COVINGTON

A Review of Modern Working Practices in the UK

July 12, 2017

Employment

Overview

In October 2016, the UK Prime Minister, Theresa May, commissioned Matthew Taylor, the Chief Executive of the Royal Society of Arts and former policy adviser to Tony Blair, to look at how employment practices need to change in order to keep pace with modern business models.

The Taylor Review of Modern Working Practices (the "**Review**") was published on July 11, 2017. Underlying the measures and recommendations put forward in the 114-page document, the Review makes the fundamental argument that "good work for all should be a national priority."

While the "traditional" full-time employment model still dominates the UK labour market (with the percentage of workers in full-time employment having declined only 1.6 percent over the last 20 years, to 63 percent), the Review acknowledges that there are significant labour market challenges ahead, including continued poor productivity, slow real wage growth, and increasing automation. In particular, the Review discusses how digital platforms and other new business models have changed the way we work and considers whether and how the existing regulatory employment framework should be updated in response.

The wide-ranging recommendations encompass numerous aspects of the working relationship. Many of these were anticipated, such as the clarification of employment/worker status and greater protections for those (often in the gig economy) who are subject to considerable control at work but who are nevertheless classified as self-employed. Other recommendations go further than many anticipated, including those calling for significant reforms to the employment tribunal process and personal tax system.

This alert outlines the most significant recommendations in the Review and briefly considers their implications.

Dependent Contractor

Despite representations from a number of stakeholders to the contrary, the Review proposes that the UK Government should retain the current three-tiers of employment status: employee, worker, and self-employed. However, those who are eligible for worker rights should be renamed "dependent contractors" and should be more easily distinguished from both employees and the self-employed.

The Review calls for a new test to determine dependent contractor status, with greater importance to be given to the degree of control exercised by the employer, and less emphasis on the requirement to perform work exclusively and personally. It follows that substitution clauses—purporting to give individuals the right to appoint somebody else to provide the services—should not automatically preclude a finding of worker/dependent contractor status. Further, the Review recommends that the Government provides individuals and employers with access to an online tool that determines employment status in the majority of cases.

Gig Economy

The Review recognises that genuine "two-way flexibility enabled by digital platforms" needs to be preserved, as flexibility is a key motivator for the majority of those who work in gig economy industries. However, for the national minimum wage ("**NMW**") to apply fairly for those working in the gig economy, changes would need to be made to the way in which working time is calculated. Digital platforms do not place limits on when individuals can log onto an app and current NMW legislation would enable individuals to take advantage of digital platforms by logging on and being paid for logged-on time when there is no (or limited) work to do.

As the Review explains, where piece rates are currently used, there is a requirement to issue a notice before the start of the pay reference period, explaining what the "mean hourly output rate" is and stating the rate or sum to be paid to the worker for the performance of the task in question. With the vast amount of data available to both digital platforms and the Government, the existing piece rates framework might be adapted so that gig economy workers continue to be compensated based on their output, whilst at the same time earning the NMW and retaining the flexibility that so many seek.

Aligning Employment and Tax Frameworks

The Review calls for the Government to ensure that Employment and Tax Tribunals are aligned in the application of employment status frameworks, with those who are determined to be workers/dependent contractors taxed as employees. Currently, workers may either be taxed as employees, or as self-employed, and there is a lack of certainty of outcome that the Review argues is caused, in part, by inconsistency in the legal approach taken to determining employment status.

Other Key Recommendations

- The introduction of a statutory right to receive a written statement of employment particulars on the first day of work (rather than within two months) for both employees and dependent contractors, and ensuring the information contained is relevant to either an employee or dependent contractor. Employers who fail to comply could face a claim for compensation.
- In order to preserve continuity of employment for workers who take breaks between jobs or periods of engagement, the Review recommends extending the permitted break in service before continuity of service is lost from one week to one month.
- The Government should address again the disparity between the level of tax applied to employed and self-employed labour, particularly in respect of National Insurance ("**NI**") contributions. Employers currently pay 13.8 percent of salary in employer NI contributions; the self-employed pay none. The Review expresses concern that the

current gap encourages employers to label the relationship as one of self-employment, even if that does not reflect the underlying realities.

- Reform Statutory Sick Pay ("**SSP**") so that all dependent contractors are eligible to receive it from the first day of work and give the UK tax authority, HMRC, greater responsibility to enforce the "basic set of core pay rights" for the lowest paid workers (i.e., NMW, SSP and holiday pay).
- Extend the Information and Consultation of Employees Regulations in respect of employee engagement in the workplace by applying them to employees and dependent contractors and reduce the employee threshold number for requesting the negotiation of a workplace representative body from 10 percent of the relevant workforce to 2 percent.
- Work with the Low Pay Commission to raise the NMW rate for non-guaranteed hours so that individuals on zero hours and short hours contracts are paid better for being more flexible and enduring greater uncertainty.
- Remove what is known as the "Swedish derogation" with respect to agency workers, which allows them to opt out of the right to equal pay (compared with permanent employees of the client) on the ground that they are paid a fix rate whether they work or not. Research suggests fixed rates are in many cases too low and results in breaches of NMW rules.
- Abolish unpaid and potentially exploitative internships, which the Review considers reduce social mobility.

Going Forward

The Government has said that it will respond to the recommendations made in the Review later this year, though Theresa May has already given an indication that nothing more will happen in the short-term following the Conservative Party's loss of its majority in the recent UK General Election. Whilst there is potential economic value in implementing a number of the Review's recommendations, it remains to be seen whether Theresa May will secure the support necessary to make any meaningful reforms.

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