

Title: Draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022. IA No: BEIS039(F)-22-LM Lead department or agency: The Department for Business, Energy and Industrial Strategy	Impact Assessment (IA)			
	Date: 11/07/2022			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary legislation			
Contact for enquiries: lm.correspondence@beis.gov.uk				
Summary: Intervention and Options			RPC Opinion: Not required as De Minimis	

Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Qualifying provision
£m 0.0*	£m 0.0*	£m 0.0*	

What is the problem under consideration? Why is government action or intervention necessary?
 Industrial action causes negative externalities, as employers facing industrial action are unable to provide services (such as education or transport), negatively impacting on employers and individuals who are not involved in the industrial dispute. Employment businesses under regulation 7 of the Conduct Regulations are prohibited from providing temporary agency workers to employers facing industrial action, preventing a route by which these employers could obtain labour so that they could fulfil some or all of their key functions and reduce the negative externalities.

What are the policy objectives of the action or intervention and the intended effects?
 The objective of the policy is to tackle the disproportionate impact of strikes, including those affecting important public services, and reduce the restriction on access to placements for temporary agency workers. Employers facing industrial action currently can directly hire workers to provide industrial action cover, or contract out the work to a service provider. The policy option will enable these employers to hire temporary agency workers from employment businesses, providing employers with a ready supply of labour available for temporary assignments, and removing the restriction on these workers' access to these placements. Therefore, agency workers will be able to perform some or all functions not being carried out due to the industrial action allowing employers in disputes to provide key services which will reduce the impact of the dispute on the wider economy and society.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 The policy option is to revoke regulation 7 of the Conduct Regulations and thereby allow employment businesses to provide temporary agency workers to employers facing industrial action to perform the work affected by workers taking part in industrial action.

Will the policy be reviewed? It will be reviewed (non-statutory review) If applicable, set review date: July 2027				
Is this measure likely to impact on international trade and investment?		No		
Are any of these organisations in scope?	Micro Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: N/a	Non-traded: N/a	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Rt Hon Kwasi Kwarteng MP
 Secretary of State for BEIS:



Date: 11 July 2022

*This is a permissive change, employers will only hire agency workers when the net benefit is positive. In order to estimate the impact of this measure, we would need to make a number of assumptions and do not have the evidence to do this, hence, we have developed a simple model that looks at the impacts from hiring businesses' perspective and carried out break even analysis. This shows that if agency workers were able to reduce annual average working days lost by 2%, with around half the productivity of regular workers, then the impact of this policy would be neutral (break-even). This does not include non-monetized impacts, most notably the wider (significant) benefits on the rest of the economy if employers facing strike action can maintain some activity. Hence, we are confident that this policy change is likely to be net beneficial, however, we are unable to robustly estimate the size of this impact.

Summary: Analysis & Evidence

Policy Option 1

Description: Repeal of Regulation 7 of the Conduct Regulations

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2022	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 0.0*
COSTS (£m)					
		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low		Optional	Optional	Optional	
High		Optional	Optional	Optional	
Best Estimate		0.3	0.6	5.4	
Description and scale of key monetised costs by 'main affected groups'					
There will be small levels of familiarisation costs for employment businesses (£0.16m), unions (£0.002m) and annual familiarisation for employers in industrial disputes (£0.02m). There is no requirement for any of these organisations to act on this policy. We have undertaken break-even analysis, and if only 2% of working days lost through industrial action a year are covered by agency workers it is likely to deliver positive impacts on the economy. If we assume 2% of working hours lost are recovered through agency workers, the annual costs in hiring the agency workers is around £0.6m					
Other key non-monetised costs by 'main affected groups'					
If temporary agency workers were used as cover during strikes, then it could lessen the impact of the strike and may marginally weaken the power of employees to negotiate the terms they were looking for.					
BENEFITS (£m)					
		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low		Optional	Optional	Optional	
High		Optional	Optional	Optional	
Best Estimate		-	0.6	5.4	
Description and scale of key monetised benefits by 'main affected groups'					
We have undertaken break-even analysis, and this suggests that only 2% of working days lost through industrial action a year would need to be covered by agency workers at 50% of the productivity for the policy to break even. If employers are able to utilise more agency workers, then the impacts of this policy are likely to be significantly higher. Hence, if we assume 2% of workers that are on strike are replaced, the increased output for business is estimated to be £0.63 million. Most of the annual costs estimated above will transfer to agency workers as wages, with some going to employment businesses as fees for work finding services.					
Other key non-monetised benefits by 'main affected groups'					
There may be significant wider benefits to the wider economy if some employers facing strike action are able to maintain some activity, especially those affecting important public services.					
Key assumptions/sensitivities/risks				Discount rate	3.5

It is difficult to estimate the extent to which temporary agency workers would be able temporarily to fill-in for regular workers on strike, for a range of reasons. We have therefore illustrated a scenario where the policy breaks even over 10 years. If employers are able to utilise more agency workers at the same level of productivity as used above, then the impacts of this policy are likely to be significantly higher. Different levels of relative productivity have different break-even levels of working hours recovered on this basis.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0.6	Benefits: 0.6	Net: 0.0	0.0

* We have undertaken break-even analysis and are confident that this policy change is likely to be net beneficial, however, we are unable to robustly estimate the size of this impact.

