ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL INCLUSION

EFTA Surveillance Authority
Avenue des Arts 19 H
1000 Brussels

BELGIUM

Your ref	Our ref	Date
	23/709-	5 May 2023

Request for information concerning restrictions on the use of temporary agency workers in Norway

The Ministry of Labour and Social Inclusion ("the Ministry") refers to the letter of 10 February 2023 where the EFTA Surveillance Authority ("the Authority") requests information concerning newly adopted amendments in the provisions on the use of temporary agency workers in Norway. Please find enclosed the answer to the request from the Authority.

The enclosed document is structured around a) a presentation/explanation regarding the Norwegian labour marked model and the Government's labour marked policy, b) statistics, and information regarding use of temporary agency work, and c) the justification under EEA-law. The information is categorised in chapters, and does not follow the Authority's order of questions in the letter 10 February. In addition to various explanations and analyses throughout the document, the answers to the Authority's question (1-15) will roughly be found in the following chapters:

The Authority's question	Chapter in The Ministry's attachment
1	2.1, 4.1, 4.4,
2	5
3	6.2
4	6.1
5	5.4
6	2.2
7	3.1, 3.2,
8	3.3
9	8.3
10	4.3, 8
11	4.3, 7, 8

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12	7
13	4.6
14	8.3
15	8.1

Please don’t hesitate to contact us for further information or follow up questions.

Yours sincerely

Ragnhild Nordaas
Director General

Mona Næss
Deputy Director General

This document is signed electronically and has therefore no handwritten signature

Information concerning restrictions on the use of temporary agency workers in Norway – answer to ESAs request for information dated 10. February 2023

Innhold

1 Introduction

1.1 The Norwegian labour market policy – introduction

Permanent, direct employment is a fundamental principle in the Norwegian labour market. The principle is structured around strong dismissal protection rules and limited possibilities for fixed-term and agency work. Permanent employment gives the individual employee security and predictability regarding the future work situation and income, but can also contribute to productivity, adaptability, and competitiveness for businesses - among other things as a result of investing in the employees' skills. A working life characterized by safe, permanent employment relationships benefits both the employees, the businesses, and the society as a whole.

1.2 The core of the new regulation

Before 1. April 2023, the Work Environment Act (the WEA) permitted temporary agency work in the following situations:

1. when the work is of a temporary nature
2. for work in place of another or others (substitute)
3. for work as a trainee
4. with participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Administration
5. with athletes, sports coaches, referees and other leaders in organized sport
6. by agreement with employee representatives for enterprises bound by a high-level collective agreement.

The option referred in nr. 1 was revoked as of 1. April 2023. Enterprises can still use agency workers in situations mentioned in points 2-6. In addition, new provisions introduced in 2023 permit the hiring of

7. health care personnel, and
8. specialized consultants.

The Government is also currently assessing the need for special regulations for parts of the agriculture- and events sectors. Reference is made to chapter 3 for more information.

In the construction sector in the Oslo-area it is, as of 1. April 2023, prohibited to use temporary agency workers.

Alternatives for temporary work in the construction sector, are hiring from undertakings whose object is not to hire out labour, fixed-term contracts directly in the user enterprises, and sub-contracting.

Certain transitional rules have been adopted for binding contracts until 1. July 2023.

1.3 Principal objectives of the new regulations regarding temporary agency work

The principal objective of the new regulations is to facilitate permanent employment in a two-party relationship between an employee and an employer to be used to the greatest extent possible. For the employees, this implies an increased opportunity for permanent employment, with increased security and predictability for future work and income. The regulations aim to make it more attractive and easier to recruit employees for permanent positions in the companies. It also provides a basis for better recruitment. This is valid for all sectors, and in particular for the construction industry through apprenticeship schemes and the use of skilled workers, where there are well-developed schemes in the industry and where there is a need to increase the supply of qualified labour. Recruitment of foreign workers has been necessary and important for enterprises in the construction industry. The labour market in the EEA area will continue to provide opportunities for such recruitment in the future with or without the use of temporary agency work.

Temporary agency work will continue to be used in the Norwegian labour market. However, the Norwegian Government is of the opinion that such work has the potential to displace and challenge permanent employments. Even when hired workers have a permanent employment relationship with the temporary work agency, the latter mostly acts as an intermediary. The work itself is carried out at another enterprise. In this way, a tripartite relationship arises. The Government is of the view that this tripartite relationship corresponds poorly with key regulations of Norwegian working life, through legislation and collective agreements, which are largely built around the two-party relationship. This applies, among other things, to the rules on employment protection, the health and safety structure (safety delegate services) in the enterprises and the system of employee representatives. The enterprise that hires the employee from the agency, becomes a third party with great influence. User enterprises are inter alia, closest to assessing the work performed by the hired employee, despite the fact that it is the agency that is the formal employer. Many of the factors that influence and govern the employee's everyday life will also be beyond the formal employer's control. Thus, use of agency work must not be too widespread.

1.4 Characteristics and recent developments of the Norwegian model

1.4.1 Regulation in interaction between statutory requirements and collective agreements

Key characteristics of the Norwegian working life model are the interaction between an organized working life, broad public welfare schemes and economic policy. Organized working life and collective agreements are central.

Norwegian employment law is to a wide extent subject to statutory regulations with the purpose to ensure strong employee protection. Another aspect is the strong position of

employers' organizations and trade unions. A hallmark of the labour market model is the combination of centrally regulated peace duties and procedures between the social partners, and regulations preparing for codetermination, employee participation, and negotiations at the workplace. As in the other Nordic countries, the employment legislation grants local social partners the right to derogate from statutory requirements on basis of collective bargaining agreements in several areas. Thus, this is facilitating increased flexibility for the companies, based on consultations between management and employee representatives at the local level. Reference is made to the interpretation of the «Nordic micro-model» in a report on the Nordic future of work, commissioned for the Nordic Council of Ministers: *(Dølvik, J. E. & Røed Steen, J. (2018) The Nordic future of work: Drivers, institutions, and politics, describing essential aspects of the Nordic model. TemaNord 2018:555, chapter 4.1.3.)*

Regulations in interaction between statutory requirements and collective agreements are well known also at EU level. Many directives on labor law and industrial relations allow for derogations from their provisions by collective agreement, inter alia Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union article 14, the Temporary Agency Work directive art. 5, and Directive 2003/88/EC concerning certain aspects of the organisation of working time article 17.

In Norway, there are extensive possibilities to derogate from working time regulations through agreements with trade unions at company level, and at central level for the most far-reaching exceptions. The use of temporary agency work is another such area. The fact that the right to use temporary agency work is linked to collective agreements, can thus have a positive effect on collective bargaining coverage in Norwegian working life.

1.4.2 An organized working life and permanent positions for the employees

The Norwegian labour market model depends on a high level of organization, both for workers and employers. Widespread collective agreements ensure a balancing of interests and power between the parties and a centralized, national and coordinated wage formation. The model contributes to, firstly, raising salaries at the bottom (and therefore entailing restructuring of lesser productive industries), and secondly, to moderate the highest wages, which can be invested in high productive jobs. The organized working life and the model for wage formation have resulted in a relatively high economic growth and level of welfare. To achieve these results the labour market model is highly dependent on permanent positions for workers. Only then will employers invest in skills development and produce high productive jobs.

Figures show that the unionization rate is 16 percentage point higher for permanent employees compared to temporary employees (53 per cent for those with permanent positions, 37 per cent among temporary employed. Data from Statistics Norway, Labour Force Survey Q4 2017). The average unionization rate is around 50 percent. The organization rate for employers has increased the last decades to about 70 per cent (share of employment for enterprises with membership in employers` organizations). About two thirds of the employed are working in enterprises covered by collective agreements. All

workers in the public sector are covered by collective bargaining, while the collective bargaining coverage in the private sector is about 47 per cent *(Nergaard, K. (2022). Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2020 og 2021. Fafo-notat 2022:09. in Norwegian)*. In the private sector, collective bargaining coverage has decreased over time. Some enterprises are members in employers`organizations without having collective agreements.

There has been a significant decline in union density and collective bargaining coverage in the construction sector. Collective bargaining coverage was reduced from 50 to 40 per cent over the years 2001-2018. There are no overall figures or estimates on trade union participation among temporary agency workers. Information indicates that unionization rate is low. Collective agreements are only exceptionally found in temporary work agencies.

The Norwegian Government is concerned about a decreasing trend in the coverage of collective agreements in Norway, and with the impact this will have, both for employee protection and for safeguarding the Norwegian model of tripartite cooperation.

Both on national, Nordic, and European level there is a high focus on measures for strengthening an organized working life and the social dialogue. Reference is made inter alia to the Proposal for a Council Recommendation on strengthening social dialogue in the European Union. Decline in collective bargaining coverage represent a common challenge and will also require measures at state level to support an organized working life. Reference is made to a paper prepared for discussion at the Nordic Labour Minister meeting, 22 November 2022 *(Dølvik, J. E. (2022). Strengthening the Nordic working life model – a precondition for successful transition to the future of work. Background paper for Nordic Labour Minister meeting.)*[1]*:*

> In international literature, it is well established that state support is indispensable for the maintenance of well-functioning CB systems with high coverage (Traxler et al., 2001). Besides legal protection of the freedom to organize and engage in collective bargaining in accordance with the European Convention of Human Rights, ILO-conventions and other international law recognized in the EU treaties, such support often includes arrangements for dispute resolution, making CAs generally applicable, and tripartite cooperation in labour market and social policy issues. Another lever in the Nordic context is so-called semi-dispositive employment regulation allowing actors bound by CAs to negotiate exemptions from the law, typically pertaining to rules regarding working time, use of temp agencies, subcontractors or other non-standard contracts. Providing incentives for engagement in CB, this is in the Nordic context most prominently seen in Sweden, where most employment protection law can be exempted from through CAs, opening for negotiated flexibility.

[1] https://www.fafo.no/images/pub/2022/10374.pdf

2 Overview of the laws and regulations on temporary agency work

2.1 General overview of the laws and regulations

According to Norwegian employment law, employees shall as a main rule be appointed permanently, cf. the Working Environment Act ("WEA") section 14-9 (1). Regulations regarding hiring of employees were adopted in Norwegian employment law for the first time in 1971. At that time, the hiring out of employees was, with certain exceptions, prohibited, cf. section 27 of the Labour Market Act in force at the time. The regulation gave the Ministry the authority to grant dispensations from the prohibition. The prohibition to hire out employees was justified on the grounds that the undertakings hiring out employees did not provide the labour market with any new workforce/manpower, but recruited employees from their current positions by offering higher wages. The employees were often hired out to the same undertakings that they used to be employed by, with the difference that the employer had to pay more for the workforce. However, the hired-out employees did not receive the same benefits as the permanently appointed employees, such as collective bargaining agreements, pension schemes etc., cf. Ot.prp. nr. 53 (1970–1971) page 2.

The prohibition against hiring out employees was lifted in 2000. The Ministry referred to changes in the labour market since the 1970s as grounds for lifting the ban. According to the preparatory works, the prohibition and dispensations were also difficult to practice and enforce, cf. Ot.prp. nr. 70 (1998–1999) page 28. As from 2000, conditions for hiring employees from temporary work agencies were regulated in the WEA. According to section 55 K of the WEA of 1977, hiring of employees from temporary work agencies was allowed on the same conditions as for temporary employment: work of a temporary nature, temporary replacement for another person, trainees, participants in labour market schemes, and work within sports. The provision also allowed undertakings bound by a collective agreement to enter into an agreement on the use of temporary agency work with the employee representatives that represent a majority of the employees in the category of workers to be hired in. The above-mentioned conditions for hiring employees from temporary work agencies is now regulated in the WEA of 2005 section 14-12.

The main reason given in the preparatory works for having essentially the same conditions for temporary employment and hiring of employees from temporary work agencies, is that these are alternative ways for the undertakings to cover temporary needs for labour. A considerably wider scope for hiring employees from temporary work agencies than using temporary employment, may lead to circumvention of the regulations on temporary employment. The relatively strict conditions for temporary employment and use of temporary agency work, must be viewed in the context of the Norwegian labour market model. The main rule of permanent employment and restrictions on the use of temporary employment is a fundamental part of the Norwegian labour market and expresses the high level of employment protection in Norway. This is in line with both Directive 1999/70/EC (fixed time work) and Directive 2008/104/EC (temporary agency work).

Directive 2008/104/EC ("TAWD") was implemented in Norwegian law with effect from 2013. The Ministry considered that the restrictions on the use of temporary agency work, cf. the WEA section 14-12, could be justified on the grounds of general interest. The restrictions on the use of temporary agency work were considered necessary to ensure a well-functioning labour market, to protect temporary agency workers, as well as preventing circumvention of the rules on temporary employment. The Ministry concluded that it was not possible to achieve similar protection by means of less invasive measures. The restrictions were considered proportional, and therefore in line with the directive, cf. Prop.74 L (2012–2013) pp. 43–46. The Ministry did only assess whether the existing legislation in Norway was in line with the directive. The Ministry did not consider whether the directive also allows stricter restrictions on the use of temporary agency work.

The principle of equal treatment was implemented in the WEA section 14-12 a, cf. also 14-12 b and 14-12 c.

The WEA section 14-12 (2), which allows employers bound by a collective agreement to enter into an agreement on the use of temporary agency work with the employee representatives, was amended in 2019. From 2019, the regulation applies to employers that are bound by a collective agreement entered into with a trade union with the right to make recommendations under the Labour Disputes Act, i.e., trade unions with more than 10,000 members. The amendments were based on a goal of reducing the use of temporary agency contracts, cf. Prop. 73 L (2017–2018) and Innst. 355 L (2017-2018). The amendments were also implemented in order to prevent abuse of the right to enter into agreements on the use of temporary agency work. According to the provision, the employee representatives must represent a majority of the employees in the category of workers to be hired in. The employee representatives do not however have to be organized in a trade union. The provision gives a wide access to use of temporary agency work, as long as the agreement with the employee representatives is time limited. The provision does not provide a maximum time limit on the length of such agreements. Reference is also made to chapter 6.1 below regarding the use of this provision.

