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Agency Workers Regulations AWR Frequently Asked Questions

1. What is AWR?

Following many years of debate in Brussels, the Agency Workers Directive (AWD) became European law in December 2008. The Agency Workers Regulations (AWR) 2010 will implement the Directive in England, Scotland, and Wales and will come into effect on 1 October 2011.

In summary, temporary workers will have the right to equal treatment with regards to pay, holidays and working conditions once they have completed a 12 week qualifying period. There are also new 'day one' rights.

2. Who is a Temporary Worker?

According to the regulations, an agency worker is an individual who:

- Is supplied by a Temporary Work Agency (TWA) to work temporarily for and under the **supervision** and **direction** of the hiring client; and
- Has a contract of employment with the Temporary Work Agency (TWA) or any other contract to perform work and services **personally** for the Temporary Work Agency (TWA).

An individual can be an agency worker even if they work through an intermediary, e.g. an Umbrella Company.

3. Which workers are covered?

According to the regulations:

- Genuinely self-employed persons are excluded whether they operated via companies or not.
- Regulation 3(2) means that limited company contractors are agency workers if they are not genuinely self-employed.

What are the implications?

- There are no obvious loopholes such as individuals opting out or being out of scope by using umbrella companies or other vehicles.

- It is up to the agency to identify whether an individual is an agency worker for the purposes of the regulations or not.

4. Which Providers are covered?

According to the regulations:

- A Temporary Work Agency (TWA) supplies individuals to work temporarily for and under the supervision and direction of hirers, or pays for or forwards payment for the services of those individuals.
- Intermediaries including Umbrella companies and master and neutral vendors are included
- Managed service arrangements are out of scope. In these situations the service provider provides an entire outsourced service (e.g. IT, HR, Catering etc) rather than simply providing

staff. However, if the managed service provider uses agency workers supplied by a Temporary Work Agency (TWA) those workers will be in scope.

5. 12 Week Qualifying Period

According to the regulations:

- An agency worker is not entitled to equal treatment until they have completed the 12 week qualifying period.
 - An agency worker must work in the same role with the same hirer for 12 calendar weeks (any week during which the agency workers work is counted).
 - If there is a break of over 6 weeks the clock starts again, except in certain circumstances where a break of more than 6 weeks will only pause the clock, e.g.
 - An agency worker attends jury service
 - Periods when the client does not require the agency worker because the business has temporarily closed down (e.g. school holidays and factory shut down)
 - Periods when the client does not require the agency worker because of various types of industrial action at the clients establishment
 - Sick leave for 28 calendar weeks or less.
- Pregnancy and Maternity do not pause the clock; instead it continues to tick for the protected period from the start of the pregnancy to the end of the 26 weeks following childbirth.

What are the implications?

- A major concern is the issue of short but regularly repeated assignments. Agency Workers could accrue equal treatment rights with a number of different agencies at the same time and when working for one or more hirers, particularly in the social care, education and industrial sectors.
- This has administrative implications for agencies in terms of keeping tabs on when agency workers acquire the 12 week qualifying period.
- This will be particularly true where agency workers are taken on for a series of short intermittent placements and where the breaks in between are more than 6 weeks.
- There is no obligation on the worker to tell the agency that they have worked in the same role at the same hirer but through a different agency. Agencies should ask for this information from the worker and keep a record.

6. How do you establish Equal Treatment?

According to the regulations:

- A qualifying agency worker will be entitled to work under the '**same basic working and employment conditions**' that would apply if the worker was recruited by the hirer to do the same job.
- This obligation will be deemed to be met if the agency worker has the same basic working and employments terms and conditions as a comparable employee in the hirers business (someone in a broadly similar role and with similar qualifications and skills).
- The comparable employee can be someone working at a different establishment if there is no one who meets the conditions at the same establishment.

What are the implications?

- If a comparator is established, the priority is to establish the correct rate of pay (and other working conditions to which the agency worker is entitled) and to be able to explain how this was worked out in the event of a claim.
- Where there are formal pay bands, this may involve comparing the current pay rates with entry level pay rates or similar work.

- However, the additional experience and qualification of the directly recruited comparator can be taken into account and justify why the pay rate of the agency worker is not at the same level. E.g. a school teacher that can teach Mathematics and English might receive a higher rate than a teacher that can only teach Art and Design.

7. What does equal treatment cover?

According to the regulations:

- Relevant Terms and Conditions are:
 - Pay
 - Duration of working time
 - Night work
 - Rest periods
 - Rest breaks
 - Annual Leave

8. How is 'Pay' defined?

According to the regulations:

- The definition of pay includes:
 - Basic pay, overtime and shift premia (a worker may be paid at a higher rate for working at a particular time)
 - Bonuses directly attributable to the amount or quality of the work performed by the agency worker
 - Commission payments
 - Holiday pay
 - Vouchers with a fixed monetary value, e.g. Luncheon vouchers.
- The definition of pay excludes:
 - Pension
 - Occupational sick pay
 - Maternity, paternity and adoption pay
 - Redundancy payment
 - Financial participation scheme
 - Life Insurance, private medical insurance
 - Health club membership
 - Bonuses which are based on organisation performance or discretionary, e.g. one off payment to celebrate a particular event

What are the implications?