Evidence Base

Problem under consideration

- 1) The United Kingdom has one of the most flexible labour markets in the developed world according to the OECD: tenth for permanent employees (behind USA, Canada, Australia, Switzerland, Austria, Hungary, Costa Rica, Uruguay and Peru) and second to the US on temporary contracts¹. The flexibility of the UK's labour market allows people to easily move between jobs and allows businesses to quickly respond to changing demands, which results in high participation, high employment, and low unemployment. The Government is committed to ensuring that employment law supports and maintains the UK's flexible labour market.
- 2) The recruitment sector plays an important role in ensuring the UK's labour market works effectively by improving the efficiency of matching demand for jobs to demand for workers. It places approximately 980,000 temporary agency workers into work on any given day². The recruitment sector is regulated by the Employment Agencies Act 1973³ (the Act) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the "Conduct Regulations")⁴. The Act and the Conduct Regulations govern the tripartite relationship between an employment agency/employment business, a hirer and a work-seeker. Regulation 7 of the Conduct Regulations prohibits employment businesses from providing temporary agency workers to employers to perform work a) normally carried out by a worker who is on strike or other industrial action, or b) normally carried out by a worker who is temporarily performing the work of a worker on industrial action. This restriction does not apply if the industrial action is unofficial (as defined in the Trade Union and Labour Relations (Consolidation) Act 1992).
- 3) Workers in the UK can take industrial action against their employer⁵. It is used as a last resort when workers have a grievance with their employer over aspects of their employment relationship. Industrial action is designed to impose an economic cost on the employer, in order to encourage the employer to resolve the grievance. Workers taking industrial action will also face a cost as they will lose their pay for the hours they don't work.
- 4) However, industrial action will often cause negative externalities: costs on employers and individuals not involved in the dispute. For instance, strikes in essential public services such as education can require parents to look after children rather than work or carry out other activities. Children affected will also suffer from not being in school and from missing some education. Businesses may suffer from missing workers or customers due to parenting requirements. Similarly, if postal workers were to strike, individuals and employers reliant on postal services would be placed at a disadvantage due to the resulting large backlog of deliveries⁶. There were 100 disputes involving industrial action of 10 workers or more lasting at least one day in 2019, accounting for 225,000 working days⁷.

¹ OECD Strictness of Employment Protection Legislation indicators – 2019 data for version 4 of these indicators (the latest most complete versions) – downloaded on 15th June 2022.

² The Recruitment and Employment Confederation's Industry Trends Survey 2020/21

³ Employment Agencies Act 1973, http://www.legislation.gov.uk/ukpga/1973/35/pdfs/ukpga_19730035_en.pdf

⁴ The Conduct of Employment Agencies and Businesses Regulations 2003 <https://www.legislation.gov.uk/uksi/2003/3319/contents>

⁵ GOV.UK, Taking part in industrial action and strikes, <https://www.gov.uk/industrial-action-strikes/your-employment-rights-during-industrial-action> (accessed 21 June 2022)

⁶ S. Treanor, Royal Mail Strike: What will the impact be?, BBC News, 16 October 2013 <http://www.bbc.co.uk/news/business-24551650> (Accessed 12 June 2015)

⁷ ONS, Labour Market Statistics February 2020, table LABD03: Labour disputes stoppages in progress http://www.ons.gov.uk/ons/publications/re-reference-tables.html?newquery=*&newoffset=50&pageSize=25&edition=tc%3A77-350752 (Accessed 12 June 2015)

- 5) Currently, there are some ways that employers facing industrial action are able to obtain cover for the work affected by industrial action:
- ◆ directly employing new staff (this can be done with or without using an employment agency – a business that sources workers for direct hires by an employer). The employer could use a training provider to train these workers before utilising them
 - ◆ contracting the work out to a service provider.
- 6) However, regulation 7 of the Conduct Regulations currently prohibits employment businesses from providing temporary agency workers to employers facing strikes. This denies employers in this situation from using temporary agency workers and denies these agency workers access to these work opportunities through their employment business. Employment businesses are denied the opportunity to supply workers in these situations.

