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The business people – an extension to your team

Research report

# Employment Law Panel

February 2010

## Introduction

Our Employment Law Panel comprises approximately 110 members who have volunteered to provide feedback to us on employment law issues. Traditionally, we have contacted panel members on an *ad hoc* basis to gather feedback on specific issues to provide evidence on the practical issues of regulatory changes. However, we now engage more regularly with business owners through our Member Panels to better understand and collect evidence of their real life experiences, to more effectively reinforce our policy and campaigns activities.

Feedback from 2,000 business owners and technical experts who use the Forum of Private Business's *Employment Guide* was also sought and has been included where appropriate in this research.

**Note:** as some figures refer to fewer than 120 businesses, they should be treated as indicative rather than as representative of all small and medium-sized businesses.

## Summary of findings

- 70% see that there are benefits to employment law in terms of regulating the professional relationship between employer and employee, especially when the business is having to deal with unfamiliar circumstances.
- Research undertaken by the likes of the TUC<sup>(1)</sup> and the NFEA<sup>(2)</sup> has consistently shown that employees of smaller firms are happier than people who work for larger corporations. Smaller businesses are concerned that the increasing regulatory framework will mean a loss of their unique selling point to potential employees of more informal, common-sense approaches in preference to automated faceless processes.
- 92% of businesses place a high priority on the simplification of current regulations and do feel that the regulatory reform will improve in 2010.
- However the simplification of current laws will not bring the 41% reduction in regulation that businesses want to see.
- Marginally more businesses felt that the extension of paternity leave (89%) would have a negative impact than maternity (84%). In terms of seriousness however, the trends were reversed with 64% indicating that paternity leave would have a very serious effect on their business and 67% indicating the extension of maternity leave would do so.
- Smaller firms felt that tribunals were still skewed towards the employee. The success in making tribunals readily available meant that businesses now feel vulnerable to vexatious litigation and cases that are based on minor procedural errors. Our members would like to see a nominal payment to be introduced so that unscrupulous employers still face justice, but that honest business owners are not subject to vindictive litigation.
- Businesses in knowledge-intensive businesses and those with complex manufacturing processes are most likely to suffer from legislation such as the default retirement age, inability to use freelancers and extension to paternity law due to the reduced ability for such businesses to transfer expertise and plan for the future.
- Businesses as much as government agencies are responsible for 'gold plating legislation' as they err on the side of caution when dealing with laws where there are no examples extant in case law. Informal solutions that could be used are now discarded in case it leaves them open to legal action.
- Our first barometer on the burden of employment law recorded a score of 6.2 indicating that complying with employment law is a significant burden on businesses.

