

**A Toolkit Guide
Code of Practice –
Ethical Employment in Supply Chains
May 2017**



Llywodraeth Cymru
Welsh Government

Code of Practice

Guide to tackling Unfair Employment Practices and False Self-Employment



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This Guide forms part of the Toolkit which supports the *Code of Practice – Ethical Employment in Supply Chains*.

This Guide is aimed at any person involved in the supply of goods, services and works, including procurement, contract management and supplier management.

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1. Introduction

The Welsh Government is committed to ensuring workers are treated fairly and with respect.

The ‘Code of Practice – Ethical Employment in Supply Chains’ has been established to help ensure workers in public sector supply chains in Wales are employed in a fair and ethical way. The Code helps tackle the following employment issues:

- Modern slavery and human rights abuses
- Blacklisting
- **False self-employment**
- **Unfair use of umbrella schemes and zero hours contracts**
- Payment of the Living Wage.

The ‘Wales Procurement Policy Statement’ (WPPS) sets out the expectations placed on every public sector organisation in Wales. The Code of Practice has been developed to reflect the overall aims and ethos of the refreshed WPPS and supports achievement of the following Well-Being Goals, as set out in the Well-Being of Future Generations (Wales) Act 2015:

- **A prosperous Wales** – *An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.*

The Code of Practice will contribute to the achievement of this Well-Being Goal by providing better employment opportunities and supporting long term career

development through the improvement of employment practices across supply chains in Wales.

- **A more equal Wales** – *A society that enables people to fulfil their potential no matter what their background or circumstances (including their socioeconomic background and circumstances).*

The Code of Practice will contribute to the achievement of this Well-Being Goal through supporting the eradication of unfair employment practices across supply chains in Wales.

- **A globally responsible Wales** – *A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.*

The Code of Practice will contribute to the achievement of this Well-Being Goal through supporting the eradication of modern slavery across global supply chains.

2. What are unfair employment practices?

Whilst there is a wide range of unfair employment practices, this guide is concerned with tackling the use of unfair umbrella payment schemes, unfair zero hours contracts and false self-employment.

Umbrella Payment Schemes

An Umbrella Company is a business that directly employs contractors and freelancers who typically work through recruitment agencies. It provides accountancy based services, such as calculating PAYE and National Insurance (NI) contributions, client invoicing as well as paying the contractor/freelance employee.

Organisations may use Employment Businesses who in turn may outsource their responsibilities – for recruitment and payment of temporary staff and managing PAYE and NI contributions – to Umbrella Companies.

To illustrate:

End User → Agency → Umbrella Company/
Intermediary Business → Worker

Unfair use:

Whilst umbrella schemes have their place, some schemes are unfair in how they operate, impacting negatively upon the worker.

These practices also result in a loss of revenue to the Exchequer, as the correct amount of income tax and NICs may not be paid.

Examples of unethical practice through the use of unfair umbrella payment schemes include reduced pay where employer NI contributions and various administration fees and equipment fees are deducted from the workers pay.

In addition, Holiday pay may come out indirectly when the pay is rolled up in the regular pay, creating a situation of workers working 52 weeks of the year save for time off on bank holidays (for which they receive no pay). Travel and subsistence expenses

have often been used as part of umbrella arrangements to reduce pay and tax. In April 2016 travel and subsistence rules changed for those workers who are deemed to be under “Supervision, Direction or Control”.

Zero hours contracts

Prior to the introduction of Small Business, Enterprise and Employment Act 2015 by the UK Government to ban exclusivity clauses in zero-hours contracts there was no legal definition of zero-hours contracts. The Act provides the following definition:

- (1) In this section “zero hours contract” means a contract of employment or other worker’s contract under which:
 - (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker; and
 - (b) there is no certainty that any such work or services will be made available to the worker.
- (2) For this purpose, an employer makes work or services available to a worker if the employer requests or requires the worker to do the work or perform the services.

Zero-hours contracts are used to set out casual agreements between an employer and an individual. Generally, under a zero-hours contract employers do not guarantee to provide any work and pay only for work undertaken. The worker/employee is not obliged to accept any work offered by the employer.

A zero-hours contract is one type of flexible employment practice which can be more broadly defined as arrangements which do not provide individuals with guaranteed hours or permanent roles. Individuals on

such an arrangement will be either workers or employees. All will be entitled to the National Minimum/Living Wage, paid annual leave, rest breaks and protection from discrimination. If they are employees, they will also be entitled to statutory employment rights including (but not limited to) statutory maternity/paternity/adoption pay and leave, statutory redundancy pay, the right not to be unfairly dismissed and a statutory minimum notice period.

Used appropriately such arrangements can support the effective and efficient delivery of services and can provide benefits for both employers and employees.

For the employer - they can offer flexibility to cope with fluctuations in staffing requirements by providing a pool of individuals who can be called upon in addition to the main workforce. This can help meet peaks in demand or provide cover for periods of high annual leave and sickness.

For the employee – they can offer the flexibility to accept and reject work in line with personal requirements. For example, where individuals have care responsibilities, where they have another permanent role (possibly with the same organisation) or where they wish to gain experience in a specific field of industry.

The Public Services Staff Commission in Wales has recently developed, in conjunction with the Workforce Partnership Council, principles and guidance to support the appropriate use of non-guaranteed-hours arrangements (including zero-hours arrangements) in public services in Wales. The document entitled “Principles and guidance on the appropriate use of non-guaranteed hours arrangements in devolved Public Services in Wales” is available here: www.wales.gov.uk/topics/improving-services/publications/principles-guidance-on-use-of-non-guaranteed-hours/?lang=en

This Guide is consistent with the principles and guidance developed by the Public Services Staff Commission.

Further useful guidance and a “myth busting” page is available on the Advisory, Conciliation and Arbitration Service (ACAS) website:

www.acas.org.uk/index.aspx?articleid=4468

Unfair use:

As shown above, where used appropriately non-guaranteed-hours arrangements can be of benefit to both the employer and employee. However, they can be used inappropriately for example if the employer uses them to:

- pay lower rates of pay and evade employer obligations such as payment of sick pay, holiday pay, workplace pension
- penalise individuals who reject offers of work and/or favour those who readily accept work
- give insufficient notice of upcoming work and/or give little notice of the cancellation of work.

These arrangements have also been used to prevent individuals accepting work with other employers through exclusivity clauses. However, Section 153 of the Small Business, Enterprise and Employment Act 2015, came into force on 26 May 2015 and this inserts two new sections, 27A and 27B, into the Employment Rights Act 1996 making exclusivity clauses in zero hours contracts unenforceable.

For Public sector organisations – we expect organisations to adopt the principles and guidance developed by the Public Services Staff Commission. We also expect organisations commissioning services to seek agreement from their contractors to adopt the principles and guidance.

Self Employment

Self-employment is where individuals works for themselves – operating through a trade or business which they run themselves – rather than working as employees and being paid a salary by an employer. This is different to agency workers who are engaged by an employment business (typically referred to as an employment agency) under a contract and

then placed on a temporary basis with other client businesses who supervise their work. This is also known as ‘temporary agency work’ or ‘temping’.

False Self-Employment:

False self-employment concerns employment where the contract of employment with the worker does not properly reflect the reality of the relationship. The problems that false self-employment causes can be summarised as follows:

- unfair competitive advantage for those businesses who disregard their Pay as You Earn (PAYE) and National Insurance (NICs) obligations and other costs related to direct employment when they engage workers and a corresponding disadvantage for those businesses which properly engage their workers as employees.
- Loss of entitlement for the worker to Jobseekers Allowance and State Second Pension and loss of redundancy pay, maternity/paternity leave and pay, sick pay, holiday pay, overtime premium payments, travel allowances
- Lack of long term job security and career opportunities
- Loss of revenue to the Exchequer, as the correct amount of income tax and NICs may not be paid
- Health and Safety provisions deteriorate when workers work on falsely employed terms.

Workers engaged on this basis may be unaware that they are being treated as self-employed. Alternatively they may be aware of their employment status but feel they have little choice than to accept it or risk losing the job.

False self-employment is primarily an employment law matter, and workers will have recourse to remedies to address any instances of “false self employment” through the employment tribunal service.

The UK Government introduced legislation in July 2014 - the Finance Act 2014, which included specific legislation “On Shore Employment Intermediaries: False self employment”. This new legislation provides that agency workers will be taxed as employees if they are subject to a right of direction, supervision and control.

Under the new legislation the responsibility falls upon Employment Businesses to prove if a worker is employed or self-employed and will be liable for up to 6 years of unpaid tax and national insurance if a seemingly self-employed worker is subsequently found to not to be truly self-employed.

HMRC’s Guidance on employment status may be useful: www.gov.uk/guidance/employment-status-indicator

You should note that Employment Businesses have a reporting requirement if they do not operate PAYE on workers supplied to third parties (link to Gov.uk)

www.gov.uk/guidance/employment-status-employment-intermediaries

www.gov.uk/send-employment-intermediary-report

3. Legal and Regulatory Requirements

The following pieces of legislation are relevant to the use of unfair umbrella payment schemes, unfair zero hours contracts and false self-employment.

Employment Rights Act 1996

The Employment Rights Act affords a number of statutory employment law rights to employees (and in some cases, workers) including (but not limited to):

- A right to receive a minimum notice period from the employer to terminate the contract of employment provided that the employee has been employed for a period of one month or more A statutory redundancy payment in the event that the employee is made redundant provided that two years' service has been completed
- A right not to be unfairly dismissed
- Limitation in respect of the circumstances in which an employer may deduct wages from an employee
- A right not to be dismissed as a result of absence from the workplace due to family leave, job-related education and training, maternity/paternity/adoption and public duties such as jury appearances.

National Minimum Wage Act 1998

The National Minimum Wage Act 1998 made it a statutory requirement for employers to pay at least a minimum wage to all employees.

On 1 April 2016 the National Minimum Wage (Amendment) Regulations 2016 introduced the national minimum wage (called the National Living Wage) for workers aged 25 or over.

NMW and NLW rates are updated each year (www.gov.uk/national-minimum-wage-rates)

Current rates (from April 2017) are:

- £7.50 per hour - 25 yrs old and over.
- £7.05 per hour - 21-24 yrs old.
- £5.60 per hour - 18-20 yrs old.
- £4.05 per hour - 16-17 yrs old.
- £3.50 for apprentices under 19 or 19 or over who are in the first year of apprenticeship.

The Act applies to workers and employees which will, of course, encompass those engaged under zero hours contracts.

Working Time Regulations 1998

The Working Time Regulations implemented the EU Working Time Directive 2003/88/EC in to UK law and applies to all workers (not just employees).

The regulation provides a range of statutory working hours rights for workers including:

- 5.6 weeks' paid holiday each year (equivalent to 28 days for a full time worker. This includes UK Bank Holidays
- 24 hours' uninterrupted rest per week (or 48 hours' uninterrupted rest per fortnight)
- maximum 48 hour working week unless the employee chooses to 'opt out'
- a rest break of 20 minutes where the working day is longer than six hours.

Non statutory guidance issued by the UK Government states that payment for statutory annual leave should be made at the time when leave is taken. It also refers to the fact that an employer cannot include an amount for holiday pay in the hourly rate (known as 'rolled-up holiday pay'). If a current contract still includes rolled-up pay, it needs to be re-negotiated. This guidance reflects the position as set out in the Working Time Directive.

Income Tax (Earnings and Pensions) Act (ITEPA) section 44 & Regulation 5 of the Social Security (Categorisation of Earners) Regulations 1978

The agency legislation places the responsibility for deducting income tax and National Insurance contributions (NICs) and paying this to HM Revenue & Customs on the agency that has a relationship with the worker.

In 2014 the legislation was amended so that most workers who are supplied through an intermediary agency and are subject to (or to a right of) supervision, direction or control, are treated as employees and the intermediary is responsible for PAYE.

Under this legislation the responsibility falls upon Employment Businesses to prove if a worker is employed or self-employed, and they may be liable for up to 6 years of unpaid tax and national insurance if a seemingly self-employed worker is subsequently found to not be truly self-employed.

Conduct of Employment Agencies and Employment Businesses Regulations 2003

Under this regulation employment business are prohibited from withholding or threatening to withhold payment from a worker on the following grounds, as stated under regulation 12:

- non-receipt of payment from the hirer
- the worker's failure to produce documentary evidence, authenticated by the hirer, of the fact that they have worked during a particular period of time
- the worker not having worked during any period other than that to which the payment relates or
- any matter within the control of the employment business.

The regulation also ensures that workers are free to leave an employment agency/business by prohibiting the employment business/agency from taking action against workers who have found work elsewhere (subject to a reasonable notice period).

The Agency Workers Regulations 2010

The Agency Workers Regulation sets out the meaning of the term 'agency worker' and 'temporary work agency'.

In addition Regulation 5(1) provides that at the end of the 12 week qualifying period an agency worker will be entitled to the same basic working and employment conditions (pay, the duration of working time, night work, rest periods, rest breaks and annual leave) as they would have, had they been hired as an employee. The qualifying period is specified as being 'the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.'

Small Business, Enterprise and Employment Act 2015

Section 153 of the Small Business, Enterprise and Employment Act amended the Employment Rights Act 1996 making exclusivity clauses in zero hours contracts unenforceable.

This means that employers making use of zero hours contracts can no longer prevent an individual from looking for work or accepting work from another employer. Where they do include an exclusivity clause, the individual cannot be bound by it and can ignore it. In addition, an employer is not able to stipulate that the individual must seek their permission to look for, or accept, work elsewhere.

ITEPA, part 5, Chapter 2

Under provisions introduced by the Finance Act 2016 certain temporary workers will not be able to claim tax relief or a disregard for National Insurance contributions (NICs) on the travel and subsistence expenses they incur on an ordinary commute from home to work.

These restrictions will apply to workers who are employed through an employment intermediary and who are supplying personal services (largely supplying their skills or labour) under the supervision, direction or control, of any person, in the manner in which they undertake their role.

