

**IMPLEMENTATION OF THE AGENCY  
WORKERS DIRECTIVE**

Consultation on draft  
regulations

OCTOBER 2009

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## Ministerial Foreword



The agency sector is a crucial part of the UK labour market. We have around 1.3m agency workers, performing a huge variety of roles in a huge variety of organisations. The sector provides opportunity for workers, including as an important route into permanent employment. And it provides vital flexibility for many employers, flexibility that will be particularly important as the economy emerges from recession.

We need flexibility, opportunity and fairness. Most people would agree that it is not right that an agency worker can spend months or even years on a job while always being paid less than a permanent employee doing the same thing. That is why the Government welcomed the agreement of the CBI and TUC in May 2008 and the final agreement on the Agency Workers Directive in December 2008 which allowed us to implement these proposals in a way that suits the UK labour market. This agreement means that agency workers in the UK will be given a right to equal treatment after 12 weeks on a given job.

Getting the CBI-TUC agreement reflected in the Directive itself required careful negotiation and was possible because the Government is positively engaged in the mainstream of Europe.

This consultation marks an important step forward in our implementation of the Directive. We remain committed to an implementation that meets our twin objectives of bringing greater fairness for agency workers whilst maintaining the flexibility that the sector provides for both employers and workers.

It follows the policy consultation we launched in May this year. Over 300 organisations and individuals responded, representing all interests – Trades Unions, agencies, and employers of all sizes from both the private and public sectors. We also held the consultation events in London and the regions, enabling us to hear at first hand about the issues at stake from those who will be most affected by the legislation. I am grateful to all those who took part.

Perspectives have of course varied. We have heard concerns about the practical implications about the implementation of the Directive, and requests that priority is given to maximising flexibility for hirers and agencies. But we have also heard, on the other hand, the importance of preventing the unscrupulous from depriving agency workers of their equal treatment rights. This document now sets out how we intend to proceed in the light of these varied responses and, importantly, seeks views on our draft implementing regulations themselves.

This work is a priority for the Government, and the Prime Minister has said that we will get the implementing legislation on the Statute Book in this Parliament. The regulations will come into force on 1 October 2011 giving the sectors using agency workers time to prepare for this change.

We need to ensure that our implementing legislation is informed by the widest possible range of perspective. I therefore encourage all concerned to let us have the benefit of their views.

A handwritten signature in black ink, appearing to read 'Pat McFadden', written in a cursive style.

**Pat McFadden**

Minister for Business, Innovation and Skills

## How to respond to this consultation

Responses to this consultation must be received by 11 December 2009

You can respond by email to:

[awdconsultation@bis.gsi.gov.uk](mailto:awdconsultation@bis.gsi.gov.uk)

Or by letter or fax to:

Anita Thomas  
Agency Workers Directive Consultation Team  
Department for Business Innovation and Skills (BIS)  
Bay 482  
1 Victoria Street  
London  
SW1H 0ET

Tel: 020 7215 5963

Fax: 0207 215 0168

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### Confidentiality

Your response may be made public by the Department for Business, Innovation and Skills (BIS). If you do not want all or part of your response or name to be made public, please state clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax coversheet will be taken to apply only to the information in your response for which confidentiality has been requested.

We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

## **Help with queries**

Questions about policy issues raised in this document can be addressed to:

Karen Wilshaw  
Agency Workers Directive Policy Team  
BIS  
1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 2849  
Fax: 020 7215 0168

Email [Karen.wilshaw@bis.gsi.gov.uk](mailto:Karen.wilshaw@bis.gsi.gov.uk)

Or

Iain Newton  
Tel: 020 7215 0175  
Fax: 020 7215 0168

Email [Iain.Newton@bis.gsi.gov.uk](mailto:Iain.Newton@bis.gsi.gov.uk)

If you have comments or complaints about the way in which this consultation has been conducted, these should be sent to:

Tunde Idowu  
BIS Consultation Co-ordinator  
1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 0412  
Fax: 020 7215 0235  
Email: [Tunde.Idowu@bis.gsi.gov.uk](mailto:Tunde.Idowu@bis.gsi.gov.uk)

# 1. Introduction

1.1 This document is the response of Department for Business Innovation and Skills (BIS) to the consultation we conducted between 8 May and 31 July 2009 on the implementation of the EU Directive 2008/104/EC on Conditions for Temporary (Agency) Workers - the "Agency Workers Directive" (the Directive). The Directive was published in the Official Journal of the European Union on 5 December 2008, and Member States have until 5 December 2011 to implement it. Taking into account responses to the consultation, we are now seeking views on:

- (a) our proposed response to issues arising from the previous consultation;
- (b) whether the draft regulations effectively reflect our policy intentions as set out in this document (Annex B: Draft Agency Workers Regulations 2010;
- (c) whether the details of our proposals, as reflected in the draft regulations, give rise to any particular issues of concern; and
- (d) what practical advice users would welcome in the guidance which will accompany the Regulations.

1.2 This document contains a brief synopsis of responses to the previous consultation on the issues it discusses. A fuller summary of responses is being published separately.

## The Directive - Objectives

1.3 A copy of the Directive is at 'Annex E: Agency Workers Directive text'. Its aim is to ensure the protection of temporary agency workers by applying the principle of equal treatment, as set out in Article 5. This provides that the basic working and employment conditions (duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay) of temporary agency workers should be, for the duration of their assignment at a hirer, at least those that would apply if they had been recruited directly by that hirer to occupy the same job. The Directive allows for a qualifying period before this equal treatment is applicable on the basis of an agreement between social partners at national level, and for other derogations and flexibilities such as for agency workers on permanent contracts of employment who are paid between assignments.

1.4 The Directive also provides other entitlements which aim to improve the situation for agency workers, for example, in terms of improved access to permanent employment and training. In order to liberalise the agency worker sector across the EU, the Directive also looks to address restrictions and prohibitions on agency work which exist in different Member States to see if they are justified.

1.5 The Government has always supported the underlying objectives of the Directive and was pleased that key changes were agreed which enable us to implement it on the basis of the agreement reached between the CBI and the

TUC in May 2008. Implementation on this basis will include provision of a qualifying period of 12 weeks in a given job before equal treatment is applicable. There are, however, a range of issues on which Member States are given discretion under the Directive, or which may require clarification or more specific interpretation in order to ensure effective implementation. It is on these points that we sought comments in the previous consultation.

1.6 Implementation of the Directive will be by means of Regulations chiefly using powers under Section 2(2) of the European Communities Act 1972 although certain aspects are being provided for in the same regulations using powers under the Health and Safety at Work etc Act 1974. This consultation covers implementation in Great Britain; implementation in Northern Ireland will be subject to a separate consultation and legislation.

### **Government policy for implementing EU Directives**

1.8 It is a requirement of Community Law that EU legislation should be implemented in an effective, timely and proportionate manner. The Government's policy is to transpose Directives so as to implement them on time and in accordance with other policy goals, including minimising the burdens on business. As regards temporary agency workers, the Government has the twin objective of ensuring appropriate protection for agency workers whilst maintaining a flexible labour market. Accordingly, we are seeking to ensure that implementation of the Directive is done in a way which provides a proportionate response to meeting our legal obligations under the Directive.

### **Your views**

1.9 We particularly welcome views from:

- agency workers of all kinds;
- temporary work agencies;
- companies who use agency workers;
- companies who manage agency worker contracts, eg master vendors, neutral vendors;
- people representing agency workers or workers more generally such as trade union or workplace representatives;
- trade associations or representative bodies; and
- legal firms and individuals with experience in Employment Relations legislation and the temporary agency worker sector.



## **How to take part**

1.10 Responses are welcomed by email to [awdconsultation@bis.gsi.gov.uk](mailto:awdconsultation@bis.gsi.gov.uk) or in writing. Since we are generally seeking views on any issues arising in our proposals or from the drafting of the Regulations rather than answers on specific policy questions we are not on this occasion making use of survey monkey. A response form is provided at 'Annex G: Consultation Response Form' to assist respondents though we are content for interested parties to respond on all sections of the document or only those that are of most interest to them, and in a format that suits their preferences.

## Executive summary

This consultation document sets out the Government's proposed approach to implementation of the Agency Workers Directive in the light of our policy consultation earlier this year. It provides a synopsis of responses to the previous consultation, sets out the way in which we now intend to proceed, and seeks comments on draft regulations. The key elements of the Government's proposed approach are as follows:

- (a) legislation will be on the basis of the **CBI-TUC agreement** of May 2008, providing agency workers with a right to **equal treatment after 12 weeks in a given job**;
- (b) the Regulations will come into force on **1 October 2011**. We recognise that implementation of the Directive will entail some potentially significant changes in practice for hirers and agencies, who will need time to prepare;
- (c) implementation will apply to people finding temporary work through a **"temporary work agency"** which will be based upon the existing concept of an "employment business. The **definition of "agency worker"** will be based on that used for "workers" in the Working Time Regulations 1998, adjusted to reflect the distinctive triangular relationship between an agency worker, the employment business and the hirer. This will **exclude** workers who are genuinely one of the following: the self-employed; those working through their own limited liability company; or those employed on "Managed Service Contracts";
- (d) the scope of the definition does, however, include agency workers contracted to an **"umbrella company"**, or who operate a **personal service company** but are not genuinely self-employed, or who are supplied through **"intermediaries"** such as Master/Neutral Vendors and any similar "chain" arrangements. Despite concerns expressed by some respondents, we are concerned that not to include these structures would provide a relatively straightforward way for the unscrupulous to evade the regulations;
- (e) agency workers qualifying for equal treatment will be entitled to **paid holiday entitlement**, including any entitlement above the statutory minimum requirements. To address practical issues we will, however, make it possible for payment to be made in lieu of entitlement above the statutory minimum;
- (f) **"pay"** will essentially mean **basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment**. This will include payment for overtime, shift allowances, unsocial hours premiums/bonuses, payments for difficult or dangerous duties, and some commission payments and bonuses. It will, however, exclude bonus payments that are based wholly or partly on organisational performance, that are linked to a performance appraisal process designed for long-term management, motivation and retention of staff, or would not be due for payment to the agency worker concerned within his or her time with that hirer had he or she been recruited directly.

It will also exclude other aspects of remuneration that are provided in recognition of the long-term relationship between employer and permanent employee such as profit sharing and share ownership schemes and, consistent with the **CBI-TUC agreement**, occupational pension contributions or schemes and occupational sick pay;

(g) the **12-week qualifying period** will be **12 calendar weeks**, regardless of working pattern (eg part-time as opposed to full-time). A new qualifying period will begin only if a new assignment with the same employer is **substantively** different; with a **minimum six week break** between assignments in the same job before the 12 week clock should start again;

(h) on **establishing “equal treatment”**, the “basic working and employment conditions” to which equal treatment will apply will be those that “apply generally” in the workplace. The draft regulations describe this as those terms and conditions that are ordinarily incorporated into contracts of employment of employees of the hirer whether by collective agreement or otherwise. This will include collective agreements, pay scales and company handbooks or similar, but also extend to terms generally included in employees written employment contracts and other matters of custom and practice in the workplace concerned. In recognition of the fact that deciding equal treatment will in practice often entail comparison with a ‘flesh and blood’ comparator, the draft regulations also expressly provide that treatment consistent with that given to a true comparable employee will be deemed to mean compliance with the regulations. To aid understanding, an initial draft of guidance on this important point is also provided at 'Annex A: AWD Comparator: Possible Guidance', complete with illustrative examples;

(i) on **liability**, the agency will be responsible for any breach of a right in relation to equal treatment related to basic working and employment conditions but will have a reliable defence if they have taken “*reasonable steps*” to obtain the necessary information from the hirer and acted “*reasonably*” in determining the agency worker’s basic working and employment conditions. Any party in the “chain” of relationships can be named at the outset or joined to a claim and would be liable to the extent that they are to blame for the infringement;

(j) on the provision of **information** about equal treatment on basic working and employment conditions, we propose not to specify the nature of the information that should pass from hirer to agency, but to give agency workers the ability to ask their agency for information relating to their equal treatment rights. After the 12 weeks have elapsed, the agency worker can request a written statement from the agency (and subsequently from the hirer, if they do not receive a response from the agency, both of whom will have 28 days in which to respond) about any aspect of equal treatment which they do not believe they are receiving. There will be no separate right of enforcement if any agency worker does not receive these details. But if the agency worker goes on to make a claim under the regulations, the Employment Tribunal can draw an adverse inference from the fact that the written statement was not

provided. We do not propose a specific timescale for the agency to obtain information from the hirer – this is likely to vary in different circumstances;

(k) liability in relation to access to employment and collective facilities, will be the sole responsibility of the hirer as the agency has no role in delivering these entitlements;

(l) on dispute resolution, the regulations will enable an agency worker to bring a claim to an **Employment Tribunal**. They will also be added to the list of jurisdictions covered by the Employment Appeal Tribunal. To help resolve matters without the need for court intervention, Acas (the Advisory, Conciliation and Arbitration Service) will be able to deliver pre- and post-claim conciliation. In terms of **remedies** if a Tribunal upholds an agency worker's complaint it will generally be able to order compensation, make a declaration setting out the agency worker's rights in relation to the matters to which the complaint relates, and/or recommend that the hirer/agency takes certain action to remove the adverse affect on the agency worker;

(m) on the **protection of pregnant women and new mothers** we clarify that liability for ensuring women are provided with alternative work or paid where this is not possible should reside primarily with the agency; we are **extending the right to paid time off for ante-natal appointments** to agency workers;

(n) we clarify our approach regarding the Directive's provisions on **access to employment** (including the implications for our current legislation on "temp to perm" fees), **collective facilities and vocational training for agency workers**;

(o) we propose that agency workers should count towards **thresholds for the establishment of representative bodies in the agency** (as opposed to the hirer) and provide some additional clarification regarding our proposals on the **provision of information on the use of agency workers to workers' representatives**; and

(p) finally, we intend to take advantage of flexibility allowed under the Directive to permit alternative arrangements in the case of **agency workers on permanent contracts of employment who are paid between assignments**, and where the alternative arrangements are **agreed by workers' and employers' representatives**.

Responses are requested by **11 December 2009**.

### 3. Scope of the Directive – who is covered

#### What does the Directive say?

3. Article 5.1 of the Directive says

*“.....This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction”.*

#### What was said in the previous consultation?

3.1 We proposed that:

- implementation should apply to people finding temporary work through a “temporary work agency ” based on the concept of an “employment business” under the Employment Agencies Act 1973 (i.e. an organisation introducing workers to hirers for temporary work only) and not extend to those finding permanent work through an “employment agency”;
- the legislation should protect an “agency worker” - the definition is based upon that of “worker” used in the Working Time Regulations 1998, but adjusted to reflect the distinctive triangular relationship between an agency worker, the employment business and the hirer; and
- the scope of the definition should include agency workers contracted to an “**umbrella company**”, their own personal service company where they are not genuinely self-employed, or via other arrangements such as Master Vendors and Neutral Vendors, but **exclude** workers who are genuinely self-employed, working through their own limited liability company, or employed on “Managed Service Contracts.

#### What did respondents say?

3.2 There was widespread agreement on the proposal that implementation should cover workers placed on temporary assignments by “employment businesses”, with respondents accepting that it would be unnecessary and inappropriate also to include “employment agencies”.

3.3 Views differed beyond this, however. Unions and employees’ representatives generally argued that the scope of equal treatment rights should be drawn considerably more widely than we proposed, also to include not only those employed via umbrella companies but also the self-employed, limited company contractors and managed service provision. These respondents tended to argue that failure to include these categories of people risked providing loopholes that might be exploited by the unscrupulous. Some respondents also pointed out the need to ensure effective inclusion of workers operating via personal service companies but where the worker is not genuinely in business on his or her own account.

3.4 Businesses and agencies, on the other hand, generally supported basing implementation on the Working Time Regulations 'worker' definition, but in some cases opposed the extension to those employed via umbrella companies. Such respondents argued that umbrella company structures were a legitimate business practice that could be of particular benefit to higher paid contractors who were less in need of protection under the Directive. They argued that any abuse of umbrella company structures was a matter to be addressed by HMRC given that the motivation for their use relates primarily to tax dispensation provisions.

### **Our Conclusion – What the draft regulations say**

3.5 The Government's view is that the approach set out in the first consultation document remains broadly the right one. The draft regulations therefore maintain an approach based on the existing concept of 'employment business' (for which there was near unanimous support amongst respondents) and the definition of 'worker' in the Working Time Regulations, adapted appropriately to allow for the tripartite nature of the agency employment relationship. They achieve this by use of the terms "temporary work agency" and "agency worker", defined on the basis of these precedents. The regulations apply to agency workers supplied via 'intermediaries' so as to ensure coverage of agency workers supplied through Master Vendor or Neutral Vendor and any similar 'chain' arrangements. The definitions used also ensure coverage of employees and workers including those not subject to obligations of mutuality, for example agency workers subject to zero hours contracts, and reflect the fact that the equal treatment rights are individual ones, rather than for corporate bodies.

3.6 We also continue to propose the inclusion within the scope of the regulations of workers employed by umbrella companies. We agree with respondents who have argued that the use of such arrangements is generally driven by tax management considerations rather than because of a fundamentally different kind of employment relationship between worker, agency and hirer and that they should as a matter of principle therefore come within scope. We further consider that exclusion of workers contracted to umbrella companies would provide a loophole that could be relatively easily exploited by the unscrupulous - vulnerable agency workers could be told they must work through an umbrella company and would therefore be outside the equal treatment protections. We acknowledge arguments that their inclusion will entail additional administrative complexity and that some umbrella workers do not want or need the protections. However, we are not persuaded that these concerns will be unmanageable, or that they outweigh the other considerations outlined above.

3.7 We do not, however, intend to extend coverage to the genuinely self-employed, limited company contractors and people working on managed service contracts. We have carefully considered arguments that such arrangements could be exploited by the unscrupulous in a similar way to umbrella contracts, but consider there to be considerably higher practical and existing legal disincentives to this. We also believe that the existing approach taken by the Courts and Tribunals is sufficiently robust to address most issues

arising from ‘sham’ arrangements – there is in particular well established case law around so-called ‘substitution clauses’ (which purport to provide self-employment status where in reality the individual is a worker or employee). We consider that extension of coverage to these groups would go beyond what the Directive actually requires and clearly have potentially adverse consequences for the wide range of circumstances in which these arrangements are used entirely legitimately. In summary, we consider it a disproportionate response to a substantially lower risk of such arrangements being used to evade the regulations.

3.8 Guidance will, however, be provided to address a concern raised by some respondents that we should not inadvertently exclude people simply channelling their income through ‘personal service companies’, unless of course they are genuinely in business on their own account (i.e. they are in fact limited company contractors). We will also continue to consider possible additional steps to prevent the unscrupulous from abusing these provisions in order to deny workers their equal treatment rights. We will in particular consider whether agencies should make it entirely clear to a worker the nature of the contract they are being offered before it is signed and its implications for their rights under the regulations.

### **Exemption for Government Training Programmes**

3.9 Article 1(3) of the Directive states:

*“Member States may, after consulting the social partners, provide that the Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.”*

### **What was said in the previous consultation?**

3.10 We stated that we had not identified any current programmes in the UK to which this should apply but nevertheless noted that use of the exemption could in principle be of benefit in respect of future welfare to work-style programmes. We said that this would always require consideration on a case-by-case basis.

### **What did respondents say?**

3.11 This was not a major focus of comments amongst those responding to the consultation. Some employee representatives objected to potential use of the derogation as a matter of principle, since it would entail depriving agency workers of equal treatment rights. In contrast some agency voices suggested that it might be used to allow exemption for any worker leaving a “welfare to work” programme for employment via an agency. But most respondents made no specific comment.

### **Our conclusion - what will the draft regulations say**

3.12 Having considered responses, we believe the approach on this issue suggested in the consultation document remains the right one. We do not consider that it would be right to decide as a matter of principle that equal

treatment rights should never apply to a worker purely because they have arrived at the agency following a place on welfare to work programme, since this could deprive potentially vulnerable workers of valuable protections. Equally, however, it would be wrong to rule out future use of the exemption should it be relevant. Use of the exemption will therefore be considered on a case-by-case basis.



## 4. Defining "equal treatment" under the Directive

4.1 This section considers the main issues relating to the implementation of this equal treatment principle. It covers:

- the CBI/TUC agreement of 20 May 2008
- equal treatment in relation to working time and holiday entitlements
- equal treatment in relation to pay
- the 12-week qualifying period and how to define it
- how to treat breaks between (and during) assignments – when should the 12-week clock should start again?
- possible derogation in relation to equal treatment on pay for people with a permanent contract of employment with an employment business who are paid between assignments
- agreements between workers and employers representatives
- provisions regarding pregnant women and new mothers

### What does the Directive say?

4.2 Article 5.1 of the Directive describes the “principle of equal treatment”. It provides that:

“The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly to occupy the same job”.

4.3 Article 5.4 of the Directive allows Member States to establish alternative arrangements derogating from the principle of equal treatment on the basis of an agreement concluded between the social partners (representatives of employees and employers) at national level. The Directive text specifically states that such alternative arrangements may include the provision of a qualifying period for equal treatment. In May 2008 the CBI and the TUC reached an agreement that can provide the basis for our implementation of the equal treatment principle under Article 5.4. Its principle feature was the agreement that there should be a 12-week qualifying period – *“after 12-week in a given job there will be an entitlement to equal treatment”*.

4.4 We are implementing the Directive on the basis of the CBI-TUC agreement. After the 12-week qualifying period has elapsed, an agency worker will therefore be entitled to equal treatment in relation to ‘basic working and employment conditions’. These are defined by the Directive (Article 3(1)(f)) as:

*“..working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:*

*duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays*

*pay”*

## **Working time and holiday entitlements**

### **What was said in the previous consultation?**

4.5 We proposed that after 12-week on a given assignment an agency worker should be entitled to the same working time and holiday entitlements in excess of statutory minima as he or she would have received as a directly recruited employee. We proposed that the practical implications of this as far as holiday entitlement was concerned might be simplified by making it possible to deal with any entitlement above the statutory minimum by payment in lieu, either as a one off payment at the end of the assignment or as part of the hourly/daily rate.

### **What did respondents say?**

4.6 Most respondents who commented on it supported our proposed approach on duration of working time, overtime, nightwork and rest, many agreeing with our understanding that it was already common practice not to distinguish between agency and permanent staff in these areas.

4.7 Respondents' focus was, however, largely on the question of holiday entitlement, on which views diverged significantly. Unions and employee representatives generally supported our proposal to require equal treatment on holiday entitlement above the statutory minimum. However, many of them opposed the suggestion of allowing payment in lieu, arguing that there should be an absolute right to take the additional leave. Some such respondents further argued that the entitlement should be backdated to day 1 of an assignment once it has lasted for more than 12 weeks.

4.8 Agencies, businesses and their representatives generally took a very different view. Some argued that the entitlement under the Directive was only to equal treatment in respect of time off, not for payment during that time off. Another widely held view amongst this group was that the equal treatment regime need not provide agency workers with any leave entitlement above the statutory minimum, on the basis that extra entitlement above this was linked to longer-term reward and retention policies. They also expressed concern about the administrative burden that calculating non-statutory holiday entitlement for agency workers would entail, which could be out of proportion to the additional payment involved. Some businesses were also concerned that allowing payment in lieu for leave entitlement above statutory minimum for agency workers would be unfair on permanent staff who may not have that possibility.

4.9 Some legal commentators thought there might be a potential anomaly if the pay was “rolled up” and the agency worker subsequently recruited

permanently by the hirer – there could be a possible windfall payment for the agency worker.

**Our conclusion - What the draft regulations say**

4.10 Having carefully considered responses, our conclusion is that the approach set out in the consultation document in this area remains the right one. As noted above, there was general acceptance amongst respondents of our proposed approach in this area, with the exception of holiday entitlements.

4.11 The draft regulations therefore provide that after 12 weeks on an assignment an agency worker should be entitled to equal treatment in respect of duration of working time, length of night work, rest periods and rest breaks, and to be paid at the appropriate rate for overtime. The Working Time Regulations already provide minimum statutory entitlements in most of these areas (public and bank holidays and overtime are not covered) so the effect will be to give agency workers equal treatment in respect of any additional benefits above these. We are aware that many hirers and agencies may already offer some of these additional entitlements from Day 1 of an assignment – for example a longer rest break than required by law - but the formal entitlement will only be after the 12 weeks has elapsed.

4.12 On the question of holiday entitlement, we continue to take the view that it would not be proper implementation of the Directive to interpret equal treatment as requiring only that agency workers continue to receive the existing statutory minimum entitlement. The Directive clearly provides that an agency worker should receive the holiday entitlement that he or she would have got if recruited directly to the same job – and that must include any entitlement above the statutory minimum. We are also not persuaded by arguments that the right should be to time off itself but not holiday pay – that would hardly amount to meaningful ‘equal treatment’ for agency staff. The draft regulations therefore provide for equal treatment in respect of paid time off, including – as specifically required under the Directive – public (and bank) holidays.

4.13 We also continue to take the view, however, that we should seek a way to give agencies, hirers and workers the flexibility to provide payment in lieu of additional holiday entitlement if it makes more sense for them. We consider that failure to provide this option would be to ignore the very real practical problems that would arise if agencies and hirers were required to ensure, for instance, that a worker moving between a number of assignments during a single year was able to ‘carry forward’ leave entitlement accrued with one hirer to work with another. As we said in the first consultation document, we think that would be complex and confusing for workers and bureaucratic and burdensome for hirers and agencies. The draft regulations make no specific provision on this point as it is unnecessary - the option of payment in lieu of additional holiday (above the statutory minimum), either as a one off payment at the end of the assignment or as part of the hourly/daily rate, is permitted under the Working Time Regulations.

## **Pay**

### **What was said in the previous consultation?**

4.14 The definition of “pay” for the purposes of the regulations is, as noted in the previous consultation, one of the key issues for the implementation of the Directive. We proposed that pay should be defined as basic pay, plus other contractual entitlements that are directly linked to the work undertaken by the agency worker while on assignment, i.e.:

- holiday pay (and paid time off in relation to public and bank holidays);
- payment of overtime;
- shift allowances;
- unsocial hours premiums/bonuses; and
- bonuses where they related directly to personal and individual performance – for instance, a piece-work bonus, or where the agency worker has contributed significantly to a given project, completion of which is being rewarded.

### **What did respondents say?**

4.15 This was an area that drew significant attention from respondents to the consultation. Unions and employee representatives argued for a wider definition of pay than that proposed, on the basis that agency workers should be entitled to the same ‘pay’ as permanent workers in all respects. These respondents generally proposed that the definition should also extend to include matters such as redundancy, maternity, paternity and adoption pay and progression entitlements. These respondents did, however, generally accept the exclusion of financial participation scheme, occupational pensions and sick pay in accordance with the CBI-TUC agreement.

4.16 Hirers and agency respondents generally took an opposing view, many arguing that pay should be defined as the basic hourly wage only. They considered this necessary to provide a simple system that will be easy to understand and administer, and argued that inclusion of other elements was inappropriate as they were provided to incentivise performance and longer-term commitment from permanent staff.

4.17 Particular concern was often expressed by respondents in this group regarding the proposed inclusion of some bonus payments, where respondents also saw practical problems. It was argued that it might be difficult to distinguish in practice and/or in law between those bonuses that relate directly to individual performance and those that do not (for instance where they were based on a combination of organisational and individual performance), and that it would be particularly inappropriate and problematic to include agency staff in aspects of annual (or more frequent) appraisal processes that were often used to determine bonus payments, especially since payment of these was often in practice delayed for a number of months (by when the agency worker may have left). It was also argued by some that a

requirement to include bonuses in equal treatment rights could have the perverse effect in some workplaces of seeing them withdrawn from all staff.

4.18 As to how the drafting of the regulations should approach the question of the definition of pay, respondents broadly fell into two camps. Some (predominantly agencies and hirers) argued that whatever policy decisions were taken it would be important to have as exhaustive as possible a list of elements of pay coming within scope on the face of the regulations, in order to minimise uncertainty. Others (primarily from the legal sector) argued for an approach based on the existing broad definition in section 27 of the Employment Rights Act 1996 but excluding those elements that would not come within the equal treatment regime, on the grounds that a novel definition would be likely to lead to more tribunal claims.

#### **Our conclusion - what the draft regulations say**

4.19 Having carefully considered the varied responses on this subject, our conclusion is that the approach set out in the consultation document remains broadly the right one, subject to some refinement in particular as regards coverage of bonus payments.

4.20 We continue to take the view that proper implementation of the Directive requires a definition of pay that goes beyond basic pay alone. Whilst we understand the desire from employers for simplicity and transparency in deciding what equal treatment on pay means, we do not believe that such an approach could reasonably be argued to amount to offering an agency worker the pay that he or she would have received if recruited directly to the same role. We also think it only fair as a matter of policy that an agency worker performing same role as a permanent employee for an extended period should also be entitled to equal treatment in respect of overtime payments, shift allowances and unsocial hours premiums/bonuses. This should clearly also include additional payments to which permanent staff are entitled for particularly difficult or dangerous duties – a point not mentioned in the first consultation, but rightly raised by some respondents.

4.21 The draft regulations therefore include these items in a worker's equal treatment rights. However, we agree with the point made by some employers that agency workers should only qualify for such additional payments if they have fulfilled the conditions they would have had to have fulfilled as permanent staff. So in respect of overtime, for instance, an agency worker would have to be doing work over and above standards hours to qualify – it would not be sufficient simply to be doing a shift that permanent staff tended to do on an overtime basis. This point does not need to be made explicit in the draft regulations, but will be made clear in guidance.

4.22 We also continue to take the view that equal treatment should encompass some bonus and incentive payments. Again, we think this necessary in order properly to implement the principle of equal treatment as laid down in the Directive – if agency workers have, for instance, met a piecework target that would have triggered a bonus payment had they been permanent employees, then they should qualify for it. We do, however, understand concerns expressed by hirers and agencies regarding the difficulty

of a definition based solely on the question of personal contribution, the inappropriateness of a requirement to incorporate temporary agency workers into annual appraisal systems for permanent staff, and the potential practical implications relating to the time at which bonuses are in practice paid.

4.23 The effect of the draft regulations is therefore to provide that bonus payments should not come within scope of the equal treatment regime if they:

- are awarded in the context of a performance appraisal pay systems aimed at the long-term management, motivation and retention of staff;
- relate purely or partly to company performance; or
- would not be due for payment to the agency worker concerned within his or her time with that hirer had he or she been recruited directly

4.26 Beyond this we propose maintaining the approach set out in the consultation document. Consistent with the CBI-TUC agreement, the draft regulations exclude financial participation schemes (defined as distribution of shares, share options and profit sharing), occupational pensions and occupational sick pay. We also remain unpersuaded of the case for extending the equal treatment regime to encompass other pay-related rights that are legitimately to be seen as linked to longer-term reward and retention, and whose inclusion would risk making the administration of the regime unwieldy. The draft regulations do not, therefore, bring within scope other benefits such as rights to contractual notice pay, contractual redundancy pay and benefits in kind such as company car allowances or health insurance.

4.27 The drafting approach adopted in the regulations is to provide a pay definition based on that in section 27 of the Employment Rights Act 1996 which eliminates matters that do not apply. This is well understood by interested parties, offering clarity which hirers, agencies and workers have requested.

4.28 Overall, we believe this will provide for a fair and proportionate approach, consistent with the Directive and its objectives, respecting the difference between temporary agency workers and permanent employees, whilst ensuring agency workers passing the qualifying period receive equal reward in respect of payments directly related to work undertaken and the quality of its performance.

## **Defining the 12-week qualifying period**

### **What was said in the previous consultation?**

4.29 We proposed that 12 weeks should be 12 calendar weeks no matter the number of hours or days worked during that period.

### **What did respondents say?**

4.30 Almost all respondents agreed with our proposal. Those representing hirers and agencies accepted that although the proposed approach would have the effect of extending the qualifying period for many workers, this benefit would be off-set by the additional complexity of the regime and the record keeping requirements to demonstrate compliance. Several bodies representing business reiterated their concerns over the length of the qualifying period that had been agreed in the TUC and CBI agreement of May 2008.

### **Our conclusion - what the draft regulations say**

4.31 Consistent with the general agreement on our proposed approach, the draft regulations provide that the qualifying period should be 12 calendar weeks in all circumstances. In response to observations from some respondents regarding the need to provide for atypical work patterns (such as part-time and irregular work patterns), that any week during the whole or part of which an agency worker is engaged on an assignment is counted as a calendar week.

