiguities emerge regarding unpaid leave during short assignments. The WTR prevents paying workers in lieu of statutory holiday except upon termination of their contract under Regulation 14. Determining termination for non-contractual agency workers is tricky, as agency workers aren't required to resign, and assignments can halt without notice. This issue has been addressed by the introduction of rolled-up holiday pay as a legitimate means of paying holiday pay, and this along with the introduction of further regulations around entitlement and calculations are explored further in the next section.

Untaken leave allowances

The WTR has also been updated to apply changes previously applied to it by case law. For example, the judgment of Max-Planck-Gesellschaft v Shimizu [2018], required employers 'be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law'. As a result, in cases where a worker has not taken their full leave entitlement and was aware of the consequences of failing to take their leave then the employer would no longer be required to pay the worker in lieu of the leave or allow them to roll it over. This would only be the case if the leave is not taken due to a worker's own inaction and does not apply if the leave was not taken due to other absence from work, such as maternity or sickness. A statutory right to the same thing has now been introduced to the WTR in Regulation 15D. This consolidates the law into one set of regulations and makes it easier to interpret than previously, however, there are still some issues with the practical application of this.

The new regulations (and the original judgment in Max Planck) are unclear about what is seen as a reasonable opportunity for a worker to take leave and what level of diligence an employer needs to display in reminding workers to take leave. This leaves the decisions around whether to apply this regulation as subjective and ambiguous. Clarity in legislation to expressly set out what level of opportunity and diligence is required would alleviate this and allow a more sensible judgement of what employers need to do and in what circumstances. Prescribing a timeframe in which a business must inform workers that their leave is expiring (e.g. 3 months before the expiration of the leave year) would be one way to do this.

What is renumeration?

Changes to the law were also made in regard to what counts as renumeration for the purposes of calculating holiday pay. Previously, the cases of British Airways v Williams, Bear Scotland v Fulton and Lock v British Gas set out what counted as renumeration for the purposes of calculating an agency worker's holiday pay. This led to confusion around holiday pay as the law was not codified in the legislation. New regulations have now been introduced into the WTR that adopt these principles into the legislation.

When calculating holiday pay, regulation 16 states that:

> *the following types of payments are to be included when determining the amount of a week's pay for the purposes of this regulation—*
>
> *(a) payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;*
>
> *(b) payments for professional or personal status relating to length of service, seniority or professional qualifications;*
>
> *(c) other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.*

This means that holiday pay calculations should include payments normally received, including commission, bonuses and overtime that are directly attributable to the work by the worker. These changes have simplified the application of the law by creating a single reference point for how calculations should be made and makes it easier to apply to non-employee workers. This type of change sets a good example of how other pieces of legislation could similarly be made simpler in their application to agency workers.

The revisions to the WTR also introduced regulations under regulation 16 setting out a 52-week reference period for the purposes of calculating a worker's average pay. This is the same principle that was originally set out in the cases on holiday pay noted above. Under the regulations, average pay is calculated over a 52-week reference period for a worker. When there are weeks within this period where a worker received only statutory payments instead of their normal pay, such as maternity or paternity pay where the wage costs are partially covered by the government, these are excluded from the 52-week period. The employer should then count back further weeks to reach 52 weeks of normal pay to calculate an average from.

Introducing these two changes has introduced a clear definition around what counts as renumeration for agency workers, and how average pay is calculated. This is a good example of the government getting it right around modernising legislation, and this approach needs to be adopted throughout the wider employment law framework.

Rolled-up holiday pay

As of April 2024, the law has allowed rolled-up holiday pay. Rolled-up holiday pay is the practice of paying workers their holiday pay entitlement alongside their regular wages in their pay check rather than paying holiday pay at the point annual leave is taken. Paying rolled-up holiday pay is technically unlawful under a judgment from the European Court of Justice (ECJ) that remains binding on the UK.

However, the legislation allowing rolled-up holiday pay has been introduced through the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023. This amended the WTR to account for rolled-up holiday pay, with new regulations and sections added to the prior existing text. This resolves the position around rolled-up pay and improves the transparency around the entitlement to this, in a way that allows businesses and workers to know where they stand.

