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17 May 2017

Matthew Taylor
The Independent Review of Employment Practices in the Modern Economy
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

Dear Matthew,

AUTOMATIC ENROLMENT AND THE GIG ECONOMY

We are writing to you with regard to the definition of self-employed status and the implications of it for pension saving.

Currently, automatic enrolment is working well and is showing signs of being a major policy success. Since 2012 around 7.6 million workers have been automatically enrolled into a workplace pension scheme and opt out remains lower than expected.

It would, though, be theoretically possible for automatic enrolment to be undermined if some businesses succeed in side-stepping effective regulation of the labour market. As things stand only those who are workers for the purposes of section 88 of the Pension Schemes Act 2008 are considered eligible for automatic enrolment. This definition is similar in substance to other definitions of a worker elsewhere in employment law, most notably section 230 (3)b of the Employment Rights Act 1996. People who are genuinely self-employed are thereby excluded from the scope of the regulations. We see the use of self-employment in name only as a means by which businesses might look to evade their legal duties.

We see little evidence of such a problem becoming widespread but the potential is there. This can be seen in media reports of the practices of some companies. While there has been considerable focus on technology companies role in the growth of the gig-economy, it is clear that other businesses pose similar issues. Recent employment tribunal cases against Uber BV, Pimlico Plumbers, Addison Lee and Excel Group Services show similar issues at the top level.

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The line between genuine and more questionable self-employment is not always clear. As you will be aware, businesses of concern may be identified as showing the form of self-employment in their relationships with workers but the substance of a traditional working relationship. That may extend to significant management control over workers and the acceptance of risks by the employer that would usually be borne by a genuinely self-employed contractor.

We note that there has been some progress towards the resolution of the issue of questionable self-employment as a result of legal action, including through the Supreme Court decision in *Autoclenz vs Belcher*. Were you to agree with us about the undesirability of some forms of self-employment, it would be for your review to judge whether legal action will be sufficient to address issues raised by questionable self-employment practices or whether further statutory measures are desirable.

Our legal advice so far on this issue has been that the recent cases following *Autoclenz vs Belcher* have turned more on the individual facts of each case. This means that while, from the policy perspective, the issues seem similar, the broader applicability of any legal precedent is likely to be more limited.

Should you consider that developments in case law are not sufficient to address the issue then we would potentially support a formal consultation on the relevant legislation. That might usefully include a review of S230 (3) b of the Employment Rights Act 1996. Should you regard that as necessary, we think it would be desirable to consider the degree of alignment required between S230 (3) b of the Employment Rights Act 96 and S88 of the Pension Schemes Act 2008.

As you will be aware, the two instruments in question are not exactly alike but have significant similarities in how they define a worker. If it becomes necessary to review the ERA limb b definition of a worker then it would make sense to maintain a similar degree of alignment between that definition and the definition used for the purposes of automatic enrolment.

Separate to the issue of how to define a self-employed person, in our response to the 2017 review of automatic enrolment, we suggested that people who are genuinely self-employed should be automatically enrolled. The number of self-employed people in the UK increased by c. 730,000 between 2008 and 2015, split roughly evenly between full and part time self-employment. This has been accompanied by a decline in funds flowing into the pensions of self-employed people. In 2007/08 self-employed people made c. £3.5bn of pension contributions and by 2015/16 this had fallen to £1.7bn. This was mainly the result of a fall in the proportion of the self-employed saving into a pension. This situation suggests to us that we risk a crisis in pension saving among the self-employed in the absence of action.

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We are, though, not yet settled on the best model by which reform might be achieved. Once purdah no longer applies we are looking forward to a lively conversation about how this might be accomplished. While you might not want to wade into the technical detail of this conversation, we feel that the 2017 review might benefit from an exchange of views on the general principles relating to raising the level of pension coverage among the self-employed. We would be more than happy to facilitate that if you are interested.

Otherwise, we continue to wish your review well and look forward to the final publication. If we can be of any further assistance, or if you require any further clarification, please do not hesitate to get in touch.

Yours sincerely,



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