In 2019, a definition of permanent employment was implemented in the WEA section 14-9 (1). The amendment was introduced to prevent a widespread practice in the temporary work agencies, where the employees were permanently employed, but without a guaranteed salary or minimum scope of work. The definition states that "permanent appointment shall mean that the appointment is continuous and not time-limited, that the provisions of the Act concerning termination of employment apply and that the employee is ensured predictability of employment in the form of a clearly specified amount of paid working hours".

The provision does not require the employees to be ensured a certain percentage of full-time equivalents. Nor does the provision entitle employees employed by temporary work agencies to salary between assignments. There is therefore no basis for making any exceptions from the principle of equal treatment, cf. Directive 2008/104/EC Article 5 (2). Thus, employment contracts in temporary work agencies must contain the same terms as in other undertakings. Employees shall as a main rule be appointed permanently. Temporary employment can be used if the conditions in section 14-9 are met.

From 1 July 2020, the Norwegian Labour Inspection Authority was given the authority to supervise and enforce the rules and regulations on temporary work agencies, cf. section 18-6 of the WEA, cf. Prop.61 LS (2019–2020). Surveys indicate that violations of the regulations have occurred, and that the employees employed by temporary work agencies do not follow up on these violations themselves. In cases of violations, the Labour Inspection Authority may order the illegal hiring of workers from temporary work agencies to cease, or that the temporary work agency must provide conditions that imply equal treatment. The Labour Inspection Authority has however pointed out that controls are challenging. This is due to the fact that the laws and regulations require discretionary assessments, particularly as to whether the work is of a temporary nature. Cf. chapter 4.2 for a summary of a report from the Labour Inspection Authority on inspections related to compliance of equal treatment, and to what extend the user companies controlled the conditions for use of temporary agency workers.

Consequences of unlawful hiring of employees from temporary work agencies are regulated in section 14-14 of the Working Environment Act. In the event of a breach of the provisions of section 14-12, the court shall, if so demanded by the hired employee, decide that the hired employee has a permanent employment relationship with the hirer. In special cases, the court may nevertheless, if so demanded by the hirer, decide that the hired employee does not have a permanent employment relationship if, after weighing the interests of the parties, it finds that this would be clearly unreasonable. The hired employee may also claim compensation from the hirer.

Trade unions that have members in an undertaking that has hired employees from a temporary work agency may also bring proceedings in their own name concerning the legality of such hiring, cf. section 17-1 (5).

Violations of the rules on temporary agency work are not subject to criminal liability under the WEA, neither for the employer nor the employee, cf. section 19-1 (4) and 19-2 (4).

2.2 Work of a temporary nature – the scope of section 14-9(2)(a)

Section 14-9 (2) (a) of the Working Environment Act permits temporary employment if the work is "of a temporary nature". Until 1. April 2023, this was also a legal base for the use of workers from temporary agencies, cf. former section 14-12 (1). What is considered work of a temporary nature is described in more detail in the preparatory works. According to the preparatory works, “temporary nature” means that the work must be time limited. The work must have a fairly clear work-related delimitation and a natural termination, cf. Ot.prp. nr. 49 (2004–2005) page 214. The provision does not provide a basis for temporary employment (or earlier for use of temporary agency work) if there is a permanent need for labour.

Both differences in the nature of the work and differences in the workload can give basis for temporary employment pursuant to the provision, cf. Prop.39 L (2014–2015) page 118.

Seasonal work is normally considered to be work of a temporary nature, cf. Ot.prp.nr 41 (1975–1976) page 71. However, if the season continues during large parts of the year, the

courts may deem the work not to be of a temporary nature, cf. LE-2014-84084, where the Court of Appeal found that temporary employment was not permitted to cover labour needs during a golf season that lasted approximately 9 months.

General or steady variations in new orders or general uncertainty related to future labour needs are not sufficient to be considered work of a temporary nature, cf. Ot.prp. nr. 49 (2004–2005) page 214. The fact that the work is organised in a project or as a stand-alone assignment is not sufficient. Requirements must be set that can justify a temporary need beyond the fact that the work is organised in a project. It must be a specific work, and the employer must have grounds to believe that the employee is only needed on a temporary and not permanent basis. If the company's work is organised through repeated projects, and the same expertise is requested in the various projects, the provision will in principle not give basis for temporary employment. If, on the other hand, these are projects that require special expertise that the enterprise does not normally request, or larger and rarer projects that require staffing beyond the ordinary, the provision may give basis for temporary employment, depending on the circumstances, cf. Ot.prp. nr. 49 (2004–2005) page 214.

In case law, it has been established that the provision shall be interpreted strictly, cf. Rt. 1985 p. 1141, but that it does not preclude temporary employment when personnel with special formal qualifications are necessary, and no qualified persons have applied for the position.

3 Exceptions and transitional rules

3.1 Health care

Health care personnel shall as a main rule be employed permanently and directly. While amending section § 14-12 (1) of the WEA, the Government has however adopted a narrow exception regarding the hiring of health care personnel, cf. section 3 of the Regulation on hiring from temporary work agencies. The exception is based on the consideration of ensuring proper operation of the health care services in Norway. The central and local governments have a statutory obligation of providing adequate healthcare services for the population, cf. section 2-2 of the Specialist Health Service Act and section 4-1 of the Health and Care Service Act. The state and municipalities shall ensure that personnel who perform health care services are able to comply with their statutory duties, and that sufficient professional competence is ensured in the services. To be able to provide proper and adequate health care services, it is crucial that enterprises in the health care service have access to sufficient health care personnel, and that the personnel have the professional qualifications necessary to carry out the work. Lack of qualified health care personnel may affect patient safety. Acute crisis situations may not be handled properly, or scheduled operations may be postponed due to lack of personnel.

The adopted exception states that hiring of health care personnel regardless of the terms of section 14-12 (1) of the WEA is permitted in order to ensure proper operations of health care services, if the work is of a temporary nature, cf. section 14-9 (2) (a). If the staffing

needs can be met in other ways than by hiring employees from temporary work agencies without compromising proper operation of the health care services, the provision does not give basis for temporary agency work. Possible alternative ways of meeting staffing needs may be direct permanent or temporary employment, reassignment of personnel, part-time employment, etc. The fact that hiring of employees from a temporary work agency is necessary to ensure proper operation of the health care service must be documented by the employer in case of inspection by the Labour Inspection Authority.

The exception is not limited to specific types of health care personnel. However, the exception will only be applicable on hiring of health care personnel necessary to ensure proper operation of the health care service.

The fact that the work must be of a temporary nature means that the work must be time limited. The work must have a fairly clear work-related delimitation and a natural termination. This will typically be the case in the event of unforeseen work peaks such as major outbreaks of diseases and general seasonal variations. Prior to deciding whether it is necessary to hire health care personnel from a temporary work agency, the employer/health care enterprise shall discuss the need for temporary agency work with the employee representatives. To prevent abuse of the exception, the grounds for the use of temporary agency work must also be documented by the health care enterprise when requested by the employee representatives. Both the basis for, and the necessity of the use of temporary agency work must be documented in writing.

3.2 Specialized consultants

The Government has also adopted an exception from section 14-12 (1) regarding the hiring of advisers and consultants with special expertise, cf. section 3 of the Regulation on hiring from temporary work agencies. The exception is based on the consideration of ensuring that private and public undertakings have access to special expertise, for example in connection with development and restructuring processes, including ICT. In development and restructuring processes, the undertakings often need to engage external advisers with expertise and experience that the company itself does not have. Sub-contracting is not necessarily a suitable form of contract within this market, partly because projects can be desired to be carried out in close cooperation with the client, and it is not always desirable or possible for the result to be determined in advance. Some contracts will therefore be organised by hiring such expertise from a consultancy company, and the consultancy companies may in some cases be regarded as a temporary work agency.

Hiring of advisers and consultants with special expertise will not challenge the basic staffing of the hiring company, as it is often a matter of obtaining expertise that the company itself does not possess, and only for a limited period. The advisers and consultants are often highly educated with high salaries, and less vulnerable to the negative effects of temporary agency work. The fact that expertise is shared across industries, sectors, and businesses, does also have a societal value in itself. By being employed by a consultancy company, the advisers and consultants will have a professional environment for maintenance and further

development of their expertise, which they would not have received to the same extent if they had been employed directly by the hiring company.

The exception is meant to be narrow. Hiring of advisers and consultants from temporary work agencies is only allowed if certain conditions are met. The exception permits hiring of employees with special expertise who are to perform advisory and consultancy services in clearly delimited projects. The fact that the employee must have special competence means that the employee must possess specialised knowledge or expertise within a given subject area. Specialist competence can be acquired in various ways, such as relevant education and prior learning and work experience.

“Consulting and consultancy services” means delivery of specialized knowledge and advice within a specific field or subject area. The provision is not limited to consulting within certain industries or fields. The provision could, for example, cover ICT advisers, technological advisers, business advisers, lawyers, audit and tax advisers, architects, and advisers in HR and recruitment.

The fact that the employee must perform work in a “clearly delimited project” means that the work to be performed by the employee must differ from what the hiring company normally does. However, a requirement that the work must deviate from ordinary operations does not mean that the hiring company cannot have employees with the same professional background as the employee hired from a temporary work agency. For example, an enterprise must be able to hire ICT experts to assist in a digitalization process, even if the company has employees with ICT expertise who perform ordinary operation of the enterprise's ICT systems. However, if there is a permanent need for specialist expertise, the employee should be employed directly.

To prevent abuse of the exception, the grounds for hiring advisors or consultants from a temporary work agency must be documented by the hiring company when requested by the employee representatives. Both the basis for and necessity of the use of temporary agency work must be documented in writing.

3.3 Substitute for a farmer in agriculture (“Avløsning”)

The amendment to section 14-12 (1) of the WEA is granted deferred entry into force until further notice with regard to farmers’ need for replacement/substitute. The transitional rule does not apply to agriculture in general, but only in situations in Norway called "avløsning". "Avløsning" is a special replacement scheme designed to ensure that the farmer has the same opportunity for vacation and leisure time as others, as well as help in case of sickness, etc. In Norway, farmers can apply for support from the state to cover the costs with such replacement. This must apply to tasks that the farmer normally performs himself/herself. Farmers get a refund of expenses up to a maximum amount calculated for each farm. The amount calculated for each farm is not payable until the hiring expenses are legitimized, in order to avoid misuse of the scheme. The payments are only made if the farmer can document actual expenses for hiring help.

One way to provide such substitutes, is by hiring a substitute (avløser) from a supplier enterprise in Norway called "avløserlag". Some avløserlag are owned by the farmers themselves. Avløserlag are often regarded as temporary work agencies under Norwegian law.

In addition to the support schemes that partly finance the farmers use of short term replacement, there is also a support scheme for avløserlag that on short notice shall be able to give farmers help when they suddenly are struck down by illness or an injury.

All the mentioned support schemes are a part of the Agricultural Agreement between the Norwegian Government and the farmers organisations.

There is a joint desire from the Norwegian Government, the farmers organisations, and the social partners, to ensure a continued effective and well-functioning replacement scheme for Norwegian farmers. At the same time, there is a need for a review of the regulations, including various older regulations that may be unclear. It must be assessed in more detail whether there is a need for special regulation or exemptions. Until this has been fully assessed, deferred entry into force in this area has therefore been granted.

The scope of a possible final exception has not yet been decided. The Ministry is in the process of examining these issues. A meeting has also been held with the social partners. Proposed amendments will be circulated for public consultation.

3.4 Events

The amendment to section 14-12 (1) is also granted deferred entry into force until further notice with regard to hiring of employees for short-term arrangements/events. This transitional rule was adopted as a result of a remark by the majority of the Labour and Social Committee of the Norwegian Parliament during their processing of the legislative proposals from the Government, cf. Innst. 108 L (2022-2023). The majority of the Committee requested the Government to assess, together with the employers' organisations and trade unions, whether or not the arrangement/event industry needs an exception for time limited hiring from temporary work agencies. The Committee points out that after the proposition came to the Parliament, input was received from companies within the arrangement/event industry regarding this matter, which were not submitted during the Government's consultation process. According to the inputs received, rigg staff, stage-, light-, and sound engineers etc. are often hired from temporary work agencies. The need for staffing is often present only for a very short period of time, e.g., a couple of days, and staffing needs can vary from a few workers to dozens.

The Ministry is currently assessing whether there is a need for an exception and has therefore not yet decided whether an exception will be adopted.

4 Assessments of the effect of the amendments

4.1 Compliance of equal treatment

According to a report from Fafo from 2016, the equal treatment provisions introduced in 2013 contributed to more equal treatment between temporary agency workers and permanent employees (*Alsos, K. et al. Sjatteringer av likhet. Fafo-rapport 2016.15. English summary)*. However, there were large variations in the agencies' own follow-up and the user companies' control of the working conditions for the temporary agency workers. Interviews with representatives at the management level at temporary work agencies showed that they were seldom subject to compliance checks by customers (the user companies). Where hiring firms do check compliance, it is primarily centred on the wage and working conditions that employees receive. However, many companies only control the terms in the contracts, or trust that the temporary agencies are paying in accordance with the terms. According to the report, risk of violations was more present and severe in industries where the volume of temporary labour is high, and where the temporary agency workers often are unskilled and without knowledge about Norwegian working conditions. The investigation also revealed that user companies in the construction sector controlled compliance in a much lesser degree than user companies in the shipping and shipbuilding industry.