Welsh Government's 'Ethical Employment Practices in public sector Supply Chains Procurement Advice Note'

The Procurement Advice Note (PAN), first published in March 2015, was produced by the Welsh Government to inform the public sector in Wales on how to address fair treatment in

terms of pay and employment rights through procurement. The Welsh public sector is expected to deploy the guidance in all relevant contracts, in line with Principle 9 of the Wales Procurement Policy Statement 2015:

Policy Development and Implementation – deployment of policy which supports the achievement of the seven well-being goals for Wales as set out in the Well-being of Future Generations (Wales) Act (2015)

A copy of the PAN can be found at <http://prp.gov.wales/toolkit/?skip=1&lang=en>.

4. Why should you be concerned with unfair employment practices?

Where unfair employment practices exist workers often feel they have little choice but to accept the situation or risk not getting or losing their jobs. These practices impact negatively upon workers in a number of ways:

- Reduced pay for the employee as a result of being required to pay employer NICs and employment/administration fees
- Loss of entitlement to Jobseekers Allowance and Secondary State Pension
- Loss of redundancy pay, maternity/paternity leave and pay, sick pay, holiday pay, overtime payments and travel allowances
- Lack of long term job security and career opportunities
- Reduced Health and Safety provisions
- Problems securing finance, including loans and mortgages
- Those falsely claiming self-employment (workers and/or employers) risk being held liable for payment of arrears of PAYE & NICs and may be subject to penalties. It is possible that workers engaged on a false-employed basis may be unaware that they are being treated as self-employed.

Unfair employment practices can also impact upon your business, particularly where cases are identified and publicised through the media. However, by proactively ensuring these practices do not occur within your own business or your supply chains you can benefit from:

- Improved image and reputation of your organisation resulting in:
 - Attractiveness to potential customers
 - Attractiveness to potential investors
- Increased employee engagement, recruitment and retention within your own organisation as workers are motivated by the stance taken to employee rights
- Increased staff retention leading to better quality products and/or services through skills development being retained within the business
- Increased productivity as a result of a more motivated workforce
- Protecting your organisation from the potential impact of an investigation by HMRC.



5. How can you tackle unfair employment practices?

Within this section you will find practical advice on the actions you can take to tackle unfair employment practices within your supply chain.

Area	Key actions:
Policy Development	Produce a written policy on ethical employment and communicate it widely
	Produce (or update) a written policy on whistle-blowing and communicate it widely
Training and Communications	Raise awareness of unfair employment practices amongst your staff and deliver appropriate training
	Raise awareness of unfair employment practices amongst your suppliers and deliver appropriate training
Procurement procedures	Review and amend your procurement processes and any related documentation
	Review and amend your contract management processes and any related documentation
	Review and amend your ordering and payment processes
Remedying of problems identified	Work with your suppliers to resolve issues and change working practices
	Terminate your contract

These actions should not be seen as one-off activities but should be carried out regularly as part of your normal business processes.

When reading this section it is important to consider the size of your organisation, the level of risk within your supply chain in relation to unethical employment practices and what action you have already taken. The actions undertaken and the amount of effort spent in delivering them should be proportionate and appropriate for you and your supply chain.

Policy development

Produce a written policy on ethical employment and a written policy on Whistleblowing and communicate them widely

Ethical Employment Policy:

Before you begin writing your policy you will need to determine your stance on unfair employment practices – see the Example Ethical Employment Policy in the Toolkit for guidance and a list of considerations.

Whistleblowing Policy:

Before you begin writing your policy you will need to determine how members of your staff should raise any concerns/suspicions relating to unfair employment, practices. You will also need to establish a system for reporting and investigating problems, tracking progress and monitoring outcomes. For smaller organisations where resourcing such a system may not be feasible, you may wish to involve external agencies (e.g. the Welsh Government's Supplier Feedback Service or Trade Unions) to a greater extent. See the Example Whistleblowing Policy in the Toolkit for guidance and a list of considerations.

Once developed you should:

- Ensure the policy is signed off by a member of the Board/Senior team within your organisation
- Communicate the policy to all of your staff
- Publish the policy on your website in a prominent place
- Communicate it to all of your suppliers, business partners and stakeholders
- Ensure that the policy is reflected within any other policies you have and within your standard processes and procedures, e.g. your procurement policy, tender documents, contracts, recruitment and training documents, supplier code of conduct, employee code of conduct etc.

Training and communications

Raise awareness of unfair employment practices amongst your staff and deliver appropriate training

It is important your staff understand what unfair employment practices are, what your organisation's stance is on them, how they may impact your business and your supply chains and what steps staff can take / should take within their daily roles.

You can do this by:

- Including information on unfair employment practices within staff induction processes

- Reviewing existing staff training in order to include training on unfair employment practices
- Introducing specific training on unfair employment practices for staff in relevant roles e.g. HR, procurement/buying, contract and supplier management.

