



**Unite response to the implementation of the agency workers
directive consultation**

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 welcomes the Government's move to sign up to the European agency workers directive. This is a major development that will improve the lives of millions of workers in the UK and across Europe. Unite has long campaigned on the issue of equal treatment for agency workers. The growth of this kind of employment practice has played a major part in the decline of British employment rights and terms and conditions.

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

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Executive Summary

- The **Scope** of the legislation needs to be as broad as possible to fulfil the purpose of improving living and working conditions particularly of vulnerable workers (see Directive preamble (1) and (2)) and to avoid attempts to circumvent the Regulations and the Directive (see Article 10).
- Those who may fall within scope of the Regulations who are not vulnerable and who do not need their protection or who cannot benefit from the protection available will simply not use them. Thus it is appropriate to **default to inclusivity**.
- The focus needs to be on the relationship and the fact that a dependent economic worker is carrying out work as required by a user undertaking, through an intermediary, whether or not there is an additional undertaking or person in the **triangular relationship** (such as a “supervisor”, umbrella company, limited company contractor, or bogus self employment).
- Existing definitions of employment businesses and end user are inappropriate.
- By the same token the definition of “**Agency Worker**” should be as wide as possible to prevent avoidance practices. The definitions of those covered by the Sex Discrimination Act (section 9) and other similar legislation are most appropriate.
- Unite does not believe that the 12 weeks qualifying period is justified but if it is to be used then the 12 weeks should be defined as by **calendar weeks** regardless of the number of hours worked by the agency worker. There must also be effective anti-avoidance measures (see Article 5.4 and Article 10). Already the employers’ lawyers are lining up to advise on ways to avoid the regulations. One measure that must be included is for any dismissal, action or detriment to avoid the effect of the Regulations being unlawful. In relation to a dismissal, for example, that should be automatically unfair as in relation to TUPE regulations.
- Unite favours the use of a **reference period of 6 years** in line with breach of contract legislation, along with specific legislation against dismissal or reassignment to avoid equal treatment rights and clear broad definitions.

- The definition of “**Pay**” should be the same overall package as permanent staff, or its monetary equivalent including basic pay, overtime, redundancy pay, maternity pay, shift allowances and bonuses.
- There should be clear rules for defining **holiday** entitlement for agency workers so that they are not discriminated against for taking holiday.
- All **maternity** related rights should be extended to agency workers
- Agency workers should have equal access to all **workplace services**
- **Comparators:** Equal treatment rules should allow agency workers to draw comparisons with a comparable directly employed worker doing broadly similar work and also a hypothetical worker based on market conditions or collective agreements.
- The specific job that a worker is doing should have no relevance to the definition of an “**assignment**”. The term “assignment” should refer to the period under which the worker is subject to the before mentioned triangular. Changes to job content should only influence pay comparisons rather than eligibility for equal treatment.
- Unite opposes the use of the **derogation** involving permanent contracts and pay between assignments however if it is to be included it should be set at a level that guarantees a living wage for workers.
- The legislation should be used to **tighten the regulations** around the supply of agency workers to do the work of those taking part in lawful industrial action.
- Agency workers should receive the right to join a recognised trade union however unions should be able to choose whether the agency worker counts towards the threshold of the user undertaking or the agency.
- The route to enforce new equal treatment rights for agency workers should be through the **employment tribunal system**. Agency workers should have the statutory right to raise a questionnaire to send to the agency and the end user relating to suspected unequal treatment. This should be useable in an employment tribunal.
- There is no reference to workplace agreements in the directive but **collective agreements**, particularly national collective agreements, could be used to help implement the directive.

- **Vacancies** should be advertised to agency staff except in redundancy situations. There should be no excessive transfer charges.

The Unite case in detail

1. Introduction

1.0.1 Unite welcomes the moves by the Government to sign up to the European Agency Workers Directive. If implemented correctly the directive will benefit many millions of workers across Europe.

1.0.2 Unite has long campaigned to end the disgraceful inequality experienced by agency workers and has provided extensive evidence from members in previous submissions.¹ These have included discrimination on virtually all terms and conditions in the workplace such as pay, holiday, redundancy terms, workplace service, maternity rights and parental leave, training, pensions and sick leave.

1.0.3 Unite notes and emphasises Article 9.2 of the Directive to the effect that more favourable provisions are permissible. Less favourable provisions are not.

1.0.4 The real test of the new legislation will be in the implementation and how it is enforced. Agency and gangmaster employers have shown themselves to be past masters at avoiding legislation and exploiting legal loopholes to abuse workers. The abuse and misuse of agency labour in the UK is now systematic and endemic. It is therefore crucial that every conceivable avenue is explored when implementing this legislation and that effective systems of enforcement are set up.

¹ <http://www.dodsdata.com/Resources/epolitix/Forum%20Microsites/Amicus-Unite/Agency%20Workers%20Response%20Unite%20Amicus%20Section.pdf>

2. Implementation

2.0.1 Unite urges the Government to implement this directive as soon as possible.

2.1 Time frame

2.1.1 The directive states that it must be implemented no later than 5 December 2011. Unite sees no reason why it can not be implemented sooner and urges the Government to seek to implement the directive in full at the earliest opportunity.

2.2 Reducing administrative burdens

2.2.1 The priority of this legislation should not be to reduce administrative burdens for employers but to protect workers from the abuse of employers that seek to erode their employment rights.

2.2.2 There must be a union presence in any working group that is set up as proposed by the consultation document and there must be guarantees that this won't be used as a way to dilute the legislation.

3. Scope, Definitions and Closing Loopholes

3.0.1 The key to the implementation of this directive are the definitions used to define the scope of the legislation and prevent loopholes.

3.1 Scope of the Directive

3.1.1 The **Scope** of the legislation needs to be as broad as possible to fulfil the purpose of improving "living and working conditions" particularly of vulnerable workers (see Directive preamble (1) and (2)) and to avoid attempts to circumvent the Regulations and the Directive (see Article 10).

3.1.2 Preamble 1 states 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*"

- 3.1.3 Preamble 2 states 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*”
- 3.1.4 The fundamental principle of the legislation should therefore be to prevent any loopholes from being used to disadvantage agency workers compared to full time equivalents doing comparable jobs.
- 3.1.5 Unite knows from experience that those who seek to exploit workers will use whatever loophole they can to avoid implementing the spirit of the legislation. The Government has in recent years had to act to close several loopholes in employment law, for example in minimum wages legislation to include tips and gratuities. Similarly the Employment Act 2008 sought to improve enforcement in relation to the National Minimum Wage and employment agencies although in this case the Act did not go far enough. It is also apparent from the work of the Gangmasters Licensing Authority the extent that some agency employers will go to avoid compliance with regulations².
- 3.1.6 **Unite’s position is that there should be no exclusions from the scope of this legislation.** It must be based on broad definitions covering the triangular relationship between worker, agency and user (see section 3.3). Those who may fall within scope of the regulations who are not vulnerable and who do not need their protection or who cannot benefit from the protection available will simply not use them. For example a Unite member at Steria IT services in Chesterfield reported that “the staff brought in from agencies work as freelance, self employed contractors. They receive a much higher rate of pay which is

² <http://www.gla.gov.uk/index.asp?id=1012780>

introduced to compensate for the lack of other benefits received by self-employed staff.”

3.1.7 Unite would therefore argue that it is appropriate to default to inclusivity.

3.2 Temporary work agency definition

3.2.1 The consultation seeks views on which types of organisations, businesses and contractual relationships should be included or excluded from the scope of the legislation (i.e. umbrella company, self-employment, limited company contractors, managed service contracts or master/neutral vendors).

