Recommendations for Improving the Rights of Agency Workers in Ireland

Briefing for Oireachtas Committee

March 2008

Introduction

It used to be the case that agency work was a fairly rare form of employment, it used to be an 'office temp' who filled in for a week or so when a staff member was out on sick leave or on maternity leave or sometimes it was to cover for temporary staff shortages due to seasonal fluctuations. But this is no longer the reality of agency work, progressively more employers are staffing large sections of their workforce with agency workers. This is no longer the case, increasingly employers are using agency work as the way in which they are staffing their entire workforce on an ongoing basis. It would be a mistake to think that this practice is limited to just the health or the private sector. In part, this development is a response by employers to embargos on recruitment but it's a worrying development, the replacement of permanent secure employment is driven in part by recruitment embargos, agency working offers a way through which enterprises can increase staff without taking on workers while on the other hand agencies have been actively marketing agency work as a 'hassle free', 'responsibility free', cheaper staffing solution for companies.

For the workers concerned agency working is not as rewarding as many employment agencies would have us all believe. Increasingly agency workers get less pay, have less security and worse terms and conditions than their permanent counterparts. Reports from our affiliated unions show that agency workers get no sick pay, no overtime pay, no bonuses, less holidays, no pensions, no maternity pay and have no job security.

A lot of the problems are caused by loopholes in our employment laws in particular the legislation regulating employment agencies and agency work. The legislation was relevant when it was introduced in the 1970s but it is now hopelessly out of date and not adequate to the challenges of today's workplace, to give an example, the legislation does not deal adequately with the question of 'who is the workers legal employer?. The consequence of this is that many workers who having suffered a breach of their rights are then faced with the unsatisfactory situation of both the agency and the employer claiming that its nothing to do with them. In fairness the Labour Court have tried to get around this by developing a formula that holds 'whoever pays the wages' responsible but with more and more agencies operating outside the jurisdiction or on the internet unions are finding this increasingly difficult to operate.

Of significant concern is the way in which some employers can use agency work as a means of getting around other rights, take for example our hard won rights to equal pay, an employer can get around equal pay by simply employing the female or non Irish national part of the work force through an agency. This is because of a loophole in the law which provides that agency workers cannot compare themselves with the people they are working beside but must compare themselves with another agency worker. Hard to believe it could be that simple, but already unions are loosing cases because of this ridiculous loophole. Congress is so concerned that we have asked the Equality Authority to undertake an investigation of this and of other equality avoidance practices that we believe are being facilitated through agencies. This includes the practice of 'profiling' of candidates for interview. In a survey carried out by Congress of job seekers the vast majority, over ¾ believed that some form of discrimination of the sort prohibited under the employment equality acts was a feature of the recruitment 'profiling' services offered by agencies.

Other lax provisions are exploited by agencies so that they can find some way to charge employees for their job or some other 'service' or bogus training course.

For all of these reasons, and many more, urgent action is needed to end this unjust situation and to improve the situation of the thousands of agency workers in Ireland.

Summary of Core Demands

The Irish Congress Trade Unions is calling for the enactment of meaningful legislation that in will:

1. Provide agency workers with an entitlement to equal treatment, pay and conditions with permanent staff, so that they cannot be used to drive down pay and conditions generally or to undermine hard fought for equality rights;

2. Restrict the amount of time that an employer can fill a post with agency staff, insecure agency work must not be allowed to replace secure employment;

3. Prohibit the use of agency workers in some circumstances, importantly to replace striking workers or those who have been made redundant;

4. Make both the employment agency and end user employer jointly and severally liable so that workers can ensure enforcement of their rights;

5. Prohibit agencies (or others) from charging the employee for any aspect of the recruitment or placement process and prohibit unfair discriminatory 'profiling' practices;

6. Prohibit agencies from requiring that employees use 'services' such as accommodation, transport or bogus training courses;

7. Licence employment agencies to a Statutory Code of Practice and require them to place a 'Bond' so that funds are available to secure the payment of wages owed to agency workers;

8. Require any agency operating in Ireland (no matter where they are based) to be licensed and comply with the Code;

9. Make it an offence for employers to use unlicenced agencies;

10. Increase sanctions on employers who ignore workers rights and improve redress for the workers concerned.

KEY LEGISLATIVE PROVISIONS EXPLAINED

WHAT IS THE EQUAL TREATMENT PRINCIPLE AND WHY DO AGENCY WORKERS NEED IT?