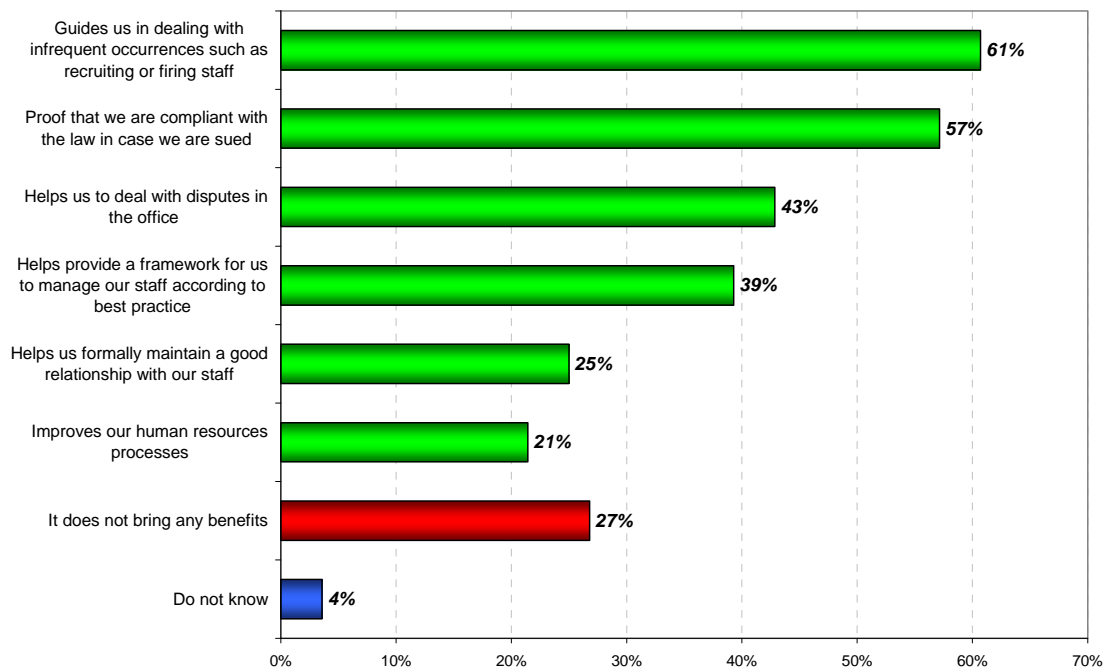
## Forum response to findings

- Businesses want central government to improve their decision-making process. Currently social legislation does not complement a long-term business strategy based on knowledge intensive and high technology industries. The FPB would like greater co ordination between business strategy and social legislation.
- We will continue to support regulatory reform as there is evidence that this is making some progress in the right direction. If anything this should be accelerated with recommendations and best practice guidelines replacing some elements of law.
- According to current research from the Department of Business, Innovation and Skills (BIS)<sup>(3)</sup> just 32% of employers feel that they are confident in understanding the law on employment issues, we would like legislation more focussed on protecting employees from unscrupulous employers but also protecting employers from claims for minor procedural infringements of the law. This would also reintroduce dynamism and increase levels of employment as the economy recovers.
- We would like the government to reassess the tribunal system to create a more equitable balance between the rights of employers and employees. One member's suggestion was for a nominal sum as security before a tribunal to limit vexatious and incorrect claims. We would like to suggest that the burden for a defendant to recover costs from an unsuccessful claimant is lowered and that a finding of "without substantial merit is created" which would allow defendants to reclaim all or part of the costs. Such a ruling should be taken into account in future cases involving that claimant. .

## Benefits of employment law

Employment law costs employers with fewer than 250 employees around £2.4 billion a year, with just 24% of business owners feeling that it is proportional to the size of their business<sup>(4)</sup>. However 70% felt that there were benefits to the regulatory framework and the majority of the 27% felt that the burden of compliance was too great to provide any benefits to their closely-knit team.

Figure 1: Benefits of employment law



Source: Employment Law Panel 2010

Businesses were generally appreciative of the practical assistance offered by employment law in regulating the professional relationship between employers and employees. This was particularly the case when dealing with employment law in the toughest economic climate for 20 years. Typical responses included:

*"In general it is too much of a burden for small businesses but when you do have an employment dispute (we have had 2 in 16 years) the legal framework helps in resolving them professionally rather than personally."*

*"Much employment law is based on good practice and observance of the law gives employees an indication that we are trying to be even handed."*

For some however the best practice was based on larger organisations which had greater resources and for businesses under 20 employees some areas of employment law were deemed inappropriate. Many respondents pointed out that employment law is *"basically...a negative benefit to make sure you do not get sued and you cover the firms position but is too blunt to improve employer/employee relationships as the law is too inflexible."*

Some businesses felt that the law actually hindered maintaining a good relationship with their staff as it *"comes between human to human relationships that should form the basis of team building in the work environment"*. Where the business owner may previously have dealt with a problem by talking the issues over with an employee over a coffee, employment law has replaced this with a far more formal approach.

A number of business owners felt that the balance had tipped too far in favour of the employee. One business owner claimed that smaller firms had become 'franchises of the government'. The majority of owners who felt this way qualified it by highlighting that it was often bad employees who benefitted whilst more valuable staff could potentially have their own jobs put in jeopardy.