## **Breaks between (or during) assignments**

### **What was said in the previous consultation?**

4.32 We proposed that short breaks between assignments or during an assignment on the same role in the same hirer should not lead to the “clock” on the 12-week qualifying period starting again. Were this to be the case, there would clearly be scope for abuse – the Directive specifically requires Member States implementing on the basis of the national social partner derogation to take “appropriate measures” to prevent its misuse. We indicated that we favoured an approach which would set a minimum break between assignments in the same job after which the qualifying period would start again rather than a ‘reference period’ system, and sought views on how long the minimum break period should be. We also proposed that in order for the clock to re-start with the same hirer in the absence of a break it should be necessary for the worker genuinely to have taken on a substantively different role.

### **What did respondents say?**

4.33 Trade unions and employees representatives generally expressed a preference for a ‘reference period’ approach to this issue. They were concerned that any ‘minimum break’ approach risked enabling hirers and agencies to put in place systems of reassignment that could facilitate evasion of the aims of the Directive. A common proposal amongst these respondents was that the reference period should be at least two years in length, and that any work with the hirer concerned in that period should count towards it.

4.34 Hirers and agencies, on the other hand, generally agreed with the 'minimum break' approach. They tended to argue that there was no requirement for a break of any significant length, since it would be impractical for employers to organise resources on the basis of regular breaks in continuity. Views on the appropriate length of break amongst this group varied from as little as one week (on the basis this was generally accepted as a break on continuity in employment law) to around four weeks (which it was pointed out would be consistent with the provisions on trial periods and bridges of continuity in the Employment Rights Act 1996). These respondents also tended to argue that the clock should re-start in the event of a worker taking on *any* new role with the same hirer – the minimum break between assignments should only apply to breaks in work on the *same job*.

**Our conclusion - what the draft regulations say**

4.35 We remain of the view that a 'minimum break' approach is preferable to one based on a reference period. We have carefully considered the arguments of those favouring the latter approach, but concluded that it would entail disproportionate administrative complexity for workers, hirers and agencies. We also consider that it is possible effectively to prevent abuse of repeat assignments by means of a 'minimum break' provision.

4.36 The draft regulations therefore propose a minimum break of 6 weeks before the clock on the qualifying period can re-start. We consider that this period would be sufficient to prevent abuse of repeat contracts by the unscrupulous, since it would be difficult for any employer to organise resources on a regular '12 weeks on, 6 weeks off basis'.

4.37 Some business and agency respondents thought greater flexibility was required to allow for irregular working – for instance an agency worker might work one day a week for a hirer, 3 days the next week and then a break of two weeks with no work. Some respondents suggested that it was therefore necessary to provide that where there was a break between assignments it should be a certain number of weeks **or** the length of the assignment, whichever is shorter. However we believe that to allow a break to be the "length of the assignment" would provide a clear route to avoidance of the equal treatment regime since any part-time assignment could simply be transformed into a succession of very short but separate assignments.

4.38 We also retain the view that it would be appropriate to provide for a re-starting of the clock following a change of role within the same hirer. The CBI-TUC agreement speaks of equal treatment after 12 weeks on a 'given job', and the equal treatment principle in the directive is framed in terms of comparison with direct recruitment to the 'same job'. We do, however, recognise the need to avoid abuse of any such provision, and therefore propose to require that in order for the clock to re-start:

- (a) the worker would have to commence a new, separate assignment with the hirer - so cannot simply be switched between roles in the context of the same contract with the agency; and



- (b) that assignment should be ‘substantively different’ to the previous one. The meaning of ‘substantive’ in this context will be a matter we would set out in guidance rather than on the face of the regulations, but our intention would be very clearly to rule out possible abuses, for instance mere changes of line manager but not duties, transfers between similar administrative or production functions, or moves within a single, relatively small business unit.

4.39 It is the Government’s objective that the system put in place on these issues provides for recommencement of the qualifying period when an agency worker genuinely begins a subsequent and substantively different assignment with the same hirer. It is of course important, however, that we ensure that the combined effect of the arrangements will not be to permit abuse.

4.40 It would not be our desire, for instance, to facilitate a system in which unscrupulous employers could feasibly ‘rotate’ agency staff between two roles and thus prevent them ever acquiring equal treatment rights. Part of the solution to this may lie in the guidance on the meaning of a ‘substantively different’ assignment, but we will continue to consider this specific point during the consultation period and would appreciate further views on it. We will consider in particular whether there is a need for a specific prohibition of switching workers between roles with the same hirer for the purposes of evading the equal treatment regime.

4.41 Finally, we agree with the point made by a number of respondents that some legitimate absences from work should not count towards a break period. We propose that:

- (a) annual leave approved by both hirer and agency and certified sick absence should have the effect of ‘pausing the clock’ on the qualifying period. So where an agency worker works for two weeks, takes three weeks’ approved leave and then returns to the same assignment the clock would recommence from the two-week point;
- (b) the clock should ‘continue to tick’ on the qualifying period in the event of maternity-related absence during an assignment. So where the worker in the previous example has worked for two weeks and is then away from work for three weeks because she was unable to fulfil her duties for a health and safety reason related to her pregnancy, the clock would continue to tick in her absence, meaning it would have reached the 5-week point on her return. If the absence extends beyond the point at which the assignment would otherwise have ended, the clock would ‘pause’ from that point; and
- (c) where agency workers are ‘employees’, account should be taken of the possibility of absence due to exercise of the wider range of rights to which they are entitled . We propose that the clock should ‘continue to tick’ when a worker is exercising a right to maternity, paternity or adoption leave in order to ensure consistency with maternity-related absence, and that it should pause in respect of all other rights to time off work under the Employment Rights Act (such as time off to

undertake public duties). The clock will also pause for absence due to jury service.

4.42 To allow for the eventuality of sick absence or jury service being very long we propose a 'long-stop' provision that the clock is automatically 'reset' after 28 weeks.

4.43 We should also be clear that we intend that the same basic approach should apply to breaks between (and during) assignments after the qualifying period has elapsed. So where an agency worker has served more than 12 weeks with a hirer and gained equal treatment rights, he or she would continue to enjoy them if returning within 6 weeks to a role with the same hirer that was not 'substantively different'. Consistent provision will also be made in respect of legitimate absences - so agreed annual leave, certified illness, maternity absence etc would not count towards the six week break between assignments after the qualifying period has elapsed.

**Permanent contracts of employment and payment between assignments – possible exemption from the principle of equal treatment on the basis of Article 5(2)**

4.44 This section considers whether to make use of the permitted derogation from the right to equal treatment in respect of pay for temporary agency workers who have a permanent contract of employment with a temporary work agency.

4.45 The option provided for under Article 5.2 of the Directive is as follows:-

*“as regards pay, Member States may, after consulting the social partners, provide that an exemption may be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid between assignments ”*

**What was said in the previous consultation?**

4.46 In the consultation paper we indicated that we wanted, in principle, to make use of this derogation. However, we also made it clear that it was essential to ensure that in doing so we did not open up a route for circumvention of the Directive's provisions. We set out initial thoughts on what might be an appropriate level of pay to require between assignments, suggesting that this might be at least half the previous pay rate. We also asked how long an agency employing a worker on this basis should be required to retain that worker after the end of the relevant assignment.

**What did respondents say?**

4.47 Generally, the response from businesses and agencies was to support use of the derogation. Whilst the practice of pay between assignments is not currently widely used in the UK, these respondents considered that it currently has a role within a fairly niche market (for example to retain workers at the

“high end” of the IT sector where skills are particularly sought after) and might be an option that would be considered in a wider range of contexts following implementation of the Directive. Business has cited benefits for workers who choose to accept slightly reduced earnings in return for a stable income, guaranteed access for hirers to highly skilled workers ‘on the books’ and greater certainty for agencies that they will be able to meet market demand and address shortages.

4.48 Trade union and employee respondents, on the other hand, did not support use of the derogation. They expressed concern that unscrupulous agencies will see the derogation as an opportunity to avoid the consequences of equal treatment and argue that it undermines the principles of the Directive. They have cited particular concerns about how it might work in practice. For example, they suggested that an unscrupulous agency might put workers on ‘derogation’ contracts to avoid having to pay them in accordance with equal treatment, but then also avoid any payment between assignments by either simply letting them go at the end of a single posting or, if we took steps to prevent that, only offering them unreasonable assignments (in terms of pay, location, hours of role) prompting them to resign. Trade Union respondents also expressed concern about the potential impact of reduced pay between assignments on an agency workers’ ability to benefit from statutory employment rights and other benefits.

4.49 In addition to the consultation we established an “Expert Group” to provide a range of views and perspectives in relation to the possible use of Article 5 (2). The Group comprised representatives from business, employment agencies, trade bodies and trade unions.

#### **Our conclusion – what the draft regulations say**

4.50 It has proved particularly challenging to devise an appropriate policy approach to this subject, given that it concerns potential use of a derogation from an equal treatment regime that we have not yet had chance to observe in operation. We have nevertheless concluded that it would be appropriate to make use of the derogation available in our implementing regulations, providing that it is possible to strike a reasonable balance between allowing people helpful flexibility and eliminating the scope for abuse.

4.51 The draft regulations therefore provide that ‘derogation contracts’ should be permissible as long as the following conditions are met:

(a) the agency worker has a **permanent contract of employment** with the agency concerned. The Directive clearly envisages that the employment relationship between the agency and the agency employee will be of an on going, long term nature, with true ‘mutuality of obligation’, giving the agency worker a greater degree of job security – and thus providing an element of compensation for potential loss of equal treatment rights in relation to pay. We have concluded that fixed term or zero hours contracts would not meet these requirements and that derogation contracts of these types should therefore be expressly excluded;

(b) there is agreement at the outset between the agency and the worker parties on the **terms and conditions that will apply across assignments** under the contract. The draft regulations provide that this should include: details of pay rates, (which would show the minimum rate the worker can be required to accept); locations where the agency worker can be expected to work; the minimum and maximum hours below or above which the worker cannot be required to work; and the type of work that the worker can be required to perform;

(c) the **level of pay between assignments** guaranteed in the contract is at least 50% of 'on assignment' pay, to be calculated on the basis of pay received in the last pay reference period in the previous assignment or a pay reference period in the previous 12 weeks' of work, whichever is greater. We proposed a 50 per cent requirement in the initial consultation document and have not received compelling evidence to suggest an alternative level would be more appropriate. Our proposal regarding the basis on which that calculation should be made is designed to ensure that the agency worker is not disadvantaged if their last assignment was, for instance, at an unusually low rate of pay or involved reduced hours. We also propose to provide an absolute floor for level of pay between assignments of National Minimum Wage;

(d) the **contract cannot be terminated without the agency worker having received at least 4 weeks of pay between assignments** (on the 'between assignments' rate), during the period of their contractual relationship with the agency. This element of the proposal has involved most debate, but we consider that it is necessary in order to provide a disincentive to workers being asked to sign 'derogation' contracts when there is in practice little intention to provide more than one assignment – in which case the worker would not receive equal treatment rights but also not benefit from any payment between assignments. Under this proposal the agency worker will receive at least 4 weeks of pay at the pay between assignment rate even if this comes at the end of the contractual relationship. Our proposal is that this requirement should be distinct from a right to notice on termination, since the four-week period would not provide any significant disincentive to abuse if it could run concurrently with the last four weeks of an assignment; and

(e) during any period that the agency worker is not working, the agency will take reasonable steps to seek a suitable new assignment for the agency worker.

4.52 In addition, where an agency worker qualifies for statutory rights relating to unfair dismissal, redundancy etc these will of course still apply.

4.53 This proposal is a relatively novel approach, as pay between assignments has not hitherto been common practice in the UK. We would therefore welcome your views on the above proposals including how they will work in practice. We should be particularly grateful to hear views on any possible unintended consequences, in particular where there may be scope for abuse. We will also consider further during the consultation period the appropriate approach as regards remedies for breach of the above



on the structure of workforce agreements based on the provisions in Schedule 1 to the Working Time Regulations 1998.

4.59 As we said in the first consultation, we would wish to enable worker and employer representatives to come to more specific arrangements subject to agency workers receiving the necessary level of protection. We are of the view that such arrangements should have to meet the same “test” regardless of whether the agreement is of the ‘collective’ or ‘workplace’ variety, i.e. that agency workers should receive the same “overall protection” as they would otherwise have received after 12 weeks. This reflects the level of protection agreed in the CBI/TUC agreement of May 2008.

4.60 Neither workforce nor collective agreements would be permitted to extend the 12-week qualifying period as such but could enable employers and workers to vary the entitlements provided to agency workers thereafter. Although there are no restrictions when such an agreement could come into force we expect they will usually apply after the 12 week qualifying period has elapsed.

4.61 In practical terms, this means that if an agency worker received less than equal treatment in one aspect of their basic working and employment conditions as a result of an agreement, they would have to be compensated elsewhere to ensure that their conditions, when viewed as a whole, meet the test of overall level of protection. For example, if agency workers were asked to work longer shifts than a permanent employee then they should receive some compensation – perhaps additional paid time off or a higher rate of pay. A failure to ensure overall protection will breach equal treatment rights of agency workers.

4.62 The draft regulations require any agreement to be kept under review by the hirer to ensure that it continues to provide an “overall” level of protection (for instance taking account of changes to pay scales) and provide as a fallback that no agreement should last for more than 5 years (the same period as in the Working Time Regulations). An agreement would be between the hirer and relevant members of the workforce or their representatives and apply to agency workers both presently working for the hirer and doing so in the future while that agreement is in place.

4.63 We propose that any agency workers present in the workplace should not be precluded from applying for the role of representative solely on the basis that they are an agency worker. Similarly, we propose that any agency workers present in the workplace should be allowed to take part in any ballot on acceptance of such an agreement. We do not propose a requirement that these representatives must include agency workers or as to any proportion of agency workers who must be in favour of an agreement.

4.64 We propose that **liability** for the terms of the agreement will rest solely with the hirer as the agency has no role in determining the terms of the agreement. As to disclosure of any agreement, we are proposing that this follows a similar process to information on basic working and employment conditions. The primary obligation would be on the hirer to disclose the

existence of an agreement to the agency but the temporary work agency still has responsibility for enquiring whether there is such an agreement, obtaining it and ensuring the agency worker is notified of the existence and provided with a copy.

4.65 The agency would be able to discharge its responsibility in this regard, and thereby establish a defence, if it has taken reasonable steps to do so. These would include making enquiries as to the existence of an agreement; drawing it to the workers' attention at an appropriate time; passing on the terms of any agreement in force, such as the level of pay, to the agency workers; and checking from time to time if the agreement has been changed, enquiring of the hirer as to whether this has happened.

## **Protection of pregnant women and new mothers**

### **What does the Directive say?**

4.66 The Directive says that the principle of equal treatment should apply to rules about the protection of pregnant women and nursing mothers, in relation to the basic working and employment conditions.

### **What was said in the previous consultation?**

4.67 The consultation document set out the protections already in place for pregnant women and new or breastfeeding mothers through the Sex Discrimination Act and our proposal to extend to agency workers certain employment protections which apply if there is a risk to the health of a pregnant woman, new mother or her child.. These include the right to be offered alternative work or hours, the right to be suspended on full pay if alternative arrangements cannot be put in place, and the right to paid time off for ante-natal appointments.

### **What did respondents say?**

4.68 Overall responses were supportive of the approach set out in the consultation document. Respondents commented on the issue of where liability to provide alternative work or to pay an agency worker in the case of a suspension or pay for ante-natal appointments lay. They also broadly agreed that the protections should apply for the duration or likely duration of the placement. Unions and employee representatives called for a greater extension of all the maternity rights currently available to employees. There were also concerns about new liabilities arising from the proposals.

### **Our conclusion - what the draft regulations say**

4.69 Having carefully considered the responses, our conclusion is that the approach set out in the consultation document is the right one. Hirers will need to make adjustments to protect an agency worker who is pregnant or a new mother from identified risks. However where this is not reasonable, or will not remove the risk, it will fall to the agency to offer alternative work or, if this is not possible, pay the agency worker for any period of the assignment when she cannot work due to a health and safety risk.

4.70 The Government proposes that liability in respect of these provisions should sit primarily with the agency since the agency will be best placed to offer alternative work. This was the overwhelming view of those who commented in the consultation. Both the hirer and the agency will have a role to play.

4.71 If it is not reasonable for a hirer to make adjustments to an agency worker's terms and conditions to remove any risks, or making adjustments will not remove the risk, the hirer should let the agency know and the agency should end the supply of the agency worker to that hirer for that position.

4.72 The agency will then be required to find alternative work for the agency worker. This should be an assignment which is appropriate for her and on terms and conditions (including pay) which are not substantially less favourable than the original placement. It could be with the same hirer (if another assignment was available which did not present health and safety risks) or with another hirer.

4.73 If this is not possible, the woman would be paid her usual pay for the duration or expected duration of the assignment. It is expected these would be exceptional cases - the majority of respondents who commented on this requirement said it reflected existing practice and that agencies would in the majority of cases be able to find alternative work. The intention would always be to enable the woman to continue working, unless this was not possible for health and safety reasons.

4.74 The Government proposes that the agency's obligation to find suitable alternative assignments if there is a risk in relation to the original assignment, and to pay the worker if this is not possible, applies for the duration or likely duration of the original assignment. This reflects the consensus of respondents, although some respondents favoured a longer period, up until childbirth, and some did not support any provision in this respect. A small number of respondents queried how the likely duration of an assignment would be calculated. However others commented that the proposal reflected a similar provision already used in respect of agency workers' entitlement to Statutory Sick Pay. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 already require the likely length of the work to be established at the outset.

4.75 Hirers will be required to allow an agency worker reasonable time off during her working hours to attend an ante-natal appointment. Health and safety legislation<sup>1</sup> already requires employers to carry out a risk assessment for anyone working at their premises, including a risk assessment in respect of new or expectant mothers. Where such a risk is identified, a hirer will be liable to make any necessary adjustments to the worker's hours or working conditions, where they have been notified in writing that an agency worker placed with them is pregnant. If it is not reasonable to make such adjustments the hirer should let the agency know and supply of the agency worker to that hirer for that position should end.

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<sup>1</sup> Management of Health and Safety at Work Regulations 1999



4.76 For these rights to apply the agency worker will need to inform the hirer and the agency that she is pregnant, in writing if requested. Where asked by the hirer and/or the agency she will also have to provide written evidence of ante-natal appointments. The requirement that the agency pay the agency worker where no alternative work is available for her will not apply if the agency worker unreasonably refuses a suitable assignment.

4.77 As with other provisions, these rights will only apply where the agency worker has satisfied the qualifying period and is entitled to equal treatment. These new rights will only apply where the agency worker is not an employee of either the hirer or the agency. The equivalent rights for employees (including employees who are also agency workers), for example the right to be suspended on full pay where there is a health and safety risk will continue to apply to those individuals, and those rights will not be affected by these Regulations.

## 5. Access to employment, collective facilities and vocational training

### Access to employment vacancies

#### **What does the Directive say?**

5.1 Article 6.1 of the Directive Article 6.1 of the Directive describes the “principle of equal treatment”. It provides that:

*“Agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged”.*

5.2 This right is a “Day One” entitlement and is not subject to the 12-week qualifying period that we intend to implement on the basis of the TUC-CBI agreement in relation to basic working and employment conditions.

#### **What was said in the previous consultation?**

5.3 We stated that Article 6.1 was not intended to cover situations where a hirer needs to redeploy surplus staff, for example as part of a redeployment exercise of permanent staff in order to avoid redundancies. In such circumstances, surplus staff are given the first opportunity to apply for jobs before permanent staff; thus agency workers would not be treated differently to permanent (non surplus) employees. We explained that we felt the requirement could generally be addressed by means of established processes – vacancy lists posted on notice boards, intranets etc.

5.4 We proposed that liability for compliance with these obligations should lie solely with the hirer (as opposed to the agency), since the practical implications of the alternative would probably be more burdensome for all concerned. It would not mean the hirer would have to inform the agency of vacancies, who would in turn have to inform the agency staff - although there would be nothing to stop a hirer and agency passing the information in this way if they wished.

#### **What did respondents say?**

5.5 Responses revealed a degree of concern on this issue amongst hirers, who argued that it would be wrong to require agency workers be informed about vacancies that a company has decided to make available only to current permanent employees in the interests of avoiding any increase in headcount. The information requirement should therefore, they argued, be restricted to externally advertised vacancies. Hirers also expressed concern about the practical problems of ensuring agency workers were properly informed of vacancies, in particular if there were to be a requirement to ensure they had equal access to IT systems (if vacancies are circulated on round-

robin e-mail lists or listed on restricted-access intranets, for example). Trade union and employee representatives, in contrast, expressed agreement with the proposed approach.

5.6 Agencies and hirers also tended to say that the Directive did not insist that agency workers should be entitled to an interview or being hired, and stressed significant concerns that vacancies may not necessarily be advertised to all permanent staff, not least because they may not be qualified for the position(s) available. They said that any attempt to introduce a one size fits all approach would simply add to the burden for all businesses and ignore existing working practices for the benefit of one group of workers. Many hirers said they did not tell employees about all vacancies, particularly if they require special skills that only a small percentage of the workforce will have.

#### **Our conclusions – what will the draft regulations say?**

5.7 The draft regulations say that an agency worker has the right to be treated no less favourably than a comparable employee doing the same or similar job in the hirer's establishment in relation to information about vacancies. Therefore, the agency worker will have the right to be informed by the hirer of vacancies in the establishment if they are available to a comparable employee whether by way of an internal or external selection process. We consider that the Directive does not allow us expressly to restrict the right to information about vacancies to those advertised externally.

5.8 The Regulations will therefore make clear that the agency worker should have a reasonable opportunity of reading a vacancy announcement in the course of his engagement or must be given reasonable notification of a vacancy in some other way. We propose to clarify the practical implications further in **Guidance**. This will in particular make clear that:

- (a) the obligation relates to information about vacancies and does not significantly constrain employers' freedom regarding any **qualification or experience** requirements they might set, nor indeed, how they treat applications from agency workers as opposed to permanent employees. So it would be legitimate to require a certain amount of service with the firm or certain company-specific qualifications that only permanent staff may in practice have; and
- (b) there is no prescription on *how* employers fulfil their obligation. So if access to electronic systems is an issue they could, for instance, simply post a regular vacancy list in a place that agency workers could be expected to see it. Access to information about vacancies could also be covered as part of an agency worker's induction with the hirers, in the same way as they are informed of health safety requirements.

5.9 Finally, it should be stressed that this part of the Directive, and access to on-site facilities, requires comparison with a 'flesh and blood' comparator alone, and therefore only applies if there are comparable employees. We have used the same test as in the Fixed-Term Regulations which aims to achieve a similar outcome.

## **Temporary to permanent status**

5.10 Article 6.2 of the Directive requires that

“ Member States shall take any action required to ensure that any clauses prohibiting or having the effect of prohibiting the conclusion of a contract of employment or an employment relationship between the user undertaking and the agency workers after his/her assignment are null and void or may be declared null and void.”

### **What was said in the previous consultation?**

5.11 The previous consultation explained that the Directive’s requirements are without prejudice to a reasonable level of recompense for services rendered to hirers for assignment, recruitment and training of agency workers, and outlined the current UK statutory position on this point. Under regulation 10 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, employment businesses can charge a “transfer fee” to hiring companies under certain circumstances where the company wishes to directly employ the worker, or where the hirer introduces an agency worker to a third party who employs the worker directly.

5.12 Contracts that provide for such transfer fees are only enforceable if the contract provides for an extended period of hire as an alternative to paying the transfer. However there are no limits on the level of the fee or the length of the extended hire period. In addition, transfer fees are only payable when the transfer (eg from temporary agency worker to permanent employee of the hirer) takes place within the “relevant period” specified in the legislation. This is the period ending either 14 weeks from the date the worker was first supplied to the hirer or eight weeks after the last date that the worker was supplied to the hirer. If there is a gap of 42 days or more between the assignments then the 14-week period starts again.

5.13 Accordingly, we considered that our current legislation might require some adjustment in order to comply fully with the requirements of the Directive in this area. In particular, we consider that it may be necessary to make provision specifically requiring any such fees to represent a “*reasonable level of recompense*” (and no more). We invited views on how such a provision would be best framed.

### **What did respondents say?**

5.14 Unions and employee representatives did not consider that current law was consistent with the obligations under the Directive. The TUC believed that the current provisions contained in the Conduct of Employment Businesses and Employment Agencies did not meet the requirements of the directive saying that while there were limits on the time period over which temp to perm fees can be levied by temporary work agencies, there were currently no limits on the amount that could be charged.

5.15 Agencies took a different view, arguing that there was little evidence that temp to perm fees prevent the conclusion of a contract between the worker and the client or act as a disincentive to hiring agency workers on permanent basis. They stressed that fees are usually negotiable and that the market therefore effectively ensure their 'reasonableness', policed by the established principles of contract law. They further believed defining "reasonable" would be difficult for the courts as it would vary greatly depending on how difficult it was to recruit the individual and how thorough the vetting procedures were for the job in hand.

5.16 This issue was of less concern to hirers, though some thought the legislation might need to be changed, arguing that fees could deter a hirer from hiring an agency worker on a permanent basis and should be abolished or capped.

### **Our conclusions - what the Regulations will say?**

5.17 We have concluded that the right course on this issue is to amend the Conduct Regulations to introduce an express 'reasonableness' test. We therefore propose to amend regulation 10 of the Conduct of Employment Businesses and Employment Agencies to limit any "transfer fee" an employment business can charge to a reasonable one and to require any extended period of hire, as an alternative to paying the transfer fee, to be reasonable.

5.18 We have carefully considered agencies' arguments on this point, but have concluded that there would be doubt as to our compliance with the Directive were we not to introduce an explicit reasonableness test. We also take the view that the impact of the change should not in practice be severe, since any fee set at a 'reasonable' level by negotiation will be compliant with the amended Regulations. There should not, as a result, be any need for responsible agencies to make any significant change to their business practices.

5.19 We have also taken into account the fact that the Employment Agencies Standards (EAS) Inspectorate and helpline regularly receive queries and complaints from hirers (and agency workers) about agency terms and enforcement of a transfer fee or extended period of hire which they believe are excessive. EAS currently cannot take enforcement action because there are no sanctions in the Conduct Regulations which provide for the amount of a transfer fee or length or an extended period of hire. Making employment businesses subject to the reasonableness test in the setting of their fees and extended period of hire will allow the EAS to take action on unreasonable practices in this area.

5.20 We are nevertheless of course open to further representations from the agency sector regarding the impact this proposal may have, and will maintain dialogue on it with REC and other agency representative bodies. Since it would entail amendment of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Conduct Regulations) it is currently our intention to make the change as part of the implementation of proposals for amendment of the Conduct Regulations set out in our separate

consultation earlier this year (*Conduct of Employment Agencies and Employment Businesses Regulations 2003, Consultation and Impact Assessment, March 2009*). The draft amending Regulation is attached separately at 'Annex D: Draft Regulations – Amendment to Conduct Regulations – Regulation 10'.

### **Work-seeking fees**

5.21 Article 6.3 requires

*“ temporary work agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking”*

#### **What was said in the previous consultation?**

5.22 We said that we believed this is already dealt with in the Conduct of Employment Agency and Employment Businesses Regulations 2003 as “temporary work agencies” (“employment businesses”) cannot charge fees. There are currently only two exceptions which apply to entertainers and models but they are supplied through “employment agencies” rather than “temporary work agencies” so are outside the scope of the Directive. There was also a separate consultation on the issue of upfront fees in the entertainment and modelling sector underway, which closed on 11 June 2009<sup>2</sup>.

#### **What did respondents say?**

5.23 No respondents thought that the current legislation fails to comply with Article 6.3 of the Directive

#### **Our conclusions - what the Regulations will say?**

5.24. Accordingly, there will be no changes to the current Regulations.

### **Access to on-site facilities for agency workers**

#### **What does the Directive say?**

5.25 Article 6.4 of the Directive says:

*“ Without prejudice to Article 5(1) temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities, and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons”.*

As with access to employment vacancies (Article 6.1), this is a “Day one” right

<sup>2</sup> This consultation can be found at [www.berr.gov.uk/consultations/page50428.html](http://www.berr.gov.uk/consultations/page50428.html)

### What was said in the previous consultation?

5.26 We said that it is important to consider that such facilities should be made available to agency workers only on the same terms as they would be available to other workers in the hirer who are not agency workers. For example, many workplaces offer crèche facilities, with a limited number of places, on a first come, first served basis and which may require a certain period of service or be subject to a waiting list. We proposed that responsibility would rest solely with the hirer.

5.27 We highlighted the ability for employers to justify less favourable treatment on objective grounds, and that the requirement is for agency workers to be treated on same terms as permanent staff, not more favourably (so, for example, there is no barrier to a system in which limited crèche places allocated on basis of a waiting list that temps can join, but inevitably favours longer-serving permanent employees in practice). Our intention would be to follow the approach we adopted when implementing similar provisions in the Fixed-Term and Part-Time Workers Directives, namely that less favourable treatment could only be justified if it is:

- **necessary** to achieve a **legitimate objective**, for example a genuine business objective; and
- an **appropriate** way to achieve that objective

### What did respondents say?

5.28 Union and employee representatives argued as a matter of principle, against an approach enabling that hirers to exclude agency workers from certain benefits provided to directly employed staff because the benefits correspond to the permanent nature of direct employment. They also understood that “amenities” to include such benefits as gym membership or access to a social club, and “collective facilities” to include canteen, childcare arrangements, as well as transport services, such as bus/pickup services, a season ticket loan or car allowance – especially for long-term assignments. In all these cases, they argue that responsibility for compliance should rest primarily with the hirer.

5.29 They agreed that a difference in treatment with permanent employees would only be justified for “objective reasons” and that consideration should be given to offering these benefits on a pro-rata basis. However, they believed that costs and financial considerations on their own would not constitute an objective reason.

5.30 Agencies and hirers had concerns about access to crèche facilities where access is decided on the basis of a queuing system when spaces are limited (as discussed above). This would continue to be workable provided that such access can be determined by the length of service of the agency worker. They were concerned that agency workers may try to extend access to crèches to child care vouchers which they considered to be a benefit in kind – part of the employment relationship – and outside the scope of the Directive. Others requested that the regulations set out clear definitions of “amenities or

collective facilities”, arguing that it should be clear that this does not extend to facilities that are in reality perks – eg a subsidised gym or staff shop, nor to benefits such as child care vouchers, which are not a collective facility.

5.31 Others stressed the importance of the “objective reasons” justification.

5.32 Legal contributors said it would be helpful if the Regulations or guidance could make clear what is meant by “collective facilities”. Whilst some are fairly self explanatory (canteens, crèches), there are others which could loosely be described as “amenities”. On cost being relevant to “objective justification”; any guidance needed to reflect existing ECJ and UK case law on this point

### **Our conclusions - what will the Regulations say?**

5.33 The draft regulations say that an agency worker has during the assignment the right to be treated no less favourably than a comparable employee (using the same test as in the Fixed-Term Regulations) in the hirer’s establishment in relation to:

- canteen or other similar facilities
- access to child care facilities, and
- the provision of transport services

and that less favourable treatment can only be justified on objective grounds. This defence will follow the similar provisions in the Part-Time and Fixed-Term Workers Regulations (a proposal made in the Consultation Paper, from which there was no significant dissent), and will mean that less favourable treatment is capable of justification on objective grounds. For example that the hirer is seeking to achieve a genuine business objective, and the treatment is a necessary and appropriate way of achieving that objective. The Regulations also provide that less favourable treatment will be justified on objective grounds where the terms of the agency worker’s contract, taken as a whole are at least as favourable as the terms of the comparable employee’s contract of employment. Guidance could also make clear that it would be possible to agree to pay workers an additional amount in lieu of these rights.

5.34 We will set out in guidance both the limits of the access right (i.e. only equal treatment, not better) and our view that transport services should be interpreted to have a restricted meaning (eg local pick-up service, transport between sites) and not extend to eg season ticket loans and company car allowances, which we agree with some respondents are more properly part of a longer-term employment relationship. We believe this proposal is sufficient to meet our obligations ie to provide for access simply to those services and facilities listed in the Article, namely canteens, child-care and transport services. There is no need to interpret ‘amenities’ any more widely than this (as some respondents suggested), since the meaning of the term in this context is limited to core services and facilities related to the performance of the job or necessary for health and safety and related purposes.



5.35 The hirer will be liable for any breach of these Regulations as the agency has no role in providing these rights.

### **Access to training**

Article 6.5 of the Directive requires that:

*“Member States take suitable measure or shall promote dialogue between the social partners in accordance with their national traditions and practices in order to*

- *Improve temporary agency workers access to training and child care facilities in the temporary-work agencies, even in periods between their assignments in order to enhance their career development and employability*
- *Improve temporary agency workers access to training for user undertakings’ workers”*

### **What was said in the previous consultation?**

5.37 We set out the key element of the UK’s skills system, and highlighted steps in the “*New Opportunities*” White Paper to make it easier for agency staff to access funding for training through “*Train to Gain*” . We invited views on how Government could further encourage employment businesses to use the existing skills framework and make provision for the training needs of the workers they hire out.