A preliminary study on the implementation of the equal treatment provisions shows an increase of wages the first year after the reform *(Hoen, M., Markussen, S. & Strøm, M. Institute for Social Research (unpublished).* Before the directive was implemented, temporary agency workers had roughly 8 per cent lower wages than comparable direct employees. In the first year after the implementation of the directive, wages increased by 2.7 per cent relative to workers not employed in a temporary work agency. This is a clear improvement, but not enough to close the wage gap. The results were driven by immigrants, indicating that the new regulation was efficient in improving their wages. The use of temporary agency work was reduced the first years after the reform. Temporarily, the user companies reduced their demand for temporary agency work due to increased costs. In some industries, there were also an effect caused by business cycle fluctuations and declining oil prices. From 2016 onwards, hiring of temporary agency workers increased in most industries.

4.2 Report on inspections from the Norwegian Labour Inspection Authority

From 1 July 2020, the Labour Inspection Authority was given the authority to supervise and enforce the rules and regulations on temporary work agencies, cf. chapter 2.1.

The Norwegian Labour Inspection Authority published a report in February 2023 (in Norwegian) summarizing inspections on compliance of equal treatment and to what extend the user companies controlled the conditions for use of temporary agency workers, cf. chapter 8.4.1 for a more detailed analysis.

The report is based on 925 inspections carried out in 2022, about one third in temporary work agencies and two thirds in user companies. On an average, one or more cases with breaches of regulations were exposed in 58 per cent of the inspections. The breaches of regulations were followed up with at least one reaction from the Labour Inspection Authority in 45 per cent of inspections. There was a higher proportion of breaches of regulations in the user companies than in the temporary work agencies. Most inspections have been carried out concerning use of temporary agency work in the construction sector, where the Labour Inspection Authority found breaches of regulations in 67 per cent of the inspections. Secondly, in manufacturing industry there were breaches of regulations in 66 per cent of the inspections. Inspections have also been carried out in other industries: Wholesale and retail trade, repair of motor vehicles, hotels and restaurants.

Temporary work agencies with activity in Norway must be registered with the Norwegian Labour Inspection Authority, and it is only permitted to hire workers from registered companies. Breaches of this regulation was found in 22 per cent of the inspections where the matter was controlled. The inspections showed that the user companies generally used registered temporary work agencies. However, there were a number of companies that did not know this provision and lacked procedures for control.

According to the WEA, workers representatives must be consulted about the use of temporary agency workers in the enterprise. In 35 per cent of the inspections where the matter was controlled, the Labour Inspection Authority found breaches of the regulation. Many of the representatives from the enterprises expressed that they have ongoing talks about use of temporary agency workers with their workers representatives, but that talks are often not formalized in minutes or protocols.

The Labour Inspection Authority also controlled the compliance with the legal conditions for use of temporary agency workers in the user companies. The Labour Inspection Authority concluded that the provision on using agency workers as a substitute did not represent challenges for the user companies. However, the understanding of «work of a temporary nature» varied. In many cases, the basis for use of temporary agency workers was seasonal variations. In some cases, it was due to a shortage of labour, and in some cases the representatives from the companies explained that the temporary agency worker did not want to be employed directly in the company. The Labour Inspection Authority concluded that many user companies did not have a clear understanding of the scope of the term «work of a temporary nature». The Labour Inspection Authority found it difficult to control to which degree the user companies complied with regulation, among other things because the companies lacked documentary proof of their own assessments. The Labour Inspection Authority exposed breaches of regulation concerning hiring of either specific employees or a specific group of employees, in 17 per cent of the inspections where the matter was controlled. In general, they found few cases of what they perceived as obvious and/or gross violations, or what they perceived as gross exploitation of employees.

The Labour Inspection Authority found that the temporary work agencies overall complied with the equal treatment regulations. In 15 per cent of the matters controlled, they found breaches caused by the temporary work agencies. In 28 per cent of the controls, the agencies

lacked routines and documentation on following-up the regulations. 55 per cent of the user companies controlled, had no routines and documentation regarding following-up on breaches of the legal basis.

4.3 General compliance of regulations

Certain surveys have been carried out, but there have been few systematic investigations on the compliance of the regulation of temporary agency work. A survey to employers indicated that between 23 and 36 per cent had stated reasons for using temporary agency workers that appeared to contravene with the legal conditions. The analyses do not involve a legal assessment and can therefore only be used as an indication of the proportion that are violating the regulatory framework. The survey was published in a report from Fafo on contract from the Ministry of Labour and Social Inclusion (*Svalund, J. et. al. Arbeidstakeres håndheving av regler for midlertidige ansettelser og innleie. Fafo-rapport 2019:38. English summary. The report has been followed up with an article: Alsos, K. & Svalund, J. (2022). Enforcing rules regulationg the use of temporary positions in Norway: A matter of exit, voice or silence? In Economic and Industrial Democracy 1-17, 2022).*

In the same survey, Fafo conducted interviews to shed light on how, and to what extent, employees follow up on cases concerning possible breaches of the regulations. Here it emerged that many people are reluctant to raise such questions in fear of losing future assignments. In those cases where a follow-up actually took place, it was usually with the support of a trade union. Fafo also interviewed trade union officials to get their opinion on why temporary agency workers seldom or never contact the union officials in the user company. The union officials mentioned that the two most important reasons are that the temporary agency workers are not aware of the provisions, and that they are afraid of losing work assignments. Alsos & Svalund points out that while the regulation of fixed-term contracts and agency work is rather strict in Norway, the limited bargaining power of many of the employees holding such contracts, combined with the lack of third-party sanctioning, means that the regulations in practice are much more flexible.

According to the WEA, workers representatives must be consulted about the use of temporary agency workers in the enterprise. A survey conducted among companies in 2016 showed that one third did not conduct such consultations (*Nesheim, T. SNF Arbeidsnotat 7-2017. In Norwegian)*. The recent report from the Labour Inspection Authority confirmed these results.

In the public procurement sector, several contracting authorities are controlling their contractors regarding the legal basis for using temporary agency work. Statsbygg is among the public enterprises that regulate the use of temporary agency work in their contract provisions with suppliers. In 2020, Statsbygg carried out a survey on how contractors on their projects used temporary agency work. Only half of the contractors could document a legal foundation for such use. Statsbygg's experience is that such legality follow-up requires significant resources and specialist expertise.

Proba Samfunnsanalyse has carried out a survey on how public developers monitor the use of temporary agency work on their projects *(Proba (2022). Offentlige byggherrers bruk og oppfølging av innleie fra bemanningsforetak Rapport 2022-02. In Norwegian).* Their report showed that many builders monitor the total extent of temporary agency work, but that more extensive control of the legality is done to a varying and sometimes limited extent.

4.4 Assessment of changes in the Working Environment Act 2019

Until 2019, the standard employment contract used in the temporary work agencies, was called "permanent employment without guaranteed salary". It did not provide a guaranteed minimum scope of work or income for the workers and was not considered to provide a real permanent position. In 2019, a new, general definition of permanent employment came into force, cf. chapter 2.1. According to the new definition, the employee must be ensured predictability of employment in the form of a clearly specified amount of working hours.

In addition, the possibility of making agreements with local employee representatives beyond the legal conditions for hiring, was limited to undertakings bound by collective agreements with a trade union with more than 10,000 members.

The Institute for Social Research has evaluated the changes the first year after the implementation *(Strøm. M & Wentzel, M. Innleie og forutsigbarhet for arbeid. En evaluering av endringene i arbeidsmiljøloven 2019. ISF-rapport 5:22. English summary)*. The total share of employees working in a temporary work agency decreased from 2.15 per cent just before the reform to two per cent in the fourth quarter of 2019. The decline was largest in crafts and non-educational occupations, and in the Oslo and Viken regions. The average work hours for temporary agency workers declined, much of it due to an increase in contracts with agreed working hours below 10 per cent and between 10 and 20 per cent. Figures from the accounts showed that companies' total expenses for hiring/subcontracting did not decrease even if the number of temporary agency workers decreased. This indicated that companies increased the use of for example subcontracting instead of hiring temporary agency workers. Medium-sized companies in the construction industry differed somewhat from the average with a slight decrease in the share of hiring and/or subcontracting. This decline was due to increased use of direct employment.

4.5 Risk-assessment in construction sector

According to reports from the co-operation between the Police, Tax Authority, Labour Inspection Authority and the Norwegian Labour and Welfare Administration, the building- and construction sector has for a long time been a particularly vulnerable industry regarding workplace crime *(Annual report on joint efforts to tackle work-related crime 2022. In Norwegian)*. Many of the players in the industry operate in the black economy, and the workers are often unskilled migrant workers from Eastern Europe. The crime scene mainly concerns the use of illegal labour, tax and duty crime and social security fraud. The market players behind it often use unskilled, foreign, and temporary agency workers and commit employment-related crime and fraud.

4.6 Assessment of consequences of new regulations

An impact assessment of the proposed new regulations was presented in the consultation paper, issued in January 2022. Some of the consultative bodies, including the Norwegian Better Regulation Council (Regelrådet), remarked that the assessment of the consequences was insufficient. The proposition for the Parliament, issued in June 2022, also contained an impact assessment on economic and administrative consequences of the proposed regulation. In this assessment, the Government points out that the principal objective of the new regulation is to facilitate permanent employment in a two-party relationship between an employee and an employer. Thus, a desired consequence of the proposals will be that temporary agency work should be used to a lesser extent. For the employees, this means an increased opportunity for permanent employment, with increased security and predictability for future work and income. A high degree of permanent employment can also contribute to more productivity, adaptability, and competitiveness in the business sector, among other things as a result of investing in the employees' skills. The regulations aim to make it more attractive and easier to recruit employees for permanent positions in the companies. It also provides a basis for better recruitment to the construction industry through apprenticeship schemes and the use of skilled workers, where there are well-developed schemes in the industry and where there is a need to increase the supply of qualified labour. Recruitment of foreign workers has been necessary and important for enterprises in the construction industry.

For some employees, work through temporary work agencies can be helpful as a gateway to the labour market. The new regulations may constitute a reduced possibility for them. In many situations, hiring of temporary agency workers will be a solution to temporarily replace an employee who is absent, and thus covered by the provision on substitutes, which has not been changed. The regulation of fixed-term contracts is also unchanged. In general, increased possibilities for permanent employment, will strengthen the jobseekers' opportunities to achieve a lasting and permanent connection to working life.

The regulation will entail a reduction in the opportunities to use temporary agency workers. However, in addition to increase permanent employment in their own business, the companies still have possibilities to use fixed-term direct employment if the conditions for this are met. Seasonal variations can be met through other flexibility mechanisms that the legislation allows for. A significant part of the enterprises can enter into a written agreement on hiring temporary agency workers regardless of the conditions in WEA section 14-12 (1), cf. chapter 4.2. If it is not relevant or possible to enter into such agreements, the regulation will represent a reduction of some of the flexibility for enterprises. A common practice in the use of temporary agency workers is to temporarily replace an employee who is absent. This possibility has not been changed. Finally, in our view, there will be an increasing awareness amongst the enterprises of, and use of, the provisions on temporary employment, cf. WEA section 14-9.

4.7 Survey among temporary agency workers

We have recently received some information about the views of workers affected by the new regulations. Fellesforbundet (The United Federation of Trade Unions) organizes workers in manufacturing, construction, and several other industries, including some temporary agency workers in these industries. Preliminary results from an ongoing survey from Fellesforbundet among temporary agency workers with permanent residence outside Norway, shows that 90 per cent of the workers wish to continue working in Norway. About two thirds will continue in the temporary work agency, and close to one third will seek permanent positions in other companies. 60 per cent of these workers have a full time (over 80 per cent), permanent position in the temporary work agency, while 24 per cent have a temporary contract. More than one third of these workers have been hired to the same user companies for more than three years. Many of the workers experience uncertainty about when they have work and find it difficult to make plans for the future. The preliminary results from the survey are based on answers from temporary agency workers in the offshore and shipbuilding industry, but it will be updated with responses from workers in the construction sector. These organized workers are with a few exceptions employed in temporary work agencies with a collective agreement.

5 Information and statistics on the development of the use of temporary agency workers

5.1 Limitations on statistics

There are no complete statistics on the use of temporary agency workers. The information and statistics available are based on reports on hiring from the temporary work agencies, but the information must be discussed based on an overall assessment and compiled from several data sources: Statistics Norway's register based employment statistics, Statistics Norway`s statistics on business services and expenses for temporary workers, as well as statistics from the member companies in the employment service industry in NHO Service og Handel (Norwegian Federation of Service Industries and Retail Trade). The last-mentioned includes about 80 per cent of the traditional part of this industry. We refer to Fafo-notat 2021:17 *(Nergaard, K. (2021). Omfanget av inn- og utleie i norsk arbeidsliv. in Norwegian)* for a detailed assessment of the methodical challenges and limitations on measuring volume and development on the use of temporary agency workers.

Statistics are not available on the exact use of the different legal options for temporary agency work. Employers are neither requested to provide information on the legal foundation for use of temporary employment, cf. Section 14-9 (2) a-e in WEA, nor on the use of temporary agency work, cf. Section 14-12 (1) in WEA.

Statistics Norway has published a paper *(SSB-notat 2022/39 – in Norwegian)* summarizing statistics on hiring from temporary work agencies and giving a description on possibilities and challenges related to produce a more accurate statistics (on contract for the Ministry of Labour and Social Inclusion). So far, there has been no further development of statistics.

On the EFTA Surveillance Authority`s request for information, Fafo has been helpful with comparing and updating of the available data.

