

CBI response to the Director for Labour Market Enforcement's 2020/2021 call for evidence

The CBI speaks for 190,000 businesses, employing 7 million people, which represents about one third of the private-sector workforce. This response sets out the CBI's views on the current labour market enforcement landscape and the ways that businesses believe it could be improved.

Recommendations:

The Director for Labour Market Enforcement should prioritise:

- Delivering an enforcement culture that balances helping willing businesses to adhere to the rules with firm penalties that act as a deterrent against non-compliance.
- Strongly lobbying the government for umbrella companies to be brought under the remit of the Employment Agencies Standards Inspectorate, as promised in the Good Work Plan.
- Advocating increased investment in the employment tribunal system to ensure it fulfils its role as an easily accessible, speedy and inexpensive resolution system.
- Introducing a system of joint responsibility for employment law breaches in supply chains, co-created with a broad range of stakeholders.

Businesses see labour market enforcement as vital to maintaining a level playing field

The UK's strong framework of employment rights can only meaningfully protect individuals where it is effectively enforced. Effective enforcement mechanisms underpin a well-functioning labour market by upholding employment rights and protecting compliant businesses from operating on an uneven playing field.

Nearly all employers take their obligations towards staff very seriously and, as a result, most people in the UK do not have to pursue enforcement action. Even so, it is imperative that robust routes to enforcement are in place where employers do not meet their obligations to staff.

There is a near unanimous view among CBI members (95% of respondents) that UK labour market enforcement could be improved, with 63% emphasising the need to increase employers' knowledge of their responsibilities.¹ This must be a fundamental part of the Director for Labour Market Enforcement's role as enabling willing businesses adhere to the rules is the best route to sustainably improving levels of compliance. This will be achieved by fostering a culture within the enforcement agencies of working in collaboration with businesses, particularly where they demonstrate that they will change practices and improve standards following breaches.

A sector where current enforcement practices are wholly inadequate is umbrella companies. Properly run umbrella companies perform an important role in our labour market as they reduce the commercial, employment and statutory risks and costs associated with the use of temporary workers. However, it is currently far too easy for non-compliant umbrella firms to operate without fear of punitive action, promising workers higher take-home pay and then falsely classify them as

¹ *Working Together*. CBI/ Pertemps Network Group Employment Trends Survey 2017, December 2018

self-employed. This activity undermines workers and compliant umbrella firms in a range of sectors and is particularly prevalent in construction. This enforcement gap could be further exacerbated by the upcoming IR35 changes which will see more people looking to engage with umbrella companies.

Stronger regulation of umbrella companies is desperately needed. The CBI supported the decision to bring umbrella companies under the remit of the Employment Agency Standards Inspectorate (EASI), and members have been disappointed by the lack of progress. This move would ensure greater oversight of umbrella firms and start to level the playing field. There could also be a role for the EASI to promote sector accreditation of umbrella firms in line with the models run by the Freelancer & Contractor Services Association (FCSA) or Recruitment & Employment Confederation (REC). These organisations encourage their members to go beyond minimum compliance by outlining the benefits of doing so and sharing best practice.

Helping businesses to adhere to the rules is key to improving compliance...

CBI members are clear that the most helpful things that enforcement bodies can do is to clearly communicate what is required of them. This is the most sustainable route to better enforcement because most firms want to comply with the law and do so when they clearly understand their responsibilities. This approach would free up more time for the enforcement bodies to focus on egregious and repeat offenders. Providing information and support that enables businesses to meet their responsibilities would also help to foster greater business confidence in the UK's labour market enforcement.

An area which would greatly benefit from a more collaborative approach is enforcement of the National Minimum Wage (NMW). CBI members have experienced situations where HMRC enforces an interpretation of the law that is not easily accessible to employers. A growing number are resigned to the possibility that they will be found non-compliant if inspected by HMRC despite actively seeking to comply with the minimum wage. This is not due to malintent or oversight, but because they do not believe that HMRC clearly sets out what it wants to see from businesses ahead of inspections or manages the inspection process effectively. One member told us of an occasion where they were being investigated by HMRC and the official changed five times. This meant that every time a new official took control of the process, the company was required to provide new evidence and begin the procedure over again. This suggests a complete lack of coordination between HMRC officials.

CBI members are also concerned that HMRC is initiating enforcement proceedings against companies on issues that it has not clarified in guidance, such as the enforcement of Annualised Hours. This has significantly eroded business trust in HMRC as such inconsistencies make it unnecessarily hard for firms to comply with the rules. The problems in regulations that create these situations also lead to inefficient use of limited enforcement resources so the DLME should lobby government to clarify legislation where necessary.

CBI members have highlighted the cultures of the Health and Safety Executive, Environmental Health, and Equality and Human Rights Commission as ones which should be emulated because of their communicative and coaching approach. The bodies are seen to be clear in their expectations of firms, willing to help them make necessary improvements to be compliant, and helpful to firms that want to go above and beyond the legal minimums.

