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Member Brief No 91

THE AGENCY WORKERS REGULATIONS 2010

IMPLEMENTATION GUIDE FOR LABOUR PROVIDERS & USERS

INTRODUCTION TO THE ALP

This guide has been produced for use by ALP members to and the food supply chain to help navigate the way through the Agency Workers Regulations, working together in partnership.

The ALP is the trade association for labour providers that serve the food, drink and agricultural industries and is a centre of expertise and good practice on temporary labour matters.

Labour users should ensure that their labour providers are members of the ALP.

Labour users (growers, producers, packers etc.) can become Associate Members of the ALP. This will ensure that they receive information at the same time as labour providers, have access to the members' part of the ALP website and have access to the advice service that the Association provides. Associate Membership for growers, producers and packers is only £500 per annum.

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.

INTRODUCTION TO THIS GUIDE

The aim of this guide is to provide a plain-spoken introduction to the Agency Workers Regulations 2010 (AWR), which includes useful, practical advice to help companies and employment businesses prepare for its implementation.

The (AWR) came into force on 1 October 2011. The main aim of the legislation is to provide the same rights for agency workers as permanent workers in terms of basic working and employment conditions. The Regulations can be downloaded from www.legislation.gov.uk/uksi/2010/93/contents/made.

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.

FLOW OF INFORMATION BETWEEN HIRERS & TEMPORARY WORK AGENCIES

The uncertainty surrounding liability in the event of a breach (please see section on Potential Liabilities) serves to highlight the absolute importance of the flow of information between hirer and temporary work agency, and ultimately the agency worker.

It is essential that the labour provider and the hirer work closely together to ensure compliance. The labour provider must fully understand the hirer's payment structure, terms and conditions and custom and practice working conditions, and all parties within the supply chain will need to consider whether they have sufficient resource and robust processes in place to facilitate this. For compliance to be achieved the flow of information, particularly where there is more than one provider within the chain, must be transparent and seamless.

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.

SCOPE OF THE REGULATIONS

Definition of an Agency Worker

An **"agency worker"** (AW) is defined as an individual who is **supplied by a "temporary work agency"** to work temporarily under the **supervision and direction of a "hirer"**, and has any contract (whether a contract of employment or for services) to **perform work and services personally**.

This **does not include** supply situations where individuals are provided in a **"managed service arrangement"**, where they are supervised and directed on a day to day basis, on site by the supplier's own staff.

It also **does not include** individuals who are **genuinely self-employed** and in business on their own account.

Definition of a Temporary Work Agency

The definition of a **"temporary work agency"** (TWA) within the Regulations is a person that **supplies individuals to work temporarily** for and **under the supervision and direction of a "hirer"**, or **pays for, or receives or forwards payments for the services** of such individuals. The temporary work agency does not have to be a company, or in business for profit, and may be carrying on such activity in conjunction with others. This definition widens the scope beyond just employment businesses, and **includes intermediaries, such as umbrella companies, and neutral and master vendor arrangements**.

A payroll bureau providing a pure payroll service to individuals will not be caught within this definition.

The definition of TWA includes all intermediaries within a supply chain. **For example:** the agency worker is supplied to the labour provider by an umbrella company, and the labour user has a master vendor arrangement through which all placements are channelled – the umbrella company, the labour provider and the master vendor would all be TWAs.

Definition of a Hirer

"Hirer" means an organisation to which **individuals** are **supplied to work temporarily** for and under the **supervision and direction of that organisation**.

Where a hirer is part of a group of companies, and each group company (or subsidiary) has its own legal identity, each group company will be considered a new hirer.

Genuinely Self-Employed Individuals

The AWR **excludes** individuals from the definition of agency worker who are **genuinely self-employed** and in business on their own account.

There are a number of key factors to be taken into account in determining whether a working individual is truly self-employed such as mutuality of obligation, right to substitution, degree of control, number of clients, being in business on their own account and financial risk and reward. This is looked at in the whole.

The BIS guidance includes a link to a Directgov site, which lists the main attributes of the supply model of workers who are self-employed, however it will be up to an employment tribunal, in the event of a claim, to decide upon an individual's employment status.

