



**Unite response to the implementation of the agency workers  
directive consultation: Consultation on draft regulations**

**This response is submitted by Unite. Unite is the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors.**

**Unite would be willing to provide further verbal or written evidence on this issue.**

**Executive Summary**

1. Unite is extremely concerned about the failure of the draft Agency Workers Regulations to comply with the Temporary Agency Work Directive (2008/104/EC) by "*preventing misuse*" in the application of the principle of equal treatment (Article 5.5) and provide an "adequate level of protection" (Article 5.4) to agency workers across the economy.
2. Unite believes there is a better way to "*provide for appropriate measures in the event of non-compliance*" with the Directive (Article 10.1) and provide "*effective, proportionate and dissuasive*" penalties for infringements as required by Article 10.2).

3. Unite has proposals, which aid compliance with the Directive, assist with the aim (Article 2) and benefit businesses by reducing cost of infringement and encouraging a level playing field for businesses that do not go out of their way to avoid the regulations.
4. Unite proposes that there should be a clause that makes the use of avoidance mechanisms unlawful and provides for clear remedy and enforcement against employers that seek to get round the legislation.
5. If the Government do not provide joint and several liability for employers and agencies, as unions have been requesting, there is an alternative that will avoid the great expense to business, claimants and the tribunal system caused by the current draft regulations, which result in workers suing both the agency and the hirer in every case in order to get any chance at justice.
6. Our current concerns centre around the fact that the regulations fail to set in place anti-avoidance mechanisms to prevent employers using loopholes to avoid compliance. The regulations fail to adequately prevent avoidance and loopholes in the following ways:
  - a. The clause that allows the qualification period to start again if a worker moves to a **substantively different** role
  - b. The limited **6 weeks break** period between assignments is far below expectations and makes the provision basically meaningless.
  - c. The exclusions from the definition of pay undermine the notion of equal treatment - most notably **bonus payments, performance related pay, maternity, paternity and adoption rights and redundancy pay**.
  - d. The exemption of **managed service companies, limited liability companies** and **self-employed** workers will open loopholes to avoid coverage.
  - e. The definition of a **hirer** is too narrow and would be open to interpretation and abuse

7. There is a clear failure to comply with the Directive on discrimination grounds over maternity rights, paternity rights and adoption pay.
8. The exemption for a permanent contract derogation i.e. agency workers that receive pay between assignments, is unsatisfactory as the minimum they can receive has also been set far lower than initially proposed at either the National Minimum Wage (NMW) or 50% of the worker's pay on their previous assignment.
9. The regulations allow the agency a defence to a claim if they "*acted reasonably*" in trying to comply with the law in delivering equal treatment (regulation 12 (2) (b)). Many agencies will be advised to plead this novel defence, which makes the right against them weaker than in any other employment legislation that currently exists in UK law. Together with the separate provision for the hirer to be responsible (regulation 12 (4)), this will result in claimants making claims against the agency and the hirer, without being confident that either may be held responsible.
10. The damages and compensation proposed do not comply with the requirement of the Directive to "provide effective, proportionate and dissuasive remedies." In particular it will be very difficult for an agency worker to prove a loss of future earnings therefore compensation for breaches is likely to be small.
11. The regulations (regulation 20) currently allow for the use of "workforce agreements" and "collective agreements" to modify rights to equal treatment on pay, hours and holidays providing that overall agency workers receive no less favourable rights. It is clear that the provision for "workforce agreements" is in breach of the Directive and Article 11 of the European Convention on Human Rights. The provision will be

used to push agreements through non-union and non-independent workforce representatives to trade off terms and conditions.

12. The proposed “package approach” (regulations 10, 11 and 20 (1)) to defining equal treatment in terms and conditions is unworkable as different terms and conditions will be of different value to different workers.
13. The regulations have poor provisions for trade union rights including the exclusion of the right to equal treatment for paid time off for trade union duties (regulation 5 (3) (g)) and also not providing rights to information on agency workers deployment.
14. As it currently stands Unite expects the regulations to have very limited impacts on the rights of workers in many sectors including Agriculture, Horticulture, Construction, the Off Shore Industries, Education, many Manufacturing sites and low skilled jobs across the economy.

## **The Unite section case in detail**

### **1. Introduction**

- 1.1 Unite welcomes the Government’s commitment to introduce legislation for implementing the European Agency Workers Directive in the current parliament. This is a major development that if implemented properly will improve the lives of millions of workers in the UK and across Europe.
- 1.2 While there are positive developments in this first draft, as it is currently written the proposals fall far short of providing adequate protection to agency workers and in Unite’s view they breach the European Directive in many areas. Unite hopes that with some changes and simplifications this legislation will become fit for purpose and make a real difference to long suffering agency workers here in the UK.