3.2.2 Unite believes that all current definitions are inadequate and the attempts to amend them will inevitably lead to the creation of new loopholes in the law thus failing to comply with Article 5 of the directive.

3.2.3 Unite instead would argue that a new definition for a “temporary work agency” should be created that inclusively covers all workers who carry out work in the context of the following triangular relationship.

3.3 Triangular relationship

3.3.1 All workers need to be covered by the directive if they are subject to the **triangular relationship** of a “dependent economic worker” carrying out “work” as required by a “user undertaking”, through an “intermediary”.

3.3.2 This relationship must be the defining characteristic of any legislation that is implemented whether or not there is an additional undertaking or person in the triangular relationship (such as a “supervisor”, umbrella company, limited company contractor, or bogus self-employment). In other words it is the power relationship that is defined.

3.3.3 The proposed exemptions for limited company contractors, self employed workers, managed service contracts and master/neutral vendors would leave many workers potentially outside the scope of the legislation. All of these forms are currently being used in the construction sector to get round employment legislation. In the case of limited company contracts/personal service companies this is also being used for tax avoidance - estimates suggested that such practices could cost the Treasury around £300 Million a year³.

3.4 “Temporary Agency Worker” definition

3.4.1 As with the proposed definition of “employment business” the proposed definition of “agency worker” is inadequate.

3.4.2 Under the definition of “worker” covered in the Employment Rights Act 1996 and the Working Time Regulations 1988 employers have been able to devise “bogus self employment arrangements” (see 3.5), which fall outside of the worker definition and which have the effect of depriving workers of employment rights. The same definition in the National Minimum Wage Act has left some people who need to work without the right to claim the national minimum wage⁴.

3.4.3 Unite reasserts the need for the definitions in this legislation to be as broad as possible to make it effective. This means that the definition of “agency worker” must be drafted in such a manner to prevent employers from using contractual constructions to avoid the new legislation.

3.4.4 It is imperative that the definition of an agency worker should be primarily based on the existence of the aforementioned triangular relationship (section 3.3) between the agency, the economically dependent individual and the user employer as opposed to on the

³ <http://www.unitetheunion.com/sectors/construction/taxation.aspx>

⁴ See James v Redcats (Brands) Ltd: 21 February 2007 UKEAT/0475/06/DM

nature of the contract or employment relationship which exists between the agency worker and the agency.

- 3.4.5 Unite argues that the definition of “**agency worker**” that integrates an understanding of this relationship should be based on the definitions of those covered by the Sex Discrimination Act (section 9) and other similar legislation.

3.5 Bogus self-employment

- 3.5.1 This new agency worker definition will not cover those workers that are genuinely self-employed as they will not be subject to the triangular relationship but will close the loophole that allows bogus self-employment for agency workers.
- 3.5.2 Unite has come across numerous examples of bogus self-employment and believes that the proposal to exempt self-employed workers from the legislation will be a green light for this practice to continue.
- 3.5.3 Government has recognised⁵ that this practice is widespread in construction. In July 2008 construction unions uncovered the case of 12 workers engaged by the subcontractor Prodim at the Mansfield Hospital PFI project (on which the main contractor was Skanska) who after illegal deductions were taking home less than £100 for a 70 hour week.⁶ Included in the deduction was £76.80 weekly towards the construction industry scheme (CIS) effectively registering them as self employed without their consent.
- 3.5.4 Unite has uncovered this practice in other sectors too. For example in the tube station cleaning contractor Blue Diamond that was axed from its £20 million three year contract for stealing wages from its workforce in 2006. It was found that the cleaning company - subcontracted by Metronet - was paying its employees considerably less than the union

⁵ http://www.hm-treasury.gov.uk/d/consult_falseselfemploymentconstruction_200709.pdf

⁶ Building Magazine – 4th July 2008

negotiated hourly rate for cleaners allegedly keeping the difference. This was done by forcing the workers to set up as limited companies and then settling their own mark up from them. Not only did these workers incur administrative costs, they also have to pay their own insurance and provide their own equipment and training.

3.5.5 Another example is Smith News that distributes newspaper and magazines. The company uses over 1,600 sham self-employed workers in its deliveries using legal loop holes to avoid responsibility. Workers have no control over what, where, or when they can make deliveries but the company argues that because they are able to find someone to replace them then they are not self-employed.

3.5.6 Lack of legal clarity on this issue has left workers open to abuse. The case James v Redcats (Brands) Ltd usefully highlights the potential for this. Mrs James' work was to deliver parcels. The parcels were delivered to her home by Redcats (Brands) Limited but her contract said Mrs James was self employed. As a result the Employment Appeal Tribunal in applying the law as it has been interpreted by higher courts was obliged to dismiss her claim to be paid the minimum wage in respect of her work.

3.5.7 Another example is the case of Consistent Group v Kalwak and others which involved a group of Polish workers brought to the UK to work in food processing and hotels. On 5 February 2008 the Court of Appeal⁷ said "Consistent is an agency that provides staff for food processing factories and hotels, mainly the latter." The staff however had contracts referring to them as "self-employed". The Court was therefore not able to conclude that those staff had rights as employees or workers.

⁷ Court of Appeal Case No: A2/2007/1211

3.5.8 Other cases demonstrate the abuse by businesses and the vulnerability of workers in a practical setting⁸. Unite believes that many Courts are far too reluctant to look behind the written word to protect those who work for a living. The problem is such that workers may never be sure, even after obtaining legal advice from an expert in the field, whether they are employed by an agency, a sub-contractor, or by the end user of their services, or none of them.

3.5.9 Some courts have acknowledged this and asked for clarity from parliament. For example in Johnson v Montgomery Underwood in 2001⁹ the Court of Appeal asked Parliament to intervene. Similarly in December 2006, the President of the UK Employment Appeal Tribunal said: *“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.”*¹⁰

3.5.10 Unite believes that the implementation of this Directive is a good opportunity to tackle this loophole and end the practice of bogus self-employment for agency workers.

3.6 Qualifying Period

3.6.1 Unite does not believe that the **12 weeks qualifying period** is justified. As it stands it will mean that a large number of the most vulnerable agency workers will still not qualify for equal treatment. Unite members who work in the construction industry highlight that many jobs are less than 12 weeks long. Also GLA figures show that currently 64% of

⁸ RNLI v Bushaway [2005] UKEAT 0719/04, and Bunce v Potsworth Ltd (t/a Skyblue) [2005] IRLR 557 to name but two.

⁹ Johnson v Montgomery Underwood [2001] IRLR 269

¹⁰ James v Greenwich Council EAT 18 Dec 2006 UKEAT/0006/06 paragraph 61. The James case went to the court of appeal, where Ms James lost again. After several years working for the Council via an agency, she was not employed by anybody.

workers in the sectors that it covers worked on assignments that lasted less than 12 weeks.¹¹

- 3.6.2 Employers are already preparing ways to avoid implementing the legislation -as a recent article in Caterer and Hotelkeeper Magazine illustrates¹². The article states that *“If you cannot afford to give agency workers the same rate of pay and basic benefits as your permanent staff, bear in mind that, under current proposals, you will not have do so for the first 12 weeks that they work for you. At 12 weeks, you have the option to stop using that particular agency worker.”*
- 3.6.3 The article goes on to say that *“If the Government's proposals are enacted, you will also be able to move a worker into a different role (for example, move waiting staff to reception)...to avoid having to give workers equal rights”* (see section 3.9).
- 3.6.4 By applying the 12 weeks rule the Government now has to set up a complicated set of legislation to prevent loopholes and provide effective anti-avoidance measures as set out in Articles 5 and 10.
- 3.6.5 Article 5.4 in particular – which allows for the declaration of 20 May 2009 between government, the CBI and the TUC – refers to the requirement for adequate protection for agency workers.
- 3.6.6 Unite would stress that there is a particular opportunity to extend collective agreements *“to all similar undertakings in a certain sector, or geographical area”* in relation to agency workers at least, which would ameliorate the effects that led to the industrial action at Total and elsewhere this year. It would also help to defeat the efforts of the BNP and others to exploit the use of foreign workers.

