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Department for Business Innovation and Skills Consultation

Implementing the Posting of Workers Enforcement Directive (July 2015) in Great Britain

Response from the Employment Lawyers Association

24 September 2015

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This Response is set out as follows:

- Introduction (including definitions)
- Responses to consultation questions
- Annex: List of ELA Working Party members

INTRODUCTION (including definitions)

ELA is an apolitical group of specialist employment lawyers and includes those who advise and represent in Courts and Employment Tribunals both employees and employers. ELA has just over 6,000 members. It is not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint.

A Working Party was set up by the International Committee of ELA to consider and comment on the BIS' consultation questions relating to implementing the Enforcement Directive. A list of Working Party members is annexed to this Response. This Response is set out in the order of the consultation questions in BIS' consultation document. Those questions have been re-stated in for convenience. ELA has not responded to BIS' call for evidence questions. We note that this consultation relates to Britain and not to Northern Ireland.

The following terms are used in this Response:

BIS:	Department for Business Innovation & Skills
Contractor:	the contractor engaging the Employer
ELA:	Employment Lawyers Association
Employer:	employer of the posted worker / sub-contractor with a contract for services with the Contractor
Enforcement Directive:	The Posting of Workers Enforcement Directive 2014/67/EU
HMRC:	Her Majesty's Revenue & Customs
Home Country:	the EU jurisdiction from which a worker is posted to Britain

NMW:	National Minimum Wage
Option 1:	creation of an individual right to bring a claim in an Employment Tribunal against the Contractor
Option 2:	state enforcement of unpaid wages
Option 3:	creation of a sanction (financial civil penalty)

RESPONSES TO CONSULTATION QUESTIONS

QUESTION 1:

Please identify your preferred option with reasons why you think it would work best.

1. ELA'S view is that a combination of Options 1 and 2 would work best. Further explanation is provided below.

2. As the consultation paper points out at paragraph 6.41, *"the underlying aim of Article 12 is to ensure that posted workers get paid*." This is reinforced by Recital 36 to the Enforcement Directive which states that "*Compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains and should be ensured through appropriate measures in accordance with national law and/or practice and in compliance with Union law*."

3. We understand that issues have been identified across the European Union in posted workers securing payment of their minimum entitlement in situations involving subcontracting chains. Specific measures via a mechanism of direct subcontracting liability are required to assist them in addressing those problems. We understand that the measures proposed must provide an effective, adequate and proportionate remedy to affected posted workers.

4. We note that BIS favours the creation of a right on the part of each posted worker (in the construction sector) to bring a claim in an Employment Tribunal against the relevant contractor. We support that proposal. However, we question whether the introduction of such a right in itself would provide a sufficiently effective and adequate remedy. This is because of various procedural difficulties in bringing claims in British Tribunals. Our preference therefore would be to introduce such a right combined with the creation of a new HMRC right of action against the contractor, i.e. a combination of Options 1 and 2.

5. We agree that on the face of it Option 1 is the closest implementation of the requirement set out in Article 12(2) of the Enforcement Directive. However, we note that existing NMW laws provide all workers employed/engaged in Britain with an option of either bringing a claim against the employer or of making a complaint to HMRC with a view to HMRC taking the necessary action. This no doubt recognises the fact that workers paid at the minimum wage level will generally lack the resources to bring legal claims and may well fear victimisation if they do so. Although trade unions can provide valuable assistance to such workers in bringing their claims there will be many who do not – for whatever reason – belong to a union.

6. The above issues relating to domestic national minimum wage enforcement are likely to be compounded in the case of workers posted to the UK from other EU jurisdictions. Reasons for this include the following.

   6.1 Many posted workers will not be familiar with legal systems, will not be dealing with UK legal systems in their first language and will be more dependent on other assistance. They may be less aware of the limited available support (e.g. ACAS or sources of pro bono advice) and may not be able to afford lawyers.

   6.2 Bringing a claim in the courts of the posted worker's Home Country is unlikely to be practical given the need to apply British law.

   6.3 Owing to recent changes to UK employment laws there are a number of formidable procedural hurdles to be overcome before a claim can validly be made which, again, could easily turn out to be traps for the unwary. We have in mind the early conciliation procedure, time limits and the incidence of tribunal fees and the complex remission system. (Although we acknowledge that fees could in due course cease to operate in Scotland and that the Government is currently reviewing the operation of the current fees regime.)

