

FUTURE WORLD OF WORK

Submission to the BEIS Committee inquiry into the future world of work

Chartered Institute of Personnel and Development (CIPD)

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ABOUT THE CIPD

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has 140,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

ACKNOWLEDGEMENTS

The CIPD would like to thank those HR professionals who are members of our policy forum and/or Employment Relations Network whose expertise and insights helped to inform this response.

In October 2016 the CIPD commissioned YouGov to conduct a survey of 508 HR professionals on their experience and views in relation to employment regulation to help inform this response. For further details, and for the data, please see Appendix 2.

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EXECUTIVE SUMMARY

On worker status

- We recognise that the employment category of 'worker' can be the most difficult to define. The term is contained across different employment rights, with no corresponding definition for tax purposes. Further, 'workers' can display characteristics of both employee and self-employed status.
- Despite this, we believe that on balance, despite its ambiguities, 'worker' is a useful category that should be maintained to cater for the more flexible ways of working and new business models that are emerging.
- We believe that the definition of worker should be clearly and consistently defined in statute as it is currently contained across a number of different pieces of legislation.
- We call on the Government to launch a separate consultation to consider whether a clearer basis of demarcation is possible between 'employee', 'worker' and 'self-employed', which maps clearly across employment rights, tax and benefits.
- We welcome the establishment of the Cross-Government Working Group on Employment Status comprising officials from HMRC, HMT, BEIS, DWP and OTS, and look forward to its conclusions about the feasibility of developing a uniform cross-government test, or set of tests, across tax and employment rights.
- We also believe that there should be an amendment to the *Employment Relations Act 1996*, requiring employers to provide all workers with a written copy of their terms and conditions after two months of employment. Currently, this right extends only to employees.
- In addition, CIPD believes there may be a case for workers to be automatically classified as 'employees' after two years of continuous work for one organisation.

On the balance of benefits between worker and 'employer'

- Overall, the CIPD believes that the UK's flexible labour market strikes an appropriate balance between providing protections for agency staff and flexibility for employers. However, we also believe that there are a number of ways in which the system can be improved to reduce instances where employers are not sure of their obligations or where individuals are unaware of their rights or feel exploited.

On the protection and support of agency workers

- Laws concerning agency workers can give rise to confusion for all those involved, in part due to the often complex nature of the triangular or quadrilateral relationships between agency, hirer and individual.
- We recommend that Government conducts a review of the statutory framework affecting agency workers, including the 12-week qualifying period. While agency workers' rights must continue to be protected, the current regulations are not having the desired impact, are perceived as being poorly drafted and complex to implement.
- The Government should develop stronger guidance outlining employment status and associated rights. It should also raise awareness of the compliance obligations that employers are under, using new and existing communication channels to reach those operating at the margins of the labour market.
- The CIPD believes there is an argument for agency workers on zero-hour contracts to be given the right to request regular hours after 12 months working for one organisation in which they have been working a consistent pattern of hours each week.
- We call on the Government to develop and implement a more comprehensive enforcement framework. We welcome the proposals set out in the 2015 BIS consultation on tackling exploitation in the labour market and the new cross-Government approach to labour market enforcement. However, we are keen to hear what resources will be made available to these new initiatives, including to the new Director of Labour Market Enforcement and the new Gangmasters and Labour Abuse Authority (GLAA). Without the right support and expertise in

place, efforts to monitor and enforce compliance with existing employment rights will be ineffective.

On restricting business use of agency workers

- We believe that there should be no need to restrict the use of agency workers by organisations if the current statutory framework of rights is adequately communicated and enforced.

On minimum wage enforcement and the Low Pay Commission

- We call on the Government to allow HMRC additional resources to enforce minimum wage compliance to prevent workers from being exploited and responsible employers from being undercut. Both employers and employees will benefit from enhanced communication from the Government on pay.
- The Low Pay Commission should be given the remit to consider the impact of inflation on the value of the National Minimum Wage (NMW) and the National Living Wage (NLW). It should also be allowed additional resources to provide support to employers, especially micro and small businesses.

On the role of trade unions

- Trade union organisations can offer some gig economy workers a stronger voice and increased bargaining power and access to a range of professional service such as legal advice and insurance at lower costs than an individual could secure. But it may not be realistic to expect unions to establish a major presence given the significant barriers to organisation and the balance between the costs of recruiting and servicing such members and likely subscription income.

