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Agency Workers Regulations

Regulations which took effect from 1 October 2011 mean that workers supplied to a company, or to any other entity, by an agency will become entitled to receive pay and basic working conditions equivalent to any directly employed employees after a 12 week qualifying period.

Guidance for businesses and other employers

Under the Agency Workers Regulations workers supplied to a company (or to any other entity) by an agency will become entitled to receive pay and basic working conditions equivalent to any directly employed employees after a 12 week qualifying period.

Where an agency worker is at the entity for less than 12 weeks, a minimum break of more than six weeks between assignments with the same employer will be necessary for the rights not to be available.

Supporting guidance

Guidance can be found on the GOV.UK website at https://www.gov.uk/government/publications/agency-workers-regulations-2010-guidance-for-recruiters

Impact of the Regulations

As explained below, most of the additional work, and much of the risk and liability, will be the responsibility of the agencies but it seems certain that they will pass the cost on by way of higher fees.

More directly, where the 'Employer' (see below) hires staff for more than the 12 week period, typically the costs of hiring staff will be greater. The Employer will also need to monitor the period of time the 'Agency Worker' has been at their premises and there may be additional risks and costs as a result.

Terms used in the Regulations

Much of the guidance uses terms such as 'Temporary Work Agency' (the Agency supplying the workers), the 'Agency Worker' and the 'Hirer' (being the entity or business where the Agency Worker is working). In this summary we have generally used the term 'Employer/Hirer' when we mean the 'Hirer' although it is not strictly the correct legal term. We have also used the word 'Agency' rather than 'Temporary Work Agency'.

Rights of Agency Workers under the Regulations

Under the Regulations, from their first day working at the Employer/Hirer, the Employer/Hirer will be required to ensure that the Agency Worker can access what are called 'collective facilities' such as canteens, childcare, transport services, car parking, etc and that they are able to access information on all job vacancies.

The Agency Worker's rights are to 'no less favourable treatment' in relation to these facilities, than that given to a comparable worker. A comparable worker is an employee or worker directly employed by the employer.

Then, after 12 weeks in the same job, the 'equal treatment entitlements' described below come into force.

Equal treatment entitlements and the 'Qualifying Clock'

After completion of the 12 week qualifying period the Agency Worker is entitled to the same basic terms and conditions of employment as if they had been directly hired by the Employer/Hirer. These would include:

- key elements of pay
- duration of working time
- night work
- rest periods
- rest breaks
- annual leave
- pregnant workers will be entitled to paid time off for antenatal appointments.

If a particular entitlement commences only after a period of service, for example, additional annual leave arises after one year of employment, then the entitlement would only start after one year plus 12 weeks.

The term 'Qualifying Clock' is used to illustrate the working of the guidance.

The guidance refers to extensive anti-avoidance provisions preventing a series of assignments being structured in such a way as to prevent an Agency Worker from completing the qualifying period and describes when the Qualifying Clock can be reset to zero, where the clock 'pauses' during a break, and where it continues to 'tick' during a break.

The examples given are extensive but include, for example:

- the clock is reset to zero where an Agency Worker begins a new assignment (and a new Employer/Hirer for this purpose is closely defined) or there is a break of more than six weeks
- the clock would be paused for a break of no more than six weeks and the worker returns to the same Employer/ Hirer, or a break of up to 28 weeks because the worker is incapable of work because of sickness or injury
- the clock continues to tick as a result of breaks to do with pregnancy, childbirth, maternity or paternity leave.

There are many more examples given in the Business, Energy and Industrial Strategy (BEIS) guidance.

Identification of basic working and employment conditions and pay

Equal treatment covers basic working and employment conditions included in the relevant contracts of direct recruits, which would normally mean terms and conditions laid out in standard contracts, pay scales, collective agreements or company handbooks. Where available this would be the same pay, holidays, etc as if the Agency Worker had been recruited as an employee or worker to the same job. There does not have to be a comparable employee (called a 'comparator') but it would be easier to demonstrate compliance with the Regulations where such a person is available.

Pay is defined as including and excluding a number of elements, most of which are shown below.

To be included in pay for this purpose:

- basic pay based on an annual salary equivalent
- overtime payments
- shift / unsocial hours allowances
- payment for annual leave
- bonus or commission payments
- vouchers or stamps with monetary value which are not salary sacrifice schemes.

Not to be included:

- occupational sick pay
- occupational pensions (agency workers will be covered by Auto-enrolment which started to phase in from October 2012)
- occupational maternity, paternity or adoption pay
- redundancy pay/notice pay (statutory and contractual)
- majority of benefits in kind
- payments requiring an eligibility period of employment
- bonuses that are not directly linked to the individual's contribution (ie long-service bonuses)
- discretionary, non-contractual bonuses.

Working time and holiday entitlements

In addition to an agency worker's existing rights under the Working Time Regulations 1998, after 12 weeks, the worker becomes entitled to the same rights for working time, night work, rest periods and rest breaks and annual leave and overtime rates, as directly employed employees.

The guidance recognises that some Agency Workers already receive these benefits from the date they join the Employer/Hirer and mention as an example that Employers/Hirers often offer a lunch hour rather than the minimum 20 minute rest under the Working Time Regulations. The guidance also includes a reminder that the statutory entitlement to paid holiday leave is 5.6 weeks per year.

Pregnant workers and new mothers

After the 12 week qualifying period pregnant workers will be allowed paid time off for antenatal appointments and classes and if they can no longer carry out the duties of their original assignment they will need to be found alternative sources of work. If no such alternative work is available from either the Employer/Hirer or the Agency, the Agency should pay the pregnant woman for the remaining expected duration of the assignment.

The provisions of the Equality Act also apply, meaning that there is a risk that either an Agency or the Employer/Hirer could be guilty of discrimination if a worker were to receive less favourable treatment as a result of their pregnancy or maternity.

If the nature of the assignment is such that there is a risk to the worker's health and safety, the Agency will need to ask the Employer/Hirer to carry out a workplace risk assessment, which they will need to do.

Information likely to be requested by an Agency

To comply with these Regulations, agencies may need to collect certain information from the Employer/Hirer before an assignment begins. This is in addition to their existing obligations under what are known as the Conduct Regulations 2010 and the Gangmasters Licensing Regulations (for the food, agricultural and shellfish sectors).

Where an assignment is likely to last for more than 12 weeks, it will probably be good practice for the Agency to ask for information at an early stage though the Regulations do not refer to any particular timescale.

Existing regulations require information about:

- hirer's identity, business and location
- start date and duration
- job role, responsibilities and hours
- experience, training, qualifications etc
- health and safety risk
- expenses.

The details now required to comply with the Agency Workers Regulations after the 12 week period are:

- basic pay, overtime payments, shift/unsocial hours allowances and any risk payments
- types of bonus schemes
- vouchers with monetary value
- annual leave entitlement.

It is likely that the Agency will also ask for information about any day one entitlements which may be available, even though they are the responsibility of the Employer/Hirer.

Liability and remedies

The responsibility lies with the Employer/Hirer to provide day one entitlements and claims would probably be against the Employer/Hirer.

Claims with regard to basic working and employment conditions could be against either the Employer/Hirer, or the Agency, or against both, depending on the nature of the breach and whether, for example, the Employer/Hirer had failed to provide information to the Agency. Claims would be made to an Employment Tribunal if not resolved through grievance procedures and/or possibly through the involvement of ACAS.

Employment Tribunals would be able to award financial compensation or recommend action that should be taken.

How we can help

If you would like to discuss the implications of the new Regulations for your business in more detail please contact us.

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