Department for Education consultation - Child and family social workers: agency rules statutory guidance

A response by the Recruitment & Employment Confederation

28 February 2023



**Introduction**

The [Recruitment & Employment Confederation](https://www.rec.uk.com/) (REC) has had ongoing and extensive conversations with both the Department for Education (DfE) and our members that operate in the child social work sector around the new rules that are being introduced. Throughout these conversations, we have repeatedly stressed the potential issues with the draft rules and how these will work in practice. With these rules due to be introduced later this year, it is crucial that there is absolute clarity around the implementation of the rules, the legal implications of these and how they will be enforced.

We appreciate the intention behind these rules and, given the role the recruitment industry plays in the social work sector, we are keen to support the DfE and offer guidance on the rules as appropriate. The guidance as written does not contain sufficient detail to ensure these rules can be introduced in a way that minimises confusion and non-compliance. Given the timelines in which the DfE is seeking to introduce the rules, it is important that they get this consultation right and use the feedback received by agencies supply workers into the sector to make the necessary changes to the draft rules before they come into force.

Throughout the rest of this document, we have set out key parts of the draft rules that need to be addressed. This includes areas that are not clear in their current iteration or have not been included at all that need to be in the final published rules. Making the changes set out below will make the implementation of these rules as smooth as possible and minimise disruption to the agency child social work workforce.

**Implementation and Transition**

The draft rules state: “*we do expect all local authorities in that position to ensure that they work towards full implementation of these rules as soon as reasonably possible. Such plans may involve changing existing contract terms or exercising rights of termination and entering into new contracts.”*

The lack of a timeline and proposed key dates for full implementation leads to a degree of uncertainty for agencies, workers and local authorities. New terms of business are usually agreed when it is necessary to negotiate new (usually commercial) terms or there is a change in the law. The lack of a clear timeline for the implementation of the rules makes it difficult for agencies to determine when they should be terminating and/or amending their existing contractual agreements with local authorities in order to be compliant with the new rules. Changes in terms can also be confusing and uncertain for workers, who need clarity around how and when they will be working. The draft rules should set out a clear timeline for implementation with key dates highlighted to ensure that all parties are able to re-negotiate and/or terminate contracts in line with their legal and contractual obligations well in advance of the full implementation of the draft rules.

In order to allow sufficient time for this, the DfE needs to consider timelines for this in line with the proposed summer implementation of the rules. This transition needs to be piloted as contract renewals come up throughout the autumn, with a view to evaluate the process in early 2025. This allows the DfE an opportunity to consider how this is working in practice and if more guidance needs to be issued around this or adjustments need to be made.

**Data Collection**

The draft rules state that local authorities must provide the DfE with quarterly survey data on the use and cost of agency child and family social workers (including where supplied via a project team or other packaged model). There does not appear to be sufficient time to scrutinise and feedback on the data and price caps user guide before the publishing of the data and the price cap rules. Arguably, DFE has access to information related to this to assist it with its goal of “*development and/or adjustment of regionally determined price caps”* from other regions within the UK in which price caps and limits on agency social workers have been implemented such as e.g. Wales and Northern Ireland. Additionally, this information could have been obtained through a review of the ways in which agencies currently work within their regions under their various memorandums of understanding. The failure to provide the data rules as part of this consultation limits the extent to which agencies can meaningfully respond.

**Job Mapping**

The draft rules provide that for consistency, data should be reported against certain child and family social work core job types including:

*“Social Worker: This is an experienced practitioner role. The postholder has at least three years’ experience in direct employment in local authority children social care. They are expected to undertake cases independently and demonstrate an ability to adapt their approach from first principles to deal with more complex or unusual cases, assessing and managing risks appropriately.”*

It is not clear how this definition of a social worker will apply to agency workers who qualified as social workers before the implementation of the agency rules or whether there is a cut-off point at which these definitions will start to apply. Additionally, this definition is potentially discriminatory in that it is likely to have a disproportionately adverse impact on younger social workers. Younger social workers with the exact same experience as older agency social workers who qualified before the implementation of the draft rules would not be considered social workers for the purposes of the application of the draft rules because they were unable to qualify earlier because of their age.

