



# Using agency workers during strike action

TUC response to BIS consultation on the Trade Union Bill

## Introduction

The Trades Union Congress (TUC) has 52 affiliated trade unions, representing nearly 6 million members who work in a wide variety of industries and occupations across the public and private sectors.

The Trade Union Bill will introduce wide-ranging measures designed to curtail the right to strike and restrict the ability of unions to represent their members in the workplace. These include the introduction of thresholds for industrial action ballots, an extended notice period before industrial action can take place, and new restrictions on the ability of unions and their members to picket and protest. The Bill also seeks to limit facility time for union workplace representatives in the public sector.

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 TUC is profoundly concerned that measures set out in the Trade Union Bill will unjustifiably restrict the right to strike in the UK. By placing more legal hurdles in the way of unions organising strike action, the Trade Union Bill will undermine workers' ability to organise collectively to protect their jobs, their livelihoods and the quality of their working lives.

In addition to the measures outlined in the Trade Union Bill, the government is also proposing to remove the ban on the supply of agency workers to replace striking workers, contained in regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

The TUC is firmly opposed to this proposal which will permit employers to use agency workers to undermine the effectiveness of industrial action or even to break strikes. In our opinion, this measure will breach international law.

The ILO Freedom of Association Committee has 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’.<sup>1</sup>

The TUC is also seriously concerned that the use of agency workers during industrial action will damage constructive employment relations and undermine workplace productivity. It will create unnecessary 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.

The ban on the supply of agency workers during industrial action has been in place in UK since 1973. A succession of previous governments, including

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<sup>1</sup> ILO (2006) Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, paragraph 632.

Conservative governments, has recognised that Regulation 7 forms an important part of the industrial relations landscape in the UK and therefore should be retained. In the TUC's opinion, the current government has failed to demonstrate why the removal of the ban on the use of agency workers is now necessary or justified.

The government's approach has been roundly criticised by the Regulatory Policy Committee (RPC). The RPC found that the BIS impact assessment was '*not fit for purpose as it does not provide sufficient evidence of the likely impact of the proposals to support the consultation*'. The RPC continued that it '*considers that the case for the central assumption has not been made and that it is not a robust basis for assessing the costs, and in particular, the benefit of the proposal.*'<sup>2</sup>

The TUC is also alarmed that the government proposes to curtail responses to this consultation. The consultation document published on the BIS website states that responses to the various sections of Question 1 should be limited to 500 characters max.<sup>3</sup> In other words, no answer should be longer than three tweets. On this basis the TUC anticipates it will be difficult for the Department to convince the RPC that is serious about this consultation or about evidence-based policy making, and to answer the RPC's significant concerns around the justification for this proposal.

## Responses to consultation questions

### **Question 1)**

#### **a) How do you think the removal of Regulation 7 would affect employment businesses?**

Negatively.

The TUC believes that this proposal will have seriously detrimental effects for employment businesses. The removal of the ban on the supply of agency workers will mean that employment businesses are forced to become involved in industrial disputes which are not of their making. Agencies will also be perceived as taking sides.

For many years, the agency industry has promoted the view that it is not good practice to supply agency workers during industrial action. Ciett, the International Confederation of Private Employment Agencies, has issued a Code of Conduct which prohibits the supply of agency workers during strikes.<sup>4</sup>

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<sup>2</sup> Regulatory Policy Committee: *Hiring agency staff during striker action: reforming regulation*. Date of issue: 18 August 2015. Available at: <https://www.gov.uk/government/collections/red-rated-impact-assessment-opinions-since-may-2015>

<sup>3</sup> <https://www.gov.uk/government/consultations/hiring-agency-staff-during-strike-action-reforming-regulation>

<sup>4</sup> Ciett Members' *Commitment Towards A Well Functioning International Labour Market* adopted on 27 November 2006. Available at: [www.ciett.org/fileadmin/templates/ciett/docs/CIETT\\_Code\\_Conduct.pdf](http://www.ciett.org/fileadmin/templates/ciett/docs/CIETT_Code_Conduct.pdf)

Several UK employment businesses have also signed international framework agreements which prohibit the supply of agency workers during strikes.

