date: 21 December 2009
embargo: 21 December 2009

Delivering Equal Treatment for Agency Workers

BIS consultation on the implementation of the Temporary Agency Worker Directive draft Agency Worker Regulations: TUC Response

Contents

Section one

Executive Summary

Introduction

The TUC welcomes the opportunity to participate in the Government's second consultation on the implementation of the Temporary Agency Worker Directive and in particular the opportunity to comment on the draft Agency Worker Regulations. The TUC believes that the early introduction of effective equal treatment rights for agency workers will contribute to flexibility and fairness in the UK labour market.

The TUC has 60 affiliated unions, representing 6 million members from a wide range of sectors, industries, occupations and professions. This includes parts of the labour market where agency working is concentrated such as manufacturing, financial services, hospitality, construction and public services, including local and central Government, health and education services and social care.

Although union density amongst agency workers is low, trade unions nevertheless use their representation and bargaining influence to provide agency workers with voice at work and to improve their working conditions.

The TUC recognises that agency working can play a legitimate role in the UK labour market, assisting employers to respond to shifts in demand, to cover for short-term absences and to meet short-term skills needs. Agency working can also assist some individuals to accommodate caring responsibilities and provide younger workers and recent graduates with valuable experience of working in a given sector before making a permanent commitment to an occupation or profession.

However, research undertaken by the TUC and affiliated unions has also highlighted the precarious nature of agency working, and level of discrimination and mistreatment experienced by agency workers in the UK. This research also questions whether agency working acts as a gateway into permanent employment for staff or whether it can trap agency workers into a cycle of insecure and often low paid employment. In some sectors agency working has also been used to displace permanent forms of employment and to avoid basic employment protections.

In the light of this evidence the trade union movement has campaigned for many years at a UK and EU level for improved statutory employment protection for agency workers. The agreement reached between the Government, the CBI and the TUC in June 2008 helped to facilitate the

eventual adoption of the EU Directive in November 2008. The TUC calls on the Government to introduce and commence Agency Workers Regulations before the General Election. The views expressed by employers' organisations that new rights will cause unemployment and impede the recovery are unsubstantiated. Similar arguments were used at the time of the introduction of the National Minimum Wage and equal treatment rights for part-time workers and were shown to be completely unfounded. As the OECD Employment Outlook reported in 2004, there is no correlation between levels of employment protection legislation and employment or unemployment levels. Agency workers are particularly vulnerable in terms of job and income insecurity during times of recession and would benefit from increased employment protection. The TUC is therefore seriously disappointed by the Government's announcement that new legislation will not be commenced until October 2011 which is one of the latest dates permitted by the Directive. We believe there is a pressing case for equal treatment rights to be introduced as a matter of urgency.

The TUC also believes that it is essential for future Agency Worker Regulations to implement the CBI/TUC agreement faithfully. Any derogation from equal treatment in future Agency Worker Regulations which goes beyond the scope of this agreement is not only likely to be unlawful under the terms of the Directive but will also not prevent the mistreatment of agency workers in the UK.

Complying with the Temporary Agency Worker Directive

The TUC has consistently argued that it is essential for future Regulations to:

- Provide agency workers with a right to genuine equal treatment on pay, including basic pay, bonuses, and redundancy pay;
- Provide agency workers with a right to equal treatment on holiday pay and the ability to take time off, and working time; and
- Close loopholes which would allow unscrupulous employers to avoid the law and to undercut reputable firms.

The TUC is not convinced that the draft Agency Worker Regulations meet these basic objectives.

The TUC also takes the view that the Regulations do not comply with the requirements of the Directive for the following reasons:

Firstly, the draft Regulations fail to provide effective anti-avoidance measures. Article 5(5) of the Directive places a clear duty on the Government to introduce appropriate measures which prevent the abuse of equal treatment rights and in particular prevent the use of successive assignments to avoid equal treatment rights. However, under the draft Regulations it will be all too easy for employers or agencies to rotate agency workers either within or

between a limited number of employers in order to avoid equal treatment. There is also concern that employers and agencies will be able to circumvent the new legislation by employing agency workers through bogus self-employment or sham management service company arrangements.

Secondly, the definition of pay used in the draft Regulations does not comply with the requirements of the Directive. The Directive permits Governments to define pay in accordance with national law. However in our view, the Government does not have discretion under the Directive to remove, for the purposes of equal treatment rights, forms of remuneration from an existing national definition, including maternity, adoption and paternity related pay, some elements of performance related pay, bonuses and expenses. The exclusion of these forms of remuneration from the definition of pay represents a derogation from equal treatment rights which are not provided for within the CBI/TUC agreement. It is therefore not authorised or permissible under the Directive.

Thirdly, the TUC believes that the proposed role for workforce agreements is not permitted under the Directive. Proposals for employers to agree for the use of a package approach in workforce agreements on pay, hours and holidays represent a derogation which is not expressly authorised by the Directive. The use of workforce agreements would only be possible under Article 5(4) (the UK-style derogation). However this is dependent on the existence of an agreement at a national level between the social partners. The existing CBI/TUC does not provide for the use of workforce agreements and therefore the Government has no legal basis for its proposals.

Fourthly, the TUC questions whether the proposals for employers to be able to justify discrimination of agency workers when accessing collective facilities on the basis that overall the agency worker receives no less favourable treatment is consistent with EU law and is therefore permissible under the Directive. The TUC also questions whether other aspects of the draft Regulations fully comply with the Directive. These include the use of an exclusive list in provisions relating to access to collective facilities; the level of protection provided for agency workers employed under the permanent employment derogation; the liability provisions and the proposed level of penalties, which in our view are not effective, dissuasive or proportionate.

The TUC calls on the Government to revise the Agency Worker Regulations so that they comply with the terms of the Temporary Agency Worker Directive and faithfully implement the agreement reached between the CBI, TUC and the Government. It is in the interests of employers, agencies, agency workers and their trade union representatives for future Regulations to implement the Directive effectively and lawfully. This would reduce the risk of future litigation or infringement proceedings. It would also assist in avoiding the unsatisfactory situation where case law requires employers and agencies to

change their practices overnight and exposes them to claims for backdated compensation.

Delivering equal treatment: Key changes to the draft Regulations

The TUC believes that the draft Agency Worker Regulations must be substantially revised if they are to meet the basic policy objectives outlined above and if they are to comply with the requirements of the Temporary Agency Worker Directive. In summary, the following key changes should be made to the Regulations:

Scope of the Directive: who is covered?

- The definition of an agency worker should be amended to ensure that all economically dependent workers are covered by equal treatment rights. It should continue to reflect the tripartite nature of agency work. However the definition of employment should be based on that used in discrimination law.
- If a broader definition of worker is not used, Regulation 3(3) should be amended to state that the following factors, for example, should not prevent an individual being an agency worker:
  - The inclusion of a substitution clause within an individual's contract;
  - The individual provides their own equipment, tools or plant;
  - A person, who is not employed by the hirer employer, directs or supervises work on a day to day basis
- There should also be a statutory presumption that any individual supplied via a temporary work agency is an agency worker for the purposes of the Regulations.
- The definition of a temporary work agency should be extended to include 'a person or business engaged in economic activity'.
- The definition of a 'hirer' in Regulation 2(1) should be extended to refer to 'a person or business engaged in economic activity'.
- The Regulations should apply to seafarers. In particular, agency workers working on ships trading between EU ports, regardless of their nationality or place of residency should be protected.

Defining equal treatment: working time and pay

- The definition of 'night work' provided in Regulation 2 should be deleted and the Regulations should clearly state that agency workers have the right to equal treatment on night work and not simply on the length of night work.

- Agency workers must be provided with equal treatment on bank holidays. 'Bank holidays' should be expressly included in the definition of relevant terms and conditions listed in Regulation 5(1).
- It should be unlawful for an agency worker to suffer detriment on the grounds that they have requested or taken holiday leave. Where agency workers suffer detriment, tribunals should have the power to make awards which not only compensate the agency worker for financial loss but also for damages to feelings. Compensation awards should be set at a level which dissuades employers from future breaches of the law.
- Pay should be broadly defined within the Regulations in line with discrimination law and equal pay. Rights to equal pay should cover all forms of financial remuneration, including basic pay, bonuses, including performance related pay, overtime, shift premia, risk payments, holiday pay, redundancy pay and maternity, paternity and adoption pay. The only exceptions which should be permitted are occupational sick pay and occupational pension arrangements.
- If the Government continues to use section 27 of the ERA 1996 as the basis for the definition of pay, then agency workers must be entitled to equal treatment on:
  - contractual bonuses and performance related pay;
  - maternity, paternity and adoption leave pay;
  - payments for time off for trade union duties and guarantee payments; and
  - expenses for vouchers which can be exchanged for money, good or services, including lunch vouchers, transport costs and childcare vouchers; and
  - redundancy pay

The 12 week qualifying period and preventing avoidance tactics

- The use of a reference period would be a more effective anti–avoidance measure than the minimum break approach proposed in the Regulations.
- Any work done by an agency worker for a hirer over a period of 2 years should count towards an individual's 12 week qualifying period, regardless of the length of breaks between assignments. Once an individual has qualified for equal treatment rights these should be retained for all future assignments with that hirer. Only where there is a long break, for example of 2 years between the end of a last assignment and the start of a new assignment should the individual be required to re-qualify for equal treatment.
- The rules dealing with continuity in the Regulations should be amended to provide:
  - Continuity should not be broken where an agency worker is reassigned to a different job but continues to work for the same hirer.

  - Where an agency worker is incapable of work wholly or in part as a consequence of sickness or injury, the period of absence should also count towards continuity of service provided it does not exceed 28 weeks.
  - Absences due wholly or in part to disability should be treated in the same manner as absences due to maternity, paternity or adoption related leave.
  - Absences due wholly or in part to a temporary cessation of work should also count towards continuity of service.
  - An agency worker's continuity of service should also not be broken where they take part in a strike or industrial action or where an employer organises a lock out.
- The continuity of service for agency workers who are on maternity leave should be protected for a minimum of 26 weeks, in line with statutory rights to ordinary maternity leave.
- Any work done by an agency worker in any assignment for the *user undertaking* or a group of user undertakings must be taken into account when calculating an individual's continuity of service.
- The Regulations should protect the continuity of service of agency workers assigned to different LEA maintained schools or health service employers.
- The Regulations should provide for a specific prohibition of switching workers between roles with the same hirer and of ending assignments for the purposes of evading the equal treatment regime. The burden of proof should rest with the agency or hirer to demonstrate that the reason for a reassignment was not connected to the avoidance of equal treatment rights.