Put simply the equal treatment principle protects employees from being paid less and treated worse than permanent employees. It does not stop employers paying agency workers more, in fact equal treatment may, in some circumstances require extra pay to compensate for reduced security. In France, for example, agency workers are entitled to receive equal pay with permanent employees and agency workers have an additional entitlement to receive a 10% bonus on completion of the contract precisely to compensate the agency worker for the precarious nature of the contract of employment. To address the fact that agency workers may not know how many days work they will have in any month, in Sweden, collective agreements must be concluded by the agencies with the trade unions for the sector. And typically these collective agreements provide that agency workers are entitled to receive 75% of full monthly salary *whether the agency worker is engaged in work or not* and the white-collar agreement provides for 80%.

Equal pay, conditions and treatment with permanent employees is also necessary if we are to call a halt to employers being able to legally avoid the employment equality rights of agency workers.

This idea is not new. Protecting employees from unfair discrimination based on the contract of employment is already a feature of Ireland's employment law. The Equal treatment/ 'non discrimination principle' already applies in respect of Fixed-Term Workers and Part-Time Workers in Ireland.

Example of Right to Equal Treatment:

The Protection of Employees (Fixed-Term Work) Act 2003 in Section 6 provides:

6.—(1) Subject to *subsections (2)* and *(5)*, a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent employee.
(2) If treating a fixed-term employee, in respect of a particular condition of employment, in a less favourable manner than a comparable permanent employee can be justified on objective grounds then that employee may, notwithstanding *subsection (1)*, be so treated.
(3) A period of service qualification relating to a particular condition of employment shall be the same for a fixed-term employee as for a comparable permanent employee except where a different length of service qualification is justified on objective grounds.
(4) For the avoidance of doubt, the reference in this section to a comparable permanent employee is a reference to such an employee either of the opposite sex to the fixed-term employee concerned or of the same sex as him or her.
(5) *Subsection (1)* shall, in so far, but only in so far, as it relates to any pension scheme or arrangement, not apply to a fixed-term employee whose normal hours of work constitute less than 20 per cent of the normal hours of work of a comparable permanent employee.
(6) The extent to which any condition of employment referred to in *subsection (7)* is provided to a fixed-term employee for the purpose of complying with *subsection (1)* shall be related to the proportion which the normal hours of work of that employee bears to the normal hours of work of the comparable permanent employee concerned.

(7) The condition of employment mentioned in *subsection (6)* is a condition of employment the amount of benefit of which (in case the condition is of a monetary nature) or the scope of the benefit of which (in any other case) is dependent on the number of hours worked by an employee.
(8) For the avoidance of doubt, neither this section nor any other provision of this Act affects the operation of Part III of the Organisation of Working Time Act 1997.

Similar provisions are contained in the **Protection of Employees (Part-time) Work Act 2001**. Section 9 of that Act provides;

9.—(1) Subject to subsection (2) and (4) and section 11(2), a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee.
(2) Without prejudice to section 11(2), if treating a part-time employee, in respect of a particular condition of employment, in a less favourable manner than a comparable full-time employee can be justified on objective grounds then that employee may, notwithstanding subsection (1), be so treated.
(3) Nothing in subsection (2) shall be construed as affecting the application of a relevant enactment, by virtue of section 8, to a part-time employee.
(4) Subsection (1) shall, in so far, but only in so far, as it relates to any pension scheme or arrangement, not apply to a part-time employee whose normal hours of work constitute less than 20 per cent of the normal hours of work of a comparable full-time employee.
(5) For the avoidance of doubt, the reference in this section to a comparable full-time employee is a reference to such an employee either of the opposite sex to the part-time employee concerned or of the same sex as him or her.