1.3 Many of the points Unite made in its previous submission are still relevant and pertinent. Unite would encourage BIS officials to revisit the response<sup>1</sup>.

## **2. Implementation date**

2.1 Unite is extremely disappointed that the Government has chosen the latest possible date to implement this legislation. Agency workers urgently need these rights. During a recession agency workers are the first to lose their jobs and currently have no rights to redundancy pay or other protections.

2.2 Unite urges the government to reconsider and bring the implementation date forward to 2010.

## **3. Failure to comply with the Agency Workers Directive**

3.1 Unite believes that in at least four areas the draft regulations fail to comply with the European Directive.

3.2 These are the provision of effective anti-avoidance mechanisms that prevent the use of successive assignments (Article 5.5), the definition of pay (Article 3.1 and 3.2 ), the use of workforce agreements without an agreement from the social partners (See Article 5.4) and the package approach to rights to access of onsite collective facilities (See Article 6.4).

3.3 In many other areas Unite would argue that the Government approach is excessively complicated and unlikely to have the effect of preventing unequal treatment of agency workers in UK workplaces.

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<sup>1</sup> [http://www.epolitix.com/fileadmin/epolitix/stakeholders/Final\\_Unite\\_Response\\_Doc\\_29th\\_july\\_09.pdf](http://www.epolitix.com/fileadmin/epolitix/stakeholders/Final_Unite_Response_Doc_29th_july_09.pdf)

## **Consultation questions**

### **4. Scope of the Directive – Who is covered?**

4.1 Unite welcomes the introduction of the new definition of an “agency worker” based on a tripartite employment relationship. It is also welcome that measures have been included to ensure that equal treatment rights for workers being supplied through an intermediary and chain of agencies and sub-contractors.

4.2 In order to make the new definitions of “hirer” and “temporary work agency” stronger and avoid potential legal challenges Unite would recommend expanding the two definitions. The definitions should be extended to cover “a person or business engaged in economic activity”. In addition, the definition of a hirer should be defined as a “group of undertakings” for the purposes of determining continuity of employment and calculating the 12 week qualifying period. Alternatively any work done for an “associated employer” should count towards the 12 weeks qualifying period as defined in section 297 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A1992) or section 231 of the Employment Rights Act 1996 (ERA 1996).

4.3 This would avoid costly arguments about whether a hirer is an individual manager or commissioner of the work or a company or related companies. It would also constitute an effective anti-avoidance provision as required by the Directive.

### **Territorial scope and rights for seafarers**

4.4 Unite believes that the agency workers regulations should have a broad territorial application and should cover offshore workers and seafarers. To this end the equivalent territorial scope tests for what constitutes employment at an establishment in Great Britain which apply to anti-discrimination legislation, (for example, section 10 (1A) of

the Sex Discrimination Act 1975) should be used in future agency worker regulations.

4.5 It is also essential that all agency workers, who work within the EU regardless of their nationality, should have rights under the Temporary Agency Workers Directive, for example those working on ships trading between EU ports.

### **Exemptions and sham arrangements**

4.6 Unite strongly believes that the exemption of **managed service companies, limited liability companies** and **self-employed** workers will open loopholes to avoid coverage.

4.7 There continues to be a major problem with bogus self-employment and other sham arrangements. Those employers and agencies that are prepared to exploit loopholes to avoid employment rights will be working out ways not to comply. Unite has a solution to avoidance attempts (See recommendations in paragraph 4.29 and 4.30 below).

4.8 Hirers and agencies and their advisors are already preparing to avoid the regulations. As a lawyer writing in the Huddersfield Examiner recently said: *“Many businesses are already looking at creative ways of avoiding the Directive. There is a growing trend of companies creating their own “internal agency” that acts as a “relief bank of workers”. The business would have a large list of individuals who will work on an ‘as and when’ basis (commonly known as ‘casuals’) and the business will avoid having to use employment agencies.”*<sup>2</sup>

4.9 Unite has come across several recent cases of the workers being moved onto “zero hours contracts” by their employers – often replacing formerly permanent members of staff. For example at

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<sup>2</sup> The Huddersfield Examiner: <http://www.examiner.co.uk/business/business-columnists/2009/11/10/chadwick-lawrence-solicitors-neil-wilson-with-the-employer-s-brief-86081-25127931/>

Gatwick the airport service company, Swissport, which provides baggage handling and check-in services, has dismissed paid permanent employees and replaced them with a casual workforce on zero hours contracts. The new workers are forced to work daily shifts which have been as long as 17 hours, starting at 6am and going on until 23.00 hours.

4.10 The zero hours contracts also mean that Swissport does not have to guarantee workers a minimum amount of hours work each week. The workers live in constant fear of not getting enough work from day to day, and from week to week do not know what they will be earning. It means they will struggle to get paid holidays, and have no clear rights to sick leave or other benefits enjoyed by permanent employees.

4.11 Unite has come across similar contracts in care homes and amongst dock workers.

### **Bogus Self-Employment**

4.12 In the case of bogus self-employment Unite has already submitted evidence<sup>3</sup> arguing that the Government's proposed solution to bogus self-employment and tax avoidance will do very little to guarantee workers employment rights, particularly in the construction sector. The current proposals will deem workers to be employees effectively for tax purposes whilst failing to confer employment protections and benefits on them.

4.13 These sham self-employment systems are endemic in the construction sector and have already spread into other sectors of the economy such as catering and call centres. If the new legislation does not provide protection for those workers Unite believes it will act to push more workers into this vulnerable status as employers seek to avoid equal treatment.

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<sup>3</sup> <http://www.epolitix.com/fileadmin/epolitix/stakeholders/UniteresponseFSEinConstruction.pdf>

## **Managed Service contracts**

4.14 Unite is concerned that this exemption will be easily used to circumvent the legislation. Draft regulation 3(1)(a) has the potential to be abused both due to the loose definition of a “hirer” and the phrase “under the direction of.” Under this definition it will be a simple matter for the agency to supply a permanent “manager” on site as a way to circumvent the regulations. This exemption would therefore clearly be a breach of Article 10 .1 and Article 5 .5.

4.15 Unite is already aware of examples where the agency sends a “manager” to the site as a sham arrangement. One member in Leeds reported that the *“agency have a manager on site at certain periods, the role seems to involve supplying the numbers required, ringing up telling the troops to come in or not as the case may be also dealing with paperwork. There is also a so called agency coordinator who spends most of his time general cleaning but is a full time employee of the agency. Neither of these roles involve managing the productivity aspect of agency workers but I’m fearful both the employer & agency may suggest it fits the legislation if passed in this form.”*

4.16 Members in further education, cleaning, hotels, construction, food processing, and manufacturing also raise fears about this. For example in a food processing factory where there are several hundred agency workers present it would not be that difficult for the agency to put in place a sham manager permanently on site for the express purpose of avoiding the equal treatment rights.

## **Legal status of sham arrangements**

4.17 In Unite’s view it is wrong to say that *“...the existing approach taken by Courts and Tribunals is sufficiently robust to address most issues arising from “sham” arrangements...”* (Page14 paragraph 3.7 consultation document).

4.18 The Courts and Tribunals continue to place heavy reliance on written “agreements”, which working people realistically have no choice but to sign.

4.19 His Honour Judge Peter Clark giving the annual lecture to the Employment Lawyers’ Association on 20 November 2007 addressed the problems that arise. At that time he was able to refer to a case where “*when certain workers were dismissed...an ET held they were employees of the agency; a decision upheld on appeal by Elias P* <sup>4</sup>. Here the tribunals saw through the documentation produced by the agency...”

4.20 That case was *Consistent v Kalwak and others*, which went on to the Court of Appeal and the decision by the Tribunal and the Employment Appeal Tribunal to see through the “agreement” was overturned ([2008] EWCA Civ 430: 5 April 2008<sup>5</sup>). In that case Lord Justice Rimer referred to the burden in law for the workers to prove the existence of a “sham”. He pointed out that the established law is that to imply a term in contract inconsistent with the written terms “*can only be done if [the contract] is first found to be a sham. That requires a finding that, at the time of the contract, both parties intended it to misrepresent their true contractual relationship.*”

4.21 The issues have been addressed subsequently and will continue to arise because of the problems in this area of law.

4.22 The most recent decision by the Court of Appeal was in (*Autoclenz v Belcher & Ors* [2009] EWCA Civ 1046: 13 October 2009<sup>6</sup>). In that case Lady Justice Smith’s opening remarks were that: “*This appeal raises a difficult point in employment law...Discerning the individual’s legal status is not always easy, as this appeal demonstrates.*” With

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<sup>4</sup> President of the Employment Appeals Tribunals.

<sup>5</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2008/430.html>

<sup>6</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1046.html>

reluctance on the part of the Court of Appeal Judges, they accepted (in Smith LJ's words) that *"the judge was entitled to infer from the evidence recited that the substitution clause did not genuinely reflect the rights and obligations of the [workers]. With some hesitation, I have come to the conclusion that he was so entitled...to hold, as he did, that both the substitution and 'right to refuse work' clauses did not contain genuine rights. HH Judge Clark was in error when he overturned those holdings."*

4.23 It is patently obvious that the Judges cannot agree on the interpretation of the law, but that in any event it is stacked against reality and the workers.