Some useful links for training include:

www.gov.uk/guidance/employment-status-employment-intermediaries

www.gov.uk/send-employment-intermediary-report

www.gov.uk/guidance/employment-status-indicator

Raise awareness of unfair employment practices amongst your suppliers and deliver appropriate training

It is important that your suppliers understand what unfair employment practices are, what your organisation's stance is on them, how they may affect business and supply chains, and what steps staff can take/should take within their own organisation.

You can do this by:

- Providing copies of any training materials on unfair employment practices for use within their own organisations
- Developing and running training courses for your suppliers to attend. This training could be provided face to face, via video conferencing or online via webinars/webcasts.

Procurement procedures

For private sector businesses and third sector organisations there are no legal restrictions on specifying that suppliers should directly employ staff and/or not use zero hours contracts or umbrella employment schemes.

Public sector organisations, however, follow the policy in the Procurement Advice Note on Employment Practices. This states that contractors delivering public contracts and public services should adopt fair employment

practices, including direct employment where possible and appropriate. Employment practices used must ensure that workers are recruited and retained in an ethical and safe manner. Public sector organisations should ensure that conditions of false self-employment are not created which unduly disadvantage individuals in terms of pay and rights of employment such as holiday pay, sick pay, national minimum wage protections and pension contributions.

Public buyers should not adopt a blanket approach to all sectors specifying that suppliers do not use zero hours contracts or umbrella payment schemes in employing their workforce. An assessment of the link to the subject matter of the contract, and of proportionality, would be needed before making these employment conditions into mandatory requirements. Whilst direct employment is usually the optimum means of engaging workers, when used correctly, zero hours contracts and umbrella employment schemes can be of benefit to both employers and employees.

It is possible however to consider, where relevant, the overall fair working practices of the bidder. Fair working practices could include, for example, fair use of zero hours contracts and/or umbrella employment schemes. In this way these factors could be included as indicators of fair working practices, alongside other indicators. We recommend that public sector organisations use a Fair Work Practices question in tenders. Details of how to do this follow below.

Asking a Fair Work Practices question can also be a useful approach for private and third sector organisations as it can help ensure that suppliers do not cover additional pay costs by taking away workers' rights in other ways.

Review and amend your procurement processes and any related documentation

You should review your procurement processes to ensure that they reflect your 'Ethical Employment Policy'. It is important that you

consider the impact of any changes on your suppliers.

Before commencing any procurement process, it is important that you develop a good understanding of the relevant market. This will help you to determine the factors that affect workforce pay and conditions, and to identify whether unfair employment practices are likely to be an issue within the contract.

You should also take a proportionate and risk-based approach to each procurement to ensure that workforce issues are assessed, understood and managed in all key decisions - this assessment should be completed at the planning stage. The Welsh Government's 'Sustainability Risk Assessment (SRA)' whilst designed for the public sector, may be a useful tool for all organisations for this purpose – www.prp.gov.wales.

You may wish to consider including the following as part of your procurement procedures.

- Include a copy of your 'Ethical Employment Policy' and 'Whistle-blowing Policy' in all your tender/pre-contract information and raise awareness of them through any 'Meet the Buyer' type events you may hold
- Encourage suppliers to voluntarily sign up to the Code and agree to implement the Code during the lifetime of the contract. Where appropriate, you may wish to incorporate elements of the Code as conditions of contract
- Identify any industry-specific labour or employment standards that are applicable to the contract and consider including compliance with these as a condition of contract. For example the Freelance and Contractors Association's Code of Conduct
- As part of the procurement process, consider asking suppliers to provide information on their working/employment practices and to demonstrate their approach to tackling unfair employment practices. Where necessary and reasonable you may

wish to include compliance with some of the matters covered in the questions below within your contract:

- What policy and processes does the supplier have in place for placing workers on zero hours contracts on to a regularised hours contract where they work regularised hours? Do these include regular reviews and opportunities for staff to request a change of contract?
- Does the supplier have fair and open recruitment processes for appointing staff on zero hours contracts? Does it have clear criteria in place for allocating work fairly and consistently between staff?
- What period of notice does the supplier give when expecting staff on zero hours contracts to undertake work? Does it give appropriate consideration to workers' other responsibilities such as study, childcare and caring responsibilities? Does the supplier compensate staff when cancelling work at short notice?
- Are workers engaged on zero hours contracts provided with paid-for induction and other relevant training and development opportunities?
- Are workers on zero hours contracts provided with a line manager and arrangements for discussing achievements, challenges and career aspirations?
- Are workers on zero hours contracts enrolled into a qualifying pension arrangement? Is this set out clearly in recruitment information and terms of appointment?
- What processes does the supplier have in place for handling agency workers who have worked with the organisation for more than 12 weeks?
- Can the supplier confirm that workers engaged on a self-employed basis are not engaged in this way as a way to avoid their legal obligations to their employees?
- Can the supplier confirm that self-employed workers are paid a fair wage and are entitled to paid holiday leave and sick leave?
- What percentage of the supplier's workforce is engaged through employment intermediaries? What processes does the supplier have in place for ensuring workers engaged through employment intermediaries are not employed on unfair umbrella schemes, unfair zero hours contracts or on a false self-employment basis?
- How many workers does the supplier employ and on what basis (e.g. direct, agency staff etc.)?
- Are all workers aware of their rights and do they have employment contracts in place?
- Can the supplier confirm that all workers are paid a fair rate of pay (in line with relevant national law)?
- Are workers charged for items which are necessary for them to perform their role e.g. uniforms, Personal Protection Equipment etc.
- Are all workers free to leave to find work elsewhere?
- Are all workers free to join a Trade Union/collective agreement?
- Consider asking suppliers to provide information on their supply chain, identifying the names of key suppliers upon contract award. Consider making this a condition of contract
- If you are looking to establish an agreement or contract with an employment or recruitment agency, ask it to provide information on its recruitment and employment practices e.g. charging of recruitment fees, identity checks carried out, retention of documentation, use of sub-agencies. Consider including adherence to its response as a condition of contract
- Carry out due diligence checks on the information provided by prospective suppliers.

