Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 3SZ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

November 2011

Member Brief No 79

The Agency Workers Regulations 2010

Introduction

The Directive of the European Parliament and of the Council on Temporary Agency Work became law in December 2008 with three years for all EU member states to implement this into national legislation. In England, Wales and Scotland, the Directive has been implemented through the Agency Workers Regulations 2010 ("the Regulations") which came into force on 1st October 2011.

The Department for Business, Innovation, and Skills (BIS) has published their guidance notes for the legislation, which was written following consultation with the ALP and various other industry bodies and large suppliers and users of agency workers. The BIS Guidance can be downloaded from www.bis.gov.uk/policies/employment-matters/strategies/awd

The ALP is supporting its members to navigate their way through this legislation. It is essential that the labour provider and the hirer work closely together to ensure compliance.

All information and opinions given in this briefing are correct at time of publication to the best of ALP's knowledge. Please note that this document is not exhaustive and is not intended to be used as a substitute for legal advice and consequently ALP and its advisors exclude all liability for any claim or loss arising out of or in connection with the use of this document. Decisions made by both agencies and hirers with regard to the Regulations are likely to be risk-based, and therefore, you should consider taking legal advice before the implementation date.

A number of services provided by the UK's leading AWR specialists are available via the ALP at discounted rates to members. These include:

- In-house ALP Agency Workers Regulations workshops
- AWR consultancy to support labour providers and users to adapt to the Regulations.
- Evaluation of the options to comply with the Regulations, whilst mitigating their impact.
- Legal advice on how to practically interpret and implement Regulations.
- Bespoke contractual and procedure preparation.

Further information about the ALP can be found at www.labourproviders.org.uk or by contacting the Association directly on 01276 509306 or email info@labourproviders.org.uk regarding any of the matters above.

Overview of New Rights

The Regulations give agency workers:

- After they have worked in the same role with the same hirer for a qualifying period of 12 continuous calendar weeks, during one or more assignments, the right to the same basic working and employment conditions with regard to pay and working time that they would receive if they were engaged directly by a hirer to do the same job.

- At any time during an assignment to access collective facilities and amenities provided by the hirer on terms no less favourably than it provides to its own workers

- At any time during an assignment to be informed by the hirer of any relevant vacancies, being provided with the same opportunity to find permanent employment as a hirer's comparable worker.

- Additional maternity rights which include paid ante-natal leave; the right to be offered suitable alternative work where an assignment is ended on related health and safety grounds; and the right to payment when there is no suitable alternative work.

Who the Regulations apply to

The Regulations apply to an "agency worker" supplied by a "temporary work agency" ("agency") to a "hirer".

An "agency worker" is an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and who has a contract of employment or any other type of contract with the agency to provide their services personally for the agency.

The Regulations are not intended to apply to self-employed workers who are genuinely in business on their own account. It does not apply to those workers who do not work "temporarily for and under the supervision and direction of a hirer" and specifically whose contract provides that their service is delivered in such a way to make the agency or hirer effectively their client or customer.

A "temporary work agency" is an undertaking in the economic activity of "supplying individuals to work temporarily for and under the supervision and direction of hirers."

A "temporary work agency" is also an undertaking in the economic activity of "paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers." This definition therefore includes umbrella companies and other intermediary structures such as master and neutral vendors. However it does not include general payroll services companies that provide this operation for all types of sectors though potentially it may cover organisations that solely payroll agency workers.

"Hirer" is the undertaking, to whom individuals are supplied, to work temporarily for and under their supervision and direction.

The Regulations may not apply to “managed service operations”. A managed service operation, of which typical examples include contract catering, security and cleaning, is one where the service provider delivers an outcome rather than just supplying people. Crucially, to be outside of the Regulations the service must be one where the managed service provider is not “supplying individuals to work temporarily for and under the supervision and direction of hirers.” An example of such an operation might include where an agricultural contractor supplies a fully supervised and managed harvesting operation using his own staff to pick a field of crops at a price per tonne. Alternatively, a logistics company whose own staff manage and operate a contract repacking warehouse for a branded food manufacturer and is paid by completed pallet meeting technical specification.

The Right to the same Basic Working and Employment Conditions

Regulation 5 provides that an agency worker who has completed the qualifying period is entitled to the same basic working and employment conditions as he would be entitled to for doing the same job had he been recruited by the hirer.

Regulation 6 sets out that these basic working and employment conditions are: pay; the duration of working time; night work; rest periods; rest breaks; and annual leave.

These are further defined and qualified as follows:

Pay - is “sums payable to a worker of the hirer in connection with the worker’s employment, including any fee, bonus, commission, holiday pay or other emoluments referable to the employment, whether payable under the contract or otherwise”.