- Although the equal treatment measures cover more than basic salary, this is the starting point for evaluating the potential impact on costs.
- In some sectors, the feedback from hirers confirms that when looking at 'point of recruitment' entry level comparisons, many temporary and contract workers are paid the same and often more than direct recruits.
- In other sectors, the analysis has shown that some temporary workers are currently paid less than staff recruited directly to do the same or similar work. It is in these situations that adjustments will need to be made after 12 weeks of an assignment.

9. How is Annual leave defined?

- Temporary staff are currently entitled to statutory paid holiday entitlements. Permanent staff will usually benefit from anything from 3 to 8 days holiday on top of the statutory minimum. Agency workers will now also be entitled to the same paid holiday entitlement as if they had been directly recruited.

- BIS guidance states that this extra paid holiday can be rolled up in the weekly pay of the temporary worker.

10. Day One Rights (Regulation 12 & 13)

From Day One of an assignment:

- The right to access the hirers collective facilities i.e. canteen, childcare facilities and transport services
- The right to be informed by the hirer of relevant vacant posts with the hirer – although no obligation on the hirer to employ the agency worker
- ONLY THE HIRER IS LIABLE FOR BREACH OF THESE REGULATIONS

Anti avoidance provisions (Regulation 9)

- Agencies and clients should not structure assignments so as to deliberately avoid the regulations.
- Do not assign workers for 11 weeks to Hirer A, then another 11 weeks to Hirer B and back to Hirer A (where A & B are connected hirers and the only explanation is to avoid the regulations.
- Fine of up to £5,000 for each instance of breach of Regulation 9
- Clients can terminate assignments after 11 weeks – however recycling of temporary workers would constitute a breach.

11. The Swedish Derogation (Regulation 10)

- Under Regulation 10, agency workers who are employed by the agency are not entitled to equal pay (though they are entitled to all of the other rights provided by AWR)
- The agency will need to comply with certain conditions for this to apply. The contract of employment must set out the following:
 - The minimum scale and rate of pay and how this will be calculated
 - The location or locations where the worker will be expected to work
 - The expected hours of work during an assignment
 - The maximum number of hours per week the worker may be required to work during an assignment
 - The minimum hours per week that the agency will offer the agency worker during an assignment – this must be at least 1 hour (therefore no zero hour contracts)
 - The type of work that the agency will offer the worker and details of any experience or qualifications required; and
 - A statement that by entering into the contract of employment, the agency worker will not be entitled to the equal pay rights.

12. What are the agencies obligations?

- Regulation 10(1)(c) – when the agency has no work for the agency worker, the agency will be required to ‘take reasonable steps’ to find suitable work for the agency worker and to offer to put that worker forward for such work.
- Regulation 10(1)(c) – during the time that the agency worker is not working but is available (no definition of available) to do so, the agency must pay them a **minimum amount of pay**.
- Regulation 10(1) (d) – the agency cannot terminate the contract of employment, until it has met its obligations to try to find work for the worker, offer suitable work found and has paid the worker the minimum amount of pay for at least a period of 4 weeks during the course of the contract.

13. What is the minimum rate of pay?

- Regulation 11 – the minimum rate of pay must be at least 50% of the pay received during the ‘relevant pay reference period’ subject always to the NMW.
- Relevant pay reference period is the week in which the temporary worker had their highest earnings in the 12 weeks prior to the date that the previous assignment ended or during the assignment if it lasted less than 12 weeks.

14. How will AWR be enforced?

- The Regulations will be enforced through employment tribunals.
- It will be crucial that agencies have internal complaints mechanisms in place as a first outlet for workers who have concerns about pay and equal treatment. Effective internal procedures will play a key role in limiting the number of tribunal claims.
- Agencies have only 28 days to respond to a written request for information. Therefore they need to be able to obtain information from a client (or vendor) with sufficient time to respond to the complainant.

15. Where does liability sit? (Regulation 14)

- The agency bears primary responsibility for the application of equal treatment
- However, the agency will have a defence if it has taken reasonable steps and the client will be liable to the extent there is a breach of the Regulations. Therefore clients must respond promptly and accurately to any information requests following receipt of an allegation of a breach from a worker.
- The employment tribunal will apportion liability between the agency, any intermediaries (such as umbrella company), and the client and will apportion financial sanctions accordingly.
- The client bears responsibility for breach of Regulations 12 & 13 (Day one Rights)

16. Claims and Sanctions

- An agency worker can bring an employment tribunal claim for breach of the Agency Workers Regulations, but must do so within 3 months of the alleged breach.
- The employment tribunal can award compensation of not less than 2 weeks pay, as well as any expenses or other losses incurred (but no award for injury to feelings)
- Breach of regulation 9 (anti-avoidance) compensation of up to £5,000
- Refusal to allow time off for ante-natal care –the amount the pregnant worker would have been paid had she not been refuse the time off.

Next Steps

ISS will be releasing a full agency guide comprising solution(s) in the near future.
It is important to consider the industry specific guidance that is due for release imminently.
For further information please feel free to contact your consultant at ISS: