

GLA 33/8.1

Licensing Standards

18 April 2012

BOARD PAPER REFERENCE – GLA 33/8.1 – Licensing Standards

Issue

1. How the Gangmasters Licensing Authority ("GLA") should consider compliance issues related to the Agency Workers Regulations 2010 ("AWR") and to agree a new version of the Standards.

Recommendation

2. The Board is invited to:
 - Discuss the issues relating to the AWR,
 - Agree a new version of the Standards to come into force from 1 May 2012, and
 - Agree a GLA position on AWR related matters.

Background

3. Following a review of the GLA Licensing Standards, a paper was presented at the January Board meeting proposing changes to the Standards for a new version to be in force from 6 April 2012.
4. One of the issues considered was how the Standards should take into account the AWR. It was agreed at the meeting that there would be no explicit reference to the AWR in the Standards and that the GLA would not check compliance at this time. This decision was subject to a further discussion at the next meeting about the role that the GLA has in considering matters related to the AWR. The Board specifically requested further consideration of whether the legislation underpinning the Authority's Licensing Standards already requires compliance with the AWR and, therefore, what action the GLA should take if issues are identified.
5. At the January 2012 Board meeting, a new version of the Standards was agreed for implementation from 6 April 2012. This included a simplified wording for Licensing Standard 2.2 stipulating a worker must be paid what they are "legally entitled" rather than referring to the basic minimum of the National Minimum Wage or Agricultural Wages Order. Following the meeting, officials in BIS and Defra considered this new wording further and raised concerns that verifying a person's 'legal entitlement' to pay would require a complex assessment not only of all relevant legislative provisions, but also the provisions of each worker's individual contract. BIS considers that the determination of such an entitlement, and whether the entitlement had been paid, is best left to the courts.
6. Margaret McKinlay subsequently proposed to the Board that the wording of Standard 2.2 remained unchanged.

7. Responses from some Board members requested that the matter return to April Board meeting for further consideration, particularly in relation to the role of the GLA with the AWR. There is no agreed process for handling Board level decisions which are required to be made between meetings.

New version of the Standards

8. In light of responses of Board members, the Authority has decided to defer issuing a new version of the Standards until the Board has the opportunity to consider the matter further.

9. The Authority considers that Standard 2.2 should remain as:

A worker must be paid at least the National Minimum Wage (NMW) or, if applicable, in accordance with the Agricultural Wages Order (AWO).

Sufficient records must be kept to prove payment of NMW or in accordance with the appropriate AWO.

10. The GLA considers that retaining a Critical Standard relating to the National Minimum Wage is important. Therefore, it proposes to retain the wording for Standard 2.2. Matters relating to the AWR and the Standards are considered below. Subject to the discussion by the Board on those issues, the GLA proposes to publish the version of the Standards at annex A.
11. Previous versions of the Standards have come into force on the common commencement dates of 6 April or 1 October. However, as no new Regulations are coming into force and licence holders should already be complying with the requirements in the Standards, the GLA intends to publish the Standards following the Board meeting with them coming into force from 1 May 2012. Any inspection from that date will be against the new version of the Standards.

Matters related to the AWR

12. The AWR makes provision for rights to be enforced by individuals. Following the discussion at the January Board meeting, the GLA has sought legal advice on GLA's legal obligations as regards AWR. Based on this advice, the GLA considers the position as follows:

- Licence holders already have a legal obligation to pay all sums owing to a worker. This would include any sums being owed as a result of the AWRs. If a gangmaster fails to pay these sums, it may in certain circumstances be a breach of the terms of the licence;
- The GLA has a duty to consider each alleged breach of a licence on its merits. The GLA has wide discretion about how to respond to any alleged breaches. In particular, the GLA would not be obliged to treat a failure to pay AWR in the same category as a failure to pay at the NMW rate.

- Not all breaches of the Agency Workers Regulations would lead to a subsequent breach of a GLA licence.
13. GLA Inspectors have been trained about the AWR. The Authority will ensure its inspectors understand the implications of case law as it develops.
14. As a prior matter, it has to be noted that the GLA is a small enforcement agency with a wide brief. Like other enforcement agencies (for example, the police) GLA has to focus its enforcement activity. In so doing, it is mindful of relevant government policies and directions from the Board. In discharging its responsibilities to protect vulnerable workers in its sectors, the GLA is seeking to target seriously non-compliant operators and reduce burdens on the fundamentally compliant. It is an intelligence led organisation and investigates the activities of labour providers on the basis of substantial credible evidence. Also its responses to breaches of licence conditions must be proportionate.

GLA position to AWR related matters

15. The Board is invited to agree the following response by the GLA to AWR related matters:
- (i) Where a GLA Inspector identifies breaches of the AWR:
- If the breach appears to affect compliance with the licence, the GLA will require an explanation from the licence holder about issues related to AWR.
 - The GLA will ensure that both the Gangmaster and workers are aware of their responsibilities and rights and individuals are aware of methods of redress.
 - Depending on the response received, the GLA may consider attaching a specific condition against the relevant Standard stipulating the identified matters be corrected within a specified period of time (this approach of attaching a condition for AWR matters includes issues related to pay covered by the Critical 3.3). Any decision to attach such a condition would have a right of appeal.
- (ii) Other relevant matters to the AWR include:
- Where an Employment Tribunal makes a ruling against a licence holder for AWR matters, the licence holder should notify the GLA within 20 working days of that decision. The GLA will then consider the specific circumstances of that decision and whether it should be considered a breach of the licence.
 - Where there is evidence of deliberate exploitation and persistent non-compliance with the licence, the GLA has the option to apply a 'fit and proper' test to any licence holder.