

The Agency Workers Regulations: Action Points

What you need to know.....

- The Agency Workers Regulations 2010 will come into effect on 1 October 2011.
- After a 12-week qualifying period agency workers will be entitled to basic working and employment conditions, including pay, that are no less favourable than if they had been recruited directly by the hirer.
- Pay includes bonuses referable to the amount and quality of work done by the agency worker and also commission payments.
- From day one of the assignment agency workers have the right to be informed of any vacancies in the hirer's undertaking.
- Collective facilities such as canteens, gyms, transport and parking facilities must be made available to agency workers from the commencement of their assignment unless the hirer can justify exclusion on grounds other than cost alone.
- Information about the use of agency workers will have to be supplied as part of the information provided in any collective redundancy consultation or consultation in relation to the transfer of an undertaking.
- Hirers can be ordered to pay compensation to agency workers if inequality of treatment in relation to employment conditions arises from the hirer supplying inaccurate (or no) information to the agency about its terms and conditions.

Who is covered by the Regulations?

An "agency worker" is an individual supplied by a temporary work agency to work for and under the direction of a hirer. The agency worker must have a contract with the agency which is a contract of employment or any other contract to perform work and services personally for the agency.

The Regulations will not apply to the genuinely self-employed, limited company contractors or those who are employed on secondment or are loaned from one organisation to another.

What rights will agency workers have?

After a 12-week qualifying period an agency worker will be entitled to equal treatment in relation to "basic working and employment conditions", as if the agency worker had been recruited directly by the hirer. For these purposes, basic working and employment conditions means terms and conditions relating to pay, annual leave, the duration of working time, rest breaks and rest periods, and night work.

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The 12-week qualifying period

The right to equal treatment will not apply until an agency worker has undertaken the same role, whether on one or more assignments, with the same hirer for 12 continuous calendar weeks. Any week during the whole or part of which an agency worker is engaged on an assignment is counted as a calendar week. Time spent on an assignment before 1 October 2011 will not count; accordingly the earliest date that an agency worker will be entitled to equality of treatment is 25 December 2011.

The continuous period that counts toward the 12 week qualifying period will be broken if the agency worker starts a new assignment with the same hirer and it comprises "*substantively different*" work or duties to the preceding assignment. However, unless the agency has provided the agency worker with a written description of the new assignment, there will be an assumption that the agency worker is working in the same role.

The 12 week period will also be broken where there is a break of at least 6 calendar weeks either during or between assignments.

Certain absences, such as sickness absence of up to 28 weeks, merely suspend continuity, so that the agency worker will still be able to count the weeks accrued before the absence towards the 12 week qualifying period. Other absences, such as those related to maternity or paternity leave, will continue to count towards the agency worker's 12-week qualifying period.

Anti-avoidance provisions

Being creative in the structuring of assignments to defeat the 12 week qualifying condition is likely to fall foul of the Regulations' anti-avoidance provisions. In essence these provide that where an agency worker has worked for 12 continuous weeks, but would not qualify for equality of treatment with permanent employees because of the structure of the assignment or assignments undertaken, then in certain circumstances the agency worker will be treated as entitled to equality of treatment.

Factors that will be taken into account by an Employment Tribunal when assessing whether the structure of an assignment was an anti-avoidance provision include: the length and number of assignments the agency worker has had with the hirer and any connected hirers, the number of times the agency worker has worked in a new role with the hirer and any connected hirer, and the period of any break between assignments with the hirer and any connected hirers.

When hearing claims relating to the Regulations, the Employment Tribunal will be able to make an additional award of up to £5,000 where a hirer and/or temporary work agency are found to have breached the anti-avoidance provision. Where hirer and agency are both considered to be responsible for attempting to avoid the Regulations the additional award will be apportioned between them as the Tribunal considers appropriate.

Equal treatment in relation to pay

The right to equal treatment in relation to pay after the 12 week qualifying period includes any fee, bonus (provided it is linked to individual performance), commission, holiday pay or other emolument referable to the employment. "Pay" does not however include:

- individually negotiated bonus payments;
- one off discretionary bonuses;
- share participation or profit sharing schemes;
- company car allowance;
- bonuses aimed at long-term management, motivation and retention of staff;
- occupational maternity/paternity/adoption pay;
- occupational sick pay;
- enhanced redundancy pay;
- any payment by way of pension allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;

- any payment for time off for carrying out trade union duties;
- any payment by way of an advance under an agreement for a loan; or
- any payment by way of expenses incurred by the worker in carrying out the employment.

