Government consultation – The application of zero hours contract measures to agency workers

Introduction

This is the response from the Universities and Colleges Employers Association (UCEA).

UCEA represents the views of higher education institutions (HEIs) across the UK in their capacity as employers.[1] UCEA is a membership body funded by subscriptions from 169 HEIs in the UK. Our purpose is to support our member Higher Education (HE) employers in delivering excellent and world-leading higher education and research by representing their interests as employers and facilitating their work in delivering effective employment and workforce strategies.

HEIs are independent employers and determine their own employment policies, usually in consultation with recognised trade unions; therefore, there are a variety of HR practices in place in the sector.

Our response is based on views provided by our member HE employers.

General comments

HEIs noted that it was challenging to respond to this consultation and the application of future legislation when the details on guaranteed hours are not yet known; including details of the reference period and, for example, any threshold for when guaranteed hours must be offered.

Consultation questions

Q1: Are you (please select from the following):

- An academic
- An employer
- An employee/worker/individual
- A Legal representative
- **A Business representative organisation/trade body**
- A trade union or staff association
- Other (please specify)

Q2: If you are an employer or individual, what is your role or the role of the organisation that you work for (please select from the following)?

- end hirer of agency workers
- employment agency
- umbrella company
- agency worker

[1] The terms “HEI(s)” (Higher Education Institution(s)) and “university/universities” are used interchangeably throughout to describe UCEA’s membership which consists of Higher Education providers which are active in teaching, research and scholarship including universities, colleges, and conservatoires, and associated organisations.

- **other (please specify) - business representative organisation representing the views of HEIs**

Q3: If you are an employer or individual, what type of organisation (do you work for) (please select from the following)?

- private sector organisation
- public sector
- charity or voluntary sector
- other (please specify)
- **Not applicable – business representative organisation representing the views of HEIs**

Q4: If you are an agency, an umbrella company or an end hirer of agency workers, how would you describe the size of your entire organisation?

- micro (1 to 9 workers)
- small (10 to 49 workers
- medium (50 to 99 workers)
- large (100 to 249 workers)
- very large (250+ workers)
- **Not applicable**

Q5: *Do you think the guaranteed hours should be offered by the employment agency (option 1) or the end hirer (option 2)?*

The majority of member HEIs who responded were undecided and did not support option 1 or option 2 with a smaller number expressing support for option 1.

Responding members commented that it would be helpful to have a "neither" option as both options have significant drawbacks and there are risks with either approach, including in the context of flexibility and agility. HEIs engage agency workers for a variety of reasons including to fill hard to recruit roles, seasonal variations in work such as exam invigilators and providing cover for absence at short notice. Seasonal variations and semester lengths make the proposal to offer predictable hours at 12 weeks problematic. In Higher Education (HE) many agency workers are engaged for a semester which is around 12 weeks and then there may be no further work. If HEIs are obliged to offer those hours going forward, that may mean they are in effect giving guaranteed hours when there is not the same volume of work (or any work) available after the (anticipated) 12-week reference period.

Agencies are generally in a better position to manage and distribute hours across various assignments, but it is important for agencies to maintain strong communication with end hirers to ensure that the specific needs of each assignment are met. The end hirer usually engages agency workers due to an unpredictable and flexible requirement for the work being undertaken, therefore extending the proposals to cover agency workers may have the effect of deterring employers from engaging agency workers, if they are required to guarantee hours after the anticipated 12-week period. Alternatively, employers may end arrangements before the (anticipated) 12-week period. Offering guaranteed hours could undermine any flexibility provided by agency workers with several HEIs being concerned for the need to retain an element of flexibility with these types of working arrangements given the need to engage agency workers for seasonal and sessional work, or for unforeseen reasons e.g. to cover an unexpected period of sickness absence.

HEIs considered that option 1 would be difficult for agencies to manage, even unsustainable, and could limit the number of staff they engage as agency workers and

that option 2 does not consider the reality of how agency workers are used in practice. Agency workers could potentially end up in a 12-weekly cycle of being offered guaranteed hours with several end hirers if they have more than one assignment that runs simultaneously. Several institutions supported agencies having responsibility for offering guaranteed hours particularly where agency workers work for multiple organisations.