⁸GLA Annual Review 2008: Feb 2009

¹²<http://www.caterersearch.com/Articles/2009/06/04/328071/eu-directive-on-agency-workers.html>

3.6.7 If the 12 weeks rule is to be used then 12 weeks should be defined by calendar weeks regardless of the number of hours worked by the agency worker. Any suggestions that refer to 12 weeks in terms of hours worked would mean that part-time workers would be substantially disadvantaged.

3.6.8 The 12 weeks period should include all training and other periods at the work place and all equal treatment entitlements after the 12 weeks should be backdated to day one of the assignment with the employer.

3.6.9 Article 5.5 of the directive states that there must be effective anti-avoidance measures *“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.”*

3.7 Breaks between assignments

3.7.1 Unite is against proposals for the use of a “minimum break” as this would invite attempts to circumvent the legislation. Unite is therefore calling for the use of a **reference period** of 6 years to protect workers returning to the same workplace in line with the period for a breach of contract claim. It would be entirely possible to have a right to 12 weeks after initial commencement of work via an agency to a particular end user (or related end users¹³), even if the recommencement was many years into the future. The agencies and end users complain that it would be onerous for them to keep records, but **the onus to prove the case rests with the worker**. In other words assuming a worker keeps pay slips then this could be used as evidence even if the agency and user have no record.

3.8 Multiple employers and the corporate veil

3.8.1 In some industries like the print or construction industries it is not uncommon for several related companies to operate on one site, or

¹³ To prevent avoidance by then effect of the corporate veil, or subcontracting – see section 3.8.

sites near to each other, such that those working there are unsure who they actually work for. Such business structures and “the corporate veil” could be used in relation to these regulations to avoid them specifically in relation to the qualifying period. If permitted by the new regulations this would not amount to an “adequate level of protection” under Article 5.4 2008/104/EC.

3.8.2 In cases where numerous companies or subcontractors are working on the same project **equal treatment should refer to work on a site or project even if the worker has moved between several different companies**. In the construction industry where this is most common the national agreements should make equal treatment easy to enforce.

3.9 Change of responsibility

3.9.1 The government approach to changes in responsibilities is not consistent with the triangular relationship definition (see section 3.3). Where “*a worker’s responsibilities change during an assignment*” (paragraph 4.25, page 26 of the consultation) this must be seen in the context of any qualifying period and the need for adequate protection under Article 5.4 and elsewhere.

3.9.2 An “assignment” relates to the period during which a triangular relationship exists. It does not have to be and neither should it be related to the activities undertaken. The reason is that there are opportunities to circumvent the effect of the claim for equal treatment. These opportunities have already been identified by businesses involved in the use of agency workers (See 3.6.3).

3.9.3 It is the existence of the 12 week qualifying period in the agreement at page 81 of the consultation paper that gives rise to the problem. The “adequate protection” required means that it is imperative to apply the interpretation that we have given to the concept of an “assignment” (see 3.9.2). Indeed this is implied by the quoted extract from the

consultation paper that “*a worker’s responsibilities [may] change during an assignment*”.

- 3.9.4 This is not inconsistent with Article 1, nor with Article 5 of the Directive. The activities undertaken by the agency worker become relevant at the point in time at which the comparison is made for equal treatment. Irrespective of any change to the responsibilities of the worker during any 12 week period, the right to equal treatment is with basic working and employment conditions “that would apply if [the worker] had been recruited directly by that undertaking to occupy the same job” as at the time the comparison is made.
- 3.9.5 In any event, provision would still be needed to give rise to a claim, when agencies and/or end users act purposefully to seek to avoid the effect of the equal treatment provisions. For example Unite can imagine a situation whereby an employer changes the responsibilities of the agency worker before the expiry of the 12 weeks to those that leave them having to compare themselves to those on lower paid jobs, than would have applied prior to the change.
- 3.9.6 Any failure to provide adequate protection in relation to this issue would be intolerable.
- 3.9.7 To be effective legislation must provide that reassignment, as well as dismissal cannot be used to avoid equal treatment rights. The legislation must provide a right for the agency worker to claim to an employment tribunal in relation to any dismissal, action or detriment to avoid the effect of the regulations. In relation to a dismissal, for example, that should be automatically unfair in a similar way to exists under TUPE regulations.

3.10 Derogation

3.10.1 Unite opposes the use of an exemption permitting for a derogation from equal pay where an agency worker is given a permanent contract and pay between assignments.

3.10.2 While this would have the advantage of defining the agency workers as employees and therefore guaranteeing statutory employment rights there are serious concerns as to how this would work in practice. Not only would workers find themselves on lower pay but they could potentially be under pressure to take on work well below their skills or earnings capabilities.

3.10.3 Unite has concerns about the ability of workers to sign on to more than one agency. Similarly the lower pay suggested for periods where the worker is not working would have serious repercussions on any redundancy rights. Current proposals suggest that derogation pay is unlikely to deliver adequate living conditions for workers and may have repercussions on the ability of the agency workers to claim benefits entitlements – such as working tax credits and job seekers allowance. It would also have the potential to undermine agency workers ability to make sufficient national insurance contributions which would undermine their entitlement to get statutory sick pay, maternity pay and a pension.

3.10.4 If the Government insists on an exemption the legislation must specify that derogation pay is at a level that guarantees a living wage or better. Any suggestions that push worker pay between assignments below the minimum wage would be completely unacceptable.

3.10.5 Were the exemption brought in Unite expects that this will be used as one way for employers to get round the equal treatment legislation as an exemption would allow the continuation of a two tier workforce in work places where they are used.

4. **What terms and conditions are covered by Equal treatment?**

4.0.1 Unite maintains that equal treatment should cover all terms and conditions available to permanent staff of the user organisations. The only exceptions should be where it is not logistically possible or not in the workers' interests. In those cases there should be provisions for equal benefits to be provided instead by the agency.

4.1 **Definition of Pay**

4.1.1 The proposals in the consultation for pay are inadequate to deliver equal treatment as defined in Article 5.1 for agency workers to receive working and employment conditions "*at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.*"

4.1.2 Unite supports the Government's proposals to include holiday pay, payment of overtime, shift allowances, unsocial hours premiums and bonuses. As it stands there are numerous examples across the economy of agency workers not receiving equal treatment on these rewards.

4.1.3 For example in SOLWAY FOODS Agency workers from Staff Box are paid over £1.00 per hour less and in some cases have worked for company via the agency for up to 3 years.

4.1.4 In Moy Park, Dungannon the percentage of agency labour has increased steadily since 2000 and is now at almost 45% of the total workforce of around 1,500. Terms and Conditions of employment of agency workers are still considerably lower than those of the permanent workforce as the table below shows. Large numbers of the agency workers are also employed for long periods making agency labour a way of life in Moy Park despite undertakings to the contrary.