5.2 Development on the use of temporary agency workers – in general

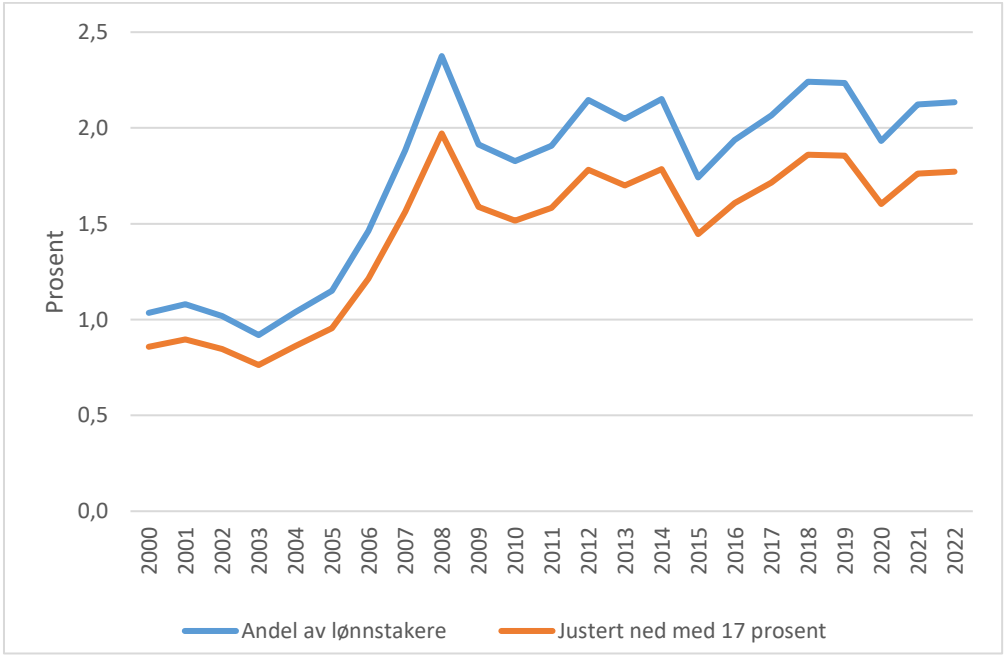
There has been a significant growth in the use of temporary agency workers in recent decades, with a pronounced increase after the EU Enlargement from 2004 and further years.

The growth has been driven mainly by migrant workers from Eastern Europe. According to Fafo, non-resident immigrants make up about one third of those employed in the industry. The activity in the industry is sensitive to cyclical changes.

Compiled figures from Statistics Norway and the industry organization for temporary work agencies in NHO Service og Handel show a sharp increase in the years following the EU enlargement, a drop after the finance crises in 2008-2009 and after the reduction in oil and gas prices in 2014, followed by an increase until 2019. In 2020, there was a general decrease in hiring from temporary work agencies as a result of covid-19. Statistics from the temporary work agencies for 2021 and 2022 showed an increase in hiring to all sectors except construction.

Fafo has presented updated figures for the period and estimate a total extent of temporary agency workers of approximately 1.7-1.9 per cent of the employed. Figure 5.1 is based on information from Statistics Norway. Information from NHO Service og Handel shows a similar pattern and development. According to their data from member companies in the industry, the extent of temporary agency workers was 1.6 per cent of total employment.

Figur 5.1 Employed workers in temporary work agencies as share of total wage-earners. Per cent.



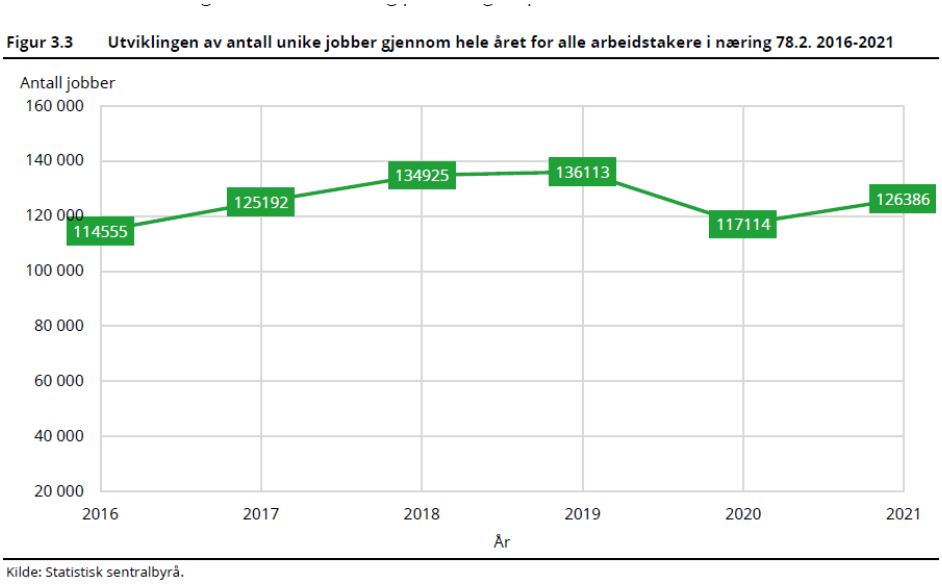
Yellow line = Adjustment for activities in the temporary work agencies which are not hiring of labour (administration, recruitment services etc. Calculated to 17 per cent of employment in the agencies.)

Source: Fafo-notat 2021:17. Updated figure. Based on registerbased employment statistics from Statistics Norway.

A different approach has been to analyse accounting data for Norwegian companies concerning the expenditure on hiring from temporary work agencies and subcontracting companies. A report from the Institute for Social Research showed that hiring and/or subcontracting accounted for just under 6 per cent of the companies' total labour costs in 2005, increasing to just over 8 per cent in 2019 *(Strøm, M. et. al. (2021). Utsetting og atypisk arbeid i foretak. Sammenheng med lønnsomhet, lønn og direkte ansettelser i perioden 2005-2019. ISF-rapport 2021:7 English summary)*. The use is higher in the construction sector, where expenses for hiring/subcontracting on average per company amounted to around 19 per cent of their labour costs. In this survey, it has not been possible to separate the use of hire and contract from each other because they are entered in the same chart of accounts. From 2005 the increased share of hiring/subcontracting was negatively related to the share of directly employed workers. This levelled off over the period, and in recent years there has been no such substitution of direct employees for hiring/subcontracting. However, there has also been a positive correlation. According to the researchers this indicates that growth in enterprises with a lot of hiring / subcontracting is carried out by means of increased hiring/subcontracting and not at the same time more own direct employment.

Figure 5.2 includes all unique jobs in temporary work agencies throughout the year 2016-2021 (based on new detailed register data). When the whole year is the reference period, there were just over 126 000 unique jobs in temporary work agencies in 2021, an increase of around 11 per cent from 2016.

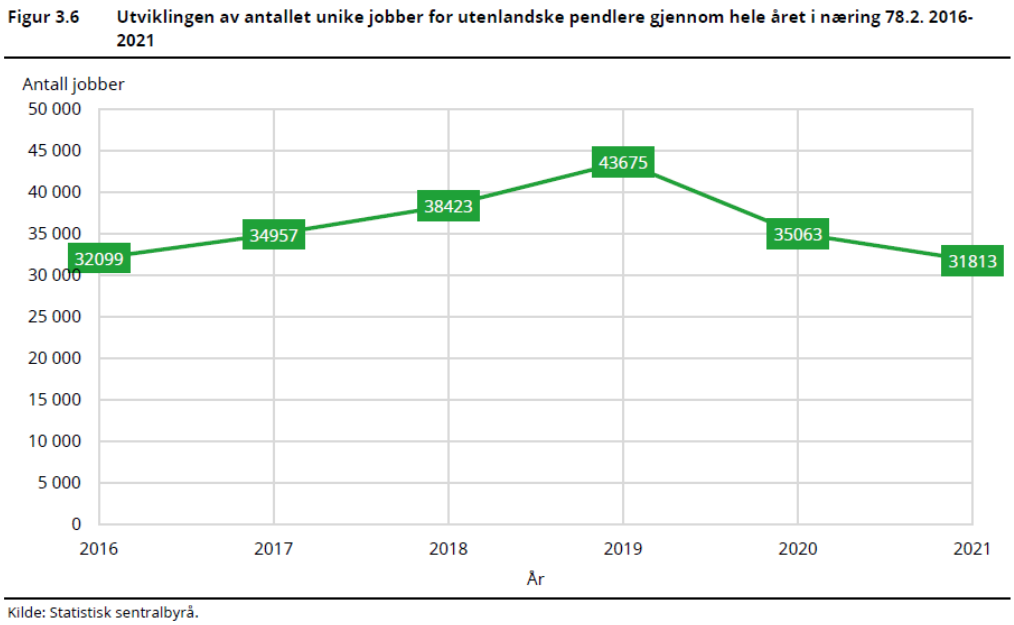
Figur 5.2 Figure 2: The development of unique jobs throughout the year for all employees in temporary work agencies.



Source: Statistics Norway (2022).

Figure 5.3 shows the development in the total number of unique jobs for non-permanent residents in recent years. In 2019, they amounted nearby a third of all jobs in temporary work agencies. The decline in 2020 and 2021 was caused by covid-19 and entry restrictions.

Figur 5.3 The development of unique jobs for non-permanent residents throughout the year for all employees in temporary work agencies.



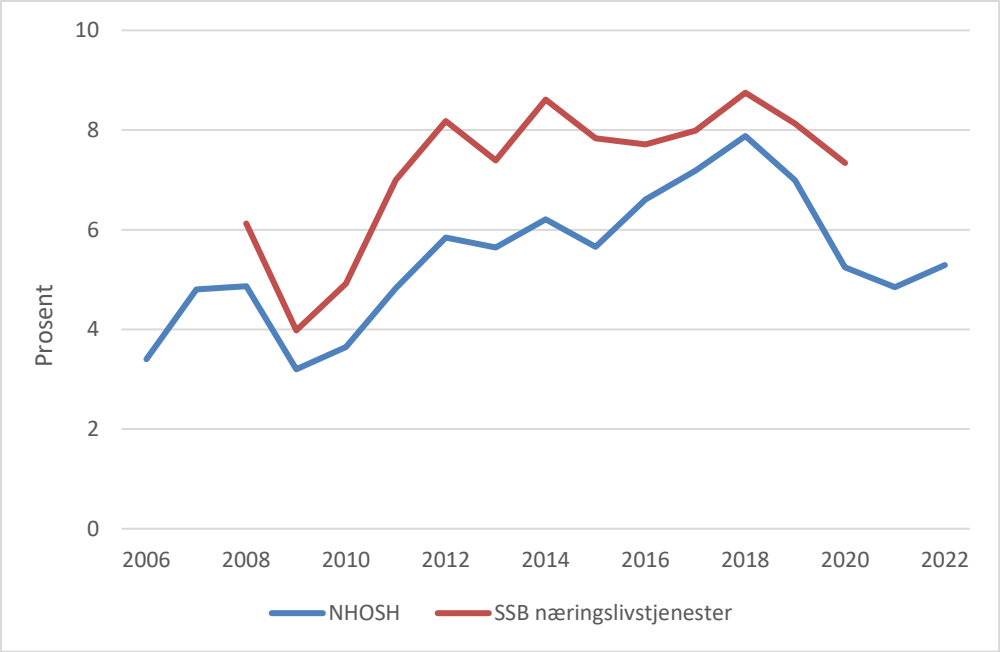
Source: Statistics Norway

5.3 Development on the use of temporary agency workers in the construction sector

5.3.1 Development for the whole of Norway

According to the available statistics, the use of temporary agency work has been considerable in the construction sector. There are several challenges in calculating the extent. There are "grey sones" between hiring and subcontracting, some enterprises combine roles, and some are registered with other business codes than as temporary work agencies. The development from 2006 onwards shows a marked growth in the use of temporary agency workers. Figure 5.4 from Fafo is based on two different information sources from Statistics Norway (surveys to companies classified as employer services (NACE 78.2) and numbers from NHO Service og Handel. According to estimates based on data from Statistics Norway, temporary agency workers made up more than 8 per cent of the man-hours in the construction industry in the period from 2012 to 2019.

Figur 5.4 Temporary agency workers as share of total employed in construction (hours worked). Per cent.



Source: Fafo-notat 2021:17. Updated figure. Information from NHO Service og Handel on invoiced hours from member companies (temporary work agencies). Information from Statistics Norway, business statistics (Næringslivstjenester omsetning & utgifter til vikarer). There are a delay in publication, and statistics for 2021 will be issued in May 2023..

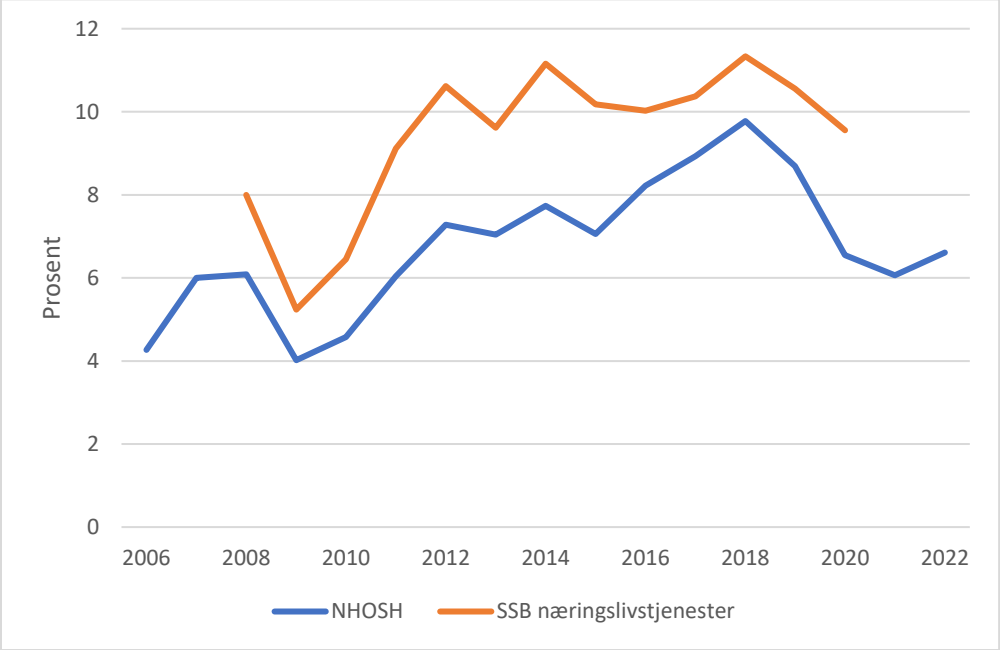
During covid-19 there were strong entry restrictions to Norway that also had a clear impact on the activity in the construction industry. In 2020 and 2021, fewer non-resident labour immigrants came to Norway for short-term stays.

