

Tackling non-compliance in the umbrella company market

Acas response

25 August 2023

This is the Acas Council response to the [government's consultation on tackling non-compliance in the umbrella company market](#).

Our response

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government's consultation on tackling non-compliance in the umbrella company market.
2. Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. Acas has considerable practical experience of employment relations and of the issues that can be experienced by workers and employers across all areas of employment law and workplace practice.
3. In carrying out this duty Acas offers a number of services including:
 - a national helpline which in 2022 to 2023 handled some 649,000 calls from individuals and employers
 - a website offering guidance and online training with approximately 14.4 million visits in 2022 to 2023
 - a conciliation service which in 2022 to 2023 handled more than 600 collective disputes and received nearly 105,000 early conciliation notifications
 - training on a wide range of workplace-related topics, provided to around 41,000 delegates in 2022 to 2023
4. Umbrella companies have been a feature of the labour market for a number of years, but evidence suggests their influence and number have been growing. They are often used to act as the employer for an agency or contract worker who would otherwise be payrollled by the agency. While there is limited information on the number of umbrella companies, Acas notes that, according to a report published in 2021 by the Low Incomes Tax Reform Group of The Chartered Institute of Taxation, there could be as many as 500 such companies employing some 600,000 individuals.
5. Acas acknowledges that compliant umbrella companies can provide useful services within the labour market which can benefit both individuals and employers. For example, an individual agency worker placed with multiple companies by multiple agencies might benefit from an umbrella company being used to give them a single employer and payroll, enabling a simpler method of dealing with tax via PAYE.
6. However, the largely unregulated nature of the current arrangements can also allow unscrupulous companies to take advantage of their unregulated status. It is also important to note that a worker may not have a free choice regarding how they engage for work where the only method of engagement made available by the employment business is through an umbrella company.
7. As the government acknowledges at paragraphs 1.14 and 1.17 of the consultation, Acas agrees that, where some employment businesses have undertaken due diligence or refused to work with non-compliant umbrella companies, they can be undercut by others willing to make use of those non-compliant umbrella companies. This can lead to an uneven playing field and a loss of business and risks otherwise legitimate employment businesses making the difficult decision on whether they may have to work with these non-

compliant businesses to remain competitive.

8. Acas therefore very much welcomes the government's consultation on proposals to bring umbrella companies within a stronger regulatory framework for both tax-compliance and employment rights purposes. It is vital that any changes are viewed through the context of both employment rights and tax regulation. Umbrella companies operate for both purposes, and both should be considered by government in its response to this consultation.

Tax compliance

9. The parts of the consultation that focus on tax compliance do not fall directly within Acas's remit. However, it is Acas's view that any employer behaviour that falls short of compliance with legal requirements and transparency can create a lack of trust and damage employment relations as well as relations with clients. On this basis, we welcome the government's proposals to strengthen and reform regulation in this area.

10. One of the stated goals for this consultation is to deliver improved outcomes for workers. In pursuing this goal an important consideration is, as outlined in Acas's response to the government's previous call for evidence in this area, that there can be significant confusion for individuals over:

- the different 'employment statuses' they may have for employment rights and tax purposes
- which regulations apply specifically for tax purposes and which for employment rights
- for employment rights purposes, whether they are a 'worker' of the employment business, an 'employee' of the umbrella company, or self-employed
- who holds responsibility for addressing problems relating to the individual's employment contract, in addition to responsibility for other employment matters

11. Longstanding evidence from calls to the Acas helpline, highlighted in Acas's earlier response to the government's consultation on employment status in 2018, show that these different areas of confusion can create uncertainty for some individuals and employers on:

- where to seek appropriate guidance to establish their rights
- understanding their options when attempting to address any problems or disputes that may arise in their working arrangement
- what options they have for seeking legal redress in various situations

12. In view of this evidence, there could be significant risk of unintended consequences for employment relationships arising from taking some of the steps set out in the consultation to address tax compliance.

