

BEIS Consultation

Taylor Review: Agency Worker Recommendations

UNISON Submission

May 2018

Introduction

1. UNISON is the UK's largest public service union with 1.26 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.
2. UNISON welcomes the opportunity to respond to the BEIS consultation on the recommendations contained in the Taylor Review of Modern Working Practices on agency workers.
3. UNISON believes that the growth in the use of agency work is part of the rise of insecure, low paid or illegal pay which has damaged the labour market and scarred the experience of too many workers.
4. By relying on agency workers, companies can outsource their risks and create lopsided balances of power in the workplace. Employers have the flexibility of being able to hire and fire agency workers as and when needed, without the need to follow normal employment procedures. In contrast, agency workers find they are offered work at very short notice or that their hours can be reduced or cancelled without notice or financial compensation, making it difficult to budget, to plan childcare and organise their life away from work.
5. Agency workers also miss out on basic rights in the workplace. UK legislation actively excludes or limits entitlements for agency workers, including the right to request flexible working¹ and paid time to attend ante-natal appointments.²
6. The tripartite nature of their employment also means agency workers fail to qualify for key rights, such as protection from unfair dismissal. Access to such rights depends on an individual having a contract with the *right* employer. This creates difficulties for those employed through agencies and umbrella companies who are deemed not to have a contract with the end user, even though it is the hirer who benefits from any work performed by the agency

¹ Agency workers, who qualify as employees, are denied the right to request flexible working, unless they are returning from a period of parental leave

² Agency workers, who don't qualify as employees, lose out on day one rights to paid time off to attend ante-natal appointments. They must for at least 12 weeks in the same job with the same hirer before qualifying.

worker and they who will often decide that the individual should be dismissed.³

7. Being in such a precarious situation means it is very difficult for workers to complain if they are treated badly. The lack of basic rights and their dependence on hirers and agencies for future offers of work means agency workers are usually reluctant or afraid to challenge bad practice. As a result, they risk having the few rights they do have disregarded.

General points

8. UNISON welcomes the review of the 'Swedish Derogation' in the Agency Worker Regulations. This has been a longstanding concern for trade unions as it has been used to mistreat agency workers, create a two tier workforce and drive down pay and conditions.
9. Recent TUC research⁴ confirms that agency workers employed under the derogation are often paid far less than directly employed staff, even they are doing the exact same job with the same level of responsibility. Employers and agencies are exploiting the derogation to employ agency workers on a long-term basis in order to reduce their wages' bill and to undercut the pay and conditions of permanent staff.
10. We therefore support the recommendation of the Taylor Review that the Swedish derogation should be removed as a matter of urgency. However, UNISON believes that the Government should also tackle widespread non-compliance with the Agency Workers Regulations (AWR). Recent research reveals that agency workers continue to suffer a significant pay penalty, earning on average £1.50 an hour less than permanent employees.⁵ Many agency workers also lose out on paid holidays when compared to directly employed staff who they work alongside.⁶
11. Enforcement of the AWR needs to be enhanced. The remit of the Employment Agency Standards Inspectorate (EAS) should be extended to include the enforcement of the Regulations. But, it is vital that the EAS is properly funded to perform any additional duties. EAS is currently seriously under-resourced. In 2017/18, the EAS only has a budget of £725,000⁷ to ensure that 23,980⁸ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent staff. The limited

³ James v London Borough of Greenwich [2008] EWCA Civ 35 CA.

⁴ TUC (2018) Ending the Undercutters' Charter available at:

<https://www.tuc.org.uk/sites/default/files/EndingtheUndercuttersCharter.pdf>

⁵ Ibid

⁶ Ibid

⁷ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

⁸ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

resources available to the EAS make it impossible for them to stamp out abuse in the agency sector.

12. UNISON also shares the TUC's concerns about umbrella companies and other intermediaries in the recruitment sector. As a result of the opaque way umbrella companies operate, agency workers are often unaware who their employer is or whether an umbrella company is involved in their engagement. This makes it difficult to enforce their employment rights. Workers are also often misinformed about the rate of pay they will receive and the level of deductions to be made for employers' national insurers' contributions and to cover the umbrella company's profit margins. Such deductions lead to lower pay for agency workers and even the non-payment of the national minimum wage in some cases.
13. UNISON therefore joins with the TUC in calling for measures that ensure that:
 - All work seekers are provided with a key facts sheet when they first register with or at the start of their engagement with an employment business or employment agency and before any new assignment with a hirer.
 - Agencies and umbrella companies which fail to provide accurate key fact sheets face substantial penalties.

