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Llywodraeth Cymru  
Welsh Government

Welsh Government  
Consultation Document

# The use of agency workers during strike action

Date of issue: 13 September 2016  
Action required: Responses by 6 December 2016

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

**Overview** The use of agency workers during strike action. This document seeks views relating to the principle of disallowing the use of temporary agency staff to cover for employees undertaking official industrial action in Welsh public services.

**How to respond** Responses to this consultation should be e-mailed / posted to the addresses below to arrive by **6 December 2016** at the latest.

Please enter 'Hiring agency workers during strike action in Wales' in the subject matter box.

**Further information and related documents** **Large print, Braille and alternative language versions of this document are available on request.**

The consultation documents can be accessed from the Welsh Government's website at:  
[www.wales.gov.uk/consultations](http://www.wales.gov.uk/consultations)

**Contact details** For further information:

[wpc.mailbox@wales.gsi.gov.uk](mailto:wpc.mailbox@wales.gsi.gov.uk)

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**Data protection** How the views and information you give us will be used?

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank

them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

# The use of agency workers during strike action

## Introduction

The Welsh Government approach to managing public services in Wales is characterised by Social Partnership. Social Partnership is the partnership between Welsh Government and public bodies and, crucially, between employers and trade unions. Here in Wales, we have an excellent track record of working with public service employers and trade unions based on openness, trust and respect. We believe this supports our agenda of continual improvement, delivering better services for the citizen by recognising the central role of our public service workforce and our responsibility to deliver equality, fairness, social justice, human rights and sustainability both through them, and for them.

Currently Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 prohibits employment businesses from providing agency workers to cover the duties normally performed by an employee of an organisation who is taking part in a strike or other industrial action, or to cover the work of an employee covering the duties of an employee taking part in a strike or other industrial action. The regulation can be found here: <http://www.legislation.gov.uk/ukxi/2003/3319/regulation/7/made>.

The UK Government has consulted on a proposal to rescind this regulation <https://www.gov.uk/government/consultations/hiring-agency-staff-during-strike-action-reforming-regulation>. Removing the regulation from the Conduct Regulations would allow employers, facing industrial action, to hire temporary agency workers from employment businesses who would then be able to perform some of the functions not being carried out due to the industrial action.

The Welsh Government believes that the use of agency workers, in this fashion, would undermine the right to strike by reducing the impact of industrial action, and affect the balance between employer and trade unions, which underlies our Social Partnership approach. We also believe that the UK Government's approach should not override our ability to pursue our Welsh way of delivering relevant public services. With this in mind, the Welsh Government proposes to protect Social Partnership by ensuring that the current position will continue to apply to Welsh public services should the UK Government act to rescind Regulation 7. This means not allowing public service employers in Wales to use agency workers, in these circumstances, and this would continue to be the case in the event that the UK Government acts to allow recruitment businesses to offer them.

We are seeking views from a wide range of stakeholders, including recruitment businesses, public sector employers, trade unions and the public who are affected by industrial action. We will publish a summary of the responses to the consultation and the next steps to be taken.

## The current law on the use of agency workers

Workers in the UK can take industrial action against their employer. It is used as a last resort when workers have a grievance with their employer over aspects of their employment relationship. Industrial action is intended to impose a cost on the employer, in order to encourage the employer to resolve the grievance. Staff taking industrial action also face a cost as they lose pay for the hours they don't work. Industrial action will sometimes have an impact on others not involved in the dispute. For instance, strikes in public services such as education will mean that some parents of school age children will need to look after their children rather than go to work because of child care responsibilities.

The UK Government has argued that the impact of industrial action in the public sector is disproportionate and unfair because of its impact on others. The Welsh Government takes a different view, both from a principled and practical perspective. We argue that our Social Partnership approach is reinforced by workers having, as a last resort, recourse to industrial action. Providing a balance between employee and employer encourages all parties to seek consensus rather than conflict.

Supporting this argument, that strike action is more closely related to the quality of relationships, is the comparative track record of public sector disputes between England and Wales as administrations have diverged around the Social Partnership approach. The 2014 Firefighters dispute was settled in Wales, whilst strike action went ahead in England. In 2015 the Junior Doctors in Wales did not strike following confirmation from Welsh Government that there would be no imposition of new contracts.

