Consultation on the application of zero hours contracts measures to agency workers

A response by the Recruitment & Employment Confederation

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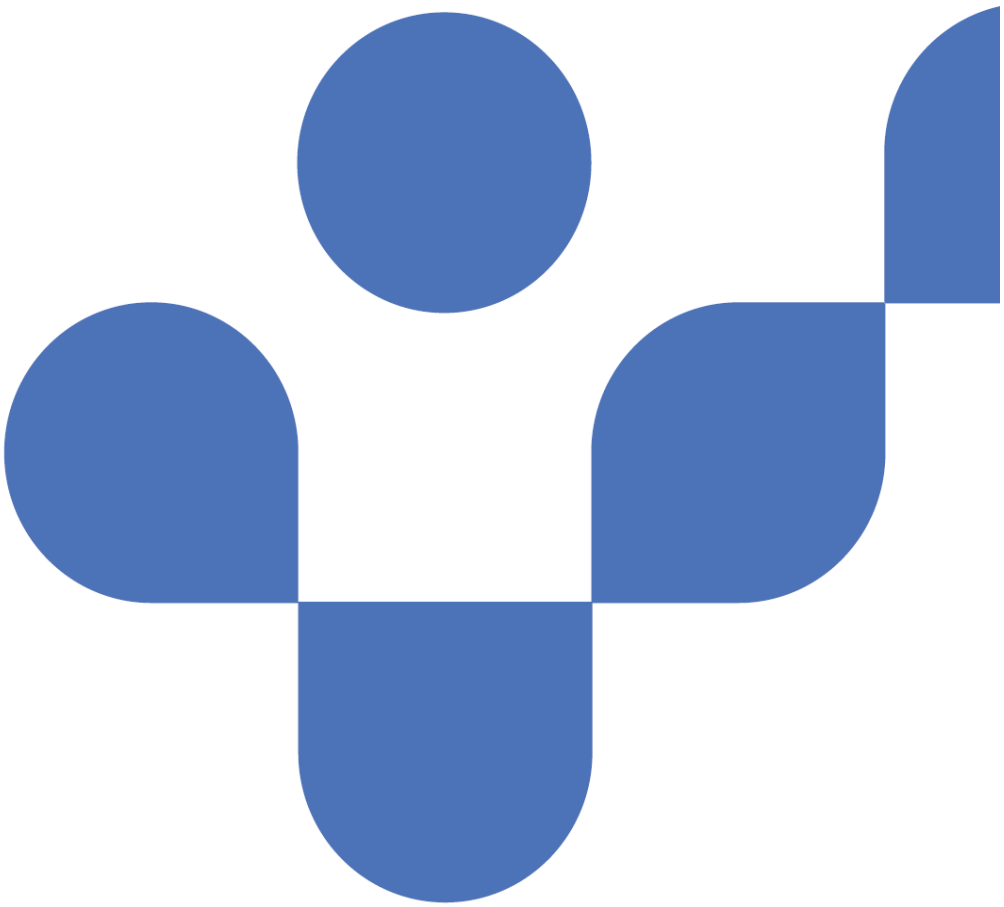

About the Recruitment & Employment Confederation

The Recruitment & Employment Confederation (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 £44 billion to UK GDP in 2023. Our members work as advisors, planners, and partners with business across all sectors on recruitment, retention and productivity.

Executive Summary

The REC strongly advises that agency workers should be exempt from new proposed restrictions on zero-hours contracts (ZHCs), as these restrictions will negatively impact workers who choose to work this way. The measures that are being introduced to zero hours workers are set to tackle issues that principally arise for directly engaged workers on contracts where their employers focus is on their own business requirements rather than a need to ensure that they are providing work for the worker. Agency workers have inadvertently been caught up in these provisions because of the nature of the contracts they are engaged on - but the policy as proposed approaches all workers in the same way, with no account taken of the specific legal protections that apply to agency workers, or the different incentives that act on Employment Businesses by comparison to direct employers. Agency work is inherently flexible, non-permanent and serves a unique role for individuals and the UK economy. The current proposals overlook the huge benefits of temporary work to a dynamic economy and could inadvertently harm the very workers and businesses they aim to protect.

Agency workers have significant legal protections available to them under existing employment and anti-discrimination laws. There are enhanced protections that are specific to the ways in which agency workers work under the Agency Worker Regulations 2010 (AWR) and Conduct of Employment Agencies and Employment Businesses Regulations 2003. These provide a package of employment rights that are the same or equal to those granted to substantive staff, whilst maintaining the flexibility that remains the unique advantage of agency work. The majority of agency workers choose to work flexibly, and agencies are incentivised to continually find them work in order to maximise their revenue; the viability of their businesses depends on this. This is the crucial distinction between agency work and traditional ZHCs, where workers are engaged directly by their employer with no guaranteed hours or pattern of work. In these direct-hire contractual arrangements, employers lack incentives and options for providing their ZHC workers with work when workloads dip. The same can never be said for agency work. The REC understands the efforts to curb exploitative ZHCs, but it is crucial the distinction between different models is made.