This means basic pay plus other remuneration such as shift allowances, unsocial hours’ premiums, vouchers with a monetary value, and bonuses that are directly attributable to the quality or quantity of work done.

Payment for holiday taken must also be equal which means that if the hirer, for example, bases holiday pay on total gross earnings over a set period, then this calculation will need to be used. There will need to be a fall back of the calculation method used for agency workers which in most circumstances is of averaging pay over the last 12 weeks worked.

Pay excludes expenses, occupational sick pay, occupational pension contributions, redundancy pay, compensation for loss of office, maternity/paternity/adoption pay, and profit sharing / share ownership schemes. Bonuses based on organisational performance which are not “directly attributable to the amount or quality of the work done” but rather are designed to “reward the worker’s long term service” are also excluded.

The agency worker can look either to the actual pay that the hirer’s own directly engaged worker receives, or the amount that the hirer would pay someone doing an identical role if the hirer has no specific comparator.

Duration of working time - "working time" is any period during which the worker is working, at his employer's disposal and carrying out his activity or duties; any period during which he is receiving relevant training, and any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement.

Night Work - is defined as work during "night time" which means the period between 11 p.m. and 6 a.m. or as modified by a relevant working time agreement.

Rest Periods - means a period which is not working time, other than a rest break or leave. This will include daily rest periods between shifts, weekly rest periods and compensatory rest arrangements.

Rest Breaks – means a period of break during daily working time where the worker is entitled to spend it away from his workstation. An issue to take account of here may be where the hirer's workers are paid for such breaks whilst the agency workers are unpaid.

Annual Leave – Agency workers who qualify for equal treatment will be entitled to the same holiday entitlement, including any amount over and above the statutory entitlement, which workers in the hirer's organisation receive. The Government has suggested that payment can be made in lieu of extra holiday over and above the statutory entitlement. Any additional holiday pay could be rolled up and paid on top of the basic wage – in effect giving agency workers what would be perceived as a higher hourly rate than the hirer's permanent workers.

Equal treatment would also extend to the right to the same conditions for the right for holiday to be carried over from one leave year to the next, the holiday leave year and any other relevant arrangements that the hirer has in place with regard to annual leave.

What is the Qualifying Period?

An agency worker is not entitled to equal treatment until he has completed the qualifying period by working ''in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.''

The agency worker may complete the 12 week period by working with the same hirer even if he is supplied by more than one agency to that hirer. Therefore an agency should confirm at registration where the worker has worked in recent weeks to ensure that no time has already been accrued.

If the agency worker starts a new assignment in the "same role" but with a different hirer this will restart the qualifying period.

The agency worker will be working in the "same role" unless he starts a new role in which the work or duties are ''substantively different," not merely where there is a different job title, shift, department etc. In addition the agency must have informed the agency worker in writing of the type of work he will be required to do in the new role.

Any week in which the agency worker works at all for the same hirer in the same role will count towards the 12 week qualifying period.

If there is a break in an assignment for 6 weeks or less, on returning to the same role and hirer, the weeks that the agency worker previously worked will be carried forward.

Where the break in an assignment in the same role and hirer is for more than 6 weeks, continuity will be broken and the qualifying period will recommence from scratch.

In certain situations, even if the break is for more than 6 weeks any weeks worked prior to the break in the same role will be carried forward and added to any weeks worked subsequently. These situations are: sickness or injury up to a maximum of 28 weeks and provided evidence is given to the agency where requested; pregnancy, childbirth or maternity and the agency worker is within a "protected period" i.e. from the beginning of pregnancy to 26 weeks from childbirth; statutory / contractual maternity, adoption or

paternity leave; jury service; when the agency worker is not required because of industrial action at the hirer; or periods when the hirer does not require the agency worker because the business has temporarily closed e.g. factory shut down.

Time on assignment prior to 1 October 2011 does not count towards the qualifying period.

The "Swedish Derogation"

The right to equal pay does not apply to agency workers who are employed by the agency on a permanent contract of employment and where other conditions apply.

For this "Swedish Derogation" to apply the contract of employment must have commenced before the assignment starts and must contain certain specified terms including a statement that informs the employee that he will not have the right to equal pay.

During any period that the agency worker is available but not working for a hirer the agency is required to:

- take reasonable steps to seek suitable work for the agency worker and if suitable work is available to offer the agency worker to the hirer; and

- pay the agency worker a minimum amount of pay and not terminate an agency worker's contract of employment until it has done this for not less than 4 weeks during the course of the contract. The minimum amount to be paid to the agency worker shall not be less than 50% of the basic pay in the best paid pay reference period within the 12 weeks immediately preceding the end of the previous assignment with not less than the National Minimum Wage for the hours worked in the relevant pay reference period.