	Permanent	Agency
Salary	£6.14	£5.73
Holidays	33 days (25 annual and 8 stats)	28 days (stat minimum)

No. of working days	5	6
Finishing time	Set finishing time	No finishing time on Saturday shift
Overtime	Voluntary	Mandatory if requested

4.1.5 In Wincanton on the Supervalu contract in Belfast agency workers are paid £5.75 an hour while permanent workers are paid £7.73. Agency workers get time and a half for working public holidays while permanent workers get double time and a day in lieu. One Unite member there commented that “the exploitation of agency workers on this site is not far off slavery.”

4.1.6 These examples are replicated across the economy with 81% of respondents to Unite’s members survey reporting that agency workers received worse basic pay than their permanent colleagues at their workplace.

4.1.7 Limiting pay to these terms and conditions will however still leave workers at a potential disadvantage and open loopholes for avoidance mechanisms on equal treatment. The consultation’s example of limited companies being used to pay workers in dividends and shares to avoid national insurance contributions serves to reinforce this point¹⁴.

4.1.8 Unite therefore strongly urges that **the definition of “Pay” should refer to the same overall package as permanent staff, or its monetary equivalent while on an assignment** including but not limited to basic pay, overtime, holiday pay, redundancy pay, maternity pay, shift allowances, bonuses, sick pay and pension contributions.

4.2 Additional Rewards and Bonuses

4.2.1 Unite does not agree that benefits associated with long term relationship with an employer such as profit sharing schemes, longer

¹⁴ Page 19 of the Consultation

holiday entitlement should not be covered under the definition of pay. Not only do we know that some agency workers are engaged for many years at a workplace (see section 4.6) but equal treatment should mean that their reward should be linked to the needs and conditions of the job rather than their employment status. In cases of short term placements this should not be an issue as they will be excluded by definition.

4.2.2 Unite's survey shows that in only 14% of responding companies did agency workers receive equal bonuses with all the rest receiving either worse bonuses or no bonuses were available at all. For example one member working at Wincanton in logistics and distribution reported that agency workers had to pick 180 cases an hour to earn a £10 bonus, for permanent staff this was only 150 cases an hour to earn a £40.50 bonus.

4.2.3 Benefits such as share participation, profit sharing schemes or company car allowances are rarely associated with low paid workers. But in cases where the equivalent permanent worker has access to them an agency worker should have the same right. For example Unite workers at Carlsberg reported that agency workers do not receive Carlsberg company benefits such as product allowances and health benefits.

4.2.4 While there may be reasons why a short term agency worker would choose not to partake in the schemes to guarantee equal treatment the option should be equally open to them as to permanent workers.

4.3 Pensions

4.3.1 It is recognised that with new statutory **pension** provisions coming into force in 2012 it may be in the worker's interest for pension's payments to be made into the proposed **personal accounts scheme** rather than for a short period into a company pension scheme.

4.3.2 Unite would however argue that employer pension contributions are deferred pay and therefore should be included in the legislation. Workers should expect to receive equal employer contributions as that received by permanent members of staff at the current user company. This means that if permanent workers are receiving above the statutory minimum contribution from their employer this should be replicated for the agency worker while working at that company.

4.3.3 This should be fairly straight forward for workers on defined contribution schemes but Unite recognises that serious thought would need to be put into making this work for defined benefit schemes.

4.3.4 The proposed inclusion of a worker opt out in the personal accounts scheme is an issue of particular concern. Unite fears that this will have a disproportionate impact on agency workers as they are currently some of the least likely workers to receive a pension.

4.4 Sick Pay

4.4.1 As with pensions, Unite recognises the positive impact of statutory sick pay provision, whilst noting the very low level of payment (£79.15 per week) compared even to the NMW (£229.20 for a 40 hour week). However it is clear that if an agency worker became sick they would be substantially disadvantaged compared to their permanent colleagues who may well be paid in full.

4.4.2 Sick pay is clearly pay and agency workers should be entitled to the same sick pay benefits as permanent workers where these are above the statutory minimum.

4.5 Redundancy pay

4.5.1 Agency workers are severely disadvantaged by the absence of redundancy pay rights. Current legislation allows workers to be sacked at short notice with no compensation for their work.

4.5.2 This has been a major motivating factor for employers to use agency workers especially the practice of using perma-tempers i.e. workers on long term/indefinite temporary contracts.

4.5.3 One of the most dramatic examples of this was in February this year in the BMW plant in Oxfordshire. After the recession hit the industry the company decided to close the weekend shift. This shift had been predominantly staffed by agency workers who had little control over which shifts they worked on. As the agency workers had no rights to redundancy or notice period the announcement led to the sacking of 850 agency workers with one hours notice. The workers, some of whom had up to 5 years service with the company, were threatened with docks to their pay if they didn't return equipment such as overalls, and then escorted off the site. Within a period of a couple of weeks all the agency workers were gone with nothing to show for their service.¹⁵

4.5.4 Unite would argue that this kind of employment practice drastically undermines redundancy legislation and is not an appropriate use of agency labour. It is imperative to include redundancy pay under equal treatment legislation.

4.6 An end to the use of perma-tempers

4.6.1 Unite would also like to see an end to the use of perma-tempers full stop – i.e. workers that are employed on indefinite temporary contracts. Unite members highlight that in some workplaces the so called “temporary” agency workers are working for several years. In essence they are used to create a second tier of easy to sack and exploit workers – a far cry from the justification of flexible workers brought in to cover seasonal variations.

4.6.2 One example of this is Monahan Mushrooms. Over the last four years Monahan Mushrooms has replaced almost all workers at its sites. A

¹⁵ http://www.unitetheunion.com/news_events/latest_news/unite_tells_bmw_heads_you_hav.aspx

workforce of 200-300 permanent workers have been replaced with around the same number of workers on temporary contracts through three agencies. It is clear that these workers are permanent in all but their rights. Some have been working in the sheds for 5 years. Unite members' report that the only reason for the change is that it gives the company the right to change the shifts at short notice, undermine recognition and make hours more flexible. The company also currently has over 100 complaints lodged against it around non-compliance with the Agricultural Wages Order.

4.6.3 At the very least agency workers should receive the same rights as those under fixed-term contracts to be treated as permanent workers after 4 years. Unite would support this period being further reduced and anti-avoidance measures brought in.

4.7 Maternity pay

4.7.1 All **maternity** related rights should be extended to agency workers.

4.7.2 Article 5.1(a) of the directive clearly states that equal treatment must include "*rules in force in the user undertaking*" on the "*protection of pregnant women and nursing mothers and protection of children and young people*"

4.7.3 The consultation document makes the welcome proposals that some maternity related employment rights must be extended to agency workers i.e. temporary adjustment of working conditions for pregnant workers; the right for pregnant women to be suspended on full pay to avoid health and safety related risks and the right to paid time off for ante natal care.

4.7.4 Unite believes that this needs to go further and that the directive requires agency workers to have access to all rights contained in the Pregnant Workers' Directive including the right to take maternity leave

and subsequently to return to work and protection from dismissal on pregnancy related grounds.

4.7.5 It is not acceptable for the length or expected length of a placement to be used as the period during which a woman should continue to be offered alternative work or suspension on full pay as a result of a health and safety risk. If the employer has an ongoing need for an agency worker in the role that the pregnant woman or nursing mother was placed in, then there should be an ongoing duty on the employer to continue to suspend her on full pay if alternative suitable work cannot be found. Similarly, if the agency has suitable alternative placements then there should be an ongoing duty on them to offer to renew the placement, even though there was still a need for an agency worker in that post, or the agency refused to consider her for further placements in suitable alternative work that would imply sex or pregnancy discrimination.