4.24 In *James v London Borough of Greenwich* as recently as 5 February 2008<sup>7</sup> the Court of Appeal found that as a general rule a temporary agency worker supplied by an employment agency to an end-user client would not be an employee of the client nor an employee of the agency itself, if the contract prepared by the agency declared that to be the case.

4.25 As a postscript in that case, Mummery LJ stated that the Court was *'fully aware'* of the controversy surrounding the lack of protection for agency workers, but stressed that in these circumstances it is not for the courts to *'express views about a change or initiate a change'* and suggested that the vast sums of money spent taking agency cases through the courts might be better spent on *'making representations to and through bodies which can pursue the debate on policy or even reform the law.'*

4.26 The courts do not want to hear more of these cases, but want Government to bring forward legislation to establish justice.

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<sup>7</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2008/35.html>

4.27 As far back as in *Johnson v Montgomery Underwood* in 2001<sup>8</sup> the Court of Appeal asked Parliament to intervene. Other cases demonstrate the abuse by businesses and the vulnerability of workers in a practical setting.<sup>9</sup>

4.28 The last word here to Elias J, the President of the Employment Appeals Tribunal (when the James' case was before his court): "*We should not leave this case without repeating the observations made by many courts in the past that many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end users...A careful analysis of both the problems and the solutions, with legislative protection where necessary, is urgently required.*"<sup>10</sup>

## **Recommendations**

4.29 Unite believes that the definition of agency worker should be based on equality legislation. However if the Government is unwilling to take this approach, it is essential that the regulations are extended to prevent loopholes. Regulation 3.3 should state that the following factors, for example, should not prevent an individual being an agency worker:

- The inclusion of a substitution clause within an individual's contract;
- The individual provides their own equipment, tools or plant;
- A person, who is not employed by the hirer employer, directs or supervises work on a day to day basis.
- There should also be a statutory presumption that any individual supplied via a temporary work agency is an agency worker for the purposes of the Regulations. The burden for proving that an individual is not an agency worker and therefore does not qualify

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<sup>8</sup> *Johnson v Montgomery Underwood* [2001] IRLR 269

<sup>9</sup> *RNLI v Bushaway* [2005] UKEAT 0719/04, and *Bunce v Potsworth Ltd (t/a Skyblue)* [2005] IRLR 557 to name but two.

<sup>10</sup> *James v Greenwich Council* EAT 18 Dec 2006 UKEAT/0006/06 paragraph 61

for equal treatment rights should rest with the employer or agency and not the agency worker.

4.30 Unite also believes that the following clause should be inserted into draft regulation 14(2) to protect the agency worker from attempts to circumvent the regulations:

- *(c) that the temporary work agency or hirer deliberately attempted to circumvent or circumvented a right conferred on an agency worker by regulation 9 or 10 by preventing successive assignments, making or causing a break in an assignment, changing the agency workers role or job, changing relevant terms or conditions, or otherwise*

## **5. Defining equal treatment – Working time entitlements; pay**

5.1 Unite is disappointed that DBIS has defined pay based on section 27 of the Employment Rights Act 1996 rather than under discrimination law as the trade union movement requested.

5.2 The definitions in the ERA 1996 are considerably weaker than under discrimination law and in Unite's view this goes against the spirit of the legislation.

5.3 Unite also has concerns that, by excluding certain types of remuneration from the draft that are included in the definition of "wages" in the ERA 1996 with no express agreement from the social partners, this will be in breach of the Directive (see Article 3.2 and 5.4).

5.4 In particular Unite would argue that the following elements of pay cannot be excluded from the definition if government is using ERA as the basis for its definition:

- Maternity Pay,
- Paternity and Adoption pay,

- Time off for dependants,
- Paid time off for trade union duties or training,
- Pay relating to time off for public duties including jury duty,
- Time off to look for work or find training in redundancy situations,
- Time off for young persons to study,
- Expenses and benefits in kind
- Some forms of bonuses such as profit related pay.

5.5 By excluding these elements of pay they are not only failing to deliver equal treatment but are also creating new loopholes for employers to get round the legislation.

5.6 An example of this can be found in the finance sector where the majority of the 1,000,000 workers were on some form of performance related and/or profit related pay systems. The high paid aside, in some companies 10% of pay would have come from profit related schemes<sup>11</sup>.

5.7 Unite would argue that, while other sectors may not be paying people in this way at the moment, the exemption makes it likely that many will use PRP and bonuses as a way to avoid equal treatment.

5.8 In addition, Unite would strongly argue for the inclusion of redundancy pay and compensation for loss of office (both outside of the ERA). These two elements of pay get to the core of the problem affecting agency workers and their vulnerability. While a worker still faces the prospect of redundancy at short notice with no compensation there will continue to be a two tier workforce and high levels of insecurity for agency workers. Unite would therefore call for the deletion of draft regulation 5(3) (d).