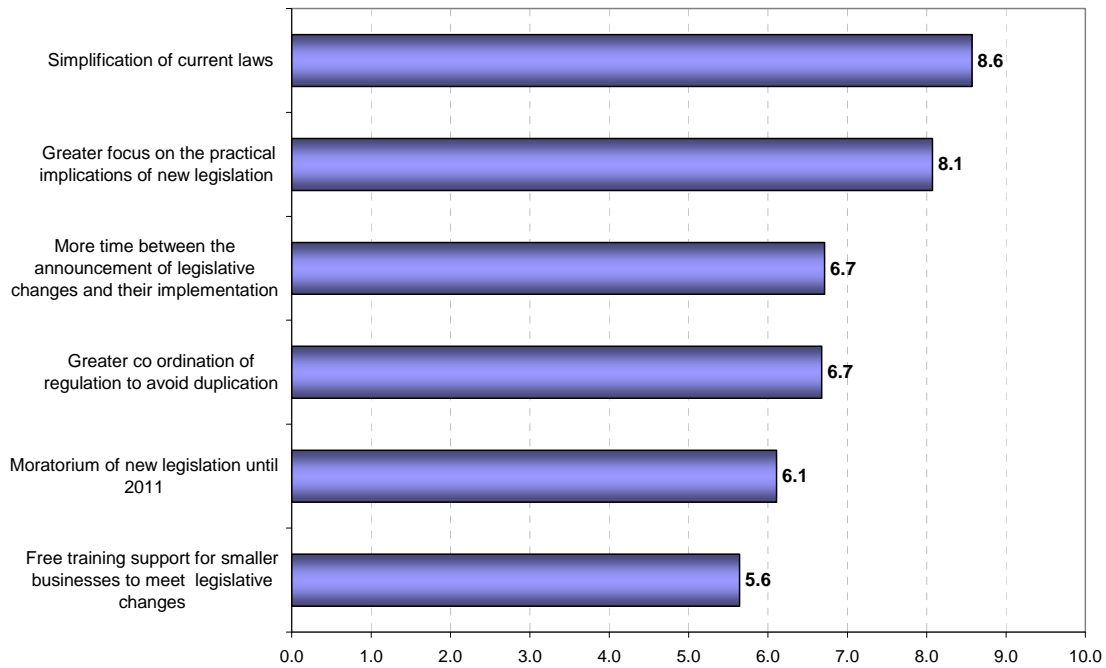
One business in particular felt that the number of grievance cases had increased significantly due to the preponderance of 'nuisance factor pay offs' of employees who felt that they had nothing to lose. With so many laws on the statute book there is a real fear for business owners that they may be caught out on a technicality. A recent BIS study confirmed this view when it found that 20% of business owners feel that they understand their obligations but worry that they get it right.

## Priorities for improvement to the regulatory system

*"Too much time [is] spent on making sure everything is correct. I am terrified of making any mistakes"* (FPB panel member response)

This emphasises the importance of simplifying the law to free up management time for the development of the business. For this reason simplification of the current law was considered a high priority by 92% of business owners who responded. The legal process is so convoluted in places that 77% of FPB employment guide users also look for clarification from a third party (predominantly the helpline), on major decisions to check they have understood the extent of the law.

Figure 2: Priorities for improvement to the regulatory system



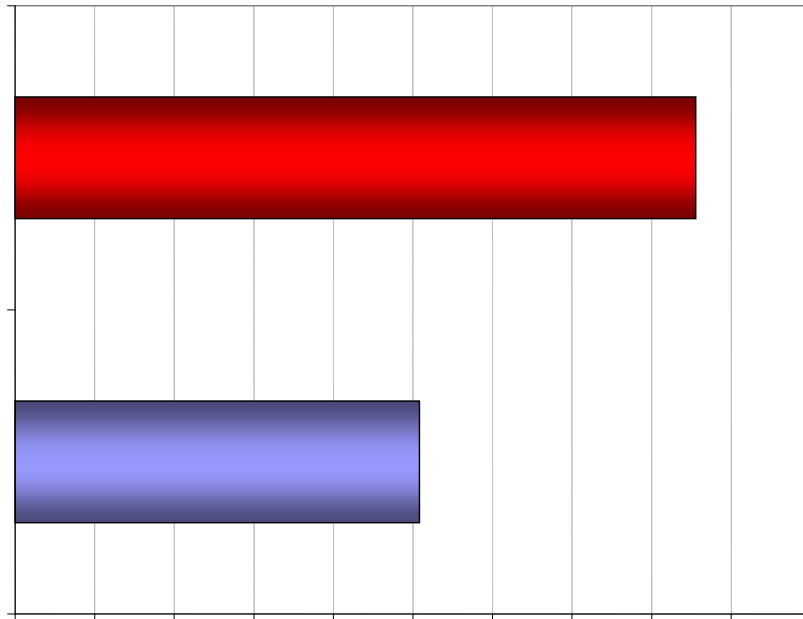
A score out of 10 was produced using the 10 for a "high priority", 6.7 for "a priority", 3.3 for "low priority" and 0 for "not important"  
Source: Employment Law Panel 2010