CBI members also welcome assistance when it comes from outside the enforcement agencies. For example, in the agricultural sector the Food Network for Ethical Trade (FNET) has played an important role in supporting supplier and retailer members to understand the challenges and

solutions on issues like responsible recruitment and effective worker engagement. As well as ensuring that minimum standards are met, the enforcement agencies also have an interest in firms going beyond them as this can free up enforcement capacity. The DLME should consider working more closely with sector bodies and networks to help share best practice throughout the business community.

...but balancing this with strong penalties and deterrence mechanisms is important

While CBI members want a more collaborative and risk-based approach to instances of technical or accidental non-compliance, they recognise that this must be balanced with effective deterrence mechanisms and penalties. CBI members support strong penalties for repeat or egregious non-compliance as they are vital to maintaining a level playing field. They support, for example, the introduction of proportionate fines levied against companies that fail to publish compliant modern slavery statements after first being notified of the breach. Such an approach holds wilfully non-compliant businesses accountable and ensures that businesses adhering to the rules are not at a disadvantage to those that don't.

Fixing the employment tribunal system is essential to ensuring fairness for employers and workers

Since the creation of the Director of Labour Market Enforcement role, the government has focussed on increasing the capacity of proactive enforcement agencies, particularly the GLAA and HMRC. Since the vast majority of employment rights are upheld via employment tribunals, it is also imperative that this mechanism is operating effectively for the UK's labour market enforcement.

Over the past two years an increasing number of CBI members have experienced long delays and dysfunction within the employment tribunal system. One submitted a request for the tribunal to clarify an unclear claim through a Preliminary Hearing but received no reply. They then attended the hearing where they were asked why they did not request a Preliminary Hearing to clarify the details of the claim.

In another example, the client of one of the CBI's legal members agreed a settlement with a condition that the firm would make a payment to the employee within a certain number of days after the tribunal confirmed that the claim had been dismissed. The employee wrote to the tribunal explaining that the matter had been settled, however it took the tribunal over 5 months to process the request and formally dismiss the proceedings. This left the employee waiting on their payment for a significant amount of time despite attempts to chase the tribunal by both parties. Such examples are commonplace and suggest a clear breakdown of process within the tribunal system – with neither party able to swiftly access justice – that indicates its lack of resource due to underfunding.

The system in its current form is not able to deal effectively with the volume of cases that are being brought. Compared to June 2018 there has been a 12% increase in outstanding Employment Tribunal caseloads and, since the abolition of the ET fees, the number of single claims has increased quarter on quarter.² The impact of these problems cannot be understated as they leave both employers and workers managing costly uncertainty and important legal precedents are left unset. Employment status claims are a recent example where long ruling delays have left workers and businesses unsure of their rights and obligations. It is only with recent Supreme Court rulings that greater clarity has been provided.

² *Tribunal Statistics Quarterly, April to June 2019*, Ministry of Justice, September 2019

CBI members are clear that the tribunal system must be returned to its original vision as an easily accessible, speedy and inexpensive system for occasions when disputes between businesses and workers cannot be resolved by agreement. This should include increased staffing for the tribunal system, investment in technology and streamlined processes, and the reintroduction of a proportionate fees system that acts as a nudge for both parties to consider the merits of a fair settlement whenever possible. Such a fees system should be designed in a way that means it is never a barrier to justice.

The introduction of joint responsibility in supply chains could help to improve working conditions...

Most firms take the stewardship of their supply chains very seriously and are continually updating their procurement procedures to ensure that they do business with reputable suppliers. They understand that they have a responsibility to respond appropriately when they become aware of labour exploitation in their supply chain, whether via due diligence, blowing the whistle, or working with state authorities or trade unions.

CBI members continue to support the principle of joint responsibility and would welcome the opportunity to progress the idea further with the DLME. A private notification of an employment breach in a supply chain would support firms with their ongoing due diligence and enable them to use their purchasing power to improve the employment practices of their suppliers. Such a mechanism could help to resolve non-compliance in a timely way, share best practice, and encourage information sharing throughout supply chains.

...however, the rules must be fair, proportionate, and reflect the complexities of modern supply chains

Modern supply chains are extremely complex, with suppliers providing goods and services to multiple firms and with products often crossing back and forth over multiple borders. Firms are acutely aware that they do not have full control, either in commercial or legal terms, of their supply chain. Joint responsibility must be designed with this firmly in mind and with the knowledge that the rules must be fair and proportionate with what can be reasonably expected of firms at the top of supply chains to know, have resource to investigate and the control to remedy.

Joint responsibility will be most effective if it provides a window for firms at the top of a supply chain to act as a positive force for driving up employment standards. So, it is important to ensure that the system is not designed in a way that makes it less risky and more cost-effective for firms to instantly terminate their relationship with a supplier as soon as they are notified of a breach. Otherwise this would likely lead to business being moved out of the UK. For joint responsibility to succeed, the right balance must be struck – it also must be an appropriate course of action for a firm to cease trading where a non-compliant supplier has resisted addressing the issue as this provides top-tier firms with essential leverage.