The Memorandum of Understanding between Ciett Corporate Members and Uni Global Union on Temporary Agency Work, which was signed by several UK agencies in 2008, prohibits ‘the replacement of striking workers by temporary agency workers without prejudice to national legislation or practices.’<sup>5</sup> As noted above the ban on the supply of agency workers to replace strikers has been in place for more than 30 years and is an established part of UK industrial relations practice.

The Memorandum also commits the agencies to promote ‘respect for freedom of association and collective bargaining as guaranteed by ILO conventions.’ As noted above, the supply of agency workers during strikes in the UK is clearly not consistent with the requirements of ILO Convention 87, Article 3.

Many UK employment businesses also recognise trade unions, with which they have longstanding and productive working relationships. If these agencies face pressure to supply agency workers during industrial action, this will have a damaging impact on their own internal employment relations. The risk will be particularly high where the dispute within a hirer’s business involves members of the same union(s) recognised by the agency.

The Recruitment Employment Confederation (REC) has also recognised that the government’s proposals are likely to have detrimental effects for employment businesses. Kate Shoemith, Recruitment & Employment Confederation (REC) head of policy, said: “*We are not convinced that putting agencies and temporary workers into the middle of difficult industrial relations situations is a good idea for agencies, workers or their clients. Our members want to provide the best possible levels of service to their clients but they also have a duty of care to the workers they provide.*”<sup>6</sup>

The TUC also believes that the government’s proposal will create significant reputational risks for employment businesses. Agencies which decide to supply agency workers during industrial action may find it is more difficult to attract business. This could particularly be the case in other EU countries, where bans on the use of agency workers are commonplace.

## **b) How do you think the removal of Regulation 7 would affect work-seekers?**

Negatively.

The TUC believes that the removal of Regulation 7 will have a detrimental impact on work-seekers. If the government decides to proceed with this policy, agency

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<sup>5</sup> Memorandum Of Understanding between Ciett Corporate Members and Uni Global Union on Temporary Agency Work, signed on 24 October 2008. Available at:

[www.ciett.org/fileadmin/.../ciett/docs/MoU-UNI-CiettCMC-Final-EN.pdf](http://www.ciett.org/fileadmin/.../ciett/docs/MoU-UNI-CiettCMC-Final-EN.pdf)

<sup>6</sup> <http://www.recruiter.co.uk/news/2015/07/recruiters-wary-of-using-temps-as-strike-breakers/#sthash.8u1BsUc1.dpuf>

workers could face an invidious choice between crossing a picket line and turning down an assignment with the prospect that they will be denied future work by the agency.

Under UK law, agency workers are not protected from suffering a detriment if they refuse an assignment because they do not wish to replace striking workers.

Many supply teachers are members of trade unions. They will not want to cross a picket line or to accept assignments which will have the effect of 'breaking the strike' or undermining the effectiveness of the action being taken by members of their own union.

In the NHS, many nurses enrol with the NHS bank or employment agencies in order to top up their hours and supplement their earnings. They often work in the same or in a neighbouring hospital trust. In 2014, health care workers took industrial action over pay for the first time in 34 years. However, under the government's proposals it is possible that in any future disputes, nurses could be pressurised by employment business or NHS banks to go to work and to break a strike even though they had voted in support of industrial action.

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.

There are also genuine health and safety risks to agency workers from these proposals, who could find themselves asked to run entire services without the support, proper induction and direction from permanent colleagues that temporary staff expect to allow them to do their jobs well.

### **c) How do you think the removal of Regulation 7 would affect hirers?**

Negatively.

The TUC is concerned that the government's proposal will seriously harm employment relations within the hirer's organisation. If employers decide to 'bus in' groups of agency workers during a strike, this will increase tensions between the union and the employer and between the employer and their workforce. It will mean that the dispute will be more difficult to resolve amicably.