Permanent contracts of employment and pay between assignments

- Provisions relating to the use of the permanent contracts of employment where agency workers are paid between assignments should be removed from the Regulations.
- If this derogation is used, the Regulations must be revised to:
  - Guarantee agency workers on permanent contracts of employment with rights to equal treatment on holidays and working time from day of an assignment.
  - Guarantee agency workers a higher rate of pay between assignments, including a right for agency workers to be paid for a minimum number of hours per week regardless of whether they are assigned to an employer.
  - Strengthen the content of contracts of employment issued to agency workers to protect their rate of pay; the quality of potential assignments and to ensure that agency workers on permanent contracts of employment on permanent contracts of employment cannot be required to travel unreasonable distances for work.

Role for collective bargaining and workforce agreements

- The provisions relating to the use of workforce agreements should be removed from the Regulations.

Protection for pregnant women and new mothers

- Where an agency worker is moved to suitable alternative employment their continuity of service should be deemed to be maintained and to continue to accrue, even where the assignment is with a new employer. Their pay, working hours and holiday entitlements in their new assignment should be no less favourable than those in their original assignment.

Temporary to permanent status

- On the issue of temp to perm fees, the Regulations should be revised to specify that agencies should only be able to recover genuine costs incurred, for example the costs of training an agency worker for an assignment.

Access to collective facilities

- The Regulations should not provide for a package approach to objectively justifying unequal access to workplace facilities. An agency worker has the right to equal treatment in relation to access to collective facilities as compared with directly employed staff, unless the difference in treatment can be objectively justified.
- Agency workers should be entitled to equal access to an non-exhaustive list of collective facilities, including canteens, childcare facilities and transport services, toilets, sanitary facilities, staff rooms, rest facilities and breast-feeding facilities.

Information for workers' representatives

- Employers should be required to provide union and workplace reps with information relating to the terms and conditions of employment of agency workers, and not just information about the numbers of, work locations of and types of job done by agency workers.
- Employers should also be required to disclose such information for the purpose of collective bargaining with recognised unions.

Establishing equal treatment

- The Regulations should provide for a broad definition of a comparator, in line with other anti-discrimination legislation.
- The reference to a similar level of skills and qualifications should be removed from the definition of a comparable worker.
- Agency workers should be able to compare their terms and conditions with the contractual terms of a directly employed worker.

- Agency workers should be able to compare their terms and conditions with those of 'workers' employed by the hirer and not just employees of the hirer.
- Agency workers should be able to compare their terms and conditions with former workers employed by the hirer.

Liability for equal treatment

- Agencies and hirers should be jointly and severally liable for breaches of the Agency Worker Regulations.
- The liability provisions should be revised to ensure that there are no circumstances where neither the agency nor the hirer can be held liable for breaches of the Agency Worker Regulations.

Information on equal treatment

- Agency workers should be entitled to send a questionnaire asking for a written statement on equal treatment to the agency and the hirer at the same time. They should not be required to wait for 28 days for a response from the agency before being able to send a questionnaire to the hirer.

Dispute resolution and remedies

- ACAS' powers should be extended to ensure that they can conciliate on a tripartite basis between the agency worker, the agency and hirer and can request any necessary relevant information relating to pay, hours, holidays and collective facilities in the hirer's organisation.
- The remedies for breaches of the Agency Worker Regulations should be increased to ensure they are effective, dissuasive and proportionate.
- The Regulations should allow for a minimum basic award for any breach of the Agency Worker Regulations.
- Agency workers should be entitled to compensation for injury to feelings.

Evidence based approach

The TUC's earlier submission to BIS on the Temporary Agency Worker Directive contained a detailed body of evidence demonstrating the case for the early implementation of effective agency worker rights in the UK. This submission, which focuses primarily on the draft Agency Worker Regulations, should be read in conjunction with the earlier submission.

Section two

Scope of the Directive: Who is covered?

The TUC has consistently argued that the scope of the Agency Worker Regulations should be broadly defined to ensure that all agency workers are protected and to prevent avoidance tactics by unscrupulous employers and agencies.

Employers and their lawyers have industriously been devising legal strategies to avoid new equal treatment rights. Many of these strategies focus on the use of different forms of self-employment to circumvent the new legislation. Such strategies will not only deprive agency workers of increased employment rights protection. They will also have a range of indirect but nevertheless detrimental effects for agency workers. For example, being classified as self-employed can make it far more difficult for low paid, vulnerable groups of workers to qualify to statutory benefits, even though they are often the group of workers most in need of welfare protection. Such strategies also will lead to reduced NI contributions and tax revenues for the Exchequer, at a time when public finances face significant deficits. The use of such strategies will also generate unfair competition for those agencies and employers who seek to comply with statutory standards and to offer decent employment conditions for their staff. This may have the effect of creating a race to the bottom, with all agencies being pushed towards using avoidance tactics so as not to be undercut by other agencies.

Defining an agency worker

The TUC believes that the concept of an agency worker should be broadly defined in the Regulations so as to prevent employers' lawyers from using contractual devices to avoid equal treatment rights.

The Government has rightly acknowledged that the Directive creates an obligation to introduce measures which constrain the use of avoidance tactics. Consequently, some attempt has been made to extend the definition of an agency worker within the Regulations. This includes adjusting the standard definition of 'worker' used on section 230 of ERA 1996 or Working Time Regulations to reflect the tripartite nature of agency work. Also Regulation 3(1)(b) not only refers to the agency worker being 'employed by' but also '*otherwise engaged by*' the temporary work agency. This definition may in some circumstances reduce the need for litigation on whether or not an

appropriate employment relationship or contract is in existence between the agency and the agency worker before the latter can assert their rights under the Regulations.

It is also welcome that Regulation 3(3) seeks to ensure that equal treatment rights apply regardless of whether an agency worker is supplied through an intermediary or via a chain of agencies or sub-contractors. As a result agency workers employed through master / neutral vendor arrangements or under umbrella companies should be covered by the Regulations.

However, the TUC remains seriously concerned that agencies and employers will be able to avoid the new Regulations by employing individuals via bogus self-employment arrangements, for example as individual contractors, or via sham managed service company arrangements. As a result some economically dependent workers employed on a false self-employment basis could still be excluded from the new equal treatment rights.

Tackling bogus self-employment

Under the proposed agency worker definition, employers and agencies will be able to deprive individuals of their equal treatment rights through a range of contractual devices designed to classify an individual as self-employed. These include the insertion of a substitution clause within the contract. The onus will then fall on the worker to show that this constitutes a sham arrangement and that they are an economically dependent worker. Similarly, the employer or agency may require the individual to provide their own equipment. In the distribution sector some firms require workers to hire a van or bike as a condition of employment. This is then used by the employer as evidence that the individual is operating their own business and is self-employed.

Unions have reported to the TUC that in a growing number of sectors individuals are increasingly employed on a freelance or self-employed basis, including those on low incomes. Nowhere is this more prevalent than in the construction sector where construction unions have for many years highlighted the problems associated with bogus self-employment and the operation of the Construction Industry Scheme (CIS). The vast majority of workers in the CIS have the characteristics of employees, as they have set hours, cannot refuse work, have to obey orders and have materials and tools provided. However, many of these individuals are classified as self-employed and as a result they fail to qualify for even basic statutory employment rights and would be excluded from equal treatment rights for agency workers.

Other sectors affected by similar trends include the media and journalism, distribution, railway maintenance, hairdressing, catering and call centres. The TUC is concerned that if the current definition for an agency worker is used, there could be an expansion in the use of self-employment in many sectors of the UK economy. As a result growing swathes of agency workers would not only lose out on equal treatment rights but also all other forms of employment

protection legislation. They would also be deprived of such benefits as statutory sick pay and Job Seekers' Allowance, which can only amplify their vulnerability.

It is welcome that the Treasury is currently investigating the operation of the CIS. However, the Treasury's proposals will have no effect on the employment status of construction workers for the purposes of employment law. There is therefore a serious risk if the Government tax proposals come into effect that agency workers could be taxed as if they were in employment, but would still lose out on new statutory equal treatment rights.

The TUC continues to press the Government to implement changes to the tax system within construction as a matter of urgency. However, these changes should also be matched by the use of a broader definition for a worker under the Agency Worker Regulations. This twin approach would help to prevent tax evasion and employment rights evasion in all sectors of the economy.

Tackling 'sham' managed service company arrangements

The TUC is also concerned at the potential for employers and agencies to establish managed service company arrangements in order to avoid equal treatment rights. The TUC recognises that some agencies have diversified their operations in recent years to include tendering for service contracts. Agencies should not be able to rely on the insecurity and lower employment conditions associated with agency working to achieve competitive advantage over service companies which employ staff directly. We therefore do not support an exemption for managed service companies within these Regulations.

The TUC also remains concerned that employers and agencies may seek to establish sham managed service arrangements with a view to avoiding equal treatment rights. One tactic which is increasingly used is the appointment of an agency manager within a workplace to allocate work responsibilities on a day to day basis. This is common practice in parts of Further Education where a high proportion of college lecturers are supplied through agencies. It is also an emerging practice in parts of manufacturing and in the finance sector and calls centres.

It is possible that the tribunals and courts may find that in such circumstances the agency workers are working under the direction and supervision of the agency as opposed the hiring employer. If so, the agency workers would not be protected by the Regulations. The TUC believes that such avoidance tactics should not be permitted and that the Regulations should apply to these workers deployed on this basis.

Proposals to revise the Agency Worker Regulations

The TUC does not agree that the proposed definition, accompanied by guidance, will provide effective protection for vulnerable agency workers.