Calculations for irregular hours workers

New government legislation has also reconfirmed the calculation of holiday pay for workers with irregular hours. Prior to this, the WTR did not provide clear rules for calculating holiday pay for workers with irregular hours. Government guidance previously set out an accrual rate of 12.07% for these workers so they would accrue holiday at this rate based on the hours they worked. The calculation was based on a standard working year of 46.4 weeks (52 weeks – 5.6 weeks of holiday), making 5.6 weeks equal to 12.07% of 46.4 weeks. It is this calculation that the government has now confirmed in legislation.

This confirmation was necessary because of the Supreme Court judgment in Harpur Trust v Brazel [2019]. In this case, Ms. Brazel, a

permanent employee with no set hours, argued that she deserved the full 5.6 weeks of holiday as per the WTR. She said her pay should be calculated based on her average income from the 12 weeks before her leave, according to the Employment Rights Act 1996. The Trust, following the government guidance, used the 12.07% method and lowered her holiday allowance accordingly. The Supreme Court agreed with Ms. Brazel, saying the 12.07% method was not required by the WTR or EU law. They ruled that she should have the full holiday time since she worked throughout the year.

This ruling was specifically about the holiday entitlement of part-year workers with employment contracts. However, there was an argument to apply the principles of this case to other temporary workers, including agency workers on a contract for services. In the most extreme case, the principles of this case could mean that a worker becomes entitled to a full 5.6 weeks of holiday regardless of the length of their assignment, so could be entitled to 5.6 weeks of holiday after being on assignment for a single day. This leaves employers potentially responsible for huge amounts of holiday. The uncertainty around this has now been resolved by the government confirming in legislation that the 12.07% accrual method is correct and lawful.

This has been a useful clarification by the government, leaving businesses and workers alike with clarity around how their entitlement is calculated. It is also a more rational method of accrual than would have been the case under the Harper Trust ruling. Had the judgment been allowed to stand, an agency worker who works multiple single-day shifts through multiple recruitment businesses could rapidly have accrued dozens of weeks of annual leave entitlement after only a few shifts.

What legislation still needs to change, and how?

As outlined, there are several nuances concerning agency workers and how they work that are not adequately addressed in legislation. Or if they are addressed, it is piecemeal and complicated to follow. The specific details of some of these pieces of legislation are set out in this section.

Workers (Predictable Terms and Conditions) Act 2023

Right to request a more stable contract

The Workers (Predictable Terms and Conditions) Act 2023 comes into force in Autumn 2024. Under these regulations, a right for all workers to request a more stable working pattern after they have worked in the same role at the same hirer for a set period of time will be introduced. This timeframe is currently expected to be 26 weeks and will be confirmed in further regulations that are not yet published.

Unlike many other pieces of the legislation, this Act does make explicit reference to agency workers in addition to employees. Under the Act, an agency worker is able to request a more stable contract after they have been working on assignment for a period of 26 weeks. The Act gives the worker the right to request a more stable contract working from the end hirer with which they have been working – but the request itself could be made either to their agency or to the client directly.

Despite carving out specific provisions in the Act for agency workers, this shows a fundamental misunderstanding of how the agency work market functions.

The Act, as written, fails to acknowledge the tripartite contractual relationship in agency work. Allowing agency workers to request a contractual change from the end hirer, where there is no existing

contract, makes no sense. The general principle of the Act of allowing workers to request a more stable contract, also undermines the core of agency work - working flexibly. Whilst the right to request a more stable contract may make sense for employees engaged on one-sided contracts, the two-directional flexibility afforded to agency workers means the workers have complete choice of when and who to work for, with no obligation to work even when work is offered. This balance and flexibility needs to be maintained given the value of the sector to the UK labour market, with the UK's temporary recruitment market contributing £33.9 billion to the economy in 2022/3.[1]

What is the solution?

As further regulations are made pursuant to the Act, the government should take the opportunity to limit the right to request for agency workers to be made to agencies only. The worker in this case has no prior contractual relationship with the hirer and introducing a dialogue between them will be complicated and in reality, handled mostly via the agency anyway. Removing this aspect of the proposal will help to manage requests in an effective manner and preserve the existing relationships in place during an agency worker's usual assignment.

Health and safety

As mentioned above, the primary legislation for health and safety is the Health and Safety at Work Act 1974 (HASAWA). This applies to employees and the self-employed. Anyone who is not an employee falls under the self-employed provisions, but these may not neatly apply to agency workers. There is a raft of regulations made pursuant to the HASAWA where this is the case.

Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013

Regulation 4 of the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) states that the "responsible person" should make a report where any person at work suffers a work-related accident.

1 REC, UK Recruitment Industry Status Report 2022/23

The "responsible person" is defined in Regulation 3 of RIDDOR as being:

> *(a) in relation to an injury, death or dangerous occurrence reportable under regulation 4, 5, 6 or 7 or recordable under regulation 12(1)(b) involving—*
>
> *(i) an employee, that employee's employer; or*
>
> *(ii) a person not at work or a self-employed person, or in relation to any other dangerous occurrence, the person who by means of their carrying on any undertaking was in control of the premises where the reportable or recordable incident happened, at the time it happened*

Under the HASAWA, an employee is someone who is working under a contract of employment. Anyone not working under a contract of employment falls within the self-employed provisions for the purpose of RIDDOR. This means that for agency workers, the reporting obligations under RIDDOR will depend on their contract. This is straightforward for agency workers engaged on employment contracts, as the agency is the employer and the responsible person for the purposes of RIDDOR.

However, for the majority of agency workers on contracts for services, the employee provisions would not apply. In this case the responsible person, who has to report an accident, would be the client where the agency worker is working - as the client is in charge of the premises. An agency should try to ensure an incident is reported by the client - but has no way to enforce this. The Health & Safety Executive has made it clear that agencies and clients should co-operate to ensure the safety of their workers but does not specify how this should be agreed.

What is the solution?

Modernising the legislation to explicitly cover the health and safety obligations for agency workers who are not employees would make this much clearer for all parties.

The Health and Safety (Display Screen Equipment) Regulations 1992

These regulations state that a "user" should have their eye tests paid for by their employer. In this case a "user" is defined as "an employee who habitually uses display screen equipment as a significant part of his normal work". Because this definition only refers to employees, this would exclude many agency workers from the scope of the legislation.

What is the solution?

Introducing amendments to these regulations to bring agency workers on contracts for service in scope of the regulation would help to address this and boost worker protection in the UK.

The Personal Protective Equipment at Work Regulations 1992

Under Regulation 4 of these regulations there is a requirement that employers provide their 'workers' with relevant personal protective equipment (PPE) for the work they are doing. When the legislation was introduced in 1993, this referred to only 'employees' but in 2022 this was expanded to cover all categories of workers. This highlights the fact that other health and safety legislation does not make this explicit distinction.

This amendment still fails to acknowledge the tripartite arrangement for agency workers. Under the amended legislation, the recruitment agency is the employer for the workers they supply, rather than the client. This does not make sense as it is impractical to place responsibility on recruiters who may not have the in-depth knowledge of the industry or the site where a candidate is being placed to assess the suitability of PPE.

What is the solution?

The express expansion to workers is a step in the right direction for health and safety legislation, but it is of no benefit to these workers if it is not implemented in a useful and usable way. In this case, responsibility for PPE would need to be placed with the end hirer who is responsible for the site and work the agency worker will be doing.

The Management of Health and Safety at Work Regulations 1999

Regulation 16 of these regulations puts in place a requirement for an employer to do additional risk assessments for new or expectant

mothers, and where risks are identified to take reasonable steps to address these. For agency workers this works in parallel with regulation 20 of the Conduct Regulations, which states that a recruitment agency must not place workers into assignments that will be detrimental for either the worker or the hirer.

This begs the question around a scenario where an agency supplies a worker to an end hirer and the worker then becomes pregnant. At the point of supply, the role was not detrimental to the worker, but the role may subsequently become detrimental to the worker. In this scenario, the agency would not be able to update their risk assessment and take appropriate steps to address risks because they do not have control of the site. They would be reliant on the hirer doing this on their behalf and providing them with updated information. However, liability for any failure to address detriments to a newly pregnant worker would sit only with the recruitment agency.

What is the solution?

It would be more reasonable for the legislation to state that the client also accepts some liability in this case as they have the knowledge of the risks and site to be able to make the necessary changes.

Statutory sick pay

Social Security (Categorisation of Earners) Regulations and the Social Security Contributions and Benefits Act 1992

Under the Act, statutory sick pay (SSP) is payable to all employees and agency workers paid on a PAYE basis, regardless of the type of contract they are engaged on. This means that an employer or recruitment agency is liable to pay SSP to a worker who is unable to work due to illness, provided all the relevant qualification criteria for SSP are met.