4.7.6 If the government implemented its proposal it would also encourage the use of very short placements with continual re-engagement, which would be against the Directive and the duty on Member States to prevent the use of anti-avoidance measures.

4.8 Holiday pay

4.8.1 There should be clear rules for defining holiday entitlement and working time for agency workers so that they are not discriminated against for taking holiday.

4.8.2 The consultation document acknowledges that under the Directive agency workers are entitled to equal treatment both regarding statutory holiday rights and contractual holiday rights.

4.8.3 Government proposals to treat holiday as a one off payment at the end of the assignment or as part of the hourly or daily pay rate are however problematic. Firstly they are similar to rolled-up holiday pay which has

been rejected by the courts already. Secondly because this would not be consistent with the principle of equal treatment on both holiday pay or on the right to take holiday. Thirdly it is not consistent with the text of the Directive which provides for agency workers to have the right to equal treatment on both holiday pay and on the right to take holiday.

4.8.4 There is a clear disadvantage to workers around the ability to take holiday. It is essential that the new regulations state that agency workers are entitled to no less favourable treatment to permanent workers on all aspects of holiday or they may face legal challenges. This should also be accompanied by statutory guidance.

4.8.5 Unite believes that the rights of agency workers should be paramount and should not be diluted by business concerns over administrative burdens and cost.

4.9 Working time

4.9.1 The Directive creates rights for agency workers not to be treated less favourably over work time breaks and crucially also the allocation of shift patterns. As it stands there are many examples of disadvantages around shift rights and guaranteed hours for agency workers. For example in one confectionary site where PMP agency workers are placed, agency workers are often sent a text message during the night to cancel their morning shift or during the day to cancel night shifts. Unite members report that the agency seems to recruit far too many employees so that not many PMP employees receive a full weeks work and are called in on an ad-hoc basis.

4.9.2 Similarly a Unite member at Birdseye reported that agency workers “frequently get nearly no shifts and do not get paid for standbys”

4.9.3 Article 3.1 (f) (i) of the Directive specifies that overtime and public holidays are included in the definition of basic working and employment conditions. This means that agency workers should have no less

favourable treatment on the rights to take for example annual leave or overtime than permanently employed staff. This will have an impact on businesses that currently use agency workers to cover unsocial working hours.

4.10 Working time safeguards and enforcement

4.10.1 There need to be statutory safeguards which ensure workers are able to request or take leave without fear of detriment or losing out on future assignment.

4.10.2 It should be unlawful for an agency worker to suffer detriment on the grounds that they have requested or taken holiday leave. This would require agencies and employers to keep records of the amount of holiday leave taken by an agency worker in each holiday year with a view to ensuring that agency workers take at least their full complement of statutory leave each year.

4.10.3 There needs to be strengthened enforcement of working time rights. As it currently stands working time regulations are poorly enforced and the most easily abused are agency workers.

4.10.4 The latest labour force survey shows that the average employee reports that they had 25 days annual leave, while the average agency worker only had 16.5 days (ONS autumn 2008). When looking at workers that had been in post for 1-2 years this went down to 16 days.

4.10.5 The Gangmasters Licensing Authority and Employment Agency Standards Inspectorate should have enforcement powers over issues of working time and holidays. This should be an addition to the existing rights that exist through employment tribunals (see section 5.2).

4.11 Training

4.11.1 Agency workers should also have equal access to **training** opportunities at their workplace.

4.11.2 In all European countries there are problems for temporary workers in accessing training. The Fourth European Working Conditions Survey finds that only 23.4% of non permanent employees receive training funded by their employer compared to 30.8% of permanent employees¹⁶

4.11.3 Some governments have realised that temporary agency workers do not have the same opportunities to participate in long term skills development. In 1999 the Spanish Government introduced a law that requires temporary work agencies to invest 1% of their paybill on vocational training. In France a training levy of 2% is applied to temporary work agencies.

4.11.4 If the UK aims to develop a high skill knowledge economy it needs to end the widespread use of under-trained temporary agency workers. More investment in training for temporary agency workers is a sensible investment for agencies, employers and the state. Agencies will be able to meet demands for skills and match more workers with vacancies, employers will be able to readily access larger numbers of skilled workers and with better opportunities for education and training workers themselves will have a greater possibility of securing permanent positions.

4.11.5 The legislation is an opportunity to introduce measures to compel temporary work agencies to assign 1-2% of their budgets for skills development and training for temporary workers. On registering with an agency workers should undergo a training needs analysis and complete literacy and numeracy assessments. A bespoke training programme should follow for each worker.

¹⁶ From the Fourth European Working Conditions Survey, European Foundation for the Improvement of Living and Working Conditions 2007

4.12 Workplace services

4.12.1 Agency workers should have equal access to all workplace **services**. It is totally unacceptable that in some workplaces agency workers are treated differently in terms of access to facilities, e.g. showers, lockers, cafeteria, child care and equipment. For example in Nestle Halifax Site contract workers had, until recently, to pay 25% extra on anything they bought from the canteen. Members reported that workers were also expected to pay for their own safety shoes which were often second hand and that they were provided with inadequate facilities to keep their personal belongings such as mobile phones which are not allowed to be taken into production areas (see 5.11 for more examples).

4.12.2 The regulation needs to make it explicit that workplace services are covered by equal treatment unless the employer can demonstrate that it was objectively justified not to provide such a service – the defence of financial constraints should not be acceptable.

5. Enforcing equal treatment

5.0.1 Enforcement of equal treatment is crucial. As with all legal rights they are meaningless if not enforced properly.

5.0.2 Unite welcomes the increase in resources for the Employment Agency Standards Inspectorate (EASI) and attempts to better coordinate enforcement activity through the Fair Employment Enforcement Board. However in the light of the scale of the use of agency workers the resources open to enforcement activity are still clearly inadequate.

5.0.3 The Gangmasters Licensing Authority (GLA) has shown that licensing and targeted intelligence led enforcement can make a significant difference. EASI should learn from this experience and should receive adequate resources and funding to expand its number of inspectors and to be able to investigate and prosecute the growing number of infringements reported and uncovered.

5.0.4 A recent GLA investigation¹⁷ uncovered shocking abuse by 1st Universal Services Ltd a gangmaster business that supplied workers to the French Croissant Company, a subsidiary of Maple Leaf Bakery UK Ltd making bread for Marks and Spencer. The investigation uncovered that the contracts manager had already had his licence removed through a previous business and had simply set up a new “phoenix” company. Workers at the agency were not being paid the minimum wage with one worker receiving only £3.27, they were not paid on time, payments were paid in cash with no evidence of payslips and records, the company was employing illegal workers and fabricating documents including national insurance cards, visas and passports and workers signatures had been forged on contracts. In addition contracts did not even cover basic legal requirements such as statutory sick pay, notice periods or an undertaking to pay the workers, even if the client did not pay the business. Workers were unaware of their holiday pay entitlement and none had been paid the correct amounts. Similarly none were aware of statutory sick pay.

5.0.5 This example illustrates that even under current licensing some employers are prepared to try to breach them. There needs to be stronger penalties for non compliance including heavy fines such as now allowed in the Employment Act 2008 and the potential for prison sentences in extreme cases such as forced labour as is the case under GLA regulations (see section 5.7).