Consultation

- 7) The consultation regarding the removal of Regulation 7 of the Conduct Regulations ran from 15 July to 9 September 2015. It received 167 substantive responses from a range of stakeholders. In addition, over 11,000 e-mails were received in response to a campaign from the group SumofUs, and the TUC submitted a petition signed by 25,000 people, of which 1,500 made additional comments. Even though this consultation was conducted a few years ago, it is still considered relevant. It received a significant response from a wide range of stakeholders, who provided views and comments from many different perspectives that remain valid today.
- 8) This consultation formed part of a wider trade union reform package and a decision was taken by Ministers of the then Government not to implement this particular aspect of the package at that time, ahead of the EU referendum (unconnected with the competence of EU law). The current Government has now decided to progress with this reform, given the strong public interest from the reforms, and since the 2016 referendum is now a settled issue.
- 9) When asked about the impact on employment businesses (EBs), 41% of the responses suggested there would be a negative effect, while 23% suggested a positive impact. The main reasons given for the negative impact were that EBs would face reputational damage from supplying workers to cover strikes and that they would not have enough skilled workers to cover striking workers, they would face unwelcome attention from unions. Some of the positive impacts suggested were that it could increase the workload and profits of employment businesses and enable them to find more work opportunities for agency workers.
- 10) When asked about the impact on work-seekers, 49% of responses expressed an opinion that there would be a negative impact, but 16% suggested a positive effect. The main reasons for their opinion of a negative impact were that work-seekers would not want to accept strike breaking work but could be forced to do so, it would damage the relationship between agency workers and employees on strike, and would reduce terms and conditions and job opportunities for both employees and work-seekers. Some responses did highlight, however, that it could provide work-seekers with more opportunities for work and provide them opportunities to build more skills that could help them to transition to permanent work. It was also noted that there may not be enough agency workers with the right balance of skills to replace striking workers and that work-seekers may not be attracted to short-term, irregular placements.
- 11) When asked about the impact on hirers, 40% of responses expressed an opinion that there would be a negative effect while (24% suggested a positive impact. The main explanations

provided for the negative impact were the detrimental effect on the employer's relationship with its employees (who are on strike), and associated knock-on consequences. Responses also highlighted challenges for employers of obtaining suitably qualified agency staff. The main explanation for a positive impact was that it would enable hirers to manage the impacts of industrial action.

- 12) When asked about the impact on employees taking part in strikes, a significant majority (70% of the total) expressed an opinion that there would be a negative impact and very small minority (2%) expected a positive impact. The main explanation for the negative effect was that it could reduce the impact of strikes, remove a fundamental right, worsen employees' relationship with their employer and temporary workers, and could increase the amount of time spent on industrial disputes. When asked about the impact on wider economy and society, a majority (53% of the total) expected a negative impact and smaller proportion (17% of the total) expected a positive effect.
- 13) The Government has carefully considered all these points and remains of the view that removing regulation 7 is the right course of action. Removing this regulation does not prevent individuals from taking part in lawful industrial action but it will give employers more choice and flexibility to manage disruption from industrial action. Similarly removing the regulation will not mean that Employment Businesses have to provide agency workers in this situation, but it will give them the freedom to do so should they wish to. Other regulations will remain in place protecting agency workers and removing this regulation we will be giving work seekers more choice on whether or not to take up assignments that give them opportunities to develop new skills. Finally removing this regulation will not change the wider frameworks that are in place to ensure the health and safety of both employees and the public.

Background

Recruitment sector

- 14) Employment businesses play an important role in our economy, contributing £32 billion in Gross Value Added 2019⁸. In 2021, there were around 11,355 employment businesses⁹ within the recruitment sector. Employment businesses supply hirers with workers on a temporary basis (Table 1). While most employment businesses are micro businesses, the proportion accounted for by micros is lower than in the economy as a whole.
- 15) In 2020/21 employment businesses placed around 980,000 individuals in temporary agency assignments on any given day. These temporary placements represented 3% of total employment in the UK in 2020/21. The sector supplies workers for a wide range of jobs, ranging from the highly skilled (e.g. IT) to the low paid and low skilled. According to BEIS analysis of the Labour Force Survey in 2021, agency workers are employed in occupations

⁸ ONS Non-Financial Business Economy 2021 release. In comparison, according to the same source, the manufacture of motor vehicles and trailers contributed around £15bn in 2019, while telecommunications contributed around £33 bn.

⁹ ONS, UK Business Counts 2021. The official Standard Industrial Classification places businesses within industries on the basis of their primary activity. These figures relate to the number of enterprises that are registered for VAT and/or PAYE, and rounded to the nearest 5. There are two legally defined types of business models in the sector; *employment agencies* who introduce people to hirers for permanent employment; and *employment businesses* (also known as temping agencies) who introduce people to hirers for temporary work. Many recruitment businesses operate as both employment agencies and employment businesses.

in all the major SOC20 occupation groups. Around 21% were in elementary occupations, while 21% were in professional occupations.

16) According to REC analysis for 2017/18, over four-in-five temporary/contract placements last for at least 5 weeks, with 36% lasting for at least 16 weeks¹⁰.

Labour dispute stoppages

17) Over the period 2015 to 2019, there has been an annual average of 93 disputes involving strike action, which accounted an annual average of around 253,000 working days lost. Over the five years to 2019, public administration, education, health and social care accounted for nearly 56% of working days lost, with transport and storage accounting for 30%. Close to 40% of these disputes involving industrial action involved just 1 day of strike action, with a further fifth involving two days¹¹.

