Fafo

English summary
of Fafo-rapport 2019:38

Compliance with the regulation of temporary contracts and agency work

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This is the main report emanating from a project examining compliance with the provisions for the use of temporary contracts and temporary agency workers under the Working Environment Act. The purpose of the project was to generate knowledge on the following:

1. the extent of violations to the provisions on temporary contracts and the use of temporary agency workers in the private and municipal sectors, and
2. enforcement of provisions on temporary employment and the use of temporary agency workers, who enforces the provisions and why they are (not) enforced.

About the regulatory framework

The legal provisions on the use of temporary contracts and temporary agency workers are pivotal to interpreting the findings of the project. The main rule is that employees must be offered a permanent contract, i.e. without a time limit, cf. section 14-9 (2) of the Working Environment Act. However, employers can, under certain conditions, hire employees temporary or use temporary agency workers. In principle, the latter is admissible under the same conditions that the company is permitted to hire temporary employees, with some exceptions, cf. section 14-12. In other words, mapping the extent of violations of the legal provisions on the use of temporary contracts and temporary agency workers entails assessing whether the conditions in the provisions have been met.

Using temporary contracts

The provisions in the Working Environment Act concerning hiring employees on a temporary contract are laid down in section 14-9 (2) as follows:

'Temporary appointment may nevertheless be agreed upon

a) when the work is of a temporary nature

b) for work as a temporary replacement for another person or persons

c) for work as a trainee

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

d) with participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service

e) with athletes, trainers, referees and other leaders within organised sports

f) for a maximum period of twelve months. Such agreements may apply to a maximum of 15 per cent of the employees of the undertaking, rounded off upwards, but temporary appointment may be agreed upon with at least one employee.'

The non-regulated minimum staffing doctrine

Section 14-9 (2) b of the Working Environment Act allows for temporary contracts when companies need labour temporarily. In some cases, such as in large organisations where many employees perform the same types of tasks (e.g. nurses in a nursing home), there may be a constant need for labour temporarily due to, for example, sick leave. In some such cases, where this constant need is predictable, creating permanent positions may be the proper choice as opposed to hiring staff temporary on a regular basis. This rule is referred to as the non-regulated minimum staffing doctrine. Assessments of whether a need is permanent or temporary may to some extent be subject to discretion, and so far, the non-regulated minimum staffing doctrine has not been used as a legal basis for court decisions on the use of temporary agency workers.

Using temporary agency workers

Temporary agency workers can be used under the same conditions as for temporary employees, with the exception of the general rule on temporary employment in section 14-9 (2) f, see section 14-12 of the Working Environment Act, which stipulates the following:

'(1) Hiring of workers from undertakings whose object is to hire out labour shall be permitted to the extent that temporary appointment of employees may be agreed pursuant to section 14-9, second paragraph (a) to (e).

(2) In undertakings bound by a collective pay agreement concluded with trade unions with the right of nomination pursuant to the Labour Disputes Act, the employer and the elected representatives who collectively represent a majority of the employees in the category of workers to be hired may enter into a written agreement concerning the hiring of workers for limited periods notwithstanding the provisions laid down in the first paragraph. In response to an enquiry from the Norwegian Labour Inspection Authority, the undertaking shall provide documentation that the hirer undertaking is bound by a collective agreement concluded with trade unions with the right of nomination and that an agreement has

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

been entered into with the employees' elected representatives as referred to in the first sentence.

[...]

(4) In connection with the hiring of workers pursuant to this section, the provisions of section 14-9, seventh paragraph shall apply correspondingly.'

In addition, where a collective agreement is in place, the employer and employee representatives may sign a written agreement concerning further rights to use temporary agency workers. A requirement was introduced on 1 January 2019 stipulating that a collective agreement must be signed with a trade union with the right of nomination, but this change had not yet entered into force at the time of the data collection for the project.

Compliance with the legal provisions

The employment contract is a private-law agreement between the individual employee and the employer. This means that, in principle, it is up to the individual employee to address violations of the provisions. Where such matters are brought before the courts, the court may decide that a permanent employment relationship exists, and the employee may be awarded compensation, see section 14-11 of the Working Environment Act. If the court determines that the provisions for temporary agency workers have been violated, the company must employ the worker concerned in a permanent position. However, in special cases and after balancing the parties' interests, the court may decide that the employment relationship should be terminated, both in relation to temporary employees and agency workers.

