

The Agency Workers Regulations - what do they mean for your business?

August 2011

The Agency Workers Regulations 2010 (the "Regulations") will come into force on 1 October 2011. The Regulations provide temporary agency workers with the right to basic working conditions no less favourable than those to which they would have been entitled had they been recruited directly by a hirer. This briefing considers the impact of the Regulations.

First, some terminology...

Agency Worker is a worker who is supplied by a Temporary Work Agency to work temporarily for, and under the direction and supervision of, a Hirer.

Temporary Work Agency is an agency which supplies the Agency Worker to the Hirer for a temporary assignment.

Hirer is the end user - i.e. the organisation to which the Agency Worker is supplied.

Who do the Regulations apply to?

The Regulations apply to workers who find temporary work through an agency. Key to the application of the Regulations is whether the Agency Worker is under the supervision and direction of the Hirer.

The following should not be covered by the Regulations: any temporary or casual workers employed directly by the Hirer, genuinely self-employed consultants, independent contractors, individuals who find direct employment with an employer via a recruitment consultant and genuine managed service contracts (i.e. where there is a provision of services rather than personnel).

However, where any personnel are provided by a third person, it is possible that the Regulations could apply, so it would be advisable to consider whether the protection is triggered.

Who do the Regulations apply to?

The Regulations offer protection in two ways: rights that apply from day 1 of an assignment (**Day 1 rights**) and rights that only apply after the Agency Worker has been on assignment for 12 weeks (**Week 12 rights**).

Day 1 rights

From day 1 of an assignment, the Agency Worker has the right to:

- be informed of any relevant vacancies in the Hirer's organisation

- be treated equally to comparable workers of the Hirer in relation to collective facilities and amenities.

This will include allowing access to canteens, crèches, common rooms, toilets and parking. If there is a waiting list for these facilities, the Agency Worker does not have the right to 'jump to the front of the queue.'

The Hirer does not need to provide equally favourable access to facilities if this can be objectively justified. Hirers can take cost into account when deciding this, but it should not be the sole factor. If a Hirer is having reasons, it should provide access to as many of the facilities as it can manage.

Week 12 rights

Once Agency Workers have completed the 12-week qualifying period, they will also be entitled to the same basic working and employment conditions as if they had been directly recruited by the Hirer to do the same job. This covers terms and conditions relating to:

- pay
- duration of work
- night work
- rest periods and breaks
- annual leave.

The test to establish equal treatment is this: what would the Hirer have paid if the Agency Worker had been employed directly, taking into account qualification, skills and experience.

What counts as pay?

Pay includes the following:

- salary/wages
- holiday pay
- commission
- childcare vouchers
- overtime
- bonuses (but only if they are directly attributable to the amount and quality of work done, e.g. bonuses payable to staff who manage to handle a certain amount of calls in a given time. A bonus paid due to the overall performance of the firm or a "Christmas bonus" would not be included).

What doesn't count as pay?

Pay excludes the following:

- occupational sick pay
- occupational pensions
- occupational maternity or paternity pay
- loss of office compensation
- redundancy payments
- benefits in kind
- vouchers (so long as they do not have a monetary value and cannot be exchanged for goods or services; if they do, then they will need to be provided on the same terms).

When does the 12 week "clock" start, stop and pause?

The 12 week qualifying period stops and starts from scratch in three situations:

- when an Agency Worker begins a new assignment with a different Hirer
- when an Agency Worker begins a new role with the same Hirer that is substantively different
- where there has been a 6 calendar week break between assignments.

The following breaks will cause the qualifying period to pause and then resume:

- where, for any reason, the break between assignments is for no longer than six calendar weeks
- a break of up to 28 weeks caused by the Agency Worker's sickness/injury
- annual leave
- jury service or a customary workplace shut down (e.g. for Christmas).

The clock will keep ticking where a break in assignment is due to:

- pregnancy, childbirth or maternity for up to 26 weeks after childbirth
- statutory or contractual maternity, paternity or adoption leave.

Impact of the Regulations on Agency Workers

An Agency Worker will be able to complain to an employment tribunal if their Day 1 and Week 12 rights have been breached. The remedies available to tribunals are:

- compensation (there is no minimum level of compensation if it is a breach of Day 1 rights, whereas for Week 12 rights usually the minimum will be 2 weeks' pay)
- a declaration about the Agency Worker's rights
- £5,000 fine for avoidance of the Regulations.

Practical steps for Hirers to take

Day 1 rights

Hirers are solely responsible for any breaches of Day 1 rights. To mitigate this risk, Hirers should:

- ensure they have in place a system which provides Agency Workers with access to vacancies (e.g. communal noticeboards, intranet or emails if Agency Workers have access)
- be clear about what collective facilities are provided to permanent employees and whether these can be extended to Agency Workers. Consider putting together this information into a pack and supplying it to the Agency.

Week 12 rights

Agencies will be primarily liable for breaches of Week 12 rights (it is up to the Agency to set the terms and conditions of a temporary Agency Worker). However, the Hirer will be responsible if it supplies incorrect information about terms and conditions to the Agency, or fails to provide such information when requested.

To mitigate this risk, Hirers should:

- ensure that they have a clear, practical and workable system to exchange information with Agencies. Both the Agency and the Hirer need to be happy that all relevant information will be captured
- make sure records clearly identify when the 12 week "trigger" point is approaching
- quantify the potential cost to the business of having to "match" pay etc (and associated administrative costs of complying with the Regulations)
- identify whether any benefits could possibly be altered to reduce costs
- consider introducing bespoke qualifying periods for permanent employees for certain more valuable benefits – this will have legal implications for existing staff
- think about whether it may be appropriate to use alternatives to Agency Workers.

Alternatives to Agency Workers?

Hirers could consider using other employment relationships which are not caught by the Regulations. For example:

- *maternity cover* - use a fixed-term employment contract
- *sickness and holiday cover* - use casual workers
- *peak business periods* - increase overtime, have banks of temporary workers, perhaps with zero hours contracts
- *discrete services required (such as cleaning)* - consider outsourcing
- *specialised services required* - use genuinely self-employed consultants.

Note that some of these categories come with their own level of legal protection which needs to be considered.

The Government has released guidance covering these Regulations, which provide helpful case studies and further detail.

If you would like to discuss the impact of the Regulations on your business, please contact Chris Seaton on 0117 939 2000 or email chris.seaton@burges-salmon.com or contact the lawyer at Burges Salmon with whom you usually deal.