Falsely classifying workers as self-employed will present a number of risks to labour providers and users, both financial and to reputation.

Transferring workers to their own limited companies in an effort to avoid equal treatment would be a considerable risk.

An individual will not be considered outside of scope just by virtue of working through a limited company.

Also, an individual could claim to a tribunal later on that they were coerced into changing the supply arrangement, and that they aren't actually self-employed, and apply for equal treatment.

DAY ONE RIGHTS

From Day One

From day one of their assignment an agency worker has the right to **equal access** to the following:

- Collective facilities and amenities – which will include canteens, child care, transport facilities.
- Information about any relevant, vacant posts within the hirer's organisation.

Equal access does not mean that the agency worker should be given preferential treatment, but should be treated the same as a comparable directly employed worker of the hirer.

For instance, if there is a waiting list for a child care facility, then the agency worker must be allowed to put their name down on the waiting list.

Also, there is no obligation upon the hirer to pursue an agency worker's application for a permanent role. The hirer's only obligation is to make the information available.

Less favourable treatment (in other words not providing any of these day one rights) of agency workers can be justified by a hirer on objective grounds. "Objective grounds" has not been defined, but it is likely that cost alone will not be considered as justifying less favourable treatment. Organisational and practical issues may be taken into consideration. For example: it would not be practical to offer child care facilities to agency workers who work on a night shift.

Applicable Regulations: 12 & 13

As these day one rights are totally in the control of the hirer, responsibility for ensuring equal access lies solely with the hirer.

This also means that this is the one area of liability within the Regulations that is clear-cut.

The hirer will be solely liable for any unjustifiable breach of equal treatment for day one rights.

These are rights to equal access. Although it would be considered good practice for a labour provider to make an agency worker aware of any collective facilities or amenities, they have no legal obligation to do so.

QUALIFYING PERIOD FOR EQUAL TREATMENT

12 Week Qualifying Period (QP)

An agency worker will only have the right to equal treatment (apart from their day one rights) after they have completed a 12 week qualifying period.

This qualifying period requires an agency worker to work for 12 continuous calendar weeks in the same or **substantively similar role** for the same hirer.

A substantively similar role is one where the main work or duties are the same. Moving an AW to a different department or team, but undertaking the same work, will not be considered a new role for the purposes of the qualifying period.

Any period worked during a week will be counted as a calendar week. For instance, if an agency worker works one day a week on an assignment, they will still complete their qualifying period (subject to the other conditions) after 12 calendar weeks.

The qualifying period relates to the role the agency worker undertakes for a hirer; it is not specific to the temporary work agency. **For example,** if an agency worker undertakes the same or similar role for the same hirer over 12 continuous weeks, but through two different temporary work agencies, those 12 weeks will count towards that agency worker's qualifying period, and the next week worked by the agency worker (in the same role at that hirer), through *any* temporary work agency will qualify for equal treatment.

For an AW to be considered as working in a new role, the TWA must have informed the AW in writing of the type of work required in the new role.

Where the agency worker undertakes a new assignment in a new role at the same hirer the qualifying period will start again from week 1.

Applicable Regulations; 7

Where a Break Between Assignments Ends the QP

Where there is a **break** of more than **six calendar weeks** between an agency worker's assignments at the same hirer, in the same role, the **qualifying period** will **start again**.

Remember, the AW could be working through other TWAs in the same role/hirer.

You will need to find the most efficient way of collating information on an AW's work pattern within each hirer.

The AW has no obligation to provide the TWA with this information, but it's likely that a tribunal would take into consideration any refusal by an AW to respond to a reasonable request for information.

Breaks that "Pause" the QP

There are circumstances in which the qualifying period may be paused, and restarted when the agency worker returns to the same role/hirer. In this situation, any continuous weeks worked by an agency worker before the break shall be carried forward and treated as continuous with any weeks the agency worker works after the break. These circumstances include:

- A break of no more than six calendar weeks.
- Absence due to sickness or injury.
- Annual leave.
- Jury service.
- Shutdowns – pre-determined factory shutdowns/school holidays.
- Industrial action.
- Time off for other contractual or statutory leave, such as parental leave, emergency dependency leave, unpaid holidays (if contractual).

