

Guide

# Equal treatment for agency workers

## A guide to the Agency Workers Regulations 2010

# Contents

Introduction	2
Key definitions – who is covered by the Regulations?	3
Scope of equal treatment: basic working and employment conditions	5
The qualifying period	7
Establishing equal treatment	8
Agency workers’ rights of access to facilities and amenities	11
Agency workers’ rights of access to employment	12
Liability and enforcement of rights	13
Miscellaneous provisions	15
Assessing the impact of the Regulations	16
What will compliance with the regulations mean?	18
Conclusion	19

# Introduction

The flexibility gained through the engagement of the services of agency workers is important in maintaining the competitiveness and efficiency of the UK's private and public sectors. Agency working also offers advantages and opportunities to individuals – it is a recognised route into long-term employment for the disadvantaged and helps many to combine productive and fulfilling work with family and domestic commitments.

When the Agency Workers Regulations 2010 come into effect on 1 October 2011, agency workers will for the first time gain rights to a form of equal treatment; after a qualifying period their basic terms and conditions of employment must be no less favourable than the terms they would have been entitled to had they been hired directly by the organisation for which they are working.

The Regulations are the means by which the UK Government is to implement its obligations under the EU Directive 2008/104/EC on Temporary Agency Work (the 'Agency Workers Directive'). This Directive followed earlier EU regulations that established equal treatment rights for part-time workers and fixed-term employees, those measures having been implemented in the UK in 2000 and 2002 respectively.

The Agency Workers Regulations were laid before Parliament in January 2010 following two periods of consultation that took place during 2009. Following the May 2010 election there was much speculation over whether the Coalition Government was going to conduct a review of the Regulations with a view to making changes before they come into effect. On 19 October 2010 the Government announced that there was to be no review, the deciding factor being the Government's decision that in the absence of an agreement between the TUC and the CBI, it was not able to introduce any significant changes without undermining the 'social partner' agreement that is the foundation for many important provisions of the Regulations.

Production of the Government's guidance notes that will help organisations to understand the Regulations has been delayed by the Government's deliberations over a possible review, and official guidance that will help organisations to understand the Regulations is not expected to be released until 2011. The lack of official guidance at this time is unfortunate. Many organisations need to understand the potential impact of the Regulations now because they are developing their HR and budget plans for 2011, hence the decision to produce this guide now.

The Regulations are not straightforward and although they introduce rights to 'equal treatment', in many important respects they differ significantly from existing anti-discrimination legislation. Understanding these differences is key to understanding the true potential impact of the Regulations. This guide, prepared by Adecco in conjunction with the CIPD, is intended to help organisations that use the services of agency staff begin to assess the effect of the Regulations and to understand the respective obligations of themselves and agencies.

The guide broadly follows the structure of the Regulations – key definitions are dealt with first, followed by sections dealing with the scope of equal treatment on basic working and employment conditions, how equal treatment is identified, access to facilities and amenities, and liability and enforcement. Finally, we consider some of the practical issues – how to begin to assess the impact and how hirers and agencies will need to work together to meet their obligations under the Regulations.

This guide was produced for the CIPD and the Adecco Group by Andy Smith, Head of Regulation and Employment for Adecco. It is not of course intended to constitute legal advice.

# Key definitions – who is covered by the Regulations?

## **‘Temporary work agencies’ and ‘agency workers’**

The Regulations apply to individuals who have a contract with a temporary work agency and who are supplied by that agency to work temporarily under the supervision and direction of a ‘hirer’ (that is, the client).

Broadly, the Regulations define a temporary work agency as an organisation that is in the business of supplying individuals to work temporarily for hirers.

Supervision and direction of a worker by the hirer is a necessary element of these definitions – it’s what makes an organisation a temporary work agency and an individual an agency worker. This means that if a worker accepts direct instruction in relation to their work not by the ‘hirer’ but by their employer (that is, the agency), they will fall outside the scope of the Regulations. This means that genuine outsourcing arrangements are not affected by the Regulations because the contractor’s personnel are not subject to supervision by the ‘host’ organisation. As an example:

A company has a staff canteen managed by an in-house catering manager. One of the company’s catering staff is absent for three weeks and is replaced by a worker supplied by a temporary work agency. During her assignment the worker is supervised and controlled by the company’s catering manager. She fits the definition of an agency worker.