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<sup>11</sup> IDS Pay report, July 2009

## **Working time and holiday**

5.9 Unite believes that the provisions on night work in the regulations need to be revised. Under Article 3.1(f)(i) of the Directive it is not permissible for agency workers to be treated less favourably in relation to night work. This includes the requirement to undertake any night work as well as the length of night work undertaken. Regulation 5(1)(c) of the Agency Worker Regulations however appears to suggest that agency workers would only be entitled to equal treatment on the length of night work. Regulation 5(1)(c) should be amended to refer only to 'night work' and not to 'the length of night work'. This would confirm that it would be unlawful for agency workers to be required to undertake night work when directly employed staff are usually or always allocated day shifts.

5.10 The definition of 'night work' found in Regulation 2(1) should also be omitted. The definition used here is taken from the Working Time Regulations 1998. However different statutory definitions and standards for night work apply to different industrial sectors, for example under the Road Transport (Working Time) Regulations 2005 (SI 2005/639). As the Agency Workers Regulations will apply to all industrial sectors within Great Britain, Unite believes that the simplest means of resolving the issue would be for the definition for night work to be removed from the Regulations.

5.11 Unite would like to see the following changes to the holidays proposals.

- Regulation 5 (1) should be amended expressly to include 'bank holidays' This should also include all bank and public holidays including substitute days when public holidays fall at the weekend and any one-off public holidays.

- The idea that there should be payment in lieu of additional holiday entitlements is reminiscent of the practice of rolled-up holiday pay (discredited by the courts) and therefore should be removed.
- There needs to be a clause in the regulations that make it unlawful for an agency worker to suffer detriment on the grounds that they have requested or taken holiday leave.
- There should also be an obligation on agencies and employers to keep records of holidays taken by agency workers to ensure workers take at least their full complement of statutory leave each year.

5.12 Unite wants it to be made clear in this legislation that after the 12 week qualifying period workers will be entitled to backdated pay and holidays from day one.

## **6. Defining the 12 week qualifying period**

6.1 As expressed in the previous Unite response Unite favours the introduction of day one rights for agency workers. However given the agreement for a 12 weeks qualifying period Unite welcomes DBIS's decision to use the 12 calendar weeks approach.

6.2 It is important to note that the 12 week qualifying period will exclude many of the most vulnerable workers from coverage by this Directive such as seasonal agricultural workers and construction workers. As the Gangmasters Licensing Authority noted in its annual report "*in terms of length of assignment [for temporary agricultural workers], the most common time period was under 6-weeks and most placements appear to last under 6-months. The short-term nature of the work assignments means that the implementation of the Agency Worker Directive... will only affect a minority (albeit sizeable) of GLA-licensed operators.*" According to the GLA's survey, 64% of agency workers are on assignment for under 12 weeks."

6.3 A recent article advising employers explained that “*the 12 week qualifying period may lead to a regular turn-over of agency staff and gaps between periods of assignment, in order to avoid the rules on equal treatment.*”<sup>12</sup>

6.4 Unite strongly argues that if these short term and seasonal workers are to have any hope of getting employment rights under this legislation then there needs to be a significantly longer break period than six weeks. The union believes that the best way to deal with this issue is a reference period of 6 years in line with breach of contract legislation.

### **Agreement from the social partners**

6.5 Under Article 5.4 of the directive qualifying periods are only possible if there is an agreement between the social partners, as there is in the UK, but even then such an agreement is subject to the restrictions in 5.4. The restrictions on a social partners’ agreement are that “*an adequate level of protection*” must be provided.

6.6 It is clear that in these draft regulations the level of protection is inadequate, especially in the absence of a further remedy in relation to any attempts to avoid the regulations. (See Unite’s proposed remedy – paragraph 4.30 above)

6.7 The TUC only agreed to the 12 weeks qualifying period with the proviso that the Government would introduce strong and effective anti-avoidance measures to prevent successive assignments and the misuse of Article 5 of the Directive. In Unite’s opinion these draft regulations fail to do so in at least three significant ways:

- The limited 6 weeks break period between assignments is far below expectations and makes the provision basically meaningless.

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<sup>12</sup> <http://www.freshbusinessthinking.com/news.php?CID=&NID=2671&PGID=1>

- The clause that allows the qualifying period to start again if a worker moves to a “*substantively different work or duties*” (regulation 7 (3) (b) (ii))
- The definitions of “hirer”, “given job” and “assignment” will open potential loopholes as they are currently written. These are likely to be interpreted by the courts and tribunals as a difference that is anything more than insubstantial.

