

THE AGENCY WORKERS REGULATIONS 2010

Authors: David Seals and Laura Marchington

Employment

October 2011



DOWNNS

YOUR COMPETITIVE EDGE

156 High Street, Dorking, Surrey RH4 1BQ T: 01306 880110 F: 01306 502283 DX 57300 Dorking
The Tanners, 75 Meadrow, Godalming, Surrey GU7 3HU T: 01483 861848 F: 01483 861856 DX 58308 Godalming1
www.downslaw.co.uk

Authorised and regulated by the Solicitors Regulation Authority

THE AGENCY WORKERS REGULATIONS 2010

This briefing note provides some basic guidance on the Agency Workers Regulations and summarises the relevant implications and responsibilities for both hirers and temporary work agencies.

The Directive

The Regulations are intended to give effect to the Temporary Agency Workers Directive (the Directive) and they came into effect on 1 October 2011.

The aim of the Directive:

- To provide basic working and employment conditions for assigned workers that are no less favourable than if they had been recruited directly by the hirer.

The Scope of the Regulations- who do they apply to and what do they provide?

The Regulations apply to agency workers who are assigned to do temporary work (for hirers) through temporary work agencies. Equally, they apply to individuals or companies involved in the supply of temporary agency workers and to hirers.

The Temporary Work Agency (TWA)

A TWA supplies agency workers to work temporarily for a third party (the hirer). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract (an employment contract or a contract to perform work or services personally) with the TWA.

Under the Regulations a TWA is a person (individual or company) in business, involved in the supply of agency workers. This could be a “high street” agency but also an intermediary such as an umbrella company if they are involved in the supply of the agency worker.

The Regulations will not apply to those who are in business on their own account where the status of the hirer is that of a client or customer of a “profession or business undertaking” (i.e. a genuine business to business relationship) or to those who are genuinely self-employed.

The Agency Worker

An agency worker (often referred to in the workplace as a “temp”) is someone who has a contract with the TWA (an employment contract or a contract to perform work personally) but works temporarily for and under the direction and supervision of a hirer.

The Hirer

The hirer, or end-user, is a “person” e.g. company, partnership, sole trader, public body- which is engaged in economic activity (whether or not for profit) and which books agency workers via a TWA.

The Regulations provide that:

- all agency workers must be able to access a hirer’s collective facilities and amenities; and
- have access to information about its job vacancies from the first day of their assignment (*the **Day One Rights** for all agency workers*)

In addition, the Regulations provide that:

- after completion of a 12 week qualifying period, agency workers are entitled to the same basic working and employment conditions that they would have been entitled to had they been recruited directly by the hirer to do the same work (*the **Right to equal treatment following the qualifying period***)

Day One Rights

Access to collective facilities and amenities

An agency worker has the right to be treated no less favourably than a comparable employee or worker in relation to “collective facilities and amenities”. This is not intended to extend to all benefits which a hirer might provide to directly recruited workers or employees; rather, it applies to collective facilities provided by the hirer either to workers or employees as a whole or to particular groups of workers or employees.

- Examples of these collective facilities and amenities include: canteen or similar facilities, child-care facilities, provision of transport services, toilet/shower facilities or a staff common room.

Access to employment vacancies

From day one of an assignment an agency worker has the right to be told of any vacancies in the hirer during their assignment in order to be given the same opportunity as a comparable employee or worker to find permanent employment with the hirer. Hirers can choose how to publicise vacancies, whether it is via the internet/intranet or on a notice board in a communal area. But the agency worker should know where and how to access this information.

It should be noted however, that this obligation does not constrain hirers’ freedom regarding any qualification or experience requirements or how they treat applications.

The right to equal treatment following a qualifying period

When an agency worker has undertaken the same role with the same hirer for 12 continuous calendar weeks (the qualifying period), they are entitled to the same basic working and employment conditions to which they would have been entitled had they been directly recruited by the hirer to do the same work. They are:-

- Key elements of pay, duration of working time, night work, rest periods, rest breaks and annual leave

Calculating the qualifying period

The 12 week qualifying period is triggered by working in the same job with the same hirer for 12 calendar weeks. A calendar week in this context will comprise any period of 7 days starting with the first day of an assignment. Calendar weeks will be accrued regardless of how many hours the worker does on a weekly basis.