Currently employers facing industrial action are able to directly hire staff to carry out work normally performed by workers who are taking industrial action or sub-contract a service to another employer. What Regulation 7 prohibits is employment businesses providing temporary agency staff who remain employed by that business, to cover the duties of an employee taking industrial action or, where an employee is covering the duties of an employee who is taking industrial action. The level of complaints to the UK regulator about potential infringements of the regulations are very low (2 in 2012/13 and 5 in 2013/2014 across all sectors) suggesting that employers rarely, in practise, choose to cover industrial action with temporary staff.

Many public sector employers, such as local authorities, commonly operate local agreements with trade unions to exclude services which are considered “life and limb” and provide essential protections for the public. In local government these include services such as minimal CCTV cover, resilience/ response services in the event of emergencies, and social care services. Whilst they do not include all services, such as refuse collection, which might significantly inconvenience the public, industrial action has, in recent years, tended to be of short term duration (on average, stoppages lasted for 1.1 days between 2010 and 2014). The current provisions therefore do appear to allow adequate protections for the public to be maintained without associated risks to quality of service and potential health and safety risks where workers who may not have received relevant training or are unfamiliar with the work and the workplace substitute for permanent staff

## **The options**

Our proposal is to maintain the status quo in relation to Welsh public services reflecting the scope of Welsh Government powers. This would not affect other public services in Wales or the private sector. This would be achieved by preventing employers in Welsh public services using agency workers to perform the duties of the employees taking industrial action or workers covering the work of the employees taking industrial action.

If the UK Government goes ahead to change the existing law then we would need to preserve the position we believe to be right for Wales.

The first option is to legislate to establish a duty on Welsh public service employers through primary legislation. The Welsh Government has given a commitment to introduce an Assembly Bill to reverse the effect of certain aspects of the Trade Union Act 2016 passed by the UK Parliament.

The second option is to use secondary legislation to issue guidance and direction to employers to achieve the proposal.

A legal duty established directly within primary legislation carries the same weight as one made through secondary legislation. Both options create an equally binding expectation of employers and would be enforceable through similar mechanisms. However, primary legislation is made by the Assembly itself whilst secondary legislation is made under powers delegated to Ministers. Changing primary legislation involves greater debate and discussion which can take time, whilst secondary legislation can be changed more easily but involves less public scrutiny. As a result secondary legislation is commonly used for more technical matters where the detail involved doesn't justify the use of Assembly time or require the same level of scrutiny. Of interest to Welsh Government therefore is the extent to which respondents feel matters of principle are affected by our proposal and the extent to which practical issues may arise which require a timely response.

Further options could include using the Agency Workers Procurement Framework to prohibit the supply of agency workers to public sector cover industrial action. This would work in a similar fashion to the current Regulation 7, although would not cover clinical staff in NHS Wales. This would take effect as the National Procurement Service Framework is rolled out across the public sector and current agency worker supply contracts managed directly by public authorities expire,

We are seeking views on the strengths and weaknesses of these options or combination of these options.

**Consultation  
Response Form**

Your name:

Organisation (if applicable):

email / telephone number:

Your address:

**Our questions**

1. The Welsh Government believes that the effect of the law currently in place should continue, in which Welsh public service employers are not be able to use workers employed by an employment business to provide cover for staff taking industrial or providing cover for them.

Do you agree? Yes/No

2. The Welsh Government believes that the current voluntary arrangements are adequate to ensure that 'life and limb' continues to be protected by public services during industrial action.

Do you agree? Yes/No

3. The Welsh Government does not anticipate that the proposal would significantly affect the financial position of employment agencies and businesses.

Do you agree? Yes/No

4. Do you agree that the option to use primary legislation to create a duty on Welsh public service employers not to use agency workers best achieves our intention?

Yes/No

5. Do you agree that the option to use guidance or Ministerial direction to Welsh public service employers best achieves the intention?

Yes/No

6. Are there any circumstances which should be exempted from the duty and if so what do you think would be the consequences of not exempting them?

7. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: