



# **Consultation on the Hiring of Agency Staff to Cover Industrial Action**

## **Unite Response to UK Government Consultation**

**January 2024**

## About Unite the Union

This submission is made by Unite, the UK and Ireland's largest trade union with over 1 million members across all sectors of the economy, including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government, and the not-for-profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

## Hiring Agency Staff to Cover Industrial Action

Unite the Union opposes the proposed repeal of Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003. In 2022 the Government introduced legislation which did repeal Regulation 7, and this led to an application for Judicial Review pursued by Unite and many other trade unions to the High Court. The application was brought on two grounds, involving a failure of consultation, and specific legal concerns advanced by the trade unions in relation to the repeal. The High Court was only required to consider the failure of consultation, and in doing so determined that the Government had acted unlawfully. Following a Judgment issued in July 2023, the repeal of Regulation 7 was quashed with effect from early August 2023. The current consultation exercise arises because the Government is proposing once again to repeal Regulation 7.

There is no evidence that the repeal is wanted by employers, employment agencies, or trade unions. It is an ill-conceived measure which will only have the result of damaging industrial relations within workplaces, potentially having a long-term impact upon the interests of workers and employers. The measure will do little to protect the legal position of agency workers and will do nothing to resolve industrial disputes. The proposed repeal of Regulation 7 ignores the long-term understanding across industry of a measure which has always had broad political and industrial support on all sides.

Unite believes that the proposed repeal involves a political gesture on the part of the current Government and is a further example of an attack upon the fundamental right of workers to take industrial action. This can include strike action if the workers decide that is their intention following what is already a technical ballot scheme which arises from the current legislative framework. Over recent months the Government has introduced legislation involving the imposition of minimum service levels in certain sectors, and together the two measures undermine fundamental freedoms respected by successive Governments, and widely supported across industry and amongst all trade unions.

Unite will confirm views in relation to the questions asked, but it should be noted that Unite's opinion is that the questions are inadequate. The questions fail to engage with any consideration of the impact of the proposal upon fundamental freedoms, and the potential practical impact of engaging possibly untrained agency workers to run complex and specialist services.

## Questions

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

Unite has seen how the repeal of Regulation 7 impacted upon trade disputes after it was repealed in 2022. This included seeing real examples of agency workers being recruited to cover the work of those involved in industrial action, a matter which caused friction within workplaces, and those on strike faced actual and implied threats to their future employment. Industrial disputes usually lead to workers agreeing to mount a picket line, and the Government's proposal automatically envisages that those recruited will be required to cross a picket line. In time, these individuals may be required to work together, and the proposal fails to recognise the impact on the agency workers, as well as those taking industrial action. The Unite experience between July 2022 and August 2023 is that the ability of an employer to recruit agency workers played no part in resolving any dispute, and instead only led to further tensions between the parties involved in industrial action.

It is common for those to be involved in a trade dispute to undertake specialist work, and this might involve highly trained public sector employees, as well as those in the private sector. It would be unreasonable to conclude that such specialist workers could be replaced easily by an agency worker recruited at short notice. There would be no opportunity for adequate training, and agency workers required to cover specialist work could endanger themselves, co-workers, and the public. Unite considers that the focus of the Government should be directed towards assisting parties to resolve trade disputes by negotiation, not by introducing a change which necessarily engages threats and conflict situations.

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

Unite recognises the right of members to organise and to operate through collective processes, including through the conduct of collective bargaining. The approach envisaged by Government undermines collective organisation, and the right of workers to withdraw their labour. The Government fails to recognise that industrial action is usually the last resort if collective bargaining has failed to resolve a dispute. As indicated above, this is a further measure designed to undermine the rights of workers, noting the proposal involving minimum service levels, and earlier legislation such as the Trade Union Act 2016.

When considering the wider impact upon society, Unite also focuses upon international standards, a matter which forms part of the Judicial Review process commenced in 2022. The right to strike is a fundamental human right which is protected by various international standards, including ILO Conventions, the UN Covenant on Social and Economic Rights, the European Social Charter, and the European Convention on Human Rights (the Convention).

The obligations upon the UK Government under Article 11 of the Convention include both the negative obligation not to commit any act which is an infringement of the rights, and the positive obligation to secure the effective enjoyment of those rights. The European Court of Human Rights has held that the right to strike is one of the most important means by which

the State may secure a Trade Union's freedom to protect its members' occupational interests. Any restriction on the right to participate in lawful official industrial action will amount to a violation of Article 11, unless it can be shown to be justified. Unite does not see any legal basis to support a justification argument on this issue. Unite submits that it is obvious that allowing employers unlimited freedom to replace striking workers with temporary agency workers undermines the right to strike. The supervisory bodies of the International Labour Organisation (ILO) have consistently held that the hiring of workers to replace workers who are on strike is a serious violation of ILO Convention 87 on Freedom of Association. Unite does not recognise any fact which would permit the introduction of this repeal measure which would impact upon all industrial sectors and all possible potential trade disputes.

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

Unite does not consider that repealing Regulation 7 is applicable to any sector, with the reasons for this set out above. The proposal undermines longstanding fundamental freedoms and takes no account of the potential risks associated with the practical implementation of the proposal. Regulation 7 engages with live trade disputes, and a proper analysis of the proposed measure would recognise that the proposed repeal will do nothing to assist parties in resolving trade disputes.

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

The impact assessment includes little evidence addressing the issues outlined above and for example, involving consideration of the practical implementation of the repeal which happened in the period from July 2022 until August 2023. The Government does not understand the issues which arise in a trade dispute which might involve ongoing industrial action, and the impact upon workers and businesses. The impact assessment also fails to understand the current role of agency workers across society, and the impact upon those workers and future agency workers if this repeal is implemented.

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

The Unite views are set out above. Regulation 7 should not be repealed, and if it is breached by an agency business for an employer, the answer is not repeal, it is effective enforcement of the existing legislation.

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