



Llywodraeth Cymru
Welsh Government

Code of Practice

Ethical Employment Practices in Public Sector Supply Chains

Procurement Advice Note (PAN)
for the Public Sector in Wales



May 2017

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1. Points to Note

- The information set out in this document is not legal advice and is not intended to be exhaustive – contracting parties should seek their own independent advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases.
- This document reflects the position as at May 2017.
- The note assumes a certain level of knowledge of public procurement.

2. Issue

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

This Advice Note has been 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.

This Advice Note supports achievement of the following Well-Being for Future Generations Goals as set out in the Well-Being of Future Generations (Wales) Act 2015:

- **A prosperous Wales** – providing better employment opportunities & supporting long term career development through the improvement of employment practices across supply chains in Wales.
- **A more equal Wales** – through supporting the eradication of unfair employment practices and modern slavery across supply chains in Wales.

- **A globally responsible Wales** – through supporting the eradication of modern slavery across global supply chains.

The advice note supports the overall aims and ethos of the refreshed “Wales Procurement Policy Statement” (WPPS) issued by the Minister for Finance and Government Business in June 2015. The WPPS clearly sets out the expectations placed on every public sector organisation in Wales. This PAN is in support of Principle 9:

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).

3. Timing & Scope

This Advice Note is to be applied to all new Welsh public sector procurements, contracts and frameworks.

This Advice Note should be applied to all existing Welsh public sector contracts and frameworks, unless there is good reason why it cannot be applied.

This note is aimed at staff involved in the procurement and/or contract management of services, goods and works.

4. Background

The Welsh Government is committed to using procurement as a lever for driving economic, social and environmental benefits and supporting jobs and growth. Effective procurement policy can encourage ethical and responsible business behaviour helping to protect suppliers and employees, promoting Wales as a good place for doing business.

It is believed that unethical employment practices are taking place in supply chains throughout Wales and beyond. These include:

- Modern Slavery
- False self-employment
- Unfair Umbrella Payment Schemes, or obliging workers to set up Private Limited Companies
- Unfair Zero hours contracts.

Agency Workers & False Self Employment:

Agency Workers:

Employment businesses engage work-seekers under a contract and then place them on a temporary basis with other client businesses who supervise their work – often called ‘temporary agency work’ or ‘temping’. Such businesses allow clients to take on temporary labour to meet uneven work loads. (This is different to an Employment Agency who is engaged by a client to find individuals for employment by the client).

Where an agency worker is an employee of the employment business, the employee is taxed on their earnings under the PAYE scheme and the employment business is liable for National Insurance contributions. This is not the case where an agency worker is engaged as a self-employed person.

Once an agency worker has been engaged by the hirer for a period of 12 weeks, provided they have been undertaking the same role for the whole period, they earn the right to the same basic working and employment conditions as direct recruits. This includes rights covering pay, duration of working time, rest breaks and annual leave. It does not include notice pay, expenses, redundancy pay, occupational sick pay or occupational maternity/paternity or adoption pay.

Deliberate attempts to avoid the above rights are covered by anti avoidance provisions, as long as it can be demonstrated that there is a deliberate and regular pattern designed to avoid the regulations. Agency workers who believe there is a refusal of the hirer or employment business to recognise their assertions over employment status, or who feel their pay is being determined unfairly, can seek redress through the appropriate industrial disputes procedure and/or the employment tribunal service.

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 Secondary State 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.

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 of an employment business will be taxed as employees if they are subject to a right of direction, supervision and control by the client.

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.

This issue is primarily one of employment law, where workers will have recourse to remedies to address any instances of “false self employment” through the employment tribunal service. Any case of False Self-Employment that amounts to a breach of labour laws would be covered by Regulation 56(2) and related Regulations within the Public Contracts Regulations 2015, allowing you to exclude a tenderer from your procurement. See the Guide to Tackling Unfair Employment Practices within the toolkit of the Code of Practice on Ethical Employment in Supply Chains for more information.

Umbrella Payment Schemes and use of Private Limited Companies:

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 use Umbrella Companies - outsourcing their recruitment and payroll overheads for temporary staff and managing PAYE and NI contributions. To illustrate:

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

The Freelancer and Contractor Services Association (FCSA www.fcsa.org.uk), the trade body that represents businesses providing umbrella employment and accountancy services to the freelance sector, operates a code of conduct which some umbrella companies adhere to.

The Finance Act 2014 led to an increase in workers being employed through umbrella company arrangements.

Whilst umbrella schemes have their place, some schemes are unfair in how they calculate deductions and fees. Potential issues identified through the use of unfair Umbrella Schemes are as follows:

- Reduced pay for employee as a result of being required to pay employer NI contributions, employment/administration fees
- Loss of entitlement for the worker to Jobseekers Allowance and Secondary State 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
- Reduced Health and Safety provisions.

In some instances holiday pay may come out indirectly when the pay is rolled up in the regular pay. The working time directive states that paid leave should be paid when the worker takes the leave. Rolled up holiday pay does not facilitate this as in reality the worker is not entitled under his/her contract to any paid days leave, thereby creating a situation of workers working 52 weeks of the year save for time off on bank holidays (for which they receive no pay).

Some contracting organisations are moving away from these Umbrella Payment Schemes and are instead obliging workers to set themselves up as Private Limited Companies. If used to avoid taxes and obligations to workers, and if workers have no choice but to set up as a Private Limited Companies these are unfair, and may amount to false self-employment (see above).

