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Temporary agency work: evolution, regulation and implications for performance

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Abstract

Temporary agency working continues to grow in the UK. This paper looks at a number of important developments in the agency industry, which generate implications for the performance of agencies, temps and the user firms in which temps work. These developments are: the increasingly complex set of contractual arrangements between agencies and user firms; the changing regulatory environment; and the the changing role of agencies in pay setting. The paper sets out some of the key performance implications of these developments.

The paper reviews the state of the art literature on agency working, and draws on 15 years of primary research and secondary analysis of the sector by the authors.

The paper shows that there is a proliferation of models of temporary agency worker supply, some of involve agencies playing a greater role within firms in the management of temps, with other involving a deliberate and strategic distancing of client firms and/or agency in the day-to-day management of temps. This creates significant challenges for the management of temps. The paper also finds that there are significant tensions and challenges arising from

the implementation of the Agency Working Regulations, even though these regulations have the potential to raise motivation and performance of temps.

Further research is needed to explore the extent and implications of the developments outlined, to see whether new models of labour supply are becoming more widely used, and where they are commonplace. Further research is also needed to explore the effects of the agency working regulations on employer and agency practice.

The management of temps creates significant challenges for organisations and agencies. New models of supply of agency labour have the potential to make these challenges even more problematic, if not addressed effectively.

The implications of the shifting regulatory and political environment also needs closer scrutiny, particularly in the context of the recent EU Referendum result in the UK.
The paper sheds light on a number of new developments in the agency sector, and by demonstrating their effects on organisations, agencies and temps, draws out some of the performance implications of the continued and changing use of agency temps.

Introduction

Temporary agency working, in which workers are hired out to client firms on a temporary basis in return for an hourly fee, continues to grow and evolve in the UK labour market and beyond. Traditionally underpinned by models of labour supply in which the agency places the worker in the client firm and then leaves the day-to-day management of temps to the user firm, this form of employment has become increasingly widely used by employers over the last 30 years. Earlier research has tended to find that agency workers have been used by organisation as a means of providing numerical flexibility in response to fluctuating product demand, or for short-term specialist tasks (Grimshaw et al, 2001). It is clear from his literature that the use of agency temps creates a number of particular human resource and people management challenges, most of which flow from the 'triangular' relationship created between worker, agency and user firm. Research has examined the extent to which, and how, these workers can be effectively integrated into firms, and motivated at work (Ward et al, 2001); the responsibilities, both legal and those stemming from a 'psychological contract', of firms and agencies towards these workers (Forde and Slater 2016) and the experience of work for agency temps (Smith and Neuwirth, 2018).

Here we argue that the agency sector has evolved markedly in recent years and that the various changes that have occurred together create further challenges for the effective management of agency temps within firms. Three developments in particular are explored. First, we look at the increasingly complex set of contractual arrangements between agencies and user firms, and the proliferation of models of temporary agency worker supply. Some of these involve agencies playing a greater role within firms in the management of temps. Others involve closer partnerships between agencies, firms and, in some cases, worker

representatives. Others involve a deliberate and strategic distancing of client firms and/or agency in the day-to-day management of temps. Secondly, the regulatory environment surrounding the supply of temporary workers has shifted dramatically in recent years, particularly in the context of the implementation of the EU Agency Working Directive (although it may shift again as the UK seeks to extract itself from EU membership and attendant obligations). The key change here is the requirement that agency temps are treated equally to comparable directly employed workers in user firms although there is a difference between day one rights and those that apply during a continuous assignment of twelve weeks or more. Thirdly, we look briefly at the increasing role of agencies in pay setting activities in firms, an area where historically, agencies have had a very limited role to pay. Their involvement in pay setting activities creates a number of challenges for the effective management and motivation of agency temps.

Throughout the discussion we draw mostly on the state-of-the-art literature in this area, supplemented in places with summaries of our own primary research into the agency industry over the last 15 years. In what follows, we first briefly examine the evolution of the agency industry in the UK over the last 30 years. We then turn to a closer examination of the three main developments outlined above, identifying the key implications for the effective management and performance of temps and the organisations in which they operate. Finally, we outline some areas for future research and draw conclusions.

The growth and evolution of the temporary agency industry

Employment intermediaries have a long history in the UK labour market, with evidence of their activity dating back to at least the 1920s. However, it is only in the last thirty years or so that temporary employment agency working, in which workers are hired out by agencies on a temporary basis to firms in return for an hourly fee, has developed and grown significantly. Forde et al., (2008) report a 500 per cent rise in the number of agency workers between the mid-1980s and 2007, the number working at any one time rising from 50,000 to around 250,000. Whilst the great recession of 2008-2012 saw some decline in the numbers of agency workers, numbers in agency workers have grown again since 2013, to reach 330,000 (1.5 per cent of the employed workforce) by 2015. Whilst this 'stock' measure of agency workers appears quantitatively relatively small, importantly agency working has penetrated into a significant proportion of firms, with round about one-in-five using agency workers according to the most recent Workplace Employment Relations Survey (Van Wanrooy et al., 2013). Furthermore, in an increasing number of firms, agency workers make up a substantial proportion of the workforce (Van Wanrooy et al., 2013). One such sector is retail warehousing and some of the attendant concerns about the conditions of agency work as the sector has grown and evolved can be seen in the media and political furore surrounding problems at Sports Direct (see BIS, 2016). There have also been concerns that as agency working has grown and spread it has, in certain sectors, come to rely on the recruitment and supply of migrant labour with attendant concerns about pay levels and awareness of and ability to exercise employment rights among the agency workforce (ibid., Forde et al., 2015).

Contractual arrangements between agencies and client firms: more complexity and greater management challenges

Not only has agency working increased in scale and scope, an important dynamic driving the evolution of the sector is the nature of the contracts that exist between agencies and client firms. Yet, the starting point for much economic analysis of the relationships between clients and agencies is to understand it in terms of 'spot' contracting. Here, the potential buyer of agency services (the client firm) can choose between many different suppliers of agency labour (see for example Williamson, 1985) and the contractual relationships are viewed as short term for discrete tasks or easily replaced skills. The (in)famous 'flexible firm' model also tended to share a similar view of agency-firm relationships (see Pollert, 1988 for a critical review). Yet, a central feature of the sector's development over the last twenty years has been the proliferation of contractual arrangements between agencies and client firms in the UK, with evolving relations bearing little resemblance to the 'spot' contracts described above. Many agencies, from the late 1990s onwards, began to develop long-term contracts with firms to supply large numbers of temps to firms on a quasi-continuous basis (see Peck and Theodore, 1998; Coe et al., 2010). In these large contracts, temps were often seen as 'permatemps', undertaking core roles in the client firms where they were working (see Druker and Stanworth, 2004; Grimshaw et al., 2001; Purcell et al., 2004). For agencies, the continuation of these contracts was heavily dependent upon them being able to meet the company's need for an (often rapidly varying) headcount, but also, crucially, upon them supplying 'repeat' (i.e. the same) temps to firms each day (Forde, 2001).

These contracts have continued to grow in importance over the last decade (Forde and Slater 2011). They typically involve a more 'hands on' role for the employment agency in the day-to-day management of temps. Many involve a manager from the employment business working 'on-site' in the client firm, and in some cases the agency undertakes other aspects of

a client's HR activities, such as payroll management, training, appraisal (CIPD/REC, 2009; Hoque et al., 2008).

An increasingly complex set of contractual arrangements and models of labour supply have emerged under which these 'hands-on' relationships are organised. Under 'preferred supplier' arrangements, a client firm will utilise multiple agencies to source their temporary staffing requirements, but will develop a close relationship with one of these agencies. This lead agency will, as Kirkpatrick et al. (2011) get the opportunity to supply temps first, drawing on other agencies if it cannot fulfil obligations on its own. For the client firm, the potential advantage of developing a relationship with a preferred supplier is that discounted rates can often be negotiated for the supply of temps, particularly where the client firm is 'buying in bulk' and arranging for large numbers of staff to be supplied on a long term basis (see Purcell et al., 2004; Kirkpatrick et al., 2011). Preferred supplier arrangements also allow the client firm to specify quality standards in terms of training and qualifications (Kirkpatrick et al., 2011), and to delegate much of the day-to-day work for monitoring, motivating and managing temps to the agency. 'Sole Supplier' arrangements are similar to preferred supplier forms, but here the client firm contracts with a single agency, and this agency has a monopoly on the supply of agency labour to the client. These are less common in practice than preferred supplier arrangements possibly due to the risks to having a single agency sourcing all temporary labour requirements.