Businesses also want the decision-making process reformed. Currently there is the perception that laws are being put on the statute book without enough consideration of how employers are expected to incorporate new legal requirements into their working practices as well as the potential duplication or contradiction of current legal practices. An example of this is the potential conflict between the flexible working statutory process and the current version of the Equality bill. Under the statutory flexible working processes, an employer may legitimately refuse a request for flexible working if, after serious consideration, the burden of additional costs is considered too much. Under the proposed Equality bill, employer conduct must be justified as a proportionate means of achieving a legitimate aim. Simply, preventing or reducing additional cost is unlikely to be a legitimate aim under the Equality bill meaning an employer may be liable for indirect discrimination for refusing a flexible working request despite following the statutory guidelines on it. This overlap and contradiction in the vast body of employment law has the potential to cause significant confusion for employers.

"We need a fundamental change and review of all legislation brought in during the last decade" (FPB panel member response)

In terms of time respondents to our employment law guide questionnaire stated that they spend on average 8.6 hours a week on employment law compliance. This is lower than the proportion who responded to our recent research using a larger sample which indicated the figure was 9.5 hours a week. However respondents would like the time spent on employment law reduced by around a half (41%).

Figure 3 Difference in hours spent on compliance and the time businesses want to spend



Source: *Employment Guide* feedback 2009

Just 20% expect to see a noticeable reduction in regulation after the next election and many do not expect anything like the changes wanted by our members. 85% of businesses feel that there will be some reduction, however 16% believe that employment law will continue to increase.

## The tribunal system

The Forum asked businesses their thoughts on the tribunal system and put these into three distinct groups. These were:

- Those who had experience of the tribunal system in the last few years
- Those who had experience of the tribunal system but not in the last few years
- Those who had never had dealings with Acas or the tribunal system

Over 60% had never had experience of the tribunal system meaning that there was a relatively small sample sizes in the other two groups. There was a slight feeling that the tribunal system was becoming more effective and that it was more cost-effective than going to court (although still a relatively high cost for smaller firms in the current economic climate). Coupled with this was a feeling amongst all employers that individuals had been too quick to turn to the tribunal system. This is stressful for the employer because despite good practice and intention there is always the prospect of a minor procedural infringement, particularly as many businesses felt the system was still balanced against them. The cost is still a concern, particularly the cost of time away from the business (which can harm the welfare of the other employees) and the financial cost incurred in the process.

Businesses believe the system should not be perceived as being supportive of the employee when a case is vexatious or incorrect. Businesses would like to see less enforcement of 'subjective' legislation; one business cited the example of what an employee found offensive "...can present an employer with extraordinary difficulties and can be used by employees to make spurious claims". They would also like to see a shorter time period in dealing with the cases and a maximum penalty based on the size of the company (particularly important for cases of alleged discrimination) as the uncertainty often increases stress in the workplace and over a longer period of time this has a detrimental impact on their staff.

Currently businesses owners have to prove that a claimant is pursuing a malicious or vexatious claim before recovering costs, which puts an almost impossible burden on the defendant employer. But we would like to see a category of 'lacking substantial merit' where businesses can look at recovering costs from the claimant. Tribunals in the future would also take this into consideration on subsequent cases.

