

## **Focus on Labour Exploitation (FLEX) written evidence to the Department for Business, Energy and Industrial Strategy**

### **Subject: Enforcement of employment rights recommendations**

16 May 2018

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#### **Introduction**

1. Focus on Labour Exploitation (FLEX) welcomes the opportunity to contribute to the Department for Business, Energy and Industrial Strategy's Inquiry on Enforcement of employment rights recommendations.
  2. FLEX is a United Kingdom (UK) based charity that works to end human trafficking for labour exploitation, both in the UK and worldwide. To achieve this, FLEX conducts research and policy advocacy to prevent labour abuses, protect the rights of trafficked persons and promote best practice responses to human trafficking for labour exploitation.
  3. This submission is in response to Section A, Questions 2-5, of the inquiry.
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#### **2) Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers? Please give reasons.**

4. Research by FLEX shows there are several factors that increase the likelihood of workers facing labour abuses such as non-payment of holiday and sick pay.<sup>1</sup> These factors are often concentrated in low-wage sectors of the economy, and many of them overlap and intersect so that one worker may experience a number of these factors at the same time. There is a strong causal link between labour abuses and labour exploitation.<sup>2</sup>
5. FLEX recommends that enforcement of labour rights should be based on detailed research and a thorough mapping of risk factors on a sector by sector basis. We have carried out such research and mapping in the construction and bakeries sectors, as well as researched particular risk factors faced by women workers.
6. The mapping of risk factors is based on the below risk and resilience matrix, which identifies the key categories of risk to workers identified by FLEX, and the vulnerabilities and resilience factors related to them.

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<sup>1</sup> FLEX. 2017. 'Risky Business: Tackling exploitation in the UK labour market'. <https://bit.ly/2A1xTun>

<sup>2</sup> FLEX and LEAG. 2016. 'Labour compliance to exploitation and the abuses in-between'. <https://bit.ly/2EuVOWc>

CATEGORY	VULNERABILITY	RESILIENCE
Migrant status	No or limited right to remain; restrictions on work and access to public funds; registration requirements; tied visas	Right to work
Unionisation	Non-unionised	Unionised
Community	Limited community ties	Strong community support
Contract	Zero hours; short hours; extensive subcontracting	Worker contract hours and terms requirements met
Terms	Self-employment; agency work; part-time work	Employee, full time
Pay	Debts; deductions; mandatory unpaid time; non-payment of national living wage	Living wage
Treatment	Multiple, persistent labour abuses; health and safety breaches; discrimination	Accessible routes to remedy; worker awareness of advice gateways
Oversight	Deregulation; poor enforcement; prioritisation of immigration control	Strong, worker-centred labour inspection and enforcement; firewall between immigration control and labour inspection
Welfare	Homeless; destitute; no recourse to public funds	Access to benefits, housing and ongoing support

7. Using the above risk matrix, FLEX's research in the **construction sector** found that the widespread use of self-employment in the sector has resulted in workers having significantly fewer rights than those employed directly by a company, including no right to statutory sick pay or paid holiday.<sup>3</sup> The former union for workers in the construction sector, UCATT – now merged with Unite – asserts that there is a direct link between these types of employment arrangements and exploitation, and in many instances employees are not really working for themselves.<sup>4</sup>
8. The industry is also covered by a unique tax regime – the Construction Industry Scheme (CIS) – which allows employers to deduct and send tax to HMRC directly from self-employed workers' wages, but they do not deduct National Insurance or make National Insurance payments, which makes self-employed workers much cheaper to hire. According to UCATT, the CIS has institutionalised self-employment, as contractors register workers as self-employed to cut labour costs in order to remain competitive. This puts falsely self-employed workers at significant disadvantage in terms of rights and protections. In 2013, it was estimated that as a result of employment intermediaries facilitating false self-employment, 200,000 workers in the construction sector were wrongly designated self-employed.<sup>5</sup>
9. FLEX also found that migrant workers in the construction sector face challenges such as discrimination, barriers to accessing the labour market, and a lack of alternative job opportunities which can leave them reliant on insecure, poorly paid and unsafe work where they are more likely to experience labour abuses such as non-payment of holiday and sick pay. When asked whether more information on labour rights and enforcement agencies would help him and his colleagues, one interview participant said:
 

*“Yes, I do. Firstly, you don't know how to find a job. If you find a job, you don't know what rights you have. For example, if we are ill, the sick leave is not paid. You stay at home and nobody pays you for that. You don't have sick leave, bank holidays. We are not paid; only British citizens are.”*
10. FLEX's research in the **bakeries sector** found employers using high numbers of temporary agency staff, many of whom face short-notice shift cancellations, irregular shifts and low hours. The insecurity associated with agency work, such as the possibility

<sup>3</sup> FLEX. 2018. 'Shaky Foundations: Labour exploitation in London's construction sector'. <https://bit.ly/2HmgP3i>

<sup>4</sup> UCATT. 2011. 'The Hidden Workforce Building Britain'. p.7. <https://bit.ly/2lmstyY>

<sup>5</sup> UCATT. 2012. 'Employment Law Briefing: Bogus Self Employment'. p.2. <https://bit.ly/2wTCKO7>

of being fired without notice or reason, compounds fear and dependency, making it difficult to complain about abusive or exploitative treatment, such as non-payment of sick and holiday pay.<sup>6</sup>

11. FLEX also found agency workers in the bakeries sector earning less than non-agency colleagues doing the same job. Coupled with the fact that agency workers are often given fewer hours than expected, there is a strong risk of in-work poverty for such workers. In-work poverty can lead to workers accepting violations of their labour rights, as they are dependent on their low-wages for survival.
12. Research by FLEX and others has identified specific problems and labour abuses faced by women workers in high-risk women-dominated labour sectors such as **cleaning, care, hospitality and domestic work**.
13. Women are overrepresented among agency workers: women accounted for 85% of the growth in number of agency workers between 2011-2016.<sup>7</sup> Women agency workers have reported poor conditions and treatment, including: excessive hours, pressure to work overtime, non-payment of holiday and sick pay, spurious deductions from wages, false self-employment.<sup>8</sup>
14. Care, hospitality and cleaning work is frequently part-time, with or without the use of zero hours contracts. In the cleaning sector 78% of work is part-time. In the hospitality sector, about half of all employment is part-time. Part-time work and flexible working arrangements can be beneficial for women workers, allowing them to combine work with family and other commitments. However, it can also cause financial hardship, uncertainty, underemployment, and the need for women to take multiple jobs to make ends meet.<sup>9</sup>
15. Research by Oxfam and Kalayaan into the care sector found there is an expectation that workers would not take holiday. The research also found that workers are being refused sick pay or holiday pay as a method of coercing them into being constantly on call and available to work. Most workers in the sector barely earn more than minimum wage, and are therefore unable to afford to take time off unpaid. By refusing to pay sick or holiday pay, employers can ensure that workers are always available for work.<sup>10</sup>
16. A report by the Equality and Human Rights Commission on the cleaning sector found that while a small number of workers reported not receiving any sick pay, or not the full amount, a significant number reported that they were paid less holiday pay than the number of days taken, or employers refused to pay for time off. Cleaning firms were found to tell workers they were not entitled to sick or holiday pay despite being permanent employees. The report found that migrant workers in particular did not query this as they were unaware of their holiday or sick pay entitlements.<sup>11</sup>

### **3) What barriers do you think are faced by individuals seeking to ensure they receive these payments?**

17. **Poverty wages.** Poverty is one of the main barriers preventing workers from addressing abuses. Where workers are in poverty, they are less likely to complain for fear of losing the little money they have to survive. Participants in a study by FLEX and the Labour Exploitation Advisory Group (LEAG) spoke of cases of workers suffering labour abuse and even victims of exploitation who, having accessed advice about what

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<sup>6</sup> FLEX. 2017. 'Risky Business: Tackling exploitation in the UK labour market'. <https://bit.ly/2A1xTun>

<sup>7</sup> Resolution Foundation, 2016. Secret Agents: Agency workers in the new world of work, p.27. Available at <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