The REC also has concerns regarding the nature and intention of the proposals set out in the consultation document. For example, proposals requiring either agencies or their clients to provide guaranteed hours after 12 weeks on an assignment or "reasonable notice" of shifts and any changes to shifts including the cancellation of temporary assignments do not reflect the nature of genuine temporary work, or what workers want. Such commitments would be unnecessary and impossible to grant in roles with genuine fluctuating demand, like supply teaching or healthcare where cover is needed for sickness absence, and hospitality, logistics and retail where seasonal variations are widely understood.

Further, proposals to remove transfer fees in temp-to-perm working arrangements will destabilise both the permanent and temporary recruitment sectors, and impact hiring and job creation. Removing transfer fees could lead to employers adopting a temp-to-perm model as their default to circumvent

direct hiring fees. If implemented incorrectly this could also undermine the government's own plans to introduce greater protection for workers from day one, as the temp period could be used to "trial" workers before offering them a full-time position.

Finally, the proposals as drafted could exacerbate pre-existing enforcement issues. In the UK, Employment Tribunals are already working over capacity with backlogs and a spike in claims following the repeal of Employment Tribunal Fees in 2017 and the Covid-19 pandemic. In the year 2023/24 the total number of Employment Tribunal claims increased from 86,000 in 2022/2023 to 97,000, an increase of nearly 13%. Widening the scope of complaints that are within the Employment Tribunal's jurisdiction will only exacerbate this issue. Whilst one of the objectives of the Fair Work Agency will be to mitigate the impact of the potential influx of new claims under the proposed new rights, there will be complex legal complaints that only judges and Employment Tribunal panels have the expertise and experience to address. More needs to be done to improve other aspects of proactive enforcement through the Employment Agency Standards Inspectorate and Fair Work Agency, and through communication to clear up ongoing misconceptions around worker rights.

We recognise that tackling the issue of exploitative ZHC's is a priority for the government, and this needs to be executed in a way that strikes the right balance. The goal here should be protecting workers' rights, whilst maintaining job fluidity and appetite to hire to meet government's goal of 80% employment. The professional services industry is a foundational pillar of the UK economy, and the recruitment, staffing and talent sector is a key component of that. Any provisions which seek to compromise the viability of the recruitment sector are likely to be contrary to the objectives set out in the government's plan to make work pay which include boosting productivity and economic growth. We understand from our ongoing engagement with government that there is no intention to undermine the recruitment sector, but in raising these concerns, we are seeking to guard any unintended consequences for the labour market. We welcome the opportunity to work with the government to ensure that any proposals for reforms protect everyone, help individuals find the work and flexibility they need, and maintain the functionality of the temporary labour market. Labour's manifesto promises set out "greater in-work security" for workers, rather than this specific proposal, so it is not too late for the government to consider other plans that still allow them to deliver on this commitment in a less disruptive way.

To address any concerns over these issues in the context of agency work, the government could enhance existing processes rather than introducing broad restrictions. For instance, updating the Key Information Document (KID), which agency workers already receive before assignments, to include anticipated hours would better inform workers about job expectations earlier in the process. Expanding the right to a KID to all worker types, including those directly engaged by hirers, would ensure consistent treatment, provided enforcement bodies are adequately resourced for this. Additionally, agency workers' rights under the AWR could be strengthened. While they are currently entitled to apply for vacant roles with hirers, granting them guaranteed interviews for relevant positions would provide a balanced path to permanent roles without automatically imposing contracts on uninterested workers. The government could also explore incentives for businesses to create more permanent part-time roles, addressing unfilled vacancies while preserving access to flexible work. The REC recently wrote to the Secretary of State for Business and Trade offering to support the development of this and remains open to conversation with Ministers and the civil service. Open dialogue with businesses is essential to achieve these goals without diminishing the benefits and value of agency work.

Consultation Response

The nature of agency work

The REC strongly recommends that agency workers remain exempt from the government's plans to restrict the use of ZHCs. Given the nature of agency work as a flexible alternative to permanent employment, the options proposed in the consultation to try and apply these changes to the agency worker market are unworkable in practice. The proposals highlight a misunderstanding of the purpose and benefits of agency work to the individuals who choose to work in this way, and the businesses that engage them. There are over 1 million agency workers working in the UK on any given day, and the government needs to recognise that it is not fair to damage the position of these workers from being able to work in the manner they want. We understand that the government is keen to avoid agency work becoming a loophole for employers seeking to circumvent other labour's policy changes for directly engaged workers, but undermining the whole agency worker model is not the correct approach to do this.

The REC understands the government's rationale for introducing measures to curtail the use of exploitative ZHCs in employment. However, the proposals for addressing this issue as set out in the consultation document are likely to have the unintended consequence of disrupting both workers, and the temporary and permanent recruitment sectors. The temporary recruitment sector is a key component of the UK economy, and its viability is crucial to achieving the government's mission of economic growth. The starting point of any reforms should be to ensure that a distinction is drawn between exploitative ZHCs with workers that a business engages directly, and agency workers supplied by regulated employment businesses with an expertise in matching suitable candidates to roles under contractual arrangements with their clients. The assumption that all workers who work in a non-permanent way are insecure or worse off than permanent employees.

It is also important to note the role agency workers play in delivering large-scale projects, or short-term events that require an additional short-term workforce. The success of cultural events like Euro 2028, being held across the UK and Ireland, or Oasis' 2025 reunion tour will be built upon short-term flexible staff. Hiring additional staff on permanent contracts won't be practical for events of this nature, especially considering the government's other changes to employment rights. However, a well-regulated and effective agency worker market would be able to deliver.

The existing regulatory framework for agency workers

There are higher levels of regulation and enforcement applied to agency workers, and relatively lower levels of regulation and leverage experienced by directly engaged workers on ZHCs. Agency workers, many of whom are on contracts for services, have genuine two-sided flexibility. They are free to pick and choose their own shifts to suit their lives and circumstances, and agencies are able to offer work based on demand from their clients. There is no penalty for refusing work. Agencies are also incentivised to find additional work for these workers when hours are light or the worker requests it, as this is how they generate revenue. Agency workers enjoy similar rights and protections to individuals directly engaged under general employment law provisions, guaranteeing them protections and rights including holiday pay, sick leave and maternity/paternity/other parental pay and protection from discrimination. They are, however, subject to additional regulatory requirements under the Agency Worker Regulations 2010 (AWR), the Employment Agencies Act 1973, the Conduct of Employment Agencies and Employment Business Regulations 2003 (the Conduct Regulations). The Gangmasters Labour Abuse Authority (GLAA) also seeks to protect agency workers from unequal treatment and exploitation on the basis of their status as agency workers. And fundamentally, someone who signs up for temporary work with a recruitment agency, knows that the work they will be assigned is, indeed, temporary. The additional regulatory framework that agency workers are subject to creates a clear distinction between temporary agency workers who choose to work flexibly and directly engaged ZHC workers who are engaged under a contract with the business they are providing work for. The latter category of ZHC workers are more likely to have an expectation of regular and consistent work from

their employer and be disappointed when it is not provided. And their employer has no obligation or incentive to find additional work when hours are low or unavailable.

In contrast, the relationship between the agency and an agency worker is transparent, where both parties to the contract depend on the other to achieve their respective work goals. The inherent flexibility in the arrangement applies to both parties and both parties can terminate the arrangement with little to no notice where the agency workers are engaged under a contract for services, (the contract most commonly used in agency worker engagements). A robust regulatory framework with supporting enforcement measures is in place to address the power imbalance that naturally exists between an employer and a worker. For example. the requirement to issue a Key Information Document (KID) to an agency worker under Regulation 13 A of the Conduct Regulations. This recognises the need for key information about pay and the assignment to be communicated to an agency worker to allow them to make an informed decision about whether they wish to be engaged on an assignment. Under regulation 13A a KID document must have the details of the Employment Agencies Standards Inspectorate (EAS) who are the regulatory body in the sector to enable agency workers to complain directly to them about non-compliance. This requirement highlights the compliance framework that is in place specifically to protect agency workers.

Listen to the voices of the workers

The previous government sought to introduce the Workers (Predictable Terms and Conditions) Act 2023, which had a similar intended outcome to the government's own proposals and could have had a similarly negative implications for the UK labour market. However, it must be noted that this legislation did at least acknowledge the distinction between employees and agency workers in how the law would be applied. Whilst it is good to see that the current government is taking action to repeal this failed legislation, it must tread carefully to avoid making similar mistakes in its own legislative programme.

Research shows that people who choose to work via agencies understand the nature of the work they are doing and have actively chosen to work in this manner. A survey conducted by the REC as part of our Voice of the Worker campaign showed that 79% of agency workers said their work provided an important need for flexibility, 68% said their work as an agency worker provided greater work/life balance and 53% stated that agency work was the right kind of role for them at their current stage of life. Similarly, a survey of businesses by the World Employment Confederation (WEC) showed that 8 in 10 UK respondents were planning to increase their use of agency workers in the next two years. The same survey showed that 86% of UK respondents wanted existing legislation simplified so that workers were not prevented from choosing short-term contracts that suit their lives.[1] Government needs to embrace principles that allow good quality agency and flexible work contracts to continue, rather than unintentionally demonising any form of flexible work.

How to carve out agency work in legislation

Carving out agency workers from the zero-hour contract proposals could be done in a relatively straightforward manner. The term agency worker is already clearly defined in UK law. The AWR states that an agency worker is:

> *An individual who—*
>
> > *(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and*
> >
> > *(b) has a contract with the temporary work agency which is—*
> >
> > > *(i)a contract of employment with the agency, or*
> > >
> > > *(ii)any other contract with the agency to perform work or services personally.*[2]

[1] WEC, The Work We Want: Reimagining the world of work, 2024

[2] Agency Worker Regulations 2010, Regulation 3(1)

Similarly, temporary work agency is defined in the same legislation as:

> *a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—*
>
> *(a)supplying individuals to work temporarily for and under the supervision and direction of hirers; or*
>
> *(b)paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.*[3]

These definitions are well understood in the UK labour market, and include any workers supplied via an agency, umbrella company or other intermediary within their scope. Using this definition to carve out this class of workers from those eligible for the government's new legislation on zero-hour contracts is the most straightforward way to introduce the new rules without inadvertently disrupting the temporary labour market.