OUR RESPONSE

1. *Is the term worker defined sufficiently in law at present? If not, how should it be defined? What should be the status and rights of agency workers, casual workers, and the self-employed [including those working in the 'gig economy', for the purposes of tax, benefits and employment law?*

- 1.1. The category of 'worker' for employment purposes carries with it ambiguity. It can be the most difficult category of employment status to define because workers tend to display characteristics of both employee and self-employed status. Further, the definition of 'worker' is contained across different employment rights [although the definitions in statute are broadly similar], with no corresponding definition for tax purposes. We believe that the definition of worker should be clearly and consistently defined in statute as it is currently contained across a number of pieces of legislation.
- 1.2. 'Worker' can be seen as a vehicle for giving some statutory protection to an individual who is not clearly (or clearly not) an employee but who, under a contract of employment, 'undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or undertaking carried on by the individual' (ERA 1996 s 230).
- 1.3. In practice, courts and tribunals have tended to find worker status where it's not clear that either 'employee' or self-employed status is appropriate. Case law suggests that the courts have actively sought to use this default employment status to protect people where employers have made clear their intention *not* to award them the status of 'employee'.

Despite ambiguity, 'worker' status can be useful

- 1.4. There are a number of ways in which the ambiguity associated with 'worker' can be addressed, as considered by the Cross-Government Working Group on Employment Status.
- 1.5. One option is to remove the category altogether for employment rights and tax purposes. The CIPD, however, does not support this solution because of the potential loss of rights currently afforded to workers and set out specifically in laws relating to areas such as working time, national minimum wage and part-time status. If 'worker' status were to be removed to create a single employment status, 'employee', (which would, in theory, help to align with the binary employment status framework of 'employee' versus 'self-employed' for tax purposes), we urge the Government to undertake a full consultation on this question as it could risk a number of unintended consequences.
- 1.6. Another is to amend 'worker' status for employment rights to confer workers with 'employee' status, so they can benefit from the full range of individual rights applying to employees – either at the point of recruitment (and so effectively removing 'worker' status entirely) or after a defined length of service working for the same employer. The legal boundary between 'employee' and 'worker' is often blurred. Currently, 'workers' benefit from many of the same employment rights as 'employees', although they are excluded from a number of rights including maternity, paternity, adoption leave and pay and unfair dismissal. As the latter right is only available (unless on automatically unfair grounds) to employees after two years in continuous employment, employers would not be under much additional regulatory burden if people employed by them for longer than two years were to assume 'employee' status.
- 1.7. Our view is that, in the context of emerging new business models, such as those operating in the gig economy, it would be prudent to keep 'worker' status. In this context, 'worker' status could help to cater for the less traditional and more flexible ways of working that are emerging and the range of motivations that people have for working in the gig economy.¹

¹ In the US, academics from Princeton and Cornell universities have made calls for legislation to create a [new legal category of workers](#), called 'independent workers... to occupy a middle ground between the existing categories of employee and independent contractor' [the only two categories of employment status currently available in the US]. This would enable businesses 'to provide benefits and protections that employees currently receive without fully assuming the legal costs and risks of becoming an employer.' Therefore, it could be viewed as fortunate that the UK already has this ['hybrid of employees and self-employed status'](#) that affords some enterprises the flexibility of affording 'workers' with some

- 1.8. Maintaining the status quo would also recognise that employers might wish to take on individuals for a period without them assuming the full range of obligations of an employer and allow for a degree of 'churn' in the labour market.

Aligning employment status across employment rights and tax

- 1.9. The lack of alignment in how employment status is tested/defined for employment and for tax purposes is a contributory factor causing confusion and lack of certainty for businesses and individuals. Currently an individual could be classified as self-employed for tax purposes while being simultaneously defined as a 'worker' for employment rights purposes.
- 1.10. Therefore we call on the Government to launch a separate consultation to consider whether a clearer basis of demarcation is possible between 'employee', 'worker' and 'self-employed', which maps clearly across employment rights, tax and benefits.
- 1.11. We welcome the establishment of the Cross-Government Working Group on Employment Status comprising officials from HMRC, HM Treasury, BEIS, DWP and Office of Tax Simplification (OTS). We need a serious consideration of the feasibility of a uniform cross-government test, or set of tests, across tax and employment rights, as recommended by Julie Deane OBE in her independent Self-Employment Review. We, therefore, look forward to the Group's conclusions about the advantages and challenges of developing such a single test and the publications of its recommendations, due in early 2017.

Closing the 'employee shareholder' status

- 1.12. We also welcome the Government's intention to legislate to close the additional employment status of 'employee shareholder', introduced by the Coalition Government for workers to waive certain rights in exchange for a shares in the company, which was an unnecessary and scarcely used category that could potentially further complicate the area of employment status.

Employment status alone cannot protect workers from other abuses

- 1.13. Finally, if it were possible to clarify issues around employment status, this would not in itself guarantee better protection for individuals. Any changes to employment status in isolation will not remedy any malfunctioning of the rights that are awarded to people when engaged for their labour. For example, 'atypical' or non-standard forms of employment limit either the duration of employment or the number of hours worked and this may have implications for pay, hours, holidays and/or job security beyond someone's employment status – atypical workers can have either employee or worker status. An individual's rights to pay, hours, holiday etc. are not solely dependent on employment status, but are determined by the terms of the employment contract.