   6.4 Workers may simply not know the legal identity of the relevant Contractor whereas it will be easier for HMRC to secure information and make relevant determinations as part of its investigations.

6.5 In a considerable number of cases workers would bring such proceedings after their posting had ceased and when they were no longer physically present in the UK.

6.6 It remains to be seen how easy it will actually be to bring such a claim against the Contractor, e.g. can the Contractor be joined to proceedings against the employer from the outset or will certain steps first have to be taken against the employer before such a claim can be made against the Contractor. If the latter, how easy will it be for such workers to demonstrate compliance? See our further comments below in this regard.

6.7 Enforcement by workers of any Tribunal award could well be very difficult, particularly for posted workers. A recent survey of over 1,000 successful Employment Tribunal claimants conducted by the Ministry of Justice found that under half (49%) had received payment in full, a further 15% had only received partial payment and 35% had received no payment at all. Again, all necessary steps in this regard would need to be taken by the posted worker in an unfamiliar jurisdiction.

7. The prospect of enforcement by HMRC is more likely to encourage Contractors and Employers to comply, for example, for the following reasons.

7.1 HMRC is likely to take action in relation to a number of affected posted workers rather than in relation to one isolated individual which is likely to mean that potentials costs for non-compliance will be higher.

7.2 Action taken on behalf of a number of individuals by HMRC is more likely to come to the attention of prospective future Contractors, i.e. there will be greater commercial incentives to settle claims and to comply for Employers who want more business.

8. We accept that providing for a combination of Options 1 and 2 at first sight places posted workers in a more favourable position than those of other workers. We consider that this could be justified in order to meet the specific disadvantages that they would otherwise suffer.

QUESTION 2:

a. What might a Contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

b. How would they prove this?

9. Option 1 envisages that the Contractor will be able to defend claims brought by posted workers in circumstances where the Contractor has carried out due diligence in respect of the Employer.

10. In a sub-contracting situation, a prudent Contractor will typically seek the following assurances from the Employer, by way of warranties, in order to mitigate the risk that they are joined as a party to a claim against the Employer for non-payment of wages.

    10.1 Have any claims for non-payment of wages/breach of NMW legislation been brought against the Employer in the preceding 12 months? Note: where workers are posted from another Member State, the reference period would need to be adjusted to take into account local limitation periods (given that a history of breach in another Member State will also be a relevant consideration).

    10.2 Has the Employer been named as an organisation that has failed to meet its obligations to pay at NMW rates, whether under the UK regime of naming such employers or under a local equivalent?

    10.3 Is the Employer the subject of an enquiry and/or investigation into compliance with NMW laws, whether in the UK or otherwise?

    10.4 Have any penalties for breach of NMW laws been imposed on the Employer?

11. Where an issue is identified, the Contractor will usually insist on robust indemnities in any sub-contracting agreement, having regard to its potential exposure. The practical implications are addressed in greater detail under Question 3 below. Note that current practices of seeking information, warranties and indemnities for the Contractor's protection does not equate to comfort that wages are actually delivered to workers.

12. We do not consider that it will be practical for Contractors to collect and analyse raw data to demonstrate compliance with NMW laws. NMW laws, eg in terms of the remuneration that is included for such purposes and the calculation of working hours for the relevant reference period, is very complex and the costs and practical difficulties entailed in securing the relevant data from the Employer would be demanding.

13. Simply requiring Contractors to check a public register in relation to an Employer's historical non-compliance with NMW etc is unlikely to be sufficient to procure compliance, i.e. with delivery of wages due to posted workers, and would effectively leave posted workers without the remedy intended by the Enforcement Directive.

14. It would be possible to require Employers to provide certain information to Contractors, ie to introduce a regime similar to the regime applied under the Transfer of Undertakings (Protection of Employment) Regulations. We do not recommend this course of action. In ELA's view it would be more flexible and effective if Contractors and Employers use commercially agreed warranties and indemnities, formulated on the assumption that the Contractor is materially at risk.

15. It may be helpful to specify that the Contractor should undertake some minimum entity checks, i.e., that the Employer is genuine. Our existing anti-money laundering legislation may provide a model, i.e. a requirement to seek documents demonstrating identity, ownership etc. This aspect of the Enforcement Directive does not appear to have been addressed.