However even where the "Swedish Derogation" applies the agency worker will still be entitled to equal treatment in respect of working conditions (other than pay); access to collective facilities and to be notified of vacancies by the hirer.

Structuring Assignments to avoid the Qualifying period

The Regulations contain anti-avoidance measures which seek to deter agencies and hirers structuring assignments to prevent agency workers from reaching the 12 week qualifying period.

An employment tribunal will deem the qualifying period to have been completed the time it would have been completed but for the structure of the assignment(s) where the agency worker has:

- completed two or more assignments with the same hirer;

- completed at least one assignment with the hirer and one or more earlier assignments with other hirers connected to that hirer; or

- worked in more than two roles during an assignment with the hirer and on at least two occasions has worked in a role that was not the "same role" as the previous role;

and

- the most likely explanation for the structure of the assignment or assignments is that the agency, hirer or persons connected to the hirer (i.e. where one hirer has control of the other hirer or a third person has control of both hirers) intended to prevent the agency worker from being entitled to equal treatment.

A tribunal that finds the assignments were structured so as to prevent the agency worker from reaching the qualifying period may make an additional compensation award of up to £5,000 per agency worker. Liability will be apportioned according to fault between any hirers and agencies involved.

Rights of agency workers to access collective facilities and access to employment

An agency worker has from day one and during the whole of an assignment the right to be treated no less favourably than a comparable worker in relation to the collective facilities and amenities provided by the hirer unless the hirer is able to justify this on objective grounds. Collective facilities and amenities include, in particular, but are not limited to canteen or other similar facilities; child care facilities; and transport services.

An agency worker has from day one and during the whole of an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer in order to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

The right is limited only to the "right to be informed" of "relevant" vacancies e.g. vacancies should be posted in areas known to and accessible by agency and hirer workers alike.

Establishing terms and conditions with the hirer

In order to ensure that agency workers are provided with the equal treatment to which they are entitled then prior to commencement of the assignment the agency should seek to establish relevant essential information.

The information to establish is:

- Whether the agency worker has worked in the same role at that hirer previously through another agency, and if so whether any time has already been accrued towards the qualifying period.

- What pay and basic working and employment conditions an agency worker is entitled to for equal treatment terms by ascertaining:

    - Is there a comparable employee or worker?

    - If yes, what terms and conditions are they engaged under including those terms often referred to as "custom and practice" which would be regarded as incorporated into their contract?

    - If no, what terms would apply if the hirer had engaged an individual directly to fill the role?

- What collective facilities and amenities are available to the hirer's own workers?

    - How will these be made available to the agency worker?

    - If the hirer is withholding access to a collective facility from agency workers what objective grounds justify this?

- How and where does the hirer advertise relevant vacancies?

In most cases this information will be obtained from the hirer. Where intermediaries such as master or neutral vendors are involved this may be provided by these organisations. In such cases the agency should seek to verify this information with the hirer.

Pregnancy and Maternity rights of agency workers

These new rights present an additional cost for most agencies and this needs to be taken account of in charge rates.

Ante-natal appointments - An agency worker who has completed the 12 week qualifying period and who is pregnant will be entitled to take paid time off from her working hours to attend an ante-natal appointment on advice of a registered medical practitioner, midwife or nurse. For the second and later appointments, if asked, the agency worker will be required to provide evidence of her appointment to the agency or hirer.

An agency or hirer should not unreasonably prevent an agency worker from taking time off to attend her ante-natal appointment.

An agency will be required to pay the agency worker for time that she has to take off from an assignment in order to attend her ante-natal appointment at the applicable hourly rate or by averaging the previous 12 weeks worked if the hours vary from week to week.

Right to be offered alternative work – An agency worker who has completed the 12 week qualifying period and whose assignment is ended on health and safety grounds which arise because she is pregnant, has recently given birth or is breastfeeding, has a right to be offered to be put forward for alternative suitable work where the agency has this available.

The alternative work must be suitable and appropriate for her to do in the circumstances, with terms and conditions at least as favourable as those of the terminated assignment.

Where an assignment is ended on maternity grounds, if the agency is not able to find alternative work which meets the above criteria, the agency will be required to pay the agency worker for the original intended duration, or likely duration, whichever is the longer, of the terminated assignment or until the agency worker has confirmed in writing that she no longer requires the work-finding services of the agency. The remuneration due is the amount that the agency worker would receive under her contract with the agency if her original assignment would not have been ended on maternity grounds.

Where the agency puts the agency worker forward and the hirer accepts the worker for a suitable alternative role, the agency will not be required to pay the agency worker if she “has unreasonably refused that offer or to perform that work”. Collecting details during registration of the type of work that workers will accept will assist in this argument.

Where the agency puts the agency worker forward for a suitable alternative role but the hirer declines to accept the worker then this does not allow the agency to avoid having to pay the agency worker if no other suitable assignment can be found.