While it will be important for clear guidance to be developed alongside the Agency Worker Regulations, this advice will have no legal status and cannot determine how tribunals and courts apply the legislation.

The TUC supports attempts to increase transparency and for agency workers to be given more information about their employment rights. However, we do not believe that simply by providing information to an agency worker about the implications of their employment status and the nature of the contract will provide effective protection for agency workers. In most instances individuals will not have a genuine choice whether to accept an assignment as they need to earn a living and cannot afford to refuse employment.

Rather the TUC believes **the Government should extend the definition of an agency worker within the draft Regulations to ensure that all economically dependent workers are covered by equal treatment rights. The definition should continue to reflect the tripartite nature of agency work. However the definition of employment status should be based on that used in discrimination law.**

The TUC recognises that these proposals would bring some self-employed individuals within the scope of the Agency Worker Regulations. However, as argued in our earlier submission such individuals have the option of using the services of 'employment agencies' to find business opportunities and they are free to contract directly with user employers if they choose to opt out of equal treatment rights. Such workers will also often attract premium pay rates due to the scarcity of their skills sets. As a result they will earn more than directly employed staff and will therefore not be affected by new equal treatment rights. In our view, when drafting the Agency Worker Regulations the Government should prioritise the prevention of abusive practices towards genuinely economically dependent workers.

If the Government is unwilling to take this approach, it is essential to strengthen the existing definition of an agency worker by closing the legal loopholes which may be exploited by agencies and employers to avoid equal treatment rights. One way of achieving this would be to **extend the list of factors which should be disregarded by a tribunal when determining whether an individual is an agency worker. Regulation 3(3) should state that the following factors, for example, should not prevent an individual being an agency worker:**

- **The inclusion of a substitution clause within an individual's contract;**
- **The individual provides their own equipment, tools or plant;**
- **A person who is not employed by the hirer employer directs or supervises work on a day to day basis**

There should also be a statutory presumption that any individual supplied via a temporary work agency is an agency worker for the purposes of the Regulations. The burden for proving that an individual is not an agency

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

What is a temporary work agency?

In our initial response, the TUC agreed that future Agency Worker Regulations should apply to organisations generically referred to as 'employment businesses', i.e. businesses involved in the supply of agency workers to work under the direction or supervision of a hirer, but which maintain the employment relationship with the agency worker during the course of assignments.

It is welcome that Regulation 4(2) extends the definition of a temporary work agency to include situations where an agency worker has been supplied through one or more intermediaries. This will assist in ensuring that the Regulations continue to apply where complex contractual arrangements exist between master or neutral vendors.

The TUC however believes that the **definition of a temporary work agency should be further extended to cover not only 'a person engaged in []economic activity' to include 'a person or business engaged in economic activity'.** This definition would be more consistent with the definition of an employment business contained in section 13(3) of the Employment Agencies Act 1973. It would also remove any doubt that the Regulations apply to agency as a legal person, as opposed to any one individual working within a larger agency.

Who is a hirer?

Similarly, **the definition of a 'hirer' used in Regulation 2(1) should be extended to refer to 'a person or business engaged in economic activity'.** This amendment would clarify that the term 'hirer' applies to an undertaking, as opposed to any individual who has authority to hire agency workers under a given budget head. There is concern that if the latter interpretation were applied to the definition, it would be lawful for an agency worker to be rotated between 11 week assignments in different departments within larger organisations for a long period. The worker would never qualify for equal treatment rights because on each occasion they would have been reassigned to a new 'hirer'.

In addition, as argued in Section 4 below, the TUC believes that **for the purposes of determining continuity of employment and calculating the 12-week qualifying period, a hirer should be defined as a group of undertakings.** Alternatively, any work done for an associated employer should also count for the purposes of determining whether an individual has met the 12 week qualifying period. The definition for associated employer can be found in section 297 of the Trade Union and Labour Relations (Consolidation) Act

1992 (TULR(C)A1992) or section 231 of the Employment Rights Act 1996 (ERA 1996).

Territorial scope and rights for seafarers

The TUC believes that future Agency Worker Regulations should have a broad territorial application. **The equivalent territorial scope tests for what constitutes employment at an establishment in Great Britain which apply to anti-discrimination legislation, (for example, section 10(1A) of the Sex Discrimination Act 1975) should be used in future agency worker regulations.**

It is also essential that all agency workers who work within the EU, regardless of their nationality should have rights under the Temporary Agency Workers Directive. It is particularly important to ensure that effective protection is provided to agency workers working on ships trading between EU ports, regardless of their nationality or place of residency. This approach would mirror the approach adopted in relation to EU working time rules. The Directive does not provide any exclusion for seafarers and therefore it is assumed that future legislation implementing the Directive must apply to seafarers.

In the TUC's view, the Agency Worker Regulations should apply to all agency workers employed on ships registered in Great Britain (unless they operate solely outside the GB and EU) plus all ships trading between GB ports regardless of their nationality or place of residency. The Regulations should also apply to agency workers on ships trading in the UK offshore sector and between Great Britain and Jersey and Guernsey.

Section three

Defining equal treatment: working time and pay

Central to the Temporary Agency Worker Directive are the rights to equal treatment on basic working and employment conditions.

The Directive states that the pay, working time and holidays of agency workers should be at least those that would apply if they had been directly recruited by the user undertaking to occupy the same job (Article 5(1)). Agency workers are also guaranteed equal treatment on access to amenities and collective facilities in the user undertaking, and in particular staff canteens, childcare facilities and transport services. However, unlike part-time workers and fixed term employees, agency workers are not provided with guaranteed equal treatment on all terms and conditions of employment. The TUC therefore believes it is essential for agency workers to benefit from *genuine* equal treatment on pay, hours and holidays after the agency worker has attained the agreed 12 week qualifying period.

Once an agency worker has completed the 12 weeks' qualifying period the TUC believes that they should be entitled to backdated equal treatment on hours, pay and holidays from day one of the assignment with the employer. This approach is intrinsic to the concept of a qualifying period. For example, under statutory redundancy payment rights, where an employee has worked continuously for more than 2 years' with the same employer, the full length of their service is taken into when calculating their entitlement to redundancy payments.

Working time and holidays

Under the terms of the Directive agency workers are entitled to equal treatment on all aspects of holiday rights including holiday pay and the ability to take paid leave and on all aspects of working time, after the 12 week qualifying period.

Evidence of discrimination

As reported in the TUC's earlier submission there is evidence of widespread discrimination against agency workers on holidays and working time.

According to the Labour Force Survey (LFS) agency workers receive on average 10 days fewer days paid leave as compared with directly employed staff.

Number of days of paid holiday entitlement (mean)

	Agency workers	All employees
All workers	16.5	25.0
All workers with at least 12 months service	16.2	25.4

Note: autumn quarter 2008 (question only asked in autumn)

Nearly half (46%) of respondents to the 2009 You Gov survey commissioned by the TUC said they received less holiday entitlement as compared to directly employed staff doing the same job and nearly one in three said they lost out on overtime and unsocial hours payments. 59% of respondents with 2 or more children reported they received less holiday entitlement.

Some workers found it hard to take any holidays at all due to the need to be available for assignments when offered by the agency and others reported receiving rolled up holiday pay, even though this is unlawful. Some of the statements made in the survey included:

> *'Never sure when I can take time off;'*
>
> *'Unpaid holidays;'*
>
> *'No holidays. I haven't had a break for years and it's taking a toll on my health.'*

Equal treatment on holidays

The TUC in general agrees with the proposed approach taken on leave and holiday pay with the Regulations. As drafted, **the Regulations provide agency workers with rights to equal treatment on holiday pay and on the ability to take leave, with limitations. In our view, this is the only way for the UK Regulations to comply with the terms of the Temporary Agency Worker Directive.**

The TUC however has two issues of contention in relation to holiday entitlements. Firstly, the definition of basic employment and working conditions contained in Article 1(f)(i) of the Directive includes 'public holidays'. Consequently, under the Directive agency workers have the right to be treated no less favourably in relation to bank holidays. This involves rights to bank holiday pay premia and the right not to be disproportionately required to work on bank holidays as compared with directly employed staff. **The definition of relevant terms and conditions listed in Regulation 5(1) must therefore to be amended expressly to include 'bank holidays'.** The TUC

understands the terms "public holiday" and "bank holiday" to have the same meaning. The definition covers all bank and public holidays, including the substitute days when public holidays fall at the weekend. It also includes the one-off public holidays that are granted from time to time, such as the 2002 Royal Jubilee holiday.

Secondly, the TUC however does not agree with the proposition contained in paragraph 4.13 that ways should be found for employers / agencies to be able to provide payment in lieu of additional holiday entitlements. This approach would result in on-going discrimination against agency workers. It is reminiscent of the practice of rolled-up holiday pay, which has already been rejected by the courts, albeit the judgement only applied to statutory holiday pay. A workplace policy which only provided agency workers with rolled-up holiday pay for leave which exceeds the statutory minimum, when directly employed staff had the right to take paid leave away from work would, in our view, not be permissible under the Directive. The TUC would therefore strongly resist any changes to the Regulations to this effect.

The decision of the European Court of Justice (ECJ) in the case of *EC Commission v UK* (C484/06 [2006] 3CMLR 1322), which arose from a complaint by Amicus to the European Commission, also confirms that the Government is obliged to issue guidance which encourages employers to comply fully with the terms EU Directives. It is therefore important that future guidance accompanying the Agency Workers Regulations does not advise employers that the use of payments in lieu of holiday is permissible in relation to agency workers where directly employed staff are entitled to take paid leave.

In order to ensure that agency workers are provided with genuine rights to equal treatment on holidays, the TUC believes that the Agency Worker Regulations should be strengthened in two ways:

Firstly, there is a need to put in place **statutory safeguards** which ensure workers are able to request or take leave without fear of detriment or losing out on future assignments. Agency workers however are often reluctant to request or to take significant periods of leave for fear that if they turn down the offer of work from an agency they will not be offered future assignments. Regulation 14, which sets out the detriment provisions, only provides protection for an agency worker who asserts that the hirer or agency had breached their statutory rights. In our view this Regulation should state that **it is unlawful for an agency worker to suffer detriment on the grounds that they have requested or taken holiday leave. Where agency workers suffer detriment, tribunals should have the power to make awards which not only compensate the agency worker for financial loss but also for damages to feelings. Compensation awards should be set at a level which dissuades employers from future breaches of the law.**

Secondly, agencies and employers should be required 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. In practical terms, the TUC would suggest that this information become an integral part of, or be attached to, the pay slip so that the agency workers can keep track of their entitlement.