Zero hours contracts:

Zero hours contracts, or 'Non-Guaranteed Hours Contracts', are where an employment contract is in place under which the employer does not guarantee the employee any work and the employee is not required to accept any work offered by the employer. In effect, under a zero hours agreement there is no set minimum level of work or pay. 'Bank' staff are often employed on zero hours agreement.

Where used fairly, zero hours contracts can be of benefit to both the employer and employee.

For an 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. For example, to meet peaks in demand or to provide cover for periods of high annual leave and sickness.

For an employee they can offer the flexibility to accept and reject work in line with their personal requirements. Examples of where this can be of benefit include where the individual has 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.

Those on a zero hours contract will either have the employment status of a 'worker' or an 'employee'. Employees on zero hours contracts are entitled to the same employment rights as permanent members of staff including holiday, sick pay, maternity / paternity pay and redundancy pay. Those classed as 'workers' on zero hours contracts have limited employment rights, however they must be paid at least the National Minimum Wage / Living wage and receive pay for rest breaks and paid annual leave.

Potential issues identified through the use of unfair zero hours contracts are as follows:

- They can be used as a way for the employer to pay lower rates of pay and evade employer obligations such as payment of sick pay, holiday pay, workplace pension
- Unfair use of zero hours contracts by Employers can include:
 - preventing the individual accepting work with other employers
 - penalising those who reject offers of work and/or favouring those who readily accept work
 - giving insufficient notice of upcoming work and/or giving little notice of the cancellation of work

They can make it difficult for individuals to secure finance, including loans and mortgages.

Employers making use of zero hours contracts are required to pay individuals the minimum wage and are prevented from stopping an individual from looking for work or accepting work from another employer. The issue is primarily an employment law issue where workers will have recourse to remedies to address issues through the employment tribunal service.

The Public Services Staff Commission issued Guidance on the appropriate use of non-guaranteed hours arrangements, and these this should be followed.

www.gov.wales/topics/improving-services/publications/principles-guidance-on-use-of-non-guaranteed-hours/?lang=en

5. Advice

The Welsh Government is committed to ensuring good employment practices operate in the delivery of public services and seeks to encourage contracting authorities and suppliers to promote this through their procurement activity and the management of their contracts.

Public sector bodies should require contractors to adopt fair employment and labour practices, recruiting and retaining staff in a fair and ethical manner, and provide a safe and competent workforce employed in accordance with industry best practice. Specifically in relation to the issues raised in this policy note clients 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.

The setting of nationally-agreed terms and conditions of service in the UK is intended to set employment standards within sectors and remove the potential for unfair practices. Details of current collective agreements in the construction sector can be found from the following links:

www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructioncollectiveagreements

www.ucatt.org.uk/cijc-construction-industry-joint-council-working-rule-agreement

Contracting authorities should require contractors to provide transparency of employment practices being deployed across the workforce delivering the project. In the Invitation to Tender inclusion of a statement such as the following will alert contractors to this:

“[Contracting Authority] 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.”

Good contract management is vital to ensure the requirements of the contract are being delivered and value for money is achieved. Adopting a partnering approach with the contractor and agreeing shared principles to ensure fair employment practices are adopted throughout the supply chain will foster better relationships and improve the working conditions of all workers.

The ‘Code of Practice – Ethical Employment in Supply Chains’ was developed to support the development of more ethical public sector supply chains. The Code is designed

to ensure that everyone employed in public sector supply chains is employed ethically, in compliance with both the letter and spirit of UK, international and other national laws. Slavery is at the extreme end of illegal and unethical practice, but other issues include blacklisting, false self-employment, unfair use of umbrella companies and zero hours contracts (and possibly the living wage).

The Code of Practice is accompanied by a Toolkit containing guidance material and points to sources of further advice, training and useful documentation. The Guides also

contain practical advice on the actions each organisation can take to tackle unethical employment practices, which public sector bodies in Wales should look to implement.

The following guides are relevant to this PAN and can be found on the Procurement Route Planner – <http://prp.gov.wales/toolkit/?lang=en>

- Guide to tackling Modern Slavery and Human Rights Abuses
- Guide to tackling Unfair Employment Practices.

These guides provide detailed advice and guidance on the following actions:

Area	Key actions:
<p>Policy Development</p>	Produce a written policy on ethical employment and communicate it widely
	Produce a written policy on whistle-blowing employment and communicate it widely
	Appoint an ‘Anti-slavery and Ethical Employment Champion’
<p>Training & Communications</p>	Raise awareness of modern slavery and human rights abuses amongst your staff and deliver appropriate training
	Raise awareness of modern slavery and human rights abuses amongst your suppliers and deliver appropriate training
<p>Procurement procedures</p>	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

Area	Key actions:
Assess your existing suppliers and supply chains	Map your supply chain
	Carry out a risk assessment on your supply base
	Review/audit your high risk suppliers
Remedying of problems identified	Work with your suppliers to resolve issues and change working practices
	Terminate your contract
Annual Written Statement	Produce and publish an annual written statement on Modern Slavery

6. Further Information

Below are some of the policy guidance documents and supporting tools that are available to you for use in your procurement activity.

A full list of Procurement Advice Notes, Policy documents and Tools are available on Value Wales Procurement Route Planner (PRP) www.prp.wales.gov.uk/toolkit

7. Contact

Should you require further information please contact:

Value Wales: vwpolicy@wales.gsi.gov.uk