6.8 Indeed, it is clear that the draft regulations are wrong in relation to the understanding of an assignment. An assignment under Article 3.1 (e) refers to the duration of a period of time spent with a particular hirer and is distinct from the jobs or roles undertaken whilst on the assignment. In other words there may be several different jobs undertaken during one assignment. Further, there is no reference to the agency in relation to an assignment, such that it is possible to have one assignment with a hirer, but covering a period with one agency followed by another agency.

6.9 Draft regulation 8 makes matters worse by providing that beyond the 12 week qualifying period, similar principles apply to stop the continuing right to equal treatment. Changing the role and/or encouraging a break of over 6 weeks will defeat claims. This is not effective anti-avoidance and does not comply with Article 5.5.

6.10 Unite has absolutely no doubt that all these factors will open the way for avoidance action by employers. In low paid and low skilled jobs it will be relatively straight forward to rotate workers every 12 weeks between sites and companies, create breaks of over 6 weeks, or change roles to exploit the lack of clarity in the definitions. This will make the regulations in breach of Article 5.5 of the Directive, in that they will fail to amount to “*appropriate measures...with a view to preventing misuse in the application of [the principle of equal*

*treatment] and in particular to preventing successive assignments, designed to circumvent the provisions of this Directive”.*

### **Breaks in the 12 weeks**

6.11 Unite is concerned that there are also substantial flaws in the treatment of breaks in the qualifying period. Unite believes the standard statutory rules relating to continuity of employment contained in sections 210 to 219 of ERA 1996 should also apply to equal treatment rights for agency workers. As a result:

- Continuity should not be broken where an agency worker is reassigned to a different job but continues to work for the same hirer.
- Where an agency worker is incapable of work wholly or in part as a consequence of sickness or injury, the period of absence should also count towards continuity of service provided it does not exceed 28 weeks (s212(3)(a) of ERA 1996).
- Absences due wholly or in part to disabilities should be treated in the same manner as absences due to maternity, paternity or adoption related leave under regulation 7(5). Failure to make this change could result in a legal challenge on the grounds of disability discrimination. The 28 weeks' limit on sickness related absence should also not apply to individuals who are absent for disability related sickness.
- Absences due wholly or in part to a temporary cessation of work (s.212(3)(b) of ERA 1996) should also count towards continuity of service. This amendment would be of particular assistance in the sectors such as education where organisations close for periods of time (for example during the summer vacation) and therefore no work is available for agency workers. In the case of *Ford v Warwickshire County Council* [1983] IRLR 126 HL, the House of Lords ruled that an interval between two contracts of employment (which spanned the summer vacation) did not break continuity as the employee was absent from work due to a temporary cessation of work.

- An agency worker's continuity of service should also not be broken where they take part in a strike or industrial action or where an employer organises a lock out (s.216 of ERA 1996).
- The continuity of service for agency workers who are on maternity leave should be protected and therefore continue to accrue for a minimum of 26 weeks, in line with statutory rights to ordinary maternity leave.

## **7. Permanent contract of employment and payment between assignments**

7.1 As explained in the previous Unite submission (3.10) the proposed exemption for workers that receive payment between assignments will maintain a two tier workforce here in the UK. Unite believes that these proposals will have a disproportionate effect on workers in low paid sectors.

7.2 The proposed 50% pay rate or NMW is far lower than that received by workers in other European countries. Unite fears that the lack of equal treatment rights will easily be used to offset the cost of payments between assignments especially for the low paid.

7.3 The derogation would prevent workers registering with several agencies at the same time and also affect their ability to claim benefits entitlements when between assignments – such as working tax credits and job seekers allowance.

7.4 In the light of other weaknesses in the regulations Unite would like to see the removal of regulations 21 and 22.

7.5 If the government proceeds with its approach the proposals must be amended to:

- Guarantee day one rights for holiday and working time in any assignment.

- Regulation 7 needs to be disapplied in relation to agency employees employed under regulation 21
- The pay rates between assignments need to be increased to 100% of their normal earnings assignments (i.e. the pay they receive while on an assignment).
- Regulation 21(2)(a) should be strengthened to define the locations where the agency worker will be expected to work, the hours that the agency worker will be guaranteed pay and the nature of the work that the agency will seek for the agency worker.

## **8. Agreements between workers' and employers representatives**

8.1 Unite is extremely concerned about the inclusion of workforce agreements in the legislation as a way for employers to negotiate modifications to equal treatment.

8.2 Workforce agreements offer little or no protection for workers and there is nothing to stop an employer creating a sham agreement to force through unwelcome changes.

8.3 The 'package approach' to equal treatment rights is also troubling. The idea that different terms and conditions can be easily traded off against each other is naïve at best. Experience working with equalities legislation clearly shows that terms and conditions are of different value to different workers.