According to NHO Service og Handel, hiring in the construction sector started to decrease from Q4 in 2018, due to the upcoming amendments in the regulations the following year. For the years 2020 and 2021, there are a clear effect of the pandemic in the form of a decrease in invoiced hours. Presumably, the restrictions on entry to Norway played a significant role. There is only a minor increase in 2022.

According to Fafo, the use of temporary agency workers is highest in building (NACE 41) among the different parts of the construction sector (around 50 per cent over the average for the sector). These figures are based on data from Statistics Norway on services among enterprises within the construction sector.

Many of those hired from temporary work agencies, are working as unskilled workers or are skilled craftsmen. These occupations make up around 75 per cent of wage earners in the construction sector. Among these groups, the share of temporary agency workers was estimated to be 9-10 per cent of total employment in 2019. For 2020-2022 the share is estimated to 6-7 per cent (figure 5.5).

Figur 5.5 Temporary agency workers in craftsmen professions and unskilled workers as share of total employed in construction (hours worked). Per cent.



Source: Fafo-notat 2021:17. Updated figure.

5.3.2 Development on the use of temporary agency workers – in the construction sector in Oslo, Viken and Vestfold

The proportion of temporary agency workers is generally higher in Oslo and the surrounding area. According to the industry organization in NHO Service og Handel, close to half of the activities of their member companies take place in Oslo and Viken regions. Largely, the Oslofjord-region (Oslo, Viken[2] and Vestfold) represents one common labour market area. As in the country in general, there has been a strong increase in employment in the construction sector. The employment growth in construction in this region was 29 per cent in the period 2008-2020.

[2] The Viken region was constituted in 2020 based on the counties Akershus, Østfold and Buskerud. From 2024 the former counties will be reestablished. Vestfold was united with Telemark into one county in 2020. They will be separated from 2024.

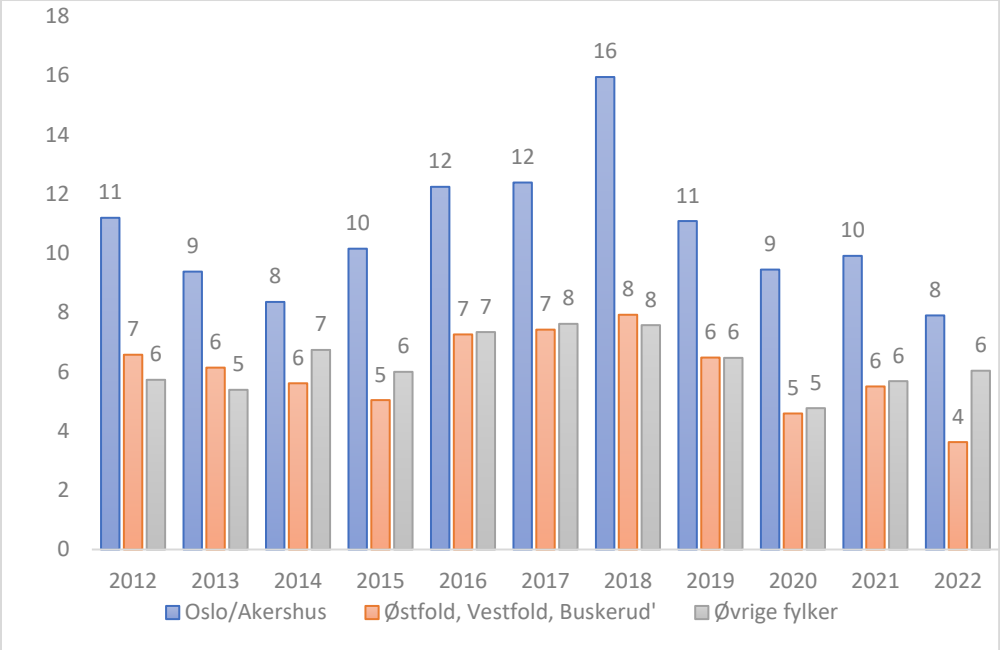
Previously there was a regulation on general application of collective agreements for construction in force, covering the counties Oslo, Akershus, Østfold, Buskerud and Vestfold (Regulation 29 June 2005 no. 739). A motivation for this regulation was that this region is considered as a common labour market in the construction industry in several respects, with a great mobility in the workforce within the region. An analysis indicates that almost one third of the economic value in construction took place in Oslo and Akershus, however, employment and economic activity in construction is of even higher importance in central Eastern Norway outside of Oslo and Akershus *(Bygballe, L. E. et al. Forskningsrapport 2/2019. Handelshøyskolen BI. in Norwegian)*. On the one hand, this may indicate that Oslo and the former Akershus in general are in a special position as an area of pressure with associated high economic activity in construction, on the other hand that this industry is even more important as a place of work for the region surrounding the central Oslo-area.

In 2020, Oslo Economics carried out a survey on how workers on a construction site are distributed between the main contractor, subcontractors, and temporary agency workers *(Oslo Economics (2020). Kartlegging av omfang og særtrekk ved entrepriser. in Norwegian)*. The answers indicate that there are significant regional differences within the industry. In Oslo, about one third were employed by the main contractor, 42 per cent by subcontractors and 24 per cent were estimated to be temporary agency workers. This pattern applied to the Viken-region, while in the region of Møre and Romsdal and the counties in northern Norway, more than 50 per cent were employed by a main contractor, and a lower proportion were employed by subcontractors and temporary work agencies.

Trade unions have surveyed the use of temporary agency workers on certain building sites in Oslo and the surrounding area and estimated an average share of 35 per cent of total employment at these sites (*Engelstad, E. (2019). Slutt med mobilen i handa? Egenbemanning, underentreprise og innleie i byggenæringa i Oslo og Akershus høsten 2019. in Norwegian)*.

According to NHO Handel og Service, about 60 per cent of the hiring to construction is concentrated to the Oslofjord-region. Fafo has compiled information from NHO Handel og Service and Statistics Norway on regional differences in the hiring of temporary agency workers to construction. Figure 5.6 shows temporary agency workers in craftsmen professions and unskilled workers as share of total employed in the same occupations in construction for the central region in Oslo & Akershus, the rest of the Viken area & Vestfold and the remaining counties.

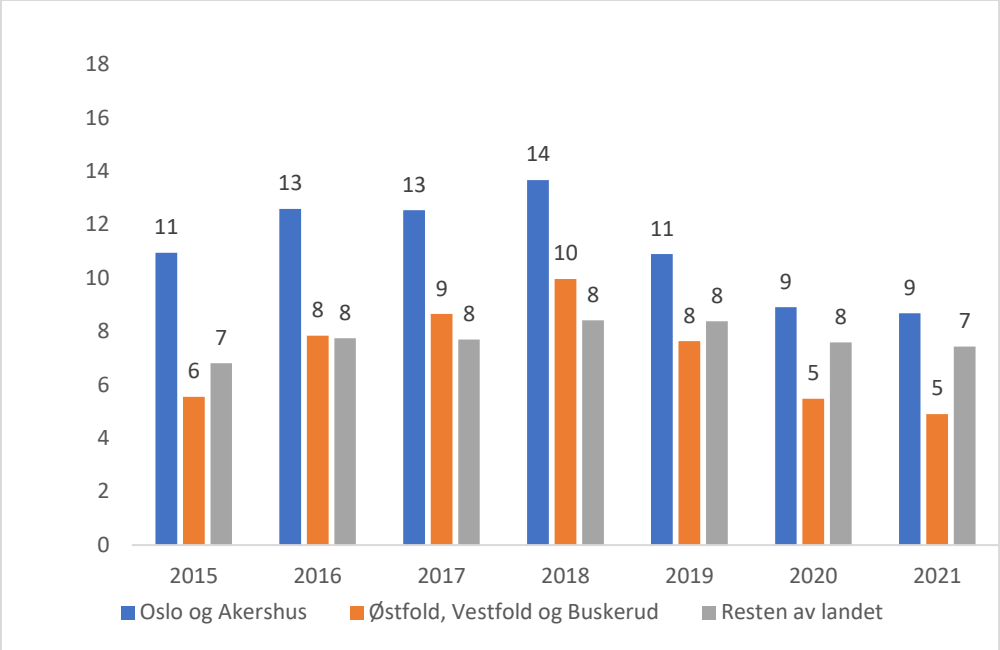
Figur 5.6 Temporary agency workers in craftsmen professions and unskilled workers as share of total employed in construction (hours worked). After region. Per cent.



Source: Fafo-notat 2021:17. Updated figure. Based on information from NHO Handel og Service & Statistics Norway.

The same calculation can be done based on which professions temporary agency workers possess. In figure 5.7 Fafo has summarized information on workers' occupation, in the new reporting system from employers to Statistics Norway from 2015. Both figures show a high level of temporary agency workers in construction in Oslo & Akershus, peaking in 2018 and declining in the following years. For 2020 and 2021 effects of covid-19 must be taken into consideration.

Figur 5.7 Share of temporary agency workers in professions working in construction After region. Per cent.



Source: Fafo-notat 2021:17. Updated figure. Based on information from NHO Handel og Service & Statistics Norway.

5.4 Information on posted workers from temporary work agencies established in other EEA States

Posted workers make up a very small part of migrant workers in Norway. According to information from Statistics Norway, there were about 18,200 posted workers in Norway in 2022. The same year, there were over 169,300 foreign non-residents working in Norway. Approximately one third of all temporary agency workers are non-residents. A majority are working for temporary work agencies registered in Norway. Fafo has estimated that about five per cent of registered workers in temporary work agencies are employed in a company that is not included in Statistics Norway's overview of Norwegian enterprises (Fafo-notat 2021:17). This is equivalent to about 3,000 workers. According to information from Statistics Norway on posted workers, the number of employment relationships among posted workers were about 2,700 in Q4 2022. More than half of the posted temporary agency workers had not given information about their profession. Among those who had stated such information, welders and carpenters were most common.

Some temporary work agencies from other countries are registered in Norway. Fafo has estimated that about 4,000 are employed in these enterprises. This figure covers all occupations.

We have no information about temporary agency workers who are contracted from Norwegian companies to work in other European countries.

6 Information on the use of the different options for when temporary agency work is allowed

6.1 Agreement with employees' representatives

As mentioned in chapter 1.4, high rates of organization for employers and employees and widespread collective agreements are a hallmark of the labour market model in Norway. Close to two-thirds of the workers are covered by collective agreements. The collective bargaining coverage is 100 per cent in the public sector. In the private sector, average collective bargaining coverage is 47 per cent according to recent calculations *(Nergaard, K. Fafo-notat 2022:9. In Norwegian).* Oil & gas, electric supply, manufacturing, financial service, transport, and health & care are sectors and industries with collective bargaining coverage above average. Industries with lower collective bargaining coverage are construction (41 per cent), retail trade (39 per cent), ICT (33 per cent) and hospitality (hotel & restaurants) 29 per cent).

According to NHO Handel og Service, the sectors with the highest proportion of hiring temporary agency workers are construction, manufacturing, transport & logistics, education (mainly public sector), health & care (mainly public sector), office & administration and accounting/economy service.

In general, the prevalence of collective agreements correlates with the size of the undertakings. In enterprises with more than 100 employees, the collective bargaining coverage is over 75 per cent.

Undertakings bound by a collective agreement with trade unions with at least 10 000 members, cf. chapter 2.1, can enter into a written agreement on hiring temporary agency workers regardless of the conditions in WEA section 14-12 (1). Thus, a significant part of working life will have the opportunity to use this agreement access to temporary agency work.

Statistics Norway produces statistics on membership in trade unions (03546: Central organisations and other nation-wide associations for wage earners. Members per 31 December 2001 - 2021. Statbank Norway (ssb.no)

According to the latest available data (2021), about 93 per cent of all organized workers are members in one of the four central organizations:

- The Norwegian Confederation of Trade Unions (LO) 978 338 members
- The Confederation of Unions for Professionals (Unio) 388 220 members
- The Federation of Norwegian Professional Associations (Akademikerne) 243 293 members
- The Confederation of Vocational Unions (YS) 230 348 members

In addition, the following independent/free-standing federations have at least 10 000 members:

- NITO – The Norwegian Society of Engineers and Technologists 96 067 members
- The Norwegian Union of Managers and Executives (Lederne) 16 486 members

Totally, the trade unions with at least 10 000 members represent about 98,9 per cent of all workers organized in trade unions at national level.

According to the Ministry's information, no formal statistic is available on the actual use of this arrangement. However, some studies have mapped the actual use.

A survey on temporary agency work at construction sites in Trondheim from 2018 showed that written agreements were entered into in just about 20 per cent of the possible cases *(Nergaard. K. (2019). Innleie i byggebransjen i Trondheim. Fafo-rapport 2019:20. English summary).* Even when the nature of the hiring relationship indicated that the hiring enterprise should have signed such an agreement, agreements were frequently not entered into.

A survey based on some construction sites in Oslo indicates that 19 per cent had entered an agreement with union representatives in undertakings which were part of a collective agreement between LO (Norwegian Confederation of Trade Unions) and NHO (Confederation of Norwegian Enterprise) *(Engelstad, E. (2019). Slutt med mobilen i handa? Egenbemanning, underentreprise og innleie i byggenæringa i Oslo og Akershus høsten 2019. in Norwegian)*.

