Agency Workers Regulations 2010

Briefing for hirers - August 2011

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1. Background

The Agency Workers Regulations 2010 ("the Regulations") will come into force in England, Scotland and Wales on 1 October 2011. The REC worked closely with the Department of Business, Innovation and Skills (BIS) on guidance to assist clients and agencies to implement the Regulations correctly. The guidance was released on 27 May 2011 and is available by clicking here.

The Agency Workers (Northern Ireland) Regulations 2011 will come into effect on 5 December 2011. The Department of Employment and Learning (DELNI) are currently consulting on the NI Regulations (these are almost identical to the UK Regulations) and will produce separate guidance later this year.

Therefore it is imperative that hirers:

- understand the Regulations;
- assess the impact the Regulations will have on their business;
- start to work closely with their agencies to minimise the costs and limit the potential disruption the implementation of the Regulations may cause to their business; and
- put effective systems in place to adhere to the Regulations.

2. What are the Agency Worker Regulations?

The Regulations stem from the EU Temporary Workers Directive 2008 which gives agency workers the right to the same pay and other working conditions enjoyed by a hirer's own workers. Importantly however, the Regulations **do not alter agency workers' employment status** i.e. they do not make an agency worker an employee of either the hirer or the agency. Whilst in other parts of the EU, this right to equal treatment comes into effect from day one of an assignment, the UK has secured a derogation period of 12 weeks (this was agreed by the TUC and the CBI in May 2008). This means that an agency worker will only be entitled to equal treatment once she/he has completed 12 weeks' of service in the same role with the same hirer (there are two exceptions, the Day One rights, which are detailed later).

3. Who is an agency worker for the purposes of the Regulations?

The Regulations do not apply to workers who have found a 'perm' job with a client, even if they were introduced by an agency.

The Regulations apply to individuals who meet the definition of an agency worker. The Regulations define an agency worker as:

- an individual;
- who is supplied by a temporary work agency to work temporarily under the supervision and direction of a hirer; and who
- has a contract of employment with the agency, or any other contract with the agency to perform work or services personally.

Workers who are genuinely in business on their own account (i.e. genuinely self-employed) will not be within scope.

Workers working on managed service contracts (i.e. those where the supplier rather than the hirer, manages or directs staff such as in an outsourced IT contract or catering contract) are excluded. However they will be within scope of the Regulations if either (1) in reality, the hirer, rather than the managed service supplier, supervises and directs the staff or (2) they are supplied by another agency to the managed service provider.

4. What is a 'temporary work agency' for the purposes of the Regulations?

The Regulations use the term 'temporary work agency' rather than employment agency or business which is used in other legislation. A temporary work agency includes the agency which supplies the worker to the hirer and any intermediaries in the supply chain including umbrella companies or any master or neutral vendors. This is important for the purposes of liability under the Regulations and means that all those suppliers are responsible for ensuring that the agency worker receives his/her entitlements. It is important therefore that contracts between hirers and master or neutral vendors deal appropriately with the Regulations and in particular with the flow of information down the supply chain.

5. When does an agency worker qualify for equal treatment?

Except for the Day One rights (detailed at section 7 below) the agency worker will be entitled to equal treatment only once she/he has worked for 12 weeks in the same role at the same hirer. This is irrespective of the working pattern (e.g. full time or part time). It is also irrespective of which or how many agencies supplied the agency worker to do the same role at the hirer.

A new qualifying period will begin only if (1) a new assignment with the same hirer is substantively different (and that does not mean simply changing a job title) and the agency has told the agency worker that there has been a substantive change to the role (which means the hirer should tell the agency that there has been a substantive change to the role), or (2) if there is a break of more than six weeks between assignments in the same role.

The qualifying period will be paused (rather than stopped) if the worker takes:

- a break of six weeks or less; or
- certified sick leave for no more than 28 weeks; or
- statutory/contractual maternity, adoption or paternity leave; or
- time off for public duties (including jury service up to 28 weeks).