Measures are also needed to clamp down on the substandard practices found throughout the umbrella company sector.

- Umbrella companies should be required to comply with the same standards which apply to employment businesses and agencies.
 - The remit of the EAS should be extended to cover umbrella companies.
 - The Conduct Regulations should be amended to ensure that the contractual rates agreed between the recruitment agency and the umbrella company include an uplift to cover any administrative fees charged by the umbrella company.
14. Agency work no longer appears to be a stepping stone into regular employment in many sectors and workplaces, at least for the less skilled.⁹ Official statistics suggest that more than 420,000 agency workers have been in their jobs for more than a year, and shockingly, over 120,000 have worked for an agency for over five years.¹⁰ Agency workers can remain trapped in low paid, insecure work, with few rights in the workplace. Younger agency workers are particularly missing out on career progression with over forty per cent of all those who have been in agency work for over a year are aged 16-34.¹¹ In the light of these findings, it is regrettable that the government has

⁹ Countouris, N, Deakin, S, Freedland, M, Koukiadaki A, and Prassl, J. (2016) Report on temporary employment agencies and temporary agency work: A comparative analysis of the law on temporary work agencies and the social and economic implications of temporary work in 13 European countries: ILO

¹⁰ TUC (2018) Ending the Undercutters' Charter available at:

<https://www.tuc.org.uk/sites/default/files/EndingtheUndercuttersCharter.pdf>

¹¹ Ibid

disregarded the recommendation in the Taylor review that agency workers should be given a "*right to request a direct employment contract with the hirer when they have been engaged with the same hirer for 12 months.*"

15. UNISON joins with the TUC in calling for the government to introduce wide-ranging reforms to protect agency workers. These should include
- The first priority must be the repeal of the Swedish derogation, to ensure all agency workers have the same rights to equal pay.
 - After 12 weeks doing the same job for the same hirer, hirers should be required to carry out a review to assess whether the work will be required on an on-going basis. Where this is the case, agency workers should be offered a permanent contract with the hirer.
 - The rules on employment status should be revised to ensure agency workers benefit from the same rights decent floor of rights as employees.
 - The government should consider extending GLAA licensing to other high risk sectors.
 - The law should be reformed to ensure end-users, agencies and umbrella companies are jointly and severally liable for any breaches of employment law during any assignments.
 - The government should substantially increase the level of resources for the EAS to ensure that the inspectorate can properly fulfil its enforcement duties.
 - The penalties for non-compliance with agency workers' rights should also be increased. Agencies and umbrella companies which breach minimum standards should be required to pay increased fines and full compensation to work seekers.
 - Public procurement rules should be adjusted to ensure that agencies and umbrella companies which breach agency workers' rights are excluded from public contracts.

Consultation Questions

Improving the transparency of information provided to work seekers

Q1: To what extent would you agree that a key facts page would support work seekers in making decisions about work?

Slightly Agree

Providing work seekers with a key facts sheet may help to improve transparency. But, being provided with additional information - by itself - is unlikely to have a significant impact on worker seekers' decisions about work. Any such benefits will be limited to those individuals who have a genuine choice whether to accept the work which is being offered or not. For many no such choice exists.

Furthermore, agency workers are often unaware who their employer will be, whether they will be employed via an umbrella company, how much they will be paid for work on an assignment or what deductions will be made from their wages.

Q1 (a): If slightly or strongly agree, what key facts do you think should be made prominent?

UNISON believes that it is important for a work seeker to receive all such information when they first register with an agency or umbrella and before each assignment. However, it may be helpful if prominence was given to information about:

- their pay and hours of work who will be responsible for paying them
- their holiday entitlement and how holiday pay is calculated
- the start date for an assignment and how long the contract is likely to last
- any health and safety risks
- whether they will be employed via an umbrella company or intermediary. Where this is the case, they should also receive written confirmation that:
 - they are employed on a contract for employment and therefore will be entitled to all employee rights
 - any administrative fees for umbrella companies will be deducted from any uplift negotiated between the agency / umbrella company and the end user but not be deducted from the pay assigned for their work
 - they will be paid at least the same hourly remuneration that they would have received had they been employed directly by the agency
 - they will have rights under the Agency Worker Regulations
- what statutory or other deductions will be made and by whom

UNISON believes that the Swedish derogation should be repealed. But if this legal loophole is retained, the key facts sheet should make clear if the agency worker is being asked to sign a pay between assignments contract. It should emphasise that by signing the contract the individual will lose the right to be paid at least the same pay as directly employed staff doing the same job.