HEIs commented that there should be more exploration of whether it is viable for the end hirer to offer guaranteed hours without directly employing the agency workers. There was concern that option 2 would place a disproportionate burden on employers both in terms of administrative and financial responsibilities, and that both options would be very complex operationally.

Q6: *Should end hirers be required to pay a transfer fee or use an extended hire period if they are required to offer guaranteed hours to an agency worker?*

The majority of responding HEIs did not agree that end hirers should be required to pay a transfer fee or use an extended hire period if they are required to offer guaranteed hours to agency workers.

There were concerns that if there was a transfer fee after the (anticipated) 12 weeks this would dissuade employers from using agency workers altogether. HEIs considered that the addition of potential transfer fees as well as the need for guaranteed hour reviews, potential day one employment rights and overall loss of flexibility would be unsustainable. Agencies receive income from the markup on the hourly / daily rates they charge and having an additional transfer fee on top of these rates seems unnecessary and creates significant additional costs for employers. There was concern that this measure might create more rather than less uncertainty for agency workers if employers decide they are unable to continue with the use of an agency worker before the end of 12 weeks because it is not financially viable to have to pay additional costs.

Whilst HEIs did not typically support a fee being incurred for offering guaranteed hours, they recognised a fee being incurred where an agency worker becomes an employee of the hirer and noted that transfer fees are often substantial, sometimes as much as 20 – 25% of a role's annual salary. If the primary reason for offering guaranteed hours is to provide stability and security to agency workers, the addition of transfer fees does not seem relevant for achieving this purpose and could deter employers from extending an agency workers' agreement such that it would offer guaranteed hours and incur a fee.

Q7: *If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to guaranteed hours to them, please explain them here***.**

There were several comments on other factors including:

- Given a primary purpose of using agency workers is to provide temporary support in times of particular staff shortages, there are likely to be unintended consequences for the workers of applying the right to guaranteed hours to them. These arrangements can often be a way of an individual becoming part of an organisation and moving into a permanent or fixed term employment arrangement and new legislation could reduce such opportunities.
- Greater clarification on the term for which any guaranteed hours are offered, i.e. they should not be permanent or (if fixed term) extend beyond the period for which the work is required - whatever the legislation delivers, it must not commit organisations to pay for work that does not, in reality, exist.

- Agency workers often have varied assignments with different employers, which can make it challenging to guarantee consistent hours. The flexibility that agency work offers is a key attraction and need (for employers, agency businesses, and individual agency workers); therefore, any new regulations should balance guaranteed hours with the need for flexibility and the purpose of using agency workers.
- Tailoring the application of guaranteed hours to fit sector-specific needs may help ensure that the regulations are practical and effective.
- It is important to ensure any new regulations align with existing employment legislation and that guidance on this is clear, for example, the interaction of guaranteed hours with rights to minimum wage, holiday pay, and other entitlements.

Q8: *Do you agree that the responsibility for providing an agency worker with reasonable notice of shifts should rest with both the employment agency and the hirer, so that where a tribunal finds that unreasonable notice was given, it will apportion liability according to the extent that the agency and the hirer are each responsible for the unreasonable notice?*

The majority of HEIs who responded agreed that the idea of shared responsibility between the employment agency and the hirer for providing reasonable notice to agency workers seems fair and balanced and acknowledges that both parties play a role in the engagement relationship and can influence the notice given to workers. By apportioning liability based on the extent of each party's responsibility the proposal would ensure that both the agency and the hirer are held accountable for their actions. This could encourage better communication and coordination between them, ultimately benefiting agency workers by providing more consistent and fair treatment.

However, several HEIs noted that each individual case would be fact specific, and it should be clear that if an employer is not at fault i.e. the fault was with the employment agency business, no liability and cost should be apportioned to the employer.

