

WORK RIGHTS CENTRE - EVIDENCE SUBMISSION

Employment Rights Bill – evidence to House of Commons Public Bill Committee

November 2024

ABOUT WORK RIGHTS CENTRE

Work Rights Centre is a registered charity dedicated to supporting migrants and disadvantaged Britons to access employment justice and improve their social mobility. We do this by providing free and confidential advice in the areas of employment, immigration, and social security, and by mobilising frontline intelligence to address the systemic causes of migrants' inequality. The charity was founded in 2016. Ever since, we have advised over 6,000 people, helped recover over £300,000 in unpaid wages and fees, and supported hundreds more to make job applications and secure their immigration status.

OUR INTEREST IN THE EMPLOYMENT RIGHTS BILL

The Employment Rights Bill was published on 10 October 2024 and includes 28 individual employment reforms in a variety of areas including zero-hours contracts, fire and rehire practices, day one rights and a new model for labour market enforcement. As an organisation that provides employment legal advice to predominantly migrant workers in precarious work situations, the purpose of this submission is to highlight areas where the bill can be strengthened so that its effects can be felt by those at the sharpest end of non-compliance and exploitation in the labour market.

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Executive Summary

- The Employment Rights Bill (herein referred to as the “Bill”) provides a tentatively positive framework for strengthening the employment rights of millions of workers across the UK.
- This evidence submission makes a number of recommendations to strengthen the Bill so that it addresses some of the most pertinent issues facing migrant and other vulnerable workers in the labour market. This includes:
 1. **Ensuring that unfair dismissal probationary periods for individuals on fixed-term contracts are proportionate to their length;**
 2. **Removing the qualifying period for unfair dismissal in respect of migrant seasonal workers arriving in the UK under the Seasonal Worker visa scheme;**
 3. **Amending the Statutory Maternity Pay (General) Regulations 1986 to allow for flexibility regarding the calculation of normal weekly earnings during the “relevant period” e.g. by allowing the weeks a pregnant worker was sick/worked fewer hours to be left out or substituted with other periods;**
 4. **Amending section 75 of the Bill to allow groups of migrant workers or their representatives to join the Advisory Board to advise the Secretary of State/new Fair Work Agency in respect of labour market enforcement functions;**
 5. **Enshrining safe reporting pathways in part 5 of the Bill to prevent the sharing of workers’ immigration status with the Home Office;**
 6. **Amending section 29(3) of the Bill to allow interested parties such as groups of migrant workers or their representatives to apply to join the Adult Social Care Negotiating Body as members; and**
 7. **Using and adapting the wording in Section 105 of the Bill to introduce a new provision that ensures that where workers cannot obtain remedy from their employer (a company), company officers who are found to have connived or consented to the issue, or contributed to it due to neglect, can be held jointly liable for the payment of associated tribunal awards or settlement amounts.**

Section 1 – Unfair dismissal and probationary periods

1. The Bill removes the two-year qualifying period for unfair dismissal claims but envisages a probationary period in which employers will find it easier to dismiss people. The Next Steps to Make Work Pay document suggests that the government's preference is a period of nine months.
2. While the precise length of probationary periods will be subject to consultation, there are two areas which are worth covering in the Bill itself. The first relates to protections for those employed on fixed-term contracts, who constitute more than 5% of all working age people in the UK, and as much as 12% of black employees.¹ Subjecting people on one-year or two-year contracts to the same probation time as employees on permanent contracts would be disproportionate, adding insecurity to livelihoods which are already insecure, and entrenching precisely the type of racial inequality the government promised to address.²
3. A similar issue is pertinent for the tens of thousands of migrant seasonal workers on the Seasonal Worker visa who come to the UK every year to work in horticulture, for a maximum period of six months, before being required to return to their country of origin. The government's preference for a nine-month probation period would completely exclude them from full protection against unfair dismissal (with some exceptions). Even a probationary period that is considered proportionate to this time in the UK can be circumvented – for example, there have been an increase in concerns related to productivity targets on farms, of which there is no specific regulation, and its use as potentially arbitrary grounds to dismiss workers prematurely.³ In addition, these workers are generally not unionised and often do not have representation throughout the disciplinary process to challenge unfair dismissals. The Director of Labour Market Enforcement⁴ and the Independent Chief Inspector of Borders and Immigration⁵ have previously identified that horticulture is a high-risk sector for labour market non-compliance. The Migration Advisory Committee and other NGOs/institutions⁶ have identified that seasonal workers coming to the UK are particularly susceptible to exploitation due to the nature of the work in often isolated rural areas, frequently with little or no English. In this context, the legislation must remove qualifying periods in their entirety for migrant seasonal workers on the visa so that they are adequately protected.

Recommendation

Our recommendation is to amend the Bill to:

- **Ensure that probationary periods for individuals on fixed-term contracts are proportionate to their length; and**
- **Remove the qualifying period for unfair dismissal in respect of migrant seasonal workers arriving in the UK under the Seasonal Worker visa scheme.**

Section 2 – Statutory Maternity Pay (SMP) reform

4. We have previously argued that a legislative gap in the SMP rules excludes lower-paid pregnant workers from access to SMP. To qualify for SMP, individuals must meet certain qualifying criteria, including giving notice to the employer within a prescribed time, submitting specified evidence of the pregnancy and due date and, importantly, earning enough (£123 per week on average) over a specific period during the pregnancy (also known as the “relevant period”).
5. However, if a pregnant worker earns less because they have been off sick or working fewer hours due to pregnancy-related illness, they can receive a reduced amount of SMP or none at all. This is potentially discriminatory. According to section 18 of the Equality Act 2010, “(2) a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably - (a) because of the pregnancy, or (b) because of illness suffered by her [in that protected period as a result of the pregnancy]”. The SMP rules have previously been changed to allow for flexibility in other situations - e.g. furloughed workers during Covid were assessed for SMP on the basis of what they would have earned in the “relevant period” before birth, rather than furlough pay. Similarly, the calculation of notice pay is based on a reference period (generally 12 weeks before the notice period starts) that excludes time spent not working/ill. A similar system needs to be instituted for entitlement to SMP, to account for earnings fluctuations caused by pregnancy-related illnesses, and outside of workers’ control.
6. Pregnant workers who fail to meet the earnings criteria for SMP could still claim Statutory Maternity Allowance (SMA), but they would do so at a potential disadvantage. Maternity Action have previously identified that SMA receives differential treatment when the Department for Work & Pensions considers Universal Credit awards (it is treated as unearned income, so is deducted from Universal Credit awards, whereas SMP is largely disregarded).⁷ A new mum on Universal Credit who qualifies for SMA can therefore be £4,500 worse off than someone in the same circumstances, but receiving SMP, over a nine-month period of maternity leave.⁸

Recommendation

Our recommendation is for the Employment Bill to include a provision that amends the Statutory Maternity Pay (General) Regulations 1986. This amendment should allow for flexibility regarding the calculation of normal weekly earnings during the relevant period e.g. by allowing the weeks a pregnant worker was sick/worked fewer hours to be left out or to be substituted with other periods.

Section 3 – A new Fair Work Agency

7. Part 5 of the Bill creates a new state enforcement agency for the purposes of labour market enforcement.
8. As part of the new system, the legislation provides that the Secretary of State must establish an Advisory Board to provide advice on certain matters relating to the enforcement of labour market legislation. Section 75(4) provides that the Board must include an equal number of members representing the interests of trade unions, employers and independent experts. There is no specific representation of migrant workers envisaged on the Advisory Board.
9. This is an issue because migrant workers tend to be at the sharpest end of exploitation in the workplace. For example, quarterly intelligence pictures from the Gangmasters and Labour Abuse Authority have consistently identified foreign nationals as being the most common potential victims of modern slavery and human trafficking for labour exploitation, particularly in sectors like social care, horticulture and hospitality.⁹ Similarly, the intelligence pictures have consistently identified that the most common vulnerability factor among potential victims of forced and compulsory labour in the UK is the work-sponsorship system (the system that underpins work visas and which apply to most migrant workers in the UK).¹⁰ The lack of a migrant worker contingent on the board risks undermining the Agency's ability to understand and respond to risk factors experienced by migrant workers (including trust in authorities, shame of whistleblowing and a fear of implicating others).¹¹
10. Another issue with Part 5 as currently drafted is that there is no provision for secure reporting to labour market enforcement authorities for migrant workers. A key issue for migrant workers when deciding whether to report a labour market offence is the extent to which reporting risks their lawful immigration status in the UK (or is perceived as risking it). Data relating to migrants' immigration status has previously been shared with the Home Office,¹² and joint or simultaneous inspections have been conducted with Immigration Enforcement.¹³ This has been an issue with the previous labour market enforcement bodies, who have consequently lacked upstream intelligence and reporting from migrant communities and victims of labour exploitation.¹⁴
11. The bill must include secure reporting pathways to protect workers, but also to ensure that a new Fair Work Agency can understand and tackle the full scale of labour exploitation that is occurring. The Modern Slavery Act 2015 Committee recently recommended that the government should establish protocols for secure reporting pathways to limit labour market enforcement from sharing migration status with immigration enforcement.¹⁵ Secure reporting pathways are also a feature of labour market enforcement in other countries such as Brazil, the Netherlands and U.S.A. ¹⁶