Breaks During which the QP Continues to Accrue

Where there is a break between assignments or during an assignment when the agency worker is not working, and the absence is either:

- related to pregnancy, childbirth, or maternity (during the period from the start of a pregnancy to 26 weeks after childbirth, or when the agency worker returns to work); or
- due to statutory or contractual leave to which the agency worker is entitled for maternity, adoption, or paternity leave

the qualifying period will continue during the absence for the original intended duration, or likely duration, of the assignment.

The Regulations do not prohibit a temporary work agency from providing agency workers on 12 week assignments, and then replacing the agency workers with new agency workers. However, please be aware that there are specific anti-avoidance measures in Regulation 9. The agency worker will be *treated* as having completed the qualifying period where the most likely explanation for the structure of an assignment (or series of assignments) is to prevent the agency worker from completing the qualifying period. This applies only where the agency worker would have otherwise completed the qualifying period.

Hirers can request a new AW for an assignment every 12 weeks. However, this does not mean that you can rotate an individual, or pool of AWs between a number of hirers - please read the anti-avoidance measures explained here.

For example: An agency worker undertakes three 11 week assignments with two six week gaps in between. In the event of a claim an employment tribunal may well consider that the assignments were structured deliberately to stop the agency worker from completing the qualifying period.

Applicable Regulations; 7 & 9

EQUAL TREATMENT ENTITLEMENTS

Rights Applicable from Week 13

Once the agency worker has completed the 12 week qualifying period they shall be entitled to the equal treatment rights explained below. This entitlement shall continue until such time as they are no longer working in the same role for the same hirer, or there is a break between or during an assignment of more than six weeks, which is not due to one of the reasons stated in "Breaks Between Assignments", above, as having the effect of pausing or continuing the qualifying period.

The qualifying period can start only from 1st October, 2011.

Any **weeks on assignment** undertaken by an AW **before 1st October 2011, will not count** towards the qualifying period.

What are "Basic Working & Employment Conditions"?

These conditions are defined as the terms and conditions that are ordinarily included in contracts of a comparable employee of the hirer whether contained within:

- an identifiable pay scale or structure;
- a collective agreements in place;
- contracts of employment or engagement;
- a company handbook, or other similar document; or
- by custom and practice.

You will have complied with your obligations to provide equal treatment if the AW is working under the same **relevant terms and conditions** as a comparable employee.

This will include any variations in those relevant terms made at any time after the qualifying period has commenced.

Relevant Terms and Conditions

After the 12 week qualifying period, an agency worker will have the right to equal treatment in terms of:

- **pay**;
- the duration of working time;
- night work;
- rest periods;
- rest breaks; and
- annual leave (above the statutory entitlement).

Please see definitions of these terms in the following paragraphs.

EQUAL TREATMENT FOR "PAY"

"Pay" Includes

- Basic Salary
- Overtime
- Shift Allowance
- Bonuses or commission payments, which are directly attributable to the quantity or quality of work done by the agency worker.
- Vouchers or stamps of a fixed monetary value, which are capable of being exchanged for money, goods, or services.

Please note that any eligibility criteria that would apply to a comparable worker will also apply to the AW. The requirement is for equal treatment, not preferential treatment.

"Pay" Excludes

The definition of pay does not include all payments that a hirer would make to its permanent staff.

The following is a list of the payments specifically excluded by the Regulations and to which equal treatment need not be provided:

- Occupational sick pay (entitlements to statutory sick pay are not affected).
- Occupational pensions.
- Occupational maternity, paternity, or adoption pay.
- Redundancy pay (statutory and contractual).
- Payments or rewards linked to a financial participation scheme.
- Compensation for loss of office.
- Expenses payments, such as travel expenses.
- Bonuses, incentive payments or rewards, which **are not directly attributable to the quantity or quality of the work** undertaken by the agency worker.
- Payments for time off for Trade Union duties.
- Notice pay (statutory and contractual).
- Guarantee payments if laid-off.
- Payments by way of an advance or loan, e.g. season ticket loan.
- Any other non-contractual/discretionary payment, the payment of which has not become custom and practice.

Payments not linked to work undertaken by the AW **will not be included**.

For example payments made to encourage loyalty, or reward long-term service, would not be included.