Within the public sector, interactions with temporary employment agencies increasingly take place in the context of 'framework agreements'. These arrangements establish the terms governing contracts to be awarded during a given period (typically one or two years) in particular with regard to price and quantity. Framework agreements will specify which

agencies a public sector organisation can contract with. Essentially, framework agreements establish a list of 'preferred suppliers', although they do not typically place one agency in lead position over the others. Gaining access to framework agreements is seen as highly lucrative, with intense competition amongst agencies to be included. As Kirkpatrick *et al*. (2011) note, public sector firms may have some leeway in practice to use an agency which is not part of the framework agreement, however, there are strong financial and transactions cost incentives for remaining with the framework agreement. Indeed, in both this case and that of preferred supplier arrangements, these arrangements prove attractive to client firms in that they bring continuity to the arrangements that underpin their use and, very often, in the temps that they use. Even in cases where the same temps cannot be supplied, agencies will develop expertise in sourcing and managing temps that meet the client's requirements. From that perspective, although such arrangements reduce competition after the initial contract is established, the expectation is that they enhance organisational efficiency both in terms of workforce performance and in administrative terms.

A further dynamic in the sector, and one which creates new challenges for the management of temps, are contractual arrangements where agencies act as employer of the temps that they hire out to third party firms. For example, Manpower, one of the largest suppliers of temporary agency labour in the UK and globally (see Forde, 2008; Coe et al, 2010), has long marketed itself as an employer of the temps that it hires out, providing holiday pay, training and a range of other benefits. In this case, we might expect that agency workers enjoy greater stability and skill enhancement and hence, directly employed temps would provide their agencies with a competitive advantage through higher productivity and lower turnover. In practice, the obligations of agencies as employers are few and such arrangements can be found across agencies with a range of reputations. For example, the agencies supplying Sports

Direct employ their own temps but questions have been raised about the employment conditions and work practices their temps operate under (BIS Committee, 2016). Where agencies do not act as the formal employer, complex legal arguments remain as to obligations of agencies and the reality of the employment relationship, with much debate and related case law generated (see Davidov, 2004; Forde and Slater 2005). Whatever the employment situation of an agency temp, they will, in many instances be working alongside, or in proximity to employees of the client firm. Particularly where tasks are similar between each category of worker, inequalities in terms, conditions and the experience of work can arise. Not surprisingly, this can cause tensions with attendant negative impacts on motivation and performance, not just for agency workers but for permanent client-firm staff who may feel their security threatened or who may see their job tasks change where agency temps become a regular feature of an organisation's employment model (De Cuyper *et al.* , 2007 review the evidence). Some of these tensions may be able to be managed, with effective human resource practices, in which the responsibilities of agency managers, and HR/line managers towards temps are clearly delineated (see Kirkpatrick et al, 2011; CIPD/REC, 2009). However, if the *raison d'etre* for these contracts is to create distinctions and segmentations between directly employed staff and temps (through the payment of lower wages, and the offering of poorer benefits to agency staff who are employed via an agency), then it is difficult to see how these tensions may be overcome.

The regulation of agency working

Until recently, the regulation of agency working was light touch and minimal in the UK. Indeed, temporary agency work arrangements had fallen outside of the scope of much

employment legislation altogether. Neither the 1973 Employment Agencies Act, which required the licensing of temporary employment agencies, nor the 2003 Employment Agencies and Employment Businesses regulations, were used to clarify the ambiguous employment status of agency workers generated by the 'triangular' nature of their employment relationship, rather they set the basic framework for the operation of agencies. This is not to say that the regulatory coverage has no improved. As a by-product of other, more general regulatory changes temporary agency workers have seen an improvement in the extent of regulatory protection. For example, both the national minimum wage (1999) and the Working Time Regulations (1998) apply to the broader category of 'worker', with the latter including explicit provision to extend coverage to agency workers who may otherwise fall outside its scope. Yet even these broad measures have been implemented in the UK in such a way that some agency workers (and other vulnerable groups of workers) have slipped through the net of regulatory coverage and formal protection does not always equate to actual protection (see BIS Committee, 2016).