An agency that refuses to register pregnant women, or put them forward for work, or a hirer that refuses to accept a pregnant candidate for an assignment will open themselves to a claim for sex discrimination.

Right of an agency worker to receive information

An agency worker who has completed the qualifying period and who considers that he has not received equal treatment can make a written request to the agency for a written statement containing information relating to the treatment in question. Within 28 days the agency has to provide a written statement in response to the agency worker setting out:

- relevant information relating to the basic working and employment conditions of the workers of the hirer;
- the factors the agency considered when determining the basic working and employment conditions which applied;
- relevant information which explains the basis on which the hirer's comparable employee was identified and the relevant terms and conditions which apply to that employee.

If the agency worker does not receive the written statement from the agency within 30 days of making the request, the agency worker may request this information from the hirer who then has a further 28 days to respond.

An agency worker who considers that the hirer may not have provided equal access to collective facilities and/or been informed of relevant vacancies may at any time make a written request to the hirer for a written statement containing information relating to the treatment in question. The hirer should within 28 days of receiving this, provide the agency worker with a written statement setting out all relevant information relating to the rights of a comparable worker and the particulars of the reasons for the treatment of the agency worker.

If it appears to the employment tribunal that the agency or hirer has deliberately, and without reasonable excuse, failed to provide information or is evasive or equivocal, it may draw an inference that the agency worker's rights have been infringed.

Liability and Penalties

An agency worker can bring an employment tribunal claim that he has not received equal treatment against the agency, the hirer or both, generally within 3 months of the last date of the alleged failure

The agency shall be liable for any failure to provide equal treatment but liability will pass to the hirer where the agency:

- obtained or took reasonable steps to obtain the appropriate basic working and employment conditions information from the hirer;
- acted reasonably in relying upon this information provided; and
- applied those conditions to the agency worker.

If an employment tribunal finds that the agency worker did not receive equal treatment, then it will apportion any compensation awarded to the agency worker between the agency and the hirer depending on where it decides the fault lies.

Intermediary organisations such as umbrella companies, master or neutral vendors are "temporary work agencies" for the purposes of the Regulations. Where more than one agency is a party to proceedings, the employment tribunal shall determine the apportionment of responsibility.

Agencies and hirers will be liable for the actions of their own employees or agents whether or not they were done with the employer's knowledge or approval. In any proceedings it will be a defence if the employer took such steps as were reasonably practicable to prevent the person from doing that act or such acts. Agencies and hirers should therefore ensure that their relevant employees and agents understand the Regulations and relevant company policies and procedures.

The hirer is wholly liable for any failure to provide access to collective facilities or for not providing access to information on relevant vacancies.

If an employment tribunal finds that a hirer or any agency has failed to meet their obligations under the Regulations, it can:

- make a declaration as to the agency worker's rights in relation to the claim;
- order the liable party to pay compensation;
- recommend that the liable party take appropriate action within a specified period to rectify the matter complained of.

Compensation will be what the tribunal considers just and equitable based on the agency worker's loss attributable to the infringement, with any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

There is a minimum award of 2 weeks' basic pay (unless this is not just or equitable); no cap on the compensation; no award for injury to feelings and the tribunal can reduce compensation if it finds that the agency worker contributed to their own loss.

An agency worker, generally within 3 months, may bring a claim in the employment tribunal that she has been unreasonably refused time off to attend an ante-natal appointment. If upheld, the tribunal will order payment of the financial loss, apportioning the compensation award on where the fault lies.

An agency worker whose assignment was ended maternity related health and safety grounds may also bring a claim in the employment tribunal if she is not paid when she is not working because no suitable alternative work was found for her. She must bring the claim generally within 3 months of the day on which her assignment with the hirer was terminated. If upheld, the tribunal will order the agency to pay compensation to cover the financial loss.

An agency worker will also have the right not to be subjected to a detriment by, or as a result of, any act, or any deliberate failure to act, of an agency or the hirer, done because the agency worker:

- brings proceedings under the Regulations;
- gives evidence or information in connection with proceedings brought by another agency worker under the Regulations;
- requests a written statement of information;
- alleges that an agency or hirer has breached the Regulations;
- refuses or proposes to forego a right conferred by the Regulations; or
- the hirer or agency believes or suspects that the agency worker has done or intends to do any of the things mentioned above.

Where an employment tribunal finds that an agency worker has been subject to a detriment the tribunal can award at least 2 weeks' pay as calculated and apportioned above.

An agency worker who is an employee can bring a claim for unfair dismissal and shall automatically be regarded as unfairly dismissed if any of the above circumstances are determined by the tribunal as the principal reason for the dismissal. In such a case the agency worker will not need the one year's service ordinarily required to bring an unfair dismissal claim.