However, **a team bonus**, for early completion of a project for instance, where the **AW worked as part of that team**, **would be included** within the definition of Pay.

Making a Comparison for "Pay"

When identifying comparable pay, it is essential that all elements of the financial package are analysed, including any relevant payments discussed above, to ensure that all payments that fall within the definition of pay are included in the comparison with an agency worker's pay to ensure equal treatment.

It is **essential** to all parties' compliance with the Regulations that the Labour Provider fully understands the structure of pay and bonuses within the Labour User's organisation.

This will require a **true partnership approach**, to aid the flow of information.

Performance Related Pay Awards

Where performance-related bonuses are awarded based on a performance appraisal system, it will not be necessary to integrate the agency worker into the hirer's permanent staff appraisal process.

However, the hirer and the temporary work agency will need to utilise an existing, or put in place a new, process to appraise the performance of agency workers, to enable them to make informed decisions on the appropriate performance-related bonuses to be paid.

Applicable Regulations; 6, 12, & 13

EQUAL TREATMENT FOR OTHER TERMS & CONDITIONS

The agency worker will be entitled to equal treatment with regard to the following terms and conditions after they have completed the 12 week qualifying period.

Definition of the Duration of Working Time

Working time means any period during which an individual is:

- working for the hirer;
- at the disposal of the hirer and undertaking their duties;
- receiving relevant training; or

any period which is to be treated as working time for the purposes of the Working Time Regulations 1998 under a working time agreement.

Definition of Night Work

Night work means work undertaken under the following circumstances:

- the duration of the working time must be at least 7 hours; and include the period between midnight and 5am, which is determined by a working time agreement; or
- in default of such a determination, the period between 11pm and 6am.

Definition of Rest Periods & Rest Breaks

A rest period is any period which is not working time, other than a rest break or contractual or statutory leave. **For example**, the period between an individual completing one shift and starting the next.

Rest breaks are the breaks that an individual is entitled to take during their working day.

Annual Leave

All workers are currently entitled to 5.6 weeks paid holiday per year, which can include the bank and public holidays.

If a hirer gives a comparable employee more than the statutory entitlement, then the agency worker will also have the right to receive the extra annual leave, above the statutory level.

However, where the agency worker chooses not to take the time off, payment for the proportion of holiday pay above the statutory minimum may be rolled up into the agency worker's pay.

If a comparable employee has the right, whether conferred within a company handbook, or similar, or by custom and practice, to carry over annual leave into the following leave year, the agency worker must be treated equally.

Any extra annual leave entitlement, above the statutory, must not automatically be rolled into pay without the agreement of the AW. We would suggest that you always get the AW's agreement in writing.

MAKING A COMPARISON FOR EQUAL TREATMENT

After the qualifying period an agency worker is **entitled to** the same **relevant** working and employment **conditions *as if*** they had been **recruited directly** by the hirer. This is known as the "as if" test. A hirer must apply this test to all agency workers who are entitled to equal treatment.

The "as if" test is what a Labour User should focus on to ensure that they are providing equal treatment to qualifying AWs.

The hirer needs to ask what basic terms and conditions (see "Relevant Terms & Conditions" above) the agency worker would have been given, had they been employed or engaged directly by the hirer to undertake the same role, and make these available to the agency worker once they qualify (see Qualifying Period for Equal Treatment).

To be deemed to be compliant, and defend their decision as to what the relevant comparable terms and conditions are that apply to an agency worker, the hirer may **identify** a **comparable employee** doing the same or **broadly similar work** (taking into account, where relevant, whether they have a similar level of qualification and skills). If no comparable employee can be found at the same workplace, then the hirer should extend the comparison to its other establishments, if applicable.