Detailed record keeping will be particularly important for those agency workers who qualify for equal treatment after 12 weeks in an assignment with an employer. Such individuals will not only have rights to future holiday entitlements but also to accrued entitlements from the first day of assignment after the 12 weeks qualifying period has elapsed.

Equal treatment on working time

The TUC in general agrees with the approach taken in the draft Regulations in relation to equal treatment on the duration of working time, on rest periods and on rest breaks. Under these provisions, agency workers will have the right to no less favourable treatment on rest breaks and rest periods as compared with directly employed staff doing the same work. Agency workers can also not be expected to work longer hours or to be offered shorter shifts than directly employed staff.

However, the TUC takes the view that the provisions in the Regulations on night work need to be revised in two respects. Firstly, under Article 3(1)(f)(i) of the Directive it is not permissible for agency workers to be treated less favourably in relation to night work. This includes the requirement to undertake any night work as well as the length of night work undertaken. Regulation 5(1)(C) of the Agency Worker Regulations however appears to suggest that agency workers would only be entitled to equal treatment on the *length* of night work. **Regulation 5(1)(c) should be amended to refer only to 'night work' and not to 'the length of night work'.** This would confirm that it would be unlawful for agency workers to be required to undertake night work when directly employed staff are usually or always allocated day shifts.

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

As argued in our earlier submission, steps should also be taken to **strengthen the enforcement of working time rights** for agency workers. The TUC believes that dual enforcement systems should be developed. Agency workers should continue to have the right to make a complaint to an employment tribunal. However they should also have the right to complain to either EASI or GLA who should be required to investigate such complaints and to take enforcement

action where appropriate. These agencies should also be encouraged to develop more proactive investigations of breaches of working time and holiday rules. The same dual enforcement system has been shown to be successful in relation to the National Minimum Wage, which is one of the government's flagship policies.

Pay

The TUC does not agree with the approach taken on the definition of pay in the Agency Worker Regulations. In our view, the proposed definition is not sufficiently broad to guarantee genuine equal pay for agency workers in Great Britain.

Evidence of pay discrimination

In Sections 2 and 4 of our original submission, the TUC documented in detail the extent of pay discrimination faced by agency workers in the UK. In summary:

Findings from the 2009 YouGov survey which involved more than 2,700 individuals reveal that:

- 33% of agency workers reported they had faced pay discrimination as compared with directly employed staff doing the same job.
- More than two in three (70%) reported that temps were entitled to less maternity pay than other staff.
- 29% of agency workers reported that they lost out on overtime pay and unsocial hours payments as compared with directly employed staff.
- 32% said they received worse entitlements to performance related pay and bonuses than directly employed staff.

The TUC analysis of the Spring 2009 LFS statistics also indicates the extent of the agency worker pay gap. Agency workers earn on average 73.8% as much as permanent workers per hour. A significant proportion of agency worker earn poverty wages. According to the LFS Microdata Service (Winter 2009), nearly 40% of agency workers are paid £6.00 or less per hour, as compared to just 15.6% of all employees.

It is important to note that pay discrimination experienced by agency was one of the principle drivers for the adoption of an EU level Directive. It is essential that future Agency Worker Regulations put an end to pay discrimination for agency workers and ensure that agency workers receive fair pay for work undertaken.

Equal treatment on pay

Regulation 5(2) defines pay for the purposes of equal treatment rights within the Agency Worker Regulations. The general definition of pay used in Regulation 5(2) is similar to the definition of wages in section 27 of the ERA 1996. However, the Regulation 5(3) goes on expressly to exclude certain payments some of which are treated as pay within section 27 including:

- Occupational sick pay arrangements;
- Payments relating to pensions or allowances relating to an individual's retirement or compensation for loss of an office;
- maternity, paternity and adoption pay;
- pay relating to time off for dependents;
- pay relating to time off for trade union duties or training (and similarly pay relating to time off for workforce representatives' duties);
- pay relating to time off for public duties;
- pay relating to time off to look for future employment or training in redundancy situations;
- pay relating time off for young people to study;
- expenses in the form of benefits in kind, including vouchers for childcare, transport or lunches;
- contractual bonuses relating to company performance or annual appraisals.

The Regulations also exclude statutory redundancy payments from the definition of pay, although it recognised that these payments are also excluded from pay in section 27.

The TUC does not agree with the proposed definition of pay and considers that it fails to comply with the Temporary Agency Worker Directive.

Article 3(2) of the Directive recognises that each Member State has its own conception of pay. However it does not provide governments with the discretion to create a unique definition of pay for the principle of equal treatment for agency workers. Article 5(4) of the Directive which contains the UK style derogation makes some provision for 'arrangements' which may narrow the definition of pay. Article 5(4) expressly refers to Member States specifying occupational social security schemes, including pension, sick pay or financial participation schemes'. However such exclusions must be based on an agreement concluded by the social partners at a national level. The agreement between the TUC and CBI recognises that the principle of equal treatment 'will not cover occupational social security schemes'. This is understood to include occupational pension arrangements and occupational sick pay.

In the TUC's view, the other exclusions from pay listed above which are covered by section 27 of the ERA 1996, represent derogations from the

definition of pay which are not covered by the agreement reached between the CBI and TUC.

As previously argued, **the TUC believes that pay should be broadly defined within the Regulations. We continue to hold the view that pay should be defined in line with discrimination law and equal pay and therefore should cover all forms of financial remuneration, including basic pay, bonuses, including performance related pay, overtime, shift premia, risk payments, holiday pay, redundancy pay and maternity, paternity and adoption pay. The only exceptions which should be permitted are occupational sick pay and occupational pension arrangements.** It is also important that agency workers benefit fully from statutory sick pay arrangements and from the provisions of the Pensions Act 2008, including personal accounts.

If the Government decides to continue to rely on section 27 of the ERA 1996 as the national definition for pay, then **the definition for pay used in the Agency Worker Regulations must be revised to include:**

- **contractual bonuses and performance related pay;**
- **maternity, paternity and adoption leave pay;**
- **payments for time off for trade union duties and guarantee payments; and**
- **expenses for vouchers which can be exchanged for money, good or services, including lunch vouchers, transport costs and childcare vouchers.**

Failure to include these elements within the definition of pay would not be consistent with the Directive and could be subject to legal challenge.

Perhaps more importantly failure to include these elements within the definition of pay will mean that agency workers in Great Britain continue to face pay discrimination. For example, excluding **performance related pay** is likely to disproportionately affect agency workers in the finance sector. Unite which represents members in the Finance sector reports that the majority of the 1,000,000 workers in the finance sector will be on performance related and/or profit related pay systems, even though in recent months there has been a reduction in the use of bonuses following the financial crisis. In some workplaces 10% of pay would have come from profit related schemes. Performance related pay also applies in central and local Government. 49% of agency workers responding to the 2009 You Gov survey who were employed in central and local government reported losing out on all or part of the bonuses or performance related pay where such payments are made to directly employed staff. 35% in transport and distribution and 38% of agency workers in manufacturing also reported losing out on performance related pay.

The TUC has repeatedly applauded the Government for its progressive policies in relation to maternity pay and leave and adoption and paternity leave. We are therefore surprised that pay relating to maternity, paternity and adoption

leave has been excluded from the definition of pay within the Agency Worker Regulations.

The TUC would also call on the Government to include **redundancy payments** in the definition of pay. One of the main features of agency working in the UK is job insecurity, which in turn brings financial insecurity. Agency workers have no security of tenure and can be laid off without any notice or redundancy pay.

75% of respondents to the 2009 You Gov survey said agency workers in workplaces they had been assigned were entitled to less redundancy pay than directly employed staff. This proportion rose to 86 % among agency workers in manufacturing; 85% in social care and child care; 89% in central and local government.

The absence of redundancy pay makes it almost impossible for agency workers to plan financially or to cover household bills between assignments. In times of recession agency workers are usually the first to be laid off. Where large numbers of agency workers can be laid off at one time, the lack of or very low levels of redundancy pay, even for those who have provided years of service for an employer, can have devastating effects on the financial security of multiple households and of local communities. This was illustrated recently at Cowley.

Section four

The 12 week qualifying period and preventing avoidance tactics

The Temporary Agency Worker Directive enshrines the principle of equal treatment as a day one right for agency workers.

The Directive however permits derogations from equal treatment through collective bargaining, where agency workers are employed on a permanent contract of employment and are paid between assignments and under the UK-style derogation which allows for the use of qualifying periods.

However, the Directive makes clear that the derogations can only be used where both adequate protection for agency workers and effective anti-avoidance measures are in place. Article 5(5) requires member states to introduce appropriate measures with a view to prevent misuse of derogations from equal treatment and in particular preventing the use of successive assignments to circumvent equal treatment rights.

The agreement reached between the TUC, the CBI and the Government allows for a qualifying period of 12 weeks before equal treatment on basic working conditions applies. However, in the TUC's view, the Government's proposals for the operation of the qualifying period contained in Regulation 7 do not meet the requirements of Article 5(5) as they fail to prevent employers from rotating agency workers either within or between a limited number of organisations in order to avoid equal treatment. In the TUC's view, this part of the Regulations must be reconceived and rewritten in order to provide effective anti-avoidance measures.

The TUC has always recognised that the adoption of a 12 week qualifying period would lead to a significant proportion of agency workers failing to qualify for equal treatment rights. However, there was also an expectation that employers who had previously deployed agency workers for longer assignments would offer direct, permanent employment to the staff. This would bring clear benefits for previously temporary workers. For the reasons outlined below, the vast majority of agency workers in Great Britain may never qualify for equal treatment rights if the Regulations are not revised. This clearly does not comply either with the aims of the Directive of offering greater protection for agency workers and breaches Article 5(5).