Recommendation

Our recommendation is to amend the Bill to:

- **Allow groups of migrant workers or their representatives to join the Advisory Board to advise the Secretary of State/new Fair Work Agency; and**
- **Enshrine safe reporting in legislation, preventing the sharing of workers' immigration status with the Home Office.**

Section 4 – Adult Social Care Negotiating Body

12. Chapter 2 of the Bill makes provision for an Adult Social Care Negotiating Body to establish the process of sectoral agreements in the adult social care sector through secondary legislation, following engagement with the sector. Unfortunately, much like the Advisory Board to the Secretary of State/the Fair Work Agency, section 29(3) of the Bill only mandates trade union representatives and persons representing the interests of employers of social care workers as members of the new Negotiating Body. Though this provision gives discretion for other descriptions of persons to be appointed as members, there is no specific representation of migrant workers envisaged on the board of the Negotiating Body.
13. This is significant for a few interconnected reasons. Firstly, as of March 2024, a total of 25% of the entire adult social care workforce in England were foreign nationals, with 6% being EU nationals and another 19% being non-EU workers.¹⁷ The share of foreign nationals was even higher for direct care roles – as many as 32% of care worker job roles and 29% of senior care worker job roles were filled by foreign born nationals. Therefore, migrant workers make up a substantial proportion of the sector's workforce. The second crucial point is that care workers have historically been under-unionised. Previous analysis by the Institute for Public Policy Research has suggested that around one in five care workers and senior care workers are members of a trade union or staff association, compared with around four in five nurses who are members.¹⁸ The latest statistics also indicate that around 17% of those involved in residential care activities are unionised, compared with 52% of those involved in human health activities.¹⁹ The point is of even greater significance for migrant workers recently arriving on the Health and Care Worker visa who tend not to be unionised.
14. In light of the above, and although a sectoral agreement would likely impact all workers in the sector, it is hard to see how trade union presence on the Negotiating Body alone would act as a sufficient proxy for the interests and specific needs of migrant workers in the sector.

Recommendation

Our recommendation is to amend Section 29(3) of the Bill to allow interested parties such as groups of migrant workers or their representatives to apply to join the Adult Social Care Negotiating Body as members.

Section 5 – Enforcement of tribunal awards against rogue company officers

15. An area where the bill needs to be strengthened is its effects on workers' access to remedy in cases of wrongdoing. Even in cases where an employer is found to have behaved unlawfully, our clients find that access to remedy is often obfuscated. This can happen for a range of reasons but in our experience is most commonly attributed to company officers/directors refusing to comply with Employment Tribunal orders or illegitimate phoenixing (where companies are closed and declared insolvent to avoid paying debts, only to be reopened under a different name).²⁰
16. Unfortunately, claimants are too often left without access to remedy - in a survey of Employment Tribunal Applications, 37% of claimants did not receive the money they were owed in 2012. This figure was 28% in 2017 with a decrease likely being influenced by the introduction of tribunal fees.²¹ Since 2016, an employer who fails to pay can be subject to a penalty payable to the Secretary of State if the claimant completes an enforcement form and they can also be publicly named (this is known as the Employment Tribunal penalty enforcement and naming scheme).²² However, in 2023 it was revealed that not a single employer had been named since 2018 (despite 3,713 notifications of non-payment).²³ It was also revealed that, on average, more than 50% of employers fail to pay all or any of the money won by claimants 28 days after being given a warning notice through the scheme.²⁴ Even where the penalty amounts are paid, this money goes to the government rather than the claimant.
17. The case of illegitimate phoenixing is particularly problematic because of regulatory gaps that currently exist. Despite the passage of the Economic Crime and Corporate Transparency Act, which provides Companies House with a range of new powers to deal with those engaged in suspicious or fraudulent activity when setting up a company, dissolving it and more,²⁵ the issue remains pertinent for workers - much of this stems from an inability to in practice prevent an employer from running out of or moving funds that could otherwise be frozen or used to pay back workers who were underpaid or not paid at all. Solutions like objecting to a company strike-off at Companies House have very little effect as a remedy for workers because individual actors cannot be held accountable. There is also an issue about *who* regulates this issue – the Insolvency Service considers the non-payment of an employee's wages “an