2. For those causal and agency workers working in the 'gig economy', is the balance of benefits between worker and 'employer' appropriate?

- 2.1. If the current regulatory framework for protecting agency workers and regulating the use of temporary work agencies is upheld by both agencies and end-users or hirers, we feel that the current framework is adequate, particularly since the introduction of the 2010 Agency Workers Regulations and 2011 Agency Workers [Amendment] Regulations (together with the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and 2016 Amendment Regulations and other relevant employment laws that apply to workers).²

protections while not requiring compliance with the full set of employment rights afforded to 'employees'.

² The 2010 and 2011 Regulations fulfil the original dual aims of the Temporary Agency Workers Directive [from which the UK Regulations are transposed] by striking a fair balance between affording adequate protection and rights at work to temporary agency workers, while recognising the flexibility that temporary agency work brings to the labour market. The Regulations establish equal treatment for temporary agency workers with permanent employees and, as such, in addition to 'day one' rights relating to facilities, after 12 weeks working for the same organisation, agency workers are entitled to the same basic conditions

- 2.2. However, the CIPD believes that there are a number of ways in which the system can be improved to reduce instances where employers are not sure of their obligations or where individuals are unaware of their rights or feel exploited (see answer to question 3 below).

Preview of exclusive CIPD survey of gig economy workers

Forthcoming CIPD research suggests that the individual circumstances of different gig economy workers will decide the extent to which the balance of benefits of working in the gig economy are appropriately shared between worker and employer.

For example, the research based on a survey of more than 400 gig economy workers, shows that only a relatively small minority of respondents report that the gig economy work they do is their main job. The most popular reasons given by gig economy workers for working in the gig economy is that it allows them to boost their overall level of income and/or is a short-term solution to achieving an end goal, such as buying a car or going on holiday.

The data suggests that gig economy work is, in many cases used by casual and agency staff as a means of topping up income rather than as a standalone form of employment. This finding is reinforced by data from the survey showing only a very small proportion of gig economy workers say they are only working in the gig economy because they could not find a traditional job with an employer. In terms of income security, gig economy workers are evenly split between those who are satisfied and those that are dissatisfied on this measure, highlighting why it is difficult to generalise on the balance of benefits between gig economy worker and employer.

The survey also shows that while a majority of gig economy participants agree that people working in the gig economy make a decision to sacrifice job security and workers' benefits for greater flexibility and independence, a similar proportion believe the Government should regulate the gig economy so that all working in it are entitled to receive a basic level of rights and benefits (e.g. NLW/holiday pay etc.).

CIPD believes that rather than introducing new legislation to seek to guarantee minimum employment rights for all gig economy workers, Government should do more to raise awareness about employment status and existing employment rights. CIPD's research on zero hours contracts shows a lack of awareness among many employers and zero hours contract workers about the employment status of workers and the rights they are entitled to [access research [here](#)].

3. *What specific support should there be for the protection and support of agency workers and those who are not employees? Who should be responsible for such provision – the Government, the beneficiary of the work, a mutual, the individual themselves?*

- 3.1. As outlined above, we believe that the current balance between protection for casual and agency workers and flexibility for the 'employers' is right (see 2.1).
- 3.2. The majority view amongst the HR professionals we have surveyed is that temporary agency workers should be entitled to the same basic conditions of employment after a 12-week qualifying period, with 44% agreeing with this statement, 19% disagreeing while 13% don't know. However, the agency workers laws and the rights they afford to temporary agency workers (as well as where responsibility lies for implementing them) can give rise to confusion for all parties – agency, hirer and individual.
- 3.3. The HR professionals we surveyed were mixed in their views on these requirements: overall, 37% said that they find these laws 'well drafted and easy to apply' while almost the same proportion (31%) think they are 'not well drafted and difficult to apply'. A further 34% responded that they didn't know, which suggests a possible lack of awareness and confusion

with regard to rights such as pay, working hours and holidays.

about the role and remit of agency workers' rights.