The most significant recent change in regulatory environment for agency working stems from EU-inspired moves to regulate the sector. In 2002, the European Commission set out a draft Directive on agency working, which, in line with earlier Directives on part-time workers and fixed-term temporary staff, was motivated by the aim to ensure non-discrimination of these workers. In practice, for agency temps this was to mean equal treatment to a comparable permanent employee in the client firm in which agency worker is placed. In 2008, following opposition from the UK, a revised EU Directive was put forward, which was accepted by the EU Council in June 2008, with the UK Agency Working Regulations (AWR) formulated soon after. Despite a change of government in 2010, these regulations were implemented in virtually unchanged form in October 2011 (Forde and Slater, 2016).

For the management of agency workers in the client firm, the requirements of the AWR provide a significant change in responsibilities. Some rights for agency temps are available from day one of an assignment, such as access to staff canteens, childcare, transport and client-firm job vacancies equal to that enjoyed by a comparable employee of the hirer. After a 12-week qualifying period, agency workers are also entitled to the same basic conditions of employment as if they had been directly employed by the hirer on day one of the assignment. This specifically covers pay - including any fee, bonus, commission, or holiday pay relating to the assignment but does not include redundancy pay, contractual sick pay, and maternity, paternity or adoption pay. It also covers working time rights - for example, including any annual leave above what is required by law, but does not cover other aspects such as access to training.

The regulations cover continuous assignments within a client firm. In reality many agency temps are sent on assignment to many firms, often through multiple agencies (Forde and Slater, 2011). Some may therefore accrue 12 weeks of continuous employment but not with a single client firm. The regulations stipulate that if an agency worker is working on more than one assignment the accrual to 12 weeks will occur separately across each assignment. The regulatory guidance also sets out a range of 'anti-avoidance' stipulations which are designed to prevent assignments being structured in such a way so as to prevent an agency worker completing a qualifying period. These provisions focus on the 12 week continuous employment period, the movement of agency workers around a series of roles within the same firm, and the movement of agency workers onto contracts with different subsidiaries within the same organisation, and seek to pre-empt and prevent any opportunistic use of the regulations by employers or agencies to construct assignments to avoid the regulations.

These measures are designed, therefore, to encourage compliance with the regulations and ensure that the regulations are interpreted in the spirit in which they were intended at EU-level. There is detailed guidance in the regulations about which arrangements are in and out of scope of equal treatment, and it is clear that most of the 'managed service contracts' outlined above are seen to be within the scope of the regulations. These regulations create new obligations and liabilities for the client firms, exclusively in the case of day one rights and jointly with agencies in relation to basic terms and conditions. Hence, where client organisations have attempted to 'outsource' some elements of management of the employment function to agencies, these regulations have the effect of a partial reversal. However, they also create incentives to change patterns of agency labour use with the risk that efficiency may be impaired by attempts to evade costs of compliance. For example, where no comparable client firm employees exist, equal day one rights cannot apply. This may create an incentive to move to exclusively agency-staffed functions to avoid obligations that follow from having comparable workers.

Relatedly, and interestingly, since the Regulations were put in place there has been a growth of contractual arrangements which take advantage of gaps or flexibility in the regulations, in particular so-called 'Swedish Derogation' or 'Pay between Assignment' models of labour supply. This refers to arrangements where a temporary work agency offers an agency worker an ongoing contract of employment and agrees to pay the agency worker between assignments. It effectively means that after 12 weeks with a hirer the agency worker will not be entitled to the same pay as if they had been recruited directly, although workers covered by this exemption will still be entitled to other provisions under the regulations, for example annual leave after 12 weeks and day one access to facilities (where there are comparable workers). For this derogation to apply, the agency must offer an agency worker a permanent

contract of employment and pay the worker some pay between assignments (the higher of the minimum wage or half or average pay from the last 12 weeks of the previous assignment). Importantly, whilst these contracts would seem to give agency workers a trade-off between lower pay and greater stability, in practice, agencies can terminate the temp's employment contract as long as at some point during the contract, the agency has paid the temp between assignments (or at the end) for at least four weeks in total. During non-working periods at the end of an assignment, the agency must take reasonable steps to find future work for the worker and workers are obliged to demonstrate their continuing availability for work, with suitable work determined by the initial contract agreed to by the temp at the outset of their relation with the agency. Should a temp refuse an agency's offer of 'suitable' work, then they forego the right to between assignment pay. Finally, although a 'zero hours' contract would not count as a suitable derogation contract if offered by an agency, BIS guidance does indicate that contracts of greater than 'one hour' per week may provide a sufficient amount of mutuality of obligation to meet the requirements of the derogation contract (BIS, 2011).