individual commercial dispute”,²⁶ while the Financial Conduct Authority cannot assist in individual cases between employees and phoenix companies.²⁷

Recommendation

As was identified by Dr Caroline Emberson (Nottingham Rights Lab) in evidence to the Modern Slavery Act 2015 Committee, the way to tackle this problem is to target individual rogue directors so they “do not just reintroduce a new business and perpetuate the same problematic practices”.²⁸

Our recommendation is to use and adapt the existing wording in Section 105 of the Employment Rights Bill (which concerns joint liability for company officers for offences relating to the system of labour market enforcement undertakings introduced by the bill) to ensure that where workers cannot obtain remedy from their employer (a company), company officers who are found to have connived or consented to the issue, or contributed to it due to neglect, can be held jointly liable for the payment of associated tribunal awards or settlement amounts.

¹ Gov.uk, ‘Permanent and Temporary Employment’, 28 November 2023, <https://www.ethnicity-facts-figures.service.gov.uk/work-pay-andbenefits/employment/permanent-and-temporary-employment/latest/#data-sources>.

² Labour Party, ‘Change. Labour Party Manifesto 2024’, 2024, <https://labour.org.uk/wpcontent/uploads/2024/06/Labour-Party-manifesto-2024.pdf>.

³ Worker Support Centre, ‘MID-YEAR REPORT January – July 2024’, 2024, <https://workersupportcentre.org.uk/wp-content/uploads/2024/09/Worker-Support-Centre-%E2%80%93-mid-year-report-%E2%80%93-FINAL-Sept24.pdf>.

⁴ HM Government, United Kingdom Labour Market Enforcement Strategy 2023/24, October 2023, https://assets.publishing.service.gov.uk/media/65324da6e839fd001486724f/uk_labour_market_enforcement_strategy_2023_2024_accessible_version.pdf

⁵ ICIBI, An inspection of the immigration system as it relates to the agricultural sector (May – August 2022), December 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1125411/An_inspection_of_the_immigration_system_as_it_relates_to_the_agricultural_sector_May_to_August_2022.pdf

⁶ Migration Advisory Committee, Review of the Seasonal Worker visa, July 2024, <https://www.gov.uk/government/publications/seasonal-worker-visa-review/review-of-the-seasonal-worker-visa-accessible>

⁷ Maternity Action, ‘Briefing: Different Treatment of Maternity Allowance and Statutory Maternity Pay in the Calculation of Universal Credit Awards’, 2020, <https://maternityaction.org.uk/wp-content/uploads/MA-briefing-on-MA-UC-May-2020.pdf>.

⁸ Richard Dunstan, 'Missing: 85,000 Maternity Allowance Claims Worth £500m to Low-Income New Mothers', Maternity Action (blog), 22 March 2022, <https://maternityaction.org.uk/2022/03/missing-85000-maternity-allowance-claims-worth500m-to-low-income-new-mothers/>.

⁹ GLAA, Intelligence Picture reports, <https://www.gla.gov.uk/our-impact/intelligence-picture>

¹⁰ Ibid.

¹¹ Fiona David, Katherine Bryant, and Jacqueline Larsen, 'Migrants and Their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour' (International Organisation for Migration, 2019), https://publications.iom.int/system/files/pdf/migrants_and_their_vulnerability.pdf.

