

**BERR**

Department for Business  
Enterprise & Regulatory Reform

**EMPLOYMENT BILL**

Impact Assessment –  
Employment Agency  
Standards Enforcement

DECEMBER 2007

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>BERR</b>	<b>Title:</b> <b>Impact Assessment of Employment Bill: Employment Agency Standards Enforcement</b>	
<b>Stage:</b> Final	<b>Version:</b> Final	<b>Date:</b> 5 December 2007
<b>Related Publications:</b> National Minimum Wage and Enforcement Agency Standards Enforcement - Government response to consultation		

### Available to view or download at:

<http://www.berr.gov.uk/files/file42758.pdf>

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### What is the problem under consideration? Why is government intervention necessary?

The penalties available for breaches of employment agency legislation have proved insufficient to deal with the small minority of seriously non-compliant agencies, in particular those contravening a prohibition order may not be an effective deterrent. The investigative powers are also not sufficient to identify the scale of any misconduct (eg the number of workers affected).

In the absence of government intervention there may be continued abuses of workers by rogue agencies who are not prepared to put right their procedures when problems are brought to their attention.

### What are the policy objectives and the intended effects?

To strengthen the employment agency enforcement regime to target those who cut corners illegally to the detriment of agency workers, hirers and reputable agencies who are disadvantaged by such practices. We have concluded that the penalties for offences under the Employment Agencies Act 1973 should be increased by making them triable either way; and that the powers of inspection for officers appointed under the Act should be extended. Overall this should lead to reduction in abuse of agency workers and increase compliance.

### What policy options have been considered? Please justify any preferred option.

1. Make offences under the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 triable either as summary offences in a Magistrate's Court or as indictable offences in a Crown Court.
2. As above and amend Section 9 of the Employment Agencies Act 1973 to clarify powers available to EAS inspectors to be able to demand and secure copies of financial information from an agency or suspect directly or from their bank or building society. This will enable inspectors to assess the scale of any abuses against workers.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** The policy will be reviewed two years after the amended provisions come into force..

### **Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:

Pat McFadden, Minister of State (Employment Relations and Postal Services)

.....Date: 6 December 2007

## Summary: Analysis & Evidence

<b>Policy Option:</b>	<b>Description:</b> penalties for offences should be increased by making them triable either way; the powers of inspection officers should be extended
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups' There would be increased costs for non-compliant agencies. These have not been quantified. None of these costs would arise under 100% compliance with existing regulations.		
	<b>One-off</b> (Transition) <b>Yrs</b>			
	<b>£ 0</b>			
	<b>Average Annual Cost</b> (excluding one-off)			
	<b>£ 0</b>		<b>Total Cost (PV)</b>	<b>£ 0</b>
Other <b>key non-monetised costs</b> by 'main affected groups'				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups' Not quantified		
	<b>One-off</b> <b>Yrs</b>			
	<b>£ 0</b>			
	<b>Average Annual Benefit</b> (excluding one-off)			
	<b>£ 0</b>		<b>Total Benefit (PV)</b>	<b>£ 0</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Greater compliance, more unquantifiable benefits such as less mistreatment of agency workers and protection for reputable against those who cut corners through non-compliance				

Key Assumptions/Sensitivities/Risks
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Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> <b>£ 0</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 0</b>
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What is the geographic coverage of the policy/option?	UK				
On what date will the policy be implemented?	1 October 2008				
Which organisation(s) will enforce the policy?	Tribunals Service				
What is the total annual cost of enforcement for these organisations?	£ 800,000 approx				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ N/A				
What is the value of changes in greenhouse gas emissions?	£ N/A				
Will the proposal have a significant impact on competition?	Yes/No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro N/A</td> <td style="width: 25%; text-align: center;">Small N/A</td> <td style="width: 25%; text-align: center;">Medium N/A</td> <td style="width: 25%; text-align: center;">Large N/A</td> </tr> </table>	Micro N/A	Small N/A	Medium N/A	Large N/A
Micro N/A	Small N/A	Medium N/A	Large N/A		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of    £ 0	Decrease of    £ 0	<b>Net Impact    £ 0</b>

Key:    Annual costs and benefits: Constant Prices    (Net) Present Value

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### **A: Strategic overview**

On 16 May 2007, the Government launched a formal consultation to seek views on enforcement of the National Minimum Wage (NMW) and Employment Agency Standards. The consultation closed on 8 August 2007. The proposals in respect of employment agency standards sought to ensure that an effective enforcement regime is in place for dealing with the minority of employment agencies that do not comply with agency legislation. While the present enforcement regime has proved effective with the great majority of agencies who wish to comply with the legislative requirements, there are difficulties related to the limitations of prosecuting the minority of seriously non-compliant agencies for summary offences. There are particular problems in terms of adequacy of penalties where an individual who has been prohibited from running an agency (because of their unsuitability on account of misconduct) ignores the ban. There are also problems in assessing the scale of abuses against agency workers by disreputable agencies in the absence of specific powers to obtain financial records regarding the agency.