As mentioned in chapter 4.3, a survey to employers indicated that between 23 and 36 per cent had stated reasons for using temporary agency workers that appeared to contravene with regulation in force. In this survey, employers were asked about agreements with local workers representatives. A minority had entered into such agreements, and they are not counted in the estimate cited above.

6.2 Assessment on the possible impact of removing the option of using temporary agency workers when the work is of a temporary nature

An assessment of the consequences of the new regulation was presented in the proposition for the parliament, cf. Prop. 131 L (2021–2022) chapters 6.4.4 and 13. According to the assessment, the proposed measures could help to prevent abuse and circumvention. As mentioned in chapter 4.3 a survey carried out by Statsbygg showed that only half of their providers could document a legal foundation for use of temporary agency work. The changes in regulation will in this aspect clarify conditions and could lead to better compliance.

As a consequence, the possibilities for using temporary agency workers will be more limited. If not relevant or possible for businesses to enter into agreements with union representatives, the new regulation will involve a reduction of some of the flexibility businesses have had to hire in connection with production peaks and short-term needs for access to labour. However, the consequences will depend on how the enterprises have adapted. Those who have adapted to a persistently high level of letting, will have greater

adjustment costs than others. Often hiring will be a solution to temporarily replace an employee who is absent, and thus covered by the provision on temporary work, which is not changed. A likely consequence of the regulation will be that there will be increasing awareness of, and use of, the provision Section 14-9 (2) b (substitutes).

In some industries, seasonal variations lead to a need for additional labour in periods, as in the hospitality sector, agriculture, and fishery industries. A consequence of removing access to hiring for work of a temporary nature will be that such needs must be solved by using the other legal grounds for hiring, or by other measures as increasing part-time positions, reorganizing their own work force, using agreements on working time flexibility, overtime work, hiring workers from other production companies or using subcontractors.

6.3 Evaluation project

The consequences of the regulation will be evaluated. Already, a contract has been summited to Fafo to follow the development, focusing on the industries where the use of temporary agency work has been widespread. The social partners are involved in the evaluation, and reports will be published annually at the end of 2024 and 2025 before a final report in 2026.

7 Negative consequences of temporary agency work

7.1 Working conditions and job quality

There are differences in the working conditions and working situation for temporary agency workers compared to workers with permanent positions and direct employment in the undertakings where they perform their work. Temporary agency workers are to a lesser extent organised, they get less part in skills development at the workplace, have lower job satisfaction compared to permanent employees and have an increased risk of being exposed to injuries and accidents.

The organization itself in a tripartite relationship does not correspond well with central regulations of Norwegian working life, such as the rules on job protection, security services in the enterprises and the system of the employees' representatives.

International studies indicate that use of temporary agency work can lead to an increased level of conflict in the enterprises, for example by people performing the same work having different pay *(Olsen, K. M. (2016) Utfordringer ved midlertidighet i organisasjoner. Article in Magma no. 3/2016. In Norwegian).*

International surveys show that temporary employees and temporary agency workers often have jobs with poorer working conditions, also when comparing with employees who otherwise have the same characteristics (age, gender etc.). Longer education, however, somewhat reduces the risk that employees with non-standard forms of work experience poorer job quality. The same pattern is found in studies from the Norwegian labour market. The Work Research Institute at OsloMet University has submitted a report where they

analyse and compare different surveys from Norway on working conditions and industrial relations for standard and non-standard forms of work *(Ingelsrud, M. H. et al. (2020) Konsekvenser av atypiske tilknytningsformer for arbeidsforhold og partssamarbeid. AFI-rapport 2020:08. In Norwegian)*. Different surveys of the working environment, unionization, participation, and co-determination at the workplace show that temporary agency workers score somewhat lower than employees with a permanent position in ordinary enterprises when it comes to job satisfaction, experiencing positive challenges at work and participation in on-the-job-training. There are significantly more temporary agency workers feeling that they do not have enough competence to carry out the work tasks or that they do not get enough training. Fewer of the temporary agency workers are familiar with arrangements such as safety representatives and workplace environment committees. Temporary agency workers report lower predictability for work than other employees, cf. chapter 4.7. Several of them have more than one position and must show up for work at short notice. Non-resident workers are under-represented in these surveys. The general knowledge we have about working conditions for migrant workers in Norway gives reason to assume that their situation is not better, quite the contrary.

Both temporary employment and temporary agency work can entail the risk of a looser connection to the labour market. However, some studies show that work through temporary work agencies can increase the likelihood of obtaining ordinary work for non-Western immigrants and young people without completed upper secondary education.

The Institute for Social Research has found that the total income for temporary agency workers is somewhat below the income for permanent employees. The lower income compared to permanent employees is mainly due to lower hourly wages *(Strøm, M. & von Simson, K. (2020). Atypisk arbeid i Norge 1995-2019. ISF-rapport 2020:12. English summary)*.

In another study, the Institute for Social Research found that the average work hours for temporary agency workers declined after the new regulation in 2019, much of it due to an increase in contracts with agreed working hours below 10 per cent and between 10 and 20 per cent, cf. chapter 4.4.

7.2 Health and safety

The National Institute of Occupational Health in Norway has prepared a review on international research regarding temporary forms of employment and health *(Statens Arbeidsmiljøinstitutt. (2014). Midlertidige arbeidsformer og helse – en kunnskapsoversikt)*. Studies from various countries indicate that temporary employees have a higher incidence of psychological problems than permanent employees. There are indications that the connection between temporary employment and mental health is linked to the degree of stability and predictability in the employment relationship. A recent study from Denmark supports the hypothesis that employment in a fixed term rather than a permanent contract position is associated with an increased risk of developing mental health problems *(Hannerz, H. et. al. (2023). Mental illness among employees with fixed-term versus*

permanent employment contracts: a Danish cohort study. In International Archives of Occupational and Environmental Health (2023 96:451-462).

Documentation from the Norwegian Labour Inspection Authority shows that foreign workers have an increased risk of being exposed to injuries and accidents. Their analysis of occupational injury deaths in the period 2011−2016 showed that workers from the EU countries in Central and Eastern Europe had 3.2 times higher risk of occupational injury death than Norwegian workers *(Arbeidstilsynet (2018) Risiko for arbeidsskadedødsfall i det landbaserte arbeidslivet. En sammenligning av norske og utenlandske arbeidstakere. In Norwegian)*. According to the Labour Inspection Authority, short employment relationships and non-standard forms of work indicated increased risk. Lack of competence and training is often an underlying cause of accidents. The Labour Inspection Authority points out that temporary agency workers often do not receive the same safety training as those who are permanently employed directly in the companies, and that the threshold for reporting errors and deficiencies in the working environment is higher for temporary agency workers. A survey by SINTEF in 2017 suggests that non-standard forms of work as fixed-term positions and temporary agency work are more important than the nationality of the employee when it comes to risk for accidents at the workplace *(Kilskar, S. et. Al. (2017). Flerkulturelle arbeidsplasser I byggenæringen. Kartlegging av muligheter og utfordringer. SINTEF i samarbeid med IdeThandling. In Norwegian)*.

Over several years, the Petroleum Safety Authority has followed up the consequences for health, safety, and environment of temporary agency work in its inspections in the oil & gas sector. The result shows that temporary agency workers experience increased job insecurity, that they are more exposed to unfavourable working environment factors and that they are monitored less closely in the area of the working environment compared to permanent employees. A report from Safetec on commission from the Petroleum Safety Authority points out that increased use of temporary agency workers in modifications and maintenance operations (M&M), and the insulation, scaffolding and surface treatment (ISS) trades may lead to increased safety risk *(Safetec (2023). Endrede rammebetingelser og konsekvenser for arbeidsmiljø og sikkerhet i petroleumsvirksomheten. English Summary at https://www.ptil.no/en/)*. According to the report, it is a growing problem that personnel from temporary work agencies has part-time positions in several companies, and during the free period in one company they start on a new work period in another temporary work agency, with only a few days rest between work periods. There are reports of insufficient training and provision for work, especially for temporary agency workers, as well as negative consequences for the social environment at the workplace.

7.3 Unionization and collective bargaining coverage

According to answers from workers in the Labour force survey (Statistics Norway), the unionization rate among those with temporary employment were 37 per cent, while 53 per cent of the workers with permanent positions were members of a trade union *(Nergaard, K. (2018). Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2016/2017. Fafo-notat 2018:20. Norwegian only.)* There are no overall figures or estimates on trade union

participation among temporary agency workers. Information from various sources indicates that the degree of organization is low. This is due, among other things, to the high degree of replacement of workers. There is no separate collective agreement for the industry, but a few temporary work agencies are part of collective agreements in industries to which the workers are hired. This mainly applies to employees who are hired in the construction industry. There has been a significant decline in union density and collective bargaining coverage in construction during the period with high use of temporary agency work, cf. chapter 1.4. *(Alsos, K. et al. (2021). Arbeidsgiverorganisering og tariffavtaler. Fafo-rapport 2021:07. English summary.)* As most of the temporary agency workers are not organized in unions, the high level of temporary agency workers also affects the industrial relations in the hiring companies. According to Ingelsrud et. al (2020) this may imply a weakening of opportunities to establish collective agreements or weaken the importance of the established organizations in the workplace.

7.4 Consequences for recruitment

Increasing specialization and separation of functions has been a general trend in the industry. Much of the growth in employment has been among subcontractors, in addition to temporary agency work and sole proprietorship. The association for building contractors (Entreprenørforeningen Bygg og anlegg) in the Federation of Norwegian Construction Industries (Byggenæringens landsforening i NHO) states that employment in its member companies increased by 10 per cent from 2013 to 2021, while sales in the companies in the same period increased by over 50 per cent.

Use of temporary agency workers might be a solution for companies striving with recruitment. In a survey among member companies in the Federation of Norwegian Construction Industries in 2021, almost half of the companies answered that they could not get hold of skilled workers, while a quarter could not get hold of apprentices. However, a high use of temporary agency workers may also have resulted in a deterioration of recruitment of apprentices to permanent positions in the undertakings. There are a shortage of carpenters and craftsmen, and fewer pupils in secondary education are showing interest in these occupations. A study has found a negative correlation between the increased competition for jobs at the labour market brought about by increased labour immigration to construction and the students' interest in applying for vocational training in construction *(Brekke, I. et. al. (2013). Påvirker innvandring investeringen i utdanning? Søkelys på arbeidslivet nr. 3-2013. In Norwegian).* The number of students and apprentices within upper secondary education in construction and electrical engineering decreased in the wake of the financial crisis from 2008 onwards. For electrical engineering, the level increased again after a few years, while applications for construction have remained stable at roughly the same level since 2010, according to statistics from the Norwegian Directorate of Education. The enterprises in the industry have a high demand for apprentices. Construction is the education program with the highest proportion of applicants who get an apprenticeship.

8 Justification of the measures under the EEA Agreement/Directive 2008/104/EC

8.1 Introduction

As follows from the preparatory work, the Government has assessed and concluded that the adopted amendments in the legislation are compatible with EEA law. The purpose of this chapter is to elaborate this assessment further.

The legal framework for national regulations regarding temporary agency work in the EEA, consists of several legal instruments: Article 36 EEA, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and the amended Posting Directive 2018/957, and the Directive 2008/104 on Temporary Agency Work.

The point of departure is that Article 36 EEA gives the primary framework on free movement of services, including the doctrine that restrictions must be justified on grounds of general interest. The Posting directive(s) regulate inter alia cross-border temporary agency work, while the Temporary Agency work directive regulates the national framework for the use of such work.

These legal instruments complement each other, and they must be interpreted in light of each other. The Posting Directive, which was adopted back in 1996, before the Temporary Agency Work Directive, makes it clear that cross border temporary work agency workers are part of the freedom to provide services, and thus fall within the legal framework of the Posting directive. And, similar to the directive on Temporary agency work, the Posting directive has a two-folded purpose, and thus need to balance between the freedom to provide services and protection of the workers. Neither of the directives harmonises the level of protection. This lies with the member states to determine.

The legal framework mentioned here, has become more social over the years, ref the latest amendment of the Posting directive (2018/957), illustrated by paragraph 3 in the Preamble:

> «According to Article 3 of the Treaty on European Union, the Union is to promote social justice and protection. According to Article 9 TFEU, in defining and implementing its policies and activities, the Union is to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."

Article 36 EEA:

As mentioned above, Article 36 EEA gives the primary framework on free movement of services. It is applicable to the posting of agency workers to Norway, but it is complemented by the (later) instruments regarding posting of workers and the TAWD. The latter refers in Article 4 to the fact that any prohibitions or restrictions on the use of agency work must be justified only on grounds of general interest related in particular to the protection of temporary agency workers, the requirements of health and safety at work

or the need to ensure that the labour market functions properly and that abuses are prevented. Such justification and the mentioned legal grounds follow also from Article 36 EEA, and thus the TAWD makes the legal requirements by the primary legal source applicable to domestic use of temporary agencies. The Posting Directives fulfil and harmonises the same legal principles in the cross-border situations.

The Postings Directives:

According to the 1996 Posting Directive, a 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works (art 2(1)). One of three posting situations covered by the Posting directive (art 1 (3) c)), is the situation where the posted worker is hired out by a temporary employment undertaking[…], to a user undertaking established or operating in the territory of a Member State, provided that there is an employment relationship between the temporary employment undertaking[…] and the worker during the period of posting.

The choice of law regarding conditions for hiring out workers in the host state, is also regulated in the 1996-Directive. Article 3 contains a list of terms and conditions of employment, and Member States shall ensure that, whatever the law applicable to the employment relationship, the workers posted to the host territory must be guaranteed the terms and conditions of employment in the list. According to art 3 (d), this includes "the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;". In Recital 19 of the directive it is stated that "Whereas, without prejudice to other provisions of Community law, this Directive does not entail the obligation to give legal recognition to the existence of temporary employment undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers and temporary employment undertakings to undertakings not established in their territory but operating therein in the framework of the provision of services;".