## Specific areas of employment law that could be improved

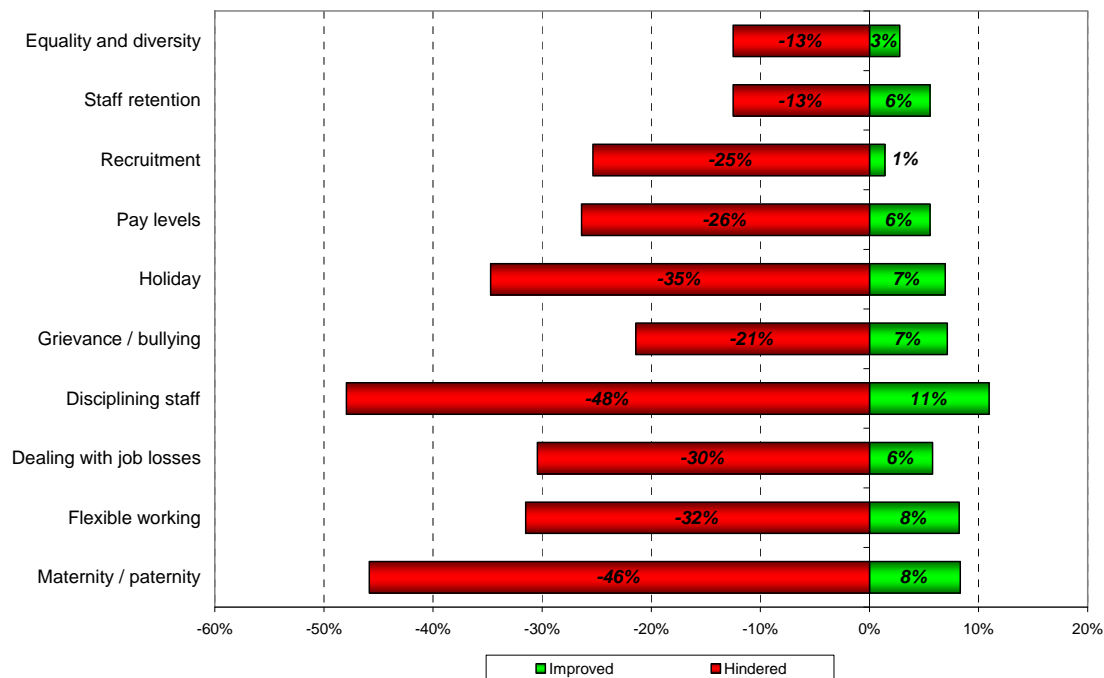
Business owners were asked about specific areas of employment law that they would like to see repealed or amended. A significant proportion of businesses indicated that it was not so much the legislative framework, but the laws and minor regulations that could trip up even the most responsible small business as they did not have the resources available to check whether or not they were subject to or exempt from specific legal requirements.

A number of business owners would like to see dynamism built into the system with employees taking more responsibility for their work. Some owners felt that the working time directive should be amended or even abolished with employees allowed to decide if they want to work longer hours or not. One or two owners who mentioned this concept would also like to see fewer restrictions on the ability of employers to sack staff for incompetence as they feel this would lead to a more balanced relationship between employer and employee.

Disciplining staff in general is seen as the area that causes most difficulty to respondents with 48% feeling that the current system is a hindrance to their business. It was also the most controversial area of employment law as 11% felt that this regulatory framework had helped their business. Maternity and paternity legislation were also considered a significant hindrance by guide subscribers whilst the equality and diversity legislation was considered the least controversial. Due to the time of publication, the feedback excludes any impact from proposed legislative changes in April 2010.

Businesses also want clear and defined boundaries - they do not want 'more layers of useless laws' but want clear procedures that they can follow and not be punished for interpreting complex legislation incorrectly.

Figure 4: The impact of employment law on business practice



Source: *Employment Guide* feedback 2009

Unsurprisingly business owners felt that the maternity and paternity laws were not proportionate as they were a significant drain on resource, particularly the obligation to keep a job open for an individual who may or may not return. Business owners felt it should be done on a less formal basis so that businesses could retain valuable staff members.

*“Maternity benefits should be recommendations and guidance rather than law”.*

Businesses currently do not want maternity rights removed but treated more sensibly. Few businesses want to lose valuable staff who have years of experience, but likewise they feel that the decision of how to deal with the situation has been taken away from the employee and employer.

Support for expectant and new mothers should also be improved, with one business feeling that there was a lack of balance between the support and cost of maternity leave for the business and the help from the state with pregnancy services and support for new mothers often not being accessible outside work hours.