The HMRC website has several useful sections and checklists for you to read if your procurement or supply chain involves labour providers, employment intermediaries or workers paid the UK the minimum wage.

www.gov.uk/government/publications/use-of-labour-providers

www.gov.uk/national-minimum-wage/what-is-the-minimum-wage

If your supplier is an employment intermediary – i.e. it pays people but does not operate PAYE (Pay As You Earn) for them – it must submit quarterly employment intermediary reports to HMRC. You may consider requesting the same information as part of your contract management process to ensure that the workers operating on your project are paid correctly.

www.gov.uk/guidance/employment-status-employment-intermediaries

www.gov.uk/send-employment-intermediary-report

www.gov.uk/guidance/employment-status-indicator

See the Example Tender Questions and Contract Conditions document in the Toolkit.

Consider including a Fair Work Practices tender question

Before including a Fair Work Practices question in your tender you should make sure that fair work practices are relevant to the contract, considering the impact of the welfare of workers on their ability to deliver high-quality services. Some of these issues are covered in more detail in the other Guides in the Toolkit supporting the Code of Practice for Ethical Employment in Supply Chains. In particular you should consider whether:

- employees will be coming into contact with service users, members of the public and/or your organisation's employees, and/or will spend time on your premises
- there is any history of unethical work practices having a negative impact on quality of services

- there is a history of low pay in the sector, with employers seeking to cut costs by reducing staff pay and conditions
- there is a risk of unethical or illegal employment practices such as false self-employment, or inappropriate use of zero hours contracts or umbrella companies; or
- there is evidence of poor recruitment and retention in the sector.

If one or more of these factors apply to the contract then fair work practices are likely to be relevant and you should consider including a question about these in your invitation to tender.

The question should ask bidders to describe the package of measures which demonstrate their positive approach to fair working practices. It should be emphasised that failure to comply with one of the measures does not mean that the employers' overall approach would fail any fair working practices assessment.

Care should be taken to ensure that the appropriate weighting is applied to this question compared with price and other quality factors – this will vary depending on the relative importance of fair working practices to the contract / service being delivered.

An example Fair Work Practices tender question has been included in Annex A.

In addition you may wish to consider:

- Including a copy of your 'Ethical Employment Policy' and 'Whistle-blowing Policy' in all your tender / pre-contract information and raise awareness of them through any 'Meet the Buyer' type events you may hold
- Encourage suppliers to voluntarily sign up to the Code and agree to implement the Code during the lifetime of the contract.

You may also wish to include the following statement alongside an invitation to tender

“[organisation] is committed to ensuring that fair and transparent employment

practices are in place throughout the supply chain for this project. We will work with you to monitor to ensure fair employment practices operate on this project. Whilst direct employment under Collective Agreements with Trade Unions, where these apply, is the preferred default position, alternative means of engaging workers may be used to accommodate flexible working, provided they do not unduly disadvantage workers in terms of pay and rights of employment”.

Additional requirements for public sector buyers

Public sector buyers (“Contracting Authorities”) must ensure that they comply with the Public Contracts Regulations 2015 (PCR 2015), the Public Contracts Directive 2014 (2014/24/EU) and principles of transparency, equal treatment, proportionality and non-discrimination derived from the Treaty on the Functioning of the European Union. You should also seek legal advice as this Guide is not intended as a comprehensive statement of the law and each procurement exercise will raise different considerations.

We have suggested using a Fair Work Practices Question because imposing requirements on tenderers which do not have a legislative basis could be challenged on the ground that they are discriminatory and a breach of article 56 of the Treaty on the Functioning of the European Union, which deals with the free movement of services.