What we are calling for the development of similar legal provisions to these that will apply to agency working. We are asking that the legislation would provide that agency workers would be guaranteed no less favourable pay, terms and conditions than other permanent workers in the user undertaking. We are also recommending that measures should be available to ensure that agency workers are adequately compensated for the precariousness of their situation. We are recommending the inclusion of measures similar to the French system which recognise that agency workers should be financially compensated at the end of the contract and that a bonus based on 10% of the contract should apply.

In relation to the applicability of Registered Employment Agreements (REA) and Employment Regulation Orders (ERO) that apply to different sectors. It would be helpful, if the legislation, for the avoidance of confusion and for the purpose of clarity confirmed that agency workers were covered in the REA/ERO.

WHAT DO OTHER EU MEMBER STATES DO?

The vast majority of EU member states have dealt with the problem of employers using agency work as a means to pay less and introduce lower standards by introducing laws to provide for equality of employment between agency workers and comparable permanent staff. Referred to as the 'non discrimination principle' the majority of laws around Europe provide that agency workers must receive the same terms and conditions as comparable permanent employees in the user enterprise.

- In Belgium, agency workers must be paid the same and give same terms and conditions as permanent workers in the user enterprise.

- In Spain, the law was modified in 1999 to ensure pay parity with that of the collective agreement of the sector to which agency worker is assigned.

- In Portugal the law establishes pay and conditions parity with permanent workers.

- In Greece, an agency worker's pay must not be lower than that set by the relevant collective agreement applying to the user company staff.

- In the Netherlands, the equal wages clause can be varied but only by a collective agreement within the employment agency.

- In France, the pay of an agency worker is linked to what a post probationary permanent employee with the same qualifications would earn in that post. Agency workers are also eligible for an end of assignment 10% of gross pay earned during the assignment and compensation equivalent to a further 10% in lieu of paid holidays which they are not entitled. In addition there is a compulsory levy of 2% of payroll costs for training.

- In Germany, since 2004, agencies are obliged to guarantee their workers the same pay and employment conditions as permanent staff in the user enterprise unless a collective agreement is made to the contrary.

- Not just 'old' member states but also the majority of new member states have introduced laws to guarantee equal pay and treatment for agency workers, including Poland, Romania, Slovakia, Czech Republic, Slovenia.

An examination across EU shows that only the UK, Hungary and Ireland have not respected the non discrimination principle and legislated in some way to protect the equal pay and conditions between agency workers and comparable employees in the user enterprise. But even Hungary introduced in 2001 a definition in their labour law of 'employee leasing' and clarified the contractual position and obligations of the parties however they did stop short of imposing an equal pay principle.

ENSURING THAT INSECURE AGENCY WORK DOES NOT REPLACE SECURE PERMANENT WORK

Many member states further reinforce the equal treatment/'non discrimination principle' with additional measures to ensure that agency work is used for bona fide reasons and does not replace secure permanent employment.

- seven member states define in law **specific reasons** for which an employer may have recourse to agency workers,
- five **limit the duration** of agency work.
- four set **limits to the sector** and occupation usage

Some examples of restrictions on agency work from around Europe:

- In Spain, agency work is prohibited in certain sectors, including the public service sector and for a 'dangerous' work.

- In Poland legislation was introduced in 2003 to provide that the maximum employment period is an aggregated 12 months over a period of 36 consecutive months.

- In Belgium the maximum permitted duration for use of agency workers is connected to the reasons for use.

- In Portugal where the justification is the temporary substitution of permanent workers then the duration must correspond to the duration of the justifying cause.

- In Greece a user company may not employ agency workers for a total period of over eight months, if the period is exceeded the contract between the agency worker is automatically transformed into an open ended (contract of indefinite duration) between the agency worker and the client firm.

- In France neither the objective nor the outcome of agency working can be to fill a post for a 'lengthy period' of the client company and the maximum duration in any case is 18 months renewals included.

