GUIDANCE NOTE

The Agency Workers Regulations 2010

October 2011

Overview

The Agency Workers Regulations came into force on 1st October 2011. They give agency workers a right to the same basic working and employment conditions as if they had been recruited directly by the hirer, if and when they complete a qualifying period of 12 weeks in the same job. In addition agency workers are also entitled to access to collective facilities such as staff canteens, childcare and transport and information about job vacancies from day one of their assignment.

The Regulations are not retrospective, so for agency workers already on assignment the 12 weeks qualifying period starts on 1st October 2011.

Who is covered?

The Regulations apply to an agency worker who is supplied by a temporary work agency (TWA) to work temporarily for a hirer and who has a contract of employment or contract for services with the TWA. This means they cover the traditional temp arrangement where an employment business supplies a temporary worker to a hirer for temporary work. Individuals who find direct employment with an employer through an employment agency fall outside the scope of the Regulations.

The Regulations do not apply to:-

- the genuinely self-employed (where the hirer is a client or customer of a professional or business undertaking carried on by the individual);
- individuals who provide their services through their own personal service company;
- managed service contracts, i.e. where a contractor provides a specific service to a client (such as catering) and the contractor is responsible for managing and delivering the service, not just supplying staff - although the Regulations would apply to the contractor (as a hirer) where the contractor uses agency workers supplied by a TWA.

In-house temporary staffing banks are not covered where the temporary staff are employed directly by the business and only work for that business. However, the Regulations will apply if the staffing bank supplies workers to third parties: the in-house bank would be acting as a TWA.

Individuals on secondment from one organisation to another are unlikely to fall within the scope of the Regulations.

Rights from day one

From day one of the assignment an agency worker must be given the same access as a comparable employee to:-

- collective facilities and amenities (such as canteen facilities, childcare, transport services, a staff common room, shower facilities, car parking, a prayer room; note that transport services do not include company car allowances or season ticket loans);

- information about relevant job vacancies arising during the assignment; this can be provided by, for example, advertising the vacancy on a staff notice board to which the agency worker has access.

Liability for failure to provide access falls on the hirer as the TWA has no role in providing this right.

Rights after the 12 weeks qualifying period

After a 12 weeks qualifying period an agency worker is entitled to the same basic working and employment conditions to which they would have been entitled if they had been recruited directly by the hirer. This right is not dependent on there being a comparator.

The entitlement does not arise until the agency worker has undertaken the same role with the same hirer for 12 continuous weeks, but particular rules apply to the calculation of the 12 weeks qualifying period: there are circumstances in which continuity will be broken, circumstances in which continuity will be suspended and circumstances in which it continues to accrue despite the agency worker's absence (see below).

The right to the same basic working and employment conditions means the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer relating to pay and working time.

- Pay includes basic pay, shift allowances, overtime rates, holiday pay, commission, bonus related to individual performance (but not discretionary, non-contractual bonus or bonus linked to overall company performance).

- The working time rights cover the duration of working time, rest periods, rest breaks and night work.

What is "ordinarily included" in employees' employment contracts will be a matter of fact. For example, in relation to pay, where a business has a clear grading structure or salary bands for employees doing the same or a similar job to the agency worker, it should be clear what terms would be ordinarily included if the agency worker had been an employee. However, where

salaries are set on an individual basis, it may be more difficult to establish what the "going rate" would have been.

As regards annual leave, payment for statutory holiday entitlement under the Working Time Regulations must be made when the leave is taken (this is to ensure that workers take the leave to which they are entitled). As to additional leave entitlement (over and above the statutory minimum of 5.6 weeks per year), this can be dealt with by way of a one off payment at the end of the assignment or alternatively as part of the agency worker's hourly or daily rate (provided the holiday element payment is transparent).

The principle of equality in relation to pay related rights does not extend to longer term rewards. Thus the Regulations do not cover the following:-

- notice periods and notice pay;
- redundancy pay (statutory or contractual);
- benefits in kind, e.g. company car allowances, health insurance, reduced rate mortgages;
- occupational sick pay;
- occupation pensions;
- occupational maternity, adoption or paternity pay;
- share option schemes.

Note that the Regulations do not affect the agency worker's entitlement to statutory sick pay, statutory maternity pay, statutory adoption pay, or statutory paternity pay.

Where the hirer operates a performance appraisal system for its employees, there is no requirement to carry out performance appraisals for agency workers.