### **What did respondents say?**

5.38 There was widespread agreement amongst those who have commented on this issue. in responses to the consultation that this need not be a legislative matter. The exception to this was the proposal from some of those representing employees that consideration be given to giving agency workers a right to equal access to in-house training programmes and to pay while on any pre-assignment training.

### **Our conclusions - what will the Regulations say?**

5.39 We consider that a regulatory approach would clearly go beyond the requirements of the Directive. We will, however, work to encourage hirers to work with the public skills system, including the Train to Gain service, to invest in training agency workers. Changes have already been made to the LSC funding guidance to providers so that agency workers are eligible for training support. The Government will set out how it will support the development of a high-skill high productivity economy for the long term in the forthcoming National Skills Strategy.

## 6. Thresholds for bodies representing agency workers

### What does the Directive say?

6.1 Article 7 of the Directive says:

*" temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed...".*

6.2 Article 7 provides two options for member states:

*- temporary agency workers can count towards the calculation of thresholds applicable to the temporary-work agency (Article 7.1); or*

*- temporary agency workers can count towards the calculation of thresholds applicable to the hirer (Article 7.2).*

### What was said in the previous consultation?

6.3 We provided a list of the relevant thresholds, most of which relate to the number of employees or workers an organisation must employ before the law in question applies to them, and asked whether the list identified the correct thresholds. We sought views on the Directive's stipulation that temporary agency workers must count towards either the thresholds as they apply to the hiring business to which they are assigned, or to the thresholds that apply to the temporary-work agency: we proposed the latter approach.

### What did respondents say?

6.4 On relevant thresholds, respondents considered that the list appeared to the best of their knowledge to be correct. Unions and employee representatives argued that some, if not all, of the thresholds should be abolished because representational and consultative rights should apply across all organisations regardless of their size. No respondent identified any other thresholds. A minority of respondents thought the list was defective, but the reasons were unclear – it appears that at least some considered that agency workers should not be counted at all for these purposes.

6.5 The majority of respondents who commented agreed with our proposal that temporary agency workers should count towards the thresholds as they apply to employment businesses. Those who supported the Government's proposal considered that it was justified on the grounds that the agency was either the employer concerned or had an ongoing employment relationship with the agency worker which the hirer, many of whom engaged the workers for very short periods, did not typically establish.

6.6 Opponents considered that temporary workers were part of the hirer's workforce and seldom met other agency workers on the books of the employment business. It was also understood that the thresholds would ensure that virtually all employment businesses would be covered by these representational arrangements, even those who employed only a handful of staff on a permanent basis. Some agencies pointed out that some agency workers were registered with two or more employment businesses, and would be counted several times for the purposes of the thresholds under the Government's proposals.

6.7 Those representing employees suggested that the law should be changed to ensure that temporary agency workers receive the same representational and consultative rights as employees. They also suggested that hiring businesses should be encouraged, as a good practice, to involve agency workers within their consultative arrangements for permanent staff. Those representing agencies and businesses wanted to ensure that the regulations did not change the employment status of agency workers in any way.

### **Our conclusion – what the draft regulations will say**

6.8 We remain of the view that our view that the Directive requires the UK to specify in law how temporary agency workers must be counted towards the thresholds. Since the Directive does not itself change the law on the need to have thresholds, we do not intend to abolish or alter the numbers used in any of the existing thresholds. Virtually all the laws in question – including the law relating to union recognition – do not provide for representational bodies to be automatically established.

6.9 Most require the employees involved to instigate a procedure which might, or might not, lead to the establishment of such a body. The overwhelming majority of organisations which are currently above the thresholds have never received any application for bodies to be established, and so the law rarely impinges on them. There is no reason to believe that those smaller employment businesses which will exceed the thresholds as a result of the regulations will have a different experience.

6.10 We have re-examined the list of relevant thresholds, and identified additional thresholds (at regulation 29 of the European Public Limited-Liability Company Regulations 2004, at regulations 5 and 7 of the Information and Consultation of Employees Regulations 2004 and at regulation 21 of the European Co-operative Society (Involvement of Employees) Regulations 2006), to which Article 7 should also apply.

6.11 The necessary changes to the thresholds are effected in provisions within Schedule 3 of the draft regulations, where consequential amendments to primary and other legislation are set out. The Schedule does not, however, amend the Transnational Information and Consultation of Employees Regulations 1999 (TICE) because those Regulations are due to be substantially amended as a result of the recently-agreed Recast of the European Works Council Directive. The new TICE Regulations, currently in

preparation, will therefore be used to make the corresponding changes to the way agency workers will be counted towards the thresholds involved.

6.12 Following the previous consultation it has been decided not to pursue the proposed amendment of the Occupational and Personal Pension Scheme (Consultation by Employers and Miscellaneous Amendment) Regulations 2006. This is because these regulations relate to technical changes to pensions, not involving agency workers, rather than the wider form of discussion by representative bodies employment-related issues relevant to such workers, as envisaged by the Directive. The method of calculation of numbers of employees provided for under regulation 3 of these regulations, using the method of calculation under regulation 4 of the Information and Consultation of Employees Regulations 2004, will not be affected by the separate amendments to the latter regulations relating to provision of information dealing with use of agency workers.

6.13 Where the same person has an employment relationship with two or more agencies (including intermediaries), the Government believes that they could potentially count towards the threshold of each one, because they may have ongoing relations with each. This is similar to the way employees who work for two or more employers are currently treated because they count towards the thresholds of each of their employers. However, those persons "on the books" of an agency who have not actually been supplied to a hirer or an intermediary by the agency will not be counted because they do not meet the definition of an "agency worker" at regulation 3(1). Also, some of the thresholds - for example, the 20 worker threshold used in the statutory recognition and derecognition procedure - are defined by way of a weekly average calculated over a reference period (for example, 13 weeks preceding an application for union recognition or derecognition).

6.14 Only those workers who were employed during the reference period can therefore count. In addition, some thresholds also contain formulas for the way part-time workers or others employed for just part of the reference period are to be counted when calculating the average number employed in a week. In the draft regulations, these arrangements for calculating the average apply, in the same way to agency workers. Therefore those who were not supplied in the reference period will not be counted at all and those who were supplied for just a part of the reference period may not count in full when calculating the average.

6.15 Article 7 does not require Member States to assign new representational or consultative rights to temporary agency workers. Rather, the Directive simply requires agency workers to count towards the calculation of the thresholds above which the existing rights in these areas are calculated. In most areas of UK law, those rights apply to employees only.

6.16 The Government does not wish to use the transposition of the Directive to change the statutory rights of temporary agency workers to be consulted or represented. It agrees with the unions that it is indeed a good practice for hirers to engage with their agency staff, especially those who are assigned on a longer term basis to them. As regards qualifying periods, the

Government notes that most of the thresholds in question already provide for employment to be calculated over a set reference period to ensure that a short term and untypical upturn in employment does not affect the calculation of the threshold. When finalising the regulations, the Government will aim to ensure that this effect is maintained.

## 7. Information of workers' representatives

### What does the Directive say?

7.1 Article 8 of the Directive describes the circumstances under which information on the use of agency workers should be provided to employees or their representation. It provides that:

*“Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and, in particular, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (1), the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation.”*

### What was said in the previous consultation?

7.2 In the previous consultation we made clear that Article 8 does not introduce a new requirement to provide information on the use of agency workers unless there is an existing requirement to provide information on the employment situation to workers' representatives – it is triggered *when* the hirer provides information. Nor does it require an increase in the number of occasions on which information on the employment situation should be provided. We identified a number of existing relevant items of legislation which require the provision of such information:

- The Information and Consultation of Employees Regulations 2004
- The Transnational Information and Consultation of Employees Regulations 2000
- Transfer of Undertakings (Protection of Employment) Regulations 2006
- Collective Redundancies laws (section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992)
- Training Consultation (Section 70B of the Trade Union and Labour Relations (Consolidation) Act 1992)
- Safety Representative and Safety Committee Regulations 1977
- Health and Safety (Consultation with Employees) Regulations 1996
- The European Public Limited-Liability Company Regulations 2004
- The European Cooperative Society (Involvement of Employees) Regulations 2006

- Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006
- The Companies (Cross-Border Mergers) Regulations 2007

7.3 We also proposed that, whilst the reference to “workers’ representatives” could be restricted to merely those bodies set up under European or national legislation which specifically fulfil a representative role for others, it has a wider meaning and includes situations where the employer provides information on the employment situation to employees direct.

7.4 We also proposed that the phrase “*suitable information*” on the use of temporary agency workers be defined. We suggested that this may relate back to the principle of equal treatment set out in Article 5 eg information relating to basic working and employment conditions if they had been recruited directly by the undertaking to occupy the same job. We proposed that we introduce a definition of ‘suitable information’ that included this reference.

### **What did respondents say?**

7.5 Much of the approach identified above received significant support from respondents to the Consultation. A significant majority of responses supported the Government’s belief that the Directive did not require information to be provided in any new circumstances and that we had identified the correct legislation that needs to be amended. The TUC proposed that employers should also be required to provide information about agency workers during the normal process of collective bargaining with recognised trade unions. Nearly all respondents who commented on the need for a definition for ‘suitable information’ felt that one was required. Very few respondents commented on what that definition should be, but those that did were mostly strongly against the inclusion of a reference to the equal treatment of agency workers.

### **Our conclusion - what the Regulations say**

7.6 The draft regulations seek to amend the legislation identified above with the exception of the Occupational and Personal Pensions Scheme (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 which we consider to be outside the scope of the implementation exercise in view of the fact that these regulations relate to technical changes to pensions, not involving agency workers, rather than the wider form of discussion of employment-related issues relevant to such workers, as envisaged by the Directive. The amending legislation will introduce a requirement that, where information is provided on the employment situation, information is also provided on the use of agency workers. The draft regulations seek to define what constitutes ‘suitable information’ in the context of each set of amended Regulations, but will not make reference to information on the equal treatment of agency workers, which is subject to separate provision under part 2 of the draft regulations. As TICE will be amended as part of the implementation of the recast European Works Council

Directive, we propose that the changes to it relating to information as to use of agency workers are incorporated in that instrument instead.

7.7 The Government wishes to ensure that the relevant information on the use of agency workers is supplied in all the situations where there is a currently an obligation, either explicit or implicit, on employers to provide information on the employment situation. The Government does not consider that normal collective bargaining falls into that category of legal obligation. The Government therefore considers it would be outside the scope of Article 8 to introduce a new requirement on employers to provide information about their use of agency workers in the general context of collective bargaining.

7.8 The draft regulations contain amendments to both the Safety Representative and Safety Committee Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996, the effect of which is to require employers to provide information about agency workers to safety representatives and to representatives of employee safety. In the first consultation, respondents were content with this approach in principle. The Government has however re-examined the case for amending these two sets of health and safety regulation. It notes that employers already have a legal obligation to provide agency workers with information on risks to their health and safety and the measures taken to manage those risks. Additionally, safety representatives and representatives of employee safety should receive, under existing law, a range of information from their employer about safety arrangements for agency workers. For example, the Management of Health and Safety at Work Regulations 1999 (MHSWR) requires employers to assess the risks of his undertaking, including an assessment of risks to "workers not in his employment". The Approved Code of Practice on the MHSWR makes it clear for employers that the position of temporary agency workers must be included in that risk assessment and will need to take account of the views of safety representatives during that process. The Government intends to give further consideration to this issue during the consultation process and respondents are asked to give any views they may have on the suggested provision in this area.

7.9 Consultation respondents felt strongly that there should be a definition of 'suitable information', but there was no consensus on what that definition should involve. The Government suggests that the following pieces of information would constitute "suitable information" for these purposes, and the regulations have been drafted accordingly:

- the total number of agency workers employed;
- the areas of the business in which they are employed; and
- the type of work they are contracted to undertake.

7.10 The Government considers that this definition of suitable information should apply across all the jurisdictions involved, because such information will always be pertinent, whatever the context. The Government expects that the disclosure of such information will be sufficient to stimulate an informed



dialogue about the impact of agency working in the various situations. Of course, once that dialogue begins, parties will share views and other information will be exchanged as a result. It would be a mistake for statute to try to specify what that additional information could be, because the individual situations and contexts will vary so much. This approach avoids over-complicating the regulation and, because it sets common requirements, it should make it easier for employers to fulfil their obligations.

## 8. Establishing Equal Treatment

### What does the Directive say?

8.1 Article 5.1 of the Directive describes the “principle of equal treatment”. It provides that

*“The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly to occupy the same job”.*

‘Basic working and employment conditions’ are defined by the Directive (Article 3(1)(f)) as:

*“..working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:*

*duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;*

*(ii) pay”*

8.2 As discussed earlier in this document, on the basis of Article 5.4 of the Directive our implementation will provide for a right to equal treatment once a 12-week qualifying period has been served, consistent with the CBI-TUC agreement.

### What was said in the previous consultation?

8.3 We proposed that an agency worker who remains in a “given job”, after 12 weeks should be entitled to equal treatment – as provided in the CBI and TUC agreement. We considered that, in practice, the key comparison would be with a comparable permanent worker doing broadly similar work with the same organisation but that other factors might be relevant – these would cover existing pay scales or relevant collective agreements.

### What did respondents say?

8.4 This was understandably viewed by many respondents as one of the key issues in implementing the Directive. As on other issues, views varied significantly.

8.5 Many respondents stressed the importance of basing our approach around comparison with a ‘flesh and blood comparator’, a permanent employee doing the same kind of work. A number of hirer and agency respondents argued that hirer and agency should have to treat agency staff as they would such a comparator (limited to someone doing the *same* job), or in accordance with formal pay scales or collective agreements. If there was no

comparator, they argued, the question of equal treatment need not arise. Many of these respondents also stressed the need to be able to take account of expertise, experience, skills and qualifications in deciding, for instance, where an agency worker should start on an established pay scale.

8.6 Other employer and agency respondents took a different view, considering that the key question was the Directive's reference to 'binding general provisions in force'. These respondents tended to argue that this meant regard only needed to be had to provisions in established collective agreements, pay scales and company handbooks. They took the view that the effect of the Directive's drafting was that the right to equal treatment did not apply to agency workers posted to employers where there were no such things in force.

8.7 Unions and employees representatives, by contrast, tended to accept that a flesh and blood comparator would in practice often be the key to determining equal treatment, but thought it important to provide more generous scope for comparison where this was necessary or relevant. Some in this group argued, for instance, that agency staff should be able to compare their terms and conditions with permanent staff employed by the same hirer in other locations or with the 'market rate' in the area, and that comparison should be allowed with permanent staff doing any similar work, construed widely.

### **Our conclusions - what will the draft regulations say**

8.8 Having carefully considered responses, we have concluded that the thrust of the policy approach outlined in the consultation document remains correct, but that the approach to the drafting of the regulations should be slightly different to the one it implied.

8.9 The basic test in the draft regulations is that an agency worker should be treated 'as if' he or she had been recruited directly to the same job. Consistent with the requirements of the Directive, they provide that the right to treatment on this 'as if' basis applies only to 'basic working and employment conditions' that are established in 'binding general provisions in force'. The Regulations interpret this latter provision in a UK context as terms and conditions that are ordinarily included in contracts of employment in the hirer's business. This will include collective agreements, pay scales and company handbooks or similar, but also extend to terms generally included in employees' written employment contracts and other implied contract terms. We consider that these express and implied contractual elements would be included by any court asked to interpret the meaning of the Directive's reference to 'binding general provisions in force' in a UK context.

8.10 We also retain the view, however, that identification of a flesh and blood comparator will in practice very often be the means by which hirers, agencies and agency workers wish to establish what equal treatment should mean in respect of these basic working and employment conditions. The draft regulations therefore expressly provide that if a comparable permanent employee can be identified and the agency worker receives treatment in

relevant respects that is consistent with that received by that employee, then the equal treatment provision is deemed to have been complied with.

8.11 We consider that this approach fully implements the Directive's requirements whilst also enabling all concerned to base their consideration of equal treatment questions with confidence on the approach that makes most sense for them. In the case of larger employers with pay scales, for instance, regard can simply be had for where the agency worker would have been placed on the scale. In other circumstances it will often make most sense for all concerned to base the assessment on the treatment received by an appropriate comparable employee.

8.12 We are also aware, however, that the above discussion of the reasons behind the drafting approach adopted may not be readily understood by respondents who are less familiar with the issues concerned. As well as the draft regulations, we are therefore also including to this document an initial draft of the guidance we would envisage issuing on this point, complete with a number of illustrative examples (Annex A: AWD Comparator: Possible Guidance).

## 9. Liability (and enforcement) in relation to an equal treatment claim

### What does the Directive say?

9.1 Article 10 requires that

*“Member States shall provide for appropriate measures in the event of non-compliance of the Directive by temporary work agencies or user undertakings. In particular they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.*

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions implementing this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by 5 December 2011. Member States shall notify to the Commission any subsequent amendments to those provisions in good time. They shall, in particular, ensure that workers and/or their representatives have adequate means of enforcing the obligations under this Directive.”

### What was said in the previous consultation

9.2 We proposed to place primary liability with the agency but acknowledge the fact that the agency, but that the agency should have a reliable defence that they have taken “reasonable steps” or “best endeavours” to obtain accurate and relevant information from the hirer with regard to the equal treatment package. If an agency had done this in good faith but had been provided with inaccurate or incomplete information, liability in the event of any claim would pass to the hirer. In the event of an Employment Tribunal case, the tribunal would be able in such circumstances to join the hirer to a claim (and potentially release the agency from it entirely).

### What did respondents say ?

9.3 Unions and employee representatives believed that agencies and hirers should be jointly and severally liable for breaches of agency workers rights; anti-discrimination law already provides for this and should they argued be replicated for the regulations. This approach would more accurately reflect the reality of agency sector working and would enable more effective enforcement of the legislation, especially as agency employers are not normally present on the hirer’s premises to oversee treatment of agency workers or any breaches of law, and also have limited access to relevant documentation. The same respondents said that joint and several (J&S) liability would enable Employment Tribunals to determine where responsibility for breaches lies and would ensure that agency workers would always be able to enforce their rights, including where an agency or hirer has become insolvent or in situations where the contract for the supply of agency workers has been outsourced through a supply chain.

9.4 Businesses and agencies said J&S liability would be extremely damaging for the agency sector as the blameless party could find themselves called to account for another party's actions, leading to a major reduction in the use of agency work as firms manage their risks of exposure to censure. Businesses agreed that if the agency can establish that it has acted in good faith on information provided by the hirer, then the hirer should be potentially liable.

9.5 Businesses also suggested that the decision to join the hirer to a claim in instances where a claim proceeds to an Employment Tribunal should be able to be taken by the agency or the hirer (although the Employment Tribunal should clearly retain this right too). This would enable both parties to be clear about the necessary level of involvement and plan in advance of the Employment Tribunal accordingly, thus helping to streamline the process. It would not be in the agency's commercial interests to join a hirer vexatiously, which should prevent abuse by agencies trying to apportion blame to other parties.

9.6 Generally agencies and businesses believed that a reliable defence for agencies claiming to have been provided with incorrect information by the hirer would be the "*reasonable steps*" defence: the phrase "best endeavours" placing too high a burden on agencies who would respond by imposing excessive information requirements on hirers. Agencies felt that more onus was needed on the hirer to provide pay information than suggested in the Consultation, ie the hirer to have a legal obligation in this respect, and for the agency to have an obligation to ask the hirer for information on equal treatment.

### **Our conclusions - what will the regulations say**

9.7 After carefully considering responses, we have taken the view that the approach set out in the consultation document is broadly correct. The draft regulations therefore provide that the agency is responsible for any breach of a right in relation to basic working and employment conditions unless it establishes a defence. The agency will be able to mount a reliable defence if they have taken "reasonable steps" to obtain the necessary information from the hirer and acted "reasonably" in determining the agency worker's basic working and employment conditions.

9.8 In the event of a claim the agency worker may still cite the agency and the hirer at the outset – but this does not mean J&S liability. It is a matter for the individual who they cite in any claim but the primary focus will remain on the agency who will need to establish a defence in which case the hirer is to be responsible in full or in part for the breach of the right. The regulations will ensure that any party in the "chain" of relationships can be named at the outset or joined to a claim and is liable to the extent that they are to blame for the infringement. We have defined "temporary work agency", for the purpose of these regulations, in such a way as to ensure that we capture any intermediary body, such as a master vendor or umbrella company, as they will play a role in delivering equal treatment to the individual agency worker or have a direct contractual relationship.

9.9 In relation to an equal treatment claim where the hirer is solely responsible (eg access to canteens, child-care) the agency will not be held liable because the agency will have no role in delivering these entitlements.

9.10 As we said in the initial consultation document, we do not consider making provisions for J&S liability between agencies and hirers to be in the best interests of either party or the worker. We believe this could be a deterrent to using agency workers as well as the potential for one or other party to be held liable for the others failures. However, where a hirer is solely responsible for delivering certain entitlements, then the agency should not be liable.

9.11 As for a legal requirement for the hirer to provide the agency with the information on equal treatment, we do not think this is necessary as the agency can rely on the defence of taking “reasonable steps” in trying to obtain the information in any claim. An explicit obligation on the hirer would be meaningless without a separate enforcement mechanism (whereby an agency made an Employment Tribunal claim against the hirer) which would add an additional, and we consider unnecessary, layer of bureaucracy. Our intention would rather be to address this point in guidance so that the hirer is aware of the consequences of lack of co-operation or delay in giving the agency the necessary information.

9.12 Some respondents raised concerns that agencies could be forced to **indemnify** hirers against claims made under the regulations so that agencies would be held “liable” financially even if they were able to mount an acceptable defence. For legislation to provide that such indemnity clauses are void involves an intervention into private commercial arrangements, to protect the commercial interests of a particular party. We do not consider that there are sufficient policy justifications for taking this unprecedented step.

## **Information on equal treatment**

### **What was said in the previous consultation ?**

9.13 We proposed that we adopted an approach similar to that used in the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. This would enable agency workers who do not believe they are receiving equal treatment to ask their agency for written details, to be supplied within 21 days; on any matter relating to their equal treatment rights under the Directive’s implementing regulations. As in the afore mentioned regulations, we would intend that failure to respond to such a request should not be unlawful in itself but that an Employment Tribunal could draw inference if a request were refused or the response was clearly inadequate.

### **What did respondents say?**

9.14 Unions and those representing employees said the proposals needed to be extended so that agency workers can receive written information about their equal treatment rights prior to an assignment and of any adjustments during the assignment. Agency workers should also have a statutory right to

ask for a written statement relating to suspected unequal treatment from both the agency and the hirer; such information should also be admissible as evidence at an Employment Tribunal, who in turn could draw an inference of non-equal treatment where a hirer fails to respond. Most respondents welcomed the use of a template for providing information, which would also increase transparency and ease comparisons.

9.15 Agencies were particularly concerned about the 21 days saying it was too short – some suggested 8 weeks in line with discrimination law.

**Our conclusions – what will the regulations say**

9.16 On the period of time to supply written details, we agree that it should be longer but believe 8 weeks is too long for an agency worker to wait for this information. We have proposed 28 days based on the fact that the agency worker can only request the information after the 12 weeks qualifying period has elapsed. Therefore the agency should already be in the process of obtaining the information or have already received it and the hirer should also be preparing the information or already have sent it. The information itself is not as comprehensive as required in, for example, an equal pay claim.

9.17 While the agency worker has to request information from the agency in the first instance with regard to any basic working and employment condition they feel is being infringed we have made provision that the agency worker is able to approach the hirer direct if the agency has not responded within the 28 days.

9.18 We also believe it necessary to provide for certain circumstances in which the agency worker will want to approach the hirer direct. For example, where an agency worker has requested information from an agency but the agency subsequently goes out of business but the agency worker still wants to pursue a claim against the hirer or where the hirer has not provided the information to the agency. An agency worker can pursue a claim where information has not been provided but may prefer to assess the information before taking that decision

9.19 As under the Fixed Term and Part Time Regulations, there will be no separate right of enforcement if any agency worker does not receive these details but if the agency worker goes on to make a claim under the regulations, the Employment Tribunal can draw an adverse inference from the fact that the written statement was not provided.

9.20 We have not set out in the draft regulations any specific timescale for the agency to obtain information on basic working and employment conditions from the hirer – this is likely to vary in different circumstances. For example, where it is not expected that the assignment will last beyond 12 weeks but at short notice it is extended.

9.21 In relation to access to employment and collective facilities, the draft regulations provide that an agency worker can request written information from the hirer – as the hirer has sole responsibility and liability. Again the hirer must respond to any requests within 28 days. An agency may wish to remind



the hirer at the start of an assignment of their responsibilities or to seek information from the hirer to pass onto the agency worker at the start of an assignment. The agency worker can also request written information about agreements between workers' and employers' representatives.

9.22 The issue of **confidentiality** was also raised, particularly rates of pay which some hirers would want to protect from being passed on to rivals. However we believe that existing legislation, particularly relating to data protection which can be reinforced by contractual terms between the agency worker and the agency or agency and hirer are sufficient and in line with other employment legislation.

## **10. Dispute Resolution, Employment Tribunals and Remedies**

### **What was said in the previous consultation?**

10.1 We said that we would hope the majority of queries about equal treatment rights would be capable of amicable resolution between agency and agency worker, with involvement of the hirer as necessary. Where this was not possible, we proposed that agency workers should be able to make a claim to an Employment Tribunal, and that we should also pursue with Acas the possibility of making use of pre- and post-claim conciliation for these cases.

10.2 We said that the question of enforcement remedies would be considered in detail once the framework for establishing equal treatment, information flows and liability had been more fully defined, and that we would cover the matter in more detail in this second consultation.

### **What did respondents say?**

10.3 Overall there was support for the proposal, in particular that Acas should play a role in pre- and post-claim conciliation and that enforcement should be through employment tribunals. Unions and employee representatives thought that compensation levels for breaches of equal treatment rights should be specifically set at a level which deterred future breaches. Many agencies and businesses stressed the need for agency workers to come to the agency first to try and resolve the matter rather than going directly to the hirer or bringing a claim, and the general need to frame the regulations to deter speculative or vexatious claims.

### **Our conclusion - what the draft regulations say**

10.4 The regulations implementing the Directive will enable an agency worker may bring a claim to an Employment Tribunal and the regulations will be added to the list of jurisdictions covered by the Employment Appeal Tribunal. In the interests of preventing cases coming to tribunal unnecessarily, we can confirm that disputes relating to rights under the regulations will be eligible for Acas pre- and post-claim conciliation. We will also encourage agencies to set up or use internal dispute resolution procedures as a way of informally resolving problems related to equal treatment.

10.5 We propose that an agency worker should be able to complain to an Employment Tribunal if they feel their rights under the Regulations have been infringed, or that they have been subjected to a detriment for asserting their rights under the Regulations - usually within 3 months from the date of the infringement/detriment. In the event that the Tribunal upholds the worker's complaint, we propose to adopt a similar approach to remedies as that available under the similar regulations governing equal treatment in the Fixed-Term and Part-Time regulations, enabling the Tribunal to compensate the worker for infringement of his or her rights or the detriment suffered. We have carefully considered some respondents' arguments in favour of a more punitive remedies regime, but do not believe there are grounds for departing

in this instance from an approach that provides an effective, proportionate and dissuasive enforcement framework in respect of those other rights.

10.6 Where a Tribunal orders compensation, the amount of compensation payable to the agency worker by either the agency or hirer will be required to be “just and equitable” having regard to the extent of that party's responsibility for the infringement. If awarding compensation the tribunal will have regard to the infringement to which the complaint relates and the level of award will be based on any financial loss of any benefit that an agency worker should have received and any expenses reasonably incurred as a result of the infringement. Generally, any award will not include injury to feelings, although it will be possible to include injury to feelings in relation to a claim that the worker has been subjected to a detriment for asserting their rights under the Regulations. As in other regulations, there is no statutory cap on the amount of compensation that can be awarded. The principle of contributory conduct applies so that where the tribunal finds the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by the action of the claimant, it shall reduce the amount of compensation by such proportion as it considers just and equitable.

10.7 This dispute resolution and remedies framework provided in the draft regulations will relate to failure to deliver rights to agency workers related to:

- equal treatment in relation to the basic working and employment conditions after expiry of the 12 week qualifying period - for example that an agency worker did not receive the same paid holidays as they would have received if they had been recruited directly to occupy the same job;
- access to vacancies, transport services and collective facilities - for example, that the agency worker was denied access to a bus service which other comparable employees would have access to;
- challenges in relation to workforce or collective agreements made under regulation 20, for example:
  - a) that an agency worker did not receive equal treatment on pay and the “offsetting” measure in the workforce or collective agreement did not provide sufficient compensation to meet the “overall” level of protection test. If this is the effect there will be a breach of the right to equal treatment under regulation 9; or
  - b) that a workforce agreement does not comply with the requirements of Schedule 1. Again such a claim will be in relation to a breach of the right to equal treatment under regulation 9.
- challenges on the ground that a hirer has not complied with information disclosure and review duties under regulation 20(2) and/or (3), or that a temporary work agency has not complied with information disclosure duties under regulation 20(4); and

- the right not to be subjected to a detriment for asserting rights under the Regulations or for giving information or evidence in a case involving another agency worker asserting their rights, or in the case where an employee of the hirer brings an unfair dismissal claim relating to the adoption of a workforce agreement

10.8 The Regulations will also amend or adapt existing legislation to provide remedies for failure to deliver rights in relation to:

- health & safety maternity provisions - for example, the tribunal can order payment of remuneration owing in relation to time off for ante-natal care; and .
- counting of agency workers towards recognition body thresholds, and disclosure of information on the use of agency workers. The extension of various employers' obligations to count agency workers towards thresholds for representative bodies, as well as information provision requirements, will be enforced via existing mechanisms eg in the Employment Tribunal for TUPE and collective redundancy cases, in the CAC for union recognition, information and consultation and European companies legislation cases.

10.9 Permanent employees will also receive protection in relation to workforce agreements - unfair dismissal and detriment rights – again as in other regulations. Although these regulations are primarily aimed at the equal treatment and protection of agency workers, the use of workforce agreements gives rise to the need to offer appropriate protections against detriment and unfair dismissal affecting the employees of hirers who (along with agency workers) will be able to sign (or decline to sign) such agreements, stand for election as representatives, have the right to vote for representative candidates, receive advanced copies of such agreements etc. There will also be protection against victimisation where such employees give evidence in Employment Tribunal proceedings brought by agency workers eg to allege a failure to afford equal treatment.

## 11. Review of restrictions and prohibitions on the use of temporary agency work

### What does the Directive say?

11.1 Article 4.1 and 4.2 of the Directive says

*“ Prohibitions or restrictions and on the use of temporary agency work shall be justified only on the grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented*

*By 5 December 2011, Member States shall, after consulting the Social Partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.”*

### What was said in the previous Consultation?

11.2 We did not believe there to be any such restrictions in the UK that required review in this context, but sought any relevant information from respondents. We also said we hoped that implementation of this requirement would lead to beneficial liberalisation of the agency sector across the EU as a whole.

### What did respondents say?

11.3 The small number of respondents who commented on this point generally agreed with our analysis. The only exception was a suggestion that our rules prohibiting employers from using agency staff to provide cover when employees are on strike could come within scope.

### Our conclusion

11.4 We consider that there are good arguments that the rules prohibiting use of agency labour to provide cover in the event of strike action are fully justified on the basis of the exception allowed in the Directive for provisions necessary *“to ensure the labour market functions properly”*, as well, possibly, as providing a means of ensuring *“abuses are prevented”*. We therefore propose maintain our view that there are no restrictions in the UK requiring notification. We will nevertheless welcome further comment on the point in order to comply with the requirement to report to the Commission on the matter by December 2011.

11.5 We will also take a close interest in the notification process as regards possible restrictions in other Member States. In that context, we would welcome information from respondents, whether in the context of responses to this consultation or separately, on provisions in other Member States that they consider represent restrictions and prohibitions inconsistent with the Directives requirements in order that we can ensure they are brought to the Commission’s attention.

## **12. Reducing Administrative Burdens**

### **What was said in the previous Consultation?**

12.1 We noted that the implementation of the Directive is likely to increase administrative costs for hirers and agencies, as well as the costs to hirers of additional pay, holiday entitlement etc in respect of agency workers whose assignments last longer than 12 weeks. We were keen to look at offsetting measures that could be implemented to reduce any additional administrative costs. We welcomed further ideas and involvement from industry on how best we can take this forward.

