

**November 2011**

## **Member Brief No 93**

### **Agency Workers Regulations 2010**

#### **Specialist Brief Number 1 - "The Qualifying Period"**

#### **INTRODUCTION**

The Agency Worker's Regulations 2010 came into force on the 1<sup>st</sup> October 2011. The Regulations can be downloaded at [www.legislation.gov.uk/ukxi/2010/93/contents/made](http://www.legislation.gov.uk/ukxi/2010/93/contents/made). The BIS Guidance can be downloaded from <http://www.bis.gov.uk/policies/employment-matters/strategies/awd>.

This Specialist Briefing is designed to build upon the information given in the ALP Agency Workers Regulations Implementation Guide, giving a more detailed review and analysis of the specifics of the Qualifying Period.

The qualifying period does not apply to an agency worker's entitlement to access to collective facilities and amenities, and access to information about relevant vacant posts, both of which the agency worker is entitled to from day one of their assignment.

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.

#### **TO QUALIFY FOR EQUAL TREATMENT**

An agency worker's entitlement to equal treatment for basic working and employment conditions, under Regulation 5, is subject to the agency worker having completed the qualifying period.

Regulation 7 states: "...To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments..."

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

**KEY POINT 1** - Any time spent working on an assignment by an agency worker before 1st October 2011 will not count towards a qualifying period.

**KEY POINT 2** - Any period worked during a week will be counted as a calendar week.

**Example a.** - if an agency worker works one day per week on an assignment, they will still complete their qualifying period (subject to the other conditions) after 12 calendar weeks.

**KEY POINT 3** - "A calendar week in this context will comprise any period of seven days starting with the first day of an assignment." This is what the BIS guidance states, and their interpretation suggests not a calendar week, but any period of 7 days from the start of an assignment. There isn't a specific definition of a calendar week in the legislation, but the usual definition of a calendar week is recognised as a seven day period from midnight Saturday.

Therefore, there is some speculation as to whether BIS's interpretation, which is in favour of the agency worker, is actually correct. Until this becomes clear, the examples below and later in this briefing to illustrate breaks between assignments use the BIS interpretation of a calendar week.

**Example b.** - if an agency worker begins work on a Tuesday all work done up to and including the following Monday will count as one calendar week.

**KEY POINT 4** - The qualifying period relates to the role the agency worker undertakes for a hirer, it is not specific to the temporary work agency.

**Example c.** - if an agency worker undertakes the same or similar role for the same hirer over 12 continuous weeks, but through two or more 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, or substantively similar role at that hirer), through any temporary work agency will qualify for equal treatment.

**KEY POINT 5** - An agency worker may have more than one qualifying period on-going at any one time for different roles, either within the same or different hirers.

The agency must therefore monitor qualifying periods for each separate role undertaken to ensure that equal treatment is provided from week 13.

**Example d.** - an agency worker works in an assignment for hirer "A" for 3 weeks, then undertakes an assignment for hirer "B" for 2 weeks, then returns to hirer "A" to undertake the same role for 2 weeks. The agency worker will have two separate qualifying periods on-going; one with hirer "A" where they have completed 5 weeks of their qualifying period; and one with hirer "B", where they have completed 2 weeks of their qualifying period. Where the two assignments at hirer "A" are through two different temporary work agencies, the qualifying period accrued for the role undertaken at hirer "A" remains at 5 weeks.

## **THE SAME ROLE**

Regulation 7 states: "...To complete the qualifying period the agency worker must work in **the same role** with the same hirer for 12 continuous calendar weeks, during one or more assignments..."

**KEY POINT 6** - A role will be considered to be the same role unless the work or duties that make up the whole or the main part of that new role are “substantively different” from those in the previous role. Issues to be considered in deciding whether a role is different will include:

- Are different qualifications, skills, or competencies needed?
- Is the rate of pay different (not including changes in pay in relation to a review or re-grading of the job)?
- Are the working hours different?
- Does the agency worker require training to undertake the new role?
- Is different equipment used?
- Is the agency worker’s line manager different?
- Is the work undertaken at a different location?

This is not an exhaustive list, and can serve only as an indication as to whether a particular role would be considered new for the purposes of the Regulations. There is no definitive answer as to whether a role is “substantively different”, and the decision, in the event of a claim, will be a fact based one made by the employment tribunal.

**Example e.** - The agency worker is working as a lettuce chopper in the hirer’s processing department for 6 weeks, and is then moved to work as a salad packer within the same hirer, but in their packing department for a further 4 weeks, and the duties undertaken by the agency worker are very similar in both assignments. Although the location and line manager may be different, the role may well be likely to be considered the same, as the hirer has not changed, and the role is substantively similar. In this case both assignments will count towards the accrual of the agency worker’s qualifying period.