The use of agency workers to undermine industrial action may mean that disputes remain unresolved. As a result, tensions between management and the workforce are likely to grow and fester. The use of agency workers is also likely to damage employees' sense of goodwill. Bringing in temporary staff to cover roles normally performed by permanent staff is likely to increase tensions with the workforce on their return to work. At best, this could damage staff morale. This will undermine organisational effectiveness and productivity. At worst, it could amount to an effective lock-out of staff. This will vastly prolong the disputes and make them more difficult to resolve. Staff are also likely to feel less committed to the organisation and may decide to look for new employment. The loss of experienced staff will undermine organisational effectiveness and increase

recruitment and training costs for employers. It will also place increased pressure and stress on remaining staff. The overall effect will be to reduce productivity.

The use of agency workers during strikes is also likely to create reputational risks for organisations. Agency workers will often lack the requisite skills, training and knowledge to act as a substitute for permanent staff. They will not be familiar with processes in the organisation or company and it will be difficult for them to take on the roles normally performed by permanent staff. As a result, the quality of service provided by the company or organisation during a strike is likely to decline.

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. This could lead to accidents or injuries in the workplace with the safety of other workers or indeed the public being placed at risk.

These problems are likely to increase as the labour market tightens. The supply of agency workers is likely to decline, meaning that employers will need to recruit from a small pool of less experienced agency workers. The TUC is concerned that the estimates contained in the impact assessment are based on individuals who identify themselves to be agency workers who are unemployed, inactive or employed but away from their job or waiting to take up a new job in the LFS survey.<sup>7</sup> This includes individuals who may have been required by the DWP to register with an employment agency as a condition for receiving on-going benefits. It is unclear whether this pool of workers will provide employers with the requisite skills and experience needed to cover for permanent staff.

Employers are also likely to incur significant additional costs as a result of deciding to hire agency workers during industrial action. They will be required to pay agency fees. They may also need to deploy additional managers to supervise work undertaken by agency staff.

Similarly, if employers decide to outsource work, staff will anticipate that their jobs may be at risk in the medium to longer term. This could increase staff turnover and increase recruitment, induction and training costs for employers.

#### **d) How do you think the removal of Regulation 7 would affect employees taking part in industrial action?**

Negatively.

Permitting employers to use agency workers to replace strikers will have a severe impact on employees taking part in industrial action.

The government's proposal is clearly designed to undermine the effectiveness of industrial action and even to break strikes. This could contribute to a major imbalance of power in the workplace, with employers being able to impose

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<sup>7</sup> BIS (2015) *Hiring Agency Staff During Strike Action: Impact Assessment*. Footnote 31 on page 31.

changes to terms and conditions, without agreement or even taking the views of their workforce into account.

The use of agency workers to replace striking workers will violate trade union members' right to strike which is safeguarded by ILO Convention 87 Article 3, the European Social Charter 1961 (Article 6(4)) and Article 11 of the European Convention of the European Convention of Human Rights.

The government's proposal will make it far harder for working people to organise collectively to defend their jobs, their livelihoods and the quality of their working lives. Employees will find it harder to secure pay increases. As a result, the gap between the rich and low paid in the UK will continue to grow and families will continue to struggle to meet household bills.

**e) How do you think the removal of Regulation 7 would affect the wider economy and society?**

Negatively.

Encouraging employers to use agency workers to replace employees participating in lawful industrial action is likely to have wide-ranging negative implications for service users, for the economy and for wider society.

Using agency workers to undertake work normally performed by permanent staff will raise serious concerns about safety in the workplace and for the wider public. Agency workers will be recruited at short notice to cover for those participating in industrial action. They are, therefore, less likely to have received health and safety training necessary to do the job safely. The use of inexperienced temporary staff will also reduce the quality of services provided to the public. There is a significant difference between using agency staff to cover temporary vacancies in a business or service, and staffing an entire organisation with temporary agency staff.