Nearly all the respondents were supportive of both proposals to strengthen penalties and give clearer investigation powers. None of those responding opposed to either proposal although one business association expressed concerns that burdens on business should be taken into account. The proposed changes should benefit agency workers by discouraging non-compliance through higher penalties and improved investigative powers, and should also benefit legitimate agencies against non-compliant agencies who compete unfairly through cutting corners at the expense of agency workers.

### **B: The issue**

The Government is proposing changes to the penalties regime for breaches of employment agency legislation, and to clarify the investigative powers of the Employment Agency Standards Inspectorate (EAS) to achieve more effective **enforcement**.

In the absence of government intervention there may be continued abuses of workers by rogue agencies who are not prepared to put right their procedures when problems are brought to their attention. This damages not only vulnerable agency workers who are deprived of their rights but also legitimate agencies who suffer from unfair competition from the minority of disreputable agencies who cut corners at the expense of their workers and therefore gain an unfair advantage.

### **C: Objectives**

The Government is proposing measures to enhance the enforcement of the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

#### *Background*

The Conduct of Employment Agencies and Employment Businesses Regulations 2003, which came into force in April 2004, are enforced by the Department for Business, Enterprise and Regulatory Reform's Employment Agency Standards (EAS) Inspectorate. The Inspectorate

follows up every relevant complaint it receives which indicates a possible breach of the legislation, and undertakes spot checks on the basis of risk.

While EAS inspectors seek in the first instance to achieve compliance through advice and persuasion, the Inspectorate can take prosecution action, where appropriate, in a Magistrates' Court against an agency found to be in breach of the legislation. If the prosecution is successful, the agency may be fined up to £5,000 for each offence. Inspectors can also apply to an employment tribunal for orders prohibiting those persons who are considered to be unsuitable from operating an agency for up to 10 years. At present, the EAS considers prosecution in between 5 and 10 cases per year.

While any breach of the regulations governing employment agencies is a criminal offence, all criminal offences under the EA Act are summary offences (i.e. tried in a Magistrates' Court). The EAS experience has been that it has proved difficult to prosecute the small minority of determinedly non-compliant agencies who seek to exploit every possible loophole. Some of the difficulties relate to the limitations of prosecuting for summary offences, both in terms of adequacy of penalties and the relative lack of investigative and prosecution powers where criminal offences are summary only.

This problem is most acute in terms of the penalty for contravening a prohibition order, i.e. when an individual who has been prohibited from running an agency ignores the ban and carries on in business, thus rendering the prohibition ineffectual. While the EAS has powers to seek the prohibition of unsuitable individuals from running an agency for up to 10 years, the maximum sentence for breaching a prohibition order is a level 5 fine (i.e. a maximum of £5,000). This may not be an effective deterrent where the agency is generating a lot of money.

Section 9(1) of the Employment Agencies Act already gives EAS Inspectors the right to enter any relevant business premises, to inspect any records or documents kept in pursuance of employment agency legislation and to take copies of any such records or documents. However, the right to take copies of documents in practice requires an element of co-operation from the agency concerned (since invariably this means taking copies on the agency's photocopier), and in cases where the Inspectorate is investigating serious allegations, such co-operation may not be forthcoming. While it is a criminal offence to obstruct an Inspector in the course of their duties, and the vast majority of agencies readily co-operate with Inspectors, seeking a prosecution for obstruction is of itself a time-consuming and labour intensive process.

As offences under employment agency legislation are summary offences, an actual offence has to take place before charges can be made. In effect this means that the EAS need to identify witnesses to come forward to give evidence that the offence was committed. In the main, such witnesses will be agency workers who have been victims of these offences. Getting such victims prepared to stand up in court and give evidence against an agency that has refused Inspectors' requests to correct their illegal practices has proved to be a problem on a number of occasions. There is a fear that such individuals will be seen as potential trouble-makers and not get future work from other agencies.

In an investigation where it appears workers may have been denied money that is owed to them, it is crucial for EAS inspectors to discover what payments have been made to an agency to identify what monies have been received and the identities of those making payment. In a number of cases, the EAS receives complaints from one or two workers who may have lost money as a result of bad practices of rogue agencies. But there may be a substantial number of other workers who have been similarly mistreated by an agency but who (for a variety of reasons) have not complained. Unless the EAS Inspectors can examine the agency's financial records (at present the EAS do not have specific powers to do so), it is not possible to determine in such cases whether this is a generally compliant agency or a rogue operation systematically cheating agency workers out of their money. The EAS's policy is to concentrate enforcement resources on the latter type of agency.

## **Consultation**

In May 2007 the Government undertook a public consultation on its proposed approach.