### **What did respondents say?**

12.2 Union respondents asked the Government to ensure that the principle of equal treatment that underlies the Directive is not compromised: business arguments about administrative burdens should be carefully examined to ensure that the burdens identified are genuinely administrative burdens, not increased costs associated with equal treatment.

12.3 Hirer and agency respondents, on the other hand, urged us to focus on minimising the costs of the regulations as far as possible. They stressed the need for clear definitions (eg regarding 'umbrella companies'), and the importance of designing the overall scheme in such a way as to minimise complexity and administrative burdens.

12.4 Specific simplification proposals were raised by a number of respondents, with several respondents offering to join our proposed Working Group to consider these issues more closely.

### **Our conclusion**

12.5 As proposed in the first consultation, we will set up a Working Group, in early 2010, comprising a representative sample of stakeholders to closely examine the practical implications of the proposed Regulations, especially for small and medium size businesses. This will include suggestions made previously, such as keeping duplication to a minimum, and the development of standardised templates, and more generally the issues on which stakeholders have requested additional guidance.

## **13. Entry into force**

13.1 The Directive requires all Member States to adopt the necessary laws to implement the Directive by 5 December 2011.

### **What was said in the previous Consultation?**

13.2 We had received a number of representations to the effect that the entry into force of the regulations should be delayed in order to provide time for all concerned to adjust to their requirements, particularly during difficult economic times. We were also aware, however, that others would wish to see earlier entry into force in order to enable agency workers to derive benefit from the new provisions from an earlier point. Accordingly, we sought views on when stakeholders considered the Regulations should come into force - and why.

### **What did respondents say?**

13.3 Employers and agencies reiterated their view that implementation should be delayed as long as possible, to reflect the potentially significant changes in practices that will be required, especially in the current economic climate. Unions and employees representatives generally urged for our implementing legislation to be brought into effect as soon as possible, with some specifically calling for this to be by Spring 2010.

### **Our conclusion - what do the draft regulations say?**

13.4 The implementing regulations will be brought into effect on 1 October 2011.

13.5 Having carefully considered responses to the consultation on this point, we have concluded that it is necessary to give due time for the agencies and hirers to adjust to what will be a significant change in the regulatory framework. We are also acutely conscious of the additional difficulty that some businesses concerned might face in making the adaption necessary in the context of difficult economic times, particularly given the valuable role that agency staff are likely to play in the recovery. We have therefore concluded that the regulations should come into effect on the common commencement date preceding the implementation deadline provided in the Directive.

## Annex A: AWD Comparator: Possible Guidance

### What does 'equal treatment' mean?

1. An agency worker is entitled to equal treatment after 12 weeks on an assignment. Deciding what "equal treatment" means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been recruited directly to the same job. You can take into account the agency worker's qualifications, experience or expertise (or lack of them) – you simply need to provide the treatment you would have given that person if recruiting them directly to that job.

2. Equal treatment is not necessarily required in respect of all the terms and conditions that the person would have received had they been recruited directly. It only covers 'basic working and employment conditions' (see separate section of this guidance). The equal treatment right also only extends to these conditions if they apply generally in the workplace concerned. This means terms and conditions formally set out in:

- (a) a pay scale or pay structure;
- (b) a relevant collective agreement; or
- (c) a company handbook or similar.

4. It also means conditions included in permanent employees' written contracts as a matter of course, or other things that have not formally been written down but have clearly become established as a matter of 'custom and practice'. The general rule here is that the longer and more consistently a term or condition is followed, the clearer and more comprehensive its communication to employees and the greater the impression amongst employees that they have agreed to it or that it applies automatically, the more likely it is to have become a matter of 'custom and practice'.

5. So to recap, the equal treatment right concerns basic working and employment conditions that apply generally because they have been either formally set out or have become a matter of custom and practice. It does not apply to terms and conditions that do not come within this, or in workplaces in which no 'basic working and employment conditions' can be said to apply generally.

### How to decide what 'equal treatment' needs to be in practice

6. As noted earlier, in many cases deciding what 'equal treatment' means will be a matter of common sense. For instance, in organisations with pay scales or pay policies it will often be clear at what level the person concerned would have been paid if recruited directly, taking account of skills, qualifications, expertise and experience. In other organisations there will be a clear 'going rate' for a given job. And other rights such as holiday entitlements and overtime rates will also usually be clearly set out or well understood.



7. In many cases, the simplest approach will be to compare the position of the agency worker with that of permanent employees doing the same or broadly similar work. Where this comparison can be made, providing an agency worker with treatment in respect of 'basic working and employment conditions' that is consistent with that given to a 'comparable employee' will ensure compliance with the requirements of the regulations – the Regulations make specific provision for this. And in making such a comparison, regard can of course be had for the agency worker's qualifications, skills, experience and expertise.

### **Illustrative Examples**

#### **Example 1** (Where a hirer has pay scales or pay structures)

*Question:* A hirer has various pay scales to cover its permanent workforce, including its production line. An agency worker is recruited on the production line and has several years' relevant experience. However the agency worker is paid at the bottom of the pay scale. Is this equal treatment?

*Answer:* Yes if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly. But if the worker's experience would mean starting further up the pay scale if recruited directly, then the agency worker would be entitled to the same treatment.

#### **Example 2** (Where no pay structures but a 'going rate')

*Question:* A hirer has decided to increase its workforce on a particular shift with agency workers. There are 10 permanent staff and 3 agency workers, doing the same work. The permanent staff are paid between £8-10 per hour – those recruited most recently being paid £8 per hour and the higher rate reflecting on the job experience). The work involves no specialist skills and only minimal on-job training. The agency workers are recruited at a rate of £6 per hour and continue to be paid at that rate after 12 weeks. Is this allowed?

*Answer:* No. There is clearly a 'going rate' of at least £8 for the job and the agency workers would be entitled to at least this after 12 weeks on the assignment.

#### **Example 3** (Where there are no pay scales or structures or comparable permanent employees)

*Question:* A small company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same or a similar job and does not have pay scales or collective agreements. The agency worker is paid at the same rate before and after the 12-week qualifying period. Is this allowed?

*Answer:* Yes. There are no pay scales or collective agreements, or a 'going rate', so in relation to pay, there are no relevant terms and

conditions ordinarily included in the contracts of employment of employees in the hirer. However if, say, the company gives all its permanent employees 6-weeks paid annual leave and paid time off for bank and public holidays, the agency worker should be entitled to the same treatment on these points.

**Example 4** (All directly recruited terms individually negotiated)

*Question:* A small sales company pays its 10-person sales force at different rates. The rates vary considerably and all depend on individual negotiation. There is no going rate. An agency worker is paid at the same rate before and after the qualifying period. Is this equal treatment?

*Answer:* Yes, if all rates really are individually negotiated and there is no established custom and practice as regards pay – which the hirer and agency would need to be very clear was the case. But, as in the previous example, if there is a clear company policy on, for instance, annual leave, the agency worker would be entitled to equal treatment in that respect.

# Annex B: Draft Agency Workers Regulations 2010

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## STATUTORY INSTRUMENTS

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2010 No.

### TERMS AND CONDITIONS OF EMPLOYMENT

#### Agency Workers Regulations 2010

*Made* - - - - - \*\*\*

*Laid before Parliament* \*\*\*

*Coming into force* - - - - - *1st October 2011*

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972<sup>(3)</sup> in relation to employment rights and duties<sup>(4)</sup>.

The Secretary of State makes these Regulations—

- (a) in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and sections . . . the Health and Safety etc at Work Act 1974<sup>(5)</sup>, (“the 1974 Act”); and
- (b) independently of any proposals submitted by the Health and Safety Executive under section 11(3) of the 1974 Act.

The Secretary of State has consulted the Health and Safety Executive and such other bodies as appear to the Secretary of State to be appropriate, as required by section 50(1AA) of the 1974 Act.

### PART 1

#### General and Interpretation

##### Citation, commencement and extent

1.—(1) These Regulations may be cited as the Agency Workers Regulations 2010 and shall come into force on 1st October 2011.

(2) These Regulations extend to Great Britain.

##### Interpretation

2.—(1) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996<sup>(6)</sup>;

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<sup>(3)</sup> 1972 c.68.

<sup>(4)</sup> SI 2000/738.

<sup>(5)</sup> 1974 c.37.

“a particular group” means a part of the workforce who undertake a particular function, work at a particular workplace or belong to a particular department or unit within the hirer’s business;

“assignment” means a period during which the agency worker is placed by the temporary work agency at the hirer to work temporarily under the supervision and direction of the hirer;

“collective agreement” means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992<sup>(7)</sup>, the trade union parties to which are independent trade unions with the meaning of section 5 of that Act;

“contract of employment” means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

“employee” means an individual who has entered into or works under or, where the employment has ceased, worked under a contract of employment;

“hirer” means a person engaged in economic activity, public or private, whether or not operating for profit, to whom a temporary work agency supplies an agency worker to work for and under the direction of the hirer;

“job” means in relation to an agency worker the nature of the work that the agency worker is engaged to do in accordance with the contract and the capacity and place in which the agency worker is so employed;

“night time”, in relation to an employee, means a period—

- (a) the duration of which is not less than seven hours, and
- (b) which includes the period between midnight and 5 a.m.,

which is determined for the purposes of these Regulations by a working time agreement, or, in default of such a determination, the period between 11 p.m. and 6 a.m.;

“night work” means work during night time;

“representatives of the workforce” are members of the workforce duly elected to represent the workforce, “representatives of the group” are members of the workforce duly elected to represent the members of a particular group, and representatives are “duly elected” if the election at which they were elected satisfied the requirements of paragraph 2 of Schedule 1 to these Regulations;

“relevant members of the workforce” comprise any agency workers who are contracted to work for and under the direction of an employer as at the date of coming into force of a workforce agreement and, otherwise, at any time during its currency, excluding any agency worker whose relevant terms and conditions are provided for, wholly or in part, in a collective agreement;

“relevant training” means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training—

- (a) the immediate provider of which is an educational institution or a person whose main business is the provision of training, and
- (b) which is provided on a course run by that institution or person;

“rest period”, in relation to an employee, means a period which is not working time, other than a rest break or leave to which the employee is entitled either under the Working Time Regulations 1998 or under the contract of employment of that employee.

“workforce” comprises all of the workers working for a particular hirer (including agency workers contracted to work for and under the direction of that hirer) at the relevant times in paragraphs 1 and 2 of Schedule 1;

“workforce agreement” means an agreement between an employer and its workforce (or representatives of the workforce) in respect of which the conditions set out in Schedule 1 to these Regulations are satisfied;

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<sup>(6)</sup> 1996 c.18.  
<sup>(7)</sup> 1992 c.52.

“working time”, in relation to an employee, means—

- (a) any period during which the employee is working, at the disposal of the employer of that person and carrying out the activity or duties of that employee;
- (b) any period during which that employee is receiving relevant training; and
- (b) any additional period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement; and

“working time agreement”, in relation to an employee, means a workforce agreement within the meaning of regulation 2(1) of the Working Time Regulations 1998<sup>(8)</sup>, as it applies to an employee, which applies to an employee any provision of a collective agreement which forms part of a contract between that employee and the employer of that person, or any other agreement in writing which is legally enforceable as between an employee and the employer of that person.

### **The meaning of agency worker**

**3.**—(1) In these Regulations “agency worker” means an individual who—

- (a) is supplied by a temporary work agency to work for and under the direction of a hirer;
- (b) is employed by or otherwise engaged by the temporary work agency; and
- (c) is not a party to a contract under which that individual undertakes to do work for another party to the contract, whose status is, by virtue of that contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) Where an individual is “employed by or otherwise engaged by” a temporary work agency, or one or more intermediaries, this includes arrangements made between a temporary work agency, one or more intermediaries and the agency worker.

(3) An individual is not prevented from being an agency worker—

- (a) because the temporary work agency supplies the individual through one or more intermediaries;
- (b) because one or more intermediaries supply that individual;
- (c) because the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;
- (d) because the temporary work agency pays for the services of the individual through one or more intermediaries; or
- (e) because the individual is employed by or otherwise engaged by one or more intermediaries.

(4) In these Regulations an “intermediary” may include another temporary work agency.

### **The meaning of temporary work agency**

**4.**—(1) In these Regulations “temporary work agency” means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—

- (a) supplying persons to work for and under the direction of the hirer; or
- (b) paying for, or receiving or forwarding payment for, the services of persons who are supplied to work for and under the direction of a hirer.

(2) A person is supplied to work for and under the direction of a hirer whether or not that person is supplied through one or more intermediaries.

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<sup>(8)</sup> SI 1998/1833.

## **Relevant terms and conditions**

**5.**—(1) In these Regulations, “relevant terms and conditions” means terms and conditions relating to—

- (a) pay;
- (b) the duration of working time;
- (c) the length of night work;
- (d) rest periods;
- (e) rest breaks; and
- (f) annual leave.

(2) For the purposes of paragraph (1)(a), “pay”:

- (a) means any sums payable to an employee in the hirer in connection with the employment of that employee, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3);
- (b) does not include any monetary value attaching to any payment or benefit in kind furnished to an employee by the hirer.

(3) Those payments or rewards are—

- (a) any payment by way of occupational sick pay;
- (b) any payment by way of a pension, allowance or gratuity in connection with the employee’s retirement or as compensation for loss of office;
- (c) any payment in respect of maternity, paternity or adoption leave;
- (d) any payment referable to the employee’s redundancy;
- (e) any payment or reward made pursuant to a financial participation scheme;
- (f) any payment or reward by way of a bonus awarded pursuant to a performance appraisal pay system aimed at the long-term management, motivation and retention of staff;
- (g) any payment for time off under Part VI of the Employment Rights Act 1996 or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out union duties etc);
- (h) a guarantee payment under section 28 of the Employment Rights Act 1996;
- (i) any payment by way of an advance under an agreement for a loan or by way of an advance of pay (but without prejudice to the application of section 13 of the 1996 Act to any deduction made from the employee’s wages in respect of any such advance);
- (j) any payment in respect of expenses incurred by the employee in carrying out the employment; and
- (k) any payment to the employee otherwise than in that person’s capacity as an employee.

(4) In paragraph (3)(e) “financial participation scheme” means any scheme that offers employees in the hirer a chance to acquire a stake in the ownership of the organisation either by—

- (a) a distribution of shares or options; or
- (b) a share of profits in cash or shares.

## **Comparable employees**

**6.**—(1) For the purposes of these Regulations, an employee is a comparable employee in relation to an agency worker if at the time when the breach of regulation 9 or 10 is alleged to take place—

- (a) both workers are—
  - (i) working under the hirer, and

- (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills, and
  - (b) the comparable employee works or is based at the same establishment as the agency worker.
- (2) For the purposes of paragraph (1), an employee is not a comparable employee if that person's employment has ceased.

## PART 2

### Rights and Remedies

#### **Qualifying period**

7.—(1) Regulation 9 does not apply unless an agency worker has completed the qualifying period.

(2) To complete the qualifying period the agency worker must—

- (a) undertake the same role with the same hirer for 12 continuous calendar weeks; and
- (b) be engaged on one or more assignments.

(3) For the purposes of paragraph (2) and regulation 8—

- (a) any week during the whole or part of which an agency worker is engaged on an assignment is counted as a calendar week;
- (b) the agency worker undertakes “the same role” unless—
  - (i) the agency worker has started a new assignment, with the same hirer, whether given by the same or by a different temporary work agency; and
  - (ii) that new assignment comprises substantively different work or duties to the preceding assignment with that hirer.

(4) For the purposes of paragraph (2) and regulation 8, when calculating whether any weeks completed with a particular hirer are continuous, where—

- (a) the agency worker has started an assignment, which is followed by a break, either between assignments or during an assignment,
- (b) that break meets the requirement of paragraph (6), and
- (c) the agency worker returns to the same hirer,

any continuous weeks completed with that hirer prior to the break shall be carried forward and treated as continuous with any week completed with that hirer following the break.

(5) For the purposes of paragraph (2) and regulation 8, when calculating the number of weeks that have been completed, where the agency worker has—

- (a) started an assignment, and
- (b) is unable to continue that assignment for a reason described in paragraph (6)(c) or (6)(d)(i)(ii) or (iii),

for the period that is covered by one or more such reason, that agency worker shall be deemed to be performing the assignment, for the duration, or likely duration of the assignment, whichever is the longer.

(6) This paragraph applies where the reason for the break between assignments, or during the assignment is—

- (a) for any reason and the break is not more than six calendar weeks;
- (b) wholly due to the fact that the agency worker is incapable of performing an assignment in consequence of sickness or injury, and the requirements of paragraph (7) have been satisfied;
- (c) related to pregnancy, childbirth or maternity and is at a time in a protected period;

(d) wholly for the purpose of taking time off or leave, whether statutory or contractual, to which the agency worker is otherwise entitled which is—

(i) ordinary, compulsory or additional maternity leave;

(ii) ordinary or additional adoption leave;

(iii) paternity leave;

(iv) time off or other leave not listed in sub-paragraph (d)(i), (ii) or (iii);

(e) wholly due to the fact that the agency worker is required to attend at any place in pursuance of being summoned for service as a juror under the Juries Act 1974, the Coroners Act 1988, the Court of Session Act 1988 or the Criminal Procedure (Scotland) Act 1995, and the break is 28 calendar weeks or less; or

(f) due to one or more of the reasons listed in sub-paragraph (b), (c), (d) and (e)

(7) Paragraph (6)(b) shall only apply where:

(a) the break is 28 calendar weeks or less;

(b) sub-paragraph (6)(c) does not apply; and

(c) if required to do so by the temporary work agency, the agency worker has provided such written medical evidence as may reasonably be required.

(8) For the purposes of paragraph (6)(c) in relation to a woman, a protected period begins each time she becomes pregnant, and the protected period associated with any particular pregnancy of hers ends in accordance with the following rules—

(a) where the agency worker is not entitled to ordinary or additional maternity leave, the protected period ends at the end of the 2 weeks beginning with the end of the pregnancy;

(b) where the agency worker is entitled to ordinary or additional maternity leave, the protected period ends at the end of the period of the leave connected with the pregnancy, or, if earlier, when she returns to work after the end of her pregnancy.

### **Completion of the qualifying period**

**8.**—(1) Where an agency worker has completed the qualifying period with a particular hirer, the rights conferred by regulation 9 shall continue to apply to that agency worker in relation to that particular hirer unless—

(a) that worker is no longer undertaking the same role with that hirer; or

(b) there is a break between assignments or during the assignment, which does not satisfy the requirements of regulation 7(6).

### **Rights of agency workers in relation to the basic working and employment conditions**

**9.**—(1) An agency worker (A) shall be entitled to the same basic working and employment conditions as A would have been entitled to if A had been recruited by the hirer at the time the qualifying period commenced—

(a) other than by using the services of a temporary work agency; and

(b) to do the same job under a contract of employment with the hirer.

(2) For the purposes of paragraph (1), the basic working and employment conditions shall be relevant terms and conditions that are ordinarily included in the contracts of employment of the employees of the hirer whether by collective agreement or otherwise.

(3) Paragraph (1) shall be deemed to have been complied with where an agency worker is engaged on the same relevant terms and conditions as a comparable employee whose terms of employment contain relevant terms and conditions ordinarily included in the contracts of employment of the employees of the hirer whether by collective agreement or otherwise.



## **Rights of agency workers in relation to access to employment and collective facilities**

**10.**—(1) An agency worker has during the assignment the right to be treated no less favourably than a comparable employee in the hirer's establishment in relation to—

- (a) access to canteen or other similar facilities;
- (b) access to child care facilities; and
- (c) the provision of transport services.

(2) The rights conferred by paragraph (1) only apply if the less favourable treatment is not justified on objective grounds.

(3) An agency worker has during the assignment the right to be informed by the hirer of any vacant posts in the hirer, to give that agency worker the same opportunity as a comparable employee to find permanent employment, whether by way of an internal or an external selection process.

(4) For the purposes of paragraph (3) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment.

## **Objective justification**

**11.** Where an agency worker is treated less favourably by the hirer than the hirer treats a comparable employee as regards the rights conferred by regulation 10(1), the treatment in question shall be regarded for the purposes of regulation 10(2) as justified on objective grounds if the terms of the agency worker's contract, taken as a whole, are at least as favourable as the terms of the comparable employee's contract of employment.

## **Liability of temporary work agency and hirer**

**12.**—(1) A temporary work agency shall be responsible for any breach of regulation 9, to the extent that it is responsible for the infringement to which the complaint relates.

(2) A temporary work agency shall not be responsible for the infringement of regulation 9 where it is established that the temporary work agency—

- (a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force in the hirer; and
- (b) where it has received such information, has acted reasonably in determining what the agency worker's basic working and employment conditions shall be at the end of the qualifying period and during the remainder of the assignment.

(3) Where the temporary work agency or hirer seeks to rely on regulation 9(3), relevant information in paragraph (2)(a) includes information that—

- (a) explains the basis on which it is considered that a person is a comparable employee; and
- (b) provides the basic working and employment conditions in force in the hirer which apply to that employee.

(4) The hirer shall be responsible for any breach of regulation 9, to the extent that the hirer is responsible for the infringement to which the complaint relates.

(5) In deciding whether or not the temporary work agency or the hirer is responsible in full or in part, the employment tribunal shall apportion liability having regard to the extent to which the parties are responsible for the infringement to which the complaint relates, and having particular regard to paragraphs (2) and (3).

(6) Where more than one temporary work agency is a party to the proceedings, when deciding whether or not each temporary work agency is responsible in full or in part in accordance with paragraph (5), the employment tribunal shall also have regard to the extent to which each agency was responsible for determining any of the basic working and employment conditions which apply to the worker.

(7) The hirer shall be responsible for any breach of regulation 10.

- (8) In relation to the rights conferred by regulation 14—
- (a) the temporary work agency shall be responsible for any act, or any deliberate failure to act, of the temporary work agency;
  - (b) the hirer shall be responsible for any act, or any deliberate failure to act, of the hirer.
- (9) In relation to regulation 20—
- (a) the hirer shall be responsible for any breach of paragraphs (1), (2) or (3) of that regulation; and
  - (b) the temporary work agency shall be responsible for any breach of paragraph (4) of that regulation, unless it is established that the temporary work agency obtained or has taken reasonable steps to obtain relevant information from the hirer, and passed on or took reasonable steps to pass on such information to the agency worker; and
  - (c) where the supply of an agency worker involves intermediaries who are temporary work agencies, and where more than one temporary work agency is party to proceedings relating to an alleged breach of any duty in paragraph (4) of that regulation, when deciding whether or to what extent each temporary work agency is responsible, the employment tribunal shall have regard to whether or to what extent each temporary work agency took reasonable steps to obtain or pass on relevant information from a hirer to, or for the benefit of, the agency worker.

**Right to receive information in relation to rights and duties under regulations 9, 10 and 20**

13.—(1) If an agency worker who considers that the hirer or a temporary work agency may have treated that worker in a manner which infringes a right conferred by regulation 9, requests in writing from the temporary work agency a written statement providing—

- (a) relevant information relating to the basic working and employment conditions in force in the hirer,
- (b) the factors the temporary work agency considered when determining the basic working and employment conditions which apply to the agency worker following the qualifying period and during the remainder of the assignment, and
- (c) where relevant, information which—
  - (i) explains the basis on which it is considered that a person is a comparable employee, and
  - (ii) provides the basic working and employment conditions in force in the hirer which apply to that employee,

the agency worker is entitled to be provided with such a statement within 28 days of the request.

(2) If an agency worker has made a request under paragraph (1) and has not been provided with such a statement within 28 days of the request, the agency worker may request in writing from the hirer a written statement providing relevant information relating to the basic working and employment conditions in force in the hirer.

(3) Where a request has been made in accordance with paragraph (2) the agency worker is entitled to be provided with such a statement within 28 days of the request.

(4) If an agency worker who considers that the hirer may have treated that worker in a manner which infringes a right conferred by regulation 10, requests in writing from the hirer a written statement providing—

- (a) all relevant information relating to the right of a comparable employee conferred by regulation 10,
- (b) the particulars of the reasons for the treatment of the agency worker in respect of the rights conferred by regulations 10(1),

the agency worker is entitled to be provided with such a statement within 28 days of the request.

(5) If an agency worker, who considers that the hirer or a temporary work agency may either have-

- (a) treated that worker in a manner which infringes a right conferred by regulation 9, or
- (b) failed to comply with a duty under regulation 20,

requests from the hirer—

- (i) a copy of any relevant signed collective or workforce agreement in force at the hirer's undertaking during the time that the agency worker was assigned to work for and under the direction of the hirer, or
- (ii) a written statement providing details of the outcome of any review or reviews undertaken pursuant to regulation 20(2),

the agency worker is entitled to be provided with a copy of the collective or workforce agreement under sub-paragraph (i), or a statement under sub-paragraph (ii), within 28 days of the request.

- (6) Regulation 13(1), (2), (3) and (5)(a) only apply to an agency worker who, at the time that worker makes such a request, is entitled to the right conferred by regulation 9.
- (7) Information provided under this regulation, whether in the form of a written statement or otherwise, is admissible as evidence in any proceedings under these Regulations.
- (8) If it appears to the tribunal in any proceedings under these Regulations—
  - (a) that the temporary work agency or the hirer (as the case may be) deliberately, and without reasonable excuse, omitted to provide information, whether in the form of a written statement or otherwise, or
  - (b) that any written statement supplied is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the temporary work agency or hirer (as the case may be) has infringed the right in question.

### **The right not to be subjected to detriment**

**14.**—(1) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of the temporary work agency or the hirer, done on a ground specified in paragraph (2).

(2) The reasons or, as the case may be, grounds are—

- (a) that the agency worker—
    - (i) brought proceedings under these Regulations;
    - (ii) gave evidence or information in connection with such proceedings brought by any agency worker;
    - (iii) made a request under regulation 13 for information, a written statement or a copy of a collective or workforce agreement;
    - (iv) otherwise did anything under these Regulations in relation to the temporary work agency, hirer, or any other person;
    - (v) alleged that the temporary work agency or hirer had infringed, or breached duties under, these Regulations;
    - (vi) refused (or proposed to refuse) to forgo a right conferred by these Regulations;
    - (vii) declined to sign a workforce agreement for the purposes of these Regulations; or
    - (viii) participated, or sought to participate, in elections for representatives of the workforce for the purposes of these Regulations;
    - (ix) being—
      - (aa) a representative of members of the workforce for the purposes of these Regulations, or
      - (bb) a candidate in an election in which any person elected will, on being elected, become such a representative,
- performed (or proposed to perform) any functions or activities as such a representative or candidate;

- (x) gave evidence or information in connection with proceedings brought by an employee of the hirer in relation to an alleged detriment or unfair dismissal arising out of the same subject matter as any of (vii) to (ix); or
  - (b) that the hirer or the temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).
- (3) Where the reason or principal reason for subsection to any act or deliberate failure to act, is that mentioned in paragraph (2)(a)(v), or (b) so far as it relates thereto, paragraph (1) does not apply if the allegation made by the agency worker is false and not made in good faith.

### **Complaints to employment tribunals etc**

- 15.**—(1) In this regulation “respondent” includes the hirer, and any temporary work agency.
- (2) An agency worker may present a complaint to an employment tribunal that the temporary work agency or the hirer has-
- (a) infringed a right conferred on him or her by regulation 9, 10, 14(1); or
  - (b) breached a duty under regulation 20(2), (3) or (4).
- (3) Subject to paragraph (4), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—
- (a) in the case of an alleged infringement of a right conferred by regulation 9, 10 or 14(1) or of a breach of duty under regulation 20(2), (3) or (4), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;
  - (b) in the case of an alleged infringement of the right conferred by regulation 10(3), with the date, or if more than one the last date, on which other individuals, whether or not the employees of the hirer, were informed of the vacancy.
- (4) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it consider that it is just and equitable to do so.
- (5) For the purposes of calculating the date of the infringement, detriment or breach under paragraph (3)(a)—
- (a) where a term in a contract infringes a right conferred by regulation 9, 10 or 14(1), or breaches a duty in regulation 20(2), (3) or (4) that treatment or breach shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term infringes that right;
  - (b) a deliberate failure to act contrary to regulation 9, 10 or 14(1) or 20(2), (3) or (4) shall be treated as done when it was decided on.
- (6) In the absence of evidence establishing the contrary, a person (P) shall be taken for the purposes of paragraph (5)(b) to decide not to act—
- (a) when P does an act inconsistent with doing the failed act; or
  - (b) if P has done no such inconsistent act, when the period expires within which P might reasonably have been expected to have done the failed act if it was to be done.
- (7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—
- (a) making a declaration as to the rights of the complainant and the temporary work agency, or as the case may be the hirer, in relation to the matters to which the complaint relates;
  - (b) ordering the respondent to pay compensation to the complainant;
  - (c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.
- (8) Where a tribunal orders compensation under paragraph (7)(b), and the temporary work agency and hirer are respondents, the amount of compensation payable by each or any respondent shall be such as may be found by the tribunal to be just and equitable having regard

to the extent of each respondent's responsibility for the infringement to which the complaint relates.

(9) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

- (a) the infringement or breach to which the complaint relates; and
- (b) any loss which is attributable to the infringement.

(10) The loss shall be taken to include—

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and
- (b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

(11) Compensation in respect of treating an agency worker in a manner which infringes the right conferred by regulation 9 or 10, or breaches the duties in regulation 20(2), (3) or (4) shall not include compensation for injury to feelings.

(12) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(13) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(14) If the temporary work agency or the hirer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under paragraph (7)(c) the tribunal may, if it thinks it just and equitable to do so—

- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (7)(b); or
- (b) make an order under paragraph (7)(b).

## PART 3

### Miscellaneous

#### **Restrictions on contracting out**

**16.** Section 203 of the 1996 Act (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Act.

#### **Liability of employers and principals**

**17.—**(1) Anything done by a person in the course of employment shall be treated for the purposes of these Regulations as also done by their employer, whether or not it was done with that employer's knowledge or approval.

(2) Anything done by a person as agent for the employer with the authority of the employer shall be treated for the purposes of these Regulations as also done by the employer.

(3) In proceedings under these Regulations against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from—

- (a) doing that act; or
- (b) doing, in the course of his or her employment, acts of that description.

## **Rights in regulation 9**

18. Schedule 2 sets out the transitional provisions in relation to the rights set out in regulation 9.

## **Amendments to legislation and transitional provisions**

19. Schedule 3 which contains amendments to legislation shall have effect.

# **PART 4**

## **Modifications**

### **Collective and workforce agreements**

20.—(1) A collective agreement or a workforce agreement may modify the application of regulation 9(1) to an agency worker, provided that, when taken together, the relevant terms and conditions to which the agency worker is subject, shall overall be no less favourable than if regulation 9(1) had not been modified.

(2) The hirer shall keep the relevant terms and conditions of any such agreement under review, in order to be satisfied that these continue to provide the level of protection required in paragraph (1).

(3) The hirer shall, in relation to a temporary work agency with whom that hirer has entered into a contract for the supply of an agency worker to work on assignment—

- (a) indicate in response to any enquiry from that temporary work agency whether such a collective or workforce agreement is in force;
- (b) provide that temporary work agency with a copy of any such a collective or workforce agreement in force at the date of entry into the contract for supply;
- (c) provide that temporary work agency with a copy of any new collective or workforce agreement entered into after the commencement, and during the course, of an assignment, within 7 days of the new agreement being coming into effect;
- (d) indicate in writing, in response to an enquiry from that temporary work agency, the outcome of the most recent review of relevant terms and conditions (and, if none has occurred, when such a review is anticipated).

(4) A temporary work agency shall—

- (a) prior to the entry into arrangements with an agency worker for that agency worker to go on assignment, or to renew an assignment, at a hirer, and where a collective or workforce agreement has not been supplied under paragraph (3)(b), enquire of that hirer whether any such agreement is in force, and, if it is, request a signed copy of it;
- (b) notify the agency worker of the outcome of any such enquiry, including whether such an agreement exists;
- (c) supply a copy of any such agreement, that may be received from the hirer at any time before or during the course of an assignment, to the agency worker placed there by the temporary work agency; and
- (d) from time to time enquire of the hirer whether the hirer has reviewed the relevant terms and conditions pursuant to paragraph (2) and notify the outcome of such enquiry to any agency worker, currently on assignment with that hirer, placed there by the temporary work agency.

(5) Where the supply of an agency worker to work for a hirer involves one or more intermediaries, the duties under paragraph (4) shall apply to every such intermediary who is a temporary work agency.