Businesses also want to have greater control over disciplining their own staff, 11% of the respondents to our guide felt that the framework was useful and our panel members did generally feel that the system was helpful, however it was felt that it did not take into account individual situations, where sacking staff for incompetence may be in the best interest, for example where there was a health and safety issue or when that individual was a disruptive influence and damaging staff morale.

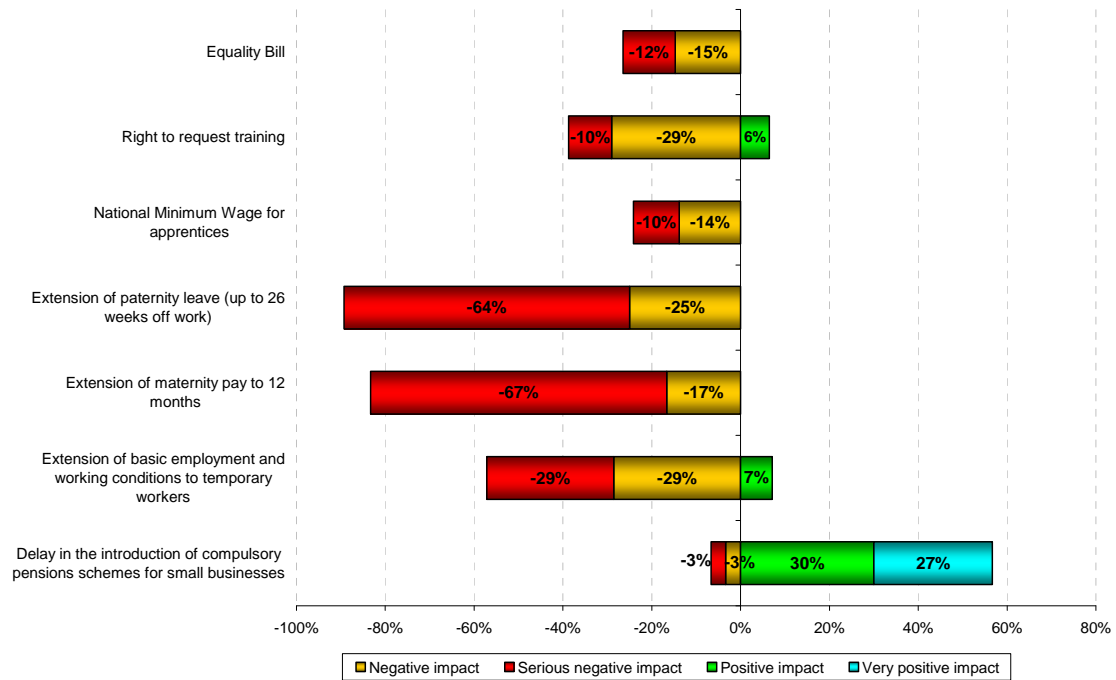
Legal requirements such as the *Data Protection Act*, where the side effects have proved far more detrimental than any benefits accrued through the legislation have not been removed or amended.

## New legislation

*“None of this is necessary, it is all fiddling around at the edges.”* (panel member response)

Some businesses were concerned about the delay in the introduction of compulsory pension schemes as with larger businesses it could mean the system that is eventually introduced for smaller firms is overly bureaucratic and resource-intensive. There was also some distrust of the pensions industry in general to invest the money appropriately after past financial scandals and others felt that it was the individual’s responsibility to provide for their old age.

Figure 5: The impact of new legislation to businesses



Source: Employment Law Panel 2010

6% saw the right to request training as being a positive as it gave more responsibility to the individual and 7% saw the extension of employment and working conditions to temporary workers as positive as it meant that competitors employing temps would have to compete on a level playing field. No one felt that the equality legislation was an improvement and 27% believed that it would be detrimental to their business even though it was designed as a simplification of current legal practices.

In general the feeling was that the new legislation was an additional impediment to development of their business at a crucial time. Nor were the changes considered complimentary to the "Think Small First" agenda.