The TUC rejects the argument that tighter avoidance measures would have a negative impact on flexibility for employers. More effective rules on the qualifying period would not constrain employers' use of agency workers. It

would simply mean that agency workers are paid a fair rate for work undertaken after the 12 week qualifying period. Ensuring that agency workers receive the same rate of pay as directly employed staff after the 12 week period is the only way to achieve the flexibility and fairness, which is the Government's stated policy objective.

Ways of circumventing the 12 week qualifying period

Under draft Regulation 7, to meet the 12 week qualifying period the worker must undertake the same role with the same hirer for 12 continuous calendar weeks, under one or more assignments. Draft Regulation 7 (3) (a) proposes that any work done in any or part of any week counts towards the 12-week period. An agency worker will have undertaken the same role unless the agency worker starts a new assignment which involves substantially different work or duties. In this case, the individual's continuity of service will be broken and the 12 week qualifying period clock will revert to zero even though the new assignment is with the same hirer and may be in the same workplace. Regulation 7 (3) (b) (ii) does not explain what 'substantively different' means, but the TUC understands this to mean work which is factually different, for example involves different tasks or a different skills set.

Regulation 7 (6) (a) also proposes that 'a six week break' should be sufficient to break continuity for the purposes of the 12-week qualifying period, i.e. the clock would start again if the agency worker has a break of 6 weeks or longer during or between assignments with a specific hirer. The only reasons deemed to justify a break longer than 6 weeks without breaking continuity are listed in regulation 7 (6) (b-f) and include absence on grounds of annual leave, sickness, maternity/paternity and public duties such as jury service.

As indicated above, the TUC does not believe that these arrangements comply with the requirements of Article 5(5) of the Directive. There is nothing in Regulation 7 which will prevent employers rotating agency workers either between or within organisations in order to avoid equal treatment rights. Indeed in our view it will not be difficult for employers and agencies to organise working patterns which will prevent agency workers from qualifying for equal treatment rights.

The findings from the 2009 YouGov survey confirm that it is commonplace for agency workers to be reassigned to the same employer on a regular basis. Overall 41% of respondents said that most of their assignments as an agency worker lasted 12 weeks or less and 54% reported having been placed with the same employer on more than one occasion.

35% had been placed with the same employer within 12 weeks of the end of the last assignment. 15% had been placed with the same employer between 12 weeks and up to 2 years after last job and a further 4% had been placed with the same employer over 2 years after the end of the last job. The 12 week

qualifying clock would have been reset to zero for all of these agency workers. Regardless of the length of their previous service with the hirer they would not qualify for equal treatment unless their new assignment lasted more than 12 weeks.

Evidence from a wide range of sectors within the UK labour market demonstrates it would be all too easy for agencies and hirers to devise systems for the re-deployment of agency workers in order to circumvent the 12 qualifying period. Case studies provided by unions, reveal that the following groups of agency workers might lose out on equal treatment:

- Agency teachers or lecturers on longer assignments whose continuity would be broken during the summer vacation (typically of 6 weeks) or as a result of being assigned to teach a different age group or in a different department within a school or college

'A break of 6 weeks alongside a service requirement of 12 weeks would ensure that agency teachers are very unlikely to acquire equal treatment rights. Even in circumstances in which agencies which did not see to avoid the provisions, and the teacher remained working with a single hirer, the summer vacation would inevitably result in a break of continuity. In those circumstances in which the agency or hirer wishes to avoid the acquisition of equal treatment rights, it would be extremely easy to ensure that a break of 6 weeks or a failure to reach 12 weeks of service is imposed by ending the placement earlier than at the end of term or starting it later than the beginning.

In addition, in those areas where local authorities have moved to 4 or 5 shorter academic terms, it might be difficult for teachers to acquire 12 weeks continuity in a single school.

In any event, it will also be extremely easy to avoid the provisions by moving teachers between different hirers. In the case of local authority schools, if the individual governing body is treated as the hirer rather than the local authority, a teacher could be moved around schools within a single local authority area without ever working for more than a single term of 12 weeks, thereby never acquiring equal treatment rights. This is in contrast to the employment situation of most teachers in local authority schools, who if they work in community schools are all employees of the local authority.'

NUT official

'The 6 week break is likely to be a problem within education. The break between academic years is usually at least 6 weeks so this would mean that the worker would always start from square one at the beginning of an academic year and need to work for 12 weeks to re-qualify. Currently teachers do not have an entitlement to annual leave and the summer break is not counted as leave – teachers' are contracted to work for up to 195 days per year.

It is possible for a teacher to be employed within the same school teaching different year groups, classes or subjects. We will be pressing that employment as a teacher, irrespective of the type of teaching undertaken should count.

It is also possible that employment at a different level – ie as a specific post holder (subject or year head) may be classed as different to a normal classroom teacher.

ATL official

- Agency workers working in food processing who could be moved from picking work to packing work in a warehouse, or moved between different sites of the same company where the only thing that differs is the product that is being packed (e.g. chicken on one production line; turkey on another and so on). According to the draft Regulations these workers would therefore be assigned to 'substantively different' work with the same hirer;

'[There] can be relatively minor changes such as the type of product that is being picked (e.g. from frozen to dry grocery). However, there is the potential for such workers to be moved around the warehouse from picking to loading for example. The other question is what would happen if an agency worker was moved from one site to another site that are both operated by the same employer doing the same work but where there are slightly different job titles etc. and terms and conditions.'

Union official working in food processing sector

- Seasonal workers in agriculture who year on year return to the same employer for the 3-5 months harvest season but who would fail to qualify for equal treatment rights because they are rotated and 'shared' between various farms in the same area;
- Agency workers in the warehouse, distribution and transport sectors who can easily be rotated by an agency between different employers based on the same industrial site in order to avoid equal treatment. The agency workers could be assigned to successive assignments with the same hirer, but only after a break of more than 6 weeks during which they have worked for a different hirer in the same industry;

' Within the sectors that Usdaw organises, it is unlikely that the six week break would provide adequate protection to agency workers and, in many cases, would only mean that such workers never qualify for equal treatment. In the Transport, Distribution and Warehouse sector in particular it is highly unlikely that the six week break would provide the protection as intended under the Directive. The nature of such work means that it would be relatively straightforward for agencies to rotate workers between the sites of different employers in a similar location. We know that the same agencies work across a number of different employers on the same industrial estates and that such

rotation would pose no significant problems. The idea that agency workers could not work 12 weeks on and 6 weeks off (as per the Government consultation) is slightly spurious as rather than having 6 weeks off, agency workers will merely work 12 weeks with one employer as a picker in a warehouse and then 12 weeks with another doing a similar job, thereby never triggering equal treatment. A similar situation would also be true of LGV/HGV agency drivers who work from similar locations (and are generally more mobile anyway).

USDAW official

- Similarly agency workers working in communications can be rotated between different call centres;

'In the Telecoms sector it is becoming increasingly common for an agency worker to be reassigned from one call centre job to another, some of these new rules require different skills and extensive retraining. It is the view of the CWU that continuity should lie with the end user irrespective of the job function which is the same practice that applies to permanent employees'

CWU official

- Construction workers can be supplied to work for a number of different subcontractors on the same construction site with each assignment involving minimally different tasks.

Proposals for effective anti-avoidance measures

Given that it is clearly foreseeable that agencies and employers will be able to use the 12 week qualifying period and other provisions contained in Regulation 7 to avoid equal rights, the TUC concludes that the Government's current proposals fall far short of the requirements of the Directive. Rather than preventing agencies and employers from circumventing equal treatment rights, the current proposals could almost be interpreted as an invitation to evade new equal treatment rights. Extensive revisions are required if the Agency Worker Regulations are to provide effective anti-avoidance provisions. The TUC therefore calls on the Government to make all the following changes to Regulation 7.

Reference period

The use of a reference period would be a more effective anti –avoidance measure than the minimum break approach to equal treatment proposed in Regulation 7. Any work done by an agency worker for a hirer over a period of

2 years should count towards an individual's 12 week qualifying period, regardless of the length of breaks between assignments. Once an individual has qualified for equal treatment rights these should be retained for all future assignments with that hirer. Only where there is a long break, for example of 2 years between the end of a last assignment and the start of a new assignment should the individual be required to undergo a new qualifying period.

Given the frequency with which agency workers are reassigned to the same employer or hirer, the use of a reference period would mean that over time more agency workers are likely to qualify for equal treatment rights. The use of a reference period would therefore be consistent with the aims of the Directive to provide agency workers with increased protection. The TUC also understands the reference period was considered as an appropriate anti-avoidance measure when the draft Directive was discussed within the EU institutions, suggesting that this approach may be recognised as an effective model by the Commission and other EU Member States.

The TUC does not accept the premise that a reference period should not be adopted as it would place too great an administrative burden on employers. Agencies are well equipped to create computer programmes and databases aimed at tracking the length of assignments with any given hirer. It is also highly unlikely that the ECJ will acknowledge administrative burdens for employers as a legitimate justification for diluting equal treatment rights.

Extending the length of reference period or break

It is essential that whichever form of anti-avoidance measure is used, it is framed in a way that it operates effectively and prevents abuse in all sectors of the economy where agency workers are used. This includes in sectors where agency workers are assigned regularly to the same hirer but on short-term basis, for example hospitality, as wells as sectors where agency workers are regularly reassigned to the same workplace, but the break between assignments is longer, such as manufacturing, education or in the case of seasonal working.