<sup>8</sup> Oxfam. 2009. Who Cares? How best to protect UK care workers employed through agencies and gangmasters from exploitation, p.2 <https://bit.ly/2L5D0N1>

<sup>9</sup> FLEX. 2017. 'Risky Business: Tackling exploitation in the UK labour market'. <https://bit.ly/2A1xTun>

<sup>10</sup> Oxfam. 2009. Who Cares? 'How best to protect UK care workers employed through agencies and gangmasters from exploitation.' <https://bit.ly/2L5D0N1>

<sup>11</sup> Equality and Human Rights Commission. 2014. 'The invisible workforce: Employment practices in the cleaning sector'. <https://bit.ly/2rLVM36>

could be done, chose not to pursue remedies as they were too afraid of losing employment upon which they were reliant for survival.<sup>12</sup> This level of financial vulnerability, which can be exacerbated by very low wages or withholding of wages, was thought to open the door to further exploitation. Where survival is more urgent than remedy, workers have no option but to endure abuse and therefore employers can get away with more exploitative practices without fear of reprisal.

18. **Confusion and lack of clarity around employment rights and entitlements.** LEAG members have also found that many of the people they encounter who have suffered labour abuses or exploitation do not know their labour rights or what they should expect of their employers.<sup>13</sup> This may mean that they accept low-level abuse, which can develop into more severe exploitation. It also means that even if they suspect something is wrong, they are not equipped to challenge it.
19. **Not knowing where to report or seek help.** Where workers know they are being abused and wish to report, not knowing where to complain to and how to enforce their rights is a barrier. This may be because they don't know who they work for, or because they don't know what mechanisms are available for reporting.
20. According to Citizens Advice, who helped 380,000 people with employment-related enquiries in 2015-2016:

*options for enforcing rights have become less accessible, with ... a confusing and often poorly-resourced set of enforcement bodies, including HMRC, Acas, GLAA and EASI. This leaves many workers unaware of, unsure about, or unable to enforce their rights.<sup>14</sup>*

21. **Long employment chains.** Subcontracting models which create long employment chains have been identified by LEAG as a key driver of exploitation in certain sectors, particularly construction and cleaning.<sup>15</sup> As many workers do not know by whom they are ultimately employed they are unsure of where they can complain if there are problems. Lack of accountability within subcontracting models is a major issue; primary contractors are able to deny knowledge of or responsibility for abuse, and often do not know who is working for them. One LEAG member mentioned a case of a group of cleaners working at a high street retailer who were contracted through a recruitment agency and did not receive their holiday entitlements but instead had their timesheets altered. When they approached their manager, they were dismissed and told that it was the recruitment agency's responsibility.
22. The construction industry's reliance on often complex **subcontracting** arrangements has de-centralised both control and oversight by creating multiple layers of contracting and subcontracting at the same site. This means that a large national building company may be in charge of the site and establishing subcontracting agreements, but will have little oversight over working conditions for those working for subcontractors.
23. When responsibility for working conditions is obscured by layers of subcontracting and mechanisms for remedying abuse are unclear, workers are left with little recourse to address problems and claim their rights. Long subcontracting chains, often combined with use of agencies and umbrella companies, can mean that workers don't know who their employer is or who is ultimately responsible for a construction site or project, which makes it extremely difficult to take an employment case or seek enforcement of rights.
24. **Fear of immigration authorities** is a major barrier to reporting for both undocumented and documented migrant workers – the latter often being unaware or insecure in their migration status. The threat of reporting to police or immigration authorities is routinely used by unscrupulous employers to hold workers in abusive

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<sup>12</sup> FLEX and LEAG. 2016. 'Labour compliance to exploitation and the abuses in-between'. <https://bit.ly/2EuVOWc>

<sup>13</sup> *Ibid.*

<sup>14</sup> Citizen's Advice, 2017, 'How can job security exist in the modern world of work?'