Existing options for employers facing industrial action

18) As noted above (paragraph 5) employers facing strike action have some options to use alternative labour to replace their workers on strike. These options largely involve the employer directly hiring temporary staff. This may involve a significant administrative burden, in terms of handling payroll and pension issues, recruitment processes and contractual arrangements to resolve industrial action that typically last 1 or 2 days. Employers would also face the difficulty in finding a ready supply of labour available for direct hire at short notice for a short-term post. Sub-contracting services at short-notice on a temporary basis is also likely to prove relatively expensive. The Employment Agency Standards Inspectorate, which enforces the Conduct Regulations, receives very few complaints about potential infringement of regulation 7 (just 2 in 2018/19 and 2020/21 and 3 in 2021/22) which suggests that there may be a low level of usage of the current options.

Rationale for intervention

19) Regulation 7 of the Conduct Regulations currently prohibits employment businesses from providing temporary agency workers to perform the work normally carried out by workers who are taking industrial action, or by those who have been allocated work normally carried out by the workers on industrial action.

20) This prevents employers facing industrial action from accessing a supply of available, reasonably cost efficient, labour to enable them to provide a service to customers during the industrial action. This can have an impact on businesses, employers and workers with which the striking workers do not have a dispute (negative externalities of industrial action). The removal of Regulation 7 from the Conduct Regulations would enable some employers facing strike action to provide some services/output by employing temporary agency workers as cover, thus minimising the effect of the negative externalities of industrial action. The use of agency workers by employers in this situation will be determined by their assessment of business need and will differ depending on the type of work done by the employer and the particular circumstances facing the employer.

21) The removal of regulation 7 would also remove the restriction on temporary agency workers accessing placements which provide cover for work affecting industrial action, giving them the same opportunities to access work as other work seekers. It would also provide employment businesses with additional opportunities to supply labour.

¹⁰ Recruitment and Employment Confederation, Recruitment Industry Trends 2017/18 – more recent versions do not contain this information.

¹¹ BEIS analysis of the Labour Disputes Survey

Policy Objectives

22) The objective of the policy is to tackle the disproportionate impact of strikes, in both important public services and other industries, and removing the restriction on access to placements for temporary agency workers. By enabling employers facing industrial action to use temporary agency workers from employment businesses, where employers determine that using agency workers will be beneficial to their organisation, agency workers will be able to perform some of the functions not being carried out due to the industrial action. This will allow some functionality for employers when industrial action takes place, which will enable them to carry out some key services.

Description of Policy Option

23) Regulation 7 in the Conduct Regulations will be revoked, so that employment businesses will be able to provide temporary agency workers to employers facing industrial action so that they can carry out work normally performed by a) workers who are taking industrial action, or b) workers who have been allocated work normally performed by workers taking industrial action.

24) Alternative to regulations and other policy options were not considered because without repealing Regulation 7, agency workers would not have access to the potential for extra placements from this work and similarly, businesses would not be able to access to these workers when their regular workers were on strike.

The main stakeholders

25) The main stakeholders affected by the proposed changes to the recruitment sector regulations are:

- Employment businesses
- Employers facing industrial action
- Temporary agency workers
- Union workers and unions
- Businesses, customers and individuals negatively impacted by the strikes

Policy option costs and benefits

26) This Impact Assessment identifies both monetised and non-monetised impacts on employers, employment businesses and work-seekers with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of the proposed option are compared to the no change option. Where possible, the estimated costs and benefits have been monetised, but it is not possible to monetise all of the potential impacts.

27) **Option 0:** The 'do nothing' option, provides the baseline against which the other proposals are compared.

28) **Option 1:** The Government is proposing to revoke regulation 7 of the Conduct Regulations.

Transition costs

Familiarisation

- 29) Three main groups may familiarise themselves with the repeal of Regulation 7 of the Conduct Regulations: employment businesses, who provide work finding services for temporary agency workers, unions, and employers who might face strike action.
- 30) As noted above, there are around 11,195 employment businesses in Great Britain. They should already be familiar with the Conduct Regulations. This measure is purely deregulatory as it removes the ban on providing agency workers to replace striking workers. We estimate that it would take a maximum of half an hour of an HR directors¹² time to take account of this legislative change, given how straightforward it is. This is in line with the estimated familiarisation time for the reform of Section 9 of the Employment Agencies Act, which similarly did not place any burden on employment businesses but potentially affected how any enforcement inspection might be conducted¹³. No requirement is being placed on employment businesses by this proposed change. According to the Annual Survey of Hours and Earnings 2021 the median salary for an HR Manager or Director is £24.33. The latest estimate from the ONS Index of Labour Costs per Hour is that non-wage labour costs are 17.9% of wages. We therefore estimate that the hourly labour cost for this occupation are £28.69. We estimate that the familiarisation cost for employment businesses = $11,195 \times 0.5 \times 28.69 = \text{£}161,000$.
- 31) It is difficult to estimate precisely the number of employers who might face strike action. Evidence from 2018 and 2019 trade union annual returns suggest that only a minority of trade unions have balloted for industrial action. There are also relatively few disputes each year, and even fewer that actually result in industrial action. Therefore it isn't sensible to expect all employers with a recognised trade union would familiarise themselves with this change, as many would have no reason to. Our approach is therefore to estimate that employers will familiarise themselves with this change when they are subject to an industrial action ballot. This would probably give the employer warning of around 2 months before industrial action could feasibly take place (and the employer would know prior to that that they were in a difficult dispute). The trade union annual returns for 2018 and 2019 report that there were around 1,014 ballots in 2018 and 1,346 in 2019, an average of 1,180¹⁴. This is likely to be an overcount of employers who potentially face industrial action: ballot numbers are much higher than reported levels of industrial action; there may be some double-counting, if employers face multiple action within this timeframe; some ballots will not pass the legal requirements for action; and unions do not necessarily need to proceed with action when the ballot has been successful. As the change will not require the employer to do anything, and is a straightforward change to the legislation, we estimate familiarisation time of around half an hour for an HR director. This gives an estimated annual familiarisation cost for employers of $1,180 \times 0.5 \times 28.69 = \text{£}17,000$ to the nearest 1,000.
- 32) Unions may familiarise themselves to be aware of the legislative change. There are around 126 Great Britain listed and scheduled trade unions. Again we estimate around half an hour of familiarisation time with the proposed change, with the hourly labour cost of a union