For public sector buyers any Fair Work Practices question must be framed in such a way that it is consistent with the PCR 2015. You should first consider whether it is relevant and proportionate to include a question on Fair Work Practices, to be evaluated alongside other criteria, satisfying yourself that the quality of delivery is likely to be affected by the conditions of the workforce. You should make sure you can justify each part of any Fair Work Practices question you plan to include in your tender. Overall you should ensure you achieve the appropriate balance between quality and cost for the contract.

The PCR 2015 require there to be a link between any evaluation criteria and the subject matter of the contract (see reference below to regulation 67). So it would be helpful to include a reference, within your description of your contract, to your policies around ethical employment, along with a statement to the effect that you seek to achieve fair and non-exploitative working practices within your contracts.

Your evaluation of bidders’ responses to the Fair Work Practices question needs to be conducted in a proportionate, objective, transparent and non-discriminatory way, in light of the fact that individual responses may describe different approaches to fair working practices, depending, for example on the size of the organisation.

Public sector buyers are referred to the provisions in the PCR 2015 which support ethical sourcing. Some of those most relevant to the subject matter of this Guide are summarised below, however you must refer to the Regulations themselves for the full terms of the regulations (www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxi_20150102_en.pdf).

- Regulation 56(2) allows you to decide not to award a contract to the tenderer submitting the most economically advantageous tender where you have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law as established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive – <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0024>. Please note that this provision focuses on the tender – rather than the tenderer (the tenderer being the focus of the discretionary grounds for exclusion)
- Regulation 57(8) includes a list of discretionary grounds for exclusion, which allows you to exclude a tenderer from a procurement exercise if you can demonstrate by appropriate means that the supplier has

either violated its applicable obligations referred to in Regulation 56(2) (which would cover any case of False Self Employment that amounted to a breach of labour laws) or is guilty of grave professional misconduct, which renders its integrity questionable. Tenderers must be offered the chance to show evidence of any 'self-cleaning' they have undertaken and, if these are deemed sufficient, can avoid exclusion

- Regulation 67 stipulates that award criteria must be linked to the subject matter of the contract. You can include social (including workforce matters) and trading considerations within your contract award criteria provided they are linked to the subject matter of the contract
- Regulation 69 allows you to require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low. If it is established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2) (see above) you can reject the tender
- Regulation 70 allows you to include special conditions relating to the performance of a contract, which may include social or employment-related considerations, provided they are linked to the subject-matter of the contract and were included in the contract notice and/or tender documentation
- Regulation 71 allows you to ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors. Making use of this provision can make your supply chain more transparent.

Contract management processes and related documentation

You should review and amend your contract documents, including your Standard Terms and Conditions, to reflect your commitment to fair employment practices and ensuring that false self-employment is not being used. If you

have included fair work practices as evaluation criteria and/or conditions of contract then these should be included in regular contract management and monitoring arrangements. Changes that you might consider making include the following:

- Including a link to your 'Ethical Employment Policy' on your purchase orders, invoices, goods receipt notes etc
- Including discussions on fair and legal employment practices within all Contract review meetings with your suppliers. These discussions should focus on steps that each party has taken to tackle any potential or known issues, including false self-employment where relevant
- Developing Key Performance Indicators (KPIs) on fair and legal employment practices and ensure that these form part of your contractual agreement with key/high risk suppliers
- Including a clause in all contracts allowing inspection of supplier premises. This clause should give you the rights to carry out audits and speak directly to supplier's employees and to request information on the pay, terms and conditions of staff delivering the contract
- Making it a contractual condition that you must approve all sub-contractors who are to carry out services as part of your contract
- Making it a contractual condition that you must approve all Employment businesses/agencies used as part of your contract.

Wherever possible you should look to retrospectively build these in to existing contracts through discussions with your current suppliers.

HMRC's Due Diligence advice suggests further clauses to be included in contracts with labour providers, for example:

- Preventing the use of offshore intermediaries
- Ensuring the agency is complying with employment intermediary reporting

requirements and requesting evidence of reports submitted to HMRC where they do not operate PAYE – including where they use umbrella companies.

www.gov.uk/government/publications/use-of-labour-providers/use-of-labour-providers-advice-on-due-diligence

www.gov.uk/government/publications/employment-intermediaries-reporting-requirements

If you are a public sector buyer, Reg. 70 permits you to include contract conditions relating to social and employment-related considerations, provided they are linked to the subject-matter of the contract and provided you included in these in the call for competition and procurement documents.

See the Example Tender Questions and Contract Conditions document in the Toolkit.

Review and amend your ordering and payment processes

You should consider the potential impact that your payment processes and contract renegotiations may have on the supply chain workforce.

You should ensure that you do not put undue pressure on your suppliers in terms of delivery timescales and costs, as this can result in unfair employment practices occurring within the supply chain.