### **Permanent contracts providing for pay between assignments**

**21.**—(1) To the extent to which it relates to pay, regulation 9 shall not have effect in relation to an agency worker who has a permanent contract of employment with a temporary work agency if—

- (a) the contract of employment was entered into before the commencement of the first assignment and includes terms and conditions in writing relating to—
  - (i) the scale or rate of remuneration or the method of calculating remuneration;
  - (ii) the location or locations where the agency worker may be expected to work;
  - (iii) the expected hours of work during any assignment;
  - (iv) the maximum number of hours of work that the agency worker may be required to work each week during any assignment;
  - (v) the minimum hours of work per week that may be offered to the agency worker during any assignment provided that it is a minimum of one or more hours;
  - (vi) the nature of the work that the agency worker may expect to be offered including any relevant requirements relating to qualifications or experience;
- (b) during any period in which the agency worker is not undertaking an assignment under the contract –
  - (i) the temporary work agency takes reasonable steps to seek a suitable new assignment for the agency worker,
  - (ii) if a suitable assignment is available, the temporary work agency offers the agency worker to be proposed to a hirer who is offering such an assignment, and
  - (iii) the temporary work agency pays the agency worker a minimum amount of remuneration in respect of that period (“the minimum amount”); and
- (c) the temporary work agency does not terminate the contract of employment until it has complied with its obligations in paragraph (b) for not less than an aggregate of four calendar weeks during the contract.

(2) For work to be suitable work for the purposes of paragraph (1)(b)(i) the nature of the work, and terms and conditions applicable to the agency worker whilst performing the work, must not differ from the terms and conditions included in the contract of employment under paragraph (1)(a).

### **Calculating the minimum amount of pay**

**22.**—(1) Subject to paragraph (3), the minimum amount to be paid to the agency worker during a pay reference period when the agency worker is not working on an assignment shall be not less than 50% of the pay paid to the agency worker in the relevant pay reference period.

(2) For the purposes of paragraph (1), the relevant pay reference period shall be either—

- (a) the last pay reference period in the immediately preceding assignment, or
- (b) any pay reference period in the 12 weeks preceding the termination of the immediately preceding assignment,

whichever pay reference period provided the agency worker with the greater amount of pay.

(3) The minimum amount shall not be less than the amount that the agency worker would have received for the hours worked in the relevant pay reference period as prescribed by any enactment made under the National Minimum Wage Act 1998.

(4) For the purpose of calculating the minimum amount as set out in paragraph (1), only payments in respect of basic pay whether by way of annual salary, payments for actual time worked or by reference to output or otherwise shall be taken into account.

(5) For the purposes of this regulation, “pay reference period” is a month or, in the case of a worker who is paid wages by a reference period shorter than a month, that period.

## SCHEDULE 1

Regulation 2

### Workforce Agreements

1. An agreement is a workforce agreement for the purposes of these Regulations if the following conditions are satisfied—

- (a) the agreement is in writing;
- (b) it has effect for a specified period not exceeding 5 years;
- (c) it applies either to relevant members of the workforce, or to all relevant members who belong to a particular group;
- (d) the agreement is signed—
  - (i) by the representatives of the workforce, or, where it refers to members of a particular group, by representatives of that group, excluding in either case any representative not a member of the workforce on the date on which the agreement was first made available for signature, or
  - (ii) if the workforce comprised 20 or fewer members on the date referred to in sub-paragraph (d)(i), either by the appropriate representatives in accordance with that sub-paragraph or by the majority of the workforce employed by that employer;
- (e) before the agreement was made available for signature, the employer provided all the workforce, who would be working for the employer on the date on which it came into effect, with copies of the text of the agreement and such guidance as might be reasonably required in order for it to be understood fully.

(2) Representatives of the workforce are “duly elected” if the election at which they were elected satisfied the following requirements—

- (a) the number of representatives of the workforce to be elected is as determined by the employer;
- (b) the candidates for election as representatives of the workforce are members of the workforce as at the date of the election;
- (c) no worker who is eligible to be a candidate shall be unreasonably excluded from standing for election;
- (d) all the workforce at the date of the election are entitled to vote for representatives of the workforce;
- (e) the workers entitled to vote may vote for as many candidates as there are representatives of the workforce to be elected;
- (f) the election is conducted so as to secure that—
  - (i) so far as is reasonably practicable, those voting do so in secret, and
  - (ii) the votes given at the election are fairly and accurately counted.

## SCHEDULE 2

### Rights in Regulation 9 - Transitional provisions

1. Time spent by an agency worker undertaking an assignment prior to 1st October 2011 does not count for the purposes of regulation 7(1), (2) and (3).



## SCHEDULE 3

### Amendments to legislation and related transitional provisions

#### PART 1

##### Primary Legislation

###### **The Trade Union and Labour Relations (Consolidation) Act 1992**

1. The 1992 Act is amended as follows.
2. After section 70B, sub-section (4) insert—

“(4A) Where information relating to the employment situation is supplied under sub-section (4) by the employer, this shall include—

  - (a) the number of agency workers contracted to work for and under the direction of the undertaking,
  - (b) the areas of the business in which those agency workers are contracted to work, and
  - (c) the type of work those agency workers are contracted to undertake.”.
3. In section 188, sub-section (4), paragraph (e), after “are to take effect” delete “and”.
4. After section 188, sub-section (4), paragraph (f) add—

“(g) the number of agency workers contracted to work for and under the direction of the undertaking,

  - (h) the areas of the business in which those agency workers are contracted to work, and
  - (i) the type of work those agency workers are contracted to undertake.”.
5. After Schedule A1, paragraph 7, sub-paragraph 2 insert—

“(2A) The following provisions relate to agency workers “otherwise engaged” by one or more temporary work agencies within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010—

  - (a) for the purposes of paragraphs 7(1) and (2), an agency worker engaged by a temporary work agency shall be treated as being a worker employed by that temporary work agency for the duration of an assignment with a hirer, and
  - (b) in this paragraph “agency worker”, “hirer” and “temporary work agency” have the meanings in regulations 2, 3 and 4, (respectively) of the Agency Workers Regulations 2010.”

###### **The Employment Rights Act 1996**

6. The 1996 Act is amended as follows.
7. After section 47E insert—

“**47F Workforce Agreements under the Agency Workers Regulations 2010**

  - (1) An employee of a hirer has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (2).
  - (2) The reasons or as the case may be, the grounds are—
    - (a) that the employee has—
      - (i) declined to sign a workforce agreement for the purposes of these Regulations,

- (ii) participated, or sought to participate, in elections for representatives of the workforce for the purposes of these Regulations,
- (iii) when—
  - (aa) a representative of the workforce for the purposes of Schedule 1, or
  - (bb) a candidate in an election in which any person elected will, on being elected, become such a representative
 performed (or proposed to perform) any functions or activities as such a representative or candidate,
- (iv) given evidence or information in connection with proceedings brought by any agency worker under regulation 15(2), or
- (b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph (a).
- (3) Where the reason or principal reason for dismissal, or as the case may be, ground for subsection to any act or failure to act, is that mentioned in paragraph (2)(b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.
- (4) This section does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part X of this Act.”.

**8. In section 48(1)—**

- (a) after “47C” delete “or”; and
- (b) after “47E” insert “or 47F”.

**9. After section 55 insert—**

**“55A Right to time off for ante-natal care (agency workers)**

- (1) An agency worker who—
  - (a) is pregnant, and
  - (b) has, on the advice of a registered medical practitioner, registered midwife or registered nurse, made an appointment to attend at any place for the purpose of receiving ante-natal care,
 is entitled to be permitted, by the temporary work agency and the hirer, to take time off during the agency worker’s working hours in order to enable her to keep the appointment.
- (2) An agency worker is not entitled to take time off under this section to keep an appointment unless, if either the temporary work agency or hirer (or both) requests her to do so, she produces for inspection (to the temporary work agency or hirer or both as the case may be)—
  - (a) a certificate from a registered medical practitioner, registered midwife or registered nurse stating that the agency worker is pregnant, and
  - (b) an appointment card or some other document showing that the appointment has been made.
- (3) Subsection (2) does not apply where the agency worker’s appointment is the first appointment during her pregnancy for which she seeks permission to take time off in accordance with subsection (1).
- (4) For the purposes of this section the working hours of an agency worker shall be taken to be any time when, in accordance with the terms of the assignment, the agency worker is normally at work.”

10. After section 56 insert—

**“56A Right to remuneration for time off under section 55A (agency workers)**

(1) An agency worker who is permitted to take time off under section 55A is entitled to be paid remuneration by the temporary work agency for the period of absence at the appropriate hourly rate.

(2) The appropriate hourly rate, in relation to an agency worker, is the amount of one week’s pay divided by the number of normal working hours in a week for that agency worker when performing the assignment in force on the day when the time off is taken.

(3) But where the number of normal working hours during the assignment differs from week to week or over a longer period, the amount of one week’s pay shall be divided instead by the average number of normal working hours calculated by dividing by twelve the total number of the agency worker’s normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off taken.

(4) A right to any amount under subsection (1) does not affect any right of an agency worker in relation to remuneration under her contract with the temporary work agency (“contractual remuneration”).

(5) Any contractual remuneration paid to an agency worker in respect of a period of time off under section 55A goes towards discharging any liability of the temporary work agency to pay remuneration under subsection (1) in respect of that period; and, conversely, any payment of remuneration under subsection (1) in respect of a period goes towards discharging any liability of the temporary work agency to pay contractual remuneration in respect of that period.”.

11. After section 57 insert—

**“57AA Complaint to employment tribunal (agency workers)**

(1) An agency worker may present a complaint to an employment tribunal that the temporary work agency—

(a) has unreasonably refused to permit her to take time off as required by section 55A, or

(b) has failed to pay the whole or any part of any amount to which she is entitled under section 56A.

(2) An agency worker may present a complaint to an employment tribunal that the hirer has unreasonably refused to permit her to take time off as required by section 55A.

(3) An employment tribunal shall not consider a complaint under sub-section (1) or (2) unless it is presented—

(a) before the end of the period of three months beginning with the date of the appointment concerned, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) Where an employment tribunal finds a complaint under this section well-founded, the tribunal shall make a declaration to that effect.

(5) If the complaint is that the temporary work agency or hirer has unreasonably refused to permit the agency worker to take time off, the tribunal shall also order payment to the agency worker of an amount equal to the remuneration to which she would have been entitled under section 56A if she had not been refused the time off.

(6) Where the tribunal orders payment under subsection (5), the amount payable by each party shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent’s responsibility for the infringement to which the complaint relates.

(7) If the complaint is that the temporary work agency has failed to pay the agency worker the whole or part of any amount to which she is entitled under section 56A, the tribunal shall also order the temporary work agency to pay to the agency worker the amount which it finds due to her.”

**12. After section 66 insert—**

**“66A Meaning of ending the supply of an agency worker on maternity grounds**

(1) For the purposes of this Part the supply of an agency worker to a hirer is ended on maternity grounds if, in consequence of the following, the supply of the agency worker to the hirer is ended on the ground that she is pregnant, has recently give birth or is breastfeeding a child—

- (a) action taken pursuant to Regulations 8(3) or 9(2) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997<sup>(9)</sup>;
- (b) action taken pursuant to Regulation 16A(2) or 17A of the Management of Health and Safety at Work Regulations 1999<sup>(10)</sup>; or
- (c) action taken pursuant to Regulation 20 of the Conduct of Employment Agencies and Employment Business Regulations 2003<sup>(11)</sup>.”.

**13. After section 67 insert—**

**“67A Right to offer of alternative work**

(1) Where the supply of an agency worker to a hirer is ended on maternity grounds and the temporary work agency has available suitable alternative work, the agency worker has a right to be offered to be proposed to a hirer that has such alternative work available.

(2) For alternative work to be suitable for an agency for the purposes of this section—

- (a) the work must be of a kind which is both suitable in relation to her and appropriate for her to do in the circumstances, and
- (b) the terms and conditions applicable to her whilst performing the work, if they differ from the corresponding terms and conditions which would have applied to her but for the fact the assignment was ended on maternity grounds, must not be substantially less favourable to her than those corresponding terms and conditions.

(3) Paragraph 1 does not apply—

- (a) where the agency worker has confirmed in writing that she no longer requires the work-finding services of the temporary work agency,
- (b) beyond the duration, or likely duration of the assignment which was ended on maternity grounds, as described in section 66A.”.

**14. After section 68 insert—**

**“68A Right to remuneration**

(1) Where the supply of an agency worker to a hirer is ended on maternity grounds, that agency worker is entitled to be paid remuneration by the temporary work agency.

(2) An agency worker is not entitled to remuneration under this section in respect of any period if—

- (a) the temporary work agency has offered to propose the agency worker to a hirer that has alternative work available which is suitable alternative work for her for the purposes of section 67A,

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<sup>(9)</sup> SI 1997/2962.

<sup>(10)</sup> SI 1999/3242.

<sup>(11)</sup> SI 2003/3319.

- (b) the hirer has agreed to the supply of that agency worker, and
- (c) the agency worker has unreasonably refused to perform that work.

(3) Nothing in this section imposes a duty on the temporary work agency to pay remuneration beyond the original intended duration, or likely duration of the assignment which was ended on maternity grounds as described in section 66A.”

**15. After section 69 insert—**

**“69A Calculation of remuneration (agency workers)**

(1) The amount of remuneration payable by a temporary work agency to an agency worker under section 68A is a week’s pay in respect of each week for which remuneration is payable in accordance with section 68A; and if in any week remuneration is payable in respect of only part of that week the amount of a week’s pay shall be reduced proportionately.

(2) A right to remuneration under section 68A does not affect any right of the agency worker in relation to remuneration under the contract with the temporary work agency (“contractual remuneration”).

(3) Any contractual remuneration paid by the temporary work agency to an agency worker in respect of any period goes towards discharging the temporary work agency’s liability under section 68A in respect of that period; and, conversely, any payment of remuneration in discharge of an temporary work agency’s liability under section 68A in respect of any period goes towards discharging any obligation of the temporary work agency to pay contractual remuneration in respect of that period.

(4) For the purposes of paragraph 1, a week’s pay is the weekly amount that would have been payable to the agency worker for performing the work, according to the terms of the contract with the temporary work agency, but for the fact the assignment was ended on maternity grounds.”

**16. After section 70 insert—**

**“Section 70A Complaints to employment tribunals (agency workers)**

(1) An agency worker may present a complaint to an employment tribunal that the temporary work agency has failed to pay the whole or any part of remuneration to which the agency worker is entitled under section 68A.

(2) An employment tribunal shall not consider a complaint under subsection (1) relating to remuneration in respect of any day unless it is presented—

- (a) before the end of the period of three months beginning with that day, or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within that period of three months.

(3) Where an employment tribunal finds a complaint under subsection (1) well-founded, the tribunal shall order the temporary work agency to pay the agency worker the amount of remuneration which it finds is due to him or her.

(4) An agency worker may present a complaint to an employment tribunal that in contravention of section 67A the temporary work agency has failed to offer to propose the agency worker to a hirer that has suitable alternative work available.

(5) An employment tribunal shall not consider a complaint under subsection (4) unless it is presented—

- (a) before the end of the period of three months beginning with that day, or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within that period of three months.

(6) Where an employment tribunal finds a complaint under subsection (4) well-founded, the tribunal shall order the temporary work agency to pay the agency worker the amount of compensation which it finds is due to him or her.

(7) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

- (a) the infringement of the agency worker's right under section 67A by the failure on the part of the temporary work agency to which the complaint relates, and
- (b) any loss sustained by the agency worker which is attributable to that failure.

#### **Section 70B Agency workers: general provisions**

(1) Without prejudice to any other duties of the hirer or temporary work agency under any enactment or rule of law sections 55A, 56A, 57AA, 66A, 67A, 68A, 69A and 70A shall not apply where the agency worker—

- (a) has not satisfied the qualifying period, or
- (b) is no longer entitled to the rights conferred by regulation 9 of the 2010 Regulations pursuant to regulation 8(a) or (b) of those Regulations.

(2) Nothing in sections 55A, 56A, 57AA, 66A, 67A, 68A, 69A and 70A imposes a duty on the hirer or temporary work agency beyond the duration, or likely duration of the assignment, whichever is the longer.

(3) This section, and sections 55A, 56A, 57AA, 66A, 67A, 68A, 69A and 70A shall only apply in circumstances where sections 55, 56, 57, 66, 67, 68, 69 and 70 do not apply.

(4) For the purposes of sections 55A, 56A, 57AA, 66A, 67A, 68A, 69A and 70A:

“the 2010 Regulations” means the Agency Workers Regulations 2010;

“agency worker” has the same meaning as in the 2010 Regulations;

“assignment” has the same meaning as in the 2010 Regulations;

“hirer” has the same meaning as in the 2010 Regulations;

“qualifying period” has the same meaning as in the 2010 Regulations;

“temporary work agency” has the same meaning as in the 2010 Regulations.”.

17. After section 104D insert—

#### **104E Workforce Agreement under the Agency Workers Regulations 2010**

(1) An employee of a hirer shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is as set out in paragraph (2).

(2) The reasons are—

(a) that the employee has—

(i) declined to sign a workforce agreement for the purposes of these Regulations,

(ii) participated, or sought to participate, in elections for representatives of the workforce for the purposes of these Regulations,

(iii) when—

(aa) a representative of the workforce for the purposes of Schedule 1, or

(bb) a candidate in an election in which any person elected will, on being elected, become such a representative

performed (or proposed to perform) any functions or activities as such a representative or candidate,

(iv) given evidence or information in connection with proceedings brought by any agency worker under regulation 15(2), or

(b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph (a).

(3) Where the reason or principal reason for dismissal, or as the case may be, ground for subsection to any act or failure to act, is that mentioned in paragraph (2)(b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.”.

**18.** In section 105, after “(7BA) insert—

“(7BB) This subsection applies if the reason (or if more than one, the principal reason) for which the employee was selected for dismissal was one specified in section 104E.”.

**19.** In section 108(3), after paragraph (gj) insert—

(gk) section 104E applies.”.]

### **The Employment Tribunals Act 1996**

**20.** The Employment Tribunals Act 1996<sup>(12)</sup> is amended as follows—

(a) In section 18(1) (cases where conciliation provisions apply)—

(i) at the end of paragraph (u), omit “or”, and

(ii) after paragraph (v), insert—

“or

(w) arising out of a contravention, or alleged contravention of regulation 9, 10, 14(1), or 20(2), (3) or (4) of the Agency Workers Regulations 2010.”;

(b) In section 21 (jurisdiction of the Employment Appeal Tribunal) in subsection (1) (which specifies the proceedings and claims to which the section applies)—

(i) at the end of paragraph (u), omit “or”, and

(ii) after paragraph (v), insert—

“or

(w) the Agency Workers Regulations 2010.”.

## **PART 2**

### **Other legislation**

#### **The Safety Representatives and Safety Committees Regulations 1977**

**21.** These Regulations are amended as follows.

**22.** After regulation 7, paragraph (3) add—

“(4) Where under the provisions of this regulation an employer provides information to safety representatives in the undertaking, that information shall include—

(a) the number of agency workers contracted to work for and under the direction of the undertaking;

(b) the areas of the business in which those agency workers are contracted to work; and

(c) the type of work those agency workers are contracted to undertake.”.

#### **The Health and Safety (Consultation with Employees) Regulations 1996**

**23.** These Regulations are amended as follows.

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<sup>(12)</sup> 1996 c.17.

24. After regulation 5, paragraph (3) add—

“(4) Where under the provisions of this regulation an employer provides information to employees, or to representatives of employee safety, in the undertaking, such information shall include—

- (a) the number of agency workers contracted to work for and under the direction of the undertaking;
- (b) the areas of the business in which those agency workers are contracted to work; and
- (c) the type of work those agency workers are contracted to undertake.”.

### **The Management of Health & Safety at Work Regulations 1999<sup>(13)</sup>**

25.—(1) These Regulations are amended as follows.

(2) After regulation 16 insert—

#### **“Alteration of working conditions in respect of new or expectant mothers (agency workers)**

16A.—(1) Where, in the case of an individual agency worker, the taking of any other action the hirer is required to take under the relevant statutory provisions would not avoid the risk referred to in regulation 16(1) the hirer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.

(2) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the hirer shall without delay inform the temporary work agency, who shall then end the supply of that agency worker to the hirer.

(3) In paragraphs (1) and (2) references to risk, in relation to risk from any infectious or contagious disease, are references to a level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace.”.

26. After regulation 17 insert—

#### **“Certificate from registered medical practitioner in respect of new or expectant mothers (agency workers)**

17A. Where—

- (a) a new or expectant mother works at night; and
- (b) a certificate from a registered medical practitioner or a registered midwife shows that it is necessary for her health or safety that she should not be at work for any period of such work identified in the certificate,

the hirer shall without delay inform the temporary work agency, who shall then end the supply of that agency worker to the hirer.”.

27. After regulation 18 insert—

#### **“Notification by new or expectant mothers (agency workers)**

18A.—(1) Nothing in regulation 16A(1) or (2) shall require the hirer to take any action in relation to an agency worker until she has notified the hirer in writing that she is pregnant, has given birth within the previous six months, or is breastfeeding.

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<sup>(13)</sup>



(2) Nothing in regulation 16A(2) shall require the temporary work agency to end the supply of the agency worker until she has notified the temporary work agency in writing that she is pregnant, has given birth within the previous six months, or is breastfeeding.

(3) Nothing in regulation 16A (1) shall require the hirer to maintain action taken in relation to an agency worker—

- (a) in a case—
  - (i) to which regulation 16A (1) relates; and
  - (ii) where the agency worker has notified the hirer, that she is pregnant, where she has failed, within a reasonable time of being requested to do so in writing by the hirer, to produce for the hirer’s inspection a certificate from a registered medical practitioner or a registered midwife showing that she is pregnant; or
- (b) once the hirer knows that she is no longer a new or expectant mother; or
- (c) if the hirer cannot establish whether she remains a new or expectant mother.

### **Agency workers: general provisions**

**18AA.**—(1) Without prejudice to any other duties of the hirer or temporary work agency under any enactment or rule of law in relation to health and safety at work, regulation 16A, 17A and 18A shall not apply where the agency worker—

- (a) has not satisfied the qualifying period, or
- (b) is no longer entitled to the rights conferred by regulation 9 of the 2010 Regulations pursuant to regulation 8(a) or (b) of those Regulations.

(2) Nothing in regulations 16A or 17A imposes a duty on the hirer or temporary work agency beyond the original intended duration, or likely duration of the assignment, whichever is the longer.

(3) This regulation, and regulations 16A, 17A and 18A shall only apply in circumstances where regulations 16, 17 and 18 do not apply.

(4) For the purposes of this regulation and regulations 16A, 17A or 18A—

- “the 2010 Regulations” means the Agency Workers Regulations 2010;
- “agency worker” has the same meaning as in the 2010 Regulations;
- “assignment” has the same meaning as in the 2010 Regulations;
- “hirer” has the same meaning as in the 2010 Regulations;
- “qualifying period” has the same meaning as in the 2010 Regulations;
- “temporary work agency” has the same meaning as in the 2010 Regulations.”

**28.** In regulation 20(1)(a) for “regulations 16-18”, substitute, “regulations 16-18AA”.

### **The European Public Limited-Liability Company Regulations 2004**

**29.** These Regulations are amended as follows.

**30.** In regulation 16 (Interpretation of Part 3) after the definition in paragraph (1) of “standard rules on employee involvement” insert—

- ““suitable information relating to the use of agency workers” shall mean—
  - (a) the number of agency workers contracted to work for and under the direction of the undertaking;
  - (b) the areas of the business in which those agency workers are contracted to work; and
  - (c) the type of work those agency workers are contracted to undertake.”.

31. In regulation 18, paragraph (2)(b), after “concerned establishment,” delete “and”.
32. After regulation 18, paragraph (2)(c) insert—
- “, and
  - (d) the number of agency workers contracted to work for and under the direction of the undertaking;
  - (e) the areas of the business in which those agency workers are contracted to work; and
  - (f) the type of work those agency workers are contracted to undertake.”.
33. After regulation 28, paragraph (3) insert—
- “(3A) Where under the employee involvement agreement the competent organ of the SE provides information on the employment situation in that company, such information shall include suitable information relating to the use of agency workers (if any) in that company.”.
34. After regulation 32, paragraph (3) insert—
- “(3A) The following provisions relate to agency workers “otherwise engaged” by one or more temporary work agencies within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010—
- (a) for the purposes of paragraph 3(a) and (b), any agency worker engaged by a temporary work agency, which was at the relevant time a participating company, shall be treated as having been employed by that temporary work agency for the duration of their assignment with a hirer, and
  - (b) in this sub-paragraph “agency worker”, “hirer” and “temporary work agency” have the meanings provided for in regulations 3, 2 and 4, respectively, of the Agency Workers Regulations 2010.”.
35. After Schedule 3, Part 2, paragraph 6(3) insert—
- “(3A) Where under the provisions of this paragraph the competent organ of the SE provides information on the employment situation in that company, such information shall include suitable information relating to the use of agency workers (if any) in that company.”.

#### **The Information and Consultation of Employee Regulations 2004**

36. These regulations are amended as follows.
37. In regulation 2 (Interpretation) after the definition of “standard information and consultation provisions” insert—
- ““suitable information relating to the use of agency workers” means information on—
- (a) the number of agency workers contracted to work for and under the direction of the undertaking;
  - (b) the areas of the business in which those agency workers are contracted to work; and
  - (c) the type of work those agency workers are contracted to undertake.”.
38. After regulation 3 insert—

#### **“Agency Workers**

**3A.—**(1) The following provisions relate to agency workers “otherwise engaged” by one or more temporary work agencies within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010.

(2) For the purposes of regulations 3, 4, 5 and Schedule 1, any agency worker engaged by a temporary work agency shall be treated as being employed by that temporary work agency for the duration of their assignments with a hirer.

(3) In relation to regulation 7, for the purposes of the calculation of the number or proportion of employees in the undertaking making a request, any agency workers engaged by a temporary work agency shall be treated as being employed by that temporary work agency for the duration of their assignments with a hirer.

(4) In this regulation “agency worker”, “hirer” and “temporary work agency” have the meanings in regulation 3, 2 and 4 (respectively) of the Agency Workers Regulations 2010.”

39. After regulation 8 insert—

**“Pre-existing agreements: agency workers**

8A. Where information is provided under a pre-existing agreement by an employer, such information shall include suitable information relating to the use of agency workers (if any) in that undertaking.”.

40. In regulation 16, paragraph (1), sub-paragraph (e), after “the employer;” delete “and”.

41. After regulation 16, paragraph (1), sub-paragraph (f) add—

“and

(g) provide that where an employer provides information, under that agreement or under any part, such information shall include suitable information relating to the use of agency workers (if any) in that undertaking.”.

42. In regulation 20, paragraph (1), sub-paragraph (b), after “in particular, where there is a threat to employment within the undertaking” and before “and” insert “(and such information shall include suitable information relating to the use of agency workers (if any) in that undertaking)”.

**The Transfer of Undertakings (Protection of Employment) Regulations 2006**

43. These Regulations are amended as follows.

44. After regulation 13, paragraph (2) insert—

“2A. Where information is supplied under paragraph (2) by an employer—

(a) this shall include suitable information relating to the use of agency workers (if any) by that employer; and

(b) “suitable information relating to the use of agency workers” means—

(i) the number of agency workers contracted to work for and under the direction of that employer;

(ii) the areas of the business in which those agency workers are contracted to work; and

(iii) the type of work those agency workers are contracted to undertake.”.

**The European Co-Operative Society (Involvement of Employees) Regulations 2006**

45. These Regulations are amended as follows.

46. In regulation 3 (Interpretation) after the definition in paragraph (1) of—

(a) “absolute majority vote” insert—

““agency worker” has the meaning provided for in regulation 3 of the Agency Workers Regulations 2010;”;

(b) “employees’ representatives” insert—

““hirer” has the meaning provided for in regulation 2 of the Agency Workers Regulations 2010;”;

(c) “standard rules on employee involvement” insert—

““suitable information relating to the use of agency workers” shall mean—

- (a) the number of agency workers contracted to work for and under the direction of the SCE or any subsidiary, in each EEA State;
- (b) the areas of the business and concerned establishments in which those agency workers are contracted to work; and
- (c) the type of work those agency workers are contracted to undertake; and

“temporary work agency” has the meaning provided for in regulation 4 of the Agency Workers Regulations 2010;”.

47. After regulation 6 insert—

#### **“Agency Workers**

**6A.**—(1) This regulation relates to agency workers “otherwise engaged” by one or more temporary work agencies within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010.

(2) For the purposes of regulations 5 and 6, any agency worker engaged by a temporary work agency, that is a participating individual or SCE respectively, shall be treated as being employed by that temporary work agency for the duration of their assignment with a hirer.”.

48. In regulation 7, paragraph 2, sub-paragraph (c), after “each establishment,” delete “and”.

49. In regulation 7, paragraph (2), sub-paragraph (d) substitute “;” for “.”.

50. After regulation 7, paragraph (2), sub-paragraph (d) add—

- “(e) the number of agency workers contracted to work for and under the direction of a participating individual, legal entity or subsidiary;
- (f) the areas of the business and concerned establishments in which those agency workers are contracted to work; and
- (g) the type of work those agency workers are contracted to undertake.”.

51. After regulation 17, paragraph (5) insert—

“(6) Where under the employee involvement agreement information is provided on the employment situation in the SCE, such information shall include suitable information relating to the use of agency workers (if any) in that SCE.”.

52. After regulation 21, paragraph (3) insert—

“(3A) For the purposes of regulation (3), agency workers “otherwise engaged” within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010, by a participating legal entity at the relevant time, shall be treated as having been employed by such a temporary work agency or agencies for the duration of their assignment with a hirer.”.

53. In Schedule 1, paragraph (1), sub-paragraph (2)(b), after “any establishment,” delete “and”.

54. In Schedule 1, paragraph (1), sub-paragraph (2)(c), substitute “;” for “.”.

55. After Schedule 1, paragraph 1, sub-paragraph (2)(c) add—

- “(d) the number of agency workers contracted to work for and under the direction of the SCE or any subsidiary, in each EEA State;
- (e) the areas of the business or any establishment in which those agency workers are contracted to work; and
- (f) the type of work those agency workers are contracted to undertake.”.

**56.** After Schedule 1, paragraph 11, sub-paragraph (4) add—

“(5) Where under the employee involvement agreement the competent organ of the SCE provides information on the employment situation in the SCE, such information shall include suitable information relating to the use of agency workers (if any) in that SCE.”.

**57.** After Schedule 2, paragraph 6, sub-paragraph (3) insert—

“**3A.** Where under sub-paragraphs (2) and (3) the competent organ of the SCE provides information on the employment situation in the SCE, such information shall include suitable information relating to the use of agency workers (if any) in that SCE.”.

### **The Companies (Cross-Border Mergers) Regulations 2007**

**58.** These Regulations are amended as follows.

**59.** In regulation 3 (Interpretation) after the definition in paragraph (1) of—

(a) “the 1996 Act” insert—

““agency worker” has the meaning provided for in regulation 3 of the Agency Workers Regulations 2010;”;

(b) the “Gazette” insert—

““hirer” has the meaning provided for in regulation 2 of the Agency Workers Regulations 2010;”;

(c) “standard rules of employee participation” insert—

““suitable information relating to the use of agency workers” shall mean—

(a) the number of agency workers contracted to work for and under the direction of a merging company or the transferee company (as the case may be);

(b) the areas of the business in which those agency workers are contracted to work; and

(c) the type of work those agency workers are contracted to undertake;

“temporary work agency” has the meaning provided for in regulation 4 of the Agency Workers Regulations 2010.”.

**60.** After regulation 8, paragraph (2) insert—

“(2A) Where information provided under paragraph (2)(a) relates to the employment situation, it shall include suitable information relating to the use of agency workers.”.

**61.** After regulation 22, paragraph (1) insert—

“(1A) For the purposes of paragraph (1)(a), agency workers “otherwise engaged” within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010, by one or more temporary work agencies that were merging companies at the relevant time, shall be treated as having been employed by such a temporary work agency or agencies for the duration of their assignment with a hirer.”.

**62.** After regulation 23(3) add—

“(4) Where under the provisions of this regulation a merging company provides information, such information shall include suitable information relating to the use of agency workers (if any) in that company.”.

**63.** After regulation 29(2) insert—

“(2A) Where under the employee participation agreement the transferee company provides information on the employment situation in that company, such information shall include suitable information relating to the use of agency workers (if any) in that company.”.

**64.** After regulation 37, paragraph (2) insert—

“(2A) For the purposes of paragraph (2), agency workers “otherwise engaged” within the meaning of regulation 3(1)(b) of the Agency Workers Regulations 2010, by one or more temporary work agencies that were merging companies at the relevant time, shall be treated as having been employed by such a temporary work agency or agencies for the duration of their assignment with a hirer.”.