- 3.4. Some of this confusion is attributable to the nature of the triangular relationships (or even quadrilateral in the case of umbrella arrangements) that, to a large extent, are inherent in the contractual arrangements that arise when (typically) an agency enters into a contract of employment with the agency worker who is then supplied by the agency to work for the agency's client or 'end-user', with the agency then invoicing its client and being responsible for remunerating the worker.
- 3.5. These complex, contractual arrangements require good working relationships between all parties, with an effective and consistent flow of information on working conditions and the rights that agency workers are entitled to, as well as careful monitoring of the length of the assignment so that all parties know well in advance when the 12-week qualifying period will apply.
- 3.6. Our research shows that, among those employers that use agency workers, well over half (58%) have in place a process to determine when temporary agency workers qualify for equal rights to permanent staff in relation to basic conditions of employment after 12 weeks.
- 3.7. The 20 July 2016 minutes of the Cross-Government Working Group on Employment Status aptly notes that 'some individuals may not know themselves whether they are a worker or another status for employment rights, because this is not relevant in every day work.' Government officials undertook to do further work to determine whether, and how to, quantify this and we welcome this much-needed review – enterprises and the individuals they engage to provide labour need to know at the outset the employment status terms of that contract/relationship and the associated level of employment protection.
- 3.8. To address these issues, we recommend that:
- 3.9. **We believe that there should be an amendment to the Employment Relations Act 1996, requiring employers to provide all workers with a written copy of their terms and conditions after two months of employment.** Currently, this right extends only to employees.
- 3.10. **The Agency Workers Regulations should be reviewed to assess their effectiveness.**
 - 3.10.1. These laws are one of the key areas of EU-derived employment regulation that are widely predicted to be under review following the UK's vote to leave the EU. While there clearly needs to be continued provision to protect agency workers, it is evident that the regulations are not necessarily having their desired impact and are perceived as not very well drafted and complex to implement. Therefore, the statutory framework affecting agency workers should be reviewed, including the 12-week qualifying period for equal treatment. HR professionals we surveyed also agree. Although the great majority (75%) said that the agency worker laws are necessary, 56% are in support of reviewing the Regulations.
- 3.11. **We urge Government to consider developing more high-profile guidance.**
 - 3.11.1. There is brief but accessible guidance on the gov.uk website about employment status and agency worker rights, as well as a comprehensive guide on the agency workers regulations.³ But stronger guidance outlining employment status and associated rights for people, as well as the importance of complying with the UK's employment protection framework, should be made available and reinforced through appropriate government-led channels. The Government should develop more effective and proactive mechanisms to raise awareness and communicate the compliance obligations of all enterprises that engage labour, using appropriate new or existing channels to reach those operating on the fringes of the labour market such as digital platform providers of labour.
 - 3.11.2. Our survey of HR professionals found that there is considerable scope for improvement in the availability and profile of guidance on employment regulation more generally,

³ Guidance on gov.uk for agency workers is based on statutory requirements and states that an agency must give an agency worker written terms of employment before looking for work for them, including whether they are employed under a contract for services or a contract of employment, notice period, pay and holiday entitlement, followed by a further list of information that must be provided by the agency offers an individual a job. There is also a comprehensive BIS guide on the agency workers regulations that clearly sets out the requirements for hirers and agencies to ensure that this flow of information takes place to help ensure that temporary agency workers receive their statutory rights.

including in the fundamental area of employment status – almost half (47%) agreed with the statement that ‘available guidance to help employers meet their employment regulation obligations is poor’, while a further 29% were neutral. Our research asked employers which organisations/resources they use to seek advice on new legislation and how to meet any new obligations and, while ‘Government departments and/or websites’ is one of the most popular channels used by 30% of respondents, there needs to be more proactive promotion of the agency workers guidance in particular to hirers, agencies and temporary agency workers, as well as the implications of not implementing these rights.

3.12. Government must develop and implement a more comprehensive enforcement framework.

- 3.12.1. There is little point in conferring additional rights on workers if there is evidence that existing provision is not being observed by some enterprises, including new business models operating in the gig economy. With the UK continuing to operate one of the most lightly regulated labour markets in the OECD, there is no reason to justify gig economy type enterprises being subject to a lower level of employment regulation than their more traditional counterparts.
- 3.12.2. We therefore fully support the rationale and proposals set out in the 2015 BIS consultation⁴ and response on tackling exploitation in the labour market and the new cross-Government approach to labour market enforcement [that ‘will leave no place to hide for those who abuse the system’]. We also welcome the wider labour market enforcement strategy currently under development by Government, following its 2015 consultation, as it would appear that these changes could have the potential to bolster the role of enforcement in tackling failure by agencies and hirers to award agency workers and casual workers the rights to which they are entitled to by law.
- 3.12.3. The Employment Agency Standards (EAS) Inspectorate has a key role to play here. As stated in its 2016 annual report, ‘the mission of EAS is to work with recruitment agencies, hirers and work-seekers to ensure compliance with employment rights, particularly for vulnerable workers, and to ensure that everyone who uses the services of a private recruitment agency to find work is treated fairly and within the law.’ In appropriate cases, EAS can consider prosecution and, on conviction, the courts can impose unlimited fines.
- 3.12.4. On a broader level, the report⁵ also refers to the establishment of a ‘central intelligence hub’ to enable the sharing of details of complaints and intelligence ...to inform joint enforcement action by the enforcement bodies’, a new type of enforcement order, ‘a labour market enforcement undertaking, supported by a criminal offence for non-compliance’, and the appointment of a statutory Director of Labour Market Enforcement ‘whose remit is to set priorities for the enforcement bodies across the spectrum of non-compliance’, including the EAS, HMRC’S NMW team and the former GLA (now GLAA). The post-holder is also responsible for an annual labour market enforcement strategy, which will set government priorities for the year.’
- 3.12.5. It would seem that there is a strong argument to support the scaling up of EAS’s proactive, targeted inspection strategy, the effectiveness of which will be dependent on the resources made available to it.
- 3.12.6. CIPD will also be very interested to learn more about the role of Director of Labour Market Enforcement now that Sir David Metcalf has been appointed. The ministerial foreword to the 2015 BIS consultation stated an intention to provide the new Director ‘with the necessary powers, remit, skills, intelligence and increased resources to deliver a step change in impact’. However, we are keen to have sight of the new strategy and hear more about how their resources will be directed (as well as their level of funding).
- 3.12.7. We welcome the establishment from 1 October 2016 of the new Gangmasters and