The full meaning of these texts is not completely clear, but in our view, they must be read in the light of the different situations regarding restrictions on temporary agency work in the member states at the time of the adoption of the directive. The fact that the text was not amended in connection with the revision of the Posting directive in 2018 (or in 2014), but still exists, shows that this is still the case. In the amended Posting Directive from 2018, new provisions regarding temporary agency work were added, strengthening the protection of temporary agency workers further, both in the so-called "chain-posting" situations, cfr. art 1 (1) c) ii, and the equality principle, cfr. Article 3, 1b.

The Temporary Agency directive («TAWD»):

The relationship between the Posting Directives and the TAWD has also developed over the years. Recital 22 of the TAWD, states «This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of

workers in the framework of the provision of services». The amended 2018 Posting directive has a main focus on equal remuneration, but also on temporary agency work. The 2018 Posting directive aim became more social, and it links it's provisions to the need for striking a better balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other. Thus, the amended Posting Directive refer to the TAWD both in the Preamble and in its substantive provisions. One example is article 1, (2) b, 1b: «Member States shall provide that the undertakings referred to in paragraph (c) of Article 1(3) guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC of the European Parliament and of the Council (*2) to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out.»

The aim of the TAWD follows from article 2 of the directive:

«to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.»

8.2 The Government's assessment - introductory remarks

Several of the measures in the recent amendments in our legislation are assessed as restrictions – but in the Government's (and the majority of the Parliament's) view, they can be justified on grounds of general interest. The overall starting point is that the legal framework leaves the state with a wide margin of appreciation in order to define the level of protection and to develop appropriate and efficient measures within the national context.

This is based on the two-folded aim of the directive, but also the Preamble of the TAWD (10), (12) and (15).

Paragraph 10 states: "There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union."

Paragraph 12 states: "This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations."

Paragraph 15, 1 st. sentence states: "Employment contracts of an indefinite duration are the general form of employment relationship."

In addition, Article 9(1) of the Directive, provide Member States with the right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.

TAWD article 4:

Article 4, (1) and (2) states:

«Article 4 Review of restrictions or prohibitions

1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.»

The Implementation report from the European Commission[3] provides information on limitations on the use of temporary agency work in the member states. According to the report, many member states have limitations of a high variety of rules, such as ban on agency work in certain sectors, in a given geographical areas or for certain undertakings. Some states limit the maximum length of assignments or the possible reasons to hire out agency workers. The prohibition to employ agency workers during strikes or similar collective actions is also common. There are also examples to limit the number of agency workers in the user company depending on the proportion of the directly employed workforce.

Over the years, the European Court of Justice has been invited to interpret the TAWD several times. However only one case regards article 4, the AKT-case (C-533/13). We will elaborate on that case below, but first we will mention some relevant statements from other cases regarding the TAWD.

The KG-case (C-681/18) regards inter alia the member states' obligation according to the TAWD art. 5.5 to adopt appropriate measures to prevent misuse of temporary agency work. The ECJ concludes that article 5.5

> «…must be interpreted as precluding a Member State from taking no measures at all to preserve the temporary nature of temporary agency work, and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking in order to circumvent the provisions of Directive 2008/104 as a whole.»

In paragraph 51 the Court states

> «That twofold objective thus gives expression to the intention of the EU legislature to bring the conditions of temporary agency work closer to 'normal' employment relationships, especially since, in recital 15 of Directive 2008/104, the EU legislature expressly stated that employment contracts for an indefinite term are the general form of employment. That

[3] Report from the Commission to the European Parliament,the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014)176 final

directive therefore also aims to stimulate temporary agency workers' access to permanent employment at the user undertaking, an objective reflected in particular in Article 6(1) and (2) of that directive.»

The Daimler-case (c-232/20) concerns issues regarding misuse and the term «temporary». In (33), the Court notes

«It should therefore be noted at the outset that there is no provision in directive 2008/104 that relates to the nature of the work or the nature of the position to be filled in the user company. This directive also does not list the cases that can justify the application of this form of work, as the Member States, as the Advocate General has stated in paragraph 37 of the proposed decision, have preserved a considerable margin of discretion with regard to determining the situations that justify the application hereof. In this respect, directive 2008/104 only stipulates the introduction of minimum requirements, as is apparent from this directive's article 9, subsection 2 (cf. in this regard judgment of 14.10.2020, KG (Successive postings in connection with temporary employment), C-681/18, EU:C:2020:823, paragraph 41).» (Our translation from the Danish version)

In our view, the said case-law stipulates some clear points of departure: The TAW-directive does not set out requirements for specific regulations regarding when hiring can be used or the access to hiring. On the contrary – the directive's preamble emphasizes that the directive must respect inequalities in the labour markets. The legislator has not regulated this in the directive, which means that the member states have considerable margin of discretion.

In the AKT-case, the ECJ did not rule on whether the restrictions in that case in itself were in line with Article 4. And neither did the Court assess article TFEU art 56 (36 EEA). In this case, a Finnish court referred the question whether Article 4 must be interpreted as laying down an obligation on the national courts not to apply any rule of national law, (in the case a collective agreement) containing prohibitions or restrictions on the use of agency work which are not justified on grounds of general interest. The ECJ ruled article 4 as a sole procedural provision. While the Advocate General ("AG") argued that Article 4 has a direct effect, the Court ruled otherwise. According to the ECJ, the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of agency work which are not justified on grounds of general interest.

The Opinion of the AG delivered on 20 November 2014 nevertheless contains several relevant arguments. We note (113):

"Notwithstanding, Directive 2008/104 does not define temporary agency work, nor does it list the cases in which the use of this form of work may be justified. Recital 12 in its preamble does, however, state that the directive is intended to respect the diversity of labour markets."

And (114):

" Given that the EU legislature has chosen not to define the situations in which the use of temporary agency work is justified, the Member States retain a broad discretion in that regard."

The AG assessed the concrete restrictions in question, and found them justified on grounds of general interest (paragraph 124)[4]. Regarding the proportionality, the AG stated:

> « Whilst it is for the national court to carry out the assessment of proportionality, I would nevertheless observe at the outset that the restrictions imposed by the clause at issue do not appear to me to go beyond what is necessary to achieve the objective pursued by the legislationparagraph.» (paragraph) 127.

In his article from 2020, Dr. Gabor Kartyas[5] assesses the legal situation after the AKT-case, and states

> "As Member States enjoy high level of discretion, it is rather unlikely that the Commission would start infringement procedures on the grounds that it disagrees with the Member States interpretation of "general interest" and hold that the given limitation cannot be upheld on the grounds of the given nation's interest. I find it only probable if such national restriction contradicts of the very basics of Article 4, meaning that it is based on mere distrust towards agency work, or the debated restriction also contradicts the freedom to provide cross-border services."

In our view, the legislation on temporary agency work in Norway is clearly compatible with the TAWD. We will go into further details below.

8.3 Repealing the option "when the work is of a temporary nature"

8.3.1 Justified on grounds of general interest

An important purpose of the measure is to prevent the use of temporary agency work at the expense of permanent and direct employment in user undertakings. This is also fully in line with the purpose of the directive. The TAWD clearly states in Recital 15 that "Employment contracts of an indefinite duration are the general form of employment relationship". The opinion of the AG in the AKT case also states in paragraph 112 that "Secondly, it is clear from the definitions set out in Article 3 of Directive 2008/104 that temporary agency work implies relationships which are maintained 'temporarily'. It may be inferred from that, that this form of work is not appropriate in all circumstances, in particular, where staffing needs are permanent".

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[4] «Consequently, national rules such as those at issue in the dispute in the main proceedings, which limit the use of temporary work to the performance of tasks which, by reason of their nature or duration, objectively meet a temporary need for labour and which prohibit the employment of temporary agency workers alongside an undertaking's own employees for a long period of time, seem to me to be justified on the ground of a general interest relating to the need to ensure that the labour market functions properly and abuses are prevented»

[5] Dr. Gabor Kartyas, Pazmany Peter Catholic University, Budapest, Hungary 2020:

https://www.researchgate.net/publication/339390116_The_limiting_interpretation_of_reviewing_agency_work%27s_restrictions

With this amendment, the Norwegian Government wishes to ensure a well-functioning labour market in a broad sense. A regulation that states that permanent employment should be the main rule, and with limited access to temporary agency work, concerns fundamental features of the organization of the Norwegian labour market. Reference is made to chapter 1 above. As explained, the use of agency work must not be too widespread. In the Governments view, the provision being revoked, opened up for a too far-reaching hiring practice.

The measure also aims to protect workers' rights, which is a recognised objective under EU law.[6] Permanent employment directly in the user undertaking is clearly beneficial for the individual employee compared to temporary agency work. Reference is made to chapter 7.

The provision that has been removed for the use of temporary agency work, is highly discretionary. We have reasons to believe that it could easily be misused, including using temporary agency work when the need for employees was actually permanent in the user undertaking. The measure is therefore also justified on the ground of preventing abuse. Reference is made to chapter 4.2. and 4.3. above. (See further assessment on this in chapter 8.4.2.)

These grounds are closely linked and must be seen in context with each other.

In its question 9, the Authority refers to the justification assessment of the Norwegian rules made in connection with the implementation of Directive 2008/104. The Authority asks for an explanation on the different assessments of the same rules and on which information this new assessment is based. The assessment that was made in connection with the implementation of the TAWD, regarded whether the existing legislation in Norway was in line with the directive. The Ministry did not discuss or consider whether the directive also allows for stricter restrictions on the use of temporary agency work. In the view of the government, political decision-makers can introduce a higher level of protection, as long as the measure is justified on grounds of general interest and being proportional.

8.3.2 The measure is proportionate

According to case law from the ECJ, Member States must be allowed a margin of appreciation regarding the degree of protection. The Government will first draw attention to the Opinion of the Advocate General in case C-533/13 paragraph 126: «The varying intensity of the restrictions on the use of temporary agency work in the Member States cannot, however, affect the appraisal as to the need for and proportionality of the provisions under examination." The AG also gives further reference to C-108/96[7] in this respect.

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[6] See C-164/99 paragraph 20.

[7] 33 It should be borne in mind in this regard that the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law (Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 51, and Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 42).

Reference is also made to C-110/05 paragraph 65:

> «With regard, second, to whether the said prohibition is necessary, account must be taken of the fact that, in accordance with the case-law of the Court referred to in paragraph 61 of the present judgment, in the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate (see, by analogy, Case C-262/02 Commission v France [2004] ECR I-6569, paragraph 37, and Case C-141/07 Commission v Germany [2008] ECR I-0000, paragraph 51."

In the Government's view this also means that the amount of use of temporary agency work in Norway compared to other EU/OECD countries, is not relevant.

As mentioned above, the purposes the measure is leaning on; ensuring a well-functioning labour market, preventing abuse and protection of workers, are closely linked and must be seen in context with each other. The overall purpose is to prevent the use of temporary agency work at the expense of permanent and direct employment in user undertakings. In the view of the Government, the measure will lead to more permanent employment.

The hiring rules are enforced by the Norwegian Labour Inspection Authority. Their experience indicates that enforcing the now repealed regulation has been challenging. Reference is made to The Norwegian Labour Inspection Authority's consultative statement from 19. April 2022. In this statement, the Labour Inspection Authority refers to an inspection period in the autumn 2020, where they inspected 81 user undertakings in the central eastern part of Norway. They point out that it was challenging to draw conclusions, particularly on whether the work was carried out as hiring or sub-contracting, and on whether the hiring was legal. Assessing whether the hiring was legal was particularly challenging where the employer stated that the basis for hiring was that the work was of a temporary nature.

Reference is also made to a new report from The Norwegian Labour Inspection Authority published a in February 2023 (see also chapter 4.2). As can be seen from this report, many enterprises have experienced that it has been unclear what the term "work of a temporary nature" means. In addition, the Labour Inspection Authority states that they in many cases have not had an adequate opportunity to assess the legality, both because it requires considerable and detailed knowledge of both the industry and the enterprise, and what assessments have been made in each individual case of hiring. This also requires the user company to provide the necessary information to the Authority.

A state of law that creates such uncertainty for those who are to use the regulations, as well as great difficulties for effective supervision and enforcement by the supervisory

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34 The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted (Case C-67/98 Zenatti [1999] ECR I-7289, paragraph 34

authorities, implies a high risk of abuse. See also chapter 4.3. where it is referred to Alsos & Svalund pointing out that while the regulation of fixed-term contracts and agency work is rather strict in Norway, the limited bargaining power of many of the employees holding such contracts, combined with the lack of third-party sanctioning, means that the regulations in practice are much more flexible.

Until now, broad access to temporary agency workers has functioned as a guarantee and predictability for providing labour for the enterprises. When this option has been revoked, there is reason to believe that enterprises will want to ensure predictability from other sources. The most predictable workforce is permanent and direct employment. The Government therefore believes that the measure is suitable for achieving the desired objectives, including increasing permanent employment.

One cannot rule out that the measure leads to more enterprises using direct temporary employment (fixed-term) to a greater extent than previously, instead of employing permanently. At the same time, direct employment requires more administration than hiring from temporary employment agencies. Research indicates moreover that fixed term contracts lead to permanent employment to a greater extent than temporary agency work. The Institute for Social Research (ISF) estimates that around 40-50 per cent of temporary employee's transition to permanent employment within one year, while around 30 per cent of temporary agency workers move on to permanent and direct employment in other enterprises. ISF has looked at the period 1995-2019. The share of temporary employees who switched to permanent employment is increasing as the period progresses, while the share of temporary contractors who switch to permanent employment in other enterprises declined towards the end of the period. The figures will be updated in the final report from the project in the autumn 2023. (*Strøm, M. & von Simson, K. (2020). Atypisk arbeid i Norge 1995-2019. Institutt for samfunnsforskning. Rapport 2020:12. English summary.)* This shows that the measure have a potential of increasing permanent employment.