**Pay Caps**

It is challenging to respond meaningfully to this proposal without having sight of the price cap details at this stage. However, the draft rules currently state that local authorities should work within their region to agree and implement price caps that all local authorities in the region can comply with. However, there is no guidance around how the cap should be agreed, and how this works in circumstances where local authorities within a region have different levels of wealth. The draft guidance does state that more detail on price caps will be found in an additional "data and price caps user guide" but it is unclear when this additional guidance will be published, or what detail it will cover. Guidance around the regional price caps needs to be clear about how rates are agreed across regions to ensure that talent is not monopolised by certain local authorities within them. In order for price caps to be fit for purpose, they should account for the following to ensure it covers the full cost of supplying an agency worker:

* A worker’s hourly rate of pay at the applicable market rate for that role at that level within that region.
* Employer's National Insurance contributions for the worker
* Holiday pay entitlement for the worker
* Increases related to the Agency Worker Regulations 2010 (AWR)[[1]](#footnote-2)
* Increases to National Minimum Wage
* Compliance expenses such as engaging digital identity service providers to conduct right to work and ID checks.

Any rules implementing price caps should contain a mechanism allowing for the price caps to be reviewed at regular intervals, and where necessary increased. If the price caps are not reviewed, increases to costs could create a scenario where the supply of social workers is no longer financially beneficial to agencies and could result in agencies being deterred from supplying agency social workers, further exacerbating shortages in the sector.

The guidance does state that "rates above the price caps should be signed off by the relevant local authority’s Director of Children’s Services (DCS) and Chief Executive prior to the assignment being agreed". However, there is nothing in the guidance about the circumstances in which a rate above the price cap can or should be used. In the NHS, staffing frameworks have clear "break glass" clauses that set out the circumstances where rates above the framework price cap can be paid if there is a substantial risk to patient safety. Given the sensitive nature of child social work, it is important that there is clear guidance around how and when this similar approach can be applied to the agency workforce. This will ensure these provisions are used only when necessary to ensure high-quality social work can continue.

**Project Teams**

The draft rules around the use of project teams remain unclear. In particular, the specific tax arrangements needed for a project team are not clear according to the current guidance. The guidance recommends that Local Authorities use HMRC's Check Employment Status for Tax (CEST) tool to help make decisions regarding the application of IR35 to project teams. CEST as a tool is far from foolproof, and reliance on CEST is not a sure-fire way to remove accidental tax non-compliance from these arrangements. Clearer information around how project teams need to be structured to remove concerns around tax should be included in the guidance around the rules.

**Notice Periods**

The lack of clarity around how notice periods for agency workers will work in practice is very concerning. The requirement to introduce notice periods in the first-place conflicts with both the employment status of an agency worker, and the inherent flexibility that is such a fundamental part of temporary work. REC has previously raised this issue with the DfE as introducing a notice period into agency work will create a legal grey area around the nature of the employment relationship.

This is because there is no automatic legal right to enforce a notice period under a contract for services, unlike the statutory notice periods which are provided for in contracts of employment. The majority of agency social workers are supplied under a contract for services. Therefore, where a work seeker is engaged under a genuine contract for services which provides no notice period, when a notice period is imposed upon an employment business there is no way to enforce this against the agency worker. The employment business could be in breach of contract but with no means of passing that liability on to the worker.

If an employment business does enforce a contractual notice period under an agency worker's contract for services, it is arguable that this creates a period of mutual obligation between an agency and an agency worker which indicates the existence of an employment relationship. This is the case even if it is doing so because of an obligation imposed on the agency by a hirer. Employment businesses therefore risk employment tribunal claims from work-seekers challenging their employment status. Agency workers could claim further employment rights such as unfair dismissal, redundancy, flexible working, employee holiday entitlements and the right to be transferred under TUPE.

When determining the employment status of a worker, the Employment Tribunal’s approach will be to consider the reality of a worker’s engagement (what is happening in practice) rather than the label given to the contract they are engaged under. Therefore, even if an agency worker contract for services is labelled as such, a Tribunal could find that it is a contract of employment if it imposes mutual obligation.

Section 86 of the Employment Rights Act 1996[[2]](#footnote-3) provides that:

*the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*

*(a) is not less than one week’s notice if his period of continuous employment is less than two years,*

*(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and*

*(c) is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.*

This means that legally employees are required to be provided with one week's notice for each complete year of service as a minimum. The draft guidance only refers to the contractual notice period, and it is not clear how a longer statutory notice for a substantive worker would affect the notice period of an agency worker in the same local authority.

If a notice period is introduced for agency staff in the social work sector, the guidance is also unclear who is responsible for enforcing this, and which party would be liable in the event of a breach. This leaves all the parties in the supply chain in an uncertain situation, with no clarity around who is responsible for ensuring workers receive their proper entitlement. Putting this liability with the employment business would cause problems potentially where the end client in any given local authority then chooses to terminate an assignment without notice. There is a limit to the degree to which MSP’s and agencies can facilitate agency worker compliance with the provisions of the draft rules that apply once a worker is engaged on an assignment. There is no mechanism for agencies to challenge a worker who does not work a notice period during their assignment with a local authority without inadvertently asserting that there is a period of mutual obligation within the engagement, which is a key characteristic of an employment relationship, as set out above. Additionally, paying an agency worker for a period of notice when there is no work available to them is likely to be a waste of local authority resources which undermines the costs saving objectives of the draft rules.

The notice provisions in the draft rules also fail to consider the dilemma for external regulatory agencies tasked with enforcing the compliance of employment businesses and employment agencies with the law where there are inconsistencies in existing legislation and the draft rules. For example, the Employment Agencies Standards Inspectorate is likely to encounter difficulties in enforcing compliance with the Conduct of Employment Agencies and Employment Businesses Regulations 2003 where they conflict with the draft rules. The rules state “*Where an agency child and family social worker has left without working the agreed notice, local authorities may wish to reflect this in the standard reference they provide.”* This provision is likely to be a breach of Regulation 6 of the Conduct Regulations[[3]](#footnote-4) which states:

*an employment business may (whether by the inclusion of a term in a contract with a relevant work-seeker or otherwise subject or threaten to subject a relevant work-seeker to any detriment on the ground that the relevant work-seeker has terminated or given notice to terminate any contract between the work-seeker and the agency or employment business, or in the case of an employment business, the relevant work-seeker has taken up or proposes to take up employment with any other person.*

There needs to be consistency between all legislation as it relates to agency workers and the draft rules before they are implemented.

Where notice periods are introduced and enforced, this could lead to a disparity between regions. Regions where the substantive staff are on shorter notice periods will become more appealing, with the regions with longer notices likely to find it harder to attract talent. This will be exacerbated by the introduction of price caps as notice periods will become a larger differentiator in a scenario where the rates of pay are fairly even.

**Cool-Off Periods**

Under the rules as drafted, local authorities must "refrain from taking on an agency child and family social worker who has left substantive employment with that local authority or a local authority within that local authority’s regional boundaries" for a 'cool-off' period of 3 months. This process could encourage social workers seeking to move into agency work to cross regional borders for the duration of the cool-off period, and then move back to work in their original region at the first possible chance. The intention of the cool-off period is to ensure continuity in service being provided to care service users, but under this system continuity could actually be even more disrupted, lowering the quality of care.

It is also not clear in the draft guidance which party would be responsible for tracking and enforcing the cool-off period. Without this clarity it will be difficult to police cool-off periods across different local-authorities and multiple agency suppliers, especially as agency workers may work for more than one agency at a time.