- In Slovenia, agency workers cannot be used by the user firm 'continuously' or, to replace striking workers or in circumstances where there has been collective redundancies in the past year or in other cases determined by sectoral agreement.

- In the Czech Republic an agency may assign an employee to the same user for a maximum of 12 calendar months, unless the employee requests a longer period.

Congress is seeking similar restrictions on the length of time that an agency can fill a post with an agency worker. This should be limited to a maximum of 6 months in the previous 18 months. Exemptions to this rule should be available only (i) where the agency worker is filling for a permanent employee out on statutory leave (i.e. Maternity, Adoptive, Carers Leave) or in limited circumstances where the use of agency work can be objectively justified according to the cause. These measures should be reinforced with an entitlement for the agency worker who has been temporary in the post to be offered the permanent position.

In addition the use of agency work should be prohibited in certain circumstances including:

- to replace striking workers;
- to carry out high-risk activities;
- to fill vacancies arising from unfair dismissal, redundancies on economic, organisation or production grounds, or unilateral termination of the contract by workers because of serious and culpable behavior by the employer;
- to work in other employment agencies;
- to fill posts by agency workers for longer than the specified periods (see above);
  - to fill posts for which there is no occupational hazard assessment

Summary of Main Areas of Statutory Regulation in EU

Country	Equal Treatmen Guaranteed	Limit on Reasons for Use	Limits on duration /sector/occupation
BE	**Yes**	**Yes**	**Yes**
PT	**Yes**	**Yes**	**Yes**
FR	**Yes**	**Yes**	**Yes**
ES	**Yes**	**Yes**	**Yes**
LU	**Yes**	**Yes**	No
EL	**Yes**	No	No
DE	**Yes**	No	**Yes**
IT	**Yes**	**Yes**	No
AT	**Yes**	No	No
FI	**Yes**	**Yes**	No
NL	**Yes**	No	No
UK	No	No	No
DK	**Yes**	No	No
SE	**Yes**	No	**Yes**
IE	*No*	*No*	*No*
PL	**Yes**	**Yes**	**Yes**
RO	**Yes**	**Yes**	**Yes**
SI	**Yes**	**Yes**	**Yes**
CZ	**Yes**	**Yes**	**Yes**
SK	**Yes**	No	No
HU	No	No	**Yes**

Source: **Temporary Agency Work in an Enlarged European Union**, European Foundation for the Improvement of Living and Working Conditions, 2006.

EQUAL TREATMENT AND THE EU DIRECTIVE ON AGENCY WORK

Ireland has been part of a blocking minority which has stalled progress on the adoption of the EU Directive on Agency Work. The Directive has the stated objective of providing a minimum level of protection for agency workers. The proposal establishes the principle of non-discrimination in working conditions, including for pay, between agency workers and comparable workers in the user undertaking as soon as the agency worker has completed [6 weeks'] work in the same user undertaking. The Amended Draft Directive contains the following in respect of a commitment to equal treatment :

(15) ~~With respect to~~ **The** basic working and employment conditions~~,~~ **applicable to** temporary workers should **be at least those which would apply to such workers if they were recruited by** ~~not be treated any less favourably than a "comparable worker", i.e. a worker in~~ the user undertaking **to occupy the same job** ~~in an identical or similar job, taking into account seniority, qualifications and skills~~.

~~(16) However, differences in treatment are acceptable if they are objectively and reasonably justified by a legitimate aim.~~

(16) In the case of workers who have a permanent contract with their temporary agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.

We do not need to wait until this Directive is agreed before Ireland can legislate for the equal treatment principle, in fact the vast majority of other EU states have already implemented

laws giving effect to the Equal Treatment Principle. Of course in Ireland at the moment there is nothing 'temporary' about agency work.

THE LEGAL 'COMPARATOR' FOR AGENCY WORKERS

Agency workers need to be guaranteed equal treatment with other workers in the user enterprise. Again we can look at existing legislative provisions for guidance. Both the Fixed Term and the Part Time Acts provide that the '**comparable worker'** is defined as a worker in the user undertaking occupying an identical or similar post to that occupied by the worker assigned by the agency. However the comparator used for Employment Equality legislation provides for comparisons for equality purposes to be made with 'similar', associated enterprises' and with workers undertaking **'**work of equal value' and very importantly for comparisons to be made with workers who previously occupied the position - going back over a three year period**.**

To address situations where there is a lack of a comparator because companies have either employed all of their staff through agencies or the very unwelcome development of companies establishing agencies of their own to employ their staff. Congress is seeking comparator provisions similar to those available under equality legislation.

> The Employment Equality Act 1998 provides in Section 7 that
>
> 7.—(1) Subject to subsection (2), for the purposes of this Act, in relation to the work which one person is employed to do, another person shall be regarded as employed to do like work if—
> (a) both perform the same work under the same or similar conditions, or each is interchangeable with the other in relation to the work,
> (b) the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant to the work as a whole, or
> (c) the work performed by one is equal in value to the work performed by the other, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions.

Because of delays in introducing these rights in Ireland and the move towards agency work that has been occurring over recent years Congress is recommending that the comparator be capable of being applied to past workers going back 6 years and/or to workers in similar user enterprise or sector.

It is important to point out here that we are also seeking an urgent amendment to the comparator used in equality legislation.

> (2) In relation to the work which an agency worker is employed to do, no person except another agency worker may be regarded under subsection (1) as employed to do like work (and, accordingly, in relation to the work which a non-agency worker is employed to do, an agency worker may not be regarded as employed to do like work).

We are calling for this detrimental legal interpretation of the existing 'comparator' provisions in the Employment Equality Act to be amended. It unfairly provides that agency workers can only compare themselves to other agency workers and it is providing a loophole which is encouraging equality avoidance by companies.

MEASURES TO STOP EQUALITY AVOIDANCE THROUGH THE USE OF AGENCY WORK

Last year 2007 we carried out a survey to examine job seekers perceptions and attitudes as to whether they believe that discrimination is occurring in the recruitment process through the use of employment agencies. The survey was carried out through the Congress Network of Centres and the Congress Youth Committee and specifically targeted current and recent job seekers.

280 Questionnaires were returned from around Ireland and the results were clear, over ¾ of job seekers believed that employers would use employment agencies to filter out prospective employees on a discriminatory basis. This is a scandalous situation and cannot be allowed to continue.

While there are very few cases where an employer will pointedly and overtly refuse to employ a person (under one of the nine grounds of discrimination prohibited in the Employment Equality Acts) job seekers are concerned that discrimination is being practiced in more indirect and subtle way by employers recruiting through agencies. Job seekers are concerned that during the recruitment stage, some employers are using recruitment agencies to ensure that the right "type" of person is sent to them for interview.

Interviews and jobs are not refused because the prospective employee is, for example in their 50s but rather the prospective employee is simply not sent for interview by the recruitment agency as they do not suit the company employee "profile". And concerns about discrimination are not restricted to age and gender but across all nine grounds.

Summary of Survey Results

- 76%% of people believed that there were some jobs that an employment agency would not send people for because they were a women and 55% believed that to be true for men.

- The group identified as most likely to experience discrimination were pregnant women (89%) followed closely by workers with a disability whom 87% believed would not be sent for jobs because they had a disability even though the disability would not preclude them undertaking the work involved.

- 64% believed that having children would influence the decision of an agency to send a worker for some jobs.

- 86% identified that they believed that agencies would discriminate against Irish people because of where they lived, (this is not currently a discriminatory ground protected by employment equality legislation). Discriminating on the basis of nationality is unlawful however it had a similar perception of discrimination also at 86% whereas a job seekers colour was considered to be less relevant with only 63% of people believing this would influence a decision to send someone for interview.

- 83 % of people expressed an opinion that there were jobs that an employment agency would consider unsuitable for people from the Traveller Community.

- Age was identified as an influence on the decision to send people for jobs by 85% of the respondents.

Of this first sample group, a third (32.5%) had tried to find work through an employment agency.