As demonstrated above, current proposals involving a 6 week break and for continuity to be broken where an agency worker moved to a new assignment involving substantially different work or duties, simply does not work effectively in any sector. **The only way to provide an effective anti-avoidance measure is by providing either a long reference period or a long break. The TUC believes that a 2 year period should apply in both contexts.**

Continuity rules

In addition, continuity of service should also not be broken where an individual moves to an assignment involving different work or a different location. Rather the TUC believes the standard statutory rules relating to continuity of employment contained in sections 210 to 219 of ERA 1996 should also apply to equal treatment rights for agency workers. As a result:

- **Continuity should not be broken where an agency worker is reassigned to a different job but continues to work for the same hirer.**
- **Where an agency worker is incapable of work wholly or in part as a consequence of sickness or injury, the period of absence should also count towards continuity of service** provided it does not exceed 28 weeks (s212(3)(a) of ERA 1996).
- **Absences due wholly or in part to disabilities should be treated in the same manner as absences due to maternity, paternity or adoption related leave under Regulation 7(5).** Failure to make this change could result in a legal challenge on the grounds of disability discrimination. The 28 weeks' limit on sickness related absence should also not apply to individuals who are absent for disability related sickness.
- **Absences due wholly or in part to a temporary cessation of work (s. 212(3)(b) of ERA 1996) should also count towards continuity of service.** This amendment would be of particular assistance in the sectors such as education where organisations close for periods of time (for example during the summer vacation) and therefore no work is available for agency workers. In the case of *Ford v Warwickshire County Council* [1983] IRLR 126 HL, the House of Lords ruled that an interval between two contracts of employment (which spanned the summer vacation) did not break continuity as the employee was absent from work due to a temporary cessation of work.
- **An agency worker's continuity of service should also not be broken where they take part in a strike or industrial action or where an employer organises a lock out** (s.216 of ERA 1996).

Absences relating to maternity

The TUC is seriously disappointed that the Agency Worker Regulations only protect the continuity of agency workers for 2 weeks of maternity leave. Regulation 7(8) states that where an agency worker is not entitled to ordinary or additional maternity leave then only 2 weeks of maternity leave will count towards on-going continuity of service. Given that statutory rights to ordinary and additional maternity leave are limited to 'employees' and that under employment status case law it is highly exceptional for agency workers to be legally classified as employees, these provisions would mean that all agency workers who are new mothers will only be entitled to 2 weeks' absence from the office for maternity leave purposes. If an agency worker decides to take longer maternity leave and this additional exceeds 6 weeks, the individual will lose their equal treatment rights.

In the light of the Government's progressive policies of maternity rights in recent years, the TUC is very surprised by the effect of the Regulations. In practice, agency workers who are new mothers will be forced to return to work very early after giving birth or risk losing their equal treatment rights. The TUC therefore recommends that **the continuity of service for agency**

workers who are only maternity leave should be protected and therefore continue to accrue for a minimum of 26 weeks, in line with statutory rights to ordinary maternity leave.

Broadening the definition of a hirer

As argued in section 2 above, the TUC believes that the definition of a hirer should be defined as an undertaking or group of undertakings for the purposes of determining an individual's continuity of service. The TUC believes that **any work done by an agency worker in any assignment for the user undertaking or a group of user undertakings in any location must be taken into account when calculating an individual's continuity of service.**

The Agency Worker Regulations should also protect the continuity of service of agency workers assigned to different LEA maintained schools or health service employers. Employment in one school or health service workplace should therefore count towards the individual's qualifying period where they move workplaces.

This approach is already used in section 218 of the ERA1996 in relation to other statutory employment rights which are dependent on continuity of service. The same approach should apply to equal treatment rights for agency workers.

Specific prohibition on reassignments aimed at avoiding equal treatment

The Regulations should provide for a specific prohibition of switching workers between roles with the same hirer and of ending assignments for the purposes of evading the equal treatment regime. The burden of proof should rest with the agency or hirer to demonstrate that the reason for a reassignment was not connected to the avoidance of equal treatment rights.

The TUC welcomes the fact that the Government is consulting on this proposal. However, we would emphasise that the inclusion of such a specific prohibition would not be effective without any additional stronger anti-avoidance measures as outlined above.

Section five

Permanent contracts of employment and pay between assignments

The TUC continues to oppose the use of the permanent contracts derogation on the grounds that it will not offer adequate protection, in particular for lower paid agency workers, and could be used by unscrupulous agencies and employers to circumvent equal treatment rights. Agency workers could significantly lose out on pay. Paying agency workers on reduced pay between assignments is also likely to have a serious impact on agency workers' rights to benefits entitlements, including working families tax credits, statutory sick pay, maternity allowance, and job seekers' allowance. Because some benefits are means-tested and also dependent on 'availability to work', the TUC is concerned that being paid between assignments could adversely affect agency workers' eligibility for certain benefits. In particular, it would be extremely complicated to calculate the entitlement to working tax credits, for example, which are linked to being in employment. It would be preferable that agency workers who continued to be paid between assignments had an adequate level of pay rather than having to rely on working tax credits. Equally, it would be unclear whether these workers would be able to claim JSA as, in principle, they are in employment. Similarly, such arrangements could have repercussions on NI contributions as well as income tax rates/allowances.

Proposed revisions to Regulations 21 and 22

Given the weakness of other provisions on equal treatment following a 12 week qualifying, the TUC sees no case for the provision of additional derogations on pay within the Regulations. **We therefore believe Regulations 21 and 22 should be omitted.**

If, however, the Government decides to proceed with the derogation, a number of important changes need to be made to the Regulations.

Firstly, Article 5(2) of the Directive which contains the provisions relating to permanent contracts of employment only permits derogations from pay. Under this derogation, **agency workers must be guaranteed with equal treatment on holidays and working time from day one of any assignment.** As currently drafted, the Agency Worker Regulations appear to require agency workers employed on permanent contracts of employment to have completed

the 12 week qualifying period before they are entitled to equal treatment on holidays and working time. This is because Regulation 7(1) states that '*Regulation 9 does not apply unless an agency worker has completed the qualifying period*'**. Regulation 7 needs to be disapplied in relation to agency employees employed under Regulation 21.**

Secondly, the TUC believes that **agency workers should be guaranteed a higher rate of pay between assignments.** Under Regulations 21 and 22 agency employees are only guaranteed pay between assignments amounting to 50% of the pay rate they received on the previous assignment or on an assignment in the previous 12 weeks (whichever is the greater and subject to a floor of the NMW). This is far lower than the pay received by agency workers in other EU countries where this derogation is used. The TUC believes that agency workers should be entitled to 100% of their normal earnings assignments (i.e. the pay they receive whilst on an assignment).

Furthermore, where an agency worker has worked limited hours during the preceding 12 weeks they will be entitled to very low rates of pay between assignments. In order to prevent this situation, the TUC believes that the Agency Worker Regulations should provide options for agency workers to be employed either on a full time basis (i.e. 35 or 40 hours a week) or part time basis (i.e. 15 hours). This approach would also ensure that the use of 'zero hours' contracts was not permissible under this derogation. It would also ensure that the worker has a guaranteed income for the specified hours even when they are not required to work, or work a fewer hours than their contracted hours due to lack of assignments. Regulations should also state that, when contracted to work on a part time basis, agency workers cannot be prevented from registering with another agency for the remainder of their working time.

Thirdly, the provisions relating to the content of agency workers' contracts of employment in Regulation 21(2)(a) should be strengthened in the following manner:

- **the locations where the agency worker will be expected to work, during the course of their employment with the agency**. Regulation 21(2)(a) should be amended to state that agency workers cannot be expected to travel unreasonable distances for different assignments.
- **the hours that the agency worker will be guaranteed pay.** In line with the proposals outlined above should be amended to state the minimum of amount of pay which an agency worker will receive during and between assignments, reflecting whether they are contracted to work on a part time or full time basis.
- **the nature of work that the agency will seek for the agency worker, including whether these would require different types or levels of experience, or qualification.** The Regulations should expressly state that an agency cannot require an agency worker to accept a lower status, paid or skilled

assignment or work for which training has not been provided.

Section six

The role for collective bargaining and workforce agreements

Collective bargaining

The TUC firmly believes that collective bargaining can play a central role in the implementation of equal treatment rights for agency workers. Trade unions have an unrivalled track record in using their bargaining influence to achieve compliance with statutory employment rights in workplaces across the UK and thereby to deliver fair treatment for working people. Trade unions work with employers to implement statutory standards in a manner which reflects the nature of different sectors and industries.

Although trade union density is low amongst agencies in an increasing range of sectors unions have recruited, organised and bargained on behalf of agency workers. Leading examples of this include CWU's work amongst call centre staff; PCS was the first union to win statutory recognition for agency workers in DEFRA's Rural Payment's Agency; and Unite's campaigns to improve working conditions for agency workers in the white meat industry. In other workplaces, unions use their bargaining influence with hiring employers to achieve improved working conditions for agency workers.

The TUC believes that collective bargaining will play a key role in delivering equal treatment rights for agency workers and in providing agency workers with improved conditions beyond the statutory minimum. In order to perform this important enforcement role, it is vital that union reps are provided with information about the use of agency workers and their terms and conditions for the purposes of collective bargaining, as argued in Section 12 below.

Consideration should be given to the use of the derogation in Article 5(3) to promote the role for collective bargaining in determining agency workers' terms and conditions, particularly at a sectoral level. UK trade unions however would only seek to use collective bargaining as a means of delivering improved working conditions which *exceed* not undercut the statutory minimum contained in Regulation 9.

Workforce agreements

The TUC is firmly opposed to the proposed use of workforce agreements to undercut equal treatment rights through the adoption of a package approach on pay, hours and holidays. The TUC believes there is no legal basis for the

use of such agreements and therefore corresponding provisions in Regulation 20 are in breach of the Directive.

Proposals for employers to agree for the use of a package approach in workforce agreements on pay, hours and holidays represents a derogation from the principle of equal treatment contained in Article 5(1). In our view such a derogation is not expressly authorised by the Directive. It is possible that a package approach to equal treatment may be permissible under Article 5(3). However this paragraph within the Directive is strictly limited to collective bargaining between independent trade unions and employers.

The use of workforce agreements would only be possible under Article 5(4) (the UK-style derogation). However this is dependent on the existence of *an agreement* at a national level between the social partners. The existing CBI/TUC does not provide for the use of workforce agreements and therefore the Government has no legal basis for its proposals. It is not sufficient simply for the Government to consult the social partners on the issue. The TUC therefore considers the Government has no legal basis for its proposals and that the Regulations do not comply with the Directive in this respect.

