



## Agency Workers Regulations 2010

The **Agency Workers Regulations 2010** ('the Regulations') give agency workers, for the first time, a right to equal treatment with their directly recruited counterparts with regards to basic working and employment conditions. The Regulations implement the EU Temporary Agency Workers Directive (2008/104/EC) and come into force on **1 October 2011**.

Detailed guidance on the Regulations has been published and is available on the [BIS website](#). This guidance assists both users and providers of agency workers to understand their respective obligations under the Regulations, but it has no legal force and ultimately the Regulations will fall to be interpreted by the Courts.

### Who is covered?

The Regulations apply to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings ('the hirer') to work temporarily under their supervision and direction.

The Regulations do not cover genuine outsourcing arrangements, those working through their own limited liability company and the genuinely self-employed, or to secondment or loan arrangements between businesses. They will, however, apply to agency workers supplied through intermediaries, often referred to as 'umbrella companies'.

### Equal treatment

The Regulations provide that, after a qualifying period of 12 weeks, the basic working and employment conditions of temporary agency workers shall be, for the duration of any assignment, at least those that would apply if they had been recruited directly by the hirer to occupy the same job.

**The Regulations do not confer full employment status on agency workers.** The right to equal treatment extends to: the duration of working time, overtime, night work, rest periods, rest breaks, and holiday entitlement, as well as pay (see below). Certain rights under the Regulations, including access to certain facilities, will apply from day one of an assignment (see below). The rights conferred by the Regulations cannot be contracted out of.

## Working time and holiday entitlement

Agency workers accrue statutory holiday (under the Working Time Regulations 1998 ('WTR')) from the beginning of any assignment. The guidance makes it clear that there is scope for flexibility on how any holiday entitlement in excess of the statutory minimum can be provided. Contractual holiday in excess of the statutory minimum will accrue after the 12 week qualifying period. The Agency can provide for this by making a payment in lieu at the end of an assignment, or by including it as part of the hourly or daily rate of pay (effectively 'rolling up' the additional holiday entitlement).

Where the hirer allows more generous rest breaks than those provided under the WTR for its permanent employees, an agency worker will similarly be entitled to those breaks after the 12 week qualifying period.

## Pay

The question of what amounts to 'pay' is broadly defined in the Regulations. Essentially pay is based on the principle of 'equal pay for work done'. In other words, basic pay plus other contractual entitlements directly linked to the work undertaken. Pay includes:

- shift allowances;
- overtime;
- unsocial hours premiums;
- commission; and
- individual performance/productivity bonuses.

'Pay' does not include those aspects of remuneration that reflect a long-term permanent employment relationship, such as:

- profit sharing schemes;
- occupational sick pay;
- redundancy pay;
- maternity or paternity pay;
- occupational pension contributions;
- any bonus or incentive payment which is not directly attributable to the amount or quality of work done, e.g. loyalty award, company performance bonus or discretionary bonus; and
- payment in relation to statutory time off rights, e.g. union duties.

In addition, the Regulations specifically exclude non-cash rewards, therefore equal treatment will not apply to private medical insurance or a company car. The sole exception is vouchers or stamps with a monetary value, e.g. luncheon vouchers.

The right to the same pay as the hirer's employees is disapplied for agency workers who have a permanent contract of employment with the agency and continue to be paid a minimum of 50% of their basic pay between assignments. This is known as the 'Swedish derogation'. However, the right to equal treatment in respect of working time and holiday entitlements will continue to apply.

## Qualifying period

The equal treatment principle will not apply until an agency worker has worked in the same role for the same hirer for **12 continuous weeks**. There is no minimum amount of work that will need to be completed in order for a week to count. The 12 week period will begin to accrue from 1 October 2011, meaning that agency workers will begin to qualify for equal treatment from 24 December 2011.

Certain breaks between or during assignments are discounted when calculating the qualifying period (essentially the clock is paused), as follows:

- breaks of less than six weeks;

- sickness up to a maximum of 28 weeks;
- maternity, paternity and adoption leave;
- a temporary cessation of work provided it affects all the hirer's relevant employees and accords with the hirer's established practice;
- time off that relates to a statutory or contractual entitlement;
- jury service;
- a strike or lock-out.

Once an agency worker has completed the qualifying period, they will remain qualified for equal treatment unless and until there is a break of sufficient length to break continuity.

### **Meaning of 'the same role'**

In addition to breaks of sufficient length, continuity will also be broken if the agency worker takes up a 'substantively different' role. The Regulations provide that 'substantively different' requires the whole or main part of that role to change.

### **Anti-avoidance measures**

The Regulations contain deterrents to prevent deliberate attempts at preventing agency workers from qualifying for equal treatment rights. This may be relevant if:

- an agency worker is rotated between 11-week assignments in 'substantially different roles'; or
- they complete two or more assignments with the same hirer with a break of at least six weeks between assignments.

