

AGENCY WORKERS REGULATIONS 2010 FACTSHEET

The Agency Workers Regulations 2010 are being introduced in the UK on 1st October 2011. The Regulations were made under the EC Directive on Temporary Agency Work and provide for equal treatment rights for agency workers in relation to basic working and employment conditions after 12 weeks on a particular assignment.

Who do the regulations apply to?

Covered: workers supplied through a temporary work agency to work temporarily for and under the supervision of a hirer. Also covered are those working via umbrella companies and through intermediaries.

Not covered: self-employed contractors/consultants, fixed term employees, casual workers, employees placed into a permanent job via an agency, those working through their own limited liability companies or on managed service contracts.

The Regulations, where they relate to the 12 week rights (see below), will also not apply where the agency worker has a permanent contract of employment with an agency, is paid between assignments and the contract of employment meets certain conditions.

Two types of equal treatment rights

Type 1 – Rights from day 1 of assignment

Agency workers will be entitled from day 1 of assignment to equal treatment with regard to:

- Information on relevant vacant posts in the hirer's organisation to enable the agency worker the same opportunity as a comparable permanent employee to find permanent employment with the hirer; and
- Access to collective employment facilities e.g. canteen, transport, childcare facilities unless inequality can be objectively justified. Agency workers are not entitled to more favourable treatment in relation to waiting lists for e.g. use of childcare facilities due to potential short nature of assignment, they are simply entitled to access.

Type 2 – Rights after 12 weeks in a particular assignment

Agency workers will be entitled, after completion of 12 weeks in an assignment, to equal treatment with regard to:

- Pay (agency workers must be paid the same as permanent employees doing the same or very similar work);
- Duration of working time, overtime, rest periods, breaks, night work, holidays and public holidays;
- Maternity protection.

What types of payments are included in the term "pay"?

"Pay" includes, for example:

- Basic pay;
- Overtime pay;
- Shift allowances;
- Unsocial hours premiums/bonuses;
- Payments for difficult or dangerous duties;
- Some commission payments;
- Bonuses/incentives directly attributable to the quality or quantity of work done;
- Vouchers or stamps with monetary value i.e. luncheon vouchers;
- Paid holiday entitlement (Note: employers will be permitted to make payment in lieu for entitlement above the statutory minimum)

"Pay" does not include, for example:

- Profit share schemes;
- Occupational pension schemes;
- Occupational sick pay;
- Maternity/adoption/paternity pay;
- Redundancy pay;
- Pension;
- Allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;
- Shares or share options;
- Statutory guarantee pay.

An agency worker will be entitled to take paid time off work in order to attend ante-natal classes.

How to establish equal treatment

In order to tell if an agency worker has been afforded equal treatment, the following question must be asked:

On what terms would the agency worker have been employed, had the hirer employed the individual directly?

Factors such as the worker's qualifications, skills and experience will need to be taken into consideration when determining how much the worker would have been paid if recruited directly. The Regulations expressly provide that treatment consistent with a true comparable employee will be deemed to mean compliance with the Regulations.

Calculating 12 weeks' service

12 weeks means 12 calendar weeks with a particular hirer, not a particular agency. If two agencies place a worker with the same hirer the worker will be able to count together assignment periods with both agencies for their qualifying period. Any work done prior to 1st October 2011 will not count towards a qualifying period. Any week during which an agency worker works only part of a week will count as a week for qualifying purposes.

The qualifying service 'clock' will be reset where there is a break of 6 weeks or more during or between assignments in the same job. The clock will also reset when the worker starts a new role with the same hirer that is substantively different to the current one.

The 'clock' will pause for breaks of less than 6 weeks; periods of sickness up to 28 weeks (medically certified where required by hirer); jury service; strikes or lockouts; planned workplace closure e.g. school holidays in an education establishment.

The 'clock' will continue running for the original intended duration, or likely duration of the assignment, for periods of pregnancy and maternity related absence, maternity/adoption/paternity leave.

Anti avoidance measures

An agency worker will be deemed as having served the qualifying period in certain circumstances, for example, where they would have achieved the qualifying service but for the structure of the assignments where the most likely explanation for the structure is the intended prevention of the agency worker being entitled to their rights i.e. agency worker consistently moved after 11 weeks on an assignment to a substantively different role. Hirers found to have used these tactics are liable to a fine of up to £5000.

Right to receive information

After 12 weeks, an agency worker can request a written statement from the agency (and subsequently from the hirer in the case of non-provision from the agency) about an aspect of equal treatment in relation to the 12 week rights they do not believe they are receiving. Where the agency worker believes equal treatment is not being received in relation to a day 1 right, they should make the request to the hirer. A request should be responded to within 28 days. Tribunals are entitled to draw an inference that is just and equitable from failure to provide information; or information that is evasive or equivocal, including an inference that the agency worker's rights have been infringed.

Liability

In relation to 12 week rights, both the agency and hirer are liable to the extent that they are responsible for a breach, however, the agency will have a defence if they have taken "reasonable steps" to obtain the necessary information from the hirer and acted "reasonably" in determining the agency worker's basic working and employment conditions. Liability in relation to day 1 rights will fall solely on the hirer.

Complaints to Employment Tribunal

The Regulations will enable an agency worker to bring a claim that they have been breached to Tribunal. If a Tribunal upholds an agency worker's complaint it will generally be able to order compensation of a minimum award of 2 weeks' pay, and an additional award of up to £5000 where there is a breach of the anti-avoidance measures. It may also make a declaration setting out the agency worker's rights in relation to the matters to which the complaint relates, and/or recommend that the hirer/agency takes certain action to remove the adverse affect on the agency worker.

Employment Status

The Regulations do not change the employment status of an agency worker. Provision of equal treatment rights will not, singularly, make an agency worker an employee of the hirer.

This factsheet is for information purposes only and is based on information available at the time of writing. It is not an authoritative statement of the law and advice should always be sought from our 24 Hour Advice Service on specific circumstances before action is taken. Taking advice is a condition of your indemnity protection.