Possible violations of the legal provisions

Temporary employees

In the project, we define the extent of violations of the regulatory framework as the proportion of temporary employment that is not provided for in section 14-9 (1) (a) to (f) of the Working Environment Act. For the provisions on the use of temporary agency workers, our aim was to identify whether the conditions for use are met, i.e. whether the use of agency workers is intended to meet a temporary need as stipulated in section 14-9 (1) (a) to (e). The reasons for using temporary employees or agency workers are therefore central. When temporary agency workers are used in a way that does not cover temporary needs, we also

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

investigate whether a written agreement has been entered into that allows for exceptions to this requirement, as provided for in section 14-12 (2).

The extent of possible violations of the Working Environment Act can be measured in two ways: either by asking employees why they are a temporary employee or an agency worker, or by asking employers why they use temporary employees or agency workers. Neither method of measurement is infallible, and nor will it provide an exact answer to the proportion of violations, but it can give an indication of possible violations.

In the project, we used the Labour Force Survey to analyse the reasons that employees gave for being a temporary employee. These analyses showed that between 23 and 35 per cent of temporary appointments lack a clear justification in the legislative framework. This involves between 40 000 and 65 000 workers in the private sector, the municipal sector and the health trusts. There are clear differences between industries in relation to the justification for temporary employment, but the number of temporary employees who are not classified under any of our indicators does not vary significantly.

Surveys completed by companies were used to analyse employers' reasons for using temporary employees and agency workers. The analyses showed that between 30 and 42 per cent of the companies, depending on which indicator is used, justify the use of temporary employees by referring to conditions that indicate possible violations of the Working Environment Act. The proportion of possible violations is higher in municipal and county administration and teaching, as well as in health and social care, than in the other main industry categories.

Temporary agency workers

The Company Survey 2019 indicates that between 23 and 36 per cent of companies in the last two years have stated reasons for using temporary agency workers that appear to contravene section 14-11 of the Working Environment Act, cf. section 14-9 (2) (a) to (e), without this being provided for in an agreement with employee representatives. The use of labour from East Europe, including from agencies, has also been mapped through a separate survey of construction companies, parts of the manufacturing industry and the hospitality industry. Here, we find that between 3 and 6 per cent of all companies use temporary agency workers as part of their daily operations, without this non-conformance being provided for in an agreement. This suggests that temporary agency workers are being used unlawfully.

Are companies deliberately breaking the law?

In the project, the companies' reasons for using temporary employees or agency workers form the basis of our estimate of the proportion of companies that are

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

violating the provisions. The analyses do not involve a legal assessment and can therefore only be used as an indication of the proportion violating the regulatory framework. In the project, we also asked company managers if they themselves think their company is breaking the rules. The Company Survey 2019 shows that nine per cent of companies' state that they had entered a grey area, or had broken the rules on temporary employment in the last two years. The percentage of companies that admitted to breaking the rules on temporary positions, or applying them in a way that is perceived to be in a grey area, is highest in municipal and county administration, primary and secondary education (17 per cent), and health and social services (13 per cent). We also found that two per cent of the companies had used temporary agency workers in a way that had, or may have, contravened the provisions. Thus, far fewer companies acknowledge that they are breaking the rules compared to the stipulation we arrived at when looking at the reasons cited by the companies for using temporary employees and agency workers.

Addressing violations of the regulatory framework

The analyses indicate that many companies are breaking the rules, and many employees are in positions that should be permanent rather than temporary. The other main research question in the project is whether these violations are being addressed. We examine reasons for non-compliance of the regulatory framework, and the nature of the compliance processes for matters that are actually addressed.

Violations of the regulatory framework can be addressed at various levels. The employee can raise the issue with his employer, or with the support of a local employee representative. If this does not resolve the matter, workers who are trade union members can contact their union, and others can contact a solicitor or other advisor for assistance. If the matter is still not resolved, mediation or the courts can be used. In the project, we examined the extent of cases that are dealt with at these levels, as well as the reasons for not addressing temporary employment issues.

What factors lead to violations not being addressed?

Knowledge on the reasons for not addressing violations was generated from focus group interviews with temporary employees and agency workers, and qualitative interviews with employees in trade unions and employers' organisations. The data collected indicates that many workers are not familiar with the law, and they do not know whether their terms of employment comply with the legal requirements. This particularly applies to casual part-time workers, on-call staff,

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

etc. Several participants in the focus groups were uncertain whether the Working Environment Act applies to them, because they are not permanent employees.

Knowledge was particularly poor among agency workers with a foreign background working in the construction and catering industries. These informants expressed a low level of knowledge about the regulatory framework, and this is probably partly due to poor Norwegian skills. The results of the focus group interviews are supported by data from an employee representatives panel in the Norwegian Confederation of Trade Unions (LO) from autumn 2019, which shows that the representatives believe that lack of knowledge about the regulatory framework (45 per cent) and the fear of losing their job (43 per cent) are the two main reasons why agency workers seldom or never contact them or other employee representatives.

Many temporary workers, especially those from agencies, have short employment contracts and do not know the terms of their own position. It takes some time before they know whether the contract is legal or not, and by then it is near the end date. This reduces the opportunities for addressing violations of the provisions. Furthermore, there is a risk attached to reporting violations or suspected violations. Many temporary employees or agency workers are in a weak position in the workplace. These employees tended to adopt a short-term perspective due to the short-term nature of their contracts, and they were more concerned about keeping their job than about acquainting themselves with the regulatory framework and their rights. If temporary employees/agency workers believe that they are being used unlawfully, the risk associated with demanding a permanent position can often be considered *too* great.

The results from the focus group interviews are supported by surveys of LO's employee representatives: 69 per cent agree completely or to some extent that workers will not report the illegal use of temporary contracts because they fear not having their contract extended, and 51 per cent agree completely or to some extent that foreign workers are more anxious about reporting such conditions than Norwegian workers.

In the choice between not reporting possible violations (loyalty), leaving their job (exit) and addressing issues (voice), we find that temporary employees and agency workers choose loyalty. For some, the option may be having a temporary job or no job at all. Exit is therefore not a relevant course of action for the workers, but a natural consequence of the contract expiring. Many workers do not find the voice strategy appropriate, given their weak position in the workplace and their desire to continue working. We find that those with knowledge of the Working Environment Act express that the law does not apply to them *in practice* because the risk associated with demanding a permanent job is considered too great.

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

What happens when an issue is raised and addressed?

How many issues are reported and what is the outcome? The first step for a worker is to raise the matter with the employer, or to do so after contacting an employee representative. We have examined whether employers receive enquiries about positions that should, in accordance with the law, be permanent. Fafo's Company Survey 2019 shows that most have not received such enquiries in the past two years. Seven per cent of HR/company managers had received an enquiry from an employee representative, and somewhat fewer from the worker in question. Relatively fewer business managers in the private sector had received such enquiries, compared with the HR/company managers in public (not central government) companies. Among those who had received one or more such enquiries, almost half had received one, while 22 per cent had received two. Fourteen per cent of those who had received such enquiries had done so four times or more over a two-year period.

During the past two years, a relatively large proportion of employee representatives (45 per cent from LO and 33 per cent from Negotia) have been asked by union members whether these trade union members are being unlawfully used as temporary employees or agency workers. The proportion of LO employee representatives who have frequently or occasionally been contacted with questions about employees being exposed to the illegal use of temporary employment varies between the different parts of the labour market, and is lowest among employee representatives in service production (21 per cent) and highest in the municipal and county sector (30 per cent). Some representatives have been contacted by agency workers looking to establish whether their working terms were legal. Forty-five per cent of the LO representatives and 37 per cent of the Negotia representatives have been contacted during the past two years. Seventeen per cent of the LO representatives and 5 per cent of the Negotia representatives are contacted frequently or occasionally about such matters.

This report further shows that once an employee decides to address/report an issue, the formal processes seem to work relatively well, according to both the employers' organisations and the trade unions. The issues are mainly resolved at a low level (level 1) between the employer and the employee. In Fafo's Company Survey 2019, the HR/company managers were asked at what level the temporary employment issues they have dealt with in the last two years were resolved. Fifty-eight per cent were settled on the spot, while 37 per cent were settled after a meeting(s) between the employee and management. Only in a very small percentage of cases was the matter escalated to a higher level, and settled after meetings with a solicitor or trade union at a higher level. None of the HR/company managers reported legal proceedings.

We were interested in the outcome of issues and disagreements concerning temporary employment. In the Company Survey 2019, HR/company managers

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

were asked about the outcome of the cases they were involved in. Nearly nine out of ten replied that the parties had 'reached agreement about the position', while 8 per cent said 'the employee chose not to take the matter further'. This means that in some cases, the employer and the employee still disagreed about whether the temporary position should actually be permanent, but the employee nevertheless chose not to pursue a voice strategy. Violations of provisions and disagreements about regulatory compliance are therefore not always fully resolved.

Employee representatives play an important role in these processes. Some employee representatives in LO (15 per cent) and Negotia (9 per cent) have experienced that temporary agency workers were given permanent employment in the companies they were working for because the basis for their temporary employment was unlawful. However, a large proportion, especially among Negotia employee representatives, were uncertain about this. LO employee representatives in the private sector have seen the described scenario to a much greater extent than those in the municipal or county sector. This is to be expected, however, since agency workers are also used more frequently in the private sector.