¹² While not everyone in employment businesses and employers who familiarises themselves with the change would be an HR Manager or Director this provides a good general proxy for a high paid role specialising in people management.

¹³ It is also in line with the estimated familiarisation time for extending the right to a written statement to dependent contractors <https://www.legislation.gov.uk/ukxi/2019/731/impacts>

¹⁴ It should be noted that some of these ballots will be where unions are asking about strike action and action short of a strike in the same dispute, so some disputes will be counted twice. Some employers will also face multiple disputes in a year.

General Secretary being £30.83. This gives a one-off familiarisation cost to unions of $126 \times 0,5 \times 30.83 = \text{£}2,000$.

33) This gives a one-off familiarisation cost of £163,000, and an annual familiarisation cost of £17,000. Over the 10-year period this comes to around £332,000.

Ongoing impacts:

34) As noted in paragraph 17, between 2015 and 2019, there were an annual average of 93 disputes a year involving strike action, which accounted for 253,000 working days lost on strikes a year. Some strike action took place in nearly all broad industry groups across the 5 year period.

35) We assume that the pattern of industrial action that occurred in this period is likely to be representative of industrial action that will occur in the following 10 years. Trade union demographics are not likely to substantially alter based on recent trends.

36) The policy option would allow employers facing industrial action to contract employment businesses to provide temporary agency workers to provide cover for all of these days lost. It is difficult to estimate what proportion of working days lost by individuals may be covered by employers using temporary agency workers. The information on working days lost is available at a broad sector level, and data from the LFS suggests that temporary agency workers have assignments in all broad sectors.

37) However, there are a number of reasons why employers might not get cover from agency workers for all of the working days lost.

- ◆ **Availability, skillset and location of temporary agency workers** –the vast majority of temporary agency workers are on assignment at any one time, so only a low proportion would be available to provide replacement labour for workers who are on strike¹⁵. Agency workers would also have to have the right skills, experience and training to be able to replace workers on strike: Most union members work in occupations that require some skills or training to be considered competent to do their job. If it would take an agency worker some time to get up to speed with an employer's work processes, then only agency workers with some existing familiarity with these processes would be suitable as most strikes are short (though employers may be able to train agency workers in advance, at additional cost). Agency workers available, able and willing to take on the work of those on strike would need to be able to get to the workplace.
- ◆ **Temporary agency workers and employment businesses not interested in providing cover** –some responses to the consultation indicated that some temporary agency workers would not want to take assignments that involved providing cover during industrial disputes. This may be because they are trade union members themselves and would not want to work in place of workers on strike, or it may be that they would not want to be placed into an environment where industrial relations are strained. Evidence from the consultation suggested that some employment businesses would not want to provide services to employers involved in industrial action, as they feared potential reputational damage from being seen to have become involved in the dispute.
- ◆ **Employers using currently allowed options** – in most cases employers may not want to use the current options for recruiting temporary labour to provide cover during industrial action, due to the administrative and logistical costs. However, in some cases,

¹⁵ BEIS analysis of the Labour Force Survey for the four quarters of 2021 shows that around 18% of individuals identifying themselves as agency workers were unemployed or inactive.

such as where employers have a statutory requirement to provide services, for instance the clearing of refuse from residential properties, employers may currently have no option but to use one of the options currently allowed to get replacement workers to provide industrial action cover.

38) It would be for employers involved in an industrial dispute to assess the costs and benefits and decide whether it was in their interests to use temporary agency workers to provide cover for striking workers. They would need to consider some of the factors mentioned above, the length of the strike and the potential impact on customers, suppliers and the wider economy (which might be particularly relevant for employers providing public services like education, health or transport – the wider impact of industrial action in public services may provide an incentive to employers to obtain cover for striking workers even for one day strikes. Any direct impacts would be at the discretion of the employer facing strike action. They are not required to use agency workers to temporarily replace striking workers, so would only do so if it was net beneficial for the business.

39) There is a lack of robust information available that would enable the quantifying of the extent to which temporary agency workers would be used to provide cover for striking workers by employers experiencing industrial action.

Impacts:

40) Any other direct impacts would be at the discretion of the employer facing strike action. They are not required to use agency workers to temporarily replace striking workers, so would only do so if it was net beneficial for the business.

