

Q&A BRIEFING NOTE – AN OUTLINE OF THE AGENCY WORKERS REGULATIONS 2010

Q1. What is the aim of the Regulations?

A. Their aim is to give to agency workers who have been in an assignment for more than 12 weeks the same pay and other basic working and employment conditions as they would have had if employed directly to that role. They also include, from the first day of the assignment, provisions relating to access to facilities and vacancies, and the maternity rights of agency workers.

Q2. When will the Regulations come into force?

A. 1 October 2011.

Q3. Which types of workers will receive this treatment?

A. Workers who find work through an agency, whether they are employed by that agency or not, including workers supplied by “umbrella companies”. Self-employed contractors are not covered nor are in-house temporary staffing banks, secondments and managed service contract staff.

DAY 1 RIGHTS

The Regulations give agency workers entitlement to certain rights from the first day of their assignment.

Q4. Access to job vacancies equivalent to permanent employees or workers - what if roles are only available because they are created during an internal reorganisation?

A. These are not “vacancies” as such, and therefore the hirer is not obliged to notify agency workers about any such roles.

Q5. Access to collective facilities and amenities as comparable employees – what are they?

A. These may include things like a canteen, workplace crèche, transport services, toilet/shower facilities, staff common room, waiting room, mother and baby room, prayer room, food and drinks machines, car parking.

The hirer, not the agency, is responsible for ensuring that the workers have access to information about job vacancies and access to collective facilities

AFTER 12 WEEKS IN THE SAME JOB

After 12 weeks in the same job with the hirer, an agency worker will be entitled to the same basic working and employment conditions as if he had been employed directly by the hirer.

Q6. What is meant by “basic working and employment conditions?”

A. Not all terms and conditions of employment are covered. The terms covered are the following terms, which are ordinarily included in relevant contracts:

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

Q7. How can it be proved that the agency worker has received proper entitlement in relation to basic working and employment conditions?

A. The agency worker must be treated as if he/she had been recruited directly to the job. This will usually be a matter of common sense. Evidence of what this is could come from standard contracts, a handbook, collective agreements or standard pay scales.

However, the hirer will be deemed to have provided proper entitlement if it can point to a permanent employee (“a comparator”) with equivalent basic working and employment conditions. This person should be a permanent employee who:-

- is employed by the hirer;
- has normal working and employment conditions (i.e. not rare or unusual terms);
- carries out “the same, or broadly similar work”; and
- works at the same place.

Q8. Is it necessary to have a comparator?

A. No. The existence of one is just another piece of evidence, which might not be necessary if the relevant terms and conditions are clear from other evidence.

Q9. What is “Pay” for these purposes?

A. Pay is sums of money paid to the worker in connection with the worker’s employment. The following chart summarises what is included and excluded:

‘Pay’ includes:
• Basic pay
• Overtime payments, subject to any requirements regarding the number of qualifying hours
• Shift/unsocial hours allowances, risk payments for hazardous duties
• Payment for annual leave (any entitlement above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate)
• Bonuses or commission payments directly attributable to the amount or quality of the work done by the individual
• Vouchers or stamps which have monetary value and are not “salary sacrifice schemes” – e.g. luncheon vouchers, child care vouchers
‘Pay’ excludes:
• Occupational sick pay
• Occupational pensions (agency workers will be covered by new automatic pension enrolment which will be phased in from October 2012)
• Occupational maternity, paternity or adoption pay
• Redundancy pay (statutory and contractual)
• Notice pay (statutory and contractual linked to loss of employment)
• Payment for time off for Trade Union duties
• Guarantee payments as they apply to directly recruited staff if laid off
• Advances in pay or loans e.g. for season tickets
• Expenses such as accommodation and travel expenses
• Payments or rewards linked to financial participation schemes such as share ownership schemes, phantom share schemes
• Overtime or similar payments where the agency worker has not fulfilled qualifying conditions required of someone directly recruited
• The majority of benefits in kind given as an incentive or reward for long service
• Any payments that require an eligibility period of employment/service, if not met by the agency worker
• Bonuses which are not directly linked to the contribution of the individual
• Additional discretionary, non-contractual bonuses

Q10. What about bonus or commission schemes?

A. Agency workers are entitled to be paid any bonuses or commission which are directly attributable to the amount of work done, or personal performance, but not if the bonus is purely because of company or department performance which is not attributable to the workers’ personal performance. The hirer will be responsible for making these payments to agency workers; the agencies will need accurate information from the hirer in order to make these payments.

Q11. Will an agency worker be entitled to a bonus if they are paid more than a relevant directly employed employee?

A. In principle, yes. Agency workers are entitled to what they would have received were they employed direct. However, on this basis it might be possible to construct their pay to include any bonuses payable.

Q12. What if the hirer pays employees more due to experience or level of qualifications?

A. Agency workers are entitled to the same treatment that *they personally* would have received had they been directly recruited as a permanent employee at the same time as they started their assignment, so any difference in pay or conditions which is due to these factors would not be unlawful.