⁴ Department for Business, Innovation and Skills (2015) *Tackling exploitation in the labour market: government response*. Available at: <https://www.gov.uk/government/consultations/labour-market-exploitation-improving-enforcement>

⁵ The EAS’s enforcement action is guided by a structured assessment of risk and in 2015/16 it carried out ‘a series of targeted inspections in geographical locations or occupation sectors.’

Labour Abuse Authority (GLAA) which expands the role of the former Gangmasters Licensing Authority (GLA) and has additional powers to investigate abuse allegations across the entire UK labour market (as opposed to a narrow sector approach by the GLA). The issue 'of most concern' raised by respondents to the 2015 BIS consultation about reform of the GLA 'was about resources', and it was felt that the 'expansion of the Authority's role would be more effective if it was matched by greater resources to enable it to make a greater impact across labour sectors.

- 3.12.8. Another key question for the new cross-Government approach is how proactive it will be across all enforcement agencies to deal with suspected abuse of individuals' employment rights in areas of the labour market, such as the gig economy and agency working.

3.13. The Government must conduct and publish a post-implementation review of employment tribunal fees.

- 3.13.1. The main way in which individuals are guaranteed to receive any disputed employment rights to which they are entitled by law is to seek redress via the employment tribunal system. However, since the introduction of the fee system in 2013, the number of claims made by individuals seeking redress has fallen by over 70%, which has led many commentators to question whether people's access to justice has been adversely affected by the fee system. Indeed, when the House of Commons Justice Committee published its report on changes to fees for court users in the civil and family courts and tribunals in June 2016, it stated that the 'clear majority of the decline' in employment tribunal cases 'is attributable for fees.' It also called on the Government to publish its post-implementation review of the impact of employment tribunal fees, and that the delay was unacceptable. We concur with this view. If people are now less able to seek redress and gain the employment rights to which they are entitled through the courts, this further questions whether other approaches need to be considered. When making changes, the Government should consider employment rights, labour market enforcement frameworks and the dispute resolution system in tandem as part of a strategic and coordinated approach.

3.14. The CIPD believes that agency workers on zero-hour contracts should have the right to request regular hours after 12 months working for one organisation where they have consistently been working the same pattern of hours each week.

- 3.14.1. Recent literature suggests that zero-hour contract workers are disproportionately represented among agency workers. Approximately 14% of agency workers are employed under a zero-hour contract compared with a national average of around 3%.⁶
- 3.14.2. CIPD believes there is a case to provide all zero-hours workers with a right to request regular hours if they have been working for one organisation for a year and have been working consistently the same hours each week. The main reasons employers cite for using zero hours contracts is because they are responding to fluctuations in demand or because they are providing flexibility for workers.⁷ If they are not being used for these reasons then it is difficult to see what benefit there is for either party. A light-touch right to request regular hours for all zero-hours contracts workers after 12 months working for one organisation would provide an opportunity for employers to review arrangements with workers and decide if there is an opportunity to agree a regular weekly set of hours.

4. What differences should there be between levels of government support for the self-employed and for employees, for example over statutory sick pay, holiday pay, employee pensions, maternity pay?

- 4.1. There shouldn't be, unless the Government wishes to promote one form of employment over

⁶ Resolution Foundation (2016) Secret Agents: Agency workers in the new world of work. Available at: <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

⁷ CIPD (2013) Zero-hours contracts: myth and reality. Available at: <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/terms-conditions/zero-hours-reality-report>

another. While there are checks that establish whether employees are entitled to these benefits, these aren't available for the self-employed. If the Government is concerned about eligibility, then it would need to establish tests that were quick and simple.