For example, the proposed "Option 3: Deeming the employment business which supplies the worker to the end client to be the employer for tax purposes where the worker is employed by an umbrella company, moving the responsibility to operate PAYE", proposes that the individual will have one employer for tax purposes (the employment business) and another employer for employment relations purposes (the umbrella company). This could:

- exacerbate the already significant confusion for workers around the identity of their employer, as noted at paragraphs 8 and 9 above. Acas notes further that the Recruitment and Employment Confederation (REC) reports that confusion over the identity of the employer is also a common feature of complaints raised within its professional standards regime
- also introduce further challenges for employment businesses through opening opportunities for unscrupulous umbrella companies to operate in a way that takes advantage of tax responsibility lying with the employment business. In addition, Acas encourages the government to consider whether some employment businesses may be too small to carry out the kind of due diligence necessary to protect themselves from this behaviour

13. Acas therefore urges the government to ensure that any steps taken to improve tax compliance are precise and unambiguous in terms of their applicability for tax purposes. The government should seek to ensure that any steps taken do not unintentionally undermine workers' understanding of their employment relationship with the umbrella company.

Defining umbrella companies

14. In Acas's view, a definition that improves people's ability to identify umbrella companies clearly, as well as the nature and implications of their relationship with umbrella companies, is of paramount importance. As we set out in Acas's response to the government's previous call for evidence, our evidence points to this being a particular area of confusion for workers.

15. Acas notes that this is likely to be a complex issue to solve. It should involve defining what an umbrella company is in a way that removes the possibility for organisations to provide these services while falling outside the regulations. The definition must also avoid the unintended consequence of inadvertently capturing organisations which provide other similar services (for example, personal service companies and payroll bureaux).

16. To that end, Acas considers that neither of 2 options for definitions set out in the consultation are sufficient to both capture all organisations that should be included while excluding those that should not be, and to ensure that methods of engagement that currently operate legitimately are not prevented from continuing. For example:

Option 1: this is potentially too restrictive as it could prevent some ways of working that are currently legitimate. For example, it is possible for a personal service company to employ more than one individual, but model 4 here would not allow those companies to operate in this sector on the basis they would have more than one person made available by the company.

Option 2: this option allows for a lot of flexibility but could potentially open up opportunities to redefine an umbrella company in ways that allow it to sit outside the legal definition and avoid the application of the regulations.

17. Acas recommends, therefore, that before introducing any limitations the government should establish comprehensive data on the different ways currently being used to engage workers in this sector to ensure the best possible understanding of how a new legal definition can accurately address the current wide range of engagement methods.

Minimum standards and legal framework

18. Acas very much welcomes the government's proposal to introduce new minimum legal standards in this sector. Acas observes that the scope and detail of these minimum standards will necessarily depend on the solution the government develops to the challenges around definition (as above). However, in broad terms, in Acas's view, it is especially important to address minimum standards in those areas where our evidence shows particular and persistent confusion for workers, namely:

- pay
- holiday
- identity of the employer and employment status

Pay

19. Acas's evidence, as set out in our response to the government's call for evidence on the umbrella company market, finds that there are cases where deductions are taken from pay which workers were not expecting, were more than expected, or which have not been fully explained to them. In some cases, these deductions may be unlawful, in others they may reflect the legitimate costs of working via an umbrella company which, had the worker been aware of them before the contract commenced, may have led to them choosing a different method of engagement with the employment business.

20. In this regard, Acas supports Option 2 in the consultation insofar as it relates to setting out additional regulations regarding workers' pay. In light of Acas's evidence these should include measures aimed at reducing confusion for individuals about the payments they should receive, for instance by:

- clarifying what type of deductions can be taken by an umbrella company
- mandating that deductions as well as gross pay must be transparent when a job is advertised

- prescribing what information umbrella companies must provide to workers and when
- ensuring that umbrella companies are transparent about pay, deductions and fees at point of payment, so that workers can clearly understand the amount they receive

Holiday

21. The entitlement to paid holiday is key for all workers to ensure that they remain adequately rested to protect their health and safety as well as their ability to perform in their role. Acas therefore supports the proposed principle of introducing new regulations covering the handling of holiday pay for workers employed by umbrella companies.