- 60% of these job seekers were not informed of who the agency had sent their CV to.
- While over a half (53%) were not told who the prospective employer was that they were being interviewed for.

Congress has been calling for improved legislation to combat the use of employment agencies as a means of equality avoidance. In relation to equality avoidance in the workplace we are seeking the introduction of legislation to guarantee equal pay, conditions and treatment by allowing for comparisons with employees in the user enterprise.

In relation to the recruitment process Congress believes that agencies should be (i) obliged to inform workers of the jobs that they have put them forward for and also the jobs that they were deemed unsuitable to be put forward for. Otherwise, recruitment and placement agencies are capable of being used as a mechanism through which employers may defeat the protections against unlawful discrimination in the recruitment process provided in the Employment Equality Acts 1998 & 2004.

Establishing a "right to know" what job you were/were not put forward for should be supplemented by the right to be informed about any other use the employees CV was put to. This will assist people to complain about breaches of their rights to the Equality Tribunal and allow employees existing rights to be vindicated.

WHY WE NEED A LICENSING REGIME FOR EMPLOYMENT AGENCIES

Congress is calling for the introduction of a Licensing regime for employment agencies. The type of regulation we are seeking is already in place in a number of sectors such as the Private Security industry, Tour Operators etc. The Licensing of employment agencies will provide assurance as to the standard of operation and the character of the people involved in the employment agency and this is important for employees and employers alike.

It will also provide a way to address employment rights of agency workers in a cross border context.

We are seeking a three pronged approach:

1. That all employment agencies operating in Ireland (no matter where they are based) would be required to hold a Licence, it will be an offence to operate in Ireland as an employment agency without a Licence

2. That compliance with a standard set out in a statutory code of practice would be a condition of licencing and

3. That it will be an offence for employers to use unlicenced agencies;

We are further recommending that agencies would be required to place a 'Bond' so that funds are available to secure the payment of wages owed to agency workers. The reason that licensing should require the lodgement of a capital deposit with the Department of Enterprise Trade and Employment is to ensure that there are sufficient finances on deposit to pay wages (and other associated costs) of agency workers in circumstances where an agency goes out of business. Agencies 'disappearing' with workers wages is a very real danger facing agency workers. The Irish Nurses Organisation has reported a situation where the former owner of an employment agency had gone out of business owing thousands of euro to the 21 former agency employees.

This bond is also needed to address the unfair situation that unlike all other employees, agency workers are not preferential creditors, that is unlike other employees they are not entitled to be 'paid first' where their employer is insolvent and goes out of business.

The amount required by the bond deposit should be established by reference to the annual salaries of the workers hired out by the agency. Ideally the deposit would be set to cover an average of one months salary, subject to minimum (€20,000) and maximum (€500,000) amounts.

REQUIRING A BOND WHEN LICENSING IS A COMMON PRACTICE ACROSS EUROPE

- Greece –share capital at least 176k, 2 bank guarantees for pay & social security, prior inspection, proper premises, at least 5 operating staff
- Italy – register with labour ministry, suitable premises, cover 4 regions, capital of at least €600,000
- Hungary – permanent premises, necessary competencies, collateral €4000, right to inspect
- Portugal - €74,000 guarantee, authorised by Employment and Technical Training Institute
- Belgium – authorisation from a regional Approvals Commission, no debts, some permits only for 2 year period in Walloon
- Romania – high financial guarantee, licence fee, licence lasts for 2 years but after 4 years is permanent.

Congress believes that such a provision is essential for Ireland not only to protect workers and employers but that it will also assist greatly in removing cowboy agencies and in assessing the eligibility of an agency for a licence.

A STATUTORY CODE OF PRACTICE FOR EMPLOYMENT AGENCIES

Congress is calling for the development of a Statutory Code of Practice for employment agencies. Compliance with Ireland's employment law and the CODE OF PRACTICE must be mandatory. Proof of compliance should be sought from the agency at the application for Licence and renewal stage. The aim of the Code is to stamp out unfair and unacceptable practices such as:

- agencies charging workers for any of the costs associated with their recruitment work or work placement. Many agency work contracts contain clauses allowing the agency to make deduction s from the workers wage for travel, registration fees, bogus training courses,

- agencies stopping the agency worker taking up a permanent job with the employer, again many contracts contain provisions that are detrimental to workers working elsewhere, such as penalty or "transfer fees".