Another organisation contracts out the management of its canteen. The contractor manages the entire operation of the canteen and is responsible for the direction and control of its own catering staff. Although they are working on the client’s premises, the contractor’s staff are not agency workers because they are not subject to direction and control by the host organisation.

While genuine outsourcing arrangements are outside the scope of the Regulations, employment tribunals can be expected to be alert to attempts to avoid the Regulations through the establishment of purported outsourcing arrangements offered by organisations that are otherwise operating as temporary work agencies.

## **Exemptions**

The Regulations’ definition of an agency worker is broad and only the genuinely self-employed are intended to fall outside its scope.

The Regulations seek to achieve this by excluding individuals who work under a contract that has the effect that the hirer is a customer of a profession or business undertaking run by the individual. In practice, this is likely to mean that individuals who legitimately provide their services through their own limited company are exempt, but it is important to note that the Regulations do not expressly exclude from their scope an individual simply because a limited company is involved in the supply of the individual’s services. In every case, the test of genuine self-employment must be satisfied.

## **‘Umbrella companies’, ‘master’ and ‘neutral’ vendors**

Contractual relationships within the recruitment industry are increasingly complex. Workers may be engaged or employed not directly by an agency, but by a so-called ‘umbrella’ company. Sometimes the supply of agency workers is managed on behalf of a client by a master or neutral vendor that may or may not engage workers directly itself.

The Regulations make clear that an individual is not prevented from being an agency worker because of the existence of one of these additional links in the chain of supply between them and the hirer. Because they are involved in the supply of workers to hirers, these

'intermediaries' are likely themselves to fall within the definition of a temporary work agency and will in effect share responsibility for compliance with the Regulations.

Overall, the Regulations' definitions are far-reaching and comprehensive. They are likely to be effective in preventing the unscrupulous from attempting to avoid their obligations through the deliberate creation of certain contractual arrangements.

# Scope of equal treatment: basic working and employment conditions

Importantly, unlike the regulations concerning the rights of part-time workers and fixed-term employees, the right to equal treatment under the Agency Workers Regulations is not a general right not to be treated less favourably on the ground that an individual is an agency worker; instead, the principle of equal treatment will apply only to certain terms and conditions relating to working time, holiday entitlement and pay.

The section on 'Establishing equal treatment' (page 8) considers how under the Regulations 'equal treatment' is identified: in essence, qualifying agency workers will be entitled to the relevant terms and conditions concerning working time, holiday and pay to which they would have been entitled had they been recruited directly by the hirer to carry out the same job. It is important to bear this in mind when considering the scope of equal treatment.

## Working time and holiday entitlements

The right to equal treatment will extend to terms and conditions related to:

- the duration of working time
- night work
- rest periods
- rest breaks
- annual leave.

The Government's responses to the consultations carried out during 2009 made clear that where the right to equal treatment grants an entitlement to annual leave in excess of the statutory minimum, there will be considerable scope for flexibility with respect to how this additional leave is provided, for example it might be 'rolled up' into the worker's pay.

It will in many cases be important for hirers to give proper consideration to the specific requirements

of the job an agency worker is hired to perform. For example, if the particular requirement is for a part-time worker, then logically the relevant terms concerning working time are those that would have applied had the hirer directly engaged the agency worker as a part-time employee. It would not be appropriate to draw a comparison with the working time terms that would apply to a full-time employee, as the agency worker is not being engaged to carry out a job with full-time hours.

## Pay

The Regulations' definition of what is and what is not 'pay' is clearly very important to an assessment of the impact of equal treatment. The Regulations begin with a broad definition of pay that includes '...any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay, or other emolument, whether payable under the contract or otherwise...'.

Certain types of pay that would otherwise fall within this definition are then expressly taken out of scope. These are:

- occupational sick pay
- any payment related to a pension or compensation for loss of office
- maternity or paternity pay
- redundancy pay
- any payment made under a 'financial participation scheme' – a scheme that offers workers a share in an organisation's profits through distribution of shares or cash
- any payment for time off work made in accordance with certain statutory rights
- guaranteed pay under the Employment Rights Act 1996
- any payment by way of an advance under a loan agreement

- any payment in respect of expenses
- any bonus or incentive payment ‘...which is not directly attributable to the amount or quality of work done by a worker and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker’s loyalty or to reward long service’.

This last exemption is likely to remove from scope payments such as an annual bonus paid to all a hirer’s staff irrespective of individual contribution to the organisation’s results.