Calculating the 12 weeks qualifying period

Because of the irregular working patterns of agency workers, the Regulations provide for a number of circumstances in which continuity will be broken as well as circumstances in which continuity will be suspended or will continue to accrue.

Continuity is broken and the agency worker must start the 12 weeks qualifying period again in the following circumstances:-

- the agency worker starts a new assignment with a new hirer;
- the agency worker stays with the same hirer, but starts a new, substantively different role and the TWA has informed the agency worker in writing of the work required to be done in the new role;
- there is a break of at least 6 calendar weeks between assignments in the same role with the same hirer.

Continuity is suspended in the following circumstances:-

- there is a break of no more than 6 calendar weeks and the agency worker returns to the same role;

- there is a break of up to 28 weeks due to sickness or injury or for jury service;

- there is a break for the purpose of the agency worker taking leave to which he is entitled, including annual leave;

- there is a break due to a planned shutdown of the workplace, e.g. Christmas close down;

- there is a break caused by a strike or other industrial action at the workplace.

Continuity will continue to accrue (for the originally intended duration or the likely duration of the assignment, whichever is longer) in the following circumstances:-

- there is a break for a reason relating to pregnancy, childbirth or maternity (for up to 26 weeks after childbirth), e.g. absence for a health and safety reason connected to pregnancy;

- there is a break due to the agency worker taking maternity leave, adoption leave or paternity leave.

The Regulations contain detailed anti-avoidance measures to prevent hirers from structuring assignments in a way which is designed to prevent an agency worker achieving the 12 weeks qualifying period.

Derogation from the equal treatment principle

There is an exemption (referred to as the Swedish derogation model as it was negotiated by the Swedish government) from the right to equal treatment with regard to pay (including holiday pay) where the TWA provides the agency worker with a permanent contract of employment and pays a minimum amount between assignments when the worker is not working.

However this does not avoid the agency worker being entitled to the other provisions under the Regulations relating to working time and access to facilities, etc.

For the derogation to apply the contract with the TWA must be entered into before the first assignment and include written terms relating to remuneration and hours of work.

There are further detailed requirements in the Regulations which must be satisfied for the derogation to apply. We can provide specific advice on these in a particular case.

Pregnancy

The Regulations make specific provision under which, after completion of the 12 weeks qualifying period, a pregnant agency worker must be allowed paid time off to attend antenatal appointments. In addition the hirer must carry out a risk assessment if the nature of the assignment is such that a risk to health and safety is likely and, if necessary and possible, make a reasonable adjustment for the pregnant agency worker. If an adjustment is not possible, the TWA must provide the agency worker with suitable alternative work if available, or if this is not possible, the TWA must pay the agency worker for the remainder of the original assignment.

Enforcement

An agency worker can bring a claim in the employment tribunal for breach of the right of access to collective facilities and information about job vacancies and for breach of the right to equal treatment in relation to basic working and employment conditions (subject to the 12 weeks qualifying period).

Where a claim is upheld the tribunal can award compensation and make recommendations for action to be taken.

There is provision for an agency worker who believes that the hirer or TWA may have infringed their right to equal treatment to request the TWA to provide written information relating to their treatment. The TWA must respond to the request within 28 days. If the TWA fails to provide the information, the agency worker can make a written request to the hirer, who must also respond within 28 days. Failure to respond to a request is not unlawful in itself, but adverse inferences may be drawn against a party that fails to respond or provides an evasive or equivocal response.

A request for information relating to the right to collective facilities and information about vacancies can be made only to the hirer, not the TWA.

The TWA is responsible for any breach of the right to equal basic working and employment conditions to the extent that it is responsible for the infringement. However, the TWA will have a defence if it took reasonable steps to obtain information from the hirer about its basic working and employment conditions and acted reasonably in establishing the agency worker's basic conditions.

The hirer will be responsible for any breach of the right to equal treatment to the extent that it is responsible for the infringement.

The hirer is solely responsible for any breach of the right to access to collective facilities and vacancy information.

Given the potential for liability, it is in the interests of both the TWA and the hirer to ensure that they exchange information about terms and conditions on a regular basis. This is particularly important in relation to the annual pay round. As a matter of good practice TWAs should put in place reminders to check with hirers on a periodic basis whether there have been any changes affecting terms and conditions. Similarly hirers should notify TWAs when they make changes to their basic terms and conditions.

The comments in this Guidance Note are of a general nature only. Full advice should be sought on any specific problems or issues.

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