*"As a small business it always comes down to the same line of thought. These laws and regulations are probably not too difficult for big companies with human resources departments but for small businesses they are largely a nightmare".* (panel member response)

There is a cost implication to the new legislation that will have an impact on the rate and nature of any recovery as some felt that *"these are good examples of the Government deciding on benefits for people without actually costing it or checking the negative effects on business. If the Government had to fund these alterations it would NEVER EVER consider implementation."*

For businesses working on long-term projects, the extension of maternity and paternity leave also exacerbated issues over knowledge management as the knowledge built up on a project is often hard to pass on in a short space of time and such benefits will require further training by businesses to ensure that the quality of their service or product does not decline.

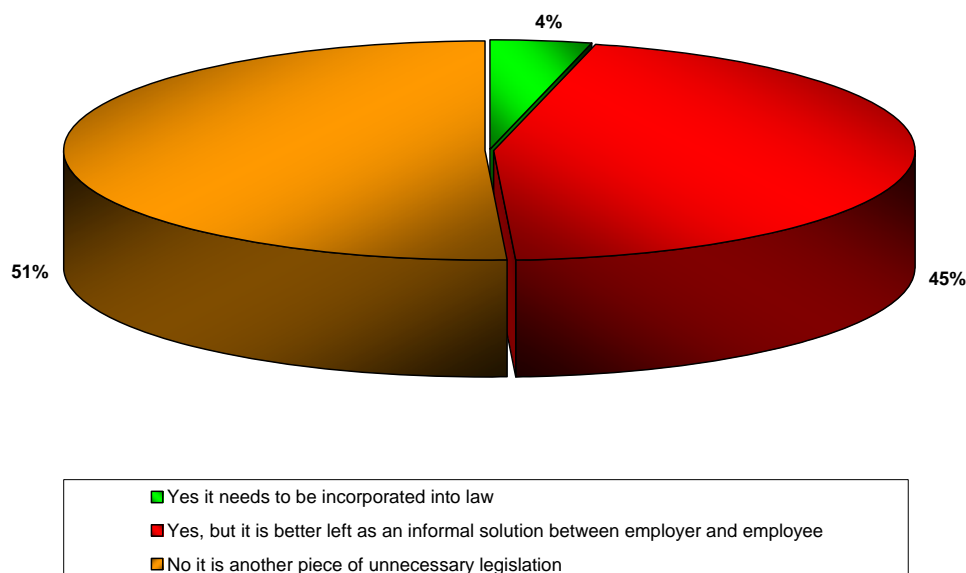
Offering the National Minimum Wage for apprenticeships was considered detrimental by a number of employers, however a number of these cited indirect reasons in particular the increased cost of employment through national insurance increases and its impact on other wages in the company. For one or two businesses this was a case of incorrect priorities.

*“This is a real sticking point, the LSC already has a minimum wage for apprentices. We used to employ 4-5 apprentices, with the LSC taking over and increasing the wages we now only train 1, I feel so sorry for young people training at FE and cannot get jobs afterwards as they have no commercial experience, I have over 60 in my rejection file.” (panel member response)*

## Default retirement age

Just 4% of businesses felt that this was a justifiable piece of legislation, with businesses believing that the abolition of a default retirement age would give valuable employees the opportunity to request staying on. 45% felt that such things were best left to the informal relationship between employer and employee as these businesses emphasised the greater leeway this offered to both the employee and employer to deal with each case individually. A similar proportion felt that this was an unnecessary piece of legislation and one or two went further suggesting it was a case where government was looking to business owners to bail them out for failure to regulate the pensions industry more effectively.

Figure 6: Need for the default retirement age legislation



Source: Employment Law Panel 2010

Businesses who felt that the system was better left informally and those that felt that it was another piece of unnecessary legislation broadly pointed out the similar flaws in introducing the legislation to their business:

- Where businesses are able to keep an employee on and the employee wants to remain in work it should be up to the employer and employee to come to some arrangement. Smaller firms are loath to lose staff due to the cost of recruitment and training of a new individual as well as their experience etc
- Some jobs require people to retire at a certain age for health and safety reasons, business owners often felt that letting them go in their 60s was the best solution. In these instances both employer and employee came out of the situation with dignity. Owners are now worried that they will effectively have to dismiss loyal and long-serving employees under new legislation which will have a negative impact on the employer, employee and the morale of other employees
- A default retirement age ensures that there is a social acceptance of individuals retiring at a particular age and puts the onus on the employee to save for retirement.