**KEY POINT 7** - Where the agency worker undertakes a new role, the role will not be considered new unless the temporary work agency has informed the agency worker in writing of the type of work they will be required to undertake in the new role, and it would also be sensible (to avoid confusion and possible claims) to confirm to the agency worker that the qualifying period at that hirer has reset to week 1.

**Example f.** - The agency worker is working as a lettuce chopper in the hirer’s processing department. The temporary work agency then offers the agency worker another assignment in the credit control division of the same hirer, to undertake a credit control role at the same pay rate. The agency worker undergoes a week’s induction training with the hirer to undertake the role, as the duties are different from the previous assignment with the hirer. Although the pay rate is the same, this is clearly a different role, with different duties, and so the qualifying period for this role would start at week 1. However, for the qualifying period to be reset to week 1 the temporary work agency will need, at the beginning of the new assignment to inform the agency worker in writing that it is a new role, and the type of work they will be undertaking.

## **THE SAME HIRER**

Regulation 7 states: “...To complete the qualifying period the agency worker must work in the same role with **the same hirer** for 12 continuous calendar weeks, during one or more assignments...”

**KEY POINT 8** - The BIS Guidance gives a clear definition of “new hirer”, stating that “A new hirer for this purpose must be a different person (a different legal entity).”

This means that where a hirer has multiple locations, then assignments undertaken at all the hirer’s sites, where the hirer is the same legal entity, will be considered as working for the same hirer. Therefore moving an agency worker between sites will not break the accrual of the qualifying period.

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. Therefore, in this situation assignments undertaken by an agency worker at different group companies will restart the qualifying period.

However, if an agency worker is deliberately moved between companies within a group, and the most likely explanation for the movement is to avoid the agency worker completing their qualifying period, then the agency worker may still be entitled to equal treatment. Please see Structure of Assignments, below.

## **BREAKS BETWEEN ASSIGNMENTS**

The working patterns of agency workers can be irregular, and the legislation has taken this into account by allowing for various types of breaks between assignments, which will affect the qualifying period of an agency worker in different ways.

**KEY POINT 9** - There are circumstances in which the qualifying period may be **paused**, and will then restart if 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 complete calendar weeks\*
- Absence due to sickness or injury. To pause the qualifying period an absence due to sickness or injury must be for 28 calendar weeks or less. Also, if required to do so by the agency, the agency worker must provide reasonable written medical evidence in relation to any sickness/injury absence.
- Annual leave
- Any other statutory or contractual time off to which the temporary worker is entitled (but not including maternity, adoption or paternity leave) e.g. statutory parental leave.
- Jury service
- Shutdowns – pre-determined factory shutdowns
- Industrial action

**\*A break of no more than six calendar weeks means the following:**

Please refer to this calendar to illustrate the following examples.

| Month 1  |     |     |     |     |     |     |     |
|----------|-----|-----|-----|-----|-----|-----|-----|
| Week Nos | Sun | Mon | Tue | Wed | Thu | Fri | Sat |
| 0        |     |     |     | 1   | 2   | 3   | 4   |
| 1        | 5   | 6   | 7   | 8   | 9   | 10  | 11  |
| 2        | 12  | 13  | 14  | 15  | 16  | 17  | 18  |
| 3        | 19  | 20  | 21  | 22  | 23  | 24  | 25  |
| 4        | 26  | 27  | 28  | 29  | 30  |     |     |
| Month 2  |     |     |     |     |     |     |     |
| 5        | 3   | 4   | 5   | 6   | 7   | 8   | 9   |
| 6        | 10  | 11  | 12  | 13  | 14  | 15  | 16  |
| 7        | 17  | 18  | 19  | 20  | 21  | 22  | 23  |
| 8        | 24  | 25  | 26  | 27  | 28  | 29  | 30  |

According to the method of calculation in the BIS Guidance:

- A calendar week is a period of 7 days starting with the first day of an assignment. So if the worker starts work on Wednesday 1<sup>st</sup> (week 0), that calendar week will end on Tuesday 7<sup>th</sup> (week 1).
- There can be up to 42 days between the end of the last calendar week in which the agency worker worked on assignment, and the first day of the next assignment.

**Example g.** - if the agency worker works on a 3 day assignment starting on Wednesday 1<sup>st</sup> of week 0: the calendar week would run from Wednesday 1<sup>st</sup> (week 0) until Tuesday 7<sup>th</sup> (week 1).