However, the review indicates that relatively few cases are raised with the organisations. This may be a result of effective negotiation procedures between the parties. If negotiations do not lead to a solution, the case may be resolved as the result of, for example, court-administered mediation. For this report, we performed a search in Lovdata, which, after the exclusion of cases for varying reasons, resulted in 39 cases in the period 2006–2019, where section 14-9 or section14-12 was referred to as a legal basis. This includes all cases from the Supreme Court and the appeals courts, but only a selection of cases from the district courts. Thirty cases related to temporary employees, while nine involved the unlawful use of temporary agency workers. The key role of the employee representatives and trade unions is also reflected in the cases that end up in the courts. Trade unions have been involved in 28 of the 39 cases involving unlawful temporary employment or use of agency workers since 2005.

Since not all district court cases are included in our search, the actual figure may be higher. However, our informants in the organisations and various legal aid schemes also gave the impression that few cases end up in the courts. The data suggests that most cases are resolved through dialogue. This often takes place in the workplace between the employee and employer, but such dialogues are also held at higher levels. Our informants reported that they receive far more requests for advice and guidance, which could also explain the low number of cases brought before the courts. The volume of formal cases and enquiries appears to be stable over time. According to the informants, the majority of issues are not related to the grounds for temporary employment, but to the provision on additional work (section 14-4a), the three-/four-year rule and the minimum staffing level. Issues relating to temporary agency workers often involved the written

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

agreement that can be made with employee representatives. Based on the experiences of the informants, issues relating to temporary employees appeared to be most prevalent in the municipal sector, while issues relating to unlawful use of agency workers were most prevalent in the private sector, particularly in the construction industry and in manufacturing. However, our informants emphasised that these cases were examples taken from the unionised labour force. As such, the legal professionals in the trade unions assumed that they only saw 'the tip of the iceberg' and that the entire labour force in Norway would need to be examined in order to uncover the hidden figures.

Is the large extent of violations and non-compliance a problem?

The results of our survey indicate that many companies are operating in a grey area and may be violating the Working Environment Act in relation to temporary employees and the use of temporary agency workers. Additionally, few of these violations appear to be addressed. It is reasonable to assume that there is a link between the risk of a violation being identified and the employers' focus on the provisions in question. Violations are not necessarily of a serious nature, but may be the result of practices evolving that have not been fully in line with the intention of the law. The large proportion of violations can be problematic in itself, as this can have consequences for the integrity of the provisions, for the competition between companies and for the workers concerned. However, the consequences for the workers may vary, depending on the position they hold. Some workers do not have ambitions to stay in their position for a long time, and may be less concerned about whether the position is temporary or not. The consequences of violating the provisions are probably greatest where workers remain in temporary positions for a longer period of time. Nergaard (2018: 130) has previously shown that a very high percentage, 51 per cent, move to a permanent job from a temporary job during the course of a year. As such, many only have a temporary employment contract for a short period of time, which may partly explain why so many choose not to pursue violations with regard to the position they hold. However, Svalund and Nielsen (2017) show that many of those with a temporary job, and particularly those with the weakest attachment to the labour market, such as the young, those with a low level of education and casual workers, are less likely to secure a permanent job. Svalund and Berglund (2018) have further shown that young people, those with a low level of education and immigrants from outside Europe and the USA are more likely to subsequently experience unemployment and other forms of marginalisation. An upcoming study by Berglund, Svalund, Nielsen and Reichenberg also shows that some temporary wor-

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos

kers do not necessarily achieve a stronger attachment to the labour market over time. Simson (2009; 2012) has studied whether agency working can be a stepping stone to other parts of the labour market for immigrants and young people with no upper secondary qualifications, and finds that this is more often the case for immigrants who have had such a job than for those who have not had a job at all (Simson 2009).

Overall, these studies show that attachment to the labour market increases the likelihood of securing a new job or being employed at a later. Although temporary jobs and agency work increase the chances of subsequent employment, several of the studies show that some of those in such work are more likely to be marginalised and to remain so, and less likely to find permanent, secure work. Some people do not go on to find a better job, and remain on temporary contracts and continue to have a weak position in the labour market. For this group, it is vitally important that the provisions are complied with, or that a mechanism is in place to sanction employers who contravene such provisions and to protect and support the rights of workers.

In line with the theory that workers can choose between exit, voice and loyalty, voice seems to be the least common path for workers who believe that the regulatory framework is not being complied with. The results of the survey also illustrate how important the employee representatives are in the compliance process. This may indicate that the problem of compliance is greatest in sectors with the lowest unionisation rates and contract coverage. If the Norwegian working life will face wakened collective institutions at company level, the authorities might have to take greater responsibility for ensuring compliance in the years ahead.

English summary of Fafo-rapport 2019:38
Compliance with the regulation of temporary contracts and agency work
Jørgen Svalund, Beate Sletvold Øistad and Kristin Alsos