Q1 (c): Thinking about work seekers and employers in the recruitment sector, what would be the impact of ensuring work seekers are provided with a key facts page for:

(i) Work-seekers

Creating a new statutory right to a key facts sheet may have a small positive impact for individual work seekers

UNISON agrees it would be helpful to provide work seekers with a key fact sheet setting out clear and full information about:

- who their employer is (including, where relevant, an umbrella company or intermediary)
- their pay rates, hours of work, and who is responsible for paying them
- their holiday entitlements and how their holiday pay has been calculated
- any statutory and non-statutory deductions which will be made from their gross pay

Such information may assist individuals to assess whether they are receiving their full statutory and contractual rights and to take any enforcement action where this is not the case.

Enforcement agencies and union officials will also be able to use the key fact sheets to assess whether the employment business or umbrella company/intermediaries are breaking the law and to take relevant enforcement action.

(ii) Employers in the recruitment sector

Creating a new statutory right to a key facts sheet may also have a small positive impact for employers in the recruitment sector

Requiring employment businesses to prepare key facts sheets is likely to improve compliance levels in the recruitment sector. This will mean that reputable agencies are less likely to be undercut and to face unfair competition by unscrupulous firms.

Q2: What information would be important to include in a “key facts” page?

In line with existing requirements under the Conduct Regulations, the key fact sheet should include information about:

- whether they'll be employed under a contract for services or a contract of employment
- the relevant notice period
- their pay and hours of work
- their holiday entitlement and how their holiday pay will be calculated
- the start date for an assignment
- how long the contract is likely to last
- any health and safety risks
- the type of work the work seeker will be expected to undertake and the location of the work
- about any experience, training or qualifications needed for the role
- any expenses they may have to pay

The key facts page should include the following additional information:

- who will be responsible for paying the work seeker, and how they are being engaged

- what statutory deductions will be made and by whom
- any other fees, costs or charges that will be deducted. Work seekers should be reminded of their right to refuse any services provided by the agency and to do so without suffering any detriment. The facts sheet should also clearly state it is unlawful for employers to charge fees for work searches.
- any additional benefits that will be provided or offered, for example, access to a benefit in kind scheme or childcare vouchers.
- whether they will be employed via an umbrella company or intermediary. Where this is the case, they should be informed about:
 - what they will be paid by the umbrella company or intermediary
 - any statutory deductions which will be made, including relating to employers' national insurance contributions, employers' pension contributions or the apprenticeship levy
 - any tax relief they will receive on any travel expenses incurred during the course of their work

They should also receive written confirmation that

- they are employed on a contract for employment and therefore will be entitled to all employee rights:
- any administrative fees for umbrella companies will be deducted from any uplift negotiated between the agency / umbrella company and the end user but not be deducted from the pay assigned for their work

It would be helpful for all this information to be provided in a single document. The employment business and / or umbrella company or intermediary should also provide the individual with an updated document whenever the individual starts a new assignment with an end user and when any of the relevant information changes.

The government should assist the recruitment sector by preparing online template forms.

Agency workers who receive a completed template form would also have some reassurance that they have been provided with all the relevant information.

Q2(a): What conditions should be in place to ensure the 'key facts' page is provided and understood by the workseeker before any contractual engagement?

Work seekers should have a right to a key facts sheet when they first register or start an engagement with an employment business and when they are offered a new assignment with an end user.

Employment businesses and umbrella companies which fail to provide work seekers with a key fact sheet, or a complete fact sheet, should face substantial penalties. The work seeker should also be properly compensated.

The provision of accurate key fact sheets should also be a condition of receiving and retaining a GLAA licence.

Q3: Should an employment business be required to ensure that the work seeker understands fully the information being given to them?

Yes

Q3(a): If yes, how do you think this should be achieved?

Wherever possible, employment businesses, umbrella companies and intermediaries should arrange to meet face-to-face with work seekers when they first register with the firm. Such meetings will provide a good opportunity for the companies to explain the key facts sheet and to inform the work seeker of the terms under which they will be offered work.