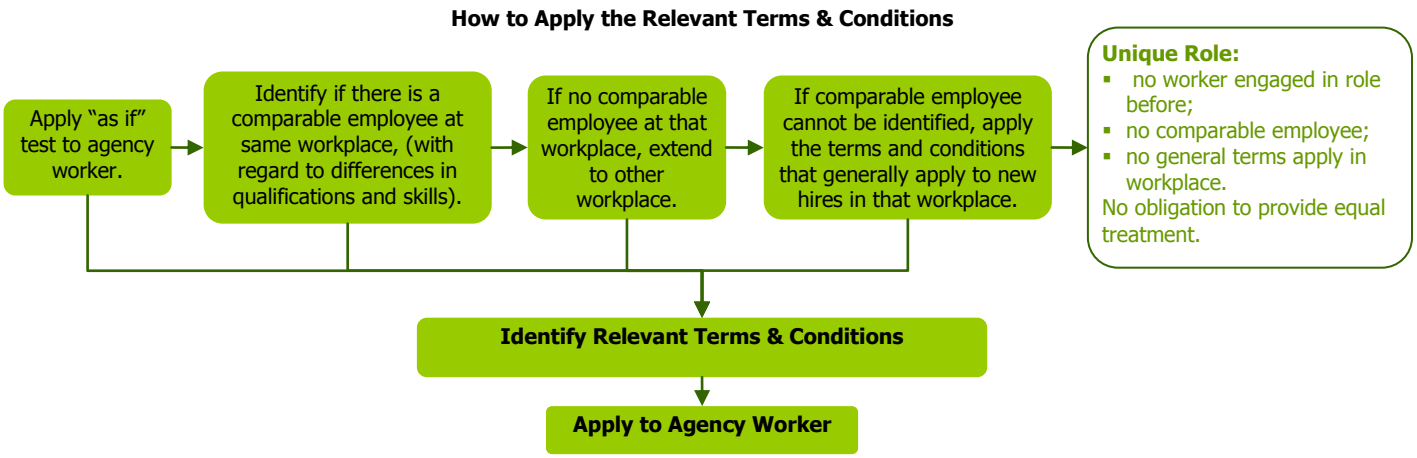
The terms and conditions, which apply, shall be those that are ordinarily included in the contracts of employment of comparable employees, either included in employees' contracts as a matter of course, those which have become custom and practice, or formally set out in other documents, such as:

Only basic terms and conditions ordinarily given to comparable employees shall apply. Please see the list of relevant terms on page 6.

- a pay scale or pay structure;
- a relevant collective agreement; or
- a company handbook, or similar.

If the hirer can show that they have never engaged a worker in a particular role before, and there is no identifiable comparable employee (at any site), and no basic terms and conditions that apply in that work place – **that the role is unique** – then there is no obligation to provide equal treatment.

Applicable Regulations: 5



NEW PREGNANCY AND MATERNITY RIGHTS

The AWR includes changes to The Employment Rights Act 1996, concerning pregnant workers and new mothers.

The following entitlements will only apply once the agency worker has completed the qualifying period. However, the temporary work agency/hirer must ensure they fulfil any duties regarding the rights of workers under any other legislation.

We would urge caution when dealing with this. Until such time as a labour provider/user's reliance on the qualifying period has been reviewed by an employment tribunal or court, and case law exists, we would suggest that you take specialist legal advice as and when an issue arises.

Right to Time Off for Ante-natal Care

A **pregnant agency worker** will have the right to take **paid time off** for **ante-natal appointments** (not including the first appointment of the pregnancy) during their working hours.

Ante-natal appointments may include medical examinations, and relaxation and parent-craft classes.

If requested by either the hirer or the temporary work agency, the agency worker shall provide evidence of her pregnancy and of any appointments for which she requires time off.

The agency worker should be paid at the appropriate hourly rate for any such period of absence. The hourly rate shall be calculated by dividing one week's pay by the number of normal working hours in a week that the agency worker is contracted to undertake for and on behalf of the Labour User. Where an agency worker's hours of work differ from week to week, the hourly rate shall be calculated by taking an average over the last 12 weeks (ending with the last complete week before the absence) of the agency worker's normal working hours, and dividing that by one week's pay.

The entitlement to paid time off is not on top of any contractual liability to remunerate. In other words, if she works 8 hours in a day, and has 2 hours off for an ante-natal appointment, then the total payment to her on that day would be 8 hours.

Right to be Offered Alternative Work

When an agency worker notifies the temporary work agency that they are pregnant, have recently given birth, or are breastfeeding, the temporary work agency must inform the hirer of this fact. The hirer has an obligation to undertake a health and safety risk assessment for that assignment. Where a risk exists, the hirer should make reasonable adjustments to the role to eliminate such risk.