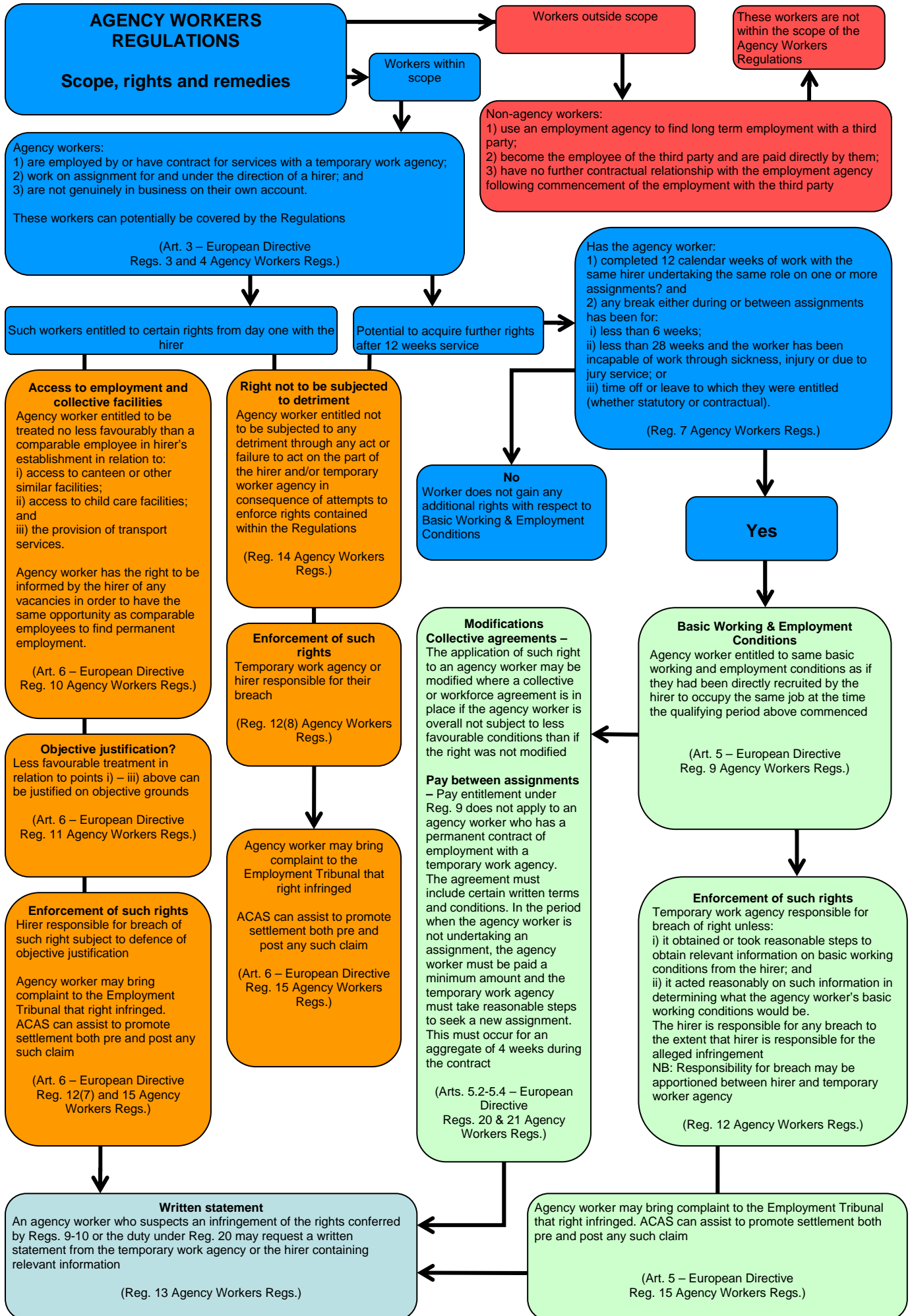
**65.** After regulation 38(4) add—

“(5) Where under the standard rules of employee participation the transferee company provides information on the employment situation in that company, such information shall include suitable information relating to the use of agency workers (if any) in that company.”.

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

# Annex C: Agency Workers Regulations: Scope, rights and remedies flowchart



## **Annex D: Draft Regulations – Amendment to Conduct Regulations – Regulation 10**

**10.** - (1) Any term of a contract between an employment business and a hirer which is contingent on a work-seeker taking up employment with the hirer or working for the hirer pursuant to being supplied by another employment business is unenforceable by the employment business in relation to that work-seeker unless the contract provides that instead of a reasonable transfer fee the hirer may by notice to the employment business elect for a reasonable hire period of such length as is specified in the contract during which the work-seeker will be supplied to the hirer -

(a) in a case where there has been no supply, on the terms specified in the contract; or

(b) in any other case, on terms no less favourable to the hirer than those which applied immediately before the employment business received the notice.

(2) In paragraph (1), “reasonable transfer fee” means any reasonable payment in connection with the work-seeker taking up employment with the hirer or in connection with the work-seeker working for the hirer pursuant to being supplied by another employment business.”.

(3) Any term as mentioned in paragraph (1) is unenforceable where the employment business does not supply the work-seeker to the hirer, in accordance with the contract, for the duration of the hire period referred to in paragraph (1) unless the employment business is in no way at fault.

(4) Any term of a contract between an employment business and a hirer which is contingent on any of the following events, namely a work-seeker -

(a) taking up employment with the hirer;

(b) taking up employment with any person (other than the hirer) to whom the hirer has introduced him; or

(c) working for the hirer pursuant to being supplied by another employment business,

is unenforceable by the employment business in relation to the event concerned where the work-seeker begins such employment or begins working for the hirer pursuant to being supplied by another employment business, as the case may be, after the end of the relevant period.

(5) In paragraph (4), "the relevant period" means whichever of the following periods ends later, namely -

(a) the period of 8 weeks commencing on the day after the day on which the work-seeker last worked for the hirer pursuant to being



supplied by the employment business; or

(b) subject to paragraph (6), the period of 14 weeks commencing on the first day on which the work-seeker worked for the hirer pursuant to the supply of that work-seeker to that hirer by the employment business.

(6) In determining for the purposes of paragraph (5)(b) the first day on which the work-seeker worked for the hirer pursuant to the supply of that work-seeker to that hirer by the employment business, no account shall be taken of any supply that occurred prior to a period of more than 42 days during which that work-seeker did not work for that hirer pursuant to being supplied by that employment business.

(7) An employment business shall not -

(a) seek to enforce against the hirer, or otherwise seek to give effect to, any term of a contract which is unenforceable by virtue of paragraph (1), (3) or (4); or

(b) otherwise directly or indirectly request a payment to which by virtue of this regulation the employment business is not entitled.

## Annex E: Agency Workers Directive text

**DIRECTIVE 2008/104/EC OF THE EUROPEAN PARLIAMENT AND OF  
THE COUNCIL  
of 19 November 2008  
on temporary agency work**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee<sup>14</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>15</sup>,

Whereas:

- (1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union<sup>16</sup>. In particular, it is designed to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.
- (2) The Community Charter of the Fundamental Social Rights of Workers provides, in point 7 thereof, inter alia, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly in respect of forms of work such as fixed-term contract work, part-time work, temporary agency work and seasonal work.
- (3) On 27 September 1995, the Commission consulted management and labour at Community level in accordance with Article 138(2) of the Treaty on the course of action to be adopted at Community level with regard to flexibility of working hours and job security of workers.

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<sup>14</sup> OJ C 61, 14.3.2003, p. 124.

<sup>15</sup> (2) Opinion of the European Parliament of 21 November 2002 (OJ C 25 E, 29.1.2004, p. 368), Council Common Position of 15 September 2008 and Position of the European Parliament of 22 October 2008 (not yet published in the Official Journal).

<sup>16</sup> OJ C 303, 14.12.2007, p. 1.

- (4) After that consultation, the Commission considered that Community action was advisable and on 9 April 1996, further consulted management and labour in accordance with Article 138(3) of the Treaty on the content of the envisaged proposal.
- (5) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include temporary agency workers in the Directive on fixed-term work.
- (6) The general cross-sector organisations, namely the Union of Industrial and Employers' Confederations of Europe (UNICE)<sup>17</sup>, the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) and the European Trade Union Confederation (ETUC), informed the Commission in a joint letter of 29 May 2000 of their wish to initiate the process provided for in Article 139 of the Treaty. By a further joint letter of 28 February 2001, they asked the Commission to extend the deadline referred to in Article 138(4) by one month. The Commission granted this request and extended the negotiation deadline until 15 March 2001.
- (7) On 21 May 2001, the social partners acknowledged that their negotiations on temporary agency work had not produced any agreement.
- (8) In March 2005, the European Council considered it vital to relaunch the Lisbon Strategy and to refocus its priorities on growth and employment. The Council approved the Integrated Guidelines for Growth and Jobs 2005- 2008, which seek, inter alia, to promote flexibility combined with employment security and to reduce labour market segmentation, having due regard to the role of the social partners.
- (9) (9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity, which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation.
- (10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.
- (11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

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<sup>17</sup> (4) UNICE changed its name to BUSINESSEUROPE in January 2007

- (12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.
- (13) Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed duration employment relationship or a temporary employment relationship<sup>18</sup> establishes the safety and health provisions applicable to temporary agency workers.
- (14) The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.
- (15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.
- (16) In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.
- (17) Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided.
- (18) The improvement in the minimum protection for temporary agency workers should be accompanied by a review of any restrictions or prohibitions which may have been imposed on temporary agency work. These may be justified only on grounds of the general interest regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented.
- (19) This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law.
- (20) The provisions of this Directive on restrictions or prohibitions on temporary agency work are without prejudice to national legislation or practices that prohibit workers on strike being replaced by temporary agency workers.

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<sup>18</sup> OJ L 206, 29.7.1991, p. 19.

- (21) Member States should provide for administrative or judicial procedures to safeguard temporary agency workers' rights and should provide for effective, dissuasive and proportionate penalties for breaches of the obligations laid down in this Directive.
- (22) This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>19</sup>
- (23) Since the objective of this Directive, namely to establish a harmonised Community-level framework for protection for temporary agency workers, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level by introducing minimum requirements applicable throughout the Community, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### GENERAL PROVISIONS

#### Article 1

#### **Scope**

1. This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.
2. This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.
3. Member States may, after consulting the social partners, provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.

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<sup>19</sup> OJ L 18, 21.1.1997, p. 1.

## *Article 2*

### **Aim**

The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

## *Article 3*

### **Definitions**

1 . For the purposes of this Directive:

- (a) ‘worker’ means any person who, in the Member State concerned, is protected as a worker under national employment law;
- (b) ‘temporary-work agency’ means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;
- (c) ‘temporary agency worker’ means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;
- (d) ‘user undertaking’ means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;
- (e) ‘assignment’ means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;
- (f) ‘basic working and employment conditions’ means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
  - (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
  - (ii) pay.

2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency.

#### *Article 4*

##### **Review of restrictions or prohibitions**

1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.
2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.
3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.
4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies. 5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011.

## CHAPTER II

### **EMPLOYMENT AND WORKING CONDITIONS**

#### *Article 5*

##### **The principle of equal treatment**

1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:

- (a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation; must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1.

Such arrangements may include a qualifying period for equal treatment. The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers.

5. Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.

## *Article 6*

### **Access to employment, collective facilities and vocational training**

1. Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general



announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.

2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void. This paragraph is without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers.

3. Temporary-work agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking.

4. Without prejudice to Article 5(1), temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons.

5. Member States shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices, in order to:

- (a) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability;
- (b) improve temporary agency workers' access to training for user undertakings' workers.

#### *Article 7*

### **Representation of temporary agency workers**

1. Temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency.

2. Member States may provide that, under conditions that they define, temporary agency workers count for the purposes of calculating the threshold above which bodies representing workers provided for by Community and national law and collective agreements are to be formed in the user undertaking, in the same way as if they were workers employed directly for the same period of time by the user undertaking.

3. Those Member States which avail themselves of the option provided for in paragraph 2 shall not be obliged to implement the provisions of paragraph 1.

#### *Article 8*

#### **Information of workers' representatives**

Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and, in particular, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>20</sup>, the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation.

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<sup>20</sup> (1) OJ L 80, 23.3.2002, p. 29.

## CHAPTER III

### FINAL PROVISIONS

#### *Article 9*

##### **Minimum requirements**

1. This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.
2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This is without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are respected.

#### *Article 10*

##### **Penalties**

1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary-work agencies or user undertakings. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.
2. Member States shall lay down rules on penalties applicable in the event of infringements of national provisions implementing this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by 5 December 2011. Member States shall notify to the Commission any subsequent amendments to those provisions in good time. They shall, in particular, ensure that workers and/or their representatives have adequate means of enforcing the obligations under this Directive.

#### *Article 11*

##### **Implementation**

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 5 December 2011, or shall ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member

States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained. They shall forthwith inform the Commission thereof.

2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

#### *Article 12*

##### **Review by the Commission**

By 5 December 2013, the Commission shall, in consultation with the Member States and social partners at Community level, review the application of this Directive with a view to proposing, where appropriate, the necessary amendments.

#### *Article 13*

##### **Entry into force**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

#### *Article 14*

##### **Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 19 November 2008.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

J.-P. JOUYET

# Annex F: Impact Assessment

Summary: Intervention & Options		
Department /Agency: ■ <b>BIS</b>	Title: ■ <b>Impact Assessment of the European Parliament and of the Council Directive on working conditions for temporary agency workers</b>	
Stage: Consultation	Version: Final	Date: 06 October 2009
Related Publications: Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency workers		

Available to view or download at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF>

Contact for enquiries: Ian Rutherford/Karen Wilshaw

Telephone: 020 7215 5934 / 2849

**What is the problem under consideration? Why is government intervention necessary?**

The problem under consideration is that agency workers can work for the same hirer for lengthy periods and be well integrated into the hirer's business but may not receive the same basic working and employment conditions, such as pay and holidays, as the permanent employees who they are working alongside. They are still entitled to statutory entitlements but these may be below contractual entitlements of permanent employees. The Temporary Agency Workers Directive, hereafter referred to as "the Directive", aims to give agency workers the same basic working and employment conditions as permanent staff. The Government proposes this legislation comes into force on 1<sup>st</sup> October 2011.

**What are the policy objectives and the intended effects?**

To provide agency workers with appropriate treatment which achieves the Government's twin objectives of flexibility for UK employers and fairness for workers. Equal treatment is defined as basic working and employment conditions that would apply to agency workers as if they had been recruited directly by the user undertaking "the hirer" to occupy the same job. The Directive does not change the agency worker's contractual relationship which remains with the employment business (agency).

**What policy options have been considered? Please justify any preferred option.**

Option 1: Do nothing – All EU Member States agreed the Directive so this option would result in infraction proceedings.

Option 2: The Directive assumes Day-1 equal treatment unless an exemption or derogation is used which still requires that agency workers have an adequate level of protection.

Option 3: An agreement was reached between the TUC and CBI - on 20 May 2008 - on how fairer treatment for agency workers in the UK should be promoted while not removing the important flexibility agency work can offer both employers and workers. Agreement was reached on key points, including the principle that after 12 weeks in a given job there will be an entitlement to equal treatment.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** Article 12 of the Directive requires that the Commission will review the application of the Directive by 5 December 2013 - this will provide an opportunity for an early review of the costs/benefits.

**Ministerial Sign-off** For consultation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister:



.....Date: 14/10/09

## Summary: Analysis & Evidence

<b>Policy Option: 2</b>	<b>Description: Implement the Directive, based on Day-1 equal treatment in a given job (0 weeks qualifying period)</b>
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<b>1. COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' <b>The costs to private and public sector business represent about 0.6 per cent of the total UK pay bill.</b>  Private sector hirers mostly affected with increased costs of £2,887 to 3,592m. Similarly public sector hirers costs increase by £543 to 815m. Costs to employment businesses range from £188 to £ 725m, rising up to £829 m if higher wage/temp-to-perm cost assumed and falling to £ 143m if lower temp-to-perm costs assumed.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	<b>£ 40 m</b>	10	
	<b>Average Annual Cost</b> (excluding one-off)		
<b>£ 4,154 - 4,594 m</b>		<b>Total Cost (PV)</b>	<b>£ 35,796 - 39,584m</b>
Other <b>key non-monetised costs</b> by 'main affected groups' Hirers: negligible costs from access to amenities, pregnant worker requirements, bodies representing workers and I&C provisions (admin cost). Employment businesses: negligible cost from changes to pay between assignments.			

<b>2. BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Agency workers mostly affected – £2,398 to 2,642m in increased benefits due to wage and paid holiday increases. Similarly HM Exchequer/ public sector hirers see benefits of £810 to 901m. Benefits to private sector hirers range from £35 to £ 69m.
	<b>One-off</b>	<b>Yrs</b>	
	<b>£ 0 m</b>	10	
	<b>Average Annual Benefit</b> (excluding one-off)		
<b>£ 3,242 - 3,613 m</b>		<b>Total Benefit (PV)</b>	<b>£ 27,906 -31,100m</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Agency workers: increased productivity.			

**Key Assumptions/Sensitivities/Risks** The evidence base outlines all assumptions used. Key assumptions include that 100% of agency workers are affected by qualifying period and that employment businesses can pass on 85-100% of higher wage and holiday costs to end users.

Price Base Year 2008	Time Period Years 10	<b>Net Benefit Range (NPV)</b> <b>£ -7,890 to -8,484 m</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ -7,890 to -8,484 m</b>
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What is the geographic coverage of the policy/option?	GB				
On what date will the policy be implemented?	1 October 2011				
Which organisation(s) will enforce the policy?	Tribunals Service				
What is the total annual cost of enforcement for these organisations?	£ tbd				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ N/A				
What is the value of changes in greenhouse gas emissions?	£ N/A				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off, see Annex A for more details)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro <b>£575</b></td> <td style="width: 25%; text-align: center;">Small <b>£5,875</b></td> <td style="width: 25%; text-align: center;">Medium <b>£43,952</b></td> <td style="width: 25%; text-align: center;">Large <b>£172,481</b></td> </tr> </table>	Micro <b>£575</b>	Small <b>£5,875</b>	Medium <b>£43,952</b>	Large <b>£172,481</b>
Micro <b>£575</b>	Small <b>£5,875</b>	Medium <b>£43,952</b>	Large <b>£172,481</b>		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of	£ 156 m	<b>Net Impact</b> £ 156 m
Decrease of	£ 0 m	

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: 3</b>	<b>Description: Implement the Directive based on a 12-week qualifying period for equal treatment in a given job</b>
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<b>3. COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' <b>The costs to private and public sector business represents about 0.3 per cent of the total UK pay bill.</b> Private sector hirers mostly affected with increased costs of £1,194 to 1,476m. Similarly public sector hirers costs increase by £227 to 337m. Costs to employment businesses range from £122 to £ 340m, rising up to £378 m if higher wage/temp-to-perm cost assumed and falling to £ 77m if lower temp-to-perm costs assumed.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	<b>£ 40 m</b>	10	
	<b>Average Annual Cost</b> (excluding one-off)		
<b>£ 1,777 - 1,935 m</b>		<b>Total Cost (PV)</b>	<b>£ 15,336 - 16,696m</b>
Other <b>key non-monetised costs</b> by 'main affected groups' Hirers: negligible costs from access to amenities, pregnant worker requirements, bodies representing workers and I&C provisions (admin cost). Employment businesses: negligible cost from changes to pay between assignments.			

<b>4. BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Agency workers mostly affected – £959 to 1,057m in increased benefits due to wage and paid holiday increases. Similarly HM Exchequer/ public sector hirers see benefits of £340 to 373m. Benefits to private sector hirers range from £35 to 69m.
	<b>One-off</b>	<b>Yrs</b>	
	<b>£ 0 m</b>	10	
	<b>Average Annual Benefit</b> (excluding one-off)		
<b>£ 1,368 - 1,499 m</b>		<b>Total Benefit (PV)</b>	<b>£ 11,775 - 12,903m</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Agency workers: increased productivity.			

**Key Assumptions/Sensitivities/Risks** The evidence base outlines all assumptions used. Key assumptions include that 40% of agency workers are affected by qualifying period and that employment businesses can pass on 85-100% of higher wage and holiday costs to end users.

Price Base Year 2008	Time Period Years 10	<b>Net Benefit Range (NPV)</b> <b>£ -3,561 to -3,793m</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ -3,561 to -3,793m</b>
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What is the geographic coverage of the policy/option?	GB				
On what date will the policy be implemented?	1 October 2011				
Which organisation(s) will enforce the policy?	Tribunals Service				
What is the total annual cost of enforcement for these organisations?	£ tbd				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ N/A				
What is the value of changes in greenhouse gas emissions?	£ N/A				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off, see Annex A for more details)	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro <b>£244</b></td> <td style="width: 25%; text-align: center;">Small <b>£2,493</b></td> <td style="width: 25%; text-align: center;">Medium <b>£18,650</b></td> <td style="width: 25%; text-align: center;">Large <b>£73,188</b></td> </tr> </table>	Micro <b>£244</b>	Small <b>£2,493</b>	Medium <b>£18,650</b>	Large <b>£73,188</b>
Micro <b>£244</b>	Small <b>£2,493</b>	Medium <b>£18,650</b>	Large <b>£73,188</b>		
Are any of these organisations exempt?	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of    £ 65m	Decrease of    £ 0 m	<b>Net Impact    £ 65m</b>

Key:    Annual costs and benefits: Constant Prices    (Net) Present Value

### A: Strategic overview

#### *Existing Government initiatives*

Under existing employment rights, agency workers benefit from many of the same protections as permanent workers in the UK. All workers, including agency workers, are entitled to be paid at least the National Minimum Wage, are granted working time entitlements such as paid annual leave, a limit on the working week (unless signed an opt out) and regular rest breaks. Protection under anti-discrimination law, health and safety rules and statutory benefits such as maternity pay apply to agency workers and permanent workers alike. Evidence suggests agency workers are one group who have benefited from the increase in statutory leave entitlement to 28 days in April 2009.

#### *Cost on business*

This Impact Assessment presents the main costs to business and it worth putting these into some context, £715 billion of wages and employer social contributions were paid across the UK economy in 2006 of which £568 billion was paid out in the private sector. The costs for private and public sector business are between 0.3 (using a 12-week qualifying period) to 0.6 per cent (Day-1) of the total pay bill.

#### *Impact Assessment coverage*

The consultation covers implementation in Great Britain, implementation in Northern Ireland will be subject to a separate consultation and accompanying Impact Assessment. According to most sources<sup>21</sup> around one per cent of UK agency workers are located in Northern Ireland. For simplicity, figures in this Impact Assessment are generally presented for the UK.

#### *Administrative burdens*

The implementation of the Directive would have administrative burdens cost implications; mainly for hirers and these are detailed in Section F.

### B: Background

The Government's position on the Directive has been consistent. The Government supported the underlying principles of the Directive but sought changes which ensured that it met the twin objectives of flexibility for UK employers and fairness for workers. The Government undertook high level discussions during 2008 with the UK's national social partners – TUC and CBI – to try and find a way to break the deadlock on the Directive which had prevented agreement. On 20 May 2008 the CBI and TUC reached an agreement on how fairer treatment for agency workers in the UK should be promoted, including a commitment to equal treatment for agency workers after

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<sup>21</sup> ONS Labour Force Survey shows 1.4 per cent of agency workers in Northern Ireland and REC 'Census' gives 1.3 per cent.



12 weeks in a given job. The Directive was published in the Official Journal on 5 December 2008. EU Member States have until 5 December 2011 to adopt and publish laws, regulations and administrative provisions.

## **C: Policy objectives**

The Directive is aimed at establishing equal working and employment conditions that would apply to agency workers as if they had been recruited directly by the user undertaking “the hirer” to occupy the same job. The Directive will implement a ‘floor’ and not a ‘ceiling’ in terms of this equal treatment after 12 weeks in a given job. This will not cover notice pay, redundancy pay, benefits in kind (e.g. company car allowance, life insurance, discount for purchase of company products), financial participation schemes (e.g. profit sharing, subsidised share ownership) and occupational social security schemes, including occupational sick pay as well as occupational pensions.

The Directive also has the aim of liberalising the agency sector across the EU; this could bring benefits to UK employment businesses who wish to expand into the EU but have found existing laws in EU Member States prohibitive. The new arrangements will be reviewed at an appropriate point. The Government proposes that the legislation will come into force on 1 October 2011.

## **D: Policy options**

### ***Option 1:***

Do nothing – as the Directive has been agreed all EU Member States will have to implement it by 5 December 2011 so doing nothing would result in infraction proceedings.

### ***Option 2:***

Implement the Directive, based on Day-1 equal treatment in a given job (0 weeks qualifying period).

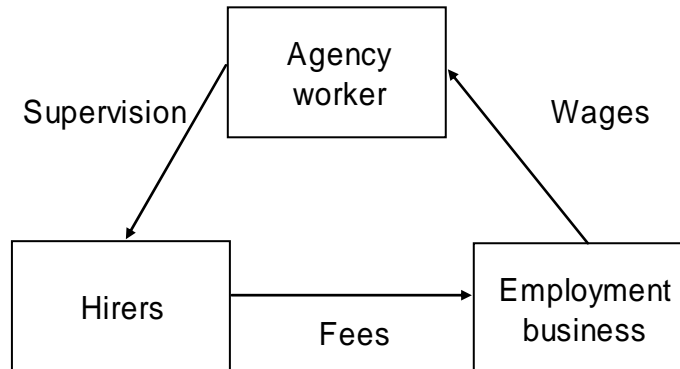
### ***Option 3:***

Implement the Directive based on a 12-week qualifying period for equal treatment in a given job.

## E: Key evidence

The Directive is established on the basis agency workers have a triangular employment relationship. This involves the employment business or 'agency' placing them on assignment with a user undertaking or hirer, which employs them temporarily while paying the employment business a fee who in turn remunerates the agency worker, as illustrated in figure 1 below.

**Figure 1: 'Basic' triangular employment relationship**



The three parties in the above figure represent the main affected groups of the Directive and separate cost-benefit analysis is provided for each. A further split between the private and public sector (incl. HM Exchequer) is made. Generally the equal treatment provision created by the Directive is a benefit transfer to the agency worker resulting in a cost which has to be shared by the employment business and hirer. Uncertainty in the exact cost is presented as a range. For simplicity the maximum cost to the hirer is generally presented rather than the maximum cost to the employment business.

### ***Static versus dynamic effects***

The cost-benefit analysis is developed in two ways:

- First, we examine the potential change in costs and benefits likely to occur assuming the characteristics of the industry stay the same (i.e. number of agency workers on assignment, assignment lengths, etc.). This is a *static* analysis.
- Second, we examine how implementation of the Directive might impact on behaviour and bring on changes to the current characteristics of the industry, other things being equal. For example, if the costs of agency workers do rise, then hirers would be expected to reduce their usage of agency workers. This is a dynamic analysis and the potential effects not explicitly quantified in Section F are discussed in Section G.

### ***Eligibility***

The qualifying period for equal treatment applies to basic working and employment conditions as defined in the Directive – pay, working time,

overtime, breaks, rest periods, night work and holidays. Other aspects of the Directive are not subject to the qualifying period but give equal treatment from Day-1 – e.g. access to amenities or collective facilities such as canteens – unless different treatment can be objectively justified.

In addition, agency workers will also be informed of any vacant posts with the hirer; EU Member States shall take action to ensure that clauses preventing the movement from temporary worker to permanent employee are null and void (although employment businesses will be able to receive a reasonable level of recompense for services rendered); employment businesses shall not charge workers any fees; and EU Member States shall take suitable measures to improve an agency worker’s access to training. Table 1 summarises those areas affected by the 12-week qualifying period and those not.

**Table 1. Summary of areas affected by qualifying period and those not**

From Day-1	12-week qualifying period
Access to amenities	Pay <sup>1</sup>
Temp-to-perm fees	Holidays
Improved access to training	Working time
Informing temporary workers about vacancies	Overtime
	Breaks
	Rest periods
	Night work

Note: 1 Pay excludes notice pay, redundancy pay, benefits in kind (e.g. company car allowance, life insurance, discount for purchase of company products), financial participation schemes (e.g. profit sharing, subsidised share ownership) and occupational social security schemes, including occupational sick pay as well as occupational pensions.

### ***Evidence base and assumptions***

In October 2008, BERR (now BIS) published “Agency working in the UK: A review of the evidence”<sup>22</sup>. This reviewed key data on the agency sector with the aim of providing an authoritative and up-to-date picture. The publication presented the nature of the industry in relation to agency workers, the employment businesses and hirers that use them. This gave an account in terms of existing sources as well as reporting on the recent Survey of Recruitment Agencies (SORA) - a department funded survey on the sector. No one source gave the definitive word on agency working; instead a reasonable assessment was made on the best available evidence. During the initial consultation on policy a cost benefit analysis was presented on this evidence and views sought. From the consultation responses no further evidence emerged to radically change the key assumptions used within the cost-benefit analysis.

#### *(i) The number of agency workers*

The consultation seeks views on a suitable legal definition of who’s covered by the Directive. It is difficult to estimate the number of workers covered by each proposed definition as the introduction of legislation relating to the

<sup>22</sup> See BIS website: [www.berr.gov.uk/files/file48720.pdf](http://www.berr.gov.uk/files/file48720.pdf)

working conditions of temporary agency workers is a new area and there have been no official statistics or studies that quantify in a robust and comprehensive way the degree of agency working in the UK. However, there are 3 estimates available on the number of agency workers. These are:

- **Office of National Statistics (ONS) Labour Force Survey (LFS)**, 2008 – gave estimates of around a quarter of a million;
- **Recruitment & Employment Confederation (REC) Census**, 2006 – gave an estimate of 1.1 million, and
- **BIS Survey of Recruitment Agencies (SORA)**, 2007 – which estimates around 1.5 million.

These estimates clearly differ significantly. As sources, it is recognised the REC and SORA business surveys have their limitations but they are preferable to the Labour Force Survey (LFS) because of strong evidence this source underestimates the number of agency workers. The differences in estimates may be explained as follows:

- SORA and REC were “snapshot” surveys of recruitment businesses. These businesses were asked how many agency workers were on temporary assignment in a given time period.
- LFS is a quarterly survey of households with a sample of 53,000 each quarter. Agency workers are harder to find in a national sample of households as they represent a small proportion of workers.
- Also, as the LFS is self-reported, respondents do not always perceive themselves to be “agency workers” as we define them. Some call themselves “casual workers”, others “seasonal workers”. Other people may not perceive themselves to even be temporary workers.

The mid-point between the REC and SORA of **1.3 million agency workers** is suggested as the best point or ‘mean’ estimate because of the high seasonality of agency work.

*(ii) Length of time on assignment*

If equal treatment were a Day-1 right then the entire estimated 1.3 million agency workers would be affected. Table 2 shows the distribution of agency workers by length of assignment. The Directive allows for a 12-week qualifying period after which there would be an entitlement to equal treatment. Data from SORA and the CBI indicate that between 40 and 45 per cent of agency assignments last more than 3 months, while the LFS indicates around 70 per cent. Possible explanations for why there is a difference between sources are the LFS data does not pick up on the shorter assignments and new assignments are more likely to be reported by the survey respondent as continuous employment when with the same agency.

It is proposed that the 12 week qualifying period should be 12 calendar weeks, regardless of working pattern (eg part time as opposed to full time). For the purpose of this Impact Assessment we use the re-weighted SORA estimates. As such we estimate that the proportion of agency workers affected

by the 12-week qualifying period is approximately 45 per cent of the total, or around 590,000. While this does not equate exactly to the 12-week qualifying period, it is used as a working approximation. With a 6-week qualifying period, this would affect some 819,000 agency workers or 63 per cent of the total. The number of agency workers on assignments of longer length clearly drops away from the higher percentage on short assignments, which is in line with the common conception that agency working is often characterised by short term employment.

**Table 2. Distribution of temporary agency workers by length of assignment**

Duration of assignments	Source			
	CBI 2005	CBI 2007	SORA <sup>1</sup>	LFS <sup>2</sup>
Less than 6 weeks	32%	33%	37%	-
Between 6 weeks and 3 months	28%	23%	18%	-
Between 3 months and 6 months	17%	25%	19%	23%
Between 6 months and 1 year	16%	13%	14%	19%
Greater than 1 year	7%	6%	11%	29%
Proportion greater than 3 months (12 weeks)	40%	44%	44%	71%

Sources: CBI Employment Trends Surveys, 2005 and 2007; BIS Survey of Recruitment Agencies (SORA), 2007; ONS LFS 2007

Note: Proportions may not add to 100 due to rounding. - means data is not available.