41) As noted above, it is very difficult to estimate exactly where agency workers would be available, suitable and willing to temporarily replace workers who are on strike. However, given the information available, including that from employment businesses, we expect that the numbers would be relatively low.

42) To estimate potential impacts, we have calculated the average annual hours lost through strike action¹⁶, the estimated output per hour by broad industry (using ONS GVA estimates for Q4 2020 to Q3 2021, and ONS productivity hours data for the same period) and the costs to hirers of agency worker labour. The latter is based on median hourly wages uprated to take account of non-wage labour costs, which is then increased by 17.3% to take account of employment business margins¹⁷.

43) Table 1: Estimated annual hours lost from strikes, output per hour and cost of agency workers

¹⁶ This was based on the average annual days lost in 2015 to 2019 by broad industry, converted into hours using median weekly hours worked for a full-time worker (converted into days by dividing by 5).

¹⁷ REC industry trends 2018/19 – the latest figure available for the average employment business margin per agency worker.

industry group	annual working hours lost	usual output per hour £	Average hourly cost to employer for agency worker (£)
Agriculture, forestry and fishing	0	17	12
Manufacturing	72384	44	15
Electricity, gas and air conditioning, Mining and Quarrying	13895	120	25
Sewerage, waste management, remediation activities, water supply	24024	68	10
Construction	15040	32	19
Wholesale and retail trade; repairs	9867	30	14
Transport and Storage	594048	26	14
Accommodation and Food service activities	4000	18	14
Information and Communication	38063	47	24
Financial and Insurance	740	83	33
Real estate Activities;	12938	286	24
Professional Scientific and technical activities	35750	31	27
Administrative and support services;	34944	21	14
Public administration and defence	88650	29	19
Education	679172	29	14
Human Health and social work	293550	29	16
Other services	40800	27	18

44) For this approach, we use a simple model to the net benefit from hiring an agency worker (the difference between the average output for hiring an agency worker minus the average cost for hiring an agency worker) and multiply this by take up rate to ensure that these impacts offset the other monetised costs from this policy.

45) We do not know precisely which workers (specific jobs and specific industries or employers) took strike action in 2015 to 2019, or which will be taking action in the future. We also do not know precisely what occupations or skills agency workers have, what their availability will be or their willingness to undertake work replacing those on strike. Therefore we take a simple modelling approach: this assumes that a certain proportion of working hours lost will be recovered, with the same proportion applied across each industry group. Then the related costs and outputs for these estimated recovered hours are calculated. We recognise that

this is a simple assumption y (it might be more feasible for some employers to utilise agency workers to replace those striking in some industries and occupations than others). In each broad industry, the estimated hourly output is higher than the estimated hourly cost for an agency worker, so that indicates that if an employer is able to generate more output than costs through using agency workers to temporarily replace striking workers there might be a benefit in using agency workers.

- 46) However, this would depend on how productive agency workers were relative to the workers who are taking strike action. Where an occupation requires some skills and/or training to achieve competency, it is likely that employers would only use agency workers where there was an existing pool of agency workers with the basic level of competency required to perform the task adequately on day one. In such cases, there may be minimal loss of productivity, though potentially there will be a lack of familiarity with the specifics of the work carried out. Where agency workers with no experience of the type of work could be used, there may be a dual effect of a lack of familiarity with the type of work, and a lack of knowledge of the particular approach of the employer.
- 47) In order to estimate the impact of this measure, we would need to make a number of assumptions and do not have the evidence to do this, hence, we have developed a simple model that looks at the impacts from the businesses perspective and carried out break even analysis.
- 48) This is a permissive change, employers will only hire agency workers when the net benefit is positive. We also don't have evidence on how productive agency workers replacing striking workers will be. A break-even point for the policy over 10 years is estimated to be achieved if the agency workers are 50% as productive as the workers they are replacing, if 2% of working hours lost were recovered. This illustrated impact provides the headline figures used in this impact assessment. It produces an output of £630,000, with a cost of around £596,000 (which is largely a transfer to employment businesses of around £103,000 and to agency workers of around £493,000).
- 49) If agency workers are more than 50% as productive then the break-even point on this basis requires fewer working hours to be recovered by agency worker replacement, and more hours to be recovered if less than 50% as productive¹⁸. This also does not include non-monetised impacts, most notably the wider (significant) benefits on the rest of the economy if employers facing strike action can maintain some activity. Hence, we are confident that this policy change is likely to be net beneficial, however, we are unable to robustly estimate the size of this impact.

¹⁸ The calculation involves using the hourly cost to hirers of agency workers and the output per hour by broad industry in table 5, and the working hours lost by broad industry in table 4. The 10 year break even figures shown in this document are based on assuming a 50% productivity level for each broad industry, and finding that the break even level for working hours recovered was 2% of work hours lost applied across each broad industry's working hours lost). Different break even points for working hours recovered can be calculated based on different proportions of regular productivity being estimated for agency workers. In some broad industries agency workers having low percentages of regular productivity may mean that costs would be above output recovered, but employers may still choose to go ahead with employing agency workers where possible if it enables them to meet contractual obligations (and possibly avoid penalties for failure to meet obligations).

