



## Agency Workers Regulations – 1<sup>st</sup> October 2011

**Egerton Stephens Partners**, your preferred recruitment provider, is pleased to provide the following information on the impending changes to employment regulations concerning the use of agency workers.

**The Agency Workers Regulations (AWR)**, sometimes known as the **Agency Workers Directive**, is a new piece of legislation that is due to come into effect in October 2011. The aim of the AWR is to protect vulnerable workers from exploitation and ensure them the same basic employment conditions as their permanent equivalents after 12 weeks of service - mainly the right to the same pay, working hours and holidays. This information has been produced by the Recruitment & Employment Confederation (REC), the representative body for the UK's recruitment industry.

This briefing document explains what the new regulations on agency workers will mean for hirers who engage workers via a temporary staffing supplier. With the legislation coming into force on 1<sup>st</sup> October 2011, it is important hirers:

- ❖ Understand the scope and implications of the regulations
- ❖ Assess the potential impact the proposed regulations will have on their business or organization
- ❖ Start as early as possible to develop plans with their temporary staffing suppliers to minimise the costs and potential disruption the implementation of the proposed regulations may cause.

### What are the Agency Worker Regulations?

The new regulations derive from European legislation designed to give temporary agency workers parity in pay and employment conditions as they would have been entitled to had they been recruited by the hirer directly to do the same job. Whilst in other parts of the EU, this entitlement comes into effect from day one of an assignment, the UK has a derogation period of 12 weeks. This means the agency worker needs to be engaged for 12 weeks' of service with the same hirer, in the same role, in order to qualify.

The official definition of an agency worker is a person who has a contract of employment with a temporary work agency and is supplied by them to work



temporarily for, and under the supervision of, a hirer or client. They can also be known as temps, interims, contractors, freelancers or flexible workers and as vulnerable workers.

### **Will agency workers be entitled to the same rights and benefits of employees?**

The new regulations will not change the employment status of agency workers who will still not have the rights to claim unfair dismissal, redundancy pay or maternity leave. Nor will agency workers be entitled to the same benefits such as occupational sick pay, company pension schemes, financial participation schemes and bonus payments based upon organisational or company performance. These are considered a reflection of the long term relationship between an employee and an employer. Agency workers will therefore remain a flexible labour resource for hirers.

### **What will the agency worker be entitled to after 12 weeks?**

Agency workers will be entitled to the same basic pay and working conditions. This includes the basic hourly rate and any additional entitlements that are linked to the work done by the agency worker during an assignment. It will include the same overtime and shift allowances, unsocial hours premiums, payments for difficult or dangerous duties and lunch vouchers. Bonuses which are directly attributable to the quality and quantity of work done by an agency worker will also be included. Agency workers will also be entitled to the same rest breaks and annual leave allowance.

Whilst the other benefits are only given after 12 weeks, there are some benefits which agency workers will be entitled to from day one of an assignment. Firstly, you will need to ensure that agency workers are made aware of vacancies that arise in your organisation. Secondly, agency workers will also be entitled to access a number of collective facilities including crèche and childcare facilities, canteen facilities and the provision of transport services but access to these can be refused if there are 'objective grounds' for doing so. 'Amenities' e.g. subsidised gym membership, season ticket loans and childcare vouchers are out of scope.

**In brief:** (when referring to conditions,) **the AWR includes:**

- Pay
- Holidays
- Hours of work
- Night work
- Rest periods and breaks
- The right to hear about vacant posts within the business
- The right to use collective facilities such as a canteen, childcare facilities or transport services

**What AWR does not include:**

- Occupational sick pay
- Pensions
- Parental leave
- Redundancy payments
- Share schemes
- Long service award schemes

**Who will be protected?**

The Regulations apply to all temporary agency workers regardless of whether they are on a contract of employment or contract for services. PAYE workers who are employed via an umbrella company will also be within scope. Workers who are genuinely in business on their own account, e.g. self-employed or working through a corporate vehicle, will not be within scope. Managed service contracts (i.e. those where the supplier rather than the hirer, manages or directs staff) are not expressly excluded, but they will be outside of scope unless in reality, the user, rather than the manager service, supervises and directs the staff.

**How will I establish equal treatment?**

When employing temporary workers, some companies may have difficulty in identifying a 'comparable employee' within the business, and this lies at the heart of the AWR. Also known as the permanent equivalent, the comparable employee is the person in permanent employment with the hirer doing the same job as the agency worker and will therefore be the benchmark in any AWR metric or hearing.

As a rule of thumb, the agency worker will be entitled to the same basic employment conditions as the comparable employee assuming they are both being supervised and managed by the hirer, are doing the same basic work and usually work in the same place. In some workplaces, for example a factory production line, the agency worker may be working next to a worker recruited directly who could serve as a 'flesh and blood' comparator to establish parity in pay and working conditions. In these circumstances the hirer and the agency will be deemed compliant with the regulations. If a 'flesh and blood' comparator cannot be found, then there may be an identifiable pay scale or a starting rate which could be used as a reference point. In other workplaces, the agency worker may be a unique hire and there may be no easily identifiable comparator, pay scales or starting rates. In these circumstances, parity does not need to be established. However, in all scenarios agency workers will be entitled to benefits which 'apply generally' in the workplace.

Benefits outlined in company handbooks, employment contracts and collective agreements will be taken into account by the courts in determining parity in pay and working conditions. The legislation is framed so that workers who would not previously have been afforded these rights will now do so. But this does not mean that those agency workers who enjoy better conditions have to be treated equally. For example, if you pay your agency workers a higher rate than a comparable permanent employee, this won't be affected under the legislation.

### **How will the 12 week qualifying period work?**

The provisions will apply after the worker has been engaged for 12 weeks regardless of their working pattern (e.g. full time or part time). A new qualifying period will only begin if a new assignment with the same hirer is substantively different, or if there is a break of more than six weeks between assignments in the same role. The 12 weeks qualifying period can be paused if the worker takes annual leave, takes certified sick leave or takes time off for public duties. The regulations include a complex set of anti-avoidance provisions designed to make it difficult for hirers to circumvent the qualifying period.

### **Who is liable for establishing equal treatment?**

It is envisaged that most cases will be effectively dealt with via a recruitment agency's grievance procedure. Where this fails, a pre-conciliation service will be available via ACAS to minimize the number of claims that end up in an employment tribunal. The agency will be liable for any breach of a right in relation to equal treatment for which they are responsible. However, they will have a defence if they have taken 'reasonable steps' to obtain the necessary information from the hirer. This will mean the hirer and the agency will need to work together closely to share appropriate information to ensure the agency worker is receiving equal treatment. A professional recruitment agency should already be working closely with you so that they have a good understanding of your business and can supply candidates to match your recruitment needs. The new regulations will mean that this close relationship will become even more important.

For example:

#### **(1) Some of the agency workers I engage get paid more than my own employees. Will I have to lower their rate of pay to match the rate paid to permanent workers?**

No. If the agency workers you are supplied with are on a higher rate of pay than your own employees then their pay does not need to be lowered. However you may need to show the steps you put in place to decide on the temp's rate of pay.

**(2) Can I circumvent the Directive by employing temporary workers directly?**

Unlike workers employed directly, agency workers do not have rights to claim unfair dismissal, request maternity or paternity leave or claim redundancy pay. This makes them a flexible resource for employers to meet unexpected peaks in demand and cover for absences. Employing workers directly, even on zero hour contracts, means workers may qualify for those additional rights. The regulations will not change the employment status of agency workers who will continue to be a more flexible resource than permanent workers employed directly.

**(3) Are there legitimate ways to derogate from the regulations?**

Agencies that have a contract of employment with their workers and pay them in between assignments do not need to establish equal treatment for those workers when they are placed with hirers. However the workers must be paid at least 50% of what they were being paid in their previous assignment when out of work and no less than National Minimum Wage. They must be paid for an accrued four weeks whilst between assignments before the contract can be terminated.

**Further Advice**

In order to prepare fully for the implications of hiring temporary staff from 1<sup>st</sup> October 2011, please feel free to contact our offices for further advice.

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