

Hiring agency staff to cover industrial action

**Trades Union Congress response to
government consultation. January
2024**

The TUC brings together more than 5.5 million working people who belong to our 48 member unions. We support trade unions to grow and thrive, and we stand up for everyone who works for a living.

We oppose the proposed repeal of regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which is a further and unjustified attempt to undermine the right to strike:

- Both workers and agency employers oppose the measure.
- It is counterproductive and would make disputes harder to resolve.
- Together with other recent measures, it seeks to undermine the ability of workers to take collective action to defend their pay and conditions.
- It creates unnecessary health, safety and wellbeing risks for workers.
- It is likely contrary to international law.

This measure is being brought forward once again, despite the consistent opposition of both trade unions and employment agency employers to the revocation of a provision that had been in place since 1976. Governments of both main parties have long acknowledged this protection as an essential element of Great Britain's industrial relations framework.

The previous repeal of this regulation was quashed by the High Court due to failings in consultation. It is therefore remarkable that the government has opted for a truncated consultation period. This consultation is open for just eight weeks, as opposed to the standard 12.

We also note that in his judgment, Mr Justice Linden concluded that "the case for the measure was on any view less than overwhelming". This remains the case. As we set out below, the government has failed to find evidence to support the case for this change.

1. Can you provide views and evidence on the effect that regulation 7 has on employment businesses, hirers, and agency workers? If so, please elaborate.

The use of agency workers during industrial action would damage employment relations and undermine workplace productivity. It would create unnecessary additional tensions between employers and their employees, making it more difficult to resolve disputes.

Agency workers could also face an invidious choice between crossing the picket line or turning down an assignment and risking not being offered future employment. Many are likely to be unaware that they are being hired to replace others who are on strike.

Employment agency employers believe that this measure will be counterproductive and could lead to longer disputes.

We note the comments from Neil Carberry, chief executive of recruitment industry employer body REC, when this consultation was published: "The announcement of a consultation on whether to remove the prohibition on use of agency workers in strikes is a disappointment, given the scale of opposition from employers and workers to the previous proposal. We will represent the views of agencies fully in response to the consultation.

“Neither agencies or trade unions think this change promotes effective strike resolution or protects agency workers. Strikes are industrial disputes within a single industry or firm. Inserting a third party like this into an industrial dispute may end up extending the dispute, not least by inflaming tensions.

“It is also puzzling that the government assumes agency staff will choose a role that requires them to cross a picket line versus one that doesn’t, when we have two million job postings in the UK.”¹

Changing the law could put agency workers at risk. Agency workers are not protected from suffering a detriment if they refuse an assignment because they do not wish to replace striking workers.

In some circumstances they may not be aware that a strike is ongoing and find themselves being hired to undermine a strike.

For example, many supply teachers are members of trade unions who would not want to undermine action being taken by members of their own union.

Likewise, in the NHS, many nurses enrol with the NHS bank or employment agencies in order to supplement their earnings. They often the work in the same or in a neighbouring hospital trust.

In these scenarios, neither the supply teacher nor the agency nurse would be protected from victimisation for exercising their basic trade union rights.

However, the alternative of agreeing to break the strike could leave them in a stressful environment at work.

Meanwhile, agencies would come under pressure from some clients to help them break strikes and some may fear that failure to do so could jeopardise their future relationship.

2. What impact do you think the repeal of regulation 7 would have on workers and the wider economy and society?

The repeal of regulation 7, by allowing employment agencies to supply workers to replace those on strike, would undermine workers’ ability to organise collectively to protect their jobs, their livelihoods and the quality of their working lives.

Workers don’t take lightly the decision to withdraw their labour. Strike action is always the last resort but is often necessary to bring an employer to the negotiating table.

¹ REC (7 November 2023). *REC comments on announcement of Regulation 7 consultation aimed at allowing agency staff to replace striking workers* <https://www.rec.uk.com/our-view/news/press-releases/rec-comments-announcement-regulation-7-consultation-aimed-allowing-agency-staff-replace-striking-workers>

This latest measure must be considered in the context of other anti-union measures implemented in recent years aimed at weakening the ability of workers to act collectively to defend their pay and conditions.

These include:

- the Trade Union Act 2016 which brought in thresholds for industrial action ballots, an extended notice period before industrial action takes place, and restrictions on the ability of unions and their members to picket
- the Strikes (Minimum Service Levels) Act which allows employers to issue work notices in certain services requiring workers to work during periods of strike action.

The government is proposing to repeal regulation 7 without even having conducted the post-implementation review of the Trade Union Act 2016 which is now two years overdue and which it recommitted to earlier this year in a submission to the International Labour Organisation.

The right to strike is a fundamental human right which is protected by an array of international treaties and human rights standards, including ILO Conventions, the UN Covenant on Social and Economic Rights, the European Social Charter (1961) and the European Convention on Human Rights.

The ILO Freedom of Association Committee has also confirmed that “the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term constitutes a serious violation of freedom of association”.²

It is remarkable that the government proposes taking forward this measure only months after the ILO’s Committee on the Application of Standards (in its comments on UK compliance with Convention 87 on freedom of association) requested that the British government “facilitate the dialogue between and with the social partners with a view to... [ensuring] that existing and prospective legislation is in conformity with the Convention”.³

Beyond the clear conflict with international law, the use of inexperienced agency workers may also give rise to serious health and safety concerns, within the workplace and for the wider public. Agency workers recruited at short notice are unlikely to have received relevant health and safety training. They could find themselves asked to run entire services without the support, proper induction and direction from permanent colleagues. This could lead to accidents or injuries.