A total of 15 responses on the proposals on EAS enforcement were received, 7 of which were from trade unions and 5 from business and trade associations. Nearly all the respondents were supportive of both proposals to strengthen penalties and give clearer investigation powers. No responses were received in relation to the partial impact assessment. More information of the overall consultation responses can be found in the Government response.

## **D: Options identification**

The Partial RIA considered three options:

**Option 1:** Do nothing.

**Option 2:** Make offences under the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 triable either as summary offences in a Magistrate's Court or as indictable offences in a Crown Court. The penalties and powers of prosecution would depend on which court the case came before.

**Option 3:** As Option 2 and amend Section 9 of the Employment Agencies Act 1973 to clarify powers available to EAS inspectors to be able to demand and secure copies of financial information from an agency or suspect directly or from their bank or building society.

Under **option 2**, making the offences triable either by Magistrate's Court or by Crown Court would: provide a more effective penalty to deter non-compliance and would also enable the EAS to prosecute individuals for "attempting" to commit the various offences under the EA Act (e.g. attempting to obtain money for job finding services) without having to rely on witnesses being prepared to appear in court.

To ensure this power available under **option 3** could only be used appropriately, limits would be placed on the circumstances in which it could be used to enable a proper balance to be achieved between the needs of the EAS to establish the amount of money received from unlawful practices and the needs for confidentiality and privacy of information. Such powers should only be available where the agency concerned has been asked in writing to provide the relevant records by a specified date and had not done so. On the basis of current experience and practice, we would therefore envisage such powers being used on around 10 occasions per year.

The Government considers that it is important to strengthen the enforcement regime to target those who cut corners illegally to the detriment of agency workers, hirers and reputable agencies who are disadvantaged by such practices. The Government's preferred option is option 3 as we have concluded that the penalties for offences under the Employment Agencies Act 1973 should be increased by making them triable either way; and that the powers of inspection for officers appointed under the Act should be extended.

### *(i) increased penalties*

The Government intends to bring forward provisions in the forthcoming Bill on employment law to provide that the offences of failure to comply with a prohibition order; failure to comply with regulations made under the Act; and seeking a fee for work-finding services will be triable either way. On conviction on indictment a person will be liable to an unlimited fine; on summary conviction a person will remain liable to a fine not exceeding £5,000.

Having the most serious cases tried in a Crown Court would mean that the sentences would be more of a deterrent in cases where an agency was making a lot of money through illegal practices (an unlimited fine rather than a maximum of £5,000). This is particularly appropriate for an offence of running an agency while subject to a prohibition order. It would also reduce the EAS's dependence on witnesses prepared to stand up in court in order to achieve a conviction. The Government recognises that witnesses can be reluctant to give evidence due to fears of

intimidation or being seen as a trouble-maker; however, making the offences triable as indictable offences would allow the EAS to bring charges of “attempting to” commit offences which would overcome this problem.

#### *(ii) increased powers of EAS inspectors*

The Government has concluded that clearer powers to obtain information is necessary to enable EAS inspectors to establish the extent and scale of illegal practices, such as; identifying other mistreated workers, in addition to those who have complained. The Bill will therefore contain provisions to enable EAS inspectors to seek information from third parties, such as banks and other financial institutions, where such information is needed to determine the extent of non-compliance and where the EAS is considering prosecution. Before seeking information from third parties, the EAS will have to formally request the person carrying on or connected with the carrying on of the business of an agency, to supply the necessary financial information by a specified deadline. If the agency fails to provide the information by the stated date, EAS will be able to seek the information directly from the bank or other financial institution.

We will also extend inspectors’ powers to remove records and documents where there are no facilities to take copies inspected on the agency’s premises, for the sole purpose of making such copies and to return them as soon as is reasonably practicable.

Failure to comply with a request made under the new power will be an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

We will also put into place safeguards to protect agencies from any abuse of the new powers and to ensure that the changes are human rights and data protection compliant.

## **E: Analysis of options**

### *Sectors and groups affected*

Obtaining an accurate picture of the numbers of agency workers in the labour market has always proven difficult. The Labour Force Survey (LFS) reports a UK figure of nearly 260,000 agency workers in Q4 2006. But this is likely to underestimate the numbers of agency workers, partly because of definitional problems.

In an effort to get more reliable figures, BERR commissioned a survey of agencies during 1999. Based on this data it estimated that the number of agency workers at 550,000. Updating this figure for the growth in agency workers implied by the LFS since then would imply a figure of 560,000 in 2006. The DTI/BERR survey found there were around 10,000 agencies in 1999. This figure is likely to have grown since then: the ONS Annual Business Inquiry indicates there were around 17,000 enterprises involved in labour recruitment and provision in 2005, with an aggregate turnover of £27bn. The DTI/BERR survey found that most agencies have fewer than 10 employees. Some 37 per cent of those directly employed work in single site establishments. Agencies with over 100 direct employees account for approximately 15 per cent of the industry. BERR is currently commissioning research to obtain firmer numbers of agency workers.