<sup>1</sup> The SORA data is re-weighted on valid responses

<sup>2</sup> LFS data is months in a job. Average of 4 quarters taken and uses 2007 weights

There is good reason to think the distribution of assignment lengths will change with the implementation of the Directive. One of the incentives to hirers will be to switch towards greater use of short-term agency working (i.e. assignments lasting less than 12 weeks) in an attempt to minimise costs. This will depend on the degree of extra cost, how sensitive hirers are to these cost changes, as well as the overall labour market situation and the feasibility of switching to shorter-term placements.

Around 20 per cent of assignments last between 3 and 6 months, this equates to around 260,000 agency workers. It is here that hirers may be induced to want to make greater use of short-time agency working of assignments lasting less than 12 weeks. Although the data does not allow a more precise estimate of duration of assignments within the 3-6 month range, it is likely that a certain proportion of these will, subject to practical considerations, become either one shorter-term assignments or two or more consecutive short-term assignments.

More work needs to be undertaken to assess the potential extent of switching to shorter-term assignments, but the data above indicate that this may be a substantial group. We make an initial assumption that 25 per cent of assignments lasting between 3 and 6 months become assignments lasting less than 3 months; then the 12-week qualifying period would affect about **520,000 agency workers or 40 per cent** of the total. A greater number of shorter-term assignments will result in more administrative and process costs, offsetting some of the cost reductions. This will be investigated for the final Impact Assessment.

It should be noted that the cost and benefit analysis is based on the average duration of agency assignments for all sectors taken together. This may need to be refined in the final Impact Assessment to account for differences in length by each sector.

*(iii) Additional comment on the data sources*

Despite the Labour Force Survey's (LFS) underestimation of the number of agency workers and overestimation of the average length of assignment, no other data source gives as rich detail on the labour market to enable analysis of the current employment conditions of agency workers compared to a permanent employee, and so the Labour Force Survey is preferred for conducting more detailed analysis (i.e. by sector, occupation, workplace size etc.) in this Impact Assessment. Wherever possible the estimates produced in this Impact Assessment have been sourced for added precision from the Annual Population Survey (APS). This is an annual derivation of the LFS with a boost sample. In a typical quarter, the sampled LFS will pick up around 300-350 agency workers, equating to the estimated weighted count of around 250,000 agency workers. The APS picks up the number of agency workers sampled across all four quarters of the year and so around four times as many agency workers (1,200-1,400) are included in the sample. The estimated weighted count of the number of agency workers remains at around 250,000, but the increase to the number of agency workers in the sample means we have added confidence that the characteristics of the sampled agency workers is in line with the population of agency workers across the economy.

*(iv) The characteristics of agency assignments*

The cost-benefit analysis of the Directive is likely to be highly sensitive to the distribution and characteristics of agency workers, by industry sector in particular. Annual Population Survey proportions for the main industry classes where agency workers are found were applied to the 1.3 million agency workers to arrive at the number in each sector.

SORA found over half (approximately 57 per cent) of temporary assignments were full-time compared to 43 per cent part-time. According to the APS/LFS sources, around 75 per cent of agency workers were full-time compared with 25 per cent part-time, the same proportion as all employees. We assume the latter.

As shown in Table 3, agency workers tend to work in *business services, manufacturing and transport, leisure and retail*. Education, health and the 'other public sector' presented in the table are a close but not a complete match with the public sector, as there are private sector jobs within this sector and public sector jobs in the other industry sectors. For simplicity we assume a complete match for the purposes of the costs and benefits presented in this Impact Assessment.

**Table 3. Distribution of Temporary Agency Workers by industry sector**

Industry sector <sup>1</sup>	Proportion	Number <sup>2</sup>
Manufacturing	20%	260,000
Other production	7%	88,000
Business Services	22%	283,000
Transport, Leisure & Retail	18%	234,000
Other services	10%	130,000
Education	6%	79,000
Health	10%	132,000
Other public sector <sup>3</sup>	7%	94,000
Total		1,300,000

Source: Annual Population Survey Apr 2007 - Mar 2008, SORA

Note: Figures have been rounded

1 'Education', 'health' and the 'other public sector' presented in the table are a close but not a complete match with the public sector, as there are private sector jobs within this sector and public sector jobs in the other industry sectors.

2 APS proportions are applied to the 1.3 million agency workers estimated by SORA. Rounded to nearest thousand.

3 Includes central & local government

As shown in Table 4, agency workers tend to have jobs as administrators and secretaries, process, plant and machinery operatives and other elementary occupations. Agency workers are unlikely to be managers and senior officials.

**Table 4. Distribution of Temporary Agency Workers by standard occupation classification**

Occupation	Proportion	Number <sup>1</sup>
Managers and senior officials	1%	19,000
Professional occupations	7%	96,000
Associate professional and technical	8%	102,000
Administrative and secretarial	25%	329,000
Skilled trades	4%	48,000
Personal service occupations	8%	99,000
Sales and customer service occupations	5%	58,000
Process, plant and machinery operatives	16%	214,000
Elementary occupations	26%	335,000
Total		1,300,000

Source: Annual Population Survey Apr 2007 - Mar 2008, SORA

1 APS proportions are applied to the 1.3 million agency workers estimated by SORA. Rounded to nearest thousand.

## F. Main costs & benefits

This section looks at the main effects of the Directive in terms of the costs and benefits related to basic working and employment conditions like duration of working time, overtime, breaks, rest periods, night work, holidays and pay by each of the affected groups. Unless stated otherwise the estimated costs and benefits are presented on the basis of Option 3 under a 12-week qualifying period.

### Pay

The Directive defines the principle of equal treatment as basic working and employment conditions shall be at least those that would apply if the agency worker had been recruited directly by the hirer to occupy the same job. Following the initial consultation, we propose that pay should be defined as basic pay plus other contractual entitlements that are directly linked to the work undertaken by the agency worker while on assignment. In terms of the Impact Assessment, pay is estimated on what the survey respondent said was their pay in a given reference period (this will include any overtime/night work premiums, bonuses and any other payments included in their salaries). Again, it would be difficult to adjust the data to exclude specific benefits or to even know what some of these are.

The main benefit the Directive provides to agency workers is eliminating any basic pay differentials between them and an appropriate direct recruit. In terms of the data, it is impossible to find an exact match based on pay scales, collective agreements or custom and practice but instead a reasonable assumption is made that agency workers are likely to be either less experienced or that mismatches are more likely to occur among agency workers in terms of their skills and qualifications. On this basis, it is more appropriate to compare pay of permanent employees with relatively short job tenure. In this case permanent employees with less than 2 years' job tenure within the same or similar industry and occupation as the agency worker are chosen from the data as a suitable comparator.

Table 5 compares median hourly earnings<sup>23</sup> for full-time, part-time and all agency workers by industry sector against an appropriate direct recruit as described above. This APS data compares well with other sources like the Annual Survey of Earnings and Hours (ASHE) which gives headline figures by full-time and part-time but no further breakdowns.<sup>24</sup>

As shown, overall agency workers earn about 90 per cent of the median hourly wage of the chosen comparator representing the direct recruit. There is a more significant gap in earnings among full-timers where agency workers

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<sup>23</sup> Median earnings are the point at which 50% of the selected population earn at or above this level. This measure is preferred to the mean as a more representative and stable measure, less affected by skew in the earnings distribution usually caused by a few high earners.

<sup>24</sup> In ASHE all, full-time and part-time median hourly earnings of temporary agency workers are £7.09, £7.14 and £7.00 respectively compared with £6.67, £6.58 and £7.14 in the APS covering the same period.



earn only about 80 per cent of the chosen comparators' earnings, roughly equivalent to a pay gap of £1.75 an hour. Other notable results are in education where full-time agency workers earn more than their comparator, and health (96 per cent) and 'transport, leisure and retail' (91 per cent) where the pay gap is much smaller. This balances with business services (68 per cent) and 'other public sector' (66 per cent) where the pay gap is much larger.

In contrast, there is no real difference in earnings among part-timers. If anything in most industries sectors part-time agency workers earn more than their permanent counterparts, with manufacturing, 'other production' and 'other public sector' being the exceptions. The following formula is used to work out the additional wage benefits and costs:

$$\text{Additional Wage Bill} = \text{Number of agency workers affected} \times \text{Hours per week} \times \text{Weeks per year (46.4)} \times \text{Median hourly earnings gap.}$$

**Table 5. Median hourly earnings between agency workers and a permanent comparator**

Industry sector <sup>1</sup>	Manufacturing	Other production	Business Services	Transport, Leisure & Retail	Other services	Education	Health	Other public sector <sup>2</sup>	Total
Median hourly earnings									
<b>(A) Agency workers</b>									
Full time	£6.11	£7.25	£6.75	£6.00	£6.89	£11.43	£8.11	£6.76	£6.58
Part time	£5.97	£5.60	£7.41	£5.83	£6.50	£14.00	£9.58	£6.06	£7.25
All	£6.00	£7.22	£6.80	£6.00	£6.77	£13.39	£9.26	£6.58	£6.67
<b>(B) Comparator: All permanent employees who have been with their company for less than 2 years<sup>3</sup></b>									
Full time	£8.02	£8.65	£9.88	£6.58	£9.23	£10.87	£8.46	£10.27	£8.33
Part time	£6.50	£7.21	£6.27	£5.47	£6.00	£6.40	£6.80	£7.81	£5.83
All	£7.89	£8.61	£9.11	£5.89	£8.11	£8.57	£7.70	£9.77	£7.40
<b>(A/B) Hourly pay gap</b>									
Full time	76%	84%	68%	91%	75%	105%	96%	66%	79%
Part time	92%	78%	118%	107%	108%	219%	141%	78%	124%
All	76%	84%	75%	102%	83%	156%	120%	67%	90%

Source: Annual Population Survey Apr 2007 - Mar 2008

Note: 1 'Education', 'health' and the 'other public sector' presented in the table are a close but not a complete match with the public sector, as there are private sector jobs within this sector and public sector jobs in the other industry sectors.

2 Includes Central & local Govt.

3 Certain occupation groups were excluded in this comparator where only a small percentage of agency are found (i.e. less than 0.2%)

From the APS, hours worked per week were between 37 and 40 for full-time agency workers and between 18 and 20 for part-time workers. This is very close to the hours worked by the comparator group, but the distribution of hours is different between the two groups; therefore the hourly wage is used in the calculation. The number of weeks per year is calculated as a whole 52 week year, minus the 5.6 weeks for the entitlement to statutory paid holiday.

## 1. Agency workers

Using the formula together with the data we construct estimates of annual wage benefits to agency workers. The overall *gross* wage benefit to agency workers under the 12-week qualifying period is therefore estimated to be between £1,196 and 1,327 million per year. The benefit range is based on the wage bill calculation over a 9 month period using the 3 month rolling APS data. The largest and smallest costs are then taken as the range. Any earnings are subject to tax and national insurance contributions (NICs) and we assume a 25 per cent deduction for this. This means *net* direct wage benefits to agency workers are estimated to be between **£897 and 995 million per year**.

## 2. Employment businesses

As represented in the triangular model, the wage benefits to agency workers create a wage cost to employment businesses. Employment businesses will aim to pass these increased costs on in the form of higher fees charged to the hirer. It may be the case that employment businesses are not able to recover all of their increased costs from hirers and the extent to which they can is likely to be affected by a number of factors, not least the prevailing economic conditions. This will be explored further in Section G on the dynamic effects where we consider the effect of higher costs associated with hiring temporary agency workers in terms of the impact on demand.

For the cost estimates produced in this document, we present an upper and lower bound based upon the level of pass through of increased costs from the employment business to the hirer. We assume here that employment businesses will pass on between 85 – 100 per cent of their increased costs as fees onto hirers. Any additional wage cost will incur non-wage labour costs, which are broadly defined by the International Labour Organisation as social insurance expenditure and other labour costs<sup>25</sup>. Past analysis of published data suggests that the level of non-wage labour costs is an addition of 21 per cent to the wage bill. Therefore employment businesses under the 12-week qualifying period will incur costs of between **£0 and 241 million** if either a 100 (entire) or 85 per cent of the wage costs are passed to the hirer.

## 3. Hirers in the private sector

The private sector is defined as those hirers operating in the following sectors; manufacturing, any other production industry, business services, transport, leisure & retail and any other service industry. Total costs in Table 5 are calculated and aggregated from sector data. For more detailed costs by sector see Table A1 in the Annex. As described, we assume employment businesses are able to pass on between 85 and 100 per cent of the increased wage costs onto hirers in the private sector. Costs to hirers in the private sector will comprise of extra wage costs including non-wage labour costs (at

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<sup>25</sup> See OECD Glossary of statistical terms [stats.oecd.org/glossary/detail.asp?ID=4837](https://stats.oecd.org/glossary/detail.asp?ID=4837).

21 per cent). On this basis we estimate that the total cost to hirers of increased wages under the 12-week qualifying period will be between **£1,073 and £1,347 million**.

#### **4. HM Exchequer & hirers in the public sector**

The public sector is defined as those hirers operating in the following sectors; education, health and other public sector (including local and central Government). Total costs in Table 5 are calculated and aggregated from sector data. For more detailed costs by sector see Table A1 in the Annex. Increased pay for agency workers would also result in higher tax income and NICs. Assuming around 25 per cent of the increase in wages would be paid in taxes and NICs, the estimated annual benefits to the Exchequer would be between **£299 and 332 million per year**.

Further, the public sector as users of agency workers will incur extra wage costs including non-wage costs (at 21 per cent). On this basis we estimate that the total cost to public sector hirers of increased wages under the 12-week qualifying period will be between **£157 and 259 million per year**.

## Summary

Table 6 below sets out the additional wage costs and benefits for each affected group and compares against the different policy options. Where cost ranges were given in the text above, the maximum value to the hirer rather than the employment business is presented here.

	Derivation	Option 2	Option 3
Additional wage bill (£ Millions)	(A)	£3,317	£1,327
of which: in private sector (£ Millions)	(B)	£2,783	£1,113
Marginal tax rate (per cent)	(C)	25%	25%
Non-wage labour cost (per cent)	(D)	21%	21%
Additional wage & non-wage bill (£ Millions)	(E = A * (1 + D))	£4,014	£1,606
of which: in private sector (£ Millions)	(F = B * (1 + D))	£3,367	£1,347
Cost pass through from Employment business to Hirer (per cent)	(G)	100%	100%

(£ Millions)	Derivation	Option 2		Option 3	
		Benefits	Costs	Benefits	Costs
HM Exchequer (25% rate)	(H = A * C)	£829	£0	£332	£0
Agency worker (net earnings)	(I = A - H)	£2,488	£0	£995	£0
Employment business	(J = E * (1 - G))	£0	£0	£0	£0
Hirer (private sector)	(K = F * G)	£0	£3,367	£0	£1,347
Hirer (public sector)	(L = E - (J + K))	£0	£646	£0	£259
<b>Total</b>	<b>(M = SUM(H - L))</b>	<b>£3,317</b>	<b>£4,014</b>	<b>£1,327</b>	<b>£1,606</b>

Source: BIS estimates. Figures have been rounded

## Holiday pay

The Directive also covers equal treatment on paid annual and public holidays. These will apply to all those agency workers who fall within the 12-week qualifying period. Although recent REC research (2008) indicates 79 per cent of agency workers benefit from holiday pay through the employment business, the purpose of the Directive is not to ensure an agency worker has the statutory minimum (already legislated for) but for the agency worker to have equal paid holiday as though they had been recruited directly by the hirer to occupy the same job.

The information on holiday entitlement is weak with the quarterly LFS as the only source available on paid holiday and bank holiday entitlement. The most recent information covers October – December 2007 when the statutory leave entitlement was changing from 20 to 24 days. To reflect the change from April 2009 onwards when statutory leave entitlement becomes 28 days including bank holidays, from 24 days previously, the latest LFS data is 'updated' as described below.

Table 7 shows the mean paid holiday entitlement for full-time, part-time and all agency workers by industry sector against an appropriate direct recruit as described in the pay section above. This table is split between the data before 'uprating' and after 'uprating', where the former is the data as observed and unadjusted while the latter is adjusted for the change to 28 days by altering individual holiday entitlement for those currently falling below this level<sup>26</sup>.

Agency workers are one of the groups most likely to benefit from the recent increase, and this is validated in the 'uprating' where the leave entitlements of agency workers rise faster than those of the direct recruit comparator. Also as one might expect the largest differential appears in the public sector where entitlements are higher, followed by the service then production sector. From the pay section above, the same assumptions and similar formula is used to calculate the additional holiday benefits and costs.

**Table 7. Mean paid holiday entitlement between agency workers and a permanent comparator**

Industry sector <sup>1</sup>	Industry Sector					Total	Industry Sector				
	Production sectors	Business services	Other services	Public sector <sup>2</sup>			Production sectors	Business services	Other services	Public sector <sup>2</sup>	
	Not Upated to 28 days <sup>3</sup>						Upated to 28 days <sup>3</sup>				
<b>(A) Agency workers</b>											
Full time	23	17	23	26	22	29	29	29	32	29	
Part time	16	11	15	13	13	22	21	21	22	22	
All	23	16	21	19	20	29	27	28	26	27	
<b>(B) Comparator: All permanent employees who have been with their company for less than 2 years<sup>4</sup></b>											
Full time	29	30	29	37	31	30	31	30	38	32	
Part time	22	24	20	26	22	25	26	24	29	25	
All	29	29	26	34	29	30	30	28	35	30	
<b>(A/B) Holiday entitlement gap</b>											
Full time	80%	58%	79%	72%	72%	96%	93%	97%	84%	92%	
Part time	71%	48%	75%	51%	61%	88%	83%	89%	75%	85%	
All	79%	54%	82%	58%	70%	96%	89%	99%	75%	90%	

Source: Labour Force Survey, Oct - Dec 2007

Note: 1 'Education', 'health' and the 'other public sector' presented in the table are a close but not a complete match with the public sector, as there are private sector jobs within this sector and public sector jobs in the other industry sectors.

2 Includes Central & local Govt.

3 Annual leave entitlement includes bank holidays. This changes to 28 days including bank holidays in April 2009

4 Certain occupation groups were excluded in this comparator where only a small percentage of agency are found (i.e. less than 0.2%)

<sup>26</sup> For part-time workers they were observed to work around 3.5 days on average, so their new entitlement after April 2009 will be about 20 days (i.e. 3.5 x 5.6 weeks, see [www.direct.gov.uk/en/Employment/Employees/Timeoffandholidays/DG\\_10029788](http://www.direct.gov.uk/en/Employment/Employees/Timeoffandholidays/DG_10029788)).

## 1. Agency workers

In terms of gross holiday pay this would mean agency workers are likely to benefit under the 12-week qualifying period by around £82 million per year. After tax and NICs, this is equivalent to **around £62 million** per year. The benefit range is based on a wage calculation over a 9 month period using the 3 month rolling APS data.

## 2. Employment businesses

Increased paid holiday may result in costs to employment businesses under the 12-week qualifying period of between **£0 and 15 million** if either a 100 (entire) or 85 per cent of the costs are passed to the hirer.

## 3. Hirers in the private sector

Increased paid holiday may result in costs to hirer under the 12-week qualifying period in the private sector of between **£39 and 46 million**, including non-wage labour costs at 21 per cent, if either a 100 per cent (entire) or 85 per cent of the costs are passed to the hirer. Total costs in Table 7 are aggregated from sector data. For more detailed costs by these sectors see Table A2 in the Annex.

## 4. HM Exchequer & hirers in the public sector

In addition to this increased paid holiday entitlement would yield tax and NICs estimated at about **£ 21 million** per year. Increased paid holiday will also result in costs to hirer in the public sector under the 12-week qualifying period of between **£45 and 53 million**, including non-wage labour costs at 21 per cent, if either a 100 per cent (entire) or 85 per cent of the costs are passed to the hirer. Total costs in Table 7 are aggregated from sector data. For more detailed costs by these sectors see Table A2 in the Annex.

## Summary

Table 8 below sets out the additional paid holiday costs and benefits mentioned for each affected group and compares against the different policy options. Where cost ranges were given in the text above, the maximum value to the hirer rather than the employment business is presented here.

**Table 8. Paid holiday costs & benefits**

	Derivation	Option 2		Option 3	
Additional wage bill (£ Millions)	(A)	£206		£82	
of which: in private sector (£ Millions)	(B)	£94		£38	
Marginal tax rate (per cent)	(C)	25%		25%	
Non-wage labour cost (per cent)	(D)	21%		21%	
Additional wage & non-wage bill (£ Millions)	(E = A * (1 + D))	£249		£99	
of which: in private sector (£ Millions)	(F = B * (1 + D))	£114		£46	
Cost pass through from Employment business to hirer (per cent)	(G)	100%		100%	
(£ Millions)	Derivation	Option 2		Option 3	
		Benefits	Costs	Benefits	Costs
HM Exchequer (25% rate)	(H = A * C)	£52	£0	£21	£0
Agency worker (net earnings)	(I = A - H)	£155	£0	£62	£0
Employment business	(J = E * (1 - G))	£0	£0	£0	£0
Hirer (private sector)	(K = F * G)	£0	£114	£0	£46
Hirer (public sector)	(L = E - (J + K))	£0	£136	£0	£53
<b>Total</b>	<b>(M = SUM(H - L))</b>	<b>£206</b>	<b>£249</b>	<b>£82</b>	<b>£99</b>

Source: BIS estimates. Figures have been rounded



## **Duration of working time, breaks and rest periods**

Other benefits provided to agency workers by the Directive under the right to equal treatment after 12-weeks in a given job derogation are working time provisions such as breaks and rest periods. The impact of these is difficult to quantify due to the limitation of data available; however it is thought that the benefits to the agency worker and the corresponding cost to the employment business/hirer would be small due to the likelihood that these benefits already exist. Further the public consultation did not raise any serious cost constraints to complying with this part of the Directive and stated this was common practice in most instances.

## **Other costs & benefits**

This section on other costs and benefits covers other aspects of the Directive mainly those where no qualifying period is applicable. The estimated costs and benefits of these areas are smaller and sometimes more difficult to quantify than those presented in previous sections. These will be reviewed and further information sought through out consultation and eventual findings will be presented in the final Impact Assessment.

### ***Fees (i.e. Temporary to permanent status)***

The Directive deals with the prohibition of contractual barriers and the levy of 'reasonable' fees by the employment business where the hirer wishes to directly employ the worker or the hirer introduces an agency worker to a third party who employs them directly. To comply with this part of the Directive, it is proposed the Conduct of Employment Businesses and Employment Agencies regulations are amended to introduce the concept of "reasonableness" in relation to the "transfer fee" an employment business can charge and in relation to the extended period of hire as an alternative to paying the transfer fee. The restriction on such fees would effectively be a straight forward transfer from the employment business in terms of a reduction in revenue, to the hirer in terms of lower costs. There is question as to what extent this may be clawed back by the employment business through other means such as higher search and selection fees.

### **1. Employment businesses**

We assume there are no direct benefits to employment businesses resulting from the implementation of the Directive. In theory there may be scope for employment businesses to benefit in terms of fee income, but in practice when combined with the overall increase in costs we believe the opportunities for levying additional fees would be minimal. If the Directive put in place further restrictions on the levying of temp-to-perm fees this would be at a cost to employment businesses.

In the absence of detailed information on average fees charged by employment businesses for temp-to-perm contracts, the cost estimates set out are given for illustration and will be reviewed based on the results of the

consultation. The 2002 Agency Worker Impact Assessment used REC data that 20 per cent of temporary jobs are 'permed' each year. Based on current levels this could amount to up to 260,000 temp-to-perm jobs per year. Research at the time suggested 69 per cent of employment businesses charged such fees in which case around 179,000 agency workers would be affected.

Further evidence is required to estimate actual temp-to-perm fees and, as stated above, in the absence of knowing what the Directive might deem to be a reasonable fee, we present here an illustrative estimate. We assume that the 'excessive' part of the fee could range between £250 and £500 which would equate to overall loss of income for the employment business of between **£45 and £90 million** per year.

## 2. Hirers

We anticipate while employment businesses will lose some temp-to-perm fee income as discussed above, this results in a direct transfer to hirers through reduced fees so that they benefit by between **£45 and £90 million** per year.

### ***Pregnant women and new mothers***

Article 5.1 of the Directive requires "*... the rules in force in the user undertaking on protection of pregnant women and nursing mothers.... must be complied with*".

### **Hirers**

Only about one per cent of the UK workforce are pregnant or expectant mothers at any one time. We initially assume businesses are able to accommodate this small group and this poses **negligible** cost under the extension of additional health and safety provisions. These include the right to be offered alternative work or hours if there is a health and safety risk; the right to be suspended on full pay if alternative arrangements cannot be put in place; and paid time off for ante-natal appointments. Again, this will be reviewed throughout the consultation and any associated cost will be presented in the final Impact Assessment.

### ***Pay between assignments***

Article 5.2 of the Directive provides an "exemption" from equal pay where the agency workers has a permanent contract of employment with the employment business and continues to be paid between assignments. The issue is whether a 'fair' level of pay needs to be set in these instances to tackle any anti-avoidance abuse.

We assume the practice of pay between assignments involves a small number of agency workers in larger employment businesses who are generally well paid. Many of the examples given were among those working in managed services and therefore excluded from the scope of the Directive.

### ***Informing temporary agency workers of vacant permanent posts***

Article 6.1 of the Directive states that “*agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which and under whose supervision temporary agency workers are engaged.*”

### **Hirers**

Each year around 7 million<sup>27</sup> people move into a new job. Given that around 16 per cent of organisations use temporary workers<sup>28</sup>, an initial approximation would suggest that around 1.12 million vacancies should be advertised to agency workers per year. In terms of unit costs, a direct comparator is available from the 2005 PwC Administrative Burdens exercise under the 2002 Fixed-term contract workers regulations. Here the unit cost associated with *informing fixed-term employees of available vacancies in the establishment* through a public notice board/email was estimated at £2.22<sup>29</sup>. As such the total additional costs to employers of advertising vacancies to the temporary agency workers they use would amount to around **£2.5m** a year.

### ***Access to amenities***

Article 6.4 of the Directive states that “*agency workers shall be given access to the amenities or collective facilities in the user undertaking especially canteen, childcare facilities and transport services under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons.*”

### **Hirers**

We assume access such amenities or services within the hirer imposes little or no extra cost. Most social facilities are likely to involve a certain amount of fixed set-up costs, therefore the marginal costs of making these facilities available to temporary agency workers will tend to be **negligible**.

### ***Access to training***

Article 6.5 of the Directive states EU “*Member States take suitable measure or shall promote dialogue between the social partners in accordance with their national traditions and practices in order to improve agency workers access to training...*” in the employment business and in the hirer. This is **not** necessarily to give equal treatment with regards to the training an agency worker receives in comparison to a permanent employee.

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<sup>27</sup> See for instance ERRS No. 56, How have employees fared?, see [www.berr.gov.uk/files/file48720.pdf](http://www.berr.gov.uk/files/file48720.pdf)  
This suggested 6.75 million at the time but will need updating from the LFS

<sup>28</sup> Inside the Workplace: First findings from the 2004 Workplace Employment Relations Survey  
[www.berr.gov.uk/files/file11423.pdf](http://www.berr.gov.uk/files/file11423.pdf)

<sup>29</sup> We believe that generally the marginal costs are probably lower still and so this should be seen as an upper bound estimate.

## 1. Agency workers

Improved access to training will potentially provide agency workers with enhanced skills, which may increase their productivity in the workplace. This is a difficult benefit to quantify and will be reviewed and any monetised benefits presented in the final Impact Assessment.

## 2. Employment businesses

The cost estimates set out below are given for illustration and will be reviewed based on any further evidence from the results of the consultation. LFS data for 2007 suggest that 29 per cent of permanent employees had received job training in the 3 months prior to the survey being carried out. In comparison 19 per cent of agency workers had done so, a differential of 10 percentage points. As such, 10 per cent of the 1.3 million agency workers would be affected or around 130,000.

We assume the affected agency workers would *on average* receive an additional 2½ days' training per year. Furthermore we assume an average cost of training of £200 per day. This suggests additional training imposes a total cost of **£65 million per year**. For illustrative purposes if 20 per cent (instead of the 10 per cent quoted above) of the affected agency workers get 3 (rather the 2½) days' training at an average cost of £300 (instead of 200) per day the additional training cost would be £234 million per year.

Although the provision is directed at training provided by both the hirer and the employment business, most (78 per cent) is carried out by the hirer, 14 per cent by employment businesses and the remaining 8 per cent of training is carried out by both parties<sup>30</sup>. We therefore assume that the final split between hirers and employment businesses is 82:18.

Although employment businesses would also need to provide about 18 per cent of the additional training to agency workers, as assumed previously between 85 per cent and 100 per cent of the costs could be passed on to a hirer through increased fees. Therefore, the actual cost liability from additional training for employment businesses would amount to an estimated between **£0 and 2 million** per year. However, even if we assumed the higher illustrative additional costs of £234 million shown above the actual liability for additional training for employment businesses would only increase to around £7 million.

## 3. Hirers

Taken from assumptions and costs presented in employment business section, 82 per cent of training is provided directly by hirers so we estimate the cost of providing this is £53.3m, plus between £9.9m and £11.7m in indirect training costs passed on by employment businesses in increased

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<sup>30</sup> REC report: "Temporary agency workers in the UK: Understanding their role and expectations."

fees. Overall therefore costs of additional training to hirer would range between **£63** and **65 million** per year.

It is acknowledged that in many hirers, training budgets are not an elastic resource and it is possible that there is a fixed amount that a company can spend on training each year. In this case, it is possible that any additional training for agency workers would be at the expense of training for permanent employees and therefore there would be no increase in the annual cost to the hirer. For now, we assume the costs as described above.

### ***Thresholds for bodies representing workers***

Article 7 of the Directive states that *"agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed..."*. This requirement will be consulted on and any associated cost from the final policy recommendation will be presented in the final Impact Assessment.

### ***Information of workers' representatives***

Article 8 of the Directive relates to the provision of information, whereby the *"...user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing the workers set up in accordance with national and Community legislation."*

### **Hirers**

This requirement may create a cost to the hirer in the collation and retainment of such information, see also administrative burden costs.

### ***Public sector as an employer***

There will be costs to the public sector as a user of agency workers. The LFS suggest that just under a quarter (23 per cent) of agency workers are on assignments in the public sector. Sector analysis for the items in this section will be difficult to quantify in the same way as the wage and holiday costs and benefits, instead a 77:23 split is applied to all costs to hirers to work out the public/private sector share. This split is presented in the Table 9.

### ***Liability and dispute resolution***

After implementation of the Directive an agency worker can make a claim citing unequal treatment through the employment tribunals service. Assuming there would be a greater number of tribunals than at present, there would obviously be an increase in costs to HM Exchequer of staging the employment tribunals. These costs are unknown as each case is different and the information in this area is not readily available.

## Summary

Table 9 below sets out the costs and benefits mentioned for each affected group and compares against the different policy options. Where cost ranges were given in the text above, the maximum value to the hirer rather than the employment business is presented here.

**Table 9. Other costs & benefits**

(£ Millions)	Derivation	Option 2		Option 3	
		Benefits	Costs	Benefits	Costs
<u>Temporary to permanent fees</u>					
Employment agency	(A)	£0	£90	£0	£90
Hirer (private sector)	(B = A * 0.77)	£69	£0	£69	£0
Hirer (public sector)	(C = A - B)	£21	£0	£21	£0
<u>Access to amenities</u>					
Hirer (private sector)	(D)	£0	£0	£0	£0
Hirer (public sector)	(E)	£0	£0	£0	£0
<u>Informing about internal vacancies</u>					
Hirer (private sector)	(F)	£0	£2	£0	£2
Hirer (public sector)	(G)	£0	£1	£0	£1
<u>Access to training</u>					
Employment agency	(H)	£0	£0	£0	£0
Hirer (private sector)	(I)	£0	£50	£0	£50
Hirer (public sector)	(J)	£0	£15	£0	£15
<b>Total</b>					
Agency worker		-	-	-	-
Employment agency	SUM(A,H)	£0	£90	£0	£90
Hirer (private sector)	SUM(B,D,F,I)	£69	£52	£69	£52
Hirer (public sector)	SUM(C,E,G,J)	£21	£15	£21	£15
<b>Total</b>	<b>SUM(A-J)</b>	<b>£90</b>	<b>£158</b>	<b>£90</b>	<b>£158</b>

Source: BIS estimates. Figures have been rounded

## Administrative burdens

The introduction of the Directive will inevitably have cost implications in terms of increased information obligations within the administrative burdens framework. This is particularly the case in relation to the information on the basis for establishing equal treatment (pay, holiday etc), as this will need to be calculated, communicated between the parties and ultimately recorded by the employment business. The precise details of the underlying mechanism for

this are still to be determined, but it is likely that employment businesses will bear most of this cost, with some falling on to hirers.