5. *Is there evidence that businesses are treating agency workers unfairly, compared with employees?*

- 5.1. Research published in 2015 by Acas examining calls to its helpline found that agency workers were often unaware of their rights, particularly around holiday pay, notice periods 'and, critically, the 12-week threshold'; many were also afraid of asserting their statutory rights due to the perceived imbalance of power in the employment relationship.
- 5.2. Any imbalance in the employment relationship will be exacerbated by an agency worker's lack of knowledge about their rights. Although the number of Acas calls by agency workers does not represent a large sample, the analysis is still indicative of two potential problems: first, that agency workers are not being made aware of their rights as stipulated by law and, second, reluctance to assert them (which would presumably result from them not being awarded in the first place).
- 5.3. The first finding is supported by the Employment Agency Standards Inspectorate (EAS) 2016 annual report, which states that the majority of infringements of the employment agency legislation that it identified related to 'non-compliance with the content of the terms that were issued to temporary workers or hirers, or the information that is required to be collected and passed on to the worker or hirer.'

Evidence on employers circumventing the 12-week qualifying period for agency workers

- 5.4. The 2010 Regulations contain strong anti-avoidance measures (reflected in the BIS 2011 guidance), based on an agreement between the CBI and TUC, to help ensure that the 12-week qualifying period for agency workers is not circumvented. However, it is still perfectly legal for an end-user to end a temporary agency worker's assignment before this point, providing it complies with these anti-avoidance measures. Our research shows that, among those employers that use agency workers, more than a third (36%) said they try to limit assignments for temporary agency workers to less than 12 weeks, with a further 45% responding that they don't, while 19% don't know. 2013 research by BIS found that, with the exception of one employer, all employers had changed their working practices to avoid using agency workers for more than 12 weeks 'because they did not want to offer agency workers paid annual leave or equal pay, which would increase the cost.' In this sense, the impact of the equal treatment provisions for agency workers could be undermining the intended impact of the legislation if assignments are deliberately being cut short (albeit legally in many cases) to avoid giving them enhanced rights after 12 weeks.
- 5.5. A further (legitimate) provision in the 2010 Regulations is the 'Swedish Derogation' whereby temporary agency workers can waive their rights to equal treatment after 12 weeks if they opt for a 'pay between assignments' model of employment with the agency. Research by Leeds University Business School shows that many temps are not aware of the disadvantage they face in accepting this condition.

6. *Should there be steps taken to constrain the use by business of agency workers?*

- 6.1. We believe that it shouldn't be necessary to take steps to constrain the use of agency workers by organisations if the current statutory framework of rights is adequately communicated and enforced.
- 6.2. The ability to hire short-term labour (often at short notice) such as agency workers on a temporary basis to cover short-term absence and seasonal and workload peaks is essential for employers operating in a range of different sectors. It is also a central feature of the UK's approach to ensure common basic employment rights as far as possible across different groups of employees, rather than artificially constrain or ban certain forms of employment.

The evidence from elsewhere is that such bans limit employment opportunities rather than enhance the job security of permanent employees.⁸

- 6.3. Having said that, enterprises, be they employment agencies supplying labour to clients or digital platforms in the gig economy, must weigh up the pros and cons of the type of business models they could develop and the level of control they wish to exert over people.
- 6.4. To ensure the right balance is struck, the Government must make available the information and guidance (see 3.5.3) these enterprises need in order to be aware of the employment protection obligations they would be subject to if they engage providers of labour on a basis that reflects an employment relationship. Further, as well as enforcing adherence to regulations, the Government should highlight best practice to inspire other organisations to pursue high-value business models operating with fair and transparent employment practices.
- 6.5. We also need to remember that the UK still has one of the highest shares of permanent jobs in its labour market compared with other OECD countries and the gig economy still represents relatively marginal changes in the labour market as a whole, although we acknowledge that it is likely to grow significantly in the coming years. For more information on this, see Appendix 1.

Impact of 2010 Regulations on employers hiring temporary agency workers

Some commentators predicted that the introduction of the 2010 Regulations and their equal treatment provisions would act as a deterrent for organisations to hire temporary agency workers. Since then, however, the use of agency workers has increased, as part of a longer term shift away from employers directly employing temporary workers and operating through agencies, including sub-contracting the management of a significant part of the workforce (see ONS:

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/temporaryemployeesemp07>). We can see a similar trend in the US with significant increases in labour supply companies.