The qualifying period is not retrospective and for those agency workers already on assignment, the 12 week qualifying period will start from 1 October 2011.

The qualifying period will be broken and an agency worker will have to start to count their 12 week period again if the worker remains with the same hirer but starts a “substantively different role”. The Government has promised further guidance on the meaning of “substantively” but characteristics such as skills employed, level of competence, pay rate, location, management, working hours and training required can help to establish if the work or duties are substantially different.

It will also be broken where there is a break of more than 6 calendar weeks between assignments the agency worker undertakes with the same hirer. However, there are circumstances where the continuity will not be broken but the weeks will not count (that is, the clock is paused), for example, due to sickness, holidays or family leave.

Anti-avoidance Provisions: structure of assignments

The Regulations contain anti-avoidance provisions to ensure agency worker rights are enforceable. These give an agency worker the right to be treated as if they were entitled to equal treatment if a structure of assignments develops, within either the hirer or between that hirer and a connected business, which is intended to prevent the agency worker from acquiring equal rights.

Thus, for example, a hirer or TWA terminating an assignment at 12 weeks and then reassigning the agency worker to the same position after a 6 week gap had broken continuity under the qualifying period rules would probably fall foul of the anti-avoidance provisions.

Sanctions

Tribunals will be able to make an additional award of up to £5,000 where a hirer and/or TWA are found to have breached the anti-avoidance provisions.

The Swedish Derogation: where equal treatment can be lawfully avoided

The Directive permits two types of derogation from the equal treatment principle:

- 1) Permanent employment contracts providing pay between assignments (the Swedish derogation);
- 2) Collective or workforce agreements between workers and employer's representatives.

However, only the first of these options is permitted under the Regulations. The Swedish derogation provides an exemption from the right to equal treatment with regard to pay where the TWA provides the agency worker with a permanent contract of employment with the TWA which pays them a minimum amount between assignments when they are not working for a hirer. This minimum must not be less than either 50% of the agency worker's normal pay whilst on assignment or the national minimum wage.

The fact that the agency worker enters into a "pay between assignments contract", does not prevent them from being entitled to other provisions under the Regulations. They will still be entitled to equal treatment in relation to the duration of working time, night work and rest periods, rest breaks and (unpaid) annual leave after the 12 week qualifying period and to the "day one" entitlements regarding access to facilities and job vacancies.

Pay and Bonuses

Under the Regulations, the definition of "pay" includes basic pay, overtime payments, shift/unsocial hours allowances, risk payments for hazardous duties, holiday pay, bonus or commission payments directly attributable to the amount or quality of work done by the individual but excludes other forms of bonus such as profit share or share schemes. Also excluded are occupational sick pay, occupational pensions, statutory and contractual redundancy pay and benefits in kind such as car allowances and health insurance.

How can the rights be enforced?

Liability for breach of the Day One Rights rests with the hirer. For failure to provide basic working conditions liability can rest with either the TWA and/or the hirer to the extent that each is actually responsible for the failure. An agency worker will be able therefore to bring a claim in the Employment Tribunal against the hirer, the TWA or both. The time limit for presenting claims to a Tribunal will usually be 3 months from the date of the infringement (subject to a Tribunal's ability to accept a claim out of time where it is "just and equitable" to do so).



Compensation

The agency worker will be compensated for any loss of earnings related to their entitlements under the Regulations. There is no maximum award but there is a minimum award of 2 weeks' pay regardless of the value of loss. However, this minimum award may be reduced where a Tribunal finds that the agency worker has behaved unreasonably.

If you require any advice on any of the issues covered in this briefing note our Employment team would be happy to assist. Please contact:

Matthew Kilgannon, Partner

Direct Dial: 01306 502217

Email: m.kilgannon@downslaw.co.uk

David Seals, Partner

Direct Dial: 01306 502218

Email: d.seals@downslaw.co.uk

Nicola O'Dwyer, Associate

Direct Dial: 01306 502216

Email: n.o'dwyer@downslaw.co.uk

Details of our full range of legal services can be found on our website at www.downslaw.co.uk

Disclaimer: Information contained in this document should not be treated as legal advice.