In light of this, it is difficult to accurately quantify the financial effects, but we assume here a relatively light touch approach. Our underlying assumptions are that:

- Hirers will need to calculate and/or communicate<sup>31</sup> to the employment business the necessary information. For this we assume on average 1.5 hours' of a personnel manager's time<sup>32</sup>.
- Employment businesses will have communication (with both hirer and agency workers) and record-keeping obligations. For this we assume a total of 3 hours' of agency staff time<sup>33</sup>.

This results in an average unit cost per assignment of £30.4 for employment businesses and £39.1 for hirers<sup>34</sup>. Official data does not exist of the total number of agency assignments. The recent Survey of Recruitment Agencies, 2007, suggests there are around 2.5 million temporary agency assignments per year. We therefore assume for now that the number of affected assignments will range from around 1 million under a 12-week qualifying period. Multiplied by the total number of assignments affected each year this results in an increase in admin burdens for hirers of around **£41m** and **£32m** for employment businesses under a 12-week qualifying period.

Sector analysis for the item in this section will be difficult to quantify in the same way as the wage and holiday costs and benefits, instead a 77:23 split reflecting how agency workers are apportioned between the two sectors is applied to all costs to hirers to work out the public/private sector share. This split is presented in Table 10.

**Table 10. Administrative burden**

(£ Millions)	Option 2		Option 3	
	Benefits	Costs	Benefits	Costs
Employment business	£0	£98	£0	£32
Hirer (private sector)	£0	£58	£0	£32
Hirer (public sector)	£0	£17	£0	£9
<b>Total</b>	<b>£0</b>	<b>£174</b>	<b>£0</b>	<b>£73</b>

Source: BIS estimates. Figures have been rounded

<sup>31</sup> Much depends here on whether or not there is a direct comparator within the hirer or whether a 'hypothetical' comparator needs to be established.

<sup>32</sup> This is based on the median hourly wage (£20.48) for personnel managers (code 1135), uprated for 2008 prices and non-wage labour costs.

<sup>33</sup> This is the median hourly wage (£7.92) for staff in the *Labour recruitment and provision of personnel* industry, uprated for non-wage labour costs (21%) and 2008 prices. Source: ASHE 2007, table 16-6a

<sup>34</sup> Clearly in those enterprises employing a number of agency workers for a given assignment there will be economies of scale and average unit cost should be lower.

### *Transitional costs*

Employment businesses are likely to incur one-off transitional costs following the implementation of the Directive. Beyond the administrative burden information obligations outlined above employment businesses will incur costs associated with changes to IT systems, staff training and in some cases recourse to expert legal advice.

As an illustration, across the 16,000 employment businesses in the UK, even relatively minor average unit costs for implementation of £2,500 would amount to **£40 million in transitional costs**. Further research will be required to more accurately measure these costs in due course, but it is likely that these costs will be significant. Greater understanding of the nature and scale of transitional costs will also inform work by the Department to minimise those costs, e.g. through providing clear guidance and developing simple procedures for implementation.

## **G. Further potential dynamic effects**

Higher costs associated with hiring temporary agency workers are likely to have important dynamic effects. These effects may manifest themselves in terms of price (wages) and/or quantity (number of agency workers hired) adjustments. Furthermore the nature of the effect is likely to vary by sector or occupation. Such dynamic effects should therefore also be considered as part of the overall cost-benefit analysis.

The 2002 Impact Assessment suggests that employers may benefit from such things as higher productivity from the increased training received by agency workers as well as greater ease in filling vacancies<sup>35</sup>.

Estimating the dynamic effects has a number of problems, not least predicting what the actual response of hirers might be. In addition to this the nature and degree of their response may well be determined by the prevailing economic climate. For these reasons a more extensive dynamic analysis will be carried out on the basis of further research as well as responses to the public consultation in future iterations of this Impact Assessment, with a view to quantifying these effects.

For now, we consider some initial evidence on the reasons why employers take on agency workers in the first place and then existing survey evidence on how hirer might respond in the face of increased costs of hiring temporary agency workers.

### *(i) Reasons for using agency workers*

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<sup>35</sup> This assumes the Directive's provisions serve to increase the attractiveness of agency working and hence the supply of agency workers, thereby resulting in a larger pool of labour for employers to draw on.



Data from WERS 2004 shows that among workplaces with 10 or more employees, the main reason<sup>36</sup> for hiring temporary agency workers was to *provide short-term cover for absences/vacancies* (58 per cent of workplaces), followed by *to match staffing levels to peaks in demand* (37 per cent), *because it was not possible to fill staff vacancies* (24 per cent) and *to cover maternity or annual leave* (17 per cent); other, less common, reasons included *to obtain specialist skills* (9 per cent) and *because of a freeze on permanent recruitment* (4 per cent).

The CBI Employment Trends Survey 2004 listed the following reasons: *short-term cover for vacant position* (31 per cent), *to meet an upturn in demand* (29 per cent), *cover for staff absence* (21 per cent), *cover for maternity/paternity leave* (6 per cent), *cover for skill shortages* (6 per cent) and *changes in work organisation* (3 per cent).

What these results highlight is the key role of temporary agency work in offering the necessary labour market flexibility for employers in order to respond quickly and effectively to both shortfalls in labour supply and/or surges in product/service demand.

*(ii) The effect of higher cost of hiring agency workers*

The 2007 CBI Employment Trends Survey asked what effect the proposed EU Directive on agency work would have on firms. The results are given in table 11 below.

**Table 11. Perceived effects of the proposed EU directive on agency work on firms**

% Response	Significant	Little	No effect
Additional bureaucracy	58	32	10
Extra costs	65	26	9
Reduction in flexibility	62	28	10
Reduction in use of temporary workers	58	30	12
Increase in workload for permanent staff	37	46	18
Reduction in benefits for permanent staff	10	30	60
Positive consequences	9	43	48

Source: CBI Employment Trends Survey 2007

REC (2008)<sup>37</sup> conducted research which asked employers how their current use of agency workers would be affected if costs increased by 25 per cent. Some 37 per cent of employers stated they would stop using agency workers altogether, while a further 36 per cent said they would reduce their use. The remainder stated their use of agency workers would not be affected.

<sup>36</sup> More than one response was allowed and 32% of workplaces offered more than one response.

<sup>37</sup> Temporary agency workers in the UK: Understanding their role and expectations. REC/BIS, [www.rec.uk.com/about-recruitment/research/bookshop/Tempagencyworkintheuk](http://www.rec.uk.com/about-recruitment/research/bookshop/Tempagencyworkintheuk)

These results indicate that there may be a substantial impact on the use of agency workers, though clearly account must also be taken of differences in perceived and actual outcomes (i.e. employers may not have such an extreme reaction), plus the cost increase associated with employing temporary agency workers is estimated in this Impact Assessment to increase costs by around 10 per cent.

A follow-up question in the REC survey asked those employers who stated they would stop using agency workers altogether, how they would replace them. 43 per cent of employers stated they would employ more permanent staff, while a further 27 per cent would ask existing staff to work longer hours, i.e. they would deal with the situation by internal re-organisation. Beyond this, 13 per cent reported they would use casual staff and 9 per cent would use fixed-term contract workers. Finally, 5 per cent reported that they would turn down contracts/work to manage work flows.

The results above point towards behavioural outcomes that are arguably more complex than first envisaged – for instance, a significant share of employers who would stop using the more flexible option of agency workers are likely to replace them with a more inflexible, permanent alternative. Some of these results may be explained by a lack of awareness and understanding of the Directive. The follow-up analysis will therefore attempt to account for these anomalies.

The responses of hirers and any impact on their behaviour of usage of agency workers could conceivably have either a positive or negative effect on the underlying cost estimates. For instance, a switch towards more permanent workers may actually increase costs to business, whereas a reduction in the number of temporary workers hired and consequent effects on output, if work is turned down.

### *(iii) The effect on permanent staff*

Estimating the effect the Directive will have on agency workers is complex but sufficient data exists on pay and holidays and the like to enable reasonable cost estimates and associated assumptions to be made. However, we are unable to ascertain the effect, to permanent staff as a result of the Directive. Table 11 shows that an increase to the workload for permanent staff was marked as 'significant' by 37 per cent of respondents, and a reduction in benefits to permanent staff was marked as either 'significant' or 'little' by 40 per cent of respondents.

Beyond the CBI's survey, information of the effect to permanent staff is limited. It may reasonably be assumed that with the increased cost of hiring agency staff that companies could cut back on permanent recruitment, but that would only affect potential staff, not staff already employed. As discussed on page 18, increased access to training for agency workers could result in training opportunities being transferred away from permanent employees if training budgets could not be increased.

### *(iii) The effect on employment businesses*

To a large extent the effect of this Directive on employment businesses will be based on the hirers demand for their services due a rise in the cost of agency workers as discussed above. Also the effect of additional administrative burden on their costs will also have an effect in the flexibility to deal with current and new demand.

## **H: Risks**

The analysis so far is based on a number of assumptions about the detail of the provisions of the Directive, as well as some of the underlying evidence base. The second public consultation on implementation will facilitate further analysis to arrive at a more robust cost-benefit estimate, first of all from a static perspective, but also more importantly taking into account the dynamic effects of the introduction of the Directive.

## **I: Enforcement**

The Government is committed to consulting the social partners regarding the implementation of the Directive, in particular with regard to mechanisms for resolving disputes regarding the definition of equal treatment and compliance with the new rules that avoid undue delays for workers and unnecessary administrative burdens for business. Further work on the costs of enforcement will be undertaken as part of the public consultations.

## **J: Summary table of costs and benefits**

The summary of total maximum costs to hirers rather than employment businesses and maximum benefits is given below by main group and is largely an aggregation of the estimates from tables 6, 7, 9 and 10 above. Where cost ranges were given above, the maximum value has been used here. These estimates should therefore be read as costs may be 'up to' the given figure.

**Table 12. Total quantified costs and benefits by source and by group**

(£ Millions)	Option 2		Option 3	
	Benefits	Costs	Benefits	Costs
<u>Agency worker</u>				
Wages	£2,488	£0	£995	£0
Holiday	£155	£0	£62	£0
Other	£0	£0	£0	£0
Admin burdens	£0	£0	£0	£0
<b>Total</b>	<b>£2,642</b>	<b>£0</b>	<b>£1,057</b>	<b>£0</b>
<u>Employment business</u>				
Wages	£0	£0	£0	£0
Holiday	£0	£0	£0	£0
Other	£0	£90	£0	£90
Admin burdens	£0	£98	£0	£32
<b>Total</b>	<b>£0</b>	<b>£188</b>	<b>£0</b>	<b>£122</b>
<u>Hirer (private sector)</u>				
Wages	£0	£3,367	£0	£1,347
Holiday	£0	£114	£0	£46
Other	£69	£52	£69	£52
Admin burdens	£0	£58	£0	£32
<b>Total</b>	<b>£69</b>	<b>£3,592</b>	<b>£69</b>	<b>£1,476</b>
<u>Public sector (hirers &amp; HM Treasury)</u>				
Wages	£829	£646	£332	£259
Holiday	£52	£136	£21	£53
Other	£21	£15	£21	£15
Admin burdens	£0	£17	£0	£9
<b>Total</b>	<b>£901</b>	<b>£815</b>	<b>£373</b>	<b>£337</b>
<u>Grand Total</u>				
Wages	£3,317	£4,014	£1,327	£1,606
Holiday	£206	£249	£82	£99
Other	£90	£158	£90	£158
Admin burdens	£0	£174	£0	£73
<b>Total</b>	<b>£3,613</b>	<b>£4,594</b>	<b>£1,499</b>	<b>£1,935</b>

Source: BIS estimates. Figures have been rounded

It should be noted that costs are different in magnitude to the benefits because the latter are uprated to include non-wage labour costs. Equally, the maximum total costs should be read as employer costs with 100 per cent pass-through, in which case employment business costs are zero. Hence employment business costs only arise with less than 100 per cent cost pass-through.

**Table 13. Total quantified costs and benefits by option and by group**

(£ Millions)	Option 2			Option 3		
	Benefits	Costs	Net	Benefits	Costs	Net
Agency worker	£2,642	£0	£2,642	£1,057	£0	£1,057
Employment business	£0	£188	-£188	£0	£122	-£122
Hirer (private sector)	£69	£3,592	-£3,522	£69	£1,476	-£1,407
Public sector (Hirers & HM Treasury)	£901	£815	£87	£373	£337	£36
<b>Total</b>	<b>£3,613</b>	<b>£4,594</b>	<b>-£981</b>	<b>£1,499</b>	<b>£1,935</b>	<b>-£436</b>

Source: BIS estimates. Figures have been rounded

From the above table:

- Agency workers would benefit by between £1.1bn (12-week qualifying period) and £2.6bn (Day-1 right)
- Private sector hirers would face net costs of between £1.4bn (12-week period) and around £3.5bn (Day-1)
- Employment businesses would face net costs of between £0.1bn and £0.2bn.
- The Exchequer would incur net benefits of between £0.09bn and £0.04bn. The Exchequer benefits through higher tax revenues and this slightly offsets the higher costs of employing agency workers in the public sector.

To put these figures into some context, £744 billion of wages and employer social contributions were paid across the UK economy in 2007<sup>38</sup>. These costs represent somewhere between 0.3 (12-week qualifying period) and 0.6 per cent (Day-1) of these total payments.

## K: Implementation

Political agreement on the Directive was reached at the EU Employment Council on 9 June 2008 and published in the Official Journal on 5 December 2008. EU Member States have until 5 December 2011 to adopt and publish laws, regulations and administrative provisions. The Government proposes that the legislation will come into force on 1 October 2011.

<sup>38</sup> ONS Blue Book 2008, [http://www.statistics.gov.uk/downloads/theme\\_economy/BB08.pdf](http://www.statistics.gov.uk/downloads/theme_economy/BB08.pdf)

## **L: Monitoring and evaluation**

The new arrangements will be reviewed at an appropriate point in the light of experience.

## Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	Yes
Small Firms Impact Test	Yes	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	Yes
Disability Equality	Yes	Yes
Gender Equality	Yes	Yes
Human Rights	Yes	No
Rural Proofing	No	No

## Annex

### **Annex A: SPECIFIC IMPACT TESTS**

#### **1. Competition Assessment**

##### *Business sectors affected*

Agency workers tend to be concentrated in business services (i.e. legal, accountancy, secretarial) (22 per cent), manufacturing (20 per cent) and 'transport, leisure and retail' (18 per cent), see Table A1. The 1.3 million agency workers in these sectors represents about 4.5 per cent of all UK workers, while the estimated costs from implementing the Directive represent somewhere between 0.3 (12-week qualifying period) and 0.6 per cent (Day-1) of the total UK pay bill in 2006.

##### *Competition Assessment*

In terms of the impact on the pay bill by industry sector, Table A1 presents some indicative estimates excluding non-wage costs for an 8 sector split while Table A2 shows both wage and paid holiday bill (excluding non-wage costs) in a collapsed set of 4 industries. Both tables show figures in terms of the burden across sector and the percentage change in each sector's total wage bill.

In terms of the cost burden, this is estimated to fall greatest on business services (35 per cent), manufacturing (24 per cent) and other public sector (includes local and central Govt.) (15 per cent). In terms of increase on baseline cost, this is estimated to fall greatest on other public sector (includes local and central Govt.) (20 per cent) followed by business services (15 per cent). Overall, the Directive may raise the cost of agency workers by almost 10 per cent.

**Table A1. Wage bill impact by 8 sector split**

Measure	Industry sector <sup>1</sup>								Total
	Manufac- ture	Other production sectors	Business Services	Transport, Leisure & Retail	Other services sectors	Health	Education	Other public sector <sup>2</sup>	
Proportion of agency workers	20%	7%	22%	18%	10%	6%	10%	7%	100%
(A) Total increase in wages from the Directive (£ Million)	£320	£90	£460	£80	£160	£20	-	£200	£1,330
% burden of total costs on sector	24%	7%	35%	6%	12%	2%	-	15%	100%
(B) Baseline costs: Total wage bill before the Directive (£ Million)	£2,770	£1,110	£3,000	£2,310	£1,380	£1,520	£1,180	£1,000	£14,280



(A/B) % change in total wage bill after the Directive	12%	8%	15%	3%	12%	1%	-	20%	9%
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Source: BIS estimates. Figures have been rounded to the nearest £10 m.

Note: 1 'Education', 'health' and the 'other public sector' presented in the table are a close but not a complete match with the public sector, as there are private sector jobs within this sector and public sector jobs in the other industry sectors.

2 Includes Central & local Govt. "-" means negligible amount less than £ 5m

Table A2 (next page) tells a similar story on a reduced number of industry sectors, business services again stands out with the greatest burden of overall costs and increase in baseline costs.

**Table A2. Wage & paid holiday bill impact by 4 sector split**

Measure	Industry sector <sup>1</sup>				Total
	Production sector	Business services	Other services	Public sector	
Proportion of agency workers	27%	22%	28%	23%	100%
(A) Total increase in wages & holidays from the Directive (£ Million)	£420	£480	£250	£260	£1,410
% burden of total costs on sector	30%	34%	18%	18%	100%
(B) Baseline costs: Total wage & holiday bill before the Directive (£ Million)	£4,370	£3,370	£4,170	£4,160	£16,070
(A/B) % change in total wage bill after the Directive	10%	14%	6%	6%	9%

Source: BIS estimates. Figures have been rounded to the nearest £10m

Note: 1 The 'Public sector' presented in the table is a close but not a complete match with the public sector, as there are private sector jobs within this sector and public sector jobs in the other industry sectors.

## 2. Small Firms Impact Test

Once again, the lack of robust data on agency working poses problems for more in-depth analysis and in particular to assess the true effect of the Directive on smaller firms. Data from both the LFS and the CBI are used below to provide some insight into the effects, though this should not be considered definitive.

### *Annual cost per organisation*

The annual costs per organisation, presented on the summary cost sheets, are calculated by splitting the cost by the proportion of agency workers who reported they worked in that workplace size. This is divided by the number of organisations in each of these size categories. Not all these organisations will use agency workers, so these figures should be treated as indicative only.

#### *(i) Distribution of agency workers by number of employees at workplace*

Table A3 below demonstrates the distribution of agency workers by firm size and industry – denoted here by the number of employees at the workplace. It is clear that agency working is relatively more concentrated in larger

organisations. For instance, over a third of agency workers are in workplaces with fewer than 50 employees compared with about half across all employees.

**Table A3. Distribution of agency workers by number of employees at workplace**

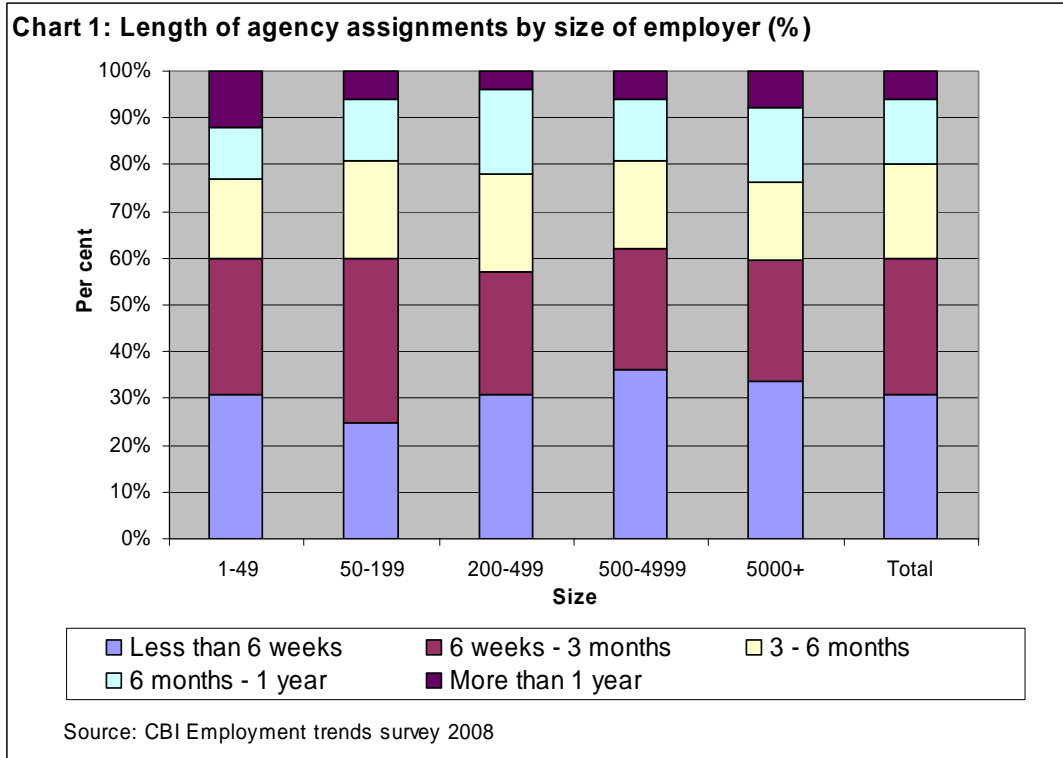
% response Industry sector	Workplace size <sup>1</sup> (employees)				Total
	Micro	Small	Medium	Large	
Manufacture	6	15	34	44	100
Other production	24	22	38	17	100
Business Services	12	17	43	28	100
Transport, Leisure & Retail	22	32	24	22	100
Other services	14	25	24	38	100
Education	14	48	28	10	100
Health	19	27	19	35	100
Other public	10	19	25	46	100
<b>Total</b>	<b>14</b>	<b>24</b>	<b>30</b>	<b>32</b>	<b>100</b>

Source: Annual Population Survey April 2007 - March 2008. Proportions may not sum to 100 due to rounding.

Note: 1 Micro businesses are defined as having 1-10 employees, Small as 11-49, Medium as 50-250 and Large 250+

(ii) Length of agency assignments by size of employer

The latest data from the 2008 CBI Employment Trends Survey shows the distribution of agency worker assignment lengths by employer size. In general, there does not appear to be much difference in assignment lengths of 3 months or more between larger and smaller employers, see chart 1.



(iii) Distribution of agency workers pay by number of employees at workplace

In firms of all sizes, apart from micro businesses, agency workers earn less than their permanent comparators. In large workplaces (250+ employees), median hourly earnings of agency workers are only 70 per cent of the level of their permanent comparators, compared with 97 per cent among small workplaces (11 – 49 employees).

**Table A4. Median hourly wage of agency workers and permanent employees by number of employees at workplace**

	Workplace size <sup>1</sup> (employees)			
	Micro	Small	Medium	Large
(A) Agency workers	£8.53	£8.12	£7.64	£8.49
(B) Comparator: All permanent employees who have been with their company for less than 2 years <sup>2</sup>	£7.98	£8.35	£9.88	£12.08
(A/B) Hourly pay gap	107%	97%	77%	70%

Source: Annual Population Survey April 2007 - March 2008

Note: 1 Micro businesses are defined as having 1-10 employees, Small as 11-49, Medium as 50-250 and Large 250+

2 Certain occupation groups were excluded in this comparator where only a small percentage of agency workers are found (i.e. less than 0. per cent)

Overall, the LFS data suggests that agency working is less prevalent in smaller firms and the hourly pay gap is also smaller among smaller firms as such the introduction of the Directive is likely to have a greater impact on larger firms.

### 3. Equality Impact Assessment

The characteristics of agency workers<sup>39</sup> are presented alongside median hourly earnings differentials to inform how equal pay provisions are likely to affect the equality in this part of the labour market, as narrowing these differentials is likely to be the main effect of the Directive.

#### By gender

LFS/APS and the Survey of Recruitment Agencies (SORA) data show around 43 – 45 per cent of agency workers are female. According to REC data the proportion is higher at 58 per cent. In terms of full-time median hourly earnings (Table A5), male agency workers appear to have a greater wage differential at 75 per cent of the permanent comparator's level compared with 86 per cent among female full-timers. Therefore male full-time agency workers are likely to gain more from the Directive than female workers. Among part-timers, both male and females compare better as their median hourly earnings are greater than the permanent comparator.

**Table A5. Median hourly earnings of agency workers and permanent employees by gender and full-time/part-time split**

	Median hourly earnings		
	Male	Female	All
<b>(A) Agency workers</b>			
Full time	£6.48	£6.86	£6.58
Part time	£6.17	£8.00	£7.14
All	£6.48	£7.03	£6.67
<b>(B) Comparator: All permanent employees who have been with their company for less than 2 years<sup>1</sup></b>			
Full time	£8.62	£8.00	£8.33
Part time	£5.58	£5.95	£5.83
All	£7.96	£6.90	£7.40
<b>(A/B) Hourly pay gap</b>			
Full time	75%	86%	79%
Part time	111%	134%	122%
All	81%	102%	90%

Note: 1 Certain occupation groups were excluded in this comparator where only a small percentage of agency are found (i.e. less than 0.2 per cent)  
Source: Annual Population Survey Apr 2007 - Mar 2008

<sup>39</sup> See BIS publication "Agency working in the UK: A review of the evidence"; [www.berr.gov.uk/files/file48720.pdf](http://www.berr.gov.uk/files/file48720.pdf)

## By age

LFS/APS data show around 33 per cent of agency workers are 16 to 24 years old compared with 16 per cent of all employees. According to REC data the proportion is lower at 15 per cent. In terms of full-time median hourly earnings (Table A6), older agency workers appear have a greater wage differential at 72 per cent of the permanent comparator's level compared with 91 per cent among 16 - 24 year olds. Therefore older full-time agency workers are likely to gain more from the Directive than younger workers. Among part-timers, all ages compare better as their median hourly earnings are greater than the permanent comparator.

**Table A6. Median hourly earnings of agency workers and permanent employees by age and full-time/part-time split**

	Median hourly earnings			All
	16- 24	25 - 49	50 +	
<b>(A) Agency workers</b>				
Full time	£6.08	£6.94	£6.83	£6.58
Part time	£5.83	£8.15	£9.03	£7.14
All	£6.00	£7.14	£7.29	£6.67
<b>(B) Comparator: All permanent employees who have been with their company for less than 2 years<sup>1</sup></b>				
Full time	£6.68	£9.63	£8.28	£8.33
Part time	£5.28	£6.25	£6.39	£5.83
All	£6.00	£8.61	£7.50	£7.40
<b>(A/B) Hourly pay gap</b>				
Full time	91%	72%	82%	79%
Part time	110%	130%	141%	122%
All	100%	83%	97%	90%

Note: 1 Certain occupation groups were excluded in this comparator where only a small percentage of agency are found (i.e. less than 0.2%)  
Source: Annual Population Survey Apr 2007 - Mar 2008

## By ethnicity

LFS/APS and REC data show around 66 per cent of agency workers are white British compared with 85 per cent of all employees. In terms of full-time median hourly earnings (Table A7), white British agency workers earn 81 per cent of the permanent comparator's level compared with 75 per cent among those who aren't. Therefore non-white or non-British agency workers are likely to gain more from the Directive than white British workers. Among part-timers, both groups compare better as their median hourly earnings are greater than the permanent comparator.

**Table A7. Median hourly earnings of agency workers and permanent employees by ethnicity and full-time/part-time split**

	Median hourly earnings		All
	White British	Other	
<b>(A) Agency workers</b>			
Full time	£6.76	£6.25	£6.58
Part time	£7.50	£6.17	£7.14
All	£6.89	£6.25	£6.67
<b>(B) Comparator: All permanent employees who have been with their company for less than 2 years<sup>1</sup></b>			
Full time	£8.38	£8.29	£8.33
Part time	£5.81	£5.97	£5.83
All	£7.39	£7.48	£7.40
<b>(A/B) Hourly pay gap</b>			
Full time	81%	75%	79%
Part time	129%	103%	122%
All	93%	84%	90%

Note: 1 Certain occupation groups were excluded in this comparator where only a small percentage of agency are found (i.e. less than 0.2%)  
Source: Annual Population Survey Apr 2007 - Mar 2008

## By disability

LFS/APS and REC data show between 7 and 11 per cent of agency workers are disabled compared with 13 per cent of all employees. While this result isn't statistically significant due to the small sample involved, in terms of median hourly earnings (Table A8) those who are disabled (under the Disability Discrimination Act (DDA)) earn 87 per cent of the permanent comparator's level compared with 78 per cent among those who aren't. Therefore non-disabled agency workers are likely to gain more from the Directive than disabled workers. Among part-timers, both groups compare better as their median hourly earnings are greater than the permanent comparator.

**Table A8. Median hourly earnings of agency workers and permanent employees by disability status and full-time/part-time split**

	Median hourly earnings		All
	Disabled (DDA)	Not disabled	
<b>(A) Agency workers</b>			
Full time	£6.72	£6.57	£6.58
Part time	£6.69	£7.22	£7.14
All	£6.72	£6.67	£6.67
<b>(B) Comparator: All permanent employees who have been with their company for less than 2 years<sup>1</sup></b>			
Full time	£7.73	£8.43	£8.33
Part time	£5.85	£5.82	£5.83
All	£6.86	£7.49	£7.40
<b>(A/B) Hourly pay gap</b>			
Full time	87%	78%	79%
Part time	114%	124%	122%
All	98%	89%	90%

Note: 1 Certain occupation groups were excluded in this comparator where only a small percentage of agency are found (i.e. less than 0.2%)  
Source: Annual Population Survey Apr 2007 - Mar 2008

## Annex G: Consultation Response Form

Once you have completed the form it can be emailed to:

[awdconsultation@bis.gsi.gov.uk](mailto:awdconsultation@bis.gsi.gov.uk)

Or posted to:

Agency Workers Directive Consultation Team  
Department for Business Innovation and Skills (BIS)  
Bay 482  
1 Victoria Street  
London  
SW1H 0ET

Or faxed to: 0207 215 0168

The closing date for this consultation is 11 December 2009

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

We will publish all the responses received in this consultation unless you tick the box below.

Please treat my response as confidential



Name:

Organisation (if applicable):

Address:

Please state if you are responding as an individual or representing the views of an organisation, by selecting the appropriate interest group on the consultation response form. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the box below that best describes you as a respondent to this consultation:

Micro business (up to 9 staff)	
Small business (up to 50 staff)	
Medium business (50 to 250 staff)	
Large business (over 250 staff)	
Business representative organisation/trade body	
Trade union or staff association	
Social enterprise	
Local government	
Legal representative	
Central government	
Individual	
Charity or social enterprise	
Other (please describe)	

### **Scope of the Directive – who is covered**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

(e) what possible additional steps might we take to prevent the unscrupulous from abusing these provisions in order to deny agency workers their equal treatment rights?

Please provide your comments below.

**Defining equal treatment – working time entitlements; pay**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

**Defining the 12 week qualifying period; breaks between (or during) assignments**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

## **Permanent contract of employment and payment between assignments**

- (a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why
- (b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed
- (c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests
- (d) what practical advice you would like to be covered in the guidance which will accompany the Regulations
- (e) given this is a relatively novel approach, we would welcome your views on the proposals and how they will work in practice. We should be particularly grateful to hear views on any possible unintended consequences, in particular where there may be scope for abuse. We will also consider further during the consultation period the approach as regards remedies for breach of these requirements so comments on this issue would also be welcome.

Please provide your comments below.

**Agreements between workers’ and employers’ representatives**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

### **Protection of pregnant women and new mothers**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

**Access to employment vacancies**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.



**Temporary to permanent status**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests – this involves amendments to the Conduct of Employment Agencies and Employment Businesses Regulations 2003 – a draft of the revised Regulation 10 is part of the consultation document

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

**Access to on-site facilities**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

### **Thresholds for bodies representing agency workers**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

### **Information of workers' representatives**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

### **Establishing equal treatment**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

**Liability (and enforcement) in relation to an equal treatment claim**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.

**Information on equal treatment**

(a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why

(b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed

(c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests

(d) what practical advice you would like to be covered in the guidance which will accompany the Regulations

Please provide your comments below.


## **Dispute resolution, employment tribunals and remedies**

- (a) does the response cover the issues which arose from the previous consultation? If not, can you say which areas you consider were not covered and why
- (b) your views on whether the draft Regulations effectively reflect our policy intentions as set out in this document, and if not, how they could be changed
- (c) your views on whether the draft Regulations give rise to any particular issues of concern – especially regarding specific sectoral interests
- (d) what practical advice you would like to be covered in the guidance which will accompany the Regulations
- (e) we said that the question of enforcement remedies would be considered in detail once the framework for establishing equal treatment, information flows and liability had been more fully defined so we would welcome views on this particular issue

Please provide your comments below.



**Any other comments on issues raised in the consultation document**

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