Importantly, the Regulations expressly exclude non-cash rewards, so equal treatment will not apply to benefits such as private medical insurance or private use of a company car. The sole exception is vouchers or stamps that have a fixed monetary value and that can be exchanged for goods and services – luncheon vouchers being perhaps the obvious example.

It is important to remember that the right to equal treatment confers a right to the relevant terms and conditions concerning pay, and so on, that would have applied in the event of direct recruitment. With respect to bonus payments, this means that any relevant condition that would need to be met before payment is due to a direct employee would have to be met in the case of an agency worker. So, if it is a necessary requirement of qualification for a bonus that an individual remain in employment on a certain date for payment to be due, this condition would also apply to an agency worker.

The original draft of the Regulations excluded from the definition of pay any payment of a bonus made in connection with a hirer’s appraisal scheme that was aimed at the long-term motivation or management of staff. Although this express exclusion was removed from the final version, the Regulations will not impose any obligation on a hirer to conduct any form of performance appraisal on agency workers. Where necessary, the hirer and agency are free to decide an appropriate system to measure workers’ performance.

Some bonus schemes may appear to fit the definition of a ‘financial participation scheme’ while also rewarding individual effort – for example, an organisation creates a bonus ‘pot’ if profit targets are met, with individual payments then being allocated according to performance assessments. There is some doubt about how these will be dealt with once the Regulations come to be interpreted by tribunals. The Government’s guidance may be of assistance here.

# The qualifying period

## 12 weeks in the same role

The right to equal treatment with respect to relevant terms and conditions will not apply until an agency worker has worked in the same role for a hirer for 12 continuous weeks. Importantly, any change of agency during the 12-week period will not affect qualification.

There is no minimum amount of work that will need to be completed in order for a week to count as one of the 12 for qualification purposes.

## Meaning of 'the same role'

If a change in position is to require an agency worker to re-qualify for equal treatment, the Regulations state that the whole or the main part of the new role must be 'substantively different' from the previous role. A further requirement is that the agency must have notified the worker in writing of the type of work they will be required to carry out in the new role.

## Breaks between assignments

The general rule under the Regulations is that any break between assignments of six weeks or less shall not break 'continuity' for qualification purposes. This means that if a worker returns to a role with a hirer within six weeks of their previous assignment, the previous assignment will count towards qualification.

The Regulations make specific provision for preserving continuity between assignments separated by particular types of break extending beyond six weeks. This provision applies to breaks because of:

- sickness up to a maximum of 28 weeks (subject to medical evidence if requested)
- 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.

The Regulations make a different provision for breaks that are for a reason related to pregnancy or maternity, paternity or adoption leave. In these cases, the period of the break counts towards qualification and will continue to do so for the intended or likely duration of the assignment.

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

## Anti-avoidance

A specific provision of the Regulations is aimed at frustrating deliberate attempts at preventing agency workers from qualifying or continuing to qualify for equal treatment by structuring assignments in certain ways. This provision may be relevant where in relation to a particular agency worker, one or more of the following applies:

- the worker has completed two or more assignments with a hirer, and/or
- the worker has completed one or more assignments with a hirer and one or more assignments with hirers associated with that hirer, and/or
- the worker has worked in more than two different roles with the hirer.

If the worker presents a claim to an employment tribunal, it will be for the tribunal to decide whether the most likely explanation for the particular pattern of assignments is that it was a deliberate attempt on the part of the agency and/or the hirer to prevent the worker from qualifying for equal treatment.

If the tribunal finds that there was a deliberate attempt to frustrate or prevent qualification, it can award compensation of up to £5,000, which can be apportioned as appropriate between hirer and agency. The worker will also be deemed to have qualified for equal treatment despite the attempt to prevent them so doing.



# Establishing equal treatment

## What is equal treatment?

As stated above, the right to equal treatment under the Regulations is very different from equivalent 'anti-discrimination' provisions under existing employment legislation. Firstly, the right only extends to basic working and employment conditions, specifically the elements of pay, working hours and holiday entitlement as explained in Section 2 (page 5).

Secondly, the Regulations' test of equal treatment does not require a comparison to be drawn between the treatment of an agency worker and an actual or hypothetical 'comparator'. Instead, a qualified agency worker will under the Regulations be entitled to the relevant terms and conditions they would have been entitled to had they been recruited by the hirer on the first day of assignment other than through a temporary work agency to carry out the same job.