Industry bodies, such as the Professional Contractors Group and the Recruitment and Employment Confederation have been keen to point out that the Swedish derogation is explicitly allowed for in both the EU directive and UK AWR and is therefore legal. However, they have also stressed that few agencies would be expected to utilise this option, given the requirement for agencies to find work for temps on a continuous basis, and to pay workers whilst not on assignment. However, it is clear that such contracts can be used to avoid a key element of the objective of delivering equal treatment. Whilst workers are formally provided with protections and rights, crucially their effectiveness depend on workers being informed of and aware of the consequences of waiving their rights to equal pay and to be aware of the importance of defining and agreeing suitable and acceptable work with the agency *at the*

outset of their contract in order to keep the right to between assignment pay. As a manager who did not use derogation contracts we interviewed in our own research (Forde and Slater, 2014) and who was attracting staff who had entered into them in relative ignorance observed:

'are they aware about what 'finding suitable work' for them means, and what sort of work they'll need to accept to get pay between assignments….I don't think so…many are signing up to these contracts with agencies without realising what they are signing away.'

Again, the recent revealing evidence surrounding the practices of Sports Direct and its supplying agencies shows that the trade-offs under derogation contracts need not maintain overall protection: agency workers supplied to Sports Direct's Shirebrook warehouse are employed by the agencies and whilst working alongside a small number of Sports Direct employees they are paid the minimum wage and do not share access to pay-related benefits and since temps are a permanent feature of the warehouse's employment model, the possibility of pay between assignments is largely redundant (BIS Committee, 2016).

Whilst derogation contracts may be more suited to labour supply situations where the demand for temps is relatively large, stable and on-going given the costs to the agencies of employing their own staff (even if they are less than one might initially think) our research indicates that the risk with these contracts not only remains with the temp, client firms have been able to increase their power over agencies. As we heard from an agency manager (Forde and Slater, 2014):

'[the AWR derogation has] changed things overnight – it's not a level playing field anymore….'clients are getting together and insisting on the derogations…it's a zero cost strategy for them. They can push it onto agencies. But agencies are working with them on it too'

The increasing role of agencies in pay setting

These regulatory changes increase the focus on pay and raise questions about how rates are determined between agencies and client firms. Historically, agencies have had a minimal role to play in pay-setting activities. Rather, their focus has tended to be on setting the margin level that they charge a client firm over and above the hourly wage rate for the temp (see Gonos, 1997; Forde and Slater, 2011). These margins are affected by a range of factors including broader economic conditions, the sectors being supplied and the nature of contractual arrangements between agencies and clients including the range of services provided by agencies with research suggesting an hourly mark-up of between 15-50% per hour. As for the role of agencies in setting hourly pay, there are very few studies that have directly considered this. Qualitative studies of the nature of agency working tend to support the notion that the pay setting process is driven by the client firm rather than the agency, with the former largely dictating hourly rates or salary levels to the agency (see Kirkpatrick et al., 2011; Purcell et al., 2004; see also BIS Committee 2016 for a clear example of the client dictating the pay of temps). These and other studies hint at the possibility of a greater role for agencies in influencing the hourly wage during strong economic conditions, where there might be shortages of labour. Agencies (and in some cases individual agency workers) may also have a greater role within particular occupations or sectors, where norms, industry standards, labour shortages or skill levels may provide the agency with greater bargaining power to influence wage rates paid by the client.

The structural and regulatory developments discussed above will clearly have led to a reappraisal of the involvement of agencies in pay setting. Studies have shown that a key facet

of the growth strategies of the largest agencies has centred on developing high 'added value' contracts with client firms. Within these contracts, the agency often assumes responsibility for payroll activities and the day-to-day management and performance of temps (see Druker and Stanworth, 2004; Purcell and Purcell, 2004) and it is reasonable to expect that this will be accompanied by a greater role for the agency in pay-setting activities. Indeed, a joint CIPD and REC report examining the rise of the various embedded relationships between agencies and clients discussed above noted that agencies are increasingly offering to provide pay benchmarking services to client firms (CIPD/REC, 2009). Studies of these embedded relations have also highlighted some correlation between formalised contracts and the provision of additional benefits by agencies to temporary staff. Given the close and on-going relations between agencies and clients in preferred and sole supplier agreements, for example, even before the recent regulatory changes there is evidence under these arrangements provide their temps may be provided with some of the benefits enjoyed by permanent staff, and training from the agency (Druker and Stanworth, 2004).