Take the example of education where 37 per cent of supply teachers stated that they were not given a school’s overall risk assessment, and almost one in ten (9 per cent) stated that they were not sure. Likewise, just under one in ten supply teachers (8 per cent) stated that they were given sufficient information and time to understand systems in a school and just 14 per cent stated that they were provided with the details of any designated contact(s) for

² International Labour Organisation (2006). *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, paragraph 632

³ International Labour Organisation (2023). *Committee on the Application of Standards 111th session*. https://www.ilo.org/ilc/ILCSessions/111/committees/standards/individual-cases/cases/WCMS_885425/lang--en/index.htm

any questions, problems or emergencies by their agency. Agency workers, such as supply teachers, may therefore be less likely to have received health and safety training necessary to do the job safely, which may then have a detrimental impact on the quality of services provided to the public.⁴

3. What are the sectors where repealing regulation 7 would be most applicable and do you think there are sectors it should not apply to? Please give reasons for your views.

This should not be applied to any sector for the reasons set out above.

4. Do you have any views on the methodology used in the Impact Assessment provided alongside this consultation and does it represent all the likely costs and benefits?

The impact assessment is remarkably light on evidence. It notes that the government is unable to robustly estimate the impact on business.

It is remarkable that the government did not attempt to accurately measure the use of regulation 7 during the period when it had been repealed.

The 2023 impact assessment cites some news articles but makes little attempt to understand the effect on those particular employers and workers. It states: "There is no comprehensive data source that would enable a quantitative assessment of the extent of use of agency workers to provide cover during strikes during the period in which Regulation 7 has been repealed."

Parliament has previously warned that the government has failed to demonstrate the case for this proposed change. The House of Lords Secondary Legislation Scrutiny Committee noted that the impact assessment published in relation to the previous repeal of regulation 7 by the then Department for Business, Energy and Industrial Strategy, was "unable to 'robustly estimate the size' of the policy's impact because of a lack of evidence" and that this "raises questions as to the effectiveness of the change proposed by the draft Regulations."⁵

There was a previous damning assessment by the Regulatory Policy Committee (RPC) which rated a draft IA published when the policy change was consulted on in 2015 as "not fit for purpose" because it did "not provide sufficient evidence of the likely impact of the proposals."

Yet, the impact assessment for this consultation, makes an almost identical remark in respect to the assessment of the impact of the proposal to repeal Regulation 7: "To

⁴ NASUWT (Feb 2023). *Supply teachers: annual survey of experiences*

<https://www.nasuwt.org.uk/asset/E183D19A%2DBBD0%2D425E%2DAE2A7C910E7DC2C4/>

⁵ House of Lords Secondary Legislation Scrutiny Committee (14 July 2022): *9th report of Session 2022–23* <https://publications.parliament.uk/pa/ld5803/ldselect/ldsecleg/46/4603.htm>

estimate the exact impact of this measure, we would need to make several assumptions about variable factors and do not have the evidence to do this.”

The 2023 impact assessment suggests a marginal overall direct benefit to UK employers in aggregate of merely £38,000 annually and even this is based on highly speculative assumptions. This hardly suggests that Regulation 7 is currently hindering employers and employment businesses in the way suggested in the consultation, or that it represents an interference in the operational freedom of employment businesses.

Indeed, some of assumptions appear woefully inaccurate, based on unions’ data. For example, the impact assessment assumes that the cost to employ an agency worker in education, such as a supply teacher, is £16 per hour, when the average cost is conservatively estimated to be around £23 per hour.⁶

Furthermore, the IA suggests that employment business margins are 17.3 per cent which is not the case for employment businesses operating in education, where the average margins are estimated to be 38 per cent.⁷

The repeated failure of the IA to evidence the non-monetised impacts of the repeal of regulation 7, such as the impact on workers’ rights and the prospect of worsening industrial relations, means that a simple modelling approach fails to capture and detail the complexity of the impact on the labour market and the economy that the proposal will have.

5. Do you have any other comments not covered by or evidence not provided in your response to the questions above that we should consider?

We are sceptical that there are large pools of sufficiently skilled and trained workers in sectors such as the health service, education and transport to cover often specialised roles.

There remains huge demand for staff in sectors such as healthcare.⁸

In addition, agency staff will often be members of the same trade unions as those taking industrial action and unwilling to cross a picket line to replace them. It is unlikely that they would cover the roles of striking workers if they were made aware of the nature of their assignments.

⁶ NASUWT (Feb 2023). *Supply teachers: annual survey of experiences*

<https://www.nasuwt.org.uk/asset/E183D19A%2DBBD0%2D425E%2DAE2A7C910E7DC2C4/>

⁷ Crown commercial services (2020). *What is mark-up and its impact?*

<https://assets.crowncommercial.gov.uk/wp-content/uploads/What-is-mark-up-and-the-impact-on-worker-pay.pdf>

⁸ REC (8 January 2023). *Report on jobs* <https://www.rec.uk.com/our-view/news/press-releases/report-jobs-softer-decline-recruitment-activity-end-2023#>