The directive also aims to stimulate temporary agency workers to access permanent employment in the user undertaking, see C-681/18 paragraph 51:

> That twofold objective thus gives expression to the intention of the EU legislature to bring the conditions of temporary agency work closer to 'normal' employment relationships, especially since, in recital 15 of Directive 2008/104, the EU legislature expressly stated that employment contracts for an indefinite term are the general form of employment. That directive therefore also aims to stimulate temporary agency workers' access to permanent employment at the user undertaking, an objective reflected in particular in Article 6(1) and (2) of that directive.

In the view of the Government, it follows that permanent employment in a temporary work agency is not the same as permanent employment in a user undertaking, see also chapter 7 above. In our opinion, this implies that the Directive also recognizes that it is more advantageous for employees to be permanently employed in a user undertaking than in a temporary work agency.

In this important area, it is crucial to have provisions that can be easily enforced and controlled. The remaining options on using temporary agency work are in our view easier

to understand and apply. ECJ has recognized that uncomplicated solutions may be preferred, for example to facilitate enforcement, cf. C-110/05 (Commission v Italy), see paragraph 67:

> Although it is possible, in the present case, to envisage that measures other than the prohibition laid down in Article 56 of the Highway Code could guarantee a certain level of road safety for the circulation of a combination composed of a motorcycle and a trailer, such as those mentioned in point 170 of the Advocate General's Opinion, the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.

Measures related solely to enforcement or guidance are in the view of the Government not enough to reduce the use of hiring that displaces permanent and direct employment.

It is important to emphasize that the Norwegian rules express the aim for a high level of protection. The regulations of the use on temporary agency work must also be seen in connection with the regulations of employment protection. In order to prevent misuse, it is desirable with high correlation between these two sets of regulations. Reference is made to OECD Employment outlook 2020 chapter 3.3[8]:

> The overall positive relationship between the regulation of regular and temporary contracts is likely to be the result of the differences in regulation of regular contracts together with policy makers' desire to restrain the use of temporary contracts. Where regular contracts are not much regulated, firms have few incentives to replace regular with temporary contracts; the need to restrict the use of temporary contracts is therefore not there. In countries with high regulation of dismissals of regular workers, strict regulation of temporary contracts can help avoid that these are overused. As seen in the Netherlands, Portugal and Sweden for example (OECD, 2014[60]), relatively low regulation of temporary contracts in situations of high regulation of regular contracts can lead to strong, unintended labour market segmentation between highly protected regular workers and weakly protected temporary workers.

The recent Norwegian regulations imply that one of the options for using temporary agency work is removed, while at the same time the other options are retained.

ESA has raised some questions regarding consistency. The first regards whether it is in line with the requirement of consistency to prohibit the use of temporary agency workers when the work is of a temporary nature, with the main aim of promoting permanent employment, while still allowing for the use of fixed-term workers in the same situations. Fixed-term employment directly in the user undertaking implies a two-party relationship, as a basis for trust, involvement, and cooperation, and also transition to permanent employment, to a greater extent than triangular relationships cf. above.

Another question is whether it is in line with the requirement of consistency to prohibit the contracting out of workers from temporary work agencies when the work is of a temporary

[8] https://www.oecd-ilibrary.org/sites/1686c758-en/1/3/3/index.html?itemId=/content/publication/1686c758-en&_csp_=fc80786ea6a3a7b4628d3f05b1e2e5d7&itemIGO=oecd&itemContentType=book#section-d1e24760

nature, while making no such restrictions in relation to the contracting out of workers from all other undertakings, cf. WEA section § 14-13.

Reference is made to the preparatory work in Ot.prp. nr. 70 (1998–1999) chapter 6.3.4.1, describing why there are legal differences between hiring from temporary work agencies and hiring from undertakings whose object is not to hire out labour[9].

In short, undertakings whose object is not to hire out labour, are ordinary enterprises, traditionally manufacturing companies within the engineering or oil industry. It is desirable to have wider access for hiring between such enterprises. This is "lending-like" situations, and the regulation for using temporary agencies is not suitable for enterprises that wish to hire out their employees as an alternative to dismissal or temporary dismissal. This distinction (for regulation) has a long tradition in Norway.

For hiring from undertakings whose object is not hire out labour, it is a requirement that the hired worker has a permanent employment relationship in the hiring-out undertaking, cf. WEA § 14-13. The employees will thereby have an ordinary and permanent employment relationship in an ordinary manufacturing/production enterprise as a basis. In our view, an employee being seconded to another production enterprise for a period will not challenge the main rule of permanent employment in a two-party relationship.

The Norwegian Government considers that the former framework was not effective enough to ensure the main rule on permanent employment. Other measures have been considered, but are not considered as effective when it comes to achieving the aim. As mentioned in chapter 8.4 below, a quota has previously been considered as a measure. In Prop. 131 L (2021–2022) section 6.4.4, the Ministry also assesses various other measures. The Ministry notes, inter alia, that enforcement measures are not enough to reduce the use of temporary agency work that displaces permanent and direct employment, and to limit the negative effects temporary agency hiring has on contract workers, the hiring agency's own employees and the labour market. The Ministry points out that there is a need for measures to limit the right to hire as such, and not only to crack down on illegal hiring. Other measures were also considered.

The employer may still use temporary agency workers in temporary situations when the work shall be in place of another or others (substitutes). Moreover, there is still a wide scope for entering into contracts for temporary agency work pursuant to Section 14-12, second

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[9] "Dette er ordinære virksomheter, tradisjonelt produksjonsbedrifter innenfor verksteds- eller oljeindustrien. Begrunnelsen for å gi særskilte regler for virksomheter som ikke har til formål å drive utleie er at det er ønskelig med en videre adgang til arbeidsleie mellom slike virksomheter enn det § 58 A-modellen gir adgang til. For eksempel vil en § 58 A-løsning ikke være egnet for virksomheter som ønsker å leie ut sine tilsatte som alternativ til f.eks. oppsigelse eller permittering. Utvalget beskriver dette som utlånslignende situasjoner mellom virksomheter som driver aktivitet innenfor noenlunde samme områder. Utvalget viser til at skillet har lang tradisjon i Norge, ettersom det i utgangspunktet har vært et forbud mot utleie av arbeidskraft fra vikarbyråer, med unntak av kontorsektoren mv., mens det i praksis har vært vid adgang til å få dispensasjon for arbeidsleie mellom tradisjonelle produksjonsbedrifter. Forslaget tar således sikte på å videreføre muligheten til å benytte arbeidsleie i disse tilfellene."

paragraph. The provision in the second subsection does not set out any conditions/reasons for when hiring is permitted. As long as the hire is time-limited, it is up to the local parties to decide whether the hiring should be used in the case in question. Certain exemptions have also been granted in certain areas, cf. Chapter 3 above. Enterprises have also had time to adapt to new rules. The proposals were circulated for consultation in January 2022, and came into effect on April 1, 2023, with transitional rules for binding contracts until July 1, 2023.

The actual effects of the measure, including whether the Government achieves the objective of more permanent employment in user enterprises, including other positive effects such as a higher degree of organisation – or whether it leads to more fixed term contracts or sub-contracting, – will be closely monitored. A research project has already been initiated to survey the effects of the measures. Reports will be published annually in 2024 and 2025 before a final report in 2026. The results will be included in an evaluation of whether the measures have had the wanted effect.

8.4 Prohibition in construction sector in the Oslo area

8.4.1 Justified on grounds of general interest

The construction sector is characterised by several challenges.

The building- and construction sector has for a long time been a particularly vulnerable industry to workplace crime, see chapter 4.5 above. This sector is one of the most accident-exposed industries in Norwegian working life, both in terms of occupational death and occupational injuries. See chapter 7.2 on negative consequences of temporary agency work regarding health and safety. The Labour Inspection Authority finds that direct employment in the enterprise where the work is performed, contributes to a safer working environment and reduces the risk of occupational accidents.[10] They mention, inter alia, that hired workers often do not receive the same training as direct employees regarding how the work can be performed safely and securely by the hiring agency, including the use of work equipment. The threshold for reporting errors and deficiencies in the working environment is also higher for hired workers than for employees who are directly employed. The Government would in this connection also like to point out that the Norwegian Labour Market Model, and regulations in both the WEA and collective agreements, implies wide-ranging duties for consultations at the workplace, cooperation, and involvement of social partners – not least concerning issues regarding health and safety. This framework and system are built up around two-party relationships.

The construction sector in Norway is in need for skilled workers. Application for apprenticeships in construction are lower than the demand. Extensive use of temporary agency work in construction might have deteriorated recruitment through ordinary vocational training, cf. chapter 7.4.

[10] Consultative statement 19. April 2022.

There has been a significant decline in union density and collective bargaining coverage in construction. Collective bargaining coverage was reduced from 50 to 40 per cent 2001-2018. The unionization rate is 16 percentage points lower among temporary employees than permanent employees. See chapter 7.3.

According to the available statistics, the use of temporary agency work has been considerable in the construction sector. See chapter 5.3.

Reference is also made to chapter 7 describing negative consequences of temporary agency work. The proportion of temporary agency workers in the construction industry also means that the industry is more exposed to these negative consequences.

The prohibition of use of agency work in the construction sector is based on the need to ensure a well-functioning labour market within this sector. The goal is not only to stimulate to more permanent positions, but thereby also to facilitate use of collective agreements in the industry. It also provides a basis for strengthened recruitment to the industry through apprenticeship schemes and the use of skilled workers. As the construction industry is a particularly accident-prone industry, the measure may also be justified by health and safety requirements. The measure also aims to protect workers' rights.

8.4.2 The measure is proportionate

It is important to distinguish between the consequences in the short term and long run. In the short term, and in a transitional phase, the prohibition may entail certain adaption challenges for enterprises regarding the supply of labour. Employees who have previously been employed by temporary employment agencies may also experience unpredictability before they get a new job. However, the initiative's long-term aim is to create permanent and lasting changes in this sector.

In the Governments view, the prohibition surely has the potential for increasing permanent employment in the user undertakings. With no access to use temporary agency workers, the enterprises in the construction sector must find other ways to engage labour. It is expected that some enterprises will enter into more fixed-term contracts, some will increase the use of sub-contracting, and some will be hiring employees from undertakings whose object is not to hire out labour (WEA § 14-13). The Government nevertheless consider it likely that many enterprises in the construction sector will increase the amount of permanent employment, as this will provide the enterprises the predictability that previously came from hiring from temporary agencies.

Media reports already show that construction companies are hiring more people in permanent direct positions.[11] The article mentioned in the footnote states that a construction company hired 170 construction workers last year, and that 50 more will be hired this year. The union representative interviewed, explains that he has just been involved in the hiring of 27 new construction workers in permanent positions. These workers are mostly workers

[11] https://frifagbevegelse.no/nyheter/feiret-forbudet-mot-innleie-na-far-flere-i-byggebransjen-fast-jobb-6.158.948877.d64efc9c6a

from Poland and Portugal, and came from temporary work agencies. He also explains that these are people who do not have a certificate of apprenticeship, but that they are now aiming to help them with Norwegian courses and to get a certificate of apprenticeship. This shows that the measure in fact has the potential for increasing permanent employment. The overall effects of the prohibition, including developments in the proportion of permanent employment in the construction industry, will be monitored closely through an already initiated research project, see Chapter 6.3.

Introducing a prohibition in the construction sector is assessed as necessary. The challenges with hiring in the construction industry have persisted for a long time. The growth in hiring from temporary work agencies in the construction sector has been significantly higher than to other industries. There has been a clear growth in the use of temporary agency workers in construction, with a pronounced increase after the financial crises in 2008-2009. (See chapter 5.3.1 and figure 5.4) The growth has mainly been driven by migrant workers from Eastern Europe. According to Fafo, non-resident immigrants make up about one third of those employed in the industry. Safeguarding decent working conditions for vulnerable workers has been given high priority from the Government. As mentioned in chapter 4.5, the construction sector has been vulnerable for workplace crime. The police and the Labour Inspection Authority identifies foreign workers as particularly vulnerable for exploitation. The Action plan to combat social dumping and work-related crime, submitted by the Government in autumn 2022, consists of several measures to strengthen employees 'rights, including the proposed regulation on temporary agency work.

A possible introduction of a quota has previously been considered by the Government, cf. Prop. 73 L (2017–2018). This proposal was met with opposition in the consultation at the time, both from organizations on the employee and employer sides. In the reasons why it was not chosen to introduce a quota, it was pointed out (cf. section 8.3.1):

> Many believe that a quota could be perceived as a norm and lead to more hiring. Challenges have also been pointed out in the application of a quota rule, and several believe that any regulation must take place at the workplace level rather than at the enterprise level. Others have pointed out that a quota will be complicated, and several have pointed to challenges with enforcement and sanctioning.

Instead, it was proposed by the Government at the time to raise the level of the collective agreement that businesses must be bound by in order to enter into an agreement pursuant to section 14-12, second paragraph, with regard to hiring for building and construction activities. The Parliament at the time decided to make this rule general for all sectors/industries.

The Directive recognizes that introducing a prohibition on temporary agency work could be a necessary measure. This follows directly from Article 4(1). The necessity criterion must be viewed in light of this.

The Government is of the opinion that the Directive respects and recognizes that a prohibition may be the right solution in certain cases, and the states' wide margin of discretion and the directive's respect for the differences in labour markets leave these assessments to the states. The Norwegian Government believes that this is what is needed

for ensuring that companies in the construction industry to change course and invest in their own employees. As mentioned above, the amendments will be followed very carefully in the years to come.