We understand there is concern from the government that carving out agency workers would create a "loophole" and that businesses would begin only engaging agency workers to avoid the application of these rules to other workers. This is not a realistic outcome as businesses will still feel the need for a pool of their own directly engaged staff to better manage their own resources and staff workloads. Agency work will not be replacing directly engaged staff but this method of working needs to be preserved in order to supplement flexible work requirements for workers and businesses.

We also have concerns about the respective proposals outlined in the consultation document in respect of their impact on the temporary labour market, these are explored in more detail below.

The right to guaranteed hours

Neither agencies nor end hirers have the ability to predict the availability of work beyond the term of the initial assignment.

The consultation document sets out that an agency worker engaged on a ZHC could request a more stable contract from either the end hirer or the agency after 12 weeks. The Employment Rights Bill provides that this could either be a permanent or a fixed term contract. The nature of agency work means that it is impossible for either business to predict and then guarantee hours outside of the current work assignment. Imposing a legal obligation on either organisation, therefore, is largely redundant. We understand that there are exceptions to the requirement to make an offer of a guaranteed hours contract in the Employment Rights Bill in circumstances in which work is of a genuinely temporary nature. The government's own *Next Steps to Make Work Pay* document states that *'where work is genuinely temporary, there will be no expectation on an employer to offer permanent contracts'*, and this principle is repeated in the consultation document. And, in our experience, most agency work is genuinely temporary in nature. According to research by the REC, 24% of agency work assignments last less than 12 weeks, with a further 43% of assignments only last between 12-24 weeks, highlighting the short-term temporary nature of the majority of assignments.[4] In many sectors the ability to work flexibly also allows workers to develop their skills across a variety of different projects or areas. In the construction sector, workers can use agency work to move between working on a highways project one week and an energy project the next in a way that wouldn't be possible in a permanent role.

Introducing a legal obligation to offer contracts could have the unintended consequence of undermining the principles behind the proposals. Contracts could be arbitrarily offered to comply with

[3] Agency Worker Regulations 2010, Regulation 4

[4] Recruitment Industry Status Report 2022-23, 2024

the provisions with companies then requiring redundancies as a consequence of this due to reductions in work. Whilst the proposed "light touch" 9-month probationary period could make termination of guaranteed hour contracts relatively straightforward, this would result in an administrative burden on the entities that are obligated to offer a guaranteed hours contract. This whole process and the logic behind it would be contrary to the objectives of the proposals around guaranteed hours contracts under the government's plan to make work pay which include tackling insecurity and helping people to stay in work.

Agency work is inherently temporary in nature and agency worker assignments are intended to be temporary in nature. Where assignments go beyond their expected duration and there is a long-term need for work, there are mechanisms in place for agency workers to transition to permanent contracts with a hirer through the temp to perm clauses in contracts and transfer fees which the Conduct Regulations provide for. In scenarios in which temporary workers are required to cover the work of a permanent worker on sickness absence, assignments can be entirely variable in length because there can be no certainty about the permanent worker's expected date of return. However, if end-hirers are required to offer permanent contracts to agency staff once they have been on assignment for 12 weeks, this could see a rise in redundancies also. Once the original staff member returns from their period of absence, the end-hirer would effectively have two people performing one role. Workers who have been absent for maternity leave or reasons related to disability may find themselves discriminated against with hirers choosing to keep the replacement instead.

There are also many sectors where the nature of work means guaranteeing hours is not possible or practical. For example, in the construction sector work is done in phases, with different skills and job roles needed for each phase. In some cases, these phases can be more than 12 weeks, but any given phase will come to an end, and the construction company will need to move workers on to allow the next phase to begin. The variable nature of the lengths of the phases, and the vastly different jobs needed for each phase make it difficult to guarantee hours in these scenarios.

Existing agency worker rights

Under the AWR, agency workers have a day one right to be informed of the same information as the end hirer's own directly engaged workers about any vacancies the end hirer is seeking to fill. Therefore, after 12 weeks on an assignment an agency worker will have been informed of any vacancies in accordance with the requirements of AWR and will have the option to seek permanent employment with the end-hirer. The requirement to offer a guaranteed hour contract undermines this provision. Additionally, there is currently no restriction on an agency worker's ability to enquire about permanent vacancies during an assignment, the imposition of a requirement to offer guaranteed hours of work risks this becoming a tick box exercise. Where an end user engages a temporary worker on an assignment and a genuine need for the work to become permanent arises, our experience is that end hirers tend to take on those workers permanently. They benefit from retaining a worker whose suitability for the role they have already assessed through their work on the temporary assignment, and while the agency loses a suitable candidate they can place in future assignments, they are recompensed with a transfer fee. From November 2023 to November 2024, the REC's legal team addressed 186 enquiries related to transfer fees. Whilst this may not seem like a large number, this represents only a fraction of the instances where this happens as in the vast majority of cases transfers are done smoothly, without the need for input from the REC. This demonstrates the fact that when work is no longer of a temporary nature end hirers are willing to and do take temporary workers on permanently where appropriate.