8.4 In Unite's view both the inclusion of workforce agreements and the package approach to equal treatment would require a further agreement from the social partners for them to be permissible under the Directive. As it is the inclusion of workforce agreements is not only in breach of the Directive but also contrary to Article 11 of the

European Court of Human Rights (see Demir and Baykara v. Turkey (12 November 2008, application no. 34503/97)<sup>13</sup>

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

9.1 As they stand the regulations do not provide adequate protection or equal treatment to pregnant women and new mothers. As has already been mentioned the proposed definition of pay explicitly exempts maternity related pay and also benefits in kind such as child care vouchers.

9.2 Unite is concerned that if a woman is moved to suitable alternative employment their qualifying period should not restart even if they move employer. They should also be guaranteed the same pay, working hours, and holiday entitlement as on their previous assignment.

9.3 The Directive requires agency workers to have access to all rights contained in the Pregnant Workers' Directive (92/85/EEC) including the right to take maternity leave and subsequently to return to work and protection from dismissal on pregnancy related grounds.

9.4 The following changes need to be made to the regulations:

- The definition of pay for purposes of equal treatment rights must include payments relating to maternity, paternity and adoption leave. Failure to do so is likely to be in breach of the Directive.
- The continuity of service for agency workers who are on maternity leave should be protected and therefore continue to accrue for a minimum of 26 weeks, in line with statutory rights to ordinary maternity leave.
- Regulation 10 must be extended to provide rights for agency workers to equal access to all facilities in the workplace, including

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<sup>13</sup><http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=843054&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

sanitary facilities, staff rooms, rest facilities and breast-feeding facilities.

## **10. Access to employment vacancies**

10.1 Unite supports the proposals to make agency workers aware of permanent vacancies (as covered by Article 6.1 of the Directive). However, the reference to “*comparable employee*” and the context in which the words “*permanent employment*” are too restrictive to comply with the Directive. For example, Article 6.1 provides for an agency worker to be given details of a fixed term job, or even another agency role, which may “*give...opportunity to find permanent employment.*” Employers should develop additional ways of notifying agency workers of vacancies for those workers who are often away from the hirer’s premises such as drivers.

10.2 Unite also supports the proposals that in redundancy situations directly employed staff should get priority in applying for vacant posts.

## **11. Temporary to permanent status**

11.1 Unite’s position on this has not changed. In Unite’s view there should be no transfer charges for workers going from temporary to permanent status. Workers should simply be expected to give the same level of notice as if they were getting a job at another employer.

11.2 If the Government continues with the proposed “reasonableness test” for transfer charges this needs to be explicitly defined so that there is no ambiguity as to what “reasonable” actually means. At the very least charges should be capped and dependent on justifiable costs incurred through transfer.

## **12. Access to on-site facilities**

12.1 Unite does not agree with the Government’s approach to access to collective on-site facilities in regulations 10 and 11. Unite believes that

a “package approach” to equal treatment does not comply with the Directive.

12.2 Adopting a package approach will disadvantage groups of workers; make it more difficult to enforce their rights; and will present the tribunals with the impossible task of assessing the differing values of different benefits to different workers.

12.3 Unite therefore suggest that:

- Regulations 10 and 11 should state that an agency worker has the right to equal treatment in relation to access to collective facilities as compared with directly employed staff, unless the difference in treatment can be objectively justified.
- Regulation 10 sets out an exhaustive list of collective facilities, and refers only to canteens, childcare facilities and transport services. The list should be non-exhaustive and include reference to toilets, sanitary facilities, staff rooms, rest facilities and breast-feeding facilities as illustrations of the types of facilities covered.
- In addition regulation 10 is limited to facilities in the hirer’s *establishment*. This restriction is not in the Directive and would exclude agency workers from for example “transport services” as these would not technically be available within an establishment.
- There should be a provision to give agency workers the right to equal access to in-house training programmes and agency workers should also be entitled to be paid when they are expected to undertake any pre-assignment training. Agency workers should also be given equal rights in the new statutory right to request time off for training.

### **13. Thresholds for bodies representing agency workers**

13.1 Unite supports the legislation’s clarity that agency workers have representation rights in the temporary work agency.

## **14. Information of workers' representatives**

14.1 Unite is concerned that the draft regulations are limiting information rights for workers' representatives to where there is a statutory duty to inform and consult.

14.2 If this legislation is going to be effective and properly enforced it is key that trade union shop stewards and representatives have access to all the information. It is clear that the best way to challenge rogue employers and abuses at work is to empower the workers themselves to defend themselves. Unite members highlight company and sectoral agreements that illustrate good practice on this issue. For example the Code of Practice on the use of agency workers in the Unite – British Printing Industry Federation national agreement sets out clear guidelines on consultation rights for union representatives and conditions for the use of agency workers.