16. It will be difficult in practice for Contractors to procure Employer compliance or to check that an Employer has complied. The Enforcement Directive would protect posted workers more effectively if there were no due diligence defence at all, or at least if the bar were high. That would encourage Contractors to push the risk on to the Employer commercially and help posted workers more effectively in the event that an Employer has no funds to meet its obligations. The flip side of that is, of course, that Contractors may be obliged to accept financial and reputational responsibility for compliance failings of a third party over which it has no direct control. This may particularly disadvantage smaller Contractors who are less able to secure compliance or comfort from Employers, or insurance at reasonable cost. ELA considers the appropriate balance between Contractors and posted workers' interests to be a political matter.

QUESTION 3:

a. If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might Contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

16. In our view the principal protection Contractors would seek in most cases would be an indemnity from the Employer. Beyond that, the decision whether to undertake due diligence or simply discharge claims will likely depend on the complexity of the steps they are required to take to be sure of succeeding in any such defence, see further below.

b. Irrespective of whether due diligence has been done, do you think the Contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

c. Under what circumstance would the Contractor choose to contest a claim?

17. It should not be assumed that contractors will simply settle such claims on the ground that the amount of any claim is likely to be small. The decision whether to contest or settle a claim is likely in each case to depend on a number of factors including for example the following:

    17.1 the number of workers making claims and whether they have legal or other assistance;

    17.2 the resources available to the Contractor to defend the claims (e.g. some may have annual fixed price retainers with advisers covering such claims in any event);

    17.3 whether the Contractor considers that it has a defence to the claims, whether pursuant to the new due diligence provisions or otherwise (e.g. if the claimants are not posted workers but, say, self-employed);

    17.4 the availability, and terms, of any indemnity protection (and the creditworthiness of the indemnifying party).

QUESTION 4:

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the Contractor?

18. It would be sensible to align HMRC's authority and duties with those that are currently provided for under NMW legislation in relation to workers who are not posted. We would recommend that broad discretion to approach a Contractor (or potential Contractor) be given to HMRC where an Employer is approached.

QUESTION 5:

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

19. Option 3 is not our preferred Option. Sanctions that apply to directors personally can be motivating, particularly for multinationals. However, we do not think this is the best option.

QUESTION 6:

Should the implementation of Article 12 go beyond the construction sector?

20. Not unless there is evidence of a comparable level abuse in other sectors. The requirements for Contractors are potentially quite onerous in terms of diligence, negotiation of contract terms and dealing with any issues arising.

QUESTION 7:

Do you have any other comments on the proposals?

21. It would be helpful if attention could be given to the definition of "posted worker" to enable Contractors and Employers to understand their responsibilities clearly. We recognise that it is difficult for BIS to deal with this in isolation given the term is contained in a European Directive but more formal guidance may be helpful.
22. ELA notes that BIS does not intend to propose legislation that will allow claims where there is a longer contractor chain. The proposed new enforcement right is currently only against a "first stage" Contractor. It would be helpful if BIS could include a mechanism that will assist in avoiding abuse, for example, the creation of additional group companies to own the Contractor. The legislation might be more effective if other group companies could be joined where there is a sufficient level of ownership or control and the Contractor has insufficient funds to meet claims.
23. ELA considers that it would be helpful to offer translation of core information relating to employment rights, not just for posted workers who may not choose to make enquiry of a public authority, but also for other interested parties such as potential inward investors and UK residents. Note that many employees do not expend great energy in make enquiries until things go wrong – translations freely available on the internet would help potential posted workers before they are posted. Translations are more likely to be useful, accurate and be produced more cost efficiently if produced once centrally with due care. Misunderstandings produced by poor translation can be unhelpful to all parties and considerable resource is

currently expended on translating on an ad hoc basis (i.e. Britain as a whole is wasting resources in duplication of effort).

24. In order to improve the potential for risk-based inspection it may be helpful if a requirement to report numbers of posted workers to HMRC were imposed. This could be linked administratively to payroll/social security compliance.

Employment Lawyers Association
24 September 2015

Annex

List of ELA Working Party Members

Juliet Carp of Dorsey & Whitney (Europe) LLP (Chair of ELA's International Committee)

Caroline Carter of Ashurst LLP

Peter Frost of Herbert Smith Freehills LLP

Annabel Mackay of Addleshaw Goddard LLP