If a worker presents a claim to the tribunal, it will be for the tribunal to decide whether the most likely explanation for the working pattern is a deliberate attempt to prevent the worker from qualifying for equal treatment. If this is the case, the worker will be treated as having completed the qualifying period and the tribunal can award compensation for loss, including a minimum two weeks' pay award and an additional award of up to £5,000.

### **Access to facilities, amenities and employment**

From the start of any assignment (i.e. there is no qualifying period), agency workers will have the right to access certain collective facilities and amenities provided by the hirer. The Regulations specifically refer to the examples of canteen, transport services or childcare facilities, although this is not an exhaustive list. The guidance makes reference to further examples, such as toilets/showers, common rooms and car parking. It does not apply to off-site facilities not provided by the hirer, such as subsidised gym membership or to season ticket loans.

Hirers will only be able to deny access to such facilities where an objective justification exists. It is likely that this will be of limited application in practice. The guidance makes it clear that cost may be a factor to take into account but cost alone is unlikely to justify different treatment. It suggests that hirers should ask themselves 'is there a good reason for treating the agency worker less favourably?'

In addition, from the start of any assignment agency workers must have the same access to information in respect of any vacant posts with the hirer in order to give them the same opportunity as other comparable workers to find permanent employment. This information may be provided by way of a general announcement at the place of work, such as the posting of a vacancy list on a notice board or intranet.

The guidance makes it clear that this provision would not apply in circumstances where an organisation is looking to redeploy surplus permanent staff in order to avoid redundancies. In addition, the hirer would remain free to require any particular qualification or level of experience.

## **Establishing equal treatment**

The test for establishing equal treatment in basic working and employment conditions does not require a comparison to be drawn between an actual or 'hypothetical' comparator; instead the agency worker will be entitled to be treated 'as if' they had been hired directly. In other words, the agency worker will be entitled to the relevant terms and conditions they would have been entitled to had they been recruited directly by the hirer from day one.

In contrast, the right of access to facilities, amenities and employment requires a comparison to be made with the rights of a comparable directly employed worker. A comparable worker is someone engaged in the same or broadly similar work as the relevant agency worker and working at the same establishment or, if there is no comparable worker at the same establishment, at another of the hirer's establishments.

## **Liability for failure to provide equal treatment**

If an agency worker believes that they have not been afforded equal treatment, they can make a written request for relevant information about basic working and employment conditions from the agency. If the information is not provided the agency worker may repeat that request directly to the hirer. Both the agency and hirer will have 28 days from receipt of the request to respond. If the request relates to the access of facilities, the request can be made to the hirer direct.

A breach of the right to information is not actionable itself, but a tribunal can take into account a failure to comply with a written request in determining whether there has been an infringement of the right to equal treatment.

Where there has been a breach of the right to equality, the Regulations allow for a sharing of liability between the agency and the hirer, depending upon the extent to which each is responsible for the breach. However, a specific provision of the Regulations provides that an agency shall not be responsible for any breach if it can show that:

- it obtained, or took reasonable steps to obtain, relevant information from the hirer about basic working and employment conditions; and
- where it received such information, it acted reasonably in determining what the agency worker's basic working and employment conditions should be.

As rights relating to access to facilities represent an obligation on the hirer only, liability for any breach will rest solely with the hirer.

## **Other provisions**

The Regulations makes minor amendments to other pieces of employment legislation.

- **Protection of pregnant agency workers**

The Regulations contain provisions for the protection of pregnant agency workers, which will give them the right (after 12 weeks) to reasonable paid time off for antenatal care and the right to reasonable adjustments, alternative employment or paid suspension to address health and safety risks. The responsibility for these new rights will, in the main, lie with the agency.

Where a worker is moved to a different assignment to protect from such risks the move will not act as a break, thus she will retain continuity for the purposes of calculating the qualifying period for equal treatment.

In addition, if an agency worker is unable to continue with the assignment because of a reason related to pregnancy, the assignment is deemed to continue for the intended duration, or likely duration of the assignment, whichever is the longer.

- **Provision of information during collective bargaining**

Where a hirer has an existing obligation to disclose information about employment to representatives of its workforce, relevant legislation will be amended to oblige the hirer to include information about its use of agency workers. For example, under the Trade Union and Labour Relations (Consolidation) Act 1992 where there is an obligation to collectively consult in certain circumstances, hirers will have to include details about the number of agency workers, where they work and their roles.

## **Conclusion**

There remain some areas of uncertainty under the Regulations, for which the Government's **guidance** only goes some way to assist. We will need to await the first cases to be heard under the Regulations for any definitive interpretation by the Courts.

It should be remembered that primary liability remains with the agency. Nevertheless, those organisations that use agency staff should continue to monitor their use of such workers and ensure that arrangements are in place to comply with their obligations, particularly those that apply from the beginning of any assignment.

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