However, it is the entitlement - to only receive SSP when a worker that would otherwise be working and is unable to do so due to illness - that raises complications for agency workers. The case of Brown v Chief Adjudication Officer [1997] stated that if an employee is on a short-term contract or series of short-term contracts for a period of more than three months, then they are able to treat their contract as if it is of indefinite duration. This principle has since been

amended into the Employment Rights Act 1996 under section 18(4). This means that the assignment can only be terminated by giving the employee notice, rather than just letting the short-term deal expire. Failure to issue notice, regardless of whether the short-term assignment has ended, will mean that for SSP purposes the contract is deemed to be ongoing. An employer will continue to be liable to pay SSP to an employee who has qualified for SSP previously.

This approach has subsequently been extended to agency workers by the judgment in NHS Professionals v HMRC [2012] and applies to any agency worker who has worked for an agency for over 3 months. HMRC will deem an agency worker to have an ongoing contract in this scenario and will treat an agency as liable to pay SSP to an agency worker who otherwise meets the qualifying criteria. In order to end their liability to pay, an agency would have to issue notice to an agency worker to end their assignment. However, if the agency is deemed to have issued notice solely to avoid SSP liabilities they will continue to be liable for SSP. This means agencies can be liable for SSP for workers who are no longer working for them.

What is the solution?

The case law in this scenario can lead to some unclear circumstances, particularly given the nature of agency work and the frequency with which workers are on short-term assignments. Introducing a new clearer set of SSP regulations specifically for agency workers would help to address this issue. New legislation would need to be explicit about how and when agencies would be liable for SSP and the circumstances for ending this liability in a fair and transparent way.

Further, the SSP regime was initially introduced as a state benefit, the administration of which was then shifted to employers who initially could reclaim the payments, and then we moved to the current system where employers are wholly liable. The complexities of the SSP regime are tied up in its origins as a state benefit. No employer that operates an occupational health scheme would create one as complicated as the SSP regime. A review of the process is well overdue.

Transfer of workers

Transfer of Undertakings (Protection of Employees) Regulations 2006

Historically, the Transfer of Undertakings (Protection of Employees)

Regulations 2006 (TUPE) have only applied to employees. These regulations apply where there is a transfer of employees from one business to another, for example if a business is sold to a new owner. TUPE provides that where there is a transfer, all of the employees in the relevant business will automatically transfer to the new owner and their terms and conditions of employment are preserved. Regulation 2(1) of TUPE sets out definitions for contract of employment and employee as follows:

> *"contract of employment" means any agreement between an employee and his employer determining the terms and conditions of his employment;*

And;

> *"employee" means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly.*

This means that under TUPE as written agency workers on a contract for services are not covered by regulation and would not transfer automatically to the new business.

However, this situation has been complicated by the employment tribunal case of Dewhurst and ors v (1) Revisecatch Ltd t/a Ecourier and (2) City Sprint (UK) Ltd. In this case, the tribunal judge construed that the words 'or otherwise' in the definition of employee would include a broader set of workers engaged on a contract for services, despite the express wording excluding them. In this case the agency workers were transferred, and the provisions of TUPE were applied. However, this case was only in the Employment Tribunal, so its judgment is not yet binding on other similar circumstances. This leaves businesses, agencies and agency workers in an unclear position as to whether or not TUPE is strictly applicable to transfers for agency workers.

What is the solution?

Legislating to clear up this confusion would be simplest to resolve this solution. Reverting to the original position of TUPE where it did not apply to agency workers would be a clear and simple position for all parties.

What next?

The legislative changes set out throughout this document may seem like minor adjustments, but they can have a huge impact in making our labour market more efficient, productive and secure for workers.

Stakeholders in parliament and the civil service need to seize this opportunity to update the law in line with these proposals to ensure that worker rights are clear and accessible for all types of worker. The way people work is changing, and we need to ensure that our labour laws are fit for the future of work.

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The Recruitment & Employment Confederation is the voice of the recruitment industry, speaking up for great recruiters. We drive standards and empower UK recruitment businesses to build better futures for their candidates and themselves. We are champions of an industry which is fundamental to the strength of the UK economy.

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