The agency worker must return to the same assignment with the same hirer by Tuesday 19<sup>th</sup> of week 7 (which is 42 days from the end of the last calendar week on assignment, on Tuesday 7<sup>th</sup>) for the qualifying period to continue as if there were no break.

If the agency worker returns to the assignment on Wednesday 20<sup>th</sup> (week 7), the qualifying period would be reset to zero, as 43 days would have elapsed since the end of the calendar week in which the last assignment took place.

The examples in this brief all use the BIS definition of a calendar week, which is explained in a) above, however, it is possible that the legislation's use of the term "calendar week", might be the generally understood definition of a calendar week, being from Sunday to Saturday. If this is the case, breaks between assignments will need to be calculated differently. As and when the accuracy of the BIS guidance on this point becomes clearer, we will issue further advice.

### **Breaks between Assignments for Multiple Reasons:**

**KEY POINT 10** - It is possible that an agency worker may break their assignment for a number of different reasons. During one assignment there may be a natural break in the assignment, where the hirer does not require the agency worker's services for a period of time, and the agency worker may also be absent from the assignment due to illness, and they may also take annual leave. Each absence needs to be treated individually, and calculated in relation to the effect it has on the qualifying period.

Breaks that pause the qualifying period, such as illness and holiday, should **not** be included in the calculation of the length of a break between assignments. This is because absences by the agency worker due to sickness (not more than 28 weeks), holiday, or a natural break of less than 42 days (6 weeks) pause the qualifying period, so the break is not counted. In these cases it's as if the break didn't happen, and when the agency worker returns to work, the qualifying period continues.

Referring to the calendar above, see examples below of types of breaks, and their effect on the qualifying period.

**Example h. - Where the break between assignments is more than six weeks:**

An agency worker undertakes two day's work on assignment at a hirer on the Friday and Saturday of week 0. The agency worker undertakes two more days work on assignment in the same role at the same hirer, on the Friday and Saturday of week 8. The last day of the calendar week in which the first assignment was worked, was Thursday, 9<sup>th</sup> (week 1). The second assignment began on Friday 29<sup>th</sup> (week 8). A total of 49 days (more than six weeks) elapsed between the two assignments, and therefore, the qualifying period for that role at that hirer would start again.

**Example i. - Where the break between assignments is not more than six weeks:**

An agency worker undertakes two day's work on assignment at a hirer on the Friday and Saturday of week 0. The agency worker undertakes two more days work on assignment in the same role at the same hirer on the Friday and Saturday of week 7. The break between the end of the calendar week in which the first assignment took place (7 days from Friday 3<sup>rd</sup> to Thursday 9<sup>th</sup>) and the beginning of the second assignment on Friday 22<sup>nd</sup> is exactly 42 days (or six complete calendar weeks), so the qualifying period on that role at that hirer would continue. This is because to reset the qualifying period the break must be **more** than 42 days (six weeks).

**Example j. - Where there are multiple types of break on one assignment that pause the qualifying period:**

An agency worker works for 3 weeks in a role for a hirer, then takes 2 weeks annual leave. After their holiday the agency worker has a 6 week break between assignments, then returns to the same role at the same hirer and undertakes a 9 week assignment. The agency worker worked 3 weeks (which counted towards the qualifying period), had a 2 week annual leave break (that paused the qualifying period), then there was a natural break of six weeks (which is not long enough to break the qualifying period), therefore, when the agency worker returned and completed the 9 week assignment, this 9 weeks was added to the original 3, and the agency worker has now completed their 12 week qualifying period for that role. Therefore, any further work they undertake for that hirer in that role will qualify for equal treatment.

*Remember these assignments could be through different temporary work agencies, the qualifying period is specific to the role and the hirer, not the agency.*

**Example k. - The effect of different types of break that either reset or pause the qualifying period:**

An agency worker works for 11 weeks in a role for a hirer, and then is absent from the assignment for 8 weeks due to sickness (which pauses the qualifying period). When the agency worker returns to the role at the hirer, their first week back at work will be the 12<sup>th</sup> week of their qualifying period (the original 11 weeks is still valid because the sickness absence paused the qualifying period), and therefore equal treatment must be provided from the following week. However, if an agency worker works for 11 weeks in a role for a hirer, and then there is an 8 week break in the assignment because the hirer does not require their services, when the agency worker returns to that role at that hirer the qualifying period will begin again at week 1, because there was a break of more than six calendar weeks.

These workers are to be treated differently because of the different type of break between the assignments.