¹² Domestic Abuse Commissioner, 'How to Ensure the Victims and Prisoners Bill Meets the Needs of All Victims', accessed 15 October 2024, https://domesticabusecommissioner.uk/wp-content/uploads/2023/11/FINAL-DOC_FirewallReport_2023_V2.pdf.

¹³ GLAA, 'FOI 20-21 30 - Immigration Enforcement - GLAA', 2021, 20–21, <https://www.gla.gov.uk/whats-new/freedom-of-information-requests/foi-requests/foi-20-21-30-immigration-enforcement>.

¹⁴ Low Pay Commission, 'Compliance and Enforcement of the National Minimum Wage', 2023, https://assets.publishing.service.gov.uk/media/65004e0657278000142519c1/NC_report_2023_final.pdf.

¹⁵ House of Lords Modern Slavery Act 2015 Committee, "The Modern Slavery Act 2015: becoming world-leading again", 16 October 2024, p.75, available at: <https://publications.parliament.uk/pa/ld5901/ldselect/ldmodslav/8/8.pdf>

¹⁶ Labour Exploitation Advisory Group, Safety for Migrant Workers: the case for safe reporting mechanisms, December 2022, https://labourexploitation.org/app/uploads/2023/01/Firewalls-Policy-Briefing-November-2022_JCWI-FLEX-LAWRS-SUMW.pdf

¹⁷ Skills for Care, 'The State of the Adult Social Care Sector and Workforce in England, 2024', Skills for Care, 10 October 2024, 83, <https://www.skillsforcare.org.uk/Adult-Social-Care-Workforce-Data/Workforce-intelligence/documents/State-of-the-adult-social-care-sector/The-state-of-the-adult-social-care-sector-and-workforce-in-England-2024.pdf>.

¹⁸ Joe Dromey and Dean Hochlaf, 'Fair Care: A Workforce Strategy for Social Care', IPPR, 25 October 2018, 24, <https://www.ippr.org/articles/fair-care>.

¹⁹ Department for Business and Trade, 'Trade Union Statistics 2023', GOV.UK, 29 May 2024, <https://www.gov.uk/government/statistics/trade-union-statistics-2023>.

²⁰ Emma McClelland, 'Matais and the Phoenix Company', Work Rights Centre, accessed 16 October 2024, <https://www.workrightscentre.org/case-studies/matais-and-the-phoenixcompany>.

²¹ 'Survey of Employment Tribunal Applications: Findings from the 2018 Survey', Department for Business, Energy & Industrial Strategy, July 2020, 256, <https://assets.publishing.service.gov.uk/media/5f06c2e3e90e0712d0206e99/surveyemployment-tribunal-applications-2018-findings.pdf>.

²² Department for Business and Trade, Employment tribunal: penalty enforcement and naming scheme, 13 April 2016, <https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement>

²³ Lavelle, UK's rogue boss name and shame register still blank after four years, The Guardian, 23 April 2023, <https://www.theguardian.com/global-development/2023/apr/23/uks-rogue-boss-name-and-shame-register-still-blank-after-four-years>

²⁴ Ibid.

²⁵ Home Office, Serious Fraud Office, HM Treasury, Department for Business and Trade, Ministry of Justice, Companies House, "Economic Crime and Corporate Transparency Act: overarching factsheet", published 29 February 2024 (last updated 1 March 2024), available at: <https://assets.publishing.service.gov.uk/media/65df57cfcf7eb1e5f4f57fdf/01.+ECCT+Bill+Overarching+Fact+Sheet.pdf>

²⁶ The Insolvency Service, "Phoenix companies and the role of the Insolvency Service", updated 24 March 2017, available at: <https://www.gov.uk/government/publications/phoenix-companies-and-the-role-of-the-insolvency-service/phoenix-companies-and-the-role-of-the-insolvency-service>

²⁷ Action Fraud, Phoenix company fraud, available at: <https://www.actionfraud.police.uk/a-z-offraud/phoenix-company-fraud>

²⁸ House of Lords Modern Slavery Act 2015 Committee, "The Modern Slavery Act 2015: becoming world-leading again", 16 October 2024, p.29, available at: <https://publications.parliament.uk/pa/ld5901/ldselect/ldmodslav/8/8.pdf>