Q9: *Do you think that legislation should prescribe how the end hirer should notify the agency that they have a shift available and of changes to these and when notification should be deemed to be received?*

Responding HEIs held a range of views with the majority not in favour of legislation prescribing how the end hirer should notify the agency of available shifts and changes to these.

HEIs not in support of legislation considered such a measure would be overly prescriptive, bureaucratic and restrictive. The means of communicating with agency workers varies across different sectors and having a prescribed means of communicating shift availability and pattern would not be appropriate, in other words “one size fits all” is unlikely to work. There was support for legislation around the need to notify and be explicit about what is agreed but it is important for there to be a level of autonomy for agencies and end hirers to agree the terms of the notification and it was suggested that guidance on how to notify the agency of available shifts and changes might be helpful.

HEIs in support of legislation commented that prescribing specific methods and timelines for notifications in legislation could help standardise the process and reduce misunderstandings between hirers and agencies. This could ensure that all parties are clear on their responsibilities and the expectations for communication, minimum notice periods for offering shifts and for notifying changes or cancellations. Such measures could

enhance transparency and reliability, making it easier for agency workers to plan their schedules and reduce the risk of disputes.

However, it is also important to consider the flexibility needed in different industries and situations and HEIs considered that a level of flexibility is needed and would be pragmatic. A fundamental aspect of the need to engage agency workers is the need to cover work, sometimes at short notice i.e. to cover a period of unforeseen sickness absence – as such, it is not realistic that an end hirer would always be in a position to follow prescriptive notification requirement as that is not reflective of the nature of the work at hand.

Q10: *If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to reasonable notice of shifts to them, please explain them here.*

There were a range of comments from HEIs on other factors specific to agency workers that should be considered which included:

- In many cases, the need for agency workers arises from a last-minute need, i.e. to cover unforeseen or urgent capacity issues.
- The fact that agency work is variable and unpredictable by its very nature, and will often arise from a last-minute need, should be accounted for in any legislation to ensure it is practical and fair, for example, regarding what constitutes reasonable notice based on the nature of the work and sector/industry standards.
- Agency workers may be registered with multiple agencies or take on multiple assignments simultaneously; therefore, clear guidelines to manage notice periods across different engagements to avoid conflicts and ensure workers are not overbooked would be helpful.
- Agency workers may have varying availability, and any legislation should consider situations where a worker is unable to accept a shift due to prior commitments or personal reasons.
- Different sectors may have unique requirements. For example, healthcare or emergency services may need more flexible notice periods due to the nature of their work.

As referred to above, to respond to this question, it is necessary to have some clarity on what the new right is.

Q11:*Do you agree that the agency should be responsible for paying any short notice cancellation or curtailment payments to an agency worker?*

The majority of responding HEIs agreed that the agency should be responsible for paying any short notice cancellation or curtailment payments to an agency worker with a minority either undecided or not in agreement.

HEIs considered it reasonable for an agency to be responsible for paying short notice cancellation or curtailment payments primarily because the contractual relationship is between the agency and the worker. The agency is responsible for the worker's contract, payments, and other employment-related matters and, therefore, this would be the most straightforward approach. Having agencies administer these payments would ensure consistency and accountability and simplify the process for workers, who may otherwise have to navigate multiple hirers for compensation.

HEIs noted that agencies may build these costs into their charging model to ensure that any costs incurred from cancellations are fairly distributed between the agency and the hirer. However, it is important to note an unintended consequence of this is it may become the case even if the fee does not need to be paid because the employer is not at fault. Therefore, it is important that there is transparency in identifying where fault lies in order to avoid an unnecessary cost to business. A consequence could be a reduction in the use of agency workers because of such costs.

Q12: *Do you think that the agency should be able to recoup this cost from the end hirer if/to the extent that the end hirer was responsible for the short notice cancellation or curtailment?*

The majority of responding HEIs agreed that the agency should be able to recoup this cost from the end hirer if/to the extent that the end hirer was responsible for the short notice cancellation or curtailment, with a minority either undecided or not in agreement; this includes for the reason of it not being commercially viable for agencies to compensate workers when they have no control over the working hours
If the employer does not give due notice and it can be determined that the cancellation was unreasonable, responding HEIs felt it was fair that the agency should be able to recoup the cost from the end hirer if the hirer was responsible for the short notice cancellation or curtailment. In other words where the employer is at fault HEIs agreed that there should be a mechanism for agencies to recoup costs which are outside of their control.

