

## Agency Worker Regulations 2010

Does your business use agency workers or temps, supplied by an employment agency?

The Agency Worker Regulations ("AWR") are due to come into force on 1 October 2011.

The AWR places new legal obligations on hirers of agency workers, providing such workers with equal access to facilities and amenities at work, the right to receive information about new positions within the hirer and, after working for a qualifying period of twelve weeks, the right to basic working and employment conditions that are equal to the hirer's own employees. As the agency pays the worker, there is a new obligation on hirers to supply agencies with relevant information and an agency defence that it took reasonable steps to obtain the information from the hirer, in which case the hirer is liable for the compensation awarded.

Agency workers will be able to bring a claim in the Employment Tribunal against both the agency and/or the hirer.

### Who is an agency worker?

This is defined as a person supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and who has a contract with the agency which is either a contract of employment or any other contract to perform work and services personally. Self employed persons who supply their services through their own service company will not normally be covered nor would casual workers engaged by the hirer itself .

### Day one rights

From the start of any assignment, a hirer will need to ensure that:

- it treats its agency workers no less favourably than 'comparable workers' with regards to accessing collective facilities and amenities. These facilities include canteen facilities, child-care facilities and transport services, but can include others such as a crèche, car parking facilities, staff common room, or prayer room unless any less favourable treatment of agency workers is justified on objective grounds; and
- it provides its agency workers with information about any relevant vacancies that may exist during their assignment. Agency workers should be notified generally of new positions at the same time as the hirer's other staff.

### Rights after twelve weeks

Please contact Lee Jefcott on 0161 618 1538 or e-mail [lee.jefcott@blueskylaw.co.uk](mailto:lee.jefcott@blueskylaw.co.uk) for more information.

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After carrying out the same role, whether on one or more assignments, with the same hirer for twelve weeks (from 1<sup>st</sup> October 2011), agency workers will gain the right to the same “basic working and employment conditions” as they would have if recruited directly by the hirer (“twelve week rights”).

The qualifying period will normally be broken if the agency worker starts an assignment with a new hirer, or, while still assigned to the same hirer, starts a new, substantively different assignment, or takes a break of at least six calendar weeks after one assignment before commencing the next. If this happens, the qualifying period starts again. However, we expect that Employment Tribunals will be alive to spotting any anti avoidance practices.

For a new assignment to be ‘substantively different’ to a current assignment, there must be a real and genuine difference in the work and duties which make up the whole or main part of each role. It goes on to suggest that differences in the required skills and competencies, rate of pay, line manager and equipment should be considered in this respect. If the agency does not inform the agency worker of any changes to the role in writing, it will be presumed that the agency worker maintains the same role as before. It is therefore crucial for the hirer to ensure that the agency communicates this information in writing in such circumstances.

Not all periods of non-work will break continuity for the purposes of the qualifying period. For example sickness absence, maternity leave and certain other absences will count towards the 12 week qualifying period.

## **Basic working and employment conditions**

Upon completing the 12 week qualifying period, agency workers become entitled to the same basic working and employment conditions as a person who had been recruited directly by the hirer to do the same or a broadly similar job. Such basic working and employment conditions are to be determined by reference to the conditions that are ‘basic’ and ‘ordinarily included’ in the hirer’s contracts.

Basic terms are defined as pay, working time, night work, rest periods, rest breaks and annual leave. For the purposes of pay, the AWR provide that any fees, certain bonuses, commissions and holiday pay should be paid to agency workers. However, certain arrangements, including those in respect of redundancy pay, occupational sick pay, occupational maternity pay, bonuses not attributable to the amount and quality of work done by the agency worker and participation in long-term incentive, share-option or profit-sharing schemes, do not fall under the right to equal treatment.

## **Anti-avoidance provisions**

The AWR contains a number of provisions aimed at preventing agencies and hirers from structuring assignments so that the agency worker does not complete the 12 week qualifying period. The Government Guidance gives the following example of a possible structure of assignment designed to prevent workers completing the 12 week qualifying period:

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*An agency worker completes two assignments with the hirer. The first lasts 11 weeks, followed by a 6 week break, and the second also lasts 11 weeks, again followed by a 6 week break. The agency worker is then taken on for a third assignment of 11 weeks.*

In certain circumstances, attempts by any agency and/or hirer to structure assignments in this way will not prevent an agency worker from completing the 12 week qualifying period. In addition, Employment Tribunals may award agency workers who successfully bring claims that avoidance measures have been operated, additional compensation of up to £5,000.

## **What should hirers now do?**

- Carry out an audit of agency staff engaged in the company, including what basic terms they receive and how these terms compare with equivalent employees. Are they supplied by one agency or a number of agencies?
- Create skills matrices for each of the roles that agency workers and employees are assigned to carry out, to enable a proper comparison of the roles. This will help assess whether the agency workers have an appropriate comparator for the purposes of the Regulations, and, if not, determine whether it is necessary to provide the same basic working and employment conditions.
- Provide agencies with copies of standard terms and conditions of employment, pay scales and annual leave entitlements of comparable workers.
- Establish a mechanism to keep track of agency workers so that the qualifying period can be calculated correctly.
- Subject to the anti-avoidance provisions, consider engaging workers on short assignments (of no more than 12 weeks) and replacing them with different agency workers. However, the cost implications of induction and a lack of continuity may make this model unattractive.
- Ask agencies to enter into pay between assignments contracts (as this may disapply the regulations).

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