The leading industry organisation, the Recruitment Employment Confederation (REC) also produces its own estimates. Data presented in *The Recruitment Industry Census 2006* suggests there are 1.08 million agency workers in the UK. While this Census is the most widespread survey of the industry to date, as it is based on over 4,500 site level responses, it consistently provides a higher number of agency workers than other sources. The REC Census estimates there are a total of 10,426 recruitment businesses and 15,970 recruitment sites (hence the majority of recruitment agencies are single site agencies).

The proposals in this impact assessment are highly targeted at agencies not complying with the Conduct of Employment Agencies and Employment Businesses Regulations 2003. We do not anticipate that taking these additional powers would have any impact upon law-abiding agencies or indeed upon those agencies who swiftly put right any small and/or inadvertent

breaches of the law when these are brought to their attention. The EAS currently considers prosecutions in around five to ten cases per year, with two successful prosecutions since the Conduct Regulations came into force in April 2004. While more effective enforcement could feasibly raise the number of successful prosecutions, the number of cases considered for prosecution would still be expected to be low in comparison to the total number of agencies.

### ***Analysis of benefits***

The purpose of the proposals is to tighten the enforcement and compliance of the Conduct Regulations. If this were effective, and potentially rogue agencies were to face a greater chance of being prosecuted effectively, and higher fines from being found guilty, then this should lead to benefits to agency workers in terms of facing fewer practises that contravene the regulations. Although there are currently only a small number of prosecutions each year, the improved deterrent effect could lead to a larger number of agencies following the regulations. It may also benefit the vast majority of agencies that abide by the regulations, as they will not face unfair competition from those breaking the law. It is not possible to provide a quantification of these benefits.

### ***Analysis of costs***

Under the proposals non-compliant firms facing prosecution may face higher costs, owing to the greater costs involved in Crown Court cases than Magistrates' Court cases. However, these costs are avoidable if firms follow the Conduct Regulations and are therefore not regulatory costs. Under **Option 2**, inspected firms would also potentially face higher costs from the ability of EAS inspectors to take documents away. However, inspected firms who are confident they are compliant with the Regulations would have little incentive to refuse inspectors from making copies, and therefore the incremental cost from this measure is expected to be small.

The Government may face higher costs as a result of some prosecutions taking place in County Courts. It is estimated that the cost to Her Majesty's Court Service (HMCS) in a Magistrate's Court may be around £1,477 per day<sup>1</sup>. In a Crown Court this figure rises to £5,284<sup>2</sup>. A case brought by EAS might be expected to take around one day in court time. This could imply an additional cost to HMCS of £3,807<sup>3</sup> per case. If five cases were brought before a Crown Court each year, the total cost to HMCS would be around £26,400.

**Option 3** may in principle affect a larger number of agencies than just those who are prosecuted by the EAS. But it is considered that the power to seek financial information regarding agencies from third parties should only be available where the agency concerned has been given notice to provide the specified information by a set time and has not done so. On the basis of current experience and practice, this might occur in perhaps 10 occasions per year. For these firms, the costs of inspection may be higher if there were required to provide information to the EAS. These costs are likely to be low, although exact quantification is not possible. The overwhelming majority of agencies would, however, be unaffected.

## **F: Risks**

The EAS currently considers prosecutions in around five to ten cases per year, with two successful prosecutions and five prohibitions since the Conduct Regulations came into force in April 2004. While more effective enforcement could feasibly raise the number of successful prosecutions, the number of cases considered for prosecution would still be expected to be low in comparison to the total number of agencies.

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<sup>1</sup> Ministry of Justice estimates

<sup>2</sup> Ministry of Justice estimates

<sup>3</sup> £5,284 - £1,477



## **G: Enforcement**

Enforcement of these provisions will be through the Employment Agency Standards (EAS) Inspectorate. The effectiveness of the measures will be monitored by the EAS and the results reported in the EAS Annual Report.

## **H: Recommendation**

The Government considers that it is important to strengthen the enforcement regime to target those who cut corners illegally to the detriment of agency workers, hirers and reputable agencies who are disadvantaged by such practices. The Government's preferred option is option 3 as we have concluded that the penalties for offences under the Employment Agencies Act 1973 should be increased by making them triable either way; and that the powers of inspection for officers appointed under the Act should be extended.

## **I: Implementation**

The policy will be implemented on 1<sup>st</sup> October 2008.

## **J: Monitoring and evaluation**

The policy will be reviewed two years after the amended provisions come into force.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	No
Rural Proofing	No	No

## Annexes

Please see the summary impact assessment for the details of the specific tests carried out with respect to this policy area.