CIPD research shows that, among those employers that hire such workers, 41% said that their use of temporary agency workers has stayed the same since 2011 while a further 21% said that its use had increased (just 18% indicated that their use had decreased). However, 44% indicated that the Regulations have 'significantly increased the cost of using temporary agency workers' compared with 7% who disagreed (28% remained neutral on the question). Results were mixed when we asked whether or not the Agency Workers Regulations had hampered their organisation's resourcing capability, with 28% agreeing and 26% disagreeing, and 29% neither agreeing nor disagreeing.

7. What are the issues surrounding terms and conditions of employees, including the use of zero-hour contracts, definitions of flexible contracts, the role of the Low Pay Commission, and minimum wage enforcement?

- 7.1. In relation to minimum wage enforcement, we need more investment in communication for employers about what needs to be paid and when. The Government should also look to make employees more aware of what they're due and when. There should also be more investment for the HMRC so that it has the resources to enforce compliance to prevent

⁸ CIPD (2015). *Employment regulation and the labour market*. Available at: <https://www.cipd.co.uk/knowledge/work/trends/labour-market-regulations>

workers from being exploited and responsible employers from being undercut.

- 7.2. The Low Pay Commission should be given an explicit remit to consider the impact of inflation, to prevent significant future drops in value of the NMW and the NLW. It should be given more resource so that it can help employers, especially micro and small-enterprises, understand how much they need to pay through the provision of improved advice and guidance.
- 7.3. The Government needs to better communicate to both employees and employers that those on zero-hour contracts are eligible to many of the terms and conditions enjoyed by employees with regular hours.⁹

8. What is the role of trade unions in representing the self-employed and those not working in traditional employee roles?

- 8.1. Trade union organisation can offer some gig economy workers a stronger voice – often lacking in the debate – as well as increased bargaining power and access to a range of professional services, such as legal advice and insurance at lower costs than an individual could secure. Some trade unions, such as BECTU, have organised the self-employed in some specialised areas, such as the music and film industries for many years and have developed specialised packages of support. More recently, unions have started to represent gig economy workers in areas such as taxi and delivery services, including the formation of a new union. This could and should be an important area for future union recruitment, given the growth of labour-only self-employment, but it may not be realistic to expect unions to establish a major presence given the significant barriers to organisation and the balance between the costs of recruiting and servicing such members and likely subscription income. As well as trade unions, the sharing economy trade body, Sharing Economy UK (SEUK) could build on the existing code of conduct for its members and more skilled professional and technical workers can also turn to professional trade bodies, such as IPSE, for voice and support.

⁹ For more information on the CIPD's policy position on zero-hour contracts and flexible contracts, please see https://www.cipd.co.uk/Images/zero-hours-contracts_2013-understanding-the-law_tcm18-10706.pdf

APPENDIX 1 – ABOUT THE GIG ECONOMY: NATURE, SIZE AND IMPACT

Nature of the gig economy

The gig economy has been seen by some as an empowering people to leverage their skills in new ways, and on an unprecedented scale, to create good jobs for those who no longer desire traditional employment security. Others see it as using new technologies to sustain business models based on old-fashioned exploitative employment relationships, which minimise obligations to workers and drive down hourly pay.¹⁰ There is probably some truth in both these views but neither is an adequate description of the gig economy.

In reality, there are two gig economies. The first consists of professional freelancers and skilled technicians who labour only as self-employed and are increasingly turning to digital platforms to secure some, or most, of their work. The second consists of less skilled workers providing taxi and “concierge services”, such as household tasks and delivery of goods and services. The first gig economy is not without its problems, but it is the second which has attracted almost all the attention from the media, policy makers, academics and commentators because this is where labour market conflicts over employment status, pay and working conditions are most prevalent.

Size of the gig economy

Direct measures of the gig economy have so far been mainly for the United States and have varied wildly, depending on the methodology and definition from between 0.4 per cent to 40 per cent of the workforce or population.¹¹ The high end figures are not credible, often as not re-labelling everyone not a full time permanent worker as a freelancer or gig economy worker, including highly marginal activity, and adding past participation to current participation. However, some of the low end figures concentrate just on the low value added end of the gig economy. The CIPD will be publishing new estimates based on direct survey evidence for the UK in the near future.

Impact on job creation

The extent and impact of the gig economy is hard to measure because, like most new forms of marginal employment activity, it is not easily captured in the current employment statistics. Some have also argued that participants in the gig economy may be under-represented in conventional labour force surveys.¹²

The likely impact on employment will depend on whether it is a net employment generator or is replacing existing employment opportunities, and whether, in turn, that replacement is reducing the number of more secure jobs in the economy or simply transforming the nature of atypical work. In some cases, the demography of gig economy workers may be different to those providing the same service through conventional means, so displacement could favour some groups over others.¹³

The gig economy could expand consumer demand by offering more innovative, flexible and cheaper services. That can have two effects on the labour market. First, it could expand employment by creating more jobs to meet increasing demand. Second, it could reduce unemployment by opening up

