

EXPLANATORY MEMORANDUM TO
THE CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT
BUSINESSES (AMENDMENT) REGULATIONS 2022

2022 No. XXXX

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy, and Industrial Strategy (BEIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The recruitment sector is regulated by the Employment Agencies Act 1973 (the 1973 Act) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations).

2.2 Regulation 7 of the Conduct Regulations makes it a criminal offence for an employment business to knowingly (including having reasonable grounds for knowing) provide temporary workers to an employer to perform the duties of workers taking part in an official strike or other official industrial action.

2.3 The Government is committed to ensuring strikes only happen as the result of a clear, democratic decision and commits to tackling the disproportionate impact of strikes on important public services. In addition, there are sectors in which industrial action has a wider impact on members of the public that is disproportionate and unfair. Strikes can prevent people from getting to work and prevent businesses from managing their workforces effectively.

2.4 The Government also considers it important to protect individuals' right to strike but believes this must not come at the cost of unreasonable disruption to important services for members of the public or unreasonable cost to businesses at a time when both are struggling with the rising cost of living and doing business.

2.5 This instrument therefore repeals regulation 7 of the Conduct Regulations, with the aim of limiting the impact to society and the wider economy of strike action by ensuring that businesses can continue to operate to some extent.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is Great Britain.

4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

5.1 The Secretary of State for Business, Energy and Industrial Strategy, the Rt Hon Kwasi Kwarteng, has made the following statement regarding Human Rights:

“In my view the provisions of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The recruitment sector is regulated by the Employment Agencies Act 1973 (the 1973 Act) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) both as amended.
- 6.2 Employment agencies introduce people to be employed by a business (the hirer) directly, with the hirer becoming their employer. Employment businesses employ (on a contract of service) or engage (on a contract for services) individuals to work under the supervision and control of a third party, the hirer, but the individual is not employed or engaged by the hirer.
- 6.3 The legislative framework comprised of the 1973 Act and the Conduct Regulations applies to all employment agencies and employment businesses operating in Great Britain, while this policy is devolved in Northern Ireland. This framework sets the minimum legislative requirements that government expects of the conduct of employment agencies and employment businesses in their dealings with work-seekers. It also ensures that work-seekers are not normally charged a fee for being found work and that they are paid for all hours worked.

7. Policy background

What is being done and why?

- 7.1 This instrument repeals regulation 7 of the Conduct Regulations.
- 7.2 Prior to repealing regulation 7, it was a criminal offence for an employment business to knowingly (including having reasonable grounds for knowing) provide temporary workers to an employer to perform the duties of workers taking part in an official strike or other official industrial action. This restriction did not apply to the employment agency model, in which an individual is provided to a business to be employed by them directly.
- 7.3 The objective of repealing regulation 7 is to tackle the disproportionate impact of strikes, including those which affect important public services.
- 7.4 Employers facing industrial action can directly hire workers to provide cover during periods of industrial action or contract out the work to a service provider. Once this instrument comes into force, employment businesses will be permitted to supply temporary workers (agency workers) to employers facing industrial action. The workers supplied by employment businesses will be permitted to perform the work normally carried out by those workers taking part in industrial action.
- 7.5 Section 2 of the Trade Union (Wales) Act 2017 prohibits a devolved Welsh authority from hiring a worker supplied by an employment business for the purpose of replacing staff who are on strike or participating in other industrial action. Since the passage of the Trade Union (Wales) Act 2017, the Wales Act 2017 has clarified that industrial relations is a reserved matter. As previously stated in 2017, the UK Government intends to legislate to remove the Trade Union (Wales) Act 2017 through primary legislation when Parliamentary time allows, to ensure trade union legislation applies equally across Great Britain.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no plans to further consolidate the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (as amended).

10. Consultation outcome

- 10.1 The Department carried out a consultation from 15 July to 9 September 2015. Details of this consultation and impact assessment published at the time can be found on gov.uk at the following link - <https://www.gov.uk/government/consultations/hiring-agency-staff-during-strike-action-reforming-regulation>. 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 in the reforms, and since the 2016 referendum is now a settled issue. The substantive policy issues are otherwise unchanged from 2015.
- 10.2 The Department received 167 substantive responses from a range of stakeholders. In addition, the Trades Union Congress (TUC) submitted a petition opposing the repeal that 25,000 members signed, 1,500 of whom also made comments. The consultation was also targeted by a campaign from an organisation called SumofUs, who rallied their members to respond to the consultation to oppose the repeal via a form on their website. This campaign resulted in us receiving over 11,000 individual emails with comments.
- 10.3 When asked about the impact on employment businesses (EBs), a majority of the responses (41% of the total) suggested there would be a negative effect, but a small proportion (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, that they would not have enough skilled workers to cover striking workers, and 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.
- 10.4 When asked about the impact on work-seekers, a majority of responses (49% of the total) expressed an opinion they thought there would be a negative impact, but a small proportion (16%) suggested a positive effect. The main reasons for their opinion on the 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.

- 10.5 When asked about the impact on hirers, a majority of responses (40% of the total) expressed an opinion that there would be a negative impact and a smaller proportion (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.
- 10.6 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.
- 10.7 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 flexibility to manage disruption to businesses and important public services. 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.

11. Guidance

- 11.1 Information for businesses and work-seekers about the Employment Agencies Act 1973 and associated Conduct Regulations is available on the Gov.uk website.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies has been considered in the Impact Assessment which will be produced to accompany this policy.
- 12.2 The impact on the public sector has been considered in the Impact Assessment which will be produced to accompany this policy.
- 12.3 The Impact Assessment will be published in good time before any parliamentary debates on these regulations and will be available on legislation.gov.uk.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

- 14.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Secretary of State for Business, Energy and Industrial Strategy, the Rt Hon Kwasi Kwarteng, has made the following statement: “It is not appropriate to include a statutory review clause in this Statutory Instrument as the expected impact on business falls well below the +/- £5 million *de minimis* threshold. This ensures that the statutory review clauses remain focussed on those measures with significant impacts. In addition, this measure will be subject to proportionate monitoring, evaluation and non-statutory review where appropriate”

15. Contact

- 15.1 Ryan Gausden at the Department for Business, Energy and Industrial Strategy (BEIS) Telephone: 020 7215 8660 or email: ryan.gausden@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 James Stevens, Deputy Director for Employment Rights and Enforcement, at the Department for Business, Energy, and Industrial Strategy (BEIS) can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kwasi Kwarteng at the Department for Business, Energy and Industrial Strategy (BEIS) can confirm that this Explanatory Memorandum meets the required standard.