5.1 Liabilities

5.1.1 Unite strongly argues that there needs to be a system of **Joint and Several Liability** where both the “user” and “intermediary” shoulder liability for failure to comply with equal treatment (“joint and several liability” should be construed with reference to the Civil Liability (Contribution) Act 1978 (c. 47)). The simple expedient of using a

¹⁷http://www.gla.gov.uk/embedded_object.asp?id=1013529

provision akin to that in the Employer's Liability (Defective Equipment) Act 1969 would be appropriate¹⁸.

5.1.2 While the agency shoulders much of the responsibility for the conditions of the agency worker the user employer often has a closer relationship and therefore responsibilities over the conditions in the workplace.

5.1.3 There should be obligations to exchange information between the agency, the user employer and the worker (see section 5.4). This should follow the precedent of TUPE legislation.

5.2 Dispute resolution and Employment Tribunals

5.2.1 Unite does not share DBIS optimism that "*most agency workers will be satisfied that they are receiving equal treatment after 12 weeks in a given job.*" It is imperative that there is a clear and effective dispute resolution system in place.

5.2.2 Unite supports the view that employment tribunals are the appropriate forum for taking up a case of unequal treatment, with ACAS also providing conciliation services to seek to resolve disputes at an early stage.

5.2.3 Tribunal cases should include rights to compensation for breaches of equal treatment rights that are set at a prohibitive level that deter future

¹⁸ Employer's Liability (Defective Equipment) Act 1969.

1. (1) Where...(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and

(b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not),

the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.

breaches and do not simply compensate agency workers for the losses incurred.

5.2.4 Unions should be able to take collective actions on behalf of groups of workers in appropriate cases¹⁹

5.2.5 Unite would support the inclusion of other sanctions on employers that deliberately or repeatedly break equal treatment regulations including prosecution, unlimited fines and potential prison sentences in extreme cases such as forced labour or serious health and safety abuses (see section 5.6).

5.3 Unlawful to penalise workers who take up cases

5.3.1 It needs to be unlawful for agencies and employers to penalise workers who seek to claim their right to equal treatment and take up tribunal cases or report abuses.

5.3.2 One Unite member who worked as an agency gardener reported having taken out a case against his employer and agency for under payment of wages. He won the case but as a result was made redundant and never received any more work from the agency.

5.3.3 Another example of this was highlighted in 2006 during the dispute at the Cottam power station near Lincoln where an Hungarian welder Barnabas Bito was excluded from the site as a direct result of having a conversation with a union representative.

5.3.4 It later emerged that he and his colleagues were being paid well below the standards set in the agreement for the site – the National Agreement for Engineering Construction Industry (NAECI). He was paid between £6 & £7 an hour, working a 9.5 hour day 5 days a week

¹⁹ See Civil Justice Council paper “Improving Access to Justice through Collective Action” http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Action_s.pdf

and up until 1pm on Saturdays with no rest or tea breaks and with no provision to the workload to accommodate periods of inclement weather. Further investigation revealed the appalling accommodation standards being provided to the migrant workers. At any one time there were between 8 and 10 workers living in a small terraced house. The employer seemed to be aware of when the council were coming to check the accommodation and workers were ordered to take beds out of the house and hide them, and then put them back in again once the inspection had taken place. At no time were any of the Hungarian workers advised of their employment rights or UK labour laws, they had no knowledge of holiday entitlement, the national minimum wage or health & safety regulations.

- 5.3.5 Unless there are protections for workers seeking to enforce their rights this legislation will not achieve its intention to protect the most vulnerable workers from abuse.

5.4 Provision of information

- 5.4.1 For the employment tribunal approach to be effective employees should have increased legal rights to information regarding pay arrangements. This should include the right for workers to submit questionnaires to agencies and user employers to ask for written statements relating to equal treatment that can be used as evidence in employment tribunals. This should work in a similar way to fixed term contract regulations.
- 5.4.2 If the user employer is not also under obligation this right will be insufficient as agencies will not necessarily have full details of terms and conditions available to permanent workers on the site. This is also another good reason for joint and several liability generally (see section 5.1).
- 5.4.3 Similarly the consultation's suggestion that existing regulations on the provision of information to work seekers could be used are not

acceptable. Agency workers will require information on all terms and conditions covered under the legislation after 12 weeks of being on a assignment (see section 3.6).

5.4.4 Failure to provide the written statement upon request should be taken as an inference of non-equal treatment when in tribunal. The recent high profile dispute at Lindsey Oil refinery (see 5.5.4) serves as a good example of this where a subcontracting agency refused to provide information around the pay and terms of its workers.

5.4.5 The list under paragraph 7.2 of the consultation document does identify the relevant regulations which establish a direct or indirect requirement to provide information on the employment situation. In Unite's view employers should also be required to provide this information to inform negotiations and collective bargaining between employers and recognised trade unions.

5.4.6 In addition a government template to help workers request information provision would be welcome.

5.5 Comparators and "given job"

5.5.1 It is crucial that agency workers are able to make effective comparisons with other workers in order to provide evidence of unequal treatment.

5.5.2 The legislation should specify that equal treatment rules will allow agency workers to draw comparisons with a comparable directly employed worker doing broadly similar work in their workplace, other locations and sites owned by the same employer or related employers and also hypothetical workers based on existing pay scales for permanent staff, market conditions and relevant collective agreements including collectively agreed job evaluation schemes.

- 5.5.3 The legislation needs to specify that what is defined as a worker's "given job" should be the work that they are actually doing rather than just what is given as the description of the assignment when it was started.
- 5.5.4 The recent high profile dispute of the Lindsey Oil Refinery construction site in Lincolnshire illustrates how complicated agency contacts can be. At the site the oil refinery is owned by the French multinational Total. Total awarded the contract for the installation of a new desulphurisation facility at the site to the American multinational Jacobs Engineering Group who in turn subcontracted the mechanical piping work to the Shaw Group UK. It was also agreed between Jacobs and Shaw that certain areas of the project would be further subcontracted out to IREM, an Italian company that brought in agency workers from outside the UK. The ensuing dispute hinged on whether IREM's agency workers were receiving lesser terms and conditions as afforded under the national agreement (NAECI) and also whether it was discriminatory to not open the work up to workers already on the site.
- 5.5.5 It is clear then that for equal treatment to exist in this case comparisons must be with the national agreements or conditions of other workers on the site not just in the company.

5.6 Licensing

- 5.6.1 The UK abolished the need to obtain a licence in order to operate as an employment agency in 1994. Most other European countries recognise the need for licensing and registration with the exceptions of Finland, Netherlands, Norway and Sweden.
- 5.6.2 In Norway and Sweden voluntary agreements are used to regulate the sector in place of statutory instruments. In Finland where the permit scheme was phased out in 1994 agencies must still notify health and safety authorities before they can set up their business. In the Netherlands, a financial warranty scheme operates instead of

registration. The UK therefore operates the most deregulated temporary agency sector in Europe.