14.3 Unite strongly urges the inclusion of the right for information for purposes of collective bargaining with recognised unions under sections 178 to 181 of TULR(C)A 1992 and also the extension of information rights about agency workers to include terms and conditions information in addition to basic information about numbers, deployment and types of work. This would ensure that unions could assist agency workers in accessing their equal treatment without the need for costly litigation.

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

15.1 As the draft regulations currently stand "*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.*" This is a qualification of liability (responsibility) which does not appear in the directive. Article 5.1 says: "*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.*” Article 10.1 says: “*Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary work agencies or user undertakings.*” This is not an effective measure and it follows that it is not appropriate for these purposes.

15.2 Further under draft regulation 12 (2) A temporary work agency shall not be liable... [including] where it has received...information [from the hirer and] has acted reasonably. That the temporary work agency may “*not be liable*” creates a lacuna. It does say that when the agency is not liable the hirer must be liable in relation to any breach of regulation 9. In any event as is asserted below the obvious practical (cumulative) effect is that a lawyer advising a claimant before an employment tribunal will bring proceedings against both the agency and the hirer. Further, the defence of acting reasonably not only adds to the lacuna, but also invites lawyers to advise parties to raise a dispute before a tribunal. There will be uncertainty, cost on all sides and delayed and denied justice as a result.

15.3 Once draft regulation 12 (4) is considered where the hirer may be responsible for any breach of regulation 9 “*to the extent that the hirer is responsible*”, it is even clearer that the concept of a hirer or agency being responsible for a breach of regulation 9 and Article 5.1 is fundamentally flawed. It does not follow that the hirer must be responsible.

15.4 The claimant’s representatives will not be certain at the outset whether the agency will allege it was not responsible, or that it had behaved reasonably. With a 3 month period to apply to an employment tribunal and no significant costs consequences at the outset the obvious practical effect is that a lawyer advising a claimant will bring proceedings against both the agency and the hirer. The representative could not be certain either that such defences would

not be raised and permitted after the 3 month period. The only safe and obvious option would be to sue both the agency and the hirer in every case.

15.5 In addition both respondents are more likely to deny liability. The respondents' lawyers will advise their clients to dispute responsibility and the agencies' lawyers will additionally advise that the agency should claim to have acted reasonably. The employment tribunal would not be in a position to decide the issue of who is "responsible" as an early and inexpensive preliminary issue.

15.6 A different solution is called for. Unite continues to call for Joint and Several Liability for both the hirer and the temporary work agency.

15.7 If the Government will not provide for Joint and Several Liability Unite would suggest an approach based on the Employers' Liability (Defective Equipment) Act 1969<sup>14</sup> as follows that after regulation 12 (4) the following clauses are inserted:

- (5) (a) Where there is a breach of regulation 9 the temporary work agency shall be deemed to be responsible for that breach and liable for any steps declared, ordered and/or recommended under regulation 15(7) (whether or not the agency is responsible apart from this subsection), but without prejudice to the contribution by action of the complainant under regulation 15(13) and to remedy which is hereby available to the agency against the hirer for the hirers responsibility for the infringement under sub-paragraph (4).
- (b) In so far as any agreement purports to exclude or limit any liability or responsibility of an agency arising under sub-paragraph (5) (a) of this regulation, the agreement shall be void.

## **16. Information on equal treatment – Regulation 13**

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<sup>14</sup> [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1969/cukpga\\_19690037\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1969/cukpga_19690037_en_1)

16.1 The 28 days time for the agency to provide information along with the sequential time period of a lunar month in which the hirer should provide information coupled with 3 month time limit for submitting claims will mean that workers will bring proceedings before the Tribunal in many cases against both the agency and the hirer in order to secure justice.

## **17. Dispute resolution, employment tribunals and remedies**

17.1 Unite broadly supports the approach set out in the regulations but feels that they need to be strengthened if they are going to be effective.

17.2 The damages and compensation proposed do not comply with the requirement of the Directive to “*provide effective, proportionate and dissuasive remedies.*” In particular it will be very difficult for an agency worker to prove a loss of future earnings therefore compensation for breaches is likely to be small. There also needs to be provision for compensation for injury to feelings.

17.3 Unite would suggest that ACAS is given stronger powers of intervention in the event of a dispute.

## **18. Any other comments**

18.1 Unite would like to re-emphasise the need for licensing of the whole agency sector. The Gangmasters Licensing Authority has shown that licensing can make a significant difference to the enforcement of employment rights for those working for agencies.

## **19. Conclusion**

19.1 As they stand the draft regulations fall significantly short of delivering equal treatment to agency workers. The regulations urgently need strengthening and Unite would be happy to lend its legal expertise to help make this important piece of legislation workable and effective.

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