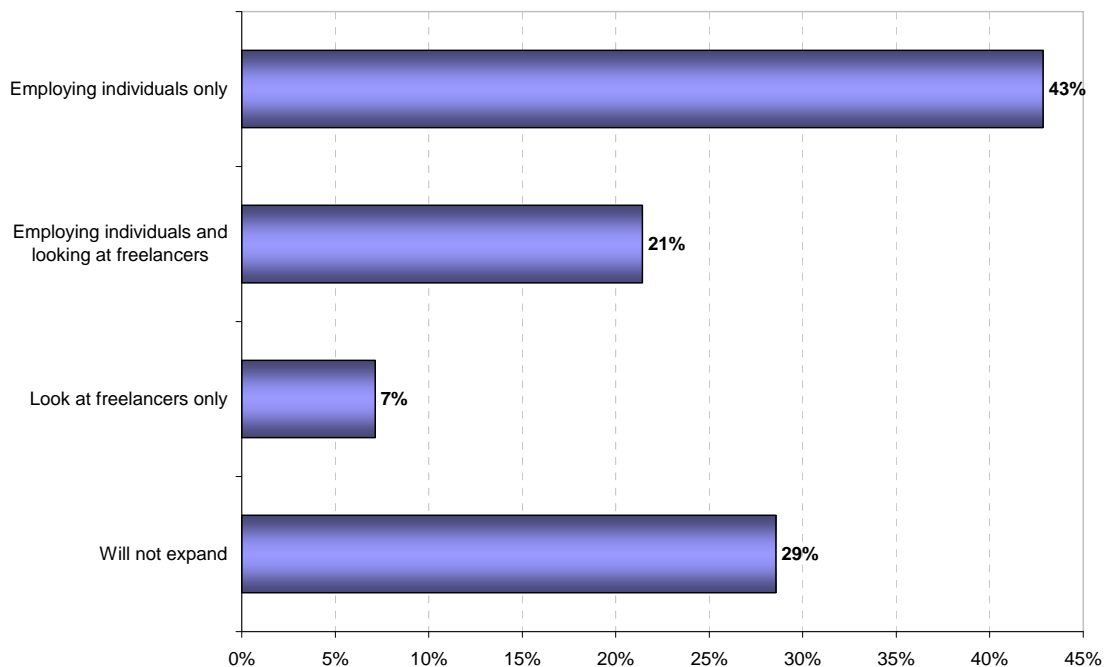
- One or two business owners were worried about broader social issues as older workers looking to reduce their level of seniority could potentially take jobs away from younger people.

## Impact on the business

43% of businesses would still continue the employment of individuals rather than using more flexible arrangements such as freelancers or contractors. In the main this is down to training needs in areas as diverse as high tech manufacturing process and childcare techniques, these have often been honed through experience and internal training. Businesses also value the consistency of support, reliability and the team-working that direct employment provides.

However there are growing signs that increased employment costs are making around 1 in 5 businesses consider employing freelancers instead and 7% will consider using freelancers in the future as the main way to expand their business. This is mainly down to the burden of compliance on their business, however the increased cost of employment through additional National Insurance costs, cost of non compliance and the cost of meeting new paternity and maternity legislation. Some businesses will simply not expand any further.

Figure 7: The impact of employment law on future employment intentions



Source: Employment Law Panel 2010

## Employment law barometer

In order to gauge the burden of employment law over a period of time we have created an employment law burden barometer to look at its impact on businesses. The current mean score is 6.2 however 46% thought that the current system was a serious burden to their business and almost 5% scored the burden at 9 or 10 indicating that it was putting the company out of business.

Figure 8: The burden of employment law on businesses

Few problems (1-3)	14%
A burden (4-6)	39%
Serious burden (7-10)	46%
Score out of ten	6.19

Source: Employment Law Panel 2010

### About the Forum of Private Business

The Forum of Private Business is a proactive, not-for-profit organisation, providing comprehensive support, protection and reassurance to small businesses.

The organisation aims to deliver an exceptional service to its members, adding value through the provision of practical, tailored solutions that promote business success, and by being their voice in government.

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