Where an agency employs temps directly, we might also expect the agency to play a more central role in setting pay rates (for debate on this particular issue, see Forde, 2008). However, our research (Forde and Slater, 2014) indicates that this has not generally happened. Indeed, as discussed above the possibility of derogation contracts seems to have strengthened the hand of client firms to demand temps at minimum wage rates and in the process requiring agencies to employ their temps directly. As the Sports Direct example indicates, this is likely to consign agency temps to minimum wage work. Our own research has shown, for example, that workers in a weaker labour market position are likely to suffer a bigger wage penalty for

working through a temporary employment agency. That is, even after controlling for different skills, attributes and experiences, agency temps in lower parts of the wage distribution have the biggest wage gaps compared to comparable permanent workers (Forde et al, 2008).

Where next for the agency industry? Unpacking the performance of agency temps and areas for further research

Temporary agency working is a complex, growing and heterogeneous sector. Whilst there are many situations where genuine flexibility requirements create a need for agency temps, the various new supply practices and opportunities afforded by regulatory changes reviewed here serve to embed agency temps in the core employment model of many private and public sector organisations. Many of the contractual forms that we have outlined in this paper are only sustainable for client firms if the agency is able to guarantee that a large number of the same workers turn up for work each day, every day, even if this figure is 500 or 1000 temps. Temporary agency workers, in this situation are dependent upon a single agency (and a single client firm) for their work, yet receive few of the normal benefits associated with an ongoing employment relationship. Many temps are accruing long levels of tenure with an agency and a client firm, often running into years, yet with little opportunity to progress into an internal labour market.

As discussed, this can, in some cases, lead to the embedding of low wages and, despite regulations inspired by equal treatment, in reality these obligations can be relatively easily evaded by embedding agency temps more deeply in organisations. Evidence of the performance implications of agency work on both the temps themselves and on permanent staff is similarly mixed. One finding is that treating temps separately and differently from

permanent staff when they are working side-by-side is bad for performance and in this way, equal treatment regulations hold out the possibility of avoiding stark differences in treatment and hence may help to improve organisational performance (Torka and Schyns 2010). However, the regulations do involve greater obligations for client firms to provide equal access to facilities and to work closely with agencies in defining comparable workers and in ensuring equal pay obligations are met. The perceived 'red tape' that these regulations involve raise a question mark over their longevity given the prospect of a UK departure from the EU, even if by delivering greater equality between temps and permanent staff such regulations actually help overall performance, by improving worker motivation. Further, as discussed above, the regulations also provide an incentive for some firms to restructure their employment models to minimise the scope for comparable worker assessments and to reduce costs by obliging agencies to employ their temps on derogation contracts. These pressures may deepen and extend the use of agency temps in organisations raising question marks over the resulting longer-term productivity and performance outcomes. For example, should agencies and employers experience shortages of labour it is likely that labour costs and turnover would rise more rapidly than with directly employed staff.

Further research is needs to assess the performance implications for workers and client firms of some of the trends we have outlined in this paper. Whilst our research hints at the rise of Derogation contracts, more quantitative and qualitative research is needed to map the extent of these emerging contractual forms, and to explore why they have become more commonplace in particular sectors. Are they seen as by firms as a means of bypassing the requirements of the AWR? To what extent are they driven by user firms, agencies or both?

How extensive are they in sectors such as warehousing and logistics, and why do they appear to have taken a particular hold in these sectors, but not others? Further research is also needed to look in more detail at responses of client firms and agencies to the AWR. Where exactly are the regulations biting? Have they changed employer practices in the ways we note above, and as employers and agencies develop further strategies around the use of agency temps, will the sector see further innovation in the use of contractual forms to supply agency temps? The post-EU Referendum environment in the UK will also require further research to understand the implications of Brexit on evolving models of temporary labour supply, and the effects of any changes in mobility for EU migrants, who are extensive users of agencies, in the future.

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