Where an adjustment is not possible, the temporary work agency must offer the agency worker any suitable alternative work available.

Alternative work offered must be suitable in relation to the AW and appropriate in the circumstances, and must be under terms & conditions no less favourable than those that applied to her previous assignment.

Right to be Paid

Where her assignment is ended due to the assignment not being suitable (due to risks related to her pregnancy), the agency worker will have the **right to be paid** by the temporary work agency **for** the **intended duration**, or likely duration (whichever is the longer), of the assignment.

There is no obligation upon the labour provider to pay the AW beyond the original intended duration of the assignment.

The temporary work agency **will not** have to **pay** the agency worker **where** the temporary work agency has offered the agency worker **suitable, alternative work**, which the agency worker unreasonably **refused**.

Applicable Regulations: Schedule 2 Consequential Amendments

PAY BETWEEN ASSIGNMENTS MODEL (SWEDISH DEROGATION)

Where an agency worker is employed under a **permanent contract of employment** by a temporary work agency, where the following obligations are met, the agency worker will **no** longer have the **right to equal pay** (as defined in "Equal Treatment Entitlements" above).

This derogation only relates to **pay**; an agency worker's entitlement to equal treatment in other areas will remain unaffected.

This is known as the "pay between assignments" model, and to qualify, the employment contract must be entered into before the first assignment under that contract, and such **contract must include the following**:

- the minimum scale, rate, or method for calculating remuneration;
- the location(s) at which they will be expected to work;
- hours of work for any assignment;
- maximum hours of work each week during any assignment;
- minimum hours of work per week that will be offered during an assignment (**minimum of one hour each week**);
- nature of work, including requirements of qualifications or experience; and
- confirmation that entering into the contract means they will not have the right to equal treatment in relation to pay for the duration of that contract;

The AW will still be entitled to the Day One rights, and to equal treatment for:

- duration of working time;
- night work;
- rest periods;
- rest breaks; and
- annual leave.

We would urge labour providers to be cautious if intending to provide AWs with employment contracts for the minimum number of hours per week, unless this is a genuine reflection of the work availability.

The temporary work agency must also, **during any period under the contract that the agency worker isn't working**, **but is available to work** ("between assignments"):

- take **reasonable steps** to **seek suitable work** for them;
- propose the agency worker to the hirer offering such work; and
- **pay the agency worker a minimum amount** of remuneration during that period.

A contract for a minimum of 1 hour per week, where the AW has worked an average of 40 hours per week over a period, may well mean that the contract is varied by custom and practice.

The temporary work agency must not terminate the agency worker's contract of employment until it has taken reasonable steps to find suitable work for an agency worker, and paid him for that time whilst between assignments for an **aggregate of not less than four calendar weeks during the life of the contract**.

If using this model labour providers/ users should build the four weeks pay between assignment into the cost of the assignment, as this will always be payable, except in certain circumstances of misconduct or unsuitability dependent upon the contract in place.

Changing the Structure of Supply

The law does not prohibit a temporary work agency from offering an agency worker a 12 week temporary contract, and then offering them a permanent contract of employment from week 13, or from moving agency workers into permanent contracts during an assignment.

However, the agency worker must enter into any contract freely and without coercion. There is always the risk of an agency worker going to an Employment Tribunal later on, and claiming that they weren't in fact employed, or that they were forced to sign an employment contract, otherwise the work would not have been available to them.

It is likely that contracts not written in the spirit of the law, which are designed specifically to reduce the Labour Provider's & User's financial exposure, may find them challenged fairly quickly.

How to Calculate Pay Between Assignments

The minimum amount to be paid to an agency worker between assignments must not be below the National Minimum Wage provisions for that period of time.

The amount paid to an agency worker between assignments must not be lower than 50% of the highest level of basic pay paid to them in the 12 weeks immediately preceding the end of their previous assignment (or during the assignment, where it was shorter than 12 weeks).

For the calculation of pay between assignments, only basic pay should be taken into account, or where applicable payments for actual time worked, or output.