22. The consultation document does not provide further detail of proposed reforms in this area. Acas recommends that, in regulating this area, the government should address those areas of holiday entitlement and pay where Acas's response to the government's call for evidence identified misunderstandings between umbrella companies and workers, namely:

- uncertainty around whether someone is receiving the correct amount of holiday entitlement, which can result in workers not always being able to take all the leave they are due
- lack of clarity about the calculation of pay for holiday, which can result in uncertainty about whether the correct amount has been paid

23. Acas notes that holiday pay in this sector is often in the form of rolled-up holiday pay. Acas recognises that the regulation of this practice has been inconsistent for many years and supports the government's proposal, in its recent consultation on retained EU employment law reforms, to seek to provide clarity and certainty in this area. For Acas's considerations and recommendations in this regard, see paragraphs 12 to 19 of Acas's response to the government's consultation on retained EU employment law.

Identity of employer and employment status

24. As noted at paragraph 11 above, Acas's evidence shows that workers can experience considerable confusion about who their employer is and their employment status. Moreover, there can be a substantial lack of clarity for workers regarding the functions of the umbrella company.

25. One consequence of this confusion and lack of clarity, also evident from calls to the Acas helpline, is uncertainty regarding who a worker should approach when attempting to address any problems that arise in their working arrangement. This affects the capacity for workers to understand and pursue their options for resolution or redress.

26. In Acas's view, it is critical that the introduction of minimum standards in this area should aim to address such confusion and, in turn, to facilitate early and effective dispute resolution in these arrangements.

Measures to address this should include, for instance:

- an obligation on the umbrella company to provide accurate information to the employment business to inform the worker's Key Information Document
- an obligation on the umbrella company to confirm certain details to the individual worker, such as confirmation that the umbrella company is the employer where appropriate

Cost of conflict caused by disputes

27. As set out in our response to the government's call for evidence on the umbrella company market, Acas's evidence points to the potential for time-consuming conflict and disputes around pay, holiday and identification of the employer where the latter is unclear.

28. In assessing the benefits and risks of proposals under consideration in this consultation, Acas encourages the government to take into account the potential costs of workplace conflict and disputes in such cases. Acas's evidence on the total cost of conflict in UK

workplaces indicates an estimated total annual cost of conflict to UK organisations of £28.5 billion in 2018 to 2019.

29. In Acas's view, the introduction of regulation in the above areas could help lower the potential for costly conflict by bringing additional clarity on the important areas of pay, holiday and identity of the employer.

Enforcement

30. In Acas's response to the government's Good Work Plan consultation on the Agency Workers Recommendations in the Taylor Review in 2018, Acas supported the government's proposal to explore extending the remit of the Employment Agency Standards Inspectorate (EAS) to cover umbrella companies. Acas believes this proposal has merit on the basis that it would likely be more efficient to rely on existing enforcement infrastructure than to create a new enforcement agency for this purpose. EAS has specialist, relevant skills in this area. The government should ensure that the EAS (or other enforcement option) is well resourced to achieve its remit.

31. A further option that Acas believes merits exploration is the operation of a register of umbrella companies that would be maintained by the EAS (or other enforcement body).

For example, this could help make any due diligence required to be carried out by an employment business more straightforward. The development of such a register could also help with establishing how best to define an umbrella company. Acas notes the practicality of this is likely to depend on the ability of the government to effectively manage and update such a tool.

32. In Acas's view, enforcement in this area should be focused on a combination of compliance, education and deterrence. Education will be of particular importance as the initial introduction of regulation, including new statutory definitions, will inevitably lead to a period of learning and adaptation for umbrella companies, employment businesses and workers. Acas would welcome working with the government and EAS (or other enforcement body) to develop and implement a proportionate educational drive to support the reach and effectiveness of any new regulations and enforcement arrangements.

33. Acas also has an important role to play in working with the enforcement agencies and has a close working relationship with EAS with regards to enforcement of the current regulation of agencies. Our role here includes explaining and discussing rights, responsibilities and dispute resolution options with callers to the Acas helpline and transferring callers to the EAS to take forward enforcement queries and options as appropriate. Acas recommends that our role in these respects should be extended to cover any new regulations and enforcement options introduced for umbrella companies.

Guidance

34. Timely, accessible and effective non-statutory guidance is always helpful to support the successful implementation of new employment legislation. This will be especially the case in this highly complex and currently unregulated area, to provide explanation and support for those affected by the introduction of new regulation.

35. Acas recommends that the government works closely with Acas on the development and delivery of such guidance.