**Three years Post-Qualifying Experience**

The current guidance around the requirement for agency workers to have 3 years post-qualifying experience (PQE) raises concerns about discrimination due to the requirement for the experience to be "in direct employment of an English local authority". The requirement for the PQE to be in an English local authority is potentially indirectly discriminatory, on the grounds of the protected characteristics of race, sex, disability and age[[[[4]](#footnote-5)]](https://ukc-word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en%2DGB&rs=en%2DUS&wopisrc=https%3A%2F%2Frec365-my.sharepoint.com%2Fpersonal%2Fkate_shoesmith_rec_uk_com%2F_vti_bin%2Fwopi.ashx%2Ffiles%2F0d1a3bd6875549d9aaa879350c9e0ffd&wdlor=c0FFCBA35-D19F-468F-9F4C-2B68964EADA5&wdenableroaming=1&mscc=1&wdodb=1&hid=B57E8BD8-F0CD-4663-B2EF-1D140A85E873&wdorigin=Outlook-Attachments.Sharing.ServerTransfer&wdhostclicktime=1701881146028&jsapi=1&jsapiver=v1&newsession=1&corrid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&usid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&sftc=1&cac=1&mtf=1&sfp=1&instantedit=1&wopicomplete=1&wdredirectionreason=Unified_SingleFlush&rct=Normal&ctp=LeastProtected#_ftn2). Under the Equality Act 2010, the definition of race includes nationality and skin colour[[[[5]](#footnote-6)]](https://ukc-word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en%2DGB&rs=en%2DUS&wopisrc=https%3A%2F%2Frec365-my.sharepoint.com%2Fpersonal%2Fkate_shoesmith_rec_uk_com%2F_vti_bin%2Fwopi.ashx%2Ffiles%2F0d1a3bd6875549d9aaa879350c9e0ffd&wdlor=c0FFCBA35-D19F-468F-9F4C-2B68964EADA5&wdenableroaming=1&mscc=1&wdodb=1&hid=B57E8BD8-F0CD-4663-B2EF-1D140A85E873&wdorigin=Outlook-Attachments.Sharing.ServerTransfer&wdhostclicktime=1701881146028&jsapi=1&jsapiver=v1&newsession=1&corrid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&usid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&sftc=1&cac=1&mtf=1&sfp=1&instantedit=1&wopicomplete=1&wdredirectionreason=Unified_SingleFlush&rct=Normal&ctp=LeastProtected#_ftn3), and disability is defined as a long-term health condition with an adverse impact on an individual’s ability to do daily activities[[[[6]](#footnote-7)]](https://ukc-word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en%2DGB&rs=en%2DUS&wopisrc=https%3A%2F%2Frec365-my.sharepoint.com%2Fpersonal%2Fkate_shoesmith_rec_uk_com%2F_vti_bin%2Fwopi.ashx%2Ffiles%2F0d1a3bd6875549d9aaa879350c9e0ffd&wdlor=c0FFCBA35-D19F-468F-9F4C-2B68964EADA5&wdenableroaming=1&mscc=1&wdodb=1&hid=B57E8BD8-F0CD-4663-B2EF-1D140A85E873&wdorigin=Outlook-Attachments.Sharing.ServerTransfer&wdhostclicktime=1701881146028&jsapi=1&jsapiver=v1&newsession=1&corrid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&usid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&sftc=1&cac=1&mtf=1&sfp=1&instantedit=1&wopicomplete=1&wdredirectionreason=Unified_SingleFlush&rct=Normal&ctp=LeastProtected#_ftn4).

It is arguable that the imposition of the PQE requirement places non-UK nationals (who are likely to have qualified and been practising social workers abroad), or those who have trained in the devolved nations, at a disadvantage in meeting this requirement and accessing agency social work in England. It is also arguable that the strict application of this policy without any carve outs for example for those from commonwealth countries or countries operating a similar social work model to the model operated in England is disproportionate and such exemptions could be applied to mitigate the discriminatory impact of the proposals. The rules as written will have a particular impact in regions on the border between England and Scotland/Wales, where agency workers might currently fill gaps in both nations. The DfE has applied such exemptions in its approach to awarding qualified teacher status to teachers who have qualified outside of the UK. The DfE updated its approach in June 2022 to include teachers from a wider group of countries. In its justification for doing this, the DfE stated:

*(DfE) is developing a fairer approach to awarding* [*qualified teacher status (QTS)*](https://www.gov.uk/guidance/qualified-teacher-status-qts)*. In June 2022, we announced we would be changing the way we award QTS to teachers from overseas. Under retained EU and domestic legislation, teachers from some countries can easily apply for QTS, but others cannot, even if they have equivalent skills and experience. The new legislation makes this process more consistent and fairer. It also supports the movement of well-qualified teachers to the English workforce*[*[[[7]](#footnote-8)]*](https://ukc-word-edit.officeapps.live.com/we/wordeditorframe.aspx?ui=en%2DGB&rs=en%2DUS&wopisrc=https%3A%2F%2Frec365-my.sharepoint.com%2Fpersonal%2Fkate_shoesmith_rec_uk_com%2F_vti_bin%2Fwopi.ashx%2Ffiles%2F0d1a3bd6875549d9aaa879350c9e0ffd&wdlor=c0FFCBA35-D19F-468F-9F4C-2B68964EADA5&wdenableroaming=1&mscc=1&wdodb=1&hid=B57E8BD8-F0CD-4663-B2EF-1D140A85E873&wdorigin=Outlook-Attachments.Sharing.ServerTransfer&wdhostclicktime=1701881146028&jsapi=1&jsapiver=v1&newsession=1&corrid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&usid=5f529bf6-ac4a-4be6-a50e-ad0893adc9b6&sftc=1&cac=1&mtf=1&sfp=1&instantedit=1&wopicomplete=1&wdredirectionreason=Unified_SingleFlush&rct=Normal&ctp=LeastProtected#_ftn6)*.*

The same approach could be applied to the PQE requirement and the aims of the DfE could still be achieved by removing the PQE requirement altogether or applying carve outs for those who have qualified in certain countries.