The TUC also opposes the use of workforce agreements on two further grounds. Firstly, permitting employers to adopt a package approach via workforce agreements will have the effect of sustaining discrimination faced by agency workers in the UK. One of the reasons why no provision was made for workforce agreements within Article 5(3) of the Directive is because it is widely recognised that non-union workplace reps often lack expertise, experience and independence from employers and therefore are not well placed to negotiate terms and conditions on behalf of other workers.

Secondly, there is nothing within the draft Regulations which would prevent a hiring employer from negotiating a workforce agreement for agency workers which undercut a collective agreement with a recognised trade union. The only limit on the use of workforce agreements is where there is already a collective agreement which covers the agency workers. Permitting employers to use workforce agreements to undercut existing collective agreements is likely to generate industrial tension within workplaces and will not contribute to good employment relations.

Section seven

Protection for pregnant women and new mothers

It is welcome that the draft Regulations seek to extend existing health and safety protections for pregnant workers and new mothers to agency workers. For many years the TUC has argued that all the protections provided by the Pregnant Workers' Directive (92/85/EEC) should be extended to agency workers. The provisions contained in the draft Agency Worker Regulations represent a welcome development.

In particular it is welcome that the Regulations will extend to agency workers statutory rights to paid time off for ante-natal care, and to adjustment in working conditions, working hours and the offer of suitable alternative work for pregnant and new mothers and the right to be suspended on full pay to avoid health and safety related risks.

However, the TUC is concerned that under the draft Regulations where an agency worker is moved by the agency to suitable alternative work with a different hirer, their continuity of employment will be broken and therefore any accrued equal treatment rights may be lost. The Regulations should be amended to state that **where a pregnant agency worker is moved to suitable alternative employment their continuity of service should be deemed to be maintained and to continue to accrue, even where the assignment is with a new employer. Their pay, working hours and holiday entitlements in their new assignment should be no less favourable than those in their original assignment.**

The TUC also believes that three further improvements should be made to the Regulations relating to the rights of pregnant women or new mothers.

- As argued in section 3, the TUC believes that the definition of pay for purposes of equal treatment rights must include payments relating to maternity, paternity and adoption leave. Failure to do so is likely to be in breach of the Directive.
- As argued in section 4 above, the continuity of service for agency workers who are only maternity leave should be protected and therefore continue to accrue for a minimum of 26 weeks, in line with statutory rights to ordinary maternity leave.
- As argued in section 10 below, Regulation 10 must be extended to provide rights for agency workers to equal access to all facilities in the workplace, including sanitary facilities, staff rooms, rest facilities and breast-feeding

facilities.

The TUC is also disappointed that the Government has not taken the opportunity to extend the employment rights of agency workers to include protection from dismissal or detriment on pregnancy or maternity related grounds. The TUC believes that by failing to extend these rights to agency workers, the UK has not fully implement the Pregnant Workers' Directive (92/85/EEC).

Section eight

Access to employment vacancies

It is welcome that Regulation 10(3) clearly states that agency workers have a right during an assignment to be informed of all vacancies within a hirer and that agency workers should have the same opportunity as directly employed staff to apply for vacant posts either through an internal or external selection process.

Employers should be required to notify agency workers of employment opportunities. Agency workers should be given access to and encouraged to use any existing systems of communicating job vacancies, including notice-boards and employer websites. The obligation for notifying agency workers of vacancies and the liability for not doing so should sit with user employer, rather than the agency. Accompanying guidance should outline the steps which hirers may consider taking to ensure that agency workers are fully informed of vacancies, particularly in situations where agency workers may work off site or in different locations from directly employed staff.

The TUC also agrees with the proposal that in redundancy situations employers should be able to redeploy directly employed staff into vacant posts before offering such posts to agency workers.

Section nine

Temporary to permanent status

It is welcome that the Government recognises the need to amend the provisions of the 2004 Conduct Regulations in order to comply with the Temporary Agency Worker Directive.

If agency work is to function genuinely as a stepping stone for individuals from unemployment or labour market inactivity to more secure form of employment then barriers such as these, need to be more effectively addressed. This will work to benefit hirers too, who genuinely want to offer more secure forms of employment to workers who they have effectively given a 'trial run' through assignment and know that the worker will be of benefit to their organisation.

The TUC notes that amending the Regulations to refer to reasonable fees may be the simplest approach to adopt. However, we are concerned that the inclusion of a 'reasonableness' test may not have not be sufficiently effective to prevent the use of policy or cost structures which impede directly or indirectly access to permanent work for agency workers. In our view it would be helpful if the Regulations made clear that **agencies should only be able to recover genuine costs incurred, for example the costs of training an agency worker for an assignment.**

The TUC believes that agency workers should only be required to give the same period of notice as employees. The notice provisions in the Conduct Regulations should therefore be brought into line with the notice provisions of the Employment Rights Act 1996. In addition, a statutory cap of 1 month should be placed on the amount of notice which agency workers can be required to give agencies before transferring to permanent contracts. The Conduct Regulations should be amended accordingly.

Section ten

Access to collective facilities

Access to collective facilities

The TUC does not agree with the Government's approach to delivering equal treatment for agency workers to collective facilities in the hirer's workplace. The relevant provisions are contained in Regulations 10 and 11. Regulation 10 proposes that an employer should be able to justify discrimination relating to access to collective workplace facilities on the basis that overall the agency worker does not receive less favourable treatment.

In our view, this package approach to equal treatment does not comply with the terms of the Directive. The proposed package approach is not consistent with existing EU law on objective justification which requires a tribunal to assess whether, in the circumstances, the employer's practices correspond to a real need and are appropriate and necessary to the objective pursued (*Bilka-Kaufhaus* [1987] ICR 110.)

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

Furthermore it will be difficult if not impossible for tribunals to apply this provision in practice, as the relevant benefits will often be incommensurable. Take the example of an employer who decides not to offer agency workers access to workplace childcare facilities but rather decides to compensate them with increased holiday. In such cases, it would be impossible for a tribunal to calculate whether equal treatment had been achieved across a diverse workforce. Access to workplace childcare facilities is likely to be valued highly by agency workers with young children. Indeed such benefits could be deemed priceless for them, whereas other agency workers may not be able to benefit from such a right and would have preferred extended holidays. The proposed package of benefits would disadvantage the workers with children as compared to childless workers. In our view **Regulations 10 and 11 should state that an agency worker has the right to equal treatment in relation to access to collective facilities as compared with directly employed staff, unless the difference in treatment can be objectively justified.**

Furthermore in the TUC's view, the list of facilities contained in the Regulation 10 (1) does not comply with article 6 (4) of the Directive in that the former is an exclusive list whilst the latter is clearly a non-exhaustive list. Currently under Regulation 10, an agency worker would not be guaranteed equal access

to toilets, sanitary facilities, staff rooms, rest facilities and breast-feeding facilities or other collective facilities. Regulation 10 should therefore be amended. One option would be to include a comprehensive list of all possible collective facilities provided in hirer's workplaces. However as this is likely to be difficult, we suggest that **Regulation 10 sets out an non-exhaustive list of collective facilities, but refers to canteens, childcare facilities and transport services, toilets, sanitary facilities, staff rooms, rest facilities and breast-feeding facilities as illustrations of the types of facilities covered.**

Access to training

The TUC has welcomed the commitments in the New Opportunities White Paper, which identified agency workers as requiring additional support on the basis that 'all too often [they] miss out on the benefits of permanent employment – in particular additional in-work training' (para 6.32). To address this, the Government says it will encourage more companies to use Train to Gain funding to train agency staff they hire even though they are not their permanent employer. The Train to Gain funding rules are also to be relaxed to enable agency workers to train for qualifications under this programme even if they already hold qualifications at an equivalent level.

The TUC is nevertheless disappointed that the Government has decided not to take further steps to deliver improved access to training for agency workers.

There is clear evidence that agency workers do not have the same access to training as directly employed and permanent staff.

Access to training

	Agency workers	All employees
Given job-related training by employer during past 13 weeks	20.9	27.8
If no training in past 13 weeks - ever offered training by current employer?	18.0	41.5
Never offered training by current employer	61.1	30.7
Total	100.0	100.0

(LFS variables ed1-13wks; Trnopp)

(LFS Microdata Service –Spring 2009 April-June unless otherwise stated)

Access to collective facilities

43% of respondents to the 2009 YouGov survey also reported that when working as an agency worker they had less access to on the job training or paid time off for training than staff directly employed by the employer. Of those who were required to do pre-assignment training 64% were paid in full for this training, but 26% received no pay.

Improved access to training would assist in increasing productivity levels and would ultimately improve the services offered in those sectors where agency workers are employed. For instance, a social worker has to be registered with one of the four UK social care regulators to be able to work and has to undergo 15 days professional training over three years, which has to be documented to enable re-registration as a social worker. Unless equal access to training is offered – and at the same conditions as offered to permanent employees - an agency social worker would have pay for the course fee and would incur loss of earning as s/he would not be paid time off to attend the training.

Consideration should be given to providing agency workers with a right to equal access to in-house training programmes, especially after a certain duration of employment with an employer. Agency workers should also be entitled to be paid when they are expected to undertake any pre-assignment training. Consideration should also be given to reviewing the proposed new statutory right to request time off for training one year after implementation to assess whether this right should also be extended to agency workers.

Section eleven

Thresholds for bodies representing agency workers

It is welcome that the Directive will help to ensure that agency workers can benefit from worker representation rights, including rights to union recognition and information and consultation, either in the user enterprise or within the agency.

The TUC strongly supports the principle that agency workers should have the right to be informed and consulted by the agency on collective redundancies, TUPE transfers rights and other employment conditions and to have unions recognised for the purposes of bargaining on terms and conditions on their behalf.

The TUC takes the view that these rights should apply regardless of the size of the organisation, including in small businesses.

The TUC agrees with the approach adopted within the Agency Worker Regulations in relation to thresholds for bodies representing agency workers. We agree that representation rights for agency workers should relate to the agency, as opposed to the user employer, as the agency is considered in the vast majority of cases as the agency worker's employer.

Section twelve

Information for workers' representatives

The TUC is seriously disappointed that the Government is proposing to limit the rights for trade union reps and other workplace reps to be given information by their employer about agency workers deployed in their workplace.