For example:

- Agency cleaners recruited to work in food factories may not have received the requisite safety training relating to handling chemicals or cleaning products. This could mean that customers' safety is placed at risk.
- The use of agency workers to work on track maintenance on the railway network or London Underground during industrial action could place public safety at risk or lead to a major accident. In recent years, Network Rail has deliberately decided to reduce the number of contractors working on maintenance in the interests of safety. If practices alter following the change in government policy this could create serious risks for the public.
- A significant number of migrant workers are recruited by agencies, and other employment businesses, in their home countries. These workers may not even be aware that they are being brought over to the UK to replace the jobs of local striking workers and could be placed in an appalling position. The client employer may be unaware of any language skills needs of the workers, who are likely to have been hired at short notice. This could lead to significant health and safety problems, particularly in high risk industries such as food and construction, as well as potentially fuelling wider community tensions.

- Whilst agency nurses and midwives are trained and highly qualified, they nevertheless are unlikely to be familiar with procedures used in different health care centres or hospitals. The use of such staff will inevitably reduce the quality of service provided to patients.
- Requiring supply teachers, with little or no support, to replace all or a large number of teachers will pose genuine risks to the education and care of children and young people. Despite their teaching qualifications and years of experience, supply teachers will face a challenge if they are expected to replace the entire teaching staff within schools where industrial action is taking place. They will find it difficult to deliver high quality education in these circumstances. It will also leave supply teachers without the proper handover or induction from permanent colleagues that they would usually receive if they were undertaking their usual supply teaching roles.

The use of agency workers to replace striking workers is also likely seriously to damage employment relations within the hirer's workplace. It will create unnecessary tensions between managers and their employees. It is likely to undermine staff's sense of commitment to the workplace and loyalty to their employer. This will reduce workplace productivity. It may also lead to some employees looking for alternative employment. The loss of skilled staff and of institutional knowledge will undermine organisational effectiveness. It will also increase recruitment, induction and training costs for employers.

The TUC believes that rather than legislating to restrict the right to strike in the UK, the government should concentrate on securing the recovery and investing in policies which will improve workplace productivity. This should include measures which boost employee engagement and workplace voice, rather than seeking to undermine them.

### **Question 2)**

**a) The impact assessment for this consultation assumes that, between 17% and 27% of working days lost due to industrial action will potentially be covered by temporary agency workers, based on the limit of availability of suitable temporary agency workers, and the fact that some stoppages involve a large number of workers on a particular day. Do you think this assumption, as set out in the impact assessment, is reasonable?**

**No**

### **b) Please give your reasons**

The TUC seriously questions the assumptions made by the government when calculating the numbers of agency workers who may be available for use during strikes.

The government's assumptions have been the subject of extensive criticism by the Regulatory Policy Committee which concluded that:

‘The IA lacks evidence to support many of the quoted figures. In particular, the IA provides a central, critical assumption that 22% of the working days lost due to strike action will be covered by temporary



workers (paragraph 64). This is essentially based on the maximum potential numbers of temporary workers available (27%), with an arbitrary reduction (para 28). The IA provides an extensive list of why employers might not get cover for all of the working days lost due to strike action (paragraph 26). These range from availability of temporary workers through skillsets to location of the strike. The paragraph appears to undermine the central assumption, as it provides reasons why it might be more beneficial to the employer to take the short term costs associated with a strike instead of seeking temporary workers.’

‘The RPC considers that the case for the central assumption has not been made and that it is not a robust basis for assessing the costs, and, in particular, the benefits of this proposal. The IA notes that the consultation will be used to test the plausibility of these estimates, and the underpinning assumptions. The RPC view is that these estimates are an unsatisfactory basis for the consultation.’<sup>8</sup>

The TUC also questions the government’s assumption that the only agency workers who will be available to replace striking workers will be those who are currently not working on an assignment. It is likely that some hirers will ask employment businesses to redeploy agency workers from other assignments to cover the strike. This is particularly to be expected in larger organisations which regularly use agency workers on an on-going basis. In multi-site companies, employment businesses will be asked to redeploy agency workers from areas of the business not affected by the dispute to sites where the strike is taking place. This will significantly increase the numbers of agency workers available for use during strikes.