The Government has referred to this as an 'as if' test:<sup>1</sup> the agency worker is entitled to be treated 'as if' they had been hired directly – in essence, identifying equal treatment will involve answering a hypothetical question: what terms would *the agency worker* have been entitled to were they hired directly to carry out the same job?

Equally important, the Regulations state that the right extends to relevant terms and conditions that the hirer 'ordinarily includes' in contracts of employment or in workers' contracts (the latter applying if the agency worker would have been hired directly as a worker, not an employee).

This concept of terms and conditions that are 'ordinarily included' in contracts by the hirer is key to an understanding of the Regulations – the intention is that the concept will only bring within scope relevant terms set out in a hirer's pay scale or policy, in an agreement negotiated with a trade union, or, in organisations with no formal pay policy or systems, terms that are granted to directly hired workers or employees as a matter of 'custom and practice'.

The Department for Business, Innovation and Skills (BIS) included a helpful illustration of how equal treatment might be identified under this test in the form of [draft guidance](#) (pp52–54).

Several important principles emerge from the wording of the Regulations and the BIS guidance:

- For organisations with pay scales or collective agreements, equal treatment will involve identifying the relevant starting point of that scale or agreement, taking account where relevant of an agency worker's qualifications, skills and experience.
- An organisation with no formal policy may still be considered to 'ordinarily include' relevant terms in direct employees' contracts if it does so as a matter of 'custom and practice' (probably meaning that it grants the relevant terms more often than not or in the majority of cases).
- If an organisation genuinely negotiates pay on an individual basis, equal treatment with respect to pay will *not* apply as there will be no relevant terms that are 'ordinarily included' in contracts.
- If an agency worker is hired to fill a unique role and there is no relevant policy that dictates what the hirer would pay were it to recruit directly to fill that role, equal treatment with respect to pay will not apply.
- The same principles will apply to equal treatment with respect to working time and holidays, but it may be easier to establish that certain terms are 'ordinarily included' if (for example) all new employees in relevant categories are granted 30 days' leave in their first year.

## The concept of a 'comparator'

As stated above, because this test of equal treatment involves reference to be made to the relevant terms to which the agency worker would have been entitled if they were hired directly, it need not be necessary (and in some cases might not be relevant) to make reference to the pay of any directly hired comparator. For example, the only relevant comparators may have been employed

<sup>1</sup> BIS Response to consultation on draft regulations, January 2010 URN10/583

by the hirer for several years and may have received several pay increases under an incremental scale. Their pay may therefore bear no relation to the pay the hirer would give a new starter under its pay scale.

That said, it might often be straightforward to establish equal treatment by reference to a comparator where one exists, simply because the comparator's relevant terms and conditions can be identified with absolute certainty. In recognition of that, the Regulations state that if there is a directly employed employee whose terms and conditions match those of the relevant agency worker, equal treatment will be deemed to have been provided – effectively, this is a short-cut for hirer and agency to demonstrate compliance.

As well as the obvious need for the comparator's terms to match those of the agency worker, the following conditions must be met if compliance is to be proven by reference to a comparator:

- The comparator must be a current employee of the hirer.
- The comparator and agency worker must be engaged in the same or broadly similar work.
- The comparator and agency worker work at the same establishment, or the comparator works at another establishment if there is no comparator at the agency worker's establishment.
- The comparator's terms are consistent with those ordinarily included in relevant contracts of employment by the hirer.

### **Ongoing entitlement**

Once an agency worker has completed the qualifying period, they will continue to be entitled to equal treatment for the duration of the assignment and any subsequent assignment if one of the provisions preserving continuity between assignments applies.

Because the 'as if' principle of equal treatment continues to apply, the agency worker will be entitled to the benefit of any relevant service-related enhancement of relevant terms as if they had been hired directly. For example, if a directly hired employee's holiday entitlement increases to 30 days per annum on completion of one year's service, the agency worker's entitlement would also increase after one year in an assignment.

It also means that if the hirer applies a cost-of-living increase to all direct employees' salaries, an agency worker would be entitled to the same increase.

### **Transitional arrangements**

Agency workers who are carrying out an assignment when the Regulations come into effect will begin their qualifying period on 1 October 2011 and no credit is given for work undertaken before that date. This means that the earliest date for qualification will be the week commencing 25 December 2011.

Once the qualifying period has been completed, a worker's right is to the relevant terms and conditions they would have been entitled to if hired directly on the first day of the qualifying period, that is, no earlier than 1 October 2011.