¹⁰ Wall Street Journal (2015) *Can the sharing economy provide good jobs?* Available at: <http://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393>

¹¹ The Work Foundation (2016) *In search of the gig economy*. Available at: http://www.theworkfoundation.com/wp-content/uploads/2016/11/407_In-search-of-the-gig-economy_June2016.pdf

¹² Fusion (2015) *There are probably more people in the gig economy than we realize*. Available at: <http://fusion.net/story/173244/there-are-probably-way-more-people-in-the-gig-economy-than-we-realize/>

¹³ A study of US Uber and conventional taxi drivers in some big US cities found that Uber drivers were more likely to be young, better educated, white and female than taxi-drivers in general. <http://dataspace.princeton.edu/jspui/handle/88435/dsp010z708z67d>

new, different and more flexible opportunities to enter the world of work, making the labour market more efficient at matching individuals to jobs.¹⁴¹⁵

But the gig economy could, just as easily, leave overall demand unaffected with gig economy businesses taking a larger share of the existing market over time. In this scenario, employment would continue to grow at the same pace, receiving no additional boost from increased demand. We may, nonetheless, see change in the composition of that growth with the gig economy and its less conventional activities accounting for a greater share of employment.

In practice, both impacts (increasing and decreasing demand) are likely to occur side by side and to varying degrees depending on markets and sectors but in expanding markets it is hard to know how much, if any, of that growth can be attributed to an increase in gig economy activity.

Impact on nature of employment

The aggregate employment statistics suggest that the rise of the gig economy has, so far, had a bigger impact on the nature of self-employment than the overall structure of employment. The share of permanent jobs in the economy has remained fairly stable since 2010, at just over 79 per cent of the workforce, roughly the same share as twenty years ago. The rise of the gig economy might also see more second job-holding as some gig economy work will supplement income from a main job, but the share of second jobs has fallen since 2010.

There has however been a significant increase in the share of labour only self-employed and a shift towards part time self-employment since 2010 and both trends are consistent with more gig economy work. (The increase has been offset by a fall in the share of temporary workers, people on government schemes and unpaid family workers). Over 70 per cent of the increase in self-employment since 2010 has been in the top three more highly skilled occupational groups, which is often used as a proxy measure of freelance employment.¹⁶ Self-employment has also grown strongly, in percentage terms, for some lower skill groups.

From these aggregate figures, we might infer that the expansion of the gig economy is likely to have been greater among higher skilled than lower skilled jobs. The growth of self-employment has not been associated with falling employee employment in any occupational group, though employee employment would likely have been even higher had self-employment not expanded.

¹⁴ McKinsey (2015) *Connecting talent with opportunity in the digital age*. Available at: http://www.mckinsey.com/insights/employment_and_growth/connecting_talent_with_opportunity_in_the_digital_age

¹⁵ A study of UberX taxi-drivers in France concluded that unemployment for younger people was lower as a result of the expansion of the service. See: https://thework.eu/reports/working-in-the-on-demand-economy-an-analysis-of-uber-in-france_r1267.html

¹⁶ John Kitching (2015) *Tracking UK Freelance Working Trends 1992-2014*. Available at: <https://www.ipse.co.uk/sites/default/files/documents/research/IRE-Trends-1992-2014-v1.pdf>

APPENDIX 2 – OVERVIEW OF EMPLOYMENT RIGHTS BY EMPLOYMENT STATUS

Table 1: General categories of rights and protections

Right/protection	Employee	Worker	Self-employed
Right not to be unfairly dismissed (after two years' service)	Yes	No	No
Right to receive written statement of terms and conditions	Yes	No	No
Itemised payslip	Yes	No	No
Statutory minimum notice	Yes	No	No
Statutory redundancy pay (after two years' service)	Yes	No	No
Protection from discrimination in the workplace	Yes	Yes	Possibly
National Minimum Wage	Yes	Yes	No
Protection from unlawful deduction from wages	Yes	Yes	No
Paid annual leave	Yes	Yes	No
Right to daily and weekly rest breaks	Yes	Yes	No
Pension auto-enrolment	Yes	Yes	No
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes	No
Rights under data protection legislation	Yes	Yes	Yes
Whistleblowing protection	Yes	Yes	Possibly
Statutory Sick Pay	Yes	Possibly	No
Statutory maternity, paternity, adoption leave and pay	Yes	No	No
Unpaid time off to care for dependants	Yes	No	No
Right to request flexible working	Yes	No	No
Time off for ante-natal care	Yes	No	No
Time off for trade union activities	Yes	No	No
Protection under the transfer of undertakings legislation	Yes	No	No
Health and safety in the workplace	Yes	Yes	Yes

You can access our full guide on zero-hours contracts [here](#).