Such meetings will assist the company to get to know and build a good working relationship with the individual.

Work seekers who agree to sign a contract with the agency or umbrella company should also be provided with a cooling-off period of at least one month during which time they can seek independent advice and seek to renegotiate the terms of the agreement.

The government should include advice on the benefits of meetings and information about cooling off periods on template forms.

Q4: BEIS has estimated the cost of a new information document to be between £33,000 and £1 million over a ten-year period. This is based on the assumption that it will take up to one hour to produce a key facts page. Do you feel an hour is an accurate estimate of the time it would take to produce information document for a work seeker?

This estimate is about right.

Q4 (a): If too high or too low, please provide reasons for your answer below:

Employment businesses, umbrella companies and other intermediaries should gather all the relevant information to be included in the key fact sheet as part of their normal compliance activities. Producing fact sheets should therefore not create significant additional administrative duties for these firms.

Businesses will need to invest some resource in the preparation of an initial fact sheet. The government could assist the recruitment sector by preparing online template forms.

Q4 (b): Other than the time taken by personnel to produce a "key facts" document, are there other business costs we should be aware of?

Q4 (c): If yes, please provide further details below:

As noted above, employment businesses, umbrella companies and other intermediaries should gather all the relevant information to be included in the key fact sheet as part of their normal compliance activities. The new duties should not therefore create significant additional costs for firms.

Extending the remit of the Employment Agency Standard inspectorate to cover umbrella companies and intermediaries in the supply chain

Q5: Have you used or are you currently using an umbrella/intermediary?

N/A

Q6: Do you know of any examples of the benefits and/or problems for agency workers of using an umbrella company or intermediary? Please provide reasons for your answer below

UNISON is not aware of any significant benefits for agency workers using an umbrella company or intermediary. Businesses sometimes claim that employment through an umbrella company benefits agency workers as they are more likely to be employed on a contract of employment and therefore to qualify for the fuller range of employee rights. But most employee rights only apply once an individual has accrued sufficient continuity of employment (2 years in the case of unfair dismissal protection and statutory redundancy pay). Individuals' access to such rights therefore will depend on whether different agencies and end users will agree to engage the same umbrella company when the agency worker moves to a new assignment. This is unlikely as agencies and end users tend to use a preferred supplier.

A recent TUC report outlines the problems caused by employment through umbrella companies. These include:

- Lack of transparency and misinformation about pay rates: Individuals are often misinformed about how much they will be paid, with workers frequently not receiving the advertised rate of pay or the rate that was agreed with the employment business. The hourly or daily rate for the agency worker which is agreed with the employment business is paid to the umbrella company, as the umbrella company's income. The umbrella company then deducts their administrative costs and sums to cover employers' National Insurance Contributions, pension contributions, the apprenticeship levy and holiday pay (as the umbrella company is the employer). The remainder is then classed as the work-seeker's gross pay, from which income tax and employees' National Insurance Contributions are deducted, with the work seeker receiving the resultant net pay.
- The involvement of umbrella companies drives down pay for agency workers: Employers who decide to use agencies to supply workers will inevitably incur agency fees, which on average amount to 16.5 per cent of the costs of any assignment¹².

These problems could partly be alleviated if the law was amended to ensure that the contractual rates agreed between the recruitment agency and the umbrella company had to include an uplift reflecting any administrative fees charged by the umbrella

¹² <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

company as well as any employer's national insurance and other related costs which may be deducted.

- The involvement of umbrella companies increases the length and complexity of the supply chain making it harder for individuals to enforce their rights. The use of umbrella companies inserts another link in the chain between the agency worker and the business hiring them to do work. This is another link which transfers risk and responsibility away from the hirer and employment business.

Q7: Should the extension of the remit of the Employment Agency Standards Inspectorate to cover the regulation of certain activities of umbrella companies and intermediaries in the supply of work seekers to a hirer:

i. Be limited to the regulation of the key facts page and provision of information relevant to those facts as part of a work offer by the hirer or employer?

ii. Be aligned to the regulation of the types of employment rights already regulated by EAS under the current legislative framework such as non-payment of wages, deductions from wages which the work seeker has not agreed to, and failure to provide written terms and conditions before the assignment starts?

Please provide reasons for your response.

UNISON believes that umbrella companies operating in the recruitment sector should be regulated on the same basis as employment businesses and employment agencies. The extension of the Conduct Regulations to umbrella companies would help to create a level playing field within the sector and mean that individuals employed through umbrella companies receive the same level of protection as other agency workers.