Time served in an assignment prior to that date might be relevant in identifying what those terms would have been, but only to the extent that previous experience in a particular position influences starting pay for direct hires. For example:

An organisation generally pays recruits to a particular grade a starting salary of £20,000 if they have no relevant experience, but if a new starter has at least one year's previous experience their starting salary will be £22,000. An agency worker began their assignment on 1 September 2010 and is still working in the relevant role on 26 December 2011. If she were recruited directly by the hirer on 1 October 2011 to carry out the role she had undertaken since 1 September 2010, her basic pay could have been £22,000, so this is the relevant 'equal treatment' rate.

### **Permanent contracts and pay between assignments – 'derogation' from equal treatment on pay**

In the UK agency workers are typically not guaranteed that work will be available at all relevant times and are generally entitled to be paid only when they are actually working on an assignment to a hirer. This arrangement is however by no means universal and some agency workers are engaged by agencies as salaried employees with the right to be paid irrespective of the agency's ability to provide work.

Because of the additional protection offered by this latter arrangement, the Regulations make provision for a 'derogation' from the right to equal treatment with respect to pay – the so-called 'Swedish derogation'. Provided certain provisions are met, agency workers who are permanently employed by their agency and who are entitled to a minimum income of 50% of their basic pay in any week when no work is available will not be entitled to equal treatment with respect to pay.

This means that their pay will not fluctuate according to where they are assigned to work. The right to equal treatment will however continue to apply to their entitlement to the provisions of the Regulations relevant to working time and holiday entitlements.

As a safeguard to prevent potential abuse, the Regulations state that an agency must not terminate an employee's contract of employment until the employee has had the benefit of at least four weeks during which they have had the benefit of pay despite the agency's inability to find them work.

Of course, under this model an agency will take on a significant financial liability. It remains to be seen whether it will be widely used.

# Agency workers' rights of access to facilities and amenities

From day one of an assignment, under the Regulations agency workers will be entitled to be treated no less favourably than a comparable direct employee in being given access to 'collective facilities and amenities' provided by the hirer. Because it is not subject to any qualifying service, this right will apply from 1 October 2011.

The expression 'collective facilities and amenities' is not defined by the Regulations, but three examples are listed:

- canteen or other similar facilities
- child care facilities
- transport services.

It is important to note that this is not an exhaustive list and the right to equal access will apply to other facilities and amenities that are of a similar nature. There is at present no definitive guidance to indicate what else might be included, but perhaps an obvious example is car parking provided by the hirer: this would seem consistent with the listed 'amenities' in that the ability to park at a hirer's site makes it easier for workers to meet the demands of working at a particular location.

It is not expected that 'facilities' that are more in the nature of discretionary benefits will be within scope, for example membership of a hirer's on-site gym.

In the notes accompanying the final text of the Regulations, the Government made clear that in its view 'transport services' will have a restrictive interpretation and will not extend to season ticket loans and company car allowances.

## No less favourable treatment

Of course, a right to be treated no less favourably than direct employees with respect to access to facilities is not the same as an absolute right of access. For example, if direct employees are required to join a

waiting list before they are granted a place at a hirer's crèche, equal treatment is satisfied by an agency worker also having an opportunity to join the waiting list.

The same principle would apply to access to a staff car park on a 'first-come-first-served' basis.

## Scope for objective justification

Unlike equal treatment with respect to relevant working and employment conditions, a failure to provide agency workers equal access to collective facilities and amenities will not be unlawful if it can be objectively justified.

The test of justification as it applies to the regulations governing the rights of part-time workers and fixed-term workers is likely to be followed when this provision comes to be interpreted.

## Reference to a 'comparable worker'

Importantly, in contrast to the right to equal treatment on working and employment conditions, when establishing an agency worker's right of access to facilities and amenities it will be necessary to have regard to the rights that are granted to a comparable directly engaged worker.

In this context, a comparable worker is someone engaged by the hirer in the same or broadly similar work as the relevant agency worker and based or working at the same establishment or, if there is no comparable worker at the same establishment, at another of the hirer's establishments.

This is likely to mean that if access to certain facilities depends on direct workers' status, agency workers' access will be similarly restricted – for example an agency worker in a 'clerical' grade would not be able to access a canteen reserved for only direct employees in 'executive' grades.

# Agency workers' rights of access to employment

Also from day one of an assignment, an agency worker will be entitled to be informed of any relevant vacant positions with the hirer so the agency worker has the same opportunity as a comparable worker to find permanent employment with the hirer.