Q13. How does the 12 week qualifying period work?

A. Agency workers are entitled to the above entitlements after being in the same role for 12 continuous calendar weeks. Any week or part of a week during which the agency worker is on assignment with the hirer counts towards calculating this qualifying period.

Q14. What is meant by “substantive change”?

A. To start the 12 week period running again, there would have to be a substantive change to the work or duties which make up the role. It would not be sufficient to give the agency worker slightly different duties or the same duties but work in a different department or for a new line manager. However, if somebody was engaged as a driver and they then became an administrative assistant, for example, this would amount to a new role and the 12 week period would start running again.

Q15. Can you get around the 12 week qualifying period by deliberately moving agency workers into different roles e.g. every 11 weeks?

A. No. The Regulations include “anti-avoidance” provisions which stop companies from trying to get around the 12 week rule in this way. Companies may be fined up to £5,000 if they are caught doing this.

Q16. What type of absence affects the 12 week qualifying period and how?

A. Whether or not an agency worker’s absence from work counts towards the 12 week qualifying period depends on what type of absence it is. The table below summarises the effect of different types of absence:-

Type of absence that affects the 12 week qualifying period	Effect on 12 week qualifying period
Agency worker begins a new assignment with a new hirer	Clock resets
Agency worker remains with the same hirer but is no longer in the same role	Clock resets
Break between assignments of 6 weeks or more (which is not one which 'pauses' the clock or during which it continues to tick)	Clock resets
Any reason where the break is less than six weeks	Pauses the clock
Sickness absence	Pauses the clock for up to 28 weeks
Annual leave	Pauses the clock
Shut down – e.g. factory closure, school holidays	Pauses the clock
Jury service	Pauses the clock for up to 28 weeks
Industrial action	Pauses the clock
Pregnancy and maternity-related absence	Clock keeps ticking*
Statutory maternity, paternity or adoption leave	Clock keeps ticking**
<p>*The protected period for a pregnant agency worker begins at the start of the pregnancy and ends 26 weeks after childbirth (or earlier if she returns to work)</p> <p>**Where an agency worker has a contract of employment with an agency and is entitled to this type of leave</p>	

Q17. Is it possible to contract out of the Regulations?

A. Generally, no. But there is an exception (now becoming known as “the Swedish Derogation”) which would avoid having to provide equivalent pay, only – but would not avoid other rights provided by the Regulations. This would arise if a permanent contract of employment were created between the agency and the agency worker. There are numerous detailed requirements for such a contract to avoid equivalent pay and it would be advisable to seek advice before embarking on this road.

Q18. If the agency worker changes agencies, will that start the 12 week qualifying period again?

A. No. What matters is how long the agency worker has been on assignment with the hirer, it does not matter which agency engages them.

Q19. Under the Regulations, what are the entitlements for pregnant agency workers or those who have just given birth?

A. The hirer must allow agency workers to take time off work to attend ante-natal appointments. As with permanent employees, it can ask for written confirmation of the appointment, if required.

It must also make any adjustments to their role which are required to protect them from identified risks if they are pregnant, if they have recently given birth or if they are breastfeeding. Risk assessments should therefore be carried out for pregnant agency workers in the same way that they are for permanent employees.

Q20. Who is responsible for ensuring that agency workers receive their entitlements under the Regulations?

A. Aside from access to facilities and details of vacancies, which will be the hirer's responsibility, it is the agency's duty to ensure that the Regulations are followed. However, if the agency has taken reasonable steps to obtain information from the hirer but has not received this information then the hirer may become liable for any failure to provide proper entitlement.

Q21. Is there a maximum amount of compensation that the agency worker can recover?

A. No. Compensation is the actual loss suffered by the agency worker as a result of the breach. There is a minimum of 2 weeks' pay but there is no maximum.

Q22. What should a hirer do if employment agencies ask for information relating to its employees' rates of pay and other terms and conditions?

A. The hirer needs to provide the agencies with certain types of information so that they can ensure that the agency workers receive that to which they will be entitled. However, the hirer needs to make sure that all of the information that it provides is accurate but it does not need to provide any more information than is necessary. Such information includes:

- basic pay
- overtime payments
- shift/unsociable hours allowances
- vouchers offered
- annual leave entitlement

An agency worker who believes that he is not receiving his entitlement under the Regulations can write to the agency requesting a written statement providing the following details. The written statement must be provided within 28 days of receiving a written request:

- the relevant basic working and employment conditions provided by the hirer
- the things that the agency took into account when identifying the basic working and employment conditions which apply to the agency worker at the time that the breach was alleged to have taken place
- where relevant, the information which explains the basis on which it is considered that a person is a comparable employee and the relevant terms and conditions which apply to that employee.

If an agency worker does not receive a written statement within 30 days of making the request, the agency worker can write to the hirer direct to request the same information.