The application of the PQE requirement is likely to be indirectly discriminatory on the grounds of disability as those managing long term health conditions may have barriers to achieving the PQE requirement due to flare ups in in their health conditions and periods of hospitalisation or treatment which may require them to take prolonged career breaks.

The PQE requirement will likely have an indirectly discriminatory impact on women who may take longer to access a qualifying social work role due to having taken career breaks to care for children or other family members. Whilst this is not exclusive to women, historically women have held more caring responsibilities than men and so are more likely to take time away from their careers to do this.

 The PQE requirement is likely to create a barrier to young social workers accessing agency social work. Those of younger age groups are less likely to have acquired the PQE requirement than social workers of older age groups.

Generally, the draft rules restrict the movement of labour within the social work field and could ultimately result in social worker shortages because of the barriers these rules place on entry into agency social work. Current and prospective social workers whose individual circumstances mean that they require a level of flexibility in the way in which they work will ultimately be deterred from entering into the profession. There is also concern about the practical implementation of this rule for agency care workers who have less than three years’ experience when this rule is introduced. Under the rules, an agency worker with two years’ experience at the time this rule is introduced would have to return to permanent employment until they hit 3 years, despite having already been working via an agency. This will lead to a cliff-edge in the number of agency staff available and may mean there is insufficient capacity in the number of agency staff available to fill vacancies.

**Agency rules in other nations**

It is important to learn lessons from where other devolved nations have attempted to introduce rules to the agency market in the social work profession. In Northern Ireland, a full ban on agency workers in the social work sector was introduced in June 2023. However, recruitment businesses working in Northern Ireland have reported that agency staff continue to be requested by trusts. Whilst the agency rules proposed are not the same as a ban, they will have an impact on the level of agency social work supply available. Demand, however, will remain high and people will choose to continue to work via agencies for reasons such as flexibility regardless of the restrictions in place. The Department should bear this in mind when considering the wider impact of these rules.

We have also seen issues in Wales with the introduction of the ADSS All-Wales Pledge last year. This pledge was introduced without sufficient consideration for the practical implications of the pledge, and almost a year on agencies and local authorities remain unsure about the specifics of the pledge. This creates an uneven and confused market where different local authorities are interpreting the pledge in different ways. There is a real concern that the same issue will occur in England if these rules are not properly considered before implementation.

**About the Recruitment & Employment Confederation**

The [Recruitment & Employment Confederation](https://www.rec.uk.com/) (REC) is the professional body for the UK recruitment industry. We represent over 3,000 recruitment businesses and our sector places nearly a million people into permanent jobs each year and ensures that a further one million are working flexibly through temporary assignments on any given day.

The professional staffing sector is bigger in scale than either law or accountancy and contributed over £41 billion to UK GDP in 2022. Our members work as advisors, planners, and partners with business across all sectors on recruitment, retention and productivity.

As the professional body for the sector, the REC is responding to this consultation on behalf of REC members.

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1. Regulation 5 and 6 Agency Worker Regulation 5 and 6.Under Regulations 5 and 6 of the agency worker regulations, agency workers are entitled to equality in respect of certain terms and conditions including annual leave, holiday pay and pay generally. [↑](#footnote-ref-2)
2. Section 86 (1) Employment Rights Act 1996 [↑](#footnote-ref-3)
3. Regulation 6(1)(a) of the Conduct of Employment Agencies and Employment Businesses 2003-Restriction on detrimental action relating to work-seekers working elsewhere. [↑](#footnote-ref-4)
4. Section 4-6, 9 and 11 Equality Act 2010 [↑](#footnote-ref-5)
5. Section 9 Equality Act 2010 [↑](#footnote-ref-6)
6. Section 6 Equality Act 2010 [↑](#footnote-ref-7)
7. https://www.gov.uk/government/publications/awarding-qualified-teacher-status-to-overseas-teachers/a-fairer-approach-to-awarding-qts-to-overseas-teachers--2 [↑](#footnote-ref-8)