While the Regulations say very little about what this will mean in practice, the intention appears to be that the obligation on hirers is simply to make agency workers aware of the existence of relevant vacancies and not to disallow applications simply on the ground that the individual applying is an agency worker. The Regulations are explicit in providing that the obligation can be met by the means of a general announcement, such as the posting of a vacancy list on a notice board or intranet.

Two potentially important issues are mentioned in the Government's January 2010 response to consultation on the draft Regulations. First, the Government does not believe that this provision would apply where an organisation is looking to redeploy surplus permanent staff in order to avoid redundancies, perhaps in the context of a headcount freeze. Second, the hirer will remain free to require of applicants any particular qualification or level of experience.

As with the right of access to facilities and amenities, the right to information about vacancies also requires a comparison to be made with the rights of a comparable direct worker – it is a right to information about vacancies to give the agency worker the same opportunity to find permanent work as is afforded to a direct employee – it will not be an absolute right to information.

# Liability and enforcement of rights

The Regulations will give individual agency workers rights that they will be able to enforce through the employment tribunal system. As with similar employment legislation, there will be no system of inspection to ensure compliance.

## **Equal treatment – basic working and employment conditions**

If an agency worker does not receive the relevant terms about working time, holidays and pay to which they are entitled, the Regulations state that the agency is liable for that failure to the extent to which it is responsible for the breach of the Regulations.

On the same basis, the Regulations provide that the hirer shall be responsible for any breach to the extent to which it is responsible for the relevant failure.

A specific provision of the Regulations states that in a particular case an agency shall not be liable if it:

- obtained or took reasonable steps to obtain relevant information about equal treatment terms from the hirer
- if it obtained relevant information, it acted reasonably in setting the agency worker's terms and ensured that the worker received those terms.

If the agency succeeds in establishing this defence, any liability will lie with the hirer if it is the case that the hirer failed to provide accurate information to the agency.

If the agency and/or hirer intends to rely on the 'comparator' defence (see page 8), the information provided by the hirer to the agency must include information setting out why it is believed that the relevant individual is a comparable employee and must describe the relevant terms and conditions.

## **Equal treatment – access to facilities and amenities and information about vacancies**

Because the agency is unlikely to have any control over these issues, the hirer alone will be liable if there is any failure in relation to these rights.

## **Compensation**

If a claim succeeds, the employment tribunal can make an award of compensation. In general, this will involve the tribunal making an assessment of the worker's loss and calculating what it concludes is just and equitable compensation for that loss. Where there is more than one respondent to a successful claim (for example agency and hirer are both involved), a tribunal can decide how to apportion an award of compensation between the respondents in accordance with its assessment of fault.

Unless there are exceptional circumstances, compensation awarded under the Regulations will be subject to a minimum of two weeks' pay. This is intended to avoid the situation where some claims are of such a low value as not to be worth pursuing.

Awards of injury to feelings are expressly excluded and cannot be made under the Regulations.

As mentioned above, if a tribunal finds that a hirer, an agency or both has arranged a worker's assignments in a deliberate effort to prevent qualification, the tribunal can order the payment of an 'additional award' of up to £5,000. This does not have to have any relation to the worker's actual loss.

## **Time limits**

As with most individual employment rights, claims under the Regulations will have to be presented within three months of the act complained of.

### **Information requests**

An agency worker who believes their equal treatment rights may have been infringed will have a right to request information for the purpose of identifying whether they may have a claim under the Regulations. The key features of this provision are:

- if the claim relates to basic working and employment conditions, the request must in the first instance be made to the agency only
- the agency must provide the worker with a statement that sets out relevant information concerning working and employment conditions of employees of the hirer
- only if the agency does not reply within 30 days can a request be made to the hirer.

### **Contracting out**

Consistent with a principle that applies throughout employment legislation, individuals may not contract out of their rights under the Regulations unless it is in accordance with the strict requirements concerning compromise agreements set out under the Employment Rights Act 1996.

# Miscellaneous provisions

The Regulations require changes to be made to some provisions of existing employment legislation.

## **Protection of pregnant women**

Two rights that currently apply only to agency workers who are engaged as employees will be extended to all: the right to reasonable paid time off to attend ante-natal appointments and the right to be suspended from work if an insurmountable risk related to pregnancy is identified and an alternative assignment cannot be identified for her.