The Conduct Regulations should also be amended to include additional, specific provisions relating to umbrella companies including:

- Any contractual rates agreed between the recruitment agency and the umbrella company should include an uplift to cover any administrative fees charged by the umbrella company, as well as any employer's national insurance and other related costs which may be deducted from the agency workers' pay.
- Work seekers should have the right to decide whether they wish to be employed via an umbrella company or not. Where they decline, they should not suffer any detriment, including missing out on offers of future assignments from an employment business.

If the remit of the Employment Agency Standards Inspectorate (EAS) is to be extended, it is important that they are provided with additional resources.

The EAS is seriously under-resourced. Between 2010/11 and 2015/16 the EAS saw its budget cut roughly in half with the number of inspectors falling to just 2 at one

point.¹³ Since then budget cuts have only been partially reversed. In the current year (2017/18) the EAS only has a budget of £725,000¹⁴ to protect approximate 1.2 million workers¹⁵ and to ensure that 23,980¹⁶ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent staff. The scale of the task for these 12 inspectors is already unenviably enormous. If the remit of the EAS is to be expanded, it must be accompanied by a significant injection of additional resources and lead to a rapid expansion in the number of inspectors.

Failure to invest additional resources would mean that any changes to the enforcement regime will be ineffective.

UNISON also believes that the EAS's enforcement strategy should be substantially strengthened. EAS regularly fail to take effective enforcement action in response to complaints, including where unions report that agencies have supplied agency workers to replace striking workers in breach of regulation 7 of the Conduct Regulations 2003.

It is a matter of serious concern that the EAS only pursued one successful prosecution and one application for a prohibition during 2016/17 and that correspondence with agencies remains a primary method of enforcement.

UNISON believes that the penalties for non-compliance with agency workers' rights should also be increased:

- Agencies and umbrella companies which breach minimum standards should be required to pay increased fines and full compensation to work seekers.
- Public procurement rules should be adjusted to ensure that agencies and umbrella companies which breach agency workers' are excluded from being awarded public contracts.

Q7 (a): What do you think the impact of ensuring that umbrella companies provide work seekers with a key facts page would be on:

i. Individual work seeker

Requiring umbrella companies to provide work seekers with a key facts sheet may also have a small positive impact for individual work seekers.

UNISON is concerned that practices in the recruitment sector increasingly lack transparency, especially where umbrella companies are involved.

¹³ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-23/61285/>

¹⁴ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

¹⁵ BEIS (2018) Good work: the Taylor review of modern working practices; consultation on agency workers recommendations

¹⁶ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

Agency workers are often unaware who their employer is or whether an umbrella company is involved in their engagement, making it difficult for them to enforce their rights.

Individuals are also likely to be unaware how signing up with an umbrella company may affect their take home pay or the rights to which they are entitled in the workplace.

Some may be lured into signing a contract with the umbrella company on the promise of more take home pay as umbrella companies are able to offset their travel and work-related expenses against national insurance contributions (NICs). Individuals might not realise some such practices may be unlawful,¹⁷ and could mean they lose out on future contributory-based benefits, such as statutory maternity pay, statutory sick pay and their state pension.

Work seekers, employed via umbrella companies, are often misinformed about the rate of pay they will receive or the level of deductions which will be taken from their pay to cover employers' national insurers' contributions and to cover the umbrella company's profit margins. As a result, there is often a significant gap between the advertised rate of pay for an assignment and the gross wages eventually paid to agency workers.

Such deductions, inevitably lead to lower rates of pay for agency workers. They can also lead to non-payment of the national minimum wage.

Requiring umbrella companies to provide work seekers with additional information may assist in improving transparency. But, increased information, by itself, will not prevent the wider abuses experienced by work seekers employed via umbrella companies.

The government should adopt wider measures to regulate the activities of umbrella companies. As a minimum, the Conduct Regulations should also be amended to ensure that the contractual rates agreed between the recruitment agency and the umbrella company must include an uplift reflecting any administrative fees charged by the umbrella company as well as any employer's national insurance and other related costs which may be deducted.

ii. The recruitment sector

Requiring umbrella companies to provide work seekers with a key facts sheet may also have a small positive impact for the recruitment sector.