An agency worker's entitlement to receive a bonus is subject to the same qualifying requirements that apply to the hirer's permanent employees. For example, if a hirer's employees have to be working on the bonus payment date for the bonus to be paid, the same restrictions can apply to agency workers.

Other agency worker rights

From day one of the assignment an agency worker will be entitled:

- to be informed of any vacant posts in the hirer's undertaking, in order to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer; and
- to be treated no less favourably than a comparable employee in the hirer's establishment in relation to access to collective facilities such as canteen or similar facilities, childcare facilities and the provision of transport services. However, a hirer is entitled to treat an agency worker less favourably with regard to access to or provision of these facilities if it is objectively justifiable, e.g. a genuine business reason.

These rights are directly enforceable against the hirer, not the temporary work agency.

Providing information to agency workers

Under the Regulations, an agency worker who believes that they are not receiving equal treatment is entitled to a written statement providing certain information, including the basic working and employment conditions at the hirer, within 28 days of a written request to their temporary work agency. In the event that the agency worker has not been provided with this information within 30 days of making the request, they can request such information directly from the hirer. The hirer must then provide the information in writing within 28 days of the agency worker's written request.

Liability

The temporary work agency will be responsible for any breaches of rights in relation to an agency worker's basic working and employment conditions, to the extent that it is responsible for the infringement. However, an agency will, have a defence if it can show that it took "*reasonable steps*" to obtain certain information from the hirer about its basic working and employment conditions and, when it received such information, acted "*reasonably*" in determining the agency worker's basic working and employment conditions.

The hirer will be responsible for any breach to the extent that it is responsible for the infringement, for example if it supplied inaccurate information about its terms and conditions to the agency which resulted in the agency worker being engaged on less favourable terms.

The hirer is solely responsible for any breach of the agency worker's right of access to permanent employment opportunities and collective facilities.

Employment tribunals will be able to award compensation in relation to any failure to provide equal treatment, access to collective facilities or to notify agency workers of vacancies at the hirer. There is no cap on the amount of compensation that can be awarded. A tribunal may also make recommendations that specified action should be taken to reduce the adverse effect of any matter which is the subject of a successful complaint by the agency worker. For example a recommendation about how a hirer should draw vacancies to the attention of agency workers. Failure to comply with a recommendation can lead to an increase in any compensation awarded or an award of compensation where no award was made initially.

Action plan for companies that make use of agency workers

- Audit the current use of agency workers to determine which agency workers will qualify for equal treatment.
- Assess what exactly 'equal treatment' will entail. This process will involve examining which roles are currently filled by agency workers, who are the permanent employees working in the same or comparable roles, what are the basic working and employment conditions of those comparable employees, and how do these conditions differ from the terms on which agency workers are currently supplied.

- Assess whether greater use of self-employed workers and managed service contracts are commercially more practical.
- Assess whether revising qualifying periods for benefit and bonus eligibility to exclude agency worker entitlement is a cost effective and/or practical measure.
- If agency workers will continue to be used after 1 October 2011, an internal process should be developed for collating information on the basic working and employment conditions that would apply if the agency worker were recruited directly and a procedure established for disseminating this information to the relevant temporary work agencies and to any agency workers who may request such information.
- Consider how to address confidentiality and data protection issues arising out of the disclosure of information to agencies and agency workers, for example through confidentiality agreements or the redaction of documents.
- Assess what company facilities and amenities will have to be made available to agency workers or what justification exists for excluding access to such facilities.
- Thought should be given to how/whether information about vacancies will need to be provided to agency workers.
- Consideration should be given to whether it will be necessary to document the current pattern of use of agency staff and the reasons for engagement to help deflect any future challenge that the pattern of assignments is a deliberate attempt to avoid the equal treatment obligations of the Regulations.
- Finally, companies should be aware that temporary worker agencies are likely to revise their terms of business to include information requirements, detailing what information a hirer must provide about its basic working and employment conditions and when/how such information should be provided. Temporary work agencies may also include indemnities in their standard terms of business in respect of liability they incur as a result of any failure on behalf of the hirer to supply the necessary information to enable them to provide equal treatment for their agency workers.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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