Although a hirer will (as now) have general responsibilities towards agency workers under health and safety legislation, responsibility for these new rights will in the main lie with the agency.

## **Thresholds for representative bodies**

Existing employment legislation concerning employee representation will be amended to make clear that agency workers will count towards the agency's workforce and not the client's.

The main provisions are the statutory trade union recognition and derecognition procedures and the Information and Consultation of Employees Regulations 2004.

## **Provision of information to workers' representatives**

Where a hirer has an existing obligation to disclose information about the employment situation to representatives of its workforce, relevant legislation will be amended to oblige the hirer to include information about its use of agency staff.

This will apply, for example, to an information and consultation committee established by a hirer in accordance with the Information and Consultation of Employees Regulations 2004. It will also apply to information required to be disclosed by a hirer to a recognised trade union during a collective bargaining process.

Importantly, this provision will not impose any freestanding obligation to disclose information – it applies only where an obligation to provide information to representatives already exists.

The information required to be disclosed is:

- the total number of agency workers engaged by the hirer
- the areas of the business in which they work
- the type of work they undertake.



# Assessing the impact of the Regulations

All organisations that make significant use of agency staff will need to conduct an assessment of the impact of the Regulations on their business. The actual impact of the Regulations will vary from organisation to organisation – the effect of the Regulations will be a factor of whether or not workers will fall within the limited exemption for the genuinely self-employed, the hirer’s pattern of use of agency workers, in particular the duration of their assignments, and the extent to which an equal treatment ‘gap’ will exist.

The necessary analysis can be conducted in advance of the Regulations coming into effect. The process is likely to involve co-operation between hirers and agencies. This section is intended to help with that process.

Because no qualifying period applies, all hirers will need to consider the potential impact of agency workers’ rights of access to facilities and amenities, and provision of information about vacancies. Hirers will need to identify all relevant facilities and amenities that are potentially within scope, bearing in mind that the examples set out in the Regulations (canteen, child care facilities and transport) are not exhaustive. As explained above, it will be important to bear in mind that the right of access will not be absolute, but will in all cases involve the access afforded to a comparable directly hired employee.

## **Pattern of engagement of agency workers**

What further analysis may be necessary depends on a hirer’s pattern of engagement of agency staff – in particular, whether assignments exceed 12 weeks.

Of course, if an organisation does not engage agency workers for periods in excess of 12 weeks, the right of equal treatment with respect to basic working and employment conditions will not apply; however, two important considerations should be borne in

mind in the event that a particular agency worker is re-engaged by a hirer.

Firstly, assignments subsequent to the first may count towards qualification if the period between them is less than six weeks, or if one of the other provisions preserving ‘continuity’ applies.

Secondly, it is possible that an agency worker who has not qualified for equal treatment might seek to challenge their engagement on a series of assignments as a deliberate attempt to avoid equal treatment (see the section on the ‘qualifying period’, page 7). Of course, such a claim will only succeed if an employment tribunal is not persuaded that there is an innocent explanation for the worker’s pattern of assignments. Hirers who identify this as a risk may wish to consider recording evidence of their current pattern of use of agency staff and the reasons for the engagements.

## **Assessing the impact – agency workers qualifying for equal treatment**

If a hirer expects that it will engage agency workers who qualify for equal treatment, assessment of the impact of the Regulations will generally involve consideration of the following questions:

### ***Does the hirer directly recruit employees to carry out the same work as agency workers?***

As discussed, the right to equal treatment is based upon the terms an agency worker would have been entitled to if hired directly to carry out the same job. An agency worker may be carrying out a unique role and the hirer may never have hired employees directly to carry out that job. The BIS’s draft guidance (see page 8) acknowledges that if this is genuinely the case, the right to equal treatment with respect to pay may not apply at all.

The draft guidance does, however, suggest that the right to equal treatment may still extend to holiday entitlement if as a matter of course the hirer grants the same entitlement to all direct employees whatever position they hold.

If the hirer does recruit employees directly to do the same work, the question is whether the hirer 'ordinarily includes' relevant terms in direct hirers' contracts.

### ***Does the hirer 'ordinarily include' relevant terms and conditions in direct employees' contracts?***

As explained above, the right to equal treatment will apply only to terms and conditions that are 'ordinarily included' in directly engaged staff contracts, because they are set down in a pay scale, union agreement, relevant company policy or are included by 'custom and practice'.

