

THE TAYLOR REVIEW: WHAT IS GOOD WORK?

Nine months ago, Matthew Taylor launched a Review into Modern Employment Practices. The much anticipated Review findings have now been published. This Briefing explores some of the key recommendations that range from specific measures that the Good Work Report (the 'Report') would like to have enacted as soon as possible to recommendations that will require further consultation before implementation. The Report addresses a broad range of issues from determination of employment status to the right to return to work after extended sick leave. Although there will be a period of consultation prior to any legislative changes, employers should start considering the potential cost and administrative implications of the key recommendations in the Report.

The Good Work Report can be found [here](#).

Reclassification

It is proposed that the current three tier approach to employment status (i.e. employee, worker and self employed) is retained. The Report recommends, however, that 'workers' (who are not employees) should, as a matter of law, be reclassified as 'dependent contractors'. The term 'worker' is currently used in different pieces of legislation which would require amendment in the event this recommendation is implemented.

Test for determining employment status

At present, the statutory definition of employment is extremely high level; this has resulted in the courts and tribunals applying a number of test and factors for determining if an individual is an employee, a worker or self-employed. Each case is fact specific and in some cases this has made it difficult for individuals and companies alike to be certain about the nature of their relationship. It has also allowed less scrupulous companies to exploit this uncertainty and treat individuals as self employed to circumvent any statutory employment rights such as the right to holiday pay, national minimum wage and so on.

The Report recommends that the legislative tests for 'employment' and 'dependent contractor' status should be updated to incorporate the high level

Key issues

- Reclassification
- Test for determining employment status
- Alignment of tax status and employment status
- Statement of terms and conditions
- Zero hours premium
- Higher penalties for repeated breaches
- Initial employment status assessment
- The right to request ...
- Miscellaneous
- What is not being progressed?
- What Next?

Implications

Although it is not known which (if any) of the recommendations from the Taylor Report will be adopted, or when, existing employers (and financial investors and corporates looking to acquire companies) that engage a significant number of individuals who are not currently characterised as employees will need to give some thought to:

- the nature and composition of the workforce of any businesses (including a business that is being acquired);
- whether the employment status of the workforce is clear;
- are there tax, national insurance and accrued holiday pay risks arising from the incorrect employment status being allocated;
- whether there will be any additional financial exposure in the event that the Taylor recommendations are implemented.

criteria that case law has identified as relevant (mutuality of obligation, degree of control, right of substitution and so on). This should be supplemented by official guidance and secondary legislation containing additional detail which can be updated quickly to respond dynamically to changing market conditions and case law.

The new legal test for dependent contractor status should place less emphasis on personal service and more emphasis on control. The Review team considered that it is unfair that an individual can be subject to extensive control by a business from rates of pay to disciplinary action, but nevertheless be classified as self employed. This deprives them of statutory employment protections by virtue of there being a genuine right of substitution on the part of the individual.

Building on the new legislative framework, the Report recommends the provision of an on-line employment status tool for individuals and employers. An Employment Status Indicator tool is currently available for tax purposes; however, its use can at times be somewhat problematic; much work will have to be done on the legislative definition to ensure that any new employment indicator tool is fit for purpose.

The potential clarity that would be achieved by enshrining the test for employment status in legislation may be helpful to new employers. However, to the extent there is less emphasis on personal service and more emphasis on control, some employers will have to re-consider the basis on which they have categorised their workforce to date and the implications of re-characterising their workforce. This would result in material extra costs.

Alignment of tax status and employment status

At present, employment status for tax and statutory employment purposes are not always aligned. It is possible for an individual to be an employee for statutory employment purposes and not for tax purposes and vice versa. In addition, an individual who is a worker for statutory employment purposes can be either employed or self employed for tax purposes depending on the precise factual matrix. The Report suggests that this position should be revised so that being employed for tax purposes means that an individual is either an employee or dependent contractor. In addition, where a tax tribunal finds that an individual is an employee that decision should be binding for employment law purposes.

If this recommendation is implemented, employers and their employment law advisers will need to pay much more attention to tax tribunal cases on employee status.

Statement of terms and conditions

The current obligation to provide a statement of terms and conditions to employees should be extended to dependent contractors with an obligation to provide it on the first day of the job. The information to be provided should be expanded to address the day one statutory rights the individual is entitled to and how they will be paid. To encourage compliance, there should be a new statutory right to claim compensation if there has been a failure to provide a statement. The Report recommends that a standard form statement is developed. If this recommendation is implemented, employers who currently employ large numbers of workers who are not employees (and to date have

not been required to issue documentation) could potentially face a large administrative and cost burden.

Zero Hours Premium

A ban on the use of zero hours contracts is not suggested, however, it is recommended that consideration is given to establishing a higher national minimum wage rate for hours which are not guaranteed in a contract. This leaves employers with a material level of flexibility.

Higher penalties for repeated breaches

Employment Tribunals should be under an obligation to consider whether to impose aggravated breach penalties and costs orders on companies that have already lost employment status cases on broadly similar facts. Employers who fail to pay tribunal awards and apply judgments to other relevant relationships in the workforce would be subject to greater penalties.

Initial employment status assessment

Individuals contemplating employment tribunal proceedings should be entitled to a free initial adjudication by the tribunal on their employment status. This would help them to determine whether to pursue substantive claims in relation to holiday pay, the national minimum wage and other worker related rights.

If a case does proceed to the Tribunal the burden of proof would sit with the employer to demonstrate that it is not an employment relationship.

The right to request ...

Employees on zero hours contracts who have been in post for 12 months should be given the right to request fixed hours. In addition, agency workers who have been placed with the same hirer for 12 months would have the right to request a permanent contract with the hirer. The hirer would have an obligation to consider it in a reasonable manner. Companies beyond a certain (unspecified) size should be required to report on their employment structures and detail how many such requests have been received and agreed to. If this proposal is adopted, the risk of adverse publicity for repeatedly refusing such requests has the potential to act as a real incentive for change.

Miscellaneous

Also of note are the following recommendations:

- Continuity of employment should be preserved where there are gaps of up to one month in employment; currently a gap of one week will usually break continuity of employment.
- Dependent contractors should be given the option of receiving rolled up holiday pay and the holiday pay reference period should be extended from 12 weeks to 52 weeks so that seasonal variations can be taken into account. If the rolled up holiday pay suggestion is taken up, it may not be possible to implement it until after Brexit has occurred in light of the ECJ ruling that rolled up holiday pay is not lawful in any circumstances.
- There should be a new right to return to the same or a similar job in the event of long term ill health absence.
- HMRC should be given enforcement powers in relation to holiday pay as well as in relation to national minimum wage breaches.

What next?

The Government proposes to study the Report over the summer and will respond in detail later in the year. Clearly, some of the suggestions are more straightforward and easier to implement than others if the Government has the appetite for them. The thorny problem of establishing a clear bright line test for employment status has evaded the courts in practice for many years and will clearly require a lot of work. What changes will be made and when are far from clear at this stage.

- The right to request flexible working should be extended to permit temporary changes to contracts, for example to accommodate the flexibility needed for particular caring requirements.
- The trigger threshold for employers to establish an information and consultation body should be 2% of the workforce (taking into account workers).The threshold is currently 10%.

What is not being progressed?

A number of proposals outlined in the Tory manifesto and elsewhere are seemingly not being taken forward. These include:

- A proposed consultation on the extension of parental leave rights to the self employed.
- Equalising tax and benefits between the employed and self-employed.
- Grandparent leave.

CONTACTS

Chris Goodwill
Partner

T +44 207 006 8304
E chris.goodwill@cliffordchance.com

Mike Crossan
Partner

T +44 207 006 8286
E michael.crossan@cliffordchance.com

Alistair Woodland
Partner

T +44 207 006 8936
E alistair.woodland@cliffordchance.com

Chinwe Odimba-Chapman
Senior Associate

T +44 207 006 2406
E chinwe.odbima-chapman@cliffordchance.com

Tania Stevenson
Senior PSL

T +44 207 006 8938
E tania.stevenson@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2017

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.