- Identify any industry standards for the delivery of goods and services bought by your organisation. Ensure that when placing orders your organisation aligns with the relevant industry standard and only seeks faster delivery in exceptional circumstances. Where faster delivery is required, you should discuss this with your supplier to satisfy yourself that this will not have an adverse impact on the supply chain's workforce
- Establish a fair timescale for paying your suppliers and ensure that payments are not unduly delayed. The 'Prompt Payment Code' requires payment within 30 days of receipt of a valid invoice. See the Example

Tender Questions and Contract Conditions document in the Toolkit for an example contract condition

- Consider using Project Bank Accounts as a way to pay suppliers in your supply chains. Project Bank Accounts are ring-fenced bank accounts with trust status from which payments are made simultaneously to members of the supply chain. For further information see the Welsh Government's 'Guidelines deploying Welsh Government Project Bank Account Policy'.

Remedying of problems identified

Work with your suppliers to resolve issues and change working practices

If you have found occurrences of unfair employment practices within your supply chain you should aim to work with the supplier to further clarify and understand the situation, and help put matters right, where possible.

Your relationship with the supplier is likely to determine how much influence you have to bring about change. Although you may not be a key customer of the supplier, they may be critical to your business. In these situations co-ordinating with your supply chain partners and other businesses which use the same supplier may be a good way to increase your influence. It may also help to involve local organisations such as Trade Unions and Industry bodies.

Steps that you can take include:

- Working with the supplier to understand what the key issues are, why they are occurring and what needs to be done to bring about change
- Providing copies of your Ethical Employment Policy to your supplier to help them understand your position and why you want the issues to be addressed
- Providing copies of any internal training materials on unfair employment practices and encourage the supplier to provide training for both management and its workers

- Developing and agree an action plan with the supplier which clearly outlines what each action involves and who is responsible, along with deadline dates and milestones/targets. Major issues should be dealt with as a priority within the action plan
- Keeping in contact with the supplier to assess progress against the plan, but also to ensure the supplier feels that this is a shared responsibility
- Establishing feedback processes which workers can take part in order to provide updates from an employee's perspective.

If you find instances of workers not being paid the National Minimum/Living Wage within the UK, or other concerns about employment rights or rules, you can contact the ACAS helpline for confidential advice:

www.acas.org.uk/index.aspx?articleid=2042

www.gov.uk/pay-and-work-rights

Any actions agreed should aim to correct the issues and also prevent them from happening in the future.

Terminate your contract

You should consider what you will want to be able to do if a supplier, or a supplier further down the supply chain, is found to be engaged in unfair employment practices. If you want to have the ability to bring your relationship to an end you will need to ensure that the wording of your contract allows you to terminate in such circumstances.

Terminating a contract may have a detrimental effect on your own business in terms of continuity of supply, quality of supply and reputation. In those circumstances you may decide it is worth trying to remedy the problem before contemplating termination.

Legal advice should be sought on drafting the appropriate termination provisions of any contract and before any action is taken to terminate the contract.

Annex A: Example Invitation to Tender question on Fair Work Practices

This is an example of a tender question you might use to assess potential suppliers' commitment to fair work practices, and paying the Living Wage. It is based on the sample Invitation to Tender question in the Scottish Government's Statutory Guidance¹.

The question should be adapted to be more specific about your requirements, and those work practices that are relevant to the subject matter of the contract.

Question Guidance:

***** [Insert organisational name] has adopted the Welsh Government's Code of Practice on Ethical Procurement in Supply Chains. This is designed to ensure that high-quality public services are delivered throughout Wales by a workforce that is treated legally, fairly and safely, and is well rewarded. This Code includes a commitment to consider promoting the Living Wage in relevant contracts. Evidence of fair work practices may include:

- a fair and equal pay policy that includes a commitment to paying all staff at least the Living Wage;
- becoming an accredited Living Wage Employer;
- ensuring that all staff have access to training and development opportunities;
- promoting equal opportunities for all staff regardless of age, gender, disability, religion, race and sexual orientation;
- stable employment, avoiding inappropriate use of zero-hours contracts, and umbrella employment firms;

- flexible working arrangements to allow support for carers, and for family-friendly working;
- supporting workforce engagement, for example Trade Union recognition and representation, or other arrangements for empowering staff.

In order to ensure high standards of service quality in this contract we expect contractors to take a similar approach in relation to ethical working practices.

Tender Question:

Please describe how you will commit to fair working practices for workers engaged in the delivery of this contract (including any agency or sub-contracted workers).

Answers need not be constrained to the examples given in the guidance alongside this question. Good answers will reassure evaluators that your company takes a positive approach to ensuring that your workers are subject to fair work practices, receive fair pay and have opportunities to develop skills.

¹ Statutory Guidance on the Selection of Tenderers and Award of Contracts – Addressing Fair Work Practices, including the Living Wage, in Procurement. Llywodraeth yr Alban, Hydref 2015