Requiring umbrella companies to prepare key facts sheets is likely to improve compliance levels in the recruitment sector. This will mean that reputable agencies and umbrella companies are less likely to be undercut or to face unfair competition from unscrupulous firms.

Q7 b): What impact would extending the regulations of the Employment Standards Inspectorate to umbrella companies have on individual work seekers and employers in the recruitment sector.

¹⁷ Since 2013, it has been unlawful for agencies, umbrella companies and intermediaries to offset costs of travelling to and from work against NICs. Although it is still possible to offset expenses incurred during the course of work.

i. The work seeker

Extending the Conduct Regulations, enforced by the Employment Agencies Standards Inspectorate to umbrella companies may also have a small positive impact for individual work seekers.

It would mean that work seekers employed through umbrella companies have the same rights as other agency workers, including rights to:

- be paid in time and on full
- be informed about their pay and other working conditions in advance of any placement with an end user
- not be charged for any work seeking fees
- refuse wider services and charges levied by agencies, without suffering a detriment

ii. The recruitment sector

Extending the Conduct Regulations, enforced by the Employment Agencies Standards Inspectorate to umbrella companies may also have a small positive impact for the recruitment sector.

The extension of the Conduct Regulations to umbrella companies will help to create a level playing field within the sector and to ensure that reputable businesses are not undercut by non-compliant and unscrupulous employers.

Ensuring the Swedish Derogation is used appropriately

Q 8: Have you used or are you currently using a pay between assignments (PBA) contract?

UNISON members employed through agencies in health, social care, administrative, catering, security and cleaning roles often have to sign contracts which include nominal Pay Between Assignment conditions. This is an abuse of the system and was not what was intended when the directive was negotiated at the EU level. The derogation was created for Sweden because the vast majority of their agency workers are full time and permanent employees of the agency and also covered by sectoral collective bargaining agreements between trade unions and employers. In Sweden, therefore, there are not material differences in the pay, holidays, sick pay, maternity pay, pensions and other conditions of agency workers and the employees of the hirers. This is not the case in the UK and therefore the use of the derogation in the UK is a loophole to avoid provisions of the Temporary and Agency Worker Directive to give agency workers fair treatment on pay rates in particular.

Q 9: In your experience, what are the benefits and any problems associated with working on a PBA contract basis?

UNISON welcomes the government's long overdue review of the 'Swedish derogation' in the Agency Worker Regulations. For many years unions have called

for the derogation to be repealed as all the evidence suggests that the derogation is being used to mistreat agency workers and to drive down pay and conditions.

Recent research from the TUC found:

- ***A pay penalty for agency workers employed on the Swedish derogation***

Agency workers employed under the Swedish derogation suffer a significant pay penalty with some agency workers earning up to £4 less per hour than directly employed staff even though they do the exact same work with the same level of responsibility.

- ***Agency Workers missed out on enhanced pay for work in anti-social hours***

Agency workers need to work overtime and anti-social hours to make up for the shortfall in their wages packets, but often face a bigger pay penalty when doing so. Employers have a clear incentive to use agency workers on Swedish derogation contracts to cover longer shifts and anti-social hours agency workers to achieve significant savings and undercut the pay and conditions of their core workforce.

- ***Swedish derogation being used to undercut pay and conditions of permanent staff***

Employers and agencies are exploiting the Swedish derogation to employ agency workers on a long-term basis to reduce their wages' bill and to undercut the pay and conditions of permanent staff.

This has been corroborated by recent research published by the government¹⁸ which reveals a very clear but stark picture of hirers, agencies and umbrella companies all using the Swedish derogation to reduce costs and undercut pay and conditions. The types of reasons given for using the derogation include:

- It cuts costs and means hirers and agencies can avoid enhanced pay rates for agency workers
- It is the best way to maximise revenue and to minimise risk
- The avoidance of pay parity
- It was the surest way of hirers and agencies to ensure compliance with the AWR
- It reduces administration
- It avoids the need to identify possible comparators in the hirers' firm
- The hirer does not need to disclose their pay rates.

¹⁸ Berry-Lound, Greatbatch and Tate (2015) "Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers" - Final report to BIS by HOST Policy Research

It is notable that not a single agency or umbrella company interviewed for the government's research reported that the reason for using the derogation was to improve the working conditions of agency workers.

Q10: In your experience, how effective do you think pay between assignments contracts are in supporting workers and work seekers when they are not working?