- 5.6.3 Unite believes that agencies doing business in the UK must be regulated through reinstating the obligation to operate under a license and abide by industry standards. Positive steps to tackle temporary worker abuse have been taken through the establishment of the Gangmasters Licensing Authority but this only happened after the tragedy at Morecambe Bay and when the systematic abuse of agency workers was highlighted through the work of trade unions campaigning on the issue.
- 5.6.4 Requiring agencies to obtain a licence before setting up business in the UK will prevent exploitation of migrant and vulnerable workers who work in sectors where there is abuse but that are not currently covered by the Gangmasters legislation. Licensing will also ensure that employment agencies abide by their financial and health and safety responsibilities.
- 5.6.5 A joint declaration made in February 2007 by Eurociett, the European employment agencies confederation, and Union Network International Europa committed both bodies to tackling “unfair competition, illegal, practices and undeclared work...through systems of licensing, certification, inspection or registration schemes”.²⁰
- 5.6.6 A licensing scheme for the UK should include provisions to assure non discrimination and protection of those who make disclosures, minimum standards of health and safety, the enforcement of the minimum wage, new equal treatment rights and evidence that the agency can meet its financial obligations in the event of bankruptcy. Similar provisions are already included in the legislation concerning fixed term contracts. Registration of the agency should include conditions on the use or

²⁰ Extract from the Eurociett/UNI Europa Joint Declaration within the framework of the ‘Flexicurity debate’ as launched and defined by the EU Commission issued on 28.2.07

provision of additional services to work seekers such as accommodation, supply of utilities, meals, CV writing, training, translation, accountancy services or loans.

5.6.7 It is important to stress that this would not create restrictions in UK legislation which would need to be reviewed in the context of Article 4 of the Directive. It has already been recognised that the licensing arrangements operated by the Gangmasters Licensing Authority fully comply with the requirements of EU competition law.

5.7 Union rights and recognition

5.7.1 Agency workers must be able to benefit from worker representation rights, including rights to union recognition and information and consultation, either in the user enterprise or within the agency.

5.7.2 As it stands agency workers are much less likely to join trade unions. In a Unite survey members reported that over 60% of agency workers were not members of a trade union. Given that these were comments from predominantly well organised workplaces the actual figure of union membership would certainly be much lower. One member in manufacturing commented *“agency workers don’t tend to join unions as they don’t know which union will be covering the company they work for. This is because they change companies so often in their search for work”*.

5.7.3 A member of Unite working for Bostik Ltd commented *“the use of Agency workers is not only an abuse of them and their terms and conditions and rights etc but also has an adverse effect on the Union’s ability to have unity, strength and bargaining power in areas where they are employed. Management would like to employ more and more temps to keep wages at a low.”*

5.7.4 The introduction of the Regulations presents a good opportunity to close at least one loophole in relation to Regulation 7 of the Conduct of

Employment Agencies and Employment Businesses Regulations 2003. Whilst employment businesses should not supply workers to do the work of those taking part in lawful industrial action, it is a defence that they did not know and there is no obligation on the end user to tell them. More importantly the end user should be prohibited from seeking to recruit agency workers to cover the work of those taking lawful action. Unite believes that employment agencies should be covered and that unions should have the express right to take out an injunction to stop the unlawful supply of agency workers to undermine lawful action. Paragraph 20 of the pre-amble to Directive 2008/104/EC confirms that such amendments to the existing provisions in this regard are permissible.

5.8 Thresholds

- 5.8.1 Unite notes in particular that the government recognises that the 21 worker threshold found in the statutory recognition procedure (Paragraph 7, Schedule A.1 Trade Union and Labour Relations (Consolidation) Act 1992) is affected by Article 7.
- 5.8.2 The government is under a clear duty to ensure that the decisions they take in this regard must promote collective bargaining. We propose that the most appropriate way to achieve this is for unions to choose to count agency workers or not depending on which is most appropriate to encourage collective bargaining.
- 5.8.3 Already the 21 worker threshold has been criticised as failing to meet international conventions, most notably by the ILO Committee of Experts²¹. The Committee has called for the UK to confirm to the ILO “the measures taken or envisaged to further promote collective bargaining in small businesses”. Since then the decision in Demir &

²¹ [CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 \(No. 98\) United Kingdom \(ratification: 1950\) Published: 2007](#)

Baykara v Turkey²² has confirmed the obligation on government to consider the matter from the perspective of promoting collective bargaining. For government to decide otherwise would be unlawful.

5.9 Collective agreements/workplace agreements

5.9.1 There is no scope for the use of workplace agreements in the implementation of the Temporary Agency Worker Directive. There is therefore no need for legislation in this area.

5.9.2 Given that the Directive refers to a minimum of equal treatment trade unions will retain the ability to negotiate voluntary collective agreements with employers which provide more favourable terms and conditions than those contained in the Directive or covered by the UK style derogation.

5.9.3 Unite has already negotiated several positive agreements around the use of agency workers. These include local agreements in the white meat sector and the Codes of Good Practice contained in the national agreements in the printing and papermaking industries that set rates for different jobs, guarantee equal treatment and limit the use of agency workers to justifiable times.

5.9.4 Unite argues that article 5.3 of the directive permits the use of collective bargaining, in particular sectoral level agreements, as the means of implementing the Directive.

5.9.5 The opportunity to declare collective agreements generally applicable consistent with Article 3.8 of the Posting of Workers Directive 96/71/EC should not be missed. Clearly this is relevant and is referred to in the preamble at paragraph 22. Such provision should significantly reduce the unrest that led to industrial action at various sites, notably at East Lindsey, earlier this year.

²² Decided by Grand Chamber of European Court of Human Rights 12 November 2008 (*Application no. 34503/97*)

5.10 Vacancies

5.10.1 Unite is happy with government proposals regarding making agency workers aware of permanent vacancies (as covered by Article 6.1 of the directive). 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.

5.10.2 The exception to this should be in redundancy situations. In these cases workers with permanent status should be given priority for available jobs. As has already been highlighted (see section 4.6) at the very least after 4 years in a job agency workers should be treated as permanent in the same way as workers on fixed-term contracts covered by Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

5.10.3 Unite is of the view that 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. If the government is minded to allow transfer charges these should be capped and dependent on justifiable costs incurred through transfer. At the moment there are no limits to the charges which often act to prevent workers from accessing permanent work that might otherwise be on offer.

5.11 Health and Safety

5.11.1 Unite would like to highlight that more should be done to protect agency workers from health and safety risks. It is no coincidence that the sectors with the highest levels of agency workers such as construction and agriculture have some of the worse recorded health and safety abuses.

5.11.2 There are many examples of agency workers not receiving proper health and safety training for their jobs. Similarly because of the added

insecurity of their employment status agency workers are often unaware or unwilling to raise health and safety abuses. For example a Unite member working as a Drayman highlighted that in his company agency workers “are used to deliver to dangerous accounts.”

5.11.3 During 2007 the Unite members employed by Salford City Council fought a successful campaign to end casualisation of jobs in the Council’s refuse disposal and street cleansing department. Agency workers were obliged to get up very early on a daily basis to queue up in the hope that work would be offered to them. They were not only employed at lower rates than permanent staff, but they were also obliged to pay for their own uniform and personal protection equipment.

5.11.4 Unite also took action in support of Polish workers working for a company making prepared salads for leading catering companies, pubs and rail companies. They worked extremely long hours in an unsafe working environment. The workers claimed that they were forced to work all day in sodden clothing, could not access toilets during a shift without permission and at times worked up to 16 hours a day. They received no contracts of employment or training.

5.11.5 The legislation should guarantee agency workers equal treatment in terms of health and safety training and equipment and there needs to be joint and several liability for making sure that the agency worker working in a safe work place.

6. Conclusions

6.0.1 In conclusion Unite welcomes the implementation of the directive but warns that many areas need to be tightened up for it to have a significant effect on the lot of agency workers in the UK economy.