**Example I. - Where there are simultaneous breaks that both pause and reset the qualifying period:**

An agency worker is engaged on a 12 week assignment for a hirer. She works for 11 weeks, and then is absent through certified sickness for 8 weeks (the sickness absence will pause the qualifying period). She is only absent from the assignment for the 12<sup>th</sup> and final week, and then the assignment finishes. After 8 weeks sick, the agency worker recovers. After a natural break of 7 weeks (i.e. 7 weeks from the end of the previous 12 week assignment) the hirer requires the agency worker on assignment again in the same role, and the agency worker is engaged on another 12 week assignment for the hirer. Note, as far as the hirer is concerned she was only sick for one week, because she only missed one week of the last assignment. There are two possible ways to treat the agency worker's qualifying period:

- a) Treat the first 11 weeks on assignment as continuous, and add them to the second assignment, which would mean that after one week in the second assignment the agency worker would have completed their qualifying period. Or,
- b) Treat the qualifying period as having been broken by the natural gap of 7 weeks between the end of the 1<sup>st</sup> assignment and the beginning of the 2<sup>nd</sup> assignment.

Neither the legislation nor the BIS guidance is clear on which of the above scenarios is correct, and until clarity comes via case law this will have to be a judgement made by the agency. It would seem unreasonable to treat agency workers differently where one was sick towards the end of an assignment, and during a natural break that would normally reset the qualifying period to zero, whilst another was well throughout, and clearly their qualifying period had been broken.

Please note, however, this issue only relates to sickness absence not due to the circumstances discussed in Key Point 10 below.

**KEY POINT 11** - There are circumstances when the qualifying period will **continue** during the absence for the original intended duration, or likely duration of the assignment, whichever is longer.

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. This is a specific timeframe relating to the entitlement to continue the qualifying period during such a break, and should not be confused with other statutory or contractual leave to which an agency worker might be entitled, as shown below; or
- due to statutory or contractual leave to which the agency worker is entitled for maternity, adoption, or paternity leave;

**Example m.** - A pregnant agency worker starts an assignment with no definite end date, but a likely duration of 26 weeks. In week 5 of the assignment she is advised by her medical practitioners to cease to work in any role for the remainder of the assignment. At the end of week 12 of the assignment she will have completed the qualifying period for that role at that hirer, and from week 13 she will be entitled to equal treatment for basic working and employment conditions. Her entitlements under this assignment will continue for the intended or likely duration of the assignment. This agency worker was engaged with a team of 5 other agency workers all undertaking the same work at the same hirer. The assignments of the other 5 agency workers continued for 30 weeks. In this situation the pregnant agency worker's rights to equal treatment would continue up to the thirtieth week, and she would be entitled to be paid from week 13 to week 30.

#### **Accrual of Entitlements before the Qualifying Period:**

The legislation is clear under Regulation 7 that equal treatment entitlements **do not** apply until an agency worker has completed the qualifying period. Therefore, using example m. above, for the period of time between her leaving the assignment in week 5 and completing her qualifying period at the end of week 12 (i.e. when she is on pregnancy-based sick leave and not working, and not being paid) equal treatment entitlements under the AWR would not apply.

Again, using the above example, where an assignment is terminated on maternity grounds, and as in the above example, an alternative assignment is not an option (the agency has an obligation to find alternative work, if possible, where an assignment is terminated on maternity grounds) the agency has an obligation to pay the agency worker for the duration or intended duration of the assignment. However, Schedule 2 "Consequential Amendments" "The Employment Rights Act 1996" 68D states clearly that the right to be paid for the duration or intended duration of an assignment **does not** apply until the qualifying period has been completed.

However agencies should be extremely careful when dealing with pregnant agency workers in such situations because the agency may have other statutory obligations to the agency worker. For example, "Pregnancy and Maternity" is a protected characteristic under the Equality Act 2010, and treating such a worker unfavourably because of their pregnancy/maternity would be considered direct discrimination under that legislation. ALP will be issuing a brief that discusses the rights of pregnant agency workers in more detail in the near future.

## **Duration of the Assignment:**

The original intended duration or likely duration of an assignment may be clear if the agency worker has been taken on for a specific period, with a clear end date. However, in situations where the agency worker is working on an on-going assignment required from day to day, or from week to week, this will be more difficult to determine.

For example, if the agency worker is truly on a daily assignment, where it is not known until the day of work that the agency worker will be required (and they may be called by the temporary work agency, asking them to return to the hirer for a new day's assignment) then it may be arguable, and an employment tribunal may accept that the assignment is of one day's duration only. However, if in effect the agency worker just turns up for work at the hirer the next day, without any recruitment activity sitting behind this, then this is unlikely to be seen as a daily assignment, but as an on-going assignment.