The draft Regulations propose that employers should only be required to provide union and workplace reps with information about the number of agency workers, where they were deployed within the organisation and the type of work they do. In contrast, the consultation document proposed that union and workplace reps should also be provided with information about agency workers' terms and conditions.

The TUC believes that in order to enable genuine consultation in the context of the ICE Regs, TUPE transfer situations and in the context of collective redundancies it is important for union or workforce reps to be provided with information relating to agency workers' terms and conditions. For example, under TUPE Regulations employers are required to give information relating to 'legal, economic and social implications of the transfer'.

Furthermore, providing such information to workplace reps, in particular union reps, would help to provide essential protection for vulnerable agency workers; help to promote compliance with the Agency Worker Regulations; and avoid the need for litigation.

The TUC therefore calls on the Government to amend to Schedule 3 to require employers to disclose information to workplace representatives relating to the terms and conditions of employment of agency workers.

The draft Regulations also state that employers are only required to provide information to workplace reps where there is a legal obligation to inform and consult. The TUC believes that the duty on employers to disclose information for the purpose of collective bargaining with recognised unions under sections 178 to 181 of TULR(C)A 1992 should be extended to include a requirement to disclose information relating to the number of agency workers used; where they are deployed; the types of work they undertake and their terms and conditions. This would assist unions in ensuring agency workers can access their rights to equal treatment without the need to resort to litigation.

Section thirteen

Establishing equal treatment

The TUC believes that the Regulations should provide for a broad definition of a comparator, in line with other anti-discrimination legislation. In our view, a number of changes should be made to the comparator provisions in Regulation 6.

The draft Regulations also contain complex rules for determining whether an agency worker has received equal treatment on basic working and employment conditions (i.e. pay, hours and holidays). The Regulations define basic working and employment conditions as those which are ordinarily included in the contracts of employment of the employees of the hirer whether by collective agreement or otherwise. The explanatory text in the consultation document suggests this will include terms and conditions set by a collective agreement, or contained pay scales or a company handbook, or generally included in the contract of employment as a matter of custom and practice.

The TUC has three main concerns about the proposed approach:

- It differs from the approach used in all other equal treatment legislation which permits, for example, women, black and ethnic minority workers, disabled workers etc, and part-time workers and fixed term employees to make comparisons between their terms and conditions and any terms in another relevant individual's contract.
- Agency workers deployed in workplaces where staff are employed on individualised contracts with differing rates of pay could be excluded from equal treatment rights.
- The rule is very complex and will place substantial hurdles in the way of agency workers seeking to enforce their equal treatment rights. For example, it would be very difficult for an agency worker assigned for a short period in a new workplace to ascertain what is custom and practice in that workplace.

In our view **the Regulations should be revised to ensure that agency workers are entitled to compare their terms and conditions with the contractual terms of a directly employed worker.**

The TUC is also concerned that the draft Regulations limit the scope for comparisons by only allowing for direct comparisons to be made between an agency worker's terms and conditions and those of a comparable employee employed by the hirer rather than a comparison with a comparable worker's terms and conditions. In our view, Regulations should be revised to replace all

references to employees' terms and conditions or references to comparable employees with workers' terms and conditions or comparable workers. The reference to a similar level of skills and qualifications should be removed from Regulation 6(1)(b).

The TUC also does not agree with Regulation 6(2) which prevents comparisons with former employees of the hirer. In our view this would unjustifiably restrict the use of hypothetical comparators. It would also mean that the Agency Worker Regulations would not apply where an unscrupulous employer decided to sack their directly employed workforce and to replace them with agency staff. In such a case, the agency workers would not be able to claim that they were entitled to the same terms and conditions of employment as formerly directly employed staff. As a result individuals such as Debra Allonby who experienced just such treatment in a further education college would have no rights to equal treatment under the Regulations. (see C–256/01, Debra Allonby v Accrington & Rossendale College[2004] IRLR 224).

The TUC believes that Regulation 6(2) should be deleted.

Section fourteen

Liability for equal treatment

As argued in our previous submission, it is essential for future regulations to provide effective and swift enforcement mechanisms. Agency workers should not be deprived of their EU rights due to the complexity of any enforcement process. If the enforcement process is unnecessarily lengthy agency workers are likely to be deterred from enforcing their rights. It is also important that compensation awards are set at a level which dissuades employers and agencies from committing further breaches of agency worker rights.

Joint and Several Liability

The TUC believes that the Agency Worker Regulations should provide for agencies and user employers to be jointly and severally liable for breaches of agency worker rights. Anti-discrimination law already provides for joint and several liability between agencies and employers.

This approach more accurately reflects the reality of agency working and would enable more effective enforcement of the legislation. Agency workers spend all their working time on user employer premises. Agency employers are usually not present on the employer's premises to oversee treatment of agency workers or breaches of law. Agencies also have limited access to relevant documentation.

It is also arguable that agencies should not be held liable for actions undertaken by employers, which result in a breach of equal treatment rights, for example, decisions on the shift patterns of agency workers, the victimisation of agency workers who seek to enforce their statutory rights, or decisions to fire an agency worker who is approaching the 12 week qualifying period. Providing for joint and several liability would enable employment tribunals to determine where the responsibility for breach of regulations lies - whether it sits with the user employer or the agency. It also would ensure that agency workers would always be able to enforce their rights, including where an agency or user employer has become insolvent or in situations where the contract for the supply of agency workers has been outsourced through a supply chain of agencies (including under the master/vendor agency model).

Concerns with draft Agency Worker Regulations

The TUC is concerned about the provisions relating to liability contained in Regulation 12. In particular there is concern that Regulation 12(2) could be interpreted to mean that an agency will not be liable for the failure to provide

an agency worker with equal treatment where the agency, having received the relevant information from a hirer, reasonably fails to determine an agency worker's basic working and employment conditions correctly.

The issue of concern is that as a result of Regulation 12(2), an agency worker, who surmounts all other hurdles in the Regulations and proves that they have not been treated equally, could still lose out on their rights because a tribunal rules that it was reasonable, for example, for the agency to make a mistake when calculating the agency workers' pay. It appears it is possible that neither the agency nor the hirer would be liable for the agency worker being paid less than a directly employed individual doing the exact same job. If this is the case, the Regulations would clearly not be consistent with the requirements of the Directive.

Section fifteen

Information on equal treatment

The TUC has consistently argued that in order to guarantee agency workers effective equal treatment rights, measures must be put in place to increase the transparency of agency workers' terms and conditions of employment.

It is welcome that the Government has responded to representations from the TUC calling for arrangements for agency workers to submit questionnaires to agencies to ask for a written statement relating to equal treatment which can be useable as evidence at an Employment Tribunal. As is the case under fixed term contract regulations, the TUC agrees that the written statement should be useable as evidence at an employment tribunal and that an employment tribunal can draw an inference of non-equal treatment where a user employer fails to respond.

Agency workers should have a statutory right to ask for a written statement relating to suspected unequal treatment (as defined by the Regulations) from both the agency and from the hirer. It is particularly important that the agency worker can seek information directly from the user employer. The agency will often not have sufficient information relating to pay and conditions or workplace facilities in its possession, unless previously provided by the user employer. Agency workers should therefore be entitled to ask for information directly from the hirer.

The TUC believes that the approach taken within the regulations relating to information on equal treatment need to be revised in order to enable swift and effective enforcement of equal treatment rights. In our view, agency workers should be entitled to send a questionnaire simultaneously to the agency and the hirer. The hirer should not only be required to respond to a questionnaire relating to equal treatment rights under Regulation 9 where the agency has failed to respond with 28 days. Under the current Regulations agency workers could be required to wait up to 2 months to receive relevant information about a potential equal treatment claim. It will also be very complex for an agency worker who suspects that they have been discriminated against on pay and on access to a workplace to navigate who should be issued with a questionnaire and at what point.

On a separate issue, the TUC is also disappointed that the consultation document does not include proposals for agency workers to be provided automatically with additional information relating to equal treatment rights at the start of an assignment, or even once the individual accrues equal treatment rights.

Information on equal treatment

From the beginning of any assignment, agency workers should be notified of all relevant workplace facilities within a user undertaking and where appropriate when and how agency workers will be entitled to such rights, for example where the entitlement is dependent on a particular length of service or where the benefit will be provided on a pro rata basis. The agency worker should also be notified in writing of any adjustments to their terms and conditions which may take effect once they have met the 12 week qualifying period. This adjusted information must be provided before or at the same time as the individual qualifies for equal treatment on pay, hours and holidays. The statement should also inform the agency worker of any accrued holiday or pay rights.

Section sixteen

Dispute resolution and remedies

The TUC agrees that employment tribunals should be the forum within which agency worker rights are enforced.

We also recognise that ACAS should play an important role in attempting to resolve disputes at an early stage. The TUC would support an extension in ACAS' powers to ensure that they can seek to conciliate on a tripartite basis between the agency worker, the agency and hirer and that ACAS can request any necessary relevant information relating to pay, hours, holidays and collective facilities in the hirer's organisation.

The TUC is also not convinced that proposed remedies provided in the draft Agency Worker Regulations comply with the requirements of the Directive to provide effective, proportionate and dissuasive remedies. Agency workers will only be entitled to damages for any losses for example in earnings incurred by the agency worker where an employer or agency fails to comply with the Regulations. The agency worker will not be compensated for injury to feelings. Due to the temporary nature of agency work and the fact that most agency workers are employed on an 'as and when required' basis, most agency workers will find it very difficult to prove loss of future earnings. As a result, compensation awards for breaches of the regulations are likely to be small.

The TUC believes that the Regulations should provide for a minimum basic award which should be paid to an agency worker for any breach of the Regulations.

Trades Union Congress
Congress House
Great Russell Street
London WC1B 3LS

www.tuc.org.uk

contact:
Hannah Reed
020 7467 1336
hreed@tuc.org.uk

For more copies of this title contact our ordering point on 020 7467 1294 or smills@tuc.org.uk. Bulk discounts may be offered.

All TUC publications may be made available for dyslexic or visually impaired readers, on request, in an agreed electronic format or in accessible formats such as braille, audio tape and large print, at no extra cost.