Assignments could be terminated early despite an ongoing need for work as an avoidance measure

We have already set out how agency work is a well-protected and vital part of the UK labour market. But if the proposals set out in this consultation go ahead, an unintended consequence could be that

assignments end prematurely, even where there is a genuine and continuing need for agency workers, as a means of avoiding guaranteeing hours. This will deprive work seekers of pay and work. For example, we could see assignments automatically being artificially lower than 12 weeks or any other arranged reference period, with end-hirers opting to rotate and substitute agency workers rather than extending assignments beyond 12 weeks as an avoidance measure.

We acknowledge that there can be some end-hirers that use agency workers on an ongoing basis. However, experience shows that these are usually very large organisations with complex needs, including the NHS, government departments like the MoD, and local authorities. There is a consistent demand in these organisations for highly competent contractors (who by law are often classified as agency workers and will be caught by these changes) and agency worker services, all year round.

But this category of hirers is in the minority - in 2023, the government's business statistics reported that 5.5 million businesses in the UK were SME's, accounting for 61% of UK employment but only 7% of business turnover. And SME hirers are unlikely to have need or be able to offer the level of consistent work that public sector hirers and larger businesses require.

The changes proposed in the consultation are not something that many agency workers seemingly require, and this is evidenced by job vacancy data. Even when permanent vacancies are available, they are not being filled. In December 2023, the NHS reported 34,709 Registered Nursing permanent staff vacancies. Our own REC jobs data, for example Report on Jobs and Labour Market Tracker, finds that this is a long-term and ongoing trend today. Agency workers assigned to public sector roles have the option of finding and being permanently engaged and yet are choosing the flexibility of agency work. This is not a decision driven by pay either. For agency workers supplied to the NHS, price caps and controls are imposed on agencies supplying them under the agency rules, and agency workers have also been unfairly left out of pay rises and bonus payments (for example the Covid thank you) offered to their substantive counterparts. Flexibility is what informs their decision to work as temporary agency workers, and this is clear from REC case studies.

For all the reasons set out above, businesses of all kinds, including temporary employment agencies, are flummoxed by the suggestion that either an agency or end-hirer will ever have the ability to provide ongoing work following a typical temporary agency work assignment. When they do have work, the offer to extend an assignment or transfer the candidate from a temp to perm contract is already available. The agency is contracted by their client, and the agency in turn contracts the worker. The work offered at the start of each assignment is based on all the evidence currently available to all parties. There is no obligation on a worker to take the work offered. We are aware that the draft regulations of the Bill acknowledge that where the work does not exist, it will be impossible for any party to 'manufacture' work. The proposals set out here are seeking to address a problem that does not exist, and further underline a misunderstanding of the agency work sector.

Reasonable notice

What constitutes "reasonable" notice will vary depending on the business in question, the sector, the nature of assignment and the reason a temporary agency worker is required. It may even be affected by the location and place of work. In some scenarios, reasonable notice may be a matter of hours. For example, if teacher calls in sick that morning before school starts, a supply teacher may be requested from the agency and the school may want that supply teacher to be on assignment from 8.30am. This is a common enough occurrence that most education agencies have recruiters on call from 5-6am. It can be just as difficult to know when the substantive teacher will be well enough to return to work. Likewise, available shifts in public services like the NHS can change at short notice due to patient demand and emergency situations. An appropriately responsive workforce must never be undermined in these scenarios.

In many cases, shifts may be offered at short notice because another worker has cancelled or pulled out of the shift. In this scenario being required to offer reasonable notice to a replacement worker is impossible, as the business and agency have not been provided with reasonable notice themselves. Being required to pay compensation for a situation created a third party would be unreasonable.

The same level of consideration needs to be afforded to the proposals requiring reasonable notice of changes to shifts. Every effort is already made to give as much notice as possible of changes to shifts, including cancellations. There is no incentive for the agency to do otherwise. But any obligations here must apply equally to end hirers. One of the worst culprits for last-minute cancellation of shifts is the NHS. A worker turns up expecting to work but finds their shift has been cancelled whilst they were en route. As union representatives said in recent consultation meetings with DBT, in these instances where a nurse turns up ready to work to find the shift cancelled, the NHS should be liable and cover the pay for that shift. Another sector with notably high last-minute cancellations is the railway industry, with railway providers offering no compensation to workers in many cases despite being the party responsible for cancelling the shift.

If a legal requirement for notice was implemented, we would suggest that any compensation to agency workers arising from a failure to provide notice be provided for under the agency worker's contractual arrangements with the agency and not through legislation. We are aware of REC members who currently offer contractual compensation for the last-minute cancellation of shifts voluntarily and they report that these arrangements work well. It encourages more responsible behaviour from all parties, including end-hirers.