### **Pay**

If there is a pay scale or relevant collective agreement, it should be possible to identify the relevant point on that scale at which the agency worker would have been placed if hired directly – this will be the reference point for equal treatment. Where relevant, it will be appropriate to take account of an agency worker's qualifications and experience when deciding where on a scale they would be placed.

As discussed above, the right to equal treatment applies throughout an assignment, so an agency worker would be entitled to the benefit of any across-the-board increase or pay increment that would apply had they been hired directly.

Some organisations give hiring managers discretion to decide an individual's starting pay provided the relevant figure falls within a band. This may result in employees having individual 'spot rates' of pay within that band. While a qualified agency worker's pay would obviously need to sit within that band, the relevant circumstances would probably have to be carefully considered to determine whether the right to equal treatment would entitle an agency worker to a certain pay rate within the band.

Even where there is no pay scale, the draft BIS guidance says that a hirer will be considered to 'ordinarily include' terms related to pay if permanent

employees generally start on the same rate of pay. It is not clear what proportion of a direct workforce will need to have a particular rate of pay for that rate to be held to be 'ordinarily included' within the meaning of the Regulations.

As considered above, bonus or commission schemes that relate to individual effort will fall within the definition of pay. Piece-rate payments are an obvious example. Another is a commission scheme that entitles employees to a payment if particular sales targets are met.

### **Working time and rest breaks**

As with pay, the question is what terms and conditions about working time would have applied had the agency worker been recruited directly by the client to do the same job? It should not be difficult to answer this question because most organisations either operate standard hours of work or have set hours for employees carrying out particular work.

That said, if an agency worker is engaged to fulfil a client's need for ad hoc work without fixed weekly or daily hours, the same conditions about hours of work (that is, there being no fixed or guaranteed hours) would have applied in the event of the hirer's direct employment of an employee to do the same job. It may then be necessary to consider what relevant policy the hirer has concerning the direct engagement of zero hours of flexible workers.

### **Holiday entitlement**

In most cases it should be straightforward to identify what relevant terms concerning holiday entitlement would have applied in the event of an agency worker being hired directly to carry out the same job. Even if there are no formal policies setting out entitlement to holiday, most organisations will grant all employees the same amount of leave, for example 20 days per annum plus public holidays.

### **How do these terms compare with agency workers' terms?**

Of course, the impact (if any) of the Regulations' right to equal treatment will depend upon the extent of any disparity between the relevant terms as identified and the terms upon which agency workers are supplied.

# What will compliance with the Regulations mean?

Hirers and agencies will need to work closely to assess the potential impact of the Regulations and to identify means by which to mitigate any negative consequences. A detailed consideration of organisations' possible responses to the Regulations is outside the scope of this work.

Of course, it will not always be the case that the cost of supplying the services of an agency worker will increase as a result of the Regulations coming into effect. However, where an increase in costs will occur, how this is dealt with is a commercial matter to be decided between hirer and agency.

## **The hirer/agency relationship**

It is clear that compliance with the Regulations will involve a high degree of trust and co-operation between hirers and agencies. Hirers will need to disclose to agencies potentially sensitive information concerning relevant terms and conditions. They will need to trust agencies to safeguard that information and to act appropriately when setting their workers' terms and conditions in accordance with information received.

Some organisations will undoubtedly attempt to protect themselves through contractual indemnities intended to protect the innocent party from harm as a consequence of the failures of the other party. While this approach may have its place, for hirers it will be no substitute for a careful selection of agencies based on their ability to assist the hirer with compliance.

Hirers may also wish to consider how they interact with agencies on a day-to-day basis: if line managers deal with agencies directly, will they be aware of the organisation's responsibilities under the Regulations? Some might consider that a degree of centralisation of control might be preferable.

# Conclusion

The effect of the Regulations is likely to vary widely and all organisations that hire the services of agency workers will need to conduct an analysis to identify whether the Regulations will have an impact on their operations. In carrying out this process, it is obviously essential that the Regulations are properly understood; in particular it must be recognised that they are based upon a form of equal treatment that differs significantly from the UK legislation that implemented the EU part-time and fixed-term work directives.

Where change is needed, hirers and agencies will need to work together to identify and implement appropriate responses in advance of the Regulations coming into force.

A high degree of trust and co-operation between hirers and agencies will be necessary to ensure successful compliance. Professional agencies that can support their clients are likely to benefit, and in time this is likely to have the effect of enhancing standards within the recruitment industry to the benefit of all.

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