

Information

The Agency Workers Regulations 2010

The Agency Workers Regulations 2010 (the "Regulations") are coming into force on 1 October 2011. They represent a major change in the law, which all employers should be aware of. This information sheet looks at the main features of the Regulations.

Who is covered by the Regulations?

The Regulations apply to a worker who:

- is supplied by a temporary work agency (TWA) to work temporarily for and under the supervision and direction of a hirer; and
- has a contract with the TWA, which is either a contract of employment or a contract to perform work, and services personally for the TWA.

The Regulations therefore cover the classic 'triangular' relationship between the TWA, the hirer and the temporary worker. The Regulations will also cover some more complex situations, such as where a worker is employed by an 'umbrella company', but finds work through a TWA.

The Regulations do not, however, cover those who are genuinely self-employed or work under service contracts.

Day one rights

All agency workers covered by the Regulations will enjoy two rights immediately upon starting work for the hirer.

Access to collective facilities and amenities

The hirer must ensure that the agency worker has access to the same facilities and

amenities as a comparable worker employed directly by the hirer. Collective facilities and amenities would include, for example:

- canteen or similar facilities;
- child-care facilities;
- provision of transport services;
- a staff common room;
- food and drinks machines; and
- car parking.

It would not include off-site facilities provided by an external provider, such as subsidised gym membership or other benefits intended to reward long-term loyalty.

Access to employment vacancies

An agency worker must be told of any relevant vacancies in the hirer. This is to ensure that they have an equal chance to secure permanent employment as any comparable worker employed directly by the hirer.

The obligation only extends to the hirer providing agency workers with access to relevant vacancies. There is no corresponding obligation to treat all applications equally.

The right to equal treatment

The principal right contained in the Regulations is the right of agency workers to enjoy the same "basic working and employment conditions" as those employed directly by the hirer. This right arises once the agency worker has been employed by the hirer for 12 continuous weeks. There

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are detailed rules regarding the calculation of this 12-week qualifying period.

The 12-week qualifying period

To qualify for the right to equal treatment, the agency worker must work for the hirer for 12 continuous calendar weeks in the same or substantively the same role. This 12-week 'clock' may be reset to zero, or simply paused, on the occurrence of certain events.

The clock will be reset if:

- the worker starts a new assignment with a different hirer;
- the worker remains with the same hirer but starts a new and substantively different role; or
- there is a break of more than six calendar weeks between assignments that the worker undertakes with the same hirer.

The clock will be paused and will thereafter resume from the same point, if:

- there is a break, for any reason, of no more than six weeks;
- there is a break of up to 28 weeks due to the worker's sickness or injury, or the worker performing jury service;
- there is a break of any length for the purpose of taking leave to which the worker is entitled;
- there is a break caused by a planned shutdown of the workplace; or
- there is a break caused by a strike, lock-out, or other industrial action.

The Regulations contain anti-avoidance provisions, which are intended to catch

employers who intentionally structure assignments in such a way as to prevent the end of the 12-week qualifying period being reached. To be caught by these provisions would, however, require a clear and deliberate attempt to avoid the Regulations (for example, an 11-week assignment, then 6 weeks off, then an 11-week assignment again). The Regulations do not prevent hirers from having, for example, a standard assignment length of 12 weeks in duration.

"Basic working and employment conditions"

The Department for Business Innovation and Skills has produced guidance on the Regulations, which is available at www.bis.gov.uk. This guidance sets out what is and what is not covered by the right to the same 'basic working and employment conditions'. The rights that are covered by the equal treatment principle include:

- pay;
- annual leave;
- overtime pay;
- working time duration;
- rest breaks; and
- bonuses linked to individual performance.

Conversely, there are some rights that are not covered by the Regulations. These include occupational pensions (although note that the Government are introducing automatic enrolment into occupational pension schemes by employers starting in October 2012), occupational sick pay, contractual maternity, paternity and adoption pay (over and above the statutory entitlements), redundancy pay, notice pay,

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benefits in kind (such as company cars) and bonuses not linked to individual performance (such as loyalty bonuses).

The most contentious area is bonuses. Ultimately, an agency worker's entitlement to bonuses will hinge on whether the bonus is directly attributable to the amount and quality of the work that the worker has done. Commissions or bonuses linked to individual performance are typically covered by the Regulations, but those linked to the performance of the hirer as a whole are not.

The 'Swedish Derogation'

This is an exception to the right to equal pay after 12 weeks, so-called as it was negotiated by the Swedish Government when the European Directive was drafted. It applies where the agency worker has a permanent contract of employment with a TWA, which means the TWA will pay them in between assignments.

In this situation, the right to equal pay would not apply. It does not affect the right to equal treatment in all respects other than pay. The agency worker must be made aware of this before signing any permanent contract with a TWA, so that he or she may make an informed decision.

The use of 'Swedish derogation' contracts is increasingly favoured by hirers looking to avoid the equal pay provision. There are, however, some complex provisions in the Regulations and advice should be sought before engaging an agency worker in such a contract.

Enforcement & liability

An agency worker who suspects that they may be the subject of less favourable

treatment has the right to request relevant information to allow them to determine if this is the case. The request is made to the TWA in the first instance, then to the hirer if no response is received within 30 days. There is no obligation to provide this information, but an Employment Tribunal may take a dim view of any refusal and may draw adverse inferences.

An agency worker who feels that the Regulations have been breached may bring a claim before an Employment Tribunal. It will usually be the TWA that is held liable for any infringement. The TWA will, however, have a defence to any claim if it can show it took "reasonable steps" to obtain relevant information from the hirer and acted reasonably in the circumstances. The Tribunal has the power to apportion liability between the TWA and hirer, depending upon who it deems to be at fault.

Any breach of "day one" rights will always be entirely the hirer's responsibility.

Although this information sheet highlights the key issues relating to the Agency Workers Regulations 2010, it should not be considered comprehensive and is not a substitute for seeking professional advice on specific issues.

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