Not at all effective

Some employers claim that the Swedish derogation provides workers with a fair trade-off. They give up the right to equal pay on the promise of pay between assignments when the agency cannot find them work. However, evidence gathered by the TUC and researchers commissioned by the government, as outlined above, suggests that agency workers are receiving a raw deal at work.

Research commissioned by the government reveals that sometimes - maybe often - any monies that are paid to agency workers between assignments do not amount to an extra benefit for agency workers. Instead they are deducted from pay they would otherwise receive for doing the job.¹⁹

The report revealed for example that:

- Seven of the 11 umbrella organisations interviewed revealed that they use some form of 'roll-up' deductions from the salaries of workers on PBA contracts (pay between assignment contracts - otherwise known as Swedish derogation contracts). This means that a figure is calculated at each salary payment proportionate to the possible PBA payments and held in reserve.
- One umbrella offered workers the choice of being paid the money up front in return for waiving their right to pay between assignments: 'it is up to the worker to decide which they prefer'.
- At least two umbrellas reported deducting an amount for PBA from the worker but then paying them the same amount in the form of a loan; in the event of PBA being triggered, they would pay out but also require repayment of the loan: 'the net effect is always zero.'

As the report to government highlights, such practices raise questions about compliance. Clearly such practices are not consistent with the spirit and aims of the derogation.

The research also includes telling evidence from an umbrella company which chose not to use agency contracts. The research states that this agency *"does not offer PBA [Pay Between Assignment - or Swedish derogation] contracts because they view them as a way of avoiding the equal pay aspects of AWR which is unfair to workers as well as increasing the risk to themselves in terms of compliance and tax liability.... They suggest that pay between assignments is not a benefit for workers as organisations will simply calculate a deduction from this from the hourly rate in the*

¹⁹ Berry-Lound, Greatbatch and Tate (2015) "Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers" - Final report to BIS by HOST Policy Research.

*same way as holiday pay is calculated. However, in their experience any workers will never receive any pay between assignments...*²⁰

Q 11: Do you have evidence that there are wider issues (beyond equal pay) with PBA contracts, for example agency workers not being able to access to facilities, rest break, annual leave or job vacancies?

Yes. UNISON endorses the evidence submitted by the TUC which outlines issues found by sister unions.

Q11 (a): Do you believe that that the above issues would justify wider state enforcement?

No

There is clear and compelling evidence that the abuse of agency workers employed under the derogation is widespread. Such agency workers are not only paid far less than directly employed staff doing the exact same job. They also lose out on paid holidays. It is also evident that pay between assignment arrangements do not compensate agency workers for the loss of equal treatment rights. Indeed in many workplaces pay between assignments does not amount to additional benefit for agency workers. It is simply deducted from the pay they would otherwise have received when working for an end user.

UNISON therefore believes that better enforcement cannot remedy the abuses experienced by agency workers or protect them from future mistreatment.

We therefore support the recommendation of the Taylor Review that the Swedish derogation should be removed as a matter of urgency.

Q12: To what extent do you agree that enforcement of the Agency Worker Regulations 2010 should come within the remit of the Employment Agency Standards inspectorate?

UNISON agrees that the enforcement of the Agency Worker Regulations (AWR) needs to be enhanced and that individual agency workers should not only be able to rely on the employment tribunals to enforce their equal treatment rights. The responsibilities of the Employment Agency Standards inspectorate (EAS) should be expanded to include the AWR.

As far back as January 2012, the Gangmasters Licensing Authority (GLA - now the GLAA) decided to enforce the AWR, as least as regards rights to equal treatment on pay.²¹ It is welcome that the government is now proposing that the EAS should enforce all aspects of the AWR, and not just rights equal pay - a decision that is long overdue.

However, an extension in the EAS remit must be accompanied by a substantial increase in funding.

²⁰ Ibid page 12

²¹ www.gla.gov.uk/media/1795/gla-32-81-licensing-standards-review.pdf

As noted above, the EAS is inadequately resourced. In the current year (2017/18) the EAS only has a budget of £725,000²² to protect approximate 1.2 million workers²³ and to ensure that 23,980²⁴ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent inspectors. The scale of the task for these 12 inspectors is already unenviably enormous. If the remit of the EAS is to be expanded to include enforcement of the AWR, the government must provide the EAS with significantly increased resources.

²² <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

²³ BEIS (2018) Good work: the Taylor review of modern working practices; consultation on agency workers recommendations

²⁴ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