Business impacts from different take up rates and relative productivity of agency workers replacing workers on strike:

As pointed out, it is difficult to estimate what the potential impacts would be because it is difficult from available data to make an assessment of whether there would be agency workers available, in the right location, with the right skills and training and willingness to replace striking workers. The simple model developed provides illustrations of possible impacts on business with some assumed inputs, though the real impact on the labour market and economy will be more complex.

We set out further illustrated impacts, based on the model developed, to exemplify the point that direct impacts will depend on the number of strike hours recovered by agency workers, and the relative productivity of those agency workers compared to the regular workers. We make no assessment of the likelihood of these scenarios.

Firstly, by continuing with the assumption that agency workers in these situations provide 50% of the productivity of regular workers, we get the following annual net benefit to employers of output minus agency worker costs during strikes:

Working hours recovered	Annual net benefit (£)	10 year NPV
10%	£160,000	£1.1m
30%	£510,000	£4.1m
50%	£850,000	£7.0m

If we assume a higher relative productivity of 80%, then we get the following annual net benefits to employers replacing striking workers:

Working hours recovered	Annual net benefit (£)	10 year NPV
10%	£2.0 million	£17.1m
30%	£6.1 million	£45.3m
50%	£10.1 million	£75.6m

Non-monetised impacts

50) As noted above, if employers are able to use agency workers to temporarily replace regular workers who are taking strike action, it could impact bargaining power for unions. This potential reduction in workers' power relative to that of their employer might adversely affect these workers' ability to successfully negotiate terms and conditions. As noted above, there are a number of factors that will impact on the ability of an employer facing strike action to utilise agency workers to maintain at least some activity during a strike. The size of this impact will depend on take up rate, which we are not able to robustly estimate. This impact will be larger in sectors where workers can be replaced (i.e. sectors that have low barriers and readily available agency workers). Also, employers can already directly employ temporary workers to carry out the activities of striking workers. We therefore cannot monetise what this impact would be but expect that it would be low.

51) Employers will only use temporary agency workers to replace their regular workforce if the latter is striking if they deem the benefits to be greater than the costs. Therefore the impact on firms will not be negative.

52) There may be significant wider benefits to the wider economy if some employers facing strike action are able to maintain some activity, especially those affecting important public

services. This would obviously depend on the strikes that the agency worker labour could be used in. If in transport, it might enable some workers and other individuals to travel in their normal way, benefiting their employers and services they might utilise. If in schools, then workers and other individuals would be able to carry on their planned activity, and pupils would benefit from attending school.

53) For example, there is evidence that the negative externality from strikes can be very large, especially those affecting important public services. For instance, Hospitality UK estimated that the cost of the rail and tube strikes beginning on 21st June 2022 could cost the hospitality sector (leisure, tourism, theatres) at least £500 million. In addition, the CEBR have said that the worker absence costs could cut up to 0.1 percentage points off the second quarter growth figure, noting that home working might reduce this impact.

54) Hence, we are confident that the wider benefits could offset the theoretical costs. The number of working days lost due to strikes that are recovered due to the repeal of Regulation 7 are likely to be proportional to the overall benefit to the economy (that is the reduction of the net externality of strike action). In addition, the net impact to the economy of the impact on unionised labour is zero in the short term, as the corresponding benefit will go to the business. Any future reduction on Union bargaining power would be a transfer to the employer. Hence, we are confident that this policy change is likely to be net beneficial, however, given the evidence base, we are unable to estimate the size of this impact.

Summary

55) We estimate that there are familiarisation costs of around

- ◆ £160,000 one-off costs for employment businesses
- ◆ £17,000 each year for employers facing industrial action ballots (totalling £169,000 over 10 years)
- ◆ £2,000 one-off costs for trade unions

56) This is a permissive change, employers will only hire agency workers when the net benefit is positive. In order to estimate the impact of this measure, we would need to make a number of assumptions and do not have the evidence to do this, hence, we have developed a simple model that looks at the impacts from hiring businesses perspective and carried out break even analysis. This shows that if agency workers were able to reduce annual average working days lost by 2%, with around half the productivity of regular workers, then the impact of this policy would be neutral (break-even). This does not include non-monetized impacts, most notably the wider (significant) benefits on the rest of the economy if employers facing strike action can maintain some activity. Hence, we are confident that this policy change is likely to be net beneficial, however, we are unable to robustly estimate the size of this impact.

57) At this level there would be an annual benefit to employers of £0.63 million in output during strike action. This would incur an annual cost of £0.6 million for agency workers and employment businesses. For this estimate, the Equivalent Annual Net Cost to Business would be £0 million, and the ten year Net Present Value would be £0.0 million, at 2019 prices and 2020 Net Present Value.

58) Given the low level estimates, and the fact that it is difficult to precisely affect whether employers facing strike action are in the public or private sector, the EANDCB figure is based on estimates for all strike action.

