

RESPONSE TO CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES REGULATIONS 2003 CONSULTATION AND IMPACT ASSESSMENT – MARCH 2009

Introduction

The Association of Employment Management Companies (AEMC) fully welcomes the government's aim of ensuring protection for vulnerable workers whilst preserving flexibility as one of "the key strengths of the UK labour market," according to the ministerial foreword.

We also recognise the need to continue reviewing regulation to ensure that standards of fairness are maintained.

The AEMC has a strict code of conduct and tough entry requirements to ensure that our organisation represents umbrella companies that seek to act fairly and properly, whilst also confirming that all our members process payments to their workers via PAYE.

Our members provide the full range of employment rights to their workers including child care vouchers, maternity and paternity pay, and the AEMC is determined to uphold the best standards.

Building on the relationship we have already established with HMRC and the Treasury, we wish to build a strong strategic relationship with all relevant government departments, to help provide assistance and to work towards a position of fairness for all, under which non-compliant companies have little room to operate.

Response

The AEMC notes that the focus of proposed changes to regulations affecting employment businesses is in relation to the opt out arrangement afforded by Regulation 32 and that any change to the present arrangements are on the premise that agency workers are vulnerable to being forced to opt out and thus are subjected to some kind of detriment, for example non payment of wages.

It is not the experience of the AEMC's members that workers are forced to opt out and whilst there may be some traders that behave illegally, the vast majority do not. Further, to the extent that it can be said that any trader fails, for example, to pay a worker sums that are properly due, there are already existing laws that protect the worker under the National Minimum Wage regulations and/or the Employment Rights Act (given that you identify umbrellas as organisations that employ their workers). Umbrella workers as defined enjoy the full range of employment rights and failure to comply by one employer, should not justify new laws.

We caution against the use of evidence from or in relation to organisations that are not true employment umbrellas. Many organisations use the description of

“umbrella” and the use of that term is widespread across various disciplines within the recruitment sector. To that extent, the evidence of abuse you refer to is in fact not provided by true employment umbrellas and such evidence should not be considered in relation to the changes to regulation.

We are concerned that the identification of umbrella companies as organisations that pose a particular problem may be too broad a view given that our members do not operate to disadvantage vulnerable workers. However, the proposition to disallow umbrella companies to opt out in contrast to personal service companies, does appear to treat all “umbrella” operators as the same.

In addition, we are concerned that you may have formed the view that umbrella companies only represent low paid workers, and imply that such companies are not entitled to the same rights as other companies.

The consultation paper says that the opt-out “was originally intended to provide flexibility for highly skilled professional personnel in the IT and Finance sector that wanted to operate as limited companies due to tax advantages.”

It further asserts that “in recent years, there has been an increasing trend for employment businesses supplying low skilled temporary workers to require work-seekers to operate through a limited company” and expresses the fear that they are disadvantaged by this.

We welcome the commitment in the consultation paper to “gather evidence on this issue and gauge how much of a problem this is for vulnerable workers” and are willing to co-operate in this process.

The AEMC’s experience is that umbrella companies employ workers that earn monies throughout a very wide price range, in many cases far exceeding the national average income, let alone the national minimum wage.

It is also our belief that those umbrella companies that only pay the very lowest skilled workers, and thus could be said not to be the intended recipients of the opt out entitlement because the workers have no element of business intention, are few and far between. Whilst it may be that such organisations could pose a greater risk of non compliance with existing rules, their operations should not, in fairness, impact upon the operations of the majority who operate the opt out as a matter of free choice and quite properly without detriment.

Conclusions

1. Umbrella companies should not be treated differently from personal service companies. They have exactly the same legal status and they should not be prejudiced commercially by unfair distinction.
2. We reject the inference that umbrella companies represent vulnerable agency workers or that agency workers operating through umbrellas under flexible contracts

are vulnerable. In fact, the opposite is likely to be the case due to the employment laws that protect those umbrella workers who are employed by genuine umbrellas.

3. Organisations that hold themselves out as umbrella companies but that in fact do not offer and apply the full range of employment rights, for example that withhold payments in conjunction with complicit employment businesses, must be distinguished and should be the subject of entirely separate scrutiny and enforcement under existing laws. The AEMC believes that these organisations are likely to be those that exploit workers.

4. The AEMC believes that there are sufficient laws in place to protect all agency workers and that removal of the right to opt out will not improve the position. In contrast, it may result in loss of business for genuine umbrellas with resultant loss of employment status and rights from the disenfranchised agency workers, who would then be pushed into personal service companies, which pay their taxes annually as opposed to monthly payments via umbrella companies.

5. A further consequence of loss of business referred to above would inevitably be the loss of employment by regular employees of the umbrella companies.

6. Existing laws should be rigorously enforced in order to eradicate rogue traders, rather than create new rules and potentially penalise compliant operators. This would maintain the freedom of choice for workers both to operate through umbrella companies that offer a secure employment platform, and to choose whether or not the regulations should apply to their arrangements.

7. Existing laws include the restriction upon employment businesses from making the provision of their work finding services conditional upon a company opting out. The wording of this restriction could be revised to make it easier to apply and enforce against unscrupulous agencies and other operators, but wherever the evidence is that a worker has been forced to opt out the restriction should enable the authorities to apply the appropriate sanction (which we note has recently been toughened).

8. The advantage of an umbrella company in offering a secure employment platform to much-valued workers should not be undermined, but instead should be seen as a positive value, adding to flexibility for the workforce but with sufficient and indeed enhanced levels of protection; the protection that comes with employment, including rights in between assignments, is valuable and this method of engagement should not be singled out as an example of unfair or incorrect practice in any respect.

9. Non compliant employers of any ilk should be singled out under current rules and it would be wrong to apply a broad brush to all in the sector.

10. Flexibility of the workforce is key and any interference with the ability of agencies to operate commercially, so long as there is adequate protection for the

workers (which we say exists from employment umbrellas and existing legislation) should, we say, be avoided.

Agency Workers Directive

It is unclear to us if or how the proposals within this consultation are linked to the consultation relating to the implementation of the Agency Workers Directive.

Within that consultation there is a proposal to treat agency workers operating through umbrella companies differently from those operating through personal service companies with the result that those operating through personal service companies may have an unfair advantage. A consequence may be that more contractors operate through personal service companies with possible resultant tax loss to the Treasury at a time when the Treasury wishes to maximise its income.

We ask why the definition of a worker within that consultation distinguishes a worker providing services through an umbrella from one providing services through a personal service company given that both vehicles have the same legal status and both high skilled and low skilled operate through either vehicle. The parallel with option 5 (page 16) of this consultation is relevant.

We would be very happy to expand on this response or supply further information.

Adrian Marlowe
Director – AEMC

9th June 2009