If more than one agency worker is taken on at the same time, to perform the same role for the same hirer, then there could be an argument to suggest that the intended duration of an assignment is the same as the other agency workers, and a link could be made here.

Due to these difficulties in defining the length of on-going or open-ended assignments, the temporary work agency might want to consider discussing the possibility with clients of replacing such assignments, with ones with a definite end date that can, of course, be extended or terminated if necessary.

## **TRACKING THE QUALIFYING PERIOD**

**KEY POINT 12** - The qualifying period for each agency worker supplied will need to be tracked to ensure that equal treatment entitlements are provided after 12 continuous calendar weeks on assignment.

It is quite possible that over a period of time an agency worker may be supplied by a number of different temporary work agencies to work at the same hirer in the same (or similar) role. Therefore, it is essential that each agency knows whether an agency worker has worked in the same role at a hirer previously, and if so, when.

Agencies and hirers will therefore need to work together to find the most efficient way of collating information on agency workers' work patterns within particular roles. Remember this includes all sites/locations of the hirer.

The temporary work agency may ask the agency worker whether or not they have worked in a particular role at a particular hirer within the previous 6 weeks (or longer period if they have recently taken holiday or sick leave), however, the agency worker has no obligation to provide this information.

It is likely, in the event of a claim, that a tribunal would take into consideration any refusal by the agency worker to respond to a reasonable request for information, or the supply of false information. However, the agency worker may claim that they felt unable to answer the question for fear that they would not be considered for the assignment.

## STRUCTURE OF ASSIGNMENTS

**KEY POINT 13** - There are specific anti-avoidance measures contained within the Regulations, regarding the rotation of an agency worker between hirers or within a hirer with the intention of preventing them from completing their qualifying period.

Where the most likely explanation for the structure of an assignment or series of assignments is to prevent the agency worker from gaining equal treatment, by:

- a) not allowing them to complete the qualifying period, and,
- b) but for that structure the agency worker would have completed the qualifying period, then the agency worker will be treated as having completed the qualifying period.

These measures relate to:

- two or more assignments at the same hirer; or
- two or more assignments at hirers within the same group of companies (a connected hirer); or
- where the agency worker has worked in more than two roles during an assignment with a hirer, and on at least two occasions has worked in a role that was not the “same role”.

In the event of a claim, the following matters shall be taken into account:

- the length of the assignments;
- the number of assignments with a hirer, or a connected hirer;
- the number of times the agency worker has worked in a new role with the hirer, or a connected hirer;
- the number of times the agency worker has returned to work in the same role with the hirer, or a connected hirer;
- the period of any break between assignments with the hirer, or a connected hirer.

**Example n.** - An agency worker works on an assignment for seven weeks with a hirer, and then is swapped with another worker at a different hirer. After seven weeks, the workers are swapped with each other again and the agency worker returns to the original hirer for another seven week assignment. This could be considered as deliberately structuring the assignments to stop the agency worker from completing the qualifying period.

Where the most likely explanation for the structure of an assignment or series of 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.

## 12 WEEK ASSIGNMENTS

The Regulations do not prohibit a hirer from requesting agency workers for a maximum of 12 weeks, and then replacing them with new agency workers. Thus, agency workers would never go beyond the qualifying period for that role at that hirer, and would remain outside the scope of the Regulations.

It is possible that in some roles, where work efficiency is reached quickly, and continuity is not important, that this would be an option for a hirer.

In such a situation the agency workers should never be placed on assignment by any temporary work agency at that hirer (or a connected hirer) again. This is because to do so may open up the agency and the hirer to a claim under Regulation 9(4) for deliberately structuring assignments to avoid the agency worker achieving the qualifying period.

**KEY POINT 14** - A hirer should consider the cost implications of continued recruitment and induction, the impact of lack of continuity on efficiency and the drain on labour supply before considering this model. Such a model of automatically terminating assignments before the completion of 12 weeks in order to avoid the obligations under the Regulations is also likely to be regarded by the major retailers as contrary to the ETI Base Code and their ethical trading policies.

## FROM WEEK 13

**KEY POINT 15** - Once the agency worker has completed the 12 week qualifying period they shall be entitled to the equal treatment rights contained within Regulation 5 from week 13.

This entitlement shall continue until such time as they are no longer working in the same role (and have been informed in writing by the temporary work agency of the type of work they will be required to do in the new 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 above as having the effect of pausing or continuing the qualifying period.