Risks and Proportionality

- 59) The analysis reflects the potential impacts of this policy change. The repeal of Regulation 7 is an enabling reform that does not impose significant burden on employers, employment businesses or agency workers. It gives employers an additional choice to employ an alternative source of labour temporarily when its usual workforce is on strike. The employer is only likely to do this where the benefits outweigh the cost.
- 60) Evidence from the consultation responses suggested that the potential for the supply of temporary agency workers to employers facing strike action would depend on a number of factors: agency workers might not want to cross the picket line, employment businesses may not want the potential reputational damage from supplying workers to replace striking workers, suitable agency workers may not be available due to already being on a placement and there may not be agency workers available with the required skills to be able to do the work of those on strike.
- 61) As noted above, employers can already directly employ temporary replacements for striking workers. It may be that where the repeal of Regulation 7 allows employers to use employment businesses to source these workers it would be a more cost-effective option for the employer and potentially, at least to some extent, replaces direct employment rather than increasing the amount of temporary labour replacing those on strike.
- 62) The risks are that the break-even point for employers would not be reached. However, if that is the case, the costs for employers would be very low.

Impact on Small and Micro Businesses

- 63) There is likely to be direct benefits to small and micro businesses. Most employment businesses are small and micro firms, and some would have the potential to supply temporary labour to employers facing strike action, if they chose to do so.
- 64) While smaller businesses are much less likely to have unionised workforces than larger employers, some industrial action may affect smaller workplaces. The repeal of Regulation 7 may therefore enable some smaller businesses to utilise temporary agency workers to fill-in for striking workers if they thought it would be beneficial.
- 65) Where there are wider benefits to the economy not directly involved in the strike resulting from the use of agency workers, this will potentially benefit all sizes of business, including small businesses and micros.
- 66) While most unions that ballot members for industrial action tend to be the larger unions, there are some with relatively small memberships that are likely to be small or micro organisations. These might be weakened more.

Trade implications

- 67) There are not likely to be any trade implications from this policy.

Monitoring and Evaluation

- 68) There are no regular sources of information on the use of temporary labour during industrial action. Given the relative difficulty in surveying industrial action, it would not be easy to collect regular data. Monitoring and evaluation would largely be through regular discussions with stakeholders.

- 69) We will continue to monitor the level of industrial action, union membership and collective agreement coverage, to see if there has been any possible impact on any occupations or industries, and any indication of an impact on bargaining power.
- 70) We will explore the possibility of collecting data on use of agency workers on the Labour Disputes Survey, and other mechanisms for collecting information on industrial action. However, these surveys are owned by other organisations and they may want to limit the burden placed on respondents.

Equalities Analysis

71) Under the Equality Act 2010 the Department for Business, Energy and Industrial Strategy, as a public authority, is legally obligated to have due regard to equality issues when making policy decisions. Specifically, the Public Sector Equality Duty (PSED) sets out:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- Advance equality of opportunity between people who share a protected characteristic and those who do not; and
- Advance equality of opportunity between people who share a protected characteristic and those who do not; and
- Foster good relations between people who share a protected characteristic and those who do not.

72) The protected characteristics consist of nine groups: age, race, sex disability, religion or belief, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership. This Equality Analysis considers the potential equality impacts of Repealing Regulation 7 of the Conduct Regulations.

73) While it is not feasible to provide an analysis of the demographics of these specific groups, we can consider those for agency workers and union members more broadly.

74) Employees who are union members are more likely than non-union member employees to be women, black, aged 50 or more, to have a disability and to be Christian.

75) Temporary agency workers are more likely than non-agency workers have a disability, be aged 16 to 24, be from an ethnic minority and follow a non-Christian religion.

76) Looking at the overall characteristics of agency workers and union members the former are younger and more likely to follow a non-Christian religion, while the latter are more likely to be older and female. Individuals in both groups are likely to have a disability and be from an ethnic minority.

77) It is very difficult to focus more specifically on which groups of union members and agency workers would be affected. There is a lack of precise information about where agency workers would be able and willing to temporarily fill-in the roles of striking workers to precisely assess which individuals would be affected. The policy objective is to reduce the negative externalities resulting from strike action by enabling employers facing a strike to employ temporary agency workers to mitigate the reduction in activity due to the strike. It is designed to have a general impact on the labour market and economy, and any impacts on those with protected characteristics would be indirect.

78) The policy is likely to be marginally beneficial to agency workers who are able and willing to temporarily do the work of striking workers, as they will have an additional route to obtain placements.

- 79) The policy may reduce the bargaining power of trade unions.
- 80) The potential benefits to those individuals not involved in the strikes from a reduction in negative externalities from strike action is considered by the Government to outweigh any specific detriment to unionised labour.
- 81) The expectation is that generally it would be difficult for agency workers without the requisite skills or experience to fill-in temporarily in many of the occupations that union members occupy. The policy is likely to have a potential impact on strikes by those in elementary occupations, or where there is an existing pool of agency labour. However, in the latter situation, agency workers working in a sector might also benefit from union action if they improve or sustain terms and conditions. This may limit the potential labour supply among agency workers to temporarily replace striking workers, along with other factors like remaining on good terms with potential colleagues.