In implementing any legislative provisions providing for the right to notice, the government will need to carefully consider the legal and practical realities of agency work. Any legislation providing for the right to reasonable notice and compensation, should apply the following:

1. Notice provisions will need to allow for exceptions to be made where cancellations are based on suitability issues under the Conduct Regulations. Under the Conduct Regulations a hirer should be notified of any suitability issues "without delay" which means on the same day, or where that is not reasonably practicable, on the next business day;

2. There should not be a blanket one-size-fits-all approach to the criteria for reasonable notice, and the level of compensation a worker would be entitled to compensate them for a breach of their right to reasonable notice. Legislation should set out a formula for calculating the minimum payment due to an agency worker upon cancellation of a shift, from which an agency would be entitled also recover their charges. The formula should not be drafted in a way that inadvertently makes the cancellation of a shift more rewarding for the agency worker;

3. Should the provisions for reasonable notice of the cancellation of a shift be implemented, it would be appropriate for the end-hirer to shoulder the responsibility of providing reasonable notice as they are responsible for anticipating and managing staffing needs. An agency is responding to demand from a client and has little to no input in the amount of work available at a client site on any given day. The end-hirer needs to provide the agency with reasonable notice to then pass this on to the agency worker in a timely fashion. Likewise, where the decision to cancel or amend a shift is made by the end hirer, it is the end hirer who should be required to pay any compensation;

4. Any provisions related to penalties for shift cancellations should include carve outs for situations where alternative work is offered to the agency worker at the same rate of pay. We acknowledge that it will be difficult to provide for variables which relate to whether a substitution shift is comparable to the original shift. For example, a substitution shift offering the same rate of pay as the original shift could require a longer or more expensive commute

and, on this basis, could be considered as offering a lower rate of pay. In our view these are commercial considerations and nuances that are best addressed in contractual arrangements between agencies and their clients; and

5. There should be carve outs for situations where cancellation is unavoidable for example because a permanent worker returns to their role from sickness absence and only reports feeling fit to work on the same day they return.

Transfer fees

We disagree with the proposal to remove transfer fees and are concerned about the potentially destabilising impacts of this proposal on the labour market. Whilst we understand the motivation behind this proposal is to alleviate the cost to a hirer where they are compelled to engage an agency worker, the unintended impact of this on the wider labour market could be huge. The purpose of the transfer fee and the period of extended hire is to compensate agencies for any loss suffered as a result of the permanent engagement of an agency worker. Additionally, the transfer fee recognises the value in the skill and service provided by an agency in sourcing suitable, high-quality workers. REC members have reported that temp-to-perm fees account for up to 20% of their annual revenue. Removing the ability for an agency to charge these fees could decimate the recruitment industry, completely undermining a model that effectively and ethically employs and provides work for millions, and which contributes millions to the UK's GDP.

Permanent recruitment fees are usually a percentage of a permanent candidates' salary in their first year of employment including bonuses and commissions. If transfer fees are removed, end hirers will have the ability to take agency workers on temporarily for a 12-week reference period, and then engage them permanently at no cost. In some sectors this could prove a cheaper cost than using a recruitment business that introduces permanent workers. When considered in line with government's wider plans to introduce protections from unfair dismissal from day 1, employers may shift to a temp-to-perm model in this way to offset their concerns over the new probation period rules, allowing them to hire staff on a "trial" basis before engaging them permanently. At a time when we want to drive up permanent hiring and promote growth, the combined and cumulative impacts of these different parts of the plan to Make Work Pay will in fact achieve the opposite.

There is also the risk that removing the right of agencies to charge a transfer fee will lead to the emergence of other types of fee structures. Under the current system, an agency is fairly compensated for their potential loss of revenue in a reasonable and proportionate manner set out in legislation. Regulation 10 of the Conduct Regulations sets out the formula for charging a transfer fee in a fair and transparent manner that is clear to both the agency and the end-hirer at the outset of the arrangement. It is an established and eminently workable part of the UK labour market that should not be disrupted.

The impact on Employment Tribunals

Any changes introduced to the agency worker model need to consider the impact on enforcement. Under the current compliance and enforcement framework, the employment tribunal system is already struggling with its caseload leading to long waiting times for cases to be heard. It can be up to 12 months for tribunal proceedings to begin after a case has been submitted. These new proposals if enacted will lead to disputes, which in turn will lead to an even higher demand for employment tribunal hearings, further exacerbating current delays.

Many of the issues identified by others around ZHCs would be far better affected with stronger and more visible enforcement of existing employment regulations. Having clear rules around who is liable under the new proposals and how the new laws will be enforced is crucial to managing the case load

for the employment tribunal. It needs to be clear that in situations where the hirer is responsible for cancelling or amending a shift at short notice that they are the party liable for any compensation. Including the agency in this or allowing the candidate to bring a claim against either party will create confusion and duplication, further lengthening the time it takes for claims to be resolved. We have seen examples of this type of confusion in the labour market already – for example, where health & safety obligations for agency workers are not clearly set out in legislation, and this introduces ambiguity. The government needs to avoid replicating this uncertainty when it comes to claims around ZHCs and set out clearly that the end hirer is liable where they made the decision.

There are also other channels for enforcement that will help to reduce the burden on the employment tribunal. Better enforcement of agency worker rights through the Employment Agency Standards Inspectorate (EAS) and upcoming Fair Work Agency (FWA) will help to protect workers. Ensuring both the EAS and the FWA are properly resourced will allow them to conduct inspections more efficiently and address non-compliance before it reaches Tribunal stage. To allow this, the government needs to continue to educate employers and workers on exactly what their rights and entitlements are, and work with parties such as us on communicating best practice. For example, in the discourse around the wider consultation on the ERB, we have seen repeated claims that agency workers do not get SSP. This is not true, and whilst it not the subject of this specific consultation, it demonstrates a lack of understanding. The TUC and REC have previously worked together on factsheets to ensure agency workers know their rights. It's in everyone's interests to promote this type of simple to follow guidance, rather than seek to overcomplicate an already stretched system.

More broadly on enforcement, there is a concern that introducing additional legislation won't have a marked impact on the levels on non-compliance in the UK labour market. The vast majority of businesses in the UK do not intend to exploit their workers, and comply with legislation, however, a minority of bad actors continue to breach the rules that are already in place. Adding additional legislation will potentially lead to compliant companies becoming slower, more expensive and uneconomical, while non-compliant business would continue to skirt around the law. There is a concern that the new legislation just penalises the already compliant businesses, leaving those operating non-compliantly to expand their market share through cheaper but unlawful business practices. More needs to be done to crack down on these bad actors before more complex and challenging legislation is forced on those with ethical business practices.

Implications under the Transfer of Undertakings (Protection of Employees) Regulations 2006 (TUPE)

Where hirers may be required to guaranteed hours to agency workers, there are scenarios where this could have implications under TUPE. If a client has engaged a high number of agency workers via an employment business under a contract of employment, and they all reach the 12-week mark in their assignment at once, then the transition from the agency to the end hirer could amount to a service provision change within the scope of the TUPE rules. Such a scenario might arise on a national infrastructure project for instance. Arguably, in these scenarios a worker to whom a contract is offered will not genuinely have the right to decline and continue working as a temporary worker on a ZHC because TUPE applies by operation of the law and cannot be contracted out of. This is particularly relevant in light of the government's long-term plans to review the application of TUPE. If all workers are brought within scope of the rules, these transfers could create a whole raft of additional obligations for both the end hirer and the recruitment agency to facilitate a compliant transfer. Introducing further administrative and legal burden to this process would hamper productivity whilst also widening the scope of workers capable to bringing legal claims related to TUPE. This further undermines the overarching objectives and intention of the government's Plan to Make Work Pay, which included boosting productivity and economic growth.

Potential increases in offshoring of workers

Another potential unintended consequence of the proposals could be an increase in businesses choosing to offshore workers instead of hiring in the UK. Given the impact of the wider ERB changes, and the announcements in the budget changes such as these restrictions on ZHCs are seeing the cost of doing business in the UK increasing. Our members report that some of their clients are already seeking to increase their levels of recruitment internationally. The increase in remote working had already begun this process, but it is now being accelerated by these changes. Doing business in other countries is cheaper than the cost in UK, and there is ongoing access to temporary labour. The government has repeatedly stressed its intention to make the UK an attractive market for overseas business investment, but changes of this nature are actively undermining this aim.

A clear example of this is in the life-sciences sector. The UK government has previously invested heavily in the life sciences sector with initiatives such as the Innovate UK funded, Cell and Gene Therapy Catapult having successful outcomes for the growth of the sector in the UK. However, businesses using schemes of this nature have historically relied on agency staff to help maintain staffing levels during periods of uncertain funding or rapid growth. Restricting the use of agency staff in the way these proposals set out would weaken the UK's position as a hub for international life sciences businesses. We are already seeing that businesses are moving away from the UK for further growth with Ireland, Switzerland and Germany all being seen as more appealing locales. These regions are deemed by businesses in this sector to be less restrictive when it comes to the use of the temporary workforce, and the changes set out by the government will exacerbate this further.

Issues not addressed within the consultation document

The consultation document omits to address significant issues which will impact upon the practical application and effectiveness of the proposals if they are implemented.

What is a week?

The proposals do not define a "week" for the purposes of the guaranteed hours. If the proposals are implemented, this will need to be clearly defined. Under AWR, a week is not sufficiently defined, and this is a question that REC members often raise with the REC's legal team. There is no body of case law on this point in relation to AWR and we would recommend a clear definition of a week in any legislation. There is also a lack of clarity as to whether any amount of time worked within the qualifying 12-week period would count as a week worked. Under AWR, any time worked during a week counts as a week worked for the purposes of the 12-week qualifying period for equal treatment; it is not clear whether this will also be applied to the provisions for guaranteed hours contracts.

How are seasonal variations handled?

Additionally, where there are seasonal spikes in work, for example in retail during the Christmas period and in agriculture, there would need to be a longer reference period to determine a worker's average hours. This could create a problem for offers of guaranteed hours of work based on a busy period which is not reflective of an agency workers' usual hours on an assignment. In holiday pay calculations, a 52-week reference period was introduced to account for these fluctuations in demand and could be similarly applied here. Likewise, in the education sector, how can hours be guaranteed over the summer holiday when there is no work available across the entire sector if a worker has completed a 12-week assignment in the period leading up to the holiday?

How does these apply to non-standard models, including umbrella companies?

Whilst arrangements with intermediaries are referred to in the introduction to the consultation, no mention is made of umbrella companies, second tier suppliers and anything that is outside of the straightforward traditional tripartite agency supply model. It is not clear who would offer guaranteed

hours in a situation where the agency has no contractual relationship with either the worker or the end user client. The provisions need to be looked at from the lens of the realities of the labour market and the different models adopted in the supply of temporary workers. We note that umbrella companies are sometimes referred to as just payroll providers thereby falling outside of the remit of any measures relating to the employment rights of agency workers they engage, but we strongly disagree with this. Additionally, the definition of "employer" as set out in section 44 of the Employment Rights Bill is broad enough that the application of this to an umbrella company would need to be determined by an Employment Tribunal, with many previous tribunal cases deeming umbrella companies to be employers previously. Umbrella companies typically engage agency workers that agencies supply to their end-hirer clients under ZHC contracts of employment. Any measures related to the offer of guaranteed hours that do not address where liability to offer a guaranteed hours contract in arrangements involving umbrella companies would lie directly contradict the objectives as set out in the government's plan to make work pay as they could allow the umbrella companies to operate as an avoidance measure. This would also place an unequal burden on agencies, the majority of which are SME's attempting to remain viable and sustainable in what is currently a difficult economic climate.

How does this apply to NHS staffing banks?

It is also not clear from the proposals outlined in the Employment Rights Bill whether staffing banks for the NHS would fall into the remit of the obligations to offer a guaranteed hours contract. If these measures are applied to agency workers and not NHS staffing banks it will create an unlevel playing field. This would threaten the existence of agencies, prevent workers from choosing their preferred model of supply and engagement, and do nothing to solve the issues of ZHCs. Agencies supplying to the NHS are already subject to strict framework restrictions and compliance obligations, that do not apply to staffing banks. These restrictions include a limit on how much agencies are able to charge NHS trusts. And it is already proven that worker for worker, banks end up costing the NHS more.

What is low hours?

The consultation document does not define "low hours" for the purposes of the requirement to offer a guaranteed hours contract. The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022, extended the protections against exclusivity clauses beyond just workers on ZHC and make them unenforceable in employment contracts where a worker's weekly income is below or equivalent to the Lower Earnings Limit (LEL) (currently £123 per week). This is roughly equal to 10 hours of work at the incoming National Minimum Wage rate from April 2025 of £12.21. We believe that this forms a suitable baseline for low hours. Additionally, setting low hours at this level would bring other agency worker supply models into the scope of the guaranteed hour contract provisions creating greater transparency and fairness in the supply of temporary workers. For example, umbrella companies engage workers that agencies supply to their clients under contracts of employment. These are often annualised hours contracts under which they guarantee workers 360 hours of work per year, equivalent to 7 hours per week. Any proposals to define low hours for the purposes of determining the categories of workers to whom the guaranteed hours contract provisions apply to, should apply to these arrangements as well. Applying the proposed measures to agencies and/or end users only would be contrary to the government’s objectives of tackling insecurity.

Alternative proposals to consider

If the government is concerned about transparency for workers, then there are more sensible changes that can be made to existing processes to boost this.

Key Information Documents
Currently all agency workers are entitled to receive a Key Information Document (KID) that sets out key details for a candidate before they begin an assignment. The KID could be updated to include

information around expected or anticipated hours for any given assignment so a worker can be made aware of the amount of work they can expect before officially committing to an assignment. There is already a requirement for the expected number of hours per week and the anticipated duration of an assignment to be shared with an agency worker in their written statement of particulars and their assignment details form, but bringing this earlier in the process via the KID would improve transparency further.

The right to receive a KID could also be expanded to all forms of workers, including those directly engaged by the hirer. This will improve transparency and remove some of the disparity in how directly engage workers are treated versus those supplied via an agency. Expanding the entitlement to receive a KID in this way would only work if the requirement to provide a KID is enforced properly. The EAS (and the FWA once it is established) must be properly resourced to do spot checks and ensure workers are receiving their KIDs in accordance with the legislation, with harsher penalties for businesses regularly not complying with these rules, and education and support for those businesses that are new to the sector and making honest mistakes.

Enhanced AWR Rights

As set out above, agency workers already have an entitlement under the AWR to be informed by the hirer of any relevant vacant posts with the hirer and be allowed to apply to them under the same conditions as a permanent member of staff. This right could be strengthened to give agency workers who wish to move into a permanent role a right to a guaranteed interview for roles that fall within the scope of the current AWR right. This would give agency workers a stronger right than currently exists under AWR, but as workers would have to proactively register their interest in moving to a permanent role this would provide a more balanced approach than the plans for all workers to be automatically provided with a contract, regardless of whether they are interested. Alternatively, the existing right for a candidate to receive information about vacancies could be expanded to a right to an obligation for hirers to consider agency workers for direct or permanent roles. In order to mitigate the potential administrative workload around this right, this could apply to assignments where the agency worker has been working for a period of 12 months in the same role.

We are open to further dialogue with the government to consider other options that may achieve a similar effect to allow workers who wish to move into permanent employment to do so. Permanent vacancies are currently going unfilled, so it is necessary to consider how workers can be attracted into this type of work without curtailing their access to agency work. Government could incentivise businesses to offer more permanent part-time work as a step towards this, but this will require further conversation with businesses to deliver.

For more information on this submission, please contact:

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The REC is the voice of the recruitment industry, speaking up for great recruiters. We drive standards and empower recruitment businesses to build better futures for their candidates and themselves. We are champions of an industry which is fundamental to the strength of the UK economy. Find out more about the Recruitment & Employment Confederation at www.rec.uk.com.

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