- Prohibit employment agencies withholding payment from workers.

The CODE of PRACTICE would also provide for the entitlements of agency workers for example, information on the recruitment and placement process, the quality of guidance and employment matching and access to employment training. The Code would provide that agency workers are entitled to be informed of and allowed to apply for vacancies. The Code would also introduce requirements that will ensure an adequate operating standard, importantly in the area of data protection standards. It would also ensure that everyone involved in running the agency is a fit and proper person.

- No relevant criminal record; (this is particularly important in an anti trafficking context)
- Sound business practices/tax clearance /social security record etc;
- No abuse of workers rights in the past;
- Health and Safety record.
- Require agency to keep records of their activities and make these available to labour inspectorate.

WHO IS THE EMPLOYER OF THE AGENCY WORKER?

A final and vital question remains to be considered, who is the legal employer of the agency worker? In the main, across Europe it is the employment agency who is the employer, at least for the initial period. Employment contracts are with the agency and the agency is responsible for ensuring that the agency worker is given the same pay and conditions as the comparable permanent employee in the user company.

In Ireland we have a unique situation created by our common law where neither the end user nor the agency are the employer, rather that for some purposes legislation will deem the employer to be 'who ever pays the wages', usually the agency.

The Employment Agency Act 1971 which governs the operation of employment agencies in Ireland does not concern itself with the employment conditions of agency workers. Unlike other EU countries, there is no legal code covering the statutory protection of temporary agency workers. The employment rights of temporary agency workers, which are usually conditional on service qualification are extended under provisions in some (but not all) of the acts that comprise the net of statutory protection of employees.

In mid eighties a decision taken under Irish case law, *the Minister for Labour v PMPA Insurance Co. under administration,* (1986) deemed that the agency temp was not an employee of the hiring company and thus did not have the protection of legislation.

The Unfair Dismissals Amendment Act 1993 overturned this decision but only for the purposes of unfair dismissals and provided that the end hirer/user is to be considered as the employer for the purposes of unfair dismissals Acts. So for the purpose of the Unfair Dismissals Acts the employer is the person for whom the agency worker works, i.e. the end user.

However in other employment legislation – e.g. the Terms of Employment, the Maternity Protection Act 1994, Organisation of Working Time the person who pays the wages is considered to be the employer – usually the agency.

Other Acts, such as the Fixed Term Act specifically remove rights from agency workers so the issue of who is the employer does not arise.

Congress has previously proposed the following provision which would lead to a situation where the end user is the employer of the agency worker and responsible for ensuring that the worker is given their rights under the various different pieces of employment legislation.

> "Where, whether before, on or after the commencement of this Act, an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Private Employment Agency Act 200x, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract and whether or not the third person pays the wages or salary of the individual in respect of the work or service), then, for the purposes of Employment Rights Listed in Schedule 1 of this Act, after such commencement—
>
> a) the individual shall be deemed to be an employee employed by the third person under a contract of employment,
>
> b) if the contract was made before such commencement, it shall be deemed to have been made upon such commencement, and
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> c) any redress under (legislation listed at Schedule x) for the individual under the contract shall be awarded against the third person."

We have also sought to limit the amount of time that an employer can fill a post with employment agency workers, this period should be linked to the reasons for the use of agency work and should be no longer than 6 months in the previous 18 (except in circumstances where the agency workers are covering for statutory leave, in which circumstance the statutory period should apply). Otherwise there is a danger that insecure agency work will replace permanent employment based on a direct employment contract with the end employer. In any event agency workers must be protected under all employment law and must have an employer who is responsible for providing those rights and who will be responsible in the event that the agency workers rights are breached. We have recommended a system of joint and several liability. This will mean that either or both the employment agency and the end user employer will be held accountable.

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