HEIs noted that potential liability for end-hirers may encourage them to plan and communicate more effectively and help protect the financial stability of agencies, ensuring they can continue to operate effectively and support their workers.

Responding HEIs commented that penalty/cancellation payments would form part of the normal contractual terms and fee structure between agencies and end hirers and that agencies will develop these to comply with any new legislation. HEIs noted that the arrangements should be transparent and agreed upon in advance. It is, therefore, important to define what is meant by ‘short notice’ cancellation or curtailment.

Q13: *If you think that the agency should be able to recoup this cost from the end hirer, do you think the Government should legislate to ensure that the agency can recoup the costs?*

The majority of responding HEIs did not agree that the government should legislate to ensure that the agency can recoup the costs, believing that the contractual arrangements between the agencies and end hirers should cover matters such as recouping costs without additional legislation – in other words it can be set out in contractual arrangements and does not require legal redress. In practice, agencies will amend their contractual terms with employers to adapt to the new employment legislation. Therefore, there is no need to legislate what can be managed through contractual arrangements. Allowing agencies and end hirers to negotiate terms that suit their specific needs was the preferred route.

While some HEIs noted that legislation has the effect of ensuring compliance as well as providing clarity and consistency, it is important that any legislation strikes the correct balance between the interests of both agencies and hirers, and to ensure it is practical and enforceable. HEIs considered that whatever changes are enacted, there is a balance between worker rights and businesses remaining financially viable.

Q14: *Do you think that it should be possible to override legislative provisions allowing agencies to recoup cancellation/curtailment costs through contracts signed after implementation (or that are clearly entered into in contemplation of the commencement of the legislative provisions)?*

A majority of HEIs supported not being able to override legislative provisions.

Comments included:

- It is commercially viable for agencies to decide how they wish to implement this aspect of legislation, and it will vary according to certain factors, e.g. size, sector etc.
- The contractual provisions between the hirer and agency business should dictate these provisions.
- There might be specific circumstances where flexibility is needed. If exceptions are to be allowed, they should be clearly defined and regulated to prevent abuse.

- Allowing contracts to override legislative provisions designed to protect agencies' rights to recoup cancellation or curtailment costs could undermine the intent of the legislation. Legislation aims to create a consistent and fair framework for all parties. This would indicate that the legislation will not be effective, so questions the point of its purpose.

Q15: *If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to payment for short notice cancellation or curtailment to them, please explain them here.*

Responding HEIs made a range of comments including:

- Different sectors have unique requirements and challenges. The legislation should be flexible enough to accommodate these differences while maintaining core protections for workers and ensuring organisations remain financially viable.
- A distinction should be made between different circumstances to reflect the fact that, by their very nature, agency workers are sometimes used to respond to short notice needs.
- Agency work is flexible by its nature therefore introducing additional measures like cancellation/short notice payments and end hirers providing guaranteed hours moves away from that flexibility.
- It is not always the case that all agency workers are used for short notice work and protection should be offered in those circumstances where that is not case to provide better job security.
- Individuals also choose agency work for its flexibility and reducing this may have a detrimental impact for individuals and employers may be reluctant to engage agency works if onerous provisions are put in place.
- Frequent short notice cancellations without compensation can discourage agency workers from accepting assignments, therefore the impact on the availability of agency workers and their willingness to accept shifts must be considered in any legislation.
- The administrative burden for agencies to track and manage compensation payments should be minimised to ensure that the process is efficient and does not deter agencies and end hirers from engaging agency workers.
- Agency workers often have different employment statuses (e.g. temporary, part-time, zero-hour contracts). Any legislation should clearly define how these rights apply across different statuses to ensure all workers are covered.