<sup>15</sup> FLEX and LEAG. 2016. 'Labour compliance to exploitation and the abuses in-between'. <https://bit.ly/2EuVOWc>

situations. Even if the threat does not come directly from the employer, undocumented workers often will not report abuse as they are afraid of coming to the attention of authorities and being deported.<sup>16</sup>

25. **Long waiting times for cases to be processed.** FLEX has heard evidence that cases of non-payment of minimum wage referred to HMRC can take up to two years to complete, and that many workers choose not to report as a result.<sup>17</sup>
26. **Lack of suitable advice for migrant workers.** While advice gateways exist for information on work-related issues, several of these are not accessible or suitable for migrant workers. For example, the Labour Exploitation Advisory Group has found that the Advisory, Conciliation and Arbitration Service (ACAS) helpline service is inaccessible to those with little understanding of the system and poor English language skills.
27. **Gender.** Women are overrepresented in precarious, low-wage work. Women-dominated sectors such as care, hospitality and cleaning are characterised by low pay, non-standard/precarious contracts (part-time, zero-hours, agency work), and low rates of unionisation. These factors combine to make it more likely that women will experience non-payment of holiday and sick pay, and make it more difficult for women to complain about such abuses for fear of losing work altogether.
28. Women also face barriers in accessing employment rights due to their need to provide and care for others. Approximately 66% of single parents are in work, the vast majority of whom are women.<sup>18</sup> Where a family depends upon a woman's employment for survival, her ability to leave or challenge abusive working conditions is likely to be significantly reduced. In these cases, the danger of losing employment, or even a reduction of hours, as a result of complaining may be too significant to risk making a complaint. As one hotel worker said, "I asked for a paid break... and the next day I was sent home and told there was no work. You soon learn."<sup>19</sup>
29. **Low or no rates of unionisation.** Unions provide members with information on their rights, as well as mechanisms by which to exercise them, and low unionisation – or even awareness of unions – leaves workers without support to access labour market protections.
30. In most non-professional sectors, men are more likely to be union members than women, and amongst part-time workers, most of whom are women, union membership is low. The highly feminised sectors of cleaning,<sup>20</sup> hospitality, domestic work, and care<sup>21</sup> have low rates of union membership, particularly for low-level workers in those sectors. In the hotel sector only 4% of workers are represented by a trade union,<sup>22</sup> and attempts to unionise can lead to outsourcing, job cuts and other repercussions.

#### **4) What would be the advantages and disadvantages for businesses of state enforcement in these areas?**

31. The key advantage for businesses of state enforcement is that it helps create a level playing field that ensures those employers who respect their workers' employment rights and entitlements are not undercut by unscrupulous operators.
32. Enforcement should be based on partnership working to prevent abuses, rather raids or other heavy-handed state enforcement that can damage relationships within supply

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<sup>16</sup> *Ibid.*

<sup>17</sup> FLEX interview with migrant support worker. 2017. 'Risky Business: Tackling exploitation in the UK labour market'. <https://bit.ly/2A1xTun>

<sup>18</sup> See <https://gingerbread.org.uk/content/365/Statistics>

<sup>19</sup> Yvonne Roberts. 2015. The Guardian. 'Britain's hotel workers – bullied, underpaid and with few rights' <https://bit.ly/2nf4yqK>

<sup>20</sup> Eurofound. 2012. 'UK: The representatives of trade unions and employer associations in the cleaning activities sector'. <https://bit.ly/2L7lQyu>

<sup>21</sup> Kristy McGregor. 2011. Community Care. 'Alarm over lack of union membership among care workers'. <https://bit.ly/2KouK9x>

<sup>22</sup> Alex Balch and Glynn Rankin., 2014. 'Facilitating Corporate Social Responsibility in the Field of Human Trafficking: The Hotel Sector in the UK'. p.24

chains and break relationships of trust that enable businesses to monitor compliance throughout their supply chain.

33. The intelligence-led licensing regime of the GLAA is a good example of a collaborative and proactive enforcement process that has helped to prevent exploitation and to ensure trust is maintained.
34. Those businesses who rely on abusive employment practices, such as non-payment of holiday and sick pay, or use falsely self-employed workers to cut costs, will rightly be disadvantaged by state enforcement.

**5) What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?**

**35. Establish Memoranda of Understanding (MOU) between immigration control and essential services, including labour inspectorates and the police.**

Confusion between immigration control and labour inspection means that migrant workers, irrespective of their immigration status, are often too afraid to report workplace abuses. In order to make sure migrant workers can come forward, memoranda of understanding should be used to establish a clear separation between immigration enforcement activities and the provision of essential services.

36. Some good examples of such agreements already exist. For example, at the city level, Amsterdam has adopted a programme called ‘Everyone’s Police’, which enables undocumented migrants to report crimes and abuses without the fear of criminalisation. In 2016, a safe reporting policy based on the Amsterdam model was rolled out nationwide to build trust and to encourage undocumented residents to report crimes.<sup>23</sup> This policy enables the police to do their work more effectively and allows the State to access information about weaknesses in the labour market.
37. In the USA there is an MOU between the Department of Labor and the Department of Homeland Security. The purpose of this MOU is to ensure that immigration control does not interfere with the protection of workers’ rights. For example, when the Wages and Hours Directorate investigates cases of unpaid wages they must not ask for immigration documents. The clear separation of roles, and the fact that workers’ rights are protected in the USA regardless of immigration status, prevents retaliation and intimidation by employers who threaten to report undocumented workers when exercising their labour rights.<sup>24</sup>
38. **Establish joint and several liability for the payment of wages, holiday and sick pay, and other entitlements.** Joint liability regimes impose shared or ultimate liability for labour rights and other regulatory breaches on entities higher up the supply chain. Such regimes already exist in a variety of forms throughout Europe, including Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain, and in numerous non-European jurisdictions, including the United States, the Philippines and Argentina. Currently there is no system for joint liability for wages, sick pay or holiday entitlements in the UK. Many workers are unable to pursue claims against their direct employer due to the employer’s insolvency or difficulties in identifying or locating the employer. This is common for instance in sectors such as construction, characterised by long supply chains and subcontracting arrangements.
39. Joint liability regimes operate to overcome the dilution of responsibility and deterioration of working conditions that occurs in labour supply chains involving significant subcontracting. In each of the above-mentioned countries, joint liability regimes were introduced to address gaps in accountability and barriers to enforcement that arise when companies outsource some or all of their labour. In most cases the

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<sup>23</sup> PICUM. 2017. “Firewall”: A tool for safeguarding fundamental rights of undocumented migrants’. <https://bit.ly/2Gn7beX>

<sup>24</sup> National Employment Law Project and National Immigration Law Center. 2011. ‘Immigration and Labor Enforcement in The Workplace: The Revised DOL-DHS Memorandum of Understanding’. <https://bit.ly/2rMIkud>

regulations were introduced against a background of employers failing in their obligations and employees suffering abuses of their rights, either in particular sectors or in general throughout the labour market. The regulations also have the secondary aim of securing required payments into tax systems and social security schemes.<sup>25</sup>

40. Joint liability regimes may also be targeted at a specific sector, or at specific types of employees. In most cases, the regulations will cover all temporary and agency workers, though in some countries (e.g. Spain and Austria) the scope is much broader to include all workers, and in other countries legislation particularly addresses the duties towards undocumented workers. In at least 13 EU countries there are specific regimes to cover workers in the construction sector, where particular issues with subcontracting exist.<sup>26</sup>
41. The Director of Labour Market Enforcement has recently recommended that joint responsibility measures be introduced in the UK. Joint responsibility is not as strong as joint liability (financial penalties will not apply to the brand at the top of the supply chain), but it does go some way in addressing the dissolution of responsibility in subcontracting arrangements. The recommendation states that, where non-compliance is found in a supply chain, follow-up action should be taken by enforcement agencies in conjunction with the brand name and supplier in private to correct the infringements. Failure to correct could result in public naming of both brand name and supplier.<sup>27</sup>
42. **Establish a centralised helpline under the office of the Director of Labour Market Enforcement.** While the provision of advice and reporting of non-compliance in the UK are placed within separate agencies, including Acas, GLAA, the Modern Slavery Helpline and HMRC, in several countries, including the Netherlands and Canada, these activities fall under the remit of the national labour inspectorate. FLEX recommends that the establishment of a centralised helpline under the office of the Director of Labour Market Enforcement is considered. As mentioned, some vulnerable workers are discouraged from seeking advice from Acas due to the helpline's inability to address their concerns. FLEX finds Acas to be a valuable source of information for workers, but considers that a centralised helpline allowing for complaints against an employer to be raised directly, would provide a more practical solution for vulnerable workers.
43. **Make subcontracting models more transparent.** Lack of accountability and transparency within labour subcontracting structures has been identified as a key driver of exploitation, as workers don't know who they are working for and employers are unaware of abuses happening within their supply chains.<sup>28</sup> In order to address this problem, employment agencies should be made responsible for providing clear information on workers' employers and the complaints mechanisms available.
44. **Increase pro-active labour inspections.** The ILO regards proactive inspection of workplaces as a core activity of labour inspectorates for the prevention of exploitation.<sup>29</sup> According to the World Bank, inspectorates should 'aim for a goal of 60 percent proactive inspections, and 40 percent reactive (accidents, complaints) based on an application of risk prioritization towards highest risk workplaces'.<sup>30</sup>
45. Proactive inspections targeting high-risk sectors of the labour market, particularly when combined with powers to enforce penalties immediately, can provide a strong disincentive to non-compliance for businesses, as well as enabling the detection of violations before they develop into severe exploitation. However, the UK currently lags far behind many of its European counterparts, as the Migration Advisory Committee has

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<sup>25</sup> European Foundation for the Improvement of Living and Working Conditions. 2008. 'Liability in Subcontracting Processes in the European construction sector: Spain'. p.11. <https://bit.ly/2INDo4s>

<sup>26</sup> Yves Jorens, Saskia Peters and Mijke Houwerzijl. 2012. 'Study on the protection of workers' rights in subcontracting processes in the European Union'. p.37-44. <https://bit.ly/2IIT8fh>

<sup>27</sup> DLME. 2018. 'UK labour market enforcement strategy 2018 to 2019'. <https://bit.ly/2Ibr8XX>

<sup>28</sup> FLEX and LEAG. 2016. 'Labour compliance to exploitation and the abuses in-between'. <https://bit.ly/2EuVOWc>

<sup>29</sup> International Labour Organisation. 2010. 'Labour inspection: what it is and what it does'. <https://bit.ly/2In4QXe>

<sup>30</sup> The World Bank. 2011. 'International Experiences in Reforming Labour Inspection Services'. p.3. <https://bit.ly/2IIT13I>

warned that ‘on average, a firm can expect a visit from HMRC inspectors once in every 250 years and expect to be prosecuted once in a million years.’<sup>31</sup>

46. In his recently published strategy report, the Director of Labour Market Enforcement has recognised the need for more pro-active enforcement, and recommends that the Gangmasters and Labour Abuse Authority, the Employment Agencies Standards Inspectorate, and the HMRC national minimum wage enforcement team should “continue to shift to more proactive enforcement methods”.<sup>32</sup>
47. As has been highlighted above, at-risk workers face numerous barriers to reporting labour abuses. Proactive enforcement of labour rights through labour inspections is crucial for encouraging workers to raise over non-payment of holiday and sick pay, as well as other labour abuses, with their employers and the state. Interviews by FLEX with trafficked persons have found a strong desire for official intervention in workplaces to offer guidance, assistance and support:

*I would like people to talk to my employer about how much they pay, how much holiday they're giving, how much time we're working for them [...] Because otherwise we don't tell anyone, we are scared because we are foreign [...] I wish someone talks to them who has a responsibility'*

*- Trafficked person's testimony<sup>33</sup>*

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<sup>31</sup> Migration Advisory Committee. 2014. ‘Migrants in Low-Skilled Work’. p.4. <https://bit.ly/2L3F6g9>

<sup>32</sup> DLME. 2018. ‘UK labour market enforcement strategy 2018 to 2019’. <https://bit.ly/2Ibr8XX>

<sup>33</sup> FLEX Interview in December 2014 for Pro-Act Project. 2015. ‘Pro-Active Identification and Support in the Netherlands, the UK and Romania’.