Employment businesses may also face pressure to redeploy agency workers from assignments in other companies as a condition of retaining their contract with the hirer. Employment businesses will be given two weeks’ notice to make such arrangements. Such practices would release more agency workers to cover for striking workers. They would also create significant reputational risks for the agencies. The redeployed agency workers will not be familiar with the work or processes used in the workplace where industrial action is taking place, leading to increased safety risks and reduced quality of service.

It is also wrong to conclude that the only workers available to provide agency cover are those who currently define themselves as ‘agency workers’ for the purposes of the Labour Force Survey. There are currently 1.85 million unemployed people in the UK, and a further 2.32 million people who are economically inactive but would like to work. Involuntary part-time work is also still high, with 1.29 million part-time workers seeking full-time work. In this labour market context, there are significant numbers of unemployed or

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<sup>8</sup> Regulatory Policy Committee: *Hiring agency staff during striker action: reforming regulation*. Date of issue: 18 August 2015. Available at: <https://www.gov.uk/government/collections/red-rated-impact-assessment-opinions-since-may-2015>

underemployed workers who could be recruited over a two week period prior to industrial action to provide agency cover.

The BIS impact assessment also assumes that the use of agency workers will not lead to a fall in workplace productivity. This cannot be correct. It is evident that agency workers with limited experience of the sector or the relevant workplace will not be able to perform with the same efficiency or deliver the same quality of service as employees with years of experience.

The use of agency workers to undermine strikes will also seriously damage employment relations – a factor which has been completely ignored by the impact assessment. Such practices are likely to escalate the dispute between the employers and the permanent workforce, making it more difficult to secure an amicable settlement. In some instances it could prolong the industrial action.

If employers decide to redeploy agency workers already working in an organisation to cover work normally done by striking workers, this will have a seriously detrimental effect on team-working following the strike. It will create unnecessary tensions between permanent staff and agency workers. It will also undermine organisational effectiveness and productivity levels.

### **Question 3)**

**a) The impact assessment assumes that the current options for recruiting temporary labour to provide cover during industrial action are used infrequently, due to the additional costs and administrative burden of hiring staff directly, or contracting service providers at short-notice. Do you think this assumption is reasonable?**

**No**

### **b) Please give your reasons**

The TUC does not agree with this assumption.

In the UK, most industrial action is time-limited. In 2014, 64 per cent of all stoppages lasted for only one or two days and accounted for 633,000 days lost (80 per cent) and 93 per cent of workers taking part in industrial action.<sup>9</sup>

Sensible employers will recognise that it is preferable to accept the limited disruption caused by industrial action rather than taking the risks associated with the use of temporary staff or of the outsourcing of work. But many will not. Too many UK companies take a low road to business success and have a history of placing short-term gains ahead of longer term strategies for achieving high productivity growth. The TUC therefore believes that BIS is significantly underestimating the likely take up of the provisions.

The TUC is seriously concerned that if Regulation 7 is removed, employers will decide to use agency workers on short term assignments with a view to undermining or breaking strikes. This will have wide-ranging implications for

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<sup>9</sup> ONS Data on days lost to industrial action.

employment relations within the companies or organisations. It will also create significant concerns about public safety and the quality of service being provided.

**Question 4)**

**a) The impact assessment estimates that a quarter of the pool of temporary agency workers would be available for a placement at short-notice to provide cover for workers taking industrial action. Do you think this estimate is reasonable?**

**No**

**b) Please give your reasons**

The TUC does not agree with the government's estimates. As noted in the response to question 2, the impact assessment assumes that the only agency workers who will be available to replace striking workers will be those who are currently not working on an assignment. However, it is likely that employment agencies will be required to redeploy agency workers from other assignments to cover the strike. Agency workers may be redeployed from other parts of the hirer's organisation or from other assignments in other companies. This will significantly increase the pool of agency workers who are available to replace striking workers. As stated above, the TUC also believes the impact assessment greatly underestimates the potential pool of agency workers, which includes all workers who are unemployed or economically inactive and seeking work as well as those who are currently registered as agency workers without work.