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Appendix - The Agency Sector

According to the European Confederation of Private Employment Agencies (Eurociett) the total number of agency workers in Europe is around 3 million (full time equivalent), which corresponds to a total number of 9 million agency workers. These are based on a broad network of 33,000 private employment agencies and 58,000 branches in Europe²³.

BERR (now DBIS) says that in the UK "the best estimate for the number of agency workers comes from the REC 'census' and SORA business surveys of the agency sector. These figures show there are between 1.1 and 1.5 million agency workers, with the mid-point being 1.3 million. The high turnover, the seasonality and the flexibility of agency work make it difficult to come to a definitive figure." "From the same sources, there are an estimated 16,000 recruitment sites (branches and offices). A number of large well-known agency businesses operate in this sector but there are also significant proportions (just under 60 per cent) of small single site agency businesses with between one and five employees who match agency workers with assignments."²⁴

The table below shows the growth of the agency worker sector across Europe between 2004 and 2007 illustration the substantial expansion of this kind of employment.²⁵ It is clear that the UK is the biggest user of agency labour and this is continuing to grow.

²³ Eurociett, Press release <http://pr.euractiv.com/press-release/agency-work-offers-solutions-short-long-term-employment-challenges-10077>

²⁴ "Employment Relations Research Series No.93 - Agency working in the UK: a Review of the evidence. October 2008"

²⁵ http://www.eurociett.org/fileadmin/templates/eurociett/docs/EIRO_Foundation_Report_on_TAW_Dec_08.pdf

Temporary agency work – a snapshot

Significance and recent growth

Temporary agency work is a significant form of employment in most Member States and employs large numbers of workers, especially in the larger economies. Belgium, France, Germany, Italy, the Netherlands, Spain, and the UK have a particularly well-developed TAW sector (Table 1). This is also a sector commonly experiencing rapid, and in some cases substantial, levels of growth, both in terms of number of employees and sector revenues.

Table 1: *TAW employment and revenues, 2004–2007*

Country	Number of workers, 2007	Change since 2004 (%)	Sector revenues (€ millions), 2007	Change since 2004 (%)
AT*	59,262	34.3	n.a.	n.a.
BE	95,465 (382,188)	27.1 (17.3)	4,176	35.2
CZ*	35,000	n.a.	153	n.a.
DE	614,000	53.6	15,000	11.3
DK*	20,600	-12.4	1,038	135.9
ES	160,000	4.6	3,733	23.6
FI	28,000	100.0	925	110.2
FR	637,901	11.9	21,700	17.9
GR	8,172	133.3	87.5	338.0
HU	55,000	4.4	n.a.	n.a.
IE	35,000	40.0	1,600	23.1
IT	(594,744)	(48.0)	6,290	17.0**
LU	(8,003)	(45.8)	230	53.3
NL	233,000	48.4	11,300	73.8
NO	24,982	8.6	1,578	n.a.
PL	60,000	93.5	530	219.3
PT	(103,400*)	(10.9***)	750	15.4
RO	(c. 25,000)	n.a.	c.120	84.6
SE	59,400	69.7	2,200	n.a.
SI	(4,874)	(99.3)	n.a.	n.a.
SK*	10,828	n.a.	31	n.a.
UK	1,196,000	(8.7)	35,700	7.0

Notes: (1) Employment is expressed in terms of in full-time equivalents (total daily average) except for figures in parentheses which refer to absolute numbers. Source: Eurociett except for UK (supplied by BERR, 2008) and figures in parentheses which are provided by national centres, utilising official statistics (apart from RO, where the national centre provides an estimate of the number of agency workers employed by the largest four firms, and BE, where these are supplied by ACV-CSC).

(2)* 2006 not 2007 figures; ** increase 20062–2007; ***increase 2005–2006

(3) Source for revenue data: Eurociett except for IT, LU, PT, RO (estimates for 2008)

These figures need to be taken with some caution especially as they neglect to include those working in the informal and black economies, those who are employed through bogus self-employment systems and other contractual arrangements and the large numbers of migrant workers housed by their agencies or client employers in agriculture and the hospitality industry.

The Small Business Council estimates the informal sector i.e. illegal, hidden or unregistered work, to be worth £75 billion of the UK economy²⁶. In this

sector pay is often well below the minimum wage and conditions do not meet basic health and safety requirements. The tragic example of the Chinese cockle pickers in Morecambe Bay should serve as a reminder of the serious problems workers face.

The UK Government considers temporary agency work to be integral to the flexible labour market model operated in the UK. It is often cited as a way out of unemployment, to fill skills gaps and provide job matching. The Government wrongly lauds agency work as a means of providing employment for demographic and socio-economic groups who, historically, have found it difficult to find placements in the labour market or as a first rung on the ladder for younger workers.

The assumed macro economic benefits of the widespread use of temporary agency work are not, however, weighed against the long term impacts for the labour market and the welfare of the UK's most vulnerable workers. Similarly many wrong assumptions have been made about the impact and choices of workers engaged on short term assignments.

As Unite has highlighted many times before the experience of many agency workers is very different from that highlighted by government.

The Commission of Vulnerable Employment (CoVE) report²⁷ showed that temporary and agency workers were more vulnerable, lower paid and less-well protected than workers in permanent work:

- While temporary workers comprise only 6% of the labour market, around 41% are classified as low-paid i.e. below £6.50 per hour
- The most extreme forms of employment rights' abuses involve agencies and temporary workers.
- Many temporary workers are classed as 'workers' rather than 'employees' and so have less legal protection. Some are not even classified as workers and have even fewer rights.

²⁷ TUC 2008a, p. 167

- Temporary workers are less likely to have trade union protection - penetration rates are rarely above 10% in the lowest-paid sectors of the economy.
- Seasonal agricultural workers are particularly vulnerable and often get their benefit claims refused.
- Between 46-61% of agency workers felt that working for an agency made it harder to complain if something went wrong at work.

Similarly a revealing survey of Employment Rights Advisers working in Citizens Advice Bureaux and Law Centres was carried out across the UK (Pollert et al., 2008). The issues dealt with most commonly (weekly) by advisers in Law Centres and CABx were found to be:

- Dismissal/termination: 79%
- Pay: 67%
- Working-time/contractual rights issues: 60%
- Maternity/paternity/parental rights and flexible working: 71%
- Discrimination and bullying: 65%
- Health and safety problems: 19%
- Unfair treatment because of migrant status: 9% (weekly) 16% (monthly)

A survey for the Gangmasters Licensing Authority also highlighted that “a significant majority (95%) said that they preferred to be directly employed or permanently employed than in temporary agency work”.²⁸

The temporary agency workforce is often composed of some of society’s most vulnerable groups; migrants, older workers and those with lower educational attainment. Their precarious employment status acts to enhance and further the potential for discrimination and exploitation in the workplace.

Many temporary agency workers however do not fit the Government’s demographic profile of a ‘vulnerable worker’ but suffer equally from a lack of rights. Temporary Agency workers often do not receive sick pay, paid

²⁸ http://www.gla.gov.uk/embedded_object.asp?id=1013505

holidays, shift premiums or overtime premiums, pension, job control, adequate health and safety coverage training or skills development. The recession is pushing more people into the agency sector as they are made redundant and making these issues worse.

Unite members report that temporary agency work can become a vulnerable employment trap whereby individuals experience cycles of unemployment alternating with periods of insecure temporary employment. The lack of opportunities to access training or advancement are harmful to the worker's long term career prospects, making it harder to move into secure, sustained employment.

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