Example of Pay Between Assignments

An agency worker has a contract to work at least 7 hours per week, and is paid weekly at the rate of £6 per hour. They complete an assignment where they work 40 standard hours each week (not overtime).

After the assignment they are available to work, but the temporary work agency cannot find them any work for two weeks. During that two week period when no work is available, but the agency worker is available to work, the temporary work agency must pay the agency worker at the rate of National Minimum Wage per hour for 40 hours per week.

If the worker was receiving an hourly rate of £10 per hour, then they would be paid at NMW for that two week period between assignments.

Applicable Regulations: 10 & 11

AN AGENCY WORKER'S RIGHT TO RECEIVE INFORMATION

An agency worker has a right to request (in writing) information from the temporary work agency relating to their entitlement to equal treatment for basic working and employment conditions, where they feel that this right may have been infringed.

The temporary work agency must respond to this request within 28 days, providing a written statement to the agency worker setting out all relevant information regarding the basic working conditions, and the factors it took into consideration when determining these.

An agency worker only has the right to request information regarding basic working and employment conditions whilst they are actually entitled to them.

Where the determination is reliant upon a comparable employee, the temporary work agency must explain the basis of the comparison and the relevant terms and conditions that apply to that comparable employee.

There is no obligation to name a comparable employee at this stage.

If the temporary work agency does not respond within 30 days of the request, the agency work may make a written request direct to the hirer. The hirer must respond to the agency worker with a written statement within 28 days.

Where the agency worker considers its Day One entitlements have been infringed, they can make a written request directly to the hirer for information. Again, the hirer has 28 days to respond.

If an Employment Tribunal finds that a temporary work agency or a hirer has deliberately, and unreasonably failed to provide information requested, or has provided an evasive or equivocal statement, then the Tribunal may draw the inference that the party concerned has infringed the right in question.

Applicable Regulations: 14 & 16

POTENTIAL LIABILITY

Day One Rights

With regard to the provision of the rights, which all agency workers are entitled to from the first day of their assignment, the liability for failing to provide access to these rights (a breach of Regulations 12 or 13) shall fall upon the hirer.

Equal Treatment Rights

Both the temporary work agency and the hirer shall be liable for a breach of Regulation 5, an agency worker's rights in relation to basic working and employment conditions, to the extent that they are responsible for that breach. Where there is more than one temporary work agency involved, **all the temporary work agencies in the supply chain will be held liable** to the extent that they are responsible.

The question of **liability will be** decided by the Employment Tribunal, and shall be **dependent upon the efforts undertaken by each party** to ensure that the agency worker received equal treatment.

A temporary work agency may have a defence where it can show that:

- it obtained, or took reasonable steps to obtain the relevant information from a hirer;
- it acted reasonably in determining the agency workers working and employment conditions; and
- where it has responsibility, it ensured that the agency worker was treated in line with that determination.

To the extent that a temporary work agency is found not to be liable for a breach, due to the actions above, then the hirer, or another temporary work agency in the chain shall assume that portion of liability.

In other words, liability for equal treatment will not automatically fall to the labour provider at the bottom of the chain of supply. The question of liability is by no means clear cut, and will be apportioned dependent upon each party's actions.

Powers of an Employment Tribunal

Where an Employment Tribunal finds that a breach of an agency worker's rights to equal treatment for basic working and employment conditions, or Day One rights has occurred, it shall have the following powers:

Labour Users in sectors with established unions should be very cautious before relying on any agreements, which would put agency workers outside of scope.

- Make a declaration as to the rights of the agency worker regarding the complaint.
- Order the payment of compensation to the agency worker.
- Recommend action to be taken by the liable party(ies) to obviate or reduce any adverse effect on the agency worker in regard to the breach.

The unions have always supported the European Directive, and were instrumental in the UK Government voting in its favour. It is, therefore, likely that the unions will encourage and support test cases in favour of agency workers' rights to equal treatment.

The level of compensation awarded shall be that which the Employment Tribunal considers just and equitable.

Where the most likely explanation for the structure of an assignment or assignments is found to be the prevention of the agency worker from reaching the qualifying period, an Employment Tribunal may make an additional award of compensation of up to £5,000.

Read "Breaks Between Assignments" on page 5.