In other cases where an agency worker takes a break which is related to pregnancy or childbirth (up to 26 weeks after childbirth), or takes maternity, adoption or paternity leave, the agency worker will be treated as if he or she has continued working in an assignment i.e. the clock is neither suspended nor stopped for the duration of the assignment.

It is clear that an agency worker does not have to work for 12 consecutive weeks via the same agency to qualify for the right to equal treatment. They can accrue the 12 weeks' qualifying service over a much longer period of work and through more than one agency.

Therefore agencies will need to effectively monitor workers who have a series of ad hoc assignments with the same hirer. Hirers should also keep track of which workers have already worked for them and in which roles so that they can assist the agency to establish how much qualifying time any agency worker has on his/her clock.

6. What does equal treatment mean?

Agency workers will be entitled to the same basic working and employment conditions as a recruit of the hirer (or a comparable employee) after 12 weeks of service in the same role with the same hirer. The entitlements include pay, duration of working time, night work, rest periods, rest breaks and annual leave. 'Pay' has been specifically defined as *"any sums payable to a worker of the hirer in connection with the worker's employment including any fees, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under a contract or otherwise…"* The definition of pay includes holiday pay, shift allowances, unsociable hours premia, overtime rates, vouchers with a fixed monetary value (but which are not subject to a salary sacrifice arrangement), stamps and bonuses directly related to quantity and quality of the work carried out.

As stated at section 2 above, the Regulations will not change the employment status of agency workers. Therefore they will still not have the right to claim for unfair dismissal, redundancy pay or maternity leave which are entitlements reserved for employees (agency workers employed by an agency will of course havea all of the rights of employees). Nor will agency workers be entitled to benefits such as occupational sick pay, company pension schemes, share options schemes, loans, expenses, health/life insurance, financial participation schemes and bonus payments based upon organisational or company performance. These are considered a reflection of a long term relationship between an employee and an employer. Agency workers will therefore remain a flexible labour resource for hirers.

Finally, many hirers worry that the Regulations mean that if an agency worker is paid more than their own employees they will have to either decrease their rate of pay to that of employees or increase the rate of pay to employees. Neither of these is true. The Regulations provide for equal treatment for agency workers when their pay is lower and they do not enjoy the same level of working conditions as comparable employees or workers.

7. Day One rights

As mentioned above, there are two rights to which agency workers are entitled from the first day of an assignment.

Firstly, hirers must inform agency workers of existing vacancies in their organisation. Hirers do not have to actively seek out each agency worker and tell them individually of the vacancies but they must ensure that they have the same access to information about vacancies as other workers. This can mean posting a vacancy into a communal area (such as a staff canteen) or on an intranet.

Secondly, agency workers will also be entitled to access collective on-site facilities such as crèche and childcare facilities, canteen facilities, car parking and the provision of transport services. However, access to facilities can be refused if there are 'objective grounds' for doing so. In practice this means that if there is a waiting list for childcare facilities or a car park space, an agency worker is not automatically entitled to a place but can be subject to the same criteria to access the facility as someone directly recruited by the hirer. 'Amenities' such as subsidised gym membership and season ticket loans are out of scope as they are considered to be a reflection of the long term relationship between an employee and a hirer which will not be appropriate for agency workers. The hirer is solely liable for the Day One rights.

8. Who is liable for establishing equal treatment?

The Regulations will require a qualifying agency worker to be treated as if she/he had been recruited directly by the hirer to do the same job. On a practical level, this means that equal treatment will need to be established in respect of the terms and conditions that apply to a comparable worker or a comparable employee engaged in the same role or broadly similar work.

For example on a factory production line, the agency worker may be working next to a worker recruited directly. The direct recruit could serve as a 'flesh and blood' comparator to establish parity in pay and working conditions. In these circumstances, the hirer and the agency will be deemed compliant with the regulations. If a 'flesh and blood' comparator cannot be found, then there may be an identifiable pay scale or a starting rate which could be used as a reference point. Therefore, pay scales and benefits outlined in

company handbooks and any collective agreements must be taken into account when establishing equal treatment.

The hirer is solely liable for breach of the Day One rights. The temporary work agency and any intermediaries in the supply chain are responsible for ensuring that the agency worker receives the correct entitlements in respect of all other equal treatment rights and will be liable for any breaches of those rights. However, the agency will have a defence if it has taken 'reasonable steps' to obtain the necessary information from the hirer (and any intermediaries), and has acted 'reasonably' in determining the agency worker's basic working and employment conditions. An employment tribunal will examine the where the fault for the breach lies and will apportion liability, and any financial sanctions, accordingly.

The agency, the hirer and any intermediaries must co-operate with each other to ensure that an agency worker receives his/her rights. An agency can assist the hirer by asking the right questions at the right time – whether this is on receipt of instructions to supply a worker or when it is clear that the assignment will last longer than 12 weeks. The REC has prepared an information request form which REC member agencies can use with their clients to establish what constitutes equal treatment for any particular agency worker.

9. Pregnant agency workers

Pregnant agency workers will be entitled to paid time off to attend medical appointments and antenatal classes once they have achieved the 12 weeks' qualifying service.

In addition, if an assignment is terminated on pregnancy related health and safety grounds the agency will have to find suitable alternative work on terms which are not substantially less favourable than the previous assignment. If the agency cannot find suitable alternative work the agency will be required to pay the worker for the remainder of the original assignment unless she unreasonably refuses the assignment. Agencies and hirers should ensure that an assignment is not terminated solely on the grounds of pregnancy as this would constitute direct sex discrimination against the pregnant agency worker. Compensation for direct sex discrimination is unlimited. Therefore REC recommends that when an agency workers announces that she is pregnant, that the hirer conducts the relevant health and safety risk assessment as it would for one of its own pregnant employees. This will establish which, if any, reasonable adjustments the hirer can make to ensure that the agency worker remains in her assignment.

10. Are there legitimate ways to derogate from the Regulations?

Yes. Regulation 10 provides that where an agency worker has a contract of employment with the agency (which meets the specific conditions set out in Regulation 10) then that worker is not entitled to equal pay. However, the agency worker will still be entitled to equal treatment in respect of working conditions and the 'Day One rights.' This is commonly known as the "Swedish Derogation" or a "Pay between Assignments" contract.

Importantly, where an assignment has terminated, the agency must take reasonable steps to find suitable alternative employment for the agency worker. Where the agency cannot find suitable alternative work, the agency must pay the agency worker at least 50% of what they were being paid in their previous assignment provided the amount is not less than the National Minimum Wage (NMW).

The agency must do this for a minimum of four weeks before it can terminate the contract of employment.

Therefore it is clear that this derogation is only feasible for agencies where their agency workers earn significantly more than the NMW or where the hirer guarantees a volume of work for a certain period. Otherwise it will be an expensive option for agencies who will bear all of the liabilities of an employer and all of the additional liabilities required by Regulation 10 but without the guaranteed income.

11. Anti-avoidance measures

The Regulations contain anti-avoidance measures to prevent agencies and hirers from structuring assignments in a way to prevent the agency workers from reaching the 12 week qualifying period. This includes supplying a worker to connected hirers, rotating workers or repeatedly terminating and recommencing assignments when the most likely explanation is to prevent the agency worker from accruing the 12 weeks' qualifying period. In the event that the Tribunal finds that the Regulations have been deliberately avoided they can award an agency worker compensation of up to £5000.

12. What are the financial penalties for breach of the Regulations?

The Tribunal can award compensation to an agency worker where they have suffered as a result of a breach of the Regulations. The compensation will normally be based on their losses but will be not less than two weeks' pay. In any event, the compensation will be just and equitable. The hirer and the agency will need to work together to ensure that the agency worker receives equal treatment after the 12 week qualifying period.

13. Next steps

The REC has a complete implementation support programme for it members. In addition to this briefing, we have produced a briefing for temporary workers, detailed factsheets, presentations and an impact assessment sheet. We have also produced Model Contracts which can be downloaded for free by Corporate Members. Therefore hirers can be confident that REC members have at their disposal all the tools they need to ensure a successful implementation of the Regulations. all the tools they need to ensure a successful implementation of the Regulations.